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

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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.

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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.