

The Constitution Unit

**Commentary on:
the Freedom of Information White Paper**

Your Right to Know (Cm 3818)

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Commentary on The Freedom of Information White Paper
Your Right To Know (Cm 3818, December 1997)

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This commentary concentrates on the major issues rather than on points of detail. In general it is a very positive and promising White Paper. The positive features include:

- **Wide scope**, embracing the whole of the public sector, including local government, the Health Service, Quangos and the public utilities
- **Universal access** allowing an individual or corporation (including overseas bodies) to request any document or information, regardless of date
- **Effective enforcement**, by an Information Commissioner with power to order disclosure, and no Ministerial override
- **Exemption provisions** based on an injury test ("substantial harm"), rather than exempting whole classes of documents
- **A liberal charging regime**
- **The requirement to give reasons** for administrative decisions.

The White Paper offers a very generous FOI regime - probably the most generous yet seen amongst countries that have introduced Freedom of Information. It is almost too good to be true. That is the central concern: that this is an unreal White Paper which has been brought out without full understanding or wholehearted commitment on the part of Departments or their Ministers, or proper consultation of the other public bodies which will be affected. It is an aspirational White Paper, in which the staffing and resource implications are never mentioned; but without adequate resources FOI risks becoming a hollow shell. So against the many positive features of the White Paper must be set a lesser number of concerns focused on:

- **Resources**, on which the White Paper is completely silent
- **Collective Ministerial commitment**, without which FOI risks being still born
- **Commitment of other public bodies and agencies**, which will not be forthcoming without proper consultation
- **Publicity and public information**, without which requesters will not know about the Act or how to use it.

Staffing and Resources

FOI is not cost free. It is rarely a matter simply of finding the file and copying the relevant papers. What takes time is reviewing the file for exemptions and consultation with third parties. This can be very time consuming: in Australia even after 12 years of operation, they estimate that it still takes an average of 12 staff hours to process each request, and in Canada they estimate an average of 50 staff hours to process a request for general information, and 7 staff hours for a personal file. In the first couple of years

it takes longer, because it takes time for staff to familiarise themselves with the operation of the legislation and to become efficient in processing requests:

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

The table shows how in Australia and Canada the number of requests built up steadily over the first three years; and over the same period the processing of FOI requests became considerably more efficient. These early years in Canada and Australia may be a better guide to the likely volume of requests than the UK's recent experience of the Code of Practice, because the Code has received minimum publicity and few people have been aware of it. To allow for the UK's larger population, the Australian figures need to be multiplied by about 3.5 and the Canadian figures by 2.2. Extrapolating in this way suggests that with proper publicity and a liberal charging regime the UK might receive 50 - 70,000 requests in the first year, rising to 60-120,000 in the second. 80-90% of these requests are likely to be for personal files, concentrated on a few big case work departments: DSS and the Benefits Agency, the Immigration Department, the Inland Revenue, and the Child Support Agency.

In Canada no staff increases were authorised when the legislation was first introduced; but the legislation has an opportunity cost, because the civil servants working on FOI have to be taken from other functions. After 3 years the total number of FOI staff in Canada was about 250; and in Australia about 350. These Canadian and Australian figures suggest that Whitehall Departments might need to allocate between 500 - 1,000 civil servants to cope with the equivalent of federal FOI requests; with further staff needed to handle the equivalent of provincial and state requests.

Fees and Charges

The volume of requests will be significantly affected by the Government's charging policy. In Australia and Canada most personal files are available free of charge. The Government is proposing an application fee of no more than £10, and then a further fee of a maximum of £10 for giving access to an individual's personal information (para. 2.31). Even modest fees of this kind may be a significant disincentive. When after 3 years Australia increased the charges for general information, the number of requests fell significantly. We have no parallel example for the impact of a fee increase on demand for personal files.

Another factor which may dampen the number of requests in the UK is the Government's proposal to exclude access to the personnel records of public authorities by their employees (para. 2.20). In Canada one-third of all initial Privacy Act requests come from Federal Government employees; and in Australia personnel requests by civil servants account for 15% of all FOI requests. But even if excluded under FOI, similar requests may be made in the UK under the Data Protection Act, when it is amended to give access to paper records. How much use public servants make of this new right will depend on how much information they already receive through open personnel management practices (access to performance appraisal, promotion markings, etc.).

The two tier charging regime proposed in Para. 2.23 is certainly worth pursuing, because the majority of requests for general information will come not from individuals but from business, the media and organisations. But there will be major problems of definition, to distinguish private from public interest requests (e.g. by the media or by charities, many of which are incorporated); large from small corporations; and to charge some unincorporated bodies, such as City firms of solicitors and accountants.

The White Paper envisages that public authorities will be able to set charging schemes within parameters laid down in subordinate legislation (para. 2.32). This central guidance should include a uniform charging scheme as a default option for those public bodies which do not want or do not need to devise their own: because of the skewed pattern of demand, in the first few years at least one half of all public bodies are unlikely to receive any requests.

Scope (Chapter 2)

The White Paper adopts a commendably broad definition of public authorities (para. 2.2). There are only a few points which require clarification or further extension:

- Parliament is to be excluded, on the grounds that its deliberations are public; but its administrative functions are not. The public might reasonably want information about the administration of Parliament (as with the administration of the courts), and this should be made available upon request
- Although the Security Services are to be excluded, their archives should be made available through the Public Record Office. In other countries such archive material has been released and is of particular interest to historians

- The duty to publish information (para. 2.18) should include a duty to publish departmental manuals and staff instructions - a duty which is already imposed administratively under the Code.

Exemption Provisions (Chapter 3)

The Government has usefully set out in Annex D to the White Paper a table showing how the exemption provisions in the current Code of Practice compare with the exemptions in overseas FOI laws. It would be helpful if the Government could include a final column showing which areas will be covered by the seven ‘specified interests’ proposed in the White Paper; and in the case of areas which apparently are not covered (e.g. effective management of the economy, effective management and operation of the public service) why no protection is required.

Investigation and Prosecution of Crime

Instead of relying on the usual exemption to protect the interests of law enforcement, the White Paper proposes a blanket exclusion for “information relating to the investigation and prosecution functions of the police, prosecutors, and other bodies carrying out law enforcement work such as the DSS or the Immigration Service. The Act will also exclude information relating to the commencement or conduct of civil proceedings” (para. 2.21). In this regard the White Paper is more restrictive than overseas legislation; and inconsistent with its own guiding principle towards exemptions, which is critical of “a ‘class-based’ approach towards exemptions where a whole category of information or record is protected, leaving no scope for partial disclosure.....” (para. 3.3). It is hard to resist the inference that this egregious exclusion results from special pleading law enforcement by agencies such as the Crown Prosecution Service, Treasury Solicitor and the police. For such an exceptional approach to be justified, there needs to be evidence that the law enforcement exemption in other countries has not worked, and that a blanket exclusion is required.

Policy Advice and Cabinet Papers

Per contra, the approach in Australia and Canada has been to include a specific category exemption for Cabinet papers in addition to a general exemption for policy advice. If Cabinet papers in the UK are not normally to be disclosed, then it might be simpler and more direct to make them the subject of a similar specific exemption. This would not prevent Cabinet papers being released; nor would it prevent the Information Commissioner enquiring into the claim that a particular document was a Cabinet paper, and if necessary ordering its disclosure. It would merely shorten the argument when Cabinet papers were an issue; and might help to create a more realistic expectation of what kind of policy papers were likely to be released.

Personal Information and Data Protection (Chapter 4)

The interaction between FOI and the right to privacy is critical. Chapter 4 states the Government's intention "that the regimes for Freedom of Information and personal privacy accommodate each other" (para. 4.6); but there is little detail on how this will work in practice. The situation is not helped by policy on data protection and privacy continuing to be the responsibility of the Home Office. In July 1997 the Home Office published the Government's proposals for a new Data Protection Act with no reference to their likely impact on FOI (Cm 3725). If a properly integrated policy is to be developed, responsibility for privacy, data protection and freedom of information needs to be brought under the same roof; and in time this could be extended to cover the whole of the Government's information policy. Because of the wider interests of the Office of Public Service in improving the way Government manages information (*Better Government* initiative), it makes sense for the central department to be the OPS.

One small example of the overlap has already been given: the exclusion of public service personnel files from the FOI regime (para. 2.20) may be negated by their inclusion under the new Data Protection Act. Another would be the commitment "to allow an individual to be consulted in cases where his or her personal information privacy might be affected by an FOI application" (para. 4.8). This has huge resource implications, because many personal files (e.g. in Immigration or the Child Support Agency) contain references to third parties, and an obligation to consult on each request could prove impossibly burdensome for staff.

Information Commissioner (Chapter 5)

The Information Commissioner will have all the necessary powers. It is important to ensure that he or she has adequate resources; and that the Commissioner is not overloaded with too many functions and with duties which properly belong to Government. In particular Para. 5.11 will require the Information Commissioner to:

- " • Publish an annual report on the operation of the Act
- Promote greater public awareness and understanding of the Act ".

These should be the responsibilities of Government and not of the Commissioner. It is for Government to publicise the Act, and to inform citizens of their rights under it; and it is for Government to report to Parliament on its operation. That is recognised in Para. 7.4, which sets out the key tasks which will fall to the FOI Unit in implementing the Act. The Unit will need to remain in being after that as a continuing source of information, training and advice, and as the main promoters of the new culture within Whitehall. It would be an admission of failure if the Commissioner had to perform these functions by default. The White Paper must be right in saying "in general however, we believe that the role of champion should best be supplied by Government itself" (para. 7.6).

