

- ④/19. We recommend that the Government should make this point [about whether journalists' sources are to be protected under one of the "specified interests"] clear in their response to this Report (paragraph 45).

The Government is clear about the need to ensure that Freedom of Information does not diminish freedom of expression, and the rights of the media under Article 10 of the European Convention on Human Rights. The Government believes that the structure of "Gateway" provisions (including barriers to premature disclosure of information due to be published at a future date) together with the specified interests, should provide a good degree of protection for the necessary interests of public service broadcasters. In particular, the "information supplied in confidence" specified interest should protect confidential sources of information to journalists, while personal information within the data protection law will be covered by the particular protection given to information held for journalistic purposes. The Government will however, consider carefully as it moves towards publication of a draft FOI Bill, whether anything further is needed to ensure a satisfactory approach to the issue of investigative journalism

which the Committee has raised. Broadcasting and other media organisations will of course have an opportunity to comment on the draft Bill after it has been published.

RESTRICTED

From: [REDACTED]
NDPB Unit
Floor 1st

Tel: x [REDACTED]

Date: 14 October 1998

cc: Alex Stewart
Christopher Muttukumaru
Philip Stevens
Paul Heron

NICHOLAS KROLL

FREEDOM OF INFORMATION: BROADCASTERS

I attach here some background briefing for Thursday's meeting with representatives from broadcasting. I am sorry that I am unable to attend.

2.

You will note that paragraph 42 (flagged) of the briefing reflects the concerns of the broadcasters and DCMS's view that the precise conditions, which are now proposed should apply under each of the specified interests, needs further discussion. The minutes of that meeting are also attached for your own information (these will need to be returned to the Ministerial Support Unit), and you will see that it was agreed that the issue needed further consideration (last page of the minutes, also flagged) in terms of both the conditions and the public perception of backtracking on the White Paper.

3. I have attached at Annex B a background note on the main areas of DCMS interest which emerged during the preparation of the White Paper last year, and issues which have been raised in response to the publication of the White Paper. At Annex C is that latest organizational chart supplied by the new FOI Unit.

[REDACTED]

RESTRICTED

DCMS interest

40. The Home Secretary argues against applying an overall substantial (or simple) harm test to the seven interests specified in the White Paper, and for replacing it by separate exemptions applying to each of the specified interests. We are content in principle for a set of self-contained exemptions although there is little doubt that this will be seen as a backward step from the White Paper. It would certainly be difficult to maintain the simple harm test for policy papers etc while having the substantial harm test for, e.g., national security.

41. DCMS will, as a matter of policy, need to address the question where the threshold should be set in relation to commercially confidential information. We will need to be careful to avoid the temptation to lower the level of the harm test in, for example, the case of some of our grant giving bodies where the commercial confidentiality specified interest might otherwise be liberally invoked.

42. Our main concern here, however, is to ensure that legitimate claims by broadcasters for non-disclosure are protected. Having discussed this issue with the Home Office official concerned, we think it likely that the four major concerns of public service broadcasters (who will certainly be caught by the Act) and commercial broadcasters (if they are caught) will be covered by present proposals. These are:

a. investigative journalism

- (Largely) protected by the exemption for material intended to be published within a reasonable time (see paragraph 21 of the paper), and in relevant cases by the 2nd (law enforcement) and 5th (individual, public and environmental safety) specified interests.

b. protection of sources

- Protected by the Law of Confidence (see above)

c. commercial confidentiality

- Already protected as the 4th specified interest

d. decision-making and policy advice

- Already protected as the 7th specified interest (which will apply not only to Government, as stated in the White Paper, but to any other body caught by the legislation).

Annex 8

NOTES ON FREEDOM OF INFORMATION AND DCMS

Public Service Broadcasters

The present proposal is that public service broadcasters (BBC, Channel 4 and S4C) should be included in respect both of their programming activities and their statutory regulatory functions. The ITC and the Radio Authority would be included as statutory regulators, and the Broadcasting Standards Commission would also be in as a statutory body. Channel 3, Channel 5 and the other private media would be excluded.

The public service broadcasters have expressed some concern at the impact on journalistic activity of being caught by the act but subject to the necessary exemptions for the protection of investigative journalism the BBC and Channel 4 welcome the broad principles of the White Paper.

28 OCT 1998

fol,mlh

RESTRICTED

Bolton

From: **NICHOLAS KROLL**
Head of Broadcasting and Media
Group
Room 404

Tel: 0171-211 6410

Date: 7 October 1998

*In the file
please.*

ALAN HOWARTH

cc: Secretary of State
Janet Anderson
Robin Young
Paul Bolt
Janet Evans
Christopher Muttukumaru
Alex Stewart
Philip Stevens


C.

One addendum to the full brief which you have

It concerns part 7 of the Home Secretary's paper: substantial harm test.

2. As the brief says (paragraph 42), our Departmental concern is to ensure that legitimate claims by broadcasters for non-disclosure are protected. While we think that the Home Secretary's proposals are satisfactory, a number of broadcasters led by Channel 4 have alerted us to concerns which they have - not yet specified in detail. They are coming in next week to talk to me about them, with a Home Office official present at my request. On past experience, if we do not flag potential problems early we are likely to be told that they cannot be considered.

3. In your contribution on this part of the Home Secretary's paper you may therefore want to welcome his ideas in principle, but say that we understand that the broadcasters have a number of concerns and that we may want to follow up as necessary with the Home Office shortly.

Nicholas Kroll

NICHOLAS KROLL



CHANNEL FOUR TELEVISION

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TELEPHONE: 0171 396 4444, DIRECT LINE: 0171 306 8497
FAX: 0171 306 8367
MINICOM: 0171 306 8691
EMAIL: PNAIK@CHANNEL4.CO.UK

10 August 1998

✓ Mr Reeves

Nick Kröll
Head of Broadcasting and Media Group
Department of Culture, Media and Sports
2-4 Cockspur Street
London
SW1Y 5DH

cc. Janet Gray

Henry Reeves

Philip Stevens

*Grateful for quick
advice, pl*

NK

1/9

Dear Nick Kröll

Re: **FREEDOM OF INFORMATION**

When we last spoke in early March, I raised with you Channel 4's concern about its inclusion as a public authority (along with the BBC) under the proposed Freedom of Information Bill. Whilst we welcome the broad principles upon which Freedom of Information is founded, we have serious concerns about the wide-ranging proposals to be included in the Bill which would place Channel 4 under a legal obligation to disclose information which would jeopardise the future of investigative television journalism as well as our other programme-making activities. These concerns are shared not only by the BBC and ITN, but also by the ITVA and Channel 5.

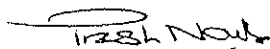
I understand that the Home Office has now taken over responsibility for the Bill. A draft Bill had been promised for the Autumn, but I understand it is now doubtful that a Bill will be included in this year's Queen's Speech.

Given the current legislative timetable, we believe that a meeting with your office to discuss the concerns of the broadcasters *before* the Bill is published would be beneficial to all parties. Our proposal is for an informal meeting which Channel 4, the BBC, ITN, ITVA and Channel 5 would attend.



We would welcome a meeting with your office at your earliest convenience
and await hearing from you.

Yours sincerely



Prash Naik
Lawyer

Cc Sue Robertson
Jan Tomalin
Martin Stott

PN-LETT263JAS

From: Philip Stevens
Media Division

Tel: 211 6432

Date: 30 June 1998

c Paul Heron

Nicholas Kroll

FOI : LETTER FROM CHARLES RAMSDEN

You asked for advice on this letter from Charles Ramsden. I have discussed it with Paul Heron and we agree that there is no need to say more than that we would like to be kept in touch with broadcasters' response to the draft Bill, and we may have comments on draft instructions to Counsel.

2. There were three issues of concern to public service broadcasters, who will be caught by FOI legislation. They were concerned that FOI legislation would catch investigative journalism (and protection of sources), commercially confidential information and programme-making activities, and that this would be wrong and inequitable vis à vis commercial broadcasters. Charles Ramsden's letter provides reassurance on all three points. The broadcasters will have the chance to comment on the draft Bill when it is produced. I suggest that we stick to the line used at namely that "no intervention is necessary unless negotiations between public service broadcasters are stalled, or the Cabinet Office appears to lean to heavily towards disclosure."

3. Draft instructions to Parliamentary Counsel have been coming in in stages, and I think it very unlikely that we would have any comments on them. The paper on protection of privacy under the FOI regime, for example, seems to me to set out all the legislative constraints admirably. But we should not say that we will not have comments.

Philip Stevens

PHILIP STEVENS



OFFICE OF PUBLIC SERVICE

Machinery of Government and Standards Group

CABINET OFFICE

Horse Guards Road • London SW1P 3AL

TELEPHONE: 0171-270 1830 • FAX: 0171-270 1860 • E-MAIL: foi@gmet.gov.uk

DATE • 19 June 1998

OUR REFERENCE • June98\kroll 19

YOUR REFERENCE •

Nicholas Kroll Esq
Head of Broadcasting and Media Group
Department for Culture Media and Sport
2-4 Cockspur Street
London
SW1Y 5DH

cc. Paul Bost
Janet Evans



Alex Stewart
Paul Haron
Trish Perry
self

Philip Stevens

Advice please on no broadcasting
issue, in consultation with Broadcast
Policy Division. Should we be
commenting on draft instructions?

Nicholas Kroll

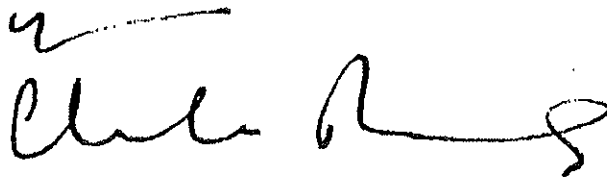
Nicholas Kr

FREEDOM OF INFORMATION

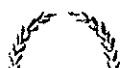
Thank you for your letter of 16 June.

22/

- Public Service Broadcasters. I am grateful for your agreement that exclusion from the Act for the broadcasters, as public bodies, would not be appropriate. As far as protection of information is concerned, we are very much aware of arguments about freedom of expression and the need to ensure compatibility with ECHR Article 10; also, the degree of exemption from subject access for journalism under Clause 31 of the Data Protection Bill. In practice, it is likely that the way that data protection and FOI will need to interlock means that Clause 31 will read across to protect journalistic activities in respect of personal information requested under FOI as well, while protection for the public service broadcasters' internal information will be variously available under the *Commercial Confidentiality* and *Decision-Making and Policy Advice* specified interests; and journalists' sources of information will be protected under the *Information Supplied in Confidence* specified interest. We will be considering with our instructing solicitors whether this combination is adequate to protect the interests of the broadcasters, including the needs of investigative journalism, or whether specific provision in the Bill is required (As you note, the draft legislation is in any case due to be published for further public consultation later this year, thus enabling the broadcasters themselves or others outside government with an interest in the media to comment directly.) I would of course be happy to keep you in touch with the reaction to that process: in the meantime, we are of course prepared to consider any comments from DCMS on the draft instructions for Parliamentary Counsel, most of which are now on circulation round the official group, with the remainder to follow within the next week or two.



C M RAMSDEN
Freedom of Information Unit



cc Paul Bolt
Sally Evans
Andy McLellan
Alex Stewart
Paul Heron
Philip Stevens
Trish Perry



2-4 Cockspur Street
London SW1Y 5DH
Telephone: 0171-211 6410
Facsimile: 0171-211 6460

Head of Broadcasting and Media Group

Charles Ramsden Esq
Freedom of Information Unit
Cabinet Office
Office of Public Service
Horse Guards Road
London
SW1P 3AL

16 June 1998

Dear Charles,

FREEDOM OF INFORMATION

I am sorry not to have replied sooner to your helpful letter of 21 April, replying to mine of 8 April.

3. On broadcasting, I had not intended to suggest that public service broadcasters should have a let-out from the legislation, and I fully accept your point that exclusions undermine the comprehensive nature of the Government's FOI proposals. As I understand it, the focus of public service broadcasters' concern is that it is inequitable that their journalistic and commercial functions would be caught, while those of non-public service broadcasters would not; hence their request for exemptions to protect investigative journalism and commercially sensitive information. My Secretary of State is sympathetic to the public service broadcasters' concerns here; and I understand that the Chancellor of the Duchy has provided reassurance on the exemptions which they have sought.

4. I gather that you are now considering the detailed terms of FOI legislation; and I hope that this will be drafted in such a way as to deliver my Secretary of State's policy preferences as outlined above. If not, perhaps you would let me know. Beyond that, no doubt the broadcasters themselves will comment on the draft Bill once published; and I should be grateful if you would keep me in touch with their reaction.

Yours,

Nicholas Kroll

NICHOLAS KROLL

From: Philip Stevens
Media Division

Tel: 211 6432

Date: 15 May 1998

cc Mark Fisher
Robin Young
Nicholas Kroll
Paul Bolt
Janet Evans
Alex Stewart
Paul Heron
[REDACTED]
Christopher Muttukumaru

Secretary of State

FREEDOM OF INFORMATION : BROADCASTERS

This is to update you on the development of Freedom of Information policy as it affects broadcasters, and to ensure that you are content with what is being proposed. There will be an opportunity to register any Departmental points

2. There are two issues on the broadcasting side: exclusions and exemptions. The present proposal is that public service broadcasters (BBC, Channel 4 and S4C) should be included in respect both of their programming activities and their statutory regulatory functions. The ITC and the Radio Authority would be included as statutory regulators, and the Broadcasting Standards Commission would also be in as a statutory body.

3. Channel 3, Channel 5 and the other private media would be excluded. In general, private bodies with statutory functions, would be covered only in respect of their statutory functions. This means bodies like some of the privatised utilities, but there are no such bodies in the broadcasting field.

4. This policy seems consistent and defensible except perhaps in catching certain programming activities only of public service broadcasters. They have expressed particular concern at the impact on journalistic activity on the grounds that it is inequitable in principle, and might jeopardise investigations if the subject could gain access to journalists' sources, records and working papers. The FOI Unit at Cabinet

Office has therefore proposed exemptions comparable with those to be conferred on Government and which protect decision-making and policy advice, and there will be a read-across to the provisions of the Data Protection Bill. There will also be exemptions for commercially sensitive information.

5. Our impression, from the responses made to the White Paper consultation, is that the BBC and Channel 4 welcome the broad principles laid down in the White Paper, subject to the necessary exemptions for, e.g., the protection of investigative journalism. Indeed the BBC, which has its own reasons for wanting better access to Government-held information, feels that it should not be excluded.

6. The public service broadcasters and the regulators will have a second chance to comment on the efficacy of the exemptions when the FOI Bill, which is being drafted now, is published, probably in early June. The presumption is in favour of disclosure, and the exemptions are based on a two-part test: the holder of the information has to decide first whether disclosure would cause (substantial) harm to certain specified interests, including privacy, and then whether the unspecified public interest should override the preliminary decision to disclose or not to disclose.

7. I suggest that you do not need to intervene with colleagues on the issue of exemptions unless any negotiations between the broadcasters/regulators and Cabinet Office are stalled, or we feel that Cabinet Office is tilting too much towards disclosure, and endangering responsible investigative journalism.

8. Do you agree that there is no need for you to intervene Ministerially unless negotiations between public service broadcasters and Cabinet Office are stalled, or Cabinet Office appears to lean too heavily towards disclosure ?

C. P. Stevens

C P STEVENS

BAK

ramsden.let



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Head of Broadcasting and Media Group

Min Stewart

Mr Heron

Mr Stevens
[Signature]

Charles Ramsden Esq
Freedom of Information Unit
Cabinet Office
70 Whitehall
London
SW1

Ms Muttukumaru,

3 main issues & requests:

- 1/ Broadcasters
- 2/ Lottery grant details
- 3/ Status of Caracol 8 April 1998

The Royal Household issue is not current - TCH is to be excluded.

Dear Mr Ramsden, Please call, if you wish to discuss. *[Redacted]* x *[Redacted]*

FREEDOM OF INFORMATION - BROADCASTERS

1/5/98

I know that a number of broadcasters have written to you about the possible application of freedom of information legislation to broadcasting. As you may imagine, this issue is a matter of close interest to my Ministers also.

2. As I understand it from their contact with me over the last couple of months, broadcasters' concerns relate among other things to:

- the scope of prospective legislation. Channel 4 and the BBC have both questioned the disparity of application as between themselves and the commercial broadcasters. It has been argued that a better approach would be to apply the legislation to all broadcasting regulatory bodies in respect of their regulatory functions but not to broadcasting bodies per se;
- the inhibiting effect on those broadcasters who may be subject to the legislation, particularly in pursuing specific strands of programming such as investigative journalism; and
- related but widely concerned about freedom of expression and commercial confidentiality.

3. I should find it helpful to have an update from you on your thinking as to these and other concerns put to you by broadcasting bodies and as to your timetable of next steps. If a meeting would help, please let me know.

Yours,

Nikolas Kroll

NIKROLL

From: Philip Stevens
Media Division

Tel: 211 6432

Date: 23 March 1998

cc Mr Bolt
Ms Evans

Mr Kroll

FREEDOM OF INFORMATION : BROADCASTERS

Prash Naik of Channel 4 wrote to you on 10 March, with a copy of his letter to Robert Cayzer of the FOI Unit asking for a meeting to discuss broadcasters' concerns before the FOI Bill is drafted. You asked whether we needed to intervene.

2. C4's main submission to the FOI Unit, sent to us in confidence with Mr Naik's letter of 2 March, raises two related questions:

- (a) why are BBC and C4 caught and the other broadcasters not (paragraph 2.12) and
- (b) will investigative programme-making be exempted (paragraph 5.6) ?

3. Barry Cox of ITVA has also sought confirmation from the Chancellor of the Duchy that commercial broadcasters are outside the scope of the legislation, but I am not sure that this assurance has been given to any broadcaster. On point (b), the CDL said in Questions on 4 February that "nothing must be done to restrict investigative journalists or to put pressure on journalists to disclose sources." There is a suggestion in his letter to John Birt of 18 March that BBC programme-planning might be treated in the same way as decision-making and policy advice in Government.

4. FOI Unit's line on discussions with broadcasters seems to be that the Government's precise intentions will become apparent with the publication of a draft FOI Bill later in the year. I doubt that this will satisfy the broadcasters. You might wish to write to Charles Ramsden in the FOI Unit to suggest that, if he has not already done so, he could let broadcasters know of the Government's intentions now.



CABINET OFFICE
70 Whitehall, London SW1A 2AS
Telephone: 0171-270 0400

Chancellor of the Duchy of Lancaster
Cabinet Minister for Public Service
KbO 11480

John Birt Esq
Director-General
British Broadcasting Corporation
Broadcasting House
Portland Place
London W1A 1AA

Mrs Pasty

18th March 1998

Dear Mr Birt,

FREEDOM OF INFORMATION

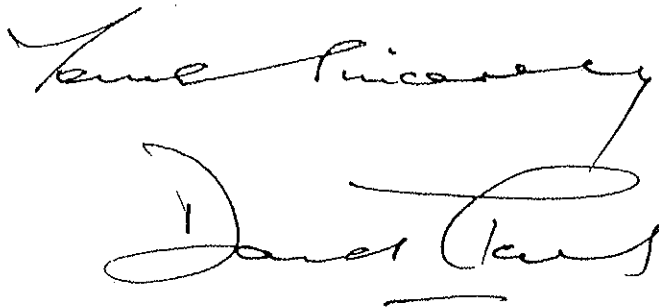
Many thanks for your letter of 23 February; I am very pleased with the positive response which the BBC has given *Your Right to Know*.

I thought you might find it helpful if I addressed, briefly at this stage, the two points of concern mentioned in your letter:

- freedom of journalistic and broadcasting expression. I note carefully what you say about the protection of programme plans, in particular journalistic input to them. In preparing draft FOI legislation - on which there will, of course, be a further period of public consultation later this year - we will obviously be taking careful account of the provisions for protecting freedom of expression in the emerging legislation on data protection and human rights. A further point to note, in the context of BBC programme planning, is that the White Paper envisages the "*Decision-Making and Policy Advice*" specified interest as likely to have application to public authorities beyond Government Departments and Agencies which have direct dealings with Ministers. We recognise that a degree of protection for planning processes is important, as seen by the distinction drawn in the relevant section of the White Paper between "decisions still under consideration, or publicly announced".

- the BBC's commercial position. We are of course conscious that our FOI proposals are intended to extend across an extremely wide range of organisations, including both those in the public sector which have direct commercial interests, and a number of private sector companies. Accordingly, the White Paper makes it clear that we would expect a degree of protection to be necessary for the commercial interests of such public authorities and other organisations themselves, as well as those of suppliers and contractors. We will of course bear carefully in mind the points you have made (as well as those that you mention which BT have put to us) in preparatory work on the relevant specified interests.

Again, I should make clear that this is not the end of the consultation process: it will resume later in the year with the publication of a draft FOI Bill, which I hope will give you the clarification in these areas that you seek.

A handwritten signature in black ink, appearing to read 'David Clark', written in a cursive style. The signature is positioned above the printed name 'DAVID CLARK'.

DAVID CLARK

1. INTRODUCTION

- 1.1 This paper sets out Channel 4 Television Corporation's ("Channel 4") views on the Government's White Paper on Freedom of Information - "Your Right To Know"¹ ("the White Paper").

Broadly speaking, we welcome the principles upon which the White Paper is founded namely :

*"To encourage more open and accountable Government by establishing a general statutory right of access to official records and information"*²

We acknowledge that the proposals set out in the White Paper mark a break with Britain's tradition of Government secrecy deeply ingrained in the British establishment. A Freedom of Information Act ("the Act") would undoubtedly be of great benefit in furthering the cause of quality investigative journalism and promoting greater freedom of expression.

- 1.2 In this regard, we welcome Dr Clark's assurances that it would be very strange if the Act brought in restrictions on the role of journalists. We note in particular Dr Clark's comments that :

*"It will be right and proper for any publicly funded organisation such as the BBC to be open to Freedom of Information, but nothing must be done to restrict investigative journalists or to put pressure on journalists to disclose sources. We made that clear and that is my commitment". (our emphasis)*³

- 1.3 We have serious concerns that the wide-ranging proposals set out in the White Paper would place Channel 4 under a legal obligation to disclose information which could include rushes, researchers notes and legal and editorial notes prepared in the course of a production ("programme-making information"). The disclosure of such information would not only jeopardise both investigative and non-investigative programme-making, but could compromise journalistic sources.

- 1.4 We believe that the proper purpose of the Act is to encourage the organisations named to be more open and accountable, by establishing a right of access to "official records and information". However we believe that a Freedom of Information Bill ("the Bill") drafted on the basis of the White Paper would not contain adequate safeguards and exemptions to cover programme-making information, which would inevitably result in the Act being open to abuse by the Maxwells of this world.

1. Your Right To Know, CM3818, December 1997

2. Para 1.2 of the White Paper

3. Hansard 4 February 1998 Col 1038

[From Channel 4 document of 2 March 1998]

- 3.6 'Many documentary investigations depend upon the disclosure to journalists of confidential documentation from within a large corporation, sometimes anonymously. On analysis, this documentation may reveal wrong-doing or give the lie to an officially accepted scenario. In this situation, the corporation in question will generally seek full disclosure of the documentation in possession of the broadcaster or journalist, before broadcast, frequently alleging that the internal documentation may be forged, altered or incomplete'.
- 3.8 'As to satire, entertainment and "showbiz" programmes, research notes will be compiled routinely on various celebrities as part of on-going research, essential to prevent or defend libel actions and to avoid unfairness and inaccuracy (as required by the ITC and BSC Codes). While such programmes are not in the same category of investigative journalism, they nonetheless play a valuable role in bringing a "warts and all" picture of those in the public eye to their public, within our obligations of fairness. The right to disseminate, and for viewers to receive, such information is no less at the heart of the principles of freedom of expression which an unfettered right of access to research information under the Act would seriously undermine.'
- 3.12 'The White Paper also raises important questions as to the compatibility of a right of access under the Act with the provisions of the Human Rights Bill, and, more particularly, Article 10 of the European Convention of Human Rights ("ECHR") which protects freedom of expression. The European Court of Human Rights has repeatedly emphasised the importance it attaches to the role of the media in freedom of expression. We believe that if the drafting of the Bill were to leave Channel 4 exposed to applications for information by the Maxwells and Aitkens of this world, then it would not comply with Article 10 of the ECHR. It would, we believe give rise to the chilling effect created by all disclosures of sources, particularly those which are aimed at procuring a prior restraint. We submit that any Freedom of Information right which required Channel 4 to disclose material collected for journalistic purposes would require the most careful scrutiny.'

6. GATEWAYS TO THE ACT

- 6.1 We welcome the White Paper's assurances that applicants will be encouraged to act reasonably and not abuse or misuse the access rights that the Act provides.²⁴ We recognise the basic tests of reasonableness for applications for information – termed as “gateway” provisions in the Act – but we are concerned that we would be required to give an indication of our plans for publication, in respect of an application for information which “*will be, or is intended to be, published at a future date*”.²⁵

We believe that programme-making material should be protected even if it is ultimately decided not to broadcast it at all. There may well be legitimate legal and editorial reasons for not disclosing future plans for publication of a programme. For example where a programme cannot be scheduled because its subject matter relates to on-going criminal proceedings which have not yet concluded. In these circumstances, it may not be possible to furnish an applicant with even an indication of the plans for broadcast. There may also be circumstances where Channel 4 is competing with another broadcaster to be the first to transmit a programme on identical subjects. In such circumstances, Channel 4 would be placed at a disadvantage with its broadcasting competitors if disclosure was required and it is arguable whether the commercial confidentiality exemption would be sufficient to establish substantial harm.

- 6.2 We note that the Code of Practice includes an exemption for publication and prematurity in relation to publication. The exemption provides for :

*“Information which is or will soon be published, or whose disclosure, where the material relates to a planned or potential announcement or publication, could cause harm (for example of a physical or financial nature)”*²⁶

24. Para 2.23 of the White Paper

25. Para 2.2 of the White Paper

26. Para 10 of the Code of Practice on Access to Government Information (1997)

A publication and pre-maturity exemption exists under the Freedom of Information Acts in Australia, New Zealand and Canada, and we believe that an equivalent exemption should be incorporated into the Act by reference to the substantial harm test.

8.7 *Information Supplied in Confidence*

8.7.1 The White Paper acknowledges that information which is subject to an explicit undertaking of confidentiality or at least a reasonable expectation that the law of confidentiality will apply, will be treated as a specified interest. However, there is no express acknowledgement here of the protection of journalistic sources, although we believe that the principles set down in the White Paper are clearly wide enough to embrace this.

8.7.2 The European Court of Human Rights has repeatedly emphasised the importance it attaches to the role of the media in freedom of expression and the need for journalists to protect their sources.³⁴

Article 10 of the ECHR expressly provides that freedom of expression may be subject to restrictions which are necessary in a democratic society for preventing the disclosure of information received in confidence. Indeed there is no reason why Article 10 should not be construed as including the protection of the confidential information of a corporation, as well as of an individual.³⁵

8.7.3 We submit, therefore, that the Bill should make it clear that the sanctity of protecting journalists sources is expressly included.

8.8 The White Paper states that the Act will not contain exempt categories at all, but rather that disclosure should be assessed on a :

*"content basis, records being disclosed in a partial form with any necessary deletions, rather than being completely withheld."*³⁶

We believe that disclosure on a content basis would not necessarily benefit the applicant. For example, where information is supplied in confidence and would substantially harm the commercial interests of a supplier, it may nevertheless still be possible to disclose that information in a partial form with necessary deletions. However, this may well result in a document being disclosed which is meaningless and of no benefit to the applicant. The Bill should make it clear that where disclosure might give rise to a substantial harm, the Public Authority need not consider partial disclosure, if there are reasonably grounds for believing that deletions to the information would undermine its value to the applicant.

34. *Goodwin -v- UK* [1996] 22 EHRR 123
35. *Auromic AG -v- Switzerland* [1990] 12 EHRR 485
36. Para 3.8 of the White Paper
37. Para 3.19 of the White Paper

13.3 'The White Paper fails to recognise the importance of journalistic, artistic and literary information which we believe should not properly be subject to a right of disclosure under the Act. The importance of protecting programme-making information is already recognised under existing legislation such as the Police and Criminal Evidence Act 1984 and the Prevention of Terrorism (Temporary Provisions) Act 1989. In these circumstances, disclosure which is limited to assisting the prosecuting authorities, would only be granted subject to strict criteria applied by the courts subject to the proper exemptions for legal professional privilege. We believe that even such limited rights of disclosure for programme-making information would not be appropriate under a Freedom of Information Act.

13.5 To conclude, we would refer to the speech of Lord Williams of Mostyn, during the second reading of the Data Protection Bill on 2 February in which he outlined the importance of exempting the media from key provisions of the Data Protection Bill. Lord Williams stated that:

"We do not wish, and would not want, to inhibit the freedom of expression which is a fundamental and continuing part of the British way of life and which British broadcasters have enjoyed up to now in making programmes in a generally responsible way. It is clearly part of that tradition of information, that dissemination of views and discussion of ideas: for example, historical programmes dealing with analysis of the past. It is not the intention of the Government in implementing the directive that the making of these programmes should be inhibited or prevented by individuals attempting to use its provisions to re-write history or prevent the responsible discussion of historical subjects and documentaries which are an important part of the media's role in informing, educating and stimulating public discussion."

Lord Williams concluded that :

"Equally, it is part of the British tradition of freedom of expression that entertainment programmes, such as art programmes, comedy, satire or dramas can refer to real events and people. It is not the intention of the Government for the directive to be used to inhibit programme makers from making programmes as they have up to now."

We hope that this submission will persuade the Government that a Freedom of Information Act should protect the legitimate expectations and requirements of those engaged in programme-making.

Annex A

Extract from document of 13 February 1998 – Barry Cox (ITV) note 're Freedom of Information' to David Clark MP.

'...we have entered informal discussions with both Channel Four and the BBC about the impact that the Act might have on their respective activities. In so far as both public corporations feel that the Act might seriously inhibit their central function to broadcast, we fully support their efforts to achieve necessary exemptions.'