

Fol developments in the United Kingdom White Paper — 'Your Right To Know'

The Blair Government's proposals on Freedom of Information in the United Kingdom were published on 11 December 1997 in the White Paper *Your Right to Know*. Launching what he described as one of the most radical sets of Freedom of Information proposals in the world, Dr David Clark, Chancellor of the Duchy of Lancaster said:

the people of this country have waited long enough for a legal right to know. That wait is nearly over... Our proposals, if fully implemented would transform this country from one of the most closed democracies to one of the most open. They represent a fundamental change in the relationship between government and the people.

The UK Government outlined its commitment to information access and the introduction of an Fol Act in its introduction to the Paper:

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

It appears that the UK Government is ready to adopt a pro disclosure regime that incorporates the best features of Fol legislation from jurisdictions such as Canada, USA, New Zealand and Australia. Proposals such as the introduction of an Information Commissioner model, the wide ambit of coverage of the Act, the 'substantial harm' test and the attempt to clarify what is meant by 'the public interest' can only be viewed as positive steps for the introduction of a truly effective information access regime. The Government is to be commended on preferring not to simply enact the existing voluntary Code of Practice, but rather to seek a 'complete root and branch examination of this whole area [Fol] in order to produce a better and more lasting scheme'.² It is also significant that the White Paper represents a very real change from the Conservative Government's response to the Second Report from the Select Committee on the Parliamentary Commissioner for Administration — Open Government (1995–1996). Indeed, should the recommendations voiced in the White Paper take effect, the UK will be armed with a Freedom of Information Act that in a number of key areas far surpasses present legislation in many jurisdictions, particularly Australia. The Campaign for Freedom of Information has welcomed the White Paper, noting that 'the proposals were much bolder than we expected' but has also expressed certain reservations concerning particular features of the proposed act.

Yet there are several features and design elements which are a cause for concern. The UK Constitution Unit in its commentary on the White Paper noted that:

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

against the many positive features of the White Paper must be set a lesser number of concerns focused on:

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

In addition to these concerns the White Paper contains several potential deficiencies which could be exploited by a begrudging bureaucracy or a government tiring of the rigours of openness and accountability. These deficiencies include a screening test for applicants, a fee regime whose finer details are left uncertain and several major areas of frequent usage (in other jurisdictions) deliberately excluded by the government.

As a side note, submissions on the White Paper may be viewed on the Web at <<http://foi.democracy.org.uk/index.html>>. The web site is managed by UK Citizens Online Democracy (UKCOD) a non-profit organisation whose objectives include developing opportunities for wider public participation in the democratic process using electronic online communication, and to provide a wide range of information that will encourage online political discussion between members of the public. Submissions are invited until 28 February 1998.

OVERVIEW: AT A GLANCE

The positives

- Under most exemptions, only information capable of causing 'substantial harm' could be withheld. This is a more difficult test for the government to meet than applies under Fol regimes in the US and countries like Australia and Canada. Exemptions in most jurisdictions refer to 'damage' (or 'harm' or 'injury') but do not require the harm to be 'substantial'.
- The scope of the proposed Act would be impressively wide — it would even cover the privatised utilities, and private bodies working on contracted-out functions, as well as government departments, NHS bodies, quangos and local authorities.
- All records and information held will be accessible — the right of access applies to all existing records, regardless of how long ago they were compiled, to historical records not yet available under the Public Records Acts, and even to information which was known to officials (adopting one of the key outstanding features of the New Zealand *Official Information Act*) but had not been recorded in official files.
- The Act would be enforced by an Information Commissioner with legal enforcement powers. In addition the Commissioner would have the powers of a court to compel government to release information, but complainants would not have to bear the potentially prohibitive cost of going to court to enforce their rights.
- Some access to civil service advice and internal discussion will be possible, where disclosure does not cause harm. Although the harm test for the exemption

for advice is easier for the government to meet than other exemptions (it refers to 'harm' not 'substantial damage') it does make clear that internal advice and discussion may be obtained under the Act.

- The government intends to repeal or amend existing statutory restrictions on disclosure.
- Some form of 'public interest' balancing test would apply, allowing the Commissioner to consider whether any refusal to disclose was in line with the Act's general objective of encouraging more accountability.

The negatives

- Fees could become an obstacle to access. The White Paper proposes that requesters of information would

be charged an application fee of up to £10, plus additional charges for requests which 'involve significant additional work'.

- The proposed legislation would apply only to 'the administrative functions' of the police. The UK Campaign for Freedom of Information believes that information relating to law enforcement functions should be available, so long as disclosure did not damage those functions.
- Security and intelligence services would not be subject to the Act.
- It is unclear whether information relating to defence, international relations, security and law enforcement will be subject to the strict 'substantial harm' test or to the lower tests set out in the *Official Secrets Act*.

Comparison Between UK White Paper and Australian Law Reform Commission Recommendations

	United Kingdom	Australian Reforms
Scope of application of Act	Very wide — includes coverage of private bodies and those services contracted out by the government.	Private bodies and GBE's that are engaged in 'commercial activities in a competitive market' excluded from coverage.
Rights of access	To information, documents and records regardless of date of creation.	To information, documents and records regardless of date of creation.
Charging mechanisms	£10 application fee no charge for internal or external review.	\$30 application fee \$40 internal review fee should be abolished \$300 fee for AAT review.
Overcoming 'agency culture'	Duty to be imposed on public authorities to release certain information (e.g. factual government proposal information) as a matter of course.	Education of FoI officers, dissemination of public FoI information, performance agreements of senior officers.
Exemption provisions	No standard class-based exemption provisions <i>per se</i> . Disclosure to be on a 'contents' basis according to 7 'specified interests' such as national security and third party protection	Traditional categorical exemptions such as National Security and defence, Cabinet documents, Executive Council and internal working documents.
Test for disclosure	Test to apply to most provisions — whether 'substantial harm' would result from disclosure of information. Contains a public interest test.	Only applies to certain provisions — whether harm or a 'substantial adverse effect' would occur if information was disclosed. Contains a public interest test.
Personal information	Data to be used only for a specified and lawful purpose, to be kept accurate and up to date Right to correct inaccurate personal information and a right to compensation for any damage and associated distress caused by the organisation's misuse of the information.	Right to amend incorrect personal information without prerequisite of access to the document. Amendment may be sought on the basis that information is not relevant for the purpose it was collected. Obligation on agency to amend if information is incorrect, misleading etc
Appeal mechanisms	Internal review Information Commissioner Model for external review. Commissioner has discretion to review request application without internal review. Commissioner to hold the powers to order the release of information, to access any records within the scope of the Act, to review or waive a charge if in the public interest, to resolve disputes via mediation, and to apply for a warrant to enter and search premises and remove records if suspecting they are relevant to an investigation and being withheld. Introduction of criminal offence for the willful or reckless destruction, or withholding of records relevant to an investigation of the Commissioner.	Internal review Internal review should not be a prerequisite to AAT review. The AAT should remain the sole determinative reviewer of FoI decisions. The AAT holds the power to require production of documents claimed to be exempt at any time after an application for review has been lodged. Ombudsman to retain current recommendatory approach to review of FoI decisions — holding no powers to set aside or substitute a decision.
Ministerial Certificates	Recommended against	Currently in use for s.33 (national security and defence), s.33A (Commonwealth/State relations), s.34 (Cabinet documents), s.35 (Executive Council documents and s.36 (internal working documents). The ALRC recommended that certificate provisions be removed from ss.33A and 36 and that certificates have a maximum life of 2 years. The Administrative Review Council suggested that certificates issued under ss.33 and 34 should be unlimited in duration.

	United Kingdom	Australian Reforms
Historical/archival records	To be disclosed after 30 years Those documents not released after 30 years to have a ceiling life of 100 years.	To be disclosed after 30 years.
Commitment to government openness	Public to be given user friendly guide. Training of agency officials Monitoring of the Act, annual reports.	The establishment of an Independent Monitor to oversee the administration of the Act.

ANALYSIS OF THE UK WHITE PAPER CHAPTER 2

Scope of the Act — Who will it cover?

The UK Government states that 'freedom of information, as a fundamental element of our policy to modernise and open up government, should have very wide application'.³ Following such tenets, the scope of the Act appears to very broad, certainly much more so than the existing Code of Practice. At a glance it will cover government departments, including non-ministerial departments and their executive agencies; nationalised industries, public corporations, as well as over 1200 Quangos (non-departmental public bodies).

The National Health Service, the administrative functions of the courts, tribunals and police, the armed forces, local authorities and local public bodies, schools and universities, and private organisations insofar as they carry out statutory functions will also fall under the Act's ambit. Further, it is specifically stated that FoI provisions will be applied to information relating to services performed for public authorities under contract.

However, as noted by the Campaign for Freedom of Information, the operations and activities of the Security Service, Secret Intelligence Service, the Government Communications Headquarters and the Special Forces (SAS and SBS) will not be made subject to the Act. The Campaign criticises this perceived failing noting that the CIA is subject to the USA *FoI Act* and the equivalent Canadian and New Zealand services are covered by their countries' laws also.

The recommendations made by the Australian Law Reform Commission in its report *Open Government: A Review of the Federal Freedom of Information Act 1982* concerning the breadth of the application of the Australian *FoI Act* were not as progressive as those put forward in the White Paper. The ALRC recommended against the extension of the *FoI Act* to the private sector on the basis that as a general rule, private sector bodies do not exercise the executive power of government and do not have a duty to act in the interest of the whole community.⁴ Further it was believed that existing regulations currently keep private sector bodies sufficiently accountable. While the Commission recommended that Government Business Enterprises (GBEs) should be made subject to the Act, those that were engaged predominantly in commercial activities in a competitive market (such as Telstra) were to be excluded from the Act's ambit.

Since that report the peak administrative law body in Australia, the Administrative Review Council, has issued discussion papers attempting to explore ways and mechanisms to handle access to information issues involving outsourcing and contracting out of public sector activities.

Rights of access under the Act

The right of access to information is stated by the Government as 'at the heart of the Act'.⁵ Anyone can apply for

information and applicants do not need to demonstrate or state their purpose in applying for information. It is significant that while the existing Code of Practice provides access to information, but not to actual records or documents, (which is in contrast to most statutory FoI schemes) the Paper suggests that information access should cover both records and information, with the term 'records' covering all forms of recorded information including electronic records, tape and film etc.

The access right is to apply to records of any date, regardless of whether they were created before or after the Act comes into force. The access right will apply to recorded information that the public authority concerned already holds. The public authority does not have to have originated this information itself.

A submission on the White Paper by Adrian Norman <http://foi.democracy.org.uk/html/submission_stack_1_3.html> alluded to the fact that the White Paper does not specify whether all information, or only documents on paper are within the scope of the proposed bill. Norman notes that decision-making activities such as committee meetings, telephone calls, and video conferences are recorded in digital form, often without additional paper records.

Australian FoI legislation generally provides a statutory right of access to government information, including documents and 'records' subject to certain exemptions. The ALRC noted that while not all documents in the possession of a Commonwealth agency are records in a technical sense (i.e. being information that is created, received or maintained by an organisation in the transaction of business or the conduct of affairs and kept as evidence of this activity) nevertheless most of the documents sought under the *FoI Act* will be.⁶ Good record keeping and record management practices were therefore recommended as vital to the success of any FoI Act.

The ALRC made similar recommendations to the White Paper concerning a right of access to all documents regardless of date, in suggesting the amendment of the Australian Act so that it applied to documents that were less than 30 years old, regardless of when they were created. The ALRC sought to close the 'access gap' that had occurred between the *FoI Act* and the *Archives Act* where the latter only provided access to documents that were more than 30 years old, and the *FoI Act* only access to documents that were created after 1977.⁷

Duties to publish information

The Government appears ready to voice a commitment to the recognition and changing of 'agency culture' noting that:

a Freedom of Information Act must be a catalyst for changes in the way that public authorities approach openness ... 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.⁸