Received 23 April 2024

Answers to Questions on Notice

Paul Mercurio: What's your hit rate on FOI requests?

Thank you for the question.

Taking a sampling of FOI requests since 2020, the over-all average 'hit rate' for information release is approximately **22%**.

This figure was determined as the average of sampled requests, calculated as pages released in full versus pages found, and a half-percentage point deducted for each page released in part, which represents an average approximation of the extent of redactions applied to the source material using various exemptions.

Overall average timeliness, at the time of writing, is **-3,242.63%** (or average of 114 days delay/overdue from statutory decision due dates).

For specific detail, please see the attached spreadsheet for the calculation data.

The matter outstanding from 2022 is:

- A complaint over the thoroughness of a search/narrow interpretation of a request.

The matters outstanding from 2023 are:

- Awaiting a decision from Melbourne City Council, due 21st June 2023, which at the time of writing is a delay of some 304 days;
- Another complaint over the thoroughness of a search/narrow interpretation of a request.

Jade Benham: You have mentioned the UK model, but other jurisdictions like New South Wales, Queensland and even the feds have the push FOI models or access to information. Have you spoken to any of your counterparts in other jurisdictions, and have they offered any insights that we might find valuable?

Thank you for the question.

We note that the Police Union supports disclosure logs. We welcome disclosure logs in our joint submission, and so are encouraged that the Police Union shares this view.

We would also certainly support seeing more disclosure qualitatively and quantitatively through informal requests, but as we note in our submission, agencies seem to have a strong aversion to this pathway, so it is not something we have a lot of experience with seeing. Our experience, again as noted in the submission, is in fact the inverse—an aversion to informal release, as well as an aversion to *formal* release via invoking exceptions in fanciful or speculative ways to prevent disclosure, the extreme lateness, or delaying of request decisions, etc.

Kim Wells: One of the concerns from one of the witnesses has been that if you were to release Body Worn camera video, then it could be edited to suit the person receiving it, who can then go to the media and go, 'Look what happened.' So I guess there is that concern. Thoughts?

Thank you for the question.

I take it to mean you're positing someone making edits that may be misleading or alter the context of the source material in ways that may contribute to personal or social harms. If so, I respectfully do not share the concern. I have not had an experience of that occurring with FOI releases, nor seen evidence that it is a systemic occurrence since the Act was introduced.

The Act places no restrictions on publishing, which is a good thing, and I believe should be upheld. So, technically, anyone can modify a document in malevolent ways already. However, again, I have no experience where this has occurred, nor seen evidence that is a systemic occurrence. All FOI releases in journalistic or advocacy work that I have been exposed to have been published in good faith, and have been useful and relevant for accountability, public discourse, and civic engagement—all of which aligns with the existing object of the Act, per section 3.

Addressing the concern however, all FOI material is traceable to its source usually by watermarked request identifiers or decision identifiers. So, if a situation should arise where source material integrity is questionable, the Act is at any persons disposal to access to the same source material should they wish to independently verify it.

Furthermore to the concern about Body Worn Camera (BWC) footage specifically, it could be notable for the Committee to turn it's attention to the ways BWC footage has largely been openly published in the United States across social media platforms for at least the past decade. In these contexts, during these years, in my experience, the publishing of the footage has been helpful for accountability, public discourse, and civic engagement, and I submit the same would apply in Victoria.

I do understand and accept that media manipulation and disinformation/misinformation is a real and valid concern in the culture currently, but I do not think that expanding the provision of the FOI Act to BWC footage (or any other material for that matter) would itself introduce specific detrimental harms at a personal or cultural level. If anything, my view is the inverse: expanding the public's right to information strengthens public discourse and civic engagement—and such access to verifiable and accurate information is what reinforces and upholds democracy, justice, transparency, and accountability. Experts in the disinformation space,[1] et al, argue that its precisely these sorts of mechanisms that 'weed out' and dis-incentivise bad actors.

1 The Centre for Humane Technology, for example.

Tim Reed: If we are looking at redesigning the system from a legislative point of view, can you think of any changes that we could make? Obviously, part of this is going to be resourcing VCAT, but beyond that is there anything else we could do to improve the system?

We support the calls made by Office of the Victorian Information Commissioner (OVIC),[2] Law Institute Victoria (LIV),[3] to completely overhaul the Act and its systems, and replace them with a cohesive modernised Access To Information (ATI) law and structure; to modernise, remove antiquated systems, etc.

We support the calls for *exceptions* rather than exemptions.

We support the recommendations of modernisation and simplification of language for a new ATI law, so that interpretation and application is consistent and strengthened.

1. Refusal, Obfuscation, and Delay

We support the commentary of LIV in regards to s25A[4] and cite similar experiences in our joint submission around s25A being used by agencies for delay and avoidance. We also note the statistics published by OVIC regarding the increased use of s25A to avoid processing requests,[5] and support the recommendation to repeal the section.[6]

We support the concerns of the Australia's Right to Know submission pertaining to the use of exemptions relating to increasing secrecy,[7] and the Monash University study that found significant differences in how FOI is viewed an implemented across agencies.[8]

We would reiterate our evidence around introducing penalties or sanctions with regard to statutory lateness, invoking exemptions in bad faith, or using other aspects of the Act for obfuscation and delay, to seriously dis-incentivise such consistent negative outcomes for applicants, and as a 'hard-feedback' mechanism to seriously incentivise cultural change, and keep it steered towards appropriate and timely disclosure. As we've seen with the current model for the past several years, the ability for agencies to make only recommendations (which are largely ignored) does not seem to be improving outcomes.

2. The Review Process

We support calls to empower OVIC's oversight roles and capacity, and recommend that both the complaints and reviews processes should be redesigned for consistency, thoroughness, reduced administrative burden for all parties, and easier access to dispute resolution. A complaint and review pathway that is smoother, applicant-focused, and interested in providing greater and more qualitative disclosure outcomes is very welcome.

2 Submission 55, page 6, 9 (Recommendation 1), 45-46.
3 Submission 22, pages 1-3.
4 Submission 22, page 6, paragraph 7(II).
5 Submission 55, page 106.
6 Submission 55, page 15 (Recommendation 39), 118-121.
7 Submission 27, pages 3-4.
8 Ibid.

We note that Victoria Police "considers that timeframes for agencies to lodge reviews with VCAT should be lengthened" from 14 days to 30 days.[9] In light of Victoria Police's extremely poor record on timeliness, we would not support such an extension. We've experienced Victoria Police lodge reviews straight away in this manner, only to withdraw them shortly before hearing dates, which inconveniences and confuses applicants, burdens the system, takes away space for genuine reviews, and as such is often construed as the agency operating in bad faith.

If Victoria Police genuinely wants to disburden the system with needless review applications as they claim, then they should allocate some of their significant resources to comply with the Act, rather than continuing to bring vexatious review applications, or be seeking further extensions of time to their already very-poor record on timeliness.

3. Definition of Document

We support Public Record Office of Victoria's recommendation to expand the definition of document to material in storage; for material that relates to commercial providers; and that access should be extended to documents regardless of their age.[10]

We support OVIC's recommendation pertaining to information not just documents[11] and refer to the joint submission, where we believe we also make good examples of the distinction between documents and information, along with other submitters.[12]

We believe the UK system is a better model to draw on pertaining to information rather than documents. If it further assists the Committee, please find attached the whitepaper that was provided to UK parliament in 1997, as the basis for what went into the creation of the UK Act, should that be useful. Similarly, please also find attached commentary pertaining to the whitepaper from Spencer Zifcak, then-Associate Professor of Law and Legal Studies at La Trobe University.

We would also draw attention to the *Campaign for Freedom of Information* organisation in the UK, that does advocacy work pertaining to the UK FOI Act, that the Committee may find relevant and useful, in terms of anticipating and weighing competing interests.

The organisation seeks to *"strengthen the FOI Act, improve how it works in practice, and prevent attempts to weaken it."* https://www.cfoi.org.uk/

4. Fees and Charges

We support the call for the removal of application fees by LIV,[13] Dr Reuben Kirkham,[14] and of other submitters and stakeholders.[15] We note and support the evidence by ACT Ombudsman, Iain Anderson, which related to how the ACT has "moved on from charging

9 Submission 24, page 12.
10 Submission 9, pages 1 and 2.
11 Submission 55, page 14.
12 Submission 48, page 23.
13 Submission 22, page 8, paragraph 8.
14 Submission 53, pages 1 and 2.
15 Submission 48, page 10 and 11.

fees” and now imposes very minimal costs. Reducing such barriers to entry and engagement are very welcome.

5. Privacy Exception

Victoria Police stated that 94% of their refusals concerned section 33 of the Act, in part or in full.[16] We would like to highlight the areas of our submission that reference this high usage of section 33, and how we have found it burdensome, overzealous, and largely overturned on appeal. We would also like to refer to the parts of the joint submission that turn to reform of the use of section 33 to prevent withholding information pertaining to agency officers both qualitatively and quantitatively.

6. Law Enforcement Exceptions

Victoria Police stated in its submission that section 31 is the second most-used exception it deploys when denying access to information.[17] For reform, we point to the experiences of our joint submission that show how this section has been routinely overzealously relied upon to withhold information; where the the exception has been invoked in numerous fanciful or speculative ways; and ways in which we recommend such exemptions could be changed to prevent these from continuing to occur in the existing FOI system, or a new ATI system.

7. Public Interest

We note the discussions around public interest to date, particularly the submission of Dr David Solomon, have been very helpful and useful perspectives. In our view, we would not recommend that there be too many caveats against disclosure. We would like to see a new ATI system implemented that encourages more disclosure, not less, and a system that provides agencies with *less* mechanisms to invoke to prevent disclosure, rather than introducing more. The desired result is less secrecy, and more disclosure both qualitatively and quantitatively.

8. Comments on Culture

We would like to stress that culture is something that can never be underestimated to keep working on, and support the comments and insights of OVIC, Iain Anderson as ACT Ombudsman, along with others on this topic.

Our joint submission provides evidence on how agencies are spending more time considering reasons against disclosure; finding good reasons not to disclose. We also note that OVIC has valuable insights around the increasing use of exceptions, and the need to decrease this trend.[18]

We agree that this is why cultural change is important, along with significant legislative change, and support the calls for both of these.

16 Submission 24, page 8.
17 Submission 24, page 8, in unnumbered paragraph under “Exemptions and exceptions in Part III and Part IV”.
18 Submission 55, page 105, paragraph 380.

We agree that personal information is where agencies appear to be the most unnecessarily risk averse, and is an area of improvement that could be focused on to encourage more consistent and helpful disclosures of information, and to disburden oversight bodies from reviews or complaints that pertain to the unnecessary risk aversion.

A re-framing of what constitutes personal information would also improve the work of accountability and advocacy organisations, journalism, and serve the public better as a whole, pertaining to the concept of open government, democratic values, and civil engagement. Agencies using (and over-using) section 33 of the Act to prevent disclosure of the work of agency officers is an area of the joint submission that we would again emphasise, for example.

9. Comments on Artificial Intelligence

As Artificial Intelligence (AI) is an ambiguous term, its use here—as is inferred by others throughout their evidence and submissions—refers to the use of Large Language Models, Machine Learning [sic] systems, or Artificial Neural Networks to emulate decision-making.

I wish to convey to the Committee that there would be concerns about these types of technologies being used in the context of information discovery, consideration, and release, pertaining to the Act as it currently stands, or any new ATI system.

9.1 ‘The Black Box’

AI systems are closed, by which is meant that even where the models of the systems themselves are publicly accessible, the precise logical pathways of any given output of an AI system is unknown and non-falsifiable. Falsifiability, or verifiability, is a scientific principle that allows for proof of conclusions. Artificial Intelligence systems do not do this. Developers of such systems call this the ‘black-box’ part of the systems. This attribute of opaqueness makes such automated systems non-rigorous and inconsistent in decision making contexts, which is inappropriate for ATI applications. The results are not only inconsistent and variable, but non-replicable and non-falsifiable. Members of the Committee may already have experience with those attributes: asking a LLM the same question multiple times and getting differing answers each time.

Information release is highly contextualised. It requires understanding of current and historical social and political issues relevant to the matters at hand; internal knowledge of the institutions relevant to its processing; understanding and interpretation of policy in adaptive or non-pedantic ways; and consideration of the complex web of relationships of all the above to derive context and a simulacrum of understanding. True understanding is not a feature of AI systems. AIs excel at manipulating symbols or doing pattern recognition (such as working with words and phrases) based on probability/statistics, and randomness, but they have no true understanding of the content they are processing.

In the larger culture globally, problems of bias in terms of racial profiling or political bias in AI training data and outcomes have been consistently demonstrated.

> *AI and machine learning tools are being deployed by police and prosecutors to identify faces, weapons, license plates and objects at crime scenes, survey live feeds for suspicious behaviour, enhance DNA analysis, direct police to gunshots,*

> *determine how likely a defendant is to skip bail, forecast crime and process evidence, according to the* [United States] *National Institute of Justice.*
>
> *But trade secrets laws are blocking public scrutiny of how these tools work, creating a "black box" in the criminal justice system, with no guardrails for how AI can be used and when it must be disclosed.*[19]
>
> *AI … can produce different outcomes throughout its life cycle. Without testing and transparency, these nuances are lost and the likelihood of error isn't accounted for…*
>
> *Currently, public officials are essentially taking private firms at their word that their technologies are as robust or nuanced as advertised, despite expanding research exposing the potential pitfalls of this approach.*[20]
>
> -- *How AI risks creating a 'black box' at the heart of US legal system*

If an agency was the sole entity to decide what training data was used and deployed in an AI system, this would inevitably 'bake in' the bias and cultural-state of the agency into the data/outcomes of its AI systems, along with the AI system's other nescient characteristics.

Even something like summarising content would be contentious, given that AIs are largely reliant on the veracity of the training data, and how the systems are built and deployed. These factors always correlate to the culture of an agency, the incentives and intentions of the AI developers, the companies deploying them, and so on. There is no such thing as 'objective' data or 'objective' AI systems.

AIs may also not be so useful for FOI or ATI in any event, where the original documents are sought, rather than summaries or abstracts of the documents.

Searching and deciding on which documents to include or not-include would be a problem, because like above, the methodology of such AI systems is not verifiable, inconsistent, non-falsifiable, and non-rigorous. That there is no proof of the AIs conclusion to be provided to the applicant in such a circumstance is also a concern around the already declining levels of public trust of agencies: the 'black box' would only 'further obfuscate, rather than illuminate.'

While it could be surmised that some of these impacts could be mitigated or reduced by having the training data incorporate decisions of oversight bodies or review processes and court decisions (to influence the data away from an agency's bias or poor cultural-state), without overcoming the 'black-box' of AIs, the point is moot, and inconsequential—AIs will always be insufficient to decision making that is fundamentally verifiable and trustworthy.

9.2 Confabulation

Beyond the difficulty around the lack of verification of how AI decisions are made, AI also has a problem with hallucination—or more accurately stated, confabulation—which has an impact on source data integrity and entropy.

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19 https://thehill.com/business/personal-finance/4571982-ai-black-box-legal-system/

20 Ibid.

> *Shortly after ChatGPT's launch, people began proclaiming the end of the search engine. At the same time, though, many examples of ChatGPT's confabulations began to circulate on social media. The AI bot has invented books and studies that don't exist,[21] publications that professors didn't write,[22] fake academic papers,[23] false legal citations,[24] non-existent Linux system features,[25] unreal retail mascots,[26] and technical details that don't make sense.[27]*
>
> -- *Why ChatGPT and Bing Chat are so good at making things up*

As noted above, pertaining to the 'black box' element of AIs, 'confabulation' largely arises because AIs do not/cannot posses understanding—it's merely the manipulation of symbols and tokens that is occurring as a simulacrum of 'understanding' or 'context.'

Examples of applications of AI in contexts that may be similar to FOI or ATI systems in some ways, can illustrate the implications and seriousness of confabulation. I have two examples from the United States relating to this issue, that raise the question of responsibility and liability for AI decisions, complacency around their use, and show broadly how these systems can be misleading and inaccurate. In these chosen examples, it's particularly notable as the systems were dealing with policies, or searching and summarising agency or business information, which is directly analogous to imagined deployments of AIs in navigating, interpreting, and applying the policies of FOI or ATI systems.

My first example is where an AI system confabulated the policy of an organisation and provided incorrect information to a customer, which the customer acted upon.[28] When the customer eventually found the information to be incorrect, they attempted to rectify the situation, but the organisation claimed that it "cannot be held liable for information provided by one of its AI systems" and rejected calls for intervention. The customer proceeded to take the matter to a Tribunal for review. In the proceedings, the company continued to rely on its defence that the AI was a "separate legal entity" and that "it was not responsible" for the misinterpretation/confabulation of the policy, and the ensuing consequences. Luckily, in this case, the Tribunal rejected that line of argument, and overturned the decision. Human intervention in that process is the key point, and how the automation probably created more work for all parties involved in the long-run, rather than less.

Another example illustrates LLMs "tendency to confabulate incorrect information while presenting that information as authoritatively true."[29] The AI system in that case provided incorrect information about a local government's policy relating to landlords and tenant eviction. It also gave "some dangerously wrong answers regarding the treatment of workplace whistleblowers."[30] Both had significant real-world implications.[31]

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21 https://twitter.com/hermansaksono/status/1615053056328228864
22 https://twitter.com/KevinZollman/status/1620438109778509824
23 https://twitter.com/dsmerdon/status/1618816703923912704
24 https://twitter.com/samuelharden/status/1620439260125077504
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26 https://twitter.com/harrymccracken/status/1618344082576912384
27 https://twitter.com/jonmasters/status/1598749857237303302
28 https://arstechnica.com/tech-policy/2024/02/air-canada-must-honor-refund-policy-invented-by-airlines-chatbot/
29 https://arstechnica.com/ai/2024/03/nycs-government-chatbot-is-lying-about-city-laws-and-regulations/
30 Ibid.
31 https://www.thecity.nyc/2024/03/29/ai-chat-false-information-small-business/

A recent Washington Post report found that LLMs integrated into major tax preparation software provides “random, misleading, or inaccurate ... answers” to many tax queries,[32] highlighting the complexity of navigating and interpreting complex policies and procedures.

Yet another example, this time pertaining to software development, a LLM “hallucinated” a software package that didn’t exist, but could be created to deploy malware. This happened ~25% of the time when LLMs were asked in various computer languages, with ~35% replicability.[33] The point here, being the frequency and ease of confabulation, and to draw attention to the fact that as information complexity in the system increases, so too does the chance of confabulation.

These attributes of confabulation, straying, and the ‘black box’ should provide a strong basis for seriously questioning AIs. Hence, I strongly advise that the Committee consider making a recommendation, that there be an explicit prohibition on the use of any AI system in categorisation, searching, applying redactions/exceptions, and delivering documents or information.

If any technology may assist the provision of the FOI or a new ATI system, it could be data mining systems that are more akin to search engines, that operate based on statistical analysis/probability pertaining to large data sets. Such systems are more rigid in providing accurate and replicable results, and are distinct from AI systems in this regard. The algorithms of data mining systems that simulate ‘decision-making’ are both auditable (the logic can be determined) and ‘replayable’ (one can see how one arrived at a specific result, based on specific data).

Such data mining systems could be used to provide suggestions such as “have you tried searching place X for information Y?” as a result. Of course, considerations and safeguards would still need to be implemented so as to not create institutional and individual complacency when performing *actual* searches, and would also be contingent on agencies having thoroughly digitised their ‘institutional knowledge’ in order for it to be ‘digitally mined.’

However, it still stands that AI systems in any event would contribute to an increase in complacency and reliance on technological solutionism, rather than addressing the more fundamental existing problems, such as poor culture within agencies, or the limitations of legislation.

9.3 Complacency

For the reasons outlined above, it should be considered how AIs would make staff complacent and dependent on them, and hence would further degrade an already degraded FOI system, or impede a new ATI system.

It is my belief that time, energy, and money would all be much better spent on training employees and reforming the culture of agencies, rather than focusing on technological ‘band-aids’ or attempting to simply port human or institutional problems into technological problems.

32 https://www.washingtonpost.com/technology/2024/03/04/ai-taxes-turbotax-hrblock-chatbot/
33 https://www.theregister.com/2024/03/28/ai_bots_hallucinate_software_packages/

I also note and agree with the evidence of Iain Anderson as ACT Ombudsman, who is very cautious about use of AI in FOI/ATI contexts.

9.4 Data sovereignty, privacy, and other social and environmental impacts

Data sovereignty is an issue with AI systems of any type. Ensuring the systems are not 'straying,' nor inadvertently disclosing information to backend systems or outside networks in unintended ways, requires significant resources, training, and expertise.

The same would apply for outsourcing AI systems, but also introduce further complexity pertaining to data/agency security, personal information security, privacy, the nature of the data exchange, the integrity/oversight of the transactions, and ensuring that information isn't being used for other commercial or research purposes—which is often a feature of commercial AI entities.

Running AIs are also expensive, and have extensive negative environmental and social impacts.[34]

Time, money, and effort would all be much better spent on other things, as outlined above, rather than focusing on the allure[35] of AI systems.

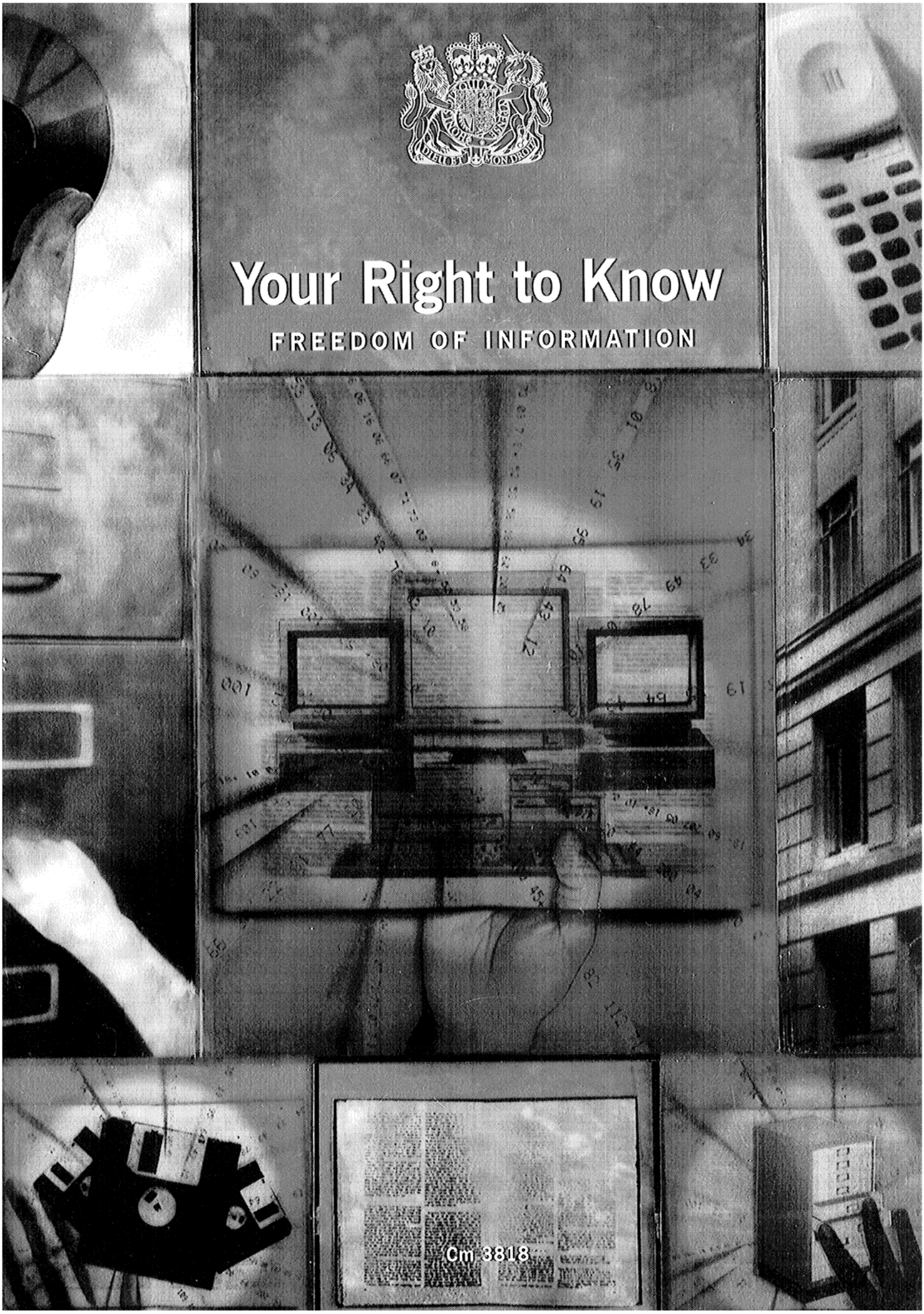
# # #

34 https://theconversation.com/the-hidden-cost-of-the-ai-boom-social-and-environmental-exploitation-208669
35 https://www.publicbooks.org/the-folly-of-technological-solutionism-an-interview-with-evgeny-morozov/

Jordan Brown - Sampling of FOIA Success Rates

Request success is defined as pages released in full versus pages found, and half a percentage point deducted for each page released in part, which would accurately represent an average approximation of the extent an average approximation of the extent of redactions applied to the source material using exemptions denoted.

Request Date	Request Ack	Days to ack	Statutory Due Date	Actual decision date	Days between request ack and decision	Days overdue	**Timeliness**	Docs found	Docs released in full	Docs released in part	Docs denied in full	**Request Success**	Exemptions invoked	Notes
2020-05-19	2020-05-20	1	2020-06-19	2020-08-17	89	59	-96.67%	87	2	26	59	17.24%	s31(1), s33	
2021-07-19	2021-07-19	0	2021-08-18	2022-07-06	352	322	-973.33%	790	1	87	(763), s25A	5.63%	s25A, s31(1), s33	
2022-07-19	2022-07-19	0	2022-08-18	2022-10-04	77	47	-56.67%	290	46	244	0	57.93%	s31(1), s33	
2022-08-22	2022-08-23	1	2022-09-22	2022-12-20	119	89	-196.67%	245	47	172	26	54.29%	s31(1), s33, s35	
2022-09-22	2022-09-27	5	2022-10-27	2023-02-08	134	104	-246.67%	99	1	98	0	50.51%	s31(1), s33	
2022-10-31	2022-11-03	3	2022-12-05	2023-02-08	97	65	-103.13%	0				0.00%		Complaint made regarding search
2022-12-06	2022-12-07	1	2023-01-06	2022-12-20	13	0	100.00%	0				0.00%		Complaint made regarding search, unresolved
2023-04-05	2023-04-05	0	2023-06-21		Still waiting	317	-31,600.00%					0.00%		Still waiting for decision, VCAT stayed
2023-07-19	2023-07-20	1	2023-08-21	2023-12-07	140	108	-237.50%	3	1	0	2	33.33%	s33	
2023-08-04	2023-08-10	6	2023-09-11	2023-10-18	69	37	-15.63%	0				0.00%		Complaint made regarding search, unresolved
					Averages	**115**	**-3,342.63%**	**168**	**16**	**105**		**21.89%**		


Your Right to Know
FREEDOM OF INFORMATION
Cm 3818

YOUR RIGHT TO KNOW — YOUR VIEWS ON THE WHITE PAPER

In working up our proposals into a draft Bill, we would welcome views on the White Paper, especially the issues on which comment is specifically sought at paragraphs 2.25, 2.33, 3.14 and 5.19.

Written comments should be sent to:

Robert Cayzer
Freedom of Information Unit
Room 65d/1
Cabinet Office (Office of Public Service)
Horse Guards Road
London SW1P 3AL

by 28 February 1998.

The White Paper has also been published on the Internet. Details of how to access this paper electronically can be found on the Cabinet Office (Freedom of Information Unit) home page:
http://www.open.gov.uk/m-of-g/foihome.htm

Electronic mail responses should be sent to:
foi@gtnet.gov.uk

Should you wish any part (or all) of your comments to be treated in confidence, you should make this clear in any papers or electronic mail you send. In the absence of such an instruction, submissions made to government will be assumed to be open, and may be published by Ministers, or placed in the Libraries of the Houses of Parliament.

YOUR RIGHT TO KNOW

The Government's proposals for a Freedom of Information Act

Presented to Parliament by the
Chancellor of the Duchy of Lancaster
by Command of Her Majesty, December 1997

Cm 3818

Contents

Preface by the Prime Minister

The Government is pledged to modernise British politics. We are committed to a comprehensive programme of constitutional reform. We believe it is right to de-centralise power; to guarantee individual rights; to open up Government; and to reform Parliament.

The Government is delivering on its promises:

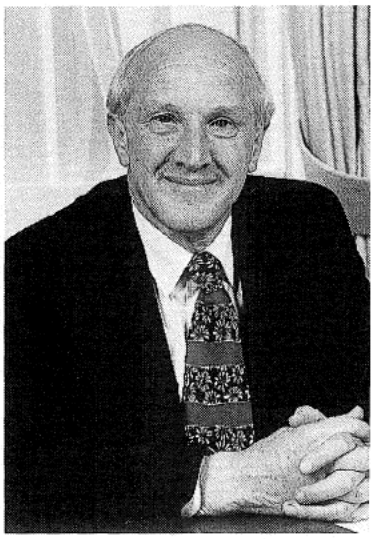
- voters have supported a Scottish Parliament and a Welsh Assembly, giving the people of Scotland and Wales more control over their own affairs within the United Kingdom;
- a Bill bringing new rights, through the incorporation of the European Convention on Human Rights into United Kingdom law, has been introduced to Parliament;
- White Papers on a new strategic authority and an elected mayor for London, and development agencies in the regions of England, have been introduced.

This White Paper explains our proposals for meeting another key pledge — to legislate for freedom of information, bringing about more open Government. The traditional culture of secrecy will only be broken down by giving people in the United Kingdom the legal right to know. This fundamental and vital change in the relationship between government and governed is at the heart of this White Paper.

These proposals will form the basis for a thorough and informed debate. As an open Government our next step will be to conduct a careful consultation exercise on the basis of a draft Bill.

Tony Blair

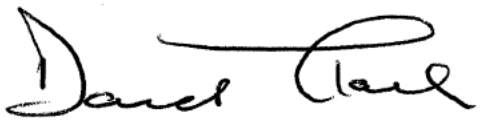
Foreword by the Chancellor of the Duchy of Lancaster



Openness is fundamental to the political health of a modern state. This White Paper marks a watershed in the relationship between the government and people of the United Kingdom. At last there is a government ready to trust the people with a legal right to information. This right is central to a mature democracy.

There are matters, such as national security or personal privacy, where information has to be protected. Government itself needs some protection for its internal deliberations. This White Paper strikes a proper balance between extending people's access to official information and preserving confidentiality where disclosure would be against the public interest. It is a new balance with the scales now weighted decisively in favour of openness.

The Government will be publishing a draft Freedom of Information Bill next year. The Government believes that the proposals outlined in this White Paper will contribute positively to the progressive opening up of the British State.



CHAPTER 1

Introduction

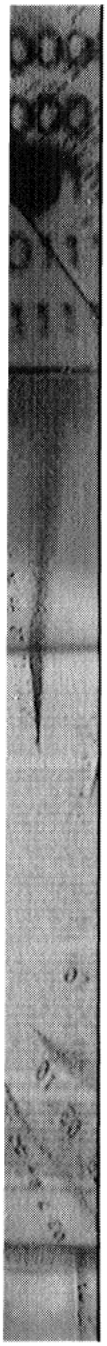
1.1 Unnecessary secrecy in government leads to arrogance in governance and defective decision-making. The perception of excessive secrecy has become a corrosive influence in the decline of public confidence in government. Moreover, the climate of public opinion has changed: people expect much greater openness and accountability from government than they used to.

1.2 That is why we pledged before the election to introduce a Freedom of Information (FOI) Act. **The purpose of the Act will be to encourage more open and accountable government by establishing a general statutory right of access to official records and information**. This White Paper sets out proposals for such legislation.

1.3 An FOI Act will provide the people of this country, for the first time, with a general statutory right of access to the information held by public authorities. This right to know has existed in Sweden since the 18th century, in the USA since 1966, in France since 1978, in Canada, Australia and New Zealand since 1982 and in the Netherlands since 1991. The United Kingdom can learn from the experience of these mature fellow democracies. This White Paper contains a number of proposals which reflect overseas experience — and in one or two cases considers but rejects ideas commonly encountered abroad. We are willing to learn and see an FOI Act as central to our programme of modernising government. The Act will provide a clear standard of openness for the Government as a whole, in keeping with the need for proper Ministerial accountability to Parliament.

1.4 It is important to set these major steps in the wider context of open government as a whole. For example, since May, we have:

- taken steps towards setting up a Food Standards Agency to provide substantially more open and transparent arrangements in this vital area of consumer interest;
- required National Health Service trusts to hold their meetings in public;
- required **all** executive and advisory Non-Departmental Public Bodies to produce and make publicly available annual reports;
- required details of most public appointments to be placed on the Internet;
- prepared consultative proposals on the commitment to an independent National Statistical Service which will enhance the integrity of official statistics. These will be published shortly;



- removed restrictions on disclosure of certain internal government papers to the National Audit Office;
- published a National Asset Register listing for the first time all the property owned by government departments.

1.5 We recognise the importance of underpinning these initiatives with a statutory guarantee of openness. This is essential. It is something that the last Government conspicuously failed to do. The result is a haphazard approach based largely on non-statutory best practice arrangements (in particular the central government *Code of Practice on Access to Government Information*) with statutory requirements for openness applying only in certain areas such as environmental information[1], or limited to particular sectors of the public service, notably local authorities[2]. In preparing Freedom of Information legislation, we intend to reduce the complexities and duplication in existing statutory and non-statutory access requirements as far as possible.

1.6 We could have scored an early legislative achievement by simply enacting the existing *Code of Practice* into statute. Such an approach would not have done justice to our firm commitments. We have taken rather longer in order to complete a root and branch examination of this whole area in order to produce a better and more lasting scheme. The result is this White Paper which makes proposals for proper Freedom of Information legislation designed to replace this piecemeal and inadequate system with clear and consistent requirements which would apply across government.

1.7 Our FOI Act will have the following features:

- application across central government departments and their agencies, to local authorities, and to many thousands of public bodies and the NHS, as well as to privatised industries and other private bodies that carry out statutory functions (paragraph 2.2);
- there will be a right of access to a wide range of official records or other information (paragraphs 2.6 – 2.16);
- strict tests will be applied to ensure that information will be released except where disclosure would cause harm to one or more of a limited number of specified "interests" or would be contrary to the public interest (paragraphs 3.7 and 3.15 – 3.18);

1. Environmental Information Regulations 1992 (SI 1992/3240).
2. For example Access to Information (Local Government) Act 1985; Access to Personal Files Act 1987.

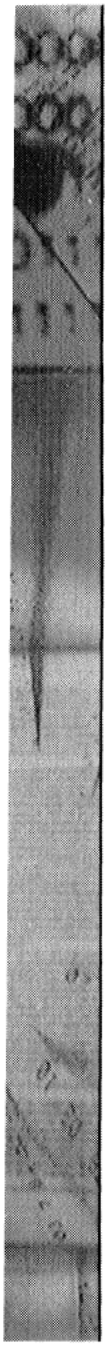
- the system for protecting sensitive information will be simple, based on seven key specified interests, as opposed to the 15 exemptions currently in the *Code of Practice* (paragraphs 3.8 – 3.13);
- individuals will be granted greater access than ever before to the personal information which government holds on them (paragraph 4.5);
- individuals will be able to exercise their rights of access to personal information under FOI or Data Protection Legislation (paragraphs 4.9 – 4.11);
- there will be an independent Information Commissioner, who will police the Act, and handle appeals. The Commissioner will have wide-ranging powers, including the power to order disclosure of information (paragraphs 5.6 and 5.12);
- access rights to current and historical records will be integrated in the Act (paragraph 6.4).

1.8 We also propose a progressive approach to openness, including a continuing programme of action by the Office of Public Service to underpin the Act by changing the culture of government towards greater openness (Chapter 7). We will also consult widely on a draft FOI Bill to be published next year (Chapter 8).

1.9 Even before the draft Bill is published however, this White Paper marks the start of a consultative process on FOI. It is designed to set out our proposals clearly and succinctly. Nevertheless, it is a White Paper with "green edges". Comments on any aspect of it will be welcome: certain issues are highlighted as likely to be of particular significance to those who may be directly affected by an FOI Act, whether they are within or outside public services. Comments on these points would be especially welcome. Details of how to comment are set out on the inside front cover; details on how to join a debate on the White Paper on the Internet are included on the inside back cover.

CHAPTER 2

A right to know — rights of access under FOI



The scope of the Act — who will it cover?

2.1 We believe that Freedom of Information, as a fundamental element of our policy to modernise and open up government, should have very wide application. The Freedom of Information Act will apply across the public sector as a whole, at national, regional and local level. It will apply throughout the United Kingdom although it will be for the Scottish Parliament to determine the approach of the Scottish executive and other Scottish public bodies to openness and freedom of information within devolved areas in which it is competent to enact primary legislation. In Wales, the Act will cover the National Assembly for Wales (as a Crown body) and other public authorities.

2.2 The Act will have a far broader scope than the existing central government *Code of Practice on Access to Government Information*, or other openness measures in government. It will cover:

- Government Departments, including non-Ministerial Departments, and their Executive Agencies;
- Nationalised industries, public corporations, and all the 1,200 Non-Departmental Public Bodies ("Quangos"). Examples range from the Equal Opportunities Commission and the UK Atomic Energy Authority to the Royal Botanic Gardens and the Northern Lighthouse Board;
- the National Health Service;
- administrative functions of the Courts and tribunals;
- administrative functions of the Police and Police Authorities;
- the Armed Forces;
- Local Authorities;
- Local Public Bodies, for example Registered Social Landlords and Training and Enterprise Councils;
- Schools, Further Education Colleges and Universities;
- the Public Service Broadcasters (for example the BBC, Channel Four, the Radio Authority);

- private organisations insofar as they carry out statutory functions;
- the privatised utilities.

In addition, FOI provisions will be applied to information relating to services performed for public authorities under contract. Appropriate requirements will be included in the individual contracts between public authorities and contractors.

Who will the Act *not* cover?

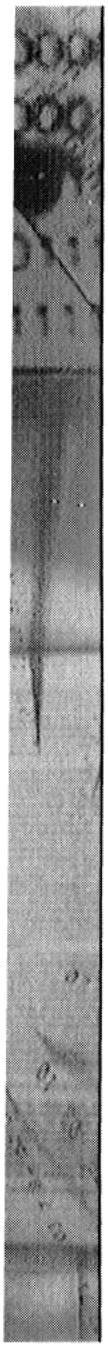
2.3 A very few public bodies, because of the nature of their role, will be completely excluded from the Act. Parliament, whose deliberations are already open and on the public record, will be excluded. We are clear that the Security Service, the Secret Intelligence Service, the Government Communications Headquarters and the Special Forces (SAS and SBS) could not carry out their duties effectively in the interests of the nation if their operations and activities were subject to freedom of information legislation. These organisations, and the information that they provide, will be excluded from the Act, as will information about these organisations held by other public authorities.

2.4 The Act will contain a list, showing which public authorities and other organisations are covered, so that there will be no ambiguity about which bodies are included and which are not.[3] This list will be published as part of the draft Bill next year. Such a list will need to be amended from time to time as public bodies are created or wound up, or public functions are carried out by different bodies. The Act will provide for this with an Order-making power to allow the list to be kept up to date.

What is the Freedom of Information Act intended to do?

2.5 The objective of the Act is to help open up public authorities and other organisations which carry out public functions. First, it will empower people, giving everyone a right of access to the information that they want to see. Secondly, it will place statutory duties on the bodies covered by the Act to make certain information publicly available as a matter of course.

3. In the rest of the Paper, we use the term "public authorities" as the generic term to cover all the bodies and organisations included in paragraph 2.2.



Your Right of Access

2.6 This is at the heart of the Act. The Government sees it as taking the general form of **a right, exercisable by any individual, company or other body to records or information of any date held by the public authority concerned in connection with its public functions**.

➤ *"... by any individual, company or other body"*

2.7 Anybody can apply for information. Applicants will not need to demonstrate or state their purpose in applying for information. All requests will be considered equally on their contents, not on the stated or presumed intentions of the applicant.

➤ *"... to records or information ..."*

2.8 The *Code of Practice on Access to Government Information*, introduced by the last Administration in 1994, provides access to information, but not to actual records or documents. This is in contrast to most statutory FOI regimes (see Annex A). *The Code's* approach has been frequently criticised as unnecessarily secretive because it offers potential scope for "doctoring" the material; and as cumbersome because in many cases disclosure of actual documents is the simplest and quickest route for both Department and enquirer.

2.9 Another key issue is the changing nature of information creation and storage. In the USA for example, updating the 1966 legislation has recently been necessary to ensure that FOI covered computer disks and other IT storage methods.

2.10 We believe that, for the Act to be fully effective, the access right should be capable of a broad and flexible application in this respect. It should cover both records and information. And the term "records" should cover all forms of recorded information including electronic records, tape, film and so on.

2.11 The flexibility in these arrangements will help both the applicant and the public authority. The applicant will be able to specify the form of the record or information requested. The authority would be required, in the first instance, to release disclosable records or information in the form requested. But it too will have flexibility to meet the

request in a different form if this would be more in keeping with the requirements of the Act or if exact compliance would involve disproportionate cost or effort (see "*Gateways to the Act*", paragraphs 2.23 – 2.27). Or it could decide to make a charge reflecting the cost of meeting the application if necessary (see "*Who Pays?*", paragraphs 2.28 – 2.34).

2.12 A refusal to supply information or records in the form requested would be appealable to the Information Commissioner (Chapter 5), who would need to take into account factors such as the technical feasibility of meeting the request, and other discretionary cost thresholds relating to the provision of information, such as that for answering Parliamentary Questions. If problems of disproportionate cost look likely to limit significantly the extent to which individual public authorities are able to provide information under the Act, there will be scope for them to agree procedures with the Information Commissioner to provide it in a more cost-effective form.

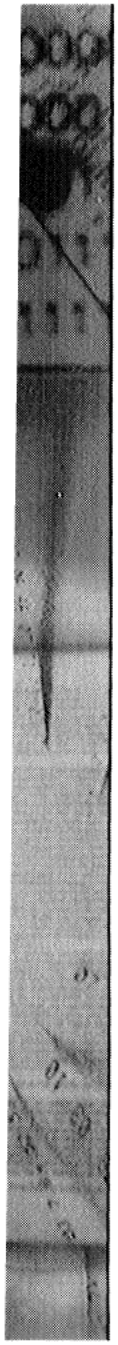
➤ "*... . of any date. ...*"

2.13 The access right will apply to records of any date, regardless of whether they were created before or after the Act comes into force. There would be only very limited exceptions to this, for example where the new Freedom of Information Act incorporates and supersedes certain existing statutory access rights which themselves only give access to records after a specified date.

2.14 Eventually, records held by many public authorities reach an age — normally 30 years — where they become subject to the criteria governing historical records. Chapter 6 of this White Paper sets out our proposals for integrating the access rights to both current and historical records under the FOI Act.

➤ "*... held by the public authority concerned....*"

2. 15 The access right will apply to recorded information that the public authority concerned already holds. It does not have to have originated this itself. If an authority does not hold the information requested, it could choose to obtain it for the applicant, but would not be legally obliged to do so.



➤ *"... in connection with its public functions. ..."*

2. 16 Many public authorities within the scope of the Act will hold records of various sorts which do not relate directly to their public functions. For example, individual authorities may hold private or personal records. Political and constituency papers may be held in the Private Offices of Government Ministers alongside official records. Commercial organisations carrying out public functions will, naturally, hold many other records relating to their separate commercial operations. Such records would not be available under the Act.

Duties to publish information

2.17 A Freedom of Information Act must be a catalyst for changes in the way that public authorities approach openness. In this respect, sensible legislation should have a far greater impact than any voluntary or discretionary system. Experience overseas consistently shows the importance of changing the culture through requiring "active" disclosure, so that public authorities get used to making information publicly available in the normal course of their activities. This helps ensure that FOI does not simply become a potentially confrontational arrangement under which nothing is released unless someone has specifically asked for it.

2.18 We believe it is important that further impetus is given to the pro-active release of information. So, the Act will impose duties upon public authorities to make certain information publicly available, as a matter of course. These requirements will be consistent with the other provisions of the Act — including its harm and public interest tests (see Chapter 3). They will be broadly along the lines of those in the *Code of Practice*, namely:

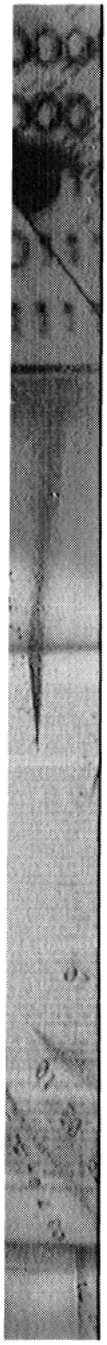
- facts and analysis which the Government considers important in framing major policy proposals and decisions;
- explanatory material on dealings with the public;
- reasons for administrative decisions to those affected by them;
- operational information about how public services are run, how much they cost, targets set, expected standards and results, and complaints procedures.

What is FOI *not* intended to do?

2.19 We are clear that an FOI Act is not appropriate for certain purposes and that the legislation should exclude certain limited categories of information held by public authorities.

2.20 First, it is not intended as an aspect of public sector employment law. It is not therefore intended that the Act should cover access to the personnel records of public authorities by their employees. This will also apply to records held for recruitment and appointments. The important distinction here is between the rights of individuals as members of the public to official information, and the different relationship between public sector employees and their employers. Allowing civil servants and other public sector employees a right of access to their personnel files under the FOI Act (as opposed to the Data Protection Act — see Chapter 4) would, among other things, result in public and private sector employees having different statutory rights. We are already acting positively on behalf of employees where disclosure issues are concerned. We are supporting a Private Member's Bill currently before Parliament (the *Public Interest Disclosure Bill*). This is concerned with protecting the rights of employees in certain specific situations where an unauthorised disclosure is seen by the employee as the only means of bringing to external attention an abuse or problem within an organisation (commonly known as "whistle-blowing").

2.21 Second, FOI should not undermine the investigation, prosecution or prevention of crime, or the bringing of civil or criminal proceedings by public bodies. The investigation and prosecution of crime involve a number of essential requirements. These include the need to avoid prejudicing effective law enforcement, the need to protect witnesses and informers, the need to maintain the independence of the judicial and prosecution processes, and the need to preserve the role of the criminal court as the sole forum for determining guilt. Because of this, the Act will exclude information relating to the investigation and prosecution functions of the police, prosecutors, and other bodies carrying out law enforcement work such as the Department of Social Security or the Immigration Service. The Act will also exclude information relating to the commencement or conduct of civil proceedings.



2.22 Lastly, FOI should not disadvantage the government in litigation. For that reason, the Act will not cover legal advice obtained by the government from any source or any other advice within government which would normally be protected by legal professional privilege.

Gateways to the Act

2.23 We are determined that the Act should be open, fair, straightforward and simple to operate both from the point of view of the applicant and of those who hold the information. The bodies covered by the Act will be expected to act reasonably and helpfully when applying the qualifying "harm tests" described in Chapter 3. Drawing upon overseas experience (see Annex B), time limits for response will be set out in the Act to ensure that applicants do not have to wait an excessive or unreasonable time for responses. Equally, applicants will be encouraged to act reasonably and not abuse or misuse the access rights that the Act provides.

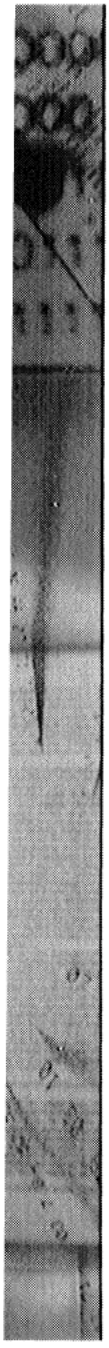
2.24 For Freedom of Information legislation to operate effectively, it is necessary to include at the outset some basic tests of reasonableness for applications for information. We have termed these "Gateway" provisions in our Act. They are intended to give an applicant rapid entry into the FOI process by — on the one hand — encouraging applications which are reasonable and practicable for public authorities to deal with and — on the other hand — encouraging the authority and the applicant to co-operate in this process. This will therefore be the first step in the process of considering an FOI application (see the diagram at Annex C which sets out the whole process, step by step).

2.25 In most cases the "Gateway" process will simply be a matter of ensuring that the request is well-formed and clear; but the tests of reasonableness will also serve as the FOI equivalent of the procedures preventing the law being misused by vexatious litigants. Overseas FOI experience includes examples of individuals making hundreds or even thousands of requests to public authorities. This has persuaded us that some such provisions are necessary but we will ensure that they are carefully drawn so that they do not obstruct genuine requests for information. We have in mind the following considerations **but would welcome views on these, and any others thought necessary**.

2.26 Applications for information covered by the Act should normally progress to the point where they are assessed against the harm and public interest tests (see Chapter 3 and the diagram at Annex C). Circumstances where public authorities could deal differently with applications would include the following:

- applications for information which has already been published and is still reasonably available. Disclosure could be refused, but information to help identify the existing publication should be given to the applicant;
- applications for information which will be, or is intended to be, published at a future date. The public authority would need to give an indication of the plans for publication;
- applications which are not specific enough to provide the relevant authority with a reasonable indication of what is being sought. The authority would, in the first instance, need to indicate the nature of the problem and invite the applicant to be more specific;
- large-scale "fishing expeditions" or other applications which would result in a disproportionate cost or diversion of the public authority's resources in order to identify collect, or review the required records. The authority would need to give an indication of why the application caused this problem or — if it intended to meet the application but at a significant charge — the likely cost to the applicant of doing so;
- multiple applications from the same source for related material in order to avoid the previous restriction. Public authorities would have flexibility in such cases over how they treated such applications for charging and cost threshold purposes;
- large multiple applications for similar information from different sources which are clearly designed to obstruct or interfere with the public authority's business. Here, authorities would clearly have the option of publishing the information at an early stage in the process, thus avoiding the need for repeated disclosure to individuals.

2.27 In general, the object should be for the public authority to be helpful in dealing with problematic requests so that, if possible, the applicant can obtain the information he or she seeks by one means or another. Where this is not possible, an applicant should normally be able to appeal to the Information Commissioner (see Chapter 5).



There may also be scope for the Commissioner to mediate — whether formally under the Act or more informally — where an authority and an applicant have failed to reach agreement on what constitutes a valid application.

Who Pays?

2.28 Freedom of Information carries costs, essentially because it puts public authorities and the information they hold at the service of the people. That is particularly so with an Act that will cover all past as well as current records. This is not a reason for refusing to have FOI. But it is a reason for examining the cost carefully.

2.29 Every major FOI regime in the world contains provisions for charging — requesting payment from the applicant in certain circumstances, depending on the type and amount of information supplied. Some also have provision for flat-rate "entry fees" to use the different services provided under the Act (eg $X to make a request, $Y to take the case to appeal). In the UK, "Data users" — bodies holding information covered by the Data Protection Act — are able to levy a maximum fee of £10 per request, but cannot impose a charge relating to the work done to respond to the request. Under the *Code of Practice* this position is reversed: fees are not permitted, but charges can be made for work done to deal with requests.

2.30 In considering what fees and charges structure would be most appropriate for FOI, we have the following aims:

- a system which is as fair as possible to applicants based on the assumption that the bulk of the costs of FOI will be borne by public authorities;
- a mechanism which reinforces the "Gateway" tests set out above by deterring frivolous requests and encouraging responsible use of the Act;
- a means of applying some control over flows of 'subject access' requests for personal information between FOI and the new Data Protection Act (this is explained in Chapter 4).

2.31 On this basis, we propose that:

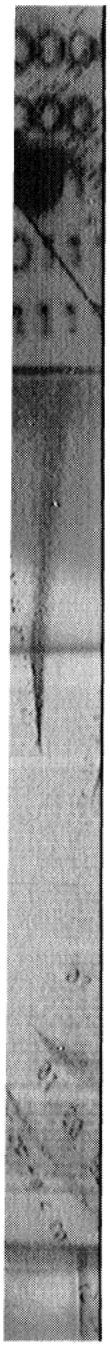
- public authorities covered by the Act should be able to charge a limited access fee per request;

- this should be no more than £10, to keep it in line with the fee for subject access under Data Protection;
- where the request is for an individual's own personal information, the authority holding the information can charge a flat fee up to a maximum of £10;
- no fees will be charged for access to review and appeals procedures. This would too easily encourage an irresponsible attitude from those dealing with the request in the first instance;
- complaints about misuse of fees may be made to the Information Commissioner.

2.32 Public authorities will be able to set charging schemes within parameters laid down either in the Act itself or (more probably) an Order made under it. These parameters would require that charging schemes:

- exclude any power to make a profit, ensuring that charges reflect only "reasonable" costs;
- should not apply to information which a public authority is required, under the FOI Act itself, to make publicly available;
- should be structured to fall primarily on the limited number of applications which involve significant additional work and considerable costs, rather than straight forward applications which, for public authorities, should be part and parcel of normal interaction with the public;
- must provide early notification of any prospective charge to applicants, to enable them to choose whether to proceed with their applications (this may be particularly important where work involving reviewing of documents for sensitive content is likely to reduce the ultimate benefit to the enquirer).

2.33 A common concern with uniform fee and charging systems is that they tend to penalise the individual applicant in search of a limited range of information, as opposed to a private company which may be systematically using FOI to augment its commercial data-base. **The Government would therefore welcome views on (a) the desirability and (b) the viability of a two-tier charging approach designed to impose higher charges on commercial and other corporate users of the Act.**



2.34 As with fees, complaints about charges will be appealable to the Information Commissioner. The Commissioner would also be able to determine whether an authority's general fee and charging structure conformed with the provisions of the Act.

Services for which the government charges

2.35 The government has for many years off-set the costs of some of its operations through charging commercial rates for certain tradeable information-based services (for example land registration data supplied by HM Land Registry). The total income from charging for these information services (including direct sales income, licensing revenue and income from data supply) amounted to some £180 million in 1996–97.

2.36 This charging regime is underpinned by Crown copyright which has been the subject of a review launched by the previous Government. The results of that review are being published shortly as a Green Paper which will invite comments on proposals to simplify the application of Crown copyright (eg more standardised and fast-track licences) and to liberalise it (eg non-enforcement for declared classes of material, such as unpublished public records, Acts of Parliament and Statutory Instruments).

2.37 We want to protect the integrity and status of government material and to secure the revenue which Departments obtain for providing high-quality services for which the customer is willing to pay a price. At the same time, we want to provide the public and the information industry with easier and quicker access to the general run of material produced and held by government. We shall consult on options for striking this balance in the Green Paper on Crown copyright.

2.38 We will take account of comments on the Green Paper in drafting the FOI Bill, the charging provisions of which will be drafted to exclude tradeable government information.

CHAPTER 3

The right to know and the public interest

Disclosure Decisions

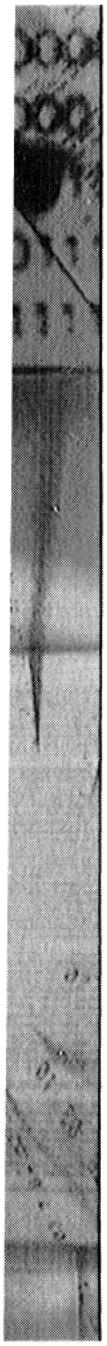
3.1 Decisions on disclosure under the FOI Act will be based on a presumption of openness. Public authorities taking such decisions will therefore need to start by assessing the effect of disclosing, rather than withholding, the information.

3.2 It is important, both for the authority itself, and for the applicant, that this assessment is as simple and straightforward as possible.

3.3 We have considered the existing *Code of Practice on Access to Government Information* in this respect, but do not believe it provides a suitable approach. In particular:

- it contains too many exemptions — 15 in total, more than any of the main statutory FOI regimes elsewhere in the world (see Annex D). This inevitably makes it complex for applicants to use, and encourages accusations that Departments 'trawl' for anything that might serve as a reason for non-disclosure;
- its wording encourages the use of a "class-based" approach towards exemptions. This is where a whole category of information or record is protected, leaving no scope for partial disclosure of a record, after deletion of sensitive material;
- it often requires a balance to be struck, whereby the harm that the disclosure could cause to one or more of the exemptions is set against the public interest in disclosure. But how the "public interest" might be constituted is not defined, and assessing harm against undefined factors can be difficult for staff and others who may be unfamiliar with the *Code* and with disclosure concepts.

3.4 In our view, it is right that the test for disclosure under FOI should be based on an assessment of the harm that disclosure might cause, and the need to safeguard the public interest. However, our proposals for doing this are designed to make decisions on disclosure — which in some cases will be complex and sensitive — as simple as possible to understand both by those required to make the decision, and by the applicant who is seeking information. In particular, the harm test which will be applied should give an indication of the degree of harm which is likely to justify protecting information relating to a particular interest. And an attempt should be made to set out how a decision on the "public interest" can be made.



3.5 This is what our proposed system is intended to do.

How decisions on disclosure will be made

I. The substantial harm test

3.6 As noted above, we see the tests for harm in the *Code of Practice* as insufficient. In particular, there is for most exemptions no indication of the extent of harm against which the disclosure or withholding of information should be judged.

3.7 We believe the test to determine whether disclosure is to be refused should normally be set in specific and demanding terms. We therefore propose to move in most areas from a simple harm test to a substantial harm test, namely **will the disclosure of this information cause substantial harm?**

II. The specified interests

3.8 We believe the 15 exemptions in the *Code of Practice* can be substantially reduced. Indeed, we do not propose that the Act should contain exempt categories at all, but rather that disclosure should be assessed on a "contents basis", records being disclosed in a partial form with any necessary deletions, rather than being completely withheld. This ensures that the harm test is sensibly and realistically applied to key areas. We have provisionally identified seven "specified interests" in place of the *Code's* exemptions.

3.9 In order to assess the circumstances in which substantial harm might be caused by disclosure, those using the Act will need to have a reasonable idea of the scope of each specified interest. So the FOI Bill will set out, to the necessary extent, particular factors in respect of each interest. Those considering applications — including the proposed Information Commissioner — should have regard to those factors when deciding whether a disclosure would cause harm or substantial harm to any one of them.

3.10. The Bill will also make clear, that such harm could in certain circumstances be caused by the cumulative effect of numerous disclosures of similar material over a period, as well as by a single disclosure.

III. Proposed key specified interests governing disclosure

3.11 We propose seven such interests:

1. National security, defence and international relations.

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

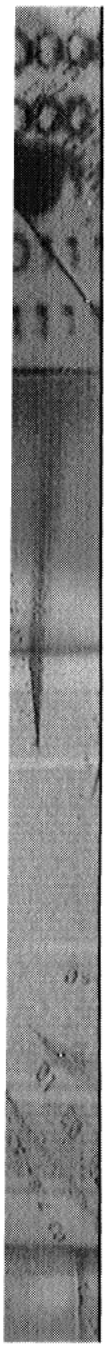
2. Law Enforcement.

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

3. Personal Privacy.

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

At the same time, the right to personal privacy cannot be absolute — there may be circumstances where disclosure of personal information may be in the public interest. Such cases could well raise difficult choices between the potentially conflicting interests of the individual, the applicant and the public authority holding the information. This is an issue which an FOI Act may need to acknowledge through a mechanism to allow third party appeals against impending disclosure (see paragraph 5.19). The Government is



introducing legislation into Parliament to implement the 1995 European Community Data Protection Directive. Data protection is integral to personal privacy, so there will be clear and important links between this legislation and FOI. These are examined in Chapter 4.

4. Commercial Confidentiality.

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

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

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

6. Information Supplied in Confidence.

Many public authorities hold information supplied to them by private individuals, companies or other organisations in the expectation that it will be kept confidential. Much of this will be personal information or commercially sensitive material, in which case the relevant specified interests will apply. But there may be other circumstances where an obligation of confidentiality exists: for example the views of experts given freely on the understanding of confidentiality, or opinions expressed about an individual in references for

appointments or citations for honours. In taking forward proposals in this area, we will have regard to the law of confidentiality. As noted in paragraph 2.13, the Act will cover information and records of any date before it comes into force. This will make it particularly important to ensure adequate protection for people or organisations whose communications with public authorities were covered by explicit undertakings of confidentiality, or at least a reasonable expectation that the law of confidentiality applied to them.

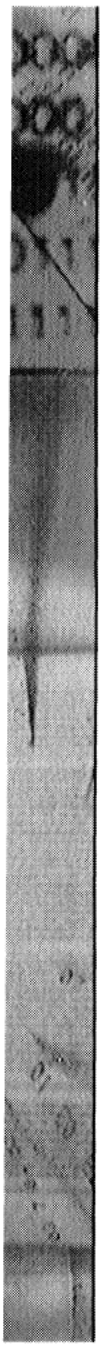
Decision-Making and Policy Advice

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

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

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

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



- the maintenance of collective responsibility in government;
- the political impartiality of public officials;
- the importance of internal discussion and advice being able to take place on a free and frank basis;
- the extent to which the relevant records or information relate to decisions still under consideration, or publicly announced.

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

Factual and Background Material

3.13 In keeping with our general commitment to openness, and in particular with our work to establish an independent National Statistical Service, we are keen to ensure that as much factual and background information as possible is made publicly available. We therefore see the decision-making and policy advice interest as designed primarily to protect opinion and analytical information, not the raw data and factual background material which have contributed to the policy-making process. Public authorities will therefore be encouraged to make such information available, even where opinion and advice based upon it needs to remain confidential. This is in line with, for example, a similar separation envisaged in the 1993 *Right to Know Bill*, and a recommendation of the 1996 Report on Open Government by the Select Committee on the Parliamentary Commissioner for Administration. We intend to exemplify this process by publishing shortly, in accordance with earlier commitments, substantial factual background to the development of this White Paper, and the decisions it announces.

3.14 We believe that these seven specified interests (subject to further definition, as necessary, in the legislation) should offer adequate protection for sensitive information. **We would however welcome views and comments on this issue.**

IV. Safeguarding the public interest

3.15 Applying the harm test is an essential element of any decision on disclosure. But there is a risk that the results of applying that test may not necessarily be consistent with the public interest (whether the outcome is to disclose or to withhold information).

3.16 Consideration of the "public interest" has become an increasingly important aspect in decisions — in both legal and non-legal contexts — on disclosure of information. It can, in certain circumstances, be critical in deciding whether information should be disclosed or withheld. We believe it to be an essential element in determining the right to know.

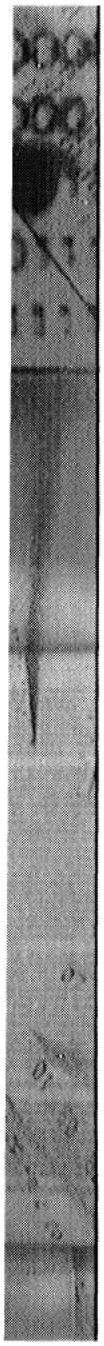
3.17 In addition, we have noted (paragraph 3.3 above) that the way that the public interest is meant to be applied under the *Code of Practice* is unclear, and can be difficult for both the disclosing authority and the applicant to understand.

3.18 We make two proposals to deal with this. First, ensuring that any decision on disclosure safeguards the public interest should be a separate, identifiable step in the FOI process. Second, an attempt will be made in the Bill to increase the clarity and certainty of individual decisions by defining what constitutes the public interest.

The public interest

3.19 No single factor can be said to constitute the "public interest", nor can the outcome of conducting a public interest test be predicted in advance: a case-by-case approach will be necessary. We believe, however, that public authorities can seek to ensure that decisions under FOI safeguard the public interest first by checking:

- that the preliminary decision on whether or not to disclose, resulting from the substantial harm test, is not itself perverse. For example, would a decision not to disclose particular information itself result in substantial harm to public safety, or the environment, or the commercial interests of a third party?



and then by ensuring:

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

3.20 Disclosure may also be prevented in specific circumstances by other legislation. We intend, however, where appropriate and consistent with European Community legislation, that the Act should repeal or amend the many existing statutory bars to disclosure first identified in the 1993 *Open Government* White Paper, bringing them into line with the harm and public interest tests set out above.

3.21 If any of the points highlighted in the text above — soundness of original decision; consistency with the purpose of the FOI Act; and consistency with other relevant legislation — cannot be answered satisfactorily, further consideration is likely to be needed before a final decision is taken on whether or not to disclose. This process is illustrated in the diagram at Annex C showing how the Act is expected to work in practice.

CHAPTER 4

The right to personal information

4.1 The Freedom of Information Act will give individuals a statutory right of access to the personal information about them which is held by public authorities. In most other countries (and under the existing *Code of Practice*) access to personal information has proved to be one of the most popular and widely-used aspects of Freedom of Information legislation. Examples of such information might include personal social security benefit records or Inland Revenue tax records.

4.2 A number of Acts already give people access to information about themselves.[4] We believe that it is desirable to bring as much of this existing legislation as possible under the new Freedom of Information Act. Further work will be done to determine how far each of these Acts can be replaced by the Freedom of Information Act. This will be done alongside the work on other statutory provisions described in paragraph 3.20.

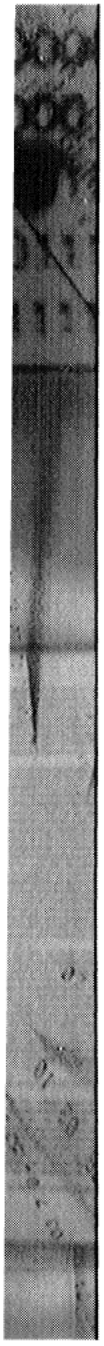
Protecting Personal Information: Data Protection

4.3 The most significant existing legislation on access to personal information is the *Data Protection Act 1984*. This is due to be replaced, in an augmented form, by a new Data Protection Act, which will implement an EC Directive[5]. Data Protection legislation is designed, amongst other things, to protect an individual's personal information from misuse by organisations, in either the public or the private sector, which process such data as part of their activities. One of the key aspects is that the individual has a right to obtain a copy of the personal information about them that an organisation holds. (The procedure for obtaining this information is sometimes called "subject access".)

4.4 The *Data Protection Act 1984* applies only to personal information held on computers. The new Data Protection Act will go wider and apply to some paper files. It will not apply to all paper files because this is not required under the Directive. For example, the Directive does not apply to policy files which only incidentally contain personal information. To comply with the Directive the new Data Protection Act must be in place by 24 October 1998.

4. Consumer Credit Act 1974; Data Protection Act 1984; Access to Personal Files Act 1987 and associated regulations ((Social Services) Regulations 1989; (Social Services) (Scotland) Regulations 1989; (Housing) Regulations 1989; (Housing) (Scotland) Regulations 1992); Access to Medical Reports Act 1988; Education (School Records) Regulations 1989; School Pupils Records (Scotland) Regulations 1990; Access to Health Records Act 1990; Human Fertilisation and Embryology Act 1990.

5. EC Data Protection Directive (95/46/EC).



What FOI will cover

4.5 Subject to the exclusions set out in paragraphs 2.20 to 2.22 above, Freedom of Information will apply to all personal data held by public authorities and other relevant organisations, whether on computer or on paper files. It will therefore cover a wider range of information held by public authorities than either the existing or the proposed Data Protection legislation.

Striking the right balance

4.6 The two regimes of Freedom of Information and Data Protection will cover the same ground in providing access for an individual to data held about them by public authorities.[6] But in other respects the two regimes will carry out very different tasks. We intend to ensure that the regimes for freedom of information and the protection of personal privacy accommodate each other. The two regimes must perform differing functions as effectively as possible, with the potential for conflict kept to a minimum.

Protection for the individual

4.7 Any Freedom of Information Act must provide adequate protection for an individual from any unwarranted invasion of personal privacy caused by an application from a third party. In practice, for the Freedom of Information Act in the United Kingdom, the new Data Protection Act will provide the basis for this protection.

4.8. The Freedom of Information Act will be drafted so that it is compatible with the Data Protection Principles which are set out in Data Protection legislation. These include, for example, the requirements that data should only be used for a specified and lawful purpose; that it should be adequate and relevant for that purpose; and that it should be accurate and kept up to date. A third party right of appeal, described in paragraph 5.19, will allow an individual to be consulted in cases where his or her personal information privacy might be affected by an FOI application. The Act will also ensure that, except where other statute requires, third parties do not have a right of access to information about an individual if the individual is denied that right.

6 . Data Protection also extends throughout other sectors of the economy

The access regime

4.9 We intend that the access regime should be as simple and helpful as possible for the applicant. It will ensure that any complexity in the overlap between the schemes or difficulty in determining the boundary is not reflected in the way in which it is presented to the user.

4.10 Data Protection legislation provides the individual with a number of rights. These include a right to correct inaccurate personal information and a right to compensation for any damage and associated distress caused by an organisation's misuse of the information. We believe it would be wrong to limit these rights to personal information covered by, or obtained through, the Data Protection Act, particularly as the boundary of coverage will move over time (because of the likelihood of phasing in of the Acts and changes in how data are held). Therefore we intend that, as far as possible, the rights applying under the Data Protection Act will apply to all personal information held by public authorities irrespective of the coverage of the Data Protection regime or the route of access.

4.11 As far as is practicable, we will align the systems for access to personal information under Data Protection and Freedom of Information. This is likely to include the means of access, time limits for reply, charges and appeals. Paragraph 2.31 sets out one method of how this might be achieved for the issue of charging. In addition the Government proposes that public authorities will have a duty to ensure that any significant difference between the two regimes is made known to any applicant who might be affected by such a difference.

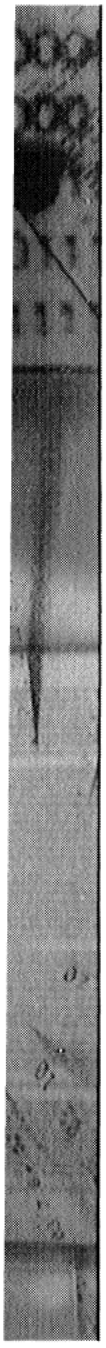
Appeals mechanisms for personal information

4.12 As explained in the next chapter, an independent Information Commissioner will be established to deal with appeals under the Freedom of Information Act. The Data Protection Registrar oversees the Data Protection regime. There will be occasions when appeals or cases involve both jurisdictions and it is clear that the two office holders will need to cooperate closely and effectively.

4.13 The Government proposes that the Commissioner and Registrar should be required, under the Freedom of Information Act, to consult each other and to exchange information on those cases where both jurisdictions come into play. In the unlikely event of a dispute arising between the Commissioner and Registrar, on which they were are unable to reach agreement, this would ultimately be resolved by the Courts.

CHAPTER 5

Review and appeals



The need for an independent review and appeal mechanism

5.1 The case for an independent review and appeals mechanism under the Freedom of Information Act is twofold. First, cases involving the disclosure of information are often complex and sometimes require fine judgements to be made on whether the public interest in disclosing information should or should not prevail over a competing public interest in withholding information. There is a clear need for an expert review body to exercise such judgements. Secondly, it is the right of appeal that will effectively guarantee and enforce people's right to know under the Freedom of Information Act.

5.2 The importance of independent review and appeal is recognised internationally through the provision of different types of appeals mechanisms, whether an Ombudsman, a tribunal or a specially designated Commissioner. Similarly, in this country, the Parliamentary Ombudsman[7] supervises the *Code of Practice on Access to Government Information* while the Data Protection Registrar enforces the requirements of personal privacy deriving from the *Data Protection Act 1984*.

5.3 We see independent review and appeal as essential to our Freedom of Information Act. We favour a mechanism which is readily available, freely accessible and quick to use, capable of resolving complaints in weeks not months. That is what we propose to create under the Act.

Review and appeals under the *Code*

5.4 Under the *Code of Practice on Access to Government Information* there is a two–stage appeals process. In the first instance a complainant can ask a government department to carry out an internal review of its decision not to disclose information. If the complainant remains dissatisfied, he or she can then ask the Parliamentary Ombudsman to conduct an investigation.

5.5 This system has worked relatively well. Internal review has led to further disclosure in over 30% of cases. The Parliamentary Ombudsman has proved effective in policing the *Code* and in resolving the relatively small number of complaints. He has received some 140 since the *Code* was introduced in 1994. Although the Parliamentary Ombudsman does not have the power to order disclosure, departments have invariably complied with his recommendations. The Government would like to pay tribute to successive Parliamentary Ombudsmen (Sir William Reid and Mr Michael Buckley) for their valuable work on the *Code*.

7. The Parliamentary Ombudsman also fulfils the post of Health Service Commissioner (HSC), who is responsible for policing the Code of Practice on Openness in the NHS, and its Scottish and Welsh equivalents.

Review and appeals under the FOI Act

5.6 We propose to build on the *Code's* two–stage system of appeal. The internal review stage will be formalised and a new independent Information Commissioner will be given wide–ranging powers. The Commissioner will be able to challenge authorities which refuse to release records and information which are subject to the Act. The Commissioner will have the power to order disclosure.

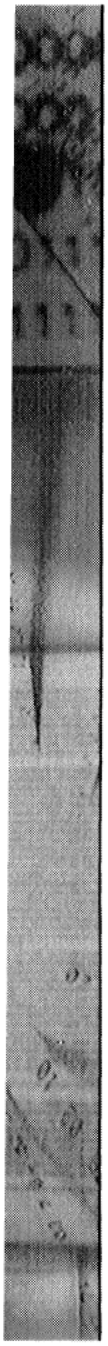
5.7 We envisage that the Information Commissioner will fulfil a role similar to that performed by the Parliamentary Ombudsman under the *Code*. However, we intend to make the new Commissioner an independent office holder (like the Data Protection Registrar) rather than an officer accountable to Parliament (like the Parliamentary Ombudsman). We believe that an independent officer is the more appropriate model given the wide coverage of the Act which will include very large numbers of bodies (for example schools and local authorities) that are not directly accountable to Parliament. An independent office holder will be answerable to the courts for his or her decisions. In this way, the appeals system will be (and will be seen to be) independent and in particular not subject to any form of political override which might ultimately be used to resolve contentious cases in favour of the Government.

Stage 1: Internal Review

5.8 Internal review will be the first step in the FOI appeals process. It will provide a quick, low cost and simple mechanism for resolving many complaints. It should also ease the burden on the Information Commissioner, leaving him or her to concentrate on more complex cases. An internal review should be carried out by an official who was not involved in the initial decision and be completed within a specified timescale.

5.9 Generally, an internal review will be a precondition for making a complaint to the Information Commissioner. However, the Commissioner will have the discretion to accept a complaint which has not been the subject of an internal review, for example, where:

- a complaint concerns unreasonable delay in dealing with an initial request for information or in conducting the internal review itself;
- the public authority concerned is too small to have its own review procedure. Care will be taken to ensure that internal review procedures do not create an excessive burden for very small bodies.



Stage 2: Appeals to the Information Commissioner

5.10 The new Information Commissioner will have a key part to play in promoting, interpreting and enforcing the Freedom of Information Act. The Commissioner will not have any locus where the information concerned is not covered by the Act. The Commissioner's primary role will be to investigate complaints that a public authority has failed to comply with the requirements of the Act either by refusing to disclose information, or by taking an unreasonable time to respond to requests, or by imposing excessive charges for information. He or she will be expected to resolve such cases as quickly and informally as possible. In a similar vein, the Commissioner will also hear appeals relating to access to historic records.

5.11 In addition, we will require the Information Commissioner to:

- publish an annual report, and special reports where necessary, to Parliament on the operation of his or her function and the operation of the Act more generally;
- publish reports on the outcomes of investigations and issue best practice guidance on the interpretation of the Act; and
- promote greater general public awareness and understanding of the Act.

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

- **the power to order disclosure of records and information which are subject to the Act.** This is an essential guarantee of the Commissioner's role in ensuring that public authorities fulfil their duties under the Act. The Commissioner could require disclosure of whole records, or of part of them with sensitive material deleted, or of extracted information as appropriate;
- **the right of access to any records within the scope of the Act and relevant to an investigation;**
- **the power to review and adjust individual charges or charging systems, or to waive a charge** if disclosure is considered to be in the wider public interest. For example, the Commissioner might consider that there is a compelling public interest in disclosure which could go by default if the applicant could not afford to meet the charge being levied;

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

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

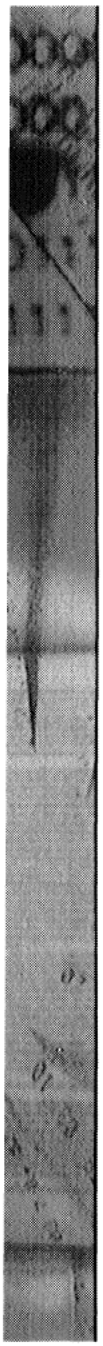
5.14 There have been a number of cases overseas where public officials have deliberately altered, destroyed or withheld records from review. Although such cases are rare, and while there is no evidence of similar abuses having occurred under the *Code*, we believe that the public's right to know established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

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

Right of appeal beyond the Information Commissioner

5.16 We do not propose that there should be a right of appeal to the courts. However, a disclosure order of the Information Commissioner (or a decision not to grant an order) would be subject to judicial review.[8] We have decided to take this approach

8. The question of whether the Commissioner has properly exercised his or her powers in reaching a reasonable decision. This is in contrast to a right of appeal to the courts on the substantive question of whether the decision was the right one or not.



because we believe it to be in the best interests of the FOI applicant. Overseas experience shows that where appeals are allowed to the courts, a public authority which is reluctant to disclose information will often seek leave to appeal simply to delay the implementation of a decision. The cost of making an appeal to the courts would also favour the public authority over the individual applicant.

5.17 Our proposed review and appeals system under FOI is set out diagrammatically at Annex E.

Ministerial certificates and vetoes

5.18 In a number of countries with FOI legislation, Ministers are given the discretion to override the disclosure powers of the appeals body. For example, they can certify that particular documents lie outside the appeals process or they can veto a finding of the relevant Ombudsman. We have considered this possibility, but decided against it, believing that a government veto would undermine the authority of the Information Commissioner and erode public confidence in the Act. We believe that our proposals strike the right balance between the sometime competing public interests in disclosing and withholding information.

Third party rights of appeal

5.19 Public authorities hold a great deal of information concerning individuals, companies and other organisations (referred to collectively as "third parties") which will be potentially releasable under the Act. **We would welcome views on whether a mechanism should be established to allow third parties to appeal against decisions to release information which they believe would cause "substantial harm" to their interests and, if so, what structure the mechanism should have**. The need for such appeals is most likely to arise in the areas of personal privacy, commercial confidentiality, or when the information requested was supplied in confidence by the third party.

CHAPTER 6

Public records

6.1 A Freedom of Information Act will have a considerable impact on our public records system. Government records of historical value are selected for permanent preservation and, when they are 30 years old, they are made available to the public in the Public Record Office.[9] "Records" includes not just written ones but records in any form (for example e-mail).

A unified Act

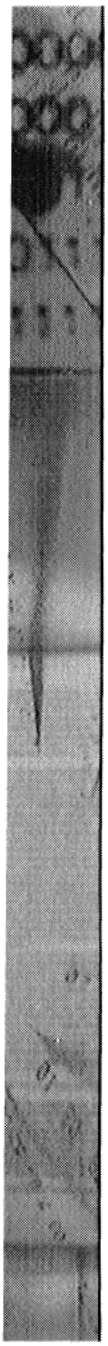
6.2 The Government wants the two systems — Freedom of Information for current records and Public Records for historical records — to complement each other to give a unified approach to openness. We therefore propose that the FOI Act should cover access to both current and historical material. This will provide a comprehensive right of access to all records, regardless of their age.

6.3 At present there are both statutory and non–statutory rules governing access to historical material:

- the *Public Records Act 1958* sets out the responsibilities of the Lord Chancellor as the Minister responsible for public records, the powers and duties of the Keeper of Public Records and the general rules governing the access to and selection, preservation and destruction of, public records;
- the *Public Records Act 1967* sets the statutory closure period after which records must be made available for public inspection as 30 years, except for certain defined reasons;
- the 1993 *White Paper on Open Government* contains more specific guidance on the criteria for extended closure of public records and the retention of documents in Departments.

6.4 We propose that those rules relating to access rights to historical records be incorporated into the FOI Act (other aspects, such as the role and responsibilities of the Public Record Office, will continue to be covered by a separate Public Records Act). This does **not** mean that exactly the same access provisions for current records will apply to historical records. Those for historical records will reflect the fact that their sensitivity has decreased due to the passage of time. In moving toward a unified Act, we want to take the opportunity to improve the public's right of access to historical records.

9. The vast majority of records have little historical value and are therefore destroyed before they are 30 years old.



The 30 year rule

6.5 At present, historical records must be made available to the public — in the Public Record Office — after 30 years. We have examined carefully the case for change and concluded that on balance it is preferable to retain the 30 year rule which is in line with international practice. In particular, we do not think that meeting the considerable costs of reducing the 30 year rule for **all** historical records would constitute the best use of scarce public resources.

6.6 Instead, under the new FOI regime which we are introducing, more records should be released before 30 years. Fewer records will be withheld for the full 30 years. This will mean that 30 year old records will generally be of a greater sensitivity than before. We think it right therefore that the threshold date should be set at 30 years, a period long enough to enable the great majority of these historical records then to be released to the public. One of the virtues of this system, in comparison with practice elsewhere, is that there is a set date by which it is known that records are going to be listed and be available for the public to use. This will continue.

Criteria for withholding documents for longer than 30 years

6.7 The overriding presumption is that all records preserved for historical reasons will be made available to the public at 30 years. The 1993 *White Paper on Open Government* laid down the strictly–defined criteria that must be met if they are to be withheld from the public for longer than 30 years. As part of our general approach to giving access rights a statutory basis, we propose to incorporate these criteria into statute, so that they have the same status as the tests governing access to current information.

6.8 The criteria relate closely to some of the specified interests identified for FOI purposes: defence, international relations and national security; information provided in confidence; and personal information. We will take the opportunity of the FOI Act to reformulate the criteria to reinforce this relationship.

6.9 We also propose to introduce an upper time limit of one hundred years on the withholding of material. Such a ceiling means that no information would be left indefinitely undisclosed either because it is not subject to any statutory disclosure

requirement or because it is subject to statutory provisions which bar its release. We fully expect that virtually all of the public records held beyond 30 years because of their continuing sensitivity will cease to need protection after 100 years. However, because of the inherent sensitivity of the records in question we propose to test whether their disclosure could still cause substantial harm to the public interest.

Application of the criteria

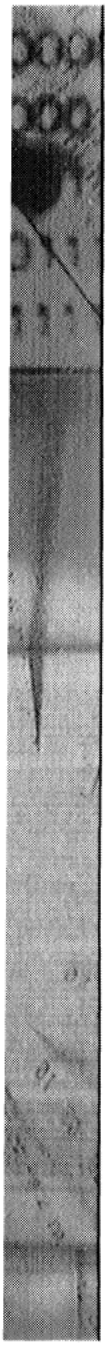
6.10 Applications from departments for the extended closure or retention of documents beyond 30 years are put to the Lord Chancellor who is advised by his Advisory Council on Public Records. We propose to give the Advisory Council the statutory support of the Public Record Office so that such applications are checked against the relevant statutory criteria.

Right of appeal

6.11 The present route of appeal against extended closure or retention of records beyond the 30 year period — to the Lord Chancellor's Advisory Council — is unsatisfactory. The Council and its little-known powers are limited to making non-binding recommendations on disclosure. Furthermore the Council is itself involved in the initial decision to close or retain material. We propose to direct appeals on public records to the independent Information Commissioner.

The importance of record-keeping

6.12 An FOI Act can only be as good as the quality of the records which are subject to its provisions. Statutory rights of access are of little use if reliable records are not created in the first place, if they cannot be found when needed, or if the arrangements for their eventual archiving or destruction are inadequate. The fast-growing use of IT will further increase pressure on the records system. We therefore propose to place an obligation on departments to set records management standards which take these changes into account, having regard to best practice guidance drawn up by the Public Record Office.



CHAPTER 7

Making government more open

7.1 Openness does not begin and end with a Freedom of Information Act. Overseas experience shows that statutory provisions need to be championed within government itself if openness is to become part of the official culture rather than an irksome imposition.

7.2 We believe that this sort of culture change has taken place in some countries — the USA and New Zealand are examples. We see no reason why it should not also be possible in the UK, despite a more entrenched culture of secrecy extending back at least to the 19th century and the Official Secrets Acts from 1889 onwards.

7.3 This will however mean that, for at least some public authorities, a Freedom of Information Act will bring with it substantial new obligations. This is all the more likely, given the very wide intended coverage of the Act. Arrangements for phasing-in through the progressive extension of the Act's provisions to all sectors and all different types of information may be needed. Existing mechanisms for openness — including the *Code of Practice on Access to Government Information* — will remain in place, with any necessary changes to smooth the transition to the fully-implemented legislation. A programme of work will be needed to facilitate this process.

7.4. In addition, a number of key tasks must be undertaken if we are to make an FOI Act the beginning of a real culture change:

- the general public will need a user-friendly "*How to use FOI*" guide;
- the public authorities covered by the Act need to be encouraged and helped to fulfil their obligations (whether statutory or otherwise) to pursue **active** openness — for example publishing internal manuals, performance indicators, giving reasons for decisions and so on;
- public authorities will need access to authoritative and up-to-date guidance in working with and interpreting the Act;
- effective training for officials must be organised and provided. A learning culture must be developed as the Act takes effect. For example, case studies of general interest could be assembled, publicised and made the subject of training courses;

- the operation of the Act needs to be monitored, leading to an annual report to Parliament;
- there needs to be a central point within government to which the Information Commissioner can turn to ease communication and liaison with the many public authorities covered by the Act.

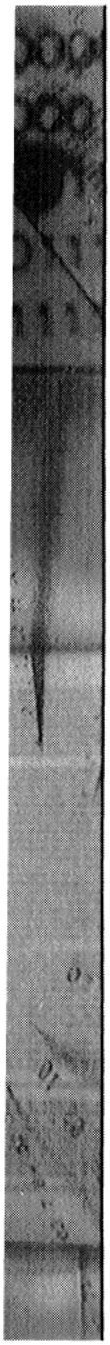
These tasks are vital if we are to realise our objective of a more open government.

7.5 A clear, active and testing approach by the Information Commissioner is unquestionably a key aspect of changing the culture, and Chapter 5 sets out our proposals for ensuring that the Commissioner does indeed play such a role. Some of the functions listed above may well also properly fall to the Commissioner, in furtherance of his or her role.

7.6 In general however, we believe that the role of champion should best be supplied by government itself. It is vital that FOI should not result in a position where all the pressure for an open and positive approach to disclosure of information lies outside government, while a resulting counter-culture of reluctance develops within.

7.7 The Chancellor of the Duchy of Lancaster set up a small dedicated FOI Unit in the Cabinet Office (Office of Public Service) in May this year. That Unit, in liaison with the Information Commissioner's Office, the Civil Service College, nominated contacts in government departments and other public bodies with a direct interest in FOI matters, will be well placed to carry forward much of this work.

7.8 All formal guidance and circulated papers of this Unit, together with, for example, the minutes of its meetings with the Information Commissioner or his/her Office, would be open documents, perhaps forming appendices to the Annual Report on FOI to Parliament. While the main focus of the Unit's work would be government departments, it would also co-ordinate its work closely with other larger public bodies and those in government performing key sponsor roles for other public services covered by the Act, such as the Department of Health and NHS Management Executive.



7.9 The Unit would also work with the Civil Service College and other training providers to ensure that training about the Act, the statutory functions and duties it imposes, and the importance of open government generally, was properly planned and implemented. The Government will consider inclusion of FOI awareness training in the central monitoring of Departments' training and development Action Plans under the requirements of the 1996 White Paper *Development and Training for Civil Servants: A Framework for Action*.

7.10 The Government regards these commitments as essential to ensure that the momentum towards open and accountable administration created by the FOI Act is maintained.

CHAPTER 8

The way forward

8.1 The people of this country have waited a long time for a legal right to know.

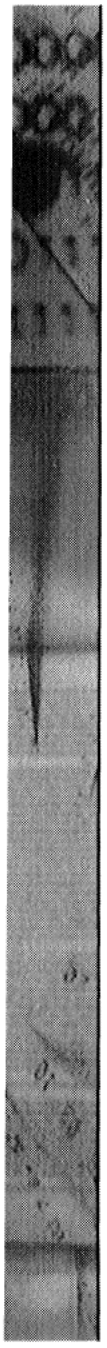
8.2 Within eight months of taking office, we are bringing forward these proposals for giving the people such a right. We are determined to get this long-delayed freedom of information legislation right. We now propose to consult on the proposals set out in this White Paper and comments are invited by the end of February. (Details of how to do this are set out inside the front and back covers.)

8.3 Helped by the points made during the consultation, we will then prepare a draft Bill on which, as part of our general programme of modernising the conduct of Parliamentary business, there will be further consultation, not least with the House of Commons Public Administration Select Committee and the House of Lords Public Service Select Committee.

8.4 This means that we will be well placed to introduce a Bill into Parliament. The long wait for the right to know is nearly over.

ANNEX A

Access rights under overseas FOI legislation



Country and Date of Enactment	Right of access to ...	Access
New Zealand December 1982	Official information: "any information recorded or stored by means of any tape recorder, computer or other device; and any material subsequently derived from information so recorded or stored".	Fully retrospective
Australia March 1982	The Act gives right of access to official documents. For the purposes of the Act 'document' includes maps, plans, photographs, audio-tapes, video and film, and records stored electronically.	Retrospection limited to 5 years before the Act (1982). Rationale was one of workload (i.e. it would be difficult to access old documents) and not that earlier 'records' had been compiled without regard to the possibility of disclosure.
Canada June 1982	The Act gives right of access to records. The definition of 'record' includes "any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microfilm, sound recording, videotape, machine readable record, and any other documentary material, regardless of physical form or characteristics, and any copy thereof". A right of access is also provided to "any record that does not exist but can be produced from a machine readable record... using computer hardware and software and technical expertise normally used by the Government Institution".	Retrospective, but with a progressive roll out: 1. To July 1980; 2. To July 1978; 3. Unreasonable workload excuse allowed; 4. No limit
USA 1966	Right of access to records. A definition of 'record' is not given.	
Sweden Principles first expressed in 1766	Right of access is given to official documents. A document is defined as something that contains information. That is anything on paper but also tape and electronic recordings. A document is official if it is held by a public authority and is regarded as having been received or drawn up by the authority.	

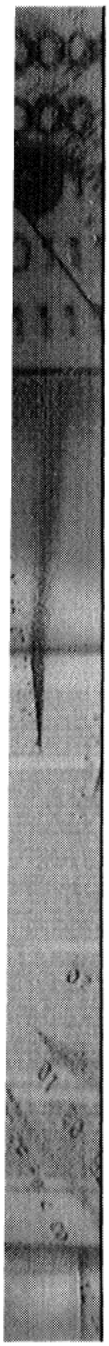
ANNEX B

Response times to FOI access requests

FOI regime	Number of days to respond to access requests
Code of Practice on Access to Government Information	20 working days
Canada	30 days
New Zealand	20 working days
Australia	30 days
USA	20 working days
Ireland	28 days

ANNEX C

Processing an FOI application



REQUEST FOR INFORMATION MADE

IS THE INFORMATION WITHIN THE SCOPE OF THE ACT?

yes

no

If no, explain that the information is excluded from the Act

"GATEWAY" PROVISIONS

DOES THE REQUEST PASS THE BASIC TESTS OF REASONABLENESS SET OUT IN PARAGRAPHS 2.24 – 2.26?

yes

no

If no, try to deal with the request as helpfully as possible (see paragraph 2.27)

Would disclosure cause harm to:
- the integrity of decision-making and policy advice?

Would it cause substantial harm to:
- National Security, Defence, and International Relations;
- Law Enforcement;
- Personal Privacy;
- Commercial Confidentiality;
- Safety of the Individual, the Public, and the Environment;
- Information supplied in Confidence?

Is the decision:
- reasonable in itself?
- in line with purpose of FOI Act (or, if not, properly justifiable)?
- consistent with other relevant legislation?

APPLY SUBSTANTIAL HARM TEST

APPLY PUBLIC INTEREST TEST

DISCLOSE/WITHOLD

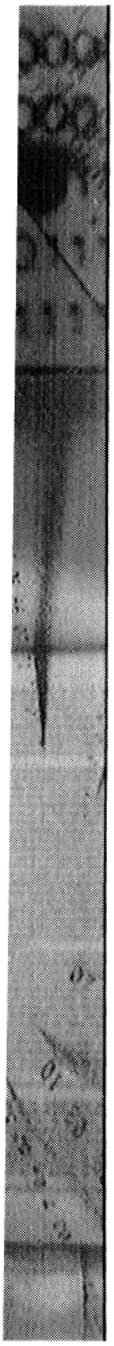
ANNEX D

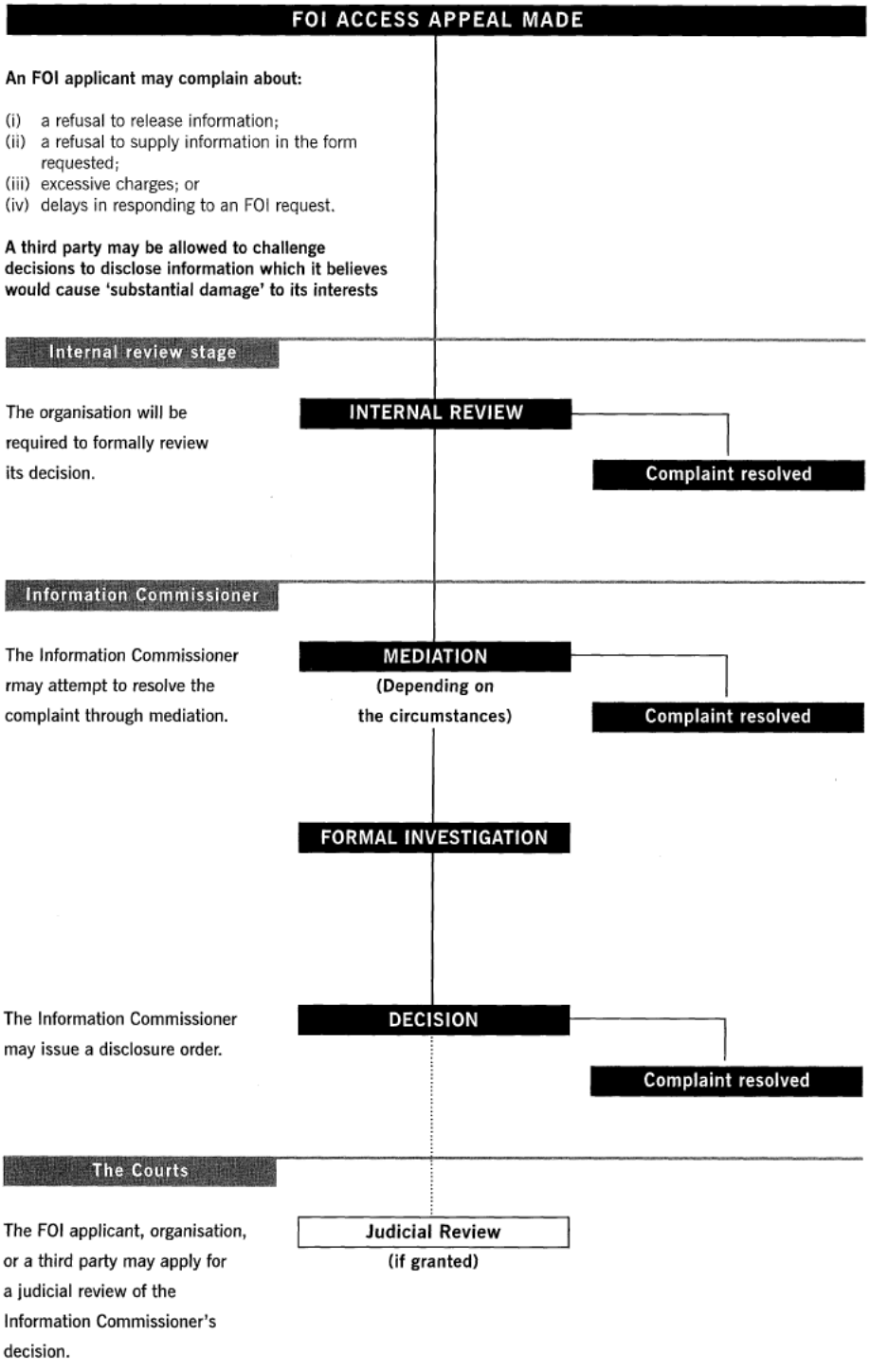
Exemptions: the *Code* and overseas FOI

Exemptions in UK *Code of Practice*	Australia	New Zealand	Ireland	The Netherlands	USA	France	Canada
1. Defence, Security and International relations	YES	YES	YES	YES	YES	YES	YES
2. Internal discussion and advice	YES	YES	YES	YES	YES	YES	YES
3. Communications with the Royal Household	YES	YES					
4. Law enforcement and legal proceedings	YES	YES	YES	YES	YES	YES	YES
5. Immigration and nationality							
6. Effective management of the economy and collection of taxes	YES	YES	YES	YES	In part	YES	YES
7. Effective management and operations of the public service	YES		YES	YES	YES		YES
8. Public employment, public appointments and honours			In part				
9. Unreasonable, vexatious or voluminous requests	YES		YES				
10. Publication and prematurity in relation to publication	YES	YES					YES
11. Research, statistics, analysis	YES		YES		In part		YES
12. Privacy of an individual	YES	YES	YES	YES	YES	YES	YES
13. Third party's commercial confidences	YES	YES	YES	YES	YES	YES	YES
14. Information given in confidence	YES	YES	YES	YES	YES		YES
15. Statutory and other restrictions	YES		YES		YES	YES	YES

ANNEX E

Processing an FOI access appeal





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YOUR RIGHT TO KNOW — DEBATING THIS WHITE PAPER ON THE INTERNET

The "Informing Government" web site (**http://foi.democracy.org.uk/**) has been set up to promote public discussion of this White Paper and to enable the public to ask questions of, and make suggestions to the Cabinet Minister for Public Service, Dr David Clark, who is responsible for the White Paper.

If you would like your submission to be published on this web site as part of this discussion, please indicate this. Although such submissions on paper can be converted for electronic publication, the process is made easier if you can e-mail your submission in text format (a.txt file) to **submissions@democracy.org.uk**, or send it by post, on a 3.5 inch disk, to:

Alex Balfour
Content Director
UK Citizens' Online Democracy
c/o Internet Vision
60 Albert Court
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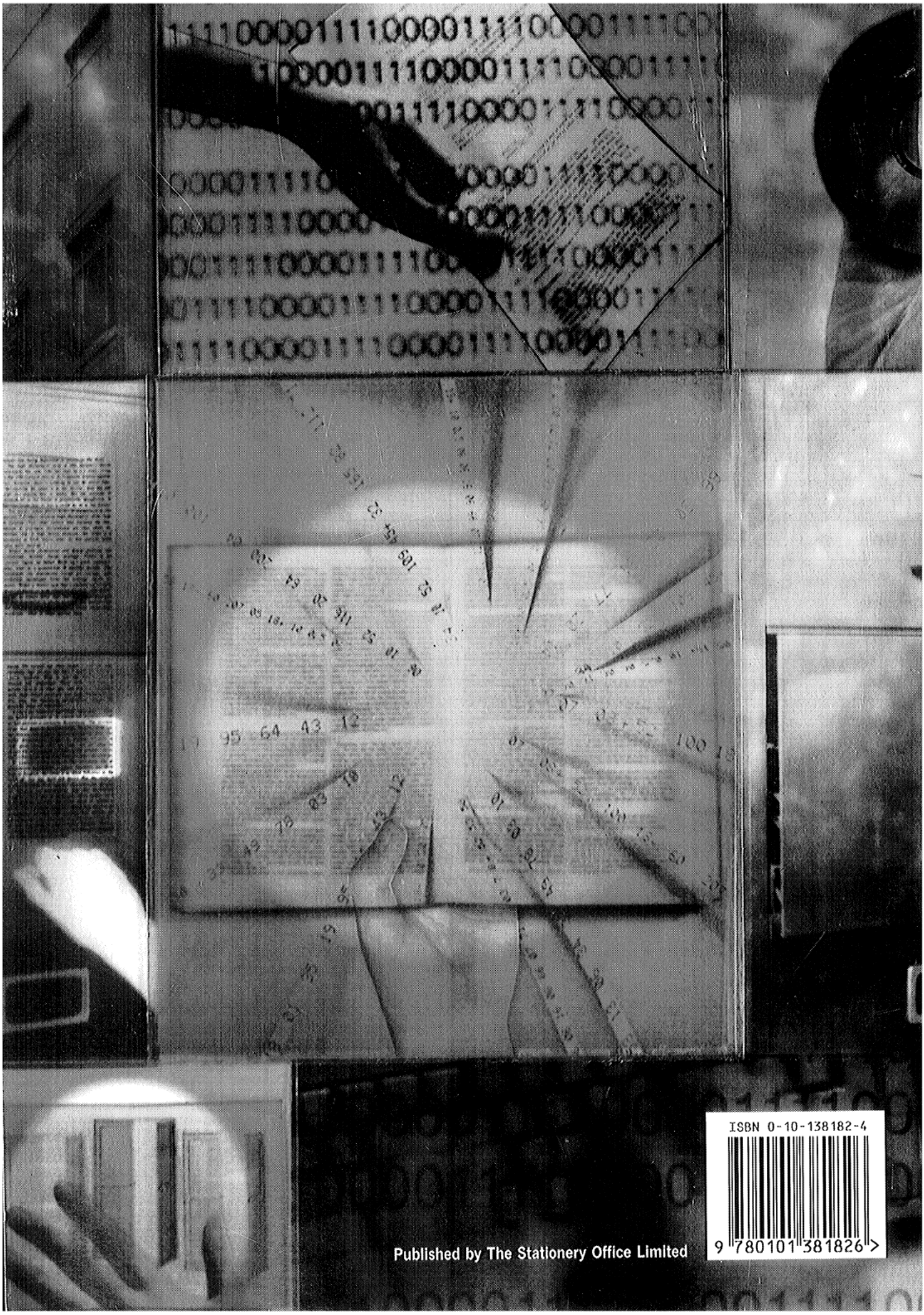

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THINKING CLEARLY ABOUT THE RIGHT TO KNOW: BRITAIN'S WHITE PAPER ON FREEDOM OF INFORMATION

*Spencer Zifcak**

Introduction

It did not start auspiciously - Britain's White Paper on Freedom of Information[1] was leaked to the press prior to its final approval by Cabinet apparently in order to sidestep anticipated opposition from senior ministers in the Blair Government. As soon as its recommendations were canvassed in the broadsheet media, however, it became very much more difficult for the oppositional faction in the Cabinet to argue that the White Paper should not be released. And so the Paper *Your Right to Know*. was duly presented to Parliament by the Chancellor of the Duchy of Lancaster, David Clark, late in December 1997.

It would have been a pity had the Paper not seen the light of day. For it contains some of the clearest thinking about access to official information published by government in recent years. It has its deficits of course. But overall its analysis of the issues and problems surrounding a right to know and the solutions it proposes augur well for British freedom of information (FOI) legislation. It also contains much from which established FOI jurisdictions can learn.

In the remainder of this article I will describe the major proposals contained in the White Paper, analyse its more interesting initiatives, explore its deficits and then make a number of concluding remarks.

* *Spencer Zifcak is Associate Professor of Law and Legal Studies, La Trobe University, Melbourne.*

An outline of the White Paper

The FOI White Paper is set against the background of a number of important measures taken by the new Labour Government to promote greater openness and accountability in political and public administration. The Government has supported the establishment of Scottish and Welsh parliaments, it has made the government of London more democratic and it has introduced legislation to incorporate the European Convention of Human Rights into UK domestic law.

The White Paper itself is the first step in delivering on the Government's promise to break down the culture of secrecy in Whitehall and introduce freedom of information laws. Freedom of information campaigners spent many years in the wilderness under the Thatcher and Major administrations but extracted promises from all the major opposition parties to implement more open government upon their election.[2] The new government has moved quickly to commence a process of consultation which will result in a draft bill and then final legislation by the spring session of parliament in 1999.

The proposed Act's coverage is broad. As usual it will apply to government departments and agencies, non-departmental public bodies, local authorities, the national health service, schools, universities and public service broadcasters. It also extends to nationalised industries, public corporations, privatised utilities and

private organisations insofar as they carry out statutory functions. There are exceptions for the parliament, the security service, the intelligence service and the special forces. But beyond this, very few others are envisaged.

The White Paper proposes that the general right of access to official information should take the form of "a right exercisable by any individual, company or other body to records or information of any date held by the public authority concerned in connection with its public functions."[3] Unlike Australian legislation, therefore, there is no retrospective time limit. Like most other FOI legislation, a decision on disclosure will be made with reference to the contents of the relevant documents and information rather than being related to the actual or presumed intentions of the applicant concerned.

Pro-active release of documentation is also encouraged. The Paper proposes, therefore, that facts and analyses underlying key governmental policies and decisions, explanatory materials on dealing with the public, reasons for administrative decisions and operational information about how public services are run should be made available as a matter of course.

A maximum fee of £10.00 will apply to any individual request. Beyond this, charges will be levied but within a clear framework of relevant principles. So, for example, no profit can be made, charges will be structured to ensure that the principal burden falls upon requests which involve significant additional work and cost and applicants will be notified of the cost to provide them with an early choice about whether to proceed. The Paper also canvasses the prospect of introducing a two-tier charging regime. Observing correctly that a uniform charging structure may penalise an individual applicant seeking a limited amount of information in relation to a private company which may stand to gain financially by pursuing information for commercial purposes, it canvasses the possibility of levying steeper charges on commercial and other corporate users of FOI.

Observing that FOI legislation abroad contains multiple exemptions, the Paper seeks to consolidate protected interests under only seven headings:

- National security, defence and international relations
- Law enforcement
- Personal privacy
- Commercial confidentiality
- Public safety
- Information supplied in confidence
- Decision-making and policy advice

Documents will be exempt under these headings only if their disclosure would result in demonstrable harm. The harm test is one of the most interesting features of the Paper and I will return to it presently. The Paper makes it clear that none of the proposed categories of exemption should be regarded as precluding the release of factual and background material. While analytical and opinion related information may be withheld, raw data and explanatory material will be released as a matter of course.

Britain already has Data Protection legislation.[4] The proposed new Freedom of Information Act (FOI Act) will complement its provisions. The FOI Act will provide for access to personal documents but will also contain adequate protection for personal privacy. It will also be drafted in order to be compatible with data protection principles in an amended Data Protection Act. These will include a requirement that data should be used only for the purpose it is collected, that it

should be adequate and relevant for that purpose, and that it should be timely and accurate. Individuals who believe their privacy may be compromised by disclosure under the Act will be able to bring third party proceedings to prevent disclosure they feel would be undesirable.

Finally, a comprehensive system of review and appeal is suggested. An office of Information Commissioner will be established to hear appeals against decisions by departments and agencies not to disclose requested information.

> We see independent review and appeal as essential to our Freedom of Information Act. We favour a mechanism which is readily available, freely accessible, and quick to use, capable of resolving complaints in weeks not months.[5]

Appeal will be a two-stage process. Applicants denied access will be able to seek internal review and then appeal to the new Commissioner's office. The Commissioner will be an independent office-holder rather than an officer accountable to the Parliament. The Commissioner will be empowered to publish annual and special reports, to issue best practice guidance on the interpretation of the Act and to raise public awareness of its provisions. The office will be answerable to the courts for its decisions.

Key initiatives

The first matter that catches one's attention about the British Government's new proposals is the breadth of the FOI Act's coverage. With the advent of the new managerialism and market governance, observers of FOI in Canada, New Zealand, Australia and elsewhere have become familiar with restrictions being placed on the application of FOI to agencies and organisations which engage in commercial and semi-commercial activity. The claim that information is "commercial-in-confidence" has been heard with increasing frequency from privatised utilities, public corporations and agencies engaged by contract to perform functions formerly allocated to governmental instrumentalities.[6]

Conscious of these trends, the White Paper's authors propose nevertheless that agency-based and functional exemptions of this kind ought not to form part of the new FOI regime in Britain. The Act will extend not only to state owned enterprises but also to public corporations, privatised utilities and to information relating to services performed for pubic authorities under contract. The core commitment appears to be that wherever public purposes are being pursued, the agencies responsible, whether public or private, should be drawn to account through freedom of information:

> We are mindful that the Act's proposed coverage will include the nationalised industries, executive public bodies with significant commercial interests and some private bodies in relation to any statutory ... functions which they carry out. But we believe that openness should be the guiding principle where statutory or other public functions are being performed, and in the contractual arrangements of public authorities. ... Commercial confidentiality must not be used as a cloak to deny the public's right to know.[7]

Next, the White Paper seeks to consolidate and constrict the operation of the exemptions to disclosure. Criticising the fact that most FOI legislation abroad is made excessively complex by the inclusion of numerous categories of exemption, it proposes only the seven protected interests outlined above. Both the categorisation and the wording of the exemption provisions, it says, should discourage the use of a class-based approach to exemption. Perhaps the potent example of this discouragement is that no separate category of exemption for cabinet documents is suggested. Whether or not cabinet documents should be disclosed should be determined on the same criterion as that applied to other internal working documents, that is,

whether or not disclosure of any particular document would result in harm to the government's processes of deliberation.

The Paper then proposes a new standard in relation to which all decisions on disclosure should be determined. The common test to be applied is whether the disclosure of information will cause "substantial harm":

> We believe that the test to determine whether disclosure is to be refused should normally be set in specific and demanding terms. We therefore propose to move in most areas from a simple harm test to a substantial harm test, namely, *will the disclosure of this information cause substantial harm?*[8]

The nature of the harm which may arise from the disclosure of each protected interest will be set out indicatively in the terms of the exemptions themselves. Both government agencies and the Information Commissioner will be required to have regard to these indicative harms in making their decisions. So, for example, in relation to cabinet documents, decision-makers will be required to assess whether disclosure will "impair the maintenance of collective ministerial responsibility."

Subject to one reservation that will be made presently, the introduction of the standard of "substantial harm" is to be welcomed. The standard focuses attention clearly on the content rather than the nature or source of the information concerned, it is stringent and it places the onus of demonstrating harm squarely upon the agency seeking to withhold the information. Further, rather than leaving "the public interest" at large the proposed legislation will seek to define its relevant attributes in relation to each category of exemption. It remains to be seen, of course, how successful such an enterprise will be in practice but the intention at least should be applauded.

Ministerial certificates and vetoes will have no place in the legislation proposed. The White Paper's authors believe that their inclusion would undermine the uniform and consistent approach to decisions on disclosure upon which the new Act will be based. Ministerial intervention of this kind, they say, would have the effect of undercutting the authority of the Information Commissioner and eroding public confidence in the integrity of access decisions.

The Information Commissioner is given very substantial authority. The Commissioner will have the power to order the disclosure of any records, the right to obtain access to any records relevant either to a request or an investigation and the power to review and adjust individual charges and charging systems. The Commissioner will be encouraged to engage in mediation wherever possible. In the interests of speed, economy and finality, no right of appeal to the courts is proposed. Rather, the Commissioner's decisions, like those of other tribunals will be subject to judicial review:

> Overseas experience shows that where appeals are allowed to the courts, a public authority which is reluctant to disclose information will often seek leave to appeal simply to delay the implementation of a decision. The cost of making an appeal to the courts would also favour the public authority over the individual applicant.[9]

The introduction of a powerful Commissioner's office, of course, places great weight on the necessity for a sound appointment to the position but again, the Paper's careful consideration of applicants' interests is a very welcome one in this regard.

Some reservations

During the lengthy and extensive debate which took place in the years preceding the White Paper's introduction, the position of governmental internal working documents was a central issue of contention. It was only to be expected that Whitehall, renowned for its secrecy,

would argue that documents reflecting its policy making processes should be exempt from disclosure.[10] Even in drafts produced by the lobby organisation, "The Campaign for Freedom of Information", therefore, deliberative documents were treated very cautiously even to the extent of excluding any consideration of the public interest in their disclosure.

While the White Paper does not propose that internal working documents be accorded a class exemption of this kind, it does tread the area with extra sensitivity. So, while the test for disclosure under every other exemption is that of "substantial harm" in relation to deliberative documents it is altered to "simple harm".

In and of itself, the reduced standard for deliberative documents might be acceptable. But when combined with the White Paper's treatment of "the public interest" it takes on a different complexion. The White Paper defines the public interest quite specifically in terms of protection. That is, a decision to disclose documents will be acceptable only if it is consistent with safeguarding the public interest. The idea that, in a particular circumstance, some broader public interest may demand disclosure of documents which might otherwise have properly been withheld does not feature on the Paper's analysis. Similarly, the public interest in relation to particular exemptions is to be assessed against indicative statutorily defined harms. That there might be countervailing if not statutorily delineated "goods" beyond the obvious and general ones of openness and accountability is not canvassed at all.

Thus, an internal working document will be capable of exemption if it can be determined that its disclosure would result in a simple harm, for example, to the political impartiality of public servants. In the absence of a consideration of any countervailing public interests militating in favour of release, it may readily be appreciated that this particular exemption is cast very widely indeed.

To this should be added the Paper's ambivalent treatment of secrecy provisions in other legislation. On the one hand, it recommends that a thorough review of secrecy provisions in other legislation be undertaken with a view to repealing or amending relevant provisions to make them consistent with the tests of harm it proposes. On the other hand it singles out the infamous *Official Secrets Act 1962* for special mention. This Act, made notable in particular by the *Spycatcher* and *Ponting* trials, has constituted the principal bar to more open government in Whitehall for decades.[11]

The effectiveness of the Official Secrets Act, the White Paper says, should not be reduced by freedom of information. Rather, FOI should be framed in a manner that will ensure that a decision taken under it would not force a disclosure that would result in a breach of the harm tests contained in the more restrictive piece of legislation. It may be, perhaps, that this latter statement was included in an abundance of caution. Even so, since official secrets legislation and FOI co-exist successfully in most other comparable jurisdictions, it is difficult to appreciate why it should be necessary in Britain to make the particular point that FOI will necessarily be subordinate to secrecy legislation, particularly of such a draconian kind.

Conclusion

It is frequently said that it is practical to introduce effective FOI legislation only in the flush first few months of a new government. After that, power and cynicism prevail to overwhelm the principled commitment to more open and accountable government. It may be, therefore, that the liberal approach to the "right to know" contained in this White Paper will, in its course, be overtaken by a more pragmatic, political stance as the

new Labour Government becomes more attracted to the seductions of office.

Yet even if this were the case, the Paper, in drawing attention back to first principles, will have made its contribution. In established FOI jurisdictions it is no longer common to hear from government that:

- fees and charges should be contained in the interests of applicants; and
- all agencies engaged in the pursuit of statutory purposes, whether public or private, should be required to act openly; and
- the accessibility of information should be presumed unless the release of a particular document with a particular content would cause substantial harm to the governmental process; and
- the final arbitration of disputes should be conducted quickly, impartially and without excessive prolongation in the courts.

And yet these are commitments with which almost every piece of FOI legislation has begun.

Nor is it common to acknowledge, as the White Paper does, that openness requires not only legislative reform but a significant alteration in ministerial and public service culture.

It is perhaps here above all that attempts at openness have tended to founder. Reviewing attempts to introduce more open government in Britain and elsewhere, Sir Douglas Wass, the former Permanent Secretary and Head of the Civil Service in Britain observed that :

> The problems then of creating an informed and enlightened public are not easy to resolve. All good democrats can assert their belief in the direction in which we should be travelling. But on this journey, as on so many others where government is concerned, there are few easy shortcuts. More important, in my view, than any institutional changes is the need for a commitment on the part of all who work in the field of government positively to want an informed public. If this is lacking, little in the way of machinery will help.[12]

Certainly, openness in government is a more important component of the political and administrative landscape than it was even two decades ago. And FOI has played its part in reducing the landscape's opacity. But the kind of commitment to which Sir Douglas Wass refers is still, regrettably, rarely to be seen particularly in political circles. It is this fact that makes the British Government's White Paper seem so fresh. We shall have to wait and see, however, whether this particular pudding is proved in the eating.

Endnotes

1 Cm 3818, *Your Right to Know: The Government's proposals for a Freedom of Information Act*, December 1997.

2 The Campaign for Freedom of Information's case is set out in Wilson D. *The Secrets File*, Heinemann Educational Books, 1984. The early history of the reform movement is described in Marsh N.S, "Public Access to Government-Held Information in the United Kingdom: Attempts at Reform in Marsh N.S (Ed) *Public Access to Government-Held Information: A Comparative Symposium*, Stevens, 1987. The culture of secrecy is well-described in Ponting C. *Secrecy in Britain*, Basil Blackwell, 1990.

3 Cm 3818, op cit, p. 6.

4 *Data Protection Act 1984.*

5 Cm 3818, p.26.

6 This matter is discussed in some detail in the Commonwealth Administrative Review Council's recent discussion paper *The Contracting Out of Government Services: Access to Information*, December 1997.

7 Cm 3818, p.18

8 Ibid. p.16

9 Ibid. p.30

10 The case is made articulately in Nairne, Sir Patrick "Policy-Making in Public" in Chapman R.A. and Hunt M. (Eds) *Open Government*, Routledge 1989.

11 The complete reform of the *Official Secrets Act* 1911 was first proposed by Lord Franks as long ago as 1972. See Cmnd 5104, *Departmental Committee on Section 2 of the Official Secrets Act 1911*, Volume 1, Report of

the Committee, London HMSO, September 1972.

12 Wass, Sir Douglas, *Government and the Governed*, BBC Reith Lectures 1983, Routledge and Keegan Paul, 1984 p.100.