

**Commentary on Draft
Freedom of Information Bill
(Cm 4355, May 1999)**

by Professor Robert Hazell

July 1999

£5.00

Contents

SUMMARY OF KEY POINTS	5
INTRODUCTION	7
Overseas legislation used as the basis of comparison	8
SCOPE	9
Range of agencies covered	9
Retrospective access	9
Security and intelligence	9
ROUTINE PUBLICATION OF GOVERNMENT INFORMATION	9
Publication schemes	9
Reasons for administrative decisions	10
PRESUMPTION IN FAVOUR OF DISCLOSURE	11
Purpose clause	11
‘Neither confirm nor deny’	12
THE EXEMPTION PROVISIONS	13
General	13
The public interest test	14
Policy advice and internal deliberation	14
Information about investigations	15
Commercial information	15
Third party notification procedures	16
Creation of new exemptions	16
The harm test	17
Partial access by deletion of exempt material	18
THE INFORMATION COMMISSIONER AND THE TRIBUNAL	18
ACCESS TO PERSONAL FILES	19

PUBLIC RECORDS	20
ADMINISTRATIVE DEFENCES, AND FEES AND CHARGES	20
MONITORING AND REPORTING REQUIREMENTS	21
CONCLUSION	22
APPENDIX 1	25

Summary of Key Points

- The Government is concerned how freedom of information (FOI) will work in practice. In assessing its practical impact the UK can draw on the experience of four other Westminster systems which have introduced FOI: Australia, Canada and New Zealand (which all legislated in 1982), and Ireland (1997).
- These four countries offer a range of tried and tested models. This Briefing compares their FOI regimes with the UK's draft Bill. In general the Bill is found to be restrictive by international standards. The Government appears to have made no systematic attempt to learn from overseas experience.
- Open features of the draft Bill are its very wide scope, covering all public bodies, as well as the health service and local government; and granting full retrospective access, to past as well as future records.
- The Bill relies heavily on publication schemes requiring public authorities to specify the information they will publish as a matter of routine. Websites will make a huge difference to the amount of information which can be routinely published.
- The Bill would be strengthened by a purpose clause, which has proved a useful aid to interpretation in Australia and New Zealand; and by a statutory duty to help requesters in identifying the information they want.
- The exemption provisions differ from international practice in their reliance on discretionary disclosure; in the very broad exemptions for policy advice, information from investigations and commercial information; and the lack of statutory protection to give notice and consult with business before releasing commercial information it has supplied to government.
- The new test of prejudice or simple harm need not be raised to 'substantial harm', but should be qualified by an overriding public interest test.
- The Information Commissioner should have power to order disclosure of exempt information where the public interest requires it, and power to mediate as well as to issue formal decision notices.
- The interface between the freedom of information and data protection regimes is excessively complicated and needs rethinking. Access rights to personal information should be as simple as possible for individuals to understand and for officials to administer.

Introduction

- 1.1 The introduction of a Freedom of Information Act is not a step into the unknown. The UK has the benefit of five years' direct experience of the operation of the Code of Practice on Access to Government Information, seven years' experience of the Environmental Information Regulations 1992, and twelve years' experience of the Local Government (Access to Information) Act 1985. It is also able to benefit from the 15 years' experience of Australia, Canada and New Zealand, each of which enacted FOI laws in 1982. And closer to home there is the recent experience of Ireland, whose FOI Act 1997 came into force in April 1998.
- 1.2 These overseas models provide a good international yardstick by which to measure the Government's Draft Freedom of Information Bill published on 24 May. They have been selected rather than countries like the USA or Sweden because they operate within a Westminster constitution based on the Westminster conventions of Ministerial accountability to Parliament, collective Cabinet responsibility and an impartial and politically neutral civil service. Their legislation operates within a very similar political and administrative culture; it has stood the test of time, and been adjusted in the light of experience. It offers a range of tried and tested models which between them can be said to represent sound international practice of an FOI regime within a Westminster system.¹
- 1.3 This Briefing is not a comprehensive commentary on the Draft FOI Bill. It focuses mainly on those elements which stand out by comparison with the FOI laws in these other Westminster systems, and explains the main differences between them. The Briefing highlights those aspects of the draft Bill which are more open as well as those which are more restrictive when judged by this international yardstick. Nevertheless the overall conclusion is inescapable: this is in general a restrictive bill when judged by international standards. The main restrictive features are:
 - the absence of a purpose clause, as an aid to interpretation, and to support the Government's contention that 'the scales are weighed decisively in favour of openness'
 - the absence of a statutory duty to advise and assist requesters
 - exempt information is to be disclosed on a voluntary basis, not when the public interest requires it
 - unusually restrictive class exemptions for policy advice, information from investigations and commercial information
 - the ability to add to the exemptions by order.

¹ Australia, Canada and New Zealand have the added advantage, for research purposes, of having been closely studied by UK civil servants on travelling fellowships to study the operation of FOI: Robert Hazell (1986-87), Dick Baxter (1993-94), Andrew McDonald (1996-97). This means there is a strong understanding of how their legislation works in practice, not just on paper, and of its impact on the workings of government.

1.4 The other general comment is that the Government still does not fully understand the difference between open government and freedom of information. Open government means the Government publishing information largely for its own purposes: information that the Government thinks we need to know or might like to know. Freedom of information requires the Government to disclose information which we decide for ourselves we want to know. The two may not coincide because many FOI requests are made in pursuit of private interests, and not the public interest. Freedom of information is random, citizen-driven, and often hard to predict. But significant elements in the draft Bill are based on the paternalistic model of open government, with the Government deciding what we need to know. Examples include the reliance on proactive publication schemes (cll 6-7), on multiple codes of practice (cll 38-41), the absence of a statutory right to reasons for administrative decisions (cl 6(3)(b)), and control over the disclosure of policy advice remaining in the hands of Ministers (cl 28). The bill would offer a clearer statutory framework if the Government could more firmly disentangle the two approaches.²

Overseas legislation used as the basis of comparison

1.5 Reference is made in the Briefing to the following overseas legislation (abbreviated in brackets):

Australia³ Federal Freedom of Information Act 1982, as amended by the FOI Amendment Acts in 1983, 1986 and 1991, and by the Privacy Act 1988 ('Aus')

Canada⁴ Federal Access to Information Act 1982 and Privacy Act 1982 ('Can')

New Zealand Official Information Act 1982, as amended by OIA Amendment Acts in 1983, 1987, and Privacy Act 1993 and Privacy Amendment Act 1996 ('NZ')

Ireland Freedom of Information Act 1997 ('Ire').

² For a fuller explanation of the difference between Open Government and Freedom of Information see Appendix 1. In relation to publication schemes the Government does separate the two approaches: Consultation Document para 37 explains that "Material made generally available in accordance with a publication scheme would be exempt under clause 16 from the right of access. As such, the authority would not be obliged to respond to requests for it on an individual basis".

³ All the Australian States have their own FOI laws, which are briefly summarised in Australian Law Reform Commission Report no 77: Open Government - A Review of the federal Freedom of Information Act (1995), paras 3.14 to 3.21.

⁴ In Canada the following provinces have FOI laws: Quebec, New Brunswick, Ontario, Nova Scotia, Newfoundland, Manitoba, Saskatchewan, British Columbia.

In the UK reference is made to:

Open Government Code of Practice on Access to Government Information 2nd ed 1997 ('the Code'), and

The White Paper *Your Right to Know: The Government's Proposals for a Freedom of Information Act*, Cm 3818, December 1997 ('the White Paper').

Scope

Range of agencies covered

- 2.1 The draft Bill has very wide scope in terms of the agencies to be covered. It goes far wider than the Code. It applies to central government, the health service, local government, schools, colleges and universities, and will apply to all public bodies, and to private bodies exercising public functions. It is comparable to the scope of the Irish and New Zealand legislation, which was extended progressively to local government and the health service. (The federal legislation in Australia and Canada is not directly comparable, since the federal government has no jurisdiction over large parts of the public service).

Retrospective access

- 2.2 The draft bill is fully retrospective, granting access to past as well as future records. It is more generous than Ireland, which only grants retrospective access to personal records; and Australia, which initially was not retrospective.

Security and intelligence

- 2.3 The draft Bill excludes the Security Service, the Secret Intelligence Service and Government Communications Headquarters (GCHQ) from its operation (Sch 1 para 1); and exempts as a class all information supplied by or covering the work of the security and intelligence agencies and eight related bodies (cl 18(3)). In this respect it is more restrictive than Canada and New Zealand, where the Security Intelligence Services are both subject to the legislation; but on a par with Australia, where the security and intelligence service are both excluded.

Routine publication of government information

Publication schemes

- 3.1 This is a novel feature of the draft Bill. Cl 6 requires all public authorities to specify the classes of information they will publish as a matter of routine. Their publication schemes must be approved by the Information

Commissioner, but the bill is silent about the consequences of her disapproval; she has no power to impose her views. The Commissioner may try to raise everyone's game by approving model publication schemes for a whole class of public authorities.

3.2 Publication schemes could prove to be a powerful vehicle for greater openness, depending on how much public authorities choose to include. Their effectiveness might be judged by categories like the following:

- publication of departmental manuals, rules and internal guidance (which should already be available under para 3(ii) of the Code)
- routine publication of government contracts (contract price, unit prices, performance standards)
- publication of all information which has been the subject of previous FOI requests.

Websites will make a huge difference to the amount of information which can be routinely published. They offer the possibility of disseminating large quantities of information at much lower cost than conventional publication. Here the UK does have an advantage over those countries which passed their FOI laws in the early 1980s, simply because of the new technology. The Canadians tried hard using conventional publication; but their experience was that reading rooms, required under their legislation, were hardly used. A number of government departments and public authorities are already making good use of websites to publish their departmental manuals, papers of advisory groups, inspection reports etc.

Reasons for administrative decisions

3.3 A number of FOI laws contain a general duty to give reasons: for the refusal of a grant or licence, the denial of planning permission etc.⁵ In the UK there is such a requirement in the Code, which commits departments to give reasons for administrative decisions to those affected (para 3(iii)).⁶ This was reflected in the White Paper as one element in active disclosure: it promised that public authorities would be required, as a matter of course, to give reasons for administrative decisions to individuals and companies affected by them (para 2.18). In the draft Bill this has become more muted: in preparing its publication scheme a public authority is merely required "to have regard to the public interest ... in the publication of reasons for decisions made by the authority" (cl 6(3)(b)). It also appears to remove the right of individuals to require a statement of reasons in their own case: the commentary on cl 6 explains that "Material made generally available in accordance with a publication scheme would be exempt under clause 16 from the right of access.

⁵ The duty to give reasons should not be seen simply as an adjunct to FOI. See Andrew le Sueur, "Legal Duties to give Reasons", (1999) Current Legal Problems.

⁶ Subject to exceptions mentioned in a footnote to the Code: "There will be a few areas where well-established convention or legal authority limits the commitment to give reasons, for example certain decisions on merger or monopoly cases or on whether to take enforcement action".

As such, the authority would not be obliged to respond to requests for it on an individual basis" (para 37 of the Consultation Document).

- 3.4 This is much weaker than Australia, Ireland and New Zealand, where there is a general statutory right to be given reasons. In Australia this is under the Administrative Decisions (Judicial Review) Act 1977, which entitles an aggrieved person to obtain a written statement of reasons. In New Zealand (s23) and Ireland (s18) an individual or company is entitled to a written statement of reasons, and of the findings on material issues of fact.

Reasons for refusal of FOI requests

- 3.5 Separate from this is the specific issue of a right to reasons for refusal of FOI requests, and notification of the right to appeal. The draft Bill contains neither. Cl 15 merely provides that when a public authority is relying on an exemption it must "give the applicant a notice stating that fact and specifying the exemption". A refusal notice under cl 15 will be very bald. Overseas legislation is much more helpful. It requires that a requester is given the reasons for the refusal, and the grounds in support (findings on material questions of fact, particulars relating to the public interest); the name and designation of the person dealing with the request; and information about the requester's rights to review and appeal (Aus s 26, Ire s 8, NZ s 19).

Presumption in favour of disclosure

Purpose clause

- 4.1 The draft Bill contains no purpose clause or statement of its objectives. The Home Office Summary proclaims that "overall the scales are weighed decisively in favour of openness".⁷ But no such declaration is to be found in the Bill. Such a clause has been a useful aid to interpretation in Australia and New Zealand, where it has helped officials when applying exemptions and enabled the appeal authorities to say to departments that in cases of doubt they should lean in favour of disclosure.
- 4.2 The Australian s 3 provides:
"3. (1) The object of this Act is to extend as far as possible the right ... to access to information ...
(2) It is the intention of the Parliament that the provisions of this Act shall be interpreted ... and any discretions shall be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information."

The New Zealand ss 4 and 5 provide:

"4. The purposes of this Act are ...

⁷ Consultation Document Cm 4355 para 14.

- (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 their officials...
 - (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.
5. The question whether any official information is to be made available ... shall be determined ... in accordance with the purposes of this Act and the principle that the information shall be made available unless there are good reasons for withholding it”.

4.3 In both countries the purpose clause has been invoked by the appeal authorities. In New Zealand the distinctive aim “to increase progressively the availability of official information” (s 4(a)) has been successfully used by the Ombudsman over the years to keep the openness agenda moving forward, so that policy papers which might not have been available in the early years are now routinely released.

4.4 The Australian Law Reform Commission has recommended that the Australian purpose clause should also explain the underlying purpose of the access right as a basic underpinning of democracy which “enables people to participate in the policy and decision making processes of government, opens the government’s activities to scrutiny, discussion, review and criticism and enhances the accountability of the Executive”.⁸

4.5 If a purpose clause is not acceptable to the Government, then an alternative approach might be to have a more expressive long title to the Bill. This is the approach adopted in Ireland, where the long title to the Freedom of Act 1997 asserts its purpose as being “... to enable members of the public to obtain access to the greatest extent possible, consistent with the public interest and the right to privacy, to information in the possession of public bodies ...”.

‘Neither confirm nor deny’

4.6 The draft Bill gives requesters a right “to be informed by the public authority whether it holds information of the kind specified in the request” (cl 8(1)(a)). This ‘duty to confirm or deny’ does not apply in relation to certain of the exemptions, where the mere disclosure of the existence or non-existence of a record could itself betray an important secret. The usual justification is law enforcement or national security: a member of a terrorist group or a drugs smuggler would find it useful to know whether or not the Security Service had a file on him, even if the contents of the file remained wholly protected. It is the practice of an agency like the New Zealand Security and Intelligence

⁸ *op cit* para 4.6.

Service neither to confirm nor deny the existence of a personal file: a practice upheld by the New Zealand Ombudsman.

- 4.7 What is unusual in the draft Bill is the range of exemptions to which this response has been extended. Public authorities will be allowed neither to confirm nor deny the existence of information not merely in the case of intelligence records (cl 18), law enforcement (cl 26), national security (cl 19), and defence (cl 21): but also in the case of premature publication (cl 17), international relations (cl 22), intergovernmental relations within the UK (cl 23), economic interests (cl 24), investigations (cl 25), court records (cl 27), policy formulation (cl 28), communications with the Sovereign (cl 29), health and safety (cl 30), personal information (cl 31), information given in confidence (cl 32), commercial information (cl 33), and information whose disclosure is prohibited by other statutes (cl 35). In fact the only exemption where such a response will not be permitted under the draft Bill is in the case of legal professional privilege.
- 4.8 It is hard to believe that a 'neither confirm nor deny' response is needed across such a wide range.⁹ If the Government nevertheless maintains its position, it would be simpler in drafting terms to allow such a response across the board, rather than specifically authorising it in the case of each of 17 exemptions (cf Can AIA s10(2)).

The exemption provisions

General

- 5.1 All FOI legislation contains exemption provisions to protect the effective working of government and the interests of third parties. These can be summarised under the headings of protecting national security and international relations; the economic interests of government; free discussion within government; and protecting third party information (personal information about individuals, and commercial information supplied by companies). Some play was made in press commentary on the draft Bill about its 22 exemption provisions, compared with the 15 in the Code of Practice and seven in the White Paper. In fact they cover broadly the same sets of interests, with some simply being more sub-divided than others. What is different in the draft Bill is its treatment of the public interest; the very broad definition of three exemption provisions, for policy advice, information from investigations and commercial information; and the lack of statutory protection to give notice and consult with third parties.

⁹ NZ s 10 permits such a response in relation to seven exemptions, leaving 11 exemptions where a 'neither confirm nor deny' response is not allowed.

The public interest test

- 5.2 Most freedom of information laws allow for the release of exempt information; and a number go further in requiring the release of exempt information if the public interest requires it (for example, if it discloses evidence of wrongdoing). This overriding public interest test is found in Australia, New Zealand and Ireland: not in relation to all the exemption provisions, but the majority of them.¹⁰ The effect of a public interest test is to prevent public authorities from automatically withholding information just because it falls within an exempt class; they are forced to weigh up the likely consequences of disclosure, and to reach a balanced judgment based on the circumstances of the particular case.
- 5.3 The draft Bill also permits the release of exempt information, in cl 14 under the heading 'Discretionary disclosures'. It differs from the public interest test in overseas legislation in three respects:
- it is not integrated into the exemptions and the decision making process, but appears as a second stage, which may lead officials to consider disclosure on public interest grounds as a discretionary afterthought
 - disclosure is voluntary. Public authorities may disclose exempt information if they feel like it, but not otherwise. The Information Commissioner can ask them to think again, but will have no power to order them to disclose information in the public interest
 - public authorities may ask for the reasons behind the request, and any use which the requester proposes to make of the information; and may impose conditions restricting the use or disclosure of the information by the requester. This is unknown in overseas legislation, where the motive of the requester is deemed to be irrelevant,¹¹ and disclosure is free of conditions, and amounts to publication to the world at large.

Policy advice and internal deliberation

- 5.4 All FOI laws contain an exemption for internal deliberation and advice. It is known in the UK as the exemption for policy advice, but it goes wider than that. Its purpose is captured in cl 28, which exempts information whose disclosure would inhibit the free and frank provision of advice; the free and frank exchange of views; or otherwise prejudice the effective conduct of public affairs. That is fairly standard: to operate effectively governments must be allowed to think and argue in private. But cl 28 has three unusual features:
- the decision whether such information is exempt is to be taken by Ministers. This is unprecedented by international standards: and will send

¹⁰ In Australia the public interest test applies in relation to five of the exemption provisions; in New Zealand twelve; in Ireland to eight. In Canada there is no overriding public interest test.

¹¹ See for example Ire s 8(4): "In deciding whether to grant or to refuse to grant a request -
(a) any reason that the requester gives for the request
(b) any belief or opinion as to what are the reasons for the request, shall be disregarded".

a strong signal to Whitehall about Ministerial nervousness. FOI works best where it is 'mainstreamed' into other work, and FOI decisions are taken at working level: with only the most difficult cases being referred up, but to more senior officials, never to Ministers. UK Ministers are already overloaded, and have more important things to do than to consider FOI requests

- there is no exception for purely factual material, or for statistical, technical or scientific reports (cf Aus s36(5) and (6), Ire s20(2))
- the exemption extends to "the operation of any Ministerial private office" (cl 28(1)(d)).

Information about investigations

5.5 Cl 25 of the draft Bill contains a very wide exemption for information collected for the purposes of an investigation. It covers investigations of all kinds. Cl 25(1) covers criminal investigations; but cl 25(2) goes far wider, extending to any investigation into improper conduct or legal wrongdoing; Companies Act enquiries; accident enquiries; investigations to protect health, safety and welfare at work; and enquiries into misconduct or mismanagement of charities.

5.6 This class exemption is unprecedented, both in its scope and duration. There is no equivalent in overseas legislation. One of the purposes of FOI is to allow individuals and interest groups access to government information which will enable them to make their own judgments about health hazards, about the safety of public transport, the performance of public utilities, the safety of foods and medicines. This is achieved through granting access to inspectors' reports and the underlying evidence collected during an investigation. The main exception is that access will not necessarily be granted if it would prejudice the conduct of future investigations, or an ongoing investigation (under the general exemption for internal deliberation and the effective conduct of an agency's operations, described above); or if it might prejudice future legal proceedings. There is also a specific exemption for information about investigative techniques: "testing or auditing procedures or techniques" (Can s 22), or information whose disclosure would "prejudice the effectiveness of procedures or methods for the conduct of tests, examinations or audits"(Aus s 40(1)(a) and (b)).

Commercial information

5.7 Cl 34 of the draft Bill protects trade secrets, and information whose disclosure "would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)". Tight protection of trade secrets is standard; but the blanket protection for other commercial information is not found elsewhere. All overseas legislation contains an exemption to protect commercial information, but subject to qualifications. The qualifications vary, but typically narrow the exemption to information whose disclosure would place the supplier at a competitive disadvantage, would cause material financial loss, would prejudice the future supply of

information, or would prejudice the outcome of contractual negotiations (Aus s 43, Can s 20, Ire s 27, NZ s 9(2)(b)). In addition Canada specifically provides for disclosure of the results of product or environmental testing; and information relating to public health, public safety or the environment, if the public interest in disclosure clearly outweighs in importance any financial loss or prejudice to the competitive position of the supplier (AIA s 20(2) and (6)).

Third party notification procedures

- 5.8 In the USA the 1966 FOI Act contained no requirement on government to notify business suppliers of commercial information before their information was released in response to an FOI request. Companies had to resort to the courts in what became known as 'reverse FOI' lawsuits to win the right to be notified and consulted: a right subsequently enshrined in an Executive Order.
- 5.9 Other countries have learnt from the American experience and their FOI laws provide that a department or public authority which is minded to release commercial information must first notify the business which supplied it (Aus s 27, Can s 28, Ire s 29). The supplier can make representations to the department, and supply evidence of the damage which would be caused to its business by the disclosure. If these objections fail it can appeal: in Australia to the Tribunal, in Canada to the Federal Court, in Ireland to the Information Commissioner.
- 5.10 The draft Bill contains no statutory duty to notify or consult the suppliers of commercial information before disclosing it, and no right of appeal for third parties to the Information Commissioner. Third party notification is to be left to the Home Secretary's code of practice, which must include provision for "consultation with persons to whom the information requested relates or persons whose interests are likely to be affected by the legislation" (cl 38(2)(c)). Business is likely to press for a statutory requirement, which would offer surer protection. And business would be well advised to press for a right of appeal to the Commissioner, which would be quicker and cheaper than seeking an injunction from the courts. An injunction would only lie for breach of confidence, which is a narrower and separate ground from the exemption for commercial information; and giving the courts a role in place of the Commissioner flies in the face of the Woolf reforms encouraging the speedy, cheap and informal resolution of disputes.

Creation of new exemptions

- 5.11 Cl 36 enables the Home Secretary to create additional exemptions by order. These additional exemptions may be used to block requests already in the pipeline (cl 36(4)). There is no equivalent fallback provision in any of the overseas legislation. Nor have they found the need in subsequent reviews to create any new exemptions.

The harm test

5.12 The White Paper proposed a test of substantial harm for all the exemptions except that for internal deliberation and advice. In the draft Bill this has been downgraded in two respects:

- many of the exemptions are now class exemptions, exempting whole categories of document regardless of whether harm would be caused by disclosing the document in question. There are now eight class exemptions, which are listed in Table 2 of the Consultation Document accompanying the draft Bill
- the six harm-based exemptions are now based upon a test of whether disclosure 'would, or would be likely to prejudice' the interest in question, instead of the White Paper test of substantial harm.

5.13 The number and range of class exemptions is unusual. Most legislation has some class exemptions (only New Zealand has none), but tries to keep them to a minimum. It does this by specifying exceptions, to narrow the class as much as possible; and by making them subject to an overriding public interest test. For example the exemption for policy advice in Australia (s 36) and Ireland (s 20) does not apply to factual and statistical material, scientific and technical reports etc; and can only be invoked if disclosure would be contrary to the public interest (for example, advice can more readily be released once a decision has been made).

5.14 The new level of harm required is broadly in line with overseas tests, none of which require a test of 'substantial harm'. In Australia the test is whether harm 'would, or could reasonably be expected to' result. In Canada the test is similarly one of 'could reasonably be expected to' or 'would prejudice'. Ireland uses a variety of tests, depending on the individual exemption: 'could reasonably be expected to result', 'could prejudice', 'would be likely to prejudice', 'might be prejudicial'. New Zealand similarly uses 'would be likely to prejudice', 'would be likely unreasonably to prejudice', 'is necessary to avoid prejudice' depending upon the context. On the harm test it is the White Paper which did not reflect international practice. The Government can point strongly to the overseas legislation in support of its revised policy, and of its argument

"that a single omnibus substantial harm test cannot work properly for the range of exemptions proposed: what is 'substantial' in relation to law enforcement, for example, may not be in relation to international relations. We consider therefore that the harm concerned must be capable of being interpreted clearly in line with the exemption in question" (para 35 of the Consultation Document).

This approach is borne out by overseas practice, which uses a variety of tests depending upon the context of each exemption. But part of the context overseas is that many of the exemptions incorporate an overriding public interest test, which raises the threshold again. Information can be withheld only if disclosure would cause the harm in question, and it would be contrary

to the public interest. The draft Bill's test of prejudice or simple harm would be a lot more acceptable if it were qualified by an overriding public interest test, as it is in most of the overseas legislation.

Partial access by deletion of exempt material

- 5.15 The overseas legislation provides that where a document contains exempt material which should not be disclosed, the public authority should prepare a copy with the exempt material deleted and disclose the remainder (Aus s 22, Can s 25, Ire s13, NZ s 17). There is no such provision in the draft Bill. There needs to be: it is a useful reminder to officials that the presence of exempt material does not exempt a whole document, and that they should disclose as much as possible. The Government may argue that because the draft Bill provides for access to information, not documents, such a provision is unnecessary. But it has proved useful in other FOI regimes which are similarly predicated on access to information, such as New Zealand (s 17).

The Information Commissioner and the Tribunal

- 6.1 There are two main features in the enforcement machinery which are unusual by international standards. First, its relative complexity. The draft Bill provides for a three tier system of appeals: first to the Information Commissioner; then to the Information Tribunal; and lastly on a point of law to the High Court. Other countries have just two tiers. The three tiers proposed here have been adopted from the data protection regime (see cl 5); and the case for a tribunal may be strengthened by ECHR Article 6 (right to a hearing). But in other countries the Commission or Commissioner can hold a formal hearing when required, without convening a separate Tribunal. There is also complexity in the procedures to be followed by the Commissioner, who can issue decision notices (cl 43), information notices (cl 44), enforcement notices (cl 45) and practice recommendations (cl 41). These very detailed procedures required of the Commissioner must risk importing excessive legalism. It is not clear whether in addition to these formal powers the Commissioner or her staff will be able to mediate between the parties. Mediation has proved useful in other jurisdictions, disposing of a third or one half of all cases. But if there is hesitation about how far a Commissioner can go in encouraging settlements, it may be better to authorise a mediation procedure in statute (eg Ontario's 1987 Act, s 51).
- 6.2 The other weakness is the Commissioner's limited enforcement powers in respect of discretionary disclosures under cl 14. The Commissioner has no power to order disclosure of exempt information where in her view the public interest requires it. She can merely ask the public authority to think again. This would not matter if discretionary disclosure was seldom going to be an issue. But the Government see it as central to the whole FOI regime. In many if not most of the complaints which come to the Information Commissioner discretionary disclosure will be all that can be relied on. It will be extremely frustrating for requesters and for the Commissioner if

public authorities simply go through the motions; but with no further action possible by the Commissioner, balancing the public interest considerations is a matter only for the public authority. This is a weaker arrangement than exists in Australia, Ireland and New Zealand, where the enforcement body can make decisions on public interest grounds. It is also weaker than under the Code, where the Ombudsman can recommend that exempt information should be disclosed in the public interest.¹²

Access to Personal Files

- 7.1 Access to personal files is likely to be the main area of demand. In Australia and Canada 80 to 90 per cent of all requests are for personal files, from individuals wanting to see their pension, tax, immigration or social security records. In Ireland just over half of all requests have been for personal files. It is very important that these access rights should be easy for requesters to understand and for civil servants to administer. But cl 31 which regulates access to personal information is one of the most impenetrable in the draft Bill. This is because the Government wishes to channel all requests by individuals to see their own files ('subject access') through the Data Protection Act 1998. Cl 31 opens with a roadblock denying individuals access to their own personal data which is going to be very difficult for individuals to understand. It may be that most individuals will not need to understand it, because they will simply ask to see their file. But administrators will need to understand it, and to understand whether to channel a request under the FOI or data protection regime.¹³ And individuals will want to understand when their requests are refused.
- 7.2 The interface between the Freedom of Information Act and the Data Protection Act should not have to be so complicated. Canada and New Zealand both have separate statutory regimes for subject access (in their Privacy Acts) and for freedom of information. They demonstrate some of the difficulties for requesters and also for administrators of having dual statutory regimes; but they are models of clarity by comparison with what is proposed for the UK. One difficulty is that the Data Protection Act 1998 was enacted with no regard to the forthcoming freedom of information regime. Another is that the Government's main aim was formal compliance with a directive which was itself poorly drafted, the EC Data Protection Directive 95/46/EC, without any desire to improve it or go any further. Given that the Data Protection Act is itself now to be amended by the Freedom of Information Bill it would be better to start afresh and rewrite both regimes, with the primary

¹² Part II preamble second para.

¹³ In Ireland individuals can seek access to their personal information under either the FOI Act or the Data Protection Act 1988 (s 46(3)). It remains to be seen whether this dual access regime will survive when Ireland legislates to implement the EU Data Protection Directive. Dual access was contemplated in the UK White Paper (para 4.6), but is firmly ruled out in the draft Bill.

purpose being that access rights should be as simple as possible to administer and to understand.

Public Records

- 8.1 The draft bill will reform the rights of access to public records. The 30 year rule will remain in place as the date at which records are made available at the Public Record Office but the terms on which access is provided will change. The access provisions in the Public Records Act 1958 are to be repealed and replaced with the FOI right, which will run beyond 30 years. Some exemptions - including those for policy advice and inter-governmental relations - will cease to apply after 30 years, but most will remain in place.
- 8.2 The overseas FOI and archives statutes do not provide a clear model to follow here. The Canadians have one integrated right of access to information regardless of age, whereas Australia and New Zealand have an access right to older records in archives legislation which is distinct from their FOI laws. The Australians prepared a new Archives Act 1983 in tandem with their FOI legislation, producing an access regime for archives users which has many of the features of modern public information laws. The same could not be said of our own Public Records Act 1958, and now is the time to begin the task of producing archival legislation for the new information environment.
- 8.3 If international experience does not provide a clear benchmark against which to measure the public records provisions of the draft bill, there are two questions we can ask of them: will it work and does it strengthen or weaken access rights? The first question is difficult to answer because the bill deals with public records so briefly. We are told that there is more to follow on public records and this must surely be the case if we are to have a system which defines clearly the roles and responsibilities of departments, the Public Record Office and the Advisory Council on Public Records. The case for additional clauses on these issues - or another code of practice - is strong. In terms of access rights, the public will for the first time have the right to appeal against the non-disclosure of public records, but some of the exemptions which will remain in force beyond 30 years seem to represent a step back on current practice. The class exemptions for investigations (clause 25) and honours (clause 29) do not seem to have parallels at present.

Administrative defences, and Fees and charges

- 9.1 FOI is not cost-free. That was the main weakness of the White Paper, which made no mention of resources. The draft Bill and Consultation Document do address the issue, estimating the cost of implementing the proposals in the Bill to fall within the range of £90m to £125m a year. This includes the costs of processing requests, of publication schemes, training programmes, and the costs borne centrally by the Home Office and Information Commissioner.

The costs will be spread across the public sector as a whole and are to be absorbed within existing resources.

- 9.2 The bill contains some administrative defences (eg cl 13, which offers protection against repeated or vexatious requests), but in general it relies upon the charging regime to deter unduly burdensome requests. The Government proposes to set a ceiling of £500, to provide an upper limit on the amount of resources to be devoted to dealing with an individual request. But the Government also proposes only to charge for the marginal cost of locating and disclosing the information; and in general to charge no more than 10% of that marginal cost. Judging by overseas experience this may prove to be a fatal flaw. Other countries have charged only for search time and copying, and found that it represents only a fraction of the total cost. In most FOI cases the bulk of administrative time is spent not in locating the information, but in reviewing the file for possible exemptions, and in consulting with other agencies and third parties. This can be very time-consuming. Australia reckoned it spent 18 staff-hours per FOI request, and Canada divided this into an average of 33 hours for requests for official information, and 7 hours for personal files.¹⁴
- 9.3 The Government has allowed itself some room for manoeuvre in that where disclosure is made under the discretionary provisions in cl 14 the fee need not be subject to the 10% ceiling, but can be set at a reasonable level. But this will only add to a requester's sense of aggravation if he feels that the fee is discretionary as well as the disclosure. Another lesson from overseas is that the fee structure must be simple, universal and easy to administer. And it should charge for all the time spent processing a request: for search, review, consultation, preparation of documents and provision of access. Australia is the only country which has learnt this lesson. In 1986 they introduced a robust new charging policy with a \$30 application fee, \$15 p.h. search time, \$20 p.h. review time. They also introduced a \$40 application fee for internal review, and a \$200 fee for appeals to the Tribunal.

Monitoring and reporting requirements

- 10.1 Australia, Canada and Ireland all have well documented FOI regimes. They publish annual reports of the number of requests received, the number granted in whole or in part, and the number refused. In Australia and Canada these figures are published in respect of each agency, so that it is possible to see which agencies receive the most requests, and how they respond in terms of disclosure or refusal. In Australia they also collect statistics about the usage of the different exemptions. This is thanks to

¹⁴ Both sets of figures are for 1986-87, after four years of operation. The actual time spent on each request is probably less than these figures suggest, because they are derived from top-down calculations based on the total number of FOI staff. Source: Treasury Board (Canada); Attorney-General's Department (Australia).

detailed reporting requirements written into the legislation (Aus s 93), and in Canada to a requirement for an annual report on the operation of FOI from the head of each government institution.

- 10.2 No such requirements are contained in the draft Bill. If the legislation is to be properly monitored there will need to be a statutory requirement to ensure that basic data are collected, and the Home Office will need to ensure that they are collected on a common basis (the data collected under the Code were unsatisfactory for this reason). The reporting requirements need not be as detailed and onerous as in Australia, but there should be a statutory requirement to collect and publish each year the number of requests received, the number granted in whole or in part, and the number refused.

Conclusion

- 11.1 The UK could have learnt a lot from overseas experience, as Ireland did when they prepared their Freedom of Information Act 1997. What is striking in the draft Bill, particularly by comparison with the Irish Act, is how little reference is made to the overseas legislation. No systematic attempt has been made to learn the lessons from Australia, Canada and New Zealand. Many of the worst features are home grown. Equally striking, the draft Bill fails to learn the central lesson that for ease of administration, administrative defences are more important than exemption provisions. This lesson has recently been reinforced by the Irish experience in their first year.
- 11.2 In focusing so much on a restrictive set of exemptions the draft Bill erects a Maginot line in the wrong place. It assumes that these exemptions will protect the workings of government; but they will not necessarily stem the flow of requests. Because the draft Bill is light in terms of administrative defences, and liberal in its charging regime, it may lead to significant extra demands on resources, but frustration and disillusionment in terms of what is disclosed. A tricky FOI request can be very time-consuming in reviewing the files for exempt material, whether the process eventually results in disclosure of one-quarter or three-quarters of the information sought.¹⁵ The Government risks having the worst of both worlds: the draft bill will raise expectations, generate a much higher volume of requests than under the Code, but still leave most requesters feeling dissatisfied.
- 11.3 The signals in the draft Bill for public servants are all consistently negative. In part this reflects the policy stance; but it is exacerbated by the draftsman's minimalist approach. Draftsmen tend to think only in terms of legal meaning and effect; but FOI Acts need to convey more than that. That is why a

¹⁵ In Canada the Treasury Board estimated the average staff hours per Access request in the first four years of the legislation to be 119, 74, 53, 33. This shows how efficiency improved with experience; but it also shows how time-consuming FOI requests are, even in a relatively restrictive regime.

purpose clause is important, to signal strongly the need for a change of culture. And it is why the key elements of the new FOI regime all need to be in statute, and not relegated to codes of practice. Even if the legal effect is essentially the same, the political effect is different. Civil servants are very astute in reading political messages; the messages in the draft Bill will not encourage them to be more open. The general tenor goes directly against all the messages in the *Modernising Government* White Paper, which is meant to encourage civil servants to be more outward looking, innovative and risk taking.

11.4 The other distressing feature of the draft Bill is what a mess it has become. It is evident that the difficult process of turning an aspirational White Paper into a more realistic draft Bill degenerated into a downward spiral, in which departments were allowed to plead for additional exemptions and other special provisions with no one seriously holding the ring. It would have been defensible for the government to decide on a tighter regime than that set out in the White Paper. But what should then have been an orderly retreat appears to have become a rout. The end result is a bill which contains no clear or coherent scheme, and is tortuous and very difficult to understand. The draft Bill purports to fulfil the White Paper proposals, but so undermines them in the detail that the thread has got lost.

11.5 The crucial thing which has got lost is a sense of the scheme as a whole, and of the balance between freedom of information, privacy and the effective working of government. That is why a purpose clause is so important to restore the balance. Elizabeth France, the Data Protection Registrar, identified this very clearly in her evidence to the Select Committee:

The draft Bill establishes how the data protection and freedom of information regimes are to interact but it leaves the balancing point to be established by those implementing, and those overseeing, the regime ... At present the Registrar believes the balance favours data protection and privacy.

The Registrar's view is that it would be desirable to have greater clarity about the intention of the freedom of information legislation. The Government's stated approach is to encourage openness ... The draft Bill establishes a 'general right of access to information held by public authorities', but there is nothing in the draft Bill itself which sets this in a broader context or indicates that the Bill is an instrument promoting disclosure. It does not incorporate the policy approach that openness is to be encouraged.

11.6 Fortunately there is an opportunity to remedy matters, because this is only a draft Bill. The Home Office has shown, in the Human Rights Act, that it can develop policy proposals which maintain a careful balance between competing values; and turn them into an elegantly drafted and beautifully clear statute. A Freedom of Information Act should be equally clear, for citizens and administrators alike.

Appendix 1

1. There is a distinction between freedom of information and open government.
2. Open government as practised in Britain means the government engaging in widespread consultation before formulating policy or coming to a decision, and publishing Green Papers and White Papers and other discussion documents to that end. The government does this largely for its own purposes. It wants to test its proposals and refine them in order to formulate a better policy or come to a better decision; and it wants to assess public reaction and the strength of opposition to particular proposals. Exposing proposals to be hammered on the anvil of public opinion thus has a two-fold purpose: it sharpens up the proposals and it softens up public opinion.
3. Open government does not, pace the Croham directive, mean the government publishing the background papers once a decision has been reached. By this stage the government no longer has an interest in sounding out public opinion; the officials involved are much too busy getting on with the next thing; and the public are not particularly interested in the background to last year's or last week's news. I cannot think of any instance in the Home Office where background papers have subsequently been published, except in the context of an enquiry or similar post mortem.
4. Open government thus means publishing what the government wants the people to know about a particular proposal or decision. Freedom of information means entitling the people to ask for what they want to know. The two things are very different. What the people want to know is very rarely what government thinks they want to know. FOI requests show that there is little interest in policy advice. The main area of demand is for personal files. That apart, requests tend to be for things like contractual information and technical reports. To take a Home Office example, the Immigration Department would be just as likely to receive requests for its computer plans for the next 10 years (from a software supplier), or for details of proposals to increase part-time working (from the trade union side) as they would to receive a request for forecasts of future immigration numbers of refugee asylum cases.
5. By focusing so much on policy advice, the debate in this country gives a misleading impression of what FOI is likely to be used for. Requesters tend to be more concerned with pursuing private interests than with matters of wider public interest. Because requests seldom touch on matters of political controversy, the great majority are granted, as can be seen from the following table:

FOI refusal rates in Australia, Victoria and Canada 1982-83 to 1986-87

	1982-3	1983-4	1984-5	1985-6	1986-7	1987-8
Australia:	13.2%	6.6%	6.2%	5.2%	4.6%	3.1%
Victoria		27.5%	19.2%	11.0%		
Canada:						
Access		10.0%	9.4%	7.0%	6.0%	
Canada:						
Privacy		3.8%	2.9%	1.3%	0.5%	

[Note the steady decline in the refusal rate in each country as departments grow accustomed to the legislation.]

6. Open government is not a substitute for FOI, because the government cannot predict what people will want to know. Nor is FOI a substitute for open government. Governments which have introduced FOI do not dismantle their information machines. They continue to publish the same amount of White Papers, discussion documents etc as before. They have to: "open government" is essential for any democratic government in the late 20th century, because of the need to consult so many interest groups in the course of decision-making.
7. FOI is an adjunct to open government, an optional extra. It is understandable why the British Government has tried to meet demands for FOI by demonstrating how much more open the government is; but the extra information published in the name of open government is unlikely to be the sort of information which people would seek through FOI. In particular, no government is ever likely voluntarily to publish information which undermines its case.

This note was first written for Sir Brian Cubbon, Permanent Secretary in the Home Office, in September 1987.