3063

CONFIDENTIAL

10 DOWNING STREET

THIS FILE MUST NOT GO OUTSIDE 10 DOWNING ST

FILE TITLE:	SERIES
POLICY	FREEDOM OF INFORMATION
Annex(1) Access to official information. Annex 2: Proposed National Records + Archives Legislation	PART 5
PART BEGINS: 8 OCT 2002	PART ENDS: 27 August 2003
	CAB ONE

7 NOV PREM 49/3063

Labour Administration

PART 5 CLOSED

27.8.03

CONFIDENTIAL

T.S.O. Order No. N0064510 3/98 C5 59064

PART

5

CLOSED

DATE CLOSED	27.8.03

Series : **FREEDOM OF INFORMATION**

File Title : **POLICY**

Part : **5**

Date	From	To	Subject	Class	Secret
06/08/2003	NIO	DCA	Review of National Records and Archives Legislation	U	
07/08/2003	CDL	DPM	Review of National Records and Archives Legislation	U	
08/08/2003	CDL	SS/DCA	Implementation of the Freedom of Information Act 2000	U	
14/08/2003	MS/DEFRA	DPM	Review of National Records Acts and Archives Legislation	U	
15/08/2003	NIO	DPM	Proposed Revision of the Code of Practice on Consultation	U	
15/08/2003	MS/DPMO	DPM	Review of National Records & Archives Legislation	U	
18/08/2003	DPM	SS/DCA	Implementation of Freedom of Information Act	U	
18/08/2003	DCA	SS/DCA	Proposed Consultation on Implementation of a Directive on the Re -	U	
20/08/2003	HO	SS/DCA	Proposed Consultation on Implementation on the Re-Use and Com	U	
20/08/2003	DPM	PUS/HO	DA Clearance for Consultation Paper on Review of National Records	U	
21/08/2003	ms/ODPM	DPM	Council Of Europe - Development of a Legally Binding Instrument on	U	
27/08/2003	MS/DTI	DPM	Implementation of the Privacy and Electronic Communications Direct	U	
27/08/2003	MOD	DCA	Implementation of Freedom of Information Act	U	

Series : **FREEDOM OF INFORMATION**

File Title : **POLICY**

Part : **5**

Date	From	To	Subject	Class	Secret
			ANNEX Access to Official Information	U	
30/10/2002			Access to official information (filed at annex)	C	
07/11/2002	HO	DTI	Review of s.24 of the Animals (Scientific Procedures) Act 1987	U	
14/11/2002	FCO	LC	Lord Ashcroft: Data Protection Act	U	
15/11/2002	DPM	FCS	EU directive on the re use and commercial exploitation of public sect	C	
20/11/2002	SS/DFID	FCS	Lord Ashcroft: Data Protection Act	U	
21/11/2002	CDL	FCS	Lord Ashcraft : Data Protection Act	U	
29/11/2002	DPM	FCS	Lord Ashcroft : Data Protection Act	U	
02/12/2002	LC	FCS	Implementation of Data Protection Directive	U	
09/12/2002	LCD	SOC	Martin Rosenbaum of BBC Radio 4 two bids for interviews with Sum	U	
16/12/2002	Cab Off	PD(SV)	Interchange and disclosure of information about inward secondees	C	
20/12/2002	LCD	DoT	Data Protection and Disclosure of Airline Information	U	
22/01/2003	DFID	FA/APS	Ashcroft Case	R	
30/01/2003	AGO	FA/APS	Ashcroft Case	C	
10/02/2003	LC	PM	Privacy and data sharing - the way forward for public services	C	
06/03/2003	LP	LCD	PMB - Protection of Freedoms	U	
07/03/2003	questions	LCD	PM Foreward - Privacy and data sharing - the way forward for public	C	
18/03/2003	LC	DTI	Implementation of the privacy and electronic communications directi	C	
20/03/2003	LCD	DPM	Consultation Paper on a Commitment to Protecting the Public's Pers	U	
26/03/2003	PUS/HO	MS/DTI	Implementation of the Privacy and Electronic Communications Direct	U	
27/03/2003	DPM	DTI	Implementation of the privacy and electronic communications directi	C	
28/03/2003	ms/ODPM	DPM	Consultation paper on a commitment to protecting the public's perso	U	
31/03/2003	ss/dti	DPM	Consultation Paper on a commitment to Protecting the Public's Pers	U	
01/04/2003	Cab Off	DPM	Consultation Paper on a Commitment to Protecting the Public's Pers	U	
03/04/2003	SS/DCMS	DTI	Implementation of the Privacy and Electronic Communications Direct	C	
03/04/2003	CST	PUS/LCO	Consultation Paper on a Commitment to protecting the public's pers	U	
16/05/2003	LCD	CST	Consultation Paper on a Commitment to protecting the public's pers	U	
29/05/2003	HO	PPS	Lord Ashcroft Litigation against DFID and FCO	U	
05/06/2003	HO	FCO	Ashcroft: Settlement	U	
30/06/2003	Cab Off	Cab Off	Code of practice on access to Government information	U	
01/07/2003			ANNEX Proposed National records and archives legislation	U	
09/07/2003	CDL	DPM	Public Administration Select Committee Report on Ombudsman Issu	U	
14/07/2003	dpmo	DPM	Public Administration select committee report on Ombudsman issue	C	
14/07/2003	SS/DoH	DPM	Public Administration select committee report on Ombudsman issue	C	
15/07/2003	ss/dti	CDL	Public Administration select committee report on Ombudsman issue	C	
15/07/2003	SS/DCA	DPM	Public Administration select committee report on Ombudsman issue	C	
15/07/2003	CDL	ms/ODPM	Public Administration select committee report on Ombudsman issue	U	
17/07/2003	ms/ODPM	DPM	Public Administration select committee report on Ombudsman issue	U	
18/07/2003	CST	DPM	Public Administration Select Committee Report on the Ombudsman	U	
21/07/2003	SS/DoT	DPM	Public Administration Select Committee Report on Ombudsman Issu	U	
21/07/2003	WO	CO	Public Administration Report on Ombudsman Issues	U	
23/07/2003	pus/DCA	SS/DCA	Implementation of the Freedom of Information act	U	
24/07/2003	pus/DCA	DPM	Review of National Records and Archives Legislation	U	
25/07/2003	CDL	DPM	Revised consultation code of practice	U	
28/07/2003	CDL	SS/DCA	Proposed consultation on implementation of a directive on the re-use	U	
01/08/2003	ss/dti	CDL	Revised consultation code of practice	U	
05/08/2003	DfT	DPM	Review of National Records and Archives Legislation	U	
06/08/2003	CDL	ScotAss	Proposed Consultation on Implementation of a Directive on the re-us	U	
06/08/2003	DoT	pus/DCA	Implementation of the Freedom of Information Act	U	
06/08/2003	DoT	DCA	Implementation of the freedom of information act	C	
06/08/2003	PUS/HO	pus/DCA	Review of National Records & Archives Legislation	U	

file CS/ cc JM MR

Ivor Caplin MP

PARLIAMENTARY UNDER-SECRETARY OF STATE FOR DEFENCE
AND MINISTER FOR VETERANS

MINISTRY OF DEFENCE
OLD WAR OFFICE BUILDING
WHITEHALL LONDON SW1A 2EU

Telephone (020) 7218 2216 (Direct Dialling)
(020) 7218 7610 (Fax)
(020) 7218 9000 (Switchboard)

The Rt Hon Lord Falconer of Thoroton
Secretary of State and Lord Chancellor
Department for Constitutional Affairs
Selbourne House
54 – 60 Victoria Street
LONDON
SW1E 6QW

D/US of S/IC 5/2/3

27 August 2003

Dear Charlie,

IMPLEMENTATION OF FREEDOM OF INFORMATION ACT

Nomination of Under Secretary of State as MOD Minister with Specific Responsibility for FOI Aspect of Information and Knowledge Management

Lord Filkin has copied to me his letter to you of 23 July in which he proposes to hold a series of bilateral meetings in the Autumn to review each Department's state of readiness for implementing the Freedom of Information (FOI) Act. I fully support the DCA commitment and approach to monitoring readiness and the Secretary of State for Defence has asked me to take specific responsibility for FOI Act planning within the Department.

My staff have a well-developed programme for FOI implementation and are fully committed to the opportunity to contribute to a co-ordinated programme across Departments.

. . . I am copying this letter to the Prime Minister, members of CRP Committee and to Sir Andrew Turnbull.

Yours ever

Ivor

Private Office

INVESTOR IN PEOPLE

file

dti

27 August 2003

Stephen Timms MP
MINISTER FOR ENERGY, e-COMMERCE AND POSTAL SERVICES

The Rt Hon John Prescott MP
Deputy Prime Minister &
First Secretary of State
26 Whitehall
London
SW1A 2WH

WI
cc SH
CS.

Dear John,

IMPLEMENTATION OF THE PRIVACY AND ELECTRONIC COMMUNICATIONS DIRECTIVE

In March this year, I wrote to DA Committee to clear our approach to consultation on the implementing regulations for the Privacy and Electronic Communications Directive. I am now writing to seek your agreement to the final implementation package, which includes a change to the approaches originally proposed on phone and e-mail marketing, and a commitment to further work on the enforcement and investigation issues identified in the consultation paper.

We plan to announce the Government's response to consultation and lay the new regulations in the middle of September. I would be grateful therefore for responses to this letter by 10 September.

Background

The Directive on Privacy and Electronic Communications is part of the new regulatory framework for electronic communications that came out of the Commission's review in 1999. This Directive updates the current Telecoms Data Protection Directive in the light of technological developments and ensures that the rules which apply to phone and fax services also apply to e-mail and use of the internet. It guarantees the confidentiality of communications, enables the provision of value added services with the consent of subscribers, and regulates the use of phone, fax, and now e-mail and

Department of Trade and Industi

V 842
1 Victoria Street
London SW1H 0ET

Direct Line +44 (0)20 7215 5144
Fax +44 (0)20 7215 5551
Minicom +44 (0)20 7215 6740
Enquiries +44 (0)20 7215 5000
www.dti.gov.uk
mpst.timms@dti.gsi.gov.uk

mobile text messages/SMS for unsolicited direct marketing. Other provisions include new transparency and opt-out rules on the use of cookies and similar internet tracking devices, and stronger rights for individuals in relation to subscriber directories.

I intend to implement the Directive by secondary legislation under the European Communities Act and included draft regulations in consultation pack (effectively, an update of the existing implementation regulations for the current version of the Directive). We had over four hundred responses to consultation, most of which focussed on the new provisions on **e-mail/SMS marketing** and the proposal to extend the right to register on the **Telephone Preference Service** to corporate subscribers, but many also commenting on the broader **enforcement and investigation** issues that were raised in the consultation paper.

I propose to lay the finalised regulations in Parliament in September. Because they will introduce new requirements on businesses, we propose to leave the normal twelve weeks' familiarisation period before the Regulations come into force. This entails overshooting the 31 October transposition deadline in the Directive although the implementing legislation itself will be in place.

E-Mail and SMS Marketing

The Directive makes an exemption from the general opt-in rule for e-mail/SMS messages sent in the context of an existing customer relationship. The Directive specifies that e-mails/SMS may be sent on an opt-out basis where the sender obtains the addressee's contact details in the context of the sale of a product or service, in accordance with existing data processing rules, the sender is marketing their own similar products and services, and the addressee is always offered the chance to opt-out, both initially and with every subsequent message. This exemption was the result of a compromise and, while the general principle is clear, the interpretation of some of the conditions raises questions.

In consultation, we proposed that instead of a restriction to marketing "similar" products, there should be a requirement on businesses to make customers aware of their product ranges when they collected their addresses. However, the European Commission warned us that they did not see this as fully equivalent to the "similar" restriction in the Directive, and legal advice is that we could be vulnerable to infraction.

- In view of this, I propose to replace the requirement to provide information proposed in the draft regulations with a simple requirement to restrict marketing to "similar" products and services.

Telephone Preference Service

The Directive sets harmonised requirements on unsolicited communications to individual subscribers, but it allows Member States discretion over what level of protection should be extended to corporate subscribers in relation to all forms of unsolicited commercial communications.

In consultation, we did not propose to extend the rights available to corporate subscribers, except in relation to phone marketing. Currently, the UK applies opt-out rules to direct marketing by phone to individual subscribers, who can opt-out by registering on the Telephone Preference Service. Sole traders and most partnerships can already register and we proposed to extend this right to corporate subscribers. We received some strong votes of support for this, many of which argued that businesses and particularly SMEs were increasingly inconvenienced by direct marketing calls, which have to be dealt with in real time, unlike direct marketing by post or e-mail, and cannot easily be filtered out. This view was supported by, among others, the British Chambers of Commerce. However, the proposal also met with considerable opposition, and was the subject of a campaign against by the Direct Marketing Association (DMA), supported by the CBI.

I think that the right to register does need to be extended to corporate subscribers. However, there is a case for introducing special registration arrangements for corporate subscribers, in response to the practical objections raised by the DMA, as well as considering an exemption for phone marketing within an existing commercial relationship, along the lines of the e-mail marketing rule, provided that we can be satisfied that this would not place undue burdens on or restrict the rights of businesses registering on the scheme.

- We therefore propose to make a firm commitment to extend the Telephone Preference Service to corporate subscribers but delay implementation of this new rule until after the TPS contract renewal in April 2004. This will require further regulations next year.

Enforcement and investigation

The Information Commissioner's current powers to investigate and pursue breaches of the rules in this area are based on those available to him under the Data Protection Act 1998. In consultation, we proposed that this should continue to be the case under the new Regulations, but asked consultees for their views both on the enforcement powers and sanctions available, and on the more specific issue of whether network and service providers should be required to disclose the source of unsolicited commercial communications.

On the first point, many responses argued that current procedures were slow and laborious in relation to some of the cases that might arise under the Regulations, particularly breaches of the rules on unsolicited commercial communications; they supported either the "stop now" injunctions regime or the Ofcom enforcement model as alternatives. On the second issue, the consultation highlighted significant differences between network and service providers on the extent to which they are prepared to disclose the source of unsolicited commercial communications on a voluntary basis under the current rules, and most responses agreed in principle that the Information Commissioner should have powers to require operators to disclose this, subject to adequate safeguards. The Information Commissioner's Office argued strongly in favour

both of new "stop now" type powers and the right to require information, which they see as increasingly important to effective implementation of the new regime.

The responses to consultation raise some complex issues, and any new powers would need to be carefully considered to ensure compatibility with the Information Commissioner's wider role and position under the Data Protection and Regulation of Investigatory Powers Acts. However, there does appear to be a case for change in both these areas that needs further exploration, in partnership with key Whitehall, regulatory and external stakeholders.

- We therefore plan to publicly commit to further discussions with service providers and other stakeholders including the Department for Constitutional Affairs and the Home Office.

We will be publishing a revised Regulatory Impact Assessment with the final version of the regulations and the updated draft is available from my officials (tel: 020 7215 1653).

I am copying this letter to the Prime Minister, members of DA Committee, the First Minister of the Scottish Executive, the First Minister, Welsh Assembly Government, the First Minister and the Deputy First Minister of the Northern Ireland Assembly, and Sir Andrew Turnbull.

Yours ever,

Stephen

STEPHEN TIMMS

CS
cc SW
MR

Jeff Rooker
Minister for Regeneration and
Regional Development

OFFICE OF THE
DEPUTY PRIME MINISTER

26 Whitehall
London SW1A 2WH

Tel: 020 7944 3012
Fax: 020 7944 4489
E-Mail: jeff.rooker@odpm.gsi.gov.uk

Web site: www.odpm.gov.uk

Rt Hon John Prescott MP
Deputy Prime Minister
26 Whitehall
LONDON
SW1A 2WH

Our Ref: P/R/014562/03

21 AUG 2003

Dear John.

COUNCIL OF EUROPE - DEVELOPMENT OF A LEGALLY BINDING INSTRUMENT ON ACCESS TO OFFICIAL INFORMATION

I have seen Lord Falconer's letter of 6 August with which he copies to DA members his original letter of 28 July to EP Members. He now seeks both committees' agreement to work beginning in the Council of Europe on drafting a binding legal instrument for access to official information. In Nick Raynsford's absence I am responding as Duty Minster.

In my view this is both a logical and desirable extension of the non-binding Recommendation 2002 (2) on Access to Official Documents already in place. Freedom of information should indeed be a fundamental right in a democratic society. We have a proven track record in improving access rights here at home, through the continuing implementation of the Freedom of Information Act 2000 (FOIA), the data protection, human rights and environmental information legislation we have delivered, and our continued support for international initiatives. I therefore agree that it is entirely consistent that we should support this particular proposal.

The proposal will help efforts towards a general international standard for a right of access to information and I agree that this is something we would want to see commonly recognised. The possible reasons put for withholding our support for the proposal are not persuasive and clearly demonstrate why withholding of support is not a tenable option for us. As Lord Falconer suggests, taking that line would undoubtedly be to our detriment in subsequent negotiations.

Subsequently we will of course want to ensure that our particular requirements are taken into account. I agree therefore that we should aim to ensure that the resulting instrument is consistent with our own FOIA. It would be unfortunate if we felt we were unable to commit to agreeing or adopting the resulting instrument because of limitations compared with our own regime. However, I am not averse to adopting changes at home in due course should we consider them desirable.

In particular, I agree that the alternative proposed option for an additional protocol to the European Convention on Human Rights would be a poor alternative since it would not place a positive obligation on public authorities to make information available, as the requirement for a Publication Scheme within our own FOIA does. The pro-active publication of information is a key feature which, if operated effectively, will do much to make information more readily available and reduce the need for applicants to make individual requests.

In conclusion, I agree that we should positively support the proposal for work to begin on drafting of a binding legal instrument.

I am copying this letter to members of EP and DA Committees, the Prime Minister, Sir Andrew Turnbull and the UK Permanent Representative to the EU.

JEFF ROOKER

CS
cc JJM

DEPUTY PRIME MINISTER

OFFICE OF THE
DEPUTY PRIME MINISTER
26 Whitehall
London
SW1A 2WH

Tel: 020 7944 8623
Fax: 020 7944 8621

Lord Filkin
Parliamentary Under Secretary of State
Home Office
50 Queen Anne's Gate
London
SW1H 9AT

20 August 2003

Dear Lord

DA CLEARANCE FOR CONSULTATION PAPER ON REVIEW OF NATIONAL RECORDS AND ARCHIVES LEGISLATION

You sought policy agreement in your letter to me of 24 July to publish a consultation paper considering proposals to change the current legislative provision for records management and archives. This letter gives you DA clearance to publish the consultation paper, subject to the views of colleagues recorded below.

Replies to your letter were received from Patricia Hewitt, Norman Warner, David Jamieson, Fiona Mactaggart, Paul Murphy's office, Douglas Alexander, Adam Ingram and Jeff Rooker.

David and Jeff suggested that the issues on which views are invited should be separated into two sets: policy and regulatory matters, and technical and operational concerns. The latter may be inappropriate in primary legislation. The proposals need to be viable for the Agencies and Non-Departmental Public Bodies involved and cannot become a significant budget overhead for them or an extra financial burden on Regional and Local Government.

Douglas, Norman and Fiona supported the view of the Senior Group on Information Policy that the timing of any changes and legislation should be managed to avoid any adverse impact on the implementation of the Data Protection or Freedom of Information Acts. Fiona also had concerns over the application of new higher standards and the prospect of new resources becoming necessary.

Adam and Jeff reiterated the need for the status of Departments, as being those who create the records to support their business and operational requirements, to be fully recognised in the consideration of new legislation with ministerial discretion preserved within each central government department.

Paul's office thought the results of the consultation might be useful when considering the possibility of updating the separate records in Northern Ireland.

I look forward to seeing the results of the consultation.

I am copying this letter to the Prime Minister, members of DA Committee and Sir Andrew Turnbull.

JOHN PRESCOTT

Freedom of Info.

Home Office

SPm

CC SJH
AA
EM
JR

Fiona Mactaggart MP
PARLIAMENTARY UNDER SECRETARY OF STATE
50 Queen Anne's Gate, London SW1H 9AT

Rt Hon Lord Falconer of Thoroton QC
Secretary of State
Department for Constitutional Affairs
Selborne House
54-60 Victoria Street
London
SW1E 6QB

20 AUG 2003

Dear Lord Falconer

PROPOSED CONSULTATION ON IMPLEMENTATION OF A DIRECTIVE ON THE RE-USE AND COMMERCIAL EXPLOITATION OF PUBLIC SECTOR DOCUMENTS

Please refer to the joint letter from Douglas Alexander and Stephen Timms to you and copied to the Constitutional Reform Policy committee on 28 July, seeking comments by 15 August. I apologise for the delay in replying

We welcome the launch of the consultation. The Home Office will want to respond to the consultation and may also comment on the proposals as they arise at the end of the consultation period.

I am copying this letter to the Prime Minister, members of the Constitutional Reform Policy Committee and Sir Andrew Turnbull.

Yours sincerely

K Mactaggart

FIONA MACTAGGART

Approved by the Minister and signed in her absence.

02072733965
20/08 '03 13:49 FAX 02072733965 HOME SECRETARYS OFFICE → PRIME MINISTER 001

NH (for CS)
cc. JJH
AA

DEPUTY PRIME MINISTER

OFFICE OF THE
DEPUTY PRIME MINISTER
26 Whitehall
London
SW1A 2WH

Tel: 020 7944 8623
Fax: 020 7944 8621

The Rt Hon Lord Falconer Thoroton QC
Secretary of State for Constitutional Affairs and
Lord Chancellor
Selborne House
54-60 Victoria Street
London
SW1E 6QW

PRIME MINISTERS
DIRECT COMMUNICATIONS UNIT
20 AUG 2003
RECEIVED

18 August 2003

IMPLEMENTATION OF THE FREEDOM OF INFORMATION ACT

Lord Filkin has copied to me his letter to you of 23 July in which he proposes to hold a series of bilateral meetings in the autumn to review each Department's state of readiness for implementing the Freedom of Information Act 2000 (FOIA). I am content to give this review my full support and to nominate Phil Hope as the member of my ministerial team with specific responsibility for FOIA implementation.

I agree entirely that successful implementation of the Act will only be brought about if across Government the necessary actions are undertaken for full preparation. My Office has instituted a major project, now underway, designed to ensure our own effective preparation. This includes adopting, and progressively extending, across the range of the Office's business, the pro-active approach to publication of information to which Lord Filkin has referred.

I recognise the importance of each Department having its own implementation plans and welcome the proposed review of those plans. Of equal importance is the need to ensure a consistent and open approach to disclosure of information across Government. My officials are playing an active part in the work your Department is co-ordinating in supporting Departments on implementation. I welcome particularly the specific work that is being done to develop guidance on exemptions to releasing information and the application of the public interest test, as well as work on the processes and information systems that will be needed to manage the handling of requests. I hope that this can be completed to a firm timetable that will see the results

Website: www.odpm.gov.uk
Email: john.prescott@odpm.gsi.gov.uk

available in good time to be of use to Departments in their implementation preparations.

I am copying this letter to members of CRP, the Prime Minister and Sir Andrew Turnbull.

JOHN PRESCOTT

SpM
cc: AMcG
JH
AA

From the Parliamentary Under Secretary of State
Lord Filkin

The Department for Constitutional Affairs
Selborne House
54-60 Victoria Street
London SW1E 6QW

DX 117000
Telephone: 020 7210 8562
Fax 020 7210 8620
e mail: david.liddemore@lcd.gsi.gov.uk

Our ref: 141148

The Right Honourable Lord Falconer of Thoroton
Secretary of State for Constitutional Affairs
Selborne House
54-60 Victoria Street
London SW1E 6QW

18 August 2003

Dear Charles

PROPOSED CONSULTATION ON IMPLEMENTATION OF A DIRECTIVE ON THE RE-USE AND COMMERCIAL EXPLOITATION OF PUBLIC SECTOR DOCUMENTS

I do not think we are ready to publish the draft consultation document and partial Regulatory Impact Assessment enclosed with Douglas Alexander's letter of 28 July. I do not think sufficient weight has been given to the advantages of creating a single statutory enforcement regime, and the costs of so doing may have been overstated through not considering the option of vesting enforcement powers in the existing Information Commissioner.

I appreciate the tightness of the timescale for issuing the document if guidelines on the period for public consultation are to be adhered to. However, I have given the matter careful consideration and have serious reservations about the option recommended in the consultation paper and the robustness of the partial RIA which supports it.

The paper expresses a preference for non-statutory self-regulation as the means for implementing the Directive, which I find difficult to support as it is not consistent with our broader approach on access to information held by public authorities – that the previous Conservative administration's preference for non-statutory regimes should be superseded by statutory frameworks with a single, easy-to-access regulator. As I have said recently in relation to the timetable for bringing into effect the revised regime for access to environmental information, there is little point in creating rights if no effective means of enforcement exist.

I agree that in a market of the size indicated (a figure of £18.37 billion for the UK alone is given in the RIA), it is vital that businesses who wish to re-use and exploit information produced by public authorities are not hampered by a lack of transparency, clarity and consistency in the rules governing this. As the paper points out, the risk is that without effective improvement in the conditions for re-use, there will be a loss of potential economic development in this sector. However, the cost of compliance with the Directive needs to be balanced with the objectives of effectiveness, transparency, clarity and consistency that both public authorities and enterprises need.

As the RIA acknowledges, the risk is that Option 2 would not meet these objectives very well, since it would require citizens and businesses to have recourse to a variety of ombudsmen and the courts to enforce the rights they will acquire under the Directive if they are not satisfied with the self-regulatory response. This would both drive up their costs of gaining access to the information they require, and reduce the effectiveness of the system as a whole. As the RIA itself states: "the risk is that without a regulatory body, there would be a lack of robust central control for public bodies and effective avenues of redress. There might be less certainty for re-users of information and less consistency of liaison and charging models with less effective avenues for redress."

In fact, when it comes to assessing the costs to public authorities for both options, I am not clear about the grounds for some of the claims made in the RIA in favour of Option 2. Paragraph 51 claims that monitoring costs for self-regulatory codes of practice would be less than under the formal regulatory approach in Option 1, but provides no evidence to back this claim. I would have thought the costs were likely to be similar, unless Option 2 envisages less monitoring of compliance with the codes taking place? It also asserts that the cost to authorities of adopting new policies on re-use would be less under Option 2 than Option 1 – again without evidence. It seems to me that the bureaucratic cost of drawing up and adopting a policy to comply with a Directive, in a case like this, is likely to be very similar whichever option is chosen – especially if there are model policies to adopt for different types of authority. The paragraph also acknowledges that training, seminars and workshops will be required whichever option is proceeded with, so there can be, at most, marginal cost differences there.

The only quantified costs suggested in the paper are for Option 1, for the setting up of a regulator and creating the legislative framework. The one-off cost of creating the regulations is estimated at around £50-75,000 with the regulator estimated to cost £450k per annum. But this does not take account of the fact that a potentially suitable regulator already exists in the form of the Information Commissioner. Whether or not it would be possible for the Commissioner to undertake these additional responsibilities – and at what cost – is a question which does not seem to have been addressed. But I think it important to investigate this area before publishing the paper, not least since it may considerably affect the costs attributed to Option 1 in the RIA. The Commissioner will already be having to liaise with public authorities up and down the country and enforce an access to information regime - which will include consideration of issues such as commercial prejudice to public and private bodies.

For these reasons, I am afraid that I do not feel able to support the publication of the consultation paper and RIA in their present form, but hope that it would not be too lengthy a process to recast these documents.

I am copying this reply to the Prime Minister, Douglas Alexander and Stephen Timms, Jack McConnell and Rhodri Morgan, members of CRP and Sir Andrew Turnbull.

Yours ever,

Geoffrey

GEOFFREY FILKIN

Jeff Rooker
Minister for Regeneration and
Regional Development

OFFICE OF THE
DEPUTY PRIME MINISTER

26 Whitehall
London SW1A 2WH

Tel: 020 7944 3012
Fax: 020 7944 4489
E-Mail: jeff.rooker@odpm.gsi.gov.uk

Web site: www.odpm.gov.uk

Rt Hon John Prescott MP
Deputy Prime Minister
26 Whitehall
LONDON
SW1A 2WH

NH (for CS)
JH
AA
AMcG

Our Ref: P/R/013827/03

15 AUG 2003

Dear John.

REVIEW OF NATIONAL RECORDS & ARCHIVES LEGISLATION

I have seen Geoffrey Filkin's letter of 24 July to you seeking DA clearance for the publication of a consultation paper considering proposals to change the current legislative provision for records management and archives. I am responding as Duty Minister at this time.

I accept the Senior Group's recommendation to proceed with the public consultation. However, the reservations expressed in your letter dated 24 January 2003 to the Lord Chancellor are still of concern. We must be sure that there is a real need for any change and particularly where the public is expected to understand and support such changes.

The list of issues on which views are sought is getting longer. It seems to mix policy matters with technical and operational concerns. I would prefer to see these issues separated in order that potential misunderstandings are kept to a minimum in future proposals and especially where legislation might follow.

The public consultation document in paragraph 10.9 suggests that there will be no extra resource burden on Regional and Local Government. I shall need to be assured of that in any proposals.

Finally, whatever changes may be forthcoming, we must ensure that ministerial discretion is preserved within each central government department.

I look forward to seeing the results of the consultation before any action is taken.

I am copying this reply to the Prime Minister, to Geoffrey Filkin, members of DA, Sir Andrew Turnbull and First Parliamentary Counsel.



JEFF ROOKER

File
Govt Pol
Presentation

Minister of State

NORTHERN IRELAND OFFICE
BLOCK B, CASTLE BUILDINGS
BELFAST BT4 3SG

Tel Belfast (028) 9052 0700
Facsimile (028) 9052 8202

SPM
c JPO
NH (for CS).

John Prescott MP
Deputy Prime Minister and First Secretary of State
Office of the Deputy Prime Minister
26 Whitehall
LONDON
SW1A 2WH

15th August 2003

Dear John

I have seen Douglas Alexander's letter to you of 25 July seeking clearance to publish a consultation document relating to the proposed revision of the Code of Practice on Consultation. I am responding on Paul Murphy's behalf in his absence.

I agree that the changes already introduced by the existing Code have helped raise the level of public sector consultation and the NIO and the Northern Ireland Administration follow the Code. I fully support the principle of further improvements. However as Ben Bradshaw and Keith Hill have indicated I would welcome the opportunity for officials to work with Cabinet Office colleagues to ensure the revision serves the best interests of all concerned.

I am copying this letter to the Prime Minister, members of the Domestic Affairs Committee and to Sir Andrew Turnbull.

Yours

Jane.

JANE KENNEDY MP
Minister of State for Northern Ireland

INVESTOR IN PEOPLE

/EB

Freedom of Information

Nobel House
17 Smith Square
London SW1P 3JR

020 7238 6465

Telephone 08459 335577
Website www.defra.gov.uk

defra
Department for Environment
Food and Rural Affairs

CS
cc
SPM

The Rt Hon John Prescott MP
Deputy Prime Minister
26 Whitehall
London
SW1A 2WH

AMc
cc.
CS
JTH
AWH

14th August 2003

From the Minister for Environment & Agri-Environment
Elliot Morley MP

Dear John,

REVIEW OF NATIONAL RECORDS ACTS AND ARCHIVES LEGISLATION

I have seen a copy of Geoffrey Filkin's letter of 24 July seeking clearance for publication of the consultation paper to change the current legislative provision for records management and archives. I am responding on behalf of Margaret Beckett in her absence.

I have been supportive of this review from the outset and there are sound proposals in the consultation paper why we need to strengthen the existing legislation to cope with digital records, and the issues these raise, as well as providing a better framework for Government departments and local/ regional authorities for their records management activities. Defra's records and archives are vital to our business and provide the foundation stone for compliance with Freedom of Information, Data Protection and other new legislative requirements, as well as helping us in delivering valuable business benefits.

I am therefore content to accept Geoffrey's proposal endorsing the Senior Working Group's recommendation that the public consultation document should now be issued and I look forward to seeing the results.

I am copying this letter to the Prime Minister, members of DA, Sir Andrew Turnbull and First Parliamentary Counsel.

Regards
Elliot

ELLIOT MORLEY

file CS
cc JJH
AA

Douglas Alexander MP

Minister for the Cabinet Office and
Chancellor of the Duchy of Lancaster

CABINET OFFICE
70 Whitehall
London
SW1A 2AS

Tel: **020 7276 0652**
Fax: **020 7276 0655**

The Rt Hon Lord Falconer of Thoroton QC
Secretary of State for Constitutional Affairs and Lord Chancellor
Department for Constitutional Affairs
Selborne House
54-60 Victoria Street
London
SW1E 6QW

8 August 2003

Dear Charlie –

IMPLEMENTATION OF THE FREEDOM OF INFORMATION ACT 2000

In his letter of 28 July Lord Filkin asks if each Department could nominate one of their Ministerial team to have specific responsibility for the Freedom of Information Act 2000 (FOIA). I shall take on this responsibility for the Cabinet Office.

I also endorse Lord Filkin's proposal to hold bi-lateral meetings with each nominated Minister to review the state of readiness of their Department, plus the bodies and organisations for which they are responsible, and to identify ways in which the Department for Constitutional Affairs can offer support and guidance.

Copies of this letter go to the Prime Minister, members of CRP and Sir Andrew Turnbull.

Yours ever,

Douglas.

DOUGLAS ALEXANDER

Web site: www.cabinet-office.gov.uk
Email: psdalexander@cabinet-office.x.gsi.gov.uk

INVESTOR IN PEOPLE

file CS
cc JJM
AA

Douglas Alexander MP

Minister for the Cabinet Office and
Chancellor of the Duchy of Lancaster

CABINET OFFICE
70 Whitehall
London
SW1A 2AS

***Tel:* 020 7276 0652**
***Fax:* 020 7276 0655**

The Rt Hon John Prescott MP
Deputy Prime Minister and First Minister of State
Office of the Deputy Prime Minister
26 Whitehall
London
SW1A 2WH

7 August 2003

Dear John

REVIEW OF NATIONAL RECORDS AND ARCHIVES LEGISLATION

In his letter of 24 July Lord Filkin seeks agreement to the publication of a consultation paper on proposals to change the current legislative provision for records management and archives.

The Cabinet Office is one of the Departments that has continued to have reservations on whether now is the right time to embark on new legislation in view of the other work on the records front that is going on at present. This includes, for example, the need to prepare for the full implementation of the Freedom of Information Act 2000 from January 2005and the continuing pressures of the Data Protection Act 1998. I am therefore pleased to note that we are not being asked to endorse either policy or action leading to new legislation. I do, however, agree that by going out to consultation it will put us in a better position to assess whether there is a need for primary legislation. On this basis I am content for the publication of the consultation paper to go ahead.

Web site: www.cabinet-office.gov.uk
Email: psdalexander@cabinet-office.x.gsi.gov.uk

INVESTOR IN PEOPLE

Copies of this letter go to the Prime Minister, members of DA, Sir Andrew Turnbull and First Parliamentary Counsel.

Yours ever,

Douglas

DOUGLAS ALEXANDER

FROM: THE PRIVATE SECRETARY

NORTHERN IRELAND OFFICE
CASTLE BUILDINGS
BELFAST BT4 3SG

CS
JP
ML
AA

Mrs Sarah Albon
The Private Secretary to Lord Filkin
The Department for Constitutional Affairs
Selborne House
54-60 Victoria Street
London SW1E 6QW

6 August 2003

Dear Sarah

REVIEW OF NATIONAL RECORDS AND ARCHIVES LEGISLATION

The Secretary of State has seen a copy of your letter of 24 July to John Prescott and agrees that proposed consultation document should be issued to seek views on whether there is a need for primary legislation in England and Wales. The results of the consultation might also be useful when considering the possibility of updating the separate 1923 public records legislation in Northern Ireland.

A copy of this letter goes to the private secretaries to the Prime Minister, members of DA, Sir Andrew Turnbull and First Parliamentary Counsel.

Yours Sincerely

Kate Udy

KATE UDY
Private Secretary to the Secretary of State for Northern Ireland

/IW

INVESTOR IN PEOPLE

02072733965

File FOI policy

Home Office

Fiona Mactaggart MP
PARLIAMENTARY UNDER SECRETARY OF STATE
50 Queen Anne's Gate, London SW1H 9AT

The Rt Hon Lord Filkin
Parliamentary Under Secretary of State
The Department for Constitutional Affairs
Selborne House
54-60 Victoria Street
Lonon
SWIE 6QW

6th August 2003

Dear Geoffrey,

Review of National Records and Archives Legislation

Your letter of 24th July to John Prescott seeks DA clearance to publishing a consultation paper on options for changing the current legislative provisions for record management and archives. I am replying in David Blunkett's absence.

I agree that the public consultation exercise should proceed so that the issues you have outlined can be fully aired. Consultation with the relevant bodies with an interest in record management, the community of historians and archivists, and the wider public interest in genealogy and local history, will give a full examination of the issues.

I see that there is a very real need to ensure that both current and future forms of records are fully embraced by a legislative definition. There would, other wise, be a real risk that electronic and other digital forms of record would not be subject to the same rigour as should be applied to paper records.

I also see the benefit in there being consistency of standards across government. But this also raises concerns over the application of higher standards than currently exist and the prospect of new resources becoming necessary. This needs careful examination.

You will not be surprised that I repeat the concern raised by Jack Straw in the December 2001 consultation to DA members. This is about the timetable for any new legislation. I am concerned that this may come at a time when those responsible for full implementation of new Data Protection standards, as well as preparation for the FOI access regime, may be diverted from these imperatives.

I will be asking my officials to review these practicalities and make a full response to the consultation exercise.

I have copied this letter to the Prime Minister, member of DA, Sir Andrew Turnbull and First Parliamentary Counsel.

Yours ever

Fiona Mactaggart.

FIONA MACTAGGART

From the Office of
the Secretary of State

PRIME MINISTERS
DIRECT COMMUNICATIONS UNIT
- 7 AUG 2003
RECEIVED

Department for
Transport

CS
JPo
JJH
AA

Great Minster House
76 Marsham Street
London SW1P 4DR

Tel: 020 7944 3011
Fax: 020 7944 4399
E-Mail: alistair.darling@dft.gsi.gov.uk

Web site: www.dft.gov.uk

OUR REF: AD/013016/03

- 6 AUG 2003

The Lord Filkin CBE
Parliamentary Under Secretary of State
Department for Constitutional Affairs
Selborne House
54-60 Victoria Street
LONDON
SW1E 6QW

Dear Lord Filkin

IMPLEMENTATION OF THE FREEDOM OF INFORMATION ACT

Thank you for your letter of 23 July, copied to my Secretary of State, about next steps in preparing for bringing the Freedom of Information Act fully into force.

I am afraid that the Secretary of State is away and I am not at present in a position to say which Minister is to be nominated to take specific responsibility for this aspect of Information and Knowledge management. However, I note that you are planning to set up meetings with the relevant Minister for the autumn, and we will ensure that a reply on this point is sent as soon as possible on the Secretary of State's return.

I am copying this letter to the Prime Minister, members of CRP committee and Sir Andrew Turnbull.

Yours Sincerely

Duncan Shrubsole

DUNCAN SHRUBSOLE
Private Secretary

From the Office of
the Secretary of State

PRIME MINISTERS
DIRECT COMMUNICATIONS UNIT
- 7 AUG 2003
RECEIVED

MATRIX

Department for Transport

FOI

Great Minster House
76 Marsham Street
London SW1P 4DR

Tel: 020 7944 3011
Fax: 020 7944 4399
E-Mail: alistair.darling@dft.gsi.gov.uk

Web site: www.dft.gov.uk

OUR REF: AD/013016/03

- 6 AUG 2003

The Lord Filkin CBE
Parliamentary Under Secretary of State
Department for Constitutional Affairs
Selborne House
54-60 Victoria Street
LONDON
SW1E 6QW

Dear Lord Filkin

IMPLEMENTATION OF THE FREEDOM OF INFORMATION ACT

Thank you for your letter of 23 July, copied to my Secretary of State, about next steps in preparing for bringing the Freedom of Information Act fully into force.

I am afraid that the Secretary of State is away and I am not at present in a position to say which Minister is to be nominated to take specific responsibility for this aspect of Information and Knowledge management. However, I note that you are planning to set up meetings with the relevant Minister for the autumn, and we will ensure that a reply on this point is sent as soon as possible on the Secretary of State's return.

I am copying this letter to the Prime Minister, members of CRP committee and Sir Andrew Turnbull.

Yours Sincerely

Duncan Shrubsole

DUNCAN SHRUBSOLE
Private Secretary

Douglas Alexander MP

Minister for the Cabinet Office and Chancellor of the Duchy of Lancaster

CABINET OFFICE
70 Whitehall
London
SW1A 2AS

Tel: **020 7276 0652**
Fax: **020 7276 0655**

The Rt Hon Jack McConnell MSP
First Minister
Scottish Executive
St Andrews House
EDINBURGH
EH1 3DG

6 August 2003

Dear Jack,

PROPOSED CONSULTATION ON IMPLEMENTATION OF A DIRECTIVE ON THE RE-USE AND COMMERCIAL EXPLOITATION OF PUBLIC SECTOR DOCUMENTS

We attach a draft consultation document together with a Partial Regulatory Impact Assessment on options for implementing the proposed Directive of the European Parliament and the Council on the re-use and commercial exploitation of public sector documents. We would be grateful for your agreement to publish the consultation document and accompanying Regulatory Impact Assessment by **18 August.**

The European Commission is proposing a Directive that will set a minimum level of harmonisation of the rules and administration across the European Union on the re-use and commercial exploitation of public sector information. This has now reached Second Reading Stage, and it is expected that the Council will adopt it in November 2003. The proposal has been very widely circulated within government, and departments have been kept closely informed of the progress of negotiations. This consultation, and the accompanying Partial Regulatory Impact Assessment (RIA), is primarily concerned with addressing the ways in which we can ensure that the public sector in England, Wales and Northern Ireland implements most effectively and efficiently the new measures set out in the proposed Directive in a way that is fully compliant but without entailing disproportionate cost. Although the Directive applies to the UK, implementation in respect of Scottish public sector documents within the devolved sector is a matter for the Scottish Administration. It is, however, expected that implementation in Scotland will generally follow the same regime which we are proposing for the remainder of the UK.

Public sector documents are a major resource for the information industry and others – its economic value has recently been estimated at around €68 billion [£48 billion]. The UK has already moved a long way down the path of helping smooth the process of re-using public sector documents by making most central government information available for re-use at marginal cost, in practice usually for free. There are some clearly delineated exceptions to this policy, in relation to certain value-added documents and particularly for documents originated by trading funds such as the Ordnance Survey and Met Office, but the rules are generally clear and well understood by both the public sector and industry. The UK has been recognised by the European Commission as being one of the most advanced, and coherent, Member States in its policies on the re-use of public sector documents.

The position in the rest of Europe is very uneven. A few countries have a policy of making almost all documents freely available, others are more restrictive, and in others the practice varies considerably between public sector bodies within the same country. This makes the creation of pan-European products based on public sector documents difficult, expensive and frustrating. Since there are already inevitable linguistic challenges this puts the European information industry at a significant disadvantage to its American counterpart.

The proposed Directive aims at achieving a minimum level of harmonisation across Europe. The timescale within which public sector bodies will have to respond to requests to re-use documents, for example, will have to meet the requirements of the Directive, and will have to make the terms and conditions of re-use clear and available. This is putting best practice into operation, and we do not anticipate any UK public sector body having real difficulties with implementation.

The Partial RIA accompanying the consultation document considers two main options for implementing the Directive, the deadline for which is likely to be May 2005 (the "Do nothing" option is not relevant in this case since we must implement the Directive).

Option (1) - Regulatory. A formal statutory regulatory framework could be set up. This would incorporate all the requirements in the Directive under-pinned with a formal monitoring process and appropriate sanctions for non-compliance. In the case of public bodies whose material is covered by Crown copyright, the sanctions can take the form of withdrawing the right to license.

Option (2) - framework of legislation, plus implementation through codes of best practice such as the Information Fair Trader Scheme introduced by Her Majesty's Stationery Office (HMSO). The Information Fair Trader Scheme is designed so that re-users of Government information, whether in the voluntary, professional or commercial sectors can be confident that they will be treated reasonably and fairly by public sector information providers, and the means by which HMSO regulates Crown bodies to which the Controller has delegated authority to license the re-use of Crown copyright information. This approach could be extended to parts of the public sector beyond Crown bodies.

The main difference between Option (1) and (2) is that under Option (2) implementation will be via voluntary schemes rather than being imposed by law. Many regional and local authorities are likely to opt to become members of established mechanisms such as the Information Fair Trader Scheme, but this will not be compulsory. As long as public sector bodies can demonstrate compliance if challenged that will suffice.

The respective advantages and disadvantages of these approaches are set out in the Partial RIA, with a preference for Option (2).

In order to allow the normal 12 week consultation period we would be grateful for agreement to publication of the consultation document and the partial RIA by 18 August 2003.

I am copying this letter to the Prime Minister, members of Constitutional Reform Policy Committee and Sir Andrew Turnbull and I am writing in similar terms to Rhodri Morgan and Lord Falconer of Thornton.

DOUGLAS ALEXANDER
Minister for the Cabinet Office and
Chancellor of the Duchy of Lancaster

STEPHEN TIMMS
Minister for Energy, e-Commerce and Postal Services, Department for Trade and Industry

ANNEX A

CONSULTATION DOCUMENT

Proposal for a Directive of the European Parliament and Council on the re-use and commercial exploitation of public sector documents

Explanation of the wider context for the consultation and what it seeks to achieve

1. The European Commission is proposing a Directive that will set a minimum level of harmonisation of the rules and administration across the European Union on the re-use and commercial exploitation of public sector information. A Partial Regulatory Impact Assessment which is appended to this document addresses the ways in which we can ensure that the public sector in England, Wales and Northern Ireland complies with the new measures set out in the proposed Directive. Although the Directive applies to the UK its implementation in respect of Scottish public sector documents within the devolved sector is a matter for the Scottish Administration. It is, however, expected that implementation in Scotland will generally follow the same regime which will apply to the remainder of the UK.

2. The focus of the Directive is on re-use rather than access. Access regimes, as set out in Freedom of Information legislation, remain unaffected by the proposed Directive.

3. We would welcome views on how the proposed Directive might most appropriately be implemented within England, Wales and Northern Ireland. The Partial RIA sets out options and suggests a "light touch" approach should be adopted.

Issued: August 2003

Respond by: October 2003

Enquiries to: the Directive is being negotiated jointly by the DTI and HMSO. Therefore responses and any queries can be addressed to **either**:

Adrian Brazier DTI 151 Buckingham Palace Road London SW1W 9SS Tel: 0207 215 1295 Fax: 0207 215 1370 e-mail: adrian.brazier@dti.gsi.gov.uk	Jim Wretham HMSO St Clements House 2-16 Colegate Norwich NR3 1BQ Tel: 01603 723001 Fax: 01603 723000 e-mail: jim.wretham@cabinet-office.x.gsi.gov.uk

Executive Summary

4. Public sector documents are a major resource for the information industry and others. Added value products based on such documents contribute to making the Information Society work. The UK has already moved a long way down the path of assisting this process by making most central government information available for re-use at marginal cost, in practice usually for free. There are some clearly delineated exceptions to this policy, particularly for trading funds such as the Met Office, but the rules are generally clear and well understood by both the public sector and industry. The UK has been recognised by the European Commission as being one of the most advanced, and coherent, Member States in its policies on the re-use of public sector documents

5. However, the position in the rest of Europe is very uneven. A few countries have a policy of making almost all documents freely available, others are more restrictive, and in yet others the practice varies considerably between public sector bodies within the same country. This makes the creation of pan-European products based on public sector documents difficult, expensive and frustrating. Since there are already inevitable linguistic challenges this puts the European information industry at a significant disadvantage to its American counterpart.

6. The proposed Directive aims at achieving a minimum level of harmonisation across Europe. The timescale within which public sector bodies will have to respond to requests to re-use documents, for example, will have to meet the requirements of the Directive, and will have to make the terms and conditions of re-use clear and available. This is putting best practice into operation, and we do not anticipate any UK public sector body having real difficulties with implementation.

7. We have suggested two main options for implementing the Directive within England, Wales and Northern Ireland. The first envisages a regulatory approach, with a statutory framework. The second proposes implementation through codes of best practice. The primary purpose of this consultation is to elicit respondents' views on the most appropriate option to adopt.

The proposals

8. The Commission is proposing a Directive that will set a minimum level of harmonisation of the rules and administration across the European Union on the re-use and commercial exploitation of public sector information (the original proposal by the Commission can be downloaded from http://www.cordis.lu/econtent/psi/pubsec.htm). This has now reached Second Reading Stage, and it is expected that the Council will adopt it in November 2003. The proposal has been very widely circulated within government, and departments have been kept closely informed of the progress of negotiations. This consultation, and the accompanying Partial Regulatory Impact Assessment (RIA), is primarily concerned with addressing the ways in which we can ensure that the public sector in the United Kingdom implements most effectively and efficiently the new measures set out in the proposed European Directive in a way that fully complies with the Directive without entailing disproportionate cost.

9. Public sector information is a prime content resource with substantial economic potential. The European Commission estimates that between 15 and 25% of total data used in e-commerce trading is based on public sector information. Establishing pan-European products and services based on public sector information is, however, a challenging task. Rules and practices for re-using the information tend to differ from one country to another. Although there are many good examples to be found, there remains considerable scope for improving the level of transparency and clarity about the rules for re-using public sector information throughout Europe. The lack of transparency, clarity and consistency can create difficulties for potential re-users and deter them from developing added value European products and services. In particular, SMEs that cannot afford any investment failure may be deterred from entering the market. In the United States, by contrast, a clear and simple legislative framework enables the re-use of federal government information.

10. The establishment of a minimum set of principles, rules and standards across Europe could remove a significant element of this uncertainty and stimulate the growth of the European Information industry, leading to the creation of innovative new information products and services.

11. The proposed Directive takes into account that certain public sector bodies depend on the income from the sales of their information resources to finance part of their operations. It does not impose any radical change to these charging policies. The proposal allows for the full recovery of production and related costs for the production of a document by the public sector bodies involved, including a reasonable return on investment. The review of this Directive, anticipated to be undertaken after three years of its entry into force, will address in particular the overall impact of the Directive in increasing the availability of public sector information for re-use and its impact on public sector revenues.

12. The measures in this Directive include provisions that may require action on behalf of public sector organisations, although within the UK central government and the Scottish Administration have already put into place mechanisms that meet most of the requirements of the proposal. It is anticipated that similar mechanisms and best practice can be extended to other parts of the public sector, and this is the main thrust of the Partial RIA.

13. The general approach of this proposal for a Directive is one that aims at a minimal extra burden on the public sector bodies. Documents can be made available in their pre-existing formats and there is no obligation on the public sector to create documents which they would not otherwise have produced or to make them available in many different formats. Implementing the proposed measures should, therefore, have a limited impact on the public sector bodies in terms of operational resources.

Options for implementing the proposed Directive within England, Wales and Northern Ireland

14. The Partial RIA considers two main options for implementing the Directive, the deadline for which is likely to be May 2005 (the "Do nothing" option is not relevant in this case since we must implement the Directive).

15. **Option (1) - Regulatory**. A formal statutory regulatory framework could be set up. This would incorporate all the requirements in the Directive under-pinned with a formal monitoring process and appropriate sanctions for non-compliance. In the case of public bodies whose material is covered by Crown copyright, the sanctions can take the form of withdrawing the right to license.

16. Under this option public sector bodies would be required to provide information about:

- what information is available for re-use and where it can be obtained. This could be achieved by publishing information asset lists;
- how much it costs to re-use the information. This would be linked to the publication of price lists;
- the publication of standard licence terms which set out in a clear and transparent way what the conditions for re-use are. Ideally, the facility would be able to take licences out on-line to minimise delays and unnecessary bureaucracy. The Click-Use Licence approach introduced by HMSO provides a model of what can be achieved in this field;
- the formats in which the information is available;
- how to complain or appeal if a re-user feels that he/she has not been treated fairly;
- published service standards connected with the process of licensing so that re-users will know what quality of service they can expect to receive from the public sector body. For example, the public sector body would need to inform an applicant how long it will take to conclude the licence.

17. **Option (2) - framework of legislation, plus implementation through codes of best practice** such as the Information Fair Trader Scheme[1]. The Information Fair Trader Scheme approach could be extended to parts of the public sector beyond central government and Crown bodies.

---

[1] The Information Fair Trader Scheme is designed so that re-users of Government information, whether in the voluntary, professional or commercial sectors can be confident that they will be treated reasonably and fairly by public sector information providers, and the means by which HMSO regulates Crown bodies to which the Controller has delegated authority to license the re-use of Crown copyright information. See http://www.hmso.gov.uk/about/ifts/info_fair_trader.htm

18. Under this option, as with Option (1), public bodies would be expected to publish details about the information that is available, pricing, licence terms and what recourse is open to re-users who are dissatisfied with how their requests are handled. In the case of public bodies whose material is covered by Crown copyright, the sanctions can take the form of the right to license being withdrawn, as under Option (1).

19. The main difference between Option (1) and (2) is that under Option (2) implementation will be via voluntary schemes rather than being imposed by law. Many regional and local authorities are likely to opt to become members of established mechanisms such as the Information Fair Trader Scheme, but this will not be compulsory. As long as public sector bodies can demonstrate compliance if challenged that will suffice.

20. The respective advantages and disadvantages of these approaches are set out in the Partial RIA, with a preference for Option (2).

Question A: do respondents agree with the assessment of advantages and disadvantages set out in the Partial RIA?

Question B: which option do respondents think is the most appropriate and proportionate?

Question C: are there any other implementation options that should be considered?

21. The Partial RIA sets out our preliminary assessment of the respect of the relative costs and benefits for each of the options considered. It also suggests the primary sectors affected by the proposal, and makes the assumption that there will be no significant cost to the private sector of implementing the Directive.

22. The cost to the public sector, particularly outside central government, is acknowledged in the Partial RIA. Nevertheless, in practice it is anticipated that the cost of implementing the Directive will be small in most cases, and will involve adoption of existing best practices.

Question D: are the costs and benefits identified correct, and are they of the right order of magnitude?

Question E: is the assumption that there is no significant cost to the private sector and charity sector valid?

Question F: are there any other sectors that will be affected by the implementation of the Directive?

Question G: is the estimated cost to the public sector, particularly outside central government, of implementing the Directive accurate?

Question H: is the assumption that adopting existing best practice such as the Information Fair Trader Scheme will assist public sector bodies in meeting their obligations a reasonable one?

Question I: Are there other issues, particularly affecting Wales, Northern Ireland, regional and local government that need to be taken into account that has not already been covered?

How to respond and additional copies

23. Responses to the above questions, and any other comments or views, would be welcome by .. October 2003. The information you send us may need to be passed to colleagues within Cabinet Office and the DTI, and/or published in a summary of responses to this consultation. We will assume that you are content for us to do this, and that if you are replying by e-mail, your consent overrides any confidentiality disclaimer that is generated by your organisation's IT system unless you specifically include a request to the contrary in the main text of your submission to us.

24. Enquiries or responses can be sent by letter, fax or e-mail to the addresses in paragraph 3 (or can be made by telephone). Please feel free to pass this document on to anybody else with an interest in the subject, or send us their full contact details and we will arrange for a copy to be sent to them direct. Copies can also be downloaded at www.dti.gov.uk and www.hmso.gov.uk

Plans for making the results public

25. In accordance with criterion 6 of the Cabinet Office Code of Practice on written consultation, decisions taken in the light of the consultation shall be made public promptly with a summary of the views expressed (subject to respondents' requests for confidentiality) and reasons for the decisions finally taken.

PARTIAL REGULATORY IMPACT ASSESSMENT: IMPLEMENTATION IN ENGLAND, WALES, SCOTLAND AND NORTHERN IRELAND OF A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE RE-USE AND COMMERCIAL EXPLOITATION OF PUBLIC SECTOR DOCUMENTS
24 JULY 2003

1. This is a Partial Regulatory Impact Assessment (RIA) on the implementation in England, Wales and Northern Ireland of a Proposed Directive of the European Parliament and of the Council on the re-use and commercial exploitation of public sector documents. Although the Directive applies to the UK, implementation in respect of Scottish public sector documents is a matter for the Scottish Administration. It is, however, expected that implementation in Scotland will generally follow the same regime which will apply to the remainder of the UK.

Purpose and Intended Effect of Measure

Objective

2. The Directive aims to achieve harmonisation across the European Union of the rules and administration on the re-use and commercial exploitation of public sector information. This partial RIA assesses the options for implementation in England, Wales and Northern Ireland of the proposed Directive, outlining the costs and benefits of different implementation options.

3. There is an important distinction between access to information and the right to re-use. For example, a member of the public might purchase a copy of the Highway Code from his/her local bookshop but if he/she wished to publish the text in a manual about driving, he/she would require permission, usually in the form of a licence, to do so. The focus of the Directive is on re-use rather than access. Access regimes, as set out in Freedom of Information legislation, remain unaffected by the proposed Directive.

4. The Directive will apply to England, Wales, Scotland and Northern Ireland.

Rationale of the proposed Directive

5. It is argued by the European Commission and others that the removal of barriers to the re-use of public sector information will act as a stimulus to the information and publishing industry in Europe to create innovative value added products and services. This will enable the European Information industry to compete on a more equal basis with the US Information industry. It will also lead to significant economic opportunities and enhance job creation across Europe. The growth of new value added information products and services will also enable users, both professional and non-professional, to access information in formats and ways not necessarily offered by the public sector. This is likely to lead to improve access to

information and lead to better informed decisions, efficiency and compliance with the law and regulations.

6. Establishing pan-European products and services based on public sector information depends, however, on the ease of re-use of public information across Europe. Rules and practices for re-using the information tend to differ from one country to another. Although there are many good examples to be found, there remains considerable scope for improving the level of transparency and clarity about the rules for re-using public sector information throughout Europe. The lack of transparency, clarity and consistency can create difficulties for potential re-users and deter them from developing added value products and services. In particular SMEs (small and medium sized enterprises), which cannot afford any investment failure, may be deterred from entering the market. In the United States, by contrast, the reuse of federal government information is enabled by a clear and simple legislative framework.

7. The establishment of a minimum set of principles, rules and standards across Europe could remove a significant element of this uncertainty and stimulate the growth of the European Information Industry, leading to the creation of innovative new information products and services. This will entail public sector organisations meeting these principles; and the extent to which they will need to change their current practices will vary across countries and types of organisation.

Objective in the choice of method of UK implementation of the Directive

8. There is scope for the UK in its choice of implementation method. Our choice aims to find the best balance between effective implementation of the Directive (so that the benefits described above will become available) and the cost of compliance, which will be borne by the public sector bodies affected and by the body responsible for monitoring of compliance.

Background

9. The growth of the Internet as a channel of communication has led to the development of a vibrant information, content and publishing industry (the Information Industry), with many new players, particularly on-line publishers, entering the market to compete with established publishers and information providers.

10. The European Commission estimate the size of this market across Europe to be €433 billion, employing some four million people[2]. In the United Kingdom, the turnover for the year 2000 was £18.37 billion[3]. The United States remains, however, the world leader in this field. It is estimated that the US information industry is up to five times the size of its European counterpart even though the two economies are almost equal in size[4].

---

[2] Source: Proposal for a Directive of the European Parliament and of the Council on the re-use and commercial exploitation of public sector documents in the form of an Explanatory Memorandum produced by the European Commission, June 2002.

[3] Source: Publishing in the Knowledge Economy: Competitiveness analysis of the UK publishing media sector by Pira International on behalf of the Department for Trade and Industry and the UK Publishing Media, 2002

[4] Source: Commercial exploitation of Europe's Public Sector Information report by Pira International for the European Commission, September 2000

11. The public sector is by far the largest producer of information in Europe[5]. The European Commission estimates that between 15% and 25% of total data used in e-Commerce trading is based on public sector information[6].

12. In the United Kingdom, public sector information covers a diverse range of information. It includes:

- Primary and Secondary Legislation, which is published for and on behalf of Her Majesty's Stationery Office [HMSO] and the Queen's Printer for Scotland
- Official records of the Proceedings of the Parliaments and the two Assemblies
- Case reports and departmental circulars
- Codes of practice
- Mapping data produced by organisations such as the Ordnance Survey and the United Kingdom Hydrographic Office
- Meteorological data produced by the Met Office
- Consultation and policy documents
- Statistics produced by the Office for National Statistics
- Census data collected by the Office for National Statistics, the General Register Office for Scotland and the General Register Office for Northern Ireland
- Annual reports published by government departments, agencies and local authorities
- Scientific and research data
- Company information made available through Companies House
- Statutory registers such as those for birth, death and marriage, land titles (which are administered by HM Land Registry and the Registers of Scotland)
- Defence information
- Patent Information collected and produced by the Patent Office
- Health and safety guidance and reports published by the Health and Safety Executive
- Forms issued by local and central government such as tax forms
- Press notices
- Public Records
- Leaflets
- Technical reports

13. The information is made available to the public in a variety of ways including publishing the information on official websites; in the form of free issue leaflets, pamphlets and books; as priced publications, often through private sector publishers who publish material on the public sector body's behalf; and by making the information available in statutory registers. The customers for this information are many and varied. They include the general public, companies, educational institutions, the legal profession, publishers, internet publishing companies, libraries, and the public sector itself.

---

[5] Commercial exploitation of Europe's public sector information report by Pira International for the European Commission, September 2000.

[6] Source: Communication from the Commission to the Council, the European Parliament, the Economic and social Committee and the Committee of the Regions: eEurope 2002 – Creating an EU Framework for the Exploitation of Public Sector Information published by the European Commission, October 2001.

14. The UK Government has already made significant progress in encouraging the re-use of government information. This followed a wide-ranging policy review of government information policy. The Cross Cutting Review of the Knowledge Economy published by HM Treasury in December 2000[7] and the earlier White Paper *The Future Management of Crown Copyright* (Cm 4300)[8] in March 1999.

15. Two of the key initiatives which arose from the review process were the implementation of an on-line class licence, launched as the *Click-Use Licence* in April 2001. This has proved highly successful with over 3,300 licences, covering users throughout the world, taken out since it was introduced. In addition, the UK Government introduced the Information Asset Register which provides details of information assets held by government departments and agencies. Both of these initiatives address the concerns expressed in the European Commission's proposal for a Directive on Public Sector documents. Some of these UK initiatives could, indeed, provide a model which other countries in Europe could follow and adapt.

16. Within the United Kingdom material produced by central government, including government trading funds[9] such as Ordnance Survey and the Met Office, is subject to Crown copyright protection under the Copyright, Designs and Patents Act 1988. The copyright in the material produced by other public sector bodies including local and regional authorities, as well as other public bodies which do not have Crown status, such as the Environment Agency, is held by the public sector body itself.

17. However, across Europe the Information Industry is hindered by the lack of transparency, consistency and clarity in the arrangements for the re-use of public sector information. The rules and practices for reusing the information diverge between countries or may, in some cases, not exist at all. The problems can take a number of forms but the main ones are:

- the lack of information about the range of material available for re-use e.g. in indices, catalogues and metadata (information about information);
- the lack of information about where the material can be obtained;
- the lack of clear information about the charging structure;
- the lack of simple standard licences that can be transacted quickly;
- doubts as to whether the information can be accessed in a form that can be easily processed.

18. This is compounded for users who wish to develop information products and services that draw on public sector information from across Europe. Such users find themselves

---

[7] The Cross Cutting Review of the Knowledge Economy - see: http://www.hm-treasury.gov.uk/spending_review/spending_review_2000/associated_documents/spend_sr00_ad_ccrcontents.cfm

[8] The Future Management of Crown Copyright - see: http://www.hmso.gov.uk/archives/copyright/future_management.htm

[9] A trading fund is part of government which has been established as a trading fund by means of a Trading Fund Order under the Government Trading Fund Act 1973. Typically, trading funds operate in very specialised fields and rely on their ability to derive income from their activities in order to cover their costs. Most of the material originated does not fall within the scope of material which is seen as being central to the process of government - see: http:www.hm-treasury.gov.uk/spending_review/spending_review

having to negotiate with a number of public sector bodies across Europe and find that they are hampered by the lack of certainty and consistency. Dun and Bradstreet highlighted this in a survey of their European divisions. This showed significant variations in the prices paid for similar information across Europe[10].

19. These problems are particularly acute for SMEs, which do not have the resources required to overcome obstacles and negotiate complex agreements with the public sector. These companies cannot afford any investment failure and they may be deterred from entering the market. Pira states that their research has indicated that there are examples of even large companies being deterred from developing new information products and services because of the difficulties that can arise in obtaining and re-using public sector information[11].

20. By contrast, their counterparts in the United States have the certainty that they may re-use US federal information with virtually no restrictions. If we do nothing to address these problems in Europe it is likely that the US Information industry will continue to grow at a faster rate than its European competitors so making it a dominant force in the development of worldwide information products and services. This will place the European Information Industry at a disadvantage when competing with US companies in the development of global information products and services.

Risk Assessment

21. There are several sorts of risk associated with the proposed Directive and the way it is implemented in the UK. The focus of the proposed Directive is on the opportunities that will arise by producing a more streamlined and transparent set of conditions for the commercial exploitation and re-use of public sector documents across Europe. The risk is that without an improvement in the conditions for the re-use of public sector information, there will be a considerable loss in the economic development of products and services based on this information. This will be a loss both to the firms involved and to the end-users of the information and the value-added services that might have been built upon it.

22. There are also risks associated with the different options for implementing the proposed Directive in the UK. On the one side, if implementation is not effective then the benefits expected to flow from greater ease of re-use will not occur or will be reduced. . On the other side, there is the risk that implementation will impose unnecessary costs through an excessive regulatory burden on the public sector bodies covered by the Directive, and in the costs of the establishment of monitoring and regulatory mechanisms.

<u>Attempts to quantify the potential economic benefit of greater ease of re-use</u>

23. Over the last few years, a series of studies have tried to model and assess the economic impact of more open data policies. The debate has mainly focused on the issue of

---

[10] Source: Commercial exploitation of Europe's public sector information report by Pira International for the European Commission, September 2000.

[11] Source: Commercial exploitation of Europe's public sector information report by Pira International for the European Commission, September 2000

charging, contrasting the low cost model practised in the United States – where charges for re-use of federal government information do not exceed the marginal costs for the reproduction and dissemination - with cost-recovery models used in Europe. Most analyses - on the basis of economic modelling and/or empirical sector-based approach conclude that low-pricing models give the highest benefits for society as a whole[12]. The latter report reviewed the number of databases exploited by public sector bodies and concluded that charging marginal costs for reproduction and dissemination leads by far to the highest economic impact.

24. The proposed Directive is not prescriptive with regard to the pricing regimes adopted by public sector bodies, allowing national frameworks to remain in place and explicitly permitting charges based on costs of collection, production, reproduction and dissemination, together with a reasonable return on investment. The above evidence is therefore of limited use in this partial RIA, except insofar as it underlines the market potential for the exploitation of public sector information if re-use is made easier.

25. The review of this Directive, anticipated to be undertaken after three years of its entry into force, will address in particular the overall impact of the Directive in increasing the availability of public sector information for re-use and its impact on public sector revenues.

Options for implementation

26. The measures in this Directive include provisions that may require action on behalf of public sector organisations, although within the UK central government and the Scottish Administration have already put into place mechanisms which meet most of the requirements of the proposal. It is anticipated that similar mechanisms and best practice can be extended to other parts of the public sector. It is not expected that there will be any impact on the charity sector.

27. The general approach of this proposal for a Directive is one that aims at a minimal extra burden on the public sector bodies. Documents can be made available in their pre-existing formats and there is no obligation on the public sector to create documents that they would not otherwise have produced or to make them available in many different formats. Implementing the proposed measures should, therefore, have a limited impact on the public sector bodies in terms of operational resources.

28. The "Do Nothing" option is not a valid one in the case of implementing this European Directive. If no proposal for a Directive had been made then, although there would clearly be no impact on the public sector, there would be no benefits for industry or the citizen either. It is likely that the policy on the re-use of public sector information would continue to evolve at varying rates across the Community. This will exacerbate the existing difficulties for re-users in formulating attractive pan-European information products and services. As the US information industry continues to expand it is likely that the disparity between the respective

[12] Sources: Commercial exploitation of Europe's public sector information report by Pira International for the European Commission, September 2000 and Welvaartseffecten van verscillende financiersmethoden van elektronische gegevensbestanden report by Berenschot and Nederlands Economomisch Instituut for the Dutch Ministry of the Interior, 2001

financial turnovers of the respective information industries in Europe and the United States will continue to increase in the US's favour.

Option (1) Regulatory – setting-up a formal statutory regulatory framework.

29. This would incorporate all the requirements in the Directive under-pinned with a formal monitoring process and appropriate sanctions for non-compliance. In the case of public bodies whose material is covered by Crown copyright, the sanctions could take the form of withdrawing the right to license.

30. Under this option public sector bodies would be required to provide information about:

- what information is available for re-use and where it can be obtained. This could be achieved by publishing information asset lists;
- how much it costs to re-use the information. This would be linked to the publication of price lists;
- the publication of standard licence terms, which set out in a clear and transparent way the conditions for re-use. Ideally, the facility would be able to take licences out on-line to minimise delays and unnecessary bureaucracy. The Click-Use Licence approach introduced by HMSO provides a model of what can be achieved in this field;
- the formats in which the information is available;
- how to complain or appeal if a re-user feels that he/she has not been treated fairly;
- published service standards connected with the process of licensing so that re-users will know what quality of service they can expect to receive from the public sector body. For example, the Public body would need to inform an applicant how long it will take to conclude the licence.

Benefits of Option 1

31. This should give a clear and transparent system that will facilitate the streamlined re-use of public sector documents to the benefit of re-users. A central controlling body will give focus across England, Wales and Northern Ireland, and provide a clear source of information and redress.

32. This option would have the following advantages:

- there would be full compliance with the Directive;
- central regulatory control and audit;
- visibility of compliance, including enforcement;
- transparency and clarity regarding the terms of re-use;
- re-users will know, through publication of the terms of re-use, that a level playing field is in place and they are offered the same terms as its competitors;
- it will stimulate the growth of the Information Industry, particularly the SMEs, with the potential to benefit the UK economy;
- the development of new and innovative information based products and services based on public sector information;
- it will enable the UK Information Industry to compete with the US Information industry on a more equal basis.

33. Quantification of these benefits is very difficult for the reasons already discussed in paragraphs 23-25 above. While it is possible to point to the ways in which transparency of terms of re-use would make things easier for re-users, and this could be translated into cost savings, much of the benefit of the new regime would be in the potential it would open up for growth in new value-added information products.

34. The sheer size of the economic value of public sector information in the European Union shows the potential of this area: this value has recently been estimated at around €68 billion making it comparable in size to sectors such as legal services and printing[13]. An increase in this value by a few percent would give a benefit of increased turnover of several billion euros. Better utilisation of the economic potential of public sector information would lead to increased publishing activity and job-creation in the information industry. Many of these jobs will be created in SMEs.

35. New channels are also expanding the potential for the market. We have already mentioned the Internet. Another notable example of the potential growth of the market through new channels is through the medium of mobile telephones. This market is expected to grow substantially. A recent study estimates the size of the market covering the delivery of information via mobile telephones to be in the order of €19 billion by 2006[14]. The study states that attractive public sector information applications and added-value applications based on public sector information can be a key element in developing this emerging services market.

36. The proposed measures are likely to create, therefore, enhanced opportunities for the Information industry in Europe to use public sector information for value-added information products. The challenge for the European Information Industry, working with the public sector, is to fully exploit this opportunity.

37. Our concern in this document is the potential impact on UK firms. Turnover in the UK in 2000 was £18.37 billion, employing 164,000 people. This compares to the pharmaceutical industry, which had a turnover of £12.03 billion and employed 65,000[15]. The Information Industry is, therefore, quite clearly a significant force in the UK economy. Within the Information industry there are a number of very large companies such as Reed Elsevier, Reuters and Pearson, but there are also a large number of SMEs, particularly those active in the digital publishing field.

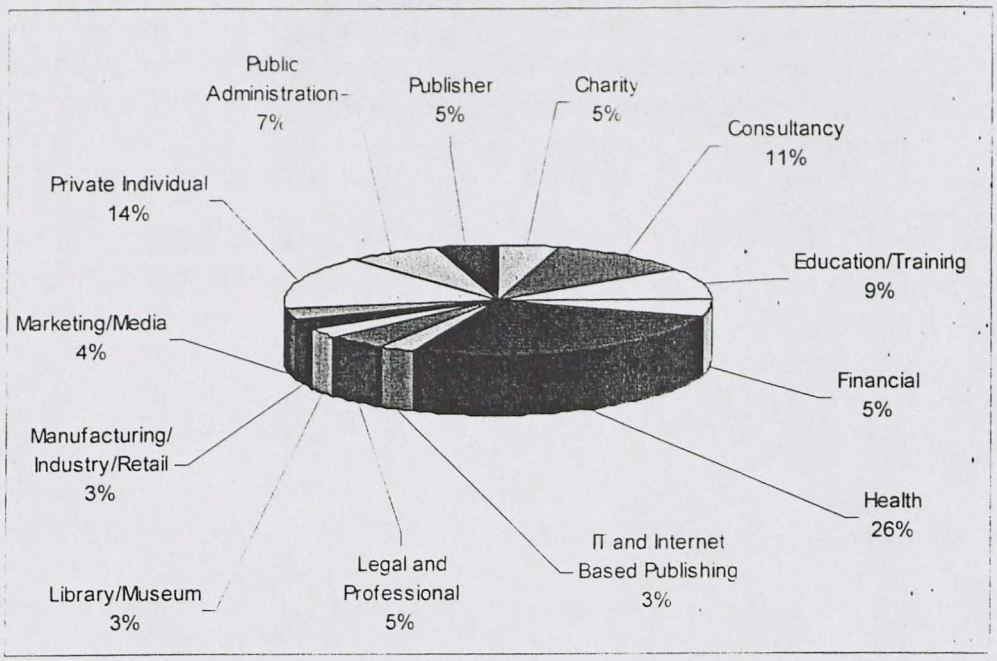
38. Experience within the UK of applicants for "Click-Use" Licences has highlighted the wide variety of re-users. This is illustrated in the chart below:

---

[13] Source: Commercial exploitation of Europe's public sector information report by Pira International for the European Commission, September 2000

[14] Source: Digital Content for Global Mobile Services, Andersen, 2002

[15] Source: Publishing in the Knowledge Economy: Competitiveness analysis of the UK publishing media sector by Pira International on behalf of the Department for Trade and Industry and the UK Publishing Media, 2002



39. The new measures would give the UK information industry the opportunity to improve their activities. The measures should lead to an improvement in opportunities across Europe. Of course, the benefits to the UK industry would depend upon their performance in competition with firms of other countries, including US companies.

Costs of Option 1

In the public sector

40. There would be costs in establishing and running the regulatory body. These would fall to the public sector and, by extension, to the taxpayer. We would need an estimate of the costs of establishing the regulatory body to ensure compliance. The costs of such a body are likely to be at least £450,000 per year. There would also be the costs of drawing up the necessary legislative framework for the new regulations, which are estimated to be around £50-75,000.

41. There would also be compliance costs for the public sector, particularly for those organisations which produce documents that fall outside the ambit of Crown Copyright. UK Crown bodies, which have responsibilities for licensing the re-use of Crown copyright material, are already operating to mechanisms and service standards established under the Information Fair Trader Scheme. The Information Fair Trader Scheme is the process by which HMSO regulates bodies to whom the Controller has delegated authority to license the re-use of Crown copyright information. It is our assessment that for the Crown bodies the additional costs of compliance under Option 1 would be limited to the more formal compliance procedures which would become necessary.

42. However, for other parts of the public sector the costs would be in setting up the measures to bring them into line with the obligations summarised earlier in this section e.g. the development of standard licence procedures, preferably on-line, such as the Click-Use Licence and the creation of information asset lists though these should be produced to satisfy Freedom of Information Legislation). To ensure that these steps were introduced as efficiently and consistently as possible it is likely that a series of seminars and workshops would need to be organised.

43. It is only possible to outline the elements of these costs at this time given the range of public sector bodies. For example, there are around 600 Local Authorities in Great Britain and over 800 other government sponsored bodies. We would need at least a broad assessment of the current state of their information re-use policies and practices and to construct an estimate of how much work would be needed to bring the practices into compliance.

In the private sector

44. As described earlier, one reason for the Directive is to make it easier for those who wish to re-use public sector information. This should result in lower costs of access and re-use i.e. cost-savings, as discussed in the section on benefits above. The main quantifiable effect would be on the potential development of the market for value-added products.

Option (2) Framework of legislation, plus implementation through codes of best practice

45. The rationale of this approach would be to gain all or most of the benefits of Option 1, with a less rigid and formal regulatory framework and much lower costs. This voluntary or self-regulatory approach would involve a measure such as the Information Fair Trader Scheme, or some equivalent scheme, being extended to parts of the public sector beyond central government and Crown bodies.

46. Under this option, as with Option 1, public bodies would be expected to publish details about the information that is available, pricing, licence terms and what recourse is open to re-users who are dissatisfied with how their requests are handled. In the case of public bodies whose material is covered by Crown copyright, the sanctions could take the form of the right to license being withdrawn, as under Option 1. The Information Industry and other re-users would be able to operate within a clear and transparent framework. Public sector bodies would be able to implement in a way that is appropriate to specific circumstances. The cost to the public sector of this option would be less and it would enable use of existing initiatives such as the Information Fair Trader Scheme.

Benefits of Option (2)

47. The issue is whether we could obtain all or nearly all of the benefits of Option 1, in terms of stimulating the growth of the Information Industry, to the benefit of both the Information Industry and end customers, without the prescriptive nature of its regulatory regime. We are confident that the measures already being implemented for Crown bodies, in relation to the Information Fair Trader Scheme, would bring about the required benefits in areas covered by the Crown bodies. This would provide a good model for other public sector

bodies. It would, moreover, be adaptable to local circumstances, which might be a disadvantage of the more prescriptive approach of Option 1.

48. The risk is that without a regulatory body, there would be a lack of robust central control for public bodies and effective avenues for redress. There might be less certainty for re-users of information and less consistency of liaison and charging models with less effective avenues for redress. Such greater non-compliance would reduce the benefits discussed above.

49. Our judgment, from the experience of HMSO and from knowledge of local authorities' current policies with regard to public sector information, is that there are good prospects that there would be high compliance under this option based on voluntary activity and light touch supervision.

Costs of Option 2

50. As with option 1, the costs for the public sector bodies would take the form of publishing information relating to the re-use of the information (see the summary of obligations earlier in this section and the development of standard licence procedures, preferably on-line, such as the Click-Use Licence and the creation of information asset lists). Much of this framework is already in operation within central government so that costs here would be negligible.

51. For public sector bodies not covered by Crown status, there would be the extension of the Information Fair Trader scheme, or some similar measure. This would have monitoring costs but they would be less than under the formal regulatory approach in Option 1. Similarly, for these public sector bodies themselves, the costs of adopting new policies would be less than under Option 1. It would be necessary to ensure that these steps were taken as efficiently and consistently as possible and it is likely that a series of seminars and workshops would need to be organised, but this would also be the case under Option 1.

Issues of equity and fairness

52. The Proposed Directive includes measures with regard to fair trading and consistency of treatment and transparency for all re-users across Europe, including non-discrimination when the public sector re-uses its own documents for commercial activities. As such it should improve equity and fairness.

Consultation with small business: the Small Firms' Impact Test

53. Implementing the proposal would have no cost or compliance implications for small businesses, and would be beneficial to those in the information industry. This was confirmed by the Small Business Service.

Competition Assessment

54. The effects of the proposed directive should all be favourable for competition. The Information industry, particularly in the sphere of publishing on the web, is not dominated by one or more major players – no firm has more than 10% of the market share.

55. The proposed new Directive will help establish a more level playing field amongst re-users of public sector documents. The transparency and fair trading conditions in the proposed Directive can be expected to have a considerable impact on the possibilities to re-use public sector information. Greater ease of re-use of public sector information will reduce costs and uncertainty, which have been barriers to the entry of firms, especially SMEs.

56. It is hard to see what the impact on the market structure will be, but with the reduction of barriers to entry, there is a chance that there will be a greater market share for SMEs in a larger market. Of course, large firms will be well placed to expand also. But there is no reason to expect an increase in market concentration.

57. There are important and complex issues relating to competition between the private sector and the public sector, where the latter is adding value to information produced as part of its core activities. The proposed Directive sets out principles of transparency and non-discrimination which are all pro-competitive. With regard to exclusive arrangements, which are sometimes entered into by public bodies for reasons of public interest (e.g. it would be uneconomic to publish certain types of information otherwise) the Directive says that Member States must ensure that the validity of the reason is reviewed every three years.

58. This is a market where there is scope for innovation in the way information is packaged and the channels over which it is made available. We have already quoted the examples of information over mobile phones. New generation mobile phones, digital television and broadband telecommunications and the greater spread of the Internet are all opening up new opportunities for innovation in the packaging and dissemination of information. This makes it all the more important that the new Directive should open up access to public sector information and that the option chosen for implementation should be effective.

Enforcement and sanctions

59. Any enforcement and sanctions will be directed towards public sector bodies not complying with the proposal. Under Option (1) the regulatory body would be responsible for enforcement. Sanctions could take the form of warning, censure, and fines. Under Option (2) enforcement would be through independent monitoring of self-regulation. This might be through accordance with codes of practice and membership of and adherence to the Information Fair Trader Scheme. Citizens and business will also have recourse to civil courts and/or the appropriate Ombudsman in the event that they consider a public sector body is not complying, and they are not satisfied with the self-regulatory response.

Monitoring and Review

60. The proposal includes provision for a review of the Directive within three years of adoption. The review will address the scope and impact of the Directive assessing the increase in the re-use of public sector documents, the application of the charging principles and the development of the European content industry. The UK government will carry out a review at the same time.

Consultation

Within Government

61. The proposal has been very widely circulated within government, and departments have been kept closely informed of the progress of negotiations. The government bodies include:

Department for Work and Pensions
Department for Environment, Food and Rural Affairs
National Archives [formerly Public Record Office]
Foreign and Commonwealth Office
Central Office of Information
Companies House
Home Office
Ministry of Defence
Fire Service College
Met Office
Registers of Scotland
Royal Mint
Advisory, Conciliation and Arbitration Service [ACAS]
Office of Government Commerce
Office of Government Commerce [Buying Solutions]
Charity Commission
Department of Health
Forestry Commission
Highways Agency
Inland Revenue
HM Treasury
Law Commission
Department for Constitutional Affairs [formerly Lord Chancellor's Department]
National Assembly for Wales
The Office of Gas and Electricity Markets [OFGEM]
The Office for Standards in Education [OFSTED]
The Office of Telecommunications [OFTEL]
The Office of Water Services [OFWAT]
Patent Office
The UK and Scottish Parliaments
UK Passport Agency
Vehicle Certification Agency
Ordnance Survey

Ordnance Survey [Northern Ireland]
Office of the Deputy Prime Minister
Department for Transport
UK Hydrographic Office
Treasury Solicitor
Health & Safety Executive
Office of the First Minister and Deputy First Minister [Northern Ireland]
Vehicle and Operator Services Agency [formerly Vehicle Inspectorate]
Medical and Healthcare Products Regulatory Agency
Driver & Vehicle Licensing Agency
Defence Geographic and Imagery Intelligence Agency [DGIA] [part of Ministry of Defence]
HM Land Registry
Department for Culture, Media & Sport
The Scottish Executive

Local Government

62. Local authorities have been kept informed through the Improvement and Development Agency (IDeA). IDeA was established by and for local government in April 1999. Their mission is to support self-sustaining improvement from within local government.

Public consultation

63. This document is being published as part of a 12-week public consultation with a closing date of October 2003. Major players such as Reuters, and representative bodies such as the Association for Geographic Information, have been consulted and kept informed during the course of negotiations on the proposed Directive.

64. The European Commission itself undertook a major consultation exercise following the publication for the proposal for a new Directive. This elicited views from the public and private sectors across Europe. The views expressed were taken into account in the drafting of the proposed Directive.

Summary and recommendations

65. On balance, Option (2), which advocates a framework of legislation, with implementation achieved by means of codes of best practice such as the Information Fair Trader Scheme, is recommended. This would be proportionate to the issues involved, and strikes a balance between the costs (to the public sector bodies) and benefits (to industry and other re-users) without imposing an unreasonable administrative burden.

DCO

Department for Transport

From the Parliamentary
Under Secretary of State

Great Minster House
76 Marsham Street
London SW1P 4DR

Tel: 020 7944 3084
Fax: 020 7944 4521
E-Mail: david.jamieson@dft.gsi.gov.uk

Web site: www.dft.gov.uk

CS
cc: WP
DH

The Rt Hon John Prescott MP
Deputy Prime Minister
26 Whitehall
LONDON
SW1A 2WH

Our Ref: AD/DJ/013057/03

- 5 AUG 2003

Dear John.

REVIEW OF NATIONAL RECORDS AND ARCHIVES LEGISLATION

I am replying in Alistair Darling's absence to Geoffrey Filkin's letter to you of 24 July, about the Senior Group's recommendation to proceed with the public consultation.

I am still concerned about the public interface with some of these issues that you list. Reservations have already been expressed and I am sure that you still expect to take them into account in any future action.

The issues on which views are invited should be separated into two distinct sets (1) policy and regulatory matters and (2) technical and operational concerns. The latter will be subject to any future changing technology and so may be inappropriate in primary legislation.

I need to ensure that any proposals on the Department's Agencies and Non Departmental Public Bodies are viable and do not become a significant budget overhead on either their operational costs or their administration.

I look forward to seeing the results of the consultation before any action is taken.

I am copying this reply to Prime Minister, members of the DA, Sir Andrew Turnbull and First Parliamentary Counsel.

I hope this is helpful.

DAVID JAMIESON

file GN
cc JJM
SPM
AA

dti

The Rt Hon Patricia Hewitt MP
SECRETARY OF STATE
FOR TRADE AND INDUSTRY

1 August 2003

Douglas Alexander Esq MP
Minister for the Cabinet Office &
Chancellor of the Duchy of Lancaster
Cabinet Office
70 Whitehall
London SW1A 2AS

Dear Minister

REVISED CONSULTATION CODE OF PRACTICE

Thank you for your letter of 25 July 2003 to John Prescott and DA members seeking agreement to launch the consultation exercise on the revision of the Code of Practice on Written Consultations. I welcome the revision of the code and give it my full support.

I am very pleased that Officials within the DTI are already engaged in the development of the new code. I hope that they can work with Cabinet Office colleagues to make further contributions to the development of the supporting guidance and help ensure the successful implementation of the revised Code.

I am copying this letter to the Prime Minister, the Domestic Affairs Committee and Sir Andrew Turnbull.

Yours sincerely

Patricia Hewitt

pp **PATRICIA HEWITT**

(Approved by the Secretary of State and signed in her absence)

Department of Trade and Industry
V 823
1 Victoria Street
London
SW1H 0ET

Direct Line +44 (0)20 7215 5428
Fax +44 (0)20 7215 5468
Minicom +44 (0)20 7215 6740
Enquiries +44 (0)20 7215 5000

Freedom of Information

SW
cc SPM
cc AMc.
NC.
MR
SW
CS
GN
OT

Douglas Alexander MP

Minister for the Cabinet Office &
Chancellor of the Duchy of Lancaster

CABINET OFFICE
70 Whitehall
London
SW1A 2AS

Tel: **020 7276 0652**
Fax: **020 7276 0655**

The Rt Hon The Lord Falconer of Thornton
Secretary of State for Constitutional Affairs
Selborne House
54/60 Victoria Street
LONDON
SW1E 6QW

28 July 2003

Dear Charlie —

PROPOSED CONSULTATION ON IMPLEMENTATION OF A DIRECTIVE ON THE RE-USE AND COMMERCIAL EXPLOITATION OF PUBLIC SECTOR DOCUMENTS

We attach a draft consultation document together with a Partial Regulatory Impact Assessment on options for implementing the proposed Directive of the European Parliament and the Council on the re-use and commercial exploitation of public sector documents. We would be grateful for the agreement of the Constitutional Reform Policy Committee to publish the consultation document and accompanying Regulatory Impact Assessment by **15 August.**

The European Commission is proposing a Directive that will set a minimum level of harmonisation of the rules and administration across the European Union on the re-use and commercial exploitation of public sector information. This has now reached Second Reading Stage, and it is expected that the Council will adopt it in November 2003. The proposal has been very widely circulated within government, and departments have been kept closely informed of the progress of negotiations. This consultation, and the accompanying Partial Regulatory Impact Assessment (RIA), is primarily concerned with addressing the ways in which we can ensure that the public sector in England, Wales and Northern Ireland implements most effectively and efficiently the new measures set out in the proposed Directive in a way that is fully compliant but without entailing disproportionate cost. Although the Directive applies to the UK, implementation in respect of Scottish public sector documents is a matter for the Scottish Administration. It is, however, expected that implementation in Scotland will generally follow the same regime which we are proposing for the remainder of the UK.

31.Jul.2003 10:51 Stephen Timms Minister-1 Vic St No.6869 P 2

Public sector documents are a major resource for the information industry and others – its economic value has recently been estimated at around €68 billion [£48 billion]. The UK has already moved a long way down the path of helping smooth the process of re-using public sector documents by making most central government information available for re-use at marginal cost, in practice usually for free. There are some clearly delineated exceptions to this policy, in relation to certain value-added documents and particularly for documents originated by trading funds such as the Ordnance Survey and Met Office, but the rules are generally clear and well understood by both the public sector and industry. The UK has been recognised by the European Commission as being one of the most advanced, and coherent, Member States in its policies on the re-use of public sector documents.

The position in the rest of Europe is very uneven. A few countries have a policy of making almost all documents freely available, others are more restrictive, and in others the practice varies considerably between public sector bodies within the same country. This makes the creation of pan-European products based on public sector documents difficult, expensive and frustrating. Since there are already inevitable linguistic challenges this puts the European information industry at a significant disadvantage to its American counterpart.

The proposed Directive aims at achieving a minimum level of harmonisation across Europe. The timescale within which public sector bodies will have to respond to requests to re-use documents, for example, will have to meet the requirements of the Directive, and will have to make the terms and conditions of re-use clear and available. This is putting best practice into operation, and we do not anticipate any UK public sector body having real difficulties with implementation.

The Partial RIA accompanying the consultation document considers two main options for implementing the Directive, the deadline for which is likely to be May 2005 (the "Do nothing" option is not relevant in this case since we must implement the Directive).

Option (1) - Regulatory. A formal statutory regulatory framework could be set up. This would incorporate all the requirements in the Directive under-pinned with a formal monitoring process and appropriate sanctions for non-compliance. In the case of public bodies whose material is covered by Crown copyright, the sanctions can take the form of withdrawing the right to license.

Option (2) - framework of legislation, plus implementation through codes of best practice such as the Information Fair Trader Scheme introduced by Her Majesty's Stationery Office (HMSO). The Information Fair Trader Scheme is designed so that re-users of Government information, whether in the voluntary, professional or commercial sectors can be confident that they will be treated reasonably and fairly by public sector information providers, and the means by which HMSO regulates Crown bodies to which the Controller has delegated authority to license the re-use of Crown copyright information. This approach could be extended to parts of the public sector beyond Crown bodies.

The main difference between Option (1) and (2) is that under Option (2) implementation will be via voluntary schemes rather than being imposed by law. Many regional and local authorities are likely to opt to become members of established mechanisms such as the Information Fair Trader Scheme, but this will not be compulsory. As long as public sector bodies can demonstrate compliance if challenged that will suffice.

The respective advantages and disadvantages of these approaches are set out in the Partial RIA, with a preference for Option (2).

In order to allow the normal 12 week consultation period we would be grateful for agreement to publication of the consultation document and the partial RIA by 15 August 2003.

I am copying this letter to the Prime Minister, members of Constitutional Reform Policy Committee and Sir Andrew Turnbull.

Yours ever,

Douglas Alexander
Minister for the Cabinet Office and
Chancellor of the Duchy of Lancaster

Stephen Timms
Minister for Energy, e-Commerce and Postal Services, Department for Trade and Industry

Similar letters will be going to Jack McConnell and Rhodri Morgan.

(1) PR SPM
(2) File. cc. JTH AMc

Douglas Alexander MP

Minister for the Cabinet Office &
Chancellor of the Duchy of Lancaster

CABINET OFFICE
70 Whitehall
London
SW1A 2AS

***Tel:* 020 7276 0652**
***Fax:* 020 7276 0655**

The Rt Hon The Lord Falconer of Thornton
Secretary of State for Constitutional Affairs
Selborne House
54/60 Victoria Street
LONDON
SW1E 6QW

28 July 2003

Dear Charlie —

PROPOSED CONSULTATION ON IMPLEMENTATION OF A DIRECTIVE ON THE RE-USE AND COMMERCIAL EXPLOITATION OF PUBLIC SECTOR DOCUMENTS

We attach a draft consultation document together with a Partial Regulatory Impact Assessment on options for implementing the proposed Directive of the European Parliament and the Council on the re-use and commercial exploitation of public sector documents. We would be grateful for the agreement of the Constitutional Reform Policy Committee to publish the consultation document and accompanying Regulatory Impact Assessment by **15 August.**

The European Commission is proposing a Directive that will set a minimum level of harmonisation of the rules and administration across the European Union on the re-use and commercial exploitation of public sector information. This has now reached Second Reading Stage, and it is expected that the Council will adopt it in November 2003. The proposal has been very widely circulated within government, and departments have been kept closely informed of the progress of negotiations. This consultation, and the accompanying Partial Regulatory Impact Assessment (RIA), is primarily concerned with addressing the ways in which we can ensure that the public sector in England, Wales and Northern Ireland implements most effectively and efficiently the new measures set out in the proposed Directive in a way that is fully compliant but without entailing disproportionate cost. Although the Directive applies to the UK, implementation in respect of Scottish public sector documents is a matter for the Scottish Administration. It is, however, expected that implementation in Scotland will generally follow the same regime which we are proposing for the remainder of the UK.

Web site: www.cabinet-office.gov.uk
Email: psdalexander@cabinet-office.x.gsi.gov.uk

INVESTOR IN PEOPLE

Public sector documents are a major resource for the information industry and others – its economic value has recently been estimated at around €68 billion [£48 billion]. The UK has already moved a long way down the path of helping smooth the process of re-using public sector documents by making most central government information available for re-use at marginal cost, in practice usually for free. There are some clearly delineated exceptions to this policy, in relation to certain value-added documents and particularly for documents originated by trading funds such as the Ordnance Survey and Met Office, but the rules are generally clear and well understood by both the public sector and industry. The UK has been recognised by the European Commission as being one of the most advanced, and coherent, Member States in its policies on the re-use of public sector documents.

The position in the rest of Europe is very uneven. A few countries have a policy of making almost all documents freely available, others are more restrictive, and in others the practice varies considerably between public sector bodies within the same country. This makes the creation of pan-European products based on public sector documents difficult, expensive and frustrating. Since there are already inevitable linguistic challenges this puts the European information industry at a significant disadvantage to its American counterpart.

The proposed Directive aims at achieving a minimum level of harmonisation across Europe. The timescale within which public sector bodies will have to respond to requests to re-use documents, for example, will have to meet the requirements of the Directive, and will have to make the terms and conditions of re-use clear and available. This is putting best practice into operation, and we do not anticipate any UK public sector body having real difficulties with implementation.

The Partial RIA accompanying the consultation document considers two main options for implementing the Directive, the deadline for which is likely to be May 2005 (the "Do nothing" option is not relevant in this case since we must implement the Directive).

Option (1) - Regulatory. A formal statutory regulatory framework could be set up. This would incorporate all the requirements in the Directive under-pinned with a formal monitoring process and appropriate sanctions for non-compliance. In the case of public bodies whose material is covered by Crown copyright, the sanctions can take the form of withdrawing the right to license.

Option (2) - framework of legislation, plus implementation through codes of best practice such as the Information Fair Trader Scheme introduced by Her Majesty's Stationery Office (HMSO). The Information Fair Trader Scheme is designed so that re-users of Government information, whether in the voluntary, professional or commercial sectors can be confident that they will be treated reasonably and fairly by public sector information providers, and the means by which HMSO regulates Crown bodies to which the Controller has delegated authority to license the re-use of Crown copyright information. This approach could be extended to parts of the public sector beyond Crown bodies.

The main difference between Option (1) and (2) is that under Option (2) implementation will be via voluntary schemes rather than being imposed by law. Many regional and local authorities are likely to opt to become members of established mechanisms such as the Information Fair Trader Scheme, but this will not be compulsory. As long as public sector bodies can demonstrate compliance if challenged that will suffice.

The respective advantages and disadvantages of these approaches are set out in the Partial RIA, with a preference for Option (2).

In order to allow the normal 12 week consultation period we would be grateful for agreement to publication of the consultation document and the partial RIA by 15 August 2003.

I am copying this letter to the Prime Minister, members of Constitutional Reform Policy Committee and Sir Andrew Turnbull.

Yours ever,

Douglas Alexander
Minister for the Cabinet Office and
Chancellor of the Duchy of Lancaster

Stephen Timms
Minister for Energy, e-Commerce and Postal Services, Department for Trade and Industry

Similar letters will be going to Jack McConnell and Rhodri Morgan.

ANNEX A

CONSULTATION DOCUMENT

Proposal for a Directive of the European Parliament and Council on the re-use and commercial exploitation of public sector documents

Explanation of the wider context for the consultation and what it seeks to achieve

1. The European Commission is proposing a Directive that will set a minimum level of harmonisation of the rules and administration across the European Union on the re-use and commercial exploitation of public sector information. A Partial Regulatory Impact Assessment which is appended to this document addresses the ways in which we can ensure that the public sector in England, Wales and Northern Ireland complies with the new measures set out in the proposed Directive. Although the Directive applies to the UK its implementation in respect of Scottish public sector documents is a matter for the Scottish Administration. It is, however, expected that implementation in Scotland will generally follow the same regime which will apply to the remainder of the UK.

2. The focus of the Directive is on re-use rather than access. Access regimes, as set out in Freedom of Information legislation, remain unaffected by the proposed Directive.

3. We would welcome views on how the proposed Directive might most appropriately be implemented within England, Wales and Northern Ireland. The Partial RIA sets out options, and suggests a "light touch" approach should be adopted.

Issued: August 2003

Respond by: October 2003

Enquiries to: the Directive is being negotiated jointly by the DTI and HMSO. Therefore responses and any queries can be addressed to **either**:

Adrian Brazier DTI 151 Buckingham Palace Road London SW1W 9SS Tel: 0207 215 1295 Fax: 0207 215 1370 e-mail: adrian.brazier@dti.gsi.gov.uk	Jim Wretham HMSO St Clements House 2-16 Colegate Norwich NR3 1BQ Tel: 01603 723001 Fax: 01603 723000 e-mail: jim.wretham@cabinet-office.x.gsi.gov.uk

Executive Summary

4. Public sector documents are a major resource for the information industry and others. Added value products based on such documents contribute to making the Information Society work. The UK has already moved a long way down the path of assisting this process by making most central government information available for re-use at marginal cost, in practice usually for free. There are some clearly delineated exceptions to this policy, particularly for trading funds such as the Met Office, but the rules are generally clear and well understood by both the public sector and industry. The UK has been recognised by the European Commission as being one of the most advanced, and coherent, Member States in its policies on the re-use of public sector documents

5. However, the position in the rest of Europe is very uneven. A few countries have a policy of making almost all documents freely available, others are more restrictive, and in yet others the practice varies considerably between public sector bodies within the same country. This makes the creation of pan-European products based on public sector documents difficult, expensive and frustrating. Since there are already inevitable linguistic challenges this puts the European information industry at a significant disadvantage to its American counterpart.

6. The proposed Directive aims at achieving a minimum level of harmonisation across Europe. The timescale within which public sector bodies will have to respond to requests to re-use documents, for example, will have to meet the requirements of the Directive, and will have to make the terms and conditions of re-use clear and available. This is putting best practice into operation, and we do not anticipate any UK public sector body having real difficulties with implementation.

7. We have suggested two main options for implementing the Directive within England, Wales and Northern Ireland. The first envisages a regulatory approach, with a statutory framework. The second proposes implementation through codes of best practice. The primary purpose of this consultation is to elicit respondents' views on the most appropriate option to adopt.

The proposals

8. The Commission is proposing a Directive that will set a minimum level of harmonisation of the rules and administration across the European Union on the re-use and commercial exploitation of public sector information (the original proposal by the Commission can be downloaded from http://www.cordis.lu/econtent/psi/pubsec.htm). This has now reached Second Reading Stage, and it is expected that the Council will adopt it in November 2003. The proposal has been very widely circulated within government, and departments have been kept closely informed of the progress of negotiations. This consultation, and the accompanying Partial Regulatory Impact Assessment (RIA), is primarily concerned with addressing the ways in which we can ensure that the public sector in the United Kingdom implements most effectively and efficiently the new measures set out in the proposed European Directive in a way that fully complies with the Directive without entailing disproportionate cost.

9. Public sector information is a prime content resource with substantial economic potential. The European Commission estimates that between 15 and 25% of total data used in e-commerce trading is based on public sector information. Establishing pan-European products and services based on public sector information is, however, a challenging task. Rules and practices for re-using the information tend to differ from one country to another. Although there are many good examples to be found, there remains considerable scope for improving the level of transparency and clarity about the rules for re-using public sector information throughout Europe. The lack of transparency, clarity and consistency can create difficulties for potential re-users and deter them from developing added value European products and services. In particular, SMEs that cannot afford any investment failure may be deterred from entering the market. In the United States, by contrast, a clear and simple legislative framework enables the re-use of federal government information.

10. The establishment of a minimum set of principles, rules and standards across Europe could remove a significant element of this uncertainty and stimulate the growth of the European Information industry, leading to the creation of innovative new information products and services.

11. The proposed Directive takes into account that certain public sector bodies depend on the income from the sales of their information resources to finance part of their operations. It does not impose any radical change to these charging policies. The proposal allows for the full recovery of production and related costs for the production of a document by the public sector bodies involved, including a reasonable return on investment. The review of this Directive, anticipated to be undertaken after three years of its entry into force, will address in particular the overall impact of the Directive in increasing the availability of public sector information for re-use and its impact on public sector revenues.

12. The measures in this Directive include provisions that may require action on behalf of public sector organisations, although within the UK central government and the Scottish Administration have already put into place mechanisms that meet most of the requirements of the proposal. It is anticipated that similar mechanisms and best practice can be extended to other parts of the public sector, and this is the main thrust of the Partial RIA.

13. The general approach of this proposal for a Directive is one that aims at a minimal extra burden on the public sector bodies. Documents can be made available in their pre-existing formats and there is no obligation on the public sector to create documents which they would not otherwise have produced or to make them available in many different formats. Implementing the proposed measures should, therefore, have a limited impact on the public sector bodies in terms of operational resources.

Options for implementing the proposed Directive within England, Wales and Northern Ireland

14. The Partial RIA considers two main options for implementing the Directive, the deadline for which is likely to be May 2005 (the "Do nothing" option is not relevant in this case since we must implement the Directive).

15. **Option (1) - Regulatory**. A formal statutory regulatory framework could be set up. This would incorporate all the requirements in the Directive under-pinned with a formal monitoring process and appropriate sanctions for non-compliance. In the case of public bodies whose material is covered by Crown copyright, the sanctions can take the form of withdrawing the right to license.

16. Under this option public sector bodies would be required to provide information about:

- what information is available for re-use and where it can be obtained. This could be achieved by publishing information asset lists;
- how much it costs to re-use the information. This would be linked to the publication of price lists;
- the publication of standard licence terms which set out in a clear and transparent way what the conditions for re-use are. Ideally, the facility would be able to take licences out on-line to minimise delays and unnecessary bureaucracy. The Click-Use Licence approach introduced by HMSO provides a model of what can be achieved in this field;
- the formats in which the information is available;
- how to complain or appeal if a re-user feels that he/she has not been treated fairly;
- published service standards connected with the process of licensing so that re-users will know what quality of service they can expect to receive from the public sector body. For example, the public sector body would need to inform an applicant how long it will take to conclude the licence.

17. **Option (2) - framework of legislation, plus implementation through codes of best practice** such as the Information Fair Trader Scheme[1]. The Information Fair Trader Scheme approach could be extended to parts of the public sector beyond central government and Crown bodies.

---

[1] The Information Fair Trader Scheme is designed so that re-users of Government information, whether in the voluntary, professional or commercial sectors can be confident that they will be treated reasonably and fairly by public sector information providers, and the means by which HMSO regulates Crown bodies to which the Controller has delegated authority to license the re-use of Crown copyright information. See http://www.hmso.gov.uk/about/ifts/info_fair_trader.htm

18. Under this option, as with Option (1), public bodies would be expected to publish details about the information that is available, pricing, licence terms and what recourse is open to re-users who are dissatisfied with how their requests are handled. In the case of public bodies whose material is covered by Crown copyright, the sanctions can take the form of the right to license being withdrawn, as under Option (1).

19. The main difference between Option (1) and (2) is that under Option (2) implementation will be via voluntary schemes rather than being imposed by law. Many regional and local authorities are likely to opt to become members of established mechanisms such as the Information Fair Trader Scheme, but this will not be compulsory. As long as public sector bodies can demonstrate compliance if challenged that will suffice.

20. The respective advantages and disadvantages of these approaches are set out in the Partial RIA, with a preference for Option (2).

Question A: do respondents agree with the assessment of advantages and disadvantages set out in the Partial RIA?

Question B: which option do respondents think is the most appropriate and proportionate?

Question C: are there any other implementation options that should be considered?

21. The Partial RIA sets out our preliminary assessment of the respect of the relative costs and benefits for each of the options considered. It also suggests the primary sectors affected by the proposal, and makes the assumption that there will be no significant cost to the private sector of implementing the Directive.

22. The cost to the public sector, particularly outside central government, is acknowledged in the Partial RIA. Nevertheless, in practice it is anticipated that the cost of implementing the Directive will be small in most cases, and will involve adoption of existing best practices.

Question D: are the costs and benefits identified correct, and are they of the right order of magnitude?

Question E: is the assumption that there is no significant cost to the private sector and charity sector valid?

Question F: are there any other sectors that will be affected by the implementation of the Directive?

Question G: is the estimated cost to the public sector, particularly outside central government, of implementing the Directive accurate?

Question H: is the assumption that adopting existing best practice such as the Information Fair Trader Scheme will assist public sector bodies in meeting their obligations a reasonable one?

Question I: Are there other issues, particularly affecting Wales, Northern Ireland, regional and local government that need to be taken into account that has not already been covered?

How to respond and additional copies

23. Responses to the above questions, and any other comments or views, would be welcome by .. October 2003. The information you send us may need to be passed to colleagues within Cabinet Office and the DTI, and/or published in a summary of responses to this consultation. We will assume that you are content for us to do this, and that if you are replying by e-mail, your consent overrides any confidentiality disclaimer that is generated by your organisation's IT system unless you specifically include a request to the contrary in the main text of your submission to us.

24. Enquiries or responses can be sent by letter, fax or e-mail to the addresses in paragraph 3 (or can be made by telephone). Please feel free to pass this document on to anybody else with an interest in the subject, or send us their full contact details and we will arrange for a copy to be sent to them direct. Copies can also be downloaded at www.dti.gov.uk and www.hmso.gov.uk

Plans for making the results public

25. In accordance with criterion 6 of the Cabinet Office Code of Practice on written consultation, decisions taken in the light of the consultation shall be made public promptly with a summary of the views expressed (subject to respondents' requests for confidentiality) and reasons for the decisions finally taken.

PARTIAL REGULATORY IMPACT ASSESSMENT: IMPLEMENTATION IN ENGLAND, WALES, SCOTLAND AND NORTHERN IRELAND OF A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE RE-USE AND COMMERCIAL EXPLOITATION OF PUBLIC SECTOR DOCUMENTS
24 JULY 2003

1. This is a Partial Regulatory Impact Assessment (RIA) on the implementation in England, Wales and Northern Ireland of a Proposed Directive of the European Parliament and of the Council on the re-use and commercial exploitation of public sector documents. Although the Directive applies to the UK, implementation in respect of Scottish public sector documents is a matter for the Scottish Administration. It is, however, expected that implementation in Scotland will generally follow the same regime which will apply to the remainder of the UK.

Purpose and Intended Effect of Measure

Objective

2. The Directive aims to achieve harmonisation across the European Union of the rules and administration on the re-use and commercial exploitation of public sector information. This partial RIA assesses the options for implementation in England, Wales and Northern Ireland of the proposed Directive, outlining the costs and benefits of different implementation options.

3. There is an important distinction between access to information and the right to re-use. For example, a member of the public might purchase a copy of the Highway Code from his/her local bookshop but if he/she wished to publish the text in a manual about driving, he/she would require permission, usually in the form of a licence, to do so. The focus of the Directive is on re-use rather than access. Access regimes, as set out in Freedom of Information legislation, remain unaffected by the proposed Directive.

4. The Directive will apply to England, Wales, Scotland and Northern Ireland.

Rationale of the proposed Directive

5. It is argued by the European Commission and others that the removal of barriers to the re-use of public sector information will act as a stimulus to the information and publishing industry in Europe to create innovative value added products and services. This will enable the European Information industry to compete on a more equal basis with the US Information industry. It will also lead to significant economic opportunities and enhance job creation across Europe. The growth of new value added information products and services will also enable users, both professional and non-professional, to access information in formats and ways not necessarily offered by the public sector. This is likely to lead to improve access to

information and lead to better informed decisions, efficiency and compliance with the law and regulations.

6. Establishing pan-European products and services based on public sector information depends, however, on the ease of re-use of public information across Europe. Rules and practices for re-using the information tend to differ from one country to another. Although there are many good examples to be found, there remains considerable scope for improving the level of transparency and clarity about the rules for re-using public sector information throughout Europe. The lack of transparency, clarity and consistency can create difficulties for potential re-users and deter them from developing added value products and services. In particular SMEs (small and medium sized enterprises), which cannot afford any investment failure, may be deterred from entering the market. In the United States, by contrast, the reuse of federal government information is enabled by a clear and simple legislative framework.

7. The establishment of a minimum set of principles, rules and standards across Europe could remove a significant element of this uncertainty and stimulate the growth of the European Information Industry, leading to the creation of innovative new information products and services. This will entail public sector organisations meeting these principles; and the extent to which they will need to change their current practices will vary across countries and types of organisation.

Objective in the choice of method of UK implementation of the Directive

8. There is scope for the UK in its choice of implementation method. Our choice aims to find the best balance between effective implementation of the Directive (so that the benefits described above will become available) and the cost of compliance, which will be borne by the public sector bodies affected and by the body responsible for monitoring of compliance.

Background

9. The growth of the Internet as a channel of communication has led to the development of a vibrant information, content and publishing industry (the Information Industry), with many new players, particularly on-line publishers, entering the market to compete with established publishers and information providers.

10. The European Commission estimate the size of this market across Europe to be €433 billion, employing some four million people[2]. In the United Kingdom, the turnover for the year 2000 was £18.37 billion[3]. The United States remains, however, the world leader in this field. It is estimated that the US information industry is up to five times the size of its European counterpart even though the two economies are almost equal in size[4].

---

[2] Source: Proposal for a Directive of the European Parliament and of the Council on the re-use and commercial exploitation of public sector documents in the form of an Explanatory Memorandum produced by the European Commission, June 2002.

[3] Source: Publishing in the Knowledge Economy: Competitiveness analysis of the UK publishing media sector by Pira International on behalf of the Department for Trade and Industry and the UK Publishing Media, 2002.

[4] Source: Commercial exploitation of Europe's Public Sector Information report by Pira International for the European Commission, September 2000.

11. The public sector is by far the largest producer of information in Europe[5]. The European Commission estimates that between 15% and 25% of total data used in e-Commerce trading is based on public sector information[6].

12. In the United Kingdom, public sector information covers a diverse range of information. It includes:

- Primary and Secondary Legislation, which is published for and on behalf of Her Majesty's Stationery Office [HMSO] and the Queen's Printer for Scotland
- Official records of the Proceedings of the Parliaments and the two Assemblies
- Case reports and departmental circulars
- Codes of practice
- Mapping data produced by organisations such as the Ordnance Survey and the United Kingdom Hydrographic Office
- Meteorological data produced by the Met Office
- Consultation and policy documents
- Statistics produced by the Office for National Statistics
- Census data collected by the Office for National Statistics, the General Register Office for Scotland and the General Register Office for Northern Ireland
- Annual reports published by government departments, agencies and local authorities
- Scientific and research data
- Company information made available through Companies House
- Statutory registers such as those for birth, death and marriage, land titles (which are administered by HM Land Registry and the Registers of Scotland)
- Defence information
- Patent Information collected and produced by the Patent Office
- Health and safety guidance and reports published by the Health and Safety Executive
- Forms issued by local and central government such as tax forms
- Press notices
- Public Records
- Leaflets
- Technical reports

13. The information is made available to the public in a variety of ways including publishing the information on official websites; in the form of free issue leaflets, pamphlets and books; as priced publications, often through private sector publishers who publish material on the public sector body's behalf; and by making the information available in statutory registers. The customers for this information are many and varied. They include the general public, companies, educational institutions, the legal profession, publishers, internet publishing companies, libraries, and the public sector itself.

---

[5] Commercial exploitation of Europe's public sector information report by Pira International for the European Commission, September 2000.

[6] Source: Communication from the Commission to the Council, the European Parliament, the Economic and social Committee and the Committee of the Regions: eEurope 2002 – Creating an EU Framework for the Exploitation of Public Sector Information published by the European Commission, October 2001.

14. The UK Government has already made significant progress in encouraging the re-use of government information. This followed a wide-ranging policy review of government information policy. The Cross Cutting Review of the Knowledge Economy published by HM Treasury in December 2000[7] and the earlier White Paper *The Future Management of Crown Copyright* (Cm 4300)[8] in March 1999.

15. Two of the key initiatives which arose from the review process were the implementation of an on-line class licence, launched as the *Click-Use Licence* in April 2001. This has proved highly successful with over 3,300 licences, covering users throughout the world, taken out since it was introduced. In addition, the UK Government introduced the Information Asset Register which provides details of information assets held by government departments and agencies. Both of these initiatives address the concerns expressed in the European Commission's proposal for a Directive on Public Sector documents. Some of these UK initiatives could, indeed, provide a model which other countries in Europe could follow and adapt.

16. Within the United Kingdom material produced by central government, including government trading funds[9] such as Ordnance Survey and the Met Office, is subject to Crown copyright protection under the Copyright, Designs and Patents Act 1988. The copyright in the material produced by other public sector bodies including local and regional authorities, as well as other public bodies which do not have Crown status, such as the Environment Agency, is held by the public sector body itself.

17. However, across Europe the Information Industry is hindered by the lack of transparency, consistency and clarity in the arrangements for the re-use of public sector information. The rules and practices for reusing the information diverge between countries or may, in some cases, not exist at all. The problems can take a number of forms but the main ones are:

- the lack of information about the range of material available for re-use e.g. in indices, catalogues and metadata (information about information);
- the lack of information about where the material can be obtained;
- the lack of clear information about the charging structure;
- the lack of simple standard licences that can be transacted quickly;
- doubts as to whether the information can be accessed in a form that can be easily processed.

18. This is compounded for users who wish to develop information products and services that draw on public sector information from across Europe. Such users find themselves

---

[7] The Cross Cutting Review of the Knowledge Economy - see: http://www.hm-treasury.gov.uk/spending_review/spending_review_2000/associated_documents/spend_sr00_ad_ccrcontents.cfm

[8] The Future Management of Crown Copyright - see: http://www.hmso.gov.uk/archives/copyright/future_management.htm

[9] A trading fund is part of government which has been established as a trading fund by means of a Trading Fund Order under the Government Trading Fund Act 1973. Typically, trading funds operate in very specialised fields and rely on their ability to derive income from their activities in order to cover their costs. Most of the material originated does not fall within the scope of material which is seen as being central to the process of government - see: http:www.hm-treasury.gov.uk/spending_review/spending_review

having to negotiate with a number of public sector bodies across Europe and find that they are hampered by the lack of certainty and consistency. Dun and Bradstreet highlighted this in a survey of their European divisions. This showed significant variations in the prices paid for similar information across Europe[10].

19. These problems are particularly acute for SMEs, which do not have the resources required to overcome obstacles and negotiate complex agreements with the public sector. These companies cannot afford any investment failure and they may be deterred from entering the market. Pira states that their research has indicated that there are examples of even large companies being deterred from developing new information products and services because of the difficulties that can arise in obtaining and re-using public sector information[11].

20. By contrast, their counterparts in the United States have the certainty that they may re-use US federal information with virtually no restrictions. If we do nothing to address these problems in Europe it is likely that the US Information industry will continue to grow at a faster rate than its European competitors so making it a dominant force in the development of worldwide information products and services. This will place the European Information Industry at a disadvantage when competing with US companies in the development of global information products and services.

Risk Assessment

21. There are several sorts of risk associated with the proposed Directive and the way it is implemented in the UK. The focus of the proposed Directive is on the opportunities that will arise by producing a more streamlined and transparent set of conditions for the commercial exploitation and re-use of public sector documents across Europe. The risk is that without an improvement in the conditions for the re-use of public sector information, there will be a considerable loss in the economic development of products and services based on this information. This will be a loss both to the firms involved and to the end-users of the information and the value-added services that might have been built upon it.

22. There are also risks associated with the different options for implementing the proposed Directive in the UK. On the one side, if implementation is not effective then the benefits expected to flow from greater ease of re-use will not occur or will be reduced. . On the other side, there is the risk that implementation will impose unnecessary costs through an excessive regulatory burden on the public sector bodies covered by the Directive, and in the costs of the establishment of monitoring and regulatory mechanisms.

<u>Attempts to quantify the potential economic benefit of greater ease of re-use</u>

23. Over the last few years, a series of studies have tried to model and assess the economic impact of more open data policies. The debate has mainly focused on the issue of

---

[10] Source: Commercial exploitation of Europe's public sector information report by Pira International for the European Commission, September 2000.

[11] Source: Commercial exploitation of Europe's public sector information report by Pira International for the European Commission, September 2000.

charging, contrasting the low cost model practised in the United States – where charges for re-use of federal government information do not exceed the marginal costs for the reproduction and dissemination - with cost-recovery models used in Europe. Most analyses - on the basis of economic modelling and/or empirical sector-based approach conclude that low-pricing models give the highest benefits for society as a whole[12]. The latter report reviewed the number of databases exploited by public sector bodies and concluded that charging marginal costs for reproduction and dissemination leads by far to the highest economic impact.

24. The proposed Directive is not prescriptive with regard to the pricing regimes adopted by public sector bodies, allowing national frameworks to remain in place and explicitly permitting charges based on costs of collection, production, reproduction and dissemination, together with a reasonable return on investment. The above evidence is therefore of limited use in this partial RIA, except insofar as it underlines the market potential for the exploitation of public sector information if re-use is made easier.

25. The review of this Directive, anticipated to be undertaken after three years of its entry into force, will address in particular the overall impact of the Directive in increasing the availability of public sector information for re-use and its impact on public sector revenues.

Options for implementation

26. The measures in this Directive include provisions that may require action on behalf of public sector organisations, although within the UK central government and the Scottish Administration have already put into place mechanisms which meet most of the requirements of the proposal. It is anticipated that similar mechanisms and best practice can be extended to other parts of the public sector. It is not expected that there will be any impact on the charity sector.

27. The general approach of this proposal for a Directive is one that aims at a minimal extra burden on the public sector bodies. Documents can be made available in their pre-existing formats and there is no obligation on the public sector to create documents that they would not otherwise have produced or to make them available in many different formats. Implementing the proposed measures should, therefore, have a limited impact on the public sector bodies in terms of operational resources.

28. The "Do Nothing" option is not a valid one in the case of implementing this European Directive. If no proposal for a Directive had been made then, although there would clearly be no impact on the public sector, there would be no benefits for industry or the citizen either. It is likely that the policy on the re-use of public sector information would continue to evolve at varying rates across the Community. This will exacerbate the existing difficulties for re-users in formulating attractive pan-European information products and services. As the US information industry continues to expand it is likely that the disparity between the respective

[12] Sources: Commercial exploitation of Europe's public sector information report by Pira International for the European Commission, September 2000 and Welvaartseffecten van verscillende financiersmethoden van elektronische gegevensbestanden report by Berenschot and Nederlands Economomisch Instituut for the Dutch Ministry of the Interior, 2001

financial turnovers of the respective information industries in Europe and the United States will continue to increase in the US's favour.

Option (1) Regulatory – setting-up a formal statutory regulatory framework.

29. This would incorporate all the requirements in the Directive under-pinned with a formal monitoring process and appropriate sanctions for non-compliance. In the case of public bodies whose material is covered by Crown copyright, the sanctions could take the form of withdrawing the right to license.

30. Under this option public sector bodies would be required to provide information about:

- what information is available for re-use and where it can be obtained. This could be achieved by publishing information asset lists;
- how much it costs to re-use the information. This would be linked to the publication of price lists;
- the publication of standard licence terms, which set out in a clear and transparent way the conditions for re-use. Ideally, the facility would be able to take licences out on-line to minimise delays and unnecessary bureaucracy. The Click-Use Licence approach introduced by HMSO provides a model of what can be achieved in this field;
- the formats in which the information is available;
- how to complain or appeal if a re-user feels that he/she has not been treated fairly;
- published service standards connected with the process of licensing so that re-users will know what quality of service they can expect to receive from the public sector body. For example, the Public body would need to inform an applicant how long it will take to conclude the licence.

Benefits of Option 1

31. This should give a clear and transparent system that will facilitate the streamlined re-use of public sector documents to the benefit of re-users. A central controlling body will give focus across England, Wales and Northern Ireland, and provide a clear source of information and redress.

32. This option would have the following advantages:

- there would be full compliance with the Directive;
- central regulatory control and audit;
- visibility of compliance, including enforcement;
- transparency and clarity regarding the terms of re-use;
- re-users will know, through publication of the terms of re-use, that a level playing field is in place and they are offered the same terms as its competitors;
- it will stimulate the growth of the Information Industry, particularly the SMEs, with the potential to benefit the UK economy;
- the development of new and innovative information based products and services based on public sector information;
- it will enable the UK Information Industry to compete with the US Information industry on a more equal basis.

33. Quantification of these benefits is very difficult for the reasons already discussed in paragraphs 23-25 above. While it is possible to point to the ways in which transparency of terms of re-use would make things easier for re-users, and this could be translated into cost savings, much of the benefit of the new regime would be in the potential it would open up for growth in new value-added information products.

34. The sheer size of the economic value of public sector information in the European Union shows the potential of this area: this value has recently been estimated at around €68 billion making it comparable in size to sectors such as legal services and printing[13]. An increase in this value by a few percent would give a benefit of increased turnover of several billion euros. Better utilisation of the economic potential of public sector information would lead to increased publishing activity and job-creation in the information industry. Many of these jobs will be created in SMEs.

35. New channels are also expanding the potential for the market. We have already mentioned the Internet. Another notable example of the potential growth of the market through new channels is through the medium of mobile telephones. This market is expected to grow substantially. A recent study estimates the size of the market covering the delivery of information via mobile telephones to be in the order of €19 billion by 2006[14]. The study states that attractive public sector information applications and added-value applications based on public sector information can be a key element in developing this emerging services market.

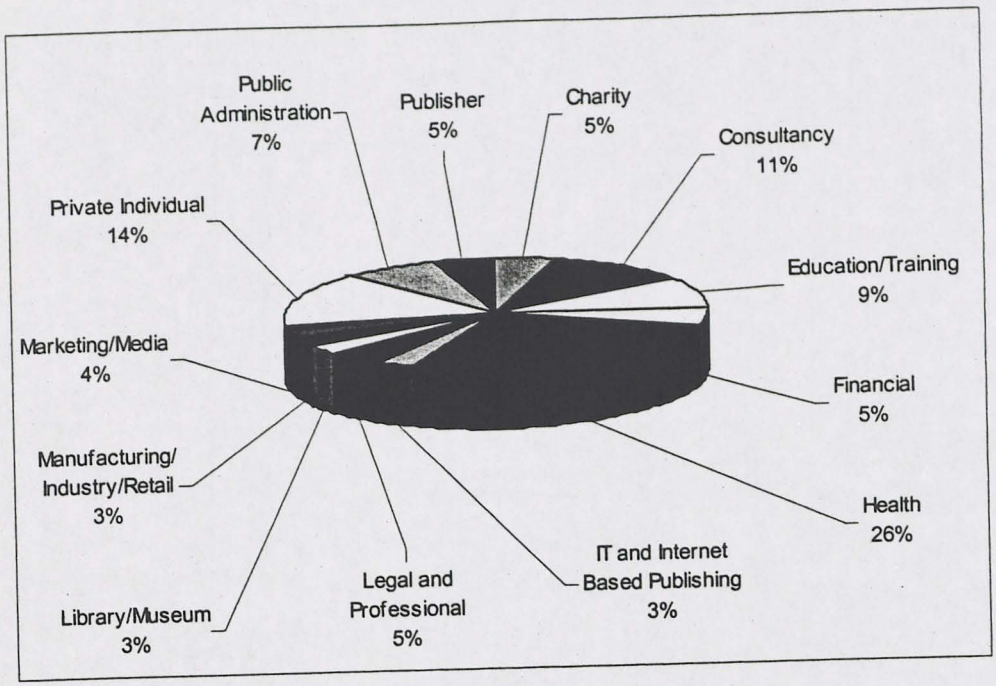
36. The proposed measures are likely to create, therefore, enhanced opportunities for the Information industry in Europe to use public sector information for value-added information products. The challenge for the European Information Industry, working with the public sector, is to fully exploit this opportunity.

37. Our concern in this document is the potential impact on UK firms. Turnover in the UK in 2000 was £18.37 billion, employing 164,000 people. This compares to the pharmaceutical industry, which had a turnover of £12.03 billion and employed 65,000[15]. The Information Industry is, therefore, quite clearly a significant force in the UK economy. Within the Information industry there are a number of very large companies such as Reed Elsevier, Reuters and Pearson, but there are also a large number of SMEs, particularly those active in the digital publishing field.

38. Experience within the UK of applicants for "Click-Use" Licences has highlighted the wide variety of re-users. This is illustrated in the chart below:

---

[13] Source: Commercial exploitation of Europe's public sector information report by Pira International for the European Commission, September 2000.
[14] Source: Digital Content for Global Mobile Services, Andersen, 2002.
[15] Source: Publishing in the Knowledge Economy: Competitiveness analysis of the UK publishing media sector by Pira International on behalf of the Department for Trade and Industry and the UK Publishing Media, 2002.



39. The new measures would give the UK information industry the opportunity to improve their activities. The measures should lead to an improvement in opportunities across Europe. Of course, the benefits to the UK industry would depend upon their performance in competition with firms of other countries, including US companies.

Costs of Option 1

In the public sector

40. There would be costs in establishing and running the regulatory body. These would fall to the public sector and, by extension, to the taxpayer. We would need an estimate of the costs of establishing the regulatory body to ensure compliance. The costs of such a body are likely to be at least £450,000 per year. There would also be the costs of drawing up the necessary legislative framework for the new regulations, which are estimated to be around £50-75,000.

41. There would also be compliance costs for the public sector, particularly for those organisations which produce documents that fall outside the ambit of Crown Copyright. UK Crown bodies, which have responsibilities for licensing the re-use of Crown copyright material, are already operating to mechanisms and service standards established under the Information Fair Trader Scheme. The Information Fair Trader Scheme is the process by which HMSO regulates bodies to whom the Controller has delegated authority to license the re-use of Crown copyright information. It is our assessment that for the Crown bodies the additional costs of compliance under Option 1 would be limited to the more formal compliance procedures which would become necessary.

42. However, for other parts of the public sector the costs would be in setting up the measures to bring them into line with the obligations summarised earlier in this section (e.g. the development of standard licence procedures, preferably on-line, such as the Click-Use Licence and the creation of information asset lists though these should be produced to satisfy Freedom of Information Legislation). To ensure that these steps were introduced as efficiently and consistently as possible it is likely that a series of seminars and workshops would need to be organised.

43. It is only possible to outline the elements of these costs at this time given the range of public sector bodies. For example, there are around 600 Local Authorities in Great Britain and over 800 other government sponsored bodies. We would need at least a broad assessment of the current state of their information re-use policies and practices and to construct an estimate of how much work would be needed to bring the practices into compliance.

In the private sector

44. As described earlier, one reason for the Directive is to make it easier for those who wish to re-use public sector information. This should result in lower costs of access and re-use i.e. cost-savings, as discussed in the section on benefits above. The main quantifiable effect would be on the potential development of the market for value-added products.

Option (2) Framework of legislation, plus implementation through codes of best practice

45. The rationale of this approach would be to gain all or most of the benefits of Option 1, with a less rigid and formal regulatory framework and much lower costs. This voluntary or self-regulatory approach would involve a measure such as the Information Fair Trader Scheme, or some equivalent scheme, being extended to parts of the public sector beyond central government and Crown bodies.

46. Under this option, as with Option 1, public bodies would be expected to publish details about the information that is available, pricing, licence terms and what recourse is open to re-users who are dissatisfied with how their requests are handled. In the case of public bodies whose material is covered by Crown copyright, the sanctions could take the form of the right to license being withdrawn, as under Option 1. The Information Industry and other re-users would be able to operate within a clear and transparent framework. Public sector bodies would be able to implement in a way that is appropriate to specific circumstances. The cost to the public sector of this option would be less and it would enable use of existing initiatives such as the Information Fair Trader Scheme.

Benefits of Option (2)

47. The issue is whether we could obtain all or nearly all of the benefits of Option 1, in terms of stimulating the growth of the Information Industry, to the benefit of both the Information Industry and end customers, without the prescriptive nature of its regulatory regime. We are confident that the measures already being implemented for Crown bodies, in relation to the Information Fair Trader Scheme, would bring about the required benefits in areas covered by the Crown bodies. This would provide a good model for other public sector

bodies. It would, moreover, be adaptable to local circumstances, which might be a disadvantage of the more prescriptive approach of Option 1.

48. The risk is that without a regulatory body, there would be a lack of robust central control for public bodies and effective avenues for redress. There might be less certainty for re-users of information and less consistency of liaison and charging models with less effective avenues for redress. Such greater non-compliance would reduce the benefits discussed above.

49. Our judgment, from the experience of HMSO and from knowledge of local authorities' current policies with regard to public sector information, is that there are good prospects that there would be high compliance under this option based on voluntary activity and light touch supervision.

Costs of Option 2

50. As with option 1, the costs for the public sector bodies would take the form of publishing information relating to the re-use of the information (see the summary of obligations earlier in this section and the development of standard licence procedures, preferably on-line, such as the Click-Use Licence and the creation of information asset lists). Much of this framework is already in operation within central government so that costs here would be negligible.

51. For public sector bodies not covered by Crown status, there would be the extension of the Information Fair Trader scheme, or some similar measure. This would have monitoring costs but they would be less than under the formal regulatory approach in Option 1. Similarly, for these public sector bodies themselves, the costs of adopting new policies would be less than under Option 1. It would be necessary to ensure that these steps were taken as efficiently and consistently as possible and it is likely that a series of seminars and workshops would need to be organised, but this would also be the case under Option 1.

Issues of equity and fairness

52. The Proposed Directive includes measures with regard to fair trading and consistency of treatment and transparency for all re-users across Europe, including non-discrimination when the public sector re-uses its own documents for commercial activities. As such it should improve equity and fairness.

Consultation with small business: the Small Firms' Impact Test

53. Implementing the proposal would have no cost or compliance implications for small businesses, and would be beneficial to those in the information industry. This was confirmed by the Small Business Service.

Competition Assessment

54. The effects of the proposed directive should all be favourable for competition. The Information industry, particularly in the sphere of publishing on the web, is not dominated by one or more major players – no firm has more than 10% of the market share.

55. The proposed new Directive will help establish a more level playing field amongst re-users of public sector documents. The transparency and fair trading conditions in the proposed Directive can be expected to have a considerable impact on the possibilities to re-use public sector information. Greater ease of re-use of public sector information will reduce costs and uncertainty, which have been barriers to the entry of firms, especially SMEs.

56. It is hard to see what the impact on the market structure will be, but with the reduction of barriers to entry, there is a chance that there will be a greater market share for SMEs in a larger market. Of course, large firms will be well placed to expand also. But there is no reason to expect an increase in market concentration.

57. There are important and complex issues relating to competition between the private sector and the public sector, where the latter is adding value to information produced as part of its core activities. The proposed Directive sets out principles of transparency and non-discrimination which are all pro-competitive. With regard to exclusive arrangements, which are sometimes entered into by public bodies for reasons of public interest (e.g. it would be uneconomic to publish certain types of information otherwise) the Directive says that Member States must ensure that the validity of the reason is reviewed every three years.

58. This is a market where there is scope for innovation in the way information is packaged and the channels over which it is made available. We have already quoted the examples of information over mobile phones. New generation mobile phones, digital television and broadband telecommunications and the greater spread of the Internet are all opening up new opportunities for innovation in the packaging and dissemination of information. This makes it all the more important that the new Directive should open up access to public sector information and that the option chosen for implementation should be effective.

Enforcement and sanctions

59. Any enforcement and sanctions will be directed towards public sector bodies not complying with the proposal. Under Option (1) the regulatory body would be responsible for enforcement. Sanctions could take the form of warning, censure, and fines. Under Option (2) enforcement would be through independent monitoring of self-regulation. This might be through accordance with codes of practice and membership of and adherence to the Information Fair Trader Scheme. Citizens and business will also have recourse to civil courts and/or the appropriate Ombudsman in the event that they consider a public sector body is not complying, and they are not satisfied with the self-regulatory response.

Monitoring and Review

60. The proposal includes provision for a review of the Directive within three years of adoption. The review will address the scope and impact of the Directive assessing the increase in the re-use of public sector documents, the application of the charging principles and the development of the European content industry. The UK government will carry out a review at the same time.

Consultation

Within Government

61. The proposal has been very widely circulated within government, and departments have been kept closely informed of the progress of negotiations. The government bodies include:

Department for Work and Pensions
Department for Environment, Food and Rural Affairs
National Archives [formerly Public Record Office]
Foreign and Commonwealth Office
Central Office of Information
Companies House
Home Office
Ministry of Defence
Fire Service College
Met Office
Registers of Scotland
Royal Mint
Advisory, Conciliation and Arbitration Service [ACAS]
Office of Government Commerce
Office of Government Commerce [Buying Solutions]
Charity Commission
Department of Health
Forestry Commission
Highways Agency
Inland Revenue
HM Treasury
Law Commission
Department for Constitutional Affairs [formerly Lord Chancellor's Department]
National Assembly for Wales
The Office of Gas and Electricity Markets [OFGEM]
The Office for Standards in Education [OFSTED]
The Office of Telecommunications [OFTEL]
The Office of Water Services [OFWAT]
Patent Office
The UK and Scottish Parliaments
UK Passport Agency
Vehicle Certification Agency
Ordnance Survey

Ordnance Survey [Northern Ireland]
Office of the Deputy Prime Minister
Department for Transport
UK Hydrographic Office
Treasury Solicitor
Health & Safety Executive
Office of the First Minister and Deputy First Minister [Northern Ireland]
Vehicle and Operator Services Agency [formerly Vehicle Inspectorate]
Medical and Healthcare Products Regulatory Agency
Driver & Vehicle Licensing Agency
Defence Geographic and Imagery Intelligence Agency [DGIA] [part of Ministry of Defence]
HM Land Registry
Department for Culture, Media & Sport
The Scottish Executive

Local Government

62. Local authorities have been kept informed through the Improvement and Development Agency (IDeA). IDeA was established by and for local government in April 1999. Their mission is to support self-sustaining improvement from within local government.

Public consultation

63. This document is being published as part of a 12-week public consultation with a closing date of October 2003. Major players such as Reuters, and representative bodies such as the Association for Geographic Information, have been consulted and kept informed during the course of negotiations on the proposed Directive.

64. The European Commission itself undertook a major consultation exercise following the publication for the proposal for a new Directive. This elicited views from the public and private sectors across Europe. The views expressed were taken into account in the drafting of the proposed Directive.

Summary and recommendations

65. On balance, Option (2), which advocates a framework of legislation, with implementation achieved by means of codes of best practice such as the Information Fair Trader Scheme, is recommended. This would be proportionate to the issues involved, and strikes a balance between the costs (to the public sector bodies) and benefits (to industry and other re-users) without imposing an unreasonable administrative burden.

Contact points:

Adrian Brazier DTI 151 Buckingham Palace Road London SW1W 9SS Tel: 0207 215 1295 Fax: 0207 215 1370 e-mail: adrian.brazier@dti.gsi.gov.uk	Jim Wretham HMSO St Clements House 2-16 Colegate Norwich NR3 1BQ Tel: 01603 723001 Fax: 01603 723000 e-mail: jim.wretham@cabinet-office.x.gsi.gov.uk

Annex A

THE CONSULTATION CRITERIA

1. Timing of consultation should be built into the planning process for a policy (including legislation) or service from the start, so that it has the best prospect of improving the proposals concerned, and so that sufficient time is left for it at each stage.

2. It should be clear who is being consulted, about what questions, in what timescale and for what purpose.

3. A consultation document should be as simple and concise as possible. It should include a summary, in two pages at most, of the main questions it seeks views on. It should make it as easy as possible for readers to respond, make contact or complain.

4. Documents should be made widely available, with the fullest use of electronic means (though not to the exclusion of others) and effectively drawn to the attention of all interested groups and individuals.

5. Sufficient time should be allowed for considered responses from all groups with an interest. Twelve weeks should be the standard minimum period for a consultation.

6. Responses should be carefully and open-mindedly analysed, and the results made widely available, with an account of the views expressed, and the reasons for decisions finally taken.

7. Departments should monitor and evaluate consultations, designating a consultation co-ordinator who will ensure the lessons are disseminated. The complete code is available on the Cabinet Office's web site, address:
http://www.cabinet-office.gov.uk/regulation/Consultation/Code.htm

COMMENTS OR COMPLAINTS

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to Philip Martin, DTI Consultation Co-ordinator, Room 725, 1 Victoria Street, London SW1H 0ET or telephone him on 020 7215 6206 or mail to: Philip.Martin@dti.gsi.gov.uk

V.PR
2. FILE

Douglas Alexander MP

Minister for the Cabinet Office
and Chancellor of the Duchy of Lancaster

CABINET OFFICE
70 Whitehall
London
SW1A 2AS

***Tel:* 020 7276 0652**
***Fax:* 020 7276 0655**

The Rt Hon John Prescott MP
Deputy Prime Minister and First Secretary of State
Office of the Deputy Prime Minister
26 Whitehall
London
SW1A 2WH

SPM
cc: JM
AJ

25 July 2003

Dear John –

REVISED CONSULTATION CODE OF PRACTICE

I am writing to seek policy clearance from the DA Committee to publish the attached consultation document, relating to the proposed revised Code of Practice on Consultation. This consultation will allow us to meet our public commitment of reviewing the existing code. I would be grateful for responses by 8 August.

The Prime Minister launched the existing "Code of Practice on Written Consultation" in November 2000 . It applies to all central government national consultations issued from 1 January 2001. The requirements of the existing Code apply to all departments, unless Ministers decide they have to depart from it – when they must give an explanation in the consultation document.

The existing code was welcomed by stakeholders, with the significant success of extending the standard length of a consultation from 8 to 12 weeks. However, there is continued pressure to improve consultation performance.

Web site: www.cabinet-office.gov.uk
Email: psdalexander@cabinet-office.x.gsi.gov.uk

INVESTOR IN PEOPLE

Cabinet Office officials have involved officials from across Whitehall and external stakeholders in early, informal consultations as part of a review of the existing code. The draft revised code is the result of this work.

The significant changes from the existing code are

(a) The clarity of the code has been improved

(b) The revision includes only the principles that departments should follow and does not attempt to provide guidance

(c) The revision refers explicitly to the principles of better regulation

The enclosed consultation paper sets out the background to the review and invites formal responses from stakeholders who wish to influence the consultation criteria. The consultation document and the revised code may be subject to minor drafting changes prior to publication.

I am copying this letter to the Prime Minister, members of the Domestic Affairs Committee and Sir Andrew Turnbull.

Yours ever,

Douglas

DOUGLAS ALEXANDER

Consultation on a Proposed Revised Code of Practice on Consultation

Executive Summary

This government is committed to consulting the public on policies and using the responses to develop more informed and focused decisions.

In November 2000 this government published the Code of Practice on Written Consultation. It introduced a minimum twelve-week consultation period and established consultation co-ordinators within departments. We also made a commitment to review the code. This consultation forms part of that formal review.

Feedback on the current code suggests that:

- The code had been effective in embedding the 12 week consultation period into the policy making process. Where this is not the case consultees complain.

- Very few complaints are received about the consultation process and some departments have received positive feedback regarding clarity and accessibility of their consultation.

- The general view of the current code, from users, is that the criteria as they stand are accepted as sensible, but that the code itself is quite long and a mixture between guidance and principles.

This draft code of practice reflects initials findings from stakeholder discussions. The main difference from the current code is that it is shorter and more principle focused. It is proposed that the code will be supplemented with guidance that is being developed with departments. This guidance, which will build on existing best practice, will enable departments to follow the code effectively.

We are keen to hear from those who may use the code and those who are involved in the consultation process. Please feel free to comment on each criterion separately, or provide more general comments. We would be grateful if you could answer the following questions when responding.

Consultation Questions

1. Do you find the criteria clear, if not what would help to make them clearer?
2. Is there anything within the criteria that you would change, what would that be and why would you change it?
3. Is there anything missing from the code? If so please explain what you think is missing and why it should be included.
4. What would be helpful to be included in the guidance which will be available to departments?
5. Do you have any further comments on the code of practice?

If you would like to refer to the existing code this can be found at http://www.cabinet-office.gov.uk/regulation/Consultation/Code.htm.

Timing and how to respond

The consultation period began on September 1 2003 and will run until 23 November 2003.

There will be consultation workshops run on xx yy and zz dates (to be confirmed) Please contact Mia Spreadbury if you would like to be involved.

When responding please state whether you are responding as an individual or representing the views of a larger organisation. If responding on behalf of a larger organisation, please make it clear who the organisation represents.

A list of those consulted is attached at the end of this document. If you have suggestions of others who may wish to be involved in this process please contact us.

All responses should be sent to:

Mia Spreadbury
Kirkland House
22 Whitehall
London
SW1A 2WH

Tel 020 7276 6275
e-mail: Mia.Spreadbury@cabinet-office.x.gsi.gov.uk

All responses will be made public unless confidentiality is specifically asked for. However, correspondents should be aware that confidentiality cannot always be guaranteed, for example where a response includes evidence of a serious crime.

The information you send us may need to be passed to colleagues within Cabinet Office and/or published in a summary of responses to this consultation. We will assume that you are content for us to do this, and that if you are replying by e-mail, your consent overrides any confidentiality disclaimer that is generated by you organisation's IT system unless you specifically include a request to the contrary in the main text of your submission to us.

If you have any complaints or comments about the way that this consultation has been conducted these should be sent to:

Nicola Simpson
Department of Trade and Industry
1 Victoria Street
London
SW1H 0ET
Tel: 0207 215 5561

PROPOSED REVISED CODE OF PRACTICE ON CONSULTATION

The Six Consultation Criteria

1. Consult throughout the process, allowing a minimum of 12 weeks for formal consultation at least once during the development of the policy.
2. Be clear about who will be affected, what questions are being asked, and the timescale for responses.
3. Ensure that your consultation is clear, concise and accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including though use of a designated consultation co-ordinator.
6. Ensure your consultation follows the principles of better regulation, including carrying out a Regulatory Impact Assessment if appropriate.

<u>These must be reproduced within all consultation documents</u>

Applicability

The criteria in this code apply to all UK public consultations by government departments and agencies including consultations regarding the implementation of EU directives.

The code is directed at all consultations by UK government departments and agencies. UK non-departmental bodies and Local Authorities are encouraged to follow this code. Devolved Administrations are free to adopt this code, but it does not apply to consultation documents issued by them unless they do.

Though they do not have legal force, and cannot prevail over statutory or mandatory external requirements (eg under European Community law), they should otherwise generally be regarded as binding on UK departments and their agencies, unless Ministers conclude that exceptional circumstances require a departure.

Ministers retain their existing discretion not to conduct a formal written consultation exercise under the terms of the Code, for example, where the issue is very specialised and where there are a very limited number of stakeholders who have been directly involved in the policy development process. In these circumstances the general principles of the code should still be followed as far as possible, and departments should consider how to ensure that the public are made aware of the policy, for example, through a press notice or statement on the department's website.

Any deviation from this code must be highlighted in the consultation documents and should state the Minister's reasons from departing from the code, and what specific measures have been taken to ensure that consultation is as effective as possible.

Comments on this guide are welcome to:

Consultation Co-ordinator
Regulatory Reform Strategy Team
Regulatory Impact Unit
Cabinet Office
5th Floor
Kirkland House
22 Whitehall
London
SW1A 2WH

0207 276 6275

consultation.policy@cabinet-office.x.gsi.gov.uk

1. Consult throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.

I. Consultation is a continuous process that needs to **be started early** in the policy development process.

II. It is important to proactively identify relevant interested parties and those who the policy will be likely to effect. These groups should be contacted and engaged in discussion early in the policy development. Small businesses should always be involved.

III. Informal consultation with these stakeholders should be conducted prior to the written consultation period. Not only does this lead to a more informed consultation document but it also ensures that stakeholders are engaged early and have a better understanding of the policy.

IV. Ask representative bodies to state who they represent when responding to consultation exercises.

V. The formal consultation period should always include a written consultation exercise. This **written consultation should be a minimum of 12 weeks.** During the main holiday periods ie, December and July and August at least 14 weeks should be allowed.

VI. There will sometimes be circumstances that unavoidably require a consultation period of less than twelve weeks. Among these may be timetables set out in statute; those unavoidably dictated by EU or other international processes; those tied to the Budget or other annual financial cycles, or measures where there is a health and safety or security dimension. Where re-consultation takes place on the basis of amendments made in the light of earlier consultation, a shorter period may also be necessary.

VII. Where a written consultation is less than 12 weeks this must be highlighted in the consultation document and should state the Minister's reasons from departing from the code. Extra effort should be made to ensure that the consultation is still effective by using some of the alternative methods of consultation suggested below.

VIII. Some Stakeholder may be particularly difficult to reach. It is important to engage proactively with individuals, organisations and trade associations. Written consultation is not the only or even always the most effective means of consultation. Other forms of consultation may help in this process. These might include;-

Stakeholder meetings
Public meetings
Web forums
Public surveys
Focus groups
Regional events
Free-phone and freepost surveys and events
Targeted leaflet campaigns.

2. Be clear about who will be affected, what questions are being asked and the timescale for responses.

I. Ask focused questions, and be clear about on which areas of the policy you are seeking views.

II. Explicitly state any assumptions made about those who are likely to be affected by the proposed policy. Encourage respondents to challenge these assumptions.

III. As far as possible consultation should be completely open, with no options ruled out.

IV. Be clear about how the respondents can influence the policy. If there are things that cannot be changed because, for example, it is part of a European Directive or due to prior Ministerial commitments, then make this clear. Your responses are likely to be more useful and focused if the respondents know where to concentrate their efforts.

V. Provide a list of consultees as an annexe to your consultation document and ask for suggestions of other interested parties who should be consulted.

VI. Clearly state the deadline for responses and any alternative ways of contributing to the process, in the consultation document.

3. Ensure that your consultation is clear, concise and accessible.

I. **Clear**
Use plain English; avoid jargon and only use technical terms where absolutely necessary. A consultation should be as accessible as possible. Explain complicated concepts as clearly as possible, where there are technical terms, use a glossary.

II. **Concise**
Provide an executive summary to the written consultation document that covers the main points of the document, preferably no longer than 2 pages. Even if the document is technical ensure that the executive summary is accessible to all. Having read the executive summary the consultee should be in a position to decide whether the consultation is relevant to them, and whether they need to read further.

III. **Accessible**
Ensure that the consultation documents are available both electronically and in paper format. Documents should be available, and easily found, on the Internet from the day that the consultation is launched. Respondents should be able to respond electronically if they choose. Produce the document in a number of different electronic formats, to ensure the widest possible accessibility.

IV. Consider groups who cannot access traditional written consultation or the on-line versions of these. It may be necessary to produce the document in different languages, including, for example, Welsh, or different formats to take into account the diversity of the community you are consulting. There may be some circumstances in which written consultation is not the best way to reach your target audience. In these circumstances other methods, for example discussion groups or public meetings, may be more appropriate.

V. Explicitly state who to respond to, giving a name, address, telephone number and e-mail address.

VI. The consultation criteria should be reproduced in all consultation documents. Explicitly state who to contact if respondents have comments or complaints about the consultation process. This should be someone outside of the team running the consultation and is likely to be the Consultation Co-ordinator for the department.

4. Give feedback regarding the responses received and how the consultation process influenced the policy.

I. Responses to consultation should be acknowledged. These acknowledgements should inform the respondent of the web address where the summary of responses will be published. Those without web access should be able to request a paper copy of this document.

II. **The consultation document should state when a summary of responses will be published. As far as possible this would be within three months of the closing date of the consultation.** This summary should give an analysis of the questions asked, for each question there should be a summary of responses to that question and then an explanation of how these responses influenced the policy. If the policy was not changed this should also be explained.

III. Wherever possible the summary of responses should also include a summary of the next steps for the policy.

IV. Individual responses should also generally be made available to anyone else who asks for them. Failure to make material available may be incompatible with Open Government or Freedom of Information provisions. It is legitimate, in accordance with those provisions, to make a reasonable charge for copying and postage. But where respondents have sought confidentiality, it should be respected. It may also be necessary to keep responses confidential where they may affect third parties' interests or privacy.

5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.

I. Each department should have a nominated consultation co-ordinator who should ensure that the consultation code is followed. They should act as an advisor to those conducting consultation exercises

II. Consultations should be evaluated for effectiveness, looking at numbers and types of responses, whether different methods of consultation were more successful than others, how the responses clarified the policy areas in question and, how the consultation helped influence policy decisions.

III. This evaluation should be used to inform future consultations in the department and lessons learnt can be disseminated across government.

IV. The consultation co-ordinator should collate information regarding how many consultations the department has carried out and any deviations from the code with the reasons given for these. This data should be available for the Cabinet Office to collate annually.

6. Ensure your consultation follows the principles of better regulation, including carrying out a Regulatory Impact Assessment if appropriate.

I. When consulting on a review of a policy area ensure consideration is given to opportunities for *reducing* bureaucracy and regulatory burdens, for example simplification or repeal of existing regulations.

II. Ensure that a *Regulatory Impact Assessment* (RIA) is attached if the policy is likely to affect business, charities or the voluntary sector. Respondents should be encouraged to comment on the RIA where one is included. For more guidance on how to do an RIA please see http://www.cabinet-office.gov.uk/regulation/scrutiny/betterpolicy.htm

III. Consider *alternatives* to regulations such as voluntary codes and encourage respondents to suggest alternatives when responding to the consultation exercise.

IV. When consulting ensure that you ask about practical enforcement and implementation issues of your policy. For guidance on implementation issues please see www.sbs.gov.uk/content/pdf/implementationguidelines.pdf

V. More Generally seek to ensure that The Principles of Better Regulation are followed whenever policy is being developed. These are

- Proportionality
- Accountability
- Consistency
- Transparency
- Targeting

For more information about these and their application, please see http://www.brtf.gov.uk/taskforce/reports/entry%20pages/principlesentry.htm

The online guidance will be developed around the following themes:

Planning the consultation process alongside your policy development process

How to write a consultation document

Identifying Stakeholders

Alternative ways of consulting, including e-consultation

Styles of questions, including questions about the implementation of policies and unintended consequences

Information regarding the Regulatory Impact Assessment process

Information on hard to reach groups

Analysis of responses and writing a government response to consultation responses.

How to evaluate consultations

The following organisations have been contacted regarding this consultation.

Age Concern
Association of British Insurers
Association of British Pharmaceutical Industry
Association of Chief Police Officers
Association of Colleges
Association of Teachers and Lecturers
Audit Commission
Bio-industry Association
British Chambers of Commerce
British Heart Foundation
British Medical Association
British Nuclear Fuels Plc
British Retail Consortium
British Telecom
British Tourist Board
Campaign for Real Ale
Campaign to Protect Rural England
Centrepoint
Chartered Institute of Environmental Health
Chartered Institute of Patent Agents
Chartered Institute of Taxation
Child Support Agency
Christian Aid
Citizens Advice Bureau
Commission of Racial Equality
Community Matters
Confederation of British Businesses
Confederation of British Industry
Consumer Association
Council of Ethnic Minority Voluntary Sector Organisations
Country Land and Business Association
Crown Prosecution Service
Directory of Social Change
Disability Alliance
Disability Rights Commission
Engineering Employers Federation
English Heritage
English Nature
Equal opportunities commission
Federation of Small Businesses
First Asian Support Trust
Food and Drink Federation
Forum of Private Businesses
Friends of the Earth
Further Education Funding Council (Scotland)
Further Education Funding Council (Wales)
Governors National Council
Help the Aged
Homeless Link
ICAEW: The Tax Faculty
Institute of Directors
Institute of Personnel and Development
Institute of Trademark Attorneys
International Federation of Intellectual Property Attorneys
International Transport Workers Federation
J Sainsbury Plc
Law Commission
Learning and Skills Council
Legal Services Commission
Local Government Association
London Regional Passengers Committee
MIND
NASWUT
Nation Association of Head Teachers
National Audit Office
National Children's Bureau
National Consumer Council
National Council for Voluntary Organisations
National Farmers Union
National Federation of the Blind of the UK
National Housing Federation
National Union of Teachers
Office of National Statistics
Oxfam

Plain English Campaign
Professional Association of Teachers
Refugee Council
Royal College of Nursing
Royal Society for the Prevention of Accidents
Royal Society for the Protection of Birds
Royal Statistical Society
Royal Town Planning Institute
Secondary Heads Association
Small Business Council
Social Security Advisory Committee
Society of Public Information Network
Sustain (The Alliance for Better Food and Farming)
Tesco
The Association of Chartered Certified Accountants
The Environmental Industries Commission
The General Council of the Bar
The Inter Faith Network for the United Kingdom
The Local Government International Bureau
The NHS Confederation
The Work Foundation
Trades Union Congress
Trading Standards Institute
UK Atomic Energy Authority
University of Manchester Environment Centre
Waitrose
Wales Council for Voluntary Action
Water UK
Welsh Language Board

Under the existing Code of Practice on Written Consultation there is a requirement to reproduce the criteria on every consultation document. They are as follows.

THE CONSULTATION CRITERIA

1. Timing of consultation should be built into the planning process for a policy (including legislation) or service from the start, so that it has the best prospect of improving the proposals concerned, and so that sufficient time is left for it at each stage.

2. It should be clear who is being consulted, about what questions, in what timescale and for what purpose.

3. A consultation document should be as simple and concise as possible. It should include a summary, in two pages at most, of the main questions it seeks views on. It should make it as easy as possible for readers to respond, make contact or complain.

4. Documents should be made widely available, with the fullest use of electronic means (though not to the exclusion of others), and effectively drawn to the attention of all interested groups and individuals.

5. Sufficient time should be allowed for considered responses from all groups with an interest. Twelve weeks should be the standard minimum period for consultation.

6. Responses should be carefully and open-mindedly analysed, and the results made widely available, with an account of the views expressed, and reasons for decisions finally taken.

7. Departments should monitor and evaluate consultations, designating a consultation co-ordinator who will ensure the lessons are disseminated.

From the Parliamentary Under Secretary of State
Lord Filkin

F

The Department for Constitutional Affairs
Selborne House
54-60 Victoria Street
London SW1E 6QW

DX 117000
Telephone: 020 7210 8562
Fax 020 7210 8620
e mail: david.liddemore@lcd.gsi.gov.uk

The Rt Hon John Prescott MP
Deputy Prime Minister and First Secretary of State
26 Whitehall
London
SW1A 2WH

24 July 2003

CS

cc SPM Letters Only
JJH
WP

Dear John

REVIEW OF NATIONAL RECORDS AND ARCHIVES LEGISLATION

I am writing to seek DA clearance to the publication of a consultation paper considering proposals to change the current legislative provision for records management and archives. I would be grateful for a response by 6 August 2003.

The Lord Chancellor wrote to you in December 2001 to seek your views on a proposed review of the national legislative provision for records and archives. This stemmed from a particular concern that the large and increasing amounts of digital records should be properly managed, stored and preserved. In your reply of 28 January 2002, you gave DA clearance for work to go forward though there were some concerns, for example about timing. Copies of the relevant letters are attached.

Since then, work has been going on under the supervision of the Senior Group on Information Policy (SGIP), a group of officials whose membership includes all relevant departments, and which is chaired by DCA. No decision on policy or action is yet proposed, but the Senior Group has recommended that a public consultation document be issued. This has been prepared by the National Archives (formerly the Public Record Office) and is enclosed. It invites views on the following issues:

a) proper legislative provision for dealing with the status, management and preservation of digital records in central government;

b) proper legislative provision for dealing with records management in central government;

c) proper legislative provision for dealing with records management outside central government;

d) proper legislative provision for archives services at regional and local levels;

e) in addition to these, a need has also emerged to consider the issue of new legislation to ensure the fully effective operation of the National Archives, which was formed in April

this year by the amalgamation of the Public Record Office and the Historical Manuscripts Commission.

I enclose a copy of the consultation document.

I repeat that I have as yet come to no conclusion, and am not asking you to endorse either policy or action leading to new legislation. My view, though, is that it would be appropriate at this stage to obtain the views of a wide range of stakeholders on the progress, which has been made to date. This would put us in a better position to assess whether there is a need for primary legislation or other action and if so, what form it should take.

I therefore propose to accept the Senior Group's recommendation that the public consultation document should be issued for the standard twelve-week period, starting in August. I would welcome DA agreement, by 6 August.

I am copying this letter to the Prime Minister, members of DA, Sir Andrew Turnbull and First Parliamentary Counsel.

Yours ever,

Geoffrey

GEOFFREY FILKIN

F

FROM THE RIGHT HONOURABLE THE LORD IRVINE OF LAIRG

HOUSE OF LORDS,
LONDON SW1A 0PW

CS

cc: SpM } Letter
JJH } Only
WP }

The Rt Hon John Prescott MP
Deputy Prime minister and
First Secretary of State
Cabinet Office
LONDON
SW1A 2AS

5 December 2001

Dear John,

Review of the Public Records Acts and the need for new National Archives legislation

The Prime Minister has set out four principles of public sector reform, of which the first was 'high national standards and full accountability'.

In the light of this, I set out below a series of issues for you to consider against the background of the *Modernising Government* initiative, the 2004 target for electronic records management across government, and the Government Policy on Archives, which I agreed and published in 1999.

I am seeking your agreement for our officials to carry out work on a proposal to review the present Public Records Acts and assess the need for new National Archives legislation. The outcomes of this work would be:

a) **legislation to replace the Public Records Act 1958 and to remedy critical deficiencies in the management of electronic records in central government;**
b) **Investigation, with a view to legislative change if required, of the current provision for other public sector records with particular regard to managing and preserving electronic records.**
c) **A programme of work to review the national framework for archival provision, arrangements for good record management and accountability and the integration of the various strands of information policy in the public sector; and to incorporate these aspects within legislative proposals if judged necessary.**

I should be grateful for replies by Friday 11 January 2002.

This work would begin at once with the necessary discussions within government. It would then lead to the issue of a public consultation paper, by the summer of 2002. Depending on the outcome

work within government, this paper would propose essential legislation to accommodate the new requirements for managing and archiving electronic records. It might also propose legislation extending to the wider public sector with a view to a new National Archives Act giving consistency to our national provision in the important field of records management and archiving.

All I am seeking at present is your agreement to carry out the initial work within central government. I will consult you again, with my proposals, before any wider consultation either publicly or across regional and local government.

This is an important subject, both necessary in terms of how we deal with electronic material in the information age, and offering significant potential benefits besides. So I hope I mihgt have your agreement to go ahead.

I am copying this letter to the Prime Minister, Jack Straw, members of DA, Sir Richard Wilson and First Parliamentary Counsel.

Yours ever,

Dery

CS
cc: WH
AA
JPO

From the Parliamentary Under Secretary of State
Lord Filkin

The Department for Constitutional Affairs
Selborne House
54-60 Victoria Street
London SW1E 6QW

DX 117000
Telephone: 020 7210 8562
Fax 020 7210 8620
e mail: david.liddemore@lcd.gsi.gov.uk

Our ref: 140548

The Rt Hon Lord Falconer of Thoroton
Secretary of State and Lord Chancellor
Department for Constitutional Affairs
Selborne House
54-60 Victoria Street
London SW1E 6QW

23 July 2003

Dear Charlie,

IMPLEMENTATION OF THE FREEDOM OF INFORMATION ACT

We are committed as a Government to bring the Freedom of Information Act 2000 fully into force in January 2005. The Act presents a real opportunity for us to build trust and to by making the process of Government at every level more transparent and accountable. But success will depend upon careful planning, not least in managing areas of risk. Over the autumn I propose to hold a series of bi-lateral meetings to review each Department's state of readiness. It will be helpful in advance of this if each Department could nominate one of their Ministerial team to have specific responsibility for this aspect of Information and Knowledge Management.

As you know, the commitment to Freedom of Information is a long-standing pledge of our party and featured prominently in our 1997 Election Manifesto. It was fulfilled in 2000 with the passing of the Freedom of Information Act. We recognised at the time that successful implementation would be a complex task requiring not only a revision of procedures and systems for handling requests for information, but also a cultural change within Whitehall towards greater openness and transparency in decision-making. The Government has therefore committed itself to bring the Act fully into force by January 2005, and this is reinforced by a sunrise clause in the Act itself.

The move to a culture of openness and transparency provides a real opportunity to build trust in public institutions, and for authorities at a local level to build closer links with the communities they serve. As such it will provide an important means of underpinning our wider initiatives to support active citizenship. Some organisations have already taken the initiative through the publication schemes they are required to maintain under the Act, and are placing in the public domain a far greater range of material than hitherto about the decisions they take. Such initiatives not only ensure that there is a regular flow of information between organisations, their stakeholders, customers and the wider public, but will also greatly assist in managing the process of dealing with requests for information, once individual rights of access become established in law.

With just under eighteen months to go, it is clearly time for work to begin in earnest in ensuring that both central and local Government, and also the wider public sector, will be equipped to reap the benefits and

also to manage the risks. Here in the Department for Constitutional Affairs, our Information Rights Division is leading a co-ordinated programme supporting Departments in the process of gearing themselves up for the Act. Its activities encompass communications and awareness raising, the fostering of network, development work on IT systems, and the production of guidance on the Exemptions contained in the legislation. Hayden Phillips is writing in parallel to Permanent Secretaries enclosing details of our Project Plan. And, as you know, Sarah Tyacke and her team at the National Archives are spearheading the introduction of electronic management of records upon which success will in part depend.

But there is also a great deal of work which must, by definition, be done within Departments, agencies and NDPBs. Each organisation knows best its own business, its customers, and the information it holds. It is therefore in the best position to plan how to use the Act most effectively to meet its customers' needs, and so build their trust and confidence. But, by the same token, each Department will also best know the possible pitfalls - those areas or topics in which there has been previous public interest and concern, and in respect of which there may exist information whose disclosure will be likely to cause controversy, or undermine confidence. Where this is the case, consideration may need to be given to pro-active and managed disclosure in advance of implementation, rather than being placed in a position of having to respond to campaigns and media pressure thereafter.

One of the steps we in the DCA have in hand is the production of a model Action Plan to assist Departments in their preparations. We hope this will be of real value. I would also suggest that each Department should nominate one of its Ministerial team to take specific responsibility for this aspect of Information and Knowledge management. For my part, I propose in the autumn to hold a series of bi-lateral meetings with each nominated Minister to review the state of readiness of their Department, and the bodies and organisations for which it is responsible, to ensure plans are robust and deliverable, and identify ways in which the DCA can offer further support and guidance during the run-up to implementation. These will take as their starting point the information we will shortly be requesting from Departments for the Annual Report which you are required to lay before Parliament at the end of November.

I hope colleagues will agree such an approach offers the best prospect of delivering the benefits of Freedom of Information to which we have for so long been committed. I would be grateful for the Committee's approval of this proposed course by [10 days from letter being sent].

I am sending copies of this letter to other members of CRP([redacted]), to the Prime Minister and to Sir Andrew Turnbull.

Yours ever,

GEOFFREY FILKIN

DCo?

Wales Office | Swyddfa Cymru

Office of the Secretary of State for Wales
Gwydyr House
Whitehall
London SW1A 2ER

Swyddfa Ysgrifennydd Gwladol Cymru
Tŷ Gwydir
Whitehall
Llundain SW1A 2ER

Ysgrifennydd Gwladol Cymru
Secretary of State for Wales

Rt Hon Peter Hain MP

Tel: 020 7270 0549
Ffon: 020 7270 0549

Fax: 020 7270 0568
Ffacs: 020 7270 0568

PRIME MINISTERS
DIRECT COMMUNICATIONS UNIT
24 JUL 2003
RECEIVED

21st July 2003

~~MH~~ AMac
MH
CC ~~A Mac~~
CS

Dear Minister

PUBLIC ADMINISTRATION REPORT ON OMBUDSMAN ISSUES

You wrote to the Deputy Prime Minister on 9 July seeking agreement to publish the Government's response to the Public Administration Select Committee's report on Ombudsman issues. I am writing on The Deputy Prime Minister's behalf, in his absence. This letter gives you DA clearance to proceed, subject to the comments recorded below.

Responses were received from Nick Raynsford, Patricia Hewitt, Charlie Falconer, David Blunkett and John Reid.

Nick initially suggested strengthening the response to reiterate our earlier commitment, which followed the Collcut Review, to legislate when time permits for a unified Ombudsman system.

In response, you made clear that differing views on the way forward, including amongst the community of Ombudsmen, means that there is no immediate prospect of a settled policy. Nor, given other pressures, is a legislative slot likely to be obtained in the near future. On that basis, we are collectively agreed there is no point in raising expectations again. Nevertheless, Nick offered some drafting changes which have been accommodated. Nick otherwise agrees that we should encourage the Ombudsmen to work closely together whilst recognising there are limitations.

Turning to others, Patricia was content save for some drafting points relating to the Memorandum of Understanding. I gather these have been accommodated.

Tel: 020 7270 3000
Fax: 020 7270 0568

Ffôn: 020 7270 3000
Ffacs: 020 7270 0568

Cont.

Charlie strongly supported the draft Memorandum of Understanding that will support the steps his Department is taking to implement the Freedom of Information Act in 2005.

David and John also supported. No other comments were received.

I am copying this letter to the Prime Minister, the Deputy Prime Minister, members of DA Committee and Sir Andrew Turnbull.

Debbie Pritchard Jones

PP Dictated by the Secretary of State
and signed in his absence

Douglas Alexander MP
Minister of State for the Cabinet Office
and Chancellor of the Duchy of Lancaster
Cabinet Office
70 Whitehall
London SW1A 2AS

DCO



Department for
Transport

From the Secretary of State

CS
cc: SpAd
MRL
SF

Great Minster House
76 Marsham Street
London SW1P 4DR

Tel: 020 7944 3011
Fax: 020 7944 4399
E-Mail: alistair.darling@dft.gsi.gov.uk

Web site: www.dft.gov.uk

Our Ref: AD/011999/03

21 JUL 2003

The Rt Hon John Prescott MP
Deputy Prime Minister
26 Whitehall
LONDON
SW1A 2AS

Dear Deputy Prime Minister

PUBLIC ADMINISTRATION SELECT COMMITTEE REPORT ON OMBUDSMAN ISSUES: DRAFT GOVERNMENT RESPONSE

I have seen Douglas Alexander's letter to you of 9 July attaching the proposed Government response to the Public Administration Select Committee Report on Ombudsman Issues and requesting comments.

I agree with the approaches proposed there in response to the three main recommendations tabled by the Committee. In particular, I agree, as regards the first of the recommendations, that now is not the right time for engaging in a full-scale review of the Ombudsmen, but that instead we should continue to explore how best we can promote closer working between the Ombudsmen under existing Statute.

I endorse the proposed response to the third recommendation, which lays down groundrules for Departments responding to queries from the Ombudsman with the aim generally of improving the degree of co-operation and trust between the two. In view of the impending implementation of the remaining provisions of the Freedom of Information Act 2000 in eighteen months' time, it is increasingly important for Government to be seen to be complying with the spirit no less than the letter of the current Code of Practice.

In my view, the Memorandum of Understanding attached to Douglas's letter sets out a sensible and reasonable set of targets that should be binding on Departments in their dealings both with individuals making requests for

information under the Code and with the Ombudsman, if we are to take seriously our responsibilities under the Code and the Act to adopt a more open approach in Government.

I am copying this letter to the Prime Minister, members of DA committee and Sir Andrew Turnbull,

Yours Sincerely

Duncan Sharkey

pp. **ALISTAIR DARLING**

(Approved by the Secretary of State and signed in his absence)

HM Treasury, 1 Horse Guards Road, London, SW1A 2HQ

CS
JH
AA
SPM

The Rt. Hon. John Prescott MP
Deputy Prime Minister and First Secretary of State
Office of the Deputy Prime Minister
26 Whitehall
LONDON
SW1A 2WH

18 July 2003

Dear John,

PUBLIC ADMINISTRATION SELECT COMMITTEE REPORT ON THE OMBUDSMAN ISSUES: DRAFT GOVERNMENT RESPONSE

I have seen Douglas Alexander's letter of 9 July to you and am content with the Government's response to the above report.

2. My Department notes the requirements set out in the Memorandum of Understanding agreed with the Ombudsman's office and I am content that this provides a helpful basis for handling future cases under the Code of Practice on Access to Government Information.



3. I am copying this letter to the Prime Minister, members of the DA Committee and Sir Andrew Turnbull.

PAUL BOATENG

SPM
cc AA

The Rt Hon Nick Raynsford MP
Minister of State for Local and
Regional Government

OFFICE OF THE
DEPUTY PRIME MINISTER

26 Whitehall
London SW1A 2WH

Tel: 020 7944 3013
Fax: 020 7944 4539
E-Mail: nick.raynsford@odpm.gsi.gov.uk

Web site: www.odpm.gov.uk

Our Ref: R/012965/03

Rt Hon John Prescott MP
Deputy Prime Minister
26 Whitehall
LONDON
SW1A 2WH

17 JUL 2003

Dear Deputy Prime Minister,

PUBLIC ADMINISTRATION SELECT COMMITTEE REPORT ON OMBUDSMAN ISSUES

Douglas Alexander wrote to me on 15 July in response to my letter to you and DA colleagues of 14 July about the Government's response to the Public Administration Select Committee's report on Ombudsman issues. Subsequently I spoke with Douglas, and we agreed certain amendments which have been included in a revised text which his office has forwarded to me today.

I can confirm that I am content with this revised text and for Douglas to proceed to put forward the Government response to the Select Committee in these terms.

I am copying this letter to the Prime Minister, Members of the DA Committee and Sir Andrew Turnbull.

Yours faithfully,

MARK HITCHEN PS/NICK RAYNSFORD

Approved by the Minister and signed in his absence

pp. NICK RAYNSFORD

Rec'd 16/7

Douglas Alexander MP

Minister for the Cabinet Office
and Chancellor of the Duchy of Lancaster

CABINET OFFICE
70 Whitehall
London
SW1A 2AS

Tel: **020 7276 0652**
Fax: **020 7276 0655**

CS

CE JSH

The Rt Hon Nick Raynsford MP
Minister of State for Local and Regional Government
Office of the Deputy Prime Minister
26 Whitehall
London
SW1A 2WH

15 July 2003

Dear Minister,

PUBLIC ADMINISTRATION SELECT COMMITTEE REPORT ON OMBUDSMAN ISSUES

I have seen a copy of your letter of 14 July to John Prescott, responding to my letter of 9 July seeking DA approval to publish the Government's response to the Public Administration Select Committee's report on Ombudsman issues.

I appreciate that we have, in the past, set out a commitment to legislate to implement the Collcutt Review and create a common Ombudsman institution. However, I understand that there is no immediate prospect of a legislative slot becoming available given the many demands on the legislative timetable and differing views to Collcutt are emerging, not least from the new Parliamentary Ombudsman herself, about what the objectives of any Bill ought to be. We are therefore some way off from having a settled policy on this. Consequently, to

Web site: www.cabinet-office.gov.uk
Email: psdalexander@cabinet-office.x.gsi.gov.uk

INVESTOR IN PEOPLE

restate past commitments at this stage would, I believe, raise expectations unrealistically within the Ombudsman community. I therefore feel it would not be appropriate to amend the draft response as you suggest.

I am copying this letter to the Prime Minister, Members of DA Committee and Sir Andrew Turnbull.

pp Georgia Hunter
(approved and signed in the Ministers absence).

DOUGLAS ALEXANDER

02072108597

From the Secretary of State and Lord Chancellor
The Right Honourable Lord Falconer of Thoroton

The Department for Constitutional Affairs
Selborne House
54-60 Victoria Street
London SW1E 6QW

DX 117000
Telephone: 020 7210 8380
Fax 020 7210 8597

The Right Honourable John Prescott MP
Deputy Prime Minister and First Secretary of State
Office of the Deputy Prime Minister
26 Whitehall
London
SW1A 2WH

15
~~18~~ July 2003

JR

cc EM
NA

PUBLIC ADMINISTRATION SELECT COMMITTEE REPORT ON OMBUDSMAN ISSUES: DRAFT GOVERNMENT RESPONSE

I agree with Douglas Alexander's proposed Government response to the Public Administration Select Committee's Report on Ombudsman Issues, and particularly agree with the draft Memorandum of Understanding. The latter will support steps my Department is taking to ensure orderly and effective implementation of the Freedom of Information Act by January 2005.

There is, in my view, little to be gained in further analysis of the arguments surrounding the Robathan case, or indeed either of the two complaints the Ombudsman has investigated at the instigation of Rob Evans. But it is clear that procedures were not as clearly understood within Departments as they should have been, and that this introduced not only a degree of confusion, but also severe delay. I would therefore support the terms of the draft response, and in particular the proposal to publish the Memorandum of Understanding which David Omand and Hayden Phillips have agreed with Ann Abraham.

There is a further reason why I support Douglas Alexander's proposed course of action. As you know, we in the DCA are responsible for the orderly and effective implementation of the Freedom of Information Act by January 2005, and Geoffrey Filkin will shortly be writing outlining the steps we will be taking to ensure Departments are in a position to reap the benefits of greater openness. It is, however, clearly not in our interest for there to be any misunderstanding about, or further criticism of, the way Departments apply the existing Access Code. The proposed Memorandum of Understanding will reduce the risk of this, and

02072108597

also provide a platform upon which we can build in the Guidance we in the DCA will be producing on the handling of requests under the Freedom of Information Act. For this reason, I particularly welcome the requirement that, if information is withheld, Departments should specify which Exemption of the Code applies, since this will also be the position under the Act. In relation to the Ministerial Code itself, there is clearly some work to be done in ensuring it is fully in line with the new statutory requirements once the Act comes into force in January 2005. Douglas's officials and mine have work in hand on this.

I am sending copies of this letter to the Prime Minister, Members of DA Committee and Sir Andrew Turnbull.

Yours

Charles

dti

15 July 2003

The Rt Hon Patricia Hewitt MP
SECRETARY OF STATE
FOR TRADE AND INDUSTRY

CS
cc: GN
OJ

Douglas Alexander Esq MP
Minister for the Cabinet Office
and Chancellor of the Duchy of Lancaster
Cabinet Office
70 Whitehall
LONDON
SW1A 2AS

Dear Douglas,

PUBLIC ADMINISTRATION SELECT COMMITTEE REPORT ON OMBUDSMAN ISSUES: DRAFT GOVERNMENT RESPONSE

Thank you for copying to me your letter of 9 July to John Prescott seeking DA agreement to publish the Government response to the Public Administration Select Committee's report on Ombudsman issues. I am generally content with the proposed response to the recommendations. However, I have a few concerns on the drafting of the proposed Memorandum of Understanding (MOU) between Government and the Ombudsman. My strong preference is that we allow ourselves a little more time to ensure that the MOU is sound. I would at least wish to see an amendment made to a reference in the MOU that implies that a public interest consideration must be made before relying on any exemption in the Code of Practice on Access to Government Information. The MOU does not accurately reflect the Code in this respect and, as presently drafted, could set us up for difficulties when needing to justify refusals of information under the Code.

I am content with the proposed Government response save for the drafting of the MOU between Government and the Ombudsman on administration of the Code of Practice on Access to Government information.

Department of Trade and Industry
V 823
1 Victoria Street
London
SW1H 0ET

Direct Line +44 (0)20 7215 5428
Fax +44 (0)20 7215 5468
Minicom +44 (0)20 7215 6740
Enquiries +44 (0)20 7215 5000
www.dti.gov.uk
mpst.hewitt@dti.gsi.gov.uk

I attach an annex of drafting suggestions on the MOU. Most of these are cosmetic and will cause no difficulties. However, one point in particular gives me concern. Paragraph 3 of the memorandum states that, where requested, information should be provided unless the public interest in disclosure is outweighed by the harm or prejudice that might arise from disclosure. This does not reflect the position under the Code. The Code is explicit in requiring the public interest test to be applied to some – but not all – of the exemptions that the Code provides. The effect of the reference is to re-write the Code in a way that even exceeds our ability to refuse information under the Freedom of Information Act. I expand on the point in the Annex of comments.

However, realistically, I doubt whether the proposed MOU - a useful document though it is – will go as far as we might wish to counteract adverse press comment on the 'openness' of Government. My preference is that we avoid rushing out an MOU which is likely to contain hostages to fortune, although I leave it to you to judge the balance of imperatives here.

I am copying this letter to the Prime Minister, Members of DA Committee and to Sir Andrew Turnbull.

Best wishes,

PATRICIA HEWITT

MOU BETWEEN GOVERNMENT AND OMBUDSMAN ON ADMINISTRATION OF OPEN GOVERNMENT CODE

COMMENTS BY DTI

Para 3 line 9: the sentence beginning 'There should be a presumption...' telescopes two concepts in the Code: firstly that there is a presumption in favour of disclosure (as indicated in the opening paragraph of Part I of the Code) and secondly that a number of the Code exemptions are subject to a public interest test as set out in the preamble to Part II of the Code. Under this test, information *prima facia* subject to a harm tested exemption must nonetheless be disclosed unless the 'harm arising from disclosure would outweigh the public interest in making the information available'. The drafting of this sentence in the proposed MOU could be taken to mean that all the Code's exemptions are harm-tested. This is not the case, and any such interpretation would imply a re-writing of the Code rather than setting out matters regarding administration of the Code. It would not, for example, be appropriate to subject to the public interest test/harm test exemption 15 of the Code which covers information statutorily barred from disclosure.

Para 7 lines 2 & 3: it is incorrect to state that Section 11(3) refers to a 'certificate'. The question of a certificate arises as regards Section 8(4) of the Parliamentary Commissioner Act, as discussed in paragraph 6, but section 11 (3) refers to a "notice".

Para 9 1st line: replace 'it' with 'if'.

Para 9 line 5: the instruction to respond in full should be expanded to make clear that this may include the possibility at this stage of our praying in aid of further exemptions. (This is as distinct from other exemptions not being welcome at draft report stage, as referred to in paragraph 10).

Para 11 line 4: the reference that the Ombudsman may use background information supplied to her in her report follows on uneasily from the preceding sentence which stresses the range of information, including exempt information, that the Ombudsman is entitled to see to conduct an investigation. There is generally an implication in the first part of this paragraph that the Ombudsman may find it necessary at times to publish exempt information or information about staff whose disclosure might breach the Data Protection Act.

Para 12 line 2: it does not seem appropriate for an MOU to have departmental openness officers inserted in it. We have no problem with publicising the name of our 'openness officers'; the MOU is simply not the appropriate place. In addition, no reference is made to the existing Cabinet Office guidance on the Code.

SS
cc JOH.

From the Secretary of State for Health

Department of Health

Richmond House
79 Whitehall
London
SW1A 2NS
Tel: 020 7210 3000

IMC: 28338

The Rt Hon John Prescott MP
Deputy Prime Minister and First Secretary of State
26 Whitehall
London
SW1A 2WH

14 July 2003

Dear John,

PUBLIC ADMINISTRATION SELECT COMMITTEE REPORT ON OMBUDSMAN ISSUES: DRAFT GOVERNMENT RESPONSE

My Department notes the recommendations of the Public Administration Select Committee's Third Report of the 2002-03 Session "Ombudsman Issues" (HC448).

I am content with the government response to the recommendations. The Ombudsman's commitment to working closely with other Ombudsmen is very welcome, however I recognise that some difficulties will remain until time can be found for legislation.

I am pleased to advise the Committee that my Department already have the systems in place and staff to supply prompt responses to the Ombudsman.

Finally, the Memorandum of Understanding is welcomed and I am content that this should form the basis of an agreed framework for handling future cases arising under the Code of Practice on Access to Government Information, until the implementation of the Freedom of Information Act in 2005.

I am copying this letter to the Prime Minister, members of DA Committee and Sir Andrew Turnbull.

Yours ever

JOHN REID

SV100703

The Rt Hon Nick Raynsford MP
Minister of State for Local and
Regional Government

OFFICE OF THE
DEPUTY PRIME MINISTER

26 Whitehall
London SW1A 2WH

Tel: 020 7944 3013
Fax: 020 7944 4539
E-Mail: nick.raynsford@odpm.gsi.gov.uk

Web site: www.odpm.gov.uk

Our Ref: P/R/012500/03

Rt Hon John Prescott MP
Deputy Prime Minister
26 Whitehall
LONDON
SW1A 2WH

14 JUL 2003

CS
cc: AMcG
Q's
JJH

Dear John

PUBLIC ADMINISTRATION SELECT COMMITTEE REPORT ON OMBUDSMAN ISSUES: DRAFT GOVERNMENT RESPONSE

I have seen Douglas Alexander's letter of 9 July to you seeking agreement to publish the Government's response to the above Report. Given ODPM's responsibility for the Local Government Ombudsman we have particular interest in Douglas's proposed response to recommendation (a) about the introduction of a draft Bill to implement the Collcutt Review recommendation for an umbrella Ombudsman organisation.

I fully agree that we have no immediate plans to bring forward a draft Bill to implement the changes put forward in the Collcutt Review. However, our collectively agreed policy, as announced to Parliament on 13 March 2002, is that the Government remain firmly committed to a unified ombudsman system and that any legislation required to implement new arrangements will be made when parliamentary time allows.

I continue to believe that this is the right approach if Ombudsman services are to effectively meet the citizens' needs and I understand that the Ombudsmen themselves continue to share this view. Indeed, in the Local Government Ombudsman's Annual Report, published on 3 July, the Chairman of the Commission for Local Administration, Tony Redmond, comments that he and the Parliamentary and Health Service Ombudsman, while recognising that there is no immediate prospect of legislation, remain concerned about the statutory barrier to their working jointly in some areas. Ann Abraham's report to the Select Committee also explicitly acknowledged these constraints.

Accordingly, I consider it is important that in the response we include a firm statement of our continuing commitment to seek legislation, at an appropriate time, to ensure an effective integration of the Ombudsman services enabling effective joint investigations to be undertaken so as to provide a seamless service to the citizen.

Equally, whilst I share Douglas's view that, pending legislation, we should encourage the Ombudsmen to seek to work closely together as far as possible we need to be careful not to generate unrealistic expectations of what can be achieved. For example, in such key and sensitive areas as health and social care, effective joint investigations of what may in effect be a single complaint will not be possible without further legislation. I would thus wish to see the response to the Committee, whilst rightly encouraging joint working, recognise that there are limitations to this until there is legislation.

Finally I would strongly endorse the proposed response to recommendation (c), which lays down ground rules for Departments responding to queries from the Ombudsman with the aim generally of improving the degree of co-operation and trust between the two. In view of the impending implementation of the remaining provisions of the Freedom of Information Act 2000 in eighteen months' time, it is increasingly important for Government to be seen to be complying with the spirit no less than the letter of the current Code of Practice. In my view, the Memorandum of Understanding attached to Douglas's letter sets out a sensible and reasonable set of targets that should be binding on Departments in their dealings both with individuals making requests for information under the Code, and with the Ombudsman, if we are to take seriously our responsibilities under the Code and the Act to adopt a more open approach in Government.

I am copying this letter to the Prime Minister, members of DA Committee and Sir Andrew Turnbull.

Yours ever

Nick

NICK RAYNSFORD

(F)

Douglas Alexander MP

Minister for the Cabinet Office
and Chancellor of the Duchy of Lancaster

CABINET OFFICE
70 Whitehall
London
SW1A 2AS

***Tel:* 020 7276 0652**
***Fax:* 020 7276 0655**

The Rt Hon John Prescott MP
Deputy Prime Minister and First Secretary of State
Office of the Deputy Prime Minister
26 Whitehall
LONDON
SW1A 2WH

CS
JDH
AA
Qs

9 July 2003

Dear John –

PUBLIC ADMINISTRATION SELECT COMMITTEE REPORT ON OMBUDSMAN ISSUES: DRAFT GOVERNMENT RESPONSE

This letter seeks DA agreement to publish the Government's response to the Public Administration Select Committee's report on Ombudsman issues. The annex to the response is a Memorandum of Understanding between Departments and the Ombudsman which sets out an agreed framework for handling cases under the Code of Practice on Access to Government Information. I propose to issue the response on 17 July. I would therefore be grateful for comments by close of business on Monday 14 July. I apologise for the short notice; the draft Memorandum has only just been agreed with the Ombudsman and we wish to publish as soon as possible to deflect some of the expected criticism arising from publication on 10 July of the Ombudsman's half-yearly report on open government cases.

The Public Administration Select Committee's report is essentially a stocktake of Ombudsman issues following the retirement last November of Sir Michael Buckley and appointment of Ann Abraham. It makes three recommendations, which I deal with in turn below.

Recommendation (a) calls on the Government to bring forward a draft Bill to implement the Collcutt Review of Ombudsmen. We have no immediate plans to do so. The response therefore relies on encouraging the Ombudsman's plans to promote joint working between Ombudsmen within current statutory arrangements.

Recommendation (b) urges the Government to reconsider its decision to refuse to disclose information about Ministers' private interests to the Ombudsman, following a complaint by Andrew Robathan MP. We have taken a consistent line that disclosure of information about Ministers' private interests would harm the frankness and candour of internal discussions and represent an unwarranted invasion of Ministers' privacy. The position was recently reinforced by the decision Charlie Falconer and I took in respect of a similar case to issue a notice under section 11 of the Parliamentary Commissioner Act preventing the Ombudsman from disclosing personal information about Ministerial interests.

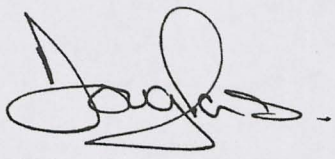
Recommendation (c) calls on the Government to ensure that all organisations within the Ombudsman's remit establish a designated contact tasked with ensuring that replies to the Ombudsman are prompt and comprehensive. I support the spirit of this approach, although I believe it is realistic for Government to accept the recommendation only in so far as it applies to Departments. The Cabinet Office will write shortly at official level seeking contact details for each Department and asking Departments to disseminate the Government response to agencies and other bodies within the Ombudsman's remit for which Departments have responsibility.

The response also informs the Committee that a Memorandum of Understanding (a copy of which is attached to the draft response) has been agreed with the Ombudsman's office setting out an agreed framework for Departments in handling cases under the Code of Practice on Access to Government Information, until the implementation of the Freedom of Information Act in 2005. The Memorandum is essentially a statement of existing practice, but helpfully consolidates this for Departments in one document. Departments will particularly wish to note the requirements set out in the Memorandum for responding to complaints, including the need to respond within three weeks of receipt of a statement of complaint from the Ombudsman and to alert the Ombudsman's office to any anticipated delay. The

Memorandum also reiterates the requirements placed on Departments when handling requests for information; where information is withheld, Departments should specify which Code Exemptions apply.

I am copying this letter to the Prime Minister, members of DA Committee and Sir Andrew Turnbull.

Yours ever,



DOUGLAS ALEXANDER

Government Response to the Public Administration Select Committee's Third Report of the 2002-03 Session "Ombudsman Issues" (HC448)

List of Conclusions and Recommendations

(a) We reiterate our concerns and once again recommend that the Government produce a draft bill to implement the review of the Ombudsmen and actively seek an early solution to the problem of legislative delay (paragraph 11).

The Government agrees with the Committee that Britain's ombudsmen have a vital role to play in maintaining and improving the quality of our public services. As the Committee says, "the Ombudsman is a key component of the mechanisms which hold Government to account". The Government also agrees with Ann Abraham, Parliamentary Commissioner for Administration, that good complaint handling is a key component of improved public services. The Government welcomes the Committee's acknowledgement that the work of the Ombudsman needs to be set in the context of the changing public sector and the need for it to adapt to the challenges of public service reform.

In preparing its response, the Government has considered the issues with great care. The Government notes the recommendation that it should produce a draft Bill to implement the findings of the Review of Public Sector Ombudsmen. However, as the Committee's report acknowledges, the Ombudsmen community is going through a period of change. In this context, it is notable that in her evidence to the Committee, the Parliamentary Commissioner indicated that she believes that the time is now right to shift the focus away from the creation of a single Ombudsman institution in England.

The Parliamentary Commissioner also indicated in her memorandum and evidence that she wishes to work with other Ombudsmen to bring about changes without legislation to "improve the service we provide to our customers". The Government strongly supports the Parliamentary Commissioner's drive to promote more co-operation across the Ombudsman community, and welcomes the range of practical measures identified in the Parliamentary Commissioner's memorandum in this regard. The Government is keen to explore – working closely with the Ombudsman community – what more can be done under existing statutory arrangements to promote joint working between Ombudsmen and ensure that Ombudsmen arrangements are fit for purpose.

(b) We recommend that the Government reconsider its decision to refuse to accept the Ombudsman's findings in the case of Mr Robathan and publish the required information (paragraph 40).

The Government has made clear that it regards the information requested as exempt from disclosure under Exemptions 2 (Internal Discussion and Advice) and 12 (Privacy of an Individual) of the Code of Practice on Access to Government Information.

The Government's position remains as set out in the Ombudsman's report of November 2001 on Access to Official Information: Declarations made under the

Ministerial Code of Conduct. It continues to believe that the relationship between Ministers and Permanent Secretaries needs to be founded on full confidence. This is as provided for in the Ministerial Code and to expose this, even in part, would eventually erode the ease with which consultations are carried out and inhibit the future operation of the Code. The Government believes that it is important to preserve the frankness and candour of internal discussions.

This decision has to be seen in the context of the strengthened procedures relating to the handling of Ministerial interests. Under the revised Ministerial Code published on 20 July 2001, Ministers are required, for the first time, to provide their Permanent Secretaries, in writing, with a list of their financial and non-financial interests which might be thought to give rise to a conflict.

(c) We recommend that the Government should ensure that every organisation within the remit of the Ombudsman has a designated contact, tasked with ensuring the replies to the Ombudsman are both prompt and comprehensive (paragraph 45).

The Government sees the merit in this recommendation and agrees that the Ombudsman should receive prompt responses to requests for information. The Government accepts the recommendation in so far as it applies to Departments. The Cabinet Office is collating a list of lead contacts in Departments which it aims to have in place immediately after the summer recess. The Cabinet Office will also ask Departments to draw this recommendation, and the Government's response, to agencies and other bodies for which Departments are responsible and which fall within the coverage of the Parliamentary Ombudsman.

A Memorandum of Understanding has been agreed between Government Departments and the Ombudsman's office, with the intention that this should form the basis of an agreed framework for handling future cases arising under the Code of Practice on Access to Government Information until the implementation of the Freedom of Information Act in 2005. The Memorandum is reproduced at Annex A.

Annex A

MEMORANDUM OF UNDERSTANDING ON CO-OPERATION BETWEEN GOVERNMENT DEPARTMENTS AND THE PARLIAMENTARY COMMISSIONER FOR ADMINISTRATION ON THE CODE OF PRACTICE ON ACCESS TO GOVERNMENT INFORMATION

1. This note sets out the understanding between the Government and the Parliamentary Commissioner for Administration (the Ombudsman) on the operation of the *Code of Practice on Access to Government Information* (the Code) and co-operation between the Ombudsman and Government departments in relation to investigations relating to the disclosure of information under the Code.

The Code

2. The Code, which is non-statutory, sets out the Government's policy on handling requests for official information. A copy of the Code is at Annex A. The Code, which applies to all bodies within the Ombudsman's jurisdiction, will remain in place and form the basis of the Government's policy on the disclosure of information until the right of access provisions of the Freedom of Information Act 2000 come into force on 1 January 2005.

Compliance with the Code

3. All requests for information received by Government departments should be decided in accordance with relevant statute and the Code and dealt with within 20 working days for simple requests or longer when significant search or collation of material is required. All information requests should be handled in accordance with the Code's requirements even if there is no reference to the Code in the request. If information is withheld, the department should specify which exemption of the Code applies: the Ombudsman will criticise departments that fail to cite an exemption. If the information is not held, the department should say so: there is no requirement under the Code for a department to obtain information it does not possess. There should be a presumption that any of the requested information should be provided unless the public interest in disclosure is outweighed by the harm or prejudice that might arise from disclosure. In order to be as helpful as possible, rather than refuse a request outright, it may be possible in some cases for departments to provide some of the information requested, perhaps in a redacted form, rather than nothing at all. The Code also has provisions for charging. In refusing information, applicants should be advised of their right to seek an internal review of the decision. The Code only gives a right (subject to exemption) to information, not documents.

Internal review

4. If an applicant seeks an internal review of a decision, the outcome of the review must be communicated to the applicant as soon as possible. The expectation is that the review would not be undertaken by the original decision-maker. If the outcome of the review is that the information, or part of it, should not be disclosed, the applicant must be informed of his or her right to be able to ask a Member of Parliament to refer the case to the Ombudsman.

The role of the Ombudsman

5. The Ombudsman's Office was set up under the provisions of the Parliamentary Commissioner Act 1967 (the Act) to investigate maladministration in central government. The role of the Ombudsman in considering complaints under the Code was set out in the White Paper "Open Government" published in July 1993. The Government's expectation is that the Ombudsman's right of access to information and documents under the Act will apply to investigations carried out in relation to complaints under the Code.

Investigations

6. In general, all information relevant to an investigation is disclosable to the Ombudsman, including the information to which access is sought (even if it is covered by a Code exemption). It is also for the Ombudsman to decide what constitutes relevant information. However, section 8(4) of the 1967 Act allows departments to withhold from the Ombudsman Cabinet or Cabinet Committee papers or papers relating to the proceedings of the Cabinet or Cabinet Committees. For this to be done, the Act requires the production of a certificate, signed by the Secretary of the Cabinet and approved by the Prime Minister.

7. In addition a Minister of the Crown may, under section 11(3) of the 1967 Act, give notice, in a certificate, to the Ombudsman that, in respect of any document or information referred to in such a certificate, the disclosure of that document or information would be prejudicial to the safety of the State or otherwise contrary to the public interest. In practice, recourse to these sections of the Act is expected to be very rare.

8. It should be emphasised that disclosing information to the Ombudsman is not the same as disclosing information to the applicant. While the Ombudsman may recommend in her report that the specified information should have been disclosed to the applicant, the decision on whether or not to disclose the information rests with the department: the information is never disclosed in the report itself.

Procedures

9. The Ombudsman's preference is to resolve cases informally it at all possible. If, however, the Ombudsman decides to investigate a complaint made to her, the Department will receive a "statement of complaint" setting out what it is the Ombudsman is investigating and seeking disclosure of relevant papers and views about the complaint. The Ombudsman will expect departments to respond in full within **three weeks** of receipt of the statement of complaint. If, exceptionally, a department anticipates that it will have difficulty in replying by the date set by the Ombudsman, it is essential to enter into a dialogue with the investigating officer at the Ombudsman's office as soon as possible.

10. When the investigation has been completed the Ombudsman will send a draft report to the department in question for comment. Departments will be given **three weeks** to reply. Departments should not, **at this stage**, cite new exemptions. As with

the statement of complaint, the investigating officer at the Ombudsman's office should be contacted as soon as possible in the event of any anticipated delay in responding to the draft report.

11. The Government undertakes to provide the Ombudsman with all relevant papers as quickly as possible, including papers that would not normally be released under Code exemptions such as those relating to internal advice to Ministers and internal consultation. The Ombudsman may use the background information supplied to her in her report. That said, the Ombudsman will only identify officials or disclose information which would otherwise be exempt under the Code (such as internal advice or consultation) to the extent that it is necessary to do so to make sense of the investigations or conclusions. If departments consider that the draft report contains too much detail about internal procedures, or where they consider the report contains factual errors, they should raise this with the investigating officer. The Ombudsman is independent of Government and the final decision as to what to publish is hers, but she will give careful consideration to concerns raised about draft reports or findings. A copy of the Ombudsman's final report is sent to the referring Member of Parliament and to the department complained against.

Further information

12. Any questions on the guidance should be referred in the first place to departmental openness officers *(Department to insert name and telephone number of departmental openness officer)* or the Information Rights Division in the Department for Constitutional Affairs on tel 020-7210-8755. The unit in the Ombudsman's office that investigates Code complaints can be contacted on 020-7217-4085. The Ombudsman can only, however, give general advice and cannot advise on how a particular information request should be handled. All the Ombudsman's Code investigations are published in full, usually twice a year. They can be obtained in hard copy from The Stationery Office or via the Ombudsman's website (www.ombudsman.org.uk).

CABINET OFFICE
Propriety and Ethics team
July 2003

File

Freedom of Information

FROM : SUE GRAY
Propriety and Ethics team
Room 118, 70W
7276-2470

PS/Douglas Alexander

c : PS/Sir Andrew Turnbull
PS/Sir David Omand
Clare Sumner
David Hill
Sally Pugh
Simon Watts

***CODE OF PRACTICE ON ACCESS TO GOVERNMENT INFORMATION*: Memorandum of Understanding with the Parliamentary Commissioner for Administration**

Issue

1. That you approve the draft Memorandum of Understanding – copy attached - on co-operation between Government Departments and the Parliamentary Ombudsman on handling cases relating to the *Code of Practice on Access to Government Information.*

Timing

2. Urgent – It is important for presentational reasons that the Memorandum is agreed before the Commissioner publishes her annual report (provisionally set for 10 July) and the report on the complaint relating to the disclosure of ministerial gifts.

Recommendation

3. That you, as the Minister with responsibility for Ombudsmen policy, approve the terms of the Memorandum as the basis on which investigations by the Commissioner will in future be conducted in relation to requests under the Access Code between now and January 2005 (officials in DCA are also seeking approval of the Secretary of State for Constitutional Affairs as DCA has ministerial responsibility for the Openness Code).

4. In the longer term, we will be working with DCA working through the terms of the Ministerial Code with the requirements of the Freedom of Information Act, in order to ensure that we are ready for the introduction of FOI legislation in 2005.

Background

5. In discussion between Sir David Omand, Sir Hayden Phillips and the Ombudsman about the handling of two open government complaints (disclosure of Ministers' financial interests and gifts received by Ministers), it was felt that future difficulties might be considerably eased if a Memorandum of Understanding (MOU) could be agreed to govern the conduct of Departments and the Ombudsman in handling open government complaints. A draft MOU is at annex A. It has been agreed with DCA and No10.

6. The Ombudsman will have a role in handling complaints under the Openness Code until the Freedom of Information Act comes into force in 2005 (at this stage the information commissioner will assume responsibility for handling complaints under the legislation). In the interim, it is clearly in everyone's interest for the Ombudsman's investigations to be conducted smoothly, and in line with well recognised and agreed procedures. The MOU will help in providing a clear statement of what is expected and therefore should help to improve the relationship and level of co-operation. Paragraph 7 of the MOU refers to the possibility of issuing Certificates under sections 11 (3) of the 1967 Act which of course has just been used to prohibit disclosure of personal information relating to Ministers other than to the Commissioner herself.

Handling

7. There is considerable merit in agreeing the terms of the MOU before the Ombudsman makes public her report on Ministerial gifts and her decision to discontinue her investigation into Ministers' financial interests. There is likely to be adverse comment (not least in The Guardian) once these issues become public. It will be important in responding to such criticisms that the Government is able to say that it has reached an understanding with the Parliamentary Commissioner which will ensure investigations in this area are more smoothly conducted in future.

MEMORANDUM OF UNDERSTANDING ON CO-OPERATION BETWEEN GOVERNMENT DEPARTMENTS AND THE PARLIAMENTARY COMMISSIONER FOR ADMINISTRATION ON THE CODE OF PRACTICE ON ACCESS TO GOVERNMENT INFORMATION

1. This note sets out the understanding between the Government and the Parliamentary Commissioner for Administration (the Ombudsman) on the operation of the *Code of Practice on Access to Government Information* (the Code) and co-operation between the Ombudsman and Government departments in relation to investigations relating to the disclosure of information under the Code.

The Code

2. The Code, which is non-statutory, sets out the Government's policy on handling requests for official information. A copy of the Code is at Annex A. The Code, which applies to all bodies within the Ombudsman's jurisdiction, will remain in place and form the basis of the Government's policy on the disclosure of information until the right of access provisions of the Freedom of Information Act 2000 come into force on 1 January 2005.

Compliance with the Code

3. All requests for information received by Government departments should be decided in accordance with relevant statute and the Code and dealt with within 20 working days for simple requests or longer when significant search or collation of material is required. All information requests should be handled in accordance with the Code's requirements even if there is no reference to the Code in the request. If information is withheld, the department should specify which exemption of the Code applies: the Ombudsman will criticise departments that fail to cite an exemption. If the information is not held, the department should say so: there is no requirement under the Code for a department to obtain information it does not possess. There should be a presumption that any of the requested information should be provided unless the public interest in disclosure is outweighed by the harm or prejudice that might arise from disclosure. In order to be as helpful as possible, rather than refuse a request outright, it may be possible in some cases for departments to provide some of the information requested, perhaps in a redacted form, rather than nothing at all. The Code also has provisions for charging. . In refusing information, applicants should be advised of their right to seek an internal review of the decision. The Code only gives a right (subject to exemption) to information, not documents.

Internal review

4. If an applicant seeks an internal review of a decision, the outcome of the review must be communicated to the applicant as soon as possible. The expectation is that the

review would not be undertaken by the original decision-maker. If the outcome of the review is that the information, or part of it, should not be disclosed, the applicant must be informed of his or her right to be able to ask a Member of Parliament to refer the case to the Ombudsman.

The role of the Ombudsman

5. The Ombudsman's Office was set up under the provisions of the Parliamentary Commissioner Act 1967 (the Act) to investigate maladministration in central government. The role of the Ombudsman in considering complaints under the Code was set out in the White Paper "Open Government" published in July 1993. The Government's expectation is that the Ombudsman's right of access to information and documents under the Act will apply to investigations carried out in relation to complaints under the Code.

Investigations

6. In general, all information relevant to an investigation is disclosable to the Ombudsman, including the information to which access is sought (even if it is covered by a Code exemption). It is also for the Ombudsman to decide what constitutes relevant information. However, section 8(4) of the 1967 Act allows departments to withhold from the Ombudsman Cabinet or Cabinet Committee papers or papers relating to the proceedings of the Cabinet or Cabinet Committees. For this to be done, the Act requires the production of a certificate, signed by the Secretary of the Cabinet and approved by the Prime Minister.

7. In addition a Minister of the Crown may, under section 11(3) of the 1967 Act, give notice, in a certificate, to the Ombudsman that, in respect of any document or information referred to in such a certificate, the disclosure of that document or information would be prejudicial to the safety of the State or otherwise contrary to the public interest. In practice, recourse to these sections of the Act is expected to be very rare.

8. It should be emphasised that disclosing information to the Ombudsman is not the same as disclosing information to the applicant. While the Ombudsman may recommend in her report that the specified information should have been disclosed to the applicant, the decision on whether or not to disclose the information rests with the department: the information is never disclosed in the report itself.

Procedures

9. The Ombudsman's preference is to resolve cases informally it at all possible. If, however, the Ombudsman decides to investigate a complaint made to her, the Department will receive a "statement of complaint" setting out what it is the Ombudsman is investigating and seeking disclosure of relevant papers and views about the complaint.

The Ombudsman will expect departments to respond in full within **three weeks** of receipt of the statement of complaint. If, exceptionally, a department anticipates that it will have difficulty in replying by the date set by the Ombudsman, it is essential to enter into a dialogue with the investigating officer at the Ombudsman's office as soon as possible.

10. When the investigation has been completed the Ombudsman will send a draft report to the department in question for comment. Departments will be given **three weeks** to reply. Departments should not, **at this stage**, cite new exemptions. As with the statement of complaint, the investigating officer at the Ombudsman's office should be contacted as soon as possible in the event of any anticipated delay in responding to the draft report.

11. The Government undertakes to provide the Ombudsman with all relevant papers as quickly as possible, including papers that would not normally be released under Code exemptions such as those relating to internal advice to Ministers and internal consultation. The Ombudsman may use the background information supplied to her in her report. That said, the Ombudsman will only identify officials or disclose information which would otherwise be exempt under the Code (such as internal advice or consultation) to the extent that it is necessary to do so to make sense of the investigations or conclusions. If departments consider that the draft report contains too much detail about internal procedures, or where they consider the report contains factual errors, they should raise this with the investigating officer. The Ombudsman is independent of Government and the final decision as to what to publish is hers, but she will give careful consideration to concerns raised about draft reports or findings. A copy of the Ombudsman's final report is sent to the referring Member of Parliament and to the department complained against.

Further information

12. Any questions on the guidance should be referred in the first place to departmental openness officers *(Department to insert name and telephone number of departmental openness officer)* or the Information Rights Division in the Department for Constitutional Affairs on tel 020-7210-8755. The unit in the Ombudsman's office that investigates Code complaints can be contacted on 020-7217-4085. The Ombudsman can only, however, give general advice and cannot advise on how a particular information request should be handled. All the Ombudsman's Code investigations are published in full, usually twice a year. They can be obtained in hard copy from The Stationery Office or via the Ombudsman's website ({ HYPERLINK http://www.ombudsman.org.uk) }.

CABINET OFFICE
Propriety and Ethics team
June 2003

1. cc JSH
NH (statement)
2. file

Home Office

From: The Private Secretary

50 Queen Anne's Gate, London, SW1H 9AT
Telephone 020 7273 2741 Fax 020 7273 3094
www.homeoffice.gov.uk

Simon Macdonald
PS/Foreign Secretary
FCO
King Charles Street
LONDON
SW1A 2AH

05 JUN 2003

Dear Simon

ASHCROFT: SETTLEMENT

As you will know by now, we struck a settlement deal with Lord Ashcroft's team late yesterday evening.

For the benefit of copy recipients and for the record, I attach the final version of the settlement reached, together with the court order underpinning it. The key points to note are that:

- the agreement is in **full and final** settlement of all claims that Lord Aschroft has or may have in relation to information held by the government, now or previously.

- FCO and DFID will pay £350,000 towards Lord Ashcroft's legal costs. Lord Ashcroft's solicitors were initially pursuing a figure of around £600,000: this final amount reflects 80% of costs incurred by Ashcroft thus far in relation to the main (unauthorised disclosure) action, but no award in relation to the DPA Action, where the Government had a strong case, or in relation to the other

defendents (Cabinet Office, DoT and OPDM).

- Lord Ashcroft accepts the settlement as representing a vindication of all his rights in relation to the DPA 1998.

Our two over-arching objectives in this matter were first, to prevent the main action from coming to trial in October, thereby limiting potential embarrassment to the Government and further cost and second, to avoid any concessions of principle on the Data Protection Act. I am pleased to say that both have been achieved.

Lord Falconer has asked me to pass on his appreciation to the DFID and FCO officials who worked extremely hard to reach a settlement, to our legal team for their skilful negotiating work, and to other Whitehall colleagues for their forbearance and advice at short notice. He has particularly asked me to thank DFID officials for securing a cross-Whitehall agreement in a very short time-frame. Thank you all for staying the course: we got the outcome we sought.

I am copying this letter to Clare Sumner, Anna Bewes, David Prout, Andrew Campbell, Stephen Parkinson, Sarah Albon and Ian Fletcher.

Yours sincerely

Tom Walker
Private Secretary to Lord Falconer

Draft/Statement in Open Court

During the years 1999 and 2000, documents held by certain Government departments, and which contained references relating to the affairs of Lord Ashcroft were disclosed to the media.

Despite investigation, the Government was not able to establish how the unauthorised disclosures to the media occurred.

The Government has though recognised that various disobliging references relating to Lord Ashcroft which were contained within documents held by Government Departments were without foundation.

Lord Ashcroft commenced litigation following the unauthorised disclosures. That litigation has today been settled, with the Government departments which were defendants to those actions apologising to Lord Ashcroft.

CLAIM NO: HQ02X03776

IN THE HIGH COURT OF JUSTICE

QUEEN=S BENCH DIVISION

B E T W E E N :

LORD ASHCROFT

CLAIMANT

-AND-

(1) HER MAJESTY=S ATTORNEY GENERAL
(2) DEPARTMENT FOR INTERNATIONAL DEVELOPMENT

DEFENDANTS

STATEMENT IN OPEN COURT

DAVENPORT LYONS
1 OLD BURLINGTON STREET
LONDON
W1S 3NL

TEL: 020 7437 8216
REF: KB/JD

SOLICITORS FOR THE CLAIMANT

Case No. HQ 01X02621

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

The Honourable Mr Justice Gray
5 June 2003

BETWEEN:

LORD ASHCROFT

Claimant

- and -

(1) HER MAJESTY'S ATTORNEY GENERAL
(2) DEPARTMENT FOR INTERNATIONAL DEVELOPMENT
(3) JOHN WILLIAMS

Defendants

Case No. HQ 02X03776

AND BETWEEN:

LORD ASHCROFT

Claimant

- and -

(1) HER MAJESTY'S ATTORNEY GENERAL
(2) DEPARTMENT FOR INTERNATIONAL DEVELOPMENT

Defendants

Case No. HQ 03X01674

AND BETWEEN:

LORD ASHCROFT

Claimant

- and -

(1) THE CABINET OFFICE
(2) DEPARTMENT OF TRANSPORT
(3) OFFICE OF THE DEPUTY PRIME MINISTER

Defendants

ORDER

UPON HEARING Mark Warby, one of Her Majesty's Counsel and Matthew Nicklin of Counsel for the Claimant and Philip Sales and Jason Coppel of Counsel for the Defendants

AND UPON the parties having agreed to settle the proceedings between them on terms contained in an agreement dated 4 June 2003 ("the Settlement")

IT IS ORDERED BY CONSENT

1. The Claimant discontinues his claim against John Williams.

2. All further proceedings in claims HQ01X02621, HQ02X03776 and HQ03X01674 be stayed save for the purposes of enforcing the terms of the Settlement.

3. The Defendants (not including John Williams) are to pay the Claimant's costs in the agreed sum set out in the settlement.

4. There shall be no other order as to costs.

Matthew Nicklin
Junior Counsel for the Claimant
4 June 2003

Jason Coppel
Junior Counsel for the Defendants
4 June 2003

Case No. HQ 01X02621

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

The Honourable Mr Justice Gray
5 June 2003

BETWEEN:

LORD ASHCROFT

Claimant

- and -

(1) HER MAJESTY'S ATTORNEY GENERAL
(2) DEPARTMENT FOR INTERNATIONAL DEVELOPMENT
(3) JOHN WILLIAMS

Defendants

Case No. HQ 02X03776

AND BETWEEN:

LORD ASHCROFT

Claimant

- and -

(1) HER MAJESTY'S ATTORNEY GENERAL
(2) DEPARTMENT FOR INTERNATIONAL DEVELOPMENT

Defendants

Case No. HQ 03X01674

AND BETWEEN:

LORD ASHCROFT

Claimant

- and -

(1) THE CABINET OFFICE
(2) DEPARTMENT OF TRANSPORT
(3) OFFICE OF THE DEPUTY PRIME MINISTER

Defendants

AGREEMENT

This Agreement is the agreement referred to in the Order in the above proceedings made on 5 June 2003 and records the terms of the settlement between the parties to dispose of proceedings brought by Lord Ashcroft against the above named Defendants in the actions HQ01X02621, HQ02X03776 and HQ03X01674.

The terms of the settlement are as follows:

1. The Claimant will discontinue his claim against John Williams.

2. The Claimant and the other Defendants agree to the reading of the Statement in Open Court in terms of the draft attached hereto before the Honourable Mr Justice Gray on 5 June 2003.

3. The Defendants (other than John Williams) will pay to the Claimant the sum of £350,000 towards the costs he has incurred.

4. This agreement is reached in full and final settlement of all claims which the Claimant has or may have (including at common law, in equity or by virtue of statute) in relation to information held by any Government department at the present time or previously.

5. The Claimant accepts that this agreement represents a satisfactory vindication of all of his rights against Government Departments and officials, and agrees not to make any further requests for access to information under the DPA 1998 for access to information held by Government departments at the present time.

Signed

.....

Davenport Lyons for and on behalf of the Claimant

Countersigned

.....

Treasury Solicitor for and on behalf of the Defendants and each of them

cc: DM
Press

CS 0/5

10 DOWNING STREET

P

PS/Sir Andrew Turnbull

AC - by fax

I need a steer on whether we are happy to agree the form of words below to settle the Ashcroft case on 4 June [we will also have to pay his costs].

Charlie has overseen the negotiation. The real issue is whether we are prepared to say "The Government defendants regret these disclosures" or whether we should try to avoid references to the Government.

Don't much care myself! Views? Jen

+44 20 7273 3094

Home Office

From: The Private Secretary

50 Queen Anne's Gate, London, SW1H 9AT
Telephone 020 7273 2741 Fax 020 7273 3094
www.homeoffice.gov.uk

Jeremy Heywood
Private Secretary to the Prime Minister
10 Downing Street
London

29 MAY 2003

Dear Jeremy

Lord Ashcroft Litigation against DFID and FCO

We have been in discussions with advisers to Lord Ashcroft about settling his legal actions against the FCO and DFID. Lord Falconer was asked to approach Lord Ashcroft by Clare Short (subsequently reconfirmed than Baroness Amos) and Jack Straw.

Following a meeting between Lord Falconer and Lord Ashcroft on 14 May I have been speaking to Lord Ashcroft's adviser about the terms of a settlement. A draft form of words is attached which I intend to offer Lord Ashcroft tomorrow.

It is important to Lord Ashcroft that the statement is given in the Government's name, not in the name of the two departments against whom the action is being taken. I would be grateful if you could confirm that the statement can be given in the Government's name. The other critical issue to Lord Ashcroft is the extent to which we refer to the material being unsubstantiated or untrue. FCO and DFID officials have agreed the draft terms attached to this letter.

The Foreign Secretary's and the International Development Secretary's agreement to this approach will be sought tonight, although FCO and DFID officials believe they will agree to this approach.

While FCO and DFID would be happy to settle in their own name, it is important to Lord Ashcroft that the settlement is made on behalf of the Government. Without this it may not be possible to achieve a settlement. Given the need to get some form of central policy agreement I would be grateful for your urgent confirmation that, if pressed, the statement can be given in the name of the Government.

+44 20 7273 3094

I would be grateful if you could come back to me on Friday 29 May – an initial action brought by Lord Ashcroft against FCO and DFID is due in court on 4 June.

Yours sincerely

Tom Walker
Private Secretary to Lord Falconer

+44 20 7273 3094

Between 1999 and 2000, a number of Government departments mentioned Lord Ashcroft in internal documents which were subsequently filed as part of normal Government procedures.

Some of these documents were disclosed to the media. Despite investigation, the Government was not able to establish how these unauthorised disclosures occurred.
[*If pressed*: The Government Defendants regrets these disclosures.]

The documents contained a number of disobliging references to Lord Ashcroft some of which the Government defendants accept are [unsubstantiated.] [*if pressed:* untrue.]

29 May 2003

LORD CHANCELLOR'S DEPARTMENT
SELBORNE HOUSE
54-60 VICTORIA STREET
LONDON SW1E 6QW

DX 117000

Telephone: 020 – 7210 8683
Facsimile: 020 – 7210 8620

Yvette.cooper@lcdhq.gsi.gov.uk
www.lcd.gov.uk

YVETTE COOPER MP
Parliamentary Secretary

The Rt Hon Paul Boateng MP
Chief Secretary HM Treasury
Horse Guards Road
LONDON SW1A 2HQ

CS
cc JJH

6 MAY 2003

Dear Paul Boateng,

CONSULTATION PAPER ON A COMMITMENT TO PROTECTING THE PUBLIC'S PERSONAL INFORMATION

Thank you for your letter of 3 April, in which you suggested an additional paragraph for our consultation paper on data handling. I am sorry that this was received too late for us to be able to consider it before the consultation paper was published. I understand that officials from your private office advised my officials that they did not intend to comment on my letter of 20 March asking for DA clearance. I had asked for comments by 27 March since we were anxious to go ahead with publication as soon as possible. On the understanding that colleagues were content for the consultation paper to proceed, we therefore went ahead with publication on 3 April.

While the timing is unfortunate, I do not think this consultation paper would have been the best place to include a reference to the Citizen Information Project (CIP). The consultation paper is focused on data handling and privacy issues. To introduce a brief mention of the CIP without spending any time explaining the rationale for it and benefits it could bring, might be distracting. I also feel that to begin to develop public confidence in the aims of CIP, would also require far more detail on its proposed benefits and the safeguards that would be in place. As you rightly point out in your letter, no Ministerial decision has been taken yet on further work, so it is not possible to set out yet a clearer account of benefits and safeguards. It is also possible that such a mention could give the misleading impression that the promises proposed in the charter applied only when data-sharing arrangements were in place, rather than to data handling generally. In addition, I think that if we had wanted to include an example of data-sharing, it would have been more effective to cite a project already in operation and showing real benefits, such as Sure Start.

I agree that if CIP does go ahead, there is much work to be done in building public trust in it. My officials will therefore continue to work closely with Treasury officials on this very important project. Although our consultation is on wider issues of privacy, the findings may well have implications for the CIP work and we will therefore ensure your officials are kept informed at an early stage of what emerges. If the CIP goes ahead, my officials will have a role to play working with yours to ensure that public trust is built and maintained.

I am copying this to the Prime Minister, members of the DA Committee and to Sir Andrew Turnbull.

pp

YVETTE COOPER

Approved by the Parliamentary Secretary and signed in her absence

File

HM Treasury, 1 Horse Guards Road, London, SW1A 2HQ

Yvette Cooper MP
Parliamentary Secretary
Lord Chancellor's Department
Selborne House
54-60 Victoria Street
London SW1E 6QW

3 April 2003

Dear Yvette,

CONSULTATION PAPER ON A COMMITMENT TO PROTECTING THE PUBLIC'S PERSONAL INFORMATION

Thank you for your letter dated 20 March and the draft consultation paper. I am pleased that your officials are working closely with those in the Treasury and the Office for National Statistics who are taking forward the Citizen Information Project (CIP). Broadly speaking, the CIP is examining the feasibility of developing a high-quality common population register that would hold core data (such as name, address and date of birth) and a unique identifier on UK residents, and which could be used by public sector



organisations to ensure that they have the right records about the right people at the right time.

2. Officials are due to present a feasibility study report to PSX(E) on 30 April. Ministers will need to decide whether the CIP work should proceed to the next stage of project definition.

3. Data sharing of limited core information such as name and address and date of birth is key to the success of the CIP and its wider application in supporting the provision of more efficient, joined-up services, better management information and policy-relevant statistics. Therefore if work does proceed, in addition to complying with the various requirements that flow from the Data Protection Act 1998 and other legislation, the project will need to win public trust and support. Your department's consultation paper, although wider in scope than core information, could help further that aim and so I welcome your attempt to encourage further public debate.

4. Finally, to reflect this on-going work, I suggest a reference to the CIP on page 5 of the draft consultation document. Taking account of the fact that no Ministerial decision has yet been taken on further work, this could be restricted to text from the CIP information note that issued in February. With that in mind, please add the following reference to paragraph 2:

> 'For example, the sharing of basic core information such as name and address within the public sector could improve efficiency and, ultimately, service to the citizen. A joint project team, led by the Registrar General for England and Wales, is examining the feasibility of developing a high-quality common population register. This would hold core data - such as name and address - on UK residents that could be used by public sector organisations to ensure that they have the right records about the right people at the right time. Any proposals that emerge from the study will be fully consistent with legislation covering data protection and privacy, and would involve public consultation on the data sharing aspects.'

5. A copy of this letter goes to the recipients of yours.

PAUL BOATENG

Department for Culture, Media and Sport
The Rt Hon Tessa Jowell MP
Secretary of State

2-4 Cockspur Street
London SW1Y 5DH
www.culture.gov.uk

Tel 020 7211 6243
Fax 020 7211 6249
tessa.jowell @
culture.gsi.gov.uk

C02/29599/03/00017/DC

Stephen Timms
Minister for E-Commerce and Competitiveness
Department for Trade and Industry
1 Victoria Street
LONDON
SW1A 0ET

3rd April 2003

WP
STH
[redacted]
CS
SV

Dear Stephen

Thank you for your letter of 10 March about the Implementation of the Privacy and Electronic Communications Directive.

I am happy to agree for consultation to take place in the manner set out in your letter.

I am also copying this letter to the Prime Minister, Rt Hon John Prescott, members of the DA Committee, the First Minister of the Scottish Executive, the first Minister of the Welsh Assembly Government, the First Minister and the Deputy First Minister of the Northern Ireland Assembly, and Sir Andrew Turnbull.

Yours

TBlr

TESSA JOWELL

INVESTOR IN PEOPLE

CS
cc JJM
AA
SU
WP

The Rt Hon Lord Macdonald of Tradeston CBE

Minister for the Cabinet Office &
Chancellor of the Duchy of Lancaster

CABINET OFFICE
70 Whitehall
London
SW1A 2AS

***Tel:* 020 7276 1250**
***Fax:* 020 7276 1257**

The Rt Hon John Prescott MP
Deputy Prime Minister
Office of the Deputy Prime Minister
26 Whitehall
London
SW1A 2WH

1 April 2003

Dear John,

CONSULTATION PAPER ON A COMMITMENT TO PROTECTING THE PUBLIC'S PERSONAL INFORMATION

I have seen Yvette Cooper's letter to you of 20 March seeking responses on the consultation paper about ways of letting citizens know the standards they can expect from the public sector in handling their personal information.

As Yvette rightly indicates, the draft guarantee and consultation paper have been widely discussed by officials within Whitehall. As Yvette also points out there remain some disagreements over, in particular, the need for supporting documentation for those departments that do not share data on a regular basis. Any differences between departments should be resolved prior to public consultation. The consultation should, as a minimum, establish whether the proposed guarantee, or any form of guarantee, is likely to achieve its aim of increasing public confidence.

It is also important that we ensure that the data sharing needs for e-government are clearly safeguarded. Therefore I would like to see the first bullet point of the guarantee amended to read *' ensure you know why we need the information and if we need to share it to give you a better service across government'.*

I would also like to see a Regulatory Impact Assessment included with the consultation document, assessing the likely impact on external service providers that work with the public sector, who will probably be affected by the requirements of the guarantee.

Web site: www.cabinet-office.gov.uk
Email: gus.macdonald@cabinet-office.x.gsi.gov.uk

INVESTOR IN PEOPLE

Copies of this letter go to the Prime Minister, members of the Ministerial Committee on Domestic Affairs and to Sir Andrew Turnbull.

Yours

GUS

GUS MACDONALD

The Rt Hon Patricia Hewitt MP
Secretary of State for Trade and Industry

Secretary of State
Department of
Trade and Industry

1 Victoria Street
London SW1H 0ET

Direct Line
020 7215 6272

DTI Enquiries
020 7215 5000

URL http://www.dti.gov.uk.
e-mail mpst.hewitt@dti.gsi.gov.uk

The Rt Hon John Prescott MP
Deputy Prime Minister and
First Secretary of State
Dover House
Whitehall
LONDON
SW1A 2AU

CS
WP
DJ
GN

31 March 2003

Dear John,

CONSULTATION PAPER ON A COMMITMENT TO PROTECTING THE PUBLIC'S PERSONAL INFORMATION

Yvette Cooper has copied to me her letter to you of 20 March seeking agreement for her department to publish a consultation paper on building public confidence in the way public sector bodies handle personal information. I have concerns over the additional layers of bureaucracy that the consultation document envisages. On balance, I agree to the document being published but with the caveat that the work to be taken forward in the light of consultation responses must not impose an unnecessary resource burden on public bodies.

I fully support the thrust of the PIU report on privacy and data-sharing which has given rise to this consultation. The report makes recommendations to allow the public sector to make more effective use of personal data. In this respect, it goes with the grain of our e-Government strategy. I also accept that, if we are to increase the sharing of information about individuals, the public will need assurance from Government that their personal data will continue to be used legally and appropriately.

I do, however, have reservations over the extent of the proposals put forward in the consultation document. There is a clear risk of imposing unnecessary layers of bureaucracy on public bodies. In my view, a better public awareness of existing obligations and rights conferred by the Data Protection Act would go a long way to appease potential public fears over the improper use of personal data, without the need to set up ever more stringent arrangements.

On balance, I agree to the consultation document being published. However, we must ensure that any additional arrangements to be set in place are in reality necessary to appease potential concerns over privacy. The arrangements must be set up with flexibility and resources in mind and must not have the untoward effect of hampering, rather than facilitating, data-sharing within the public sector.

I am copying this letter to the Prime Minister, members of DA Committee and to Sir Andrew Turnbull.

Best wishes,

Patricia

PATRICIA HEWITT

8

CS

The Rt Hon Nick Raynsford MP
Minister of State for Local
Government and the Regions

OFFICE OF THE
DEPUTY PRIME MINISTER

26 Whitehall
London SW1A 2WH

Tel: 020 7944 3013
Fax: 020 7944 4539
E-Mail: nick.raynsford@odpm.gsi.gov.uk

Web site: www.odpm.gov.uk

Our Ref: P/R/006133/03

Rt Hon John Prescott MP
Deputy Prime Minister
26 Whitehall
LONDON
SW1A 2WH

28 MAR 2003

Dear John

Consultation Paper on a Commitment to Protecting the Public's Personal Information

I have seen Yvette Cooper's letter to you of 20 March and the accompanying draft consultation document dated March 2003.

The principle of a "Charter" or "Guarantee" in relation to public sector organisations' handling of citizens' personal data, including in some cases sensitive personal data such as medical condition, is becoming increasingly relevant and crucial in the Government's drive to promote and facilitate a single front door for accessing public sector services and furthering electronic delivery. More generally, I am strongly of the opinion that there are compelling reasons for increasing citizens' awareness of their existing right to privacy of their personal data under the Data Protection Act, which this Charter is designed to achieve.

The content of the consultation document has been given a good airing in the inter-Departmental Senior Group on Information Policy and Data Sharing Practitioners' Group, and I agree that now is probably the right time to take the document to wider public consultation. I am therefore content with your proposal to go out to consultation in the near future.

I am copying this to the Prime Minister, members of the DA Committee, Sir Andrew Turnbull and Yvette Cooper.

Yours ever

Nick

NICK RAYNSFORD

DEPUTY PRIME MINISTER

OFFICE OF THE
DEPUTY PRIME MINISTER
26 Whitehall
London
SW1A 2WH

Tel: 020 7944 8623
Fax: 020 7944 8621

WP LC SW JH OS GN

Stephen Timms MP
Department of Trade and Industry
Minister for E-Commerce and Competitiveness
1 Victoria Street
London
SW1H 0ET

27 March 2003

IMPLEMENTATION OF THE PRIVACY AND ELECTRONIC COMMUNICATIONS DIRECTIVE

You sought policy agreement in your letter to me of 10 March to publish a consultation on the UK implementing regulations for the Privacy and Electronic Communications Directive. This letter gives you DA clearance to proceed, subject to the views of colleagues recorded below.

Replies were received from Andrew Smith and Derry Irvine.

Derry said he would like you to change the emphasis in the proposed extension of the Information Commissioner's power to require information, he said he would prefer the issue to be dealt with in a non-committal way rather than as a firm proposal.

Derry also said that if the proposal resulted in additional work for the Information Commissioner which required additional resources, he would look to your department to make the necessary provision.

I understand that you have incorporated Derry's drafting amendment and his officials are content with the final draft of the consultation document.

Andrew said he was content.

I am copying this letter to the Prime Minister, members of DA Committee and Sir Andrew Turnbull.

JOHN PRESCOTT

Website: www.odpm.gov.uk
Email: john.prescott@odpm.gsi.gov.uk

Lec 2713

Home Office

Bob Ainsworth MP
PARLIAMENTARY UNDER SECRETARY OF STATE
50 Queen Anne's Gate, London SW1H 9AT

JR
cc Tom
EA
WP
OS

Stephen Timms MP
Minister of State
Department for Trade and Industry
1 Victoria Street
London
SW1H 0ET

26 MAR 2003

Dear Stephen

IMPLEMENTATION OF THE PRIVACY AND ELECTRONIC COMMUNICATIONS DIRECTIVE

Thank you for copying to the Home Secretary your letter of 10 March to John Prescott about the proposed consultation on implementation of the Privacy and Electronic Communications Directive.

I am content with the proposed approach to the consultation on implementing the Directive.

My officials will continue to liaise with yours on the detail of the consultation paper.

I am copying this letter to the Prime Minister, the Deputy Prime Minister, members of DA Committee, the First Minister of the Scottish Executive, the First Minister, Welsh Assembly Government, the First Minister and Deputy First Minister of the Northern Ireland Assembly, and Sir Andrew Turnbull.

Yours

BOB AINSWORTH

LORD CHANCELLOR'S DEPARTMENT
SELBORNE HOUSE
54-60 VICTORIA STREET
LONDON SW1E 6QW

DX 117000

Telephone: 020 – 7210 8683
Facsimile: 020 – 7210 8620

yvette.cooper@lcdhq.gsi.gov.uk
www.lcd.gov.uk

1. PR
2. file
- Freedom of Information
- Policy.

YVETTE COOPER MP
Parliamentary Secretary

CS
cc: WP
ER.

The Right Honourable
John Prescott MP
Chair of the Domestic Affairs Committee
House of Commons
LONDON SW1A 0AA

20 March 2003

Dear John

Consultation Paper on a Commitment to Protecting the Public's Personal Information

The Lord Chancellor's Department is planning to issue the enclosed consultation paper on ways of letting citizens know the standards they can expect from the public sector in handling their personal information. It is an attempt to educate and empower people in an area where knowledge of their existing rights is slight. I would be very grateful for responses by 27 March 2003. I apologise for giving such short notice. I do it on the basis that the proposals have already been discussed and commented on extensively throughout Whitehall; the consultation paper is merely seeking views, rather than setting out policy; and we would like publication to co-incide with a number of already arranged public meetings at which people can discuss it in an informed way.

The consultation paper takes forward work suggested in the report by the Cabinet Office's Performance and Innovation Unit (PIU): *Privacy and data-sharing: the way forward for public services*. One of the chief recommendations of this report was the production of a charter to let people know the safeguards in place when they supply information to the public sector.

The consultation response to this recommendation was positive but the response rate was very low and there were almost no comments from private individuals. We are therefore seeking much more detailed views, both from the public at large and the public sector, on the desirability of a charter and what it should contain. Our work is at a very early stage, and many of the questions are open-ended, but responses to them will enable us to take forward work that is fully informed by public views. In particular, we want to find out:

- from the general public, whether the amended guarantee we have produced gives them the information they need and how else we might help them;

- from the general public, whether our attempt to translate the main principles of the Data Protection Act 1998 into very simple terms has been successful;

- from the public sector, views on the contents of the guarantee and supporting documentation (Codes of Practice, data-sharing protocols, management guidance and complaints procedures).

The draft guarantee and consultation paper have been extensively discussed throughout Whitehall (as well as Agencies and local government organisations) via the Senior Group on Information Policy and the Data-Sharing Practitioners Group and the documents have been amended in line with comments from these groups. While there remain some disagreements over the detail, in particular, of the supporting documentation, it has been agreed that a wider input is now needed and the responses to the consultation exercise will enable us to decide how the detail of future policy should be developed in these areas.

We have worked particularly closely with officials from the Office of the e-Envoy, and those dealing with particular aspects of data-sharing, such as the Citizen's Information Project and the Regulation of Investigatory Powers Act. While the consultation paper is not primarily concerned with data-sharing, we see it as part of the same overall project to improve the delivery of public services using information in a more effective way. By letting people know how their personal data will be handled, and their privacy protected, we aim to increase their confidence in providing information about themselves, knowing that it will be treated in a responsible fashion.

The guarantee is intended to be adopted by public sector organisations only and should have little or no effect on the private sector, charities or voluntary organisations. We have therefore not completed a regulatory impact assessment.

If the guarantee is adopted, there will be some initial resource implications for public sector organisations, which will need to ensure that they can meet its promises and have the necessary supporting documentation. This is difficult to quantify since some organisations are already fully compliant with the guarantee (as they should be if they are to comply with data protection legislation) and have the supporting documents in place, while others will have more work to do. We will do what we can to minimise these costs by producing detailed guidance on the documents so that organisations do not all have to start from scratch. The main cost will be to organisations involved in data-sharing arrangements since they will have to produce protocols. However, it will be for each organisation to do its own cost benefit analysis before embarking on data-sharing. In the long term, having protocols in place should ensure smooth running of the arrangements. Once documentation is in place there should be only minimal ongoing costs.

The benefits of having a guarantee are largely intangible. However, the efficiency gains to be achieved by increased data-sharing could be jeopardised if people were unwilling to give their personal details to the public sector.

I am copying this to the Prime Minister, members of the DA Committee and to Sir Andrew Turnbull.

YVETTE COOPER

How Can The Public Sector Provide People with Information And Build Confidence In The Way It Handles Personal Information?

CP 02/03

March 2003

How Can The Public Sector Provide People With Information And Build Confidence In The Way It Handles Personal Information?

CP 02/03

March 2003

A consultation produced by the Lord Chancellor's Department

This information is also available on the LCD website

www.lcd.gov.uk/consult/confr.htm

Contents

Introduction----------1

How to respond----------2

Executive summary----------3

The proposals----------5

Addressing public concerns----------5

Building trust through knowledge----------6

The development of the public trust charter ----------8

Availability of the guarantee ----------10

Supporting documentation ----------11

Annex A: The Public Services Trust Charter----------16

Annex B: A Guarantee----------17

Annex C: Principles of the Data Protection Act 1998----------18

Annex D: Example of a service specific statement----------19

Annex E: Code of Practice framework----------20

Annex F: Data-sharing protocol framework----------24

Annex G: Management guidance framework----------26

Annex H: Complaints Procedure----------29

Consultation co-ordinator----------31

General principles of consultation----------31

Questionnaire----------32

Introduction

This paper asks how we can best let people know what they can expect from any public sector organisations that process their personal information. It recommends publication of the standards the public sector will adhere to when collecting, holding, using and deleting information about people. The consultation is aimed at the general public, public sector organisations and interest groups in the UK. This consultation does not set out firm Government intentions. It is very much an exercise in finding out what people think about the issues and the results will help us to develop future Government policy. This consultation is being conducted in line with the Code of Practice on Written Consultation issued by the Cabinet Office. It falls within the scope of the Code. The Code criteria set out on page 31 have been followed.

The proposals, if adopted, would apply only to the public sector so would not lead to additional costs or savings for businesses, charities or the voluntary sector. A Regulatory Impact Assessment has therefore not been completed.

Copies of the consultation paper are being sent to government departments, agencies and non-departmental public bodies, local authorities, consumer groups and private individuals.

How to respond

A questionnaire is included on page 32. We would find it very helpful if you completed this, or as much of it as you wanted. We also welcome more detailed comments on any or all of the questions. The questionnaire can be completed on-line at www.lcd.gov.uk/consult/confr/htm

Please send your response by **27 June 2003** to:

Carl Pencil
Lord Chancellor's Department
Privacy and Data-Sharing Division
4th Floor
MWB Business Exchange
10 Greycoat Place
London SW1P 1SB

Tel: 020 7960 6509
Fax: 020 7654 3586
Email: carl.pencil@lcdhq.gsi.gov.uk

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

The Department may wish to publish responses to this consultation document in due course. **Please ensure your response is marked clearly if you wish your response or name to be kept confidential.** Confidential responses will be included in any statistical summary of numbers of comments received and views expressed.

Further copies of this consultation paper can be obtained from Carl Pencil at the above address, e-mail, or telephone number.

Executive summary

In April 2002 the Performance and Innovation Unit (PIU) of the Cabinet Office produced a report entitled *Privacy and Data-Sharing: the Way Forward for Public Services*. This recommended better use of the personal information collected by public sector organisations to deliver improved services. It also recommended that this would need to be accompanied by building public trust in the way people's personal information was used. The report recommended that all public sector organisations should comply with a Public Services Trust Charter. This document (see Annex A) set out key commitments to be adhered to by the public sector when handling personal data.

The PIU report contained evidence of public concerns about how personal information is protected, particularly with the development of new technologies. The report also showed that people are generally not aware of the current legal safeguards that should ensure personal information is correctly handled. We have therefore developed the charter suggested by the PIU Report to help inform people of their rights and of what they can expect from the public sector.

We have amended the PIU Charter to produce a shorter document (see Annex B) on which we wish to consult much more widely to gauge its effectiveness. Most responses to the PIU report came from people within the public sector. While it is of course vital to have the views of those who would need to abide by any form of charter, we are now particularly interested in hearing from those people whose only experience of the public sector is as a 'customer': the very people for whom the document is intended. In particular, we would like to hear views on:

- whether the document proposed is sufficiently clear about what people can expect from the public sector; and
- what else the public sector might do to address public concern and improve confidence.

Respondents may want, and are very welcome, to answer questions 1 to 6 only.

There are also more detailed questions on the suggested contents of the document and comparisons with the original draft charter.

To ensure that the document is more than just a set of aspirations, public sector organisations that share personal information to provide services to the public, will need to have in place more detailed documents, available to the public on request, on procedures for dealing with personal information. An indication of what might be included in these documents is included in this paper and comments are also requested on these.

The proposals

Addressing public concerns

1. People are increasingly attracted to the innovative and convenient services offered by the private sector, such as on-line banking and shopping. However, such services were not immediately popular and companies had to work hard to promote confidence in using these methods, and to overcome the fears many people originally felt about sending details about themselves and their finances through cyberspace.

2. In the same way the public sector is rising to meet the challenge of offering greater convenience and increased efficiency through on-line services and better use of information supplied by the public. But it faces an even greater challenge than the private sector to ensure that people are willing to impart information about themselves secure in the knowledge that it will be properly safeguarded.

3. We all accept that if we want to use public services we must provide them with information about ourselves, from simple details like name and address to the potentially sensitive information about medical conditions. We also accept that the state has a duty to prevent and prosecute crime and fraud, and that this may involve access to information about people without their consent.

4. Yet the very scale of the amount of information collected by the public sector can lead to fears about a possible erosion of privacy by a 'Big Brother' government. On a more mundane level, some people may have concerns about the efficiency of public sector bodies in safeguarding the personal information they collect and hold. These fears are understandable and often arise from a lack of knowledge about the protections offered by the law. We therefore want to provide people with information on what they can expect from the public sector and what they can do if they are not getting the service they should.

5. In April 2002 the Performance and Innovation Unit (PIU) of the Cabinet Office produced a report entitled *Privacy and Data-Sharing: the Way Forward for Public Services*. This set out two main objectives: to encourage better use of personal data to deliver improved public services; and to safeguard personal privacy.

6. The report cited a number of studies that show a lack of public trust in the way the public sector handles personal information and concern about the risks to personal privacy arising from the introduction of new technologies.

Building trust through knowledge

7. Data protection legislation provides safeguards on the handling of personal information by both the public and private sector, but there is little public awareness of it. While the Data Protection Act 1998 gives people rights and provides them with protection, this is undermined if people are not aware of their rights and do not know how to challenge an organisation that they think is acting improperly. We therefore want to produce a simple, easy to understand document that lets people know about the standards they can expect from organisations that request or hold their personal information and what they can do if they do not think these standards are being met. The Data Protection Act is overseen and enforced by the Information Commissioner. We therefore want to better advertise the Commissioner's role so that people know where to get further information and how to challenge any behaviour they think is wrong. Greater knowledge of data protection principles will thus both empower people and help to reassure them. An extract from the Data Protection Act 1998, listing the principles that organisations must adhere to, is at Annex C.

8. The PIU report proposed the publication of a Public Services Trust Charter to be adopted by all public sector organisations that handle personal information. The Charter is shown at Annex A. The Charter set out the main principles of the Data Protection Act, and promised that each service would issue a statement with any request for information, detailing how the organisation applied those principles.

9. Comments were requested on the draft Charter. A full report on the consultation responses has been published by LCD.[1] The response rate was disappointing. There were only 26 responses to the question on the Charter, and only three of these came from private individuals. None of these individuals commented either favourably or unfavourably on the proposed charter. However, the responses were broadly positive with 23 out of the 26 in favour of the introduction of a Charter, believing it would help to improve public confidence.

10. This is encouraging. However, it gives us little indication as to whether the general public would find the Charter helpful, whether it provides the information or

[1] www.lcd.gov.uk/consult/confr.htm

assurances they want and whether it would make them feel happier about surrendering personal details about themselves to public bodes. In addition, we believe that the Charter proposed in the PIU report could be shorter, simpler and less technical. We have therefore produced a new draft which translates the set of principles into a list of concrete promises to let the public know what they can expect from the public sector and also what they can do to help ensure information is kept up to date. The revised version is at Annex B and it is this version on which we are now seeking views.

11. The proposed document does not go into any details about how people's information is used and protected. We envisage that while keeping to the standards in the overarching document, organisations would also need to produce service specific statements translating the general terms of the guarantee into concrete ones referring to their area of business. For example, the first promise of the document is that we will tell you 'why we need your information and what we will do with it'. The service specific statement would therefore need to set out the reason for collecting information in brief, easily understandable terms.

12. Many public sector organisations already produce their own service specific privacy statements. An example, used by the Department for Work and Pensions, is shown at Annex D. We believe it would be best for all public sector organisations to adopt the same common statement of standards, as set out in the document at Annex B (backed up by service specific statements), as this will ensure that they are all signed up to providing a certain level of service. However, others might think that a document covering all public sector organisations is unnecessary and that individual service specific statements are sufficient. We are also seeking views on this.

13. We are particularly keen to have the views of members of the public. While everyone is of course a user of public services to a greater or lesser extent, the views of those commenting as employees of public sector organisations are likely to be different from those who only know these organisations from the position of 'customers'. **Respondents may prefer, and are very welcome, to restrict themselves to the first six general questions below.** The subsequent questions go into more detail on the content of the guarantee at Annex B and of the documents that will be needed to support it.

14. The fundamental questions are whether the document proposed at Annex B gives people the information they need to empower and reassure them; and how else we can let people know about data protection standards. . If it seems that this is not the way to let people know what they can expect, or that it can be only partially effective in doing so, we will need to consider other methods. We would welcome views on what other ways we might use to publicise the standards governing how personal information is handled.

15. We have also considered whether to change the name of the document from 'charter' to 'guarantee'. This is a work that implies a strong level of certainty that the promises will be honoured. Charters tend to contain aspirational standards. The intention with the promises given in the document is that public sector organisations should look to fulfil them 100%. Various other names have been suggested for the document such as statement of confidence, promise, commitment, privacy policy.

Q1 Do you strongly agree, agree, disagree, strongly disagree or have no opinion on the following statement:? "The document shown at Annex B tells me what I need to know about the way the public sector handles my personal information."

Q2 Do you strongly agree, agree, disagree, strongly disagree or have no opinion on the following statement:? "The document at Annex B is clear about what I can expect and easy to understand."

Q3 Do you strongly agree, agree, disagree, strongly disagree or have no opinion on the following statement:? " the document at Annex B makes me feel more confident about the way the public sector handles my information"

Q4 Do you have any further views about ways to let people know the standards the public sector should meet when handling personal information?

Q5 In your view, should public sector organisations provide: (a) one common statement on information handling; or b) separate service-specific statements? Or c) do you have no opinion?

Q6 In your view, which name would be most appropriate for the document: a) guarantee; b) charter; c) commitment; or d) other?

Development of the public trust charter

16. In revising the PIU report's charter, we have tried to balance simplicity and plain English against the need to give the public as full a picture as possible of how their personal information will be handled. We have also tried to avoid over-loading the document with information, but have instead set out what further information is available on request. At the same time we have attempted to produce a meaningful

document that reflects the main data protection principles and to avoid producing an anodyne document that is easy to read but says little.

17. It can be difficult to strike the right balance between simplicity and sufficient detail. The draft charter in the PIU report lists the occasions when information can be processed without the subject's knowledge: "for purposes such as national security, public safety, statistical analysis, the protection of the economy, the prevention of crime or disorder, the protection of health or morals, or the protection of the rights and freedoms of others". Many respondents to the consultation were puzzled about this list, particularly by terms such as 'protection of morals' which they felt were too vague. The list comes from Article 8 of the European Convention on Human Rights. However, it takes this list out of context and does not explain that these are occasions when privacy *might* be curtailed, but only if it is both necessary and proportionate, and if the law allows it. A balance also has to be drawn between how information should be protected under the Data Protection Act and how exemptions under the Act might be exercised might be capable of being passed on under the Convention. These are complicated matters and going into detail about the Convention, without explaining the added protection of the Data Protection Act would not be possible in the charter. At the same time, to quote from the Convention, without explaining the source, has been shown to be unhelpful and misleading. We therefore propose that the guarantee should acknowledge that personal information may be disclosed and that a supporting code of practice should then explain in detail, and with reference to the relevant legislation, when the right to privacy can be curtailed. We are seeking views on whether the guarantee should include examples of circumstances when personal information may be shared with, or disclosed to, another public authority without your consent, for example to prevent and detect crime.

Q7 Where data may be shared without consent do you agree that: a) the document at Annex B should detail all the circumstances when this might happen; b) only the supporting documents should detail all the circumstances when this might happen, Or c) do you have no opinion?

18. Some respondents to the consultation on the PIU charter felt it lacked detail. For example, on the subject of consent, the charter does not say how data controllers (those who collect and use personal data) will gain the consent of data subjects (the providers of personal information); the nature of 'informed' consent; how long the consent will last; how to gain consent if information is given by a third party, and the position on gaining the consent of particular categories of people, such as children.

19. We have not attempted to include this detail since to do would produce a long, highly detailed document, and therefore one that is unlikely to be read. Instead we have specified what other information is available, referring to the organisation's Code of Practice and management guidance on information handling and any data-sharing protocols it may have. This gives the public a better idea of the information that they can request, demonstrates that the document is backed up by more detailed documents, and also ensures that to comply with it, public services need to produce the supporting documentation.

20. Some respondents also felt that the Charter should refer more explicitly and in greater depth to the underpinning legislation. The guarantee proposed at Annex B is intended to be a high-level document and, for reasons of readability, we have not done this. Each organisation's supporting documents, in particular the Code of Practice, will need to include this detail.

Q8. Do you strongly agree, agree, disagree, strongly disagree or have no opinion on the following statement:? "The document at Annex B contains enough of the main principles of the Data Protection Act 1998?"

Q9. If you disagree with question 8 – what else should be included?

21. We have tried to avoid making any promises that it will be difficult to keep. For example, the draft charter promised that decisions would only be made on the basis of reliable and up-to-date information. This is unrealistic. The Data Protection Act places a duty on data controllers to 'take reasonable steps' to ensure the accuracy of the data. Organisations could explain how they do this in their supporting documents. However, the data subject must assume some of the responsibility in this area, particularly in letting the data controller know promptly about any changes in information, such as a change of address. We have therefore included a section letting people know what they can do to help.

22. We have sought to avoid any ambiguities in wording that might lead the public to think that they may be entitled to more information than is the case. The PIU charter says that a service specific privacy statement will let the public know 'who' will see their information. It is possible that some may take this to mean that individuals with access to the information will be named. This would clearly be impractical, especially in large organisations, and would not be of any real benefit to the data subject.

Q10 If you are an employee of a public sector organisation, do you strongly agree, agree, disagree, strongly disagree or have no opinion on the following statement: "the document at Annex B is realistic"?

Q11 If you disagree with question 10 - please explain.

Availability of the Guarantee

23. We propose that the guarantee proposed at Annex B should be adopted and adhered to by all public organisations that collect personal information from the public. This will include government departments and their agencies, non-departmental public bodies and local authorities. Any of these organisations using sub-contractors to deliver services will also need to ensure that the sub-contractors can meet these standards. It would be unacceptable to allow some public services to provide no, or diluted, guarantees.

24. If we adopt a common statement we will need to promote it by including it on public sector organisation websites and displaying it in public offices. We propose that it should also be made available, on request, in Braille, large print, and ethnic minority languages to ensure the widest possible accessibility. We have included a logo on the document at Annex B to indicate that all public sector organisations are signed up to a common level of service. The Information Commissioner's Office produced the information padlock logo to alert people to the fact that their information was being collected. The padlock could appear on the websites of all public organisations next to any request for information. Clicking on the logo would then bring up the common guarantee and a service specific privacy statement.

25. If personal information is requested by letter or e-mail, the service specific privacy statement should be enclosed or attached. When someone gives information in person, he or she should be given a copy of it. It is more difficult to bring the guarantee or the organisation's service specific statement to the attention of someone who is supplying information over the telephone. The most sensible solution would usually be to advise the person why their information was wanted and that it would be handled correctly according to a guarantee which could be sent to them if they wished.

Q12 Do you strongly agree, agree, disagree, strongly disagree or have no opinion on the following statement: " the consultation document proposes the right methods for bringing the guarantee and service specific privacy statement to the attention of the public, in particular to those people who are asked to provide information?"

Q13 If you disagree with question 12 – please explain.

Supporting documentation

26. The PIU report recommended that the charter be supported by Codes of Practice, Management Guidance and - where appropriate - Data Sharing Protocols. In order to comply with data protection legislation, most public sector organisations already have such background documentation, for example, advising staff on correct handling of information. However, it is particularly important that organisations that take part in data-sharing to provide services to the public have rigorous data handling procedures in place and can demonstrate this through their supporting documents.

27. We have looked at some of the existing documents to better understand current practice. This will enable us to identify and encourage best practice. We plan to produce detailed guidance on each of the documents at a later stage. At present, we are seeking views on the main subject headings that should be included in them.

28. We do not want to produce simply a layer of bureaucracy that will force organisations to produce extra documents unnecessarily. We do not therefore propose to produce rigid templates and expect all organisations to follow them. Many organisations will have perfectly adequate codes of practice and management guidance, even if they are not in the form suggested here, and even if they are spread over more than one document with different titles. (For example, instead of one document on management guidance, an organisation might have a manual telling staff how to apply data protection principles, as well as a separate security manual and separate guidance on ensuring accuracy of data. It would not then be necessary for that organisation to produce a new manual bringing those elements together.)

29. It would also be unrealistic to try to produce templates that were appropriate for all. Different organisations will need to produce very different documents to reflect differences in the work they do, the scale of their operations, and the nature and reasons for any data-sharing they do.

30. However, we do want to provide as much help as possible, particularly for smaller organisations, which might lack detailed documentation and have scant resources to produce it. Local authorities, for example, are keen to improve their services by greater use of data-sharing and, if they do this, it is envisaged that they will need to produce data-sharing protocols. However, it would be a waste of resources if they

were all to work in isolation on producing such documents from scratch. Comments on the following guidelines are therefore welcomed particularly from such organisations.

31. **Codes of practice** are encouraged in the 1995 EC Data Protection Directive and in the UK Data Protection Act. The Information Commissioner takes a role in endorsing codes of practice, publishing guidance on compliance with the DPA, and calling for a code of practice to be developed, if necessary. Codes aim to ensure the implementation of a high-level commitment to privacy protection by defining the standards to be met by an organisation and its staff; and setting out the steps of how these standards should be met. A Code of Practice should promote openness and transparency, consistency across services, and accountability.

32. A skeleton Code of Practice is shown at Annex E, in the form of a list of headings and sub-headings. Some organisations will need to place a much greater emphasis on some sections than others and some will want to contain additional information.

Q14 Do you strongly agree, agree, disagree, strongly disagree or have no opinion on the following statement: "the suggested **Code of Practice** includes all the necessary headings?"

Q15 If you disagree with question 14 – what else should be included?

Q16 If you think any of the headings in the Code are unnecessary, please state which one/s.

33. It is envisaged that **Data-sharing protocols** will need to be produced jointly by organisations exchanging personal information to provide public services. These should assist data-sharing by building trust between participating organisations and ensuring that each is working to agreed standards. The protocols will draw on the Codes of Practice of each of the organisations involved. Further, they will need to define and allocate responsibilities, and agree processes.

34. Data sharing takes place for many different reasons. For example:

- to improve services, such as health care;
- to provide joined-up services, e.g. by local authorities;
- to aggregate information to produce statistics.

It can also take place, to the extent that it is necessary and proportionate and lawful, to prevent and detect crime, such as fraud.

It also takes place in different ways. For example:

- case by case requests for information
- one-way, two-way or multi-way sharing.

35. It would be impossible to suggest a model protocol that could encompass these different types of data-sharing, taking account of different capabilities, needs and methods of different organisations, of different sizes, purposes and resources. Each organisation will need to produce a protocol according to the type of data-sharing that is taking place. Nevertheless, we will be producing guidance on what the different types of protocol should include.

36. At Annex F is a suggested skeleton for a generic protocol. As with the suggested Code of Practice, some data-sharing partners will need to include additional information and to emphasise certain aspects.

Q17 Do you strongly agree, agree, disagree, strongly disagree or have no opinion on the following statement: "the proposed **Data Sharing Protocol** includes all the necessary headings?

Q18 If you disagree with question 17 – what else should be included?

Q19 If you think any of the headings in the Protocol are unnecessary, please state which one/s.

37. **Management Guidance** is each organisation's manual for staff on the day-to-day use of data. While intended largely for staff, we believe it should be available to the public since it will show how the principles of the Code of Practice are translated into action. It will also demonstrate that standards on data handling are built into the job descriptions of relevant staff. At Annex G is a document showing suggested subject headings for Management Guidance.

Q20 Do you strongly agree, agree, disagree, strongly disagree or have no opinion on the following statement: "the attached **Management Guidance** includes all the necessary headings?

Q21 If you disagree with question 20 – what else should be included?

Q22 If you think any of the headings in the Guidance is unnecessary, please state which one/s.

38. **Complaint procedures** will need to be referred to in Codes of Practice, Information Sharing Protocols and Management Guidance. It is essential that people know what they can do if they think an organisation is not acting correctly, or not complying with the charter, and that means that fair, rigorous and effective complaints procedures must be in place. We therefore plan to produce separate guidance on this. The size of an organisation, in particular, will affect its complaints procedure. However, some aspects, such as an independent right of appeal, and referral to the Information Commissioner, should be common to all. A suggested outline for a generic complaints procedures is shown at Annex H.

Q23 Do you strongly agree, agree, disagree, strongly disagree or have no opinion on the following statement: "the proposed complaints procedure contains all the necessary elements?

Q24 If you disagree with question 22 – what is required?

39. The supporting documentation could be placed on public sector organisations' websites so that anyone who wished to could view them in that way. If someone requests a hard copy, our view is that each of the supporting documents should be available to the public free of charge. If so, the guarantee should state this. There should not be any substantial administrative cost in providing copies of the supporting documentation, which should be readily available in each organisation. Nevertheless, it may be reasonable to allow organisations the discretion to charge a small amount to cover actual disbursements, such as the cost of postage and packing. Imposing a charge also helps to discourage frivolous requests. If there is, or may be, some charge, the guarantee should clearly state this.

Q25 Do you think the supporting documents should be:
a) free of charge
b) available for a fee to cover the organisation's costs
c) no opinion

Annex C: The Data Protection Principles

What are the data protection principles?

They are an enforceable set of eight good practice rules for the handling of personal data. They form the core of the protection given by the Data Protection Act 1998. Everybody processing personal data must comply with them. They require personal data to be:

- processed fairly and lawfully;
- processed for limited purposes;
- adequate, relevant and not excessive;
- accurate;
- not kept longer than necessary
- processed in accordance with individuals' rights;
- kept secure;
- not transferred to non-EEA* countries without adequate protection.

- The European Economic Area comprises the 15 Member States of the EU together with Iceland, Norway and Liechtenstein.

Annex D: Example of a Service Specific Statement

Department for Work and Pensions Confidentiality Statement: inserted on information gathering forms.

The Department for Work and Pensions (DWP) collects information for social security, child support, vaccine damage, employment and training purposes. The information we collect about you will depend on the nature of your business with us but may be used for any of the Department's purposes.

We may check information provided by you, or information about you provided by a third party, with other information held by us. We may also get information about you from certain third parties, or give information to them, to check the accuracy of information, to prevent or detect crime, or to protect public funds in other ways, for research and statistical purposes, as permitted by law.

These third parties include other government departments, local authorities, and private sector bodies such as banks and organisations that may lend you money.

We will not disclose information about you to anyone outside DWP unless the law permits us to. DWP is the Data Controller for the purposes of the Data Protection Act. If you want to know more about what information we have about you, or the way we use your information, you can contact any of the Department's offices and ask for the leaflet GL33. Or you can find a copy of the leaflet on our website. The address is www.dwp.gov.uk.

Annex E: Code of Practice Framework

What is the purpose of this Code of Practice?

- To protect your privacy
- Legislation: To ensure compliance with Data Protection Legislation:
  - The Data Protection Act 1998 - the eight principles, and the data subject's rights;
  - any other service specific legislation, e.g. prohibiting data-sharing
- To set procedures and standards that the service user can expect from staff.

Who is this Code of Practice for?

- Members of public
- Employees/staff
- Anyone from whom personal data may be requested

Why do we keep information on you?

- To meet the needs of our service users
- When you give us information about yourself we keep a record of your personal details to reduce the number of times we need to ask you to repeat them
- We may share information with other organisations with your consent e.g.:
  - to tell you about services close to where you live
  - to supply joined-up services
  - To see if our service is effective & efficient
  - For research purposes
  - For staff training purposes to improve our service to you
- We may share information with other organisations without your consent:
  - If we are required to by law
  - For crime prevention and detection purposes
  - In the interests of national security

What choice do you have about giving us information?

- Whether you have a choice about providing us with information
- The nature of informed consent and how we obtain it (including any special types of consent e.g. involving children, the mentally incapacitated)

- Any time-limits on consent - will we renew the consent regularly or at particular stages
- Occasions when we can require information from you without your consent
- Obtaining your consent to pass on your information to other organisations
- Occasions when we can pass on your information to other organisations without requiring your consent

Confidentiality

- Personal data obtained for one purpose should not be used for an incompatible one
- Only authorised data users access/process the data when they need it for specific purposes
- Staff have a duty to keep information about you private
- Unauthorised disclosure or misuse of personal data may lead to disciplinary action
- We provide training to staff to make them aware of confidentiality issues
- Storage of data is safe and secure
- Our policies and procedures are regularly audited
- When we disclose personal data we release only as much information as is necessary for the purpose
- Anonymisation of personal data for statistical purposes

Accuracy

- How personal data is checked, cleansed, corrected, validated and analysed

Security

- A named person will assume overall responsibility for implementation of security procedures
- Electronic security provisions, e.g. use of passwords, restricted access, encryption
- Security provisions for manual records, e.g. storage
- Staff training
- Staff are made aware of legal penalties that may apply to wilful wrongful disclosure
- Regular audits to monitor security procedures and review if necessary

How long will we keep your information?

- Information will be kept no longer than necessary
- Personal data will be kept on our records for -------- time and then deleted by authorised staff
- Occasions when information may not be deleted

How can you find out what information we hold about you?

- Under the Data Protection Act you will usually have the right to see information we hold about you.
- Exceptions to subject access rights
- We will/may charge a fee for this service, £---
- We will aim to respond to your request within 40 days
- Contact details of e.g. Data Protection Officer
- What should your request for information contain? E.g. full name, address, enclose payment etc...
- Check that the details we hold about you are accurate and up to date
- Requests to amend information we hold about you need to be put in writing and addressed to ...
- We aim to make the necessary amendments in compliance with our service user care standards, e.g. undertaking to correct information in 10 days
- What happens if someone wants to complain about our handling of a subject access request?

Complaints

- Complaints procedure [see Annex H]
- Right of appeal
- Review of procedures and practices in line with justified complaints
- Full contact details

Reporting and Reviewing

- Regular review of:
  - Procedures
  - Complaints
  - This Code of Practice

Useful contacts and further information

First point of contact for queries etc, e.g. Data Protection Officer

Chief Knowledge Officer's name and full contact details

Further contacts and useful websites, e.g.

www.dataprotection.gov.uk

Annex F: Data-Sharing Protocol Framework

Who is covered?

- List the organisations involved in sharing data
- Describe what they do
- Role and responsibilities of any agents or contractors to the partners

Reasons for data-sharing

- Reasons for data-sharing e.g.:
  - crime prevention, reduction and detection; and/or to ascertain the effects of crime on the community
  - to provide better, joined-up local services
  - to collect statistical information to analyse trends

The legislative basis for data-sharing

- The Data Protection Act
- Data-sharing gateways
- If data-sharing is with the consent of the data subject only, how consent will be obtained

How is information shared?

- Case by case requests for information
- Block data-sharing between partner organisations
- Responsibilities of the parties (partners)
- Designated officers: role, responsibilities, and full contact details. The Chief Knowledge Officer

Accuracy

- Explain how accuracy of shared data will be maintained and partner organisations informed if inaccuracies come to light

Security

- Each organisation involved is subject to its own Code of Practice.
- Describe the security procedures necessary to ensure that the security of information is maintained during the exchange process

Complaint Procedures

- Highlight any differences between partners' complaints procedures
- Establish how complaints touching more than one of the partners should be dealt with
- Establish how to deal with breaches of the protocol by any of the partners
- Referrals to Information Commissioner

Training

- Staff training to promote awareness of their responsibilities when handling and exchanging information

Review and update procedures

- Regular reviews of procedures and protocols

ANNEX G Management Guidance Framework

Purpose of this document

- To ensure all employees effectively process and manage data within set standards, to protect the privacy of individuals, and to comply with the principles and requirements of the Data Protection Act 1998.

Principles of the DPA with explanation of how they should be translated to specific jobs

Other relevant service specific legislation, e.g. prohibiting sharing of personal data

Responsibilities of staff and managers

- Line managers' must interpret this policy and the associated controls in their areas of responsibility
- Line managers must ensure staff reporting to them are made aware of their responsibilities and standards to be met in carrying these duties out
- Individual employees to apply the controls as agreed with their Line manager within the requirements of office standards
- Duties and standards on data protection to be included in job descriptions of relevant staff and their managers and assessed at regular job appraisals
- The Chief Knowledge Officer /Records Management Officer to monitor the accuracy and effectiveness of the data protection controls across the department.

Subject access requests: checklist

- Requests must be from an individual
- Requests must be made in writing (includes e-mail)
- Fee required
- Exemptions/reductions
- Methods of payment
- Action to take if insufficient information
- Time limit on replying to request (i.e.. 40 days starting on the day the request was received, or less)
- Reasons for not complying with request

- Alternative arrangements (e.g. access to registry)
- Right of appeal, if dissatisfied
- Queries on confidentiality policy to be referred to (named person)
- When and where staff can get legal advice
- Retain copies of requests made and responses sent

Confidentiality

In accordance with Code of Practice

- Only authorised data users should access/process the data when they need it for specific purposes
- Data held must be kept confidential (telephone, written and electronic)
- Storage of data must be safe and secure
- Nobody should handle personal information without training on confidentiality issues first
- Procedures will be regularly audited
- Unauthorised disclosure of personal information or misuse of information may lead to disciplinary action (see disciplinary section)
- Dealing with requests for disclosure of personal information from other organisations:
  - Disclosure with consent
  - Disclosure without consent e.g. to prevent crime and trace those responsible e.g. fraud offences.
- Queries on confidentiality policy to be referred to (named person)
- When and where to obtain legal advice

Accuracy

- How to ensure accuracy of data held e.g. data matching, up-dating exercises (state office standards e.g. for accuracy and time taken to make amendments)

Security

(As in Code of Practice)

- Protect personal information from unauthorised disclosure or interception
- Security procedures for manual and electronic records
- Audit trails
- Non-compliance with the security policy may lead to disciplinary procedures

Deletion

- Deletion schedules
- Procedures for part deletion of data e.g. shave files down to basic details such as: name, date of birth, gender, history of contact, outcome (data could become anonymous and held to be used for statistical purposes)

Complaints - (see complaints Annex H)

- Complaints procedure
- What is a complaint?
- Time standards for acknowledgement and reply
- Quality standards for writing a letter in reply to a complaint
- Assessing redress / compensation
- Dealing with verbal complaints, e.g. by phone
- Learning from complaints
- Changing policies/procedures as a result of complaints

Organisations involved in data-sharing

- Adhere to the data-sharing protocol
- Standards for replying to requests for information from partner organisations

Disciplinary Policy

- Disciplinary action may be taken against any member of staff who does not fully adhere to organisation's privacy policy through:
- unauthorised access of data
- unauthorised disclosure
- unauthorised use of data (e.g. not for reason given to data subject)
- not adhering to the organisation's Code of Practice and data-sharing protocols, and Management Guidance
- Disciplinary procedures
- Right of appeal

Further advice and contact details

- Internal contacts: senior officers, Chief Knowledge Officer
- External contacts e.g. Information Commissioner

Annex H: Complaints Procedures

What is a complaint?

- Complaints can be made by members of the public, any authority or organisation
- A service provider need not assume a complaint e.g. a person points out an error in the information held about their details

How to make a complaint?

- Complaints Procedure to be quick, simple and perceived to be fair
- It must be accessible. Tell service users what the complaints procedure is, how they can find out about it and how to make a complaint.
- Oral and written complaints. While written complaints may be encouraged, oral complaints should be treated seriously and registered as complaints.

Explain standards that the organisation will adhere to in response to a complaint made against them

- Publish a time limit (e.g. 21 days) within which the complaint will be dealt with and a response sent to complainant
- In the reply letter:
  - Set out what the complaint is to ensure shared understanding
  - Explain the steps taken to investigate the complaint
  - Explain what has been taken into account in determining the complaint
  - Give the outcome with reasons
  - Explain any compensation if the complaint was successful
  - Explain any right of appeal if the complaint was unsuccessful or partially unsuccessful or compensation was claimed and has been denied.
  - Explain any internal remedial action to be taken to avoid similar complaints in future

Internal appeal process

- If the complainant is unhappy, explain to whom they may appeal within the organisation
- Give name/ position/status/full contact details

- Explain complaint will be determined by e.g. Chief Knowledge Officer (senior person someone who can influence remedial action within the organisation)
- Explain that the investigator of the complaint will be independent from those involved in the event and in the initial investigation

External appeal

- Explain what further steps the person can take if still dissatisfied with the outcome of the complaint. This should be to someone independent of the organisation e.g. the Information Commissioner, the Parliamentary Commissioner for Administration, any relevant Ombudsman.

Which organisation is responsible for the complaint?

- If, due to data sharing, a complaint involves more than one organisation, it should be determined in advance which organisation should deal with it.
- If a complaint is transferred to another organisation, the first organisation should:
  - tell the complainant where it has been sent
  - Let the complainant have a copy of the second organisation's complaints procedure and point out any significant differences, e.g. in time for reply
  - Let the complainant know when they can expect to have a full reply
- If the complaint involves more than one organisation, the determining organisation will need to arrange for the other organisation to investigate its area of responsibility, contribute to the determination and agree a draft of the substantive response

Guidance to staff

- All front-line staff and any who are likely to have to deal with complaints in person, by telephone and in writing should have full guidance and training
- Internal guidance should make clear to staff that complaints are constructive events, which help the organisation ensure good service to the public.

Consultation Co-ordinator

If you have any complaints or comments about the consultation process, you should contact the Lord Chancellor's Department's consultation co-ordinator, Laurence Fiddler, on 020 7210 2622 or email him at laurence.fiddler@lcdhq.gsi.gov.uk. Alternatively, you may wish to write to the address below:

Laurence Fiddler
Consultation Co-ordinator,
Room 8.23
Lord Chancellor's Department
Selborne House
54-60 Victoria Street
London SW1E 6QW

General principles of consultation

The criteria in the Code of Practice on Written Consultation issued by the Cabinet Office is as follows:

A Timing of consultation should be built into the planning process for a policy or service from the start, so that it has the best prospect of improving the proposals concerned, and so that sufficient time is left for it at each stage.

B It should be clear who is being consulted, about what questions, in what timescale and for what purpose.

C A consultation document should be as simple and concise as possible. It should include a summary, in two pages at most, of the main questions it seeks views on. It should make it as easy as possible for readers to respond, make contact or complain.

D Documents should be made widely available, with the fullest use of electronic means (though not to the exclusion of others), and effectively drawn to the attention of all interested groups and individuals.

E Sufficient time should be allowed for considered responses from all groups with an interest. Twelve weeks should be the standard minimum period for a consultation.

F Responses should be carefully and open-mindedly analysed, and the results made widely available, with an account of the views expressed, and reasons for decisions finally taken.

G Departments should monitor and evaluate consultations, designating a consultation co-ordinator who will ensure the lessons are disseminated.

Questionnaire

We would be grateful if you would complete all or some of this questionnaire.

We would also welcome more detailed comments on separate sheets of paper.

1. The document shown at Annex B tells me what I need to know about the way the public sector handles my personal information.

(Strongly agree) (Agree) (Disagree) (Strongly disagree) (No opinion)

2. The document at Annex B is clear about what I can expect and easy to understand.

(Strongly agree) (Agree) (Disagree) (Strongly disagree) (No opinion)

3. The document at Annex B makes me feel more confident about the way the public sector handles my information.

(Strongly agree) (Agree) (Disagree) (Strongly disagree) (No opinion)

4. Do you have any further views about ways to let people know the standards the public sector should meet when handling personal information?

.....

.....

.....

5. In your view, should public sector organisations provide,

(a) One common statement on information handling [ ] **Or**

(b) Separate service-specific statements [ ]

(c) No Opinion [ ]

6. In your view, which name would be most appropriate for the document:

a) Guarantee [ ]
b) Charter [ ]
c) Commitment [ ]
d) Other.....

7. Where data is shared without consent do you agree that,

a) The document at Annex B should detail **all** the circumstances when this might happen. [ ]
b) Only the supporting documents should detail **all** the circumstances when this might happen [ ]
c) No opinion [ ]

8. The document at Annex B contains enough of the main principles of the Data Protection Act 1998.

(Strongly agree) (Agree) (Disagree) (Strongly disagree) (No opinion)

9. If you disagree with question 8 – what else should be included?
.....
.....
.....

10. As an employee of a public sector organisation I think that the document is realistic.

(Strongly agree) (Agree) (Disagree) (Strongly disagree) (No opinion)

11.If you disagree with question 10 - please explain.
.....
.....
.....

12. The consultation document proposes the right methods for bringing the over-arching guarantee and service specific privacy statement to the attention of the public, in particular to those people who are asked to provide information.

(Strongly agree) (Agree) (Disagree) (Strongly disagree) (No opinion)

13. If you disagree with question 12 – please explain.

.....

.....

.....

14. The suggested **Code of Practice** includes all the necessary headings?

(Strongly agree) (Agree) (Disagree) (Strongly disagree) (No opinion)

15. If you disagree with question 14 – what else should be included?

.....

.....

.....

16. If you think any of the headings in the Code are unnecessary, please state which one/s.

.....

.....

17. The proposed **Data Sharing Protocol** includes all the necessary headings.

(Strongly agree) (Agree) (Disagree) (Strongly disagree) (No opinion)

18. If you disagree with question 17 – what else should be included?

.....

.....

.....

19. If you think any of the headings in the Protocol are unnecessary, please state which one/s.

.....

.....

20. The attached **Management Guidance** includes all the necessary headings.

(Strongly agree) (Agree) (Disagree) (Strongly disagree) (No opinion)

21. If you disagree with question 20 – what else should be included?

.....

.....

.....

22. If you think any of the headings in Guidance are unnecessary, please state which one/s.

.....

.....

.....

23. The proposed **complaints procedure** contains all the necessary elements.

(Strongly agree) (Agree) (Disagree) (Strongly disagree) (No opinion)

24. If you disagree with question 23 – what is required?

.....

.....

.....

25. Do you think that the supporting documents should be:

a)	Free of charge	[	]	
b)	Available for a fee to cover the organisations costs	[	]	**or**
c)	No Opinion	[	]	

Any further comments

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

Please tick whichever of the following best describes who you represent

Government Department	[ ]
Member of the Public	[ ]
Government Agency	[ ]
Local Authority	[ ]
Professional Body	[ ]
Private Company	[ ]
Academic	[ ]
Legal Practitioner	[ ]

Other.....

Name:

Address :

Tel: **Email:**

If you are a private individual, please state in which area you live, even if you would prefer not to give your full address. This is for statistical purposes only.

England Northern Ireland Scotland Wales

Please return your completed questionnaire to:

Carl Pencil
Lord Chancellor's Department
Privacy and Data-Sharing Division
4th Floor
MWB Business Exchange
10 Greycoat Place
London SW1P 1SB

Tel: 020 7960 6509
Fax: 020 7654 3586
Email: carl.pencil@lcdhq.gsi.gov.uk

02072192220
FROM THE RIGHT HONOURABLE THE LORD IRVINE OF LAIRG

HOUSE OF LORDS,
LONDON SW1A 0PW

WP
cc SH
ER
CS
JJM
AA
OJ

Our ref: 122128-1

18 March, 2003

Stephen Timms Esq MP
Minister of State for e-Commerce and Competitiveness
Department of Trade and Industry
1 Victoria Street
London
SW1H 0ET

Dear Stephen.

IMPLEMENTATION OF THE PRIVACY AND ELECTRONIC COMMUNICATIONS DIRECTIVE

Thank you for copying to me your letter of 10 March to John Prescott about your proposals for public consultation on the implementation of the Privacy and Electronic Communications Directive.

I am generally content with your proposals. Although there will be implications for the enforcement regime under the Data Protection Act 1998, I am happy for you to air the possibility of strengthening the arrangements for the enforcement of the rules that apply in the electronic communications sector. However, I should like to see a slight change of emphasis in the proposed extension of the Information Commissioner's powers to require information. I should prefer that issue to be dealt with in a non-committal way, as you propose to do in discussing the possibility of stronger sanctions, rather than as a firm proposal.

If your proposals result in additional work for the Information Commissioner which requires the commitment of additional resources, I shall expect you to make the necessary provision.

I understand that your officials will clear the draft consultation paper with mine before it is issued.

I am copying this letter to the Prime Minister, the Deputy Prime Minister, members of DA Committee, the First Minister of the Scottish Executive, the First Minister, Welsh Assembly Government, the First Minister and the Deputy First Minister of the Northen Ireland Assembly, and to Sir Andrew Turnbull.

Yours ever,
Derry

49791

10 DOWNING STREET
LONDON SW1A 2AA

From the Parliamentary Clerk

7 March 2003

Dear Sarah,

The Lord Chancellor wrote to the Prime Minister on 10 February seeking his agreement to quote the Prime Minister from his foreword to the Report *Privacy and Data Sharing – the way forward for public services*. I have discussed this with Clare Sumner. Given that the quotes are already in the public domain we are, of course, content for them to be used in the publicity material and the backdrop for the Open Forum events.

Yours sincerely,

Nicholas

NICHOLAS HOWARD

Sarah Albon
LCD

CS AL
JJM
AA

RT HON ROBIN COOK MP
LEADER OF THE HOUSE OF COMMONS
2 CARLTON GARDENS
LONDON SWIY 5AA
TEL: 020 7210 1025

Our Ref: LP/03/56/JN

- 6 MAR 2003

Dear Yvette,

PRIVATE MEMBERS BILL – PROTECTION OF FREEDOMS

Thank you for your letter of 4 March seeking agreement to oppose Mark Prisk's Protection of Freedoms Private Members Bill at Second Reading on 7 March. You may take it that you have agreement to proceed.

You wrote to me on 4 March seeking clearance to oppose Mark Prisk's Protection of Freedoms Private Members Bill, which is due for Second Reading on 7 February. The Bill would require the Government to make a statement for each new piece of legislation as to how the measure would affect freedom of expression, assembly, conscience and association and why the benefits outweigh any loss of freedom.

I agree that these issues are already addressed by the Human Rights Act and the requirement for Ministers to sign of declaration of compatibility with the European Convention of Human Rights (ECHR), though the freedoms mentioned in Mark Prisk's Bill are more limited than the rights in the ECHR. On this basis, I am content with your proposal to oppose this Bill at Second Reading.

I am copying this letter to the Prime Minister, members LP Committee, Sir Andrew Turnbull and First Parliamentary Counsel.

Yours sincerely

ROBIN COOK

Yvette Cooper MP
Parliamentary Secretary
Lord Chancellor's Department

www.pco.gov.uk
INVESTOR IN PEOPLE

FROM THE RIGHT HONOURABLE THE LORD IRVINE OF LAIRG Rec 12/2

Rec 12/2

CS
SV
JJH
AA
GM
JR

HOUSE OF LORDS,
LONDON SW1A 0PW

The Rt Hon Tony Blair MP
Prime Minister
10 Downing Street
London
SW1A 2AA

10 February 2003

Dear Tony.

PRIVACY AND DATA-SHARING –
THE WAY FORWARD FOR PUBLIC SERVICES

As you know LCD has responsibility for implementing the privacy and data-sharing agenda. To raise the profile of the initiative and to engage the views of a cross-section of the public on privacy and data-sharing we will be holding a series of Open Forum events in five locations in the United Kingdom. The first of these will be held in March.

I would be grateful for your permission to quote you from your foreword to the Report *"Privacy and data-sharing – the way forward for public services"*. The quotes would be used in the publicity material and the backdrop to the events. They are:

> *"The Government strongly support the twin objectives set out in the report of encouraging better use of personal data to deliver improved public services and safeguarding personal privacy".*
>
> *"The opportunities are clear: better, more personalised, more efficient public services which handle personal information in a way that command public trust".*

The original Report highlights that success for the initiative rests, in part, on engaging with the public and building their trust in Government to handle their personal information correctly. It is important for us to be aware of public feeling about the data-sharing initiative, to address the concerns people have and to be seen to be addressing these concerns.

This will be an opportunity for us to engage in open dialogue with the public about privacy, and to demonstrate that we will listen to their opinions and experiences and use them to inform policy development.

Your endorsement will get the message across that the Government stands by the commitment we made to safeguard personal privacy.

Yours ever,
Derry

THE LEGAL SECRETARIAT TO THE LAW OFFICERS
ATTORNEY GENERAL'S CHAMBERS
9 BUCKINGHAM GATE
LONDON SW1E 6JP

General enquiries: 020 7271 2400
Direct line: 020 7271 2413
Fax: 020 7271 2434
Email: Stephen.bravinerroman@lslo.x.gsi.gov.uk

David Hallam Esq
10 Downing Street
London SW1A 2AA

cc JPO
MR
DM
SSH

30 January 2003

Dear David,

THE ASHCROFT CASE

The Attorney General has seen a copy of the Foreign Secretary's minute of 20 January to the Prime Minister and Anna Bewes' minute of the 22 January to you.

The Attorney's principle concern with this litigation is whether, given that Counsel are of the view that the Government is highly likely to be defeated in the case, it is in the Government's interest to expose Ministers, special advisers and senior civil servants to cross examination directed at showing that the leaks were politically motivated.

The Attorney supports the Secretary of State's suggestion that the best next step would be a meeting involving officials from DFID and the FCO and the departmental lawyers. I understand that at the moment you consider that it would be best if you did not attend such a meeting. The Attorney would note that the window of opportunity in which to make an offer of settlement will to all intents and purposes close some time before 16 April. The meeting of officials should therefore be held soon as possible.

The Attorney has asked the Treasury Solicitor's Department to ensure that the meeting of officials has before it Counsel's written advice on settlement.

A copy of this goes to Anna Bewes (DFID) and Simon McDonald (FCO).

Yours

STEPHEN BRAVINER ROMAN

THE NATIONAL ARCHIVES

DEPARTMENT/SERIES Prem 49 PIECE/ITEM 3063 (one piece/item number)	Date and sign
Extract details: Letter dated 22nd of January 2003	
CLOSED UNDER FOI EXEMPTION	
RETAINED UNDER SECTION 3(4) OF THE PUBLIC RECORDS ACT 1958	
TEMPORARILY RETAINED	AE 12/06/23
MISSING AT TRANSFER	
NUMBER NOT USED	
MISSING (TNA USE ONLY)	
DOCUMENT PUT IN PLACE (TNA USE ONLY)	

(F)

LORD CHANCELLOR'S DEPARTMENT
SELBORNE HOUSE
54-60 VICTORIA STREET
LONDON SW1E 6QW

DX 117000

John Spellar Esq MP
Minister of State
Department for Transport
Great Minster House
76 Marsham Street
London SW1P 4DR

CS
cc Ref
NS

Telephone: 020 – 7210 8683
Facsimile: 020 – 7210 8620

yvette.cooper@lcdhq.gsi.gov.uk
www.lcd.gov.uk

Dear Mr Speller

20 DEC 2002

DATA PROTECTION AND DISCLOSURE OF AIRLINE INFORMATION

Thank you for your letter of 10 December about the data protection problems caused by the introduction by the United States, Australia and Canada of legislative requirements for airlines flying to those countries to provide detailed information about their passengers or face large fines.

You are right to say that the problem requires an EU-wide solution, and I welcome the European Commission's attempts to secure one in discussion with the US authorities. However, the problem does not concern only the US. I believe that Australia, to which British Airways flies, plan to impose their requirements from the end of January. I agree that we should press the Commission to focus on Australia, too.

I understand that your officials and mine have met representatives of British Airways and staff from the office of the Information Commissioner to consider how to deal with the Australian requirements in the short term. Australia has data protection law. Provided that British Airways can secure certain undertakings from the Australian authorities, this should give proper protection to the personal data concerned. The Information Commissioner's officials are content with this.

As you say in your letter, there is a further problem. The information to be disclosed would include sensitive personal data. For such data to be disclosed, it is necessary for one of the conditions set out in Schedule 3 to the Data Protection Act 1998 to be met. None of the current conditions applies. The Lord Chancellor has the power to set further conditions by order. I believe this is not an ideal solution to the problem, as this should properly be addressed as an EU wide issue. However, given the timescale I can see little alternative to making an order allowing the sensitive data in question to be disclosed.

As you will be aware the additional protection for sensitive data is intended to protect individual privacy. However, the Data Protection Act itself already recognises the need to balance individual privacy with national security for all. Moreover, those who would be effected by this order will already have chosen to travel to countries imposing these requirements and submit themselves to the jurisdiction of their laws.

The timing is tricky. Orders under Schedule 3 to the 1998 Act are subject to affirmative resolution. The Australian requirements are due to be imposed from 30 January. Since Christmas is already upon us, it will be very difficult to have the order prepared and approved by then. You may wish to consider whether it will be possible to negotiate a grace period with the Australian authorities.

So that they are aware of the position, I am copying this letter and yours to the Prime Minister, members of CRP(FOI) Committee and to Sir Andrew Turnbull.

YVETTE COOPER

Approved by the Parliamentary Secretary and signed in her absence

133624

Department for
Transport

From the Minister of State

Great Minster House
76 Marsham Street
London SW1P 4DR

Tel: 020 7944 3082
Fax: 020 7944 4492
E-Mail: john.spellar@dft.gsi.gov.uk

Web site: www.dft.gov.uk

Yvette Cooper MP
Parliamentary Secretary
Lord Chancellor's Department
Selborne House
54-60 Victoria Street
LONDON
SW1E 6QW

10 DEC 2002

Dear Yvette,

DATA PROTECTION AND DISCLOSURE OF AIRLINE PASSENGER INFORMATION

As you may be aware, UK airlines face a difficult problem which is not of their own making and the solution for which does not lie in their own hands. The security authorities of the United States, Canada and Australia are requiring all airlines flying to their countries to provide them with a wide range of information about their passengers, and are saying that airlines will be subject to heavy fines if they do not comply. But to comply would almost certainly put the airlines in breach of our data protection law.

This problem really requires a Community-wide solution, and the Commission is holding consultations with the US about it. It looks like the long-term answer is an amendment of the Data Protection Directive, but in the short term a political solution will be necessary. This has been discussed by our officials, who will be seeing the Commission jointly later this month to instil a sense of urgency and to alert the Commission to find an early solution in respect of Australia.

16 DEC 2002

I understand that one necessary element of a solution, long term or short term, would be to make it possible for the airlines to provide access for security authorities to sensitive personal information, such as religion or food preferences, for which at present there are more stringent conditions. As you will appreciate, this is just the sort of information that the security authorities would be most interested in. I understand that easing the conditions for its transfer could be achieved by an Order under Schedule 3 of the Data Protection Act 1998, and I hope that you will be willing to promote such an amendment.

I would be very happy to discuss this with you.

JOHN SPELLAR MP

SV
JJM
CS

CABINET OFFICE

CORPORATE DEVELOPMENT GROUP

Talent Directorate

John Barker, Director

Admiralty Arch (South), The Mall, London SW1A 2WH
TELEPHONE: 020-7276 1616 ▪ FAX: 020-7276 1602 ▪
EMAIL:john.barker@cabinet-office.x.gsi.gov.uk

DATE:16 December 2002

Simon Virley Esq.
Prime Ministers Office
10 Downing St.
London SW1

Dear Simon

INTERCHANGE AND DISCLOSURE OF INFORMATION ABOUT INWARD SECONDEES

We have corresponded on this before.

Maurice Frankel has now written to me about our guidance on disclosure of information about secondees. He believes that the guidance already issued misrepresents the Data Protection Act. Having looked at the document with fresh eyes and consulted Treasury Solicitors we tend to agree with him. I have asked colleagues here in the Interchange Unit to look once again at all this with a view to revising the guidance document.

This work will entail some consultation but I have asked colleagues to move as quickly as they can on this. I shall, of course, let you have a copy of the revised guidance document, in due course. But in the light of previous conversations, I thought I should alert you now.

Yours sincerely

JOHN BARKER

INVESTOR IN PEOPLE

HOUSE OF LORDS
LONDON SW1A 0PW

Permanent Secretary and
Clerk of the Crown in Chancery

Sir Hayden Phillips GCB

Tel. 020 7219 3246
Fax. 020 7219 2075
e-mail: perm.sec@lcdhq.gsi.gov.uk

9th December 2002

Sir Andrew Turnbull KCB CVO
Secretary to the Cabinet
and Head of the Home Civil Service
Cabinet Office
70 Whitehall
London SW1A 2AS

CS
cc. MH
JR

Dear Andrew

I understand that Martin Rosenbaum of BBC Radio 4 has made two bids for interviews with Suma Chakrabarti and Yvette Cooper on the Freedom of Information publication scheme.

This is getting us into very difficult territory. I am being advised to disclose certain papers to Martin Rosenbaum, but Cabinet Office and No10 want to refuse the request. If you can face it I think an urgent talk with you and No10 is essential to get our act together on this request, and others (e.g. official gifts). The consequences of refusal are serious.

Any interview with a LCD Minister will focus on my Department's lack of openness, despite being the Department responsible for FOI. Until we have a co-ordinated view, I would avoid putting up a Permanent Secretary, including from DFID. The focus will be on the differences between Departments, and the lack of joined up policy.

A copy of this letter goes to Jeremy Heywood.

Yours ever

Hayden

HOUSE OF LORDS
LONDON SW1A 0PW

Permanent Secretary and
Clerk of the Crown in Chancery
Sir Hayden Phillips GCB

Tel. 020 7219 3246
Fax. 020 7219 2075
e-mail: perm.sec@lcdhq.gsi.gov.uk

9th December 2002

Sir Andrew Turnbull KCB CVO
Secretary to the Cabinet
and Head of the Home Civil Service
Cabinet Office
70 Whitehall
London SW1A 2AS

Dear Andrew

I understand that Martin Rosenbaum of BBC Radio 4 has made two bids for interviews with Suma Chakrabarti and Yvette Cooper on the Freedom of Information publication scheme.

This is getting us into very difficult territory. I am being advised to disclose certain papers to Martin Rosenbaum, but Cabinet Office and No10 want to refuse the request. If you can face it I think an urgent talk with you and No10 is essential to get our act together on this request, and others (e.g. official gifts). The consequences of refusal are serious.

Any interview with a LCD Minister will focus on my Department's lack of openness, despite being the Department responsible for FOI. Until we have a co-ordinated view, I would avoid putting up a Permanent Secretary, including from DFID. The focus will be on the differences between Departments, and the lack of joined up policy.

A copy of this letter goes to Jeremy Heywood.

Yours ever

Hayden

02072192220
FROM THE RIGHT HONOURABLE THE LORD IRVINE OF LAIRG

HOUSE OF LORDS,
LONDON SW1A 0PW

BF CS 6/8

F

CS
cc: DM
Mo

- ~~Sph to Lee Hughes~~
- ~~Note for PM~~

Our ref: 122128-1
Your ref:

The Rt Hon Jack Straw MP
Foreign and Commonwealth Office
King Charles Street
London
SW1A 2AH

2 December, 2002

Dear Jack,

IMPLEMENTATION OF DATA PROTECTION DIRECTIVE

You will recall that earlier in the year we exchanged correspondence about the implementation of the 1995 EC Data Protection Directive.

In your minute to me of 7 January, you suggested that the Data Protection Act 1998, which gives effect to the Directive, might have over-implemented it, and you proposed a review to look at the way that decisions on the 1998 Act had been taken. In my reply of 30 January, I said that I would instruct a legal opinion from First Treasury Counsel, Philip Sales, to advise in what, if any, particular respects our Act is "excessive", and that I would discuss his advice and the way forward with you. In your further minute of 18 February you agreed this approach.

We have now received joint advice from Philip Sales and Jemima Stratford. I attach a copy. For convenience, I also attach a one page summary of their conclusions. Very broadly, they say that there is little evidence of over-implementation, and little scope for further deregulatory gains.

The Act's coverage matches that required by the Directive, although there may be some scope for restricting further the manual records that are caught. But, even here, it is clear that the gains would be tiny, and they would, in any event, be negated for the public sector by the broader definition that will apply when the Freedom of Information Act 2000 is fully in force.

One of the Directive's requirements which business finds burdensome is the requirement to tell individuals that their data are being processed. Counsel's advice is that there is no scope for limiting this requirement.

02072192220

Counsel say that the approach of the Act to subject access exemptions is justified. Merely copying the broad categories of exemption set out in the Directive would probably not have been adequate implementation. There is some scope for additional exemptions, although an exemption for the development of Government policy could not be justified. There are important caveats. An exemption for international relations, which you suggested, would have to be sufficiently clearly set out in law and apply on a case by case basis only where necessary and proportionate. An exemption for the economic and financial interests of the UK, suggested by your officials, could be relied on only where and in so far as necessary to avoid prejudice to important economic and financial interests of the state. Such an exemption would also require consideration on a case by case basis.

Finally, Counsel point out that the constraints on providing further exemptions from the requirement to notify the Information Commissioner of processing are financial rather than legal.

In the light of this advice, it is clear that there is little scope for making significant changes to the 1998 Act, consistently with the Directive, to reduce the regulatory burdens that it imposes. I think that the focus of our efforts should be to press for amendments to the Directive itself. As you know, we have recently made our submission to the European Commission in connection with their review of the Directive. They have said that they expect to produce their report by the end of the year. Meanwhile, following colleagues' approval of the consultation paper to be issued to the public, we have now launched our review of the subject access arrangements under the 1998 Act. We have asked for responses by 31 January 2003. This will provide the opportunity for considering the case for any further exemptions, including those which you and your officials have suggested. Bearing in mind Counsel's caveats , there have to be strong arguments for providing further exemptions, and we shall have to consider very carefully in each case whether the policy need is so great as to justify a further restriction of the subject access right. We are also looking at the case for some further exemptions from notification within the flexibility which the existing financial regime provides.

In the light of Counsel's advice, which shows little if any over-implementation of the Directive, I am doubtful of the value of a review of the way in which decisions about the 1998 Act were taken. Do you still wish to press for one?

I am copying this letter for information to the Prime Minister, to members of CRP(FOI) Committee and to Sir Andrew Turnbull.

Yours ever,
Derry

02072192220

ANNEX A

SUMMARY OF COUNSEL'S ADVICE

Scope and definitions

- There is no material scope for narrowing the definition of "personal data".
- The definition of the manual records caught by the Act could be made a little more precise by establishing specific criteria by reference to which the records must be structured.
- There is no scope for narrowing the definition of "processing" or restricting its field of application.

Data protection principles

- The interpretation of the principles given in the Act is consistent with the Directive.
- There is no scope for reducing the obligation on data controllers to tell individuals that their personal data are being processed.

Subject Access Exemptions

- Simply copying the categories of permitted exemptions from the Directive would risk being inadequate implementation.
- In general, exemptions will have to apply on a case by case basis. Specifically, a "class" exemption for law and order could not be provided lawfully.
- It is at least arguable that an exemption for international relations is permissible.
- An exemption for the important economic and financial interests of the UK is probably justifiable.
- There is a tenable argument that a disproportionate effort exemption is permissible. But there are significant weaknesses in the argument. A stronger case can be made for small private undertakings than for central Government. Similar considerations apply to exemptions for back-up data and for drafts.
- A broad exemption for the formulation of Government policy similar to that in the Freedom of Information Act 2000 could not be justified.

Notification

- The existing exemptions are permissible. Further exemptions can be provided, if properly defined. The constraints on providing them are financial rather than legal.

IN THE MATTER OF THE DATA PROTECTION ACT 1998 AND DIRECTIVE 95/46/EC

JOINT ADVICE

1. We are asked to advise the Lord Chancellor's Department ("the LCD") as to the interpretation and scope of certain provisions of the Data Protection Act 1998 ("the 1998 Act"). In particular, we are asked to advise as to whether the 1998 Act goes further in certain respects than is required by Directive 95/46/EC ("the Directive")[1] and by the Council of Europe Convention of 1981 ("the Convention").[2] We are also asked to advise on whether it would be permissible, having regard to the requirements of the Directive and the Convention, to amend the 1998 Act to include certain specified additional exemptions from the requirements of the 1998 Act.

2. The issues raised by our instructions fall under four broad categories and a number of sub-categories, which we address in turn:

   (a) **Definitions** (paragraphs 4-20 below)

      (i) Personal Data (paragraphs 4-8)

      (ii) Relevant Filing System (paragraphs 9-18)

      (iii) Processing (paragraph 19-20)

   (b) **Data Protection Principles** (paragraphs 21-22 below)

   (c) **Exemptions** (paragraphs 23-55 below)

      (i) General Approach (paragraphs 23-25)

---

[1] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

[2] The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Strasbourg, 28 January 1981 (Treaty Series No. 86 (1990)).

(ii) Additional Exemptions (paragraphs 26-55)

a. *International Relations* (paragraphs 27-39)

b. *Economic Well-Being* (paragraphs 40-42)

c. *Section 29 Exemption: removal of "case by case" restriction* (paragraph 43)

d. *Additional subject access exemptions based on Article 13.1(g)* (paragraphs 44-55)

i. Disproportionate effort (paragraphs 44-49)

ii. Formulation of government policy (paragraphs 50-51)

iii. Back-up data (paragraphs 52-53)

iv. Drafts (paragraphs 54-55)

(d) **Notification** (paragraphs 56-60)

3. In summary, our main conclusions are as follows:

(a) There is no material scope for narrowing the definition of "personal data" contained in section 1(1) of the 1998 Act;

(b) The deletion of the words "by reference to criteria relating to individuals" from the definition of "relevant filing system" in section 1(1) of the 1998 Act would constitute mis-implementation of the Directive, but it would appear to be open to the United Kingdom to amend the definition to include a reference to "specific criteria", and also to set out in the legislation more precisely what might constitute such criteria;

(c) The wide terms of the definition of "processing" in Article 2(b) of the Directive leave no scope for narrowing the definition contained in section 1(1) of the 1998 Act. Furthermore, the Directive would not permit an exemption such as that which existed under the 1984 Act to exclude processing which was not carried out "by reference to the data subject";

(d) The existence of Part II of Schedule 1 to the 1998 Act (which contains some interpretation of the principles laid down in Part I of Schedule 1) is in accordance with the wording and intention of the Directive. There is no scope under the Directive for reducing the obligation on data controllers to notify data subjects where personal data concerning them is being processed;

(e) A bare copy-out of Article 13.1 of the Directive would have risked being an inadequate implementation of the Directive;

(f) As a general rule, in the absence of special factors applying to justify a broader approach, any exemption will need to operate on a case-by-case basis and to be justified in the circumstances of the individual case;

(g) It is at least arguable that an international relations exemption (mirroring either section 28 or 29) would be permissible under Article 3.2 or 13.1 of the Directive;

(h) The terms of Article 9.2(a) of the Convention and of Article 13.1(e) of the Directive, both probably justify an economic well-being exemption, but such an exemption should be restricted to "important" economic and financial interests, since this limitation is specifically contained in Article 13.1(e);

(i) Section 29 could not lawfully be amended to introduce a "class exemption" applicable in all cases;

(j) There is a tenable argument that a disproportionate effort exemption would be permissible under Article 13.1(g). However, it must be recognised that such an argument has significant weaknesses which could be raised against it. Overall the argument in favour of a disproportionate effort exemption is reasonably strong with regard to small private undertakings, and the argument with regard to central government is respectable, if more problematic;

(k) The formation of government policy does not fit into any of the specific exemptions already provided for the government or constitute the protection of the rights of others. A formulation of a government policy exemption along the lines of the fairly broad exemptions contained in sections 35 and 36 of the Freedom of Information Act 2000 would be

much wider than could be justified to protect the comparatively weak rights and interests of others on which the government would need to rely;

(l) By and large the same considerations and arguments apply to a back-up data exemption as apply to a disproportionate effort exemption. However it would probably be easier to delineate the limits of a back-up exemption for the purposes of legislation than of a disproportionate effort exemption;

(m) The question of whether an exemption for drafts is permissible under Article 13.1(g) is closely related to the permissibility of exemptions for disproportionate effort and back-up data;

(n) The exemptions from the obligation to notify for manual processing operations and for core business purposes are permissible in accordance with Articles 18.5 and 18.2 of the Directive. Subject to defining proper categories of additional exemption from notification which were in accordance with Article 18.2 of and recital 49 to the Directive, the obstacles to reducing the regulatory burden imposed by notification are financial rather than legal.

(a) Definitions

(i) Personal Data

4. We are asked whether the definition of "personal data" in section 1(1) of the 1998 Act is wider than the Directive requires and, if so, in what respects the definition could be narrowed consistently with the requirements of the Directive. Section 1(1) of the 1998 Act provides in relevant part:

> " "personal data" means data which relate to a living individual who can be identified –
> (a) from those data, or
> (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,
> and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;"

5. Accordingly, the definition of "personal data" in section 1(1) is very wide. However, this echoes the very broad definition of "personal data" contained in Article 2(a) of and recital 26 to the Directive. Furthermore, it is relevant to note that the intention of the Directive is in large part to protect processing of personal data, so that any court considering the meaning of the term would be

likely to give it a generous and wide interpretation. In light of the very wide definition of "personal data" in the Directive, and of the legislative intention behind the Directive, it is our view that there is no material scope for narrowing the definition of "personal data" contained in section 1(1).

6. In particular, specific reference is made in section 1(1) to "indication[s] of the intentions of the data controller or any other person in respect of the individual" in question. Such indications had been excluded from the scope of the definition of personal data contained in the Data Protection Act 1984 ("the 1984 Act"). An important purpose of the Directive, and thus of the 1998 Act, is to afford protection to individuals who are in the position of having decisions made about them by other persons on the basis of personal data held by those other persons. In view of that purpose, and in light of the fact that Article 2(a) of the Directive refers in very broad terms to "any information", we are in agreement with those instructing us that there is no room for such an exclusion under the 1998 Act. Whilst we do not consider that the inclusion of intentions within the definition of personal data necessarily had to be made explicit in the 1998 Act, it is understandable why this was done in light of the different scope of the definition under the 1984 Act. In any event, we consider that the intentions of the data controller cannot be specifically excluded from the definition of personal data.

7. The definition of "personal data" in section 1(1) of the 1998 Act makes clear that it only applies to data relating to living individuals. We are instructed that a Minute records the view of the Council and the Commission that Member States should be free in this regard to determine whether or not the protective regime afforded by the Directive should be applied to the dead. Accordingly, in this respect the UK has chosen the more restrictive interpretation, but one which we consider is very likely to be held permissible under the Directive.

8. In summary, whilst the existing definition in section 1(1) of the 1998 Act may make explicit matters which could have been left implicit, we are not of the view that it goes further than is required by the Directive. Accordingly, the definition could not be narrowed without risking a finding of mis-implementation of the Directive.

(ii) Relevant Filing System

9. We are asked to consider whether the definition of "relevant filing system" in section 1(1) of the 1998 Act is wider than is called for by the Directive. In particular, we are asked whether the words "criteria relating to individuals" can be deleted, and/or whether any steps can be taken to ensure that the "criteria" referred to therein are restricted to criteria such as personal identification numbers. Section 1(1) provides in relevant part:

> " 'relevant filing system" means any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible."

We are instructed that the intention behind the inclusion of the phrase "criteria relating to individuals" was to cover file structures based on unique personal identifiers such as personal identification numbers. Lord Williams of Mostyn, at the Report stage of the Bill referred to unique personal identification numbers as one example of "criteria relating to individuals".[3]

10. The particular concern that has been raised relates to the fact that files titled by reference to topics relating to individuals (for example, "disciplinary matters"), in which information relating to individuals is readily accessible, apparently fall within the "set[s] of information relating to individuals ...structured ...by reference to criteria relating to individuals in such a way that specific information relating to a particular individual is readily accessible" referred to in section 1(1) of the 1998 Act.

11. By way of preliminary, it is appropriate to note that Article 2(c) (which defines "personal data filing system", the term used in the Directive for "relevant filing system") refers only to "any structured set of personal data which are accessible according to specific criteria". There is no reference in the substantive text of the article to "criteria relating to individuals". Such a reference is however found in recitals 15 and 27 to the Directive. Therefore, whilst it would seem to be entirely legitimate to make use of the latitude afforded by the recitals in the definition of "relevant filing system", it would be unlawful to stray in any way beyond that latitude.

12. As a result, we are of the view that the deletion of the words "by reference to criteria relating to individuals" from the definition of "relevant filing system"

---

3 Hansard 16.03.1998 col 467.

in section 1(1) of the 1998 would constitute mis-implementation of the Directive. This is because a definition containing only the words "by reference to individuals" would narrow impermissibly the Directive's definition of "any structured set of personal data which are accessible according to specific criteria".

13. However, there is no reason why the latitude afforded by the recitals, and in particular recital 27, should not be put to full use. The recital refers to "*specific* criteria relating to individuals" as opposed to merely "criteria relating to individuals" (the words used in section 1(1) of the 1998 Act). The meaning of "specific criteria relating to individuals" is no more immediately obvious than the meaning of "criteria relating to individuals". Nevertheless, it seems to us that the former expression is arguably narrower than the latter. As a matter of language, "specific criteria" would appear to indicate a more restricted field than merely "criteria". Accordingly, it is at least arguable that files entitled "disciplinary matters" may be structured by reference to "criteria relating to individuals", but are not structured by "specific criteria relating to individuals".

14. Moreover, recital 27 offers some further assistance in this regard. It provides that "in line with the definition in Article 2(c), the different criteria for determining the constituents of a structured set of personal data, and the different criteria for governing access to such a set, may be laid down by each Member State". This provision invites Member States to define more precisely what type of "specific criteria" are such as to be "specific criteria relating to individuals". Accordingly, it would appear to be open to the United Kingdom not only to amend the definition in section 1(1) of the 1998 Act to include a reference to "specific criteria", but also to set out in the legislation more precisely what might constitute such criteria. Any such legislative provision would have to comply with the broad definition in Article 2(c) of the Directive, with the Convention and with Article 8 of the European Convention on Human Rights ("ECHR").

15. Some guidance as to how such a provision could be drafted can be found in the definition of "personal data" in Article 2(a) of the Directive. That definition provides in relevant part that:

"... an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity;"[4]

16. It would be surprising if the types of factor which were sufficient to render an individual identifiable for the purposes of Article 2(a) of the Directive were wholly divorced from the types of criteria which constitute "specific criteria relating to individuals" within the meaning of recital 27. As a matter of strict logic, the two tests need not be identical. However, having regard to the intent and the internal consistency of the Directive, we consider that the criteria for one test are likely to be at least similar to if not identical to the criteria for the other test. In any event, the criteria set out in Article 2(a) of the Directive would not, in our view, offend the general definition in Article 2(c) ("specific criteria"), nor would they offend the Convention or Article 8 ECHR.

17. Following this approach it would not, of course, be possible to restrict the specific criteria to personal identification numbers alone. Nonetheless it is at least arguable that files entitled "disciplinary matters" would fall outside such a definition. This would result in an interpretation of the term "relevant filing system" which was closer to that which we are instructed was the original intention of those drafting the 1998 Act.

18. Finally on this point, we are of the view that if such an approach is to be adopted, this would be best achieved through amending legislation, rather than leaving the 1998 Act unamended and merely awaiting an appropriate case in which to contend for the narrower meaning of "relevant filing system". To deal with the issue in that way would surrender control of the process to the vagaries of litigation, and in the context of language used in the domestic statute which is potentially wider than it need be.

(iii) Processing

19. We agree with our instructions that the wide terms of the definition of "processing" in Article 2(b) of the Directive leave no scope for narrowing the

[4] It is interesting to note, that the Commentary on the definition of personal data in Article 2(a) of the Convention, contained in paragraph 28 of the Explanatory Report on the Convention states that "'identifiable persons' means a person who can be easily identified: it does not cover identification of persons by means of very sophisticated methods". For discussion of the status of the Explanatory Report, see paragraph *31 below.

definition contained in section 1(1) of the 1998 Act. "Processing" is defined in section 1(1) as follows:

" "processing", in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including –
(a) organisation, adaptation or alteration of the information or data,
(b) retrieval, consultation or use of the information or data,
(c) disclosure of the information or data by transmission, dissemination or otherwise making available, or
(d) alignment, combination, blocking, erasure or destruction of the information or data;"

Article 2(b) of the Directive provides:

" 'processing of personal data' ('processing') shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction;".

20. We also agree that the Directive would not permit an exemption such as that which existed under the 1984 Act to exclude processing which was not carried out "by reference to the data subject". Such an exemption would be contrary to the wide and unrestricted definition of processing in the Directive.

The Data Protection Principles

21. We agree with the view expressed in our instructions that the existence of Part II of Schedule 1 to the 1998 Act (which contains some interpretation of the principles laid down in Part I of Schedule 1) is in accordance with the wording and intention of the Directive. This is not least because Article 5 of the Directive (in conjunction with recital 22) requires Member States to "determine more precisely the conditions under which the processing of personal data is lawful" within the scope of Articles 6-21.

22. We are asked in particular to consider whether the Directive requires the notification provided for under paragraph 2 of Part II of Schedule 1. This is the obligation on data controllers to notify data subjects where personal data concerning them is being processed, and we are instructed that it is considered particularly burdensome by businesses. However, we do not see that there is any scope in the provisions of the Directive for this requirement to be narrowed. The obligations to provide information imposed by Articles 10 and 11 of the

02072192220

Directive are unqualified. To this extent, indeed, it is arguable that paragraph 2 of Part II of Schedule 1 to the 1998 Act is already narrower than is permitted by Articles 10 and 11, since paragraph 2 provides that the data subject must be given the specified information only "so far as practicable". We are of the view, however, that this "so far as practicable" limitation is probably not contrary to the Directive, as it is arguably merely making explicit an aspect of the principle of proportionality, which, as a matter of Community law, necessarily underlies the Directive.

Exemptions

(i) General Approach

23. We are asked to consider whether Article 13.1 of the Directive could have been properly implemented into UK law by simply "copying it out" in the 1998 Act. Article 13.1 permits certain defined restrictions on some of the rights and obligations provided for in other parts of the Directive.

24. We are of the opinion that a bare copy-out would have risked being an inadequate implementation of the Directive. This is because:

(a) Article 13.1 itself expressly contemplates the adoption by Member States of specific implementing legislation: "Member States may adopt legislative measures to restrict the scope of the obligations and rights ...".

(b) As a matter of Community law, directives must be implemented into domestic law with clarity and precision. In Case C-71/92 *Commission v Spain* [1993] ECR I-2303, the Court of Justice of the European Communities ("the ECJ") emphasised the importance of legal certainty and the need for Community citizens to be able to ascertain the extent and nature of the rights afforded to them by Community law. The ECJ further noted at paragraph 23, that the "requirements of clarity and precision are all the more imperative where, as in this case, exceptions to or derogations from the rules laid down by a directive are to be transposed into national law". In the present case, it is arguable that a mere "copying out" of the derogations contained in Article 13 would be insufficiently clear and precise and would not allow individuals to know with certainty the limits of their rights.

BRICK COURT CHAMBERS

(c) Similarly, any interference with the right to privacy protected by Article 8 of the ECHR must have a basis in domestic law which is clear and accessible, in order for the interference potentially to be justified under Article 8(2). A mere "copy-out" of the terms of Article 13.1 would arguably be legally uncertain and therefore insufficiently clear to satisfy the requirements of Article 8(2).

(d) A number of the exemptions provided for in the 1998 Act were previously contained in the 1984 Act, and have been carried forward in reliance on Article 13.1(g) of the Directive. Article 13.1(g) states that a Member State may adopt an exemption where it is necessary to safeguard "the protection of the data subject or of the rights and freedoms of others". Recitals 9 and 10 to the Directive make clear that implementation of the Directive must not result in any lessening of the protection of the rights and freedoms of individuals, and in particular the right to privacy. We consider that these provisions should be characterised more as an exhortation than as an absolute and invariable rule, since they are found only in the recitals. They are not translated into an article of the Directive, or to any form of 'freezing provision' as is found in some other Community legislation.[5] If the intention had been to take away the usual right of Member States to change their domestic law, we think that a specific, binding obligation to that effect would have been included in the body of the Directive. Nevertheless, the intention behind recitals 9 and 10 is clearly of relevance here. A mere "copying out" of the bare terms of Article 13.1 would not, in those circumstances, have ensured that the nature and scope of pre-existing exemptions was preserved.

25. Further, and in any event, there are, as our instructions note, good policy arguments against a simple copy-out implementation of Article 13.1 of the Directive. In particular, the general terms of Article 13.1 would have required extensive interpretation in order to clarify their scope in practice, and this in turn would have resulted in a lengthy period of uncertainty for data controllers and data subjects alike.

(ii) Additional Exemptions

[5] For an example in an admittedly different context, see Article 12.3(a) of Directive 77/388/EEC as amended, which provides that for a set period, with regard to the level of VAT, the "percentage may not be less than 15".

26. We are asked to consider a range of potential additional exemptions, which have been suggested by various departments for inclusion in the 1998 Act. As a preliminary matter, in view of the general requirement in Community law that derogations from rights conferred on individuals by Community law should be construed restrictively, and in light of the reference in Article 13.1 itself to "when such a restriction constitutes a *necessary* measure to safeguard", we consider that broad or class-based exemptions are likely to be difficult to justify. As a general rule, in the absence of special factors applying to justify a broader approach, any exemption will need to operate on a case-by-case basis and to be justified in the circumstances of the individual case.

(a) International Relations

27. We are asked to consider whether an exemption for international relations could be provided for in an amended version of the 1998 Act. It has been suggested in our instructions that such an exemption could be justified on the grounds of national security. As a model for a possible exemption, we have been referred to section 27 of the Freedom of Information Act 2000 ("the FOI Act").

28. Article 3.2 of the Directive provides that the Directive does not apply:

> "in any case to processing operations concerning the public security, defence, State security (including the economic well-being of the State when the processing operation relates to State security matters) and the activities of the State in areas of criminal law".

Article 13.1 of the Directive provides for limited exceptions from the provisions of the Directive when such restrictions are "necessary measures to safeguard", inter alia, "national security, defence [and] public security".

29. A study of the use of the phrases "State security" and "national security" in Community law reveals that neither phrase has a settled or usual meaning. Neither phrase is used anywhere in the EC Treaty, although the third phrase, "public security", is used in Articles 30, 39, 46, 58 and 186 EC. Articles 296-98 provide for general derogations from the Treaty by Member States on account of "essential interests of its security", and it appears from those articles that the intended focus of those provisions is essentially military.

30. The phrase "State security" appears in a few other directives,[6] but these provide little guidance as to its meaning or extent. Nor does the case law of the ECJ assist in relation to the meaning of "State security". "National security" is more commonly referred to than "State security", but we have not been able to identify any definitions in other pieces of Community legislation or analysis in judgments of the ECJ which provide any real assistance. The phrase "national security" does frequently appear, however, in close proximity, and apparent contradistinction to, "public security" and "defence".[7] It is perhaps interesting to note, but certainly not conclusive, that in Article 5 of the Convention implementing the Schengen Agreement, "national security" is used in distinction to "international relations", but this usage is not even consistent within this Convention itself, let alone more generally.[8]

31. In the Directive itself, it is instructive that both "State security" and "national security" are recognised as being distinct from "public security" and "defence". This may well suggest that "State security" and "national security" are wider than or distinguishable from both military matters and matters of interest to society generally.[9] Accordingly, it is at least arguable that international relations fall within "State security" and/or "national security". We consider that such an argument would be based in particular on the indivisibility of international relations, as an ongoing discourse between states in which co-operation and interaction in one field informs, and spills across into, other fields.[10]

---

6 See, for example, Article 1(5) of Directive 99/5/EC and Article 1(3) of Directive 97/66/EC, which both contain the same wording as the relevant part of Article 3(2) of the Directive.

7 See, for example, Article 20 of Regulation 45/2001, Article 3 of Directive 2001/31/EC and Article 14 of Directive 97/66/EC

8 Convention implementing the Schengen Agreement of 14 June 1985. Article 5(1)(d) refers to the fact "that the aliens shall not be considered to be a threat to public policy, national security or the international relations of any of the Contracting Parties".

9 In Case C-483/99 *Commission v France*, judgment of 4 June 2002, the Court of Justice held, in the context of Article 56EC, that "public security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society": paragraph 48.

10 Recent consideration given to the meaning of "national security" by the House of Lords in *Secretary of State for the Home Department v Rehman* [2001] 3 WLR 877 would not appear to assist this argument. However, that case concerned a statutory provision (section 3(5)(b) of the Immigration Act 1971) which referred not only to "national security", but also separately and expressly to "the relations between the United Kingdom and any other country". Therefore although their Lordships considered "national security" in section 3(5)(b) of the Immigration Act essentially to involve questions of physical threats to the integrity and stability of a country (including threats which arose due to attacks on another state), we do not consider that this more confined meaning would necessarily be applicable to the 1998 Act. Of course, since the 1998 Act implements the Directive, it is the meaning of "State security" and "national security" as a matter of Community law which is binding. In *Baker v Secretary of State for the Home Departments*, a decision of the Information Tribunal (National Security Appeals) of 1.10.01, the Information Tribunal made a number of general observations about the functions of the Security Service and concluded that not all of its statutory functions could be said to relate to national

32. Moreover, Article 9.2(a) of the Convention allows Contracting Parties to derogate from certain of its provisions where it is necessary in the interests of "protecting State security" (which is again distinguished from "public security"). Paragraph 55 of the Explanatory Report on the Convention notes that the:

> "notion of 'State security' should be understood in the traditional sense of protecting national sovereignty against internal or external threats, including the protection of international relations of the State".

The note at the beginning of the Explanatory Report indicates that:

> "this report does not constitute an instrument providing an authoritative interpretation of the text of the Convention, although it might be of such nature as to facilitate the understanding of the provisions contained therein"

However, we are instructed that in practice the Report is used as an aid to the construction of the Convention. It would appear therefore that an interpretation of "State security" to include international relations would be compatible with the Convention.

33. It is appropriate to consider the meaning of terms in the Directive having regard to their meaning in the Convention, since the Directive was in part intended to "give substance to and amplify" the rights and freedoms provided for in the Convention (recital 11). Moreover, it is potentially significant that Article 3.2 refers to "State security", mirroring the wording of Article 9.2(b) of the Convention, and not "national security" as is used in Article 13.1. Insofar as there is any difference between the two, this may specifically indicate that the Convention meaning should be adopted in relation to Article 3.2 of the Directive.

34. However, as a matter of principle, we cannot see that "national security" has a different meaning from "State security". In that respect, it would be possible to base any such exemption on either Article 3.1 or Article 13.1 of the Directive. As a result either the wide model of exemption contained in section 28 of the 1998 Act, or the narrower model of a section 29-type exemption could be used.

---

security (paras 45,46 and 113). Furthermore the Information Tribunal impliedly treated national security as a separate area from "foreign affairs" (para 76). However, the Information Tribunal was not expressly addressing itself to the meaning of "national security" within section 28 of the 1998 Act.

35. Article 3.2 explicitly excludes "State security" from the operation of the Directive "in any case", taking such matters wholly outside the scope of the Directive. In view of the more generous nature of section 28, and in view of the fact that such an exemption would necessarily only relate to the Government, we are of the view that an exemption based on Article 3.2 of the Directive would be more appropriate than one based on Article 13.1.

36. In summary therefore, we consider it to be at least arguable that an international relations exemption (mirroring either section 28 or 29) is permissible under Article 3.2 or 13.1 of the Directive respectively. However, that conclusion is subject to the general caveat – applicable to all of the additional exemptions which we have been asked to consider – that it would introduce an exemption which was not, as we understand our instructions, contained in the 1984 Act. This would therefore reduce the protection of rights and freedoms afforded to data subjects (albeit increase it for data controllers) in apparent conflict with recitals 9 and 10 to the Directive. Although, for the reasons set out above, we do not consider that the recitals constitute an absolute ban on introducing a new exemption, their terms do indicate that any potential amendments which have the result of reducing the degree of protection afforded should be considered with great care.

37. Whether an exemption is adopted on the basis of Article 3.2 or Article 13.1, we consider that it would have to be available only where necessary to safeguard the specified interests (as is already the case in sections 28 and 29 of the 1998 Act). The requirements of proportionality would be likely to necessitate a case-by-case analysis.

38. In addition, we are asked to consider whether separate consideration of the compliance of any exemption with Article 8 of the ECHR is required, beyond compliance with the Directive and the Convention. To put the question from a different perspective, is it always the case that the Directive will necessarily comply with Article 8 ECHR?[11]

39. The Directive will usually, but will not necessarily, comply with Article 8 ECHR. This is because the Directive could itself be challenged on the basis that it was contrary to fundamental rights which are a general principle of

[11] Paragraph 55 of the Explanatory Report notes that the second paragraph of Article 9 of the Convention "has been modelled after that of the second paragraphs of Articles 6, 8, 10 and 11 of the European Human Rights Convention".

Community law and which find expression in particular in the ECHR.[12] That said, it appears to us that any exemption for international relations would be likely to be justified under the national security (or, for some aspects of international relations, the public safety or economic well-being of the country or prevention of disorder[13]) derogations in Article 8(2) of the ECHR, so long as it were sufficiently clearly set out in law and applied on a case by case basis only where necessary and proportionate.

(b) Economic Well-Being

40. We are asked whether an exemption on grounds of economic well-being, comparable to section 29(1) of the FOI Act, would be compatible with the Convention, the Directive and the ECHR.

41. It would not be possible to base such an exemption on Article 3.2 of the Directive, since economic well-being is expressly restricted in that provision to matters also relating to State security. However, the terms of Article 9.2(a) of the Convention ("the monetary interests of the State") and of Article 13.1(e) of the Directive ("an important economic or financial interest of a Member State ... including monetary, budgetary or taxation matters"), both probably justify an economic well-being exemption in approximately those terms.[14] But, such an exemption should be restricted to "important" economic and financial interests, since this limitation is specifically contained in Article 13.1(e). We also consider that the drafting of any such exemption should make clear that it may only be relied on where and in so far as necessary to avoid prejudice to important economic and financial interests of the state. This will in practice require consideration on a case-by-case basis, but absent such a requirement the exemption would be contrary to the Directive, as Article 13 only allows exemptions "necessary" to safeguard the legitimate interest at issue. The exemption could be extended to important economic or financial interests of the EU, as provided for in Article 13.1(e) of the Directive.

42. An exemption in those terms would be very likely also to be justified under Article 8(2) of the ECHR. Article 8(2) expressly provides for interference in Article 8 rights where necessary in the interests of "the economic well-being of the country".

---

12 See, for example, Case 265/87 *Schrader v Hauptzollamt Gronau* [1989] ECR 2237 paras 13-14.

13 Cf *Autronic AG v Switzerland* (1990) 12 EHRR 485

14 Paragraph 56 of the Explanatory Report to the Convention notes that "'monetary interests of the State' covers all the different means of financing a State's policies".

(c) Section 29 Exemption: removal of "case by case" restriction

43. We do not consider that section 29 could lawfully be amended to introduce a "class exemption" applicable in all cases. Such an amended provision would:

(a) be contrary to Article 13.1 of the Directive which imports a general requirement that any exemptions should be necessary in the sense of being proportionate. Proportionality is, in any event, also a general principle of Community law,[15] which must be taken into account in interpreting the Directive and measures which implement it into domestic law; and

(b) fall foul of recitals 9 and 10 to the Directive, insofar as it would constitute a major reduction in the level of protection which existed under the 1984 Act.

(d) Additional subject access exemptions based on Article 13.1(g)

i. Disproportionate effort

44. We are asked to consider whether an exemption for disproportionate effort would be permitted under the terms of the Directive, in particular in relation to subject access requests.

45. It is our view that there is a tenable argument that such a disproportionate effort exemption is permissible under Article 13.1(g). However, it must be recognised that such an argument has significant weaknesses which could be raised against it. The argument would run as follows.

(a) There is in Community law a general requirement that legislation should be construed proportionately, especially where it provides for measures which impact detrimentally upon private citizens.

(b) The Directive imposes a single, general regime on all data controllers, be they eg small businessmen or central government departments.

(c) In the case of a small private enterprise, it is obvious that there must come a point at which data protection obligations could become so onerous that complying with those obligations impinges on the business's rights and

[15] See, for example, Case C-331/88 *R v MAFF, ex p. Fedesa* [1990] ECR I-4023, para 13. See also Article 5 EC.

freedoms. There must be a point at which compliance is disproportionate; at which the gain for the data subject is outweighed by the cost and effort required on the part of the data controller to provide the information sought.

(d) The Directive imposes a single regime on large and small, public and private alike. All data controllers should be treated alike. Indeed, it is very difficult to delineate exactly and in all circumstances where the line should be drawn between large and small and between public and private.

(e) Arguably, moreover, the rights of the public at large must fall within the expression the "rights of others",[16] and it might be said that the rights and interests of the general public include an interest that disproportionate burdens are not imposed upon central government (thereby consuming scarce public resources which could otherwise be used to promote the public interest in other ways).

46. As noted, however, there are a number of significant points which could be made against such an argument.

(a) It is questionable whether an exemption in these terms would be viewed by a court as "necessary" for the purposes of Article 13.1, at least insofar as it extends to central government.

(b) The necessity of such a measure is further called into question by the fact that many of the exemptions already provided for in Article 13.1, and indeed Article 3.2, are such that they could only ever apply to the government: for example, national security, defence, public security, prevention of crime and important economic interests of the State. In light of these detailed express provisions, it might be asked why should 13.1(g) be extended to cover the government as well?

(c) It is uncertain whether, as a matter of law, central government can constitute "others" within the meaning of Article 8(2) of the ECHR.

(d) The terms of Article 12 of the Directive, which provides for the right of access, make no provision for such a disproportionality exemption. It

[16] See eg the very wide meaning given to the phrase in *Ahmed v UK* (2000) 29 EHRR 1

states in terms that the right must be made available "without constraint ... and without excessive delay or expense".

(e) Such an exemption might, arguably, unjustifiably or disproportionately lessen the protection afforded to data subjects vis-à-vis the 1984 Act, contrary to recitals 9 and 10 to the Directive.

(f) Such an exemption would on occasion favour the disorganised, or those whose data handling systems were poor (since locating personal data would be more difficult for such persons), which would appear to be contrary to the intention if not also the letter of the Directive (although this is also an effect of the precise definition applicable in relation to manual data systems – the more efficient and effective they are, the more likely they are to be subject to control under the Directive).

47. In summary, therefore, an exemption for disproportionate effort would have to be drafted so as to demonstrate that it was necessary and proportionate, and so as to preclude the possibility of data controllers relying on their own inefficiency to justify a failure to comply with a subject access request.

48. In this regard, we would feel more confident if it were possible to point to existing examples of other Member States pursuing such a course. The only Member State comparator example with which we have been provided in relation to disproportionate effort is Austria, which requires the applicant for subject access to:

"co-operate in the information procedure to a reasonable extent to prevent an unwarranted and disproportionate effort of the Controller."

We consider that this provision does not, in any meaningful sense, go beyond sections 7(2) and (3) of the 1998 Act, and accordingly is not a true 'disproportionate effort exemption'. The lack of comparative evidence in this borderline and contentious area does not provide us with any comfort.

49. Nonetheless, overall it is our opinion that the argument in favour of a disproportionate effort exemption is reasonably strong with regard to small private undertakings, and that the argument with regard to central government is respectable, if more problematic.

ii. Formulation of government policy

02072192220

50. It is difficult to see how a general exemption for government policy, advice or submissions to Ministers or the like could fall within a permitted head under either Article 3.2 or 13.1 of the Directive. It is of course the case that any policy document which falls under "national security", "public security" or another permitted exemption would for that reason be exempt. However, of itself, the formation of government policy does not, in our view, fit into any of the specific exemptions already provided for the government or constitute the protection of the rights of others. A formulation of a government policy exemption along the lines of the fairly broad exemptions contained in sections 35 and 36 of the FOI Act would be much wider than could be justified to protect the comparatively weak rights and interests of others on which the government would need to rely.

51. On the other hand, it should be recalled that data subjects only have the right to personal data, and not to the document in which the individual pieces of personal datum are contained. Whilst, as noted above, the definition of personal data in section 1(1) of the 1998 Act does include "any indication of the intentions of the data controller or any other person in respect of the individual", there will be a point at which a reference to an individual, for example as a paradigm of a problem affecting a large group of people, will be too remote from the policy intention with regard to that large group of people as a whole for the intention to be "in respect of [that] individual".

iii. Back-up data

52. We are asked to consider whether a provision which exempted back-up data would be permissible under Article 13.1(g) of the Directive. In our view, by and large the same considerations and arguments apply to a back-up data exemption as apply to a disproportionate effort exemption. Arguably, the benefit to be gained by the data subject is outweighed by the burden imposed on data controllers, and in particular, on private data controllers. However, we do consider that it would probably be easier to delineate the limits of a back-up exemption for the purposes of legislation than of a disproportionate effort exemption, by virtue of the fact that it is by its nature a smaller field. In any event, we think any such legislative provision would have to make provision to permit a data subject to make representations as to why it is appropriate to provide back-up data in any particular case, so that some sensible balancing exercise comparing the interests of the data subject with the effort required by the data controller could be carried out.

53. This is another area in which it would be very useful to consider detailed comparative evidence from other EU states before any such exemption were drafted.

iv. Drafts

54. The question of whether an exemption for drafts is permissible under Article 13.1(g) is closely related to the permissibility of exemptions for disproportionate effort and back-up data considered above. In our view, the same considerations will apply with regard to the potential disproportionality of the burden of searching through such documents weighed against the possible benefit to the individual. In addition, it is worth noting that a single piece of information is only disclosable once, regardless of whether it is replicated a dozen times.

55. We also refer to the Joint Advice of 21 December 2001 by Philip Sales and Jason Coppel concerning section 33(4) of the 1998 Act for a discussion of some of the difficulties under the current legislation in relation to drafts of documents.

Notification

56. We are asked to advise as to the scope for making further exemptions from the notification obligations contained in Article 18 of the Directive. We are also asked to advise as to the manner in which any such exemptions could be structured.

57. We agree with our instructions that the exemption for manual processing operations provided for in section 17(2) of the 1998 Act is permissible in accordance with Article 18.5 of the Directive. Similarly, we agree that the exemption for core business purposes provided for in the Schedule to the Data Protection (Notification and Notification Fees) Regulations 2000 ("the Notification Regulations") would also appear to be permitted by Article 18.2 of the Directive.

58. There is certainly further scope under the Directive to provide for other categories of exemption from the requirement to notify. Accordingly, subject to defining proper categories of additional exemption from notification which were in accordance with Article 18.2 of and recital 49 to the Directive, we agree that the obstacles to reducing the regulatory burden imposed by notification are financial rather than legal.

59. However, we do consider that to exempt all processing operations which are carried out other than those involving sensitive personal data would be inappropriate and impermissibly wide. There will undoubtedly be some processing of personal data which are not sensitive personal data within the meaning of the 1998 Act, but which would nonetheless adversely affect the rights and freedoms of data subjects. One example of personal data which may on occasion be highly sensitive, but which are not defined as sensitive personal data in the 1998 Act (or as "special categories of data" in Article 8 of the Directive) is financial information.

60. Both Article 18.2 of the Directive and recital 49 specifically refer to categories of processing operations which are "unlikely ... to affect adversely the rights and freedoms of data subjects". Accordingly, this would be a more appropriate yardstick than "sensitive personal data". In addition, any such exemption would have to be drafted so as to ensure that the question of whether a particular processing operation would adversely affect a data subject's rights and freedoms was examined by reference to the circumstances of the case in question.

Conclusion

61. If we can assist further in any way, we should of course be delighted to do so.

Philip Sales

PHILIP SALES

pp Jemima Statford

JEMIMA STATFORD

2nd August 2002

DEPUTY PRIME MINISTER

OFFICE OF THE
DEPUTY PRIME MINISTER
26 Whitehall
London
SW1A 2WH

Tel: 020 7944 8623
Fax: 020 7944 8621

The Rt Hon Jack Straw MP
Secretary of State for Foreign
and Commonwealth Affairs
King Charles Street
London
SW1A 2AH

CS
cc: PM

29 November 2002

LORD ASHCROFT: DATA PROTECTION ACT

Thank you for copying me your minute of 14 November 2002 to the Lord Chancellor.

I strongly believe that it is essential for those Government Departments facing the threat of these proceedings to take a robust and consistent line in respect of how they treat paper records. I am therefore happy to confirm that my Office will be taking the same stance as you on this matter.

I am copying this reply to the Prime Minister, Derry Irvine, Gus Macdonald and Clare Short.

JOHN PRESCOTT

Website: www.odpm.gov.uk
Email: john.prescott@odpm.gsi.gov.uk

CS
cc JJM
AA
MR

The Rt Hon Lord Macdonald of Tradeston CBE
Minister for the Cabinet Office &
Chancellor of the Duchy of Lancaster

CABINET OFFICE
70 Whitehall
London
SW1A 2AS

Tel: **020 7276 1250**
Fax: **020 7276 1257**

The Rt Hon Jack Straw MP
Secretary of State for Foreign and Commonwealth Affairs
Foreign and Commonwealth Office
King Charles Street
London SW1A 2AH

21 November 2002

Dear Jack,

LORD ASHCROFT: DATA PROTECTION ACT

Thank you for copying to me your minute of 14 November 2002 to the Lord Chancellor in which you seek assurances from the Departments concerned that they will contest any proceedings that may be brought by Lord Ashcroft under the DPA.

I can confirm that should any such proceedings be brought against the Cabinet Office it is our intention to defend them. This is on the basis that we believe there are sound reasons for seeking to uphold our interpretation of the DPA. Our understanding, however, is that following the hearing on 18/19 November 2002 it seems clear that proceedings under the DPA, although issued against FCO and DFID, will not now be started against the Cabinet Office.

Copies of this letter go to the Prime Minister, Deputy Prime Minister, Lord Chancellor and Secretary of State for International Development.

Yours

Gus

GUS MACDONALD

Web site: www.cabinet-office.gov.uk
Email: gus.macdonald@cabinet-office.x.gsi.gov.uk

INVESTOR IN PEOPLE

DFID Department for International Development

1 Palace Street, London SW1E 5HE

From the Secretary of State

Telephone: 020 7023 0134
E-mail: c-short@dfid.gov.uk

CS
cc: CoS
PPS
DM
MR
AW
SV
AA

The Rt Hon Jack Straw MP
Secretary of State for Foreign
and Commonwealth Affairs
Foreign and Commonwealth Office
King Charles Street
London SW1A 2AH

21 November 2002

Dear Jack,

LORD ASHCROFT: DATA PROTECTION ACT

Thank you for copying to me your minute of 14 November to the Lord Chancellor. I am happy to provide the assurance you seek in paragraph 2 of your minute.

I am copying this letter to the Prime Minister, John Prescott, Gus Macdonald and Derry Irvine.

Yours

Clare

CLARE SHORT

Top: PSD(SV)
EU/PS
FA/ARS (MR)

DEPUTY PRIME MINISTER

OFFICE OF THE
DEPUTY PRIME MINISTER
26 Whitehall
London
SW1A 2WH

Tel: 020 7944 8623
Fax: 020 7944 8621

The Rt Hon Jack Straw MP
Secretary of State for
Foreign and Commonwealth Affairs
King Charles Street
London
SW1A 2AH

15 November 2002

EU DIRECTIVE ON THE RE-USE AND COMMERCIAL EXPLOITATION OF PUBLIC SECTOR DOCUMENTS

I have seen Stephen Timms' and Douglas Alexander's letter to you of 6 November seeking your agreement to the proposed UK negotiating line on this directive.

I am broadly content with the proposed approach, but wish to make a few comments:

- Firstly, on Point A (range of organisations and material to be covered by the Directive), care may need to be taken where accessibility regimes are in potential conflict. An example might be where the copyright for a piece of research, commissioned by HMG, is owned by another party, such as a university. In such a case, the Government would not have the power to make the research available (according to the provisions of Point A), though it would be covered by the general provisions of the Freedom of Information Act.

- Secondly, on Point B (compatibility with existing legislation) we should include the Data Protection as well as Freedom of Information legislation.

Finally, we should bear in mind the often complex relationship between the owners and the publishers of information posted to the Internet: for example where Internet Service Providers claim they are solely conduits of information and not owners, and where public information is hosted by commercial suppliers using apparently 'private sector' internet addresses.

I am copying this letter to the Prime Minister, members of EP, Lynda Clark and to Sir Stephen Wall and Sir Andrew Turnbull.

JOHN PRESCOTT

Website: www.odpm.gov.uk
Email: john.prescott@odpm.gsi.gov.uk

SKP 18/11/02

Clare
What is going on here?

V2

Top: PD (CS)
" COS
PPS
PD (SV)
PD (AA)
FA/APS (MR)
FA/APS (AW)
FA/PS

→ The advice from Treasury Counsel is that we will win this if Ashcroft takes us to Court on this. Ashcroft wrote to lots of deps and under the DPA was given reasons of material. The rules on paper files are very tight so our advice is there is no need to give him additional material. Clare Short is content with this approach and so are LCD although officials I don't know whether Denny is. I will keep an eye on this.

Clare.

FCS/02/217

LORD CHANCELLOR

Lord Ashcroft: Data Protection Act

1. Recent correspondence from Lord Ashcroft's solicitors, Davenport Lyons, makes it quite clear that he will serve legal proceedings on the FCO, Cabinet Office, DFID and the Office of the Deputy Prime Minister for breaches of the Data Protection Act if we maintain Whitehall's line that paper files are excluded from the scope of the Act. This arises from his complaints about our handling of his access requests under the DPA.

2. There are convincing arguments for maintaining the current position and I accept that on balance they override other considerations, such as the embarrassment that will be caused. As long as we all recognise this, I am content for the FCO to confirm to Davenport Lyons that we will contest any proceedings they may bring as long as Departments are acting in step and prepared to participate jointly in any court action. I would welcome early assurances from colleagues in the Departments concerned that they intend to proceed on similar lines.

3. We are in this position as a result of the wide range and scope of the access rights conferred by the Data Protection Act. I am reinforced in my belief that the Act requires amendment and do not consider relying on the courts to accept our interpretation of the Act to be an acceptable substitute.

4. I am copying this minute to the Prime Minister, John Prescott, Gus Macdonald and Clare Short.

(JACK STRAW)

Foreign and Commonwealth Office
14 November 2002

Home Office

Bob Ainsworth MP
PARLIAMENTARY UNDER SECRETARY OF STATE
50 Queen Anne's Gate, London SW1H 9AT

Lord Sainsbury of Turville
Parliamentary Under Secretary of State for Science and Inovation
Department of Trade and Industry
1 Victoria Street
London
SW1H 0E

7 November 2002

cc: JK. GN JR OJ NM EM

Dear David

Thank you for your letter of 23 September and 14 October about the review of s.24 of the Animals (Scientific Procedures) Act 1986 and animal rights extremism. We also discussed these issues on the train back from Blackpool recently. I have already replied to your points about animal rights extremism and will focus here on s.24.

I have noted your concern that repealing s.24 may create a legislative gap and might be interpreted as a lack of concern on the Government's part about the improper disclosure of information in this sensitive area. With this in mind, I took the opportunity provided at their recent forum in York to reassure certificate holders under the 1986 Act that, while we want the maximum freedom of information, the Government is fully committed to protecting individuals and their commercial and intellectual property. I also said that I want a genuine debate about the need for s.24 before making final decisions and this was well received. I will present a paper to MISC 13 setting out proposals designed to take this forward.

I am copying this letter to Yvette Cooper, Philip Hunt, Margaret Hodge, John Reid, Anne maguire, David Jamieson, Michael Meacher, Lewis Moonie, Barbara Roche and No. 10.

Bob

BOB AINSWORTH

FREEDOM OF INFORMATION : POLICY : PT5 : Annex 1

Proposed National Records + Archives Legislation

niceday by Guilbert

NAPM APPROVED RECYCLED

No.1810
No.1811
No.1811
No.1812
No.1812
No.1810
No.1811
No.1811

the national archives

Proposed National Records and Archives Legislation

Proposals to change the current legislative provision for records management and archives

Consultation paper

{Code No e.g CP 01/01– Arial 12 pt, underlined }

July 2003

A consultation produced by The National Archives

This information is also available on The National Archives website
www.nationalarchives.gov.uk

Contents

Page

INTRODUCTION ---- 4

HOW TO RESPOND ---- 9

EXECUTIVE SUMMARY ---- 10

ANNEX TO EXECUTIVE SUMMARY: SUMMARY OF PROPOSALS AND BENEFITS ---- 13

SECTION ONE: BACKGROUND – ISSUES COVERED IN THE CONSULTATION PAPER ---- 18

SECTION TWO: RECORDS MANAGEMENT AND DIGITAL RECORDS IN CENTRAL GOVERNMENT ---- 21

SECTION THREE: PROPOSALS FOR RECORDS MANAGEMENT IN CENTRAL GOVERNMENT ---- 32

SECTION FOUR: RECORDS MANAGEMENT AT REGIONAL AND LOCAL LEVELS ---- 39

SECTION FIVE: PROPOSALS FOR RECORDS MANAGEMENT AT LOCAL AND REGIONAL LEVEL ---- 46

SECTION SIX: DEALING WITH ARCHIVES SERVICES AT REGIONAL AND LOCAL LEVELS 49

SECTION SEVEN: PROPOSALS FOR ARCHIVES SERVICES AT LOCAL LEVEL ---- 57

SECTION EIGHT: OTHER ISSUES ---- 60

ANNEX 1, SUMMARY OF QUESTIONS ---- 66

ANNEX 2, LIST OF CONSULTEES ---- 69

ANNEX 3, PARTIAL REGULATORY IMPACT ASSESSMENT ---- 71

ANNEX 4, CONSULTATION CO-ORDINATOR ---- 80

INTRODUCTION

When the Public Records Act was passed in 1958, records and archives were not widely used as a resource by the community and their importance to a wide-cross section of society was not as apparent as it is today. Most government records were on paper and the impact which computerisation would have on record keeping and access to archives was not foreseen. In the late 1950s research using archives was mostly done by academic historians, and very few twentieth century records were available. Since then, the sheer volume of government records has increased enormously. It is now commonplace for schoolchildren, students, retired people and others, as well as academics, to use archives as material for a wide range of subjects. In recent years the National Archives and the wider archive sector have seized the opportunities offered by technological change to supply archival material online to a very wide range of professional, educational and leisure users, including lifelong learners as well as academic researchers.

The most important factor behind the growing use of archives since the 1958 Act has been their use by family historians. Today, over 70% of all archive users in the UK are finding out about their ancestors. The popularity of family history seemed to have peaked by the mid-1990s. However, new online services have encouraged even more growth in use. People throughout the UK, and in many cases worldwide, can now obtain at least some information about their family's history without ever having to visit the National Archives or another record office. An interest in family history also often leads to research in related topics in local, social, transport and military history. There is abundant evidence, supported by opinion surveys, and the popularity of TV programmes using archives, that many people have a developed sense of historical curiosity, which can now be satisfied through easier access to archival sources.

The importance of records as evidence of government activity is much more widely appreciated today. The publicity generated by the flow of releases of previously confidential government records is the most obvious example of this. Records provide citizens with the means not only of holding the government to account for its conduct but also, in many cases, of safeguarding their individual rights. New legislation on data protection and freedom of information gives citizens the right to see information and records on a wide variety of subjects. These records, and easier access to them, enable us to meet the reasonable expectation of a democratic society that government should be accountable for its actions.

There are many competing claims on the government's finances, and all government bodies must show that they are achieving value for money for the taxpayer. This includes the National Archives, regional and local archives, and records managers throughout the public sector, who must all demonstrate that they are making the best possible use of public funds. In practical terms, this means that there should be effective record keeping, that the business benefits of this should be maximised, and that those records of most historical value to present and future generations should be kept and treasured.

As many as 95% of records produced are destroyed as a matter of course. This is partly because resources are limited, and there are practical constraints on what can be kept, but largely because this material is needed for short term operational purposes only and has no enduring value. It is essential that decisions as to which records to keep and which to destroy should be made with proper openness and accountability so that citizens can find out not only what records have been kept but also which have been destroyed, when, and why. At the same time, the basis for all records selection policy has to include the recognition that decisions to preserve records carry with them significant long-term costs as well as benefits.

Records and archives make a valuable contribution to the Government's important policy objectives, including modernisation of public services, open and accountable government, education and social inclusion. They help enable all public sector bodies to meet new and demanding standards for corporate governance, and are essential underpinning to meeting many auditing requirements and validating performance in many important areas of work. This is not just a question of records of central government, but of records of key actions taken by all public authorities, at central, regional and local levels.

This public consultation on records and archives follows from publication by the Lord Chancellor, in December 1999, of the *Government Policy on Archives* (Cm 4516), followed up in 2002 with the *Government Policy on Archives Action Plan* which set out how the policy was to be implemented. In his introduction to the policy, the Lord Chancellor referred to the ' unique and irreplaceable archives of enduring historical value, which collectively represent the foundation collections of the English speaking world. This documentary heritage is an important, but often underrated, cultural asset for us all to share.'

It was because the nature of records and archives, as well as the social, political and business contexts in which they are used, had changed so radically since the 1950s,

as described above, that the government thought it essential and timely to carry out a thorough review of existing archival legislation. The broad conclusion of this review is that new legislation is likely to be necessary in order that:

- Citizens are able to exercise their rights under other legislation, and obtain quickly, efficiently, and economically the information they seek from public authorities and archive services.

- Archive users experience no significant gaps or discontinuities in the national archival record as a result of the emergence of digital formats as the main records medium

- Archive users benefit from a comprehensive national network of public archives covering central, regional and local government

- Government departments and local and regional authorities have a sound legislative framework for their records management activity, which enables them to deliver major business benefits and to comply with Freedom of Information, Data Protection and other legislative requirements

- The authenticity of digital records is not open to any doubt, and cannot be challenged as a source of legal evidence in the courts

- The National Archives can deliver the full benefits of the coming together of the Public Record Office and the Historical Manuscripts Commission to form a single organisation in April 2003

The time is right for public consultation on record keeping and archiving in the public sector, to seek views on whether the present situation can continue or whether change is needed. If the latter, then we need to decide how that change can be achieved. It seems likely that, given the range and the importance of the issues involved, this would require primary legislation.

A specific, major force for change is the serious question about our ability, under present legislation, to deal adequately with the very great amounts of digital records now being created, including e-mails, and to provide adequately for their long-term preservation in a demonstrably authentic and reliable form. It is these concerns which add urgency to the need to look at the whole question of records and archives, because the use of digital records is now universal, and if there are real concerns

about them, they need to be dealt with now. Taken together with more general concerns about the increasing complexity and new, high risk levels in records management in the information age, then the importance and the timeliness of this consultation becomes very clear.

There is evidence to support the view that present arrangements are not working properly and need to be changed. Recent independent research has shown up real deficiencies in the provision for and practice of record keeping, management and archiving in the public sector, and these are cited in the consultation document. If the evidence is judged sound, the matters it highlights require urgent attention. This might best be driven from the basis of a strengthened legislative framework.

New legislation would replace current legislation, notably the Public Records Acts of 1958 and 1967 and perhaps the Local Government (Records) Act of 1962 and those parts of the Local Government Act of 1972 which bear on records and archives. This consultation considers extending a consistent provision for records management across the main levels of government, that is to say central, regional and local authorities. While aimed at all types of records, not solely at digital material, any new provision would ensure that the needs of managing and archiving digital material were fully met.

The consultation will cover England and Wales, and relevant organisations and issues which are the responsibility of the UK government. It does not apply to the devolved administrations in Scotland and Northern Ireland, each of which makes its own legislative provision for records and archives. Wales has the capability, under the Government of Wales Act 1998, to make its own provisions. Should the National Assembly for Wales decide to do so, the proposals would cease to apply to Wales. Where the consultation refers to local and regional government, this is limited to such organisations within England and Wales.

The consultation is aimed at users and user groups involved in the business of records management and archiving in the public sector; all those who make use of public sector records and archives, whether for business, recreational or educational purposes; those bodies whose records would be included within the scope of such legislation; and professionals, and organisations, active in records management and archiving.

This consultation is being conducted in line with the Code of Practice on Written Consultation issued by the Cabinet Office. It falls within the scope of the Code. The Code criteria set out in Annex 4 have been followed.

An initial impact assessment indicates that central and local government is likely to be particularly affected. The proposals are not expected to lead to additional costs or savings for businesses, charities or the voluntary sector. A partial Regulatory Impact Assessment is attached at Annex 3.

HOW TO RESPOND

You will find a questionnaire attached to this document as Annex 1. Please complete the questionnaire and send it by post to :

Tom Parkinson
Information Management and Legislation Unit
The National Archives
Kew
Richmond
Surrey TW9 4DU
Or by fax to Tom Parkinson at:
020 8392 5283

If you are reading the consultation document on our website you can send us your response in either of the following ways:

- You can complete the on-line questionnaire and email it directly to us, or
- you can download the questionnaire and send it as a WORD attachment to this address: **consultation@nationalarchives.gov.uk**

The period of consultation will last twelve weeks, closing on <?> October 2003.

If you are sending comments on behalf of a group please give a summary of the people and organisations you represent when you respond.

The National Archives will publish a response to this consultation document in due course. **Please ensure your response is marked clearly if you wish your response to be kept confidential or if you do not wish to be identified as a respondent.** However, the substance of confidential responses will be included in any summary of comments received.

Further copies of this consultation paper can be obtained from **Tom Parkinson** at the above address or by phoning 020-8392 5330 extension 2423. The paper is available also on the National Archives website www.nationalarchives.gov.uk

EXECUTIVE SUMMARY

Good record keeping and management go hand in hand with the practice of keeping archives, which are the nation's memory. Today's records are tomorrow's archives, the ' unique and irreplaceable archives of enduring historical value, which collectively represent the foundation collections of the English speaking world' .[1] Archives services are very widely used, for academic research, education, pursuit of family history, business, legal and other purposes. Good record keeping is also an essential component of policy making, efficiency, accountability and transparency in government, local and central. Bad record keeping and lost information can lead to poor performance and, at worst, to disruptive crises and scandals.

Yet the legislation which controls record keeping and archives services in this country is old and inconsistent. It takes no account of the crucial development in the past two decades of the now universal use of digital records, including e-mails. Nor does it take account of the huge increases in the volume and complexity of information and records and the wide market the digital revolution has created for electronic access to information, particularly via the internet. Current legislation does not enable the necessary clarity as to what good record keeping is and how to achieve it. It applies different requirements to different parts of government. Broadly, there is far less of a framework for regional and local tiers of government to have good record keeping than central. Even the provision for central government is, in many ways, weak and outdated.

Huge, and growing, amounts of important digital records are at risk because the means to preserve them are not well understood, and many public sector organisations are not taking steps to provide for them. But information is becoming an increasingly important and valuable resource, and we need to provide properly for it in the public sector.

The purpose of this consultation paper is to canvass opinion from all in the United Kingdom who have an interest in the process of keeping and managing records in the public sector, their creation, use, and disposal. This covers both that small percentage which will eventually become archives, to be kept and treasured, and the 95% or more which are destined, once their usefulness is over, for destruction.

Responses to the proposals are needed, certainly, from the many professionals – civil servants, local government officials, elected members and politicians – whose

[1] From the Lord Chancellor's Foreword to *Government Policy on Archives* (Cm 4516), 1999

work rests on having good records and information, and who use records to help them to meet high standards of business efficiency, service delivery and corporate governance. But also, and just as important, responses are needed from the many citizens who use services from central and local government which depend on the creation, keeping, management and accessing of good records. They are needed also from those large numbers of citizens who use the many archives offices and services, all across the country.

This consultation sets out proposals to renew and update existing legislation, especially the Public Records Act of 1958, the Local Government (Records) Act 1962 and parts of the Local Government Act 1972, through a new records and archives Act. It presents a range of options, from minimal change, offering some important benefits but applying them fairly narrowly to central government organisations, through to more wide-ranging proposals, which would require substantial change and innovation to implement, but would bring wide-ranging and valuable benefits to all concerned. The proposals are set out in detail in the body of the consultation document, with supporting information about them and why they are needed.

The main issues are:

- Whether there is a need to change, or benefit in changing the Public Records Act 1958, to remedy perceived deficiencies with regard to managing, preserving and authenticating digital records in central government.
- Whether there are benefits to central government and to citizens in making a firmer legislative basis for the management of its records, including powers for a nominated authority to issue guidance and standards, and for those to be regulated.
- Whether, if such a framework were created, it could beneficially be applied on a wider basis, to cover records of regional and local public authorities where, at present, there is weaker provision than for those of central government. The creation of a new tier of regional assemblies is a particular issue, as these bodies will have some of the characteristics of both central and local government and may need special arrangements for their records.
- Whether there would be sufficient benefit, in terms of higher standards and improved services to users, to justify making statutory provision for archives service at local level.

- Other issues, including whether provision should be made to consolidate the bringing together of the Public Record Office and the Historical Manuscripts Commission as the National Archives.

The options are set out in clear sections, starting with the 'minimum change' option and moving on to the most far-reaching. There is a series of questions to guide responses on each topic. Responses are sought from the widest possible number of sources. They may cover any, or all, of the questions asked, and every comment, whatever its source, will be carefully considered before final proposals are drafted for the relevant Ministers to approve before any steps are taken to legislate.

To help you to find sections of the consultation paper that are of most interest to you, there is a table annexed to this executive summary. It sets out the main issues, and where you will find the relevant text and questions.

ANNEX TO EXECUTIVE SUMMARY: SUMMARY OF PROPOSALS AND BENEFITS

The table below sets out, in summary form, the main proposals set out in sections 3, 5, 7 and 8, the reasons for making them, and the benefits they are expected to bring.

What is the proposal?	Why is it needed?	Who will it benefit?	Which parts apply?
Records management and digital records in central government			
A new duty to create and keep records in accordance with agreed standards, to be set by the Lord Chancellor acting on the advice of the National Archivist, following prior consultation of those to be affected. The standards would be supported by guidance issued by the National Archivist	To meet the need for accurate, comprehensive public sector records; good business practice, risk management, accountability, transparency, and compliance with Data Protection and Freedom of Information legislation. To help those subject to the legislation to attain the standards set for records management.	Central government departments, government organisations and others, broadly those currently subject to the Public Records Acts. All users of the records of central government, whether for business, government, audit, personal or leisure purposes.	Section 2 for background; section 3, para 3.3
A new power to monitor and regulate compliance with the standards, probably resting with an external or independent authority	To ensure that specified requirements are accountably and consistently applied by those subject to the legislation, and that users and others can be assured that this is being done.	As above	Section 2 for background; section 3, para 3.3, 3.4
Provision to ensure that records created in digital formats and their	To manage the significant risks created by widespread use of digital records and	As above	Section 2 for background; section

What is the proposal?	Why is it needed?	Who will it benefit?	Which parts apply?
technological successors, and subsequently stored, managed and accessed using such technology, are records within the meaning of the legislation.	the need to provide for their long-term preservation, but also to 'future-proof' any new legislative provision so far as is possible.		3, paras 3.8, 3.9
Provision for standards and guidance adequate to ensure in particular the long-term preservation of digital material, its safekeeping and authenticity	To help those responsible for the care of digital records to do so effectively, in an accountable way. To ensure that digital records are preserved for future generations of users.	As above	Section 2 for background; section 3, paras 3.8, 3.9
Records management at regional and local levels			
Extension of the new duty to create and keep records in accordance with agreed standards to regional and local levels of government, including, as appropriate, new regional assemblies. The standards would be set by the Lord Chancellor, acting on the advice of the National Archivist, and subject to prior consultation, and would be supported by guidance issued by the National Archivist.	To ensure that the need for accurate, comprehensive public sector records is applied more broadly across the public sector, to achieve across this wider field the same benefits of; good business practice, risk management, accountability, transparency, ensuring compliance with Data Protection and Freedom of Information legislation. To ensure consistency of advice and guidance on record keeping, across the wider public sector and to help those	Regional and local government organisations, the exact scope to be defined following public consultation. All users of these records, whether for business, government, audit, personal or leisure purposes.	Section 4 for background; section 5, para 5.3, 5.4, 5.5, 5.6, 5.9

What is the proposal?	Why is it needed?	Who will it benefit?	Which parts apply?
	subject to the legislation to attain the standards set for records management.		
Extension to the wider public sector, on similar terms of the proposed power to monitor and regulate compliance with the standards set and guidance issued, probably resting with an external or independent authority (NB this authority may be a different one for different tiers of government)	To ensure that specified requirements are accountably and consistently applied by those subject to the legislation, and that users and others can be assured that this is being done	As above	Section 4 for background; section 5, para 5.8
Archives services at regional and local levels			
A new statutory duty for principal local authorities (subject to precise definition) to provide archives services, working if desired flexibly and in cooperation with others to achieve this.	To ensure consistent provision of archives services and to ensure similar levels of service to users through public access and other means	All those who provide such services, or who use them, for business, government, or personal and leisure purposes	Section 6 for background; section 7, paras 7.1, 7.2, 7.3
Extension, on the same terms as for records management provision, set out above, of the proposed powers to set standards, to cover provision of	To ensure consistency across the local authorities concerned, and provide a clear, accountable, transparent framework for compliance with the	All those who provide such services, or who use them, for business, government, audit, personal or leisure purposes	Section 6 for background; section 7, paras 7.1, 7.2, 7.3

What is the proposal?	Why is it needed?	Who will it benefit?	Which parts apply?
archives services at local levels, and to issue guidance and advice in support of those standards	requirement to provide archives services; to help those subject to the legislation and give them a say in the standards set; to make clear to users what the relevant standards are to define what is expected in terms of the nature and quality of archives services, and to support their efforts to meet the standards	leisure purposes	7.3
Extension, possibly in a modified form, of the proposed power to monitor and regulate compliance with the standards set and guidance issued, for the provision of local archives services to the agreed standards (NB this may be achieved for archives services by a different means, perhaps relying more on self-regulation or voluntary compliance)	To ensure delivery, at an appropriate and accountable level, of local archives services by those subject to the legislation, and that users and others can be assured that this is being achieved	As above	Section 6 for background; section 7, paras 7.1, 7.2, 7.3
Other issues			
Issues relating to the joining of the Historical Manuscripts Commission and the Public Record Office as the National Archives	To note that legislative provision for the administrative arrangements for the amalgamation of these two organisations may be sought.	Those responsible for the operation of the National Archives and users of the services it delivers	Section 8, paras 8.1, 8.2, 8.3

What is the proposal?	Why is it needed?	Who will it benefit?	Which parts apply?
National Archives	organisations may be sought.		
To consider issues to carry over from the current legislation, e.g provision for places of deposit outside the National Archives, where central government may be kept and for transmission of records to Scotland or Northern Ireland in certain circumstances	To ensure that no valuable provisions in current legislation are lost as a result of any changes.	As above	Section 8, paras 8.4, 8.5, 8.6
Other minor additional provisions, e.g. enabling the National Archivist to give grants to specific projects and providing for the setting of criteria for retention by government departments of records over 30 years old	To ensure that a range of lesser, but worthwhile, issues are not overlooked	As above	Section 8, para 8.7

SECTION ONE: BACKGROUND – ISSUES COVERED IN THE CONSULTATION PAPER

1.1. This consultation paper concerns a proposal to make new legislative provision for records and their management, and for archives, in central, regional and local government, and in other public sector bodies subject to the Public Records Act. It is set out in such a way as to cover:

- The issues for records management, digital records and archives for central government (that is, broadly, organisations subject at present to the Public Records Acts) (**Sections Two and Three**).

- The same issues of records management and digital records as they apply to local and regional tiers of government – at present covered, though to different degrees, by local government legislation (**Sections Four and Five**).

- The related issue of provision of archives services at regional and local levels (**Sections Six and Seven**).

- Other issues, including provision for the amalgamation of the Historical Manuscripts Commission and the Public Record Office to form the National Archives, and matters covered in present legislation which it would be important to retain in new legislation (**Section Eight**).

1.2. If, following this consultation, any legislative changes are judged necessary, there remains the question of how to achieve them. Depending on the nature and scope of change required, it may be possible to bring it about under section 8 of the Electronic Communications Act 2000, or an order under the Regulatory Reform Act of 2001. Other changes might be possible only by means of a new Act. The decision as to which route – or routes – to follow can only be made finally when proposals for change are being drafted following this consultation.

1.3. Since the publication of the *Modernising Government* White Paper in 1999, there has been a strong emphasis on the development of information management and information technology as means to achieving policy objectives, especially in the fields of service delivery for the citizen, education and business efficiency. Government has also introduced new information legislation – the Data Protection Act of 1998 and the Freedom of Information Act of 2000 – which protect personal data and give the citizen a right of access to official information.

1.4 The benefits of *Modernising Government* and of the new information legislation cannot be achieved in full without ensuring that records management policy and practice in the public sector are up to the mark. The importance of the issue was recognised when provision was made, under section 46 of the Freedom of Information Act, for the Lord Chancellor to issue a code of practice on records management. This code was issued in November 2002 and is available on http://www.lcd.gov.uk/foi/codemanrec.htm (the Department for Constitutional Affairs website) and http://www.pro.gov.uk/recordsmanagement/foicode.htm (the National Archives website).

1.5. Records management and archives are two sides of the same coin and should be treated together. The Lord Chancellor recognised this in his Foreword to the *Government Policy on Archives* (Cm 4516), issued in December 1999, when he wrote:

> ' Archive services have both administrative and cultural functions. The vast quantity of records which is now produced by large organisations in many formats needs to be managed under the guidance of qualified archivists and records managers. Effective records management is essential to good governance and, of course, to making records accessible to the public. The sector also has in its custody many unique and irreplaceable archives of enduring historical value, which collectively represent the foundation collections of the English speaking world. This documentary heritage is an important, but often underrated, cultural asset for us all to share.'

1.6. In addition to emphasising this unique combination of cultural, heritage, administrative and business factors, the *Government Policy on Archives* also recognises that archives make a direct contribution to some of the Government's important policy objectives, including modernisation of public services, open and accountable government, education, social inclusion, economic regeneration and regionalism. Any move towards legislative change should further these policy objectives.

1.7. This consultation sets out a progressive series of possible areas for change, starting with central government records and moving on to those of local and regional authorities. This is not to imply that the former matter more than the latter. Given the importance of all public sector records and archives, it is perhaps surprising that the legislative provision that exists to make sure that organisations in the public sector treat their business records with the care they deserve is a patchwork. Provisions for

different sectors differ widely in the requirements they impose. Broadly, there is more provision for the records of central government than for authorities locally or in the regions. To the extent that central government deals, by definition, with matters of national and international significance, this may seem appropriate. Yet other public sector organisations also deal with issues that are of crucial concern to the citizen, and involve expenditure of significant quantities of public funds. Many of them will also, in due course, be of great historical significance. Whether at central, regional or local level, there is no provision for consistent standards to be applied to record keeping, no provision to record what records are created, nor which are destroyed, even in the most general terms. Yet there are many requirements on public authorities which, if they are to be met, demand the highest professional standards of record keeping. The proposals in this consultation seek to square that circle.

SECTION TWO: RECORDS MANAGEMENT AND DIGITAL RECORDS IN CENTRAL GOVERNMENT

THE ISSUES

2.1. Good business practice demands that all organisations should keep proper records, so that the right evidence and information are available to the right people at the right time. The effort this demands is repaid with real business benefit in improved efficiency and accountability, as well as in improved service delivery. The dangers of not having good records management lie in loss of important material, or the inability to find records which do exist, when needed. They lie also in prevalent poor practice, such as using 'post-it' notes for important additions to documents, or failing to file important e-mails or even to regard them as part of the official record.

2.2. The extent to which records management is linked to business efficiency is demonstrated most dramatically by the recurrence of examples of record keeping failures in recent highly publicised problem cases. Failure to keep adequate records has been noted as an issue by the former Parliamentary Ombudsman, Sir Michael Buckley, who drew several instances to the attention of the Select Committee on Public Administration: 'The Immigration and Nationality Directorate (IND) has an appalling record in losing files and failing to associate them. We have had quite a few difficulties with the Benefits Agency, not because they lose records but because frequently their records did not happen in the first place.'[2] Not only do these failures reduce the capacity of the organisation to conduct its business, they have a direct and potentially damaging impact on those who depend on its services.

2.3. The public sector needs a legislative framework which will assure the accuracy and comprehensiveness of the records it makes. Keeping records that can serve as evidence of an organisation's policies, procedures, actions and decisions, and associated matters of governance, accountability and propriety, cannot be left to chance. In addition to this general need, new legislation – notably the Data Protection Act of 1998 and the Freedom of Information Act 2000 – links a need for proper management of records with proper ability to comply with the Acts. The Public Records Act 1958 imposes some requirements regarding records management, but these fall short of the sort of records management requirement that is now common in western nations. Examples are the framework established in recent Australian

[2] Third Report of the Select Committee on Public Administration, HC 448 (on the role of the Ombudsman), see www.publications.parliament.uk/pa/cm200203/cmselect/cmpubadm/448/44802.htm

state legislation, and which is intended in New Zealand[3]. Another example is the 1995 Archiefwet (Archives Act) in the Netherlands[4].

2.4. This section of the consultation paper is looking at the central government requirement. The case for a stronger records management regime can be made across other parts of the public sector, and this is covered in *sections four and five.*

2.5. One aspect of records management stands out at present. This is the particular issues raised by the management and preservation of digital records and how to provide for their specific characteristics and requirements in a legislative framework.

[NB This consultation paper normally uses the term 'digital' in preference to 'electronic' throughout. The word 'electronic' is still widely used throughout government, for example as the basis of the common expression 'e-government'. It is particularly prevalent in slightly older documents, to denote digital material. For most practical purposes to do with this consultation, the terms are interchangeable.]

2.6. It is important to stress that new legislation would not necessarily – and indeed would preferably not – make provision for digital records separate from that for other types of record, the more traditional formats of paper documents, parchment etc as well as more recent formats such as audio and video tape, film, etc. All need to be catered for. Where digital records are separated out in this consultation, this is only in order to be clear about what their special features and needs are, and whether any additional or particular kind of provision may need to be made for them in legislation. Only when this has been resolved can the issue of how to make this provision be addressed[5].

CURRENT STATUS OF RECORDS MANAGEMENT IN CENTRAL GOVERNMENT

The Public Records Acts of 1958 and 1967 and records management

2.7. The most detailed provision for managing records in the public sector is the Public Records Act of 1958 (PRA 1958). The term 'public records' has the specialised meaning of a record subject to the Act, while section 10(1) expresses the

---

[3] See http://www.archives.govt.nz/statutory_regulatory/about_frame.html for New Zealand proposals. For typical Australian state legislation see, for New South Wales, http://www.records.nsw.gov.au/ under the *About State Records* pages and, for Western Australia, http://www.sro.wa.gov.au/about/sra2000.html

[4] See http://www.en.nationaalarchief.nl/archiefbeheer/archiefzorg/archiefwet/

[5] The Legal Deposit Libraries Bill, introduced in the House of Commons on 11 December 2002, acknowledged that digital material needs express provision in law, distinct from the provision made for printed material, and set out to make separate but parallel arrangements, with matters of detail left to secondary legislation.

intention not to be exclusive by stating that 'records' includes not only written records but 'records conveying information by any other means whatsoever'. In addition, the Act defines 'public record', through Schedule 1, in terms of records of, or held by, government (Schedule 1, 2(1)), and goes on to say:

> ... the administrative and departmental records of bodies and establishments set out in the Table at the end of this paragraph shall be public records, whether or not they are records belonging to Her Majesty. (Schedule 1, 2(3)1)

2.8. The PRA 1958 says very little about what is required in terms of creating and managing public records, other than those which have been selected for permanent preservation and deposited at the Public Record Office in the custody of the Keeper of Public Records. This reflects a time when there were fewer pressures in terms of requirements for accountability and governance and also less information and fewer records to be dealt with. Records management now is a much more developed science, as it needs to be to cope with hugely increased volumes, and greater complexity of material, with administrative, accountability and governance requirements, and with the new disciplines of managing electronic records. In proposing new records management regimes, through legislation, we are able to draw on and benefit from a substantial body of experience from a number of states, ranging from the United States of America to South Africa, Australia and New Zealand. The complexity of modern records management needs is supported by a much greater body of research, knowledge and practical experience than was the case when the PRAs were drafted.

Scope and application of the Public Records Acts

2.9 The PRAs apply only – broadly speaking - to the records of central government, the courts, the armed services and the National Health Service. Bodies can be brought within the scope of PRA 1958 by Order in Council under paragraphs 3A[6] and 7(1) of Schedule 1. Paragraph 7(2) of that Schedule gives to the Lord Chancellor the power to resolve questions as to whether specific records are public records, and to compile and publish revisions to the list of public record bodies set out in the Schedule.

[6] Paragraph 3A was introduced by Schedule 5, Part I, paragraph 4 to the Freedom of Information Act 2000.

2.10. Under the PRA 1958, until 1967, deposit was expected to take place by the time selected records were 30 years old (section 3(4)) but access was not normally required until fifty years had passed (section 5(1)). The Public Records Act of 1967 was a very short Act, and its only provision was to amend section 5(1) of the 1958 Act to reduce the access time period from 50 to 30 years – the 'thirty year rule' which still applies generally and will not disappear entirely from access provisions under FOIA, to the extent that some of the exemptions cannot be claimed after 30 years. The obligation to transfer records by the 30 year point remained unchanged. There is nothing to stop transfer or access taking place sooner than 30 years and the Open Government Code of 1997 already encourages earlier access where possible, in order to improve accessibility of public records and information to the citizen.

Shortcomings of the Public Records Acts for records management

2.11. Section 3(1) of the PRA 1958 puts a duty on 'every person responsible for public records of any description which are not in the Public Record Office or a place of deposit' to:

> ....make arrangements for the selection of those records which ought to be permanently preserved and for their safe-keeping.

2.12. Section 3(2) of the PRA 1958 says:

> Every person shall perform his duties under this section under the guidance of the Keeper of Public Records and the said Keeper shall be responsible for co-ordinating and supervising all action taken under this section.

2.13. Only, at most, 5% of all public records created are selected for permanent preservation under the provision of sections 3(2) and 3(3). Included in the 5% are the most important records, for example, Cabinet minutes, policy documents etc – records that the department and the National Archives have, in consultation with the research community and members of the public, determined are worthy of permanent preservation[7]. Excluded are much routine and minor subject matter, and the personal records of civil servants. This 95% of the total is destroyed, much of it after only five

[7] The research community and members of the public participate in this decision-making process by commenting on policy proposals. The overall framework is provided by an Acquisition Policy, issued in 1999 following extensive public consultation. This Policy is supported by Operational Selection Policies relating to particular departments or functions, similarly issued following public consultation.

years or so, or as soon as it has ceased to have a business use, most of the rest before the 30 year point. None of it passes to the National Archives for safekeeping.

2.14. Section 3(6) of the PRA 1958 says:

> Public Records which, following the arrangements made in pursuance of this section, have been rejected as not required for permanent preservation shall be destroyed or, subject, in the case of records for which some person other than the Lord Chancellor is responsible, to the approval of the Lord Chancellor, disposed of in any other way.

2.15. The overall result of sections 3(2), 3(3) and 3(6) is curious. The Act requires departments to take proper actions in regard to records which will be selected for permanent preservation. This important decision, though, will rarely be made in the first few years of the record's life, and in a significant proportion of cases not until closer to the thirty year point. This begs the question of what provision should be made to care for, or note the existence of, the vast majority of records created – the 95% - in the interim period. At best there may be an implication that those responsible should take such steps as are necessary to care for all records in their care until the outcome of selection is known. But - remembering that the vast majority are not selected to be preserved - to leave this to implication seems unsatisfactory and, indeed, risky.

2.16. Similarly, section 4 (5) of the Act gives the Keeper of Public Records (or, in the case of records transferred to some other place of deposit, another appointed person) 'custody' of records which have been transferred to the National Archives, or a place of deposit, at the age, generally, of 30 years. There is no provision within the Act (even for the 5% of records which will be permanently preserved) that someone should have the same 'custody' responsibilities for the first 30 years of the records' life. This is despite the fact that the great majority of records are destroyed in this period, so the risks of loss of important material are great. The only specific provision in the PRA 1958 which affects the unselected 95% is the power to destroy them if they are not selected for permanent preservation. This also seems to be leaving a lot to chance as to their handling during their life, and it leaves those responsible without any obligation to record what it is they are destroying. There is no statutory obligation on those responsible for public records, either to record accurately what categories of records were created, or to note which have been destroyed and when.

General background

2.17 The PRA 1958 was enacted after the invention of computers but many years before they came into general use as an office tool. Computers are now widely - almost universally - used for the creation, management, transmission and storage of documents. The PRA 1958 also predates, or at best is contemporary with, the general use of other technology – photocopiers, fax machines – which themselves came into widespread use before the adoption of computer-based office technology. Since 1958, the government environment has changed radically in other ways. Public accountability is much higher on the agenda. Citizens also now have, or will have, a right of access to a wide range of information, and rights to personal privacy, and these are as set out in the Data Protection Act of 1998 and the Freedom of Information Act of 2000.

2.18 The result of these changes is that there is now hugely more information held in the public sector and that it is potentially much easier to access it, using the internet and other forms of electronic transmission. This is reflected in current government policy, making e-government a high priority and encouraging and requiring government bodies to adopt new technology in all aspects of their work. It is bringing great public benefit , for example the information and services offered to the citizen via the government website, www.ukonline.gov.uk, or the ability to deal direct with the Inland Revenue or DVLC via the internet.

2.19. At the same time risks have increased enormously – risks of loss of material (whether through misplacing, human error or technological inadequacy); risks of its potential misuse. The proper creation, keeping, management and disposal of records have become much more important. This is both because the diversity and bulk of records produced makes these once simple tasks highly complex, and because the risks in getting it wrong are much greater.

2.20. Digital technology can be used to create, manage and store a wide range of records including written material, images and sounds, either separately or combined. Digital records differ from most other formats of record in two ways.

2.21. The first distinguishing characteristic is that their use depends totally on technology, which provides an interface which permits the user to view and interpret the records; they are not capable of direct human interpretation. Writing, typing, printing, drawing or painting onto any physical medium can be seen without any

mechanical intermediary, as indeed – though less satisfactorily - can film negatives. Digital material can only be accessed through an interface using compatible hardware and software. Note that some modern analogue formats share this characteristic.

2.22. The second vital characteristic which differentiates digital material from all other types is its great flexibility. It can readily be altered, linked with other digital material, sent and received in electronic form, accessed by many people simultaneously and from different locations. This flexibility can, unless careful precautions are taken, become manipulability with the possibility of changing the record in ways that are hard to detect. This flexibility becomes a virtue, given the short life and relative instability of digital media and storage, because it can readily be transferred to a different format, requiring altogether different hardware and software to access, but retaining and reproducing the same original content. This ability to be transferred is at present essential to its long term preservation, both because digital storage media in their current state of development corrupt and degrade after only a few years and because hardware and software both become obsolete equally quickly.

The Public Records Act 1958 and digital records

2.23. The form of the PRA 1958 was affected by the assumptions arising from the government framework for, and within which, it was drafted. Section 10(1) expresses the intention of the Act not to be exclusive by stating that " records' includes not only written records but 'records conveying information by any other means whatsoever'. The PRA 1958 recognises in section 2(4)(f) that material such as film may require 'separate housing and .....have to be kept under special conditions'. Other than this, it imposes no specific requirement for the treatment of any public record and so does not, on the face of it, differentiate between the ways in which records in digital formats might be treated, as distinct from those in other formats.

2.24. Nevertheless, the PRA 1958 holds assumptions which make it clear that those responsible for its creation were thinking – quite reasonably – in terms of a world dominated by paper, in which record keeping was regarded as a straightforward and menial task. The underlying concept is that of the 'written record' as the main issue, and it is extended to include records 'conveying information by any other means whatsoever' – that is, by any means other than the written word. There is now a question as to whether written information, stored digitally, is a 'written record' or comes under the category of 'any other means whatsoever'. This was not resolved in

the Act because it was, at the time, not an issue needing attention. Now, there is the additional issue that digital records may be in various ways conceptually different from traditional formats, and may therefore not be fully covered by the provisions of the PRA 1958[8].

2.25. Until the last few years, records managers have worked from the relatively simple premise that records were physical objects, needing physical processes and care to manage and preserve them. The assumption was that there was an 'original' record which was authentic and the regime for its legal care sprang from that. The concepts of current legislation relate to that, using such words as 'original', 'copy' and 'custody'. None of those concepts have such clear-cut meaning where digital material is concerned

2.26. While the provisions of the PRA 1958 do not expressly exclude digital records and it should be possible to interpret the Act constructively to reflect developments since 1958, this does not mean that those provisions are adequate to meet the specific issues digital records raise. The following paragraphs set out some of those issues.

2.27 Emerging work on the technology needed to maintain digital records over time makes it certain that whatever is kept as the permanent record is unlikely to be 'permanently preserved' in the same sense as is generally understood to apply to a written document. The process required will be that digital records are from time to time – probably as often as every three or four years – 'migrated' from one technological platform to another. This is both because the original storage system will be at risk of physical degradation or corruption, and because the hardware and software used will become outdated and impossible to maintain or to access.

2.28. This process means that, every few years, as a result of this 'migration' process, a new version of the record will be created, and there will then be parallel sets of the records, one on the new and the other on the previous hardware and/or software platforms. For practical purposes, the new version must become the formal record and no use remains for the old version, which will be destroyed. By the time a record is several hundred years old, and unless some radical but unforeseeable new technological process has been devised to avoid it, this process will have been repeated many dozens of times. Under such a regime, not only does the concept of

[8] As a side-note to the issues raised above, it may be of interest that issues arose in relation to the authenticity of Acts of Parliament disseminated in different formats by the Queen's Printer. In that case, however, the issue could be resolved administratively because the law recognized as authentic any format produced by the Queen's Printer. The Keeper of Public Records does not have the same power of determining what is a public record.

the 'original' record cease to have meaning, the technology and/or equipment to access a digital record in its original format will no longer exist. (This is not to say that technology cannot be used in the future, if required, to reproduce the original appearance of the record when accessed by users.)

2.29. It is theoretically possible that this need for constant migration can be accommodated under the PRA 1958 by an administrative device relying on section 6 of the PRA 1958. This section provides for public records to be destroyed if they are duplicates, or if 'there is some other special reason why they should not be permanently preserved'. If this were to be attempted, it would be necessary to take formal steps, each time that a technological migration had taken place, to dispose of – destroy – all the old set of migrated records, and to re-accession as the 'public record' the freshly migrated material.

2.30. To do this, though, would be to strain the intention of section 6, for two reasons. First, the 'duplicates' which would be retained (if they could be described as such) did not already exist, but were specially and deliberately created through the migration process. Second, the 'special reason' for destroying the old set would not be to do with their unsuitability for permanent preservation, as the Act specifies, but with an inability, for technological reasons, to maintain them in their previous format and medium. This process, each time it happened, would require the approval of the Lord Chancellor and the Minister of the originating government department. Because of the very large quantities of material which will eventually be required to be kept in digital formats, such a procedure would become almost impossibly burdensome administratively, even if – as seems unlikely - it were judged a proper interpretation of the PRA 1958.

2.31. Such treatment of public record material would also attract public interest and the widespread fear that valuable archive material was being put at risk or lost through deliberate destruction.

2.32. There are specific aspects of the PRA 1958 whose effectiveness for digital material is questionable and where an alternative legislative solution would be less open to doubt. These are:

a. It assumes that the physical item originally received by the PRO is the record and imposes a duty concerning its preservation. Both content and medium are covered and the Act envisages that both may be of interest. The problem which will arise is that the PRO, as the responsible authority, cannot cope over time with a duty to preserve outdated computer languages and the means to read them. What seems to

be needed instead is some form of duty to preserve the information, structure and metadata in the record and to maintain its integrity, authenticity and accessibility. Whatever is kept over time, as the public record, must have the status of public record not of a copy of a public record.

b. It distinguishes between material 'in the PRO' and otherwise. This is because tangible records can only be in one place at a time. This is not a sensible concept when applied to digital records when the means of access are more important than the location. With digital records it is the responsibility for maintaining the record which is important. The analogy used earlier with the Data Protection Act is relevant here: personal data may actually be held by another body, a data processor, but responsibility for compliance remains with the data controller.

c. Words like 'permanently preserved', 'safekeeping' and 'retention' may be inappropriate for digital records, for the reasons given above.

d. The date of creation of digital records may be problematic where/if copies are, necessarily, repeatedly made and 'the record' is therefore in reality one in a potentially long series of copies. The issue would be whether the date of the record is the date of migration not original creation. If the former, there might never be a 30 year old record. The PRA 1958 concept of 'file or other assembly' might translate into the digital concept of data and accompanying metadata from its date of creation, but may not be valid for digital material under the Act in its present form.

OTHER RELEVANT ISSUES

Freedom of information, data protection and other information legislation

2.33. The Freedom of Information Act 2000 (FOIA) imposes a duty on a wide span of public sector organisations to be able to 'confirm or deny' the existence of records and to supply information as required under the Act. The Environmental Information Regulations laid under the Act make specific – and no less comprehensive – provision for access to environmental information. Bodies subject to the Act include all central government departments and organisations as well as local authorities at all levels.

2.34. All organisations subject to the Act will need proper arrangements for managing their records if they are to meet their statutory obligations – information that has not been kept in an orderly manner is unlikely to be able to be found without expenditure of enormous effort. For this and other reasons, the FOIA includes, under section 46, provision for a code of practice on records management to be issued by

the Lord Chancellor[9]. This code sets out how records of organisations subject to the Act should be managed. As the code is not yet in force it is not possible to say how effective it will be in promoting good practice on records management. However it is a non-mandatory code and it is unlikely that the Information Commissioner will act against breaches of the code unless they result in a breach of the Act.

2.35. The Data Protection Act imposes an obligation on a similarly wide range of bodies (and also on private sector bodies) to tell individuals, except in certain limited circumstances, what personal data about them is held and how it is used, and to provide a copy of such personal data. It requires also that personal data is held securely, used responsibly and kept only for as long as needed. Other legislation provides access rights at a local level, such as the Local Government (Access to Information) Act 1985 and the Local Authorities (Executive Arrangements) (Access to Information) (England) Regulations under the Local Government Act 2000. All of this legislation requires effective records management for compliance.

2.36. The records management Code of Practice under the FOI Act, though not itself mandatory, demonstrates how new records management provision might be managed under a statutory framework based on approved standards and guidance. It looks at best practice; it considers the main issues of record keeping, such as functional responsibility for records within organisations, policy on record keeping, the creation and subsequent care of records, provision for easy retrieval of information and arrangements for the ultimate disposal of records and audit needs. It emphasises that all records, whether electronic or traditional, need similar care and provision, while also referring to the need to cater properly for the needs of the electronic age. It also deals with the vital issues of review and transfer and the management of records selected for permanent preservation.

[9] This code was issued in November 2002 although the associated enforcement provisions have not yet been brought into operation. It can be seen on http://www.lcd.gov.uk/foi/codesprac.htm

SECTION THREE: PROPOSALS FOR RECORDS MANAGEMENT IN CENTRAL GOVERNMENT

3.1. One of the main issues in this consultation paper is to explore perceptions about how best to secure proper management of government records. The paper invites comment on a legislative regime which would better enable the proper creation, keeping, protection, preservation, authentication, storage and disposal of records of organisations subject to it, and which would impose duties on those organisations to do these things. Such a regime would include provision for the setting of standards and production of guidance, for monitoring of performance and, in certain circumstances, enforcement.

3.2. Access for the citizen and user to records and archives, and the information they contain, is also an important issue. But it is one which has recently been covered through the Freedom of Information Act 2000. This will provide, when it comes fully into force in 2005, an access regime for both current and historical records, in effect replacing current provision such as that in the Public Records Act 1958. For that reason the proposals set out below do not deal substantively with access to records or to information.

Proposed new records management regime

3.3. The proposals for a revised records management regime for central government are:

a. To create a duty for organisations and individuals subject to the legislation to make and keep full and accurate records that can serve as evidence of their policies, procedures, actions and decisions. This consultation invites comment on the proposal that such a duty be created.

QUESTION 1 Should legislation establish a duty to keep and manage records that can serve as evidence of policies, procedures, actions and decisions, applying broadly to all bodies subject at present to the Public Records Acts?

b. To create powers to set standards on records management for those subject to the duty in 3.3 a. This power would in all probability rest with the responsible Minister (the Lord Chancellor), acting on the advice of a nominated responsible body or a person such as the National Archivist (a position created by recent moves by Ministers to bring together the Public Record Office and Historical Manuscripts Commission into the National Archives), though it might instead rest with that body or

person. Either way, the content of the standards would be subject to cross-departmental consultation and also, if required, supervision by an accountable body with the relevant expertise and capacity to take an objective view. It might also, if judged necessary, involve Parliamentary scrutiny of some sort. If not resting with the Minister, the power would also be exercised subject to Ministerial approval. Such standards may be created specifically, or be an endorsement of existing standards, for example those produced by such bodies as the British Standards Institution. This consultation invites comment on the proposal that the standards be issued by the responsible Minister, acting on the advice of the National Archivist and subject to inter-Departmental consultation.

QUESTION 2 Should the Minister responsible for the National Archives, acting on the advice of the National Archivist, have the power to set standards for records management?

c. To create powers to issue guidance in support of those standards. This could rest with the National Archivist as the National Archives will always be a recognised source of expertise, of international standing, in these matters and there is a strong argument for placing these particular responsibilities there. This would help concentrate records and archives expertise in a single place within government, and also line up with good, current international practice. This consultation invites comment on the proposal that guidance supporting the standards be issued by the National Archivist.

QUESTION 3 Should the National Archivist have the power to issue guidance and advice in support of these standards?

d. The standards and guidance would concern matters such as normal practice and procedures for the proper care of records, including for example their creation, management and disposal, whether to destruction, a national, local or regional archives office or in some other approved way. The Code of Practice on Records Management, issued in 2002 under section 46 of the Freedom of Information Act 2000, is a very good basis, though itself non-mandatory, for the form such standards and guidance might take[10].

e. To establish a power to monitor and ensure compliance with the standards set and guidance issued. The issue of powers of monitoring and regulation is a sensitive

[10] The Code can be seen on http://www.lcd.gov.uk/foi/codemanrec.htm or http://www.pro.gov.uk/recordsmanagement/foicode.htm

one, but there would need to be some onus on organisations to demonstrate that they were meeting the records management duty (3.3.a), which they could do most easily by complying with the standards and following the guidance. Demonstrating compliance might be achieved in a number of ways, ranging from self-policing to a regime of external monitoring of compliance along audit lines.[11] Drawing on recent Australian state legislation, the two most likely options are:

- External monitoring of compliance with guidance and standards established by an appropriate person or body.
- A responsibility on organisations to establish and agree, with a nominated person, a records management programme which meets the required standards and is in accordance with the guidance.

f. If the former, the external monitoring might be done by the responsible person who exercises the appropriate powers to set standards and issue guidance. Alternatively, perhaps preferably, a neutral body, such as the National Audit Office or the Information Commissioner, might be more acceptable to Departments. Either way, exercise of the powers would need to be subject to the appropriate accountability checks, on the same lines as specified 3.3.b above. The monitoring process might also include Parliamentary scrutiny if this seemed necessary. The regime might also vary according to type of authority, with public records bodies such as the NHS being subject to a different regime from that for government departments.

3.4. This consultation invites comment on the proposal for a power to monitor compliance with the record keeping duty, separated from that to issue standards and guidance, and on the open question of where this power should best lie.

QUESTION 4 Should there be a power to regulate compliance with the standards, and if so, who should have the responsibility?

QUESTION 5 Should the compliance regime be operated by an external body, or would some form of self-policing, subject to some overview, be an acceptable solution?

[11] The issue of monitoring has been considered extensively in New Zealand. For an options paper see http://www.archives.govt.nz/statutory_regulatory/reviews/compliance/options_paper_frame.html and, for the final report, see http://www.archives.govt.nz/statutory_regulatory/reviews/compliance/contents_frame.html

3.5. There are also some issues concerning more detailed content of new legislation on records management. These might be more likely to form part of the content of standards and guidance, rather than the legislation itself. They include:

a. Policy for the creation of records and provision for disposal schedules would be part of the regime, to ensure at least that detailed records of all key business processes and actions were created and the means of the eventual disposal of records were recorded. Departments might, as part of their FOI publication schemes, publish the policy and schedules.

b. Consideration would be given to whether records passing to an archives office for permanent safekeeping would require additional guidance and standards as to their long term management.

c. A nominated person or body within the organisation would have responsibility for an organisation's records and for their proper management at all stages of their life. The responsible person or body may change over the lifetime of records, for example when records pass from one government department to another on the transfer of functions, or from current use to storage and then to an archives office. Responsibility may be through the existing principle of 'custody' in the PRAs, or through some other concept.

3.6. The legislative framework would cater for records in all formats including digital material. Special issues which affect digital records are set out in the next section.

ADDITIONAL PROPOSALS FOR MANAGING AND PRESERVING DIGITAL RECORDS

3.7. The requirements for a legislative framework for digital records must be read in conjunction with the overall requirement for records management. Most aspects of the records management requirement are common to all formats of record, including digital. The paragraphs below deal with aspects which are peculiar to electronic records. They may need different or additional provision, whether in legislation or in standards and guidance provided for by it, but should not be seen as separate from the more general records management issues covered in the section above.

Records management and digital records

3.8 A new regime for the management and preservation of digital records would require:

a. That it is clear beyond doubt that records created in digital formats and subsequently stored, managed and accessed using current technology are records within the meaning of the legislation.

b. Verification that responsibility for digital records is covered by any such provision for other records (see 3.5.c above). This responsibility must operate throughout the whole life cycle of the records, though (as at present) it need not always lie with the same person or authority over time.

QUESTION 6 Should a legislative framework for managing digital records be established, providing a framework for standards and guidance to be issued and revised from time to time as needed?

c. That the legislative framework cannot be made ineffectual by changes in technology. Any legal provision must allow for changes over time in both the technology used for storage, access and use and the standards applied to it, so it cannot be specific on these matters.

d. Perhaps the single most essential feature of digital records is the information they contain, not the format they are in for the time being, or the hardware or software on which they can, for the time being, be read. However the *context* of information is, for record keeping and record management purposes, vital. For that reason, adequate data must be created and kept to allow both context and information content to be identified and used, making up the whole of the 'record'. The context is normally known as 'metadata', and must be preserved along with the information contained in the records. The authenticity of digital records requires the capture not only of the content of the record but also their diplomatic and palaeographical context which identify them and define their characteristics. This is an area in which further work is required to establish agreed rules.

QUESTION 7 Should new legislation be specific about the issues affecting digital records, as distinct from more traditional formats?

e. While enabling a new regime for digital material, legislation will also have to continue to provide for the traditional historical material already held by archives offices, or in the process of transfer. If both elements cannot be catered for within a single framework, then the different formats should be treated beneath an overarching legislative regime, to ensure consistency.

Special issues for long term preservation of digital records

3.9. The legislative regime for digital material will need to allow for processes necessary, over long periods of time, to secure permanent preservation of the digital record. This is not to say that such processes will be written into legislation, as this would lead to rapid obsolescence, but that legislation would provide for standards incorporating features such as these:

a. That digital records, after being stored and managed electronically by the creating department, can at the appropriate time and after selection and processing be received electronically into archival storage managed and controlled by a responsible person or body.

b. Recognition that, because those responsible for long term digital preservation will not have control over formats, hardware and software used by organisations creating the material to be archived, digital preservation systems must be sufficiently flexible to deal with material coming from a wide range of original formats

c. That digital records can, over time, be authenticated as being the same as, and containing the same information and metadata they contained, at the time up to and after transfer to the control of the archives office. Authentication, both up to and after transfer, will need to be at a level to satisfy a court.

d. That records are kept of all management interventions affecting digital records up to and after the time of transfer to the control of the archives office. This will include original metadata and accurate records of subsequent changes, migrations or other technological processes applied to them.

e. That electronic storage is secure. The level of security is always going to involve a compromise between absolute security and cost of providing it, but can be taken to mean that there is reasonable provision to ensure that irreplaceable material is not lost. BS 7799, the relevant IT security standard issued by the British Standards Institution, may be a source of elements to include.

f. That facilities for the inspection of records, suitable for their format, can be provided to complement FOI rights of access. This would include the possibility of electronic access via the internet or other electronic means.

g. In the above case, the means used for preservation should not disbar such access although the legislative framework need not concern itself with the means of

access, nor need replication of the original functionality or 'look and feel' be considered a requirement.

QUESTION 8 Should specific provision be made for the long term preservation of digital records, through standards and guidance issued under new legislation?

QUESTION 9 Do you have any other comment, not covered by the other questions, on issues raised in sections 2 and 3 of the consultation document?

SECTION FOUR: RECORDS MANAGEMENT AT REGIONAL AND LOCAL LEVELS

THE ISSUES

4.1. This consultation paper has set out for comment (in section three) proposals for a new legislative framework for managing the records of central government – broadly speaking, those already covered by the Public Records Acts of 1958 and 1967. This section of the paper sets out for comment proposals for a consistent application of this new legislative framework more widely across the public sector.

4.2. The objective in doing this is threefold: to ensure that the organisations concerned operate effectively and accountably in terms of their records, particularly in relation to requirements for corporate governance; to ensure that the valuable services provided to the citizen, in terms of archives and other information and services, are as effective and useful both now and for the future as they can be; and, specifically, to enable effective compliance with the new freedom of information legislation which is to be implemented in 2005, and with current data protection legislation, both of which rely heavily on effective record keeping. The intention is to secure benefits, which are not only necessary and valuable, but the cost of which is justifiable to the local community and the taxpayer more broadly, who are funding these activities, in terms of value for money and improved services, efficiency and performance.

4.3. The comments already made, in section 2, paragraphs 2.1-2.6, on the importance of records management in public administration, apply equally to regional and local public sector organisations and their records.

4.4. The case for new legislation at local and regional government levels is that the administrative and technological environment for records management has changed significantly since 1972, when the main relevant legislation (the Local Government Act) was enacted. These changes are so significant that present arrangements have become inadequate. The public sector as a whole, not just central government, needs a legislative framework that will assure the accuracy, reliability and comprehensiveness of the records it makes, whatever the technology used to create and store them. Keeping records that can serve as evidence of an organisation's policies, procedures, actions and decisions, and associated matters of governance, accountability and propriety, cannot be left to chance, whether at central, regional or local level. New rights of access to information place new demands on records

management, just as the move towards electronic delivery of services provides new challenges. The Government's regional agenda is another factor. This paper explores these drivers for change in more detail at paragraphs 4.6-4.21.

4.5. There are two main issues:

- Whether there should be a statutory obligation on public authorities outside central government to have in place records management that meets certain standards.

- If so, on which authorities this obligation should fall.

Detailed proposals covering these issues are set out in ***section 5*** *below.*

THE CURRENT STATUS OF RECORDS MANAGEMENT AT LOCAL LEVELS

Local legislative provision

4.6. The Public Records Acts of 1958 and 1967 apply only to public records bodies as defined in the 1958 Act. Therefore they do not apply to any local or regional councils or to bodies operating at a local level other than those for which special provision is made in the Public Records Act, such as NHS authorities, Crown courts and prisons.

4.7. The main legislation bearing on records management in local government is the Local Government Act of 1972 (LGA 1972). This requires principal councils – county councils and unitary authorities - to '.....make proper arrangements with respect to any documents that belong to or are in the custody of the council or any of their officers.' Guidance on how to do this was issued in 1999 by the Department for Transport, Local Government and the Regions[12] (these responsibilities are now with the Office of the Deputy Prime Minister (ODPM)). The guidance is comprehensive and thorough and explicitly refers to electronic and traditional media. However, it has no statutory force and there is no system of standards or regular monitoring in place, centrally or locally, to ensure that authorities do have 'proper arrangements' in place.

Local provision for records management

4.8. Overall, although there are many examples of public authorities at regional and local level whose approach to providing proper records management is excellent, in

[12] Department of the Environment, Transport and the Regions, *Local Government Act 1972: Section 224 guidance on '... proper arrangements for archives'*, March 2000. See http://www.local-regions.odpm.gov.uk/section224/index.htm

general arrangements at local and regional level, including those necessary to comply properly with recent information legislation, seem less advanced than those for central government. Given this, and the concerns that exist about e-government , it is difficult to find any argument why local and regional authorities should be subject to lesser requirements as to record keeping than central government authorities. We therefore invite comment on the proposition that, if legislation affecting records management is to be changed, its scope should be extended so that it applies to regional and local authorities also and not just to those bodies subject to the present Public Records Acts.

4.9. There is evidence for the suggestion that local authorities are lagging behind in areas requiring good provision for records management. A recent report (*Ready To Be Free? - Public Sector Preparations for FOIA,* produced by *Anite Public Sector* in July 2002), conducted market research of 60 FOI authorities, 48 of which were local authorities and 12 were central government authorities. It concluded that only 50% of the authorities surveyed are as yet taking the necessary action to implement FOIA and refers to the importance, in this context, of improving records management.

4.10. Another recent report commissioned by Resource[13], and carried out by Missenden Consulting LLP, also states that there is uneven provision for records management in the local government sector. The focus of the report is on the management of electronic records, though some of the conclusions apply more widely. The report notes:

> ' Only 13.7 per cent of institutions surveyed said that some practical work was underway on the development of a corporate policy on electronic records and none had completed a policy. 9.8 per cent were trying to achieve some practical work on identifying a strategy for electronic records management. Only one institution had completed an inventory of electronic records in their authority; 23.5 per cent claim to have some practical work underway.' (page iii)

It goes on to say:

> ' There are a number of obstacles to progress. First, there is an element of complacency within local authority archives because the challenge of electronic records management is so large there appears to be little to be

[13] *Archives in the digital age: a study for Resource* by Missenden Consulting LLP, see ID435 at http://www.resource.gov.uk/information/tenders/completed.asp. Resource is the Council for Museums, Archives and Libraries. The quotations derive from a survey of 127 local authorities throughout the United Kingdom and Jersey, 42.5% of which provided returns.

gained by even attempting to address the issues. Electronic records management implies a large learning curve and the resources are not available to address this; nor are funds available to implement solutions if adequate expertise were at hand. It is worth noting that the survey conducted shows that over 94 per cent of archives participating had no provision in their budgets to support activities related to the management of electronic records; over 87 per cent have not included requests for funding in their 2003/04 budgets.' (4.38)

and

' Largely due to lack of resources and expertise, nearly 83 per cent of participating institutions fail to produce guidance on how to manage electronic records. Furthermore, nearly 67 per cent said that there was no institution with which they can liase to formulate guidance.' (4.42)

4.11. The overall impression is that records management at local level, and especially provision for digital records, may not be working properly under present legislative arrangements, and therefore fuller provision is needed.

Freedom of information, data protection and other information legislation

4.12. This impression can only be reinforced at a time when stronger data protection requirements, and the imminent implementation of freedom of information requirements, suggest strongly that excellent records management is needed. The duties imposed by the Freedom of Information Act 2000 (FOIA) apply to local authorities at all levels and of many types. The Data Protection Act has imposed obligations on a similarly wide range of bodies (and also on private sector bodies). Fuller details are given in section three, paragraphs 2.30 and 2.31, but it is worth re-emphasising here that all organisations subject to these Acts will need proper arrangements for managing their records in order to conform.

4.13. Other legislation provides limited access rights to information and records at a local level, such as the Local Government (Access to Information) Act 1985 and the Local Authorities (Executive Arrangements) (Access to Information) (England) Regulations under the Local Government Act 2000. The latter Act makes limited provision (section 22) for the making and keeping of records of meetings and of decisions.

e-government

4.14. The need, generally, for local government to be prepared for e-government in all its forms and requirements is set out in the ODPM paper *www.localgov.gov.uk: the national strategy for local e-government*, issued in November 2002. The strategy is to use new technology to deliver improved services. The emphasis is on customer focused services and increased contact by electronic means with users of services, particularly through website and web-enabled interfaces. There is a specific target of 2005 for the enabling of electronic delivery of services to those members of the public who choose to take advantage of it. This includes a commitment on

> developing a national framework of technical and legal standards so that key issues, such as authenticating the identity of electronic service users and the capacity of organisations to share information, can be resolved nationally.

4.15. For e-government to work it must be underpinned by the effective management of records. The framework referred to above should deal with the reliability and authenticity of the records created in delivery of these services.

4.16. The issue of provision for the special circumstances surrounding the creation, management and preservation of digital records is covered in *section three, paragraph 3.9*, in the context of central government. Local and regional authorities may be in a similar position and, if so, they and their constituents might benefit similarly from any new provisions specifically aimed at securing digital records. Any move towards new records and archives legislation should, therefore, include consideration of whether digital record keeping at local level needs the same provision as is made for it within central government.

Regional government

4.17. The regional and local government map is changing rapidly, with the prospect of the creation of new, regional tiers of government which will need a proper framework for the management of the important records they will be creating and storing. Central government has already created multi-departmental Government Offices for the Regions and has also set up Regional Development Agencies, which are public record bodies. Government policy is for extension of this approach to the creation of new, elected regional assemblies, where local communities wish for this.

4.18. The Office of the Deputy Prime Minister (ODPM) White Paper on the subject, *Your Region, Your Choice: Revitalising the English Regions* (May 2002) is explicit that regional assembly executive functions would for the most part be taken from

central government, not from local authorities. It cites the possibility of delegation of powers in areas such as economic development, skills and employment, housing, transport, land use and regional planning, public health and others. The Regional Assemblies (Preparations) Act, paving the way for referenda on elected regional assemblies, received Royal Assent in May 2003. In the following month the Deputy Prime Minister announced that referenda would be held in three of the eight English regions, probably in the autumn of 2004.

4.19. If new legislation on records management and archives is enacted, it can ensure that the appropriate arrangements for the records of elected regional assemblies, or, where these are not established, for the relevant records (for example, those of regional chambers) are made. Alternatively, such provision may in due course be made through legislation to establish regional assemblies.

4.20. There is a significant risk here. Regional assemblies might be taking in functions both of central and local government, and their status might contain elements of both. This is as yet undecided, and it is not appropriate that this consultation paper should become involved in any way in consideration of how these issues are resolved. In terms of present thinking, though, some issues emerge which it is relevant to note here. Some of the central government functions that regional assemblies might take on (for example, certain town and country planning duties), and some of the existing bodies they might oversee (for example the Regional Development Agencies), are at present subject to the Public Records Acts. There are therefore arguments for not removing them to the lesser requirements of the Local Government legislation on record keeping. There could also be differences between those areas where regional assemblies are set up, and those where they are not, in terms of the applicability of present records and archives legislation, or of proposed new legislation. It might be more sensible to aim for greater consistency, by aiming to make all such regional executive functions subject to any new legislation on record keeping.

4.21 There is also a need to consider the position with regard to the deliberative records of regional assemblies, although the issue of separation of powers has a bearing here.

4.22. Final judgements on this will have to be made by those responsible for them. However it is relevant to note here that there are areas of significance, in terms of records keeping, records management and also for the future of archiving, where careful thought needs to be given to the appropriate framework for future regional

assemblies or other regional bodies, their powers, and the bodies for which they are responsible.

SECTION FIVE: PROPOSALS FOR RECORDS MANAGEMENT AT LOCAL AND REGIONAL LEVEL

The requirements for records management at local and regional levels

5.1. There are four basic requirements for records management in local and regional government. These are:

a. Providing a sound legal basis for the creation, maintenance and use of all records, and ensuring that this works equally for digital records as for others.

b. Ensuring that the functions and duties imposed on public authorities by new information legislation are capable of execution, particularly in a new and predominantly electronic environment.

c. Supporting business efficiency by ensuring that the right evidence and information of decisions and actions are available to the right people at the right time

d. Providing for accountability and good governance by regulating record keeping and records management for all formats of records created and kept by public authorities.

Scope of application of the requirements

5.2. We would welcome comment on whether any revised legislative framework for records management should be applied at local and regional, as well as at central, level, and what issues this might raise. And, if it is to be applied in this way, precisely which local and regional tiers of government might be included in proposals for new records and archives management.

5.3. Present Public Records legislation does not apply outside central government (other than the National Health Service, Crown courts and prisons), whereas the Local Government Act of 1972 applies to principal councils. However other related legislation – notably the Freedom of Information Act of 2000 and Data Protection Act of 1998 – has different, wider levels of coverage. This consultation seeks particular comment on the proposal, for records and archives legislation, that it should have a similar range of coverage to the LGA 1972 among local authorities, and that it should also provide for the records of regional authorities and assemblies as these come into being.

QUESTION 10 Should a consistent, national legislative framework for records management – including digital records – be extended to local government bodies?

QUESTION 11 If so, should this be limited to principal councils only?

QUESTION 12 Should it also extend to new regional assemblies (where they exist) and regional authorities?

5.4. We would also welcome comment, not only on the extension as above, but also on whether bodies such as police authorities, should be covered.

QUESTION 13 Are there other public bodies, such as police authorities, to which it should also be extended?

5.5. If there is to be this type of legislative framework for records management, then, although there are other possibilities, the most practicable approach would be to extend the framework proposed for central government (section 3, paragraphs 3.3 and 3.4 above) to other authorities. Just as for similar proposals for central government, this would have to be based on a statutory duty for local authorities to keep and manage records, and the closely related issues of powers to secure compliance monitoring, to set standards and to issue guidance would also all need to be addressed.

QUESTION 14 Should the legislative duty proposed in question 1, to keep and manage records that can serve as evidence of policies, procedures, actions and decisions, be applied on a broader basis to local and regional authorities as specified in questions 11, 12 and 13?

5.6. This paper has set out possible approaches to monitoring and regulation, through guidance and standards, at central government level, and invites comment on this (*section three, questions 2-5).* Looking at these questions, and the range of possibilities in *section three, paragraph 3.3,* we would welcome comment on how these provisions might operate at regional and local levels. The principle and the

location of the ministerial level responsibility, ideally, should be the same, though detailed provisions could and perhaps need to be different.

QUESTION 15 Should the power to set standards for records management at regional and local levels be placed with the Minister responsible for the National Archives, acting on advice from the National Archivist? If not, who should have this power?

QUESTION 16 Should the power to issue guidance supporting these standards at local and regional levels be placed with the National Archivist?

5.7. It might also be appropriate, as has been suggested for those subject to such legislation within central government, that a consultation process on the content of standards and guidance should be established.

QUESTION 17 Should local and regional bodies, or a representative body, have a right to consultation on the formulation of the standards and guidance?

5.8. The 'responsible person' and 'accountable body' for ensuring compliance with standards would be open to discussion and agreement. For example, monitoring of compliance at local or regional level might rest with a body such as the Audit Commission, or be subject to some kind of self-policing within the authority, or be handled in some other way.

QUESTION 18 Who should be responsible for regulation of compliance at local and regional levels?

5.9. The guidance and standards would concern matters such as normal practice and procedures for the proper care of records, including for example their creation, management and disposal, whether to destruction, to an archives office or in some other approved way – that is, the matters covered by the FOI records management code, issued under section 46 of the Act.

SECTION SIX: DEALING WITH ARCHIVES SERVICES AT REGIONAL AND LOCAL LEVELS

THE ISSUES

6.1. This section of the consultation paper looks at the need to formalise arrangements for the provision of archives services at local and regional levels and includes the necessary context on why we need to safeguard historical records – archives – for a wide range of purposes. The proposals for archives services at regional and local levels are additional to those already covered in this consultation document, for a consistent application of any new legislative framework for records management more widely than at present, extending it beyond central government to principal local authorities and to regional tiers of government.

6.2. Present arrangements do not seem fully adequate to protect the unique resource that local archives services offer. This consultation asks whether a statutory requirement for a specified range of authorities to provide archives services to a defined standard would bring benefit, without imposing undue or unmanageable burdens.

6.3. Archives services hold the historical records of official involvement in individual lives from the Middle Ages to the present day. They have also acquired by purchase, gift and loan a wealth of material originating in the private sector, such as the archives of landed estates, local businesses and people who have been significant in the community, nationally or internationally. This recorded memory – described by the Lord Chancellor[14] as ' the foundation collections of the English speaking world' - is a unique resource but, as well as the benefits below, its stewardship brings obligations for the proper care and preservation of the materials on a sustainable basis and for promoting public access. It is questionable whether either these benefits or these obligations are reflected in the current status of archives services.

6.4. Archives services offer enormous benefits to the community and the citizen. They have assumed new significance as more information about archives has become available electronically and potential users - ranging from those in formal education to those engaged in the leisure-time study of local or family history or seeking information about local rights of way - have grasped the potential of these locally-held learning resources. Alongside libraries, they hold the key to that wider access to information that lies at the heart of the 'information society'. This is reflected in usage figures which show that in 1999-2000 local archive services in

[14] *Government Policy on Archives* (Cm 4516), Lord Chancellor's Foreword

England were visited by more than 740,000 people a year seeking to consult archives (extending to more than 500 kilometres) held by them[15].

6.5. There are two main issues:

- Whether there should be a statutory requirement for the provision of archives offices and related services at local level, broadly comparable to the present requirement for the provision of library services? Should this apply at any new regional level as well?

- On which authorities might this responsibility fall, and what should the constraints be in terms of the range and type of services to be provided?

THE CURRENT STATUS OF ARCHIVES SERVICES AT LOCAL LEVELS

Provision for archives in local government legislation

6.6. The Local Government (Records) Act 1962 (LGRA 1962) confers limited discretionary powers for local authorities to provide certain archive services. Section 1(1) of this Act says that ' A local authority may do all such things as appear to it necessary or expedient for enabling adequate use to be made of records under its control' . It goes on to refer to allowing inspection and copying of records, preparing indexes and guides to them and publishing and exhibiting them. These refer, however, solely to the service provision aspect of archive offices' work, not to their stewardship obligations – particularly important now, where digital archives are involved - nor any wider responsibilities and functions. In addition the Act empowers them to acquire records of local significance over and above their own administrative records, care for them and make them available for study by the public.

6.7. This Act has been successively amended to cover all county councils, all London boroughs, metropolitan districts and unitary councils. By no means all the eligible councils have chosen to exercise their powers under the Act. As a result there are some gaps in provision, leaving records of local activities at risk of neglect or loss and local communities standing to lose the evidence from which their identity and history can be traced.

6.8. There are also wide disparities across the country in the nature and standard of archive service provided. There is no statutory provision for the monitoring of standards, other than for particular records covered by other legislation, such as

[15] CIPFA, Archive Service Statistics: Estimates 2000-2001

public records held locally, or manorial and tithe records, although the National Archives (Historical Manuscripts Commission) has an advisory remit in this field.

6.9. The Local Government Act 1972 (s.224) requires local authorities to ' make proper arrangements with respect to any documents that belong to or are in the custody of the council or any of their officers' but does not oblige them to provide archive services. In 1999 the Department for the Environment, Transport and the Regions (DETR) issued guidance on the interpretation of the term 'proper arrangements' , which provides some guidance on the question of archives services[16]. There is no regulatory or monitoring process to verify compliance, nor powers to introduce one.

6.10. Additional requirements with regard to access to information in records and archives, affecting local and regional authorities, have been imposed through the Data Protection Act 1998; further such requirements will be imposed on all relevant bodies by the Freedom of Information Act 2000. This, when it comes into force in 2005, will include a statutory right for the citizen of access to information, subject to certain exemptions and conditions.

Present government policy on archives

6.11. The importance of archives was recognized as part of the publication of the *Government Policy on Archives* by the Lord Chancellor, in 1999. In his Foreword the Lord Chancellor wrote:

> ' Modernising the country's institutions and improving access to information for all our citizens are among the Government's key policy objectives. The Government is keen to harness the knowledge and expertise of the archive sector, which it believes has a significant role to play in the pursuit of these objectives.'

6.12. He also noted that ' archives have both administrative and cultural functions' , and archive services are usually grouped within one or other of these functions in organisational structures. In central government the balance has been to the administrative side. In the local authority sector, on the other hand, archive services are more commonly bracketed with cultural services. This means that, while some are actively involved in the proper keeping and management of records of their parent authority, many are not. Wherever local authorities choose to locate archive

[16] Department of the Environment, Transport and the Regions, *Local Government Act 1972: Section 224 guidance on '... proper arrangements for archives'*, March 2000. http://www.local-regions.odpm.gov.uk/section224/index.htm

services in their organisation, archive services should be closely involved in the development of effective records management systems, thereby helping their parent authorities to comply with their existing legislative obligations and to realise significant business benefits.

6.13. The government policy reflects government interest in the subject of local archives services; its third objective is:

> ' To ensure that public institutions, at local, regional and national level, select, preserve and manage their current records and archives, regardless of medium, in accordance with the relevant legislative requirements, guidance and agreed professional standards.'

6.14. Objective 1, concerning access for citizens to archives, and objective 2, relating to the use of archives to help meet national educational needs, are also relevant. The policy makes clear how archives can help government achieve its policy objectives, including open and accountable government, social inclusion, education, economic regeneration and regional developments.

6.15. The policy also highlighted that archives can offer ' ready access for all citizens to ... unique and irreplaceable primary sources' . In particular, they ' can provide for schoolchildren, students and life-long learners, an unparalleled immediacy of contact with the events of history through exposure to the original documents of the time' .

6.16. In September 2002, and as required by the policy, the Keeper of Public Records, as Chair of the Inter-Departmental Archives Committee (IDAC), issued the *Government Policy on Archives: Action Plan.* The vision behind this plan is that within a few years ' archive services throughout the UK will be able to give many new audiences access to their unique holdings' . It set these supporting aims:

- All archives in public custody will be safely preserved and made publicly available in a comprehensive network of provision
- Archives and records management services will be able to manage electronic records for present use and future historical use.

6.17. The plan makes reference to the importance of local archive services to the community and to the need for work to review legislative changes including ' the possibility of covering a wider range of public authorities than the present Public Records Acts 1958 and 1967' . It commits to issuing a public consultation document

before any decisions are made on such changes and they are taken forward into Bill preparation. This consultation paper meets that requirement.

Resource: the Council for Museums, Archives and Libraries

6.18. In 2000 government set up a new organisation to oversee libraries and museums. This was Resource, the Council for Museums, Archives and Libraries, a non-departmental public body of the Department for Culture, Media and Sport. Its remit was also extended to included archives. Although its perspectives are primarily cultural, Resource's report *Developing the 21st Century Archive – an Action Plan for United Kingdom Archives,* published in 2001, noted that

> ' The value and importance of archives extends far beyond the parameters of cultural heritage. The interests of good governance and accountability, as well as legal requirements and obligations, underpin the need to invest in, and support, archives services.'

6.19. The report also said:

> ' One of the principal features that distinguish archives from museums and libraries is the role they play in the development of information policy and records management.'

This is in complete accordance with the Government Policy on Archives, which says:

> ' Records created in the course of any organisation's business transactions are a vitally important asset. Properly managed, they provide authentic and reliable evidence of these transactions..... Without efficient record-keeping practices, no government or organisation can possess a collective memory and operate effectively in the present. As far as the public sector is concerned, citizens have a general right to obtain information about the activities of organisations acting on their behalf. This right goes to the heart of democratic accountability and is essential if public bodies are to be subject to informed public scrutiny.'

6.20. The Resource action plan also focuses on the social and educational objectives which are an integral part of government policy:

> ' The very nature of archives and the way people extract and interpret evidence from them provides a wonderful opportunity for people of the widest

backgrounds to develop research skills in the subject they are interested in and to explore for themselves the excitement of discovery.'

One notable instance of this is the growing phenomenon of family history, now one of the most popular of leisure time activities, and one where archives, directly or indirectly, provide the bulk of the research sources and where digital access, via the internet, offers enormous additional benefits.

6.21. The central government role with regard to these non-cultural aspects of local archives offices is primarily exercised by the Office of the Deputy Prime Minister on the basis of provisions in the Local Government Act of 1972. This department, the Department for Culture, Media and Sport and the National Archives are key members of the Inter-Departmental Archives Committee, to which Resource is one of the expert advisers.

The comparison with public library services

6.22. The lack of any statutory requirement upon a local authority to provide an archive service is similar to the position with regard to museums and art galleries under the Public Libraries and Museums Act 1964. It is in sharp contrast to the position with regard to libraries under the same Act, where designated local authorities (library authorities) are required to provide library services. There have been recent moves to make the duties imposed by this Act clearer and more specific.

6.23. The full title of the Public Libraries and Museums Act 1964 sets out its purpose as ' An Act to place the public library service provided by local authorities in England and Wales under the superintendence of the Secretary of State, to make new provision for regulating and improving that service and as to the provision and maintenance of museums and art galleries by such authorities, and for purposes connected with the matters aforesaid' .

6.24. Comparison of the arrangements for public libraries and those for local archives offices show marked differences. Since re-organisation of local government came into effect in April 1998, the responsibility for public libraries has rested with county councils and new unitary authorities. In June 1999, the UK Government announced that public libraries in England would in future have to meet minimum standards set by the Department for Culture, Media and Sport (DCMS). The National Assembly for Wales made a similar announcement in October 2001 in respect of public libraries in Wales.

6.25. The Act also makes it a duty of the Secretary of State for Culture, Media and Sport and, following devolution, the National Assembly for Wales in respect of authorities in Wales:

> '...to secure the proper discharge by local authorities of the functions in relation to libraries conferred on them as library authorities by or under this Act'.

6.26. These requirements placed both upon local authorities and upon the Secretary of State and the National Assembly for Wales have remained undefined, making more difficult the enforcement of the relevant provisions of the 1964 Act.

6.27. In recent years, the UK Government and the National Assembly for Wales have taken some steps to give greater force to the requirements of the 1964 Act. Since 1998, all library authorities in England have been required to produce Annual Library Plans that include reviews of past performance and strategies and targets for the current and future years. The Annual Library Plans assist library authorities in focusing their resources. The DCMS monitors the quality of Annual Library Plans. Since 2002, all library authorities in Wales have been required to produce three-year strategic Library Plans and annual reports showing progress against the Welsh Public Library Standards. The National Assembly for Wales monitors the quality of the plans and reports and this progress.

6.28. This contrasts starkly with the limited provisions for archives services.

6.29. There is an argument that any new legislation covering local authority archives services may suffer, if modelled on the provisions applying to local libraries, as even these provisions have resulted in widely varying standards of service across the country. However, the fact remains that, under present legislation, local authorities are not compelled to make any provision for the care of historical archives and that there is consequently always a risk that more serious gaps in the current network of local archive services may develop unless action is taken.

The Historical Manuscripts Commission Standard for Record Repositories

6.30. The *Standard for Record Repositories*, published by the Historical Manuscripts Commission (3rd edition, 2001) sets out standards for archives offices, drawing on relevant British Standards such as BS 5454, *Recommendations for the Storage and Exhibition of Archival Documents*, as revised 2000. The National Archives (PRO/HMC) will be developing in 2003-04 a common standards framework for

archives. These documents would provide a suitable basis for standards for the provision of local archive services under new legislation.

Regional developments in archives administration

6.31. Under the auspices of *Resource*, and with the support of the National Council on Archives, the Public Record Office and others, Regional Archive Councils (RACs) were established to cover all English Regions. These RACs have drawn up regional strategies for archives. The National Council on Archives published in 2002 *Archives in the Regions: an Overview of English Regional Archive Strategies*. The strategies demonstrate a need to develop archive services in the interests of regional and local communities and point towards the real benefits in doing so. Legislative provision would underpin progress in achieving these benefits.

Eligibility of local authorities for HLF funding

6.32. In recent years some local archive services have received substantial grant awards from the Heritage Lottery Fund and it is argued that, were they to become statutory services, such core funding might no longer be available. While it is undeniably true that HLF funding has made a significant difference to some local archive services, the importance of improving existing legislation is reinforced by the following considerations:

- Many poorer local archive services find it difficult to obtain the partnership funding needed for HLF grants
- In cases where local archives services have obtained HLF grants, these have sometimes diverted attention from their main developmental priorities
- HLF grants do not cover the key area of records management, where the role of local archive services should be reinforced
- Reliance on external grants makes service planning more problematic in the long term

6.33. The key point is that if local archive services were to be placed on a firmer legislative footing, then that should not prevent them for seeking additional funding from the grant-awarding bodies for the provision of 'value added' projects beyond their core services. Given the richness of the collections in local archives, the scope for such projects, covering both preservation and access, is immense.

SECTION SEVEN: PROPOSALS FOR ARCHIVES SERVICES AT LOCAL LEVEL

A statutory regime for local and regional archives services

7.1. This consultation seeks comment on the proposal that new legislation should provide a statutory basis for local and regional archives services. As with libraries and museums, there is no intention to impose new archival responsibilities on all public authorities. The exact scope of application of new legislation is a matter for consultation and discussion.

7.2. The current legislation for libraries may offer a good model. The Local Government Act 1972 applies to principal councils, and might be seen as the obvious model for scope in this instance. However other related legislation – notably the Freedom of Information Act 2000 and Data Protection Act 1998 – have different, wider levels of coverage. On balance it seems most sensible that the proposal for archives services at local level should have a similar range of coverage to the Local Government Act 1972, subject to any new requirement for coverage of regional authorities and assemblies. This latter point, though, needs to bear in mind the considerations affecting regional proposals set out in Section 4 above, at *paragraphs 4.20-4.22.*

7.3. The following are the proposals to consider in the context of a statutory power to ensure provision of archive services at local level:

a. That new legislation should require, as is at present the case for library services, that specified authorities ensure archives offices and related services are provided. This consultation seeks comment on which authorities the requirement should apply to.

b. That the primary responsibility for ensuring provision of an archives service and for its effectiveness be put, as is the case at present for libraries, on the principal council or unitary authority tier of local government.

QUESTION 19 Should principal councils be required by statute to ensure provision of a local archives service?

c. That there should be sufficient flexibility in the requirement to allow archives provision to be made jointly by more than one local authority in partnership, or by one authority on behalf of other authorities, or by a regional authority on behalf of local

authorities or in cooperation with another partner or partners such as a university. This flexibility should apply to aspects of the service (for example, conservation, preservation of digital archives, electronic cataloguing) or to the service as a whole, including the way in which it is provided (eg through management options such as trusts).

QUESTION 20 Should this statutory requirement to ensure provision of local archives services offer scope for authorities to work flexibly or in partnership to provide such services, in line with current practice?

d. If the provision of local archives services is to be subject to such a framework, then the provisions to underpin this, in terms of setting standards, issuing guidance and ensuring compliance, would also need to be covered, either as for the records management provisions proposed in sections 3 and 5, or in some other way. As examples of the kind of regime that might apply, the standards would include all elements of operating a professional archives office including public service, storage, staffing, training and development, etc, except where other legislation (eg the Freedom of Information Act 2000 on access rights) was predominant. It follows also, as for the other provisions, that those affected by them might seek a right to be consulted on the detailed form the standards might take.

e. That the development or endorsement of standards and guidance should be through the same mechanism as for records management at central and local levels of government, to ensure consistency

QUESTION 21 Should the power to issue standards for local archives services be placed with the Minister responsible for the National Archives, acting on advice from the National Archivist?

QUESTION 22 Should the power to issue guidance supporting these standards at local and regional level be placed with the National Archivist?

QUESTION 23 Should local and regional authorities, or a representative body, have a right to consultation on this standards and guidance?

f. That provision be made for regulation of local archives services to the agreed standards, subject as above to oversight by an appropriate accountable body. The vehicle for regulation would be by agreement. It might, for example, be the Audit Commission, or a responsible senior member or official within the relevant authority, possibly in consultation with the National Archivist and drawing on experience in inspection regimes within the National Archives.

QUESTION 24 Who should be responsible for regulation of compliance at local and regional levels?

g. That any newly created regional assemblies and authorities should be subject to a similar requirement so far as their own records and archives are concerned.

QUESTION 25 Should new regional arrangements, whether through elected assemblies or otherwise, in principle, be subject to the same requirements for their archives services as local authorities?

SECTION EIGHT: OTHER ISSUES

Issues relating to the bringing together of the Historical Manuscripts Commission and the Public Record Office as the National Archives

8.1. On 1st April 2003, the Historical Manuscripts Commission and the Public Record Office were brought together into a single organisation, known as the National Archives. Some legislative changes are needed to enable this amalgamation to secure maximum benefit and to ensure its efficiency and delivery of enhanced services. The intention is to use new records and archives legislation as the opportunity to make these changes. Most of the changes are of a purely administrative nature, not affecting the functions of the new body, and there is therefore no need to set them out in this paper or to invite comment on them.

8.2. The remit of the National Archives as a consequence of this amalgamation embraces the functions of the Historical Manuscripts Commission as set out in its Royal Warrant, which are to:

> ' make enquiry as to the existence and location of manuscripts, including records or archives of all kinds, of value for the study of history, other than records which are for the time being public records by virtue of the Public Records Acts; with the consent of the owners or custodians inspect and report upon them; with the consent of the owners or custodians reproduce and publish or assist the publication of such reports; record particulars of such manuscripts and records in a National Register thereof; promote and assist the proper preservation and storage of such manuscripts and records; assist those wishing to use such manuscripts or records for study or research; consider and advise upon general questions relating to the location, preservation and use of such manuscripts and records; and promote the co-ordinated action of all professional and other bodies concerned with the preservation and use of such manuscripts and records.'

8.3. The Historical Manuscripts Commission has made a substantial contribution to the archival and research health of the nation through these functions. It is important that its amalgamation with the Public Record Office to form The National Archives results in no loss of value to archives, the archives community or the research community. It is proposed to carry forward all of these functions. Indeed, the new organisation aspires to provide better quality services to a wider range of users than was possible for the PRO and HMC acting separately. Stakeholders will reap the full benefits of the amalgamation only if complete organisational integration is achieved,

for which legislative change is necessary.

Issues to be retained from existing records and archives legislation

8.4. This consultation is to consider ways in which the present legislative provision for records management and archives and archives services might be improved. It is important also to ensure that things which are helpful and sensible in current legislation, do not require change, and continue to be necessary, are not lost. The process of preparing new legislation, if it proceeds, will include ensuring that nothing of value from the present legislation is lost.

8.5. There are only a few such issues. Examples are:

a. Provision for the existence and role of the Advisory Council on Public Records, extended as necessary to provide for advice on matters formerly within the remit of the Historical Manuscripts Commissioners (PRA 1958 section 1(2));

b. Provision for places of deposit, outside the National Archives, where central government records may be kept as at present (PRA 1958 section 4);

c. Provision for the transmission of records from the UK public records system to Scotland or Northern Ireland (PRA 1958 section 3(8));

d. Provision for the transfer of records to archival control before they are 30 years old, and a formal process of approval by the Lord Chancellor of any retention of records by their originators beyond that date (PRA 1958 section 3(4)); and provision for the National Archives to be empowered to raise revenue through all available means, at present achieved through a statutory instrument (PRA 1958 section 2(5)).

8.6. As these issues are, and have for many years, formed a useful part of the present legislation, they are not included here in detail. If, however, there are other issues covered in the current, relevant legislation, which in your view need to be retained, we would welcome any comment from you on this.

Other new issues to be covered

8.7. Previous sections of this consultation paper have set out proposals for changes to current provision for records and archives in some key areas, such as providing for digital records (section 3) and for a framework for effective records management in central, regional and local government (sections 3 and 5). There are also a small number of issues that are additions to present legislation but fall outside the themes of preceding sections. They relate in particular to improving the effectiveness of the operations of The National Archives. They are:

a. Provision of a power for the National Archivist to give grants of money to specific projects that would further the aims of the Act. This would underpin the National Archives' continued contribution to initiatives and programmes of benefit to the user communities such as digitising catalogues to important collections so that they can be available for public access on the internet.

b. Provision of a power for the National Archivist to authorise loans of records by places of deposit for public records, provided that suitable conditions can be assured.

c. Provision for retention of historical records by their originators has been mentioned above at 8.5.d. The present criteria for retention derive from the Open Government White Paper (Cm 2290) and a formal process for agreeing criteria could be an additional matter to include in legislation.

d. Following on from that, a further provision is needed for a previously transferred record to become a retained record if, for example, after transfer it becomes apparent that, for reasons of national security the record requires protective storage that cannot be provided by the archives office. Safeguards for the proper use of such provision would be needed and the change in status should be subject to scrutiny and require approval by the Lord Chancellor.

e. Provision for the recovery of strayed public records where their removal from official custody has placed them at risk.

Archives of private sector bodies

8.8. This consultation paper deals only with the records and archives of public sector bodies. There are issues concerning the exact scope, and precisely which public sector bodies would be covered by different proposals. These are all dealt with in the relevant sections above. It is not the intention of these proposals to extend any of the provisions of present or planned legislation to include records or archives of private

sector companies and organisations. Some issues may arise concerning, for example, records of former public sector organisations, now privatised. The intention for such cases is to retain the *status quo*.

8.9. The Local Government (Records) Act of 1962 empowers local authority archives, if they choose to do so, to spend money on services relating to archives of private origin, which are such an important part of their holdings. Here, also, there is no intention to do anything but retain the *status quo*.

8.10. The National Archives has the role, deriving from the Historical Manuscripts Commission, of offering advice and guidance to owners of private archives. Nothing in this consultation or any proposals arising from it is intended to alter that role in any way.

8.11. However, if in the light of this consultation paper you wish to make any comment on those aspects of present legislation which bear on public sector records, on public sector records generally, or on private sector records, you are invited to do so.

QUESTION 26 Do you have any other comments on present provisions for records and archives of the public or private sector?

Access to public sector records and archives

8.12. This paragraph is for the avoidance of doubt. From January 2005, when the Freedom of Information Act 2000 comes into full implementation, access to records and archives across the public sector will be dealt with under that Act. In particular, sections 62-67 of the Act deal with historical records. Schedule 5 of the Act deals with amendments to public records legislation, Part I setting out amendments to the Public Records Act 1958 and Part II those to the Public Records Act (Northern Ireland) 1923. This consultation does not invite comment on arrangements for access to records or to archives under the terms of the Freedom of Information Act 2000.

8.13. Provisions for Scotland, except insofar as the UK Act applies there, are dealt with in the relevant parts of the Freedom of Information (Scotland) Act 2002. This consultation paper does not cover access arrangements for Scotland and does not invite comment on any issues, arising from that Act, to do with records management or archives in Scotland.

8.14. Another important access issue is the ease with which information can be made available to the citizen, whether for business or private reasons; and the ability

to offer suitable means for that access. Many of the proposals in this consultation document, and particularly those to do with improving record keeping and management, and improving archives services, bear directly on the ability to offer speedy and efficient access to relevant material. This applies whether considering new technology, and access via the internet or other electronic means, or more traditional forms such as local reading rooms or libraries. It also applies both to those who live locally to where information is held, and those from further afield who require access, including internationally.

Records management, archives services and public records in Wales

8.15. The introduction to this consultation paper refers briefly to the position in Wales. This paragraph is to ensure that there is no doubt concerning the role of the public consultation in relation to records management, archives services and public and other records in Wales. The capability exists, under sections 116, 117 and 118 of the Government of Wales Act 1998 (GOWA), for separate provision to be made for Welsh public records (as defined) in Wales. Under section 116, Welsh public records, though no longer public records within the meaning of the Public Records Act 1958, will be treated as such unless or until new provision is made for them. At present no such new provision has been sought.

8.16. The Lord Chancellor has the power, under section 117 of GOWA, to make an order making specific provision for Welsh public records. Such an order can cover all such records, must be made in consultation with the National Assembly for Wales, and can treat different types and categories of Welsh public records differently if so desired. However the provision is restricted to 'public records' as defined in the Public Records Act 1958 and 'Welsh public records' as defined in GOWA. If there were an additional wish to change the existing provisions for Welsh local or regional records (ie those covered at present, for example, not by the Public Records Act 1958 but by the Local Government (Records) Act 1962, or the Local Government Act 1972, which have effect both in England and Wales) this could also be done, through GOWA section 118(1)(f), 118(3)(b) and 118(4). These sections enable separate provision to be made for most categories of records in Wales which are not 'public records', though in this case the Lord Chancellor's order can be made only at the request of the National Assembly for Wales.

8.17. For the present purpose it is probably sufficient to say that, as no action has yet been taken by the National Assembly for Wales under sections 116, 117 or 118 of GOWA, this public consultation can apply to all records in Wales whether they are 'Welsh public records' under that Act, or other types of record under the relevant

local government legislation. Should that position change, then any provisions affecting records in Wales would have to be reviewed in the light of the change. On that basis responses are invited concerning the issues in the consultation document as they bear on all relevant aspects of record keeping, records management and archive services in Wales.

ANNEX 1, SUMMARY OF QUESTIONS

Below is a summary of the questions set out in the consultation paper to which we would specifically like answers. Please ensure that you include the question number(s) in your response. However, when responding, please feel free to make any additional comments or raise other points which you consider relevant.

QUESTION 1 Should legislation establish a duty to keep and manage records that can serve as evidence of policies, procedures, actions and decisions, applying broadly to all bodies subject at present to the Public Records Acts?

QUESTION 2 Should the Minister responsible for the National Archives, acting on the advice of the National Archivist, have the power to set standards for records management?

QUESTION 3 Should the National Archivist have the power to issue guidance and advice in support of these standards?

QUESTION 4 Should there be a power to regulate compliance with the standards, and if so, who should have the responsibility?

QUESTION 5 Should the compliance regime be operated by an external body, or would some form of self-policing, subject to some overview, be an acceptable solution?

QUESTION 6 Should a legislative framework for managing digital records be established, providing a framework for standards and guidance to be issued and revised from time to time as needed?

QUESTION 7 Should new legislation be specific about the issues affecting digital records, as distinct from more traditional formats?

QUESTION 8 Should specific provision be made for the long term preservation of digital records, through standards and guidance issued under new legislation?

QUESTION 9 Do you have any other comment, not covered by the other questions, on issues raised in sections 2 and 3 of the consultation document?

QUESTION 10 Should a consistent, national legislative framework for records management – including digital records – be extended to local government bodies?

QUESTION 11 If so, should this be limited to principal councils only?

QUESTION 12 Should it also extend to new regional assemblies (where they exist) and regional authorities?

QUESTION 13 Are there other public bodies, such as police authorities, to which it should also be extended?

QUESTION 14 Should the legislative duty proposed in question 1, to keep and manage records that can serve as evidence of policies, procedures, actions and decisions, be applied on a broader basis to local and regional authorities as specified in questions 11, 12 and 13?

QUESTION 15 Should the power to set standards for records management at regional and local levels be placed with the Minister responsible for the National Archives, acting on advice from the National Archivist? If not, who should have this power?

QUESTION 16 Should the power to issue guidance supporting these standards at local and regional levels be placed with the National Archivist?

QUESTION 17 Should local and regional bodies, or a representative body, have a right to consultation on the formulation of the standards and guidance?

QUESTION 18 Who should be responsible for regulation of compliance at local and regional levels?

QUESTION 19 Should principal councils be required by statute to ensure provision of a local archives service?

QUESTION 20 Should this statutory requirement to ensure provision of local archives services offer scope for authorities to work flexibly or in partnership to provide such services, in line with current practice?

QUESTION 21 Should the power to issue standards for local archives services be placed with the Minister responsible for the National Archives, acting on advice from the National Archivist?

QUESTION 22 Should the power to issue guidance supporting these standards at local and regional level be placed with the National Archivist?

QUESTION 23 Should local and regional authorities, or a representative body, have a right to consultation on this standards and guidance?

QUESTION 24 Who should be responsible for regulation of compliance at local and regional levels?

QUESTION 25 Should new regional arrangements, whether through elected assemblies or otherwise, in principle, be subject to the same requirements for their archives services as local authorities?

QUESTION 26 Do you have any other comments on present provisions for records and archives of the public or private sector?

Name:

Organisation:

Address:

If you are a representative group please give a summary of the people and organisations you represent

Please send your response by <deadline> to:

Tom Parkinson
Information Management and Legislation Unit
The National Archives
Kew
Richmond
Surrey TW9 4DU
Or by fax to Tom Parkinson at:
020 8392 5283

Or by email to:

consultation@nationalarchives.gov.uk

ANNEX 2, LIST OF CONSULTEES

Copies of the consultation paper are being sent to:

Government and Parliamentary bodies

All main government departments

Advisory Council on National Records and Archives

Cross-party Cultural Heritage Committee

National Audit Office

Office of the Information Commissioner

Re-source (the Council for Museums, Archives and Libraries)

National Assembly for Wales

Office of the First Minister, Wales

Relevant Northern Ireland authorities

Office of the First Minister and Deputy First Minister, Northern Ireland

Department of Culture, Arts and Leisure, Northern Ireland

Scottish Executive

Scottish Parliament

Regional and local government:

All principal local authorities

Association of London Government

Local Government Association

Regional Archives Councils

Single Regional Agencies

Solace (the Society of Local Authority Chief Executives and Senior Managers)

Welsh Local Government Association

Users of archives:

British Association for Local History

British Documents at the End of Empire Project

Federation of Family History Societies

Friends and Patrons of The National Archives

Historical Association

History at the Universities Defence Group

National Archives Online Advisory Panel

National Archives User Advisory Panel

Royal Historical Society (and the Academic Forum which liaises with The National Archives)

Archives and records management community:

Association of Chief Archivists in Local Government

Association of Departmental Record Officers

British Records Association

Business Archives Council

Consortium of University Research Libraries

FARMER (Forum for Archives and Records Management Education and Research)

Records Management Society

Scottish Records Association

Society of Archivists

Standing Conference of National and University Libraries

Other interested Parties

Archive Council for Wales

Arts and Historical/ Humanities Research Board

National Council on Archives

Scottish Council on Archives

Universities UK

ANNEX 3, PARTIAL REGULATORY IMPACT ASSESSMENT

Title of proposed measure

1.1 **'The Records and Archives Bill'**

2. Purpose and intended effect

2.1 The main policy objectives and issues are:

- to remedy identified deficiencies in the Public Records Act 1958 (PRA) with regard to managing, preserving and authenticating electronic records in central government;
- to provide a firm basis for records management in central government, subject to appropriate standards, guidance and monitoring, in order to promote business efficiency and help compliance with new legislation, notably the Data Protection Act 1998 and the Freedom of Information Act 2000.
- To offer the same benefits across the broader public sector, notably local and regional government.
- To provide a statutory basis for archives service operated by specified public authorities at regional and local level,
- To provide a firm statutory basis for the National Archives, which was established in April 2003 by bringing together the functions of the Public Record Office and the Historical Manuscripts Commission.

2.2 A Records and Archives Act:

- Would, in applying to central government and related organisations, replace the Public Records Acts 1958 and 1967.
- Would, if extended to regional and local government organisations, replace parts of the Local Government (Records) Act 1962 and parts of the Local Government Act 1972.

3. Risk Assessment

3.1 There are four main risk areas:

- *Digital records:* a high level of risk of serious loss of digital records because present legislation does not require the necessary arrangements for their management and preservation. This is a risk facing all digital records and the proposed action would reduce the risk for public sector records.

- *Breach of duty:* the Public Records Act 1958 at present imposes a duty on both the Lord Chancellor and the Keeper of Public Records to be able to produce properly authenticated copies of records; without new legislation there is a risk of both being in breach of that duty in the case of digital records.
- *Corporate governance:* poor record keeping as a growing risk to administrative efficiency and to meeting increasingly complex corporate governance and audit requirements. New legislation, notably the Data Protection Act 1998 (DPA) and the Freedom of Information Act 2000 FOIA), require proper record keeping arrangements to ensure compliance.
- *Inconsistent provision:* There is better provision at present for the records of central government and the courts ('public records' as defined in the PRA 1958) than for those of local and regional government, though the risks for each are broadly similar. The proposal is to manage this aspect of risk by standardising provision for records management at central, regional and local levels of government.

3.2 The likelihood of these risks being realised is high, and increasing. Shortcoming in both management of records (lack of proper systems; lack of compliance or the means to implement it where they do exist) and the related technology (rapid obsolescence of software and rapid degradation of storage hardware both likely to lead to complete loss of material or, even if it is not lost, inability to access it) demonstrably exist and pose real threats. The FOIA provides for a code of practice on records management but this is non-mandatory. The complexities of records management have increased greatly, with the widespread growth in digitally produced records, the use of e-mails for official business and related technologies such as the internet both for business and public access purposes. The Public Administration Committee, a select committee of the House of Commons, has highlighted the need for proper record-keeping procedures in Government (most recently in its report in February 2003, on the work of the Parliamentary Ombudsman (HC 448)), and the failures of administration that result from these not being in place.

4. Options

4.1 Because the Public Records Act 1958 and the code of practice under section 46 of the Freedom of Information Act 2000 both set out a framework for management of records, we have not suggested any options for voluntary regulation through codes of practice, as these are effectively already in place. The options for further action are as follows:

Option 1: Take no action and continue under the current legislation

4.2 In the short-term, this would be the least resource-intensive option. However, legal advice is that the Public Records Act 1958 does not provide the necessary statutory framework for dealing with digital public records, including their long-term preservation and authentication, both of which are required by the Act. Among other detrimental effects, this could expose the Lord Chancellor and the Keeper of Public Records to a breach of duty, as they are required by the Act to be able to authenticate public records, including digital ones.

4.3 The Public Records Acts apply only to bodies defined in its schedule 1; in particular, they do not apply to the records of local and regional authorities. In addition, although the National Archives has been functioning from 1 April 2003, it is clear from legal advice received that there will be limits to the extent to which the Public Record Office and Historical Manuscripts Commission can merge their operations. There will therefore be constraints on realising the full benefits and efficiencies of the initiative. The legal recommendation is that a merger of the HMC and PRO requires legislation properly to cement it.

Option 2: Primary legislation, or other options, to effect a merger of PRO and HMC, and amend the Public Records Act 1958 to remedy its deficiencies and provide for digital records

4.4 This is the minimum requirement, involving the least level of work and relatively limited change to the current system. This option achieves the policy objectives for securing the long term and efficient operation of the National Archives, and that for remedying some deficiencies in the operation of the PRA 1958. It does not address the policy objective of providing a firm basis for records management across government, nor that of extending this to other sectors of government. It is therefore a limited option in policy terms, meeting only an irreducible minimum requirement.

4.5 The least resource-intensive option would be to make these changes using delegated legislation. Possible measures are an Order under s.8 of the Electronic Communications Act 2000, and an Order under s.1 of the Regulatory Reform Act 2001. Advice from Treasury Solicitor's Department is neither route would be fully effective, so this option seems to require primary legislation.

Option 3: Primary legislation, or other options, to achieve all of option 2 and also to provide a firm basis for records management in central government, subject to appropriate standards, guidance and monitoring.

4.6 This option achieves the policy objectives of option 2 and, in addition, secures a firm basis for records management across government. It does not address the

policy objective of extending this to other sectors of government. It is therefore not a fully satisfactory option in policy terms, though it meets more than the irreducible minimum requirement.

4.7 For similar reasons to option 2, the additional policy objective will require primary legislation.

Option 4: Primary legislation, or other options, to achieve all of option 3 and also to extend the same benefits across the broader public sector, to include local and regional government.

4.8 This extends option 3, to meet the additional policy objective of extending a firm basis for records management to other sectors of government, beyond UK central government.

4.9 The same comments on the means of achieving this option apply as for option 3, and the extension of records management provisions to other sectors of government will require primary legislation just as for central government. Extending provision to these additional tiers of government also raises further issues, such as increased centralisation and resource needs, which will be canvassed through the public consultation process.

Option 5: Primary legislation, or other options, to achieve all of option 4 and to introduce a statutory duty on relevant authorities to make provision for local and regional authority archives services.

4.10 This option extends option 4, by adding provision to meet the policy objective of requiring regional and local authorities to ensure archives services are offered, subject to appropriate standards, guidance and monitoring.

4.11 The same comments on the means of achieving this option apply as for option 4. In addition, primary legislation would be needed to achieve the additional policy objective as stated.

4.12 A duty for statutory provision of archives services will raise issues with the authorities likely to be affected, as well as with the professionals and users affected. These will be canvassed through the public consultation process. A possible alternative however, might be for new legislation to provide for a code of practice, either mandatory or non-mandatory, governing the provision of regional and local archives services. This might achieve much of the policy objective, while being more acceptable to those bodies affected by it.

5. Equity and Fairness

5.1 No issues of equity or fairness have been identified affecting citizens.

6. Potential benefits

Option 1

6.1 There are few benefits to be realised by taking no action. The immediate, short-term, saving made by not legislating will be offset by the continuing risks from the identified risks.

Option 2

6.2 This option would give the substantial benefit of managing the breach of duty risk and ensuring proper provision for digital records of central government and the courts.

6.3 It would also enable full operational benefits from the merger of HMC and PRO to form The National Archives, by removing legislative barriers to their full integration. This would benefit users of The National Archives through enhanced levels of service and more efficient use of public resources.

Option 3

6.4 This option brings additional benefit in enabling improved management of the records of central government for business, evidential and administrative reasons. This will aid the more efficient administration of the bodies concerned, as well as improve their ability and readiness to implement the Freedom of Information Act and comply with Data Protection Acts.

Option 4

6.5 In extending option 3 to regional and local government, this option would extend the benefits identified for option 3 to all those bodies.

6.6 The extension of a Records and Archives Act to regional and local authorities would considerably aid administrative efficiency in these bodies, as well as improve their ability to implement the Freedom of Information and Data Protection Acts.

Option 5

6.7 Giving statutory status to local archives services ensures that all the users of these services will benefit from the services, often in improved form. It will also enable the continued storage and preservation of records which reflect the cultural and social diversity of the nation.

7. Compliance costs for business, charities and voluntary organisations

Businesses, charities and voluntary organisations are outside the scope of this Act. There are therefore no compliance costs for any organisations of this type.

8. Small firms impact test

There is no reason to think any of the options cited above would impact on small businesses.

9. Competition Assessment

As this measure does not impact upon any markets, there will be no effect upon competition as a result of any of these proposals.

10. Any other costs

10.1 The main pre-enactment resource burden will be borne by the Bill Team at the National Archives, in terms of project planning and management, preparing meetings, drafting papers running the consultation, preparatory Bill work etc. The contribution required of other government departments, in terms of resource, will be to attend meetings, read relevant papers and briefings, advise, and reply to the consultation paper. This work is likely to involve the officials already working on data sharing, data protection and other aspects of records management. If primary legislation is used and a slot allocated, there will be burden on the drafting and parliamentary process. If other methods are used there will be burden on the teams (eg at DTI) responsible for the chosen process/method. Outside central government there will be pre-enactment resource burdens as for government departments. A benefit of consultation wil be to identify other likely or perceived resource burdens for these bodies.

Option 1

10.2 Option 1, no action, may incur future costs from remedial action to deal with the consequences of significant loss of record, legal challenge to the authenticity of records, inefficiencies arising from the inability to find or manage records. These are not calculable but, taken across central government alone, could be substantial. There are also the social, cultural and business effects of losing important items of record, because necessary preservation actions for digital material have been neglected in the absence of a statutory duty to take them. Also breakdowns in aspects of corporate governance and audit for similar reasons.

10.3 There are no resource burdens arising from legislation to implement fully the *de facto* merger of the HMC and PRO. Full operational benefits from the merger,

including efficiency savings, cannot be obtained unless appropriate powers are conferred on the new body through legislation. Efficiency savings would be of the order of £300,000 for each 1% achieved. Without legislation, for example, HMC staff cannot be fully integrated in terms of civil service conditions of employment, which limits flexibility in deployment. Under present arrangements it is not possible to establish a fully accountable single advisory body to replace the original two bodies (the Lord Chancellor's Advisory Council on Public Records for the PRO, and the Commissioners of the Historical Manuscripts Commission). There are also some minor issues arising from the role of the Master of the Rolls in connection with property law, and related Statutory Instruments involving the secretary to the Historical Manuscripts Commission.

Option 2

10.4 There are no significant resource burdens in removing deficiencies from the present Public Records Acts.

Option 3

10.5 There should be no significant additional burden arising from strengthening provision for the proper management of all public records, for those departments which are meeting the 2004 cross-government records management target and taking appropriate steps for implementation of the Freedom of Information Act. Those who are not so doing, or whose plans are less well advanced, may have to incur costs earlier than they had planned. For all departments, proper record keeping brings quantifiable offsetting benefit in terms of increases in business efficiency through supporting the introduction of more efficient systems for storage, retrieval etc. Properly managed and accessible information is itself a resource which can be marketed.

10.6 The implementation costs would fall upon whoever might guide, monitor or enforce compliance, in terms of providing standards and guidance, undertaking audits and inspections, and carrying out any enforcement action. The standards and guidance burden should fall mainly to the National Archives, which is able to undertake them. The regulation and audit role is likely to go to a body, or bodies, already engaged in such activity for other purposes, so the additional burden would be small. For example, adding a role in verifying records management practices to National Audit Office audits would not be likely to make a significant addition to costs or burdens.

Option 4

10.7 There should be no significant policy or resource burden on the wider public sector unless those affected are not taking, or have not already taken, the necessary steps to comply with the Data Protection and FOI Acts. These steps would also ensure the business efficiency and operational benefits gains noted in 10.5.

10.8 As 10.6 above. The regulation and audit role for the wider public sector is likely to go to a different body from that engaged in such activity for central government. But it is equally the case that this body would be carrying out similar regulatory activities for other purposes, so the additional burden would be similarly small.

Option 5

10.9 Extension of the legislative provision for archives services beyond the current public records sector would bring new resource burden to those organisations currently not providing these services. Guidance was issued by DETR in March 1999 to clarify the requirements of s.224 of the Local Government Act 1972 for local authorities (principal councils) to make 'proper arrangements' for their records (this guidance included provision for them to maintain or fund archives services). Guidance has also been issued by the PRO and HMC in respect of standards for the preservation of and access to public records, and manorial and tithe records respectively. Strengthened, statutory provision for local authority archives service would be bringing more structure to arrangements which local authorities are already expected to provide.

10.10 Any application of the Act to newly established regional authorities would involve implementation costs. It is not possible to quantify this cost at present.

11. Results of consultation

This partial RIA will accompany the planned public consultation paper with a view to testing the assumptions contained in this assessment.

12. Enforcement, sanctions, monitoring and review

The proposed legislation contains its own provisions for monitoring and regulation. These will enable processes to be put in place for measurement of the effectiveness of the new provision. The National Archives can undertake this task, using information taken from the regulating bodies' findings. This can be done, initially, within three years of implementation.

13. Summary and recommendation

The final recommendation is dependent, in large part, on the outcome of the public consultation. Options 4 and 5 bring the greatest benefits, but bring additional requirements both for central and local government. Reactions to the consultation are therefore essential.

ANNEX 4, CONSULTATION CO-ORDINATOR

If you have any complaints or comments about the consultation process, you should contact the National Archives consultation co-ordinator, Dr David Leitch, on 020 8392 5330 ext 5362 or email him at david.leitch@nationalarchives.gov.uk. Alternatively, you may wish to write to the address below:

Dr David Leitch
The National Archives
Kew
Richmond
Surrey TW9 4DU
United Kingdom

General principles of consultation

The criteria in the Code of Practice on Written Consultation issued by the Cabinet Office are as follows:

A Timing of consultation should be built into the planning process for a policy (including legislation) or service from the start, so that it has the best prospect of improving the proposals concerned, and so that sufficient time is left for it at each stage.

B It should be clear who is being consulted, about what questions, in what timescale and for what purpose.

C A consultation document should be as simple and concise as possible. It should include a summary, in two pages at most, of the main questions it seeks questions on. It should make it as easy as possible for readers to respond, make contact or complain.

D Documents should be made widely available, with the fullest use of electronic means (though not to the exclusion of others), and effectively drawn to the attention of all interested groups and individuals.

E Sufficient time should be allowed for considered responses from all groups with an interest. Twelve weeks should be the standard minimum period for a consultation.

F Responses should be carefully and open-mindedly analysed, and the results made widely available, with an account of the views expressed, and reasons for decisions finally taken.

G Departments should monitor and evaluate consultations, designating a consultation co-ordinator who will ensure the lessons are disseminated.

Annex (i) Access to official information.

niceday by Guilbert

Published Document

The published document that was enclosed on this file has been removed.

Such items should not be a part of the historical record if they can be readily accessible elsewhere.

https://www.amazon.com/dp/0102919976/ref=olp-opf-redir?aod=1&condition=used&tag=bookfinder-test-b2-20

Title: Access to Official Information: Investigations Completed May - October 2002

Publisher: The Parliamentary Ombudsman, The Stationery Office

Date: December 2002

Signed _____ Dated 12/06/23

COPRA, Cabinet Office