LONDON'S GLOBAL UNIVERSITY

Understanding the Formulation and Development of Government Policy in the context of FOI

Prepared for the Information Commissioner's Office by
The Constitution Unit

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The Constitution Unit

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Chapter 1: Introduction

1.1 This report to the Information Commissioner's Office (ICO) was commissioned in October 2008. The stated "deliverables" were

- An overview of literature covering the background and context of government policy making;
- An overview of policy lifecycles and models currently used in central government
- An exploration of what is meant by the term "government policy"
- Case studies that track the evolution of government policy from initiation to completion and examples of subsequent development
- Evidence and analysis of interviews with former civil servants and/or ministers on the realities of how the process works and the impact of policy information under FOI
- An overview of overseas experience on the interaction between Freedom of Information laws and policy formulation and development.

1.2 This report is thus fundamentally about the process and nature of government policy making in Westminster and Whitehall. The context of the report is, however, derived from section 35 of the Freedom of Information Act which provides a partial exemption for release of information related to the "formulation and development of government policy". (The exemption is partial in that even if the information concerned falls within the category of government policy a "public interest test" is then applied before a decision is taken as to whether to release the information.) It was not part of our role, however, to discuss the operation of section 35 in any detail and we have not done so.

1.3 The report has been written by three former senior civil servants, Bob Morris, Duncan Simpson and Peter Waller, with Robert Hazell, Ben Worthy and Mark Glover from the Constitution Unit. It is based in part on literature reviews; and partly on the principal authors' own collective knowledge of Whitehall and Westminster. But our work has also been greatly assisted by more than 20 interviews we have conducted with former Ministers (including Cabinet Ministers[1]), and both current and former senior civil servants and government advisers. Those interviewees were selected largely from those known to the authors or the Constitution Unit and who were thought likely to be willing to give their views to us, an expectation which they entirely met. The civil servants (both current and former) were drawn from the senior civil service at all levels; and had had

[1] We decided that it was important to interview Ministers who had experience of the FOI Act – which, by definition, meant that all our interviewees were from the Labour party. The interviews were carried out in January and February 2009

experience in a significant number of Government departments and agencies. The focus of the interviews was primarily on the policy making process but interviewees were also invited to discuss with us their views on the operation of the freedom of Information Act. In all cases, the interviews were conducted on the basis that the views we received, especially on FOI, would be recorded but would not be attributed to individuals.

1.4 We would like to stress, however, that our report cannot and should not be considered as a definitive account of policy making, still less of the impact of the FOI legislation. It is simply our account of how things work – recognising that Whitehall is a complex phenomenon and there is no absolute truth, together with a record of the view we received during our interviews.

1.5 A particular thanks also goes to Dave Busfield-Birch, who was responsible for much of the material on the regimes in Canada and Ireland. Thanks also go to our anonymous interviewees, who all gave freely of their time. Finally, we are grateful to the staff of the ICO who have been helpful to our work throughout.

Chapter 2: Executive Summary

2.1 This report examines the nature of policy and policy making within Whitehall and Westminster. It is essentially descriptive of the process and makes no attempt to pass any judgement on whether the current arrangements are effective in delivering the objectives of policy making. It is based on the experience of the authors and knowledge derived from other Constitution Unit projects, backed up by over 20 interviews with former Ministers and both former and current civil servants and advisers, together with background reading of the available literature. The report also contains a number of case studies to illustrate policy making in practice.

2.2 **Chapter 3** examines the usage of the term "policy" as is commonly understood in both Whitehall and Westminster. It concludes that:

- policy and policy making is a well understood concept – but one which neither Whitehall nor Westminster has found it necessary to define with any rigour
- although distinctions can in principle be drawn between policy formulation, development and delivery, such distinctions are seldom drawn in practice and are rather artificial. Policy is increasingly seen as involving a continuous loop, with a recognition that a strong focus on delivery is necessary if policies are to be successful on the ground
- there is no meaningful distinction, except in very limited circumstances, between the policy of individual Ministers and Departments and the policy of the government as a whole.

2.3 **Chapter 4** considers how policy is made. It concludes that:

- the generation of initial policy ideas comes primarily from the political parties and wider political debate, rather than the civil service. Ministers remain pre-eminent in deciding which policy objectives they wish to be pursued
- the civil service is primarily focused on managing the process of developing high level policy objectives into practical proposals
- there are discernible trends in policy making towards greater openness with much higher levels of consultation. Policy making is, however, also becoming more informal and at times rushed

2.4 **Chapter 5** discusses the roles of the various parties in policy making, notably Ministers, Special Advisers and the civil service, paying particular attention to the role of the Cabinet Office.

2.5 **Chapter 6** gives an overview of current thinking on "good practice" in policy making and how it has developed. It discusses the role of the National School of Government, Government Skills and the Better Regulation Executive amongst others in seeking to promote a more consistent and professional approach to policy

making within the civil service. It notes the increasing focus on the importance of delivery in policy making. It briefly summarises academic thinking on the subject. But it also observes that the take up of "better policy making" initiatives appears to be limited and there appear to be overlaps between the different approaches.

2.6 **Chapter 7** records the views we received during the interviews on reactions to the operation of the Freedom of Information Act. While those interviewed were a small and not necessarily representative sample, some tentative observations from the interviews were;

- both officials and Ministers were disappointed with the operation of the Act to date. It seemed that more cases than expected were aimed at finding negative newspaper stories or seeking to provide evidence with which to pursue agendas hostile to the government. There was also considerable frustration with the resources that cases consumed;

- there was no evidence that FOI was having any adverse impact on the substance of decisions being made by government. Both Ministers and civil servants thought that the same issues would continue to be considered and the same decisions reached;

- there were, however, real concerns from both Ministers and civil servants that FOI could lead to significant – and regrettable – changes in the way that government conducted business with a more limited audit trail. Former Ministers were also concerned that the concept of Cabinet government would be weakened if the internal discussions of Ministers were to be more likely to be released under FOI.

2.7 **Chapter 8** provides an overview of the comparable FOI legislation in Australia, Canada, Ireland and New Zealand, with a brief mention of Scotland. Detailed reports on the regime in these countries have been provided to the ICO and are also available to the public but are not included in this report.

Chapter 3: What is policy?

Introduction to chapters 3 to 5

3.1 The purpose of these next three Chapters is to discuss in turn

- how policy is defined - what is commonly understood by the term "policy" in Whitehall and Westminster (chapter 3)
- how policy is made and developed (chapter 4)
- who makes policy - the various categories of people who would regard themselves as engaged with policy thinking (chapter 5)

3.2 The discussion in these Chapters is informed by the experience of the authors and by the various discussions we have had with people who are, or recently have been, involved in the process of policy making. But it is important to be clear at the outset that there is no single and authoritative account of any of these issues that would reflect the experiences of everyone who has been involved in policy making within Westminster and Whitehall.

3.3 This is not because the issue of defining policy or how it is made is controversial – it is far from that. It is more that a significant amount of what goes on in Whitehall is driven by "custom and practice", rather than formal rules. So in relation to policy, while there is a broad consensus on what policy is and "how things should be done", there is no definitive guide. On any given occasion when new policy needs to be developed, there is usually discussion on how it should be carried out in that particular case – and the individual preferences of a particular Minister or official will have considerable influence over the outcome. There are certainly some signs that policy making is becoming more consistent, with the use of standardised policy making techniques, as discussed in chapter 6. But many Ministers and officials welcome the flexibility over the process they have traditionally experienced – so it is an open question whether a more standardised approach to policy making will prevail. The next three chapters thus discuss policy making "as it is" rather than "as it should be".

Defining "policy"?

3.4 "Policy" is described in the Concise Oxford dictionary as

> a course or general plan of action to be adopted by government, party, person etc.

This was echoed in the civil service's own definition in the *Modernising Government* White Paper of 1999, namely

> policy making is the process by which governments translate their political vision into programmes and actions to deliver "outcomes", desired changes in the real world.

3.5 As straightforward definitions of 'policy' and 'making policy', these work well. But it is important to recognise that few civil servants involved in policy making in 2009

will be aware of the 1999 White Paper, still less are they likely to have read it. While most Ministers and civil servants regard all their duties with considerable seriousness, there is little doubt that the focus of everyday life is on the immediate task in hand - and reading White Papers on the underlying processes is not everyday activity.

3.6 Moreover, in that day-to-day activity, there is simply no operational need to define at any given point whether what people are doing is formulating, developing, promoting or delivering government policy. In much the same way that people know what an elephant is without ever having to define or describe it with any precision, most people in Whitehall know when they are engaged in policy without worrying about precisely what stage of policy development they are engaged in or whether it would come within the scope of "government policy" as distinct from any other form of policy. Indeed, section 35 of the FOI Act (at least as far as the authors of this report are aware) is the first occasion when the concept of "government policy" has been given legislative consequences - so the Act is the first time when it has become necessary to consider the definition of the term in any formal way. In contrast, when policy has been defined in the context of good practice training, the definitions have been descriptive rather than legal - about the substance of how to set about policy development rather than defining the precise boundaries between policy and "non-policy".

3.7 As a result of this lack of everyday need for a precise definition, the term policy is used within Whitehall in a very wide range of contexts. The word itself is probably one of the most used words of all and all the phrases in Box A would be very familiar to anyone working there.

Box A: Policy phrases in common use

- what's our policy on this? Is it coherent?
- we can't really do that. It's against current policy
- we need to develop some specific policy initiatives - to back up our broad philosophy with some practical actions
- we'd better consult the Minister on this. Its a policy matter
- Jim is strong on policy – but he's a bit weaker on delivery
- The critical thing we need to do in developing this policy is getting the approach to delivery right – otherwise it won't achieve much on the ground
- The problem is our policy conflicts with the policy of department X – and what we want to do isn't really in line with Treasury policy either
- I am afraid we can't give you the license you need to do that. It's not our policy to do so
- Jane's career to date has been largely operational. Her next move should be to a more policy focused role

3.8 During our interviews for this report, we asked a number of the interviewees what they considered policy to be. People had differing views. One interviewee - who had recently been one of the main authors of a Government White Paper - saw the policy making function as the development of practical proposals to deal with an

area of the economy or a social issue. The interviewee distinguished this from the development of a philosophical approach towards the issue in question – so would not have regarded a belief in the importance of free trade for example as policy-making in the absence of practical proposals and measures. But nor did the interviewee regard the implementation of the proposals in the White Paper in question as 'policy making' even though those proposals had by no means been worked out in the detail necessary for implementation. In short, the interviewee thought that a line could be drawn between the 'development and formulation' of policy and its implementation.

3.9 In contrast to this slightly 'linear' approach to policy making, other interviewees stressed that implementation and delivery were at the heart of policy-making, with a continuous loop from delivery back into policy formulation. It has certainly been a common criticism of Whitehall in recent years that too many policies have been announced before the details have been worked out - and prove to be ineffective as a result. So a focus on delivery from the outset is now more often seen as how policy should be made – and is increasingly the focus of training and development approaches as discussed in chapter 6.

3.10 Moreover the concept of 'policy' is ever-present, even in areas which are traditionally seen as 'delivery'. One interviewee - responsible for the management of the Coal Health schemes (Box B) - was undeniably responsible for an operational area but said he would consult the Minister 'whenever there was a policy issue', defined in effect as an issue on which the Minister might wish to make a political judgement, even though it concerned the mechanics of delivery.

3.11 None of those interviewed were taking an atypical view or being loose with language. But the differences between them simply illustrate that the term "policy" is used in a very wide range of contexts and with no single settled meaning. Moreover, however much the FOI Act might impact on Whitehall in the long run, it is highly unlikely that it will have any impact on common usage of the term amongst civil servants.

3.12 Notwithstanding these comments, it is clearly possible to distinguish different contexts in which people might very well say that they are engaged in 'policy' as commonly understood. The following paragraphs describe some of the critical areas.

i) The setting out by Government of a coherent overview approach to a key area or sector of society

3.13 The 'classic' example of government policy making is undoubtedly where the government seeks to set out its approach to an area of society in a White Paper or similar document. This might cover, for example, the government's policy towards the macro or micro economy, the health service or crime. Essentially, such a policy statement seeks to set out the government's overall analysis of a particular issue or set of issues; and to present its philosophy in relation to those issues. Such overall policy statements will usually make a set of specific proposals to address the issues, though this is not universally true – for example the Foreign Office commitment in 1997 to 'an ethical foreign policy' was clearly more a description of the philosophy than a set of individual actions.

3.14 At any given moment, many Departments will be operating within the shadow of a relatively recent White Paper - and busily implementing the proposals in the document - or preparing to draft the next one. There has also been an increasing trend in recent years for the boundaries of White Papers to be cross-Departmental, reflecting the focus on 'joined-up Government'.

ii) A set of initiatives or interventions aimed at bringing about specific goals

3.15 The next level down of policy - though a debate could be had as to whether policy making does develop in layers - would be a set of practical measures and initiatives, in line with the overall policy approach, but designed to flesh out the underlying philosophy with a series of specific intervention to achieve the high level aims. This is quite likely to be part of the same policy document as the overall approach but that is not universally the case. Moreover, many White Papers lead on to follow-up documents, consulting on the details of the individual proposals.

3.16 In his interview with us, a former Cabinet Secretary suggested a line could in principle be drawn between the concepts of 'what to do' and 'how to do' it, with the former clearly 'policy' and the latter closer to implementation and delivery. He immediately recognised, however, that the decision as to 'how' something should be done invariably raised 'policy' issues which officials and Ministers would need to address. In short, it was impossible to develop a workable distinction between the development of policy and issues related to its delivery.

iii) One-off initiatives in the normal course of events

3.17 It is a broad truism that government never stops and that Ministers and officials are constantly looking for new policy developments or to amend existing policies as they are rolled-out. This essentially results from a continuous improvement approach, with existing policies and government interventions being continuously scrutinised for their effectiveness and amended and developed further.

3.18 Such initiatives are again not easy to categorise in terms of 'policy' or 'delivery'. If a particular scheme, for example, is not proving effective in delivering its original aims, then revising it could be said to be an operational matter – but equally in terms of the public debate both within and without Whitehall the amendments will often be presented as a change or development of policy.

iv) Continuing political debate

3.19 In a similar way, the battle for ideas between the political parties is never dormant and policies are being constantly updated and restated in different language. Many Ministers develop their policy ideas through speeches and Parliamentary debates. Indeed, the current Prime Minister is well known for using speeches to think through issues from first principles and seeking through them to re-shape the terms of the political debate. In that sense a speech can be a major instrument for developing policy and its drafting can occupy officials throughout Whitehall for some time - whereas the majority of Ministerial speeches are usually simply a restatement of existing policies. (Lord Mandelson, for example, has said that it is a rule of politics that it is only when a Minister is sick to death of giving the same speech with the same arguments that the message of the speech will begin to be picked up by those at whom it is aimed.)

iv) A reaction to external events

3.20 The above categories are largely initiated by pro-active decision making, but a considerable amount of Government policy is developed in response to 'events'. The recent banking crisis has been a good example of Government having to make its policy 'on the hoof', developing its approach directly in response to events in the commercial market-place. Some of the interventions may be of huge economic and social importance, but there is an element of crisis management, rather than the more formal and measured approach that is to be found in a White Paper – at times with the measured justification for the intervention following months behind the decision on the intervention. Questions arising from 'events' are often framed in terms of policy – how will the Government ensure that a particular type of rail accident will not reoccur; or prevent doctors murdering their patients?

vi) Operational Issues requiring political judgement

3.21 It is common in Whitehall for Ministers to be consulted on issues which may seem wholly operational but where there are decisions to be made where an element of political judgement is present. The coal health case study at Box B shows that officials may well consult Ministers on matters concerning the line the department should pursue in Court, given that anything to do with the mining industry is likely to be a politically sensitive issue, particularly with MPs representing mining constituencies. Such issues would regularly be classified as 'policy' issues by the civil servants concerned.

Box B: Case Study – the Coal Health schemes

Some issues which are dealt with by Departments are essentially delivery issues – but they still require 'policy' judgements.

The coal health schemes - compensating former miners for lung conditions and other conditions caused by mining - are the largest ever industrial compensation scheme, certainly in the UK and possibly wider. By the time the schemes come to a close in the next few years, over 750,000 claims will have been processed from former miners and their estates and over £7bn paid in compensation, legal and processing costs.

Their origins, however, lie not in pro-active government policy but in the Courts. In the mid 1990s, the mining unions successfully brought a class action against British Coal; and the Courts agreed to the development of the coal health compensation schemes to put the judgments into effect. Responsibility for administering those schemes initially rested with British Coal. But when the company was privatised in 1994, the government retained these legal liabilities in the public sector.

From the late 1990s, responsibility for administering the schemes in practice was passed to the DTI. DTI negotiated the details of the schemes with the miners' legal representatives, with regular reports back to the High Court for approval or, where no agreement could be reached, for decision. The claim handling arrangements required medical examinations to establish the degree of disability, checks of employment records for occupational information, decisions about eligibility, deductions for smoking and so on. At its height, the Department employed about 45 staff and consultants in managing the schemes – essentially

managing a number of external contractors who themselves employed at their peak employed over a thousand people to deal with individual claimants.

At one level, the schemes might seem to be concerned entirely with the delivery of legal obligations arising from the Court case – and thus a 'policy-free zone'. But throughout their operation, the schemes have attracted strong political interest, particularly from the numerous MPs who have mining constituencies. Those MPs have had regular meetings with Ministers in the DTI and occasionally with the Prime Minister; and there have been numerous Parliamentary debates about details of the schemes. Such political pressure was thus regularly applied, essentially to encourage the Department to "honour its debt" to the miners, an argument which had particular resonance within the Labour Party. At times the deep rifts in mining communities between those who had supported and not supported the 1980s strikes resurfaced, causing the Department additional difficulties. And, whenever a particularly difficult issue was being negotiated with the miners' representatives, the government was lobbied to go beyond its strict legal obligations and take a more generous line.

During the course of the schemes, therefore, the relevant Minister in DTI (subsequently BERR and now DECC) was regularly asked by officials for their views on the line that the Department should take in negotiations with the miners' representatives and in Court. Usually, the context for those decisions was the schemes themselves – but consideration needed to be given from time to time as to whether decisions might create a wider precedent for future legal claims against government and, where that was the case, other departments and the Treasury were consulted. The Treasury were also consulted regularly on specific issues, recognising the cost of the schemes were met from public funding and were exceptional in scale.

In our discussion with the current manager of the schemes at DECC, he was clear that he saw his role as essentially focused on delivery rather than making policy. But he nonetheless recognised that when judgements were to be made on the schemes where the government was being lobbied, then those "political" judgements were better made by Ministers, rather than officials, and consulted them accordingly whilst making clear recommendations on the way forward and drawing out any Accounting Officer issues that might arise. In contrast, where issues in the negotiations were technical or where the issues were practical rather than political, he would make the decisions himself after taking advice from relevant experts. There was no rule-book for this – deciding when Ministers should be consulted was a matter of judgement and different Ministers had also shown differing degrees of interest in the detail.

In terms of everyday terminology, moreover, he would characterise the issues on which he consulted Ministers as 'policy' issues. And when taking the issue forward into negotiations, he would regularly defend a decision not to concede to the miners' representatives on a specific point on grounds of 'policy'.

vii) 'What does the government think about.....?'

3.22 Finally, it is the nature of government that Ministers are expected to offer views and opinions on almost anything happening in daily life. Some of these are comical - for example questions to the Prime Minister asking what the government's view is on John Sergeant's withdrawal from Strictly Come Dancing. Others are at one level trivial but require deeper thought – for example a plethora of complaints

about the most recent reality programme on Channel 4 might raise quite legitimate issues of public policy.

Is all policy "government policy"?

3.23 Because section 35 of the FOI Act specifically refers to 'government' policy, the issue arises whether that is a separate issue from the general run of 'policy'. This contrasts with section 36 of the Act, which has many similar aspects but no reference to 'government'.

3.24 In practice, this is a more complex area than might be imagined. Clearly there are circumstances in which policy is clearly identified as 'government policy'. For example, when an issue has been discussed by the Cabinet, or has at least been circulated to all Cabinet Ministers for agreement, then there is no possible dispute that it represents the policy of the government as a whole.

3.25 In terms of daily practice, however, it will only be a small proportion of issues which are formally submitted to Cabinet or agreed by Ministers collectively. A very large number of issues are therefore agreed by the Ministers of a single Department, only consulting other Departments when they have a direct interest in the issue in question. So, if the Secretary of State for DEFRA makes a statement on farming or the Secretary of State for DCMS gives a policy focused speech on the Government support for the arts, no official or Ministers - or indeed journalist writing a story about it - would ever seek to draw a distinction between that policy and "government" policy. In that sense, all Ministers of the Government invariably speak on behalf of the government as a whole and every Ministerial statement on policy is similarly a government statement. Every now and again a Minister might announce something as government policy which should have been cleared inter-departmentally but has not been - but that does not remotely mean that individual Ministers in individual Departments cannot make policy for the government as a whole.

3.26 The common usage of the term 'government' in Whitehall is thus to reflect all the activities of the government at Westminster and all the Ministerially-led Departments (i.e. 'Her Majesty's Government'). As such, it would be distinguished from the European level (though few civil servants or politicians choose to use the word "government" when referring to EU institutions), the Scottish, Welsh and Northern Irish tier and from local government. It would thus be rare for a Minister or official to use the word 'government' when discussing policy issues to make a meaningful distinction between issues agreed collectively and issues decided within a single department.

3.27 That said, there is a very clear concept within Whitehall of a 'Departmental' policy as opposed to policy overall. The most obvious example of this is the Treasury, which has traditionally taken policy positions in Whitehall debates which seek to set down cross-cutting "rules" for other Departments to follow. But that is not the only example and DTI/BERR has long had a policy in support of open markets which would not always have been supported by other Departments. Moreover, the reality of policy making within Whitehall is that much of the internal debate is about reconciling different policies which conflict as opposed to genuinely new approaches to a particular subject. The Post Office case study as Box C is an example of this with the Government's policy objectives for the post office network being at conflict with the separate policy of multiplying routes to market

for government services. There are numerous others - for example the importance of reducing carbon emissions (indisputably a government policy) would suggest higher energy prices overall, whereas Government targets for a reduction in fuel poverty sit uneasily with such higher prices. The debate over a third runway at Heathrow would be another case, with Departments having different views until a final position is brokered through Cabinet.

Box C: Case study – the post office network

A constant issue in government is the fact that policies can appear to be coherent in themselves but come into conflict with each other. Sometimes those conflicts are recognised and resolved. But not always.

The nationwide network of post offices delivers services to the public on behalf of a number of government bodies - the mail services, pensions, TV licences and so on. The government wishes to preserve the network as a genuinely national network. But the economics of the service rely on developing and maintaining that client base. Most of the costs are fixed, so if a client leaves, costs for everyone else go up.

But for some 20 years, those running the network have had to face the consequences of a rather separate government policy that those responsible for providing specific public services should seek to do so in the most cost-effective manner, while providing citizens with choice in the delivery of services. As there are numerous alternatives to the post office network – most obviously paying pensions direct to bank accounts - and these are often cheaper, the post office counters network has been steadily losing business. This has in turn led to a gradual but sharp decline in the number of post offices, with roughly one third of the network having been closed in recent years.

In short, the two policies - to maintain a national network, but to offer cost-effective choice to consumers – conflict. The DTI, now BERR, has been responsible for the government's management of the issue throughout this period. It has not found it easy to do so – the argument for maintaining the network has long since moved from an economic one to being a social one, given the perceived value of post offices to their communities. But that is not natural BERR territory.

What the case study illustrates is how one part of government's operational decisions can cause major difficulties for the policies of another part of government. A decision by one department or agency to offer alternatives to the post office for delivering their services is an operational matter for them. From time to time, individual contracts, most notably the contract for the payment of pensions, have been the cause of major Whitehall rows and arguments. But the underlying problems of the clash between the policies themselves has never been resolved.

3.28 A recent development relevant to this area is that each Department is now expected to publish an annual business plan, setting out its key priorities and work programmes. Clearly, these reflect Departmental plans and priorities rather than 'government' plans as such. And they will undoubtedly cover internal management issues (e.g. human resource and accommodation issues) which are obviously not matters of government policy. But where exactly the business plans move from

representing 'government plans' to merely reflecting 'departmental plans' is far from an exact science. For example, Departments have considerable freedom to decide on their own internal pay structures and these would conventionally be regarded as departmental rather than government policy - but it is absolutely clear that there will always be a central approach to the affordability of civil service pay agreed by the Cabinet, which will be characterised as government pay policy.

Summary of Chapter 3

- 'policy' in Government is a well understood concept. Everyone has an instinctive understanding of what it means and what it involves. It is essentially a term for the Government's attitude towards any given aspect of public life – and what it proposes to do, or is doing, to tackle the issues involved.

- But it is not a concept which is defined with any rigour in daily activity. It tends to be used therefore to cover a very wide range of activity, from 'clean sheet of paper' policy development, through to the need to decide any issue where there is a judgement to be made. Many civil servants would say that Ministers are automatically consulted on 'policy' issues even where the issue might appear to be operational in nature.

- Distinctions can certainly be drawn between 'policy development and formulation' and delivery – and such distinctions may well be drawn in practice. But a strong trend in recent years has been to regard attention to delivery issues as an integral part of policy making and not something to be managed separately. This blurs further a boundary which was never well defined.

- Policies which emerge from Whitehall and Westminster are essentially regarded as reflecting 'government' policy even when they have effectively been developed by a single Department. Policies endorsed by Ministers are regarded as government policy whether or not they have been signed off inter-departmentally.

Chapter 4: How is policy made?

4.1 In the 'classic' model of policy making, Ministers come to government with a clear philosophical approach – the approach which formed the basis on which they were elected. They then set out for the department and its officials that approach and the department in turn applies that philosophy to the issues for which the department is responsible, seeking guidance from Ministers when specific decisions are needed. Ministers in turn promote, explain and defend those policies in public debate, while officials work out and implement the detailed activities which give effect to the policy.

4.2 That classic model undoubtedly still exists. But it is no more than one model for policy making. Increasingly policy is multi-sourced, with much stronger roles for external bodies (treating the political parties as external in this context) of various sorts. In addition, the sources of policy making within government have expanded, with very significant roles for No10 and the Treasury (at least under Tony Blair and Gordon Brown) in initiating and developing policy both alongside, and even at times in parallel to, the work of the responsible department. Cross-departmental policy reviews have also become increasingly used in developing policy. The government regularly commissions reports by named individuals, such as the "Hampton" report by Sir Philip Hampton on regulation and regulatory bodies. Think-tanks have become steadily more influential in policy generation. So policy making no longer follows a single set model but is developed in different ways for different issues.

4.3 In the following paragraphs, therefore, we set out some of the ways in which policy is developed; and its different origins.

Manifesto-driven policy

4.4 It is sometimes overlooked that the principal source of policy within government is the democratic process. Political parties present both their political philosophy and their specific proposals to the electorate in a published manifesto; and the election winner is then given the opportunity to pursue them.

4.5 There are significant variations, however, in the extent to which manifesto policies are defined. The government of Margaret Thatcher, for example, famously said nothing in its initial manifesto about the privatisation of the nationalised industries, which was to feature prominently in their programme once in government. Nor was there any mention – though for rather different reasons – of the changes to the Bank of England remit in the Labour Party manifesto in 1997, implemented within days of the election. In contrast, other policies which are mentioned in a manifesto may well be quietly dropped once in government. But it remains the case that the manifesto is the clearest statement available of how a political party expects to govern.

4.6 Drafting the manifesto is of course a purely party political matter and civil servants have no role in the process. The main sources of the specific proposals are from the politicians themselves, their political advisers and party employees. But 'think tanks' are often aligned to a particular party and can be very important in developing the ideas which are then incorporated in the manifesto.

4.7 It is worth noting that the relationship between the government party and the opposition party in the run-up to an election is not symmetrical. The government of the day has the advantage of having day to day experience of government and can, within established conventions, ask their departmental staff to consider, cost and develop new policy options on a 'business as usual' basis, even if those policy ideas would not be implemented before an impending election. The opposition does not have this advantage, though it is the convention that their front bench spokesmen are permitted to have preparatory meetings with the Permanent Secretary in the department they are shadowing in the period before the expected election date. Another contrast, which arguably favours the opposition, is that the shadow Cabinet can focus on developing and working up their policies for the manifesto without the huge workload burdens faced by the government. To that degree, an incoming government can be better prepared for government than an existing government which is re-elected, especially as an election usually coincides with a major Ministerial re-shuffle. Box D illustrates these points.

Box D: Preparing for government

We interviewed for this study someone who had worked closely with the Labour Party before the 1997 election and who had been part of the initial team of advisers in 10 Downing Street.

He recalled how they had been confident for some time that they would be elected; and had therefore focused in considerable detail as to what they would do once elected. In contrast, he remarked how under-prepared he thought the No 10 civil servants were for their arrival. His impression was that the civil service had expected the incoming government simply to have high level ideas with only limited work having been done on the mechanics of delivering those ideas. But they had failed to appreciate that the Labour party had created significant capability in opposition, with a larger than usual team of advisers working alongside Shadow ministers and with the capacity not only to formulate policy ideas but also to develop delivery plans for those ideas. Most of those advisers became 'SPADs' in No 10 and elsewhere. So it had proved a shock to the officials to discover that there was a detailed programme of action ready for implementation – with the civil service being expected to get on with it without debating its merits.

A former Minister confirmed this but also pointed out how much more difficult it was to retain that momentum once in government. He recalled how well prepared he was for his first Cabinet role having shadowed the relevant department for sometime before the 1997 election. He had been able to test his ideas with the Permanent Secretary and other officials from the relevant department before the election; and he had made clear what he was expecting. So the civil service was prepared and action swiftly followed. He was full of praise for the way the officials had responded.

But for his second role in Cabinet, there had been no such preparatory period in opposition. Instead as soon as he took on the role, he was expected to make decisions on issues which had already been defined by his predecessor. He thus found it much more difficult to get to grips with his new role and make a distinctive personal mark – the grind of day to day business made it impossible to get the thinking time he wanted.

4.8 The manifesto of the incoming or returning government thus provides a blueprint for action. While the election is taking place, the normal activities of Whitehall are suspended with only 'unavoidable business' being conducted. The civil service uses this time to prepare voluminous briefing for incoming ministers – in different versions for different parties – explaining the responsibilities they will have in their new Department and what issues need to be addressed in the short term. They will also suggest how any manifesto proposals might be taken forward. Much of that early briefing is logistical in nature rather than focused on the policy itself – covering such issues as how to staff up teams to take forward the manifesto commitments, establishing timetables, priorities and so on. The civil service is well used to putting in place such processes quickly - and the detailed development of the policy and its implementation can begin very rapidly.

Ministerially-driven policy

4.9 The manifesto commitments tend to overshadow the first one or two years of a government. But any manifesto covers only a small proportion of the numerous activities of government. So the initial focus on the manifesto usually gets diluted by "business as usual".

4.10 Yet Ministers - whether Cabinet Ministers or junior ministers - remain one of the key drivers of policy proposals and ideas. Essentially, all politicians enter politics to make a difference. On being appointed as Ministers, they take on responsibility for a specific area of public life and invariably want to take the opportunity to develop the policy or improve the operation of government services. So they are seldom interested in merely presiding over the status quo. One special adviser in an introductory talk to senior civil servants in his new Department said

> X [the Cabinet Minister he had arrived with] and I know that we won't be at this Department for long. Perhaps 18 months or two years but it could be less. And we want to be able to look back in a few years time at what we achieved while we were here. So we will be quickly seeking to identify the two or three things where we can have real impact in the next 18 months and we will focus on them. Things which would take longer or are just about minding the shop won't get our attention in the same way.

4.11 Another former Cabinet Minister also stressed the focus which Ministers put on making things happen – and the difficulty some officials had in responding to this.

> One of the weaknesses of Whitehall is that the civil service simply don't value time in the way which a politician does. The incentive to get on and make things happen before the next election isn't a shared concern between ministers and officials. In the private sector as well, time is money. In the civil service, no one cares in the same way – there is an attitude of the process being never-ending - and it drives Ministers up the wall. We have to constantly battle to get across the urgency of what we want to do.

4.12 It does not follow that Ministers themselves generate the majority of *specific* policy ideas, which might well come from elsewhere. But Ministers are critical in deciding which issues they wish to address and which have priority. They regularly discuss their specific areas of responsibility both with the relevant stakeholders and their civil servants. They are constantly asking what more could or should be done, and how existing policies and activities might be taken forward or improved. They take ideas from a variety of sources (stakeholders, lobbyists, think-tanks, the press,

backbenchers) and ask for advice from the civil service machine on those ideas, authorising further and more detailed work where the idea seems promising. Nor do Ministers draw any real distinction in doing so between issues of policy and delivery – it is simply about a drive for continuous improvement. One former middle-ranking Minister commented

> it was relatively rare in my career that I was responsible for "original" policy. Most of the time the underlying policy objectives were clear and there was no need to re-examine them. But what I was doing was trying to improve the way things were being done.

Civil service *originated* policy

4.12 Policy ideas originating from the civil service are rarer. The civil service focus is usually on responding to policy ideas originating elsewhere – or improving the delivery of existing policies. One political adviser commented

> Politicians tend to say they want policy ideas from their civil servants but I am not sure they really mean it. It is the politician's job to generate the policy thinking and work with people like their political advisers and with think tanks to do so.
>
> Moreover, civil servants aren't actually very good at blue skies thinking about politics. It's not their speciality. What they are good at is working out the mechanics of how policy ideas can be translated into action, what the risks and problems are and how those problems might be overcome.

4.14 A former Minister spoke on similar lines

> I am interested in ideas from civil servants but they have to be practical and in line with our overall approach. So if an official advocated to me the abolition of the NHS I'd be really rather annoyed. Even if that were their personal view, to challenge something which the government is committed to is a waste of their and my time. But if an official came to me with a new approach to achieving the government's stated aims for the NHS then I'd be very interested. But, sadly, I can't recall many examples of that.

4.15 There are of course some policy focused issues which civil servants do advocate and promote. But they tend to be in areas which have longer pay back times – that is in areas in which Ministers are not that interested. In BERR, for example, there is invariably a long list of 'desirable' changes which are needed to update legislation concerning company or insolvency law. Other departments will have similar examples. But even if Ministers accept 'the policy case' for such changes, they are unlikely to give much priority to issues which will lead to long and protracted legislation in Parliament – slots for which are always in short supply. Put another way 'there are no votes in company law reform, however important it might be'.

Civil service-*driven* policy

4.16 If the civil service does not originate policy, it is undoubtedly the main vehicle in most circumstances for taking hold of the policy concept and working out the practical detail of developing that policy into something workable and ready for announcement in the necessary detail. Put another way, the Ministerial role in policy formulation is typically to make clear 'this is what I want to achieve'; but the

civil service role is focused on the 'these are the practical options by which you might achieve it'. That said, it should be emphasised that Ministers, rather than officials, generally sign-off the decisions both on 'what to' and 'how to' issues. Clearly, within the context of any policy area, there will be issues, most often in relation to the delivery of the chosen option, which are 'below the Ministerial radar'. But there is no precise line as to what issues are delegated to officials to decide without Ministerial clearance - that is usually decided by how much appetite the individual Minister has for being engaged with the detail.

4.17 How the civil service sets about the task of managing the policy process varies considerably from subject to subject, depending on its significance. The case studies on the development of energy policy (box E) and the review of the BBC charter (box F) give examples of how the process is managed for major exercises. In such contexts, the task of officials can be characterised as typically involving;

- **Understanding** the policy area which Ministers want to tackle. This often involves informal discussions with third parties, as well as Ministers, to improve the civil service's understanding of the issues. Before considering how to manage a policy review of an aspect of criminal law, for example, officials may well want to discuss the issues informally with the police to ensure they understand the issues. In many cases, such tentative discussions may well not be formally recorded – they are characterised as 'what if' discussions and have no formal status. For example, it is probable that before the possibility of new nuclear power was raised formally in the energy review, that there would have been informal discussions with the energy companies to gauge their potential reaction to that possibility. In other cases, especially where policy is being developed rather than formulated, the officials will already have a good understanding of the issues involved

- **Scoping** the work to be covered in any policy review and how it might be managed. This will involve advising Ministers on, for example, the arguments for and against managing the policy review internally or with an external 'figurehead', the extent to which the review will be inter-departmental, how it should be resourced, the intended timetable, the desired level of consultation, the need for consultants and so on. Ministers will typically decide these issues – but based on options and a project plan put forward by their officials

- **Assembling** the evidence base on which policy options will then be developed. Much of the necessary factual data may already be available – in other cases more work may be needed to establish the necessary facts, possibly involving some formal research

- **Managing the desired level of consultation.** In areas of major policy development, it is quite likely that there will be an initial discussion document, setting out the evidence base and identifying possible policy options, on which views will be sought. This is likely to be paralleled by a significant degree of more informal consultation by both Ministers and officials, talking to key stakeholders and seeking their views on the issues

- **Devising the analytical framework for decision making.** This is likely to involve discussions with Ministers to establish clarity about the objectives of the policy concerned in terms of the desired outcomes; and thus establishing criteria against which options can be developed and then assessed. (There is no doubt that, although civil servants may not often generate their own ideas as to 'what to do',

they are very used to developing options for 'how to do' it.)

- **Identifying and managing conflicting policies.** It is very common in Whitehall that policy development in one area will have knock-on effects on other policy areas – and these issues need to be uncovered and addressed. For example, attempts to reduce carbon emissions from domestic households by DEFRA may well impact on the housing policy of DCLG. A new initiative to tackle crime might well require new regulations which conflict with the policy objectives of the Better Regulation Executive (c.f. Box I)

- **Managing the dialogue with Ministers as conclusions are reached**. In general terms, officials will manage the timetable for the policy development so that decisions are reached in good time, involving cross-departmental approval where necessary (c.f. discussion of the Cabinet Office role in the next chapter). This is inevitably an iterative process with options being refined and further developed. There will also be a joint focus on whether the options developed are attractive (i.e. that they will meet the policy objectives and be well received) and whether they are workable (i.e. whether they are likely to be practical at the operational level) Both meetings (often with PowerPoint presentations) and written submissions are important in this context

- **Writing the final document and managing the announcements of the policy**. Depending on the nature of the issue, it is probable that the outcome will be a major policy document, often a White Paper, which sets out the specific policy decisions and how they are to be implemented. This can often be the most fraught of periods within the Whitehall village, in that there can be considerable focus on the political attractiveness of the proposals and both Ministers and their Special Advisers pay particular attention to the likely stakeholder reactions, sometimes seeking last minute changes to both substance and presentation. Indeed, one former Minister said

  > The officials [involved in developing a White Paper] were doing some splendid work on the facts, the analysis and the policy ideas. But they really struggled with the narrative. They simply couldn't draft the words in a way which got across the direction of our policy in a coherent narrative. So I had to take the draft home over a weekend and write the executive summary myself.

- **Implementing the policy**. In many respects, a White Paper can resemble a manifesto in that it sets out a programme of action for a period of years. Legislation is often needed to implement some of the proposals and a "Bill Team" will need to be established accordingly. Other policy proposals will not require legislation but will require detailed implementation plans, quite often involving further rounds of consultation, with the need to draft discussion documents and so on. Officials will again need to manage implementation as a specific programme of work. It is quite common for White Papers to include a commitment to the publication of a delivery plan setting out how it will be implemented – often with a formal progress report to Parliament.

- **Evaluating the outcome and launching the next review**. However much attention is paid to the careful development of policies, they inevitably do not always work – whether because they prove to be more difficult to deliver than anticipated or because the nature of the problem being tackled evolves. So officials

will inevitably review, both formally and informally, how effective policies are proving and what further might be needed. In that sense there are no areas in which policy making is ever complete – the process is in effect a continuous circle, a fact recognised in the better policy making work discussed in Chapter 6.

4.18 It would of course be misleading to imagine that the activities discussed at some length in paragraph 4.17 are representative of 'everyday' policy making. Even the larger Departments are unlikely to be developing more than a single White Paper at any one time; and some Departments might go several years without one. So 'lower level' policy development is a very significant part of the everyday life of Ministers and many of their Whitehall officials. As noted in paragraph 4.13- 4.15 above, Ministers are constantly and correctly asking how the issues they are responsible for might be further developed and improved, whether that means re-opening "what to" issues or - much more frequently in practice - seeking continuous improvement on the 'how to do it' agenda.

4.19 Even in discussing these lower level issues, the agenda discussed in paragraph 4.17 would fairly describe how officials work with Ministers to formulate, develop and propose policy. A policy review of a specific issue might well take a month rather than the year which is more typical of a White Paper. So not all the processes described above would be possible or necessary in that timescale - but the approach would still draw on a similar menu.

4.20 A specific mention should also be made of legislation. Working for or managing a Bill team is one of the 'rites of passage' of many senior civil servants in their earlier career (as is working in a ministerial private office). Similarly many junior Ministers regard taking a complex Bill through Parliament as an opportunity to further their reputation.

4.21 In principle the government is fully in control of legislation; and the policy is usually worked out in advance. But the translation of a broad policy intention into specific legislative proposals invariably reveals a wide range of issues which need to be considered in more detail than would normally have been done at the time when the policy was first set out. Similarly, government Bills are subject to amendment during their passage through Parliament; and a number of 'concessions' are inevitably made to ensure the Bill gains Parliamentary approval. Moreover, the pressures of the timetable often mean that decisions have to be made quickly - usually overnight - and it is not uncommon for the Act which eventually emerges to differ in quite significant ways from the original policy intention. These pressures are all the greater when legislation is introduced in an emergency, either because of overwhelming public pressure or an undesirable Court judgement. 'Dangerous Dogs' remains a well understood Whitehall code for the risks of rushing legislation through Parliament before it has been properly thought through.

Box E: Case study – Energy policy

The development of energy policy after the 2005 election is an excellent example of 'formal' policy making within Whitehall - although it was not without its own special features.

The previous formal statement of the government's broad approach to energy had been in a White Paper of 2003, a document produced by the DTI, in conjunction with DEFRA. While this had been well received at the time, the ever-growing

concerns about climate change, together with worries about security of supply as the UK moved to being a net energy importer, made it seem increasingly likely that a further review would be needed. After the election, No10 made clear that the Prime Minister felt a further formal review was needed, though it was not a manifesto commitment to carry out such a review. It was also agreed that nuclear power - which had been conspicuous by its almost total absence from serious consideration in the 2003 White Paper – should be included within the review.

The Review was launched in late 2005, after an internal debate about its nature and form. Eventually it was decided that the Review should be conducted on a cross-Departmental basis, based in the DTI, but with a dedicated team of about 20 staff, jointly led by a senior official in BERR and a secondee from the Policy Unit in No 10. The Treasury and other relevant departments also provided staff on secondment. The Review team reported to both the DTI Secretary of State and the Prime Minister.

The first public output of the review was a long discussion document 'The Energy Challenge' published in July 2006. This set out a detailed factual analysis of the current state of the energy market; and its implications for climate change. It outlined a number of potential policy responses and sought views on them. Though not formally described as a 'green paper' it had essentially that effect.

Once the responses to the consultation had been received, Ministers decided to proceed to a White Paper, managed and drafted by the Review team. The White Paper - *Meeting the Energy Challenge* – was published in May 2007. A number of the resultant policies required primary legislation and were the subject of the Energy Act which received royal assent in November 2008.

A member of the review team described how the White Paper process had been managed. It had throughout been a combination of top-down and bottom-up policy making, with Ministers clear about their headline concerns - including for example the need to have a thorough assessment of the nuclear issue – but officials recognising that it also provided the opportunity to consider all aspects of the market and how effectively the market was functioning.

So a long list of issues to be considered was collated, which was then grouped into specific themes taken forward by members of the team in workstreams. The lead economist developed an analytical framework against which the specific proposals emerging from the workstreams could be considered.

> We went through the classic Government policy process of first setting out what we were trying to achieve, that is the overriding energy policy goals, then reviewed the various policy areas and technologies to establish at a high level what potential contributions they could make to achieving our goals. For example the profile of contribution to our goals from energy efficiency was very different from the profile of nuclear because of the large time differences in implementation. The next stage was to consider what interventions or government policies might be needed in the market to realise these potential contributions. This process meant we started with a long list of about 40 areas to look at and whittled this down into a short list of about 20 specific policy proposals, which we then had to cost.

In parallel with this work, the team had to keep Ministers and Special Advisers in

touch with progress, whether by reporting back in writing or through meetings. Ministers were thus kept in close touch with the emerging ideas and could indicate which they thought were attractive to them and which weren't. A small number of possible policy initiatives were supported by Ministers at this stage but were dropped when the evidence base for intervention suggested that the ideas were unnecessary or would be ineffective. As the publication of the White Paper came nearer, the team used the formal Cabinet Office machinery to get sign-off on the specific proposals and finally the text of the White Paper. Though this generated a lot of paper and thus a lot of work, it was considered necessary in order to get formal sign-off to the specific proposals.

From the outset of the process, the review team committed to publication of a wide range of supportive analysis and documentation. (The website makes clear that, in addition to the main White Paper, there were four annexes and about twenty other associated documents on specific issues.) Throughout the process there were regular meetings with the energy companies, other third parties and with academics specialising in energy and climate change at which the evidence base was tested and reviewed. The aim – very much achieved - was to gain the fullest possible consensus on the strength of the underlying analysis, with absolute clarity on the assumptions on which the analysis was based. The political debate which followed publication of the White Paper was thus focused on whether the right policies had been adopted rather than on disputing the evidence base. The review team also held regular 'peer reviews' of the individual work streams, challenging the emerging ideas.

Obviously, there were hiccoughs along the way. The inclusion of nuclear energy in the White Paper was successfully challenged in the Courts by Greenpeace and from that point was handled separately rather than as part of the main exercise. Ministerial changes led to a need to spend time briefing a new Secretary of State at a relatively late stage. Just before the publication of the White Paper, an agreement by the Council of Ministers to new EU targets for renewable energy meant that some of the proposed policies in that area were in part overtaken before they had been published. And there was the habitual last minute revisions to the drafting of the White Paper to meet their likely specific concerns.

But, overall, as a piece of 'classic' Whitehall policy making, the White Paper process could not easily have been bettered. A dedicated team was created at the outset, there was sufficient time to do the work thoroughly and there was a strong commitment to publishing the detailed evidence base behind the recommendations.

Perhaps as a result, there were only a limited number of FOI requests (nuclear excepted) during the process. There were clearly policy ideas which were contemplated but not pursued but the clarity of the proposals that were published made it unnecessary to know what had been rejected.

Box F: Renewing the BBC's Charter

The renewal of the BBC's Charter is an example of a very large, deliberate and politically charged policy exercise working to a deadline, namely the expiry of the existing Charter in 2006. The future structure of public service broadcasting was

at stake and a great variety of powerful interests were concerned in, for example, the extent of allowable BBC monopoly, the continued place of the licence fee, technical questions concerning digitalisation and its implications, and how far the BBC could engage in activities potentially hostile to commercial TV and sound broadcasters' interests.

An added complication was the fact that the timing of the review took place during and after a major crisis over the Kelly case that had called the BBC's news gathering operations and governance into question. The fact that the crisis had occurred within the context of an unpopular government decision to participate in an attack on the then Iraq regime greatly intensified the sensitivity of the normal Charter review. Moreover, a public inquiry chaired by a senior member of the judiciary examined the events leading to the death of Dr Kelly in the full glare of detailed publicity, and led to the resignations of both the BBC chairman and its Director-General leaving the BBC for a time leaderless.

To cope with addressing issues that would be of considerable public and political interest, and aware of how the availability of the web facilitated forms of consultation not available for previous Charter reviews, the DCMS took a number of special steps in addition to making the traditional appeals for evidence. The steps included establishing an ad hoc departmental board with some powerful non-executive representation. The board worked to a programme which produced regular reports to ministers in a situation where senior Cabinet members as well as the Culture Secretary showed great interest in the board's work.

In addition, one of the board members was given the role of leading a tier of consultation with a range of independent experts by means of seminars whose proceedings were made publicly available. The same board member produced for the board an analysis of this work and other evidence received. This work in turn informed further, targeted consultations directed by the board which, looking at particular issues, saw papers produced which explained what questions arose in each instance, set out the relevant facts and sought considered responses. Although some of the more commercially sensitive subjects received limited circulation, the whole thrust of the effort was to get as much as possible out into the public domain. In this and other ways, DCMS sought to ground its thinking on a secure understanding of informed public response. In the event, the process elicited a very considerable public response indeed, and proved particularly powerful in responding to, and sometimes facing down, sectional and other special interests.

In a process which involved an unprecedented extent of public consultation, both Green and White Papers were produced in the normal way. Although DCMS's internal deliberations were confidential, its analyses and thinking were effectively made transparent during the course of the consultations, with interested parties themselves publishing their own submissions. At the same time, there was a fair amount of written traffic between ministers as views were exchanged during the consideration of the issues, and a Whitehall stakeholders group kept other departmental interests (principally in the Treasury and DTI) on board. Bringing such a complex exercise to well-considered and positive conclusions required much careful management, maintaining the integrity of which is recognised in s. 35 FOIA. The interest of at least some parts of the public was intense: how far premature disclosure, as the policy makers might see it, was in the public interest was another matter.

The review took place over an extended period – 2003-6. The FOIA was operative for only the later stages. There have been two attempts to challenge the confidentiality of the internal deliberations. The first concerned a request for the release of the Permanent Secretary's email note of a lunchtime discussion in 2005 with Michael Grade, then chairman of the BBC. The Commissioner supported refusal under s. 36(2)(b)(ii) on the grounds that there was no predominant public interest in disclosure, noting that the avoidance of a 'chilling' effect was relevant in this instance (Case No FS50085374, 30 August 2007). At the time of writing a second FOI request relating to exchanges between Lord Birt when in No 10 and the Culture Secretary (FS50098980) remains undetermined. The request was upheld by the Information Commissioner, but the DCMS has now appealed to the Information Tribunal (EA/2008/0004).

'Events' driven policy

4.22 The earlier part of this section largely focused on 'pro-active' policy making and development. But it should also be noted that a significant amount of policy making is generated in real time and in response to external events.

4.23 The banking crisis in the autumn of 2008 is an excellent and recent example of this. Faced with the real prospect of one or major banks ceasing to trade, Ministers were obliged to take decisive action to stabilise the situation and remove the risk to depositors. It is clear from the press reports that decisions were reached in hours or at most days rather than weeks. Those decisions no doubt will have had to be taken on the basis of the best available information, which was inevitably incomplete and partial. The normal processes of consultation and consideration of options would have had to be short-circuited, even leaving aside issues of commercial confidentiality.

4.24 Both Ministers and officials would inevitably have been working flat-out for sustained periods and many of the normal processes of written submission and considered advice would have been replaced by emergency meetings and rushed telephone conversations. All governments face these crises from time to time - the experience of the Major government at the time of 'Black Wednesday' in 1992 would have been very similar.

4.25 It could be argued that a distinction could be drawn between 'crisis management' and 'policy making'. But any such distinction would be wholly false. There is little doubt that policy is being made during a crisis whether or not the normal processes of policy consideration are followed. In the autumn banking crisis, decisions were made which will have major knock-on effects for public expenditure and public policy for many years to come.

4.26 The case study of the most recent foot and mouth outbreak at box G is a further example of government responding to 'events'. To some extent that may appear to be an operational situation in that contingency plans had been put in place to deal with the outbreak, plans which were rolled-out automatically. But decisions were still needed on some specific issues which were undoubtedly matters of policy rather than simple operational matters.

4.27 Not all 'events' driven policy is the result of a substantive crisis. A single newspaper article, for example, particularly if it is taken up by the opposition, can spark a

demand from a Minister for an immediate policy response and possibly new initiatives ' to make sure we are not outflanked'. Officials can at such times come under pressure to produce a new policy announcement even if there is not a strong objective case for such a development.

Box G: Case study – the 2007 foot and mouth outbreak

The outbreak of foot and mouth disease in 2001 had been a seminal moment in contingency planning by government. The inevitable - and highly critical independent - report showed that the government had been unprepared for the type of outbreak which occurred; and had not learnt – or had forgotten – the lessons of the previous outbreak in the 1960s. In contrast, the report into the 2007 outbreak, by the same independent reviewer, was far less critical and had only relatively minor criticisms. What was it about the way the government had prepared for, and managed the 2007 outbreak, which led to this more favourable outcome? This case study is based on an interview with one of those involved.

In practice, preparing for what became the 2007 outbreak had started well beforehand, as soon as the lessons from the 2001 outbreak had been fully understood. One of the authors of this report was involved at the margins of the earlier outbreak and recalled how chaotic the initial response had been. A major fault had been that contingency planning had been based on an assumption that the outbreak would be identified at a stage before the disease had spread geographically – whereas a major issue in 2001 was the fact that the disease occurred in several parts of the country more or less at once. There had also been a relatively slow realisation that the 2001 outbreak had major repercussions beyond the farming community, notably for the tourist and leisure industries.

Contingency planning after 2001 became much more rigorous and took several forms. A significant part of that response was the availability of an operational manual which specified individual roles and responsibilities in the event of a further outbreak. This meant that people knew in advance what their contribution to a further outbreak would be and how to set about it. The operational manual held up effectively under the pressure of the 2007 outbreak.

An equally important element of the contingency planning related to the extensive work done on the policy response to sit alongside the operational response. DEFRA had learnt that one of the weaknesses of 2001 had been that there was no clear sense of what the policy priorities were – so valuable time was taken up in the midst of the crisis by debating what the objectives should be. As a result DEFRA had developed a draft Response Plan for infectious animal diseases which set out the suggested policy priorities and underlying objectives when an outbreak occurred. So issues such as how to proceed with bans on livestock movements, exclusion zones and so on had been thought through in advance. Moreover, DEFRA had consulted widely on the Response Plan and ensured that all those who would be affected by a further outbreak could input at that stage. The overall response plan, once agreed, was therefore recognised as a collective endeavour which the relevant third parties were committed to when the next outbreak occurred.

The pre-agreed Response Plan and operational manual were hugely instrumental in the much smoother handling of the 2007 outbreak. It was still a crisis which

had required a crisis response. But the pre-planning gave more space for Ministers and the chief veterinary officer to focus on the communication issues – including explaining the issues in the media – rather than having to decide the priorities or the mechanics of the response to the disease. DEFRA had also recognised that they would need expert technical advice in-house - so had set up in advance a panel of technical experts on the various aspects of the disease.

It did not follow that everything ran smoothly. For example the 2007 outbreak occurred at arguably the worst time of the year in that the Plan envisaged restrictions on animal movements at the very time when farmers needed to bring their livestock in from the hills. And contrary to the expectations in the Response plan, there was strong local demand to close footpaths in the affected part of the countryside. There were also some disagreements with the Scottish Executive over some issues. So significant policy issues still arose which had to be addressed by Ministers and their officials through the normal process of submissions outlining options. But there was no doubt that in the midst of an operational crisis, it was much easier to consider whether a specific policy should be changed to meet the circumstances of the day than to have to consider for the first time what the policy should be.

A further advantage of the considerable contingency planning was that normal "office disciplines" stood up well in the midst of the crisis. Meetings were properly noted and submissions drafted. Overall, the audit trail for the outbreak was excellent. There had been some FOI cases – thought to be aimed at gathering information for possible Court action – and these would be treated on their merits. But the core information was properly recorded.

One innovation imported from the army also proved helpful, namely 'bird-table' meetings. In essence, up to three times a day, DEFRA called a short (half hour) progress meeting to which all key stakeholders were invited. Any relevant issue could be raised, resolved on the spot if possible or a decision made as to how it would be resolved. The meetings were disciplined with a strict time limit and no chairs to discourage discussion. The lead DEFRA Minister attended regularly - and even the Prime Minister had attended one and been entirely content to play by the rules of the bird- table concept.

DEFRA were far from complacent about the outcome. Clearly, there were important issues arising from the fact that the outbreak had originated in an Animal Health laboratory. A more practical issue was the need to recognise that outbreaks might well be discovered at weekends when the staff concerned in responding to the outbreak might not readily be contacted. The concept of continuous improvement would ensure that such issues would be addressed.

Some observations on the policy making process

4.28 Both the experience of our team and other work related to this study (including interviews) show that while there is a great deal of continuity within Whitehall, there have been clear developments over time in the way that the policy making process has evolved. Four key trends are set out in this section.

i) A commitment to a more open policy-making process

4.29 The very word 'stakeholder' is new to Whitehall - it was certainly not in common usage 20 years ago. But it is now a widely understood concept in everyday use and it is almost impossible to imagine any project plan for a specific initiative, not discussing 'stakeholder engagement'. But this reflects not just a change in terminology but in practice, as there is now a very clear expectation in Whitehall and Westminster that policy development should involve both formal and informal consultation with the public at large and those affected by the policy in particular.

4.30 This is driven both by increasing expectations in society that the political process should be more open and by a growing view in government that policies which have not been exposed to public scrutiny at the outset are less likely to work effectively in practice. So 'discussion' documents are now much commonly utilised in policy making. And, as noted elsewhere in this report, the corollary to this is that the civil service 'monopoly' on policy making – always perhaps over-stated – has undoubtedly been diminished.

4.31 It is possible to observe exceptions to this general rule. The Treasury, for example, has always understandably argued that possible changes to taxation should not be debated in public - and the Treasury under Gordon Brown rather bucked the general trend described by making regular announcements in the Budget and pre-Budget report which had not been debated and which were quite often nothing to do with taxation but new spending initiatives (quite often to the considerable irritation of other departments whose territory they were invading.)

4.32 A few other issues will also be deemed to sensitive on which to consult – for example the original decision to reclassify cannabis (discussed in box H below) was made without any prior public consultation. But the general trend in favour of consultation is clear; and re-enforced by good practice guidance from, for example, the Better Regulation Executive.

Box H: Case studies – Cannabis and nuclear power

Although there is a growing trend in favour of consultation, this is not always the case and policies have been introduced without it. In contrast, even the fullest of consultation does not necessarily mean any greater degree of agreement with the subsequent policy line.

A rare example of a positive decision <u>not</u> to consult arose in the case of the reclassification of cannabis from a class B to a class C drug. When this was announced in 2004, there had been no preliminary public consultation and the move had not been anticipated.

The Home Secretary made clear at the time that he had taken advice on the issue from senior police and the Advisory Council on the Misuse of Drugs. And he defended his decision robustly, based on the necessary evidence base.

But he also decided positively to announce the decision rather than consult on it in advance. The reasoning was clear – namely that the media would react strongly against the proposal and opposition to it would gather momentum, based on prejudice rather than argument. As he was convinced of the essential correctness of the decision it was preferable to make it up-front rather than spark a public debate which was likely to be ill-informed.

The government decision to reconsider the case on nuclear power took a different approach. The Energy White Paper of 2003 had committed the government to 'the fullest consultation and a White Paper' before any decision would be taken as to whether the government would support new nuclear build. Nuclear energy was subsequently discussed in the consultation document on energy policy published in 2006.

Greenpeace, however, went to the High Court to challenge whether the overall consultation document met the commitment to 'the fullest consultation' for nuclear energy. They were successful; and the government felt obliged to go through a new consultation process on nuclear, issuing a further consultation document, but also setting up a series of public road shows and national discussion events on the issue. Those roadshows were undoubtedly an unusual approach to consultation for a complex issue of energy policy.

A particular difficulty was that, by the time of the 're-consultation', the government had formed a preliminary view that there were circumstances in which they would support new nuclear build if the private sector wished to go down that route. They explained their thinking in the consultation process. But Greenpeace argued that this invalidated the neutrality of the consultation, which they considered was biased rather than neutral.

It was thought for some time that Greenpeace might well return to the Courts to argue that the consultation was thus invalid. No such case arose, however, and a nuclear White Paper was finally published in early 2008 and is now being implemented.

It is certainly possible (even if not desirable) that such experiences would, if repeated, be used as an argument against making commitments to consultation in future, if the government thus increases the risk of legal challenge. It is unlikely the process would have been challenged without the 2003 commitment to consultation.

ii) A commitment to publish the evidence base

4.33 Closely related to the commitment to consult, is the growth in expectation that the underlying evidence base for decisions will be published. That expectation was first set out in the civil service in the early 1990s, with guidelines encouraging release of background material; and it was given further impetus by the Freedom of Information Act to the extent that it made clear that "statistical information" on which government policy was based was not included within the "government policy" exemption under section 35 of the Act.

4.34 But a trend is still discernible today in the extent to which information is released. For example, the lead economist on the Energy White Paper in 2007 was clear that far more background information was released to support the document than had been made available at the time of the publication of its predecessor in 2003. It would be extremely rare today for a White Paper not to be accompanied by copious amounts of factual material as background to the policy statements being made. (As a result, the scale of White Papers has changed significantly - they may well be 300 or more pages of text, supplemented by numerous diagrams and tables, in contrast to the 30 pages of closely worded text which might once have been the usual

format. It is also now routine for them to be full colour and glossy - anything but 'White'.)

iii) A growing focus on delivery issues

4.35 A further clear trend is the increasing focus on the effective delivery of policy, rather than the policy itself, an issue articulated in the 1999 Modernising Government White Paper. Encapsulated in the phrase "what matters is what works", this trend reflects increasing recognition that there can all too often be a wide gap between policies designed in Westminster and Whitehall and the way they are delivered on the ground. So more attention is now paid in policy formulation to delivery issues and the managerial issues associated with policies are given far greater attention. Much modern theory of policy making also emphasises how far policy development is a continuous circle involving delivery and implementation as part of the process and not an afterthought. These issues are discussed more fully in Chapter 6.

4.36 This is again not universal. The extent to which "delivery" was under-played in the traditional Whitehall approach has perhaps been exaggerated. And there remain Ministers who consider that a policy process is finished when the policy is announced - a recognisable feature perhaps in the criminal justice field where numerous new offences have been created for instant headlines which are beyond the capacity of the police to enforce. But there remains no doubt that Ministers and officials are both more focused on 'delivery' than ever before.

iv) More day to day informality –and increased pace

4.37 Alongside these positive trends is one which some would argue moves in the other direction, namely an increasing informality within government in the way it does business - and records what it is doing. One former official commented

> In a less deferential world, technological changes have reinforced social changes to the benefit of more junior officers. The greater speed of communications has led to flatter official hierarchies...Changes in social mores have led to ministers becoming less and less remote and more informal.

4.38 This trend is derived from a number of developments in society and political life. Some of it is driven by technology and is well documented – for example the clear tendency for people to have more contact via e-mail and for those e-mails to be much more informal and chatty in tone. Some of it is driven by the increase in the number of sources from which Ministers get their ideas, most obviously their special advisers but also a greater range of external contacts - which is a natural corollary of the more consultative trend already identified. Relationships between Ministers and their officials are also more informal – there is now a greater tendency to 'have a quick word' on the mobile or in the office rather than a formal meeting. Perhaps because of the pressures of the '24/7' news media, it is increasingly common for issues to be taken forward over the weekend, so that decisions are more often taken out of the office and less certain to be accurately reported. One former Treasury official told us, in relation to an FOI request

> We had a huge amount of material to review – we had been doing work on the issue for a year so there was a lot to consider. But what the initial

search of the material revealed was that the nearer we got to the end game of the exercise, the less information there was on the record. I remember working through a weekend at the end and virtually everything was conducted on the telephone, so there was a very limited formal record. We did have the final submission to Ministers. But it was discussed with them in a meeting and the final decision differed from the submission in a number of detailed areas – but we had no record of that discussion. Nor did we have any record of why some of the options we had been considering were not pursued.

4.39 Another interesting development is a trend towards Ministers being talked through PowerPoint presentations in meetings, rather than being given traditional submissions in advance of any discussion. This use of PowerPoint was pioneered by the Prime Minister's strategy unit and have been taken up by other similar units. They are not normally in the public domain but some have been published – for example the "Analytical Audit" prepared by the Office for Climate Change, which provides analytical support for DECC, is published on their website and adopts the PowerPoint format – while being very clear that it is not a statement of government policy.

www.occ.gov.uk/activities/analytical_audit/FULL_REPORT.pdf

4.40 Views on the development of this category of document differ. One official described them as 'a device for winning an argument not setting out options'. And it is certainly true that such presentations give considerable power to the drafter to shape the analysis of the issue. But this is also true of more conventional submissions, with their structure of describing and analysing policy options. Moreover, a former Cabinet Minister argued that PowerPoint submissions were better suited to those who thought in 'engineering' terms - because it was possible to use graphics to explain how a delivery system was operating. And this was compared favourably to the 'classic' civil service submission which was focused on words and more abstract concepts rather than the real world. It is also true that the use of PowerPoint is more widespread in the initial stages of policy making – when the focus is perhaps on explaining the issues to Ministers and senior advisers rather than at the decision making point.

4.41 What is perhaps clear is that Powerpoint presentations are more difficult to interpret 'after the event', than a formal submission in that they lack the conventional approach of seeking precise responses from Ministers to defined questions. They should be seen therefore as supplementary to the traditional submission rather than eclipsing it - but it is perhaps too early to say whether their use will become standard practice in future.

4.42 More generally, the focus of record keeping has evolved. Until the arrival of the electronic office, records were conventionally kept on paper files which tended to be comprehensive in recording everything that went on, often in considerable detail and with multiple copies of documents for no good reason, as officials routinely sent hard copy documents to the clerical support teams "for the file". With electronic filing systems now widespread in Whitehall, less is retained but the focus is more on ensuring that the records are kept "for the audit trail" which is certainly a more selective process and more obviously reflects business practice. Similarly, notes of meetings often tended in the past to be blow by blow accounts, getting close at times to a verbatim account of the discussion; whereas the focus today is increasingly on circulating the agreed action points to all involved immediately after

the meeting, without any full record of the discussion itself. To a degree this has been driven by resource pressures - as back-up administrative support has been significantly reduced in most departments in recent years. But it is also a development that has been welcomed by many younger officials – who prefer to focus on what is necessary to get things done and are less worried about recording the debate preceding the decisions.

4.43 The trend towards informality has, of course, been encapsulated in the term 'sofa government' - and is a trend which has been questioned by a retired Cabinet Secretary. Our view is that greater informality is the inevitable result of the increasing pace of government – and that many Ministers and officials appreciate the greater flexibility in the development of policy, with an increased sense of team working. But clearly there are downsides to informality in relation to the formal recording of how decisions were reached.

4.44 Putting all four of these themes together, therefore, clearly suggests an issue of major relevance to the concept of freedom of information, namely that the 'hard' evidence base on which decisions are actually made - and indeed the options considered – are increasingly well recorded and on the public record. But the record of how the decision was made may well be less comprehensive than previously.

Summary of chapter 4

- The generation of policy ideas - including views on how those ideas should be delivered - is initiated in a variety of ways and primarily outside the civil service. The manifesto, special advisers and think-tanks are all prominent. Ministers, individually and collectively, authorise which of the numerous contenders for policy development are taken forward; and then take the decisions on issues as they are needed.

- The civil service is primarily focused on managing the process of policy development. They provide the 'secretariat' for the policy process - managing the process through origination, development, decision and implementation. This provides considerable scope for working out the practical aspects of policy development – and in particular analysing rigorously the potential difficulties with policy ideas as they are developed. But the civil service does not itself set the agenda.

- There are discernible trends in policy making in favour of increasing openness, greater levels of consultation and wider publication of background material. But there is greater informality - and at times a much faster pace - in respect of the internal processes as policy is developed, with the risk of corners being cut.

Chapter 5: Who makes policy?

5.1 This chapter describes the role of the various parties in Westminster and Whitehall. In accordance with one of the general themes of this report, it is essentially illustrative, rather than a precise guide, in that the roles of the differing parties are not proscribed and vary considerably, often according to personalities. It also focuses on Westminster and Whitehall, though there are references to both the European dimension and the various kinds of 'arms' length' central government agencies.

Government Ministers

5.2 At any given time, there are just over 20 members of Cabinet - 23 at present – plus another 80 or so other junior Ministers. The vast majority of these are MPs, though a significant number are drawn from the House of Lords. A further 40 or so backbenchers serve as unpaid Parliamentary private secretaries. In broad terms, therefore, between a third and a half of MPs of the governing party will hold some form of appointment.

5.3 The conventional structure for Ministerial appointments places Ministers in one of three tiers

- Cabinet Ministers - essentially one from each department with two from the Treasury (the Chancellor and the Chief Secretary). The Cabinet Minister is always the Ministerial head of the Department

- Ministers of State - one, two or occasionally three in each Department. These are the most senior roles outside the Cabinet

- Parliamentary Under Secretaries of State - the most junior level. Again there are one, two or three in each Department

5.4 Not all Departments follow this nomenclature - the Treasury, for example, has traditionally had posts of Economic Secretary and Financial Secretary (as well as Chief Secretary mentioned above), which are not easy to classify in the conventional structure. But the three levels give a rough indication of the seniority of the Ministers concerned. Cabinet Ministers obviously head their Departments as well as regularly attending the full Cabinet. They also lead the Ministerial team at the Department (though are seldom fully involved in choosing the team – a prerogative of the Prime Minister); and decide how the ministerial portfolios are allocated within the Department. Most Secretaries of State will decide to lead on certain issues themselves, delegating specific subjects to the Ministers of State, and the Parliamentary Under Secretaries, so that most junior ministers will have some subjects on which they lead and some on which they support a more senior minister. Titles are often given to reflect these specific roles (eg Minister for Housing, Minister for Pensions).

5.5 Some trends in Ministerial appointments are discernible in recent years

- more Ministers regularly attend the Cabinet than are actually in it. At present six Ministers have the right to attend the Cabinet even though they are not in it, with a

further three attending according to the subject under discussion

- perhaps related to this, there seems to be a trend towards individuals moving in and out of the Cabinet, but staying as Government Ministers. This contradicts the traditional expectation that Ministers might move sideways, be promoted or be sacked – but never demoted. Stephen Timms and Margaret Beckett are both currently outside the Cabinet having previously been in it

- there has been a new development of Ministers holding appointments in two Departments simultaneously, intended to encourage more "joined-up" government. There are six or seven of these at present, whereas the concept did not exist twenty years ago

- an increasing number of Ministers have originally served as special advisers within government departments. Many have first sought election as MPs (e.g. the Milliband brothers and Ed Balls). But others have been appointed to the House of Lords (e.g. Lord Adonis, Baroness Vadera and Lord Carter).

5.6 Whether such trends will continue – and what the implications will be if they do – remains to be seen. What they illustrate is the considerable freedom the Prime Minister has to determine not only the appointment of Ministers but also the underlying structure of ministerial appointments. All the above trends have been accomplished without breaching the rules – because there are no rules. (A small exception to that is that there is a conventional limit on Cabinet membership – hence the concept of people above that number having a right to attend rather than being members).

5.7 Being appointed a Minister brings responsibilities but does not bring the conventional disciplines of a contract specifying the hours of work. Nor does it bring any formal job description or explicit objectives – and there is virtually no formal training. (The incoming Labour government flirted with formal training for Ministers in 1997 but has disappointingly not sustained their interest.) Overall, therefore, how individual ministers set about their work is essentially for them - and many civil servants regularly gossip about strengths and weaknesses of the Ministers they have experienced over the years.

5.8 Nor is being a Minister a full-time role (though no one would dispute the prodigious workloads undertaken by the majority). Ministers in effect have a threefold role - their Ministerial role; their wider role as a politician within the government and Parliament more generally; and their constituency responsibilities - and they have to juggle their diary around all three. Most choose to base themselves at their departmental office at least from Tuesday to Thursday but their Ministerial private office and their constituency office have to remain flexible to accommodate an ever changing schedule.

5.9 Turning to 'what Ministers actually do' shows the considerable variety of government work. A relative constant is the Ministerial red box – the briefcase stuffed full of submissions, briefs for meetings, letters to be sent to MPs and numerous other papers which the private office will put together for each working day and at weekends in the expectation, often but not always realised, that the 'box will be turned round' overnight. But even there, some Ministers choose to deal with papers in the office rather than take a red box and a small but increasing

number work on-line. In addition to the paperwork, there is a constant stream of meetings with officials, fellow ministers and third parties on issues relating to the ministerial portfolio; and numerous out-of-the-office trips whether to negotiate in Brussels, make speeches or visit companies and other organisations whether in the UK or abroad. And, as noted above, this is all in addition to the Parliamentary and constituency responsibilities faced by all members of the House of Commons.

5.10 Given that Ministers come from a variety of different backgrounds - coupled with the lack of meaningful training and regular re-shuffles - it is not surprising that they vary considerably in their capacity to cope with their workload and, more important, to establish their own mark on the policy making process. Some Ministers never break out of "reactive" mode, essentially doing what they are asked to do as "loyal foot servants" of the government but not making any distinctive impression. A former Minister commented

> the reality is that you can spend the whole day doing useful and indeed necessary things - dealing with submissions, attending meetings and getting out and about - without really finding the time to address policy issues. And this is without your wider responsibilities as an MP. You really have to fight hard to make the time for policy making.

5.11 But the more successful Ministers remain those who are able, despite the pressures, to bring their own views and ideas to their Ministerial role. Each Minister will have their own preferences for doing so – the most well-known in recent years was Sir Keith Joseph issuing a comprehensive reading list to his senior officials – and the majority do so by constant repetition of their ideas in meetings and by asking for policy issues to be explored by their officials. Some Ministers also make a point of taking issues "off-line" in terms of the official process – by discussing particular ideas with other Ministers or with third parties and thus presenting their officials with worked through ideas. Again, there is no single approach. But one former adviser sounded a note of caution

> The situation [I faced] was complicated by the fact that there were just too many ministers generating too much activity. One of the results was that civil servants were exhausted by trivia. In that situation it was difficult for the civil servants and ministers to identify and operate on settled working patterns particularly when the number of participants with influence in the policy making process had proliferated.

Ministers acting collectively - the role of the Cabinet office

5.12 A critical part of the Whitehall infrastructure is the role of the Cabinet Office in co-ordinating the work of the Cabinet itself and the 'Cabinet Committees' (effectively smaller sub-committees of the main Cabinet), which facilitate collective discussion and agreement of issues which are cross departmental or of particular significance. Once clouded in secrecy, the existence of these Committees are now openly acknowledged and a full list of the Committees – currently some 35 in number - is listed together with their membership and terms of reference on the Cabinet Office website[2]. At any given time, some of these Committees are 'active' in that they meet regularly while others seldom meet. Business can also be taken in

[2] http://www.cabinetoffice.gov.uk/secretariats/committees.aspx

correspondence, with the lead Department writing to the Chair of the relevant Committee, other Departments then having the opportunity to comment via a deadline, and the Chair of the committee then writing a (Cabinet Office drafted) summary letter which confirms what has been agreed or proposes a way forward if differences remain.

5.13 Overall, the Cabinet Committee structure works well in providing a degree of discipline in policy making, especially where the issue is bigger than the interests of a single Department. Detailed papers are produced, sometimes having been thrashed out in meetings of officials which shadow the Ministerial committees. And decisions are clearly reached and recorded in minutes which reflect the arguments used in the meeting but tend not to attribute specific views to specific named Ministers. The number, membership and terms of reference of the Committees are also regularly revised, thus ensuring that the Committee system remains close to the political issues which dominate the agenda.

5.14 A feature of the system is that there is no absolute rule as to what needs Cabinet Committee clearance. But the Cabinet Office secretariat have strong antennae for issues which are being debated in Departments and usually have the clout necessary - especially working with the Chair of the relevant Committee (invariably a senior Cabinet member) - to ensure issues are discussed collectively. Clearly, a specific issue may to some extent be 'pre-cooked' before the Cabinet committee discusses it - and it will be rare that a Secretary of State who already has the support of the Prime Minister and Chancellor will lose a debate in a Cabinet Committee. But even then, the formality provided by the Committee system allows decisions to be recorded formally and action points clearly set out. As noted in the case study on energy policy, the system also provides an important discipline for officials in requiring them to be clear about their proposals in a structured way.

5.15 There are, of course, also numerous occasions when Ministers from different Departments meet collectively or bilaterally without the engagement of the Cabinet office secretariat.

The special advisers (SPADs)

5.16 The increasing role of special advisers, universally known as SPADs, has been a marked feature of Whitehall in recent years. The concept of the SPAD is, however, relatively recent, having only really become commonplace in the last twenty years.

5.17 Originally, SPADs fell into two rather distinct categories. First, there was a category of adviser who was an acknowledged expert on one of the subject matters of the Department, for example an academic specialising in housing or a business expert. These were invariably part-time and visibly not politicians. Second, there was a category of political adviser who was the Secretary of State's link to the political party and who would draft political speeches, talk to backbenchers on critical issues and so on. They would not usually deal directly with officials on issues of substance, but were more focused on presentation and party politics.

5.18 The last twenty years has, however, seen a rapid growth in the number and use of political advisers – now numbering not far short of 100 across Whitehall, with very significant numbers in the No10 Policy Unit and two or three in each Department. The typical special adviser today is far better characterised as a full time policy adviser, many of whom subsequently go on to being full time politicians in their own right either as MPs or in the House of Lords. The earlier breed of specialist

policy adviser (i.e. the subject specific expert) has not entirely disappeared but is now rarer; and many special advisers now move with their Secretary of State as the latter moves Departments, so are no longer obviously specialist in specific subject areas.

5.19 The role of this new breed of special adviser is considerably more developed than their predecessors. They are usually deeply involved in the policy making process within the Department, particularly in those areas on which their Secretary of State is focusing. Technically, they have no formal power over civil servants (though such a power was given exceptionally to Jonathan Powell and Alastair Campbell), but the reality is that they regularly commission work from officials on behalf of their Secretary of State. They will regularly initiate new policy thinking and bring a more overtly political approach to the consideration of the options and invariably attend any major policy discussions between officials and Ministers. They increasingly attend and, at times initiate, meetings of officials before any formal advice is submitted. They do not often draft documents, but they will be copied in on successive drafts of White Papers and similar documents and are very likely to comment in detail on them – often asking for significant re-writes to improve the presentation of the document. Further information on the role of SPADs is contained within the Code of Conduct for Special Advisers at

www.Cabinetoffice.gov.uk/media/Cabinetoffice/propriety_and_ethics/assets/code_conduct_sa_071120.pdf

5.20 Views on the development of this new breed amongst officials are mixed - and at times can reflect reactions to the personality of the particular adviser in the department at the relevant time, more than the substance of what they are doing.

5.21 The **positive** view - supported by both Ministers and many officials - is that special advisers bring a political dimension to the development of policy at an earlier stage of its development than would otherwise be the case – which can save considerable time in ruling out theoretical options which are likely to be politically unattractive. SPADs also have more time available than the Ministers themselves, so it can often be possible to discuss an issue in some depth with them before the submission is written, again saving time. SPADs can also usually articulate the direction of their Minister's thinking clearly – and can have a positive role in talking to SPADs in other departments to facilitate agreement on contentious issues. Finally, a good number of the SPADs are highly regarded for the quality of their policy analysis.

5.22 The more **negative** view is that the SPAD can too readily become a barrier between officials and Ministers; and that some SPADs have at times behaved in effect as junior Ministers, asking for additional work themselves, calling meetings on their own account and expressing views which do not always subsequently prove to be the views of the Ministers concerned. In addition some of the SPADs in No 10 and the Treasury have at times initiated work which cuts across the work of the lead Department and the Secretary of State who is directly accountable. There are occasionally tensions between junior ministers and SPADs in Departments, reflecting the fact that SPADs regularly see more of the Secretary of State day to day than the junior Ministers do.

5.23 This debate about the role of the SPADs is likely to run and run. For the purposes of this report, however, it should be noted that, by and large, SPADs operate much more informally than permanent civil servants, with far more discussed in informal meetings, on the telephone and via e-mail; and a good proportion of what they do

not being subject to formal record keeping. SPADs also spend a good degree of their time brokering solutions to problems with each other, often where policy objectives and political considerations diverge. But the details of such discussions do not always - some would say often - make the formal record. The greeter the involvement of SPADs, the greater the risk of the formal record telling only part of the story.

Departmental officials

5.24 From outside the civil service, it might be thought that officials are, in effect, leading on policy generation. This is partly true; and a considerable amount of the task of developing policy remains with the civil service. But the position is more complex. One former Permanent Secretary gave us an historical perspective

> Forty years ago, when matters should be referred to ministers was bred into the bone of civil servants and was fairly formalised. A long process of political socialisation for officials, tempered by the particular preferences of individual ministers, led to clear understandings between ministers and civil servants. However, over a long period and for many reasons interacting with each other, that balance has been disturbed…. As a result, the degree of delegated authority is less clear and the amount of reference to ministers has increased. One incoming businessman becoming a minister was astonished, for example, at the amount of what he regarded as trivial matters referred to ministers.

5.25 The more senior officials are in practice increasingly focused on resources and relationships rather than policy itself. On *resources*, it is the role of senior managers (ie the top three rungs of the senior civil service including the Permanent Secretary) to manage the Department as a whole, to ensure that the department's activities are in line with ministerial priorities and to ensure the "right people are in the right place". On *relationships*, it is their role to manage the relationship with Ministers and to smooth over friction between the Minister and more junior officials. (The civil service puts considerable weight – and some would say too much weight – on 'keeping the Minister happy'.) They also engage regularly with the numerous external stakeholders. Their role in policy making is more limited – they are regularly copied in on papers about specific policies as they develop, but they manage its overall direction rather than get involved in detailed issues unless they are of major importance.

5.26 The cutting edge of policy work – the detailed analysis of policy issues at their various levels of granulation – is therefore usually carried out further down the hierarchy, notably at the lowest SCS level (grade 5, payband 1) working with their direct reports, just below the SCS. It will thus generally fall to people at that level to develop the necessary in depth understanding of the issues; and to work out the policy options; and in due course consider how the chosen approach is best delivered. Most of the detailed policy drafting - whether that eventually emerges in green or White Papers, background documents or speeches - is also initiated just below the SCS.

5.27 A number of observations can be made on the role of these 'engine room' officials

- **though they are at the centre of the spider's web of policy making, they are not as such in control of the agenda.** As explained elsewhere in this chapter, most of the policy initiation comes from elsewhere in the system - Ministers,

SPADs, third party pressures. So, although the civil servants invariably manage the process of reviewing or implementing a policy, the decision to launch a review or the impetus to develop the delivery of a policy usually comes from elsewhere. That said, officials responsible for a specific area of policy will expect to develop considerable expertise in the area

- **they have a considerable (and perhaps surprising) amount of latitude in deciding how to set about the policy making process**. Overall, the knowledge of 'how to' make/review/improve policy is developed through experience and observation rather than by formal training in the policy making process. Even where training is available - and such training has always been available from the National School for Government and its predecessors – the extent to which individual civil servants have been on formal training courses is patchy. This is discussed further in chapter 6

- **the traditional argument that civil servants are 'politically neutral' is only a partial truth**. Clearly, it remains the case that civil servants have no known allegiance to any particular party; and it follows that they are able to remain in post when the government changes. But at any given time, civil servants are expected to pursue the policy objectives of the government of the day and to advise Ministers what policy and delivery options might best promote those objectives. In short, no official would consider they had a legitimate right to question the objectives of the government in power - but all officials should be ready to assess alternative means of achieving those objectives and to spell out to Ministers what the likely practical outcomes will be of those options. There is also a need, of course, for officials to ensure that they do not cross the line between supporting, explaining and developing government policy - a legitimate role - and being seen as advocating the political ethos of the government of the day. At least one of those we interviewed thought that the line was less clear cut than it used to be.

5.27 A brief mention should also be made of other Departmental and Whitehall officials who are engaged in any policy issue. Depending on the issue concerned, advice is likely to be sought from departmental lawyers, economists, statisticians and numerous other professional experts. Any issue involving finance will need to be cleared with the department's financial team, who may well need to consult the Treasury. It may also be necessary to engage the department's central policy or strategy unit. A communications plan will need to be developed for any announcement; and the communications team engaged. (It is one of the mantras of modern policy making that communications must be thought of from the outset of any policy consideration.) If new regulation is under consideration, discussions will be needed with the Better Regulation Executive in BERR.

The role of the Treasury

5.28 The role of the Treasury in recent years has been striking. Under Gordon Brown, the traditional Treasury role of being essentially concerned with the macro-economy and the public finances was overtaken by a far more expansive role, engaging with Departments throughout Whitehall on the substance of what they did. Whether this expanded role continues into the future remains to be seen – in part it was a reflection of the concept (much commented on in the media and insider accounts) that Tony Blair was the chair of government, with Gordon Brown as the chief executive.

5.29 The ability of the Treasury to play such a prominent role has rested on two factors in particular

- in allocating resources to Departments they have been able to impose conditions and targets (i.e. public service agreements or PSAs);

- they have been able to make announcements in the budget and the pre-budget report, at times on issues well outside their functional responsibilities, with the conventional 'budget secrecy' doctrine outweighing the usual conventions of policy being agreed by the lead Department and through the Cabinet committee structure.

5.30 Views inevitably differ as to the desirability of this all-powerful role for the Treasury. The Treasury has always attracted Whitehall's 'brightest and best' and it remains an exceptionally strong department in terms of its economic and related analysis. It is also critical to good government that there is a 'deep sceptic' in the system in relation to public spending - i.e. a department to say the case for expenditure has not been made out. Moreover, the PSA system focuses minds on what will be achieved from public spending, rather than spending for the sake of immediate headlines.

5.31 But there are related downsides. The dominance of the Treasury within Whitehall can distort the checks and balances inherent in the Cabinet committee structure. Treasury officials, however talented, can become hopelessly over-stretched. Resentment can and does build up in other Departments that they cannot develop policy without Treasury agreement - but the Treasury can make and announce significant policy initiatives in another Department's area without the same level of scrutiny. In addition, while the "budget secrecy" concept is appropriate when making announcements on taxation and overall spending, it is less appropriate to other areas of policy where positive benefits can be gathered from external consultation, so that practical problems can be identified.

5.32 All that said, there is no reason to think that the enhanced role of the Treasury in recent years will necessarily continue. The role of the Treasury, more than any other department, will depend on the relationship between the Prime Minister and the Chancellor - a relationship which will always depend ultimately on the individuals holding those two roles.

Policy making and the European Union

5.33 This chapter - and this report overall - has largely focused on Whitehall. But an increasing amount of Whitehall policy making now has a marked European dimension, with the power of decisions, to a greater or less degree, having been elevated to the institutions of the European Union.

5.34 The extent of the European dimension in particular policy areas varies considerably. In some areas, it is wholly dominant with the policy development being driven by the European Commission and European law applying directly. In other areas, the European dimension has very little impact on Whitehall policy making – and there are numerous variations in between.

5.35 The nature of policy making in a European context is clearly very different for both Ministers and officials. For the great majority of issues, the fundamental policy decision as to 'what to do' is no longer a matter for the national level but becomes

a matter for the EU as a whole, with the European Commission very much in the lead in proposing what issues would benefit from activity at the European Union level. Nor does Whitehall retain the power to decide 'how to do it', as the Commission invariably decides how far delivery of the particular policy should be standardised and how much should be left to national discretion.

5.36 Ministers do, of course, retain a very significant degree of power in that it is in most cases for the Council(s) of Ministers to decide '*whether* to do it'; and no Commission can force policies on the member states unless at least a majority of the votes of member states are in favour. But the rules of engagement for Whitehall in Europe are nonetheless markedly different – it is essentially about influencing the development of policy, building alliances and judging how and when to compromise to ensure an acceptable outcome. The guiding rule of Westminster and Whitehall - that the government ultimately decides what happens on any given subject – is no longer the case.

5.37 But the differences can be exaggerated. It was never entirely the case in Westminster that the government had unfettered power of decision. Legislation, for example, must get the support of Parliament. The increasing trend in Whitehall towards significant consultation in policy-making inevitably means a willingness to amend initial policy thoughts and be influenced by other parties before decisions are made. And such issues as the need to establish a clear evidence base and rationale for decisions are common to both Brussels and Westminster.

Central government agencies

5.38 There are a wide range of what can broadly be classified as central government agencies. Some are set up by statute, others by administrative decision. Some are essentially advisory, others have executive functions. Some are clearly part of government, others rather more independent.

5.39 Because of the variety of different types of organisation, it is difficult to generalise. But for the purposes of this report we held two interviews with officials working in such agencies and brief accounts of their contrasting experiences are in box I.

5.40 These case studies show that who is actually in charge of policy is a complex one for many agencies. By and large, agencies are created because it is recognised that a specific set of public services are best delivered by a specialist organisation, without the day to day engagement of Ministers or officials. In some cases this is because the services are high volume, specialist and operational (e.g. DVLA); in others because Ministers increasingly prefer to stand back from complex decisions (e.g. the decision that Ministers should no longer have any role in decisions on mergers, except where national security might be involved). A further issue is whether the agency has been set up by statute – in which case there are usually statutory powers and duties – or whether by administrative decision (eg the Companies Registration Office or the Insolvency Service). It also follows that, if changes are needed to the legislative regime, it falls to the Department to take forward the necessary legislation.

5.41 In the case of such agencies, there is usually some form of governance document which specifies the issues which fall to the agency and those which need Departmental approval. There is also usually an annual business plan agreed between the relevant Department and the agency concerned, setting out the budget and any Ministerially-set targets for the organisation concerned. Within that

business plan there is usually operational freedom for the agency to make its own decisions.

5.42 But moving activity to an agency can never wholly divorce it from the political arena. Ministers are responsible to Parliament for the activities of agencies within the scope of their Department and, if things go wrong, they cannot easily evade some political accountability for those failings. As a result, it is perhaps understandable that Ministers and Departmental officials may seek to influence issues which strictly fall within the authority of the agency concerned; and it is equally sensible for Chief Executives to seek to develop a positive relationship with their Department and Minister on a no surprises basis. Moreover, agencies can have a pro-active role in taking forward policy issues in collaboration with the Department concerned – any review of communications law would, for example, draw on the specialist expertise of Ofcom.

5.43 But inevitably there are disputes between Ministers and agencies over where the boundary line should be drawn, especially where agencies such as Ofcom are making decisions which are the subject of intense political interest. The most (in)famous example of this is perhaps the Jeremy Paxman interview with Michael Howard. Though this is usually recalled as an example of a politician reluctant to answer a specific question, the heart of the underlying issue was whether Michael Howard, as Home Secretary had crossed the boundary line in imposing his views on an operational matter on the head of the Prison Service.

Box I: Central government agencies

Ofcom was established by the Office of Communications Act 2002 to be responsible for a wide range of broadcasting and telecommunications issues. It took over the function of five pre-existing regulators, each of which had a different status. Ofcom itself was established as a "body corporate", under which its Board was appointed by Ministers. In very carefully defined circumstances, ministers were also able to issue directions to the Ofcom Board - but the essential function and duties of Ofcom were laid down by the Act and the government had no powers over Ofcom's decision making ability.

A senior member of the Ofcom Board reflected on how this influenced policy making within the organisation. He was very clear that it sharpened accountability. He did not consider Ofcom to be part of government but to be genuinely independent, accountable ultimately to Parliament rather than the government of the day. Obviously government was regarded as one of their major stakeholders, so it made sense to listen to their views – but there was no assumption that the government's view was decisive.

A further dominant fact on their thinking was accountability to the Courts. They were making decisions which had direct impact on the economic prospects of individual companies who did not hesitate to challenge those decisions in the relevant Courts. The result was a mindset in which they needed to consult as fully as practically possible on new policies and potential decisions. And if consultation led to changes in the evidence base as previously understood; or if it led to new policy proposals, then a further consultation would often be necessary.

The interviewee had had previous experience as a policy maker in central government and was thus able to contrast and compare. On balance, he preferred the Ofcom context. It was undoubtedly much slower – with decisions and policies

proceeding more slowly than he knew Ministers would tolerate in a department – but the eventual decision would be more soundly based on the evidence; and there was less need to take account of short term political considerations.

A former Chief Executive of the **Security Industry Authority** (SIA) described a less positive experience. The SIA was a Home Office initiative, established to 'professionalise' the security industry (bouncers, security guards etc) in the interests of crime reduction. Like Ofcom, the SIA was also established as a body corporate with its Board appointed by Ministers. But, unlike Ofcom, the power given to Ministers to issue directions to the SIA was not tightly constrained to specific circumstances but was very general.

From the Chief Executive's point of view, this critically affected the relationship between the SIA and the Home Office. After initially establishing a strong relationship with the then Ministers and officials at the Home Office, changes at both the Ministerial and official level led to a less trusting relationship. He found himself increasingly being second guessed by officials at the Home Office, who at times actively developed a separate dialogue direct with certain parts of the industry. Moreover, the officials at the time were obsessed with the concept of "light touch" regulation, notwithstanding there was common ground between the SIA and that part of the industry which maintained that firm regulation was critical to breaking the tradition of criminality within it. He struggled for some time with this breakdown of his relationship with the Home Office - though it was ultimately rescued when new officials were brought into the Home Office, with the new team recognising the need to support the expertise of the SIA and not undermine it. With hindsight, he recognised that he should have insisted much earlier on much greater clarity between the SIA and the Home Office over what was within their discretion and on what they needed approval.

Summary of chapter 5

- Ministers remain the critical proponents of policy making within Whitehall. It is by no means all they do - but they decide the priorities, and essentially authorise the work of the policy making process.

- The Cabinet committee structure remains dominant in the policy making process, whenever the issue is relevant to the government as a whole. The Cabinet secretariat continues to play a vital role in the 'formality' of decision making, providing an authoritative account of what has been decided and who has responsibility for the action points.

- The growth of importance in the role of Special Advisers is considerable. Views continue to differ as to the value of SPADs, but they are set to become a permanent feature of the landscape. They tend to work informally and less of their day-to-day work is recorded.

- Officials continue to be the great organisers of the policy process, even if their role in generating policy has been weakened by the growing number of organisations and bodies which input into policy making.

Chapter 6: A Review of current good practice in policy making

6.1 This chapter aims to summarise thinking within the civil service and in academic circles on the policy process, how it has changed over the past decade and how this has translated into guidance and training. The chapter also shows how this has influenced the process of making and delivering policy over the period in which the FOI Act came fully into force; and indicates possible future developments.

Current thinking on the policy process

6.2 Current thinking on policy formulation and development was greatly influenced by the *Modernising Government* White Paper of 1999 one of whose three aims was stated as:

> Ensuring that policy making is more *joined up and strategic*.

In support of this, the White Paper went on to set out five 'key commitments' of which the first was:

> *Policy making*: we will be forward looking in developing policies to deliver outcomes that matter, not simply reacting to short-term pressures. We will:
>
> - identify and spread best practice through the new Centre for Management and Policy Studies. (Quotations and emphases are from the Executive Summary)

6.3 The whole of chapter two of the White Paper was concerned with policy making and it started with a brief, clear definition:

> Policy making is the process by which governments translate their political vision into programmes and actions to deliver 'outcomes', desired changes in the real world

6.4 The 'new' CMPS has come and gone but it launched a sustained effort to develop how policy is made and implemented following the lines set out in the White Paper. The most noticeable feature is that policy-making is no longer seen as a separate issue but as part of a cyclical process running through from the creation of a new policy to its implementation and the outcomes it achieves and thereby informing other policy making.

6.5 By 2001 the CMPS had produced its publication *Better Policy Making*. This was preceded by a survey of senior civil servants designed 'to find out from policy-makers what they considered to be the main issues in modernising the policy process, and what support they wanted to facilitate change' and to gather a wide range of examples of the policy process to enable CMPS to set out with authority 'new innovative and professional approaches to policy making'.

> Policy makers were asked to identify what would best support modernization of the policy-making process. The strongest call was for shared best practice in policy-making' (Better Policy Making p.10)

6.6 The report used the findings of the survey to set out 'nine features of modern policy-making' which were briefly described (p.14) under the headings: forward looking; outward looking; innovative, flexible and creative; evidence based; inclusive; joined-up; review; evaluation; learns lessons.

6.7 That importance was attached to improving policy-making is shown by the publication, also in 2001, of a National Audit Office report, *Modern Policy Making – ensuring policies deliver value for money*. This set out in its Executive Summary a short definition of 'policy' which reflected the new joined-up approach and echoed the words of the White Paper:

> What is policy? Policy is the translation of government's political priorities and principles into programmes and courses of action to deliver desired changes.

6.8 The report repeated the nine characteristics of policy-making set out by the CMPS paper and set out its own 'four key elements' which were:

> Identifying the need for a policy…
> Understanding the nature of the problem…
> Assessing how policies are likely to work in practice…
> Identifying and assessing risks to performance and delivery.

6.9 So, by 2001, a tone was set and the outline of new thinking on the policy process was clear. But it would be misleading to suggest that all policy thinking within the civil service since 1999 reflects the White Paper approach. As recently as 2006 the Economics and Research Analysis Group of the Home Office produced a report entitled *Understanding Policy Options*. The group of authors offers a disclaimer, that the views they express are their own and do not represent Home Office or government views or policy. They also in the introduction describe their report as being aimed at 'specialists', whom they describe as people with 'some knowledge of economics and policy-making'. And they say that it 'aims to be consistent with and a complement to existing guidance'. The report is a dense, cerebral, academic study which whatever its strengths and its other claims does not appear to meet this latter claim. It specifically seems to focus on 'policy-making', not on a policy process. It is mentioned here not to criticise – it is an impressive if not formidable piece of work – but to demonstrate that the more open, accessible, joined-up and cyclical approach to the policy process advocated since 1999 may not in practice have gained universal acceptance, whatever the rhetoric surrounding it.

6.10 So from the White Paper of 1999 arose a new pattern for 'joined-up' policy making. It was clear by 2001 what this was. What remained necessary was for a series of new initiatives to take it forward. At the same time, the FOI Act came onto the statute book in 2000 with a long run-in to full implementation in 2005. It follows that the thinking behind the Act, in its drafting stages, pre-dated the initiatives proposed in the White Paper; and that if the White Paper did have real influence on the policy process, the full implementation of the Act took place in the civil service environment modified by changes to meet the thinking behind it.

6.11 The remainder of this section assesses what happened between 1999 and now in practical thinking within the civil service on the policy process and how it should be handled. It also looks at how effective this period of change has been – whether in fact the expressed wish to achieve 'shared best practice in policy-making' has been

achieved. And also considers what relevance this might have for the use of section 35 of the Act.

6.12 One of the general points that came across most strongly in each of the various cases outlined below is the lack of compulsion that applies to almost any formalised process in the civil service. There are a few exceptions such as the impact assessment and the gateway review processes described below, which have to be undertaken in any relevant project. But the basic approach is *laissez faire*. Guidance, training and methodology may all be available on a given issue such as policy making and normally are of good quality and fit for purpose. But the culture, as said elsewhere in this report, is one where different approaches and flexibility of approach are certainly tolerated, almost expected. An added factor here is that it is difficult to get any overview of what is happening generally now in policy thinking and implementation across the civil service. For example the NSG, which is centrally placed and whose business might give it such knowledge, was generally unaware of which departments were doing what in this field. Though they told us that they understood several departments were operating a 'policy wheel' type of approach they were unable, except for the example of DEFRA which is covered below, to tell us which these were. Nor was there any other easy way, apparently, of getting such information. This is not a criticism of NSG;' rather it is a comment on the prevailing civil service culture where departments tend in many ways to operate as separate organisations and not as parts of a single whole.

Training and policy – the role of the National School of Government

6.13 The National School of Government (NSG – formerly the Civil Service College) remains the main provider of in-service training and development for civil servants. Its website offers a range of five overall programmes which cover strategic leadership; management development and business skills; policy and government, ministers and Parliament; professional and specialist development; and personal development. The 'policy and government, ministers and Parliament' programme contains seven modules, of which one is 'policy making and policy delivery'. At the time of inspection this offered thirteen separate courses relating to policy. The emphasis is on the overall process or on delivery, implementation and assessment rather than the stage of making or formulating policy. In other words the NSG's offer on policy training seems very much to reflect the current, post-White Paper thinking outlined above, that there is a seamless progression from developing new policy through its implementation and achievement and assessment of its intended outcomes. And that formal training should be delivered to reflect this with the actual making of policy not separated from the rest of the process. While it is difficult to be certain without actually attending all of them it seemed that only two or three of the courses on offer dealt with the specific process of policy making or formulation in any detail. One course entitled 'Making policy that happens', has produced a policy toolkit, *Making policy that happens – a policy toolkit'* (September 2007). This seems to be an excellent introduction to the subject. It develops the idea of policy as a cycle or wheel, starting with a direction, strategy or issue and going full circle back to the monitoring and evaluation of a developed and implemented policy.

6.14 NSG is involved in a number of related activities, for example the production with the Public Management and Policy Association (PMPA) of *Evidence Based Policy Making*, a volume of essays produced out of a series of seminars and discussions hosted by PMPA and NSG in 2007. This is clearly a valuable contribution to the

debate on policy making but a follow up venture by NSG/PMPA has had to be cancelled due to lack of take-up.

6.15 NSG also offers through its website access to the Policy Hub, a web-site developed by the Government Social Research Unit 'which aims to improve the way public policy is shaped and delivered'. (http://www.nationalschool.gov.uk/policyhub/). This was originally set up by the CMPS in 2001 and operated by the Treasury before NSG recently took it over. It is now primarily a repository for documents, though it also offers a number of policy tools and links to related web-based resources.

6.16 NSG describes demand for policy related training as 'strong'. There are some commercial competitors and departments and government organisations are all free to choose their own training source. However NSG remains the main provider and it is probably fair to say that its long and close association with the civil service and its consequent understanding of what is required in the policy field means that most government bodies see it as having an edge.

6.17 Several disparate but relevant points emerged from our discussion with NSG. First, their training is structured and aimed chiefly at policy teams which typically are headed at civil service grade 7 level. NSG policy courses are mainly attended by these staff and members of their policy teams. More senior staff – members of the senior civil service – are comparatively rare attendees and little policy training is aimed at them though there is, for example, a course called 'policy environment' aimed at SCS members who need a general grounding in policy. Second, there has been a change over time in the policy making environment as the civil service has lost its monopoly. Other interviewees have made this point. Other forces – special advisers, think-tanks, Europe – now influence the policy process such that the civil service is more of a participator in, rather than controller of, the whole process. Third, changes in record-keeping practice are perceived as having an impact. The effective death of the 'registered file' as electronic documentation takes over and traditional file management and control breaks down has meant that more senior staff cannot so easily track the process of policy making and implementation. A final factor has been developments in senior management method such that there is an increasing emphasis at board level on matters such as risk management and leadership which, to an extent, might have supplanted emphasis on policy making.

Defining policy – the policy cycle

6.18 We are told that several departments have in the past few years evolved detailed statements of their policy process aimed at developing shared understanding and good practice in policy delivery. An example is DEFRA which recently initiated a change programme called Renew. One of the components of this was development of a standard policy cycle which DEFRA describes as 'integrating proportionate programme and project management (PPM) methodology and assurance'. In other words, the policy cycle reflects current thinking in treating the policy process as a single whole evolving from policy-making through implementation to assessment of outcomes. This is similar to the ideas set out in the NSG's policy toolkit of 2007. DEFRA also has 'Approval Panels' which see the results of the assurance process as part of making investment decisions based on business cases for programmes, projects and other functions. This policy cycle process is supported by a PowerPoint with high-level information on the policy cycle and supporting detailed guidance on the stages of the policy cycle available to all DEFRA staff. We understand that other departments have undertaken similar

initiatives but have not been able to track down details within the scope of this project.

6.19 It is worth looking in more detail at the policy cycle developed for DEFRA staff. DEFRA refers in the PowerPoint presentation we were shown to its development in response to a capability review which 'recognised lots of good practice in DEFRA but a lack of a consistent, standardised approach to policy making using PPM practice'. The policy cycle 'sets out a standard best-practice approach for policy-making and PPM in DEFRA underpinned by a programme of assurance and approvals to ensure we deliver the best policy in the best way possible'. It has four 'key themes' which are outcomes, engagement, evidence and risk management. The complete cycle runs in six steps: define the issue; understand the situation; develop and appraise options; prepare for delivery; commit to responsibilities; implement and monitor; evaluate and adapt. Clearly, the DEFRA view is that the policy process can be systematised and codified, and then run on lines broadly similar to a standard project management methodology. We can offer no detail on specific cases where it has been successfully – or unsuccessfully – applied. However, the process seems well-structured and the intention praiseworthy. It also seems to give the lie to a general feeling across the civil service that the policy process cannot be consistently and methodically managed in such a way.

The work of the Better Regulation Executive

6.20 The Better Regulation Executive (BRE) is located with the Department of Business, Enterprise and Regulatory Reform (BERR). It is a cross-government organisation whose role covers the whole of Whitehall. BRE sets out the five principles of better regulation as being transparent, accountable, proportionate, consistent and targeted. Among its tasks it lists the scrutiny of new policy proposals. All of these, whatever their size and significance, have to go through the processes devised and overseen by BRE. In this sense it is at the heart of current thinking on policy within Whitehall.

6.21 BRE endorses policy thinking as described above, with 'policy delivery' as the appropriate term for the whole process that starts with the formulation of policy and leads through to assessment of outcomes. BRE's systems are set up to encourage and support this.

6.22 BRE does not, however, claim to influence how policy is created. Its work is about trying to influence how ministers and civil servants do their policy work and thinking.

6.23 The key tool for this is the impact assessment, a process of evaluating the impact of any proposed changes arising from new policy where any costs or savings to government or society might result. Any new policy proposal must go through this process, which is supported by extensive guidance. BRE stresses that it does not control the development of impact assessments. It remains open to Ministers, having gone through the process, to persist with policy proposals which are costly or increase regulation and bureaucracy. But the results of the assessment are there to be taken into account when implementation is considered and decisions made.

6.24 Given that all of this points to a greater degree of access to the process of assessing the impacts of policy, the question arises as to whether there might be implications for the degree of privacy given to the policy process. The BRE view is that there

are still plenty of points within the policy process where the outside world should not be able to see in and so continued protection from disclosure is justified.

Applying project management techniques to policy

6.25 A further development - perhaps overlapping rather than complementary - is the trend towards an increased focus on project management skills. The primary example of this is the Office of Government Commerce (OGC) "gateway review".

6.26 The origin of gateway reviews rests in the mixed, many would say lamentable, track record of the government in major procurement projects - hence the engagement of the OGC. Various reviews of those failures made clear that a principal cause of disappointing outcomes was the lack of project management skills displayed by those involved in procurement. OGC accordingly developed considerable good practice material to support project managers, including the introduction of "gateway reviews". These were essentially short, sharp, peer group reviews ensuring that a project was under effective control before it proceeded to the next stage - hence the term 'gateway'.

6.27 While the concept of such Reviews originated in areas of procurement, it has become apparent that many of the 'good practice' techniques used in procurement were equally applicable in other areas. For example, an early stage gateway review would focus on whether the objectives of the project were clear, whether the team was organised effectively, with individual roles clearly defined; and whether there was a clearly defined overall leader of the project – to be designated the SRO or senior responsible owner. Such techniques were seen to be equally appropriate to policy making and implementation as to procurement.

6.28 Some departments have gone a considerable way to embracing this "project management" approach. In BERR, for example, it was decided in 2003 that far more of the work of the department should be carried out as defined projects with an identifiable beginning and end. About 10% of the department's staff was re-assigned to become members of a 'project pool' which could then be seconded on a time limited basis to the more conventional standing teams of officials for specific projects. Members of the pool were trained in project management techniques - and project reports had to be made in standardised form to the "project centre" which allocated these additional resources.

6.29 This development has significantly changed the way that BERR thinks about and manages its work; and the terminology of projects and programme management is now widely used. Moreover, this approach makes no distinction between policy or delivery focused projects and any major review of a specific policy will have developed a project plan accordingly. Other departments have developed their thinking along similar lines.

6.30 More information about gateway reviews is on the OGC website – which makes clear that they can be applied to policy areas just as much as the original focus on procurement. http://www.ogc.gov.uk/what_is_ogc_gateway_review.asp

Latest initiatives in policy delivery – Government Skills

6.31 Government Skills (GS) is the sector skills council (SSC) for central government and is responsible for encouraging the development across the civil service of suitable professional standards and the necessary skills to go with them. GS is based within the Department for Innovation, Universities and Skills (DIUS). It

covers all civil servants in departments and agencies and many staff in non-departmental government bodies and the armed forces, a total of roughly 800,000 employees. According to GS the mainstream civil service includes 22 recognised professions, each with a head of profession. One of the 22 is 'policy'. However it is a crucial one – GS also says that 'three quarters of central service staff (ie in the region of 400,000 officials) belong to the operational delivery or policy delivery professions' and estimates that those engaged in policy work number almost 30,000.

6.32 GS published in April 2008 a skills strategy for central government which can be seen at http://www.government-skills.gov.uk/skills-strategy/index.asp. This is based on the professional skills for government (PSG) competency framework – details of which can be found at http://www.civilservice.gov.uk/iam/psg/ - which sets out the professional skills now needed by civil servants in all fields. Although policy is now noted as a professional skill for government it does not as yet have any defined set of standards or requirements for proficiency, nor any formal qualification. The implementation plan in the skills strategy document shows the necessary work for the 'policy delivery profession' as being scheduled for carrying out over three years from 2008-2011.

6.33 It has begun. A policy head of profession at Permanent Secretary level has been appointed, itself a significant step forward. A support team within GS has also been created to take forward the development of policy professional standards overseen by an executive council for the policy profession with membership at grade 2 level. A training needs analysis is in progress. The outcome that GS hopes for from this is that professional standards for the civil service policy delivery profession should at least be defined and promulgated. That achieved, then every civil servant by the time they reach the threshold of entering the senior civil service – which is to say upon or before promotion to current grade 7 level – should be required to show competence in a range of skills which would include policy delivery. An ambitious but in GS's view attainable step beyond this would be to set up a formal professional qualification in policy delivery. This is a lot to hope for in a world where, as other sections of this report demonstrate, it is difficult to get agreement on what good practice in policy delivery might be. But the ambition itself and the work being done to achieve it is encouraging.

6.34 The importance of GS's work seems to be first that the need for progress in rationalizing policy delivery skills is recognised at a corporate level; and second, that the organisational structure to meet this need is set up and beginning to operate. The hope is that within a couple of years the process and practice of policy delivery within the civil service will be better understood and defined and operate in a more transparent and accountable way.

Other sources of policy focus

6.35 The comment was made to us that the Royal Institute of Public Administration (RIPA) used to provide a forum for debate on matters such as policy making. Since its demise several years ago nothing has replaced this role.

6.36 We understand that there is a body describing itself as a 'policy reform group' operating within the civil service at very senior level (grade 2). It appears to operate without published papers or minutes and we can report only on its existence, not its activity.

6.37 Several sources have made the comment that the civil service no longer holds the monopoly position in policy formulation that it once had. This is because others have made roles for themselves in the field, the main ones being special advisers (SPADs), think-tanks of various types and the European Union.

Policy making – theoretical approaches

6.38 In this chapter the prime focus has been on the practical development within the civil service of modern thinking and practice on the policy making and delivery process and the steps taken to realise this. There is also a literature of various academic studies in policy making. We have looked at this and our main conclusion is that these are not central to the main purpose of this report and do not add much that is immediately useful. One interviewee commented to the effect that when academics engage with the policy making process they tend to regard it as something that should adapt to conform to their theory rather than the opposite, which he found unhelpful. Nevertheless, a brief comment on the academic scene in policy development may be useful.

6.39 Social scientists have attempted to analyse the policy making process to see whether it may be possible to derive some generic understanding of what it involves and how far, therefore, it may be susceptible to modelling. The following summarises the main trends of their thinking and concludes with an overview which assesses the practical value of their work for FOI purposes.

6.40 *Analytic endeavour:* Decision-making is the process by which 'choices are made or a preferred option is selected' (Parsons 2001, 245). It is the task of 'making a choice between alternative means for achieving a goal' (Stone 2002, 232). The policy process 'very often involves either groups of decisions or what may be seen as little more than an orientation' (Hill 2005, 7). As a result, defining the policy process presents a number of problems. First, decision-making often takes place over a long period of time and it is difficult to tell where the policy process begins and ends. Second, the policy itself can also change over time (Hill 2005, 8). Third, each policy process is influenced by other ideas in what is often a 'crowded policy space' (Hill 2005, 7-8). Finally, decision-making 'extends through the policy cycle', including choices made during the process, for example deciding how to define the 'problem' the policy will solve (Parsons 2001, 245).

6.41 The nature of the policy-making process has been a source of academic debate since the 1950s. The classic 'stages' model of policy-making was developed at this time, which argued that decisions go through a certain sequence of events (Hill 2005, 20). This allows those studying the process to 'chop up' and analyse its component parts (Hill 2007, 20).

6.42 However, the 'stages' model may 'distort' the policy process, as it offers a view of what 'should' happen rather than what does (Hill 2005, 22). The real process is 'far more complicated' and may not be made up of 'tidy, neat steps' (Parsons 2001, 79). However, bearing these limits in mind, the cycle is still widely used as it remains the best way of making sense of what can often be a confusing series of events (Hill 2005, 20: 21: Dorey 2005, 6).

6.43 Since the 1950s many different academic disciplines have generated policy theory including political science, sociology, economics, psychology and management studies (Parsons 2001, 247). As result, the policy process literature contains a range of views from Marxist analysis to behavioural psychology, cybernetics and post-

modern views that claim it is impossible to map the policy-process (Parsons 2001, 247: Hill 2005, 17).

6.44 A brief sketch of three of the most influential models of policy-making illustrates the range of different ideas. Herbert Simon was one of the 'founding fathers' of policy studies and his 'rational choices' model of policy-making was one of the first, and most important, theories (Parsons 2001, 274). In this model policy-making involves the 'rational choice of selecting alternatives' that meet the objectives of the government or, as Simon puts it, 'maximises the values in a given situation' (Simon 1957, 76). One of the most 'notable responses' to this theory, and a key theory in its own right, was Lindblom's 'incrementalist' model (Parsons 2001, 284; Braybrooke and Lindblom 1963, 73). Lindblom argued that decision-making, far from being a 'rational' approach, involved 'muddling through' to a decision and he argued that no amount of rationality could improve the process (Lindblom 1959, 81). Finally, the more recent approach taken by Kingdon's agenda setting model viewed policy as a 'stream' emerging from a 'primeval soup' of ideas (Kingdon 1995, 165). The process, according to Kingdon, is driven by political support, wider public enthusiasm and the policy being perceived as a solution to a current political 'problem' (Kingdon 1995, 19).

6.45 This brief summary demonstrates the extreme difficulty of attempting to construct a policy making paradigm. Whilst social scientists have produced some helpful insights – for example, on incrementalism, and the artificiality of 'stages' – credible and useful modelling is as far away in the case of the public sector as when policy making first attracted this kind of attention.

6.46 The fundamental difficulty stems from the fact that policy making is a political and social activity of potentially great complexity rather than, for example, a programmable, robotic, or simple linear process. Initial aims may be changed over time because of a variety of influences and unforeseeable events and the interplay of personalities. Sheer chaos can be minimised by forms of project control though, by themselves, such approaches cannot determine outcomes. An identity cards project, for example, has been revived from time to time and its aims have proved very susceptible to species of 'mission creep' and changes of direction. Whilst it would be possible to discern discrete phases in its evolution, it could be plausibly be argued that in the sense of s. 35(1)(a) it has remained constantly in a state of formulation or development over decades.

6.47 Despite the general conclusion that theoretical or academic studies of the policy process do not add much illumination they do at least reinforce the general point which emerges throughout this study, that there are as many different approaches to policy development within the civil service, almost, as there are practitioners and that imposing too much order or system on this variety is not only difficult but may lose valuable ingredients such as originality and creative thinking. Against that is the feeling that some consistency, some generally accepted methodology even if at a fairly high level – such as the DEFRA policy cycle described above – might well be beneficial. If an academic approach can help in encouraging that approach then it will be valuable.

Conclusions on current thinking and training initiatives in policy development and the impact on section 35

6.48 The bullet points at the start of this section summarise its conclusions and recommendations. It has been a slow progress over almost ten years since the White Paper of 1999. Progress, or lack of it, is characterised by a reluctance to impose systems or processes across the civil service as a whole. This despite the fact that policy delivery is a core business process for the whole organisation, and one which is exercised by every part of the organisation with similar objectives. This approach has also led to the overlapping developments as demonstrated in this chapter.

6.49 There were high ambitions set out in the White Paper and the early work, statements and initiatives which followed it, notably in the efforts of the CMPS up to 2001. There is some evidence in the work of NSG and organisations such as BRE that efforts have been made to take this forward. But there is not – and the perceived need for the current initiatives and position that Government Skills is setting out bear this out – any strong evidence that these moves towards change have been as effective as they might have been. There is little evidence of systematised change and improvement in the policy process and departments seem on the whole still to go their own way. Civil servants seem generally to have little awareness of current thinking on policy development or theory. Documents such as the White Paper, now ten years old, are not seen to have great relevance to the policy process now and access to current thinking is limited to exposure to formal training such as that offered by NSG.

6.50 It is hard to resist the conclusion that more might be done to impose the thinking and change begun by the 1999 White Paper and that the policy process might and should be better codified and systematised across government. Where this has been done – we cite the DEFRA case – it seems to be both feasible and coherent as an approach. If this were done more widely then perhaps there would be a climate where policy formulation as a process could be more transparent and better understood by those outside the civil service. The application of section 35 of the FOIA might then present fewer difficulties.

6.51 Perhaps the present work of the Government Skills organisation, though in its early stages, is a move in this direction and will take thinking and practice in policy formulation and delivery in a more positive direction.

Summary of chapter 6

- Policy formulation is a core activity and skill for the civil service. Since the 1999 White Paper *Modernising Government* the civil service has made sustained moves in its thinking on policy making towards seeing the policy process as a whole, from creation through implementation to achieving planned outcomes. This view of the policy process is well defined and guidance and training are available. There is, though, no compulsion to follow the current thinking and take-up of training is variable.

- The overall picture is of a civil service wishing to change and working for change in the field of policy. There is evidence of changes having been made, such as the DEFRA initiative, and continuing initiatives aimed at change.

- There is, however, little evidence of any mechanism in place to ensure that new policy thinking is consistently or universally adopted and some evidence that it is not. Departments continue to tackle the issue in their own way and do not consistently give priority to policy making skills in their training and development of their staff. The necessary emphasis is lacking to ensure that the many civil servants involved in policy activity and needing a high level of skills in it actually have the means, motivation and opportunities to develop their skills. Many officials are engaged in policy development who have had no formal training in it.

- That said current initiatives from the organisation Government Skills point towards a will to secure more openness, consistency and professionalism in the policy delivery process. Other initiatives - such as the increasing focus put on project management, supported by gateway reviews – are also relevant to improved policy making. But the various initiatives undoubtedly overlap with limited co-ordination.

- The civil service monopoly – as it might once have been seen – in policy making has been overtaken by events and now other influences – special advisers, think tanks, European legislation – are seen to play an increasing role in the policy process.

Chapter 7: The potential impact of FOI on policy making

7.1 This report is primarily about the policy process within Whitehall rather than the specific exemption in the FOI Act relating to government policy. But that section – section 35 – does provide a backdrop to this report. And a number of those we interviewed gave us their views on FOI and the issues surrounding it. This chapter summarises those views.

7.2 It is important, however, to make three caveats on what follows

- those we interviewed were a range of former Ministers, and current and former civil servants, from a variety of backgrounds in a number of departments and agencies. The aim was to get a reasonable understanding of policy making in different contexts. But the interviewees were not chosen because of any specialist knowledge of FOI and were not in any sense expert in the subject – though most interviewees had had some experience of FOI and were willing to give views accordingly

- the Constitution Unit at UCL is currently carrying out a much more detailed review of the impact of FOI on central government, with roughly four times as many interviewees, for the most part selected because of their knowledge of FOI and its application. Many of those interviewees will have seen the full range of FOI cases, whereas our smaller sample, involving Ministers and more senior officials, will most likely have seen only a small handful of cases, probably the more high profile ones. The forthcoming Constitution Unit report will thus be more soundly based and potentially representative of Whitehall views on FOI overall

- The interviews for this report were largely carried out between the decision by the Information Tribunal to release the Iraq war Cabinet minutes and the subsequent decision by the government to veto their release (and well before the MPs expenses saga). Given that a number of those we interviewed were present at the relevant Cabinet meetings, it was perhaps inevitable that we received strong views on the issue which tended to colour the interviewees' views overall. We recognise, of course, that this issue is tangential to the main theme of this report, in that the decision on the Iraq war Cabinet minutes was based on the public interest test, rather than the definition of government policy. So we do not discuss the issues raised by that case in this report.

7.3 Inevitably, the views we received on FOI from our interviewees varied in detail but were nonetheless broadly consistent with some outliers. The following section seeks to summarise what we learnt from the interviews about Whitehall's views on the issues.

7.4 **Positive** aspects, all consistent with the philosophy of FOI, were

- there was unanimity amongst our interviewees that the government should have an obligation to put into the public domain the factual analysis and background on which its decisions were based – and should expect to justify its decisions based on that background. As noted in chapter 4, this seems to be part of a general trend over the last twenty years which pre-dates the FOI. But the commitment to it is strengthening, with more background information being published than previously;

- there was a similar consensus that decision making would be improved by more consultation and exposure of the arguments before the decision was reached. There might be exceptions to this – as in the decision to announce the reclassification of cannabis without consultation or for taxation matters – but they would be rare;

- there was also a clear view that there was no objection to the release on request of essentially factual data. This was data which government might not have traditionally published, and was certainly not "secret" but was not thought of sufficient interest to be routinely published – but 'if we have it and someone wants it, then fair enough'.

7.5 But consistently **negative** views were

- there was a general view that the majority of requests, especially from journalists, were negative in nature – usually aimed at uncovering some 'dark truth' about government and presenting it in the worst possible light. Several interviewees said that this sort of chasing after negative stories had no positive public interest value, so they could not see the case for allowing it. (As noted, our interviewees were not expert in FOI – and were unaware, for example, of the case law as to how the public interest test should be interpreted, with disclosure being favoured unless there were positive reasons to refuse.)

- there was considerable annoyance at the time and resources which could be consumed in responding to FOI requests; and interviewees felt frustrated at having to allocate resources to deal with them. This view was held even by those who were generally strongly in favour of publishing all the background information behind government papers and policy announcements. There was a sense that FOI had been enacted with high ideals – but that many requests had negative motives and were some distance from those ideals

- there was a strong sense that FOI cases were increasingly focusing less on the substance of the information behind decisions and more on the mechanics of the way that a decision had been reached. This was less about making sure that the government's policy decisions were well founded, and more about identifying what options had not been pursued and to challenge the government's motives. There was a broad view that this type of request had been unexpected - and that most interviewees had expected the 'private space' (in which Ministers discussed ideas and options with their officials and others before they decided what to consult on or what to do) to be more fully protected.

7.6 For the majority of those we interviewed - stressing again the smallness of the sample - the **overall conclusion tended clearly to the negative**. Their view was, however, clearly related to the area in which the interviewee had been working or the particular role they had fulfilled. For example, those who had felt they had had a negative experience as a result of FOI - usually defined as a critical or sensationalist press story, though in some cases legal action – were much more hostile than those who had not had those experiences. (Indeed the latter group tended to restrict their criticism to the resources that requests involved and what they sometimes saw as the "pointlessness" of the request.) One former Minister expressed his conclusion in terms of sorrow rather than anger

> overall I have a sense of disappointment about FOI. Perhaps I was naive – but I had seen it as a significant step forward to making us a more literate democracy. But the reality is that FOI is just seen generally as a means of

> attacking the government, whether the request be from an interest group or a journalist. I would have hoped that people would begin to appreciate the complexities of government through knowing more. But there has not been much evidence of that. I still think it is fundamentally a good thing. But I am disappointed.

7.7 An official expressed similar sentiments

> when we had a Code of Practice, I had a good understanding of how it was intended to work; and I felt very comfortable with it. There was an understanding that this was about putting into the public domain the facts and analysis about our decisions. But it was not about putting into the public domain the advice to Ministers which led to the decision. So the outside world would know what the decision was and what the analysis behind it was. And the public could then make up its own mind as to whether the decision was soundly based. Indeed, I remember debating whether we should restructure the way we made submissions so the factual basis and the arguments were clearly separated.
>
> But in practice it hasn't turned out like that at all. It is partly because the distinction between the facts and the arguments has been lost. And its partly because of the introduction of the public interest test which has been broadly interpreted and has led to material going into the public domain which nobody expected.

7.8 Another former Minister spoke about the need for "private space"

> Ministers simply have to have space for private discussions. You need to be able to toss around ideas, to think the unthinkable, work through an idea and discard it, argue for one policy but accept collective responsibility for another. If you haven't got the private space for that, you undermine the ability to provide good government.

7.9 And an adviser commented on similar lines

> there is no public right to know what you decided not to do or what options you rejected. It's an enormously important principle that it's the final decision which needs transparency but how you get to it is not for disclosure. Its also about creativity – you need people to come up with ideas. If those ideas automatically come into the public domain you freeze the creativity.

7.10 Some officials also gave separate arguments on the need for 'rejected options' to remain confidential. One pointed out that it would not be helpful in future dealings with industry if they had been made aware that a particular intervention in the market place had been considered – as the industry might begin to assume that the intervention might be considered 'next time'. Another pointed out that government needed from time to time to negotiate with companies seeking government assistance – and its 'negotiating brief' should not be released even when the decision had been made – as it might lead to a demand to re-open discussion.

7.11 That said, even those with negative views, tended not to complain about the way the Act was being implemented but about the way it was drafted. This particularly

applied to former Ministers who thought that the Act which emerged from Parliament was not what they had thought it was going to be, especially in not providing absolute exemptions for "private space" discussions. For those Ministers, the 'blame' rested clearly with the government itself. And an official also commented

> I do think it was a mistake to establish a "public interest" test, to be decided (except when the veto is exercised) by the Information Tribunal. I think it is extremely difficult for people without personal experience of central government to understand our concerns about how the release of documents will affect the way government works. And I tend to the view that the best judge of the public interest is ultimately the government - that is why we elect them.

Another former official spoke on similar lines

> the government will always be at a disadvantage whenever the public interest test is applied. This is because when the Tribunal comes to consider the particular case in front of it, they will be inclined to discount arguments about the negative long term impact of disclosure, given that the harm caused by the release of information in the immediate case might well be minimal. Its hard to get across an argument that releasing this specific information might well cause no problems but that releasing this type of material will do harm in the long run. Yet I am convinced of the long term risks. Nothing should be done to inhibit ministerial freedom of manoeuvre. Preserving the space for that is not sinister but an essential part of ensuring effective government.

7.12 The key issue in relation to this report, however, is not so much what Ministers and officials think about the Act and the way it is being implemented, but whether the Act is, or might in future, affect the way that policy is made and thus the way in which Whitehall works. This is dealt with in the next section.

FOI and the policy making process - the "chilling effect" and other implications

7.13 The 'chilling effect' remains a difficult and somewhat elusive concept, which is not always consistently defined. In strict terms - adopted by the ICO and the Information Tribunal - it refers to the risk that the advice given to Ministers by their officials would become less candid if that advice were thought likely to be revealed. Less strictly, the term can be used to cover other potentially deleterious changes that might occur, for example that discussions about difficult issues will increasingly take place informally so there is no formal written record. This would result in the short term, in internal uncertainty in Whitehall as to exactly what has been agreed and by whom; and, in the long term, it would mean there might be an inadequate formal public record of key events of the day.

7.14 A further potential concern is that if proceedings become more informal then the substantive decisions taken by government will also be affected. This might arise if Ministers moved to taking most of their advice orally, rather than through formal written advice, with the consequence that the advice was not as thorough or comprehensive.

7.15 Our first conclusion from our interviews is that unaccustomed disclosure of internal documents is likely to lead to changes to internal processes and procedures which the majority of those we interviewed would regard as negative. This is most likely to impact on the way that issues are recorded - with a less informative formal record - though most of the former Ministers we interviewed thought that there would also be a marked change in the way that they, at least, behaved in meetings with their colleagues, with more focus on how they might position their contribution in meetings in expectation of the eventual release of papers. We note, however, that most of those we interviewed considered there to be trends towards less full recording for other reasons - such as nervousness about leaks - and the specific impact of FOI was difficult to disentangle. It is also worth noting that the report of the Review of the Thirty Year Rule (Dacre Review) recommended in February 2009 (paragraph 8.4) that consideration should be given to inserting an obligation to maintain a full record into the Civil Service Code. If implemented, this should reduce the perceived deterioration in record keeping.

7.16 Our second conclusion is, however, that even if there were to be changes in procedures and processes, it does not follow that there will be any change in the substance of government policy making or decisions. The officials we interviewed were strongly of the view that they would continue to give their advice honestly and openly, even if they might be more inclined as a result of FOI to give difficult advice orally rather than in writing. (And several pointed out that such advice had often been given orally well before the arrival of FOI). Nor did any Minister we interviewed suggest that outcomes on policy issues would be different. So in the formal sense of the "chilling effect" - the loss of boldness or candour – we identified no evidence. Again, however, other developments make it difficult to disentangle wider changes. A number of officials, for example, noted that there were occasional but growing signs of Ministers and special advisers making decisions without fully engaging their civil servants at all - but no one thought that trend was anything to do with FOI.

7.17 On process issues, it is important to recognise that both Whitehall and Westminster are still adapting to the additional accountability introduced by FOI. It thus still remains unclear precisely *how* the system will react to increased disclosure and thus whether the outcome will be regarded as negative or positive. In some respects, this reflects the fact that the Act - and especially its interpretation - remains relatively novel and it is only through continued development of the case law that a settled position will emerge. Will, for example, Ministers and officials of the present and future take note of the exercise of the veto on the Iraqi case and assume that "private space" will now be protected, with the veto being used in similar cases? Or will they take the contrary view that if even Cabinet minutes came close to release then it is sensible to assume that any document might be released? So long as the ground rules remain unclear in this way, it is entirely likely that the response will be uncertain.

7.18 To illustrate that point, and dealing first with the views of **officials,** it is worth noting in that context two different responses to this issue from two officials of the same rank in the same department

- **Official 1:**
  whenever I or my team draft anything for Ministers these days, I realise that it might be released under FOI – I already have experience of that happening. It's perhaps not at the front of my mind – but I am aware of the possibility.

So I tend to take much more care than I might once have done to make sure the record is accurate and complete. I'll make sure we have a record of every decision and a note of all the meetings with the minister – so if private office doesn't do one, my team will. I will also make sure that neither I nor my team include any material which is extraneous to the matter in hand – for example stray comments about individuals or issues which aren't strictly relevant to the issue. Obviously there is occasionally background information about individuals which is relevant to the issue at hand and we'll mention that to the Minister so he is aware. But we won't write that sort of thing down. Overall I think the FOI Act has made us more disciplined in the way we record things. And that's positive – for example, when I took on this role, it was essential for me to understand some of the decisions of my predecessors, which was greatly helped by them leaving an excellent audit trail.

- **Official 2:**
  I am afraid I am very negative about the FOI. It is used a lot in my area by pressure groups who are opposed to what we are seeking to do. There are a lot of 'fishing trips', trying to get information which they can use in public, or even in the Courts, to undermine our policy. And they will use any information received very selectively to support their own aims. Another problem is that it ties up lots of our resources considering reams of material to see whether exemptions apply and then the public interest issues, almost line by line for some documents.

  So in the future, I'll be making sure that there is nothing for them to get at. Part of our problem is that we have had a lot of internal material and our record keeping has been good. But I've told my team to make sure in future we minimise what we write down and minimise what we keep. So we'll be getting rid of e-mails quickly and we won't worry if the record is incomplete, so long as it contains nothing we wouldn't want to see released. We just can't afford the time FOI is taking up – and if you don't have the information, then it can't be released. I am not saying my attitude is right, but given the pressures we are under, I think its the only way we can cope.

7.19 At first sight, these two reactions might appear at opposite ends of the spectrum – in the first case, FOI leads to a more comprehensive audit trail, in the second case to a much reduced account. But in their different ways, both illustrate some form of chilling effect in operation, the first ensuring that there would be a "full" record – but one which might remove all material which wasn't "defensible" even if that material might have in practice been a factor in resolving the issue in question; and the second simply reducing the record.

7.20 Neither official, however, argued that the **substance** of the policy making process would be changed. They both still expected to carry out policy making as before; and thought the same issues would still be addressed and the outcomes still essentially the same. What might change is the way in which issues were or were not consigned to the formal record and thus the accuracy of the formal record. But both accepted that the formal record might never have been the "complete truth" in that there was usually an element of political calculation in all policy decisions - and that such political calculation was usually absent from the record in any event. A third official commented as follows

> The FOI won't change the way I behave very much. I think I am a bit more careful about the way I record things. But its more a tactical response than a substantive one. I would certainly seek to avoid language

> which if it were revealed might cause offence. And I'd cut out the casual asides. But it doesn't change the way I would substantively work with Ministers.

7.21 Other officials we interviewed tended to emphasise more the risk that FOI might lead to more informal decision making processes which were not properly recorded. One official said

> Any large and complex organisation needs formal processes in its decision making. In that sense government is just the same as any large plc, which has its formal Board meetings. If you don't have that discipline then no one really knows what has been decided or who has the responsibility for following up the action points. Obviously, both in companies and in government, the formal decision may at times simply be rubber stamping something which has already been largely agreed informally. But you still need that rubber stamp, which provides clarity and formality. Yet if people get into the habit of deciding things off-line - because they are afraid of disclosure - that discipline will begin to break down.

7.22 Another official working in an agency - and who tended to the view that government remained too secretive – also argued for formality even though he was more open about time limits on disclosure

> I think it vital that our Board has the opportunity to debate things in the round before coming to decisions. At the time those decisions are made, they need the freedom to consider the issue without thinking that the debate is happening in public. And the people writing the papers need to feel they can present the issues as they see fit.
>
> Once the decision is made, however, we have to make our decisions public and give the detailed reasoning behind them. So once that has been done, then a lot of the heat goes out of the argument; and I'd be fairly relaxed about the Board papers being made available a few months later if someone wanted them.

7.23 Overall, however, none of the officials we interviewed thought that FOI was having or would have a significant impact on the nature of the decisions that the government was seeking to make (ie no actual decision would be different because of FOI concerns). And while, it might well lead to less being recorded in future, it was only one of a number of factors which were having a similar effect, including the greater informality of the relationship with Ministers and third parties, concerns about legal challenge; and resource pressures which were leading to less material being properly filed. In that sense, FOI was part of a general trend towards fewer written records rather than the dominant factor behind the trend. That said, the trend as a whole was not to be welcomed.

7.24 **Discussions with former Ministers** were rather different in character from those with officials – perhaps in part (but only in part) because of the debate on the Iraqi War minutes. With those Ministers there was a clearer concern that people would begin to behave differently

> One thing that several of us thought in Cabinet was that the more that is released, the more negative and cynical the public will become. People

> assume that politicians are up to no good. This leads on to Ministers becoming more and more opposed to openness – and the failure to record anything to make sure there is nothing to release. That would be a real pity but you do risk having more and more of that. If Cabinet documents are to be released, for example, they will become less and less informative – the decisions will be made elsewhere.

and from a different Minister

> I am not in favour of releasing Cabinet documents under FOI. I just don't think anyone would put anything in writing if that were to happen. If I were back in government and I thought that internal submissions or Cabinet papers were likely to be released then I would insist no written records were made – and that would be completely contrary to the need for proper records in government.

who also spoke in a wider context

> An FOI request was put in by [a newspaper about contact between MPs and a particular body on issue X]. And it was decided that the correspondence should be released. As it happens my letter on that issue was very carefully drafted and I had no worries about it being released. But on another issue, I might very well have objected. So from now on, I'll just ring up and give [the particular body] my views on the telephone. I don't think that's too clever to be honest. I accept the motives behind the request are sometimes proper investigative journalism. But far more often it is busybodies. We [the government] thought that FOI would be about very key issues, particularly issues protecting the citizen. We never envisaged it would be open season for anyone getting stories.

7.25 One former Minister was even more forthright

> the problem with FOI is that it puts even more of your ministerial career into a goldfish bowl. You end up not being able to have private thoughts about what to do on a specific issue - or, worse than that, decide you have changed your mind - without the very real danger that the press will write the issue up in ways which are calculated to make you look ridiculous. This isn't only about FOI of course, but about the relentless drive by the press and media to make politicians look dishonest and incompetent. I do wonder whether anyone in future will be willing to go into public life at all.

7.26 Another former Minister, however, took a different approach. The problem was not FOI but the fact that an increasing amount of Cabinet business was pre-decided and there was, as a result, limited discussion. This was nothing to do with FOI but preceded it - indeed it had been gradually happening under governments of all persuasions. Any additional impact of FOI on the robustness of discussion was minimal. That said, that Minister was also strongly of the view that there should be private space for Ministers to discuss issues with their officials, which should remain private.

7.27 Former Ministers well understood that documents should eventually be released but did not want that to happen while the participants were still active in politics;

> I can quite see that the 30-year rule is too long; and would be happy enough with a shorter period, of perhaps 15 years. But anything shorter than that means that many of those involved would still be in active politics. I just can't see the value in disagreements we might have behind the scenes being opened up while we are still active in politics.

7.28 One interesting observation from the interviews is that there was disagreement over who had most to lose from disclosure. Some thought it would be officials

> I think it would be difficult for officials if it was known what they had advised on a specific issue. They might get identified with that approach which might be difficult when the government changed. And they don't really have the same opportunity which Ministers have to defend themselves in public.

whereas others thought Ministers would be more affected

> I doubt that officials would be that affected by more release of documents. People understand their role and would accept they were doing an honest job. It is Ministers who have most to lose - they would become more identifiable with particular decisions which would be crawled over endlessly. And a submission usually sets out for and against arguments for each and every option. So you have to take a decision, knowing there are arguments both ways. But the press would see it differently if they saw those submissions – 'you were warned by your officials that there were risks, but you persisted regardless of that advice'.

7.29 Finally, where criticisms had been made of the Act, we asked what the prospects were for change. Most interviewees thought there was little prospect of legislative change - it would be just too difficult for any government to propose changes which would appear to be more restrictive than the current regime.

7.30 A former adviser commented, having first warned of the dangers he saw of irresponsible reporting by the press of FOI releases

> In the long term, the FOI will assist the political socialisation of the electorate. More of the workings of government will become transparent and voters will come to understand more what the political process entails. In that scenario the Commissioner has in his personal leadership capacity to face in two directions: chastising departments for poor compliance, and chastising the media for irresponsible reporting of disclosures.

7.31 And one former Minister did suggest a way forward;

> I think the only real way forward is if the Information Commissioner took the lead and asked for amendments to the legislation – or perhaps issued guidance as to how he intended to apply the rules in future, making clear that the protected space of internal deliberations would remain protected. If he doesn't we will continue to be on the back foot and there will be increased demands for more information. Maybe there is a deal to be made – we could reduce the 30 year rule to 15 years, agree to release much more information automatically, but be absolutely clear

about what wouldn't be released. That would provide a much clearer and less resource intensive regime.

Summary of Chapter 7

- both officials and Ministers are still getting to grips with the long term implications of FOI. Because the interpretation of the Act is still being developed through case law, people are speculating about how it might affect their behaviour and different reactions are evident. Until the case law is more thoroughly understood, there will be no single Whitehall view on how to react.

- but attitudes to the FOI Act from those we interviewed were markedly more negative than positive – though more strongly felt by Ministers than officials. For all concerned there is something of a paradox in that they subscribe to the 'high ideals' of releasing more and more information but feel that the majority of FOI requests received bear little relationship to those ideals.

- neither officials nor Ministers thought that FOI requests would have much impact on the substance of the decisions taken by government. The same factors would be considered; and the same conclusions reached.

- but there would be an impact attributable in part to FOI on the way that decisions were recorded and the extent to which those decisions were recorded on paper. There were real concerns that less would be written down, though this was not a universal view. This was bad not only for future historians but for those working in Whitehall today who needed to understand precisely what decisions had been taken and why.

- no one argued, however, that FOI was a unique driver in this context. Other concerns such as fears of leaks, and increasing informality, were driving the process in a similar direction. But that direction was not a positive one – so FOI was not helping.

- the former Ministers we interviewed were much stronger in their views that the FOI Act would have an increasingly negative impact on behaviour. They were concerned that their own behaviour would change and they would be more concerned about how the release of documents might impact on them, rather than the Cabinet as a whole.

- those we interviewed largely thought that 'the blame' for negative consequences rested with the legislation itself – and the decision not to make the exemptions – and the exemption in section 35 in particular - absolute. But no one thought that early amendments to the Act were likely. There were some suggestions that the ICO should have a leadership role in leading the arguments on its operation.

Chapter 8: FOI implementation in four overseas countries

8.1 The following accounts of arrangements in Australia, Canada, the Republic of Ireland and New Zealand are offered to give some depth of field to understanding how broadly comparable Westminster style constitutions have dealt with FOI legislation and where, as a result, the UK's arrangements stand in relation to those of its peers. Where there is a federal constitution, attention is concentrated on the federal government's regime. Detailed country-by-country accounts are at Annexes A to D of this report[3].

8.2 With the exception of Ireland, the other countries have much older FOI regimes than that of the UK. Indeed, they are getting on for 30 years old and may be presumed to have acquired reasonably settled characters. (Ireland's, on the other hand, has been in force for only a third of that time, was from the outset prospective only, and was then subjected to important amendment in 2003 after slightly less than 5 years of operation. Although the validity of league tables in this are could be debated, the five Westminster countries (including the UK) may be ranked on a rough and ready 'openness' continuum starting from the least open as follows: Canada, Australia, Ireland, UK, New Zealand.

8.3 All the systems seek to give statutory rights of access to government material and all qualify those rights in order to protect the more intimate policy making spaces of ministerial deliberation prior to decision and announcement. In every case the initial decision on release is made by the responsible government department, and all systems have review mechanisms for challenging refusals.

Cabinet documents

8.4 However, those generalities apart, all differ in the detail and degree of openness and the nature of their appeal mechanisms. As the summary at Table 2 indicates, whilst all acknowledge the special status of Cabinet discussion, some protect it absolutely and others conditionally. Ranking the degrees of protection afforded on a rough continuum, Canada has the most closed arrangements at one extreme and New Zealand the most open at the other. Thus, the Canadian system gives the most absolute protection: the material is not within the Canadian Information Commissioner's purview at all; there is no public interest criterion for the government to observe; and release is, therefore, entirely at government discretion. Australia's law is similar, though exemption involves a statutory procedure within the scheme of the Act. In that case, exemption is triggered by a self-certification procedure where a certificate signed by the Cabinet Secretary is conclusive as to exemption. As in Canada, there is no public interest test. In Ireland protection is given to similar Cabinet material (except purely factual material) and, unless the material is less than 10 years old, the exemption is not absolute but subject to a public interest test. In New Zealand, there is no exemption for Cabinet material. On the contrary, proactive release is encouraged and occurs. In the UK Cabinet

[3] During the course of preparing the report, we also looked briefly at Scotland where there is an identical regime in terms of "government policy" but a slightly different approach to exemptions for "free and frank" advice. In addition, appeals from the Scottish Information Commissioner can only be considered by the Courts, there being no Scottish equivalent to the Information Tribunal. We also made a short visit to the Office of the Scottish Information Commissioner in St. Andrews. In the time available, however, we were unable to detect any significant differences between the regimes as they are operating which would justify there being recorded in this report. It is possible that a more detailed study would identify emerging points of divergence.

material is effectively eligible for release subject to a public interest test; and is afforded no specific statutory protection.

Other policy material

8.5 None of the systems attempt comprehensive definitions of 'policy' or 'government policy'. Common practice outside the UK in that respect is to list categories by individual specification rather than the UK generic description of 'the formulation or development of government policy' in s.35 of the FOIA 2000 or as prejudicial to the conduct of public affairs in s. 36.

8.6 Although the broad categorisations have similar effects, there are some differences of detail. For example, international relations material is subject to a public interest test in the UK system but, in what is generally otherwise a more open system, in New Zealand international relations is amongst the 'conclusive' category.

'Chilling' effect

8.7 In all jurisdictions there have been claims that the expectation that policy material may be released under FOI legislation has affected the policy process in a number of ways. Different jurisdictions classify these effects in different ways. In the UK, argument before the Information Tribunal has led to distinctions being drawn by the Tribunal between effects which (a) imperil the 'safe space' that ministers need to protect discussion in the interests of good government before determining policy, (b) the risk to candour and boldness in the *giving* of advice by civil servants, and (c) the risk to the role and integrity of the civil service by identifying officials which were no longer in favour thus alienating them from future political masters.

8.8 In the Commonwealth and Irish jurisdictions discussed here, developments have not led to quite the same degree of explicit effect identification and distinction. The concerns are, nonetheless, very much the same if articulated differently. In all cases, the concerns have also tended to surface as concern that FOI has led to a deterioration of the public record. That is, records have become less full because less is written down and more business transacted by word of mouth. Moreover, this deterioration is frequently claimed to reflect an impoverishment of the policy process itself, especially in so far as officials are less likely to expose all policy options fully

8.9 It is difficult, and probably impossible, wholly to get to the bottom of these claims. Apart from the fact that they are rarely accompanied by direct, credible evidence, they have also to be seen against a background in each country where administrative practices have not stood still but, on the contrary, have been subjected to a number of influences where FOI has been but one of the likely factors affecting behaviour. At least as important, and quite possibly more important, than FOI has been the cumulative effects of changes in the character of the policy process where civil servants are no longer so much the gate keepers in charge of the policy process as they once were. The rise of special advisers, more effective non-governmental organisations, the proliferation of lobbyists, the impact of 24/7 news media and the sheer facility of digital technologies have all been especially powerful influences on how business is done. Moreover, it is not as though governments have themselves stood still. Quite the contrary, on any measure modern governments initiate much more extensive consultations than was ever formerly the case. That these do not satisfy all policy advocates and interest

groups is another matter, though it may explain why they press insatiably on their core deliberative processes.

8.10 While allowance has to made for the fact that they are statutory advocates for FOI, information commissioners and ombudsmen have tended to be sceptical if not at time downright hostile to 'chilling' claims. They tend to regard them as masking a strategy – not necessarily self-conscious or deliberate – to justify non-disclosure where convenient and contrary to the larger objects of the legislation. One recent review – by the information commissioner in New South Wales in February 2009 – has put it trenchantly:

> Contrary to this claim, knowing what they say may be made public should improve the standard of advice. It ought to cause staff to check information and structure their work in a professional manner. These are surely good developments. Difficult and controversial decisions will always have to be made, and these decisions will be more defensible if they are supported by honest, professional and clear advice.
>
> http://www.ombo.nsw.gov.au/FOI%20review.htm?id=457

8.11 However, advocacy of this kind does not, as explained in Chapter 7, do entire justice to what is in fact a more complex and nuanced situation than the model the Commissioner espouses. In New Zealand it is significant that the government introduced legislation in 2005 to impose a legal obligation (s. 17 Public Records Act) to 'create and maintain' accurate records of the business they conduct. Similarly, in the UK, the report of the Review of the Thirty Year Rule (Dacre Review) recommended in February 2009 (paragraph 8.4) that consideration should be given to inserting such an obligation into the Civil Service Code.

8.12 The separate country summaries naturally concentrate on the differences between regimes. The differences are not only legal and technical but also cultural. Political attitudes in Canada on the one hand and in New Zealand on the other are virtually at opposite extremes. In the longer run, however, and granted the extent to which governments and requesters remain in contestation, it would be difficult to fault the continuing force of the observation made in 1989 of the then regimes in Australia, Canada and New Zealand: 'If FOI has not realized its proponents' ambitious objectives, neither has it realized its opponents' worst fears'. (Hazell 1989: 208)

Table 1: Comparison of Westminster FOI regimes

	Coverage			Enforcement	
Country	**Documents only**	**Information**	**Cabinet documents exempt?**	**Commissioner**	**Ombudsman**
Australia			✓*		✓
Canada	✓		✓*+	✓	
Ireland	✓		✓* (Up to 10 years)	✓	
New Zealand		✓	PI test		✓
UK		✓	PI test	✓	

Appeal				
Internal review	**Commissioner**	**Ombudsman**	**Tribunal**	**High Court^**
✓		✓ or ->	✓	✓
	✓			✓
	✓ (Is also the Ombudsman)			✓
		✓		✓
✓	✓		✓	✓

* *Class* exemption save for purely factual material.
*+ Class exemption plus wide explicit definition including ministerial correspondence, briefs, draft legislation.
^ On a point of law only.

Table 2: Disclosure rules for policy making material

	Rules summary
Australia	PI test for documents that would disclose deliberative process in functions of an agency or of a minister, but does not extend to purely factual material. Where access is refused, the Minister has to sign a certificate specifying why it is not in public interest to release. There is explicit, unfettered exemption for Cabinet documents.
Canada	Unfettered discretion to refuse documents involving advice or recommendations developed for government institution or a minister, negotiating positions, and HR plans less than 20 years old. Explicit, unfettered exemption for Cabinet documents.
Ireland	Subject to a public interest test, material where non factual material may be refused if related to the deliberative processes of a public body except where a civil service head of department certifies in a conclusive certificate that the record contains matters relating to the deliberative processes of a Dept of State. Such certificates have to be reported to the Commissioner. Effectively an unfettered exemption for Cabinet documents.
New Zealand	Except for information in the 'conclusive' categories of s. 6 of the OIA, all other material is in principle disclosable save for those categories listed in s. 5 which satisfy a harm test but which remain also subject to a PI test and where, nonetheless, release must occur where the case for withholding is outweighed by considerations which render it desirable, in the public interest, to make the information available. Specifically mentioned in s. 5 are defined aspects of maintaining existing constitutional conventions and the effective conduct of public affairs but no explicit protection for Cabinet material.
UK	Although structured differently, the effect of the FOIA is similar to that of the NZ OIA with the principle differences that there is a specific exception for Parliamentary privilege, and a PI test is applied to some categories (defence, security, international relations, features of the economy) contained in the NZ 'conclusive' exemptions and not subject to such a test. In addition, exemptions for information relating to UK policy activity are more generally worded than in NZ e.g. exemptions for the formulation or development of government policy, ministerial communications, and prejudice to the effective conduct of public affairs. No explicit protection for Cabinet material.

Annex A: Australia

Summary

- One of the older provisions, the 1982 federal Freedom of Information Act is mirrored in provisions in the state/territory FOI Acts.

- Following internal appeal there are two routes for external appeal, a quasi-judicial route through the Administrative Appeals Tribunal, which has powers to order disclosure and an administrative route through the Ombudsman.

- The FOIA offers two exemptions covering similar ground to the UK's section 35: an absolute exemption protecting all Cabinet documents and an exemption subject to public interest protecting internal working documents.

- The Cabinet documents exemption was intended as a powerful 'class' exemption and remains so. There have been relatively few challenges on its main provision and none has been effective. The only effective challenge has been around misuse on grounds of what constitutes a 'Cabinet' document and this is now more clearly defined as a result.

- Efforts by public servants to turn the 'working documents' exemption into more of a class exemption have, broadly, failed. The effect of disclosure on 'frankness and candour' (broadly the same as our 'chilling effect') are established as only one relevant factor to consider.

The scope of this analysis

A.1 This analysis of the way that policy development and formulation are dealt with in Australia concentrates, for reasons of space, on the federal or Commonwealth Freedom of Information Act of 1982 (FOIA). Individual states also have their own freedom of information legislation and these are referred to where helpful.

Equivalent exemptions

A.2 The FOIA 1982 concerns documents, not 'information'. There are two exemptions which, taken together, broadly equate to the type of material encompassed by the UK FOI Act's section 35 exemption. The first is section 34, which protects Cabinet documents from disclosure. The second is section 36, which protects issues such as opinion, advice and deliberation in internal working documents. The former is an absolute exemption and the latter subject to a public interest test. Section 36 allows a public interest test to be invoked both generally by sub-section (1) (b) and where a Minister signs a certificate against disclosure on public interest grounds by sub-section (3). [NB: in November 2008 the federal government introduced into Parliament a Bill abolishing conclusive Ministerial certificates. At the time of writing - February 2009 - it had not yet been passed.]

A.3 Both exemptions are set out in full below and the way they operate is discussed. It is the status or nature of the document rather than the content of the information

which provides the protection. The word 'policy' is not used in either exemption, though it does occur in discussion of their application.

A.4 Section 14 provides for any document, including those which are exempt under the FOIA, being released if Ministers and agencies wish and can 'properly' or are 'required by law' to do so. So there is no obligation to invoke exemptions even where they genuinely apply.

A.5 This analysis looks at each of the two Commonwealth FOIA exemptions in turn and also, so far as it is relevant here, at what has come to be called 'frankness and candour' as well as the broader public interest issue.

FOI process and appellate machinery

A.6 Policy on the FOIA has been administered since December 2007 by the Department of the Prime Minister and Cabinet (DPMC). Before that the Attorney-General had been responsible.

A.7 To give an idea of scale, in the four years 2003-07 an average of about 40,000 FOI requests per year were made under the federal Act. Of these a sizeable majority - about 85% - were for personal information and the remaining 15% - somewhere over 5000 per year – were all other requests including those where the exemptions under sections 34 and 36 may be invoked. Over the currency of the FOIA since 1983 to 2007 there were over 3000 applications to the Australian Administrative Tribunal (AAT). While these cover the full range of the FOIA it means that there is a substantial body of case law on the application of exemptions. However, its size also makes it a difficult and lengthy task to analyse in detail.

A.8 The FOIA requires provision of an internal review system under section 54. There is no independent Information Commissioner for the federal government in Australia, though reports on the administration of FOI have called for one – so far unsuccessfully. Section 55 allows requesters to appeal to the Administrative Appeals Tribunal (AAT) against decisions on disclosure made by Government agencies. The AAT has powers to order disclosure. It was set up in 1976 to provide independent review of a wide range of federal government administrative decisions. The AAT is a federal body and constitutionally has no jurisdiction over state matters. Its senior members are legally qualified. Its operation is part of the Attorney-General's remit and FOI is just one of the provisions which it oversees. More detail on the AAT can be found at http://www.aat.gov.au/.

A.9 Section 57 allows complaints about FOI to the Ombudsman. It gives the Ombudsman powers to investigate FOI matters. There is no intention that the Ombudsman should have a day-to-day monitoring role over the administration of the FOIA so complaints are limited to administrative matters. Over the past ten years an average of just over 250 complaints per year have been made to the Ombudsman. The distinction between the roles of the AAT and the Ombudsman is not entirely clear and there seems to be some overlap. Current practice is summed up in '*Scrutinising Government',* a March 2006 report by the Commonwealth Ombudsman into the administration of the FOIA in government agencies. Para 1.11 says:

> The Ombudsman generally does not become involved with complaints about FOI decisions until the applicant has sought internal review of a

disputed decision or, in some cases, where a matter has been reviewed by the AAT. Where a matter has been reviewed by the AAT, the Ombudsman will not ordinarily investigate unless there are 'special reasons' warranting an investigation.

A.10 This report also includes the comment at para 3.8,

> This investigation did not include in any detail the contentious issues of FOI exemptions… which more commonly come within the purview of courts and tribunals.

A.11 Initially, the AAT route was free of charge and more appeals went by that route, because it has the power to make a binding decision on access, whereas the Ombudsman can only make recommendations. After a significant charge was introduced for appeal via the AAT in 1986, the balance has shifted to appeals via the Ombudsman, which incur no fee.

A.12 Further appeal to the Federal or High Courts is possible on points of law only.

The Cabinet documents exemption – section 34

A.13 The Cabinet documents exemption in section 34 expressed a clear wish of Government to protect these high level documents from disclosure. That principle has not yet been successfully challenged and the exemption remains strong. Over the years officials have sought to use the exemption to protect documents of a wider range than the FOIA originally envisaged. They have done this by, for example, referring documents not genuinely prepared for submission to Cabinet to Ministers or to Cabinet under sub-section (1) (a) as attachments for information. The argument is that simply by being seen by Ministers in this way the documents become 'Cabinet documents' in the terms of the exemption. This practice has been challenged and on the whole successfully so though without detriment to the original broad case for section 34 exemption.

A.14 The most recent official guidance on section 34 is the *Freedom of Information Guidelines - exemption sections in the FOI Act, (prepared for the Department of the Prime Minister and Cabinet 31 December 2007)*. This is available along with other DPMC FOI guidance at http://www.dpmc.gov.au/FOI/guidelines.cfm.

A.15 On the Cabinet documents exemption this says:

> 5.1.1 To maintain the confidentiality necessary for the proper functioning of Cabinet, the Government requires that the deliberations of Cabinet and the Executive Council should be protected from mandatory disclosure under the FOI Act. There are four distinct circumstances in which s 34 may exempt a Cabinet document from disclosure. These are if the document:
>
> - has been submitted to Cabinet or it is proposed by a Minister to be submitted to Cabinet for its consideration, having been prepared for Cabinet (s 34(1)(a));
> - is an official record of Cabinet (s 34(1)(b));
> - is a copy of, or part of, or contains an extract from a document referred to in paragraphs 34(1)(a) or (b) (s 34(1)(c)); or

- the release of which would involve the disclosure of any deliberation or decision of Cabinet other than a document which would disclose an officially published decision of the Cabinet (s 34(1) (d)).

A.16 To be exempt, the guidance goes on to say, the document 'must not only have been submitted to Cabinet or proposed by a Minister to be so submitted, it must also have been brought into existence for the purpose of submission for consideration by Cabinet'. The guidance is specific in this way at least partly in acknowledgement of those cases where public servants have stretched the notion of 'cabinet document' simply in order to bring other documents under the scope of the Cabinet documents exemption, a tactic used elsewhere most notably in Canada.

A.17 Having decided that a document qualifies for exemption this guidance also confirms that no further consideration, for example on the potential harm of disclosure, is needed.

A.18 The expression 'Cabinet document' is not defined in the FOIA except so far as the qualifying sub-sections of section 34 limit the expression for example in referring to 'factual' documents as being capable of falling outside the scope of the exemption.

The force of the section 34 exemption

A.19 The Australian Law Reform Commission (ALRC) and the Administrative Review Council (ARC) were asked by the Attorney-General to review the operation of the FOIA and produced a report in 1995 entitled *Open government – a review of the Federal Freedom of Information Act 1982*. (ALRC/ARC). Sections 9.7-9.13 of this report looked at the Cabinet documents exemption.

A.20 The report confirms that section 34 is a 'class' exemption where the content of material is irrelevant to application of the exemption and adds that this has always been controversial. But it immediately goes on to say 'The Review considers that Cabinet documents warrant a class exemption' and avoids any trace of doubt by adding 'It is not in the public interest to expose Cabinet documents to the balancing process contained in most other exemptions or to risk undermining the process of collective Cabinet decision making' (9.8). This is a strong statement especially after thirteen years' operation of the FOIA.

A.21 ALRC/ARC does, however, go on to consider what constitutes a 'Cabinet document' and to acknowledge some misuse of the category:

> Despite the apparently clear wording to the contrary, documents that have been submitted to Cabinet but that were not created for that purpose have been held to be exempt.http://www.austlii.edu.au/au/other/alrc/publications/reports/77/9.html - fn29 The Review considers that this is an incorrect interpretation of the legislation. DP 59 proposed that s 34(1) (a) be amended to make absolutely clear that the exemption only applies to documents prepared for Cabinet. The proposal was intended to ensure that agencies cannot abuse the exemption by attaching documents to Cabinet submissions merely to avoid disclosure under the FOI Act. The Department of Prime Minister and Cabinet supports the proposal. (Report 9.9)

And it adds a recommendation to that effect.

A.22 The report – to which there was never a response from Government - goes on in 9.10 to amplify section 34(1) (d) which provides that a document the release of which would involve the disclosure of any deliberation or decision of the Cabinet is exempt. It distinguishes between an 'officially published' Cabinet decision which should not be exempt and the 'deliberation' underlying such 'officially published' decisions which should continue to be exempt.

A.23 ALRC/ARC, thirteen years after the FOIA came into force, was prepared to re-think certain aspects of the interpretation of the FOIA but remained firmly protective of the original intention to exempt completely documents relating to the business of Cabinet and Ministers. Another twelve years on, in December 2007, the DPMC published a raft of updated guidelines for officials on interpreting the FOIA, the *Freedom of Information Guidelines - exemption sections in the FOI Act* already referred to above. This set out almost current views on section 34. Its view in sections 5.1.1 – 5.1.4 was very similar to that of ALRC/ARC. That is, that the Cabinet documents exemption was needed and strong. It went on to give relevant case law examples supporting its interpretation. (The text can be seen by following the link at http://www.dpmc.gov.au/FOI/guidelines.cfm.)

A.24 Independent observation supports this general picture. Rick Snell, in his Federal Law Review article, writes:

> Australian Cabinet papers are accorded automatic exemption. Once an agency demonstrates that information being requested by an applicant can be labelled 'Cabinet papers' then the external review bodies are forced to uphold the exemption claim. It is immaterial that it can be established that the requested information is outdated, of little consequence, or only incidental, or not even relevant to the deliberations of Cabinet… The Australian approach allows the Cabinet exemption to operate like an access buffer zone around the central core of government policy development and execution. The exemption for Cabinet information has been taken as a priori in Australia and rarely debated or challenged. (Snell 592-3)

A.25 Rick Snell also points out that Queensland Information Commissioner and the Western Australian Commission have protested the breadth and solidity of the Cabinet exemption, the latter saying:

> It was clear that the heavy veil of secrecy under which Cabinet operates does not always serve the public interest and that the current accountability mechanisms need to be supplemented without materially affecting the proper functioning of Cabinet and its role ……' (Western Australia Commission)

A.26 Such interventions have not made a significant difference in the force of the section 34 exemption.

The continuing force of the Cabinet documents exemption

A.27 The section 34 exemption for Cabinet documents has essentially retained its full force since the FOIA first applied in 1982 and there is still strong official and indeed judicial backing for that view. Only around the margins – efforts to include additional material under the heading of 'Cabinet documents' which do not

properly belong there and decisions which have been 'officially published' – has the force of the exemption been at all modified. It would be too strong to say it has been weakened.

Cabinet documents and the public interest

A.28 There is no public interest test in determining the Cabinet documents exemption. Some consideration, though, has been given to the issue of the public interest as it relates to the exemption. Peter Bayne's '*Recurring themes in the interpretation of the Commonwealth Freedom of Information Act'* cites in *Re The Fallon Group Pty Ltd and Commissioner of Taxation* and quotes the AAT as saying:

> On the other hand, it must be acknowledged that observations of the majority support an argument that in the context of documents which would reveal information about the deliberations of Cabinet, it is contrary to the public interest to disclose the information if disclosure would be liable to subject the Cabinet members "to criticism of a premature, ill-informed or misdirected nature and to divert the [Cabinet] process from its proper course". The remarks of the majority were expressly related to Cabinet discussions, but once the legitimacy of the argument is accepted, it is capable of application in other contexts, and in particular where it could be said that the information would reveal deliberations concerning the creation of state policy at the highest level.

A.29 Bayne also cites '*Recurring themes in the interpretation of the Commonwealth Freedom of Information Act',* a High Court case, Commonwealth versus the Community Land Council

> …documents for which the Commonwealth claims immunity from disclosure are documents which record the actual deliberations of Cabinet or a committee of Cabinet. …When immunity is claimed for Cabinet documents as a class and not in reliance upon the particular contents, it is generally upon the basis that disclosure would discourage candour on the part of public officials in their communications with those responsible for making policy decisions and would for that reason be against the public interest. The discouragement of candour on the part of public officials has been questioned as a sufficient, or even valid, basis upon which to claim immunity. On the other hand, Lord Wilberforce has expressed the view that, in recent years, this consideration has "received an excessive dose of cold water".
>
> But it has never been doubted that it is in the public interest that the deliberations of Cabinet should remain confidential...

The internal working documents exemption – section 36

A.30 The wording of the section 36 exemption – presumably deliberately – avoids use of the word 'policy'. The ALRC/ARC report of 1995 uses the word in its comment (para 9.15) on the internal working documents exemption:

> Section 36 has been heavily criticised by applicants and commentators as being a catch-all provision. It was suggested to the Review that it should be narrowed to apply only to deliberative material associated with policy formulation. The AAT has consistently rejected that suggestion, holding

> instead that s 36 covers all the 'thinking processes' of an agency involved in its functions. DP 59 asked whether s 36 should be narrowed in some way. Submissions are evenly divided on this issue. Agencies generally oppose restricting s 36 to policy documents on the basis that it would often be difficult to distinguish such material from other deliberative documents. They claim the public interest test provides sufficient safeguard against s 36 being claimed for innocuous material. Other submissions consider that narrowing the exemption would be desirable. The Review considers that confining s 36 to policy documents, or indeed to any one type of deliberative process document, would make the provision difficult to administer without necessarily improving the level of access to government information. Accordingly, it does not recommend any legislative narrowing of the exemption. It is, however, important that agencies only claim s 36 in respect of documents prepared for the agency's deliberative processes. The Review considers that the title of the exemption - 'internal working documents' - gives a misleading impression of the width of s 36 and recommends that it be changed to 'documents revealing deliberative processes'.

A.31 The DPMC 2007 FOI Information guidelines cited above continue to reject a definition narrowed by specific use of the word 'policy' but in other respects reinforces, twelve years on, the points made in ALRC/ARC, saying:

> For this section to apply:
> - a document must disclose **opinion, advice** or **recommendation** or **consultation or deliberation** that has been **obtained, prepared or recorded** or **has taken place** in the course of, or for the purposes of, the **deliberative processes** of the agency or Minister (Re Booker and Department of Social Security);
> - those **processes** must be carried out as part of the properly defined **functions** of the agency, Minister or government;
> - it must be demonstrable that the balance of the public interest weighs against disclosure; and
> - the information in question must not be purely factual.

A.32 There are two main issues to consider here. The first is the breadth of the applicability of the exemption to 'working documents'. The second is the applicability of the public interest test.

Howard and the Treasurer of the Commonwealth of Australia

A.33 The crucial early case for section 36 was the 1985 AAT decision on *Howard and the Treasurer of the Commonwealth of Australia*. John Howard, then leader of the opposition, had requested disclosure of 1984-5 Budget preparation papers and been refused. The Treasurer, Paul Keating, had invoked section 36, saying that disclosure '…could jeopardise provision of candid advice and views within and between Departments…. Ground applies in respect of minutes to the Treasurer and internal minutes, memoranda and discussion papers.'

A.34 The AAT decision in Howard defined five factors:

> ... the whole of the circumstances must be examined including any public benefit perceived in the disclosure of the documents sought but that:
> 1. The higher the office of the persons between whom the

communications pass and the more sensitive the issues involved in the communication, **the more likely it will be** that the communication should not be disclosed.
2. Disclosure of communications made in the course of the development and subsequent promulgation of policy **tends not to be** in the public interest.
3. Disclosure which will inhibit frankness and candour in future pre-decisional communications **is likely to be** contrary to the public interest.
4. Disclosure, which will lead to confusion and unnecessary debate resulting from disclosure of possibilities considered, **tends not to be** in the public interest.
5. Documents which do not fairly disclose the reasons for a decision subsequently taken may be unfair to a decision-maker and **may prejudice** the integrity of the decision-making process.
His Honour concluded that "there must often be an element of conjecture in a decision as to the public interest", and that "[w]eight must be given to the object of the FOI Act". This acknowledgment was not, however, filled out with illustration.

A.35 These five factors tended to close down definition or discussion of where the public interest lay in dealing with section 36 and indeed more generally. Prior to Howard there had been a more simple balance of public interest between citizens being informed of the workings of government and the possible impact of disclosure on impeding those workings. Peter Bayne in the article cited above lists an early Federal Court decision, *Harris v Australian Broadcasting Corporation*, and the AAT decision in *Re Lianos and Department of Social Security* as examples of this.

A.36 Howard, though, raised the level of the barrier. http://pandora.nla.gov.au/nph-arch/2000/Z2000-Oct-26/http:/law.anu.edu.au/publications/flr/vol24no2/Bayne.htm - P108_22700#P108_22700It did this, Bayne argues, largely by taking attention away from the actual content of documents whose disclosure was being sought to a focus instead on what kind of documents they were – factors 1, 2 and 5 cover this – or the effect of disclosure on the future behaviour of others – factor 3 covers future behaviour of officials, factor 4 that of the public.

A.37 Essentially this moved the section 36 exemption away from specifying a type of document over which arguments might be had in specific cases as to the benefit or otherwise of disclosure towards being a class exemption more on the lines of the section 34 Cabinet documents exemption. In this sense Howard strengthened the application of the section 36 exemption.

A.38 It has to be said though that the force of the Howard decision and the five "factors" has since diminished both in the Commonwealth case law and in the states. The 1993 Eccleston decision of the Queensland Information Commissioner has been highly significant in subsequent thinking on the internal working documents exemption, the "frankness and candour" arguments and the concept of the public interest. It includes a forceful critique of the Howard criteria. The Eccleston decision and its significance to the public interest argument is summarised in detail in Carter and Bouris, chapter 7.

The public interest - 'Frankness and candour'

A.39 In raising the issue described as 'frankness and candour' in factor three of the five factors the Howard decision touches on a similar issue described more recently in the UK as the 'chilling effect' – that disclosure will adversely affect the future willingness and capacity of public officials to give unfettered advice on the record because of a fear that any advice they give will sooner rather than later be disclosed. Were such a 'future effects' argument generally accepted and were it to develop force as a principle such that it could outweigh the public interest inherent in disclosure then it would become in effect a 'class' exemption in its own right. As Peter Bayne puts it:

> Acceptance of a "future effects" kind of argument where the disclosure of the documents would serve the central purposes of the Act does, of course, defeat those purposes, and for this reason the argument must be scrutinised with care.

A.40 Bayne cites as an example the AAT case of December 1986 *Fewster and Department of Prime Minister and Cabinet* where the AAT decision put the issue as:

> …the argument ran, the need to ensure confidentiality and candour and frankness in future "similar" documents is of such overriding importance in the public interest, that the present documents should not be disclosed. Such an argument, if accepted by the Tribunal, would lead inevitably to the conclusion that all deliberative process documents of the kind in question are exempt from disclosure under the Act. To disclose one such document would be likely to destroy the climate of confidentiality and candour and frankness which is essential to communication between and with Ministers. (para 34)

and so adds

> 35. In my view, a proposition in those broad terms cannot be sustained for the purposes of s. 36(1) (b) of the FOI Act. That is not to say, however, that the Tribunal treats claims of exemption in respect of Ministerial communications lightly nor that it is unmindful of the need to protect confidential communications between and with Ministers in appropriate cases (see, particularly, Re Howard and Treasurer of the Commonwealth of Australia (1985) 7 ALD 626). In my view, however, no justification is to be found within the language of s. 36 of the Act for a "class" claim of exemption.

A.41 This is a particular argument, that the wording of the Australian FOIA does not justify a particular interpretation of the 'frankness and candour' argument. It goes some way towards, but does not amount to, a general precedent on the force of that argument more generally. So it is helpful that the AAT goes on to say in para 36 that had the legislation intended to give a class exemption to documents covered by section 36 it could have adopted the same means as it did for Cabinet documents under section 34 and given exactly that. It did not do so. And the AAT summarises the position overall:

> The need to ensure candour and frankness in the expression of advice etc. and to maintain confidentiality, where appropriate, are left, in my view, as facets of the public interest to be weighed and evaluated in each case with other competing considerations. They are relevant but not determinative considerations (see Re Brennan and Law Society of the Australian Capital Territory (No. 2) (1985) 8 ALD 10 at 21; cf. Re Lianos at 496). (para 36)

and

> 37. The Tribunal has repeatedly indicated its reluctance to accept the candour and frankness argument, particularly when presented, in substance, as a "class" claim (cf. Re Murtagh at 121; Re Chandra and Minister for Immigration and Ethnic Affairs (1984) 6 ALN N257 at 260; Re Lianos at 496; Re Howard at 634; Re Downie and Department of Territories (1985) 8 ALD 496 at 503-6; Re Toohey; Re Rae and Department of Prime Minister and Cabinet - Decision No. 2574 handed down 4 March 1986 at 22-25; Re Lordsvale Finance (No. 3) and Department of Treasury - Decision No. 2836 handed down 30 June 1986 at 5-6; Re Sunderland and Department of Defence - Decision No. 2890 handed down 19 September 1986).

A.42 A similar assessment and conclusion on the public interest and 'frankness and candour' issue has been reached by Megan Carter and Andrew Bouris who cite an early AAT case from 1984, *Robyn Frances Murtagh and Commissioner of Taxation (6 ALD 112)*

> No cogent evidence has been given to this Tribunal either in this review or, so far as we are aware, in any other, that the enactment of the FOI Act 1982 has led to an inappropriate lack of candour between officers of a department or to a deterioration in the quality of work performed by officers. (Carter and Bouris 2006: 145-6)

Those were early days. But there seems to be no real evidence that things have changed much.

The continuing force of the internal working documents exemption

A.43 The internal working documents exemption remains strong. The interest and the change lies mainly in the clearer definition of what constitutes internal working documents. As for the public interest aspect, the latter is a much wider subject than there is space to consider in full here. The main conclusion is that the frankness and candour aspect has been seriously considered and – in large part – rejected as a powerful argument.

Conclusions

A.44 The lessons of the Australian experience with its sections 34 and 36 exemptions and their relevance to the UK position seem to be as follows:

- The exemption offered by sections 34 and 36 was always intended to be strong and after 25 years of operation has remained so. Section 34 for Cabinet documents is in effect a class exemption and it is the status of the document not the nature of the content that is the overriding factor. Section 36 has been ruled not to be a class

exemption despite efforts by officials to have it operate in this way – at least in large part through the argument for 'frankness and candour'. But it remains forceful.

- There seems to have been a greater willingness than in the UK on the part of those mainly concerned – the AAT and the courts – to agree that there are strong, possibly overriding arguments why the documents of high level government policy (even though the word policy is not used in the FOIA) should remain protected from disclosure.

- There has certainly not been the same protracted debate and conflict as in the UK over whether 'policy' material at the highest level should remain protected from disclosure. The Australian assumption was, and remains, that by and large it merits such protection. In part, this is probably because the Australian system has never included – despite efforts to secure it – an independent Information Commissioner on UK lines. No one has a comparable role of watchdog over the operation of the Act, with both the AAT and the Ombudsman merely responding to specific cases and appeals.

Extracts from Access to Information Act

Section 34 – the full text

(1) A document is an exempt document if it is:
(a) a document that has been submitted to the Cabinet for its consideration or is proposed by a Minister to be so submitted, being a document that was brought into (b) an official record of the Cabinet;
(c) document that is a copy of, or of a part of, or contains an extract from, a document referred to in paragraph (a) or (b); or
d) document the disclosure of which would involve the disclosure of any deliberation or decision of the Cabinet, other than a document by which a decision of the Cabinet was officially published.
(1A) This section does not apply to a document (in this subsection referred to as a ***relevant document***) that is referred to in paragraph (1)(a), or that is referred to in paragraph (1)(b) or (c) and is a copy of, or of part of, or contains an extract from, a document that is referred to in paragraph (1)(a), to the extent that the relevant document contains purely factual material unless:
(a) the disclosure under this Act of that document would involve the disclosure of any deliberation or decision of the Cabinet; and
(b) the fact of that deliberation or decision has not been officially published.
(2) For the purposes of this Act, a certificate signed by the Secretary to the Department of the Prime Minister and Cabinet certifying that a document:
(a) is one of a kind referred to in a paragraph of subsection (1); and
(b) is not a document containing purely factual material that is excluded from the application of this section under subsection (1A); establishes conclusively, subject to the operation of Part VI, that it:
(c) is an exempt document of that kind; and
(d) is not a document containing such material.
(3) Where a document is a document referred to in paragraph (1)(c) or (d) by reason only of matter contained in a particular part or particular parts of the document, a certificate under subsection (2) in respect of the document shall identify that part or those parts of the document as containing the matter by reason of which the certificate is given.

(4) For the purposes of this Act, a certificate signed by the Secretary to the Department of the Prime Minister and Cabinet certifying that a document as described in a request would, if it existed:
(a) be one of a kind referred to in a paragraph of subsection (1); and
(b) not be a document containing purely factual material that is excluded from the application of this section under subsection (1A); establishes conclusively, subject to the operation of Part VI, that, if such a document exists, it:
(c) is an exempt document of that kind; and
(d) is not a document containing such material.
(5) Where a certificate in accordance with subsection (4) has been signed in respect of a document as described in a request, the decision on the request may be a decision that access to a document as described in the request is refused on the ground that, if such a document existed, it would be an exempt document referred to in the paragraph of subsection (1) that is specified in the certificate.
(6) A reference in this section to the Cabinet shall be read as including a reference to a committee of the Cabinet.

Section 36 - the full text

(1) Subject to this section, a document is an exempt document if it is a document the disclosure of which under this Act:
(a) would disclose matter in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency or Minister or of the Government of the Commonwealth; and
(b) would be contrary to the public interest.
(2) In the case of a document of the kind referred to in subsection 9(1), the matter referred to in paragraph (1)(a) of this section does not include matter that is used or to be used for the purpose of the making of decisions or recommendations referred to in subsection 9(1).
(3) Where a Minister is satisfied, in relation to a document to which paragraph (1)(a) applies, that the disclosure of the document would be contrary to the public interest, he or she may sign a certificate to that effect (specifying the ground of public interest in relation to which the certificate is given) and, subject to the operation of Part VI, such a certificate, so long as it remains in force, establishes conclusively that the disclosure of that document would be contrary to the public interest.
(4) Where a Minister is satisfied as mentioned in subsection (3) by reason only of matter contained in a particular part or particular parts of a document, a certificate under that subsection in respect of the document shall identify that part or those parts of the document as containing the matter by reason of which the certificate is given.
(5) This section does not apply to a document by reason only of purely factual material contained in the document.
(6) This section does not apply to:
(a) reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, whether employed within an agency or not, including reports expressing the opinions of such experts on scientific or technical matters;
(b) reports of a prescribed body or organization established within an agency; or
(c) the record of, or a formal statement of the reasons for, a final decision given in the exercise of a power or of an adjudicative function.
(7) Where a decision is made under Part III that an applicant is not entitled to access to a document by reason of the application of this section, the notice under section 26 shall state the ground of public interest on which the decision is based.
(8) The responsible Minister of an agency may, either generally or as otherwise provided by the instrument of delegation, by writing signed by him or her, delegate to the principal

officer of the agency his or her powers under this section in respect of documents of the agency.
(9) A power delegated under subsection (8), when exercised by the delegate, shall, for the purposes of this Act, be deemed to have been exercised by the responsible Minister.
(10) A delegation under subsection (8) does not prevent the exercise of a power by the responsible Minister.

Annex B: Canada

Summary

- Sections 21 and 69 of the Access to Information Act (ATIA) deal with advice to Government and Cabinet confidences respectively. These classifications cover a very broad range of documents which relate to the process of Government and policy-making and their provincial counterparts are also wide-ranging.

- The official federal policy on discretionary disclosure under section 21 operates on the basis of exercising that discretion in order to protect the policy process, rather than serving the public interest. There is no public interest override either in the statute or the official guidelines.

- Section 69 places a broad range of documents relating to the process of Government outside the scope of the Act altogether, preventing the Information Commissioner from requiring disclosure. The corresponding provincial sections keep confidences within the jurisdiction of the Commissioner and in many cases confine the definition of such records to those that reveal "the substance of Cabinet deliberations."

- The evidence regarding the position that the ATIA as a whole (or its provincial counterparts) has created a "chilling effect" or adversely affected the ability to offer advice is mixed and largely anecdotal. However, the mix is by no means even and whilst analysed statistical evidence indicates little or no change in processes or attitudes, the anecdotal evidence indicates quite strongly that there has been a negative effect of both.

Introduction

B.1 Canada has two tiers of freedom of information legislation. At a federal level, information held by government institutions is governed by the Access to Information Act 1983 ("the ATIA"). The provinces of Canada also have their own freedom of information regimes to govern the release of information at a local level, which are entirely separate from the federal framework (although for definitional assistance, judgments at the federal level do refer to provincial decisions, and vice versa). The main focus of this study will be the federal framework, although provincial regimes will be referred to where it is helpful to do so.

The Basic Right of Access to Information

B.2 Section 4(1) of the ATIA provides a right of access regarding "any record under the control of a government institution." Records are defined in section 3 as "any documentary material, regardless of medium or form", a definition which includes emails, as well as handwritten notes. The right of access to records differs from the UK statute, in that it provides for access to records, rather than information.

The role of the Federal Information Commissioner

B.3 The operation of the ATIA is monitored - and its provisions enforced by - an Information Commissioner ("the Commissioner") who, unlike many of his

provincial counterparts, does not have responsibility for privacy issues. The Commissioner has statutory powers of investigation; if he comes out in favour of the release of a record, and the institution does not follow his recommendation, then either the Commissioner or the requester is able to seek judicial review in a federal court. However, his jurisdiction is limited to matters concerning the Act; if a document is placed outside the legislation by the wording of the statute, then he has no jurisdiction over its disclosure (see the section on Cabinet confidences below). Similarly, he can only order disclosure from bodies listed in Schedule 1 of the ATIA as being subject to its provisions.

Section 21 - The Exemption for Documents Relating to the "Operations of Government".

A Discretionary Exemption

B.4 As evidenced by the use of the word "may" in the statute, the exemption provided by section 21 is discretionary. If a requested record contains information covered by the exemption, the institution must exercise the discretion as to "whether or not disclosure of the information will result in injury or harm to the processes for providing advice or recommendations or carrying on consultations or deliberations" (Treasury Board Guidelines, 2008).

B.5 This internal Government policy on exercising the discretion, therefore, has at its heart the concern that disclosure is likely to damage the ability of civil servants to offer advice or otherwise carry out their duties in this area. The ATIA itself, however, makes no reference to a harms test, how an institution should exercise its discretion, including any need for the consideration of the public interest.

Advice or Recommendations

(i) The Importance of this subsection

B.6 The "advice or recommendations" subsection is the portion of the ATIA which most directly covers documents which comes within the remit of this study, since documents that contain information of either category is almost exclusively going to be related to the formulation of policy. Almost all of the examples in the case law (some of which are contained in the following sections and in the latter two appendices) are of documents which are offering a view on what the Government should do on a given subject, ie: what its policy should be. The definition of these terms and the examples of documents deemed to come within them, are therefore of prime importance to the question of what constitutes a document related to the formulation of policy generally. It is less helpful, however, in assisting the UK Information Commissioner in distinguishing between policy and "Government" policy (if in fact such a distinction exists). Other elements of section 21 do offer some assistance on this second matter. Where they do, the possibilities for distinction will be highlighted.

(ii) Two words, two definitions

B.7 The Treasury Board Guidelines provide definitions of "advice" and "recommendations," defining the latter as "bringing someone or something forward as worthy of notice or favour". "Advice" is defined in the Guidelines as "an

opinion, view or judgement based on the knowledge, training and experience of an individual or individuals expressed to assist the recipient to decide whether to act and, if so, how" (Treasury Board Guidelines, 2008).

B.8 In offering separate meanings for the two terms, the Treasury Board is following the case law of both the federal courts and their provincial counterparts, which have consistently found that in using the phrase "advice or recommendations" the framers of the legislation intended the terms to have separate meanings. This flies in the face of many dictionary definitions of the two terms, which often use one word in an effort to define the other, and has resulted in judicial exercises in linguistic contortionism of the sort that could have been avoided. This is all the more true because, for all the definitional argument and exercises in judicial interpretation (of which there have been a great deal); such grammatical distinctions make little difference in practice. Whether or not a document is classified as advice or recommendations makes no difference, provided it can be defined as either one, or consisting of both. A judicial decision that a record contains advice rather than recommendations (or vice versa) has no effect on whether or not the record is exempt (it is in either event). Nor does it have any real impact on how the discretion to disclose should be recognised. To spend time and money litigating and pontificating on the precise nature of either therefore, is to a large extent, an exercise in futility.

B.9 Such a fact was recognised in *Order PO-2028,* with Ontario's Information Commissioner reiterating the view of that province that the phrase "advice or recommendations" contained two words of very similar meaning, and offering a definition for the phrase as a whole:

> in order to qualify as advice or recommendations in the context of section 13(1), the information in question must reveal a suggested course of action that will ultimately be accepted or rejected by its recipient during the deliberative process of government policy-making and decision-making.

B.10 Such an approach avoids the unnecessary attempts of judicial decision-makers to define terms that are used in ordinary parlance and whose meaning is generally understood. It also serves as a reminder to other jurisdictions (including the UK) that attempting specific, detailed judicial definitions of broad terms such as "advice or recommendations" in an attempt at legal certainty is likely to cause additional problems and create more litigation than a broader, general understanding of such phrases.

B.11 What is certain is that "most internal documents that analyse a problem are likely to be caught within paragraph 21(a) or (b)" (*Canada (Information Commissioner v Canada (Attorney-General)* (2000). As a result, the courts have consistently given the phrase a very broad definition, but have, with equal regularity, refused to offer examples of documents that are both outside and within its bounds. Several decisions of the various Information Commissioners, however, have been more forward in doing so, and some of the provincial statutes enumerate examples within the text of the legislation itself (see appendices B and C).

(iii) Advice

B.12 In *College of Physicians* (2002), Levine J, discussing section 13 of the Ontario Freedom of Information and Protection of Privacy Act 1992 (FIPPA 1992), defined advice in a negative sense, stating that it did not need to include "a

communication about future action" in order to be recognised as such. He went on to say that advice "includes expert opinion on matters of fact on which a public body must make a decision for future action".

B.13 However, the British Columbia Commissioner has distinguished documents used during the deliberations of a local school board from the position of the records examined by Levine J, saying that the portions of the records requested by the applicant were not "expert opinions relying on the exercise of judgement or skill", adding that nor was there "any evidence that the School District weighed this information in making a decision..." (*Order 04-04).*

B.14 This last decision shows two key elements of "advice" as a concept. The first is that there should be some "exercise of judgment", rather than, for example, mere explanations of the history of a policy. The second is that the government institution should do more than merely digest information produced for the purposes of explanation, they should use it to consider their options in order for it to constitute advice.

B.15 Possibly the most helpful definition, however, comes from Saskatchewan. In *Weidlich,* Geatros J recommended that the courts interpret advice as it was used in "ordinary parlance". He therefore defined it as: "meaning primarily the expression of counsel or opinion, favourable or unfavourable, as to action."

(iv) Recommendations

B.16 The Treasury Board Guidelines define recommendations as information "bringing someone or something forward as worthy of notice or favour". In the *College of Physicians* case, Levine J concluded that one of the key aspects of a recommendation was that it should "lay out alternatives… to consider… [and] recommend [sic] courses of action", although the usefulness of this definition has rightly been questioned. Since the majority of decisions have either labelled a document as containing "advice" or used the broad brush of "advice or recommendations", it is not necessary to go into too much detail on this point. Suffice it to say that information seems to require the clear advocacy of a course of action to constitute a recommendation, and that this is in line with the common dictionary definitions of the term.

(v) Consultations or Deliberation

B.17 In *Newfoundland Power Inc. v. Canada (Minister of National Revenue)*, Martineau J defined this term as "the analysis of various strategic or legal alternatives, and any recommendation made by managers or employees of the defendant regarding the position the latter should take on a taxpayer's notice of objection," as being "clearly covered by paragraph 21(1) (b) of the Act." Of course, this statement uses the term "recommendation", so, in that specific case, the Government could also have relied on the recommendation exemption.

(vi) Negotiating Plans

B.18 Examples of the type of information which could be covered by this exemption are the mandate and fall-back positions developed by government negotiators for the purposes of bargaining in relation to labour, financial and commercial contracts. It should be noted, however, that only negotiations with parties outside the federal government are covered by the exemption. Intra-Governmental negotiations are

therefore outside its scope. To use a British example, a Home Office negotiating plan on how to secure more funding from the Treasury in the Budget would most likely not be covered, but a Ministry of Justice plan regarding a pay dispute with the National Association of Probation Officers would be exempt.

(vii) Administrative Plans

B.19 The Treasury Board Guidelines state that records relating to the internal management of government institutions are covered by this part of the exemption and that this includes plans relating to the relocation or reorganisation of institutions. However, it also advises that such records are only protected until the plan is put into operation. Once it is, the information should be disclosed if it is requested, although alternative plans and discarded options are still exempt and can only be released subject to the discretion of the relevant institution. It is not clear, however, whether or not the UK Information Commissioner could consider such records as part of "government policy". This is one of the areas where it may possible to distinguish between the policy of a department and "government policy," with administrative plans far more likely to be considered part of the former category than the latter.

(viii) External Consultants

B.20 The ATIA, however, does not permit the exemption of advice or recommendations that come from external consultants or stakeholders (s.21 (2) (b). Several decisions of the Information Commissioner have affirmed this position: recommendations on a potential smoking ban from the tobacco lobby, for example, were records which the Commissioner refused to classify as exempt for this reason (Information Commissioner, 2004).

B.21 The Access to Information Task Force (2002) has criticised the rationale of these decisions, saying in its report that where the work being done by the consultant is comparable to that of a public servant, that the records related to it should be covered by the exemption. As of yet, the federal Government has done nothing to implement this proposal. Such a view represents a consensus that exists in the provinces, which make little or no distinction between the advice given by advisers (be they internal or external) to the Government. This poses an interesting question for UK observers. Based on this view of policy creation in Canada, would external stakeholder submissions fail to be relevant to a *Government* policy exemption in the UK because they are not authored by Government officials? That is to say: are such documents contributing to the formulation of Government policy or are they merely advancing the policy of the individual submitting them?

Section 69 - The Exception of Cabinet Confidences

B.22 Section 69 places Cabinet confidences outside the scope of the ATIA, and therefore outside the jurisdiction of the Commissioner. Barbara McIsaac says of the exception:

> … the absolute bar [on the release of Cabinet Confidences], including the inability of either a commissioner or the court to review and validate the claim for Cabinet confidence exclusion from disclosure, is a unique Canadian federal legislative feature". (McIsaac, 2001).

B.23 Despite the fact that the original Bill on which the ATIA is based left confidences subject to a mandatory class exemption (which would have placed them within the Commissioner's jurisdiction), this was changed late on in the legislative process, with the Government opting to make confidences the subject of an exception instead. The broad nature of the classes of documents enumerated by section 69 means that, in effect, the Canadian Government has placed significant amounts of information related to subjects of acute public interest outside the ATIA framework entirely. Such a decision indicates that, prior to the enactment of the ATIA at least, the legislature was so concerned about its potential effects with regard to advice and record creation that it felt it necessary to keep a significant amount of Government business outside the Act's remit altogether.

(i) Agenda of Council and Records containing Cabinet deliberations

B.24 Records that qualify in this category as confidences include agenda and records of decisions from meetings of the Cabinet and Cabinet committees, and any notes made by officials regarding such meetings (RPG Information Services, 1996). Importantly, agenda have, in some provincial jurisdictions, been found to be outside of the cabinet confidences exemption as they do not reflect the "substance of deliberations" (see below).

(ii) Records of Communication between Ministers

B.25 The Treasury Board Guidelines make clear that this is not a category that confines itself to letters and emails; it includes notes taken during a meeting between ministers, and is even broad enough to include notes prepared for such a meeting. Whilst such records are only confidences when they relate to the making of government decisions or the formulation of policy, UK observers will be aware that, in practice, these are very broad terms and their use does little to limit the scope of the exception in this case.

(iii) Draft Legislation

B.26 Draft legislation constitutes a cabinet confidence regardless of whether or not it was ever introduced to Parliament (Treasury Board Guidelines, 2008). Importantly, unlike many similar categories, draft legislation does not become available once a decision is made to introduce it; it remains a confidence. Unused drafts and non-proposed amendments of legislation, regulations and orders in council would be included within this category.

The Provincial Approach to Cabinet Confidences

B.27 With the exemption of New Brunswick (which has neither an exemption or an exception), all of the provincial jurisdictions deal with information that constitutes a confidence by way of an exemption, rather than an exception, which gives the Information Commissioner far more scope to define the term through orders and recommendations. Another key difference between the provincial and federal regimes is that the class of documents which are exempt in the majority of provinces is much narrower than the federal equivalent, with only documents that reveal the "substance of Cabinet deliberations" exempt from the disclosure provisions in several cases.

B.28 The British Columbian cabinet confidences section is a typical example of a provincial "substance" provision, with a mandatory exemption for documents that

come within the class as defined by the Act. Any document that would reveal the substance of Cabinet deliberations, either explicitly or by implication, cannot be released by a minister. Several other provinces, such as Saskatchewan and Alberta, also have exemptions that explicitly refer to the "substance of deliberations", whilst sections 12 and 33 of the Ontario and Quebec Acts respectively, have similar mandatory exemptions for Cabinet confidences. It is worth noting, in addition, that section 11 of the FIPPA 1988 provides that confidences can be released when it is in the public interest to do so. However, this public interest test is only applicable to records 'that reveal a grave environmental, health or safety hazard to the public.'

The Meaning of "Substance of Cabinet Deliberations"

B.29 The term "substance of Cabinet deliberations" has provoked a large amount of litigation throughout the provinces, leading to numerous judicial attempts at definition and a large body of case law. It is more than likely that this has been in part responsible for the federal Government's reluctance to change the section 69 exception to an exemption.

B.30 One of the key cases in British Columbia is the case of *Aquasource Ltd.*, in which Donald J offered his definition of the term:

> Standing alone, 'substance of deliberations' is capable of a range of meanings. However, the phrase becomes clearer when read together with 'including any advice, recommendations, policy considerations or draft legislation or regulations submitted…' That list makes it plain that 'substance of deliberations' refers to the body of information which Cabinet considered (or would consider in the case of submissions not yet presented) in making a decision.

He went on to say that the use of the term "including" in section 12(1) of FIPPA 1992 "extends the meaning of substance of deliberations and as a consequence, the provision must be read as widely protecting the confidence of Cabinet communications."

B.31 Following the *Aquasource* decision, the local Information Commissioner has stated that the "substance" provision was broad enough to encompass how Cabinet members voted on any given measure:

> Whether a particular member of Council voted for or against a particular motion would not only reveal the substance of the deliberations of Council but the exact deliberation itself. I find that disclosure of the records of how council voted at an in camera meeting would reveal the substance of Council's deliberations. (Order 03-09).

B.32 In a separate order, however, the Commissioner ruled that items which merely outline the subjects for discussion at a Cabinet meeting were not covered by the provision and could be released. The Commissioner warned at paragraph 19 that the "subject" of deliberations was not the same as the "substance" of deliberations, adding that the broad interpretation defined in *Aquasource* was issued in relation to the "body of information" that Cabinet considers, such as advice, recommendations, or policy considerations: "It is clear from this that 'substance of deliberations' has a meaning other than a simple list of topics or subjects for discussion."

B.33 Finally, in the Nova Scotia case of *O'Connor v. Nova Scotia*, Saunders JA offered perhaps the clearest definition:

> Is it likely that the disclosure of the information would permit the reader to draw accurate inferences about Cabinet deliberations? If the question is answered in the affirmative, then the information is protected by the Cabinet confidentiality exemption.

Case Study: Discussion Papers

It is widely acknowledged that discussion papers simply do not exist in the manner that they did before the ATIA was passed. Before the ATIA's conception, discussion papers were used to present background explanations designed to assist the Cabinet in coming to a decision. However, the types of information that used to be contained in discussion papers are now contained in annexes or explanatory sections of a document rather than existing as a separate entity.

Blanchard J, in *Canada (Information Commissioner) v. Canada (Minister of the Environment)* claimed that discussion papers, as they existed in 1982, have not been produced since 1984 and that the practice of including them as part of a Cabinet submission had meant that: information the purpose of which is to present background explanations, analyses of problems and policy options, where the decision has been made public or four years have passed, is withheld by the [Government] simply because the information is now included in a memorandum to Cabinet. In other words, despite the fact that all of the criteria in paragraph 69(3)(*b*) of the Access Act may be met, the content of a discussion paper is not released after the shorter four year period has passed, because it is no longer called a discussion paper.

The judge also took the rather unusual step of claiming that the ATIA had led to the establishment of a system by which the Government changed the manner in which it compiled and labelled records in order to evade the disclosure requirements of the Act. He cited the enactment of the ATIA as the prime motivation for discussion papers ceasing to be a method for communicating information to Cabinet. The Judge's remedy for this malfeasance, as he saw it, was to define discussion papers as containing "information the purpose of which is to provide background explanations, analyses of problems or policy options," regardless of the title given to them by Government officials.

The Effects of the Canadian Legislation on Record-Keeping and Policy Advice

Advice

B.34 Commentators and the courts have both recognised the demand for secrecy and warned of the dangers of an access law which permits wider disclosure than is currently the case. In *Canadian Council of Christian Charities v Canada (Minister of Finance)*, for example, Evans J was of little doubt that the undue exposure of the advice offered by officials would be harmful, saying at page 248:

> To permit or require the disclosure of confidential deliberations within the public service on policy options would erode the government's ability to formulate and justify its policies.

B.35 Whilst the preceding paragraph indicates that there is certainly a belief in some quarters that increased openness impacts negatively on the availability and quality of the advice offered to the Government, the former Information Commissioner John Grace, is firmly against such a position (Information Commissioner, 2004):

> The myth that the Access to Information Act removes the ability of public servants to give ministers private advice is the most widespread and pernicious of all. It has no foundation in law, yet it is used by public officials to justify increasing reliance on oral briefings, decreasing the keeping of meeting agendas and minutes and broadening an official zone of secrecy for public officials.

B.36 He claimed that the very breadth of the exemptions and exceptions discussed in this paper offered policy-makers so much protection that it was completely unreasonable to surmise that they would feel compromised by the risk of disclosure. Of course, in terms of the position of the UK Information Commissioner this is less than helpful, because it appears to suggest that maintaining the widest possible exemption for documents used in policy-making has proved to be the best weapon against the inhibition of full and frank advice from civil servants.

Record-Keeping

B.37 In an article entitled *Access Denied* (Gilbert, 2000), Jay Gilbert leaves readers in no doubt as to the "chilling effect" of the ATIA:

> The Access to Information Act… has caused many senior public officials to react negatively towards the perceived intrusion posed by the access law. This negative behaviour manifests itself in several direct ways, including, but not limited to, the illegal destruction of records, negligent record-keeping practices… as well as stretching the application and use of statutory exemptions.

B.38 He concludes that the real-world effect of the ATIA has been to change the very nature of government record keeping. In his opinion, what would previously have been simple, archival records are now being created (when they are being created at all), as "consciously authored" documents, thereby changing their fundamental nature.

B.39 Such views are worth taking on board; as an archivist, Gilbert's concerns are focused on the methodologies and practices of keeping records, rather than on the political benefits of open government, so he writes from an evidence-based, rather than a political, perspective. Such an approach, however, led the Access to Information Task Force to the opposite conclusion (National Archives, 2001), asserting that Gilbert's view is unsupported by the available data:

> Record-keeping in Government agencies *did not change after the Act*. Some diminution in the quantity of records was the only element of record-keeping which changed after the Act. This could be seen as a negative response to the Access to Information Act. However, in the absence of

changes in other areas of criteria, there is no further evidence from this study to back such a conclusion.

B.40 The report is conscious of the fact that "institutions keep records for their own operational and administrative purposes" and "may still create excellent records, knowing that this documentation will be exempt under the *Access to Information Act*." What the report seems to be saying in this instance is that the exemptions essentially serve their purpose. Since policy-makers know that records covered by sections 21 and 69 are not likely to be released (and in the case of section 69, cannot be released without the approval of the Cabinet), they have not changed their practices and create records in the same manner as they always did. In essence, the Task Force is merely rearticulating the arguments made by Evans J on the parallel topic of full and frank advice.

B.41 The most telling evidence, however, comes from a Canadian public servant, Ken Dobell, who was a key figure in the government of British Columbia and its policy-making process for numerous years. During a panel discussion on the operation of the province's freedom of information laws, he confirmed that his dealings with other members of the government usually took place by means of informal meetings and telephone conversations, neither of which would usually yield any written notes or documentation. He is quoted in the Tromp report as saying that his practice regarding emails was to delete them "all the time as fast as I can", although he stressed that his actions were motivated by a desire to avoid creating documents for what he regarded as fishing expeditions. He reportedly went on to say:

> I don't put stuff on paper that I would have 15 years ago… The fallout is that a lot of history is not being written down. Archivists of tomorrow will look for those kinds of things, and none of it will be there. It will change our view of history.

B.42 It would seem, therefore, that the effects of access to information by the public cannot be said to have no effect whatsoever on the thinking of officials and their practices of record-keeping (and more importantly, of record creation).

B.43 Finally in this section, it is interesting to note briefly how the differing levels of protection offered to documents in the various Canadian regimes does not seem to have led to vastly different outcomes with regards to the approach of the relevant civil services. Whilst the federal approach indicates the Government belief that the exclusion of Cabinet documents from the ATIA is necessary to protect the ability of civil servants and ministers to offer advice, none of the provincial regimes feel that such a strong protection is necessary. There is little or no evidence that the weaker protections offered by the provincial Cabinet confidence provisions has caused local civil servants to alter their behaviour in a manner that is significantly different to their federal counterparts. This is despite the fact that the definition of confidences is far broader at the federal level, and that such documents are placed outside of the ATIA's scope altogether.

Conclusions

- A great many documents can be classified as coming within the combined ambits of sections 21(1) and 69. In this way, it is very similar to its English equivalent, section 35 of the Freedom of Information Act. What appears certain is that, whilst

creating such a broad umbrella for policy documents to shelter under may be successful in protecting the policy process as it currently operates, (and without removing that protection it is difficult to know for certain that it does), that very breadth will always give opponents of the Government a stick with which to beat it.

- Under the Canadian system, the minutes from Cabinet meetings in the lead-up to the declaration of war against Iraq in 2003 would, at a federal level, not only be non-disclosable, but would not be subject to freedom of information law at all. There is only so much that can be inferred, therefore, from Cabinet confidence provisions.

- The effect of the ATIA on the use of discussion papers, as outlined by Blanchard J, above, is clear evidence that, when deciding whether or not to disclose a record, the investigational and definitional emphasis should be placed on the type of information (e.g. background information), as opposed to the type (or format) of document in which that information is contained (e.g. discussion papers).

- There is no direct evidence to support the arguments that increased access has had a "chilling effect" on record creation or hampered the ability of civil servants to offer full and frank advice. However, there is a reasonable amount of anecdotal evidence to suggest that the possibility of disclosure has had some effect on the creation of records, and that this is a result of the freedom of information regimes that exist in Canada.

- The terms used in the exemption and exception provisions are not broad by accident. They have been specifically worded to exclude as many records related to the formulation of policy as possible. The UK law has been worded with an equal lack of specificity.

Appendix A - Relevant sections of the ATIA

21. (1) The head of a government institution may refuse to disclose any record requested under this Act that contains:

(*a*) advice or recommendations developed by or for a government institution or a minister of the Crown,

(b) an account of consultations or deliberations in which directors, officers or employees of a government institution, a minister of the Crown or the staff of a minister participate.

(*c*) positions or plans developed for the purpose of negotiations carried on or to be carried on by or on behalf of the Government of Canada and considerations relating thereto, or

d) plans relating to the management of personnel or the administration of a government institution that have not yet been put into operation, if the record came into existence less than twenty years prior to the request.

(2) Subsection (1) does not apply in respect of a record that contains:

(a) an account of, or a statement of reasons for, a decision that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of a person; or

(b) a report prepared by a consultant or an adviser who was not a director, an officer or an employee of a government institution or a member of the staff of a minister of the Crown at the time the report was prepared.

69. (1) This Act does not apply to confidences of the Queen's Privy Council for Canada, including, without restricting the generality of the foregoing,

(*a*) memoranda the purpose of which is to present proposals or recommendations to Council;

(*b*) discussion papers the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions;

(*c*) agenda of Council or records recording deliberations or decisions of Council;

(d) records used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

(*e*) records the purpose of which is to brief ministers of the Crown in relation to matters that are before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (*d*);

(*f*) draft legislation; and (*g*) records that contain information about the contents of any record within a class of records referred to in paragraphs (*a*) to (*f*).

(2) For the purposes of subsection (1), "Council" means the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet.

(3) Subsection (1) does not apply to (*a*) confidences of the Queen's Privy Council for Canada that have been in existence for more than twenty years; or (*b*) discussion papers described in paragraph (1)(*b*)(i) if the decisions to which the discussion papers relate have been made public, or (ii) where the decisions have not been made public, if four years have passed since the decisions were made.

Appendix B - Examples of documents judged to be covered by ss 21 and 69

Advice or Recommendations

- a memorandum to a Minister stating that something needs to be decided, identifying the most salient aspects of an application, or presenting a range of policy options on an issue (*Canada (Information Commissioner v. Canada (Minister of Industry)* (2001), 14. C.P.R. 449 (F.C.A.)
- the analysis of various strategic or legal alternatives, and any recommendation made by managers or employees regarding the position the latter should take on a taxpayer's notice of objection (*Newfoundland Power Inc. v. Canada (Minister of National Revenue)* 2002 FCT 692)
- Guidelines for future conduct *(Order No. 281-1998)*
- Action Plans *(Order No. 281-1998)*
- Records detailing how a minister voted in a Cabinet session (*Order No. 03-09)*

Appendix C - Examples of documents judged not to be covered by ss. 21 and 69

- Factual information unless in those rare instances where the facts themselves reveal the advice or recommendations expressed. (Federal Treasury Board Guidelines)
- an economic forecast (s.13(2) FIPPA 1988)
- a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body (s.13(2) FIPPA 1988)
- an observation or remark that does not contain enough substance or precise indication to have any influence *(Deslauriers v. Sous-ministre de la Santé et des Services sociaux du Québec,* [1991] CAI 311)
- personal observations *(Deslauriers v Sous-ministre de la Santé et des Services sociaux du Québec,* [1991] CAI 311)

Annex C: Ireland

Summary

- The Freedom of Information Act 1997, which applies to records held by public bodies, has been in operation for ten years with serious alterations made by means of the Freedom of Information Amendment Act 2003. The changes in the latter Act were mainly concerned with 'meetings of the Government' and the 'deliberations of public bodies' and the alterations to those sections were significant.

- FOI in Ireland is overseen by the Information Commissioner, who has the ability to conduct investigations into the operation of the Act and whose decisions are legally binding on the parties concerned.

- Section 20 of the Act offers a mandatory exemption to records that are concerned with the deliberations of public bodies. The statutory definition of such records includes 'advice', 'opinions', 'recommendations' and the results of 'consultations' with external bodies.

- Section 19 offers a mandatory exemption for records created for or otherwise connected to 'meetings of the Government'. Such meetings include Cabinet gatherings, as well as Cabinet committees.

- Prior to the 2003 Amendment Act, the evidence of any chilling effect, or of a negative impact of FOI upon the provision of full and frank advice, was mixed. The Information Commissioner was certainly of the opinion that the evidence did not support a claim on either count.

- Following the 2003 Act, the anecdotal evidence regarding both claims appears to have increased, despite the policy process having the greater protection that that legislation has to offer. The reasons for this remain unclear.

Introduction

C.1 The Freedom of Information Act 1997 ('the FOIA') was passed in the midst of what the Irish Government of the day intended to be a period of civil service modernisation and in the wake of a tribunal investigation of alleged political corruption. When enacted, it was one of the more liberal FOI statutes on the international stage. However, within five years of its coming into force, due to concerns about the release of Cabinet documents (see below) the Freedom of Information (Amendment) Act 2003 ("the Amendment Act") was passed by the Oireachtas. The Amendment Act was primarily designed to restrict access to records that in the UK would come within the ambit of section 35 of that country's FOI Act, with the exemptions discussed below expanded to cover a broader range of documents and, in some cases, new classes of documents altogether.

The Role of the Irish Information Commissioner

C.2 The Information Commissioner ('the Commissioner') is responsible for overseeing the overall operation of the FOIA and, by virtue of section 36 has statutory powers to commence investigations on his own initiative. The Commissioner also holds the offices of Ombudsman and Commissioner for Environmental Information.

C.3 Following the refusal of a request by a public body (and if relevant, an internal review of that decision), a requester is able to appeal to the Commissioner for a review of the decision. Section 34(14) permits the Commissioner to approve, vary or overturn such a decision, and any ruling or decision is legally "binding on the parties concerned" which "clearly establishes a statutory duty on the part of public bodies to comply with that decision" (McDonagh, 2006). A further appeal to the High Court (and superior courts) is possible, but only on a point of law.

The Scope of the Act

C.4 The FOIA applies to records, not information, and the Act's definition of record is fairly broad, being "clearly aimed at catching all possible manifestations of information, with regard to those involving newer technologies" (McDonagh, 2006).

C.5 A 'Record' is defined to include:

> …any memorandum, book, plan, map, drawing, diagram, pictorial or graphic work or other document, any photograph, film or recording (whether of sound or images or both), any form in which data… are held, any other form (including machine-readable form) or thing in which information is held or stored manually, mechanically or electronically, and anything that is a part or a copy, in any form, of any of the foregoing or is a combination of two or more of the foregoing and a copy, in any form, of a record shall be deemed, for the purposes of the Act, to have been created at the same time as the record.

This definition covers drafts of records as well as informal notes. E-mail is also within the definition.

Deliberations of Public Bodies

The Scope of the Exemption

C.6 Two criteria must be met in order for a department to invoke section 20 as a grounds for refusing disclosure. The first is that the record must contain matter relating to the deliberative process; the second is that disclosure must be contrary to the public interest. The exemption is subject to a public interest override that applies where, in the opinion of the head of the body, the public interest would be better served, on balance, by granting than by refusing the request. The section defines such records as "including" opinions, advice, recommendations and the results of consultations considered by anyone within the body. The use of the word "including" makes clear that this list is by no means an exhaustive one. It also means that falling within the definition provided in the list does not automatically make the item exempt, for it is not a class exemption. The record must have been

considered for the purposes of the deliberative processes of the body in order to come within the terms of the exemption (McDonagh, 2006).

C.7 Section 15 of the Amendment Act inserted section 21(1A) into the FOIA, which allows the Secretary General of a Government department to certify a requested record as containing a matter related to the ongoing deliberative process of a Department of State. Such a certificate requires that access to the records must be refused and cannot be legally challenged, via the High Court or elsewhere. However, such certificates are rarely issued.

Judicial Interpretation of the Types of Record that come within the Exemption

C.8 Judicial interpretation of this provision is particularly relevant to this study, as it is one of the few examples of a provision where the legislature cited an explicit concern to protect the policy process. During the Oireachtas debates on the FOIA, the sponsoring minister said of section 20 that its purpose was:'…to protect certain narrow elements of the policy making process until a decision has been taken.' (Seanad Debates, 1997).

C.9 Whilst there was no distinction made by the minister between policy and government policy, and whilst it has been acknowledged that the Information Commissioner does not restrict his recognition of records as exempt under section 20 to documents related to the policy process, there can be little doubt that the case law related to this section can offer a clear insight into the types of documents that come within an exemption explicitly designed to protect policymaking.

C.10 In *Fitzgerald,* for example, the Commissioner ruled that a background paper on unemployment was within the scope of the exemption, because the department in question: "…considered the paper for the purpose of deciding on its input into policy and strategy in relation to unemployment".

C.11 This accords with a definition of the deliberative process offered by the Commissioner in another case: "Deliberative processes involve the consideration of various materials with a view to making a decision on a particular matter" (*Parents for Justice and Our Lady's Hospital for Sick Children*).

C.12 There is no requirement in the Act that the materials in question contain advocacy of any position or that they offer the explicit opinions or views of the author. It is their role, as much as their content, which is determinative of their status under the FOIA. What both decisions make clear is that it is the fact that the process be one which ends in a decision or, at the very least, where a department expects to make a decision on the issue at the point it commissions the document's creation.

Exceptions to Section 20

C.13 The FOIA provides for five exceptions to the provisions contained in section 20. Whilst there is again no mention of the term "government policy" it is perfectly plain from the wording of the section that the intention of Parliament was intended to assist the policymaking process of ministers and Cabinet, rather than the administrative side of Government, which may have its own policies that are not worthy of such generous protections. If there is a distinction between Government policy and policy *simpliciter*, it is likely to be made in this way, with documents covered by section 20 more likely to be considered within the former category than the latter. Records covered by the exceptions to section 20, on the other hand, are

more likely to come within the latter bracket, and it is for this reason that it is worth briefly examining these exceptions.

C.14 Section 20(2) (a), for example, excepts documents that are required to be published as a result of section 16 of the FOIA, which imposes an obligation to make public the "internal law" of a department. This is essentially the guidelines, rules, precedents, etc. that a department uses in order to assist in the making of its decisions; internal documents relating to the manner in which the department organises and runs itself. Whilst such rules and practices may be considered to be "policy" in a looser sense, their confinement to the inside of a specific department, with no cross-departmental applications, is an indication that they cannot be reflective of, or operative on, the Government as a whole. This single-unit, rather than collective identity of the document, is what lessens its importance, and means that it does not require the strong protections to which more consensual, Government-wide deliberations or decisions are entitled.

Factual Information

C.15 The judicial and regulatory decisions regarding what is defined as factual information for the purposes of the Act give a reasonable indication to UK observers of the kind of records that should be seen as having a passive role in the formulation of policy, in that they provide context, but do not form part of the decision-making debate as such. As the Commissioner has said, factual information:

> would generally include, for example, material presented to provide a factual background to the central topic in a record" going on to say that such information is "distinguishable from information in the form of a proposal, opinion or recommendation" (X and Department of Finance).

Meetings of the Government

C.16 Section 19 FOIA offers strong, specific protection to Cabinet documents, creating a class exemption for such records and giving the term a broad, open meaning. In its original form, the exemption was a discretionary one, but the Amendment Act made it mandatory. The Government cited "confusion" over how to exercise the discretion as the principal reason for the change, but regardless of the motive behind the amendment, the Commissioner concluded that the new regime: "results in trivial and non-sensitive material being exempt from release under the Act." (Information Commissioner, 2004).

C.17 However, since the Information Commissioner had noted prior to the Amendment Act's passage into law that the exemption was being treated by public bodies as a mandatory one, it is unlikely that the legalisation of this approach would have led to an increase in a public servant's confidence in his ability to provide full and frank advice or that it decreased the extent to which any chilling effect was being felt within government.

C.18 Although the section refers to meetings of the Government, it is important for UK readers to understand that the term "government" in the Irish constitutional system is a legally specific one: it means the Cabinet. In the majority of legislation, therefore, mentions of the government would be a reference to the Cabinet. However, through the Amendment Act, Irish legislators have chosen to legislate in a manner which, for the purposes of those Acts, redefines the meaning of government to include a committee of "officials", a class defined as including civil

servants, special advisers and, subject to any regulations which may or may not be promulgated, further classes of persons as yet unknown. The Commissioner has concluded that the expanded definition of government was "overly loose, unclear and inefficacious" and that it contains elements of "constitutional unrecognisability" (Information Commissioner, 2003).

Documents Covered by the Exemption

C.19 The exemption covers any document (with two exceptions) that comes within the following five categories:

1. Records Submitted to the Government (s.19 (1) (a))
2. Communications between Government Members (s.19(1)(aa)
3. Briefing Records (s.19 (1) (b))
4. Statements made at a Government Meeting (s.19 (1) (c))
5. Records of the Government (s.19 (1) (d))

C.20 As the Commissioner made clear in *Sunday Times and Department of Finance,* the exemption is not primarily concerned with a record's contents, but with the "nature of the particular record, the circumstances of its creation and its subsequent use". Although this statement was made in relation to s.19 (1) (a), it could quite easily be applied to documents that have been exempted under each category of the section. It was also, however, an interpretation of the section which has been disputed by some, with Maeve McDonagh pointing out that it does not accord with the definitions of a similar phrase offered in the Australian case law. The implication of this, she claims, is that, if a record was, at any time, proposed to be submitted to Government, it will qualify for the exemption until the ten-year protection (see below) expires (McDonagh, 2006).

C.21 Subsection (1)(aa), was inserted into the FOIA by the Amendment Act and, in accordance with the rest of that legislation, is concerned with increasing the scope of the exemption. Whilst it only applies to communications that concern matters either under consideration by the Government, or records that were proposed to be submitted to the Government it does, however, apply to communications between ministers who are part of a group to which a matter has been referred by the Government (a provision in line with the expansion of the term Government discussed above). Whilst this still ensures a relatively wide protection, it does not create the comprehensive exemption for such records that exists in Canada, for example.

C.22 Subsection (1) (b) was also subject to a revision significant revision. Originally, the FOIA only prevented release of such material when it was used "*solely*" for the purpose of the transaction of Government business at a meeting of the Government. However, the Amendment Act changed this - now it is only required that the material is for use "primarily" for the purpose of such business. The case law of the Commissioner indicates that a great many records previously released would now be exempt under the amended definition.

The Exceptions

C.23 As was referred to above, two exceptions apply to section 19. Records containing factual material are not included (see above for a definition of factual information), nor are records that were created more than ten years ago.

C.24 Under the original Act, the expiry date on the exemption was five years from the point of a record's creation, but, as the fifth anniversary of the Act approached, the Government decided that such a period was too short, and the Amendment Act accordingly extended the life of the section's protection to ten years. As ministers quite rightly pointed out during the debates on the matter, ten years is still a relatively short period of protection when compared to comparable Westminster-style systems such as Canada and Australia.

The Amendment Act - A Response to a Chilling Effect and the Impact of the FOIA on Full and Frank Advice

The Situation Prior to the Proposal of the Amendment Bill

C.25 When passed, the Freedom of Information Act 1997 was widely recognised as one of the more liberal examples of such legislation in the Westminster-style democracies (with the UK, after all, not even having an FOI Act on the statute book). In 2003, however, as the five year deadline approached after which Cabinet documents could be released, the Irish government became concerned. On the basis that the FOIA was too liberal, that Government business was being hampered, and that the ability of its ministers and officials to act freely had been compromised, it established a High Level Review Group (HLRG) of senior, serving civil servants to review the operation of sections 19 and 20.

C.26 This review is understood not to have been an open ended undertaking but, rather, a device for determining what steps were necessary to respond to political concerns. The ensuing report (HLRG Report, 2003) concluded that the FOIA required significant amendment in these two key areas of Government activity, with the following passage a reasonable summary of its reasons it put forward:

> The Group has become aware of concerns that the prospect of relatively early release of [advisory and Cabinet] records may inhibit officials from freely expressing views on particular issues, particularly views which depart radically from the "conventional line." If so, a consequence would be to deprive a Minister of the full range of views which may have been more freely articulated prior to the coming into operation of the Act. It would also diminish the deliberative process which should be encouraging of fresh thinking and the free and frank expression of opinions. It may also lead to Departmental records being less rounded in their treatment of issues.

C.27 Despite the concerns raised in this statement, it is highly qualified in its nature: the words "may" "if" and "could" are used a total of four times. It also refers to "concerns" that early release may inhibit free expression by officials, but offers no evidence to support that this was the case. At the time of the report's completion, the FOIA had been in force for almost five years. It is surprising, therefore, that all that existed were "concerns" that advice would be inhibited.

C.28 In terms of a chilling effect, however, the HLRG seemed to contradict itself on the issue. In a statement to the Joint Committee on Finance and Public Service (HLRG Statement, 2003) it expressed concern that ministers would restrict expressing their views to the Cabinet room, where they were completely protected. However, at the same time, it claimed that FOI would also lead to the creation of records that might not otherwise have existed, in order for officials and ministers to have on record a different position to a final policy with which they disagreed. In effect, the HLRG

claimed that, in some cases, FOI would lead to a decline in records but, at the same time, its operation would also incite record creation that would not previously have been deemed necessary. It also concluded that the FOIA, on the whole, "contributed in a positive way to records management."

C.29 In an earlier Compliance report (Information Commissioner 2001), the Commissioner discussed the results of a survey of FOI officers, which had concluded that they were of the opinion, as a class, that less information was being recorded following the enactment of the FOIA. With regards to their personal conduct, 80 per cent of respondents stated that they exercised caution when recording information, particularly where the material may be "sensitive or embarrassing". However, the Commissioner disputed these findings, claiming that he was aware of "no evidence" that less detailed records were being created, or that public servants were omitting to create records in the first place. To the contrary, he concluded that, in some cases, the level of detail contained in minutes of management advisory meetings had actually increased, and that in one case, minutes were being created when such a practice was unheard of before the FOIA's creation.

C.30 The Commissioner has also, in the form of both decisions and commentary, refuted claims that the FOIA has adversely affected the ability of civil servants to offer full and frank advice. In *Fitzgerald* the Commissioner made clear that he did not, "as a general proposition" accept that the Act would have a negative impact on a civil servant's ability to carry out their functions and that, in order for a public interest argument to succeed on such a ground, the case would have to be "exceptional". To this date, no such cases appear to have materialised.

C.31 It is also worth noting that, since Cabinet discussions are not minuted, it is difficult to see how the lack of minute creation in the present day can be in any way attributable to freedom FOI. It is simply a matter of the Irish government abiding by a decades-old practice. Even if such minutes were to be created, in the light of the mandatory exemption for statements made at government meetings (which is not subject to a public interest test), it is difficult to see how anyone present at such a gathering could have any qualms about their ability to speak freely.

The Debate on the Amendment Act

C.32 The Amendment Act was passed over the very fierce objections of Opposition members, who portrayed the Bill they were debating as a cynical attempt to ensure that embarrassing records were kept secret. The Government, on the other hand made the (unsurprising) argument that this was not the case and that their motivation was the desire to protect the effectiveness of government operation. Interestingly, the arguments made by the government focused as much on the effect of FOI on ministers as it did on the experience of officials.

C.33 During the debate of the Bill in the Dail, the Government repeatedly stressed this latter point, with Charlie McCreevy, one of the ministers responsible for the Bill's passage through Parliament, saying:

> If Ministers know that their opinions could become public knowledge quite soon, they might well decide that they should only make their views known around the Government table. Ministers who were not directly involved in the issues might decide that it was unwise to express their real opinion. In time, it is likely that senior officials and advisors would

take the same approach. (Dail Debates Vol. 563, 2003).

C.34 However, like the HLRG's views, expressed above, this is a qualified statement about events that might take place at some point in the future. Civil servants and ministers had been operating under an FOI regime for five years at the point this statement was made, and yet at no point during the Oireachtas debates, was the Government able to offer solid examples of the negative effects of FOI on the policy process.

C.35 This lack of evidence was frequently cited by the Parliamentary opponents of the Bill, with Deputy Bruton saying:

> There has not been one example offered of the existing legislation harming the decision-making process of Government to justify the far-reaching changes now being made. None have been offered tonight either; all we had were speculative comments about potential issues. We have had the Bill for five years and there is no evidence that decision-making has collapsed, that the Cabinet has had lengthy debates without conclusions or that Ministers have been unwilling to put their views on paper. When officials were asked frankly if Ministers were now unwilling to put their views on papers, they said no - that they had no experience of that happening.

C.36 Whilst it is recognised that the very nature of Government business makes such examples difficult to discover and collate, the fact that the Government's arguments were largely based on what *might* happen, as opposed to what *did* happen is worth considering when considering the weight of such pleas.

Post-2003 - Has the Amendment Act Worked?

C.37 The Joint Committee recently completed an investigation into the FOI regime, which is of particular interest, because one of the Committee's members, Senator Mansergh, a former Fianna Fail special adviser, said:

> "People are more cautious and restrained about what they say on paper and have a distinct preference in many instances for trying to settle matters in un-minuted discussions… it is not a myth that it alters behaviour. It has altered behaviour in quite significant and sometimes detrimental ways." (Joint Committee of Finance and Public Service, 2006).

C.38 The senator went on to offer the anecdote of a particular Government committee that would act in a manner designed to circumvent the FOI regime by only documenting "agreed conclusions instead of keeping minutes that recorded the discussions and inputs from different departmental sources."

C.39 In the same session, Eddie Sullivan, the Secretary General of public service management and development at the Department of Finance, offered a similar, if more succinctly expressed opinion, saying**:** "People are certainly more careful in what they commit to paper."

C.40 If these views are to be accepted, the Amendment Act did not achieve its aims. It was expressly designed to increase the ability of civil servants and ministers to offer full and frank advice and inhibit any chilling effect which may have set in since

1998. According to all the available anecdotal evidence, there has been little change in civil service attitudes to FOI since the Amendment Act was passed. Whether or not those attitudes were as negative prior to 2003 as was claimed to be the case, however, is, as the Commissioner has repeatedly claimed, unclear. Whilst the current Commissioner has agreed that record management practices remain "poor", the previously expressed views of that office would indicate that such poor practices are a result of other factors (Information Commissioner, 2008).

C.41 The statements of Mansergh and Sullivan argue that any chilling effect is a result of the FOIA influencing the minds of individual civil servants and that it reflects their internal views on how FOI affects them personally. However, a report in the *Irish Independent* (Molony, 2006) has indicated that there may also be an institutional chilling effect, with senior officials and ministers actively encouraging less record creation. The newspaper claimed to be in possession of a memorandum generated by the Department of Health, in which the Secretary-General, Michael Scanlan, allegedly told the head of the Irish Health Service Executive: 'it would be better to progress the issues involved by way of further discussions . . . rather than by way of formal written correspondence.'

C.42 It should be said that there is no evidence that the Department of Health or the HSE was engaged in a permanent practice of avoiding the creation of records on sensitive issues. However, such a statement, regardless of it being a response to a particular issue or an example of departmental practice, could be thought on one interpretation to constitute strong evidence that the chilling effect is by no means merely a scare story conjured up by officials to avoid an expansion of FOI.

C.43 To conclude on this point, one simple fact should be stated: as far as anecdotal evidence is concerned: the view of the effects of the FOI regime on the policy process has become far less circumspect since the Amendment Act's creation than was the case pre-2003. This raises the interesting question whether, with the increased protection that legislation has to offer, officials and ministers have created fewer records, not because they fear their release, but because they know that, better protected as they are, they can successfully avoid criticism for doing so. Certainly, the reason for the increase in anecdotal evidence is worthy of investigation.

Appendix A - Relevant Sections of the Freedom of Information Act 1997 and the Freedom of Information (Amendment) Act 2003

19._(1) A head shall refuse to grant a request under *section 7* if the record concerned-
(a) has been, or is proposed to be, submitted to the Government for their consideration by a Minister of the Government or the Attorney General and was created for that purpose,
(aa) consists of a communication-
(i) between two or more members of the Government relating to a matter that is under consideration by the Government or is proposed to be submitted to the Government, or
(ii) between two or more such members who form, or form part of, a group of such members to which a matter has been referred by the Government for consideration by the group and the communication relates to that matter,
(*b*) is a record of the Government other than a record by which a decision of the Government is published to the general public by or on behalf of the Government, or

(*c*) contains information (including advice) for a member of the Government, the Attorney General, a Minister of State, the Secretary to the Government or the Assistant Secretary to the Government for use by him or her primarily for the purpose of the transaction of any business of the Government at a meeting of the Government.

(2) A head shall refuse to grant a request under *section 7* if the record concerned-

(*a*) contains the whole or part of a statement made at a meeting of the Government or information that reveals, or from which may be inferred, the substance of the whole or part of such a statement, and

(*b*) is not a record by which a decision of the Government is published to the general public by or on behalf of the Government.

(3) Subject to the provisions of this Act, subsection (1) does not apply to a record referred to in that subsection-

(*a*) if and in so far as it contains factual information relating to a decision of the Government that has been published to the general public,

(*b*) if the record relates to a decision of the Government that was made more than 10 years before the receipt by the head concerned of the request under section 7 concerned, or

(*c*) if the record relates to a communication to which subsection (1)(*aa*) applies and the communication was made more than 10 years before the receipt by the head concerned of the request under section 7 concerned.

…(5) Where a request under *section 7* relates to a record to which *subsection (1)* applies, or would, if the record existed, apply, and the head concerned is satisfied that the disclosure of the existence or non-existence of the record would be contrary to the public interest, he or she shall refuse to grant the request and shall not disclose to the requester concerned whether or not the record exists.

(6) In this section_

"decision of the Government" includes the noting or approving by the Government of a record submitted to them; "record" includes a preliminary or other draft of the whole or part of the material contained in the record;

'Government' (except in paragraphs (a) and (b)) includes-

(a) a committee of the Government, that is to say, a committee appointed by the Government whose membership consists of-

(i) members of the Government, or

(ii) one or more members of the Government together with either or both of the following:

(I) one or more Ministers of State,

(II) the Attorney General,

and

(b) a committee of officials-

(i) that is appointed by the Government for the purpose of assisting the Government in relation to a particular matter that has been submitted to the Government for their consideration,

(ii) that is requested by the Government to report directly to them in relation to the matter, and

(iii) in relation to which the Secretary General to the Government certifies in writing at the time of its appointment that it is a committee of officials falling within this paragraph;

20 - (1) A head may refuse to grant a request under section 7 if the record concerned contains matter relating to the deliberative processes of a public body (including opinions, advice, recommendations,

and the results of consultations, considered by the body, the head of the body, or a member of the body or of the staff of the body for the purpose of those processes).
(1A) (*a*) Notwithstanding subsection (1), a head shall refuse to grant a request under section 7 in respect of a record in relation to which a Secretary General of a Department of State has issued a certificate in writing stating that the record contains matter relating to the deliberative processes of a Department of State.
(*b*) Where a certificate under paragraph (*a*) is in force and the Secretary General of the Department of State concerned is satisfied that the deliberative processes concerned have ended, he or she shall, by certificate in writing, revoke the certificate and, thereupon, paragraph (*a*) shall cease to apply.
(*c*) A certificate under this subsection shall be final and, accordingly, an application for a review under section 14 or 34 in relation to a decision under paragraph (*a*) shall not lie.
(*d*) A Secretary General of a Department of State shall, in each year after the year 2003, furnish to the Commissioner a report in writing specifying the number of certificates issued by him or her in the preceding year under paragraph (*a*) and the number of certificates so issued under paragraph (*b*).
(2) *Subsection (1)* does not apply to a record if and in so far as it contains_
(*a*) matter used, or intended to be used, by a public body for the purpose of making decisions, determinations or recommendations referred to in *section 16*, (*b*) factual information,
(*c*) the reasons for the making of a decision by a public body,
(*d*) a report of an investigation or analysis of the performance, efficiency or effectiveness of a public body in relation to the functions generally or a particular function of the body,
(*e*) a report, study or analysis of a scientific or technical expert relating to the subject of his or her expertise or a report containing opinions or advice of such an expert and not being a report used or commissioned for the purposes of a decision of a public body made pursuant to any enactment or scheme.
(3) *Subsection (1)* does not apply in relation to a case in which, in the opinion of the head concerned, the public interest would, on balance, be better served by granting than by refusing to grant the request.

Annex D: New Zealand

Summary

- The New Zealand Official Information Act (OIA) is amongst the older (1982) FOI provisions amongst common law countries, and the main remedy against refusal to release is administrative (Ombudsmen) rather than judicial (tribunal or court).

- There is no absolute exemption for Cabinet documents which are not mentioned explicitly in the legislation though clearly comprehended by it (s.9).

- Except where the Act provides conclusive exemption (see s.6 at the Annex A and comparable with UK FOIA provisions), the withholding of all 'official information' is subject to a public interest (PI) test. (The principal policy making areas are listed at s. 9(2) (f) and (g) more economically than in the later UK Act but, unlike the UK Act, the NZ Act makes no explicit mention of the formulation and development of government policy as such.)

- The system is devoid of any established, independent authority with responsibility for the oversight of the operation of the legislation, or for the promotion of its understanding or improvement of its implementation. Whilst formal departmental responsibility rests with the Ministry of Justice, apart from publishing the Directory of Official Information and Charging Guidelines under the OIA, it plays a passive role. Although the Ombudsmen have issued practice advice and publish case summaries and offer training on request, they have developed no larger role.

- The OIA seems to be a fully accepted part of the political landscape. It appears that the non-adversarial, arbitral style of the Ombudsmen has been a crucial factor in creating what at first sight looks both like a more transparent system than in the UK and one where the ombudsman has been particularly attentive to, though not necessarily indulgent of, core political concerns.

Background

D.1 After a considerable history of dissatisfaction with the extent and operation of government secrecy, the OIA's immediate origins lay in a study – the Danks committee - initiated by the Muldoon government in 1978, which reported in 1981. The committee consisted mostly of senior officials, with the exception of Danks himself and Ken Keith, a law professor at Victoria University, though their recommendations (largely implemented in the OIA based on a draft the committee had itself produced) were nonetheless thought to be so sensitive to political concerns that great change was not expected:

> The area which involves protection of 'the interests of effective government and administration' raises some of the most difficult questions in our exercise. There is widespread interest in the activities of government. **The fact that release of certain information may give rise to criticism or embarrassment of the government is not an adequate reason for withholding it from the public**. To run the country effectively the government of the day needs nevertheless to be

> able to take advice and to deliberate upon it, in private, and without fear of premature disclosure. If the attempt to open processes of government inhibits the giving of blunt advice or effective consultation and arguments, the net result will be that the quality of decisions will suffer, as will the quality of the record. The processes of government could become less open and, perhaps, more arbitrary. [Danks Committee, p.19 – original emphasis – quoted White 2007: 30]

D.2 At the same time, the committee viewed 'open government' as a developing, gradualist project designed to promote more open and inclusive government styles in the long term rather than something to be produced by climactic change. This concept influenced a conclusion that appeal should be to the Ombudsmen rather than at first instance through the courts or a judicial tribunal. It is relevant that in 1982 the NZ Ombudsmen - reporting to Parliament - had been established for 20 years and enjoyed a high level of public and political esteem. The Ombudsmen's procedure axiomatically included access to government papers.

D.3 The principal amendments made in 1987 to the original legislation included

- Substitution of a collective for an individual ministerial veto against Ombudsman findings (so far never used) and

- Insertion of time limits for responses to requests from the public and from the ombudsman.

D.4 Also of interest is that the original Act contained a sunset clause (inserted not by Danks but by a Parliament hostile to quangos) for an Information Authority – a body charged with the promotion and oversight of the legislation – which was permitted to expire in 1988 with its oversight function nominally assumed by the Ministry of Justice but stood down there in 1995.

D.5 Relevant too is that from 1996 NZ adopted a new electoral system – Mixed Member Proportional (MMP), an additional member system. This ended the former two party system based on first past the post elections and produced a greater degree of political competition and uncertainty in a constitution where Parliaments cannot last longer than 3 years. NZ commentators have put considerable weight on the significance of this change for political behaviour. One result for the OIA was that politicians and their staff became the second largest group of requesters.

D.6 There have been no significant amendments to the OIA since 1987. A protracted Law Commission review made few recommendations for change in 1997 (Law Commission 1997). There has, however, been other cognate legislation such as the extension in 1987 of a similar disclosure regime to local government itself not covered by the 1982 Act, and the creation by the Privacy Act 1993 of a regime analogous to the UK's data protection legislation. Further, there have been other measures partly prompted by the direction in which the OIA has influenced thinking. Thus, the Fiscal Responsibility Act 1994 which prescribes a regime of financial disclosure to Parliament (including a Pre-electoral Fiscal Update) emerged from OIA requests about the situation (close to parlous) of the Bank of NZ at the time of the 1990 election, and recent criminal procedure legislation features of which were forced, it has been claimed, by OIA decisions that permitted accused persons to access via the OIA prosecution material otherwise unavailable.

How the OIA is designed to work

D.7 The outline is as follows:

- 'Official information' is defined as 'any information held by a department, or by a minister of the Crown in his official capacity or a designated public agency' save for certain limited exclusions, for example library material.

- Eligible applicants are confined to NZ citizens, resident non-citizens, NZ businesses and non-NZ businesses operating in NZ.

- Applicants are not required to specify that they are applying under the OIA.

- There is a fairly modest charging regime for time taken and copies supplied above certain limits.

- Time limits require any necessary transfers between agencies to occur within 10 working days and responses to requesters to be made within 20 working days of receipt of request. (Transfers may also be made from officials to ministers in the circumstances discussed under the subheading immediately below.)

- Appeal against refusal is to the Ombudsman only except for appeal on a point of law to the High Court. (There is no provision for, or practice of access to, internal review of refusal decisions. The view appears to have been that such a mechanism can only complicate and delay appeals without compensating benefits.)

Government/policy material

D.8 Save for the excepted material defined in s. 6 OIA (see Annex A for provisions which are – except for the absence of a PI test in the case of foreign affairs - essentially similar to those indicated at s. 2(3) of the UK FOIA 2000), the release of all other material, even where retention may be permissible, is subject to a PI test. Government/policy material similar to that covered by ss.35 and 36 of UK FOIA 2000 is contained at s. 9 (2) (f) and (g) – see Annex A.

D.9 Uniquely, the published Cabinet Manual provides (see Annex B) for the proactive release of Cabinet documents. It also lays down that ministers may be consulted about any request and should be consulted where Cabinet documents have been requested. But the Manual goes further

> 8.42 On being consulted, the Minister may take the view that information, which the department considers should be released, should not be released. In such a case, transferring the request to the Minister may be the appropriate way forward, if the requirement of section 14 of the OIA 1982 [transfer provision] can be satisfied. Each case of this kind needs to be carefully handled at a senior level within the department, with reference to the Minster if necessary. (Cabinet Manual 2008: 114)

D.10 This is also a unique provision and, when an earlier version made no mention of s. 14, the advice was described as 'questionable' (Price 2005: 16) though the Law Commission's study had raised no objection (Law Commission 1997: paragraph 202). The UK FOIA does not contemplate such a distinction and nor does the UK

Ministry of Justice's Guidance because the assumption is that officials in the UK have no status separate from that of the minister and the question of in effect formally registering disagreement or passing on a responsibility does not arise. From the UK point of view, it is difficult to judge the significance of this procedural difference. For example, however the position is arrived at, the outcome could in practice be the same, though the evolutions gone through in New Zealand may be thought anomalous and open to manipulation.

How the OIA s.9 provisions have worked in practice

D.11 There are two crucial elements in the NZ system: requests are for official *information* as opposed to documents, and the Ombudsman appeal system works, if not entirely to eradicate the adversarial tendencies of judicial systems, to promote arbitral negotiation.

D.12 As to information, the ombudsman has included not only documents and electronically stored data but also knowledge, that is information stored in officials' heads but not committed to any more definite form.

D.13 As to appeals, whilst it is not the case that the Ombudsmen invariably favour requesters – 'The OIA does not provide a front seat at Cabinet meetings' (McGee 2008: 9) - it seems that PI considerations (together with a declaratory provision in favour of release wherever possible in s. 5) have worked to promote an institutional bias towards release even where the whole request cannot succeed, and to release often more than departments might initially wish. (See the final case at Annex B.) It is likely too that the Ombudsmen's experience of involvement in a whole spectrum of complaints against the executive in its various forms gives them a special confidence and authority in dealing with OIA case appeals which form only about a fifth of their total workload.

D.14 At the same time, it is right to bear in mind that Ombudsman review is explicitly a case by case function. (The last paragraph disclaimer of the final case at Annex B is appended to all determinations.) As opposed to a judicial process like the UK Information Tribunal, it does not result in precedent rules of general application. Each case is dealt with afresh as if the matter had never been addressed previously. One recent review points out how this leads to 'gaming' by both departments and requesters who feel able to run old arguments repeatedly in the case of politically sensitive information and has concluded, as the NZ Law Commission refused to do in 1997, that there should be a more "rules-based" approach (White 2007: 231, 267-8).

D.15 At the same time, the Ombudsmen have sought to qualify Nicola White's judgement:

> There will always be game playing in FOI matters, particularly in respect of requests for policy advice or politically sensitive information. It will never be eradicated but it can be discouraged and minimised where a positive attitude to FOI laws and their benefits takes hold. (Donnelly 2007: 6)

D.16 Donnelly has also maintained that rules of general application *have* developed. Whilst it is true that the Ombudsmen have issued quite extensive 'Practice Guidelines' for the OIA, they are largely procedural and not determinative

(Ombudsman 2009b). For reasons that at this distance are not clear, the Ombudsmen have settled for a non-precedent setting route.

D.17 Outside New Zealand, a general view (for example in the ICO's own tender document at p. 3) is that the NZ system has been particularly successful in opening up government, or at least signally more successful than regimes elsewhere. It is certainly true that the OIA is more generously worded than analogous provisions elsewhere, and no other Westminster system gives anything like as much access to Cabinet documents. At the same time, such views do not have unqualified support in NZ. One recent review has pointed to the fact that one in eight cases breached the 20 day deadline, that responses indicated the law was not being observed (especially in respect of PI consideration), and that in one quarter of cases requesters were not told of their rights of appeal:

> More than twenty years after the passage of the OIA, agencies have little excuse for these sorts of mistakes. Taken together, they seriously compromise the OIA's ability to fulfil its constitutional role of promoting accountability, participation and good government. (Price 2005: 49)

D.18 An Ombudsman has himself quoted examples of cavalier attitudes within departments towards the OIA (Donnelly 2007: 6-7).

The 'chilling' effect

D.19 Has FOI and its creation of an expectation that records may be exposed to public view soon after their creation led to a deterioration in the quality of the policy process? Has it led to policy options being trimmed by the excision of bolder thinking, and the 'safe space' diminished so that ministers have less opportunity to engage in full, unfettered consideration of policy options? In turn, has the record become less full and authentic? The most recent thorough review of the NZ experience based on long observation and wide interviewing unhesitatingly accepts that there have been such effects:

> … openness has come at a price. Papers are written differently; if it is obvious that a paper will become public, it will be written with an eye to the public audience. The processes adjust to the new reality…Most interviewees who responded to OIA requests thought carefully about what they wrote down, and about the possible consequences. There was widespread acceptance that some work had been driven off paper…many encountered reluctance to write down 'wild ideas' before testing them at the political level, because the political cost of defending them if they turned out to be flawed was too high. (White 2007: 231)

D.20 On the other hand, this view in so far as it relates to a retreat from offering full and frank advice is not shared by the Ombudsman:

> I do not accept that as a general rule public servants are such a self-effacing class that they will not give and express candid advice and opinions to Ministers except with an assurance of long-term, access across the board, confidentiality for their contributions. (McGee 2008: 12-13)

D.21 At this distance, it is impossible judge between these views. As so often, the argument is conducted in these instances without reference to examples. Moreover,

alleged effects cannot be tested empirically except perhaps by the sort of careful longitudinal study impractical where the 'original', pre-FOI system is long past (as in New Zealand) and exceptionally difficult even where (as in the UK) the FOI regime is less that five years old. In so far as there have been changes in recording practices in the UK which may be said to reflect changes in the conduct of the policy process, they seem to have been the result of multiple factors over a longer period than FOI has been in force though a contribution by that Act could not be ruled out. Whilst there are clear political process differences between the UK and NZ, they are far short of overwhelming and it would be surprising if FOI operated to wholly distinct effects in the two countries.

Policy information: what are the differences of outcome?

D.22 There certainly have been different outcomes. The Fiscal Responsibility Act 1994, arguably the outcome of an Ombudsman case set in motion by an Opposition Leader's request just before the 1990 General Election, sets out government fiscal reporting duties in more explicit ways than in the UK. More significantly, Cabinet Papers are routinely disclosed, either in response to an OIA request, or proactively, and briefings for incoming ministers are now proactively published – and are by no means as anodyne as might perhaps be expected in the UK. New Zealand Treasury and Ministry of Justice examples - http://www.treasury.govt.nz/publications/briefings/2008efs/ and http://www.justice.govt.nz/pubs/reports/2005/briefing-ministers-2005/index.html - are models of carefully considered, trenchant conspectuses of the work of the Departments facing up frankly to known political priorities and setting out clear decision time horizons. One measure of their quality may be seen in a Treasury warning about the trend of criminal justice policy:

> We understand that you wish to act immediately to improve the safety of New Zealand communities as the justice sector is a high priority for you. Your plan for the first 100 days includes seven key legislative commitments. As a result of previous policies, New Zealand currently faces an unsustainable cost in the construction, operation, and wage cost of the infrastructure required by the criminal justice system (specifically prisons, legal aid, courts and police). For instance, for the foreseeable future, the Justice sector has the potential to consume large proportions of the operating and capital funding available to government. In addition, our incarceration rate has increased significantly over the past decade which raises social issues about whether prison is proving to be the optimal intervention and how far we would want to see this rate deviate from other developed countries.

Assuming that the briefs to incoming UK ministers speak with equally candour, it could well be argued that discussion in the UK would benefit from such material being routinely made public there too.

D.23 It follows that FOI operates in New Zealand in a very different disclosure culture, that is one where there is already a great deal more in the public domain than is likely yet to be the case elsewhere, including the UK. That said, reading the compendia of case notes published by the Ombudsman over the years does not encourage an impression of *radical* difference in the ways the *formal* FOI regimes bite. (A selection of 'policy' cases is contained at Annex C.) Whilst a former Chief Ombudsman has made much of the fact that the NZ system is an outcome rather than a class based system (Belgrave 2005), it is not clear that the product of the

FOI regime considered solely by itself is in fact wholly distinct from that of the UK system. In addition, it is right to bear in mind that, whether as a direct result of FOI or not, the policy making process has - as the BBC case study shows – become much more open in style in the UK if by no means to the same extent. Again, looking at the FOI mechanisms simply by themselves, NZ arrangements suffer as the UK does from delayed responses, from 'gaming' manoeuvres in government, and from inadequate official performance, for example over engagement with the PI test. The same claims are made about the 'chilling' effect and with the same lack of evidence.

D.24 Though in some ways the NZ system is less *publicly* adversarial, that is a consequence of the lack of an appeal on the merits of the case against the outcome of an Ombudsman's investigation; there is nothing comparable to the UK's Information Tribunal. Nor is it beyond argument that some claimed OIA 'hits' like the Fiscal Responsibility Act and the recent criminal procedure legislation may be uniquely attributable to OIA proceedings. Although an OIA request played a part in the run up to the former, it was by no means the sole spur. Similarly, whilst some elements of the recent criminal procedure legislation – pre-trial disclosure – may have been influenced by OIA cases, much of the rest of the legislation (such as majority verdicts, and qualification of the double jeopardy rule) can be viewed as catch up measures bringing NZ criminal law abreast similar jurisdictions elsewhere. Finally, the OIA has not, uniquely, increased trust in government. On the contrary, very similar reservations are entertained in NZ about its effects on that score (White 2007: 298) as appear to be emerging in the UK.

Conclusions

- Whereas the political systems of the UK and NZ are rooted in the same Westminster model, there are important differences which arise in NZ from the operation of a unicameral legislature filled by means of a distinct electoral system, and all the differences that are likely to arise in the less populous and extended political and judicial system of a country whose population is one fifteenth the size of the UK's.

- The principal virtue of the NZ system – a single tier review/appeal structure and a less adversarial system managed by an inquisitorial official (an Ombudsman) – is likely to be more acceptable in NZ because of the character of its political system. In addition, scale and probably more acute resource efficiency considerations work to encourage simplicity. On the other hand, it may be argued that the quality and consistency of Ombudsmen decisions on OIA complaints may have suffered from lack of review by a body like the Information Tribunal, or active courts and judicial review.

- The case by case argument in NZ has a very familiar ring to UK ears. In addition, apart from such distinct differences as the publication of Cabinet papers – a very considerable difference made all the greater by the UK government's decision on 23 February 2009 to veto a Tribunal decision in favour of releasing Iraq Cabinet minutes - and briefings for incoming administrations, outcomes so far seem roughly comparable. This is no doubt attributable both to a still very similar political system and to FOI criteria which, if more crisply expressed than in the UK, are virtually the same in practice.

- The arbitral style of the NZ Ombudsman seems to be an important reason why his jurisdiction is not challenged. Behaving similarly where appropriate is open to and, of course, practised by the Information Commissioner. The point here could be that an adversarial system does not have to be *confrontational*. On the other hand, the avoidance so far of judicial review is remarkable and, though consistent with acceptance of the Ombudsmen's authority, could also be consistent with a tendency to a degree of unspoken collusion that is sometimes present in arbitral systems – especially if there is any intent to avoid judicial review.

- In the longer term, the UK's Information Tribunal should - theoretically at least - create a tighter, more bounded review process at all stages of consideration. It is the lack of such a mechanism which remains the principal reservation about the NZ system's operation.

Annex D1: Extracts from New Zealand Official Information Act 1982

4. Purposes

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

(a) To increase progressively the availability of official information to the people of New Zealand in order—

(i) To enable their more effective participation in the making and administration of laws and policies; and

(ii) To promote the accountability of Ministers of the Crown and officials and thereby to enhance respect for the law and to promote the good government of New Zealand:

(b) To provide for proper access by each person to official information relating to that person:

(c) To protect official information to the extent consistent with the public interest and the preservation of personal privacy.

6. Conclusive reasons for withholding official information

Good reason for withholding official information exists, for the purpose of section 5 of this Act, if the making available of that information would be likely—

(a) To prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand; or
(b) To prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by—

(i) The government of any other country or any agency of such a government; or
(ii) Any international organisation; or

(c) To prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial; or
(d) To endanger the safety of any person; or

(e) To damage seriously the economy of New Zealand by disclosing prematurely decisions to change or continue Government economic or financial policies relating to—

(i) Exchange rates or the control of overseas exchange transactions:
(ii) The regulation of banking or credit:
(iii) Taxation:
(iv) The stability, control, and adjustment of prices of goods and services, rents, and other costs, and rates of wages, salaries, and other incomes:
(v) The borrowing of money by the Government of New Zealand:
(vi) The entering into of overseas trade agreements.

[Paragraph (d) was substituted, and paragraph (e) inserted, as from 1 April 1987, by section 3 Official Information Amendment Act 1987 (1987 No 8).]

9. Other reasons for withholding official information

(1) Where this section applies, good reason for withholding official information exists, for the purpose of section 5 of this Act, unless, in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available.

(2) Subject to sections 6, 7, 10, and 18 of this Act, this section applies if, and only if, the withholding of the information is necessary to—

(a) Protect the privacy of natural persons, including that of deceased natural persons; or
(b) Protect information where the making available of the information—

(i) Would disclose a trade secret; or
(ii) Would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information; or

(ba) Protect information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information—

(i) Would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public interest that such information should continue to be supplied; or
(ii) Would be likely otherwise to damage the public interest; or

(c) Avoid prejudice to measures protecting the health or safety of members of the public; or
(d) Avoid prejudice to the substantial economic interests of New Zealand; or
(e) Avoid prejudice to measures that prevent or mitigate material loss to members of the public; or
(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; or
(h) Maintain legal professional privilege; or
(i) Enable a Minister of the Crown or any Department or organisation holding the information to carry out, without prejudice or disadvantage, commercial activities; or
(j) Enable a Minister of the Crown or any Department or organisation holding the information to carry on, without prejudice or disadvantage, negotiations (including commercial and industrial negotiations); or
(k) Prevent the disclosure or use of official information for improper gain or improper advantage.

[Subsection (2) was amended, as from 1 April 1987, by section 4(2) Official Information Amendment Act 1987 (1987 No 8) by omitting the expression "8(1)".

Subsection (2)(b) was substituted, as from 1 April 1987, and subsection (2)(ba) inserted, as from 1 April 1987, by section 5(1) Official Information Amendment Act 1987 (1987 No 8).

Subsection (2)(g)(i) was amended, as from 1 April 1987, by section 5(2) Official Information Amendment Act 1987 (1987 No 8) by inserting the words "or members of an organisation".

Subsection (2)(g)(ii) was amended, as from 1 April 1987, by section 5(3) Official Information Amendment Act 1987 (1987 No 8) by inserting the words ", members of organisations".
Subsection (2)(i) and (j) were substituted, as from 1 April 1987, by section 5(4) Official Information Amendment Act 1987 (1987 No 8).]

Annex D2: Extract From New Zealand Cabinet Manual

Proactive release of Cabinet material

8.4 Cabinet material (Cabinet and Cabinet committee papers and minutes) may be released proactively, most often through publication online. The proactive release of Cabinet material may result from a Minister directing its release, or from the relevant department seeking the Minister's approval to release it. The key principles for proactive release of Cabinet material follow.

Only Ministers may approve the proactive release of Cabinet material (they may wish to first discuss the proposed release with Cabinet colleagues). The person administering the release of the material should: assess the information in light of the principles in the Official Information Act 1982, the Privacy Act 1993, and the *Security in the Government Sector* manual; and consider deleting any information that would have been withheld if the information had been requested under the Official Information Act 1982.

Where appropriate, papers and relevant minutes should be published together so that readers have the background to the decisions made by Cabinet. The material released should preferably show that it has been approved for release.

If the material is to be published online, the current *New Zealand Government Web Standards and Recommendations* should be followed (see www.e.govt.nz/standards).

Annex D3: Illustrative 'Policy' Cases

The most recent Compendium (the 14th) contains the following:

> Case W44962 - Information in transcripts of the PM's press conferences held to be official information after PM had refused an Opposition request. [Routinely released on No 10 website in UK.]
>
> Case W 48162 – Treasury comments on early draft Cabinet paper on Kyoto Protocol withheld to protect policy-making process. Involved Department of PM and Cabinet. Refusal upheld on grounds that PI balance in this instance came down in favour of protecting the effective conduct of public affairs. [Same outcome likely in UK.]
>
> Case 50611 – Official information can include oral advice not yet reduced to writing. [Not tested in UK.]

Earlier examples include:

> Case 423 (7Th Compendium 1986) – Refusal of text of draft PQ answer upheld, though Ombudsman refused to rule definitively as to future requests.
>
> Case 714/728 (8th Compendium 1987) – Requests for draft Children and Young Persons Bill plus product of public consultation, in which one of requesters had already participated. Outcome was that the draft Bill and analysis of consultation completed by an outside public relations consultancy was released.

The full text of case involving defence policy issues is the following –

Case Notes [W46771] - by: Office of the Ombudsmen

14th Compendium [pp. 138-141] 2007

Official Information Act 1982

Ombudsman accepts that Chief of Defence Force's recordings of free and frank comments to Prime Minister about proposed restructuring of NZDF may be withheld to maintain their constructive working relationship

Case Reference: W46771

Chief Ombudsman: Sir Brian Elwood

MP requested information on the restructuring of the NZDF – two letters from the Chief of Defence Force to the Prime Minister regarding draft reports to be published were identified as at issue – letters withheld under s.9(2)(g)(i) – Ombudsman asked to investigate and review decision – letters reviewed and distinction drawn between substantive comment about draft reports and minor editorial suggestions – substantive comments were recordings of Chief of Defence Force's free and frank discussions with Prime Minister – Chief of Defence consulted – Chief acknowledged that part of his role is to advise Prime Minister but would not have reduced comments to writing if thought they would be made public – Ombudsman accepted free and frank comments needed to maintain constructive working relationship with Prime Minister – Ombudsman formed view s.9(2)(g)(i) applied to substantive comments but not to remaining information – DPMC released letters with deletions.

Background:

A Member of Parliament wrote to the Prime Minister in 2001 requesting information on "the proposed or actual reorganisation, re-equipment and/or restructuring of the Defence Force."

The requester was advised that there were two letters written by the Chief of the Defence Force to the Prime Minister falling within the scope of his request, and that both these documents contained free and frank advice that was provided to the Prime Minister in confidence in the course of preparing final reports on the future of the New Zealand Defence Force (NZDF). The requester was advised that the letters were withheld on several grounds, including section 9(2)(g)(i) of the OIA.

Investigation:

The Ombudsman asked the Prime Minister to provide him with a copy of all the information falling within the scope of the request and a report detailing her precise concerns with release. Given the NZDF's reliance on section 9(2)(g)(i), the Ombudsman explained that it was necessary for him to determine whether:

- disclosure of the information at issue would be likely to inhibit future "free and frank expression of opinions";
- such future free and frank expressions of opinion would be necessary to maintain the "effective conduct of public affairs"; and
- in the circumstance of the particular case, the interest in withholding was not outweighed by countervailing public interest considerations favouring disclosure.

The Ombudsman asked the Prime Minister to address these issues with reference to the content of the advice, the context in which it was generated and the stage reached in the policy making process to which the information related.

Upon receipt of the two letters at issue, the Ombudsman considered carefully their contents. He noted that they contained:

- minor editorial corrections to the reports, and
- substantive comments regarding the data relied upon and assumptions made in the draft reports.

The process of identifying and correcting incidental errors and ambiguities was, in the Ombudsman's view, part of the normal editorial process of preparing reports for publication. As such, the Ombudsman did not consider these minor editorial suggestions could accurately be described as "free and frank expression of opinions" nor was it likely that the release of this particular information would inhibit the future "free and frank expression of opinions" required for section 9(2)(g)(i) to apply.

However, with respect to the remaining substantive comments made in the letter, the Department of Prime Minister and Cabinet (DPMC) maintained that they should be withheld under section 9(2)(g)(i) of the OIA. DPMC explained that the letters were written in the context of a review of the defence policy framework conducted by the Government in 1999/2000. The letters discussed certain draft reports relating to the review process that the Government intended to make publicly available. DPMC advised that the Chief of Defence Force had met with the Prime Minister to discuss certain issues relating to the accuracy of those draft reports and had been asked to follow up, in writing, the comments

made during that meeting. DPMC stated that the discussion and the resulting letters were based on the assumption that these communications were to remain confidential, particularly as the comments being recorded were free and frank. Further, DPMC said that the Chief of Defence Force had indicated that, while the advice in the letters was such that it was important to give, he believed it was also advice that needed to be given in confidence. If there was a likelihood that his free and frank comments would end up in the public domain, DPMC said that the Chief of Defence Force had made it clear he would be constrained from giving similar advice in the future.

In light of this advice, the Ombudsman considered it appropriate to seek the views of the author of the letters directly. He therefore wrote to the Chief of Defence Force for his comments.

In response, the Chief of Defence Force acknowledged that it was part of his role to provide the Minister of Defence with advice on military and command issues and, as such, he must be "utterly frank in that advice to the minister…and 'free' in the sense that [he] must be at liberty to express [himself] in a blunt and compelling manner." However, he told the Ombudsman that he could not do this if his commentary was then to be made public. The Chief of Defence Force also clarified the circumstances surrounding the generation of the letters. He said he had discussed a number of issues with the Prime Minister during their meeting and had been asked to record those issues in writing so they could be worked through methodically. He explained that he would not have agreed to commit his comments to paper if he had any expectation that they would later be made public, as he considered them particularly free and frank in nature. In his view, doing so would have been too destructive to the working relationship between the Chief of Defence Force and Ministers.

Finally, the Ombudsman considered whether there were considerations rendering it desirable in the public interest to make the information available. The Ombudsman considered there was a public interest in the accountability of Ministers and officials for the processes which were followed in preparing these reports for publication.

Outcome:

The Ombudsman formed the view that there was no good reason under the OIA to withhold the minor editorial comments made in the two letters. However, he considered that the Prime Minister was entitled to withhold the remaining substantive comments about the data relied upon and assumptions made in the reports from both letters under section 9(2)(g)(i) of the OIA. He was not persuaded that the public interest he had identified as favouring release of these comments outweighed the reasons in support of withholding the information.

DPMC advised that it accepted the Ombudsman's view and released both letters to the complainant with the substantive comments deleted.

The Ombudsman reviewed the letters as released and advised DPMC that, in his view, three further pieces of information could be released without prejudice to the provisions of the OIA. DPMC reviewed its decision and duly released this further information.

However, the complainant maintained that the remaining substantive comments should also be released. After reviewing this information, the complainant's further submissions, and the concerns of DPMC and the Chief of Defence Force, the Ombudsman formed the final view that section 9(2)(g)(i) provided good reason to withhold the information and he concluded his investigation and review on this basis.

Comment:

The basis for the Ombudsman's view that the substantive comments contained in the letters could be withheld were:

- the Chief of Defence Force's categorical assertion that, had he thought this information would be released, he would not have committed his concerns to paper; and

- the Chief of Defence Force's submissions regarding the need to maintain a constructive working relationship with the Prime Minister and his concern that release of the information would be destructive of that relationship.

This case note sets out the Ombudsman's view on this specific case. It records a view formed on the particular facts of that case in light of the then applicable laws and policies. It is not to be taken as establishing any legal precedent for the view an Ombudsman may form on a similar matter in the future.

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