

Labour

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PRIME MINISTERFREEDOM OF INFORMATION

1. The Manifesto includes a commitment to introduce a Freedom of Information Act in the first Parliamentary Session. This raises two issues for decision:

- i. which Department should lead, the alternatives are the Home Office or OMCS;
- ii. whether the Right of Access to Information Bill drafted and published while in opposition should be introduced, or a revised Bill drafted from fresh instructions.

Ministerial Lead

2. The alternatives are the Home Office, where there is practical experience of the law relating to official secrets, privacy and data protection, or OMCS/Privy Council Office, which under the previous administration had the lead on matters relating to open government and access to official papers. Although there are good arguments for maintaining a central lead, as the Cabinet Office is best placed to co-ordinate across all Departments, this need not be an overriding consideration if Ministerial dispositions suggest a Home Office lead. Much depends on the identity and workload of the OMCS or Privy Council office junior Minister (see separate brief on Machinery of Government).

Redrafting the Bill

3. A right of access to official information will have far reaching implications for all public authorities, and for the Civil Service in particular. I fully accept that the strong commitment in the manifesto will need to be delivered. Having studied the operation of Freedom of Information in Australia and other Commonwealth countries I see no reason why FOI should not be successfully introduced in the United Kingdom. It is important to learn from experience overseas, and from those countries with a Westminster system of Government in particular.

4. Departments have studied the draft legislation based on work by the Campaign for Freedom for Information which the Labour Party tabled in opposition. It is, I think, fair to describe this Bill as a lobbying group's opening bid, which even they would be astonished to see accepted as it stands. In its present form it has faults likely to defeat its purposes, for example, by failing to follow through amendments relating to existing law. Parliamentary Counsel advises that the Bill is technically defective, and needs to be redrafted from fresh instructions. In preparing a fresh draft I would hope that Ministers would look at bringing the Bill more closely into line with Commonwealth
--- models and the particular circumstances of the UK. I attach a note on some of the main issues. This will also be submitted to Ministers in the Home Office and OMCS.

5. The Bill as drafted would have a potentially damaging effect in some areas where it appears to be intended that confidentiality should be preserved, including policy advice to Ministers and collective discussion in Cabinet. The tests proposed in the Bill might also operate against the public interest in defence and security matters, law enforcement, and financial and economic management, including action to tackle tax evasion and avoidance. Overseas FOI regimes protect the necessarily secret work of the security and intelligence

services, and in view of your proposals to strengthen accountability and oversight, you may feel that records and information relating to these services can be exempted altogether from FOI requirements, or made subject to a conclusive Ministerial certificate when disclosure would not be in the public interest.

6. There is also little in the draft Bill to control the potential costs and diversion from other work entailed in dealing with large numbers of applications. Implementation would be made a more manageable and practicable task for public authorities if retrospective application is phased in gradually, and a structure of fees can be designed which, while providing an inexpensive service to individuals requiring to see their personal records, charges applications from companies, researchers, and the media at a level which goes some way towards reflecting the costs of dealing with applications.

7. These issues will need to be very carefully examined before workable legislation can be introduced. I am suggesting separately that there should be a Ministerial Working Group on Freedom of Information which would draw up proposals for the Ministerial Committee on Home and Social Affairs, with a view to introducing a Bill in the Autumn.

R.E.B.

ROBIN BUTLER

9 April 1992

CONFIDENTIAL

FREEDOM OF INFORMATION

The Manifesto Proposal

"Our Charter of Rights, backed up by a complementary and democratically enforced bill of rights, will establish in law the specific rights of every citizen."

We will start in our first parliamentary session with a Freedom of Information Act which will open up government to the people. Exceptions will be tightly drawn."

Immediate Issues

- a. Ministerial and Departmental Lead.
 - b. Policy clearance for inclusion in Queen's Speech.
 - c. Proposed Ministerial Group on Freedom of Information, to develop proposals for a Freedom of Information Act for consideration by the Ministerial Committee on Home and Social Affairs.
 - d. Assessment of draft Bill (Mr Robin Corbett's Right to Information Bill introduced on 14 February).
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1. The Manifesto commitment is clear. Successful implementation of freedom of information will set a major challenge for all public authorities. Legislation and policy need to be carefully related to administrative practicability so that arrangements allow applications for access to be met speedily and effectively at least cost and diversion from other high priority work.
 2. This note summarises initial consultation with departments on the Right to Information Bill presented on 14 February 1992 by Mr Robin Corbett and others. Departments were invited to comment on practical implementation of the Bill, and specific drafting

points affecting their area of responsibility. Many points of detail require further consideration. Collective decisions will be required quickly if the Manifesto commitment on timing is to be met. This note offers a provisional assessment of:

- (a) the technical quality of the draft Bill;
- (b) policy points which need to be addressed before successful implementations can be guaranteed.

... The attached table summarises some significant difference between the draft Bill and FOI legislation in other English speaking countries.

Quality of Draft Bill

3. Even if there were no significant changes to the policy it is likely that very extensive redrafting of the Corbett Bill will be required to correct defects, and enable its objective to be achieved. In particular:

- (a) The Bill is not integrated into existing law. It is essential that the repeal of the Official Secrets Act should be followed through. The relationship with extensive criminal sanctions guaranteeing the confidentiality of information gathered by Government needs to be addressed. (Clause 2(2) appears to set such statutory provisions aside but it is ineffective: the Purpose Clause (Clause 1) allows the public right of access to be restricted only in accordance with "specific exemptions contained in the Act", and under Clause 19(a) information is exempt from disclosure if disclosure would result in the commission of an offence. There are at least 85 relevant statutory offences.)
- (b) The Bill needs to be satisfactorily integrated with the Public Records Acts, Data Protection Act, certain specific statutory rights of access to information and European Community legislation bearing on the disclosure of information.

- (c) The Bill needs to be satisfactorily related to other elements of the Government's legislative programme. For example:

its provisions apply to the Security and Intelligence Services, and would give the Information Commissioner and Tribunal a role which could overlap with that of the proposed Inspector-General and the existing Security Service Commissioner.

- (d) the Bill needs to be related to the manifesto proposal to strengthen Britain's Data Protection Act in line with European practice.
- (e) The definition of public authorities covered by the Bill is defective and obscure.

If, following collective consideration, further policy changes are agreed, even small changes can have extensive drafting repercussions.

Policy issues

The Departmental analysis suggests that Ministers should be invited to consider a number of policy points including:

- (a) whether the Bill should apply to the Security and Intelligence Services; in view of the essential secrecy of their operations, the exclusion of security services from some overseas FOI legislation, and the proposed extension of existing means of oversight and supervision there is a case for omitting them; (Clause 17)
- (b) whether there should be other class exemptions, relating for example to honours or judicial appointments.

- (c) whether the public interest is adequately guarded by the requirement to show that disclosure would "be likely to cause significant damage"; this test applies to the exemptions relating to defence, international relations, administration of justice, economic and commercial affairs, the competitive position of a third party and the ability to obtain information from third parties can be claimed. (Clauses 16, 18, 29, 24, 25, 26). The interpretation of "significant" may lead to dispute.
- (d) whether the exemption relating to policy advice (Clause 21) is workable. The distinction between advice, opinion and recommendation (which are exempt) and factual information, analysis and expert advice (not exempt) may not be easy to interpret, and the requirement to edit and release documents which are only partly covered by exemptions could lead to disclosure of misleading records giving an incomplete picture of decision-making; on the other hand, if advice and opinion is not exempted, the neutrality of the Civil Service could be compromised.
- (e) whether a specific exemption for Cabinet proceedings and/or collective discussion and Ministerial deliberation is desirable: the Campaign for Freedom of Information, who drafted this part of the Bill, have said that the policy advice clause (21) would cover Cabinet minutes. This is very doubtful. There is a specific exemption for Cabinet papers and/or collective deliberation in all Commonwealth FOI legislation.
- (f) whether exemptions relating to law enforcement or legal professional privilege are adequate in the public interest (Clauses 19 and 20). If applications for access to information become commonplace, then the processing of cases through the courts could become congested. It would be difficult to reconcile the law enforcement exemptions in Clause 19 with the tests providing for disclosure in the

public interest (Clause 31(1)). Prosecuting authorities are likely to hold much information in the latter categories.

- (g) whether more explicit protection of expert advice within the Treasury and Chancellor's Departments is desirable. The requirement to disclose draft economic forecasts could be market sensitive. The inland Revenue's provisional view is that their work on tax evasion and avoidance could be undermined by disclosure of internal papers.
- (h) whether the Bill's provisions in relation to the corporate sector can be improved: on the one hand the protection for privacy of corporate data are weak compared to those for personal data, on the other hand there is little to deter companies from fishing trips using the Act for commercial advantage or advantage in litigation.
- (i) whether the ability of public servants to see all personal records relating to them is:
 - (a) equitable in relation to private sector employees;
 - (b) desirable in relation to the need for candour in some references and assessments.
- (j) whether the Information Commissioner and Tribunal could settle the issues put to them as strictly legal questions. The balance between the public interest in giving access to information and the significant damage to defence, international relations etc from disclosure may from time to time raise political issues, yet the Tribunal is composed entirely of lawyers, there is no provision for conclusive Ministerial certificates, no area of excluded jurisdiction, and the decisions of the Tribunal are binding. This does not follow FOI legislation in Australia, Canada or New Zealand.

- (k) whether the timescale for implementation is practicable: the Bill requires implementation by all public authorities by 1 January 1993 and full retrospection after a year.
- (l) what estimate of the cost of implementation can be made? FOI will require careful preparation, including staff training and indexing of records across the public sector. The free structure is the same whether the applicant is a pensioner wishing to see personal records or a multi-national company. The volume of applications and cost of dealing with them will be partly a function of price. No FOI regime fully recovers costs from fees, but most allow higher fees for applications not related to personal records. Costs of individual applications may be high, not least because the Bill includes complex exemptions and exceptions to exemptions, and provides for a protracted internal review and appeal process.
- (m) as well as introducing a right of access to public records, the Bill repeals the Official Secrets Act 1989. The effectiveness of the law protecting necessary confidentiality needs to be reassessed.