2569

CONFIDENTIAL

# 10 DOWNING STREET

THIS FILE MUST NOT GO OUTSIDE 10 DOWNING ST

| FILE TITLE: | SERIES |
|---|---|
| Policy | Freedom of Information |
| Annex(i) - CO + No.10 records - 72 (Annex A1 - E.) | |
| Annex 2 - Access to official information | PART 3 |
| PART BEGINS: 16 April 2002 | PART ENDS: 31 Oct 2002 |
| | CAB ONE |

Labour Administration

Material used by Official Historian DO NOT DESTROY

Part 3 Policy

PREM 49/2569



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

# PART

# CLOSED

| DATE CLOSED | 31 JULY 2002 |
| --- | --- |

Series : **FREEDOM OF INFORMATION**

File Title : **POLICY**

Part : **3**

| Date | From | To | Subject | Class | Secret |
|---|---|---|---|---|---|
| 22/07/2002 | LC | MOD | Freedom of Information Act 2000: Implementation of Section 77 (Cri | U | |
| 23/07/2002 | AG | LC | Freedom of Information Act 2000: Implementation of Section 77 (Cri | U | |
| 23/07/2002 | LCD | LC | Data Protection Act 1998: Subordinate Legislation | U | |
| 25/07/2002 | LC | SS/DTI | Freedom of Information Act 2000: Implementation of Section 77 (Cri | U | |
| 25/07/2002 | SS/DES | LC | EC Data Protection Directive: European Commission Questionnaire | U | |
| 26/07/2002 | SS/DEFRA | LCD | Freedom of Information Act : Preparations in Non Departmental Publi | U | |
| 31/07/2002 | CDL | LC | EC Data Protection Directive : European Commission Questionnaire | U | |
| 31/07/2002 | SS/WAP | LC | EC Data Protection Directive : European Commission Questionnaire | U | |

Series : **FREEDOM OF INFORMATION**

File Title : **POLICY**

Part : **3**

| Date | From | To | Subject | Class | Secret |
|---|---|---|---|---|---|
| 16/04/2002 | MS/DTLR | LC | Commercial Access to Electoral Registers | U | |
| 30/04/2002 | LC | MS/DTLR | Sale of Electoral Registers: The Robertson Case | U | |
| 30/04/2002 | Cab Off | Cab Off | FOI Act 2000 : Cabinet Office and related publication schemes | U | |
| 01/05/2002 | SS/WAP | DPM | Departmental Resource Accounts: Disclosure of pension information | R | |
| 02/05/2002 | LP | DPM | Departmental Resource Accounts: Disclosure of pension information | U | |
| 02/05/2002 | CH/EX | SS/DTLR | Access to the Electoral Roll | U | |
| 08/05/2002 | PUS/LCD | LC | Freedom of Information Act 2000: Central Government and Non-Dep | C | |
| 13/05/2002 | DPM | MS/DTLR | Sale of Elcetoral Registers - The Robertson Case | U | |
| 14/05/2002 | LCD | LC | Data protection act 1998 - subordinate legislation | C | |
| 15/05/2002 | Cab Off | Cab Off | Parliamentary Ombudsman : Complaint by Rob Evans | R | |
| 15/05/2002 | Cab Off | | Angus Dalryhmpl | C | |
| 15/05/2002 | Cab Off | E-Envoy | Freedom of Information Act 2000 - Cabinet Office and Related Public | U | |
| 17/05/2002 | Cab Off | Cab Off | Freedom of Information Act 2000 : central Government and Non Dep | U | |
| 19/05/2002 | SS/DCMS | LCD | Freedom of Information Act 2000 - Central Government and Non-Dep | U | |
| 20/05/2002 | SS/DTI | LCD | Freedom of Information Act 2000 - Central Government and Non-Dep | U | |
| 20/05/2002 | CDL | LC | Freedom of Information Act 2000 - Central Government and Non-Dep | U | |
| 22/05/2002 | SS/SO | DPM | Departmental Resource Accounts: Disclosure of Pension Information | U | |
| 22/05/2002 | LP | LCD | Data Protection Act 1998 : Subordinate Legislation | U | |
| 23/05/2002 | DFID | LCD | Freedom of Information Act 2000: Central Government and Non-Dep | U | |
| 27/05/2002 | SS/DEFRA | PUS/LCD | Freedom of Information Act 2000: Central Government and NDPB gu | U | |
| 28/05/2002 | PUS/WAP | PUS/LCD | The data Protection Act 1998 Subordinate Legislation | U | |
| 29/05/2002 | SS/DCMS | MS/LCD | Data Protection Act 1998 : Subordinate Legislation | C | |
| 29/05/2002 | LCD | Ch.Staff | FOI Act 2000 - Commencement order under section 87 | C | |
| 30/05/2002 | CDL | LCD | Data Protection Act 1998 : Subordinate Legislation | U | |
| 31/05/2002 | LC | PM | Parliamentary Question from Lord Archer Freedom of Information : W | U | |
| 10/06/2002 | MS/FCO | PUS/LCD | Data Protection Act 1998 : Subordinate Legislation | C | |
| 10/06/2002 | MS/DoH | LC | Data Protection Act 1998: Subordinate Legislation | U | |
| 11/06/2002 | PD(CS) | PM | Freedom of information | C | |
| 13/06/2002 | SS/DTI | DPM | Departmental Resource Accounts: Disclosure of Pension Information | U | |
| 18/06/2002 | SOC | PM | Requests from Rob Evans of The Guardian under the code of practic | C | |
| 19/06/2002 | PUS/LCD | LP | PMB: Data protection (amendment) | C | |
| 19/06/2002 | SS/DoT | DPM | epartmental Resource Accounts: Disclosure of Pension Information a | U | |
| 20/06/2002 | SS/DoT | MS/DoH | Data Protection Act 1998: Subordinate Legislation | U | |
| 20/06/2002 | LC | | Dear Colleague - FOI : Implementation of section 77 Criminal Offenc | U | |
| 21/06/2002 | LP | PUS/LCD | Private Members Bill : data Protection | U | |
| 25/06/2002 | LC | MS/LCD | Guidance on Publication Schemes by means of an arranged PQ in b | U | |
| 25/06/2002 | ms/cabinet office | DPM | Representation of the People: Sale of Electoral Registers | U | |
| 25/06/2002 | PUS/HO | LC | Data Protection Act 1998: Subordinate Legislation | U | |
| 28/06/2002 | LCD | LC | Freedom of Information Act: Preparations in Non Departmental Publi | U | |
| 02/07/2002 | LC | LCD | Data Protection Act 1998 | C | |
| 02/07/2002 | AG | LC | Freedom of Information Act : Implementation of Section 77 (Criminal | U | |
| 04/07/2002 | LC | SOC | Subject Access Requests | U | |
| 05/07/2002 | LC | PM | Code of practive on access to Government information Requests for i | C | |
| 08/07/2002 | SS/DoT | LC | Freedom of Information Act : Implementation of section 77 | U | |
| 08/07/2002 | Cab Off | Cab Off | Treasury Solicitors note on disclosure of No10 Documents in Civil Pr | R | |
| 08/07/2002 | dpmo | LC | FOI Act Implementation of section 77 Criminal Offence of destroying | U | |
| 08/07/2002 | SS/DTI | LC | FOI Act Implementation of section 77 Criminal Offence of destroying | U | |
| 12/07/2002 | Cab Off | Cab Off | CO and No10 records - 1972 (annexs filed at annex) | C | |
| 16/07/2002 | LCD | | Guidance on Publication Schemes under the FOI Act 2000 for Centra | U | |
| 18/07/2002 | PD(CS) | Ico | Code of practice request for information | C | |
| 19/07/2002 | LC | FCS | Ec data protection directive EC questionaire | C | |

0171 238 0665

file CS

From the Secretary of State
for Work and Pensions

DWP Department for Work and Pensions

Richmond House
79 Whitehall
London
SW1A 2NS

Telephone
020 7238 0800

Email
ministers@dwp.gsi.gov.uk
www.dwp.gov.uk

cc JP
VSW
MR
JJM

SOS/02/0921

Rt Hon Lord Irvine of Lairg
House of Lords
London
SW1A 0PW

31 July 2002

Dear Derry,

**EC DATA PROTECTION DIRECTIVE: EUROPEAN COMMISSION QUESTIONNAIRE**

Thank you for your letter dated 19 July in which you seek EP Committee member's views on the UK's proposals for amending the EC Data Protection Directive.

I am happy to support the UK's proposals set out in the Annex to your letter. I particularly welcome the proposal to simplify the notification requirements. The current process is complex, bureaucratic and does not achieve the objective of making it clear to the data subject how their data will be processed.

For DWP to function properly it has to rely on individuals providing large amounts of very personal information regarding both their financial circumstances and health. We need to ensure that customers have confidence in the way their data is collected, recorded, processed, stored and shared. To achieve this the Department currently employs a policy of fully informing customers what will happen to the information they provide through provision of a 'Confidentiality Statement' on all information gathering forms. It is also our policy to meet all Subject Access Requests in full. I would wish to see this position protected when considering any resulting changes in domestic legislation in the longer term. I wish to maintain, and if possible improve, our customers confidence in the way the Department handles personal data, continuing to allow customers full access to their records. This will be essential when modernising the way the Department works as increasingly information will be collected over the telephone and by e-mail.

0171 238 0665

I am copying this letter to the Prime Minister, members of EP Committee and Sir Richard Wilson.

Best wishes,

Andrew

ANDREW SMITH

CS
KESU
SW
MR
JJM
AA

*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 Right Honourable the Lord Irvine of Lairg
House of Lords
London
SW1A OPW

31 July 2002

Dear Danny.

**EC DATA PROTECTION DIRECTIVE: EUROPEAN COMMISSION QUESTIONNAIRE**

Thank you for your letter of 19 July seeking the agreement of members of EP to your proposals on amending the Directive.

You will be aware that the Cabinet Office chairs the inter-departmental Data Protection Practitioners' Group which provides a forum for data protection practitioners across Whitehall to come together and share experiences and good practice. We are therefore well aware of the practical difficulties experienced by government in operating the current Data Protection Act. It seems likely that many of these operational problems were not anticipated when the Directive was originally drafted and we consider the opportunity should be seized of drawing on our practical experiences and explaining why there is a need to mitigate those aspects of the current regime which cause difficulty, especially those whose amendment would not significantly reduce protection for data subjects. We would certainly welcome any amendments to the Directive which would provide clarification of the law and would reduce unnecessary bureaucracy.

I am therefore content for you to respond to the questionnaire along the lines indicated.

I am copying this letter to the Prime Minister, members of EP Committee, Sir Richard Wilson and Linda Clark.

Yours

GTMr.

**GUS MACDONALD**

***Web site: www.cabinet-office.gov.uk***
***Email: gus.macdonald@cabinet-office.x.gsi.gov.uk***

INVESTOR IN PEOPLE

020 7238 6465

**DEFRA**
Department for
**Environment,**
**Food & Rural Affairs**

Nobel House
17 Smith Square
London SW1 3JR

*From the Secretary of State*

CS
cc SV

Yvette Cooper MP
Parliamentary Secretary
Lord Chancellor's Department
Selborne House
54-60 Victoria Street
Lodnon
SW1E 6QW

26 July 2002

Dear Yvette,

**FREEDOM OF INFORMATION ACT: PREPARATIONS IN NON DEPARTMENTAL PUBLIC BODIES**

In response to your letter to the Lord Chancellor dated 28 June I am pleased to confirm that DEFRA sponsored NDPBs are generally on track with preparations for their publication schemes. With some exceptions, sponsoring Divisions have indicated that their publication schemes will be submitted to the Information Commissioner for approval by the November date and systems will be in place to allow the relevant provisions to come into effect as announced.

Where Divisions have highlighted particular problems further guidance and support will be offered to ensure compliance. The situation will be regularly reviewed over the next two months.

I am copying this letter to the Prime Minister, members of CRP(FOI) and to Sir Richard Wilson.

Regards

Margaret

**MARGARET BECKETT**

CS
CC: JJH
AA
SW

Sanctuary Buildings Great Smith Street Westminster London SW1P 3BT
tel: 0870 00123 45 dfes.ministers@dfes.gsi.gov.uk
**Rt Hon Estelle Morris MP**

The Rt Hon The Lord Irvine Of Lairg QC
Lord Chancellor
House of Lords
London
SW1A 0PW

25 July 2002

Dear Derry,

**EC DATA PROTECTION DIRECTIVE: EUROPEAN COMMISSION QUESTIONNAIRE**

This is in response to your letter of 19 July to Jack Straw seeking agreement to send proposals to the European Commission about the amendment of the EC Data Protection Directive.

The suggested way forward in the proposals seems to be a practical, sensible and carefully structured approach. The aim of reducing the administrative burden placed on those with responsibility for data protection, while maintaining a high level of protection of individuals' personal information should be commended. I am content that the proposals should be submitted to the Commission.

I am copying this letter to the Prime Minister, other members of the EP Committee and Linda Clark and to Sir Richard Wilson.

Best wishes

Estelle

**Estelle Morris**

02072192220
FROM THE RIGHT HONOURABLE THE LORD IRVINE OF LAIRG

HOUSE OF LORDS,
LONDON SW1A 0PW

CS
cc: OMC
JR

The Rt Hon Patricia Hewitt MP
Secretary of State for Trade and Industry
1 Victoria Street
London
SW1H 0ET

25 July 2002

Dear Patricia,

**FREEDOM OF INFORMATION ACT 2000: IMPLEMENTATION OF SECTION 77 (CRIMINAL OFFENCE OF DESTROYING RECORDS TO PREVENT ACCESS TO INFORMATION)**

Thank you for your letter of 8 July in which you agree in principle to the implementation of section 77 of the Act in November this year, subject to officials ensuring that Whitehall practice is compliant with the Act and specifically that the departmental personnel records managers are not placed at risk of criminal penalty. I understand that current practice is not compliant with the 1998 Act, but officials are taking steps to amend the guidance.

Current practice is that personnel files are brought up to date only when action is required on the file, including when a subject access request is made. The file is weeded before disclosure is made to the subject.

Officials have now obtained legal advice from Treasury Solicitors and consulted the Office of the Information Commissioner. In the light of this advice, the general principle that files should be weeded only when some action is required, can continue. But, if the action is a subject access request, then the information should be disclosed to the subject before weeding takes place.

Officials are now arranging for the guidance to be amended to reflect this position. Provided that the revised guidance is followed, no one will be at risk of criminal penalties from this policy.

I am copying this letter to the Prime Minister, members of CRP(FOI) and to Sir Richard Wilson.

Yours ever,
Derry.

02072192220
FROM THE RIGHT HONOURABLE THE LORD IRVINE OF LAIRG

HOUSE OF LORDS,
LONDON SW1A 0PW

GS
cc OLC
JSR

The Rt Hon Adam Ingram JP MP
Minister of State for the Armed Forces
Ministry of Defence
Old War Building
Whitehall
London
SW1A 2EU

22 July 2002

Dear Adam,

**FREEDOM OF INFORMATION ACT 2000: IMPLEMENTATION OF SECTION 77 (CRIMINAL OFFENCE OF DESTROYING RECORDS TO PREVENT ACCESS TO INFORMATION)**

**Thank you for your letter of 4 July in response to mine of 20 June. You propose that we delay implementation of section 77 until officials are fully confident about handling subject access requests under the Data Protection Act and have had proper time to absorb the impact of the new environmental information regulations. I do not think these are relevant considerations to the implementation of the provisions of this section.**

You make three broad points against early implementation of the criminal offence:

i. officials are still gaining experience of handling subject access requests under the Data Protection Act. The introduction of the criminal offence may make officials more reluctant to redact information in response to such request;

ii. there is a need to clarify the circumstances under which an official may be prosecuted and in which the proper action would be against the Department through an enforcement notice; and

iii. the proposed introduction of the new environmental information regulations will create additional problems for staff. On the timetable proposed by Michael Meacher there is very little time for awareness and understanding of the new regulations to be promoted. It would be unfair in such circumstances for a potential criminal liability to be placed on officials.

My responses are:

i. It would be impossible for the Government to argue that officials are not fully conversant with the requirements of subject access under the Data Protection Act. Subject access was introduced in 1987. Though the amount of

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information covered by the Act has grown, as the use of IT has grown in Departments, and the Data Protection Act 1998 extended the scope of data protection, (including subject access), to a limited range of manual records, the extension of scope has been gradual. Any attempt to justify non implementation of section 77 on grounds that further experience is needed of handling subject access requests, fifteen years after the rights had been brought into force, would be met with considerable derision, both within Parliament and by campaigners outside.

The concerns, anyway, seem misplaced. Redaction of information in response to a subject access request is not an action covered by the proposed offence. Redaction is simply the non disclosure of the information, or the removal of information from a document before disclosure. Provided that the information remains in the possession of the Department, there is no offence. It may be that the Information Commissioner, in due course, may order redacted information to be disclosed, but the initial non disclosure is not an offence.

ii. Clarification of the circumstances where the offence would apply, as opposed to the use of an enforcement notice, is a matter for the Information Commissioner, as, in most cases, she will investigate and prosecute offences under the Data Protection and Freedom of Information Acts. Given that a successful prosecution for the offence will be very difficult, as the prosecutor would need to show that the intention behind the destruction of the record was to prevent disclosure, and that any other reason for destruction would be a defence against the charge, I would not be surprised if no, or next to no, cases came forward. But it would be improper for the Government to seek to influence the Information Commissioner in the discharge of her duties, or to issue guidance which purported to constrain the Commissioner's independence of action.

iii. Whilst I recognise the need for a significant programme of awareness raising and training before Departments can properly be expected to implement the proposed environmental information regulations, I am sure that Michael Meacher will be setting out his proposals in due course. But I do not think this is relevant to implementation of the criminal offence. It is only the wilful destruction of records in order to prevent the disclosure of information in response to a request that could lead to prosecution. Provided that officials do not destroy information which they know is the subject of a request, they cannot be prosecuted. This seems straightforward.

In summary, therefore, I do not think that your arguments are sufficient to justify not implementing the criminal offence in section 77 of the Freedom of Information Act 2000, in November this year.

I am copying this letter to the Prime Minister, members of CRP (FOI) and to Sir Richard Wilson.

Yours ever,
Derry

The Rt. Hon The Lord Goldsmith QC

9 BUCKINGHAM GATE
LONDON SW1E 6JP

020-7271 2460

The Rt Hon Lord Irvine of Lairg
Lord Chancellor
House of Lords
London
SW1A OPW

23 July 2002

Dear Derry

**FREEDOM OF INFORMATION ACT: IMPLEMENTATION OF SECTION 77 (CRIMINAL OFFENCE OF DESTROYING RECORDS TO PREVENT ACCESS TO INFORMATION)**

Thank you for your letter of 13th July confirming that the Information Commissioner is content with the proposal for early implementation of section 77.

I am pleased to note that the Commissioner has also recognised the possibility that disappointed applicants may ask the police to investigate rather than pursuing redress through her. It is a sensible way forward to reach an agreement with the police and Crown Prosecution Service similar to the existing agreement in respect of offences committed under the Data Protection Act 1998.

The CPS has confirmed that they will liaise with the Association of Chief Police Officers and make a joint approach to the Commissioner.

I am copying this letter to the Prime Minster, members of CRP (FOI) and to Sir Richard Wilson.

Yours ever

Lord

LORD CHANCELLOR'S DEPARTMENT
SELBORNE HOUSE
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**YVETTE COOPER MP**
**Parliamentary Secretary**

PRIME MINISTERS
DIRECT COMMUNICATIONS UNIT
26 JUL 2002
RECEIVED

The Rt. Hon. the Lord Irvine of Lairg
The Lord Chancellor
HL CP/05
House of Lords
London
SW1A 0PW

23 July 2002

Dear Derry

**DATA PROTECTION ACT 1998: SUBORDINATE LEGISLATION**

Thank you for your letter of 2 July giving the agreement of CRP(FOI) to lay the draft Order permitting the processing of sensitive personal data by elected representatives without constituents' explicit consent.

I am grateful to colleagues for their comments. I attach, for information, a copy of the draft Order as it is to be laid, together with the Explanatory Memorandum. Annex A to your letter set out a list of safeguards that colleagues proposed. I attach the list with my comments on each of the proposals, explaining how they are dealt with.

I am copying this letter to the Prime Minister and the other Members of CRP(FOI) and to Sir Richard Wilson, and I am writing in similar terms to David Trimble, Mark Durkan, Rhodri Morgan and Patricia Ferguson.

Yours

**YVETTE COOPER**

SP 26/7/02

*Draft Order laid before Parliament under section 67(4) of the Data Protection Act 1998, for approval by resolution of each House of Parliament.*

DRAFT STATUTORY INSTRUMENTS

# 2002 No.

# DATA PROTECTION

# Data Protection (Processing of Sensitive Personal Data) (Elected Representatives) Order 2002

| | |
|---|---|
| *Made - - - -* | *2002* |
| *Coming into force - -* | *2002* |

Whereas a draft of this Order has been laid before and approved by a resolution of each House of Parliament:

Now, therefore, the Lord Chancellor, in exercise of the powers conferred upon him by section 67(2) of, and paragraph 10 of Schedule 3 to, the Data Protection Act 1998(**a**), and after consultation with the Information Commissioner(**b**) in accordance with section 67(3) of that Act, hereby makes the following Order:

**1.** This Order may be cited as the Data Protection (Processing of Sensitive Personal Data) (Elected Representatives) Order 2002 and shall come into force on the twenty eighth day after the day on which it is made.

**2.** For the purposes of paragraph 10 of Schedule 3 to the Data Protection Act 1998, the circumstances specified in any of paragraphs 3, 4, 5 or 6 in the Schedule to this Order are circumstances in which sensitive personal data may be processed(**c**).

Signed by the authority of the Lord Chancellor

Parliamentary Secretary, Lord Chancellor's Department

2002

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(**a**) 1998 c. 29. The functions of the Secretary of State under section 67 of, and paragraph 10 of Schedule 3 to, the Data Protection Act 1998 were transferred to the Lord Chancellor by Article 3 of, and paragraph 11 of Schedule 1 to, the Transfer of Functions (Miscellaneous) Order 2001 (S.I. 2001/3500). Article 8 of, and paragraphs 6(v) and (z) of Schedule 2 to, that Order amended section 67 of, and Schedule 3 to, the Data Protection Act 1998 so as to refer to the Lord Chancellor.

(**b**) The Data Protection Commissioner became the Information Commissioner on 30th January 2001 by virtue of sections 18(1) and 87(2)(a) of the Freedom of Information Act 2000 (c. 36). The consultation requirement in section 67(3) of the Data Protection Act 1998 now refers to the Information Commissioner as the definitions of "the Commissioner" in sections 6(1) and 70(1) of that Act have been amended by paragraphs 13(2) and 14(a) of Schedule 2 to the Freedom of Information Act 2000.

(**c**) Additional circumstances in which sensitive personal data may be processed are specified in the Data Protection (Processing of Sensitive Personal Data) Order 2000 (S.I. 2000/417).

## SCHEDULE

### CIRCUMSTANCES IN WHICH SENSITIVE PERSONAL DATA MAY BE PROCESSED

**Interpretation**

**1.** In this Schedule, "elected representative" means—

(a) a Member of the House of Commons, a Member of the National Assembly for Wales, a Member of the Scottish Parliament or a Member of the Northern Ireland Assembly;

(b) a Member of the European Parliament elected in the United Kingdom;

(c) an elected member of a local authority within the meaning of section 270(1) of the Local Government Act 1972(**a**), namely—

(i) in England, a county council, a district council, a London borough council or a parish council,

(ii) in Wales, a county council, a county borough council or a community council;

(d) an elected mayor of a local authority within the meaning of Part II of the Local Government Act 2000;

(e) the Mayor of London or an elected member of the London Assembly;

(f) an elected member of—

(i) the Common Council of the City of London,

(ii) the Council of the Isles of Scilly;

(g) an elected member of a council constituted under section 2 of the Local Government etc (Scotland) Act 1994; or

(h) an elected member of a district council within the meaning of the Local Government Act (Northern Ireland) 1972.

**2.** For the purposes of paragraph 1 above—

(a) a person who is—

(i) a Member of the House of Commons immediately before Parliament is dissolved;

(ii) a Member of the Scottish Parliament immediately before that Parliament is dissolved; or

(iii) a Member of the Northern Ireland Assembly immediately before that Assembly is dissolved;

shall be treated as if he were such a member until the end of the fourth day after the day on which the subsequent general election in relation to that Parliament or Assembly is held;

(b) a person who is a Member of the National Assembly for Wales and whose term of office comes to an end, in accordance with section 2(5)(b) of the Government of Wales Act 1998(**b**), at the end of the day preceding an ordinary election (within the meaning of section 2(4) of that Act), shall be treated as if he were such a member until the end of the fourth day after the day on which that ordinary election is held; and

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(**a**) 1972 c. 70.

(**b**) 1998 c. 38. Section 2(5) provides that "The term of office of an Assembly member- (a) begins when he is declared to be returned as an Assembly member, and (b) continues until the end of the day before the day of the poll at the next ordinary election." By section 2(4), "An ordinary election involves the holding of elections for the return of the entire Assembly."

(c) a person who is an elected member of the Common Council of the City of London and whose term of office comes to an end at the end of the day preceding the annual Wardmotes(a) shall be treated as if he were such a member until the end of the fourth day after the day on which those Wardmotes are held.

**Processing by elected representatives**

**3.** The processing—

(a) is carried out by an elected representative or a person acting with his authority;

(b) is in connection with the discharge of his functions as such a representative;

(c) is carried out pursuant to a request made by the data subject to the elected representative to take action on behalf of the data subject or any other individual; and

(d) is necessary for the purposes of, or in connection with, the action reasonably taken by the elected representative pursuant to that request.

**4.** The processing—

(a) is carried out by an elected representative or a person acting with his authority;

(b) is in connection with the discharge of his functions as such a representative;

(c) is carried out pursuant to a request made by an individual other than the data subject to the elected representative to take action on behalf of the data subject or any other individual;

(d) is necessary for the purposes of, or in connection with, the action reasonably taken by the elected representative pursuant to that request; and

(e) is carried out without the explicit consent of the data subject because the processing—

(i) is necessary in a case where explicit consent cannot be given by the data subject,

(ii) is necessary in a case where the elected representative cannot reasonably be expected to obtain the explicit consent of the data subject,

(iii) must necessarily be carried out without the explicit consent of the data subject being sought so as not to prejudice the action taken by the elected representative, or

(iv) is necessary in the interests of another individual in a case where the explicit consent of the data subject has been unreasonably withheld.

**Processing limited to disclosures to elected representatives**

**5.** The disclosure—

(a) is made to an elected representative or a person acting with his authority;

(b) is made in response to a communication to the data controller from the elected representative, or a person acting with his authority, acting pursuant to a request made by the data subject;

(c) is of sensitive personal data which are relevant to the subject matter of that communication; and

---

(a) By section 2 of the Act of Common Council made on 14th June 1984, the annual Wardmotes for the election of Common Councilmen to the Common Council of the City of London are held on the first Friday in December each year, and persons elected as Common Councilmen cease to hold office at midnight on the Thursday immediately preceding the day of the next annual Wardmotes. (Copies of the Act of Common Council made on 14th June 1984 can be obtained from the Town Clerk's Department, Corporation of London, PO Box 270, Guildhall, London EC2P 2EJ.)

(d) is necessary for the purpose of responding to that communication.

**6.** The disclosure—

(a) is made to an elected representative or a person acting with his authority;

(b) is made in response to a communication to the data controller from the elected representative, or a person acting with his authority, acting pursuant to a request made by an individual other than the data subject;

(c) is of sensitive personal data which are relevant to the subject matter of that communication;

(d) is necessary for the purpose of responding to that communication; and

(e) is carried out without the explicit consent of the data subject because the disclosure—

(i) is necessary in a case where explicit consent cannot be given by the data subject,

(ii) is necessary in a case where the data controller cannot reasonably be expected to obtain the explicit consent of the data subject,

(iii) must necessarily be carried out without the explicit consent of the data subject being sought so as not to prejudice the action taken by the elected representative, or

(iv) is necessary in the interests of another individual in a case where the explicit consent of the data subject has been unreasonably withheld.

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## EXPLANATORY NOTE

*(This note is not part of the Order)*

The first data protection principle, set out in paragraph 1 of Schedule 1 to the Data Protection Act 1998, prohibits the processing of sensitive personal data unless one of the conditions in Schedule 3 to the Act is met. The condition set out in paragraph 10 of that Schedule is that the personal data are processed in circumstances specified in an order made by the Lord Chancellor.

The Schedule to this Order specifies a number of such circumstances, which relate to the processing of sensitive personal data by, and disclosures of sensitive personal data to, elected representatives.

An "elected representative" is defined for these purposes in paragraph 1 of the Schedule, and includes Members of the House of Commons, Members of the devolved administrations in Wales, Scotland and Northern Ireland, Members of the European Parliament, elected members of local authorities and elected mayors. Paragraph 2 provides that for the purposes of paragraph 1, a person who is a Member of the House of Commons immediately before Parliament is dissolved is to be treated as if he were such a member until the end of the fourth day after the general election, and makes comparable provision in relation to Members of the devolved administrations and elected members of the Common Council of the City of London.

Paragraphs 3 and 4 of the Schedule cover certain processing carried out by an elected representative (or a person acting with his authority) in connection with the discharge of his functions as such.

Paragraph 3 covers processing carried out pursuant to a request made by the data subject to the elected representative to take action on behalf of the data subject or any other individual. The processing must be necessary in connection with the action reasonably taken by the elected representative pursuant to the request.

Paragraph 4 covers processing carried out pursuant to a request made by an individual other than the data subject to the elected representative to take action on behalf of the data subject or any other individual. The processing must be necessary in connection with the action reasonably taken by the elected representative pursuant to the request. Further, one of the specified reasons for carrying out the processing without the explicit consent of the data subject must apply.

Paragraphs 5 and 6 of the Schedule cover certain disclosures made to an elected representative (or a person acting with his authority) by another data controller.

Paragraph 5 covers disclosures made in response to a communication to the data controller from an elected representative (or person acting with his authority) who is acting pursuant to a request made by the data subject. The sensitive personal data disclosed must be relevant to the subject matter of the communication and the disclosure must be necessary for the purpose of responding to the communication.

Paragraph 6 covers disclosures made in response to a communication to the data controller from an elected representative (or person acting with his authority) who is acting pursuant to a request made by an individual other than the data subject. The sensitive personal data disclosed must be relevant to the subject matter of the communication and the disclosure must be necessary for the purpose of responding to the communication. Further, one of the specified reasons for carrying out the processing without the explicit consent of the data subject must apply.

This Order contributes to the implementation of Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

A Regulatory Impact Assessment was prepared for the Data Protection Bill as it then was and the statutory instruments to be made under it, and was placed in the libraries of both Houses of Parliament. The Regulatory Impact Assessment is now available on the internet at *www.lcd.gov.uk*. Alternatively, copies can be obtained by post from the Lord Chancellor's Department, FIDP Division, Selborne House, 54-60 Victoria Street, London SW1E 6QW.

This Order will have a negligible effect on business, charities and the voluntary sector, therefore a Regulatory Impact Assessment has not been prepared for this Order specifically.

## EXPLANATORY MEMORANDUM

**Draft Data Protection (Processing of Sensitive Personal Data) (Elected Representatives) Order 2002**

Powers under which the Order is to be made

1. The Order is to be made under section 67(2) of, and paragraph 10 of Schedule 3 to, the Data Protection Act 1998 (as amended by paragraph 6 of Schedule 2 to the Transfer of Functions (Miscellaneous) Order 2001 (SI 2001 No. 3500)). Paragraph 10 of Schedule 3 allows the Lord Chancellor to specify in an order circumstances in which sensitive personal data may be processed. Section 67(2) provides that such an order may make provision for different cases. By section 67(4), such an order is subject to affirmative resolution procedure.

Legal and Policy Background

2. The Data Protection Act 1998 gives effect to the 1995 EC Data Protection Directive (95/46/EC). The Act regulates the circumstances in which personal data may be processed. "Personal data" comprise information about individuals that is processed by automatic means or held in a structured manual filing system. "Processing" includes doing anything at all with personal data, including collecting, disclosing and merely holding them. The individuals whose data are processed are known as "data subjects".

3. At the core of the regulatory regime is a set of eight enforceable good practice requirements known as the data protection principles. Persons processing personal data (who are known as data controllers) are required to do so in accordance with the data protection principles. In summary, the principles 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.

4. The first principle is of particular relevance to this draft Order. It says:

> " 1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-
> (a) at least one of the conditions in Schedule 2 is met, and
> (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."

The requirement on elected representatives to meet one of the conditions in Schedule 2 does not normally pose a problem. The draft Order is concerned with paragraph (b),

the need to meet one of the conditions in Schedule 3. This is where the Act has been posing problems for elected representatives and their constituents.

5. Sensitive personal data cover information about data subjects' racial or ethnic origin, political opinions, religious beliefs, trade union membership, health, sexual life, and criminal record. Schedule 3 sets out nine substantive conditions relating to the processing of such data. As noted above, Schedule 3 also provides for the Lord Chancellor to specify in an order further circumstances in which sensitive personal data may be processed. One such order has already been made: the Data Protection (Processing of Sensitive Personal Data) Order 2000 (SI 2000 No. 417). (In this paper the conditions in Schedule 3 itself and those in the 2000 Order are together referred to as the "Schedule 3 conditions".)

6. Individuals often wish their elected representatives to take action on their behalf. Sometimes this may require the elected representatives to process sensitive personal data. Having regard to the wide definition of "processing", the mere storage of sensitive personal data by an elected representative (who might receive them, for example, in an e-mail) means that the elected representative has to be able to satisfy a Schedule 3 condition. The elected representative may also need to be able to disclose those data to other organisations in order to take forward action on the constituents' behalf; and organisations which are approached by elected representatives may need to be able to disclose sensitive personal data to them. In some cases, sensitive personal data of third parties may be involved (for example, if a constituent contacts an elected representative on behalf of a seriously ill relative).

7. One of the Schedule 3 conditions is that the data subject has given his explicit consent to the processing of the personal data. In most cases, none of the other conditions are likely to be relevant to cases involving elected representatives. Accordingly, if a constituent sends an elected representative sensitive personal data in the context of a request for action and the constituent has not made clear that the data may be disclosed, if a disclosure is necessary the elected representative must seek the constituent's explicit consent. Similarly, an organisation responding to a request from an elected representative acting on behalf of a constituent will require the explicit consent of the data subject before being able to disclose sensitive personal data.

8. While a requirement to seek explicit consent is a significant safeguard for data subjects, it can also act as a serious impediment to the efficient discharge of elected representatives' business, be confusing to those making the original request who feel that consent was implicit in making the request in the first place, and may even be detrimental to the data subjects' interests. This draft Order provides additional Schedule 3 conditions for the processing of sensitive personal data in cases involving elected representatives. In circumstances in which the conditions apply, it will no longer be necessary to seek the data subjects' explicit consent.

9. The draft Order has been prepared having regard to the relevant requirements of the Data Protection Directive. Article 8.4 of the Directive permits Member States to provide additional conditions for the processing of sensitive personal data for reasons of substantial public interest, and subject to the provision of suitable safeguards. In the Government's view it is in the substantial public interest to permit the efficient and effective discharge of the functions of elected representatives.

10. The draft Order contains a number of safeguards. These include restrictions on the circumstances in which particular data may be processed.

- In the case of processing by elected representatives, there must be a request to the elected representative from an individual; and the processing must be necessary for the action reasonably taken by the elected representative.
- In the case of disclosures to elected representatives by other data controllers there must, again, have been a request to the elected representative from an individual; the data disclosed must be relevant to the elected representative's enquiry; and the disclosure must be necessary for the response to that enquiry.

11. The above safeguards also apply where the processing or disclosure includes sensitive personal data of third parties. Moreover, in such cases there is an important additional safeguard. The processing or disclosure may not take place without the explicit consent of the third party unless one of four conditions is met. The conditions are that the processing or disclosure is necessary:

- where the data subject cannot give consent; or
- where the elected representative cannot reasonably be expected to obtain consent; or
- because seeking consent would prejudice the action taken by the elected representative; or
- in the interest of another individual and the data subject has unreasonably refused consent.

12. The purpose of the draft Order is to create additional Schedule 3 conditions for the processing by elected representatives or disclosure to elected representatives of sensitive personal data. It does not affect in any other way the requirement on elected representatives, or other data controllers dealing with elected representatives, to comply with the Data Protection Act 1998, including the remaining provisions of the data protection principles. For example, where an elected representative acting at the request of a constituent has received from another data controller sensitive personal data about a third party, in deciding whether he may disclose those data to the constituent he will be bound by the requirements of the data protection principles..

13. Similarly, the draft Order does not override any other legal obligations, whether statutory or common law, which prohibit or place restrictions on the processing of personal data. For example, the common law of confidence restricts the circumstances in which information (including personal data) which is held in confidence may be disclosed. Such information may be disclosed only with the express consent of the individual concerned, or if there is an overriding public interest in the disclosure. These requirements are unaffected by the draft Order.

14. The draft Order is permissive. It allows elected representatives and other data controllers to process sensitive personal data without the data subjects' explicit consent, but it does not require them to do so. Should they prefer to seek explicit consent, they may do so.

15. The substantive provisions are set out in the Schedule to the draft Order.

(1) Paragraph 1 defines "elected representatives". The definition covers Members of the House of Commons, the National Assembly for Wales, the Scottish Parliament and the Northern Ireland Assembly, Members of the European Parliament elected in the United Kingdom, and elected members in all tiers of local government.

(2) Paragraph 2 provides for persons in the categories of elected representative mentioned in the paragraph to continue to be treated as elected representatives for these purposes during election periods. Comparable provision is not needed for the other categories of elected representative mentioned in paragraph 1 since such persons only cease to be elected representatives at the end of a specified period after the election.

(3) Paragraph 3 allows elected representatives, or those acting with their authority, to process sensitive personal data in connection with their representative functions. The safeguards include requirements for the processing to be carried out pursuant to a request from the data subject to take action on behalf of him or another individual, and for the processing to be necessary in connection with the action reasonably taken by the elected representative pursuant to that request.

(4) Paragraph 4 deals with cases where the sensitive personal data supplied to the elected representative do not relate to the individual raising the matter. Such circumstances might arise, for example, when a constituent asks an elected representative to act on behalf of someone who cannot act for themselves, or when a constituent complains about a third party. In addition to safeguards similar to those provided for by paragraph 3, paragraph 4 provides an additional safeguard for the individuals whose sensitive personal data are involved. It allows the processing of their sensitive personal data without their explicit consent only if one of four conditions is met. The conditions are described in paragraph 11 above.

(5) Paragraph 5 deals with situations in which elected representatives have raised matters with other data controllers on behalf of their constituents. It permits the other data controllers to disclose the constituents' sensitive personal data to the elected representatives or those acting with their authority. The disclosure must be made in response to a communication from the elected representative, who must be acting at the request of the data subject. Additional safeguards are that the sensitive personal data disclosed must be relevant to the subject matter of the communication, and that the disclosure must be necessary to respond to the communication.

(6) Paragraph 6 is a parallel provision to paragraph 5, but deals with disclosures to elected representatives of the sensitive personal data of individuals other than those at whose request the elected representatives are acting. The provision made is broadly similar to that made by paragraph 5. Like paragraph 4, it contains an additional safeguard for third parties. Their sensitive personal data may be disclosed to elected representatives without their explicit consent only if one of four conditions is met. The conditions are described in paragraph 11 above.

Consultation

16. The Information Commissioner has been consulted about the draft Order, as required by section 67(3) of the Act, and is content.

Regulatory Impact and Financial Effects

17. A Regulatory Impact Assessment was prepared for the Data Protection Bill as it then was and the statutory instruments to be made under it, and was placed in the libraries of both Houses of Parliament. The Regulatory Impact Assessment is now available on the internet at *www.lcd.gov.uk*. Alternatively, copies can be obtained by post from the Lord Chancellor's Department, FIDP Division, Selborne House, 54-60 Victoria Street, London SW1E 6QW.

18. The draft Order will have a negligible effect on business, charities and the voluntary sector. Therefore a Regulatory Impact Assessment has not been prepared for it specifically.

19. The draft Order will not result in identifiable costs to the public or the Exchequer.

Extent

20. Data protection is a reserved matter under both the Scotland Act 1998 and the Northern Ireland Act 1998. The draft Order applies to elected representatives throughout the UK, at all tiers of government.

ECHR Compatibility

21. In the view of the Lord Chancellor, the provisions of the draft Order are compatible with the Convention rights as defined in section 1(1) of the Human Rights Act 1998.

ANNEX A

**Safeguards which must be met before disclosure takes place**

- Disclosure should be in the public interest (Lewis Moonie).

Michael Wills' letter of 14 May to Derry Irvine seeking CRP(FOI)'s agreement to the Order explained that the Order must comply with the requirements of the 1995 EC Data Protection Directive. Among other things, the Directive requires the provision made by the Order to be in the substantial public interest. The Order will facilitate the efficient and effective conduct of the business of MPs and other elected representatives including enabling them to swiftly pursue the interests and concerns raised with them by individual constituents. That is clearly in the public interest.

- Only relevant and necessary information shall be disclosed (Lewis Moonie) (see also Bob Ainsworth, below).

Paragraphs 3 and 4 of the Order, which deal with processing by elected representatives, require all processing (and not just disclosures) to be necessary to discharge the constituent's request, and for the action taken by the elected representative to be reasonable. Paragraphs 5 and 6, which deal with disclosures to elected representatives by other data controllers, expressly require the data disclosed to be relevant to the subject matter of the elected representative's communication. They also contain a necessity test similar to that in paragraphs 3 and 4. Moreover, the Order does not diminish in any way the duty of the elected representatives or other data controllers to comply with the data protection principles in Part 1 of Schedule 1 to the Data Protection Act 1998. The third principle says: "Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed."

- Disclosure under the Order does not affect the duty to abide by the remainder of the Data Protection Act 1998, in particular with regard to the eight data protection principle and to subject access rights (Lewis Moonie).

The Order merely provides a "gateway" permitting sensitive personal data to be processed in the circumstances set out in the Order. Elected representatives and other data controllers are still required to comply in full with the 1998 Act, including, as noted in the previous point, the data protection principles. Similarly, the Order does not diminish in any way individuals' right of subject access under the 1998 Act.

- The sensitive personal data of individuals other than the constituent instigating the case must not be disclosed to third party organisations (or by third party organisations to elected representatives) without their [explicit] consent (Alistair Darling).

Alistair's letter refers to sensitive personal data of individuals other than the constituent being "inadvertently" disclosed to third party organisations etc. I think that this distinction is important. It would frustrate an important purpose of the Order if third parties had always to give their explicit consent to the disclosure of their sensitive personal data. That is why there are a series of safeguards. Paragraphs 4

and 6 of the Order deal respectively with the processing of third party sensitive data by elected representatives, and the disclosure of third party sensitive data to elected representatives by other organisations. In addition to the other safeguards for which they provide, those paragraphs deal with the issue of explicit consent. The processing (paragraph 4) or disclosure (paragraph 6) may only take place without the explicit consent of the individual concerned in one of the circumstances set out in sub-paragraph (e). Further, as already noted, the processing or disclosure, as the case may be, may take place only in full compliance with the data protection principles. So, for example, if the processing or disclosure was not fair, it would be in breach of the first principle; and if the processing or disclosure was incompatible with the purpose for which the data had been obtained, it would be in breach of the second principle.

- Bodies holding the data should ensure they identify and establish the status of the public representative in advance [of disclosure] (Bob Ainsworth).

A data controller who disclosed sensitive personal data to somebody other than an elected representative (or somebody acting with the elected representative's authority) in purported reliance on the Order would not be acting in compliance with the Order, and would therefore be processing personal data unlawfully. The need for data controllers to be certain of the identity of the person to whom the data are to be disclosed is a matter that might usefully be covered in guidance.

- The [implied] permission to release the data should be limited to the subject of the data or their families (Bob Ainsworth).

This is covered by the comments on the fourth bullet point, above.

- The permission should be limited to the sensitive data necessary to inform the enquiry being pursued (Bob Ainsworth).

This is covered by the comments on the second bullet point, above.

- Limits to the further disclosure of the sensitive data should be clarified (Bob Ainsworth).

As already noted, the Order does not limit the need for elected representatives and third party organisations to comply in full with the 1998 Act. Any further disclosures of sensitive personal data will only be lawful if they are carried out in compliance with the data protection principles, including the requirement to meet one of the conditions permitting the processing of sensitive personal data.

- The sensitive data should continue to be protected once it is in the hands of the public representative (Bob Ainsworth).

The preceding comment also applies to any other processing of the sensitive data by elected representatives. In particular, unless they seek the explicit consent of the data subjects, they are unlikely to have any grounds for holding and otherwise processing sensitive personal other than those provided by this Order.

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FROM THE RIGHT HONOURABLE THE LORD IRVINE OF LAIRG

MATRIX

1. ~~RH~~
2. GE

FREEDOM OF INFORMATION: Policy

CS
cc JJH
AA
SW

HOUSE OF LORDS,
LONDON SW1A 0PW

Rt Hon Jack Straw MP
Foreign Secretary
Foreign and Commonwealth Office
London SW1A 2AL

19 July, 2002

Dear Jack,

**EC DATA PROTECTION DIRECTIVE: EUROPEAN COMMISSION QUESTIONNAIRE**

**This letter seeks the agreement of EP Committee to proposals for amending the EC Data Protection Directive (95/46/EC) being submitted by the United Kingdom to the European Commission in connection with the Commission's report on the implementation of the Directive. I should welcome responses by 31 July.**

Background

2. The Data Protection Directive requires the European Commission to prepare a report on the Directive's implementation. The Commission failed to meet the deadline of October 2001, but they now hope to produce their report by the end of this year. The report will be informed by a survey of Member States' laws transposing the Directive being carried out by an independent consultant; the responses to questionnaires addressed to a variety of recipients, including Member States' governments; and a conference to be held in the autumn.

3. The questionnaire addressed to the Government was received in May. It asked for responses by 5 June. With the exception of the last question, it seeks information of a factual nature about the UK legislation transposing the Directive, the Data Protection Act 1998. A response from the UK providing that information was sent on 14 June. I attach a copy. The response makes clear that the UK will be responding separately later to the final question. This question provides the opportunity for Member States to say how they would like to see the Directive improved.

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Substance

4. It is widely recognised that the Directive needs to be improved. It is based on the 1981 Council of Europe Data Protection Convention which was drawn up to cope with comparatively unsophisticated technology. Technology has moved on apace since it was adopted, and there is an urgent need to modernise its provisions. The Directive also has inherent defects. In a number of respects it is excessively prescriptive and creates unnecessarily heavy burdens for data controllers. Further, certain of its provisions are unclear, which leads to confusion and uneven implementation across the Member States. The Information Commissioner has criticised certain provisions of the Directive as being disproportionately burdensome and unnecessarily regulatory. She thinks that this can work against good data protection. A number of colleagues have also expressed concern about the effect of data protection legislation upon the work of their own Departments. Given these concerns, I believe that we should seize this opportunity to press for improvements to be made to the Directive.

5. I attach a draft response to the final question in the Commission's questionnaire. There are three main components. First, the response encourages the Commission to consider carefully a Swedish proposal for a radical new approach to data protection (paragraph 4). It also endorses a paper proposing amendments to the Directive, which has been drawn up by LCD officials and their opposite numbers in "like-minded" Member States (paragraph 5). Finally, it makes some additional proposals in the UK's own name.

*The Swedish proposal*

6. Sweden have already submitted to the Commission a proposal for what they describe as a "misuse" model of data protection. I attach a copy. The proposal would apply to the processing of personal data which poses little threat to individuals, for example word-processing. Under the present arrangements, the data protection rules apply in full to such processing. Sweden argue that this is unnecessarily burdensome. They propose that there should be a much simpler test: that the processing could take place provided that it did not harm the individuals concerned. This is an imaginative approach, which could help reduce the regulatory effect of data protection, without weakening the protection for individuals. It raises a number of difficult issues which would need to be resolved before it could be put into practice, not least finding a way of defining the processing to which the model would apply. But given the gains to be made if solutions to the practical problems can be found, I believe that we should encourage the Commission to consider it. .

*The joint paper*

7. In view of the Commission's obligation to produce a report on the Directive, officials from LCD have had informal discussions with Government representatives from a number of other Member States to see whether there are any shared problems with the Directive to which solutions can be jointly proposed. As well as the UK, Austria, Denmark, Finland, Germany, the Netherlands and Sweden took an active part in the discussions, and Ireland received papers. The outcome is encouraging. I attach a paper which officials from the Member States concerned have produced. It sets out a number of proposals for amending the Directive on which officials from the other Member States are also seeking their Ministers' views. A summary of the proposals is at Annex A. They are all in the main stream of what we would wish to achieve: greater simplicity, clarity and flexibility, having a deregulatory effect, with no effective reduction in the protection for individuals.

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8. I should draw colleagues' attention in particular to the proposal to simplify the requirement for data controllers to notify the data protection supervisory authority of the processing that they do. The business community have long criticised notification (which was formerly known as registration under the Data Protection Act 1984) as a burdensome and costly imposition. Its simplification in line with the proposal in the joint paper would be an important deregulatory step and should gain wide support.

9. If colleagues agree the substance of the paper, I propose that it should be submitted to the Commission as an integral part of the UK's response.

*UK proposals*

10. The main part of the draft response comprises a number of additional proposals to be made in the UK's own name. They take account of the responses made to the autumn 2000 consultation carried out as part of the Government's post-implementation review of the Data Protection Act 1998; and the Government's own experience in operating the legislation. A summary is at Annex B.

11. Colleagues' main concern has been with the arrangements for subject access. The paper suggests that the Commission should review the Directive's subject access provisions to ensure that they strike the right balance between the interests of data subjects and those of data controllers. This complements the more modest proposal in the Member States' joint paper. We shall be carrying out a separate review of the domestic arrangements for subject access, but the results will not be available in time to inform the present exercise.

Conclusion

12. I believe that the proposed response comprises a measured and defensible set of proposals which, if accepted, will greatly improve the Directive. They will ease the burdens currently imposed on data controllers without significantly diminishing the protection afforded to individuals. Indeed, as the Information Commissioner has said, by simplifying the Directive's regulatory effect, the delivery of data protection may well be improved.

13. In view of the Commission's deadline of 5 June for responding to the questionnaire, we need to send this response as soon as possible. The timetable to which the Commission are working suggests that we must submit our response by early September at the very latest if we wish our views to be taken seriously into account. I should therefore welcome colleagues' agreement by 31 July.

14. I am copying this letter to the Prime Minister, other members of EP Committee and Linda Clark and to Sir Richard Wilson.

Yours ever,

Derry

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**Annex A**

**Draft paper prepared by officials of "like-minded" Member States**

The main effect of the proposals would be to:

- clarify the scope of the sensitive data provisions, and create an additional "gateway" where the processing of sensitive data is necessary for the performance of a contract;

- simplify the provisions requiring information to be given pro-actively to data subjects;

- ease the duty placed on data controllers by the subject access provisions, by making clear that they must provide only those data which they have used "reasonable efforts" to locate;

- simplify the requirement for data controllers to notify the data protection supervisory authority of the processing that they do;

- make a number of amendments to the provisions relating to the transfer of personal data to third countries, of which the most important is a new provision making clear that personal data lawfully published in the EU may be transferred to any third country.

**Annex B**

**Proposals to be made in the name of the United Kingdom**

Th paper proposes that the Commission should:

- review the scope of the Directive (including the key definitions) to ensure that its provisions are clear and workable;
- review Article 4 (which determines both which Member State's law applies to particular processing, and the relationship with third countries' laws);
- review the need for a list of "sensitive data" and special rules relating to them, (since sensitivity is determined by context, and the data protection principles are sufficiently flexible to provide the necessary degree of protection);
- review the subject access arrangements to ensure that they strike the proper balance between the interests of data subjects and those of data controllers;
- review the need for Article 15 of the Directive (which allows individuals to challenge fully automated decisions taken about them) ;
- review the requirement for data processors (ie persons who provide services to data controllers) to be bound by the security provisions of the law of the Member State in which they are established (rather than the law of the Member State in which the data controller is established); and the requirement for written contracts between data processors and data controllers;
- review the need for multiple notifications by organisations established in more than one Member State;
- review the provisions relating to the transfer of personal data to third countries to make them simpler and more flexible.

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EUROPEAN COMMISSION
Internal Market DG

FUNCTIONING AND IMPACT OF THE INTERNAL MARKET. COORDINATION. DATA PROTECTION
**Data protection**

# Questionnaire for Member States on the implementation of Directive 95/46/EC

**1. Please indicate national laws, regulations and administrative provisions brought into force to comply with Directive 95/46/EC (with identification, if applicable, of its date of notification to the European Commission) [or otherwise substantially related to the protection of the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data ].**

Directive 95/46/EC was transposed in the United Kingdom by the Data Protection Act 1998. Notification to the Commission of the transposition of the Directive into UK law was given in the letter of 8 March 2000 from Stuart Gill at the UK Permanent Representation to John Mogg. Some amendments to the 1998 Act are made by the Freedom of Information Act 2000. A list of subordinate legislation made under the 1998 Act is attached at Annex A. The European Commission have previously been provided with a copy of each Act and the subordinate legislation. Following a change in Ministerial responsibility for data protection policy in June 2001, references in the 1998 Act to the Secretary of State have been changed by Order in Council to references to the Lord Chancellor.

**2. Where substantial provisions concerning privacy are to be found in laws, regulations or administrative provisions other than the national law transposing the Directive in your Member State, either approved before or after that law, we would be obliged if you could identify them. We would be similarly obliged if you could identify those provisions of the Directive which have not been properly implemented yet in your Member State and provide some explanations and/or identify possible solutions.**

Not applicable.

**3. Please indicate which authority/ies in your Member State is/are pursuant to Article 28 of the Directive responsible for monitoring the application within its territory of the provisions adopted by your Member State. Please indicate in particular those authorities which may have a say on data protection questions and have not been set up by the Data Protection Law transposing Directive 95/46/EC. In those cases where more than one authority has been provided, please indicate what are the rules on the sharing of their respective attributions and their co-ordination.**

Commission européenne, B-1049 Bruxelles / Europese Commissie, B-1049 Brussel - Belgium. Telephone: (32-2) 299 11 11.
Office: C100 6/014. Telephone: direct line (32-2) 296.58.59. Fax: (32-2) 296.80.10.

http://europa.eu.int/comm/internal_market/
E-mail: Leonardo.Cervera-navas@cec.eu.int

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The independent supervisory authority set up pursuant to Article 28 of the Directive is the Information Commissioner. Other than the Information Tribunal (which is the appellate authority) and the courts, no other authority has responsibility for determining the way in which the 1998 Act applies.

**4. What experience do you have of compliance with the requirement that controllers not established on Community territory making use of equipment situated on the territory of this Member State designate a representative established in the territory of your Member State?**

The Government has no such experience. Enforcement of the 1998 Act is a matter for the Information Commissioner. However, in the Government's view the relevant provision (Article 4.2 of the Directive) is of limited usefulness given difficulties in enforcing extra-territorial provisions of this kind.

**5. How has your Member State determined more precisely the conditions under which the processing of personal data is lawful (Article 5 of the Directive)[1]**

The precise meaning of Article 5 of the Directive is unclear. There are many ways in which the 1998 Act makes more precise the provisions set out in the Directive. As regards the lawfulness of the processing of personal data, please see in particular the provisions setting

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[1] There are many places in the Directive where more precision by the Member States is considered compulsory by the Directive or at least further precision by the Member States seems to be advisable. See for example:

3.1. The safeguards provided for pursuant to Article 6.1.b) of the Directive (further processing of personal data for historical, statistical or scientific purposes), when appropriate.

3.2. The safeguards laid down for personal data stored for longer periods for historical, statistical or scientific use (Article 6.1.e).

3.3. The criteria for making data processing legitimate under Article 7 f) of the Directive.

3.4. The safeguards laid down within the meaning of Article 8.2.b) of the Directive (processing of sensitive data in the employment area).

3.5. The guarantees within the meaning of Article 8.2.d) of the Directive (processing of sensitive data for non-profit-seeking organisations).

3.6. Further information that controllers shall provide to data subjects within the meaning of Articles 10 c) and 11 c) of the Directive.

3.7. The terms "without constraint at reasonable intervals and without excessive delay or expense" (exercise of the right of access by individuals, Article 12 a) of the Directive).

3.8. The terms "impossible" and "disproportionate efforts" in Article 12 c) of the Directive.

3.9. The term "a justified objection" within the meaning of Article 14 a) of the Directive.

3.10. The term "damage as a result of an unlawful processing operation or of any act incompatible with the national provisions adopted pursuant to this Directive" (Article 23 of the Directive)

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out the statutory interpretation of the data protection principles in Part II of Schedule 1 to the 1998 Act.

The following comments apply to the points raised in the footnote to this Question.

3.1 and 3.2: The safeguards (in section 33(1) of the 1998 Act) are:

(a) that the data are not processed to support measures or decisions with respect to particular individuals, and
(b) that the data are not processed in such a way that substantial damage or substantial distress is, or is likely to be caused to any data subject.

3.3: Power for the Lord Chancellor to make an order specifying circumstances in which the test is, or is not, satisfied.

3.4: Power for the Lord Chancellor to make an order excluding processing or to set conditions (Paragraph 2 of Schedule 3 to the 1998 Act).

3.5 and 3.6: No elaboration.

3.7: Section 7 of the Act, and the Data Protection (Subject Access) (Fees and Miscellaneous Provisions) Regulations 2000 (as amended in 2001), impose limits on both the time for responding to a subject access request and the fee which may be charged for responding. Under these provisions, the "standard" rule is that requests must be complied with promptly and in any event within 40 days of receiving the request and the required fee. Requests relating to educational records must be complied with within 15 school days. The "standard" maximum subject access fee is £10. In respect of certain requests for health records and educational records the maximum fee is £50.

3.8: No elaboration.

3.9: Section 10 of the 1998 Act gives individuals the right to prevent processing which is likely to cause unwarranted substantial damage or unwarranted substantial distress.

3.10: Article 5 of the Directive does not apply to Article 23.

**6. Has your Member State laid down exceptions in addition to those laid down in Article 8.2 (see Article 8.4)? If so, please indicate them.**

Paragraphs 7 and 9 of Schedule 3 to the 1998 Act, and the provisions of the Data Protection (Processing of Sensitive Personal Data) Order 2000 have been brought forward in reliance on Article 8.4 of the Directive.

**7. Has your Member State granted derogations to the principle that the processing of data relating to offences, criminal convictions or security measures**

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**may be carried out only under the control of the official authority? In that case, please indicate also what are the safeguards provided for under national law.**

The 1998 Act treats the categories of data mentioned in the question as "sensitive personal data"(see the definition in section 2 of the 1998 Act.) This means that the processing of such data may be carried out in any of the circumstances specified in Schedule 3 to the 1998 Act and in the Data Protection (Processing of Sensitive Personal Data) Order 2000, subject to the safeguards set out in those provisions. (The drafting of Article 8.6 of the Directive causes doubt about the status of the categories of data mentioned in the question. It suggests that Article 8.5, which refers to the categories of data mentioned in the question, provides derogations from Article 8.1. However, Article 8.1 makes no reference to the categories of data concerned. It is unclear, therefore, how these categories of data should be treated.)

8. **Has your Member State determined the conditions under which a national identification number or any other identifier of general application may be processed? If so, please say in what terms.**

Not applicable.

9. **What are the exemptions or derogations from the provisions of Chapter II of the Directive provided for by your Member State for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression necessary to reconcile the right to privacy with the rules governing freedom of expression?**

The relevant exemption is found in section 32 of the 1998 Act, and its associated provisions.

10. **In which cases is the recording or disclosure of personal data expressly allowed by law within the meaning of Article 11.2 of the Directive (and therefore Article 11.1 would not apply) and what are the safeguards provided for?**

General provision, which covers all relevant common law or statutory provisions, is made by paragraph 3 of Part II of Schedule 1 to the 1998 Act. The safeguards are set out in the Data Protection (Conditions under Paragraph 3 of Part II of Schedule 1) Order 2000.

11. **Please indicate the exemptions and restrictions adopted in your legislation pursuant to Article 13 of the Directive, in particular as regards their necessity to safeguard the interests listed in this provision. We would be particularly interested in those exemptions and restrictions taken to safeguard " the protection of the data subject or of the rights and freedoms of others".**

The provisions adopted pursuant to Article 13 of the Directive are found mainly in Part IV of and Schedule 7 to the 1998 Act. The exemptions are not expressly linked to particular provisions of Article 13. In many cases they relate to more than one of the provisions of that Article.

12. **Where appropriate, please indicate the measures taken by your Member State to ensure that data subjects are aware of the existence of the right referred to in the first subparagraph of Article 14 b) of the Directive (right to object).**

Information about the right not to have one's personal data processed for the purposes of direct marketing is included in guidance material provided by the Information Commissioner.

13. **May individuals obtain administrative remedy before a body other than the data protection supervisory authority? We would be particularly interested in the arrangements for dealing with data protection complaints on the processing of personal data by the Public Administration.**

If by "administrative remedy" the question is intended to cover remedies other than those available from a court, the answer to this question is "no". Individuals may seek judicial remedies in respect of failing to comply properly with: the subject access arrangements (Article (12)); the right to object (Article 14(a)); the direct marketing provisions (Article 14(b)) and the right to object to automated decision-taking (Article 15). Individuals who suffer damage because of contravention of any provision of the Act are entitled to seek compensation in a court. The 1998 Act applies the same rules to all data controllers irrespective of whether they are in the public sector or the private sector.

14. **Could administrative remedy provide compensation for individuals or is it limited to ensuring compliance with data protection legislation?**

Compensation is only available from a court. The Information Commissioner has the power to issue enforcement notices requiring data controllers who contravene the data protection principles to change their practice to make it compliant with the 1998 Act.

15. **What practical arrangements does your Member State take to ensure that the transfer of personal data to a third country may take place only if the third country in question ensures an adequate level of protection?**

The relevant statutory provision is made in the eighth data protection principle, in Part I of Schedule 1 to the 1998 Act. Enforcement of that provision is the responsibility of the Information Commissioner.

16. **Does your government play a role in authorising data transfers to third countries within the meaning of Article 26 (2) (ad hoc contract or other national authorisations)? If that is the case, please give the number of authorisations and the destinations.**

No. The Information Commissioner has the power to authorise such transfers (see paragraphs 8 and 9 of Schedule 4 to the 1998 Act).

17. **Where appropriate, what safeguards have been provided for by your Member State pursuant to Article 32.3 of the Directive?**

The provision giving effect to Article 32.3 of the Directive is found in Part IV of Schedule 8 to the 1998 Act. The safeguards are those found in section 33(1) of the 1998 Act (see paragraph 15 of Schedule 8). They are:

(a) that the data are not processed to support measures or decisions with respect to particular individuals, and

(b) that the data are not processed in such a way that substantial damage or substantial distress is, or is likely to be, caused to any data subject.

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**18. What experience have you had with the application of the provisions adopted pursuant to Directive 95/46/EC to the data processing of sound and image data relating to individuals?**

As noted above, responsibility for enforcing the 1998 Act is the responsibility of the Information Commissioner. She would be best placed to answer this question. For its part, the Government may wish to return to this question at a later date (see below).

**19. In conclusion, we would be obliged if you could summarise the most important difficulties detected in the implementation process in your Member State and what should in your view be the data protection issues on which the Commission's forthcoming report and/or future Community action should focus?**

In the time available, the Government has been able only to provide answers to the foregoing questions, which are essentially of a factual nature. The Government will submit its observations in response to the present question at a later date.

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ANNEX A

## DATA PROTECTION ACT 1998: SUBORDINATE LEGISLATION

The Data Protection Act 1998 (Commencement) Order 2000. (SI 2000 No.183(C.4)

The Data Protection (Corporate Finance Exemption) Order 2000. (SI 2000 No.184)

The Data Protection (Conditions under Paragraph 3 of Part II of Schedule 1) Order 2000. (SI 2000 No. 185)

The Data Protection (Functions of Designated Authority) Order 2000. (SI 2000 No. 186)

The Data Protection (Fees under section 19 (7)) Regulations 2000. (SI 2000 No. 187)

The Data Protection (Notification and Notification Fees) Regulations 2000. (SI 2000 No. 188)

The Data Protection (Notification and Notification Fees) (Amendment) Regulations 2001. (SI 2001 No. 3214)

The Data Protection (International Co-operation) Order 2000. (SI 2000 No. 190)

The Data Protection (Subject Access) (Fees and Miscellaneous Provisions) Regulations 2000. (SI 2000 No. 191)

The Data Protection (Subject Access) (Fees and Miscellaneous Provisions) (Amendment) Regulations 2001. (SI 2001 No. 3223)

The Data Protection (Subject Access Modification) (Health) Order 2000. (SI 2000 No.413)

The Data Protection (Subject Access Modification) (Education) Order 2000 (SI 2000 No.414)

The Data Protection (Subject Access Modification) (Social Work) Order 2000. (SI 2000 No.415)

The Data Protection (Crown Appointments) Order 2000. (SI 2000 No. 416)

The Data Protection (Processing of Sensitive Personal Data) Order 2000. (SI 2000 No. 417)

The Data Protection (Designated Codes of Practice) (No.2) Order 2000 (SI 2000 No. 1864)

The Data Protection (Miscellaneous Subject Access Exemptions) Order 2000. (SI 2000 No. 419)

The Data Protection (Miscellaneous Subject Access Exemptions) (Amendment) Order 2000. (SI 2000 No. 1865)

The Data Protection Tribunal (Enforcement Appeals) Rules 2000. (SI 2000 No. 189)

The Data Protection Tribunal (National Security Appeals) Rules 2000 (SI 2000 No. 206)

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# QUESTIONNAIRE FOR MEMBER STATES ON THE IMPLEMENTATION OF DIRECTIVE 95/46/EC

**19. In conclusion, we would be obliged if you could summarise the most important difficulties detected in the implementation process in your Member State and what should in your view be the data protection issues on which the Commission's forthcoming report and/or future Community action should focus.**

## Introduction

The United Kingdom has already submitted its response to the first eighteen questions in the Commission's questionnaire. This paper deals with the final question.

2. The data protection rules in Directive 95/46/EC are based upon but go further than those in the 1981 Council of Europe Data Protection Convention (the Convention). The Convention was drawn up at a time when the rôle of computers in society was much less sophisticated than that which they play now. The Directive was first brought forward as long ago as 1990 and finally adopted in 1995. The developments in information technology since then, in particular the establishment of the Internet and the facilities it provides for processing personal data, were not foreseeable when the Directive was elaborated. They have changed beyond recognition the technological as well as the social framework in which the activities which the Directive is intended to regulate take place.

3. The United Kingdom recognises that the Directive, like the Convention, is intended to be technology neutral. However, in the United Kingdom Government's view, the range, scale and rapidity of the developments in information technology in recent years, which is unlikely to slacken in the future, make the concept of "technology neutrality" a difficult one to sustain. The core principles (in Article 6), upon which the Directive, like the Convention, is based, remain sound. The questions which technology raises go to the manner in which they are applied. Specifically the elaboration of those principles

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which the Directive, and to a lesser extent the Convention, contains makes compliance more complicated in an environment of rapid technological change.

4. The United Kingdom therefore believes that the Commission should take the opportunity to make a radical reappraisal of the Directive to identify how it needs to be amended to make it more readily applicable in the current state of technology, whilst bearing in mind that the recent rapid advances are likely to continue. It is desirable to avoid the rigid application of rules in circumstances to which the rules are inherently unsuited, or where there is no substantive risk. Such an approach would merely impose unnecessary extra burdens on data controllers, with no countervailing added data protection value for individuals. In this connection, the United Kingdom notes the proposal made by Sweden for a radically simplified model of data protection for certain routine and inherently non-intrusive processing operations. The United Kingdom believes that Sweden's proposed "misuse" model offers the prospect of creating effective data protection by the application of simple rules. The United Kingdom hopes that the Commission will give the proposal its most careful consideration.

5. In discussion among themselves, a number of Member States have reached agreement on proposals for amending the Directive. These are attached to and form an integral part of this response of the United Kingdom to the Commission's questionnaire. The following paragraphs of this paper identify other points to which the United believes attention should be given. In some respects they go beyond the specific proposals set out in the joint paper. In all cases, they should be read in the context of the remarks made above about the need for a reappraisal of the Directive in the light of technological developments. They draw on the United Kingdom Government's post-implementation appraisal of the Data Protection Act 1998, which transposes the Directive in the United Kingdom, that was carried out in autumn 2000. Certain of the proposals would require changes to be made to the Convention. Where this is the case, the United Kingdom believes that the necessary steps should also be taken to secure the amendment of that instrument.

Scope

6. The Directive applies to all processing of personal data. As noted above, the Directive's rules can only be applied with difficulty in some cases. For example, the rule on sensitive data will apply to all image data, since pictures will always reveal individuals' ethnic origin; and there is inherent difficulty in providing subject access to CCTV data. ***The Commission should review the scope of the Directive, and in particular its application to sound and image data.***

Definitions

7. The definitions of "personal data" and "personal data filing system" help to determine the scope of the Directive. The first is unduly wide. Even with the commentary in recital (26) (which is itself unclear) it means that a data controller must treat as personal data information from which he himself cannot identify the data subject. This imposes upon him duties, such as the requirement to give subject access, which he cannot discharge. The second definition, even as elaborated in the recitals, is also imprecise. This gives rise to wide divergence of application in practice. ***The Commission should review both the definitions in order to make them more precise and capable of being applied consistently in practice.***

8. The definition of "processing" also gives rise to problems. Its meaning varies according to the provision of the Directive in which it is used. In some provisions the context suggests that it means a particular processing operation (e.g. making a disclosure); in others the context gives it a wider meaning (e.g. doing anything at all with personal data). Using a single term to convey several meanings is unsatisfactory since it gives rise to uncertainty and confusion. ***The Commission should review the definition of "processing" and the way the term is used in the Directive.***

9. Personal data need protection only when they are processed specifically in relation to the individual to whom they relate. In some cases, in particular business applications, while individuals are identified, their identity is irrelevant to the purpose of the processing. For example, the company secretary of one business might wish to send a

formal letter to the company secretary of another business. It is normal practice for the letter to be addressed to the recipient by name. This brings the processing needed to prepare and send the letter within the scope of the Directive. But it is irrelevant to the person sending the letter whether he is dealing with Mr X or Ms Y. He is only interested in the letter getting to the company secretary. The former United Kingdom legislation dealt with this problem by limiting the scope of the Act to processing done "by reference to the data subject."

***The Commission should review the case for including processing not done "by reference to the data subject" within the scope of the Directive.***

National Law Applicable

10. Article 4 of the Directive establishes the rules for determining which Member State's law applies to processing. To avoid loopholes and dual application it is important that the rules be interpreted and applied in the same way in all Member States. Article 4 also provides for a Member State's law to apply where the controller is established outside the EU. As noted in the United Kingdom's answer to Question 4, this provision, which purports to give extra-territorial effect to the Directive, is difficult to enforce and thus of limited usefulness. It is also unclear how Article 4 should be applied in the legally complex situations which can be created by Internet use.

***The Commission should review Article 4.***

Sensitive data

11. The United Kingdom supports the proposals relating to sensitive data made in the joint paper. The "sensitivity" of any data is determined by the circumstances in which the data are processed rather than by the nature of the data themselves. In the United Kingdom's view, requiring all personal data in particular categories always to be dealt with according to special, more demanding rules irrespective of whether their processing would in fact pose special risks, is unnecessarily restrictive. In many situations, the processing of data in the categories listed in Article 8.1 poses no greater threats to privacy than those posed by the processing of data not designated as sensitive. The converse is also true. The flexibility of the data protection principles allows the protection that they afford to be matched to the degree of risk involved in processing.

In the United Kingdom's view the data protection principles thus provide the required degree of protection for any data according to the risk posed by the circumstances of the processing.

***The Commision should review the need for a list of sensitive data, and special rules relating to them.***

## Subject Access

12. The United Kingdom supports the proposals relating to subject access made in the joint paper. It recognises the force of the point made in the Explanatory Note to that paper that subject access is one of the cornerstones of data protection. However, it believes that technological developments have had a huge impact upon the way in which the exercise of that right affects data controllers. It is no longer the case that data controllers can discharge their obligations by simply down-loading data from centrally held databases. The prevalence of personal computers giving access to a range of electronic services from each desk has made data controllers' task in dealing with subject access requests immeasurably more complex, time-consuming and costly. A better balance is needed between individuals' entitlement to gain access to their data, and the burdens imposed on data controllers in providing the data. The proposals in the joint paper go some way towards this, but the United Kingdom believes that more needs to be done to establish the correct balance.

***The Commission should review the subject access arrangements to ensure that they strike the right balance between the interests of data subjects and those of data controllers.***

## Automated individual decisions

13. This Article is complicated, difficult to give effect to in practice, and of doubtful relevance to data protection (as opposed to decision-making). Moreover, it is not clear what benefits it brings to data subjects over and above the right to object (Article 14(a)) or to challenge compliance with unlawful processing.

***The Commission should review the need for Article 15.***

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**Security of processing**

14. The general rule set by Article 4 is that a data controller must comply with the data protection rules of the Member State in which the data controller is established. Curiously, Article 17 makes different provisions for processors. It provides that they must comply with the security provisions of the Member State in which they are located, which may not be the Member State to whose law the data controller is subject. This anomaly is curious and difficult to justify. Article 17 also seems to leave a loophole, since it makes no mention of the position of processors situated outside the EU.
***The Commission should review the the requirement for processors to be bound by the security provisions of the law of the Member State in which they are established.***

15. Article 17 provides that a processor must always be bound to his data controller by a contract in writing or equivalent form. Given the very wide nature of the functions that could constitute acting as a processor, (e.g. a supporter of a small voluntary organisation collecting personal data on behalf of the organisation) this provision is unnecessarily restrictive.
***The Commission should review the requirement for processors to be bound to their data controllers by written (or equivalent) contracts.***

**Notification**

16. The United Kingdom supports the proposals relating to notification in the joint paper. The United Kingdom is aware that the burdens imposed by notification are a source of concern to many organisations. The burdens are perceived as being disproportionate to any added value that they may bring to data protection. The proposals in the joint paper will help reduce those burdens. Some organisations that are established in more than one EU Member State are also concerned about the multiple burdens that fall on them by having to notify separately in each of those Member States. They believe that it should be sufficient for them to notify in one Member State.
***The Commission should review the need for multiple notifications by organisations established in more than one Member State.***

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## Transfers of personal data to third countries

17. The United Kingdom supports the proposals in the joint paper which relate to the transfer of personal data to third countries. In the United Kingdom's view, experience with the operation of Articles 25 and 26 of the Directive, including the discussions that have taken place in the context of the Commission's decisions under those provisions, clearly show that those Articles are difficult to operate in practice. Neither of the concepts on which the Articles are based (i.e. "transfer" and "adequacy") are defined. The Articles envisage a centralised decision-making process, both within Member States and within the EU. The first runs strongly against the approach to data protection which the United Kingdom has traditionally favoured; and the second is inflexible and unrealistic.

***The Commission should review Articles 25 and 26 and bring forward a simpler and more flexible set of proposals for managing the transfer of person data to third countries.***

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REGERINGSKANSLIET

**Memorandum**

30 November 2000 Ju2000/4977/L6

**Ministry of Justice**
**Stockholm, Sweden**

*Division for Constitutional Law*
*Sören Öman & Katrin Hollunger Wågnert*

## Simplified protection for personal data applying misuse model

Certain difficulties have occurred both in Sweden and, as far as we know, in other Member States where the Directive has also been implemented in the application of the national legislation adopted as a consequence of the Directive of the European Parliament and 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 (95/46/EC). The difficulties of application seem to be mostly associated with the commonplace processing of personal data in the form of sound and image data and in continuous text, for example, in the processing of words and text and in the use of e-mail and the Internet. For that processing, that is carried out every day by almost every employee in Sweden and is in most cases completely harmless, the Directive's provisions on the actual processing of personal data appear far too comprehensive and complicated. In order for the provisions to gain acceptance and to have a real breakthrough in their practical application, they must be simplified and concentrate on the essentials, namely, for protecting against harmful acts in the nature of misuse.

Sweden therefore wants to propose a simplified regulation of the protection for personal data, directed towards the prevention of misuse, in such commonplace processing of continuous text and sound and image data that is in most cases completely harmless. The proposal is presented below in the form of a draft for a new article to the Directive, Article 3A. Sweden has some further proposals for certain minor revisions of certain articles in the Directive that appear to cause difficulties of application. Those proposals are also presented and explained below.

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**Proposals for simplified regulation in certain cases**

*Article 3 A (new)*

1. *In the automatic processing of personal data in the form of sound and image data and text, where the material has not been structured to enable personal data to be searched for Articles 4, 9 and 22 – 24 only apply.*

2. *The Member States shall prescribe that such processing referred to in paragraph one and amounting to the distribution of personal data that harms the data subject is not allowed. However, this shall not apply if the person distributing the personal data is obliged to express an opinion or it is otherwise justifiable for the personal data to be distributed having regard to the public interest.*

Proposals for minor revisions in certain articles

*Article 6 – Exemptions with consent*

According to Article 6, the Member States shall provide that personal data must, *inter alia,* be processed fairly and lawfully (a), collected for specified purposes and then not used for an incompatible purpose (b), be adequate and relevant (c), be accurate and up to date (d) and kept in a form which permits identification of data subjects for no longer than is necessary (e).

According to Articles 7 and 8, the data subject can in principle consent to any processing whatever of personal data, even that of a sensitive nature. He or she cannot, however, consent to personal data for example being processed for a purpose that is incompatible with that for which the personal data was collected. This does not seem reasonable. The data subject should, by giving his or her voluntary consent, be able to exempt the controller from the requirements of Article 6, items b - e. He or she should not, however, by giving consent be able to exempt the controller from the requirement in item A that personal data must be processed fairly and lawfully.

*Article 12 – Some exceptions from the right of access to data*

According to Article 11.2, a controller can voluntarily omit giving the data subject information about the processing of personal data that has not been collected from the data subject himself/herself where "... in particular for processing for statistical purposes or for the purposes of historical or scientific research, the provision of such information proves impossible or would involve a disproportionate effort".

No comparable exception is to be found as regards the data subject's right under Article 12 on request to obtain access to data from the controller. According to Article 13.2, the exception can only apply "when data are processed solely for purposes of scientific research or are kept in personal form for a period which does not exceed the period necessary for the sole purpose of creating statistics".

That results in controllers who have large collections of, *inter alia*, personal data having to expend enormous resources to search through their collections in order to be able to fulfil their responsibility for supplying access to data.

In order to deal with the anomaly described, an exception comparable to that found in Article 11.2 should be incorporated into Article 13.2.

*Article 4 – Clarification on the issue of the national law applicable*

As regards the international character of Article 4 on the national law applicable, it is necessary for the Article to be unequivocal and applied in the same way in all Member States. That is not the case today. An example that can be mentioned is the Finnish and Swedish legislation implementing the Directive's provisions:

The Finnish law:
This law is applicable to the processing of personal data if the controller's place of activity is located within Finnish territory or in general comes under Finnish jurisdiction.

The Swedish law:
This law applies to those personal data controllers who are established in Sweden.

Which country's law should, for example, apply to the processing of personal data carried out in Sweden by a company established in Finland only?

Sweden considers that it is important to obtain clarification, but is open to all practicable solutions to the material issue.

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**DATA PROTECTION DIRECTIVE (95/46/EC)**

**PROPOSALS FOR AMENDMENT MADE BY [insert names of Member States]**

## EXPLANATORY NOTE

### Introduction

1. This paper sets out proposals for amending the Data Protection Directive (95/46/EC). They are made jointly by [insert names of Member States]. The proposals are in addition to any that each Member State may make in its own name.

2. The paper was prepared against the background of the requirement in Article 33 of the Directive for the European Commission to prepare a report on the implementation of the Directive and to make, if necessary, suitable proposals for amendments. The proposals contained in this paper are intended to help the Commission in its consideration of the changes that are needed to the Directive in the light of Member States' experience with operating it. The Member States named above encourage the European Commission to take full account of the proposals in preparing its report on the implementation of the Directive. They also hope that the other Member States will support the proposals.

3. As the Directive recognises the processing (in the widest sense of that term) of personal data is essential to the effective functioning of the single market. The purpose of data protection rules is not to prevent the processing of personal data. Rather, it is to ensure the proportionate regulation of such processing. The rules must give effective protection to individuals' personal data without unnecessarily restricting the processing needed to deliver the services which our increasingly technologically sophisticated society demands.

4. In the areas which the paper addresses, the proposals seek to achieve a better balance between these two requirements than the Directive currently does. It is not the purpose of the proposals to weaken in any way the level of protection

given to data subjects. The Member States which have prepared the paper believe, to the contrary, that the proposals which they make are likely to improve data protection. By removing unnecessary, and in some cases costly, bureaucratic requirements for which there is no conclusive added value in data protection terms, the core requirements of data protection are more likely to be complied with by data controllers.

## The proposals

5. The proposals are set out in the Annex to this paper. Where appropriate the current text of the Directive is reproduced with the proposed amendments shown. Deletions are struck through; additions are shown in italics. In the case of Articles 10 and 11, where the proposal is that the articles be merged, this approach has not been possible. Although the proposed new article draws very heavily on the current articles, the whole text is shown in italics.

### Special categories of data

*Proposal (1)*

6. Article 8.1 of the Directive prohibits the processing of certain categories of personal data (commonly known as sensitive data), subject to the derogations set out in the following provisions of the Article. The precise parameters of the information covered by Article 8.1 are unclear. For example, as it stands, Article 8.1 arguably applies to the processing of an image of a person, since that image will always "reveal" the ethnic or racial origin of the person, unless he or she is masked or otherwise heavily disguised. It can also be argued that Article 8.1 covers the publication in, for example, a telephone directory, since, again, the names "reveal" ethnic or racial origin. The proposed amendments to recital (33) of the Directive are intended to make clear that such essentially incidental "revelations" of the characteristics described in Article 8.1 do not amount to sensitive data for the purposes of the Article.

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7. The amendments also correct an error in the current drafting of the recital. As it stands, the recital suggests that the Directive prohibits the processing of sensitive data without the explicit consent of the individual concerned. That is incorrect. Article 8.1 is expressed as being an absolute prohibition on the processing of sensitive data. Processing with explicit consent is itself a derogation from that prohibition.

8. Finally, the amendments correct an infelicity in the drafting of the recital. As drafted, the recital suggests that data are capable of infringing fundamental freedoms or privacy. The data themselves are neutral. It is their processing which can give rise to risk.

*Proposal (2)*

9. Article 8.2(c) of the Directive permits the processing of sensitive data where the processing is necessary to protect the vital interests of the data subject or of another person. However, where the vital interests of another person are concerned, the processing may take place only "where the data subject is physically or legally incapable of giving his consent". This proviso is unsatisfactory, since it would prevent the processing of sensitive data needed to save the lives of others, where the data subject was able to provide consent, but refused to do so. The paper proposes the deletion of the proviso.

*Proposal (3)*

10. Article 7(b) of the Directive provides a "gateway" for the processing of (non-sensitive) personal data where the processing is necessary for the preparation and execution of a contract with the data subject. Such contracts will often require the processing of sensitive data. However, Article 8 does not provide a specific gateway relating to contracts with the data subject. Where sensitive data are involved, the data subject's explicit consent will always have to be sought. Consent is unsatisfactory as a legal basis for a contract because it can be withdrawn. The paper therefore proposes that the "gateway" provided by Article 7(b) should be reproduced in Article 8, with the addition, as a specific safeguard,

of a requirement that the data subject be expressly informed that sensitive data are involved.

*Proposal (4)*

11. The final proposal in this section is for the deletion of some redundant words in Article 8.5. The first sentence establishes the condition that the processing of data relating to offences etc may be carried out only under the control of official authority. As an alternative to this condition, it permits the processing of such data "if suitable specific safeguards are provided under national law". It then goes on to say that the primary condition and its alternative (which is itself a derogation from the primary condition) are "subject to derogations which may be granted by the Member States under national provisions providing suitable specific safeguards". These final words add nothing. They are confusing and the paper proposes their deletion.

Information for data subjects

12. Experience with operating national laws transposing the Directive in the Member States concerned shows that Articles 10 and 11 of the Directive are among those which data controllers regard as the most difficult to apply in practice. Specific concerns are the absolute nature of the requirement to provide information under Article 10; and the requirement to apply different rules according to whether the information is collected from the data subject or not.

13. The paper proposes dealing with these concerns by merging Articles 10 and 11 into a single article with a single set of amended rules. The main changes are as follows.

14. New Article 10.1 changes the duty on the data controller to *provide* information to the data subject, into a duty to ensure that the relevant information is *made available* to the data subject.

15. New Article 10.2 sets out revised rules relating to the time limit for informing the data subject. The current formulation of Article 11.1 has been widely criticised as being flawed, since it allows the provision of information to be deferred indefinitely if the intention to disclose is never fulfilled. Under the proposal, where the data are collected from the data subject, the information is to be made available at the time of collection. In other cases the information is to be made available within a reasonable period after collection, having regard to the particular circumstances.

16. New Article 10.3

- retains the provision, found in both the existing Article 10 and Article 11, removing the need for the data subjected to be informed where he or she already has the information.

- applies the exemption in the current Article 11.2 to all personal data, whether they have been collected from the data subject or otherwise. The requirement for additional safeguards is retained for cases where providing information proves impossible or would involve disproportionate effort, but only where such safeguards are necessary. Where the recording or disclosure is expressly laid down by law, the requirement for additional safeguards has been removed, since the requirement for an express legislative provision is in itself a strong safeguard.

- adds a new exemption to cover circumstances in which making the information available is not necessary to guarantee fair processing. There is a strong need for an exemption of this kind where basic information about third parties, such as contact information, is passed from one person to another. Examples might be passing on third parties' e-mail addresses, providing information about next of kin, or providing the names of other drivers when hiring a car. These activities might not always involve disproportionate effort for the data controller. But there is clearly no threat to the fairness of the processing of the data of the data subject.

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Subject access etc

17. The first change proposed is a presentational one. The current Article 12 deals not only with the right of access, but also with the right of rectification etc. Since these two rights are distinct, it is proposed that each should be dealt with in a separate Article. Accordingly, new Article 12 deals with the right of access; and new Article 12A deals with the right of rectification etc. (With the amalgamation of the current Articles 10 and 11, it will be possible to renumber new Articles 12 and 12A as Articles 11 and 12. For clarity, this paper is based on the current numbering.)

18. The second change is one of substance. It affects new Article 12. This comprises the introductory words to the current Article 12 together with the current paragraph (a), with some amendments. The amendments reflect the difficulties which data controllers can have in dealing with subject access requests. When data protection rules were first drawn up in the 1970s and early 1980s, most personal data were stored in large databases designed to facilitate the retrieval of such data. Locating the personal data to which access was sought was therefore not a significant problem. With the advent of personal computers and immeasurably more sophisticated information technology, including in particular sound and image data and e-mail, the problem of locating personal data to which individuals seek access has grown. A similar, perhaps greater, problem exists in respect of manual records, which, following the Directive, are brought within the scope of certain Member States' data protection laws for the first time. Providing access where data controllers are uncertain where the data may be stored can be highly resource-intensive. Moreover, this adds little to the protection of individuals' rights: where the data controller cannot easily retrieve the personal data, those data are not likely to be used in a way that is detrimental to the data subject.

19. To deal with this problem the paper proposes the following amendments.

- New Article 12.1 requires the data controller to give subject access only where he or she is able to locate the data.

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- New Article 12.2 imposes a duty on the data controller to make all reasonable efforts to locate data relating to the data subject. It expressly encourages the data controller to ask the data subject for help in locating any data, where it is appropriate to make such a request.

Notification

20. Increasingly, notification is seen as burden for data controllers which serves no, or very little, data protection purpose. The notification arrangements set out in Section IX of Chapter II of the Directive are particularly prescriptive. The Member States which have prepared this paper recognise that some Member States may wish to retain a system of notification for domestic reasons. They have, therefore, not proposed the abolition of the notification requirement. However, they believe that the arrangements should be made simpler than those which the Directive currently requires.

21. The main thrust of the amendments is to reduce the procedural requirements which Member States are required to impose by virtue of the Directive.

- In Article 18.2, the conditions for exemption from or simplification of the notification requirement are simplified by removing the list of information which Member States must specify when providing for exemption/simplification. The revised article permits exemption/simplification where a simple test is satisfied: that processing is unlikely to affect adversely the rights and freedoms of data subjects. The provision for exemption/simplification where controllers have appointed "in-house" data protection officials is retained.

- It is proposed that Article 18.4 should be deleted. Article 18.2 permits exemption/simplification for all categories of data, including all categories of sensitive data. Article 18.4 is misleading since it suggests that exemption/simplification is currently only possible for that processing of sensitive data which it mentions.

- In Article 19.1 it is proposed that the information required to be provided by a controller in notifying should be limited to the name and address of the controller (and of his representative, if any), and the purpose or purposes of the processing. Additional information need only be provided where it is necessary in the interests of transparency or to allow the supervisory authority to carry out its functions.

- Article 19.2 is deleted.

22. By making these amendments, the process of notification will be simplified both for Member States' administrations and for data controllers, without losing any protection for individuals. Those Member States which wish to maintain more prescriptive notification arrangements will be able to do so.

Transfer of personal data to third countries

23. Experience with operating the rules set by the Directive suggests that the provisions relating to the transfer of personal data to third countries in Chapter IV are among those which give rise to the greatest interpretative problems. The provisions in Articles 25 and 26 are frequently unclear, not least because the key terms "transfer" and "adequacy" are undefined; the operation of the rules in practice often presents problems, especially as regards their application to networks, such as the Internet, whose purpose is to permit world-wide publication of and access to information; and some of the procedural requirements which those articles establish are complex and burdensome.

24. Making proposals for a radical revision of the present arrangements was beyond the scope of the purpose that the Member States set themselves in preparing the paper. Accordingly, the paper proposes only the minimum changes that the Member States believe are necessary to address the most obvious areas of difficulty, and to allow the present arrangements to be capable of being applied properly in practice.

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*Proposal (1)*

25. This is a small self-explanatory amendment. It brings this provision more closely into line with the corresponding provision at Article 8.2(c).

*Proposal (2)*

26. These amendments are of considerable importance. They address in particular the very real issue of the application to networks such as the Internet of the rules on the transfer of personal data to third countries. As noted, it is the purpose of such networks to facilitate the exchange of information throughout the world. This means that any personal data that are published in the EU through such networks will be accessible from all third countries. Publication of personal data is lawful when it is in conformity with Community law and other legal requirements in a Member State. Since Community law on data protection prevents the publication of personal data which would harm individuals' privacy rights, it follows that the lawful publication in a Member State of personal data does not harm those rights. The Directive should clarify that such lawful publication in a Member State, which results in the personal data being accessible from third countries, will not be in breach of Articles 25 and 26 of the Directive. It should be noted that, although the main purpose of this proposal is to address interpretative problems relating to electronic networks, it is not limited to such networks.

*Proposals (3) and (4)*

27. Article 26.2 allows Member States to authorise individual transfers or sets of transfers to "inadequate" third countries where the exporting data controllers adduce adequate safeguards. Article 26.2 says that appropriate contractual clauses are one way in which such safeguards may be provided. Article 26.4 complements Article 26.2. It allows the European Commission to find that certain standard contractual clauses offer "sufficient" safeguards for the purposes of Article 26.2.

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28. Article 26.4 is a useful provision. However, its usefulness is limited since its scope is restricted to the approval of standard contractual clauses. It is possible to envisage other instruments, such as codes of practice operating within a single company or a group of companies, that can provide comparable safeguards. It is desirable that such instruments should also be within the scope of Article 26.4. Proposal (4) is intended to achieve this. (It also amends the language of Article 26.4 to make it accord with that in Article 26.2.)

29. Proposal (3) is a complementary provision. The restriction of the scope of Article 26.2 to "a transfer or set of transfers" is limiting. Arguably, a "set of transfers" does not cover the situation in which transfers are made in accordance with a code of practice. The proposed rewording makes Article 26.2 more flexible, without reducing the safeguards for individuals.

*Proposals 5 and 6*

30. These proposals are a small step towards reducing the procedural burden imposed upon Member States by Chapter IV, and improving the efficiency of the procedure. At present, where Member States hold certain views or do certain things, they are required to inform both the Commission and the other Member States. This is a potentially burdensome requirement for Member States, which experience suggests is rarely complied with. Where it is desirable for information to be shared among the Member States, this is most easily achieved by the information being passed by the originating Member State to a central point from where it is distributed to the other Member States. Member States are more likely to comply with this more simple requirement. In view of the Commission's central rôle in relation to third country transfers, it makes sense for them to take on this co-ordination function. That is the main purpose of these two proposals.

31. Article 25.3 currently requires the Member Sates and the Commission to inform each other of cases where they consider that a third country does not ensure an adequate level of protection. As well as the change described in the

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previous paragraph, proposal 5 modifies these arrangements by limiting the initial provision of information about adequacy in third countries to the Member States. In view of the way in which Article 25 operates, the adequacy of protection in third countries has to take account of all of the relevant circumstances in particular cases. This means that assessments of adequacy cannot be made in the abstract. Since the Commission has no duty under the Directive to make adequacy assessments in particular cases, it is not in a position to be able to provide the information required by Article 25.3

32. Proposal 6 strengthens the effectiveness of the procedural requirement imposed by Article 26.3. At present, Article 26.3 requires Member States to provide information about the authorisations that they make under Article 26.2. The requirement can be discharged without providing any useful supporting information. If the procedure is to serve a useful purpose, the other Member States and the Commission need as a minimum to be supplied with information about the safeguards that have been provided under Article 26.2.

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**ANNEX**

**PROPOSED AMENDMENTS TO DATA PROTECTION DIRECTIVE (95/46/EC)**

**Special categories of data**

(1) Amend recital 33 as follows:

(i) Delete the first sentence and substitute the following:

*"Whereas personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs or trade union membership and personal data concerning health or sex life require special protection where they clearly describe intimate personal characteristics and their processing is particularly likely to infringe fundamental freedoms or privacy; whereas such data should in principle not be processed;"*

(ii) In the second sentence, after "explicitly provided for" insert *"where the data subject gives his explicit consent or"*.

(2) In Article 8.2(c), delete:

*"where the data subject is physically or legally incapable of giving his consent"*

(3) Add new Article 8.2(f):

*"(f) processing is necessary for the performance of a contract to which the data subject is a party or in order to take steps at the request of the data subject prior to entering into a contract, provided that the data subject has been expressly informed that the processing will involve such data as are mentioned in paragraph 1."*

(4) In Article 8.5, delete:

*"subject to derogations which may be granted by the Member State under national provisions providing suitable specific safeguards".*

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**Information for data subjects**

(1) Delete Articles 10 and 11 and substitute the following new Article 10:

*"1. Member States shall provide that the controller ensures that the following information is made available to each data subject about whom the controller collects personal data*

*(a) the identity of the controller and of his representative if any;*
*(b) the purposes of the processing;*
*(c) any further information such as*

- *the categories of data concerned;*
- *the recipients or categories of recipients;*
- *whether the provision of personal data is obligatory or voluntary, as well as the possible consequences of failure to provide personal data;*
- *the existence of the right of access to and the right to rectify the data concerning the data subject;*

*in so far as such further information is necessary, having regard to the specific circumstances in which the data are collected or otherwise processed, to guarantee fair processing in respect of the data subject.*

*2. The information is to be made available at the time of collection or, where the data are not collected from the data subject, within a reasonable period after the collection having regard to the specific circumstances in which the data are collected or otherwise processed.*

*3. Paragraph (1) does not apply if*

*a) the data subject already has the information;*

*b) having regard to the specific circumstances in which the data are collected or otherwise processed, making the information available is not necessary to guarantee fair processing in respect of the data subject;*

*c) making the information available proves impossible or would involve disproportionate effort; or*

*d) the data are not collected from the data subject and recording or disclosure is expressly laid down by law.*

*In the case mentioned in paragraph (c), where necessary Member States shall provide appropriate safeguards."*

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(2) In Article 13.1, for "*10, 11(1)*" substitute, "*10(1), 10(2),*".

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**Subject Access etc**

(1) Rewrite Article 12 as two Articles as follows:

*Article 12*

**Right of access**

1. Member States shall guarantee every data subject the right to obtain from the controller without constraint at reasonable intervals and without excessive delay or expense:

- confirmation as to whether or not the data controller has located data relating to the data subject which the data controller is processing and if so to provide the data subject *with* information at least as to the purposes of the processing, the categories of data concerned, and the recipients or categories of recipients to whom the data are disclosed;

- communication to the data subject in an intelligible form of those data and of any available information as to their source;

- knowledge of the logic involved in any automatic processing of data concerning him at least in the case of the automated decisions referred to in Article 15(1).

2. Member States shall provide that in responding to requests made under this Article, the controller shall make all reasonable efforts to locate data relating to the data subject, including, where appropriate, asking the data subject for information allowing the controller to locate such data."

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*Article 12A*

**Right of rectification etc of data**

Member States shall guarantee every data subject the right to obtain from the controller:

(a) as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data;

(b) notification to third parties to whom the data have been disclosed of any rectification, erasure or blocking carried out in compliance with (a), unless this proves impossible or involves a disproportionate effort.

(2) In Article 13.1, after "12" insert "*,12A*".

In Article 13.2, for "Article 12" substitute "*Articles 12 and 12A*".

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**Notification**

(1) Revise Articles 18 and 19 as follows:

*Article 18*

**Obligation to notify the supervisory authority**

1. Member States shall provide that the controller or his representative, if any, must notify the supervisory authority referred to in Article 28 before carrying out any wholly or partly automatic processing operation or set of such operations intended to serve a single purpose or several related purposes.

2. Member States may provide for the simplification of or exemption from notification only in the following cases:

- where the processing is unlikely to affect adversely the rights and freedoms of data subjects, and/or

- where the controller, in compliance with the national law which governs him, appoints a personal data protection official, responsible in particular:

  - for ensuring in an independent manner the internal application of the national provisions taken pursuant to this Directive

  - for keeping the register of processing operations carried out by the controller, containing the items of information referred to in Article 21(2),

  thereby ensuring that the rights and freedoms of the data subjects are unlikely to be adversely affected by the processing operations.

3. Member States may provide that paragraph 1 does not apply to processing whose sole purpose is the keeping of a register which according to laws or regulations is intended to provide information to the public and which is open to consultation either by the public in general or by any person demonstrating a legitimate interest.

4 Member States may stipulate that certain or all non-automatic processing operations involving personal data shall be notified, or provide for these processing operations to be subject to simplified notification.

*Article 19*

**Contents of notification**

Member States shall specify the information to be given in the notification. It shall include at least:

(a) the name and address of the controller and of his representative, if any;

(b) the purpose or purposes of the processing;

(c) any other information such as

- a description of the category or categories of data subject and of the data or categories of data relating to them;

- the recipients or categories of recipient to whom the data might be disclosed;

- proposed transfers of data to third countries;

as is necessary in the interests of transparency or to allow the supervisory authority to carry out its functions.

(2) In paragraphs 2 and 3 of Article 21, for "Article 19(1)(a) to (e)" substitute "*Article 19(a) and (b)*".

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**Transfer of personal data to third countries**

The "adequacy" requirement and exemptions

(1) Rewrite Article 26 1(e) as follows:

"(e) the transfer is necessary in order to protect the vital interests of the data subject or of another person; or"

(2) Add new Article 26.1(g):

*"(g) the personal data are lawfully published in a Member State."*

Add a new Recital (58A):

*"Whereas personal data which are lawfully published in a Member State may thus be freely transferred to any third country; whereas such transfers should cease if the personal data are no longer capable of being lawfully published in the Member State;"*

(3) In Article 26.2, amend the opening words as follows:

"2. Without prejudice to paragraph 1, a Member State may authorise transfers of personal data..."

(4) Rewrite Article 26.4 as follows:

"4. Where the Commission decides, in accordance with the procedure referred to in Article 31(2), that certain standard contractual clauses or other instruments offer adequate safeguards as required by paragraph 2, Member States shall take the necessary measures to comply with the Commission's decision."

Procedures

(5) Rewrite Article 25.3 as follows:

"The Member State shall inform the Commission of cases where it considers that a third country does not ensure an adequate level of protection within the meaning of paragraph 2. The Commission shall pass the information to the other Member States."

(6)Rewrite the first paragraph of Article 26.3 as follows:

"The Member State shall inform the Commission of the authorisations it grants pursuant to Article 26.2. The information shall include a statement

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of the safeguards adduced by the controller. The Commission shall pass the information to the other Member States."

THE NATIONAL ARCHIVES

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|---|---|
| DEPARTMENT/SERIES ..... Prem 49<br>PIECE/ITEM ..... 2569<br>(one piece/item number) | Date and sign |
| Extract details:<br>Letter dated<br>18 July 2002 | |
| CLOSED UNDER FOI EXEMPTION ..... | |
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## ***Instructions for completion of Dummy Card***

Use black or blue pen to complete form.

Use the card for one piece or for each extract removed from a different place within a piece.

Enter the department and series,
eg. HO 405, J 82.

Enter the piece and item references, .
eg. 28, 1079, 84/1, 107/3

Enter extract details if it is an extract rather than a whole piece.
This should be an indication of what the extract is,
eg. Folio 28, Indictment 840079, E107, Letter dated 22/11/1995.
Do not enter details of why the extract is sensitive.

If closed under the FOI Act, enter the FOI exemption numbers applying to the closure, eg. 27(1), 40(2).

Sign and date next to the reason why the record is not available to the public ie. Closed under FOI exemption; Retained under section 3(4) of the Public Records Act 1958; Temporarily retained; Missing at transfer
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BF CS 26/7

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CS
cc. SV (letter only)

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Our reference FIDP 01 07/15/02

Date 16 July 2002

Dear Colleague,

**Guidance on Publication Schemes under the FOI Act 2000**
**for Central Government and Non-Departmental Public Bodies**

The Lord Chancellor's Department has today published supplementary guidance for Government Departments and related public bodies to help them prepare for the implementation of the Freedom of Information Act 2000. The Guidance highlights some of the issues that Departments will want to consider when drawing up their publication scheme before it is submitted to the Information Commissioner. A copy of the guidance enclosed.

General guidance on the FOI Act and publication schemes for all the 80,000 plus public authorities covered by the Act is produced by the Information Commissioner. However, each sector of public service e.g. Police, Central and Local Government, hold different types of information and are organised in different ways. This guidance published today provides detailed direction to central government and related bodies as well as to the devolved Governments in Wales and Northern Ireland.

**Please can Departments ensure that the bodies they sponsor are made aware of this guidance as soon as possible.** The guidance is accessible on our website at http://www.lcd.gov.uk under the Freedom of Information section. Further copies of the guidance are also available from the Freedom of Information and Data Protection Division at:

Room 151,
Selborne House,
54-60 Victoria Street
London SW1E 6QW
Tel: 020 7210 8755
Email: paul.henery@lcdhq.gsi.gov.uk

Please do not hesitate to get in touch with me if you have any questions relating to this guidance.

Yours faithfully,

Nancy Hey
Freedom of Information and Data Protection Division

# Guidance on Publication Schemes under the Freedom of Information Act 2000

## For Central Government and Non Departmental Public Bodies

**Lord Chancellor's Department**
**July 2002**

## Central Government and Non Departmental Public Body Guidance on Publication Schemes under the Freedom of Information Act 2000

The Freedom of Information Act 2000 requires all public authorities to make information available proactively by virtue of the Publication Scheme provisions set out in section 19 of the Act. Publication Schemes give details of the classes of information that an authority makes available proactively and how they are accessible. The plans indicate a commitment to publish proactively as much information as possible and will look at how best to transmit the information to those who need to know more.

### Introduction

2. This paper sets out Guidance for Government Departments and non Departmental Public Bodies (NDPBs) as to the issues that they should consider when deciding what information they will commit to make publicly available in their Publication Schemes. This is guidance not instructions; neither is it intended to be a model publication scheme. How the commitments in their Schemes are delivered is a matter for individual Departments and NDPBs. But where Departments or NDPBs depart from the guidance in this paper, they should know why they are doing so and be prepared to justify their approach if asked by the Information Commissioner or other interested parties. Executive agencies are not required to have their own publication schemes, but should be included within the scope of the scheme applied by their parent Department.

**THE LEGAL REQUIREMENT**

Section 19 of the Act places a duty on every public authority to:

a) adopt and maintain a scheme which relates to the publication of information by the authority and to have that scheme approved by the Commissioner
b) publish information in accordance with that scheme
c) review the scheme from time to time

Each authority's Publication Scheme must specify:

a) the classes of information which the public authority publishes or intends to publish
b) the manner in which information of each class is, or is intended to be, published
c) whether the material is, or is intended to be, available free of charge or on payment

In adopting or reviewing a Publication Scheme, the Act requires that a public authority should have regard to the public interest in:

a) allowing public access to information held by the authority, and
b) the publication of reasons for decisions made by the authority.

3. Given the different nature of the business of Departments and NDPBs it is impossible to have prescribed rules on what each one will include in the Publication Scheme. The aim of this guidance is to achieve as much common ground as possible.

4. All central Government Departments and those Non-Departmental Public Bodies covered by the Code of Practice on Access to Government Information, are required to have their Publication Scheme approved and in place by 30 November 2002. The Scheme will have to be submitted to the Information Commissioner for approval between 1 July and 30 September 2002.

**Content**

5. In deciding the content of their publication scheme, Departments and NDPBs should have regard to the public interest in the information that they hold. Some information held by an organisation will be of particular interest to the public and Departments and NDPBs should consider what information they hold that they could make available proactively to meet this demand. The information included in an organisation's Publication Scheme should focus on the key areas of accountability of the organisation.

6. Departments and NDPBs will also need to consider when the information included in their Publication Scheme will be made available. For example, facts and analysis of the facts relating to policy decisions will normally be made available when policies and decisions are announced. Papers relating to meetings may need to be made available a number of weeks or months before or after the event. Allowance should be made for the time taken to approve minutes or to obtain transcripts. Items will then be held in accordance with the Department's or NDPB's record disposal policy as normal in light of their business needs. The Scheme should specify the usual retention period for each class of information.

7. There are some kinds of information which all Departments and NDPBs should consider for inclusion within their Publication Schemes. These are detailed in paragraphs 7.1 to 7.12 below. The headings are not intended as specific 'classes of information' although Departments and NDPBs may chose to use them as such.

7.1 Guidance to Staff

It is expected that Publication Schemes will provide access to explanatory material on Departments' and NDPBs' dealings with the public and other organisations. This includes such rules, procedures, internal guidance to officials, and similar administrative manuals as will assist better understanding of the organisation's interaction in dealing with the public. It will also include internal guidance to officials on implementing/operating the Code of Practice

on Access to Government Information (before 2005), the Freedom of Information Act (after 2005), the Environmental Information Regulations and the Data Protection Act 1998.

7.2 Background to Policy

The Code of Practice on Access to Government information already commits Departments and NDPBs to publishing the facts and analysis of the facts which Government considers relevant and important in framing major policy proposals and decisions. This commitment should be carried forward to the Publication Scheme.

7.3 Management Information

7.3.1 The Code of Practice on Access to Government Information requires Departments and NDPBs to publish:

i) full information about how public services are run, how much they cost, who is in charge, and what complaints and redress procedures are available;
ii) full and, where possible, comparable information about what services are being provided , what targets are set, what standards of service are expected and the results achieved.

These commitments should be carried forward to the Publication Scheme.

7.3.2 In addition, Publication Scheme commitments are also likely to provide access to the following in relation to the role, function and management of the public authority:

(i) mission, objectives and functions of the authority;

(ii) organisation of the authority, including information about who is responsible for which function and how to contact him or her;

(iii) information about Board Meetings. This may include the agendas and minutes of the meetings and associated papers or summaries where appropriate;

(iv) targets, including those set for standards of service and financial performance, together with results achieved and comparative information;

(v) sources of income, and how effectively money is raised and spent, for example, on different aspects of administration.

7.3.3 The information described above often appears in Departmental reports, Management Statements, Financial Memoranda etc. Agency

Framework Documents are also useful as they encapsulate the essential management operating arrangements for each agency with regard to its organisation of a Department. For the purpose of this guidance it is the information itself and not the form that it is presented in that is important.

7.3.4 On (ii) above, Departments and NDPBs will want to consider the appropriate level of seniority of the staff about which this kind of information is to be published. It is important that the public can identify a person who can provide the information they require. How this is achieved may well vary between Departments and NDPBs and in some instances requests for information may be channelled through call centres.

7.3.5 Departments and NDPBs should also consider for which formal meetings it is appropriate to publish the agenda, papers and minutes or summaries of these documents. It is likely that Departments and NDPBs will want to specify what information will be made available proactively for which meetings, or type of meetings. Regular formal committees or advisory groups are more likely to be included in the Publication Scheme than ad-hoc or impromptu discussions.

## 7.4 Public Consultation

The Cabinet Office guidelines on consultation should be followed. Responses submitted **in confidence** should have that confidence respected if the information submitted is properly confidential. The number of confidential responses should be published.

## 7.5 Departmental Circulars

There are many different types of circular and they are used to communicate a variety of information. It is probable that some of these circulars will be relevant for inclusion on a publication scheme. Many Departments and NDPBs already have this sort of information on their websites and for some circulars it may be helpful to provide an index to improve accessibility. The scale of this task will therefore vary and Departments and NDPBs may find that some of this information will be subsumed within other commitments within their Scheme.

## 7.6 Information placed in the Libraries of the Houses of Parliament

Departments and NDPBs should consider whether documents placed in the library of either Houses of Parliament should be included within the Publication Scheme.

## 7.7 Decisions

7.7.1 Decisions of the Information Commissioner in relation to the Freedom of Information Act 2000 and Data Protection Act 1998, and the Parliamentary

Ombudsman in relation to the Code of Practice on Access to Government Information, relating to the organisation, are also items to which a Publication Scheme is likely to provide access. Some of these decisions are published by the Ombudsman and if so it may be appropriate simply to provide a link to that information. However, not all of the decisions are published and this information should be considered for inclusion. The public availability of details of departmental infractions under the Environmental Information Regulations should also be considered.

7.7.2 Decisions of other bodies relating to the Department should be accessible where appropriate.

7.7.3 Reasons should be published for decisions made by the Department where the decision affects a significant number of interested parties. An example is the Charity Commission, which is making more information available in relation to its decisions, particularly when there is considerable public interest. The decisions, and reasons, most likely to be appropriate to include in a publication scheme are those which affect a significant number of people. This may sometimes include a decision in relation to an individual, but which sets a precedent or has ramifications for the future handling of similar cases. Personal data relating to individuals should be handled in accordance with the Data Protection principles.

## 7.8 Speeches

Keynote speeches by Ministers and senior officials are likely to be made available proactively. In practice these are often already made available through a Department's Press Office.

## 7.9 Legislation and Related Information

7.9.1 It is helpful to the public to know more about the legal framework within which Departments and other public authorities operate. Collating a list in a single place and giving a brief description of the relationship between the legislation and the Department's structure and functions should be considered, as should providing details of legislation or Codes of Practice that give rights of access to information.

7.9.2 Her Majesty's Stationery Office in the Cabinet Office have responsibility for the publication of UK legislation including Acts of Parliament, Statutory Instruments(including those made by the National Assembly for Wales), Acts of the Northern Ireland Assembly, Statutory Rules of Northern Ireland, Church of England Measures and Explanatory Notes to Acts of Parliament and Explanatory Notes to Acts of the Northern Ireland Assembly. Details of these categories of publications will be featured on HMSO's Publication Scheme with details of where users can view or purchase the documents. It follows that there is no need for organisations to provide full details of legislation which they have policy responsibility for in their own

Publication Schemes. They may, however, wish to feature a reference in their Publication Scheme to the HMSO web site where all newly enacted legislation can be viewed. The address is www.legislation.hmso.gov.uk

7.9.3 Parliament is responsible for the publication of Bills before Parliament and Explanatory Notes to Bills. This material can be viewed on the Parliamentary web site. Again, there is no necessity for departments to feature details in their own publication schemes although they may wish to provide a link to the Parliamentary web site at www.parliament.uk

7.9.4 HMSO also arranges for the publication of the London, Edinburgh and Belfast Gazettes. Details of these will be featured on HMSO's publication scheme. Organisations should, however, refer in their Publication Schemes to the categories of individual notices which are submitted for publication in the Gazettes.

7.9.5 Departments should provide details of Command Papers, White Papers and Green Papers which they have responsibility for publishing. For reference, a list of all Command Papers is published on HMSO's web site.

7.9.6 Texts of international treaties, conventions and agreements should be accessible if not provided elsewhere. Departments may wish to provide cross-references to relevant documents of European Community legislation. It is suggested that details could be supplied of websites where the material can be viewed or from where the information can be obtained.

7.10 Procurement, grants, loans and guarantees

7.10.1 Departments and NDPBs are encouraged to be as open as possible when considering making available information in relation to procurement, grants, loans and guarantees.

7.10.2 In particular, the publication of procurement and supplier policies should be considered for publication as should the details of contracts awarded. Departments and NDPBs should also consider the provision of information on specific projects including notification of bidding opportunities, decision criteria, contract performance standards, results of regular performance reviews, and results achieved where appropriate. Good examples of the type of information that can be provided can be found on the websites of Southampton Council at www.southampton.gov.uk and the National Assembly for Wales at www.winningourbusiness.wales.gov.uk. The Office of Government Commerce can provide further advice about the provision of information on Government procurement.

7.10.3 Departments and NDPBs should consider including their policies on the awarding of grants, loans and the provision of guarantees in their publication scheme as well as background information on schemes administered by the organisation . Publishing an account of how grants have

been dispensed under a particular scheme, including overall funds dispensed and an assessment of the benefit of the scheme in terms of its objectives should be considered. The publication of details of guarantees such as the guarantee recipient, purpose and amount should be considered for inclusion in departmental publication schemes whilst respecting legitimate personal and commercial confidentiality

7.10.4 Information relating to the items above need not include all such information but could be covered in a generic fashion or include information on projects above a particular cost threshold as decided by the Department or NDPB.

7.10.5 The Lord Chancellor's 'Code of Practice on the Discharge of the Functions of Public Authorities under Part 1 of the Freedom of Information Act' requires that Departments and NDPBs ensure that they consider the implications for Freedom of Information before agreeing to confidentiality provisions in contracts and accepting information in confidence from a third party more generally. In particular, Departments and NDPBs should only accept information from third parties in confidence if it is necessary to obtain that information in connection with the exercise of any of their functions. They should not agree to hold information received from third parties "in confidence" which is not confidential in nature. Acceptance of any confidentiality provisions must be for good reasons and capable of being justified to the Information Commissioner.

7.11 Information required to be published under other legislation

This includes a wide range of information, some of which will be specific to individual organisations. In particular, information relating to the environment that would be accessible under the Environmental Information Regulations such as Estate Management information and Greening Government Reports as well as Environmental Impact Assessments and Departmental Sustainable Development Strategies should be made available where appropriate.

7.12 Research Reports; Risk & Impact Assessments etc

Appropriate guidance on the publication of scientific research from the Office of Science and Technology and on risk assessment should be followed when considering the content of a Publication Scheme. Regulatory Impact Assessments are also likely to be accessible.

7.13 Information disclosed under the Code of Practice on Access to Government Information

Where information is disclosed to an individual in response to a request under the Code of Practice or Access to Government Information, or, from 1 January 2005, in response to a request under the Act, Departments and

NDPBs should consider whether the information disclosed is of general interest and include released information in the Publication Scheme where appropriate.

## Presentation and Delivery

8. Publication Schemes are intended to increase access to government information. Therefore the accessibility of the scheme and the information in it is very important. It is best practice to include:

### 8.2 Copyright

A general copyright statement should be included at the head of the Publication Scheme. Documents accessible under the scheme should feature an appropriate copyright notice whether published in print or on official websites in accordance with guidance issued by HMSO.

### 8.3 Formats

8.2.1 Details of the formats that the scheme itself and the information accessible under it are available in e.g. Braille, Welsh, other languages, electronic, paper etc should be given. The decision to publish information in alternative formats is a result of normal business deliberations and should be considered when a document is produced and is not a matter for a Publication Scheme.

8.2.2 The Scheme itself should be provided on paper and electronically. Consideration of other formats should be in line with the relevant accessibility criteria for publications including the organisation's Welsh Language Scheme.

8.2.3 Departments and NDPBs may not be able to rely wholly on the internet as a means of making information available proactively. There are many ways by which information can be made available proactively.

### 8.3 Access to the Information

Departments and NDPBs should make clear how information can be obtained by the public under the Scheme. They should publish a guide for users on **applying for information** and exercising associated rights under the Code of Practice on Access to Government Information (before 2005), under the Freedom of Information Act (after 2005), under the Data Protection Act 1998 and under the Environmental Information Regulations. **Links** to information that is part of the organisation's commitment to publish but is provided elsewhere should be provided, including an indication of any **on-line resources**, such as databases, which can be interrogated directly by requesters where this is reasonable and practicable to do so.

8.4 Relationship with Information Asset Register

8.4.1 The Information Asset Register (IAR) details Government information assets that can be reused under licence. The IAR is focuses primarily on unpublished data holdings and thus provides a guide to the unpublished information resources held by Departments. The IAR can help identify what information a Department holds, how useful that information is and how to access it. For further information about the Information Asset register and their links with publication schemes, see HMSO's Guidance note 18 which can be viewed on HMSO's website at www.hmso.gov.uk/guides.htm

8.4.2 The Department's Information Asset Register should be directly referred to in its Publication Scheme and should form an important part of their preparations for Freedom of Information. Each Department is responsible for creating its records within its own departmental asset register.

8.5 Archiving

Archiving of the Publication Scheme for records management purposes should be considered whenever the scheme is updated or otherwise amended. It is suggested that Departments and NDPBs should keep their initial scheme, and subsequent versions of the Scheme that contain significant changes.

8.6 UK Official Publications

Departments and NDPBs are reminded of their responsibilities for providing information relation to maintaining the complete bibliographic record of all United Kingdom Official Publications. For details please see HMSO's Guidance Note 17. This can be viewed on HMSO's website at www.hmso.gov.uk/guides.htm

8.7 Plain Language

Publication Schemes should be in plain language. The Cabinet Office Plain Language guide should be followed:
www.cabinet-office.gov.uk/servicefirst/2000/plainlanguage/guide.htm

## Public Interest and Consultation

9. When having regard to the public interest in the information held by the organisation, it is best practice to consider all the different stakeholders who might be interested in the information and to consult with these groups where possible - this may have to be after the Publication Scheme is in place with initial assessment of the public interest based on information the organisation already holds e.g. Minister's Cases, website hits etc

10. Consultation can take a variety of forms. These include traditional written consultation, listening events, seminars with, and visits to, representative groups. Having an email address for comments or an online feedback form can encourage user feedback. Internet discussions are also a valid way of consulting with your 'public' as is both quantitative and qualitative research including surveys and focus groups.

## Charging

11. A Publication Scheme must state whether documents in the Scheme will be available free of charge or for a charge.

### 11.1 Interpreting the law

11.1.1 The Environmental Information Regulations permit charges in respect of costs reasonably attributable to the supply of information, provided a schedule of the charges that may be levied is made available to all persons requesting environmental information. The EI Regulations apply to both published and unpublished information, including EI supplied under other enactments. (Treasury and DEFRA will let departments have further advice on charges for Environmental Information when the negotiations on the revised EI Regulations have reached a firmer point.) Some organisations may also have legislation on non-environmental matters under which they publish certain information.

11.1.2 The FOI Act does not require that a schedule of charges is included within the publication scheme, but only that the publication scheme specify whether the material is, or is intended to be, available free of charge or on payment. This is important as the Information Commissioner proposes to approve a publication scheme for three to five years. Organisations will therefore be seeking in their classes of information to anticipate the document types or subject areas which the department will be publishing during that period, but it is unlikely to be either practical nor possible to anticipate every future title or charge.

11.1.3 It is suggested that in their Publication Schemes, organisations should therefore set out their charging policy, but indicate that, where charges are made, the charge for each publication will be listed by the title of the publication on the up to date publications list. A link to the up to date list or a note of where it can be obtained is recommended. For information published under another enactment, this may in some cases take the form of a link to the relevant Fees Order.

11.1.4 For the purposes of defining the potential coverage of a publication scheme, we must have regard to both section 19 and section 21 of the FOI Act. The latter indicates that where information is available from the public authority on request, it can be regarded as reasonably accessible to the applicant where it is made available in accordance with the authority's

publication scheme, and any payment required is specified in, or determined in accordance with, the scheme.

11.2 Definition of charging

11.2.1 For the purposes of charges, HM Treasury is assuming that a publication is material which:

- has appeared on a public website; or
- has been advertised on a public website, or in a commercial publisher's list, as available, and which is already held by, or immediately available in store to, the Department's Public Enquiry Unit in its final format for supply to the public, or similarly by the Department's commercial publisher; or
- is available from book shops, public libraries, etc supplied by the department or the commercial publisher.

Information which is held by an organisation, but which it has not been intended to publish, and has to be extracted specifically for the requestor, is not covered by a publication scheme.

11.3. Form of words for use in Publication Schemes

11.3.1 A possible approach is to describe some broad pricing categories which could be applied either to an organisation's publication scheme as a whole or to individual classes. A single pricing category may apply to a particular class, but two or more pricing categories to other classes.

11.3.2 Annex A contains a suggested form of words which assumes that any payment can be requested in advance before a publication is supplied, but this is not yet certain for information supplied under the revised EI Regulations. Square brackets indicate where Departments or NDPBs are most likely to need to adapt the wording to their own circumstances.

**Review**

12. The Information Commissioner has said in her Publication Scheme Guidancethat she will want to review Publication Schemes every three years althoughthis might be extended slightly for the very first approvals (Central and LocalGovernment) but in any event that period will not exceed five years. The Information Commissioner will require notification of any additions to a Scheme during that period and will require Departments and NDPBs to seek approval of the removal of any commitment made in the publication scheme over the same period.

## Conclusion

13. When developing their Publication Scheme, Departments and NDPBs should keep in mind that publication schemes are intended as a tool for openness, to increase transparency and accountability and improve decision-making. All schemes should have the public interest as their driver and should help to promote trust between the Government and the electorate. In developing its Publication Scheme, Departments are encourage to look at the experience of their counterparts in other countries with Freedom of Information legislation and keep in mind that other openness regimes frequently over-estimated perceived risks associated with openness.

Freedom of Information and
Data Protection Division
Lord Chancellor's Department
June 2002

**ANNEX A**

## Suggested Form of Words for Charging on Publication Schemes

"Is information free of charge or on payment?

We indicate [for each class of information] in our Publication Scheme which of the following categories could apply to information you intend to use for your private research/study:

a) free of charge on website (ie there is no charge by us, although the user would of course have to meet any charges by their Internet service provider, personal printing costs, etc). For those without Internet access, a single print-out as on the website would be available by post from [....] [or by personal application at ...]. However, requests for multiple print-outs, or for archived copies of documents which are no longer available on the web, may attract a charge for the cost of retrieval, photocopy, postage, etc. We would let you know this at the time of your request [the charge would be payable in advance];

b) free of charge leaflets or booklets on, eg services we offer to the public. List available from [.....], material itself from [.....]

c) free of charge to view at [local office or wherever but charge for [certified] photocopy [a schedule of charges for [.....] is available from [....] [For other items, we would let you know the relevant charge at the time of your request [the charge would be payable in advance];

d) information available via a website, but a charge would have to be paid before the main part of the information could be accessed. [This is the exception.] This may arise, eg where the website is used to deliver a value-added customised service, particularly where the basic data is also available to private sector users who may provide their own value-added service. Where this applies, the reason for the charge and the level of charges would be advertised [where?].

   (Note: some "information" accessible on our website is not published for the information of the general public, but is part of our electronic delivery of services, for example where applications for licences can be made on-line or where tax returns can be filed on-line. In that case, access to records bearing details about a named individual or company is limited to the individual or company concerned and other authorised persons. We explain the conditions applying on our website so that you can read them before you begin to use the relevant on-line service.)

e) "glossy" or other bound paper copies, or in some cases a CD Rom, video or other mediums, are for charge as in our publication lists available at [....] [or those of our publisher available at [.....].

If you want to re-use or reproduce our publications, eg commercially or for circulation for education, etc, purposes, you will in most cases need to apply for a copyright licence for this. This [Department] [is a Crown body and our information is subject to Crown copyright administered by Her Majesty's Stationery Office]. For HMSO Guidance Notes on a range of copyright issues, see the HMSO website http://www.hmso.gov.uk/guides.htm or write to [....].

[We own the copyright in our information. Our charging policy for re-use and reproduction is [....] [Note: this applies only to NDPBs which are non-Crown and other non-Crown public sector bodies.]

More details of the Government's policy on where charges are made and on determining the level of charges is available in "Charges for Information: When and How - Guidance for Government Departments and other Crown Bodies at http://www.hm-treasury.gov.uk/about/open_government/opengov_charging.cfm

THE NATIONAL ARCHIVES

| | |
|---|---|
| DEPARTMENT/SERIES Prem 49<br>PIECE/ITEM 2569<br>(one piece/item number) | Date and sign |
| Extract details: Letter dated 12 July 2002 and annexes | |
| CLOSED UNDER FOI EXEMPTION ..... | |
| RETAINED UNDER SECTION 3(4) OF THE PUBLIC RECORDS ACT 1958 | AE 25/4/24 |
| TEMPORARILY RETAINED | |
| MISSING AT TRANSFER | |
| NUMBER NOT USED | |
| MISSING (TNA USE ONLY) | |
| DOCUMENT PUT IN PLACE (TNA USE ONLY) | |

## ***Instructions for completion of Dummy Card***

Use black or blue pen to complete form.

Use the card for one piece or for each extract removed from a different place within a piece.

Enter the department and series,
eg. HO 405, J 82.

Enter the piece and item references, .
eg. 28, 1079, 84/1, 107/3

Enter extract details if it is an extract rather than a whole piece.
This should be an indication of what the extract is,
eg. Folio 28, Indictment 840079, E107, Letter dated 22/11/1995.
Do not enter details of why the extract is sensitive.

If closed under the FOI Act, enter the FOI exemption numbers applying to the closure, eg. 27(1), 40(2).

Sign and date next to the reason why the record is not available to the public ie. Closed under FOI exemption; Retained under section 3(4) of the Public Records Act 1958; Temporarily retained; Missing at transfer
or Number not used.

TOP: CS
cc: DR
VOM

The Rt Hon Patricia Hewitt MP
Secretary of State for Trade and Industry

The Rt Hon The Lord Irvine of Lairg
Lord Chancellor
House of Lords
London
SW1A 0PW

**Secretary of State**
**Department of**
**Trade and Industry**

1 Victoria Street
London SW1H 0ET

Direct Line
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*e-mail* mpst.hewitt@dti.gsi.gov.uk

8th July 2002

Dear Derry,

**FREEDOM OF INFORMATION ACT; IMPLEMENTATION OF SECTION 77 (CRIMINAL OFFENCE OF DESTROYING RECORDS TO PREVENT ACCESS TO INFORMATION)**

**Thank you for copying to me your letter to colleagues of 20 June. I agree the arguments in favour of commencing Section 77 of the Freedom of Information Act this year, provided – and this is an important proviso – that a workable solution is found to a potential problem arising from subject access requests from staff for information held on them in personnel records.**

I agree the arguments in favour of commencing Section 77 at an early opportunity, rather than delaying until January 2005. This would certainly demonstrate publicly that we take privacy and data protection matters seriously. I therefore agree the November commencement date, provided, however, that a workable solution can be found to a problem relating to personnel records.

In line with current Whitehall practice, our personnel files are brought up to date against an agreed retention schedule only when a file becomes active. When members of staff request to see personal information held on them in personnel records, the personnel files are weeded against the retention schedule before the subject access request is administered. I understand that, notwithstanding the Information Commissioner's general agreement to the Whitehall personnel records guidance, officials are now uncertain whether the practice is square with the Act. Any doubt would place personnel records managers at risk of criminal penalty were Section 77 in force.

My agreement to commencing Section 77 is therefore subject to our officials ensuring that Whitehall practice is compliant with the Act and, specifically, that departmental personnel records managers are not placed at risk of criminal penalty.

I am copying this letter to the Prime Minister, members of CRP (FOI) and to Sir Richard Wilson.

Best wishes,

**PATRICIA HEWITT**

file

DEPUTY PRIME MINISTER

OFFICE OF THE
DEPUTY PRIME MINISTER
Dover House
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London
SW1A 2AU

*Tel:* 020 7276 0400
*Fax:* 020 7276 0196

The Rt Hon Lord Irvine of Lairg QC
Lord Chancellor
House of Lords
London
SW1A 0PW

CS

Our ref: P/017098/02

cc PMC SR.

9 July 2002

Dear Derry

**FREEDOM OF INFORMATION ACT: IMPLEMENTATION OF SECTION 77 (CRIMINAL OFFENCE OF DESTROYING RECORDS TO PREVENT ACCESS TO INFORMATION)**

Thank you for your letter of 20 June seeking agreement to bring section 77 of the Freedom of Information Act 2000 into force in November this year. I agree that the overall presentational arguments support your proposal.

In your letter of 20 June you seek colleague's agreement to bring section 77 of the Freedom of Information Act 2000 into force in November this year. This would create an offence for public officials, when faced with a request to disclose information under the Freedom of Information Act or the Data Protection Act, to destroy the information in order to frustrate the requests. Implementation in November would be in line with the first phase of publication schemes to be published by Whitehall Departments.

I agree that the option of doing so in January 2005 when full access rights are granted would not be presentationally acceptable. I note the arguments in favour of doing so along with the new Environmental Information Regulations in 2003, but I accept that the arguments in favour of doing so this November outweigh those for leaving them until 2003.

I am copying this letter to the Prime Minister, members of CRP(FOI) and to Sir Richard Wilson.

Yours ever

**JOHN PRESCOTT**

INVESTOR IN PEOPLE

Richard
This is helpful

CABINET OFFICE
A 7122
09 JUL 2002
FILING INSTRUCTIONS
FILE No.

From: Georgia Hutchinson
Central Secretariat
Rm 118, 70 Whitehall
Email: georgia.hutchinson@cabinet-office.x.gsi.gov.uk
Tel: 7276 2471
Fax: 7267 2495
Date: 08 July 2002

cc CS (f)

Jeremy Heywood
This is helpful guidance in a tricky and growing area. You should be aware. Reg. 11/7

**IAN FLETCHER**

cc: Nick Bisson
Tessa Stirling

**TREASURY SOLICITOR'S NOTE ON DISCLOSURE OF No10 DOCUMENTS IN CIVIL PROCEEDINGS**

1. Juliet Wheldon sent a note on 'Disclosure of No10 Documents in Civil Proceedings' to Sir Richard on 24 June. You asked Helen Ghosh for advice on the origins of this note.

2. At the beginning of this year, No10 were considering the need to preserve and disclose documents in relation to possible action by Railtrack shareholders against DTLR. The issue of disclosure also arose in the judicial review of the decision to hold the FMD inquiries in private.

3. These specific cases were resolved through discussion with lawyers. On the back of these cases No10 requested generic advice from Sir Richard about disclosure of documents in civil proceedings. Sir Richard asked that Juliet Wheldon be personally involved in this.

4. The note from Juliet Wheldon is a general guidance note that No10 can refer to in future cases where they are requested to disclose documents.

5. I have copied this and Juliet Wheldon's note to Nick Bisson, who was leading on this for No10 and to Tessa Stirling, who has an obvious interest as Cabinet Office Departmental Records Officer.

Georgia Hutchinson

**GEORGIA HUTCHINSON**

DCO - please also keep a copy of this on file for future reference. SV 11/7

DCO
Please copy to
SV, MEL, MH, JK
& return → me.
Many thanks
Nick 10/7

RESTRICTED

From: Georgia Hutchinson
Central Secretariat
Rm 118, 70 Whitehall
Email: georgia.hutchinson@cabinet-office.x.gsi.gov.uk
Tel: 7276 2471
Fax: 7267 2495
Date: 08 July 2002

**IAN FLETCHER**

cc: ~~Nick Bisson~~ cc: CS. MJH
~~Tessa Stirling~~

**TREASURY SOLICITOR'S NOTE ON DISCLOSURE OF No10 DOCUMENTS IN CIVIL PROCEEDINGS**

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4. The note from Juliet Wheldon is a general guidance note that No10 can refer to in future cases where they are requested to disclose documents.

5. I have copied this and Juliet Wheldon's note to Nick Bisson, who was leading on this for No10 and to Tessa Stirling, who has an obvious interest as Cabinet Office Departmental Records Officer.

Georgia Hutchinson

**GEORGIA HUTCHINSON**

# NOTE ON THE DISCLOSURE OF No. 10 DOCUMENTS IN CIVIL PROCEEDINGS AND RELATED HANDLING ARRANGEMENTS

## 1. Introduction

1.1 Getting disclosure right is an enormously difficult process. Getting it wrong need not involve an ENRON style scandal but any mistake, however technical, can open the door to criticism and accusations from all quarters, especially if No. 10 papers are involved.

1.2 This guidance covers the disclosure of No. 10 documents in the main types of civil litigation, namely, claims for damages and injunctions, judicial reviews and unfair dismissal and discrimination claims. It does not cover criminal cases or requests for information under statute[1] or the 1997 "Code of Practice on Access to Government Information".

1.3 Disclosure obligations before other tribunals and inquiries (away from the normal Courts and the Employment Tribunals) can vary and, although the handling arrangements set out below will still apply, specific advice should be sought on these.

## 2. No. 10 documents

2.1 For a variety of reasons, the disclosure of No. 10 documents in civil litigation is unusual.

2.2 Claims for damages are generally brought by and against "the Crown" with one of the main departments or the Attorney General named as claimant or defendant[2]. In principle, the Courts can order the disclosure of any government papers in such cases because they ultimately belong to "the Crown". In practice, however, the Courts recognise that the duty to give disclosure will not routinely require a trawl across the whole of government. In claims for damages, "the Crown" is usually being sued on the basis that it is liable for the actions of its departments and employees. Disclosure therefore concentrates on their actions and intentions making the files and records of the lead department most important. Depending on the issues, No. 10 documents may be disclosable (eg cases where the implementation of EU law is under challenge) but the focus will normally be on the more operational departments with large numbers of employees and extensive property and contractual portfolios.

2.3 In judicial review proceedings, the government party will be the minister or other office older who took the decision under challenge rather than "the Crown". Very few "judicially reviewable" statutory or prerogative functions are

---

[1] Eg the Data Protection Act 1998 and the Freedom of Information Act 2000.

[2] Under the Crown Proceedings Act 1947.

conferred on or exercised by the Prime Minister or other Cabinet Office Ministers so they are rarely named as judicial review defendants. Again, and depending on the issues, No. 10 documents may be disclosable (eg where it is alleged that too much reliance was placed on advice from No. 10) but the focus will be on the factors taken into account by the decision maker in question and any relevant material will normally be in his or her department.

## 3. Civil proceedings

3.1 As a basic rule, whenever government becomes involved in civil litigation it will be required to disclose key information unless there is a good reason for not doing so. This obligation arises under domestic law and human rights principles on effective access to justice.

## 4. Disclosure

4.1 Disclosure can be required at different stages and in accordance with different tests:

4.1.1 Standard disclosure in damages claims

Standard disclosure is normally ordered after the close of pleadings and before the preparation of witness statements. There is therefore an opportunity to settle or have the case struck out before disclosure takes place. The disclosing party must conduct a "reasonable" search for, and disclose, all documents which are or have been in that party's control and which support or adversely affect one party's case. This test is narrower than mere relevance.

4.1.2 Disclosure in judicial review claims

Disclosure is not normally ordered but the parties are under a "duty to make full and fair disclosure" in their written evidence. The Court can also order standard disclosure if it thinks this necessary or if the written evidence appears to be incorrect or incomplete.

4.1.3 Pre-action disclosure

Various "Pre-Action Protocols" encourage (but do not oblige) the early exchange of relevant materials. Beyond this, the Courts can order "pre-action disclosure" by persons who are likely to become involved in litigation in relation to documents which support or adversely affect one party's case provided that this is considered desirable in order to dispose fairly of the anticipated proceedings or save costs. Orders for pre-action disclosure are unusual and the disclosing party is normally entitled to the costs of compliance.

4.1.4 Non-party disclosure

The Courts can also order a person who is not involved in an ongoing case to give "non-party disclosure" of documents likely to support or adversely affect one party's case provided that such disclosure is

necessary in order to dispose fairly of the claim or save costs. As with pre-action disclosure, such orders are unusual and the disclosing party is normally entitled to the costs of compliance.

4.1.5 Production of documents under a witness summons

As an alternative to seeking "disclosure", witness summonses (formerly known as subpoenas) can be issued to compel the production of specific documents by parties and non-parties. Witness summonses ought to be more specific than orders for standard disclosure and they are subject to an additional constraint in that they only apply to documents that are admissible in evidence.

4.2 It is important to bear in mind that plans, photographs, audio and video tapes, computer files and e-mails all count as "documents" for the purposes of the Rules on disclosure.

4.3 Multiple copies of the same document also need to be disclosed if, but only if, they contain a marking or feature which supports or adversely affects one party's case.

4.4 In any case where litigation has been commenced or appears likely, it is absolutely essential that potentially relevant documents (including hard copies and emails) are preserved and not destroyed. It is equally essential that this requirement is communicated and enforced as widely as possible and that there is a good record to show this was done.

4.5 Failure to provide proper disclosure can lead to a claim or defence being struck out and a finding that there has been a contempt of court. Moreover, the disclosing party must sign a "disclosure statement" confirming the extent of the search undertaken and compliance with the duty to disclose. It is a contempt of court to make a false disclosure statement.

**5. Giving and withholding disclosure**

5.1 Disclosure normally takes place in two stages, first, the party ordered to give disclosure searches for and then lists their disclosable documents and, secondly, the other party has a right to inspect and copy those documents subject to claims of privilege and public interest immunity (PII). When production of a document is required under a witness summons, the document must be taken to Court where any arguments for non-disclosure can be heard and determined.

5.2 Disclosure (ie listing a document and confirming its existence) can only be withheld on PII grounds although the list itself need only record a very general description of sensitive documents.

5.3 Inspection and copying (and production under a witness summons) can be

withheld on the following grounds:

5.3.1 Confidentiality

Confidentiality is not a formal ground for withholding inspection but related arguments can influence the Court to refuse inspection on discretionary grounds. Such arguments may also form the basis of a claim that disclosure would breach a third party's human rights. In some situations, the person to whom the duty of confidence is owed may need to be given a formal opportunity to consent or object.

5.3.2 Statutory bars

Various statutory provisions prevent the inspection of material particularly where it was obtained by regulatory or investigatory bodies under compulsory powers or for limited purposes. In some cases, a Court order for disclosure will create a gateway through which disclosure can properly be given even though voluntary disclosure is prohibited.

5.3.3 Legal professional privilege (LPP)[3]

In very broad terms, LPP covers confidential correspondence relating to general legal advice and contemplated or pending litigation. LPP can be waived by the relevant client[4] but, if asserted so as to prevent inspection, it is otherwise absolute and can only be overridden by the Court if the material has been used to further a fraud or crime.

5.3.4 "Without prejudice" correspondence

The Courts refuse to look at evidence of "without prejudice" settlement negotiations and there is a consequent right to withhold related correspondence from inspection. This privilege can only be waived with the consent of every party to the relevant negotiations.

5.3.5 Public interest immunity (PII)

The government's current approach to PII was set out in statements made in the House of Lords and the House of Commons on 18 December 1996. In summary, a three stage approach is now adopted and the following questions are asked:

(1) Is the material disclosable?

---

[3] Note also the convention that the Law Officers' advice (and even the fact that this has been sought or obtained) must not be disclosed outside government without their prior authority (see the Attorney General's written answer to a parliamentary question dated 20 February 1986 and paragraph 24 of "The Ministerial Code").

[4] See also the Treasury Solicitor's Guidance Note "Legal Professional Privilege in Civil Proceedings: Guidance for Government Lawyers" dated September 1999, paragraph 9: "the government should not claim LPP where it is apparent that to do so would prevent the Court reaching a result that is fair and in the overall public interest".

(2) If so, does it attract PII because the disclosure of its contents would cause "serious harm" or "real damage" to the public interest?

(3) If so, is the public interest in disclosure for the purposes of doing justice in the proceedings outweighed by the public interest in non-disclosure?

If all three questions are answered "yes", a PII claim will be made and the Court will determine whether it should be upheld (sometimes after inspecting the material in question)[5].

5.4 The fact that a document has a protective marking or security classification or is marked "legally privileged" or "without prejudice" will not determine whether it can be withheld from inspection under any of the above heads.

5.5 Disclosure is subject to various conditions and pitfalls and there are different ways to limit its effects. The following points can be noted:

(a) No party may use a disclosed document for a collateral purpose (unconnected with the litigation) unless and until it has come out in open court or collateral use has been sanctioned by the Court or the disclosing party[6]. This can provide some comfort to the disclosing party (and can therefore make disclosure under a Court order preferable to voluntary disclosure) but it also means that government must be particularly careful about copying disclosed material between different departments or to outside bodies.

(b) Proceedings for libel or breach of confidence cannot be brought against a party who has disclosed defamatory or confidential material under a Court order and this can provide a further reason for preferring disclosure under such an order to voluntary disclosure.

(c) Mere mention of a document during a case does not waive LPP in its contents but LPP can be lost if extensive reliance is placed on the document or the other side is allowed to inspect even part of it.

(d) Parties are generally allowed to inspect documents "mentioned" by other parties in their written pleadings and evidence and in documents exhibited to their written evidence – care should therefore be taken about what these documents refer to.

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[5] Further information on this is contained in the "Directory of Civil Service Guidance".

[6] The Court can also be asked to impose additional restrictions on the onward disclosure and collateral use of disclosed material which has come out in open court.

(e) Irrelevant passages which do not support or adversely affect any party's case can be withheld or redacted in order to protect sensitive material without the need for a formal PII claim.

(f) Tactical admissions as to key facts and matters can help narrow the contested issues and thereby the scope of disclosure.

(g) The Court can be asked to deal with different issues in sequence so that disclosure only need take place in stages in relation to those issues.

5.6 Lastly, issues may arise under the convention that ministers are often not allowed access to the papers of a previous administration of a different political complexion[7].

**6. Handling arrangements**

6.1 Where the government is involved in litigation, but the Cabinet Office and Cabinet Office Ministers are not in the lead, the disclosability of No. 10 documents can still be an issue and thought may need to be given to whether these can and should be seen by the lead department(s), the other parties and/or the Court.

6.2 In such situations, the following handling arrangements can be applied as necessary:

(a) The Treasury Solicitor's Head of Litigation will act as a contact point for the provision of independent advice to the Cabinet Office on the disclosure issues.

(b) The task of providing this advice will be taken on by the Head of Litigation and/or allocated to others within his Division.

(c) A Chinese wall be maintained between those advising the Cabinet Office and those handling the proceedings on behalf of the lead department(s) (whether based within the Treasury Solicitor's Department or elsewhere).

(d) The two sets of lawyers will nevertheless communicate so that

[7] See the Prime Minister's written answer to a parliamentary question dated 24 January 1980. Note esp that PII claims may need to be advanced by the permanent rather than political head of the relevant department where it would not be appropriate for current ministers to review the material in question. These issues are covered further in Volume 2 of the "Directory of Civil Service Guidance" under the headings "Access by Ministers and Special Advisers to Documents of a Previous Administration" (see paragraph 8) and "Accountability for events under a Previous Administration" (see paragraph 7).

everyone involved gets a complete picture of where things stand.

(e) Independent advice can then be formulated (with or without the assistance of counsel) on:

(i) the timing and likelihood of any disclosure exercise;

(ii) the disclosability of No. 10 documents (both as a matter of principle and in terms of the test for standard disclosure); and

(ii) the extent to which the duty to conduct a reasonable search for disclosable material needs to cover No. 10 files.

(f) Those advising the Cabinet Office can undertake a confidential preliminary review of any potentially relevant No. 10 documents as necessary.

(g) If any differences arise, the Law Officers can be asked to resolve these.

(h) Agreement can then be reached on the way forward bearing in mind the legal advice, the respective views of the Cabinet Office and the lead department(s) and the overarching need for government as a whole to adopt a clear and defensible public stance in all litigation.

(i) Once it has been agreed whether No. 10 documents can and should be fed into or withheld from the litigation, those advising the Cabinet Office can maintain a watching brief or withdraw. Elements of a bi-partite approach may need to be maintained (eg so that any PII claims are handled by those advising the Cabinet Office) but only in so far as this is consistent with the professional duties of those acting for the lead department(s) and the need for someone to sign a proper disclosure statement.

**TREASURY SOLICITOR'S DEPARTMENT**
**JUNE 2002**

DCO
Please copy to
SV, MEL, MH, JK
& return → me.
Many thanks
Nick 10/7

From: Georgia Hutchinson
Central Secretariat
Rm 118, 70 Whitehall
Email: georgia.hutchinson@cabinet-office.x.gsi.gov.uk
Tel: 7276 2471
Fax: 7267 2495
Date: 08 July 2002

**IAN FLETCHER**

cc: ~~Nick Bisson~~ Tessa Stirling
cc: CS. JSH.

**TREASURY SOLICITOR'S NOTE ON DISCLOSURE OF No10 DOCUMENTS IN CIVIL PROCEEDINGS**

1. Juliet Wheldon sent a note on 'Disclosure of No10 Documents in Civil Proceedings' to Sir Richard on 24 June. You asked Helen Ghosh for advice on the origins of this note.

2. At the beginning of this year, No10 were considering the need to preserve and disclose documents in relation to possible action by Railtrack shareholders against DTLR. The issue of disclosure also arose in the judicial review of the decision to hold the FMD inquiries in private.

3. These specific cases were resolved through discussion with lawyers. On the back of these cases No10 requested generic advice from Sir Richard about disclosure of documents in civil proceedings. Sir Richard asked that Juliet Wheldon be personally involved in this.

4. The note from Juliet Wheldon is a general guidance note that No10 can refer to in future cases where they are requested to disclose documents.

5. I have copied this and Juliet Wheldon's note to Nick Bisson, who was leading on this for No10 and to Tessa Stirling, who has an obvious interest as Cabinet Office Departmental Records Officer.

Georgia Hutchinson

**GEORGIA HUTCHINSON**

# NOTE ON THE DISCLOSURE OF No. 10 DOCUMENTS IN CIVIL PROCEEDINGS AND RELATED HANDLING ARRANGEMENTS

## 1. Introduction

1.1 Getting disclosure right is an enormously difficult process. Getting it wrong need not involve an ENRON style scandal but any mistake, however technical, can open the door to criticism and accusations from all quarters, especially if No. 10 papers are involved.

1.2 This guidance covers the disclosure of No. 10 documents in the main types of civil litigation, namely, claims for damages and injunctions, judicial reviews and unfair dismissal and discrimination claims. It does not cover criminal cases or requests for information under statute[1] or the 1997 "Code of Practice on Access to Government Information".

1.3 Disclosure obligations before other tribunals and inquiries (away from the normal Courts and the Employment Tribunals) can vary and, although the handling arrangements set out below will still apply, specific advice should be sought on these.

## 2. No. 10 documents

2.1 For a variety of reasons, the disclosure of No. 10 documents in civil litigation is unusual.

2.2 Claims for damages are generally brought by and against "the Crown" with one of the main departments or the Attorney General named as claimant or defendant[2]. In principle, the Courts can order the disclosure of any government papers in such cases because they ultimately belong to "the Crown". In practice, however, the Courts recognise that the duty to give disclosure will not routinely require a trawl across the whole of government. In claims for damages, "the Crown" is usually being sued on the basis that it is liable for the actions of its departments and employees. Disclosure therefore concentrates on their actions and intentions making the files and records of the lead department most important. Depending on the issues, No. 10 documents may be disclosable (eg cases where the implementation of EU law is under challenge) but the focus will normally be on the more operational departments with large numbers of employees and extensive property and contractual portfolios.

2.3 In judicial review proceedings, the government party will be the minister or other office older who took the decision under challenge rather than "the Crown". Very few "judicially reviewable" statutory or prerogative functions are

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[1] Eg the Data Protection Act 1998 and the Freedom of Information Act 2000.

[2] Under the Crown Proceedings Act 1947.

conferred on or exercised by the Prime Minister or other Cabinet Office Ministers so they are rarely named as judicial review defendants. Again, and depending on the issues, No. 10 documents may be disclosable (eg where it is alleged that too much reliance was placed on advice from No. 10) but the focus will be on the factors taken into account by the decision maker in question and any relevant material will normally be in his or her department.

## 3. Civil proceedings

3.1 As a basic rule, whenever government becomes involved in civil litigation it will be required to disclose key information unless there is a good reason for not doing so. This obligation arises under domestic law and human rights principles on effective access to justice.

## 4. Disclosure

4.1 Disclosure can be required at different stages and in accordance with different tests:

4.1.1 Standard disclosure in damages claims

Standard disclosure is normally ordered after the close of pleadings and before the preparation of witness statements. There is therefore an opportunity to settle or have the case struck out before disclosure takes place. The disclosing party must conduct a "reasonable" search for, and disclose, all documents which are or have been in that party's control and which support or adversely affect one party's case. This test is narrower than mere relevance.

4.1.2 Disclosure in judicial review claims

Disclosure is not normally ordered but the parties are under a "duty to make full and fair disclosure" in their written evidence. The Court can also order standard disclosure if it thinks this necessary or if the written evidence appears to be incorrect or incomplete.

4.1.3 Pre-action disclosure

Various "Pre-Action Protocols" encourage (but do not oblige) the early exchange of relevant materials. Beyond this, the Courts can order "pre-action disclosure" by persons who are likely to become involved in litigation in relation to documents which support or adversely affect one party's case provided that this is considered desirable in order to dispose fairly of the anticipated proceedings or save costs. Orders for pre-action disclosure are unusual and the disclosing party is normally entitled to the costs of compliance.

4.1.4 Non-party disclosure

The Courts can also order a person who is not involved in an ongoing case to give "non-party disclosure" of documents likely to support or adversely affect one party's case provided that such disclosure is

necessary in order to dispose fairly of the claim or save costs. As with pre-action disclosure, such orders are unusual and the disclosing party is normally entitled to the costs of compliance.

4.1.5 Production of documents under a witness summons

As an alternative to seeking "disclosure", witness summonses (formerly known as subpoenas) can be issued to compel the production of specific documents by parties and non-parties. Witness summonses ought to be more specific than orders for standard disclosure and they are subject to an additional constraint in that they only apply to documents that are admissible in evidence.

4.2 It is important to bear in mind that plans, photographs, audio and video tapes, computer files and e-mails all count as "documents" for the purposes of the Rules on disclosure.

4.3 Multiple copies of the same document also need to be disclosed if, but only if, they contain a marking or feature which supports or adversely affects one party's case.

4.4 In any case where litigation has been commenced or appears likely, it is absolutely essential that potentially relevant documents (including hard copies and emails) are preserved and not destroyed. It is equally essential that this requirement is communicated and enforced as widely as possible and that there is a good record to show this was done.

4.5 Failure to provide proper disclosure can lead to a claim or defence being struck out and a finding that there has been a contempt of court. Moreover, the disclosing party must sign a "disclosure statement" confirming the extent of the search undertaken and compliance with the duty to disclose. It is a contempt of court to make a false disclosure statement.

**5. Giving and withholding disclosure**

5.1 Disclosure normally takes place in two stages, first, the party ordered to give disclosure searches for and then lists their disclosable documents and, secondly, the other party has a right to inspect and copy those documents subject to claims of privilege and public interest immunity (PII). When production of a document is required under a witness summons, the document must be taken to Court where any arguments for non-disclosure can be heard and determined.

5.2 Disclosure (ie listing a document and confirming its existence) can only be withheld on PII grounds although the list itself need only record a very general description of sensitive documents.

5.3 Inspection and copying (and production under a witness summons) can be

withheld on the following grounds:

5.3.1 Confidentiality

Confidentiality is not a formal ground for withholding inspection but related arguments can influence the Court to refuse inspection on discretionary grounds. Such arguments may also form the basis of a claim that disclosure would breach a third party's human rights. In some situations, the person to whom the duty of confidence is owed may need to be given a formal opportunity to consent or object.

5.3.2 Statutory bars

Various statutory provisions prevent the inspection of material particularly where it was obtained by regulatory or investigatory bodies under compulsory powers or for limited purposes. In some cases, a Court order for disclosure will create a gateway through which disclosure can properly be given even though voluntary disclosure is prohibited.

5.3.3 Legal professional privilege (LPP)[3]

In very broad terms, LPP covers confidential correspondence relating to general legal advice and contemplated or pending litigation. LPP can be waived by the relevant client[4] but, if asserted so as to prevent inspection, it is otherwise absolute and can only be overridden by the Court if the material has been used to further a fraud or crime.

5.3.4 "Without prejudice" correspondence

The Courts refuse to look at evidence of "without prejudice" settlement negotiations and there is a consequent right to withhold related correspondence from inspection. This privilege can only be waived with the consent of every party to the relevant negotiations.

5.3.5 Public interest immunity (PII)

The government's current approach to PII was set out in statements made in the House of Lords and the House of Commons on 18 December 1996. In summary, a three stage approach is now adopted and the following questions are asked:

(1) Is the material disclosable?

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[3] Note also the convention that the Law Officers' advice (and even the fact that this has been sought or obtained) must not be disclosed outside government without their prior authority (see the Attorney General's written answer to a parliamentary question dated 20 February 1986 and paragraph 24 of "The Ministerial Code").

[4] See also the Treasury Solicitor's Guidance Note "Legal Professional Privilege in Civil Proceedings: Guidance for Government Lawyers" dated September 1999, paragraph 9: "the government should not claim LPP where it is apparent that to do so would prevent the Court reaching a result that is fair and in the overall public interest".

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**TREASURY SOLICITOR'S DEPARTMENT**
**JUNE 2002**

FROM THE RT HON ALISTAIR DARLING MP
SECRETARY OF STATE FOR TRANSPORT

**Department** for **Transport**

Department for Transport

Eland House
Bressenden Place
London SW1E 5DU

Tel: 020 7944 3011
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The Rt Hon the Lord Irvine of Lairg
Lord Chancellor
House of Lords
LONDON
SW1A 0PW

CS

Web Site: www.dft.gov.uk

Our Ref: AD/17044/02

-8 JUL

**FREEDOM OF INFORMATION ACT; IMPLEMENTATION OF SECTION 77 (CRIMINAL OFFENCE OF DESTROYING RECORDS TO PREVENT ACCESS TO INFORMATION)**

Thank you for your letter of 20 June seeking agreement to bring section 77 of the Freedom of Information Act 2000 into force in November this year. I agree that the overall presentational arguments support your proposal.

Your letter of 20 June seeks colleague's agreement to bring the offence created in section 77 of the Freedom of Information Act 2000 into force in November this year in line with the first phase of publication schemes to be published by Whitehall Departments. This will also apply to requests made under the data Protection Act.

I agree that the option of doing so when full access rights under the Freedom of Information Act are granted in January 2005 would not be presentationally acceptable. I agree therefore that bringing this offence into force this November outweighs those arguments for leaving this until the new Environmental Information Regulations are brought into force next year.

I think it is also important that we are clear about when documents can legitimately be destroyed, i.e. in line with Department's disposal agreements, and that guidance is issued to Whitehall Departments to this effect.

I am copying this letter to the Prime Minister, members of CRP(FOI) committee and Sir Richard Wilson.

**ALISTAIR DARLING**

THE NATIONAL ARCHIVES

| | |
|---|---|
| DEPARTMENT/SERIES Crem 49<br>PIECE/ITEM 2569<br>(one piece/item number) | Date and sign |
| Extract details:<br>Minute & attachment dated 05/07/2002 | |
| CLOSED UNDER FOI EXEMPTION ..... | |
| RETAINED UNDER SECTION 3(4)<br>OF THE PUBLIC RECORDS ACT 1958 | |
| TEMPORARILY RETAINED | 25/4/24 |
| MISSING AT TRANSFER | |
| NUMBER NOT USED | |
| MISSING (TNA USE ONLY) | |
| DOCUMENT PUT IN PLACE (TNA USE ONLY) | |

## ***Instructions for completion of Dummy Card***

Use black or blue pen to complete form.

Use the card for one piece or for each extract removed from a different place within a piece.

Enter the department and series,
eg. HO 405, J 82.

Enter the piece and item references, .
eg. 28, 1079, 84/1, 107/3

Enter extract details if it is an extract rather than a whole piece.
This should be an indication of what the extract is,
eg. Folio 28, Indictment 840079, E107, Letter dated 22/11/1995.
Do not enter details of why the extract is sensitive.

If closed under the FOI Act, enter the FOI exemption numbers applying to the closure, eg. 27(1), 40(2).

Sign and date next to the reason why the record is not available to the public ie. Closed under FOI exemption; Retained under section 3(4) of the Public Records Act 1958; Temporarily retained; Missing at transfer
or Number not used.

THE NATIONAL ARCHIVES

| | |
|---|---|
| DEPARTMENT/SERIES Prem 49<br>PIECE/ITEM 2569<br>(one piece/item number) | Date and sign |
| Extract details:<br>Minute and manuscript note dated 18/06/2002 | |
| CLOSED UNDER FOI EXEMPTION ..... | |
| RETAINED UNDER SECTION 3(4)<br>OF THE PUBLIC RECORDS ACT 1958 | |
| TEMPORARILY RETAINED | 25/04/24 |
| MISSING AT TRANSFER | |
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THE NATIONAL ARCHIVES

| | |
|---|---|
| DEPARTMENT/SERIES Prem 49<br>PIECE/ITEM 2569<br>(one piece/item number) | Date and sign |
| Extract details:<br>Letter dated<br>05 July 2002 | |
| CLOSED UNDER FOI EXEMPTION ..... | |
| RETAINED UNDER SECTION 3(4)<br>OF THE PUBLIC RECORDS ACT 1958 | |
| TEMPORARILY RETAINED | 25/4/2024 |
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or Number not used.

CABINET OFFICE
A 6885
04 JUL 2002
FILING INSTRUCTIONS
FILE No. .....

A 817

F

Permanent Secretary and
Clerk of the Crown in Chancery

Sir Hayden Phillips GCB

HOUSE OF LORDS
LONDON SW1A 0PW

Tel. 020 7219 3246
Fax. 020 7219 2075

c. Tessa Stirling
Brian Hogan
SW 4/7.

4th July 2002

Sir Richard Wilson GCB
Secretary to the Cabinet
and Head of the Home Civil Service
Cabinet Office
70 Whitehall
LONDON SW1A 2AS

Please copy to
Clare Sumner.
AS 5/7

Dear Richard

Subject Access Requests

I am replying to your letter of 26 June setting out a proposed way forward in handling the large number of requests from Conservative MPs for details of information held on them by government departments, under the Data Protection Act. As I explained yesterday to Wednesday morning colleagues and, following a meeting with experts earlier this week, my clear advice is that you do not need to write as proposed, and indeed it would be preferable not to do so.

My advice is that each department should deal with its own access requests but departments should adopt as consistent an approach as possible. To promote consistency and to assist economy, departments should continue their searches in the most obvious places. The MPs are, I believe, concerned to see background material about them which may be held in Private Offices, in Parliamentary Sections, Press Offices and Correspondence Units, and especially in any comments on them in background notes to PQs. We believe that mounting searches in the most likely areas of departments will almost certainly be sufficient to satisfy most of the MPs. The sources of information to be included would therefore be in:

Parliamentary Sections;
Private Offices;
Correspondence Units; and
Press Offices.

If a particular MP, in his commissioning letter, has specified additional areas these should, of course, also be included.

When responding to the MPs, departments should indicate the areas they have searched and, quoting Section 7.3 of the DPA, should invite the MP, if he wishes further searches to be made, to be more specific about the location of the information he seeks.

When responding to the MPs, departments should indicate the areas they have searched and, quoting Section 7.3 of the DPA, should invite the MP, if he wishes further searches to be made, to be more specific about the location of the information he seeks.

On the question of searching deleted material, departments should make it clear that unless the individual can be explicit about what documents departments need to look for in back-up tapes, we would not propose to make such searches.

A template draft reply is attached as an Annex to this letter for departments to use in their responses. However, I do strongly suggest that before any replies are sent there should be a meeting of DPA Practitioners, under the auspices of the DPPG, to ensure that we are all marching in step.

On charging, we noted that some departments have a policy to charge for searches while others do not; accordingly, my advice is that departments continue to follow their normal charging policy. This is exactly what happened in relation to a number of Liberal Democrat access requests and we should follow the same policy with other MPs.

On the question of Ministerial involvement, as I said yesterday, while it would not be normal practice in most departments for Ministers routinely to be shown the replies to access requests, departments may find there will be cases which ought to go to Ministers because of the nature of the information held. This has to be a matter of judgement on a case by case basis.

Finally, as there has already been Press interest shown in these access requests, colleagues might like to forewarn their Ministers of the approach we are taking and advise them, if this matter is raised in the House or directly by the media, to take the following line:

"In dealing with access requests under the Data Protection Act from Conservative MPs, we will follow our normal departmental procedures."

A copy of this letter goes to Wednesday morning colleagues.

Yours ever

Hazel

ANNEX A

DATA PROTECTION ACT 1998

Thank you for your letter of [ ] to[ ] received on [ ] submitting a subject access request under the Data Protection Act. I am replying in my capacity as [data protection co-ordinator] for this Department.

The [department] has checked its records and [I can confirm that personal data in relation to you are being processed and attached to this letter are extracts from the records that are held showing the data to which you are entitled to under the Data Protection Act. They are in no particular order and the period covered by our search was from May 1997 up to the date your request was received. [I can confirm that we hold no personal data on you to which you are entitled under the Data Protection Act.]

We have checked records held in our Private Offices, Parliamentary Sections, Correspondence Unit and Press Office. If you believe that any other parts of our Department may be holding personal data on you, you should write to me saying where you believe it is held and giving as much detail as possible in order to assist us in tracing it. This is in accordance with section 7(3) of the Data Protection Act.

You asked about instructions given to destroy data. A copy of the current policy statement on records management in this Department is attached; this explains how we manage our records and I hope will demonstrate that we do not destroy data except within the context of our records management policy.

You also asked that we recover any deleted data on you held on "back-ups". It is possible that personal data on you may be held in the form of deleted items which are no longer available on our live system. Any such data would not be held for current processing purposes and could not be searched without exceptional difficulty and at considerable cost. The department's policy is that a search should be carried out only in exceptional cases (such as involving serious crime) as it is not possible to search the "non-live" system without expending disproportionate time and resources. However, if you are able to supply us with sufficient information to enable us to locate specific information, in our back up files, which you think may contain personal information about you, we will undertake a search of that information. As noted above this request for further information is in accordance with section 7(3) of the Act.

FROM: THE RIGHT HONOURABLE THE LORD IRVINE OF LAIRG
02072192220

6778

Please ignore previous letter.

HOUSE OF LORDS,
LONDON SW1A 0PW

CS

cc: JJH
SV
AA

Ms Yvette Cooper MP
Lord Chancellor's Department
Selbourne House
54 – 60 Victoria Street
London
SW1E 6QW

2 July, 2002

Dear Yvette,

**Michael Wills wrote to me on 14 May, copied to members of CRP (FOI), to seek agreement to the making of an order under paragraph 10 of Schedule 3 to the Data Protection Act 1998 permitting the processing of sensitive personal data by MPs and other elected representatives without the need for them to seek the explicit consent of the individuals concerned. Michael also wrote on 15 May to colleagues in the Devolved Administrations attaching a copy of his letter of 14 May inviting comments.**

Comments were received from Robin Cook, Patricia Hollis, Tessa Jowell, Gus Macdonald, Lewis Moonie, Patricia Hewitt, Denis MacShane, Philip Hunt, Alistair Darling and Bob Ainsworth. A joint response was received from David Trimble and Mark Durkan as were replies from Rhodri Morgan and Patricia Ferguson.

Agreement to the Order was given by all except Philip Hunt and Rhodri Morgan.

Philip was particularly concerned that the Order would not relieve NHS bodies or representatives of the common law obligations of confidence. He could not be certain that intermediate bodies and individuals will recognise that they are bound in the same way by the obligations of confidence. Furthermore, he argues that the public interest would not necessarily justify disclosure of patients' confidential information in every case with which an MP deals. I agree that the opportunity should not be available for any organisation or individual to fail to recognise their strict duty of confidentiality. Furthermore, I agree that the public interest would not justify disclose of confidential information in every case which is why the Order is permissive and *not* mandatory. The accompaniment of effective safeguards will qualify and regulate that permission. This is crucial to the successful operation of the Order and to protect against abuse of the Order. Robin suggested in his second letter that an explanatory memorandum accompany the Order making this point explicitly. I agree and officials drafting the Order should also draft this memorandum which should accompany the Order at all stages.

Rhodri Morgan believes that in many if not all cases the issue of obtaining explicit consent can be resolved by establishing appropriate procedures for seeking such consent rather than by a change in the law. I recognise there are alternative routes - indeed these are currently in place - but their time consuming and costly nature challenges the effective operation of the DPA 1998 which itself make

provision for the proposed Order. Although I share the concerns raised I believe an Order can be made which will adhere to the principles of the DPA.

I attach at Annex A to this letter the safeguards suggested by colleagues. I am content with all of them although the suggestion from Bob that permission should be limited to constituents and their families will need further definition. Drafting officials should bear this in mind.

Denis MacShane stressed the importance of the Order for the Foreign and Commonwealth Office. Officials from the FCO are in touch with officials in this Department to discuss the working of the Order.

Lewis Moonie and Patricia Hewitt had concerns over the presentation of the Order and possible adverse publicity. The view might be taken that MPs and other elected individuals are not being required to act in accordance with the Data Protection Act 1998. It is important the reasoning behind passing the Order is made clear and that defensive lines are drawn up to counter claims that the DPA 1998 is being bypassed. Officials in this Department will draw up lines to take on the Order.

A number of colleagues requested a Code of Practice to accompany the Order. If the Order is successfully passed by Parliament officials in this Department should make arrangements for a Code to be drawn up.

I am therefore content for a draft Order to be submitted to you and for you to make arrangements to lay it before Parliament. In view of the deadline for laying before the summer recess, the Order will need to be laid by Thursday 4 July. Officials should ensure you receive the draft in sufficient time to facilitate this.

I am copying this letter of the Prime Minister, members of CRP (FOI), David Trimble, Mark Durkan, Rhodri Morgan, Patricia Ferguson and to Sir Richard Wilson.

Yours ever,
Derry.

**ANNEX A**

**Safeguards which must be met before disclosure takes place**

- Disclosure should be in the public interest (Lewis Moonie);
- Only relevant and necessary information shall be disclosed (Lewis Moonie) (see also Bob Ainsworth, below);
- Disclosure under the Order does not affect the duty to abide by the remainder of the Data Protection Act 1998, in particular with regard to the eight data protection principle and to subject access rights (Lewis Moonie);
- The sensitive personal data of individuals other than the constituent instigating the case must not be disclosed to third party organisations (of by third party organisations to elected representatives) without their [explicit] consent (Alistair Darling);
- Bodies holding the data should ensure they identify and esablish the status of the public representative in advance [of disclose] (Bob Ainsworth);
- The [implied] permission to release the data should be limited to the subject of the data their families (Bob Ainsworth);
- The permission should be limited to the legitimate business of the constituent (Bob Ainsworth);
- The permission should be limited to the sensitive data necessary to inform the enquiry being pursued (Bob Ainsworth);
- Limits to further disclosure of the sensitive data should be clarified (Bob Ainsworth);
- The sensitive data should continue to be protected once it is in the hands of the public representative (Bob Ainsworth);

The Rt. Hon The Lord Goldsmith QC

9 BUCKINGHAM GATE

LONDON SW1E 6JP

020-7271 2460

The Rt Hon Lord Irvine of Lairg QC
Lord Chancellor
House of Lords
London SW1 OPW

CS
cc. OM
JR.

2nd July 2002

Dear Danny

**FREEDOM OF INFORMATION ACT: IMPLEMENTATION OF SECTION 77 (CRIMINAL OFFENCE OF DESTROYING RECORDS TO PREVENT ACCESS TO INFORMATION)**

Thank you for sending me a copy of your letter to John Prescott dated 20 June seeking agreement to implement section 77 of the Freedom of Information Act.

I agree with your conclusion that there are significant advantages in implementing section 77 in November in order to build public trust in the handling of personal data by public authorities.

I also agree that this decision would be bound to attract a degree of criticism because section 77 will not bite, in so far as requests made under the Freedom of Information Act 2000 are concerned, until January 2005. Therefore, those disappointed by the decision not to bring in the individual right of access until 2005 will be able to point to the continuing lack of consistency in the application of the two inter-related Acts, the Freedom of Information Act and Data Protection Act.

However, the CPS has identified that the need for consultation with the Information Commissioner prior to implementation is important in order to ensure that any investigations of allegations do not cut across her enforcement role.

There is a clear risk that dissatisfied applicants will allege that an offence under section 77 has been committed and ask the police to investigate rather than pursue redress through the Commissioner. Given her statutory role, it is fair to conclude that the Commissioner will generally be best placed to explore the circumstances and determine whether proceedings are

appropriate. Such a decision can only be taken after a detailed analysis of the circumstances made by an individual aware of this complex area.

Decisions will often not be straightforward because data can currently be legitimately destroyed under a retention policy, exemptions may apply or data may have been destroyed through administrative malpractice rather than as a result of any specific intent. In all but the clearest cases, it would seem undesirable for the police to investigate, unless asked to by the Commissioner, given her remit.

I am copying this letter to the Prime Minister, to members of CRP (FOI) and to Sir Richard Wilson.

Yours ever

Lord

LORD CHANCELLOR'S DEPARTMENT
SELBORNE HOUSE
54-60 VICTORIA STREET
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DX 117000

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Facsimile: 020 – 7210 8620

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**YVETTE COOPER MP**
**Parliamentary Secretary**

Our ref:

CS
JTH
SV
AA

The Rt. Hon Lord Irvine of Lairg
Lord Chancellor
HL CP/05
House of Lords
London
SW1A 0PW

20 June 2002

Dear Derry

**FREEDOM OF INFORMATION ACT: PREPARATIONS IN NON DEPARTMENTAL PUBLIC BODIES**

**I am writing to ask colleagues to provide a report on the state of preparations for the implementation of the Freedom of Information Act in those non-departmental public bodies (NDPBs) which are sponsored by their Departments. I would welcome a response by 31 August.**

You announced on 13 November last year an implementation plan for this Act which envisaged implementing the publication scheme provisions by sector, starting in November this year with central government Departments and those NDPBs currently subject to the Code of Practice on Access to Government Information. Officials are currently finalising the Commencement Order which will give effect to your announcement, and this will be laid before Parliament in good time to allow the relevant provisions to come into effect as announced.

The Department arranged a series of seminars around the country earlier in the year, with Ministerial participation. Though many NDPBs attended, the majority did not. Officials have written to all NDPBs identified as falling within the scope of the Commencement Order, to inform them of out intention to include them in the Commencement provisions. However, I would welcome further reassurance that NDPBs are making appropriate preparations to meet the demands that will be placed upon them in November.

To that end, I would be grateful if colleagues would arrange for the sponsor Divisions within their Departments to confirm with their NDPBs that they are on track for preparing their publication scheme for approval by the Information Commissioner, and that they will have systems in place to be able to comply with that scheme, by the November date.

I would welcome a report from each Department by 31 August so that we have time to take remedial action if needed.

I am copying this letter to the Prime Minister, members of CRP(FOI) and to Sir Richard Wilson.

Yours

**YVETTE COOPER**

File

Home Office

**Bob Ainsworth MP**
**PARLIAMENTARY UNDER SECRETARY OF STATE**
50 Queen Anne's Gate, London SW1H 9AT

CS
cc: RA

The Rt Hon Lord Irvine of Lairg
Lord Chancellor
House of Lords
LONDON
SW1A 0PW

25 June 2002

Dear Lord Irvine

**DATA PROTECTION ACT 1998: SUBORDINATE LEGISLATION**

I have seen Michael Wills' letter to you of 14th May. He suggests that CRP (FOI) be asked to agree to an order allowing MPs and other elected representatives to process personal data without the explicit consent of the individual. I am sorry that we were unable to respond by 31st May.

It seems to me that MPs and elected representatives must be allowed to carry out their business, on behalf of constituents, as effectively as possible. Wherever the interests of a constituent can be better served then we should make provision. This is such a case.

Many thousands of enquiries are raised by MPs, at the Home Office, each year. Where they are progressing a concern of a constituent there has been an implicit assumption that the constituent is content to have sensitive data about them included in discussions and exchanges. It is certainly true that there is no practical way for both parties to obtain the individual's consent before including sensitive data, without creating further delay and aggravation to the constituent's needs.

I am aware that there are existing provisions for data subjects to indicate whether or not they are content for personal data to be disclosed. The Committee will need to give particular consideration to how this new permission will interact with this pre-existing protection.

Clearly you will make provision for suitable safeguards to:

- Identify and establish the status of the public representative in advance,

- Limit the permission to constituents and their families,
- limit the permission to the legitimate business of the constituent,
- limit the permission to the sensitive data necessary to inform the enquiry being pursued,
- clarify the limits to further disclosure of the sensitive data, and
- protect the sensitive data once in the hands of the public representative.

I will be pleased, in due course, to see the outcome of the CRP (FOI) considerations, and the resulting order.

I am copying this to the Prime Minister, to other Members of CRP(FOI) and to Sir Richard Wilson.

Yours sincerely

Pete Goldie

pp BOB AINSWORTH
(Approved by the Minister
and signed in his absence)

*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**

Rt Hon John Prescott MP
Deputy Prime Minister
Dover House
Whitehall
London
SW1A 2AU

CS
cc: SV

25 June 2002

Dear John,

**REPRESENTATION OF THE PEOPLE: SALE OF ELECTORAL REGISTERS**

I have seen Derry Irvine's letter to you, dated 24 June, confirming plans to lay these regulations before recess and circulating a draft RIA. I am writing as Minister with responsibility for better regulation to express my disappointment with the approach taken to analysing regulatory impact.

I am sure that you recognise the importance of thorough scrutiny of new proposals, particularly when these represent a significant cost to business. It is surprising, therefore, that the RIA was prepared only a few days before the regulations were to be laid although costs to business are estimated to be £500m a year. There are a number of issues that might have benefited from closer consideration and it is unfortunate that the agreed process was not followed to flush out concerns. It would be helpful, for example, if options were fully explained and the extent of consultation with industry made absolutely clear. Most surprising of all is that the RIA fails to justify the proposed approach as a workable solution.

I recognise the need to act quickly to allow business to gain some access to the electoral register and that changes must be made in time for the October canvass. That is why I am prepared to take the unusual step of agreeing the timetable on the understanding that the final RIA will be more comprehensive. I believe that officials from the Regulatory Impact Unit and LCD are discussing how this can be done. It is clear that much hard work is being undertaken at short notice to ensure that possible difficulties are reduced.

It seems to me that the development of detailed plans for implementation would help business to understand the new measures and identify ways to reduce costs. As you know, it is usual for guidance to be made available 12 weeks before new legislation is implemented. It would be helpful to know more about LCD's thinking on this.

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

Yours

Gus.

**GUS MACDONALD**

02072192220
FROM THE RIGHT HONOURABLE THE LORD IRVINE OF LAIRG

HOUSE OF LORDS,
LONDON SW1A 0PW

Ms Yvette Cooper MP
Lord Chancellor's Department
Selbourne House
54 – 60 Victoria Street
London
SW1E 6QW

CS
cc: Qs

25 June 2002

Dear Yvette,

**Michael Wills wrote to me on 8 May, copied to members of CRP (FOI), to seek agreement to publish the guidance on Publication Schemes by means of an arranged Parliamentary Question in both Houses.**

Comments were received from Tessa Jowell, Lord Macdonald, Geoff Hoon, Patricia Hewitt, Hilary Benn, Denis MacShane and Margaret Beckett.

Geoff Hoon made the point that a good number of equally valid approaches might be taken in presenting the detail required by Section 19 of the Freedom of Information Act. Although it would be inappropriate to be prescriptive about how departments should structure their Publication Schemes, it is prudent to issue guidance on best practice and content. Emphasis was added to the status of the document as guidance and not a set of instructions. Furthermore, information released from those institutions which are forthcoming will set high standards against which all others will be judged. This is unavoidable and although traditional values should be challenged, there are some constraints that are, and will remain, necessary.

Patricia Hewitt agreed with the aim of having a common approach across Government and the public sector, allowing for flexibility for each public authority to tailor its publication scheme to meet relevant circumstances. It will be important for those public authorities that will need to abide by a publication scheme from November this year to have sight of the guidance as soon as possible.

I am content the guidance should be published by an inspired Parliamentary Questions in both Houses. Officials should arrange for this to happen straight away.

I am copying this letter of the Prime Minister, members of CRP (FOI) and to Sir Richard Wilson.

Yours ever,
Derry

KLe

CS

RT HON ROBIN COOK MP
LEADER OF THE HOUSE OF COMMONS
2 CARLTON GARDENS
LONDON SWIY 5AA
TEL: 020 7210 1025

Our Ref: LP/02/275/CM

21 JUN 2002

Dear Yvette,

**PRIVATE MEMBER'S BILL: DATA PROTECTION**

Thank you for your letter of 19 June about Mark Francois' Private Member's Bill on data protection. In view of the work already being undertaken to deal with the problems the Bill is intended to address, you may take it that you have approval to oppose the Bill. Arrangements will be made to block it at Second Reading.

The Bill is intended to provide for a new general exemption in Part IV of the Data Protection Act for MPs who are seeking information in pursuit of a casework enquiry on behalf of a named constituent or constituents.

You argued that the Bill should be opposed. You are currently seeking the agreement of CRP (FOI) Committee to address the problem tackled by the Bill through the more appropriate medium of secondary legislation. It is intended to lay an order permitting the processing of sensitive personal data by MPs and other elected representatives, and the disclosure of sensitive personal data to them, without the need for the explicit consent of the individuals concerned. The measures would be subject to appropriate safeguards. I understand that it is intended to lay the order, which is subject to affirmative resolution, before the summer recess.

You may take it that you have agreement to oppose the Bill. I note that it is currently seventeenth on the list for debate on 21 June and it is therefore almost certain that it will not be reached. It should therefore be opposed and blocked on the grounds that debate and further work would be needed to decide whether the Bill could be made to be workable; and that the Government is already taking forward work to deal with the issue. I agree that it is important to be able to respond robustly, and I am content that in doing so you recognise the problem that the Bill is intended to address. Subject to obtaining the agreement of CRP(FOI), I am sure that you will also want to set out the steps that the Government is taking to tackle this issue.

I am copying this letter to the Prime Minister, members of LP and CRP(FOI) Committees, Sir Richard Wilson and First Parliamentary Counsel.

Yours sincerely

**ROBIN COOK**

Yvette Cooper MP
Parliamentary Secretary
Lord Chancellor's Department

FROM THE RT HON ALISTAIR DARLING MP
SECRETARY OF STATE FOR TRANSPORT

**Department**
for **Transport**

Department for Transport

Eland House
Bressenden Place
London SW1E 5DU

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

Web Site: www.dft.gov.uk

Our Ref: SB/13799/02

Yvette Cooper MP
Parliamentary Under Secretary of
State for Public Health
Department of Health
Richmond House
79 Whitehall
LONDON
SW1A 2NS

20 JUN 2002

Dear Yvette

**DATA PROTECTION ACT 1998: SUBORDINATE LEGISLATION**

Michael Wills' letter of 14 May to Derry Irvine, copied to CRP(FOI) colleagues, seeks agreement to the making of an order permitting the processing of sensitive personal data by MPs and other elected representatives without the need for them to seek the explicit consent of the individuals concerned.

I very much welcome the proposal to enable MPs and other elected representatives to carry out their necessary duties in support of their constituents without the need repeatedly to seek explicit consent from these constituents to the processing of their sensitive personal information. We are all well aware that complying with the privacy provisions of the Data Protection Act 1998 has generally hampered elected representatives in the performance of their legitimate constituency business by unnecessarily protracting procedures and causing often serious delays in the satisfactory resolution of constituents' cases. Subject to certain safeguards being adopted, the approach you are advocating should resolve these problems. In drawing up the order, however, it will be important to make sure that certain necessary safeguards are put in place to ensure that the order cannot be abused by elected representatives or their staff, and also that the sensitive personal data of individuals other than the constituent instigating the case cannot be inadvertently disclosed to third party organisations (or by third party organisations to elected representatives) without their consent.

I am copying this letter to the Prime Minister, members of CRP(FOI) committee and to Sir Richard Wilson.

Yours

**ALISTAIR DARLING**

02072192220

FROM THE RIGHT HONOURABLE THE LORD IRVINE OF LAIRG

HOUSE OF LORDS,
LONDON SW1A 0PW

CS
cc. Ome
M

20 June 2002

Dear Colleague,

**FREEDOM OF INFORMATION ACT; IMPLEMENTATION OF SECTION 77 (CRIMINAL OFFENCE OF DESTROYING RECORDS TO PREVENT ACCESS TO INFORMATION)**

**I am seeking your agreement to bring into force section 77 of the Act, which makes it an offence for a public official, faced with a request to disclose information, to destroy it in order to frustrate the request, in November this year, alongside the provisions relating to publication schemes for central government. I would be grateful to receive your comments by 2 July.**

We have caused disappointment to some by our decision not to bring the individual right of access to information under section 1 of the Freedom of Information Act 2000 into force until January 2005, rather than on a rolling programme by sector, as we are doing with each sector's publication scheme.

Peter Archer has asked an intelligent probing question on when we intend to bring section 77 into force. This offence applies whether the request for information is made under the Freedom of Information Act or the Data Protection Act 1998. The Data Protection Act has, of course, been in force since March 2000. I propose to tell Peter Archer, in my Answer, that I am consulting on this matter.

We have not yet considered when it would be right to bring into force section 77. The Data Protection Act itself contains no such provision. At present if the Information Commissioner considers that an official is destroying information to prevent the disclosure of information, she can issue an enforcement notice under section 40 of the Data Protection Act prohibiting such action from continuing. Any breach of that notice would be an offence under section 47 of the Act.

When we were considering the provisions of the Freedom of Information Act, we decided that a more direct criminal offence of wilfully destroying records was needed given the much wider range of records, including all recorded information, which is covered by the Freedom of Information Act, as opposed to the Data Protection Act which covers computerised and structured manual files only.

The Freedom of Information Act, however, also extends the scope of the Data Protection Act, for the purposes of the disclosure of information, to all manual records. Most manual records contain both personal and non personal information. We felt it was inconsistent to provide that the wilful

02072192220

destruction of non personal information should be a criminal offence, but that similar action in respect of personal information was not. It is also difficult to justify giving, arguably, greater protection to non personal information than to personal information, which most people would consider to be more sensitive. Therefore the scope of section 77 was extended to include requests for information under the Data Protection Act.

Because the arguments for applying the section 77 offence to the Data Protection Act are based on consistency with the Freedom of Information Act, there is a case for implementing section 77 when the main provisions of the Freedom of Information Act are implemented, on 1 January 2005. But I think that this would be presentationally highly ill advised. It is really not possible to explain why the offence should not be brought into effect now, when destruction follows a request under the Data Protection Act. The offence is tightly defined, covering only intentional destruction to frustrate an individual's entitlement to information, once a request has been received by a public authority. No private prosecution can be instituted for it.

Neither will commencement of this offence prevent public authorities correcting their records, to keep them up to date. Indeed they are required to do so by virtue of Data Protection principle 4 (personal data shall be accurate and kept up to date).

A further argument for bringing into force section 77 sooner rather than later stems from the work the Prime Minister has charged me to take forward concerning the Performance and Innovation Unit's report on Privacy and Data Sharing. This report repeatedly highlights the need to build public trust in authorities' handling of personal data as a necessary condition for the greater data sharing by departments of personal information. The report concludes that "if the public does not trust the way that the public sector handles personal information, then it will not be possible to achieve the potential benefits for individuals and for society from the better use of that information...this would put at risk the potential gains for the public from the move to the electronic delivery of services."

I believe that if we can announce shortly that we intend to commence section 77 in November it would greatly enhance public confidence that Whitehall does not have its shredders ready to go to work and would be an excellent demonstration of good faith by the Government.

An alternative approach would be to commence the section 77 offence at the same time as Margaret Beckett makes regulations under section 74 of the Freedom of Information Act for the purpose of implementing the information provisions of the Aarhus Convention. I understand that Margaret proposes to bring such regulations into force during 2003. These regulations are likely to include a provision amending section 77 to make it apply to wilful destruction to prevent the disclosure of information required under the regulations. To ensure consistency of approach we would need to commence section 77 generally at the same time. Nonetheless, I think that the presentational advantages of bringing section 77 into force in November this year are overwhelming.

I am sending this letter to the Prime Minister, members of CRP (FOI) and to Sir Richard Wilson.

Yours ever,

Derry

02072192220

FROM THE RIGHT HONOURABLE THE LORD IRVINE OF LAIRG

COPY

Lee Hughes

HOUSE OF LORDS,
LONDON SW1A 0PW

CS
cc OMc
JM

→ dange Closer it.

20 June 2002

Dear Colleague,

**FREEDOM OF INFORMATION ACT; IMPLEMENTATION OF SECTION 77 (CRIMINAL OFFENCE OF DESTROYING RECORDS TO PREVENT ACCESS TO INFORMATION)**

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I am sending this letter to the Prime Minister, members of CRP (FOI) and to Sir Richard Wilson.

Yours ever,

Derry

FROM THE RT HON ALISTAIR DARLING MP
SECRETARY OF STATE FOR TRANSPORT

**Department** for **Transport**

Department for Transport

Eland House
Bressenden Place
London SW1E 5DU

Tel: 020 7944 3011
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Our Ref: AD/11307/02

Web Site: www.dft.gov.uk

The Rt Hon John Prescott MP
Deputy Prime Minister
Office of the Deputy Prime Minsiter
Dover House
Whitehall
LONDON
SW1A 2AU

19 June 2002

Dear Deputy Prime Minister

**DEPARTMENTAL RESOURCE ACCOUNTS: DISCLOSURE OF PENSION INFORMATION AND TAXABLE BENEFITS IN KIND**

Your letter of 22 April invited colleagues to consult departmental Ministers on proposals for the disclosure of pension and benefits in kind information in the Department's resource accounts.

The Ministers serving in DTLR during 2001-02 have indicated they have no objection to such information being disclosed in the accounts and each has signed a declaration to that effect. It is assumed that former DETR Ministers now serving in other departments will be covered by exercises conducted there. That, of course, includes yourself since payments made to you in the period from April to June 2001 will of course fall to be declared in our resource accounts for that year.

You will recall that as Secretary of State at the Department for Work and Pensions I wrote to you on 1 May suggesting a change in the way we answer this information. My view remains the same.

I am copying this letter to the Prime Minister, Cabinet colleagues and Sir Richard Wilson.

Yours sincerely,

**ALISTAIR DARLING**

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

LORD CHANCELLOR'S DEPARTMENT
SELBORNE HOUSE
54-60 VICTORIA STREET
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DX 117000

Telephone: 020 – 7210 8683
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www.lcd.gov.uk

**YVETTE COOPER MP**
**Parliamentary Secretary**

The Rt Hon Robin Cook MP
Lord President of the Council
House of Commons
London SW1A 0AA

19 June 2002

Dear Robin

**Private Member's Bill: Data Protection (Amendment)**

Mark Francois MP has introduced a Bill to amend the Data Protection Act 1998 to provide exemptions in respect of Members of Parliament seeking information on behalf of their constituents and for related purposes. The Bill is scheduled to have its Second Reading on 21 June. I am writing to seek the agreement of LP to oppose the Bill.

The Bill is understood to be 25th on the list for that day and therefore seems unlikely to be debated.

Mark Francois explained at First Reading of the Bill on 12 June that it was designed to address an issue which has been raised by a number of Members recently, namely that, as a result of the 1998 Act, some organisations and public bodies were responding negatively to individual casework enquiries from MPs for fear of breaching the Act, while others were developing a general policy of asking MPs to obtain constituents' written consent before they would discuss any aspect of an individual case. The Bill would aim to remedy that situation by providing a new general exemption in Part IV of the Act for MPs who are seeking information in pursuit of a casework enquiry on behalf of a named constituent or constituents.

As a print of the Bill has not yet been made available, I am unable to comment on whether or not it is defectively drafted. You will be aware, however, from earlier consideration of this subject, that the problem lies with Schedule 3 to the1998 Act, which establishes a number of permissive conditions, at least one of which must be met by those wishing to process sensitive personal data (a term which includes information about individuals' race, political opinions, religious beliefs, health and involvement in criminal activity). At present, in the absence of any other relevant condition under Schedule 3, it is necessary to obtain the explicit consent of the individuals concerned where MPs need to have sensitive data disclosed to them, or indeed to disclose it themselves.

I readily acknowledge that the current situation is causing difficulties for MPs. Indeed, we are, as you know, proposing to address the problem by making an order under paragraph 10 of Schedule 3 to the 1998 Act to permit the processing of sensitive personal data by MPs and other elected representatives,

the disclosure of sensitive personal data to them, subject to appropriate safeguards, without the need for the explicit consent of the individuals concerned.

We have sought the collective agreement of CRP (FOI) Committee to this proposal, but at the time of writing this has not been received and there remain a series of issues, which need to be resolved. I understand that protocol is that we will have to oppose this Bill. Nevertheless, I hope that you can agree that in any public statements that are made, we will be able to state that we recognise and understand the problems that this Bill is trying to address.

I am copying this letter to the Prime Minister, Members of LP Committee, Sir Richard Wilson and First Parliamentary Counsel.

**YVETTE COOPER**

THE NATIONAL ARCHIVES

| DEPARTMENT/SERIES Cren 49<br>PIECE/ITEM 2569<br>(one piece/item number) | Date and sign |
|---|---|
| Extract details:<br>Minute dated<br>18 June 2002 | |
| CLOSED UNDER FOI EXEMPTION ..... | |
| RETAINED UNDER SECTION 3(4)<br>OF THE PUBLIC RECORDS ACT 1958 | |
| TEMPORARILY RETAINED | AC 25/04/24 |
| MISSING AT TRANSFER | |
| NUMBER NOT USED | |
| MISSING (TNA USE ONLY) | |
| DOCUMENT PUT IN PLACE (TNA USE ONLY) | |

## ***Instructions for completion of Dummy Card***

Use black or blue pen to complete form.

Use the card for one piece or for each extract removed from a different place within a piece.

Enter the department and series,
eg. HO 405, J 82.

Enter the piece and item references, .
eg. 28, 1079, 84/1, 107/3

Enter extract details if it is an extract rather than a whole piece.
This should be an indication of what the extract is,
eg. Folio 28, Indictment 840079, E107, Letter dated 22/11/1995.
Do not enter details of why the extract is sensitive.

If closed under the FOI Act, enter the FOI exemption numbers applying to the closure, eg. 27(1), 40(2).

Sign and date next to the reason why the record is not available to the public ie. Closed under FOI exemption; Retained under section 3(4) of the Public Records Act 1958; Temporarily retained; Missing at transfer
or Number not used.

F

**From:** Clare Sumner
**Date:** 11 June 2002

**PRIME MINISTER**

PM agreed orally that LC should announce.

**cc:** Sir Richard Wilson
Jonathan Powell
Jeremy Heywood
Andrew Adonis
Pat Dixon
Godric Smith/Tom Kelly

**FREEDOM OF INFORMATION**

The Lord Chancellor has written to you asking for your agreement to implement one section of the FOI Act early. The current commencement date for the whole of central government is January 2005, with other public bodies required to comply to an earlier timetable.

The section the LC wishes to commence from July 2002 would make it an offence for a public official to wilfully destroy material in order to frustrate a request made under the FOI Act. A similar provision is already in force under the Data Protection Act.

The LC argues that we should do this so that people are reassured that Whitehall is not shedding documents over the summer that may be releasable.

I do not think this is sensible because:

First, that introducing this early sends out the wrong message as it implies that civil servants will be destroying files over the next few years and we need to take action to stop this now. This is not the case, civil servants are already required to ensure that there is proper record management for the public records office and the data protection legislation so there is no need to bring this in early.

Second, that if we start implementing sections in a piece meal fashion in relation to central government implementation it is likely that there will be pressure to bring forward the Jan 1 2005 date.

And thirdly, we deliberately set the date for implementation of FOI in 2005 in order to allow departments time to ensure that proper publication schemes are in place, that they can respond effectively to requests and we can learn from other

public bodies experience. As you know there are more exemptions under FOI than the DPA in relation to advice to Ministers, although this is minimised by a right of appeal. Departments are already working to the 2005 timetable.

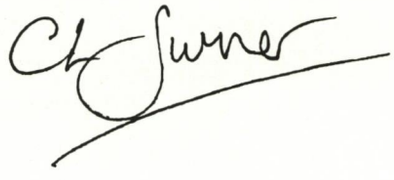
You should be aware that the LC introduced the amendment himself as chair of the cabinet committee dealing with FOI, despite the Home Office objecting on the grounds that it was not necessary.

I think in the current climate bringing this measure forward will be counter-productive and recommend that we stick to the planned implementation date for all measures relating to central government.

The LC can be robust defending the fact that the Government has no intention of not complying with the FOI Act and other relevant legislation. There are already requirements on officials to keep relevant material for certain periods of time under the Public Records Act and the Data Protection Act already in place.

You may wish to discuss with Sir Richard at your bilateral on Monday.

**?Content**



**CLARE SUMNER**

file

The Rt Hon Patricia Hewitt MP
Secretary of State for Trade and Industry

The Rt Hon John Prescott MP
Deputy Prime Minister and First
Secretary of State
Dover House
Whitehall
London
SW1A 2AU

**Secretary of State**
**Department of**
**Trade and Industry**

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JJH
cc JP
LASU
AA

13 June 2002

*Dear Deputy Prime Minister,*

**DEPARTMENTAL RESOURCE ACCOUNTS: DISCLOSURE OF PENSION INFORMATION AND TAXABLE VALUES OF BENEFITS IN KIND**

Thank you for copying to me your letter of 22 April to Gordon Brown.

Having consulted my Departmental Ministers, I am content with your proposals to disclose the personal details outlined in your letter in the Departmental resource accounts. I also agree to your proposal for future legislation making disclosure of such information a statutory requirement for both Ministers and senior civil servants.

I am copying this letter to the Prime Minister, all Cabinet colleagues and to Sir Richard Wilson.

*Yours sincerely*

***pp* PATRICIA HEWITT**

*Approved by the Secretary of State and signed in her absence*

*From the Parliamentary Under Secretary of State*
*Lord Hunt of Kings Heath*

IMC: 22082

Department of Health
*Richmond House*
*79 Whitehall*
*London*
*SW1A 2NS*
*Tel: 020 7210 3000*

The Rt Hon The Lord Irvine of Lairg
Lord Chancellor
Selbourne House
54-60 Victoria Street
London SW1E 0PW

10 JUN 2002

CS
cc JRO
AA
Qs

**DATA PROTECTION ACT 1998: SUBORDINATE LEGISLATION**

I have seen Michael Wills's letter of 14 May, seeking agreement to the making of an order under paragraph 10 of Schedule 3 of the Data Protection Act 1998 permitting the processing of sensitive data by MPs and other elected representatives without the need for them to seek the explicit consent of the individuals concerned.

I appreciate that this measure will make it simpler for MPs and other representatives to act on behalf of constituents, but feel I should highlight the special circumstances of the NHS. I hope there will be time to consider the case for treating health records (and possibly some social care records) separately.

The main difficulty is that the proposed order will not relieve NHS bodies or representatives of the common law obligations of confidence, which provide additional protection for sensitive personal data.

Since the information which is required to respond to representatives is often held under those obligations by bodies like NHS trusts which are only indirectly linked to Ministers, obtaining the information needed to respond may involve a series of disclosures. I cannot be certain that intermediate bodies and individuals will recognise that they are bound in the same way by the obligation of confidence. Explicit consent would serve as a helpful reminder.

We advise NHS hospitals and others holding confidential information about an individual's health and treatment not to disclose this information to an MP or other elected representative without first seeking the consent of the data subject unless there is a statutory requirement or robust public interest justification for disclosure. It is not clear that the public interest would justify disclosure of patients' confidential information in every case that an MP deals with.

For the NHS, there is a powerful public interest in protecting patient information and only exceptionally would we expect that information to be disclosed without the explicit consent of the patient. Patients generally appreciate that their cases cannot be

Department of Health

investigated without disclosures but do not always realise how many individuals will need to process their data to meet a simple request. To avoid doubt it still seems appropriate that, in most cases, consent should be sought. A cautious approach will also help to prevent any breach of human rights principles.

I am also concerned about ensuring that protections for the personal data of third parties are not compromised.

I hope we can take time to consider the case for treating health records separately, obtaining explicit consent for their disclosure. If we take this line, consent forms for use by MPs and other representatives could be worded to cover all disclosures required to respond properly, reminding all those involved of their obligations of confidence.

I am copying this letter to the Prime Minister, the members of CRP(FOI) Committee and to Sir Richard Wilson.

**PHILIP HUNT**

MATRIX

Top: PD(CS) cc COS PD(AA) Qs

10 June 2002

Foreign & Commonwealth Office

London SW1A 2AH

*From the Parliamentary Under Secretary of State*

Yvette Cooper MP
Parliamentary Secretary
Lord Chancellor's Department
Selborne House
54-60 Victoria Street
LONDON
SW1E 6QW

Dear Yvette

DATA PROTECTION ACT 1998: SUBORDINATE LEGISLATION

Michael Wills sent me a copy of his letter of 14 May to Derry Irvine about the processing of sensitive personal data by MPs.

I agree with the proposal to make an order under paragraph 10 of Schedule 3 to the Data Protection Act 1998 to create additional conditions to allow MPs and other elected representatives to disclose and receive sensitive personal data without the explicit consent of the individual concerned.

I recognise the difficulties that are caused to MPs by the present situation and welcome your intention to overcome them. It is important for the Foreign and Commonwealth Office that the order allows disclosure without explicit consent to MPs and other elected representatives of sensitive personal data about third parties (ie individuals other than the constituent who has contacted the MP). My officials will be in touch with yours to see how this can best be done. I presume other Departments have a similar requirement.

I am copying this letter to the Prime Minister, other members of CRP(FOI) and to Sir Richard Wilson.

Best Regards,

Denis

Denis MacShane

SKB 10/6/02

FROM THE RIGHT HONOURABLE THE LORD IRVINE OF LAIRG

HOUSE OF LORDS,
LONDON SW1A 0PW

Top: PD(CS) " COS PPS PD(AA) PD [redacted](SR) PD(OM) Qs

MATRIX

31 May 2002

**PRIME MINISTER**

**PARLIAMENTARY QUESTION FROM LORD ARCHER**
**FREEDOM OF INFORMATION: WILFUL DESTRUCTION OF MATERIAL**

**I need your urgent agreement on how to respond to this oral question on 24 June.**

We have caused disappointment to some by our decision not to bring the individual right of access to information under section 1 of the Freedom of Information Act (FOI) 2000 into force until 1 January 2005, rather than on a rolling programme by sector, as we are doing with each sector's Publication Scheme.

Peter Archer has asked an intelligent probing Question on when we intend to bring into force s.77 of the Freedom of Information Act, which makes it an offence for a public official, faced with a request to disclose information, to destroy it in order to frustrate the request. This offence applies whether the request is made under the Freedom of Information Act or under the Data Protection Act. As you are aware, the Data Protection Act has been in force since March 2000.

It is really not possible to explain why the offence should not be brought into effect now, when destruction follows a request under the Data Protection Act. Moreover, the offence is tightly defined, covering only intentional destruction to frustrate an individual's entitlement to information, once a request has been received by a public authority. No private prosecution can be instituted for it.

If we can give an affirmative answer that we intend to commence s.77 early, it would greatly enhance public confidence that Whitehall does not have its shredders ready to go to work. The PIU report on Privacy and Data Sharing, which I am charged to implement, repeatedly highlighted the need to build public trust in the handling of personal data by public authorities. It is of course not conceivable that it would in practice inconvenience Whitehall or other public authorities, because officials will not be intentionally destroying material which individuals have asked to see, and are entitled to see.

We have claimed virtue in the fact that our Freedom of Information Act applies retrospectively to information in existence, as does the Data Protection Act and not merely to future information. The suspicion that officials can easily resort to the



SG 31/5/02

shredder now, to frustrate requests for personal information under the Data Protection Act, undermines our claim.

So what I should like to say, in answer to the question on 24 June, if you agree, is that I intend to commence s.77 before the end of July.

Do you agree?

This is an easy confidence-lifting step to take at no realistic cost to Whitehall.

Yours sincerely

Amanda D

**Approved by the Lord Chancellor**
**and signed in his absence**
**by the Private Secretary**

Top: PSD(SS)
" PSD(AA)
PSD(JR)
PSD(OM)
Qs

*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**

Ms Yvette Cooper MP
Parliamentary Secretary
Lord Chancellor's Department
Selborne House
54-60 Victoria St
London
SW1E 6QW

30 May 2002

Dear Yvette,

**DATA PROTECTION ACT 1998: SUBORDINATE LEGISLATION**

Thank you for copying to me your letter of 14 May to the Lord Chancellor, seeking the agreement of colleagues to make an order under paragraph 10 of Schedule 3 to the above Act to permit MPs and other elected representatives to process sensitive personal data.

In light of the concerns which have been expressed to you by MPs I am content for such an order to be made. I note that you propose to provide for suitable safeguards in the order, and since it will not only permit MPs and other elected representatives to disclose sensitive personal data, but for third parties to disclose sensitive data in return, the inclusion of such safeguards will be necessary to protect against the possibility of abuse.

I am copying this letter to the Prime Minister, members of CRP(FOI) and Sir Richard Wilson.

Yours

GMS

**GUS MACDONALD**

***Web site: www.cabinet-office.gov.uk***
***Email: gus.macdonald@cabinet-office.x.gsi.gov.uk***

INVESTOR IN PEOPLE

SKP 31/5/02

cc : JSH
JV.

**10 DOWNING STREET**

Jonathan

No 10 will not be named at all. Only Departments will – we will come under the Cabinet Office umbrella. This letter was sent in error to you.

I am keeping a close eye, as is SPAD, on their publication scheme and am meeting officials to discuss. If there are issues I will raise them.

Clare.

LORD CHANCELLOR'S DEPARTMENT
Room 916, 50 Queen Anne's Gate
London SW1H 9AT

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Facsimile: 020 - 7273 2684
Steve.earl@homeoffice.gsi.gov.uk

www.lcd.gov.uk

Clare o/r cc UK/ US V

for legal advice Consults Rules w.in

cc: CS SV

Chief of Staff Prime Minister's Office Ang.

Your reference

Our reference

Date 29 May 2002

Dear Colleague

**FREEDOM OF INFORMATION ACT 2000: COMMENCEMENT ORDER UNDER SECTION 87**

On 13 November 2001 the Government announced its timetable for implementation of the Freedom of Information Act 2000. The publication scheme provisions of the Act will be implemented first, in a staged programme, followed by the provisions relating to the individual right of access which will be implemented in January 2005.

This letter informs you of the Lord Chancellor's intention to include your office or organisation in a commencement order to come into effect on 30 November this year in relation to certain provisions in the 2000 Act. It also explains that there will be a requirement for your office or organisation to prepare for these provisions before that time.

The Lord Chancellor has announced that the following offices and organisations will from November this year become subject to the publication scheme provisions of the Act (obligations for public authorities are contained in sections 19 and 20 of the Act):

- Central Government except for the Crown Prosecution Service and the Serious Fraud Office;
- Parliament;
- the National Assembly for Wales;
- non-departmental public bodies presently subject to the Code of Practice on Access to Government Information together with analogous Assembly sponsored public bodies in Wales.

The Lord Chancellor has also agreed with the First Minister and the Deputy First Minister that the Northern Ireland Assembly and analogous bodies in Northern Ireland shall also become subject to the publication scheme provisions of the Act at the same time.

Your organisation has been identified as falling into one of the categories listed above and will therefore be included in the commencement order.

The commencement order to be laid will make it the duty of the offices and organisations listed:

- to adopt and maintain a scheme relating to the publication of information which has been approved by the Information Commissioner; and to
- publish information in accordance with it; and

- from time to time to review it.

The publication scheme must:

- specify classes of information which the public authority publishes or intends to publish;
- specify the manner in which information of each class is, or is intended to be, published, and
- specify whether the material is, or is intended to be, available to the public free of charge or on payment.

In addition, section 19(3) of the Freedom of Information Act 2000 provides that in adopting or reviewing a publication scheme, a public authority shall have regard to the public interest –

(a) in allowing public access to information held by the authority, and
(b) in the publication of reasons for decisions made by the authority.

A questionnaire will be issued by the Office of the Information Commissioner which will assess compliance with section 19(3).

Guidance on preparing publication schemes, criteria for approval and a timetable detailing submission and deadline dates for publication scheme approval are presently available on the Information Commissioner's website (www.informationcommissioner.gov.uk) or from the Office of the Information Commissioner, Wycliffe House, Water Lane, Wilmslow, Cheshire SK9 5AF. The Office of the Information Commissioner will be contacting all offices and organisations to be covered by the commencement order with a view to receiving all publication schemes by the end of September 2002.

If you require further information, please contact Jean Sinclair in the Freedom of Information and Data Protection Division, room 912, 50 Queen Anne's Gate, London SW1H 9AT, telephone: 020 7273 3788, email: JeanP.Sinclair@homeoffice.gsi.gov.uk.

Please note that no separate letter has gone to your department's agencies (if any). I should be grateful if you would ensure they are aware of the contents of this letter. Thank you for your help.

Yours sincerely,

STEPHEN EARL
Freedom of Information and Data Protection Division

**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

cc PSD(CS)
PSD(SA)
PSD(WP)

C02/04192/01393/DC

Yvette Cooper MP
Parliamentary Secretary
Lord Chancellor's Department
Selborne House
54-60 Victoria Street
LONDON
SW1E 6QW

29th May 2002

Dear Yvette

**DATA PROTECTION ACT 1998: SUBORDINATE LEGISLATION**

I have seen your letter of 14 May to Derry Irvine and I strongly support your proposal to tackle the way the Act is obstructing MPs in carrying out their constituency work.

I also agree that the scope of the Order should not be limited to MPs as all elected representatives are likely to face the same problem.

I am copying this letter to the Prime Minister, to the other Members of CRP (FOI) and to Sir Richard Wilson.

Yours

TESSA

**TESSA JOWELL**

INVESTOR IN PEOPLE

copy: Ministers
Special Advisers
Perm. Sec
Marilynne Morgan
John Griffiths
Phillip Morgan
Berni Mundy
Charles Clubley
Shelagh Bostock
+ PM, CRP(FOI)
Sir Richard Wilson

R 3015

CS
14/5

From the Parliamentary
Under Secretary of State
for Work and Pensions

DWP
Department for Work and Pensions
Richmond House
79 Whitehall
London
SW1A 2NS
Telephone
020 7238 0800
Email
ministers@dwp.gsi.gov.uk
www.dwp.gov.uk

Michael Wills
Parliamentary Secretary
Lord Chancellor's Department
Selbourne House
54-60 Victoria Street
London
SW1E 6QW

28 May 02

Dear Michael,

**THE DATA PROTECTION ACT 1998: SUBORDINATE LEGISLATION**

Thank you for copying me your letter to the Lord Chancellor, dated 14 May, in which you seek CRP (FOI) members agreement to the making of an order under paragraph 10 of Schedule 3 to the Data Protection Act 1998 permitting the processing of sensitive personal data of MPs and other elected representatives.

Although this issue has not caused any problems within DWP, I am happy to endorse your proposal.

I am copying this letter to the Prime Minister, members of CRP (FOI) and Sir Richard Wilson.

Yours

BARONESS HOLLIS OF HEIGHAM

020 7238 6465 RC

Department for
**Environment, Food & Rural Affairs**

Nobel House
17 Smith Square
London SW1P 3JR

CS

cc JSH

From the Secretary of State

Michael Wills Esq MP
Parliamentary Secretary
Lord Chancellor's Department
Selbourne House
54-60 Victoria Street
London
SW1E 6QW

21/5/02

Dear Michael,

**FREEDOM OF INFORMATION ACT 2000: CENTRAL GOVERNMENT AND NDPB GUIDANCE ON PUBLICATION SCHEMES**

Further to your letter to the Lord Chancellor dated 8 May 2002, I am content for the publication of the formal guidance by means of an arranged Parliamentary Question in both Houses.

Work is progressing well on the development of a DEFRA Publication Scheme and publication of the formal guidance will be helpful.

I am copying this letter to the Prime Minister, members of CRP(FOI) and Sir Richard Wilson.

Regards
Margaret

**MARGARET BECKETT**

Parliamentary Under-Secretary of State

DFID Department for International Development

1 Palace Street, London SW1E 5HE
Direct Line: 020 7023 0462
Direct Fax: 020 7023 0831
Email: pspuss@dfid.gov.uk

23 May 2002

Michael Wills MP
Parliamentary Secretary
Lord Chancellor's Department
Selborne House
54-60 Victoria Street
London. SW1E 6QW

Dear Mr Wills

**FREEDOM OF INFORMATION ACT 2000: CENTRAL GOVERNMENT AND NON – DEPARTMENTAL PUBLIC BODY GUIDANCE ON PUBLICATION SCHEMES**

Thank you for copying to me your minute of 8 May to the Lord Chancellor.

I welcome the common yet flexible approach to publication schemes advocated in this guidance. DFID officials have been involved in the consultation process and have offered the benefit of their experience as one of the pilot authorities. I agree with your proposal to publish the guidance by means of an arranged Parliamentary Question in both Houses.

I am copying this letter to the Prime Minister, members of the CRP(FOI) and to Sir Richard Wilson.

pp HILARY BENN
(APPROVED BY THE MINISTER AND SIGNED IN HIS ABSENCE)

SECRETARY OF STATE FOR SCOTLAND

SCOTLAND OFFICE
DOVER HOUSE
WHITEHALL
LONDON SW1A 2AU
www.scottishsecretary@scotland.gov.uk

(F)
JDM

cc: JPo
AmcG
SV

The Rt Hon John Prescott MP
Deputy Prime Minister
Dover House
Whitehall
London
SW1A 2AU

22 May 2002

Dear John,

**DEPARTMENTAL RESOURCE ACCOUNTS: DISCLOSURE OF PENSION INFORMATION AND TAXABLE VALUES OF BENEFITS IN KIND**

Thank you for your letter of 22 April.

I have consulted George Foulkes and Lynda Clark (Advocate General for Scotland) about your proposals for disclosure in Departmental Resource Accounts of information about Ministerial pensions and the taxable value of benefits in kind.

We have no objections to your proposal. I am also content with your proposal to legislate in due course to make disclosure a statutory requirement for both Senior Civil Servants and Ministers.

I am copying this to the Prime Minister, all Cabinet colleagues and to Sir Richard Wilson.

Yours

**HELEN LIDDELL**

Recycled

**RT HON ROBIN COOK MP**
LEADER OF THE HOUSE OF COMMONS
2 CARLTON GARDENS
LONDON SWIY 5AA
TEL: 020 7210 1025

CS
CCBJ

Our Reference: 0013210

22 MAY 2002

Dear Michael,

**DATA PROTECTION ACT 1998: SUBORDINATE LEGISLATION**

I have seen your letter to the Lord Chancellor setting out your proposal for an order under paragraph 10 of Schedule 3 to the Data Protection Act 1998 to tackle the way this act is obstructing MPs in carrying out their constituency work.

MPs receive a vast amount of constituency correspondence often looking to the MP for help in dealing with an organisation such as a housing association or hospital trust. As the law stands, the MP must first have the explicit consent of the constituent before he or she can contact the relevant organisation. Not only is writing to obtain this a waste of time and money for all concerned, I am sure that it alienates electors if the first communication they receive about their case is a piece of apparently senseless bureaucracy. It is equally frustrating when an organisation feels it cannot respond to an MP's inquiry without itself having express permission from the constituents who have themselves raised the matter in question.

As you know, I have had a number of representations from MPs about the difficulties and distress this is causing. I agree wholeheartedly with your proposal and hope that parliament will be able to approve the order before the summer recess.

I am copying this letter to the Prime Minister, other members of CRP (FOI) and to Sir Richard Wilson.

Yours sincerely

Robin Cook

**ROBIN COOK**

Michael Wills MP
Parliamentary Secretary, LCD

*The Rt Hon Lord Macdonald of Tradeston CBE*
**Minister for the Cabinet Office &**
**Chancellor of the Duchy of Lancaster**

MATRIX

CS
cc JJH.

**CABINET OFFICE**
**70 Whitehall**
**London**
**SW1A 2AS**

***Tel:*** **020 7276 1250**
***Fax:*** **020 7276 1257**

The Rt Hon The Lord Irvine of Lairg
Lord Chancellor
House of Lords
London SW1A 0PW

20 May 2002

Dear Derry.

**FREEDOM OF INFORMATION ACT 2000: CENTRAL GOVERNMENT AND NON-DEPARTMENTAL PUBLIC BODY GUIDANCE ON PUBLICATION SCHEMES**

I have seen a copy of Michael Wills' letter to you of 8th May, seeking the agreement of colleagues to publish the guidance on publication schemes under the Freedom of Information Act.

I welcome this guidance. While I recognise that it cannot be prescriptive, it will help to ensure a measure of consistency across government. I am also content for the guidance to be published by way of an arranged Parliamentary Question.

I am copying this letter to the Prime Minister, members of CRP(FOI) and Sir Richard Wilson.

Yours
Gus

**GUS MACDONALD**

***Web site: www.cabinet-office.gov.uk***
***Email: gus.macdonald@cabinet-office.x.gsi.gov.uk***

INVESTOR IN PEOPLE

The Rt Hon Patricia Hewitt MP
Secretary of State for Trade and Industry

Michael Wills Esq MP
Parliamentary Secretary
Lord Chancellor's Department
Selborne House
54-60 Victoria Street
London
SW1E 6QW

CS / JJH

20 May 2002

**Secretary of State**
**Department of**
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DTI Enquiries
020 7215 5000

*URL* http://www.dti.gov.uk
*e*-mail mpst.Hewitt@dti.gsi.gov.uk

*Dear Michael,*

**FREEDOM OF INFORMATION ACT 2000 CENTRAL GOVERNMENT AND NON-DEPARTMENTAL PUBLIC BODY GUIDANCE ON PUBLICATION SCHEME**

**Thank you for copying me your letter of 8 May to Derry Irvine. I am content for the central guidance on publication schemes to be published.**

The requirement to abide by a publication scheme is an aspect of the FoI initiative that will have high public profile. I fully agree the aim of having a common approach across Government and the public sector while allowing flexibility for each public authority to tailor its publication scheme to meet its own circumstances.

It will be important for those public authorities that will need to abide by a publication scheme from November this year to have sight of the guidance as soon as possible. I would urge that the guidance be published as soon as this can be arranged.

I am copying this letter to the Prime Minister, members of CRP(FOI) and to Sir Richard Wilson.

Best wishes,

Patricia

**PATRICIA HEWITT**

File

**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 6302
Fax 020-7211 6249
tessa.jowell
@culture.gsi.gov.uk

C02/03961/01106/pa

Michael Wills MP
Parliamentary Secretary
Lord Chancellor's Department
Selborne House
54-60 Victoria Street
London
SW1E 6QW

19th May 2002

Dear Michael

**FREEDOM OF INFORMATION ACT 2000 - CENTRAL GOVERNMENT AND NON-DEPARTMENTAL PUBLIC BODY GUIDANCE ON PUBLICATION SCHEMES**

Thank you for sending me a copy of your letter of 8 May to Derry Irvine.

The guidance will prove very useful to departments and also to NDPBs that are covered by the Code of Practice. I agree it should be published as quickly as possible in both Houses as you suggest.

I am copying this letter to the Prime Minister, members of CRP(FOI) and to Sir Richard Wilson.

Yours

Tess

TESSA JOWELL

INVESTOR IN PEOPLE

HO 2002/621

FROM: TESSA STIRLING
TEL: 7217 6050
DATE 17 MAY 2002

MINISTER FOR THE CABINET OFFICE

cc: P/S John Prescott
P/S Barbara Roche
P/S Chris Leslie
P/S Lord Williams
P/S Sir Richard Wilson
P/S Mavis McDonald
Clare Sumner file
Peter Wardle
Leonie Austin
Helen Ghosh
Carol Tullo
Selvin Brown

**FREEDOM OF INFORMATION ACT 2000: CENTRAL GOVERNMENT AND NON-DEPARTMENTAL PUBLIC BODY GUIDANCE ON PUBLICATION SCHEMES (Ref 72109)**

Issue

How to respond to the letter of 8 May from Michael Wills in the Lord Chancellor's Department seeking agreement to publish guidance on the publication schemes which must be set up under the Freedom of Information Act.

Recommendation

2. That you respond by agreeing to publication of the guidance on the lines of the attached draft letter.

Timing

3. Routine. Mr Wills has asked for a reply by 21 May.

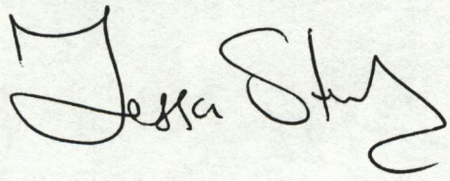
Background

4. The Freedom of Information Act is to be brought fully into force in January 2005, giving individual members of the public the right of access to publicly held information. However, to pave the way for full implementation, Government Departments are required to draw up publication schemes and submit them for approval to the Information Commissioner by 30 September 2002. The aim of

publication schemes is for departments to specify the classes of information which they will publish pro-actively, thus making it easier for members of the public to know what information is available.

5. Given that this is a new initiative, there has been some uncertainty as to the type of information to be published, and the format and content of the publication schemes. The Lord Chancellor's Department, which has the policy lead on Freedom of Information, has drafted guidance for government departments on the issues to be considered when developing a publication scheme, with the aim of achieving a common approach across government. The guidance has been discussed in various cross-Whitehall groups, and has been broadly welcomed as a useful compendium of good practice. Where departments depart from the guidance they will need to be prepared to justify their approach if asked by the Information Commissioner or other interested parties.

6. I recommend that you agree publication of the guidance and respond along the lines of the attached draft.



**TESSA STIRLING**

Encl.

**DRAFT LETTER FROM LORD MACDONALD TO THE PARLIAMENTARY SECRETARY, LORD CHANCELLOR'S DEPARTMENT:**

Michael Wills MP
Parliamentary Secretary
Lord Chancellor's Department
Selborne House
54-60 Victoria St
London
SW1E 6QW

May 2002

**FREEDOM OF INFORMATION ACT 2000: CENTRAL GOVERNMENT AND NON-DEPARTMENTAL PUBLIC BODY GUIDANCE ON PUBLICATION SCHEMES**

Thank you for copying to me your letter of 8 May to the Lord Chancellor, seeking the agreement of colleagues to publish the guidance on publication schemes under the Freedom of Information Act.

I welcome this guidance. While I recognise that it cannot be prescriptive, it will help to ensure a measure of consistency across government. I am also content for the guidance to be published by way of an arranged Parliamentary Question.

I am copying this letter to the Prime Minister, members of CRP(FOI) and Sir Richard Wilson.

BF CS 2002 -315

F

HO2002/608

ANGUS DALRYMPLE-SMITH

FROM: TESSA STIRLING
TEL: 217 6050
DATE: 15 MAY 2002

c Clare Sumner
Paul Candler
Julie Eason
Helen Ghosh
Peter Wardle
Carol Tullo

**FREEDOM OF INFORMATION ACT 2000 - CABINET OFFICE AND RELATED PUBLICATION SCHEMES**

My minute of 30 April 2002 ((HO2002/542) responded to the first action listed in your minute of 11 April 2002 April 2002, ie the timetable for preparing the Cabinet Office and related publication schemes. This submission deals with the second and third actions, ie the kind of material to be included in the Cabinet Office publication scheme and the presentations to individual Cabinet Office Ministers on the effects of the scheme.

**Publication schemes**

2. Every public authority is required to adopt and maintain a publication scheme setting out the classes of information it holds, the manner in which it intends to publish the information and whether a charge will be made for the information. A scheme is seen as a means by which a significant amount of information is made available, without the need for a specific request. Schemes are therefore intended to provide an opportunity for organisations to publish more information pro-actively and to develop a greater culture of openness.

3. It is for each department to choose how to define their "classes" of information. A publication scheme that contains "woolly intentions to publish at an unspecified date" is unlikely to be acceptable to the Information Commissioner. A scheme is effectively a series of publicly-made commitments approved by the Information Commissioner that a department will be legally obliged to fulfil.

4. In submitting a publication scheme to the Information Commissioner for approval it is a requirement to include the text of the document and an Approval Questionnaire. The questionnaire will be used to assess a public authority's compliance with the

Freedom of Information Act 2000 (FOIA). It includes, for example, specific details in relation to the following:

- Have you had regard to the public interest in allowing access to information held by you?
- Have you had regard to the public interest in the publication of reasons for decisions made by you?
- Have you considered frequently asked questions and specific areas of interest when determining your classes of information?
- Have you made information available within your scheme that has not been made available under other information regimes?
- What steps have you taken to ensure that your scheme is accessible to people with disabilities, and to those disadvantaged communities and, where appropriate is produced in other languages?

**Types of information to be included in a publication scheme**

5. There are certain kinds of information that all departmental publication schemes are meant to consider for inclusion within their schemes. These are set out in guidance that has been prepared by the Lord Chancellor's Department, in consultation with departments, and is currently with Ministers for approval. As a starting point it is necessary to include everything a department currently publishes or may be required to disclose. The other kinds of information that should be considered for inclusion are shown at 'A'.

6. The proposed method of identifying what areas can contribute to the Cabinet Office publication scheme is to "brainstorm" with Deputy Directors on a group or individual basis as appropriate. This should help formulate how we might best define the Cabinet Office "classes" of information. Other possible sources of information for the publication scheme are CabWeb and the Cabinet Office Research and Briefing System. This in practice means adopting a "what can be released" rather than "what cannot be released" approach. Where exceptions are made the reasons need to be given.

**Types of information that are exempt**

7. Under the FOIA there are a number of exemptions that are likely, depending on the circumstances, to apply to Cabinet Office material. Examples are shown at 'B'.

8. A number of exemptions confer "absolute exemption", where the need to balance the public interest in disclosure in maintaining the exemption does <u>not</u> arise. For all other exemptions the application of the exemption concerned must be balanced against the public interest in disclosure, ie whether in all the circumstances the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

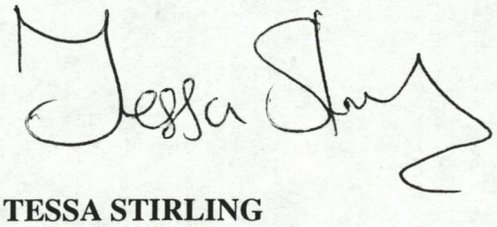
9. A list of some of the potential "elephant traps" that could affect Ministers is at 'C'.

**Presentation to individual Ministers**

10. Following discussions with Chris Leslie the current intention is that each of our Ministers should have a short presentation, no more than 30 minutes, which would cover the following areas:

- current position;
- kinds of information to be included;
- clearance of publication schemes;
- what a publication must specify;
- links with the Information Asset Register;
- what is in it for departments;
- "publishing" of publication schemes; and
- training of staff.

11. As indicated in my minute of 30 April 2002, the aim would be for the presentations to take place after discussion at Heads of Management Unit/Deputy Director level in case this resulted in something that need to be added to the presentations. We can decide nearer the time whether there would be any benefit in the presentation to Chris Leslie taking place first or last.



**TESSA STIRLING**

# MATERIAL TO BE CONSIDERED FOR INCLUSION IN THE CABINET OFFICE PUBLICATION SCHEME

- **Explanatory material on the Department's dealings with the public**

  This includes rules, manuals, procedures and guidance to staff. It also includes guidance to staff on implementing/operating the Code of Practice on Access to Government Information (Code of Practice), which remains in force until the FOIA comes fully into force.

- **Background to policy announcements**

  The Code of Practice already commits departments to publishing "the facts and analysis of the facts which the Government considers relevant and important in framing major policy proposals and decisions". This commitment should be carried forward in a publication scheme. The expectation in that such information will normally be published when policies and decisions are announced.

- **Management of the department**

  - full information about how public services are run; how much they cost; who is in charge, and what complaints and redress procedures are available;

  - full and, where possible, comparable information about what services are being provided; what targets are set; and what standards of service are expected and the results achieved;

  - objectives and functions of the department;

  - organisation of the department, including details about who is responsible for what function and how to contact the individual concerned;

  - information about Board Meetings, which may include agendas, and minutes of the meetings and associated papers or summaries as appropriate; and

  - sources of income, and how effectively money is raised and spent, for example, on different aspects of administration.

  Departments are also asked to consider "for which formal meetings it is appropriate to publish the agenda, papers and minutes or summaries of these documents". It is thought likely "that departments will want to

specify what information will be made available pro-actively for which meetings, or type of meetings. Regular formal committees or advisory groups are more likely to be included than ad hoc or impromptu discussions". This excludes disclosing any information relating to Cabinet or any of its Committees.

- **Departmental Offices Notices etc**

  It is probable that some of these circulars, that for example appear on CabWeb, will be suitable to be included in the publication scheme.

- **Information placed in the Libraries of the House**

  It is for consideration whether documents the Cabinet Office places in the Library of either Houses of Parliament should be included in the publication scheme.

- **Decisions in relation to the Cabinet Office**

  Links to decisions of the Information Commissioner in relation to the FOIA and the Parliamentary Commissioner for Administration in relation to the Code of Practice should be sufficient where these decisions are published. Those that are not need to be considered for the publication scheme.

- **Speeches by Ministers and senior staff**

  Any keynote speeches (even where they are already made available through Press Offices) should be made available pro-actively.

- **Legislation and related information**

  The aim is to provide more detail about the legal framework within which a department operates. This includes giving a brief description of the relationship between the legislation and a department's structure and functions. The following may also be included:

  - a reference to the HMSO website where all newly enacted legislation can be viewed;

  - a link to the Parliamentary website for Bills and explanatory notes; details of the categories of notices submitted for publication in the London Gazette; and

  - details of Command Papers, White Papers and Green Papers for which the Cabinet Office has responsibility for publishing.

- **Procurement information**

    - procurement and supplier policies;

    - information on specific projects, including notification of bidding opportunities, decision criteria, contract performance standards;

    - results of performance reviews; and

    - a schedule with details of contracts awarded.

  The cost threshold at which the information should be provided is for a department to determine.

- **Information required to be published under other legislation**

  This includes, for example, information relating to the environment that would be available under Environmental Information Regulations such as estate management information and greening reports. and possibly sustainable development strategies.

- **Risk and impact assessments**

  It is likely that any Regulatory Impact Assessments will need to be made available.

- **Information disclosed under the Code of Practice**

  Where information is disclosed in response to a request made under the Code of Practice, and the information is of general interest, it needs to be decided whether to include a commitment in the publication scheme to make the information pro-actively available.

## EXEMPTIONS CONTAINED IN THE FOIA

**Absolute Exemptions**

- information supplied by, or relating to, bodies dealing with security matters (section 23 of the FOIA);
- information for which exemption is required for the purpose of avoiding an infringement of the privileges of either House of Parliament (section 34 of the FOIA);
- information, if disclosed, would constitute an actionable breach of confidence (section 41 of the FOIA); and
- information if its disclosure is prohibited by or under any enactment EU law or Court Order (section 44 of the FOIA).

**Exemptions that must be balanced against public interest**

- information for which exemption is required for the purpose of safeguarding national security (section 24 of the FOIA);
- information that was likely to prejudice the defence of the "British Islands or of any colony", or the capability, effectiveness or security of any relevant forces (section 26 of the FOIA);
- information that was likely to prejudice relations between the United Kingdom and any other State, international organisation or international court, or the promotion or protection of United Kingdom interests abroad (section 27 of the FOIA);
- information that was likely to prejudice relations between any administration in the United Kingdom and any other such administration (section 28 of the FOIA);
- information that was likely to prejudice the economic interests of the United Kingdom or any part of the United Kingdom (section 29 of the FOIA);
- information if it relates to:

  (a) the formulation or development of government policy;

  (b) Ministerial communications;

(c) the provision of advice by any of the Law Officers; or any request for the provision of such advice, or

(d) operation of any Ministerial private office (section 35 of the FOIA);

- information if, in the reasonable opinion of a Minister, its disclosure was likely to prejudice the maintenance of collective responsibility or the effective conduct of public affairs, or inhibit the free and frank exchange of views or provision of advice (section 36 of the FOIA);

- information if it relates to communications with Her Majesty, with other members of the Royal Family or with the Royal Household, or to the conferring by the Crown of any honour or dignity (section 37 of the FOIA); and

- information in respect of which a claim to legal professional privilege could be maintained (section 42 of the FOIA).

Under the FOIA once a decision as to government policy has been taken, any statistical information used to provide an informed background loses its "formulation of policy" and "Ministerial communications" exemption, although the "effective conduct of public affairs" exemption remains a possibility.

## POTENTIAL "ELEPHANT TRAPS"

- If the Cabinet Office does not get its publication scheme approved by the Information Commissioner within the timescale (ie by the end of September) the department will have breached the statutory requirements as set out in the FOIA. In this event the Information Commissioner may issue an Enforcement notice against the Cabinet Office. The Information Commissioner also intends to publish a list of approved, refused and revoked publication schemes.

- Areas of the department do not provide sufficient material for inclusion in the Cabinet Office publication scheme.

- The Cabinet Office publication scheme is criticised for being not as "open" as others and this being compared to commitments in the FOIA.

- The Cabinet Office publication scheme being more open than others and leading to adverse comments about the inconsistent approach by government to the FOIA.

- If an undertaking is given to publish certain material it cannot be easily rectified if we get it "wrong" or want to change our mind, ie a "class", in whole or in part, cannot be removed from a publication scheme without the approval of the Information Commissioner and this will not be easy to achieve.

- The possible publication of "reasons for decisions" made by the Cabinet Office could lead to additional scrutiny/requests for justification etc from those with a vested interest.

- Other departments might publish information that the Cabinet Office would not, eg under the FOIA the responsibility for disclosure rests with who "holds" the information rather than who "owns" the information.

- We are likely to come under pressure to supply "whole" documents and not individual fragments of information.

- Having to be prepared to live with any difficulties that might arise from the proper disclosure of information under the FOIA.

- Whatever we include (because of our high profile data – Cabinet and Prime Minister's records) will <u>not</u> satisfy our critics/customers.

THE NATIONAL ARCHIVES

| | |
|---|---|
| DEPARTMENT/SERIES ..... Prem 49<br>PIECE/ITEM ..... 2569<br>(one piece/item number) | Date and sign |
| Extract details: Letter & attachment dated 15/05/2002 | |
| CLOSED UNDER FOI EXEMPTION ..... | |
| RETAINED UNDER SECTION 3(4) OF THE PUBLIC RECORDS ACT 1958 | |
| TEMPORARILY RETAINED | AE 25/04/2024 |
| MISSING AT TRANSFER | |
| NUMBER NOT USED | |
| MISSING (TNA USE ONLY) | |
| DOCUMENT PUT IN PLACE (TNA USE ONLY) | |

## ***Instructions for completion of Dummy Card***

Use black or blue pen to complete form.

Use the card for one piece or for each extract removed from a different place within a piece.

Enter the department and series,
eg. HO 405, J 82.

Enter the piece and item references, .
eg. 28, 1079, 84/1, 107/3

Enter extract details if it is an extract rather than a whole piece.
This should be an indication of what the extract is,
eg. Folio 28, Indictment 840079, E107, Letter dated 22/11/1995.
Do not enter details of why the extract is sensitive.

If closed under the FOI Act, enter the FOI exemption numbers applying to the closure, eg. 27(1), 40(2).

Sign and date next to the reason why the record is not available to the public ie. Closed under FOI exemption; Retained under section 3(4) of the Public Records Act 1958; Temporarily retained; Missing at transfer
or Number not used.

file

LORD CHANCELLOR'S DEPARTMENT
SELBORNE HOUSE
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DX 117000
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The Rt Hon Lord Irvine of Lairg
Lord Chancellor
House of Lords
London SW1A 0PW

14 May 2002

CS
cc SV

Dear Lord Chancellor

**Data Protection Act 1998: Subordinate Legislation**

**This letter seeks the agreement of CRP (FOI) Committee to the making of an order under paragraph 10 of Schedule 3 to the Data Protection Act 1998 permitting the processing of sensitive personal data by MPs and other elected representatives without the need for them to seek the explicit consent of the individuals concerned. The order is subject to affirmative resolution. It would be desirable for Parliament to consider it before the summer recess. I should welcome responses by 31 May .**

Schedule 3 to the 1998 Act establishes a number of permissive conditions at least one of which must be met by those wishing to process sensitive personal data. Sensitive data include information about individuals' race, political opinions, religious beliefs, trade union membership, health, sexual life and involvement in criminal activity. Paragraph 10 of Schedule 3 allows additional conditions to be provided by subordinate legislation subject to affirmative resolution. An order under paragraph 10 (the Data Protection (Processing of Sensitive Personal Data) Order 2000) was made in February 2000 in preparation for the implementation of the 1998 Act.

When that order was made it was recognised that additional provision was likely to be needed in the light of experience with its operation. It is becoming clear that the creation of some additional conditions is likely to be necessary. We need to do further work on most of them, and I will write separately later seeking colleagues' agreement. But one is particularly pressing.

A number of MPs have expressed concern that the 1998 Act hampers them in carrying out their constituency business. The point was raised in an adjournment debate in October 2001 and Robin Cook has also received representations. The concern is that the consent of the individuals on whose behalf the MPs are acting is necessary before MPs may disclose personal data to other organisations in connection with their enquiries, and before those organisations may disclose personal data to MPs in return.

We have explored the point with the Information Commissioner. She has made clear that there is no problem with disclosing non-sensitive data.

She has said that she is prepared to take a robust line in promoting that view. However, she agrees that in the absence of any other relevant condition under Schedule 3 to the 1998 Act or the February 2000 Order, it will be necessary for the explicit consent of the individuals concerned to be obtained where MPs need to disclose sensitive data, or to have sensitive data disclosed to them. MPs argue that this requirement hampers them in carrying out their constituency work. They have given some powerful examples to illustrate the difficulties.

Robin Cook and I have discussed this issue. We agree that there is a real problem and that it is desirable to deal with it by making a Schedule 3 order creating additional conditions allowing MPs to disclose and receive sensitive data without the need for explicit consent. In making the order we will have to comply with the restrictions imposed by the 1995 EC Data Protection Directive. This requires any provision of this kind to be in the substantial public interest, and to provide suitable safeguards. I have no doubt that facilitating the efficient and effective conduct of MPs' business is in the substantial public interest. We will ensure that safeguards are provided in the order.

Robin and I also think that the scope of the order should not be limited to MPs. Similar problems are likely to be encountered by all elected representatives. Accordingly, I propose that the order should also apply to Members of the devolved administrations, to Members of the European Parliament and to elected representatives at all tiers of local government throughout the UK.

Given the strength of concern among MPs on this issue, Robin and I believe that it is desirable to have the new arrangements in force as soon as possible. Accordingly, I propose to bring forward the order in time for it to be approved by both Houses of Parliament before the summer recess.

There is a statutory duty to consult the Information Commissioner before the order is made. She has already indicated informally that she can accept an order in principle.

Since the order will have a negligible effect on business, charities and the voluntary sector, a Regulatory Impact Assessment is not necessary.

I am copying this letter to the Prime Minister, to the other Members of CRP (FOI) and to Sir Richard Wilson. I am writing separately to the devolved administrations.

yours ever

Michael Wills

**MICHAEL WILLS**

**DEPUTY PRIME MINISTER**

**OFFICE OF THE**
**DEPUTY PRIME MINISTER**
**Dover House**
**Whitehall**
**London**
**SW1A 2AU**

***Tel:*** **020 7276 0400**
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The Rt Hon Nick Raynsford MP
Minister for Local Government and the Regions
Department for Transport, Local Government and the Regions
Eland House
Bressenden Place
London
SW1E 5DU

CS
cc: DT
SR.

13 May 2002

Dear Nick,

**SALE OF ELECTORAL REGISTERS – THE ROBERTSON CASE**

In your letter to me of 20 March you sought policy agreement to an interim solution, in response to the judgement in the *Robertson* case, which would allow the continued sales to the financial services industry for the time being, pending a more fundamental review for the longer term. The court held that Mr Robertson was entitled to object to his name being included on the electoral registers sold to commercial concerns. You said that the government was already committed to publishing a paper setting out its intentions for the future arrangements for access to, and sale and supply of, electoral registers in the light of the *Robertson* judgement but that the difficulty and complexity of the issues raised had prevented you publishing it in January as you had intended.

Replies were received from Gordon Brown, Patricia Hewitt, Helen Liddell, Derry Irvine, Bob Ainsworth and Ruth Kelly. You replied to Ruth Kelly's letters of 26 March and 10 April, and to Derry's letter of 1 April.

I understand that in the light of this correspondence you do not intend to proceed with the proposed interim measure but that you will go on to publish the consultation paper on Monday 13 May in its original form, without provision for a review of the access rights of credit reference agencies.

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

Yours ever,

**JOHN PRESCOTT**

***Web site: www.cabinet-office.gov.uk***
***Email: john.prescott@cabinet-office.x.gsi.gov.uk***

INVESTOR IN PEOPLE

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**MICHAEL WILLS MP**
**Parliamentary Secretary**

The Rt. Hon. The Lord Chancellor
HL CP/05
House of Lords
London
SW1A OPW

9 May 2002

**FREEDOM OF INFORMATION ACT 2000: CENTRAL GOVERNMENT AND NON-DEPARTMENTAL PUBLIC BODY GUIDANCE ON PUBLICATION SCHEMES**

**I am writing to seek your agreement, and that of colleagues, to publish the attached guidance by means of an arranged Parliamentary Question in both Houses; I would welcome replies by 21 May.**

Many Departments felt that there should be guidance for Government Departments and Non Departmental Public Bodies as to the issues they should consider when deciding what information they will commit to make publicly available in their publication schemes under the Act. Given the different nature of the businesses of Departments and NDBPs it is not possible to have prescribed rules on what each one will include in the Publication Schemes.

The aim of the guidance is to achieve a common approach to the development of publication schemes, whilst allowing the maximum flexibility to each organisation to frame their schemes to meet their own circumstances.

The guidance has been discussed extensively within the cross Whitehall officials' groups – the Freedom of Information Practitioners' group and the Senior Group on Information Policy, and the latter group has recently endorsed the guidance. Relevant sections have been drafted in co-operation with the Treasury, the Office of Government Commerce and Her Majesty's Stationery Office.

Publication schemes have to be submitted to the Information Commissioner for approval no later than 30 September, so it is essential that we issue the guidance formally as soon as possible. I would therefore welcome any views by 21 May.

I am copying this letter and attachment to the Prime Minister, members of the CRP(FOI) and to Sir Richard Wilson.

**MICHAEL WILLS**

(H)

## Central Government and Non Departmental Public Body Guidance on Publication Schemes under the Freedom of Information Act 2000

The Freedom of Information Act 2000 requires all public authorities to make information available proactively by virtue of the Publication Scheme provisions set out in section 19 of the Act. Publication Schemes give details of the classes of information that an authority makes available proactively and how they are accessible. The plans indicate a commitment to publish proactively as much information as possible and will look at how best to transmit the information to those who need to know more.

### Introduction

2. This paper sets out Guidance for Government Departments and non Departmental Public Bodies (NDPBs) as to the issues that they should consider when deciding what information they will commit to make publicly available in their Publication Schemes. This is guidance not instructions; neither is it intended to be a model publication scheme. How the commitments in their Schemes are delivered is a matter for individual Departments and NDPBs. But where Departments or NDPBs depart from the guidance in this paper, they should know why they are doing so and be prepared to justify their approach if asked by the Information Commissioner or other interested parties. Executive agencies are not required to have their own publication schemes, but should be included within the scope of the scheme applied by their parent Department.

**THE LEGAL REQUIREMENT**

Section 19 of the Act places a duty on every public authority to:

a) adopt and maintain a scheme which relates to the publication of information by the authority and to have that scheme approved by the Commissioner
b) publish information in accordance with that scheme
c) review the scheme from time to time

Each authority's Publication Scheme must specify:

a) the classes of information which the public authority publishes or intends to publish
b) the manner in which information of each class is, or is intended to be, published
c) whether the material is, or is intended to be, available free of charge or on payment

In adopting or reviewing a Publication Scheme, the Act requires that a public authority should have regard to the public interest in:

a) allowing public access to information held by the authority, and
b) the publication of reasons for decisions made by the authority.

3 Given the different nature of the business of Departments and NDPBs it is impossible to have prescribed rules on what each one will include in the Publication Scheme. The aim of this guidance is to achieve as much common ground as possible.

4 All central Government Departments and those Non-Departmental Public Bodies covered by the Code of Practice on Access to Government Information, are required to have their Publication Scheme approved and in place by 30 November 2002. The Scheme will have to be submitted to the Information Commissioner for approval between 1 July and 30 September 2002.

**Content**

5 In deciding the content of their publication scheme, Departments and NDPBs should have regard to the public interest in the information that they hold. Some information held by an organisation will be of particular interest to the public and Departments and NDPBs should consider what information they hold that they could make available proactively to meet this demand. The information included in an organisation's Publication Scheme should focus on the key areas of accountability of the organisation.

6 Departments and NDPBs will also need to consider when the information included in their Publication Scheme will be made available. For example, facts and analysis of the facts relating to policy decisions will normally be made available when policies and decisions are announced. Papers relating to meetings may need to be made available a number of weeks or months before or after the event. Allowance should be made for the time taken to approve minutes or to obtain transcripts. Items will then be held in accordance with the Department's or NDPB's record disposal policy as normal in light of their business needs. The Scheme should specify the usual retention period for each class of information.

7 There are some kinds of information which all Departments and NDPBs should consider for inclusion within their Publication Schemes. These are detailed in paragraphs 7.1 to 7.12 below. The headings are not intended as specific 'classes of information' although Departments and NDPBs may chose to use them as such.

7.1 Guidance to Staff

It is expected that Publication Schemes will provide access to explanatory material on Departments' and NDPBs' dealings with the public and other organisations. This includes such rules, procedures, internal guidance to officials, and similar administrative manuals as will assist better understanding of the organisation's interaction in dealing with the public. It will also include internal guidance to officials on implementing/operating the Code of Practice on Access to Government Information (before 2005), the Freedom of

Information Act (after 2005), the Environmental Information Regulations and the Data Protection Act 1998.

7.2 Background to Policy

The Code of Practice on Access to Government information already commits Departments and NDPBs to publishing the facts and analysis of the facts which Government considers relevant and important in framing major policy proposals and decisions. This commitment should be carried forward to the Publication Scheme.

7.3 Management Information

7.3.1 The Code of Practice on Access to Government Information requires Departments and NDPBs to publish:

i) full information about how public services are run, how much they cost, who is in charge, and what complaints and redress procedures are available;
ii) full and, where possible, comparable information about what services are being provided , what targets are set, what standards of service are expected and the results achieved.

These commitments should be carried forward to the Publication Scheme.

7.3.2 In addition, Publication Scheme commitments are also likely to provide access to the following in relation to the role, function and management of the public authority:

(i) mission, objectives and functions of the authority;

(ii) organisation of the authority, including information about who is responsible for which function and how to contact him or her;

(iii) information about Board Meetings. This may include the agendas and minutes of the meetings and associated papers or summaries where appropriate;

(iv) targets, including those set for standards of service and financial performance, together with results achieved and comparative information

(v) sources of income, and how effectively money is raised and spent, for example, on different aspects of administration

7.3.3 The information described above often appears in Departmental reports, Management Statements, Financial Memoranda etc. Agency Framework Documents are also useful as they encapsulate the essential

management operating arrangements for each agency with regard to its organisation of a Department. For the purpose of this guidance it is the information itself and not the form that it is presented in that is important.

7.3.4 On (ii) above, Departments and NDPBs will want to consider the appropriate level of seniority of the staff about which this kind of information is to be published. It is important that the public can identify a person who can provide the information they require. How this is achieved may well vary between Departments and NDPBs and in some instances requests for information may be channelled through call centres.

7.3.5 Departments and NDPBs should also consider for which formal meetings it is appropriate to publish the agenda, papers and minutes or summaries of these documents. It is likely that Departments and NDPBs will want to specify what information will be made available proactively for which meetings, or type of meetings. Regular formal committees or advisory groups are more likely to be included in the Publication Scheme than ad-hoc or impromptu discussions.

## 7.4 Public Consultation

The Cabinet Office guidelines on consultation should be followed. Responses submitted **in confidence** should have that confidence respected if the information submitted is properly confidential. The number of confidential responses should be published.

## 7.5 Departmental Circulars

There are many different types of circular and they are used to communicate a variety of information. It is probable that some of these circulars will be relevant for inclusion on a publication scheme. Many Departments and NDPBs already have this sort of information on their websites and for some circulars it may be helpful to provide an index to improve accessibility. The scale of this task will therefore vary and Departments and NDPBs may find that some of this information will be subsumed within other commitments within their Scheme.

## 7.6 Information placed in the Libraries of the Houses of Parliament

Departments and NDPBs should consider whether documents placed in the library of either Houses of Parliament should be included within the Publication Scheme.

## 7.7 Decisions

7.7.1 Decisions of the Information Commissioner in relation to the Freedom of Information Act and Data Protection Act 1998, and the Parliamentary Ombudsman in relation to the Code of Practice on Access to Government

Information, relating to the organisation, are also items to which a Publication Scheme is likely to provide access. Some of these decisions are published by the Ombudsman and if so it may be appropriate simply to provide a link to that information. However, not all of the decisions are published and this information should be considered for inclusion. The public availability of details of departmental infractions under the Environmental Information Regulations should also be considered.

7.7.2 Decisions of other bodies relating to the Department should be accessible where appropriate.

7.7.3 Reasons should be published for decisions made by the Department where the decision affects a significant number of interested parties. An example is the Charity Commission, which is making more information available in relation to its decisions, particularly when there is considerable public interest. The decisions, and reasons, most likely to be appropriate to include in a publication scheme are those which affect a significant number of people. This may sometimes include a decision in relation to an individual, but which sets a precedent or has ramifications for the future handling of similar cases. Personal data relating to individuals should be handled in accordance with the Data Protection principles.

7.8 Speeches

Keynote speeches by Ministers and senior officials are likely to be made available proactively. In practice these are often already made available through a Department's Press Office.

7.9 Legislation and Related Information

7.9.1 It is helpful to the public to know more about the legal framework within which Departments and other public authorities operate. Collating a list in a single place and giving a brief description of the relationship between the legislation and the Department's structure and functions should be considered, as should providing details of legislation or Codes of Practice that give rights of access to information.

7.9.2 Her Majesty's Stationery Office in the Cabinet Office have responsibility for the publication of UK legislation including Acts of Parliament, Statutory Instruments(including those made by the National Assembly for Wales), Acts of the Northern Ireland Assembly, Statutory Rules of Northern Ireland, Church of England Measures and Explanatory Notes to Acts of Parliament and Explanatory Notes to Acts of the Northern Ireland Assembly. Details of these categories of publications will be featured on HMSO's Publication Scheme with details of where users can view or purchase the documents. It follows that there is no need for organisations to provide full details of legislation which they have policy responsibility for in their own Publication Schemes. They may, however, wish to feature a reference in their

Publication Scheme to the HMSO web site where all newly enacted legislation can be viewed. The address is www.legislation.hmso.gov.uk

7.9.3 Parliament is responsible for the publication of Bills before Parliament and Explanatory Notes to Bills. This material can be viewed on the Parliamentary web site. Again, there is no necessity for departments to feature details in their own publication schemes although they may wish to provide a link to the Parliamentary web site at www.parliament.uk

7.9.4 HMSO also arranges for the publication of the London, Edinburgh and Belfast Gazettes. Details of these will be featured on HMSO's publication scheme. Organisations should, however, refer in their Publication Schemes to the categories of individual notices which are submitted for publication in the Gazettes.

7.9.5 Departments should provide details of Command Papers, White Papers and Green Papers which they have responsibility for publishing. For reference, a list of all Command Papers is published on HMSO's web site.

7.9.6 Texts of international treaties, conventions and agreements should be accessible if not provided elsewhere. Departments may wish to provide cross-references to relevant documents of European Community legislation. It is suggested that details could be supplied of websites where the material can be viewed or from where the information can be obtained.

7.10 Procurement, grants, loans and guarantees

7.10.1 Departments and NDPBs are encouraged to be as open as possible when considering making available information in relation to procurement, grants, loans and guarantees.

7.10.2 In particular, the publication of procurement and supplier policies should be considered for publication as should the details of contracts awarded. Departments and NDPBs should also consider the provision of information on specific projects including notification of bidding opportunities, decision criteria, contract performance standards, results of regular performance reviews, and results achieved where appropriate. Good examples of the type of information that can be provided can be found on the websites of Southampton Council at www.southampton.gov.uk and the National Assembly for Wales at www.winningourbusiness.wales.gov.uk. The Office of Government Commerce can provide further advice about the provision of information on Government procurement.

7.10.3 Departments and NDPBs should consider including their policies on the awarding of grants, loans and the provision of guarantees in their publication scheme as well as background information on schemes administered by the organisation . Publishing an account of how grants have been dispensed under a particular scheme, including overall funds dispensed

and an assessment of the benefit of the scheme in terms of its objectives should be considered. The publication of details of guarantees such as the guarantee recipient, purpose and amount should be considered for inclusion in departmental publication schemes whilst respecting legitimate personal and commercial confidentiality

7.10.4 Information relating to the items above need not include all such information but could be covered in a generic fashion or include information on projects above a particular cost threshold as decided by the Department or NDPB.

7.10.5 The Lord Chancellor's 'Code of Practice on the Discharge of the Functions of Public Authorities under Part 1 of the Freedom of Information Act' requires that Departments and NDPBs ensure that they consider the implications for Freedom of Information before agreeing to confidentiality provisions in contracts and accepting information in confidence from a third party more generally. In particular, Departments and NDPBs should only accept information from third parties in confidence if it is necessary to obtain that information in connection with the exercise of any of their functions. They should not agree to hold information received from third parties "in confidence" which is not confidential in nature. Acceptance of any confidentiality provisions must be for good reasons and capable of being justified to the Information Commissioner.

7.11 Information required to be published under other legislation

This includes a wide range of information, some of which will be specific to individual organisations. In particular, information relating to the environment that would be accessible under the Environmental Information Regulations such as Estate Management information and Greening Government Reports as well as Environmental Impact Assessments and Departmental Sustainable Development Strategies should be made available where appropriate.

7.12 Research Reports; Risk & Impact Assessments etc

7.12.1 Appropriate guidance on the publication of scientific research from the Office of Science and Technology and on risk assessment should be followed when considering the content of a Publication Scheme. Regulatory Impact Assessments are also likely to be accessible.

7.13 Information disclosed under the Code of Practice on Access to Government Information

Where information is disclosed to an individual in response to a request under the Code of Practice or Access to Government Information, or, from 1 January 2005, in response to a request under the Act, Departments and NDPBs should consider whether the information disclosed is of general

interest and include released information in the Publication Scheme where appropriate.

**Presentation and Delivery**

8 Publication Schemes are intended to increase access to government information. Therefore the accessibility of the scheme and the information in it is very important. It is best practice to include:

8.2 Copyright

A general copyright statement should be included at the head of the Publication Scheme. Documents accessible under the scheme should feature an appropriate copyright notice whether published in print or on official websites in accordance with guidance issued by HMSO.

8.2 Formats

8.2.1 Details of the formats that the scheme itself and the information accessible under it are available in e.g. Braille, Welsh, other languages, electronic, paper etc should be given. The decision to publish information in alternative formats is a result of normal business deliberations and should be considered when a document is produced and is not a matter for a Publication Scheme.

8.2.2 The Scheme itself should be provided on paper and electronically. Consideration of other formats should be in line with the relevant accessibility criteria for publications including the organisation's Welsh Language Scheme.

8.2.3 Departments and NDPBs may not be able to rely wholly on the internet as a means of making information available proactively. There are many ways by which information can be made available proactively.

8.3 Access to the Information

8.3.1 Departments and NDPBs should make clear how information can be obtained by the public under the Scheme. They should publish a guide for users on **applying for information** and exercising associated rights under the Code of Practice on Access to Government Information (before 2005), under the Freedom of Information Act (after 2005), under the Data Protection Act 1998 and under the Environmental Information Regulations. **Links** to information that is part of the organisation's commitment to publish but is provided elsewhere should be provided, including an indication of any **on-line resources**, such as databases, which can be interrogated directly by requesters where this is reasonable and practicable to do so.

8.4 Relationship with Information Asset Register

8.4.1 The Information Asset Register (IAR) details Government information assets that can be reused under licence. The IAR is focuses primarily on unpublished data holdings and thus provides a guide to the unpublished information resources held by Departments. The IAR can help identify what information a Department holds, how useful that information is and how to access it. For further information about the Information Asset register and their links with publication schemes, see HMSO's Guidance note 18 which can be viewed on HMSO's website at www.hmso.gov.uk/guides.htm

8.4.2 The Department's Information Asset Register should be directly referred to in its Publication Scheme and should form an important part of their preparations for Freedom of Information. Each Department is responsible for creating its records within its own departmental asset register.

8.5 Archiving

Archiving of the Publication Scheme for records management purposes should be considered whenever the scheme is updated or otherwise amended. It is suggested that Departments and NDPBs should keep their initial scheme, and subsequent versions of the Scheme that contain significant changes.

8.6 UK Official Publications

Departments and NDPBs are reminded of their responsibilities for providing information relation to maintaining the complete bibliographic record of all United Kingdom Official Publications. For details please see HMSO's Guidance Note 17. This can be viewed on HMSO's website at www.hmso.gov.uk/guides.htm

8.7 Plain Language

Publication Schemes should be in plain language. The Cabinet Office Plain Language guide should be followed:
www.cabinet-office.gov.uk/servicefirst/2000/plainlanguage/guide.htm

**Public Interest and Consultation**

9 When having regard to the public interest in the information held by the organisation, it is best practice to consider all the different stakeholders who might be interested in the information and to consult with these groups where possible - this may have to be after the Publication Scheme is in place with initial assessment of the public interest based on information the organisation already holds e.g. Minister's Cases, website hits etc

10 Consultation can take a variety of forms. These include traditional written consultation, listening events, seminars with, and visits to, representative groups. Having an email address for comments or an online feedback form

can encourage user feedback. Internet discussions are also a valid way of consulting with your 'public' as is both quantitative and qualitative research including surveys and focus groups.

## Charging

11 A Publication Scheme must state whether documents in the Scheme will be available free of charge or for a charge.

### 11.1 Interpreting the law

11.1.1 The Environmental Information Regulations permit charges in respect of costs reasonably attributable to the supply of information, provided a schedule of the charges that may be levied is made available to all persons requesting environmental information. The EI Regulations apply to both published and unpublished information, including EI supplied under other enactments. (Treasury and DEFRA will let departments have further advice on charges for Environmental Information when the negotiations on the revised EI Regulations have reached a firmer point.) Some organisations may also have legislation on non-environmental matters under which they publish certain information.

11.1.2 The FOI Act does not require that a schedule of charges is included within the publication scheme, but only that the publication scheme specify whether the material is, or is intended to be, available free of charge or on payment. This is important as the Information Commissioner proposes to approve a publication scheme for three to five years. Organisations will therefore be seeking in their classes of information to anticipate the document types or subject areas which the department will be publishing during that period, but it is unlikely to be either practical nor possible to anticipate every future title or charge.

11.1.3 It is suggested that in their Publication Schemes, organisations should therefore set out their charging policy, but indicate that, where charges are made, the charge for each publication will be listed by the title of the publication on the up to date publications list. A link to the up to date list or a note of where it can be obtained is recommended. For information published under another enactment, this may in some cases take the form of a link to the relevant Fees Order.

11.1.4 For the purposes of defining the potential coverage of a publication scheme, we must have regard to both section 19 and section 21 of the FOI Act. The latter indicates that where information is available from the public authority on request, it can be regarded as reasonably accessible to the applicant where it is made available in accordance with the authority's publication scheme, and any payment required is specified in, or determined in accordance with, the scheme.

11.2 Definition of charging

11.2.1 For the purposes of charges, HM Treasury is assuming that a publication is material which:

- has appeared on a public website; or
- has been advertised on a public website, or in a commercial publisher's list, as available, and which is already held by, or immediately available in store to, the Department's Public Enquiry Unit in its final format for supply to the public, or similarly by the Department's commercial publisher; or
- is available from book shops, public libraries, etc supplied by the department or the commercial publisher.

Information which is held by an organisation, but which it has not been intended to publish, and has to be extracted specifically for the requestor, is not covered by a publication scheme.

11.3. Form of words for use in Publication Schemes

11.3.1 A possible approach is to describe some broad pricing categories which could be applied either to an organisation's publication scheme as a whole or to individual classes. A single pricing category may apply to a particular class, but two or more pricing categories to other classes.

11.3.2 Annex A contains a suggested form of words which assumes that any payment can be requested in advance before a publication is supplied, but this is not yet certain for information supplied under the revised EI Regulations. Square brackets indicate where Departments or NDPBs are most likely to need to adapt the wording to their own circumstances.

## Review

12. The Information Commissioner has said in her Publication Scheme Guidancethat she will want to review Publication Schemes every three years althoughthis might be extended slightly for the very first approvals (Central and LocalGovernment) but in any event that period will not exceed five years. The Information Commissioner will require notification of any additions to a Scheme during that period and will require Departments and NDPBs to seek approval of the removal of any commitment made in the publication scheme over the same period.

## Conclusion

13. When developing their Publication Scheme, Departments and NDPBs should keep in mind that publication schemes are intended as a tool for

openness, to increase transparency and accountability and improve decision-making. All schemes should have the public interest as their driver and should help to promote trust between the Government and the electorate. In developing its Publication Scheme, Departments are encourage to look at the experience of their counterparts in other countries with Freedom of Information legislation and keep in mind that other openness regimes frequently over-estimated perceived risks associated with openness.

Version 8
May 2002

**ANNEX A**

## Suggested Form of Words for Charging on Publication Schemes

"Is information free of charge or on payment?

We indicate [for each class of information] in our Publication Scheme which of the following categories could apply to information you intend to use for your private research/study:

a) free of charge on website (ie there is no charge by us, although the user would of course have to meet any charges by their Internet service provider, personal printing costs, etc). For those without Internet access, a single print-out as on the website would be available by post from [....] [or by personal application at ...]. However, requests for multiple print-outs, or for archived copies of documents which are no longer available on the web, may attract a charge for the cost of retrieval, photocopy, postage, etc. We would let you know this at the time of your request [the charge would be payable in advance];

b) free of charge leaflets or booklets on, eg services we offer to the public. List available from [.....], material itself from [.....]

c) free of charge to view at [local office or wherever but charge for [certified] photocopy [a schedule of charges for [....] is available from [....] [For other items, we would let you know the relevant charge at the time of your request [the charge would be payable in advance];

d) information available via a website, but a charge would have to be paid before the main part of the information could be accessed. [This is the exception.] This may arise, eg where the website is used to deliver a value-added customised service, particularly where the basic data is also available to private sector users who may provide their own value-added service. Where this applies, the reason for the charge and the level of charges would be advertised [where?].

(Note: some "information" accessible on our website is not published for the information of the general public, but is part of our electronic delivery of services, for example where applications for licences can be made on-line or where tax returns can be filed on-line. In that case, access to records bearing details about a named individual or company is limited to the individual or company concerned and other authorised persons. We explain the conditions applying on our website so that you can read them before you begin to use the relevant on-line service.)

e) "glossy" or other bound paper copies, or in some cases a CD Rom, video or other mediums, are for charge as in our publication lists available at [....] [or those of our publisher available at [.....].

If you want to re-use or reproduce our publications, eg commercially or for circulation for education, etc, purposes, you will in most cases need to apply for a copyright licence for this. This [Department] [is a Crown body and our information is subject to Crown copyright administered by Her Majesty's Stationery Office]. For HMSO Guidance Notes on a range of copyright issues, see the HMSO website http://www.hmso.gov.uk/guides.htm or write to [....].

[We own the copyright in our information. Our charging policy for re-use and reproduction is [....] [Note: this applies only to NDPBs which are non-Crown and other non-Crown public sector bodies.]

More details of the Government's policy on where charges are made and on determining the level of charges is available in "Charges for Information: When and How - Guidance for Government Departments and other Crown Bodies at http://www.hm-treasury.gov.uk/about/open_government/opengov_charging.cfm

cc JN
JCS
AMc

Treasury Chambers, Parliament Street, London, SW1P 3AG
020-7270 5000

2 May 2002

**Rt Hon Stephen Byers MP**
**Secretary of State for Transport, Local Government and the Region**
**Department for Transport, Local Government and the Regions**
**Eland House**
**Bressenden Place**
**LONDON**
**SW1E 5DU**

Dear Stephen

**Access to the Electoral Roll**

You will have seen the correspondence between Ruth Kelly and Nick Raynsford through DA committee on the issue of whether banks and other institutions should be permitted to access electoral roll data for specified purposes, including money laundering prevention and credit checking.

The debate has focussed on how to announce continued access to electoral roll data for credit reference agencies for credit checking purposes. Nick believes that because of concerns about the possibility of a successful ECHR challenge, we should change our previously agreed policy and announce that credit reference agencies will be able to purchase the full electoral register on an interim basis pending a fundamental review. Both Ruth and I believe that we should maintain our original policy and announce

firmly credit reference agencies will continue to be able to purchase the register, and not have a review.

I consider access to the electoral register for credit checking purposes to be crucial for achieving our objectives to reduce financial exclusion. Denying access to the electoral register for credit checking purposes will lead to increased costs across the industry as a whole:

- Without the electoral roll, impersonation frauds will be harder to detect
- Rebuilding databases to exclude electoral roll information will cost tens of millions of pounds
- Stability of address has historically been judged a useful indicator of credit worthiness – without it, worse credit decisions are likely, with consequent increases in the cost of credit.

This extra cost will most likely feed through to consumers, increasing the cost of credit for everyone, and making it less affordable and harder to obtain for the poorest. The risk that they will end up having to borrow from loan sharks will be increased.

The weight of the argument from counsel, and from Lord Irvine's letter to Nick of 30th April, is that the public policy benefits are such that they justify providing access to electoral roll data for credit checking, and that such access would be more likely than not to withstand a challenge under the ECHR. Lord Irvine's letter also draws parallels to handling the Government response to the Data Protection Act in 1998, where he advised the Prime Minister that 'Where we have a sustainable, arguable case [for our interpretation of the law] which has a reasonable chance of success, my advice is that we should not be rushing to anticipate the judgement of...the courts'.

This is a policy to which I place the utmost importance, and therefore suggest that we announce firmly that credit reference agencies will continue to be able to purchase the register, and not have a review.

I am copying this letter to the Prime Minister, to Sir Richard Wilson, to Nick Raynsford and to DA colleagues.

Yours sincerely

**GORDON BROWN**

File

**RT HON ROBIN COOK MP**
LEADER OF THE HOUSE OF COMMONS
2 CARLTON GARDENS
LONDON SWIY 5AA
TEL: 020 7210 1025

Our Reference: 0012851

- 2 MAY 2002

Dear John,

**DEPARTMENTAL RESOURCE ACCOUNTS: DISCLOSURE OF PENSION INFORMATION AND TAXABLE VALUES OF BENEFITS IN KIND**

Thank you for copying to me your letter of 22 April to Gordon. I can confirm that both Stephen Twigg and I are content with what you propose.

I am copying this letter to the Prime Minister, Stephen Twigg and to Sir Richard Wilson.

Yours sincerely,

**ROBIN COOK**

The Rt Hon John Prescott MP
Deputy Prime Minister

0171 238 0665

From the Secretary of State
for Work and Pensions

DWP Department for Work and Pensions

Richmond House
Room 205
79 Whitehall
London
SW1A 2NS

Telephone
020 7238 0800

Facsimile
020 7238 0661

Email
ministers@dwp.gsi.gov.uk
www.dwp.gov.uk

P
JSH
cc JP
MA
SV

**RESTRICTED - POLICY**

Rt Hon John Prescott MP
Deputy Prime Minister
Dover House
Whitehall
London
SW1A 2AU

1 May 2002

Dear John

**DEPARTMENTAL RESOURCE ACCOUNTS: DISCLOSURE OF PENSION INFORMATION AND TAXABLE VALUES OF BENEFITS IN KIND**

1. Thank you for sending me a copy of your letter to Gordon Brown of 22 April. I am happy with what you propose. I have two comments.

(a) First, I think it may be helpful is there is central guidance issued about how these matters are to be presented in departmental reports. It should be as simple as possible. This will help to ensure consistency across the Government and minimise the potential for highlighting differences.

(b) Second, we might look again at the wording around the declaration which currently reads "The following facts were established for the purposes of providing for Greenbury disclosure through Department Z's resource account". Clearly

**RESTRICTED - POLICY**

accountants have their own way of expressing matters ! But we might find a formulation which looks less grudging given we are willingly disclosing this information.'

2. I am copying this letter to the Prime Minister, Cabinet Colleagues and Sir Richard Wilson.

**ALISTAIR DARLING**

20/6
1530

Access Rights

pls check Tessa + see who they are proposing to have No 10 meeting.

Present ud Lord L

Cc Me, Nick Matthews, Scott J/Scott S and possibly Tdr or Phil M.

Thanks.

Clare.

HO2002/576

**ANGUS DALRYMPLE-SMITH**

**FROM: TESSA STIRLING**
**TEL: 217 6050**
**DATE: 30 APRIL 2002**

**c Clare Sumner** ✓ cc: sy/ [illegible]
**Paul Candler**
**Julie Eason**
**Helen Ghosh**
**Peter Wardle**
**Carol Tullo**

**FREEDOM OF INFORMATION ACT 2000 - CABINET OFFICE AND RELATED PUBLICATION SCHEMES**

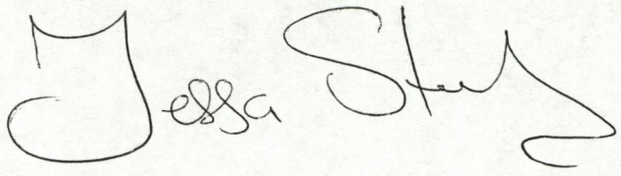
Your minute of 11 April 2002 gives a summary of the meeting Chris Leslie had with Historical and Records Division (HRD) on 11 April 2002 and the various actions placed on HRD, the first being a timetable.

2. Attached is a copy of a paper "Cabinet Office and Related Publication Schemes" that has been prepared for use within the Cabinet Office. Pages 3-6 give the current version of proposed timetable for the period April-November 2002. It will be seen that the timetable is aimed at submitting draft Cabinet Office and related publication schemes to the Office of the Information Commissioner during August for approval, ie well within the 30 September 2002 deadline. All the actions in the timetable listed for April have been completed.

3. There are two particular actions from the May and June elements of the timetable that I would draw to your attention. The first is on page 4 where there is an action, as recorded in your minute, to put a submission to Chris Leslie on the kind of material to be included in the Cabinet Office publication scheme and also individual presentations to Cabinet Office Ministers on the effects of the scheme. The second is on page 5 where there is an action relating to the presentation themselves. The intention is that the presentations should take place after discussion at Heads of Management Unit level in case this resulted in something additional being identified that needed to be covered in the presentations.

4. The Lord Chancellor's Department (LCD) chair the Senior Group of officials on Freedom of Information and Data Protection and, in their role as lead department, are monitoring departmental progress on the introduction of publication schemes. A copy of the paper, less attachment C, has been passed to the LCD as a means of showing the Cabinet Office position on preparing publication schemes.

5. If anything further is required at this stage please let me know.



**TESSA STIRLING**

02072192220

FROM THE RIGHT HONOURABLE THE LORD IRVINE OF LAIRG

hle

HOUSE OF LORDS,
LONDON SW1A 0PW

30 April, 2002

The Rt Hon Nick Raynsford MP
Minister for Local Government
and the Regions
Department for Transport
Local Government and the Regions
Eland House
Bressenden Place
London SW1E 5DW

AGM.
cc CS
JR
OM
MC
NA

Dear Nick,

**SALE OF ELECTORAL REGISTERS: THE ROBERTSON CASE**

Thank you for your letter of 17 April in which you deal with my concern about marked registers.

I accept that you cannot achieve our mutual aim of introducing restrictions on access to both the unmarked and marked registers by regulations and that it will be necessary for the procedures for marked registers to be established by conditions agreed by the Clerk to the Crown and the Treasury. I am advised that the required changes cannot be secured by conditions alone, and that it will also be necessary to amend the Representation of the People Act 1983. In your letter you do not mention the need for fresh primary legislation, and I should welcome confirmation of your view. If an amendment to the 1983 Act is needed, this will now of course be a matter for DTLR to take forward. It will be important to ensure that this work goes ahead on the same time-table as that on the unmarked registers.

It was understood from contact between our respective officials that the issue of access to the marked registers would be covered in your forthcoming policy paper. I should be grateful if you could confirm that this is still the intention.

On a separate matter, I have read your exchange of correspondence with Ruth Kelly about the way forward. Because of concerns about the possibility of a successful ECHR challenge, you believe that we should change our previously agreed policy and announce that credit reference agencies will be able to purchase the full electoral register on an interim basis pending a fundamental review of the wider issues. Ruth believes that we should maintain our original policy and announce firmly that credit reference agencies will continue to be able to purchase the register, and not have a review.

02072192220

The question for us is, whether the importance we attach to the policy we wish to maintain (as against an alternative policy which we think much more likely to be legally compliant) is such as to justify the risk of losing in the Court. The issues here are not too dissimilar from those which we had to consider in deciding how the Government should respond to the Data Protection Act 1998. On that occasion, in minuting the Prime Minister I advocated taking a robust approach. I said:

> "We must recognise that there will be difficult cases as people test [the Law]... We must be especially wary of Departments believing, on the advice of Counsel or otherwise, that they must [apply the Law] cautiously to be certain of avoiding legal challenges. In many cases it will be more sensible to wait until challenges are brought before ... the courts. Where we have a sustainable, arguable case [for our interpretation of the Law] which has a reasonable chance of success, my advice is that we should not be rushing to anticipate the judgement of ... the courts, but should follow a policy of "wait and see". It is Ministers, not lawyers, who must decide whether it is worth running the risk of litigation when practice or procedure is under challenge. We should be ready to defend ourselves ... in the courts, where we have sound reasons for seeking to uphold our interpretation of [the Law]."

There is, certainly, a balance to be struck between achieving a policy that we believe to be correct, and the risk of that policy being successfully challenged in the Courts. Where that balance lies in this case is not for me to say. However, I would encourage you not to be too risk averse. There is a danger that, by relying too heavily on necessarily imprecise assessments of the outcome of legal challenge, we give too little weight to the importance of achieving our desired policy.

I am copying this letter to the Prime Minister, to Sir Richard Wilson and to DA colleagues.

Yours ever,

Derry

file

Top: PD(ME)
" PD(NA)
PD(CS)

FROM THE RT HON NICK RAYNSFORD MP
MINISTER FOR LOCAL GOVERNMENT AND THE REGIONS

DTLR
TRANSPORT
LOCAL GOVERNMENT
REGIONS

Department for Transport,
Local Government and the Regions

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Web Site: www.dtlr.gov.uk

Our Ref: R/009648/02

17 APR 2002

The Rt Hon The Lord Irvine of Lairg
Lord Chancellor
House of Lords
LONDON
SW1A 0PW

Dear Jerry

Thank you for your reply of 1 April to my letter of 20 March. I will of course let you know when the draft regulations are published.

You mention the situation as regards the marked registers received by the Clerk of the Crown. Whatever the extent finally agreed for commercial access to the full electoral registers, it would clearly be preferable for the same restrictions to be placed on access to the marked registers. I cannot however achieve this under the regulation-making powers of the Representation of the People Acts. Sale of the marked registers comes within paragraph 57(3) of the Parliamentary Elections Rules (Schedule 1 to the Representation of the People Act 1983) and is subject to conditions agreed by the Clerk of the Crown and the Treasury.

I suggest therefore that once the new Regulations have been approved by Parliament, officials agree with the Treasury similar procedures which will apply to the sale of the marked registers.

Yours ever

Nick

NICK RAYNSFORD

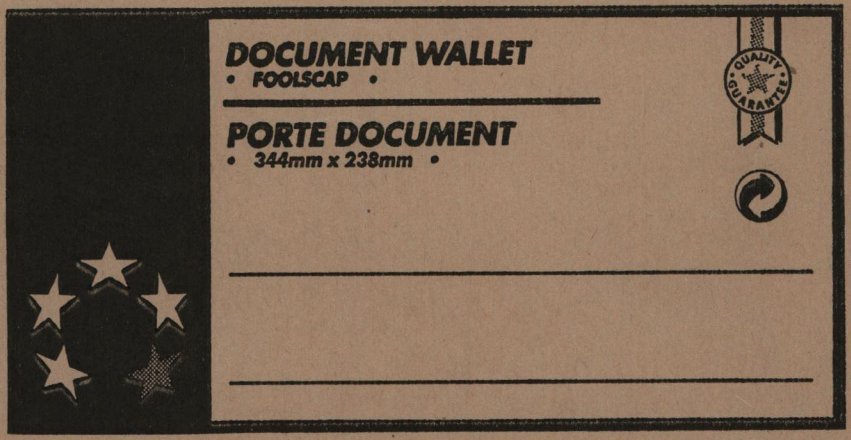
I am copying this letter to the Prime Minister, members of DA committee and Sir Richard Wilson.

INVESTOR IN PEOPLE

SHP 18/4/02

Freedom & Information Pt 3

Annex (1) CO + No 10 Records - 72
(Annex A.1 - E Letter 12/7)



THE NATIONAL ARCHIVES

| | |
|---|---|
| DEPARTMENT/SERIES FCO 49<br>PIECE/ITEM 2569<br>(one piece/item number) | Date and sign |
| Extract details:<br>Letter dated 12 July 2002 and annexes | |
| CLOSED UNDER FOI EXEMPTION ..... | |
| RETAINED UNDER SECTION 3(4)<br>OF THE PUBLIC RECORDS ACT 1958 | AC 25/04/24 |
| TEMPORARILY RETAINED | |
| MISSING AT TRANSFER | |
| NUMBER NOT USED | |
| MISSING (TNA USE ONLY) | |
| DOCUMENT PUT IN PLACE (TNA USE ONLY) | |

## ***Instructions for completion of Dummy Card***

Use black or blue pen to complete form.

Use the card for one piece or for each extract removed from a different place within a piece.

Enter the department and series,
eg. HO 405, J 82.

Enter the piece and item references, .
eg. 28, 1079, 84/1, 107/3

Enter extract details if it is an extract rather than a whole piece.
This should be an indication of what the extract is,
eg. Folio 28, Indictment 840079, E107, Letter dated 22/11/1995.
Do not enter details of why the extract is sensitive.

If closed under the FOI Act, enter the FOI exemption numbers applying to the closure, eg. 27(1), 40(2).

Sign and date next to the reason why the record is not available to the public ie. Closed under FOI exemption; Retained under section 3(4) of the Public Records Act 1958; Temporarily retained; Missing at transfer
or Number not used.

No 10 : FOI Publication Scheme Discussion

Cabinet Office and Related Publication Schemes

niceday by Guilbert

# CABINET OFFICE AND RELATED PUBLICATION SCHEMES

# CABINET OFICE AND RELATED PUBLICATION SCHEMES

## Background

The Freedom of Information Act 2000 (FOIA) received Royal Assent on 30 November 2000 and must be fully implemented by 30 November 2005. The Lord Chancellor announced in the House of Lords on 13 November 2001 that the FOIA would be implemented in stages, and implemented in full by January 2005. In practice this means implementation of the FOIA through the rolling out of publication schemes by type of public authority, starting with central government in November 2002, and the bringing into force of the individual right of access provisions in January 2005.

2. The Cabinet Office, like all other departments, is required to adopt and maintain a publication scheme for the proactive release of information. A publication scheme, which has to be submitted to the Information Commissioner for approval by 30 September 2002, commits a department to publish information in accordance with the scheme. Each scheme must specify:

- the classes of information which the department publishes or intends to publish;
- the manner in which information of each class is, or will be published; and
- whether the information is intended to be available free of charge.

3. In adopting a scheme, due regard has to be given to the public interest in allowing access to the information being held and in the publication of the reasons for decisions made by a department. How departments choose to define their "classes" is a matter for individual departments.

4. Every public authority is under a duty to publish its publication scheme as it sees fit. As a minimum it is proposed to publish the Cabinet Office publication schemes on the departmental internet website.

## Scope

5. The Cabinet Office publication scheme is to include all constituent parts of the department, including the Government Offices for the Regions, and the Government Car and Despatch Agency and the Central Office of Information (COI). PMO

6. The one executive and ten administrative Non-Departmental Public Bodies (NDPBs) sponsored by the Cabinet Office, and the one administrative NDPB sponsored by COI, will each require their own publication scheme (see 'A'). There is an apparent anomaly in relation to two of the NDPBs, the Security Vetting Appeals Panel and the Security Commission, on which legal advice has been sought. The Panel and Commission are exempt bodies under the FOIA but not the Code of Practice on Access to Government Information. Until the FOIA comes fully into force bodies that are subject to the Code of Practice are required to have a publication scheme.

7. Responsibility for the 21 administrative NDPBs that are sponsored by the Duchy of Lancaster Office is being confirmed. In the past the Duchy of Lancaster has dealt direct with the department that has the policy lead for the FOIA.

8. The position of the Intelligence and Security Committee (ISC) also needs to be clarified as the Clerk to the ISC has indicated that the ISC, which is not exempt from the FOIA, should be excluded from the provisions of the FOIA. This is a further issue on which legal advice has been sought.

**Content**

9. There are certain kinds of information that all departmental and NDPB should consider for inclusion within their publication schemes. These are set out in guidance that has been prepared by the Lord Chancellor's Department (LCD). The kinds of information that should be considered for a publication scheme are shown at 'B'.

**Pilot publication schemes**

10. There are five departments and organisations participating in the pilot publication schemes under the FOIA, ie Ministry of Defence (MOD); Department for International Development; Health and Safety Executive; Medicines Control Agency; and Public Record Office. A copy of the MOD pilot publication scheme is at 'C'.

**Information Asset Register (IAR)**

11. The 1999 White Paper on the Future Management of Crown Copyright announced the creation of the IAR, on which HMSO are in the lead, that is intended to concentrate on sources of unpublished information that could be made available on request. Each IAR record describes the individual asset, what it comprises and from where copies can be obtained. Users undertake a search across all departmental IARs from a central website known as *inforoute*. The Cabinet Office IAR currently has 70 entries.

12. The IAR and a publication scheme should be complementary. Publication schemes are aimed at reducing the number of individual requests for information by proactively publishing information that is likely to be requested. Highlighting the IAR and *inforoute* in a publication scheme will be enable users to take their enquiry beyond information that is published and also identify the department that holds the information they are seeking. This should eliminate the need for users to trawl to a number of departments and reduce the burden on departmental staff.

**Training**

13. Training is seen as playing an important role in making the FOIA a success and developing a culture of greater openness. The initial aim was to run short, no more that ½ day, "awareness/familiarisation" training seminars for Cabinet Office staff, ie around 5,000 staff. This would cover the preparation and maintenance of the Cabinet Office publication scheme and the IAR. The Civil Service College (CSC) has been approached over the possibility of providing training, but their doing so will depend on funds being available from the Corporate Services Group's programme funding. To minimise the cost "training" would be targeted to differing levels for senior and junior staff.

**Timetable**

14. The proposed timetable for the key steps are as follows:

**April 2002**

- preliminary discussion with the CSC on the provision of training (3 April);
- seminar for Government Offices for the Regions (9 April);
- seek confirmation from the Office of the Information Commissioner that the Security Vetting Appeals Panel, the Security Commission do not require publication schemes until February 2004 (26 April);
- seek advice from the Treasury Solicitor's Department on the position of the ISC (26 April);
- meeting with COI (29 April);
- confirm the position of the 21 NDPBs sponsored by the Duchy of Lancaster's Office (30 April);
- meeting with GCDA (30 April);
- submit proposed timetable to LCD and Parliamentary Secretary, Cabinet Office (30 April);

**May 2002**

- meeting with the Prime Minister's Office;
- seminar for representatives of the NDPBs sponsored by the Cabinet Office and COI;

- determine, in consultation with Communication Group (CG), the method(s) and format for publishing the publication schemes and information covered by the schemes, including any changes to the Cabinet Office internet website (Background material of publication schemes has been passed to CG and an initial discussion has already taken place of the implications for the Cabinet Office website.);

- discussion with CG on what use, if any, can be made of the Cabinet Office Research and Briefing system to identify material for the inclusion in the Cabinet Office and related publication schemes;

- determine, in consultation with CG, the method of "publishing the facts and analysis of the facts which the government considers relevant and important in framing major policy proposals and decisions", eg include the relevant in any press notice that might be issued when a policy or decision is announced;

- determine, in consultation with Finance and Planing Division (FPD), whether there is a need for a charging regime and if so what that regime should be;

- liaise with HMSO on (i) the position of the Queen's Printer and the Government Printer, including whether a separate publication scheme is required and (ii) implications for the Cabinet Office IAR;

- draw up a communications plan and options for a training programme, including dedicated training for "key player" groups, eg Private Offices, Press Offices and Heads of Management Units (HMUs);

- submission to the Parliamentary Secretary, Cabinet Office on the kind of material to be included in the Cabinet Office publication scheme and individual presentations to Cabinet Office Ministers on the effects of the scheme (15 May);

- "brainstorm" with Deputy Directors, on a group or individual basis as appropriate, about what their areas can contribute to the Cabinet Office publication scheme, starting with those areas likely to have most to contribute, and in what timescale;

- pursue with representatives of NDPBs sponsored by the Cabinet Office and COI, on a group basis, the possibility of adopting up a standard publication scheme for all 12 NDPBs;

**June 2002**

- discussion with HMUs at one of the weekly meetings;

- paper to the Cabinet Office Management Board (COMB), including options for a training programme and seeking agreement for COMB agendas, papers and minutes to feature in the Cabinet Office publication scheme (The COMB Secretary has already indicated that this should not be a problem.);

- continue to "brainstorm" with Deputy Directors, on a group or individual basis as appropriate, about what their areas can contribute to the Cabinet Office publication scheme and in what timescale;

- discussion and "brainstorm" with GCDA Chief Executive and Directors about what the GCDA can contribute to the Cabinet Office publication scheme and in what timescale;

- individual presentations to all Cabinet Office Ministers (The Parliamentary Secretary, Cabinet Office attended a ministerial seminar on 13 March and had an oral briefing on 11 April, and the Deputy Prime Minister received written briefing on 22 March.);

- discussion with FPD Web Master;

- implement communications plan;

- start any training programme agreed by COMB;

**July 2002**

- review and checkpoint;

- continue to "brainstorm" with Deputy Directors, on a group or individual basis as appropriate, about what their areas can contribute to the Cabinet Office publication scheme and in what timescale;

- continue any training programme agreed by COMB;

- implement any outstanding elements of the communications plan;

**August 2002**

- submit draft Cabinet Office and related publication schemes to the OIC for approval;

- continue any training programme agreed to COMB;

**September 2002**

- finalise the arrangements, including languages etc, for publishing the Cabinet Office and related publication scheme and the method(s) of making available the information covered by the scheme;

**October 2002**

- review and checkpoint;

- add any extras to the Cabinet Office publication scheme (Items can be added without the approval of the OIC but not deleted.);

**November 2002**

- publish the Cabinet Office and related publication schemes in accordance with the agreed arrangements;

- prepare to publish material in line with the publication schemes with effect from 30 November; and

- set up review and monitoring process.

# CABINET OFFICE PUBLIC BODIES

| Body | Type | Multiple Body | Appointments at 1.3.01 | | Members | Sponsor | Appointing Minister |
|---|---|---|---|---|---|---|---|
| | | | Chair | Deputy | | | |
| Advisory Committee on Advertising | ANDPB | NO | 1M | - | 6M, 4F | COI | Parliamentary Secretary, Cabinet Office |
| Advisory Committee on Business Appointments | ANDPB | NO | 1M | 1M | 5M, 1F | CO | Prime Minister |
| Advisory Committees on Justices of the Peace in Lancashire, Greater Manchester and Merseyside | ANDPB | 21 | 16M, 5F | - | 96M, 77F | CO | Chancellor of the Duchy of Lancaster |
| Better Regulation Taskforce | ANDPB | NO | 1M | 1F | 9M, 7F | CO | Minister for the Cabinet Office |
| Civil Service Appeal Board | ANDPB | NO | 1M | 2M | 15M, 5F | CO | Parliamentary Secretary, Cabinet Office |
| Committee on Standards in Public Life | ANDPB | NO | 1M | - | 4M, 5F | CO | Prime Minister |
| Equal Opportunities Commission | ENDPB | NO | 1F | 1F | 4M, 9F | CO | Minister for Women |
| Honours Scrutiny Committee | ANDPB | NO | - | - | 2M, 1F | | Prime Minister |
| House of Lords Appointments Commission | ANDPB | NO | 1M | - | 2M, 4F | CO | Prime Minister (appoints the Chair and 3 members.) The three main political parties each appoint a member. |
| Security Commission | ANDPB | NO | 1F | 1M | 4M | CO | Prime Minister |
| Security Vetting Appeals Board | ANDPB | NO | 1F | 1M | 4M | CO | Prime Minister |
| Senior Salaries Review Body | ANDPB | NO | 1M | - | 7M, 3F | CO | Prime Minister |
| Women's National Commission | ANDPB | NO | 1F | - | 15F | CO | Minister for Women |

## CONTENT OF A PUBLICATION SCHEME

The kinds of information publication schemes are likely to provide are:

- **Guidance to staff**

  It is expected that publication schemes will provide access to explanatory material on departments' and Non-Departmental Public Bodies' (NDPBs') dealings with the public and other organisations. This includes such rules, procedures, internal guidance to officials, and similar administrative manuals as will assist better understanding of the organisation's interaction in dealing with the public. It will also include internal guidance to officials on implementing/operating the Code of Practice on Access to Government Information (before 2005), the Freedom of Information Act (after 2005) and the Environmental Information Regulations.

- **Background to policy**

  The Code of Practice on Access to Government Information already commits departments and NDPBs to publishing the facts and analysis of the facts which government considers relevant and important in framing major policy proposals and decisions. This commitment should be carried forward to a publication scheme.

- **Management information**

  The Code of Practice on Access to Government Information already requires departments to publish full information about how public services are run, how much they cost, who is in charge and what complaints and redress procedures are available; and full and, where possible, comparable information about what services are being provided, what targets are set, what standards of service are expected and the results achieved. These commitments should be carried forward as a publication scheme.

  In addition to the above commitments are also to provide access to the following in relation to the role, function and management of a department:

  - mission, objectives and functions;
  - organisation, including information about who is responsible for which function and how to contact him or her;
  - information about Management Board meetings, including agendas and minutes of meetings and, ideally, associated papers or summaries where appropriate;

- targets, including those set for standards of service and financial performance, together with results achieved and comparable information; and
- sources of income, and how effectively money is raised and spent, for example, on different aspects of administration.

This information often appears in departmental reports, management statements, financial memoranda etc. For the purposes of the FOIA it is the information and not the form it is presented in that is important. Agency Framework Documents are also seen as useful as they encapsulate the essential management operating arrangements of an agency.

Departments and NDPBs are also asked to consider for which formal meetings it would be appropriate to publish the agenda, papers and minutes or summaries of these documents. It is likely that departments and NDPBs would want to specify what information will be made proactively available for which meetings types of meetings. Regular formal committees or advisory groups are more likely to be included in a publication scheme than ad-hoc or impromptu discussions. The Cabinet Office, in line with exemption 2 of the Code of Practice on Access to Government Information and section 35 of the FOIA, would not expect any department to disclose information relating to the proceedings of Cabinet or any of its Committees.

- **Public consultation**

Public consultation documents and the summary of responses to them should be made accessible through publication schemes. Decisions in the light consultation, a summary of the views expressed and reasons for rejecting options not adopted should also be included.

- **Departmental circulars**

There are numerous types of circular that are used to communicate a variety of information to staff. It is probable that some of these circulars will be relevant to a publication scheme. The scale of the task will vary from department to department as some of the information may be subsumed within the publication scheme commitments covering specific areas of departmental activity.

- **Information placed in the Libraries of the House**

Departments and NDPBs need to consider whether documents placed in the libraries of either Houses of Parliament should be included within the publication scheme.

- **Decisions**

  Decisions of the Information Commissioner in relation to the FOIA, and the Parliamentary Ombudsman in relation to the Code of Practice on Access to Government Information, covering the organisation are items to which a publication scheme is likely to provide access. Some of these decisions are published by the Ombudsman and if so it may be appropriate simply to provide a link to that information. Not all of the decisions are, however, published and this information should be considered for inclusion in a publication scheme. The public availability of details of departmental infractions under the Environmental Information Regulations should also be considered.

  Decisions of other bodies relating to the department should be accessible where appropriate.

  Reasons should be published for decisions made by the department where the decision affects a significant number of interested parties. The decisions, and reasons, most likely to be appropriate to include in a publication scheme are those which affect a significant number of people.

- **Speeches**

  Keynote speeches by Ministers and senior officials are likely to be made available proactively. In practice these are often already made available through Press Offices.

- **Legislation and related information**

  It is helpful to the public to know more about the legal framework within which department operates. Collating a list in a single place and giving a brief description of the relationship between the legislation and the department's structure and functions should be considered.

  HMSO have responsibility for the publication of United Kingdom legislation including Acts of Parliament, Statutory Instruments and Explanatory Notes to Acts of Parliament. Details of these categories of publications will be featured on HMSO's publication scheme with details of where users can view or purchase the documents. It follows that there is no need for an organisation to provide full details of legislation which they have policy responsibility for in their own publication schemes. Departments may, however, want to feature a reference in their publication scheme to the HMSO website where all newly enacted legislation can be viewed.

  Parliament is responsible for the publication of Bills of Parliament and Explanatory Notes to Bills. This material can be viewed on the Parliamentary website. Again, there is no necessity for departments to

feature details in their own publication schemes although they may wish to provide a link to the Parliamentary website.

HMSO also arranges for the publication of the London Gazette. Details of these will be featured on HMSO's publication scheme. Organisations should, however, refer in their publication schemes to the categories of individual notices which are submitted for publication in the Gazette.

Departments should provide details of Command Papers, White Papers and Green Papers which they have responsibility for publishing. For reference, a list of all Command Papers is published on HMSO's website.

Texts of international treaties, conventions and agreements should be accessible if not provided elsewhere. Departments may want to provide cross-references to relevant documents of European Community legislation. It is suggested that details could be supplied of websites where the material can be viewed or from where the information can be obtained.

- **Procurement, grants, loans and guarantees**

Departments and NDPBs may want to make available the following information:

- procurement and supplier policies;
- information on specific projects including notification of bidding opportunities, decision criteria, contract performance standards;
- results of regular performance reviews, and results achieved where appropriate;
- a schedule, which is updated regularly, with details of contracts awarded;
- policies on the awarding of grants, loans and the provision of guarantees; details of grants and loans awarded, guarantees provided; details of reviews and, where available, of outcomes where appropriate.

Information relating to the items above need not include all such information but could include those above a particular cost threshold as decided by the department.

The Lord Chancellor's Code of Practice on the Discharge of the Functions of Public Authorities under Part 1 of the Freedom of Information Act requires that departments and NDPBs ensure that they consider the implications for freedom of information before agreeing to confidentiality provisions in contracts and accepting information in confidence from a third party more generally. In particular, departments and NDPBs should only accept information from third parties in confidence if it is necessary to obtain that information in connection with the exercise of any of their functions. They should not agree to hold information received from third

parties "in confidence" which is not confidential in nature. Acceptance of any confidentiality provisions must be for good reasons and capable of being justified to the Information Commissioner.

- **Information required to be published under other legislation**

  This includes a wide range of information, some of which will be specific to individual departments. In particular, information relating to the environment that would be accessible under the Environmental Information Regulations such as estate management information and greening government reports as well as environmental impact assessments and departmental sustainable development strategies should be made available where appropriate.

- **Research reports, risk and impact assessments etc**

  Appropriate guidance on the publication of scientific research and on risk assessment should be followed when considering the content of a publication scheme. Regulatory impact assessments are also likely to be available.

C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- Freedom of Information Act 2000
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- Tell us what you think


Ministry of Defence / Publication Scheme Index / MOD's Pilot Publication Scheme

# MOD's Pilot Publication Scheme

**Introduction**
The aim of this pilot Publication Scheme is to explain what information the MOD makes available to the public, and wherever possible provide an easy method of accessing this information. Under the Freedom of Information Act 2000 (the "Act"), every public authority has a duty to specify what information they publish (in terms of information 'classes'), how the information is made available, and whether it is available free of charge or upon payment.

**The MOD's Pilot Publication Scheme**
The Ministry of Defence is one of six public authorities preparing pilot Publication Schemes. The pilot scheme does not provide access to the full range of information items (reports, leaflets, CD-ROMs, etc.) that will be available under each class in the full Publication Scheme, as the scope of the pilot has been kept intentionally narrow. The intention of the pilot scheme is to allow the Information Commissioner and MOD to gather feedback from the public and to learn lessons prior to launching a full scheme. Prior to the launch of the full Publication Scheme, the MOD may decide to make revisions based on lessons learned during the pilot phase.

**Search the Pilot Publication Scheme**
As well as describing the Classes of Information, our Publication Scheme allows you to browse or search to see what information is available. Having found reference to an information item, you will then be able to access it through this website. Where direct access is not possible you will be told how the information can be obtained.

Before using the Publication Scheme, you may find it useful to read about the diversity of information within the MOD.

**Tell us what you think**
We would value your opinion of the MOD's pilot Publication Scheme – please complete our feedback form.

**Page Modified:** Wednesday, February 13, 2002

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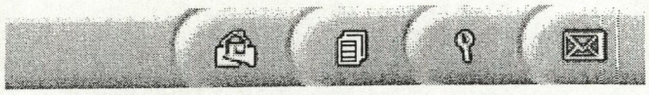

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Ministry of Defence / Publication Scheme Index / Classes of Information

# Classes of Information

The Freedom of Information Act requires a Publication Scheme to specify the classes of information that the public authority already publishes or intends to publish. The information classes in MOD's Publication Scheme are broadly stated and described in a way that gives them wide applicability across MOD: they therefore provide an umbrella for the classification of individual documents released by the areas that produce them. Our intention is to publish as much information as possible on subjects in which there is known to be public interest. However, exemptions under the Freedom of Information Act may prevent some information from being released.

The MOD publishes or intends to publish information under the classes listed below.

**Defence Policy**
Information about the UK's defence policy and strategy, our capabilities, relationship with Allies, other countries, Parliament and other Government departments, and legislation that we sponsor or in which we have a primary interest.

**The Armed Forces and their Activities**
Information about the RN, Army, RAF and their reserve forces, including their organisation, capability and equipment, the conduct of operations and training, and the strategic and political framework within these are undertaken.

**Personnel**
Information about policy and practice concerning serving and former personnel - military and civilian - including numbers, terms and conditions of service, recruitment, pay, rewards, training, welfare and health.

**Buying and Supporting Equipment and Services**
Information about the equipment and services we buy including logistic support arrangements and policy and plans for the replacement or acquisition of equipment and services.

**Sales and Export Support**
Information about the sale of MOD land, equipment, services and information, and the support provided to British industry.

**Finance and Resource Accounting**
Information about financial and accounting policy and management systems, budget and investment plans.

**Planning and Performance Management**
Information about management and planning, targets, incentives, performance and initiatives for promoting efficiency and good practice.

**Research, Science and Technology**
Information about research conducted on behalf of MOD including equipment, medical and academic research work.

**Supporting Services and Infrastructure**
Information about other supporting activities and infrastructure including the defence estate, security, contingency planning, the MOD Police, communications, information use and management, safety, health, environment and fire.

In addition, individual departments may elect to include extra classes particular to

their area of responsibility.

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Ministry of Defence / Publication Scheme Index / The Diversity of Information within the MOD

# The Diversity of Information within the MOD

**The MOD has many elements**
The Ministry of Defence is a very large, diverse organisation encompassing some 90,000 civilians and 200,000 service personnel stationed right around the globe.

The MOD is often associated just with the Navy, Army, RAF and civilian staff at the central London headquarters. In reality however, there are many other parts to the organisation. For example, the Met Office in Bracknell, and the Hydrographic Office in Taunton are both Trading Funds of the MOD. We have over 30 agencies ranging from the British Forces Post Office, the Defence Analytical Services Agency and the Ship Support Agency, to the Defence Procurement Agency which alone has over 4,000 staff.

A wide range of Non-Departmental Public Bodies (NDPBs) are also associated with the MOD and these operate either in an executive or an advisory capacity. Executive NDPBs include the National Army Museum, the Royal Naval Museum and the Oil and Pipelines Agency, while the advisory NDPBs range from the Animal Welfare Advisory Committee to the Armed Forces Pay Review Body and the National Employers' Liaison Committee.

Follow the links for a more detailed description of the organisation and management of the MOD, a full list of our Trading Funds, Agencies and NDPBs.

It follows that a diverse range of activities are carried out by these various elements, and that the information they produce is also enormously varied. However, the Publication Scheme has been structured so that you do not need to know who has responsibility for a particular subject to find out what information is published about it. You will be able to see what is available either by selecting one of the categories of activity in which we are involved (these categories match our classes of information), or by choosing an area of the organisation. You will also be able to specify a type of information (such as speeches) and to search by entering keywords.

**Try it, and tell us what you think**
As this is a pilot, we would appreciate your comments on how well the Publication Scheme has been structured, so try browsing and searching for information, and then take a moment to complete our feedback form.

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Ministry of Defence / Publication Scheme Index / Recently Released Information

# Recently Released Information

It is intended that details of information recently added to the Publication Scheme will b
This will include information released in response to requests from individual members

Items are grouped into relevant types of information. To view an item click on the title o

| Item title | Date Created | Issued Date | Next Version |
|---|---|---|---|
| **Budgets (1)** | | | |
| GVIU: Budget Information | 01/12/2001 | 01/12/2001 | n/a |
| **Consultation documents (1)** | | | |
| Public Discussion on the New Chapter for The Strategic Defence Review | 14/02/2002 | 14/02/2002 | n/a |
| **Guidance (1)** | | | |
| Getting Fit with the TA | 01/01/2002 | 01/01/2002 | 01/01/2003 |
| **Organisations and structure (3)** | | | |
| GVIU Organisational Chart | 01/12/2001 | 01/12/2001 | n/a |
| The Organisation and Management of Defence in the United Kingdom | 01/12/2001 | 01/02/2002 | n/a |
| Directorate of Air Staff Organisational Chart | 01/12/2001 | 01/12/2001 | n/a |
| **Policy papers (2)** | | | |
| Defence e-Business Strategy 2001 | 01/09/2001 | 01/01/2002 | n/a |
| Defence Information Strategy 2000 | 01/10/2000 | 20/02/2002 | n/a |
| **Project documents (1)** | | | |
| Database of MOD PFI Projects | 01/01/2002 | 01/01/2002 | n/a |
| **Reports (1)** | | | |
| DPA Annual Report and Accounts 2000/2001 | 08/11/2001 | 08/11/2001 | n/a |

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Ministry of Defence / Publication Scheme Index / Browse/Search the Publication Scheme

# Browse/Search the Publication Scheme

**Please choose whether to browse for information:**

- **by class/category** (e.g. Recruitment or Gulf Veteran's Illnesses)
- **by organisational area** (e.g. Directorate of Air Staff)

**Or to perform a search:**

Choose a class/category or an organisational area:

Class/Category: All

Organisational Area: All

And/or search for **Keywords**:

And/or choose an information type

Information Type: All

Other criteria:

Creation Date: All

Issue Date: All

Items released due to: Any

clear

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Ministry of Defence / Publication Scheme Index / Glossary

# Glossary

The glossary contains definitions for terms and acronyms used throughout MOD documents. Browse the Glossary by first choosing a letter of the alphabet:

123 A B C D E F G H I J K L M N O P Q R S T U V W X Y Z

| | |
|---|---|
| **1PWO** | 1st Prince of Wales' Own (Army) |
| **2nd PUS** | Second Permanent Under Secretary of |
| **2SL/NHC** | Second Sea Lord / Naval Home Command |

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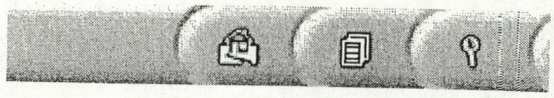

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Ministry of Defence / Publication Scheme Index / Feedback Questionnaire

# Feedback Questionnaire

**We value your opinion**
We would welcome your comments on any aspect of our pilot Publication Scheme. P use this form to send us your views.

You can answer as many or as few as the questions as you wish, or just use the final s for general comments. Your feedback will be sent directly to The Office of the Inform Commissioner.

**Your details**

Name:

Occupation:

Organisation:

Contact Details (email/postal address):

**How did you find out about MOD's Publication Scheme?**
Please tick the appropriate box(es)

- ☐ Information Commissioners Website
- ☐ UKOnline.gov.uk
- ☐ Browsing www.mod.uk
- ☐ Search engine, if so, what did you search for?
- ☐ Read about it in the press
- ☐ Other (please specify)

**Using the Publication Scheme**

Were you looking for anything particular? O Yes O No

If Yes, did you find it? O Yes O No

Please state the extent to which you agree or disagree with the following statements

| | Strongly Agree | Agree | Disagree | Strongly Disagree | Do |
|---|---|---|---|---|---|
| I understand what the MOD Publication Scheme is about | O | O | O | O | |

| | | | | |
|---|---|---|---|---|
| There was too much jargon | O | O | O | O |
| I found it easy to look for information | O | O | O | O |
| The introduction to the scheme was not clear | O | O | O | O |
| I was not sure how to go about looking for what I wanted | O | O | O | O |
| The scheme was clear and easy to navigate | O | O | O | O |
| The scheme was a waste of time | O | O | O | O |
| I would recommend the scheme to someone else | O | O | O | O |

Please use the following space to give us any further comments

**What else would you like to see?**

What other information would you like to see in our Publication Scheme?

How else could we improve the scheme?

Data Protection Act: The details you provide will be used in order to help us refin

Publication Scheme. A copy will also be passed to The Office of the Inform Commissioner. We may like to use your personal details to contact you and discus views in greater depth, or to invite you to test new features of our Publication Sche they are developed. Your personal details will be destroyed once the Pilot Publ Scheme has been completed.

Please tick here ☐ if you do not want to be contacted by MOD or The Office Information Commissioner for this purpose.

send

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## MAIN FEATURES OF THE FREEDOM OF INFORMATION ACT 2000

### Right of access

Under the Freedom of Information Act 2000 (FOIA) any person, including foreign nationals, will have the right of access within 20 working day to all Cabinet Office information held in whatever format (eg formal or informal documents, e-mails, diaries and databases), subject to certain exemptions.

2. The exemptions include national security, defence, international relations, the economy, law enforcement, formulation of policy (including the proceedings of any Cabinet Committee), prejudice to the effective conduct of public affairs and the conferring by the Crown of any honour or dignity. Most exemptions are not, however, absolute and public authorities are required to disclose part-exempt information where the public interest in disclosure outweighs the public interest in maintaining the exemption.

3. A fee of up to 10% of the reasonable marginal costs of complying with a request may be charged. This is a maximum and there will be no requirement on a department to charge the full 10%, or indeed to charge anything.

4. Departments are exempt from the obligation to disclose the information requested where the cost of doing so exceeds the threshold prescribed by the Secretary of State. The threshold, in line with that for Parliamentary Questions, will be £500. Departments may, however, charge a fee in accordance with the regulations for the provision of information that exceeds the appropriate limit. This is to enable departments to charge for large amounts of information that might not otherwise be disclosed due to cost considerations.

5. There is an appeals and complaints procedure for applicants who are dissatisfied with the response they receive. The main avenue of appeal is the Information Commissioner, who has the right to see all departmental papers relating to a particular case, though her decision is subject to Ministerial override.

6. Right of access provisions will come into effect as from January 2005.

### Publication scheme

7. The Cabinet Office, like all other government departments, is required to adopt and maintain a scheme for the proactive publication of information. A publication scheme, which has to be approved by the Information Commissioner, commits the department to publish information in accordance with the scheme. Each scheme must specify:

- the classes of information which the department publishes or intends to publish;

- the manner in which information of each class is, or will be, published; and

- whether the information is intended to be available free of charge.

In adopting a scheme due regard has to be given to the public interest in allowing access to the information being held and in the publication of reasons for decisions made by the department.

8. The publication scheme provisions will, for government departments, come into effect as from November 2002.

## CONTENT OF A PUBLICATION SCHEME

The kinds of information publication schemes are likely to provide are:

- **Guidance to staff**

  It is expected that publication schemes will provide access to explanatory material on departments' and Non-Departmental Public Bodies' (NDPBs') dealings with the public and other organisations. This includes such rules, procedures, internal guidance to officials, and similar administrative manuals as will assist better understanding of the organisation's interaction in dealing with the public. It will also include internal guidance to officials on implementing/operating the Code of Practice on Access to Government Information (before 2005), the Freedom of Information Act (after 2005) and the Environmental Information Regulations.

- **Background to policy**

  The Code of Practice on Access to Government Information already commits departments and NDPBs to publishing the facts and analysis of the facts which government considers relevant and important in framing major policy proposals and decisions. This commitment should be carried forward to a publication scheme.

- **Management information**

  The Code of Practice on Access to Government Information already requires departments to publish full information about how public services are run, how much they cost, who is in charge and what complaints and redress procedures are available; and full and, where possible, comparable information about what services are being provided, what targets are set, what standards of service are expected and the results achieved. These commitments should be carried forward in a publication scheme.

  In addition to the above commitments are also to provide access to the following in relation to the role, function and management of a department:

  - mission, objectives and functions;
  - organisation, including information about who is responsible for which function and how to contact him or her;
  - information about Management Board meetings, including agendas and minutes of meetings and, ideally, associated papers or summaries where appropriate;

- targets, including those set for standards of service and financial performance, together with results achieved and comparable information; and
- sources of income, and how effectively money is raised and spent, for example, on different aspects of administration.

This information often appears in departmental reports, management statements, financial memoranda etc. For the purposes of the FOIA it is the information and not the form it is presented in that is important. Agency Framework Documents are also seen as useful as they encapsulate the essential management operating arrangements of an agency.

Departments and NDPBs are also asked to consider for which formal meetings it would be appropriate to publish the agenda, papers and minutes or summaries of these documents. It is likely that departments and NDPBs would want to specify what information will be made proactively available for which types of meetings. Regular formal committees or advisory groups are more likely to be included in a publication scheme than ad-hoc or impromptu discussions. The Cabinet Office, in line with exemption 2 of the Code of Practice on Access to Government Information and section 35 of the FOIA, would not expect any department to disclose information relating to the proceedings of Cabinet or any of its Committees.

- **Public consultation**

Public consultation documents and the summary of responses to them should be made accessible through publication schemes. Decisions in the light consultation, a summary of the views expressed and reasons for rejecting options not adopted should also be included.

- **Departmental circulars**

There are numerous types of circular that are used to communicate a variety of information to staff. It is probable that some of these circulars will be relevant to a publication scheme. The scale of the task will vary from department to department as some of the information may be subsumed within the publication scheme commitments covering specific areas of departmental activity.

- **Information placed in the Libraries of the House**

Departments and NDPBs need to consider whether documents placed in the libraries of either Houses of Parliament should be included within the publication scheme.

- **Decisions**

  Decisions of the Information Commissioner in relation to the FOIA, and the Parliamentary Ombudsman in relation to the Code of Practice on Access to Government Information, covering the organisation are items to which a publication scheme is likely to provide access. Some of these decisions are published by the Ombudsman and if so it may be appropriate simply to provide a link to that information. Not all of the decisions are, however, published and this information should be considered for inclusion in a publication scheme. The public availability of details of departmental infractions under the Environmental Information Regulations should also be considered.

  Decisions of other bodies relating to the department should be accessible where appropriate.

  Reasons should be published for decisions made by the department where the decision affects a significant number of interested parties. The decisions, and reasons, most likely to be appropriate to include in a publication scheme are those which affect a significant number of people.

- **Speeches**

  Keynote speeches by Ministers and senior officials are likely to be made available proactively. In practice these are often already made available through Press Offices.

- **Legislation and related information**

  It is helpful to the public to know more about the legal framework within which department operates. Collating a list in a single place and giving a brief description of the relationship between the legislation and the department's structure and functions should be considered.

  HMSO have responsibility for the publication of United Kingdom legislation including Acts of Parliament, Statutory Instruments and Explanatory Notes to Acts of Parliament. Details of these categories of publications will be featured on HMSO's publication scheme with details of where users can view or purchase the documents. It follows that there is no need for an organisation to provide full details of legislation which they have policy responsibility for in their own publication schemes. Departments may, however, want to feature a reference in their publication scheme to the HMSO website where all newly enacted legislation can be viewed.

  Parliament is responsible for the publication of Bills of Parliament and Explanatory Notes to Bills. This material can be viewed on the Parliamentary website. Again, there is no necessity for departments to

feature details in their own publication schemes although they may wish to provide a link to the Parliamentary website.

HMSO also arranges for the publication of the London Gazette. Details of these will be featured on HMSO's publication scheme. Organisations should, however, refer in their publication schemes to the categories of individual notices which are submitted for publication in the Gazette.

Departments should provide details of Command Papers, White Papers and Green Papers which they have responsibility for publishing. For reference, a list of all Command Papers is published on HMSO's website.

Texts of international treaties, conventions and agreements should be accessible if not provided elsewhere. Departments may want to provide cross-references to relevant documents of European Community legislation. It is suggested that details could be supplied of websites where the material can be viewed or from where the information can be obtained.

- **Procurement, grants, loans and guarantees**

Departments and NDPBs may want to make available the following information:

- procurement and supplier policies;
- information on specific projects including notification of bidding opportunities, decision criteria, contract performance standards;
- results of regular performance reviews, and results achieved where appropriate;
- a schedule, which is updated regularly, with details of contracts awarded;
- policies on the awarding of grants, loans and the provision of guarantees; details of grants and loans awarded, guarantees provided; details of reviews and, where available, of outcomes where appropriate.

Information relating to the items above need not include all such information but could include those above a particular cost threshold as decided by the department.

The Lord Chancellor's Code of Practice on the Discharge of the Functions of Public Authorities under Part 1 of the Freedom of Information Act requires that departments and NDPBs ensure that they consider the implications for freedom of information before agreeing to confidentiality provisions in contracts and accepting information in confidence from a third party more generally. In particular, departments and NDPBs should only accept information from third parties in confidence if it is necessary to obtain that information in connection with the exercise of any of their functions. They should not agree to hold information received from third

parties "in confidence" which is not confidential in nature. Acceptance of any confidentiality provisions must be for good reasons and capable of being justified to the Information Commissioner.

- **Information required to be published under other legislation**

  This includes a wide range of information, some of which will be specific to individual departments. In particular, information relating to the environment that would be accessible under the Environmental Information Regulations such as estate management information and greening government reports as well as environmental impact assessments and departmental sustainable development strategies should be made available where appropriate.

- **Research reports, risk and impact assessments etc**

  Appropriate guidance on the publication of scientific research and on risk assessment should be followed when considering the content of a publication scheme. Regulatory impact assessments are also likely to be available.

Freedom of Information Act 2000

# Preparing for Implementation

***Publication Schemes a Practical Guide: Part I 'Classes'***

## Contents


**1** – Introduction
**2** – How should a scheme be structured?
**3** – What are classes of Information?
**4** – What about 'exempt' information?
**5** – How can the definition of a 'class' be refined?
**6** – At what level should 'classes' of information be defined?
**7** – How much information should be included in a class?
**8** – How should a text document be submitted to the Commissioner for scheme approval?
**9** – Publication schemes – what is the incentive?
**10** – What other 'practical guides' does the Commissioner plan to publish?
**Annex I** – Organisational Chart
**Annex II** – Extract illustrating the use of exemption
**Annex III** – Extract from a sample Publication Scheme Text Document


## 1. Introduction

1.1 This 'practical guide' aims to help public authorities in developing a publication scheme (a 'scheme') as required by section 19 of the Freedom of Information Act 2000 (the 'Act') [1]. The guide attempts to clarify some of the terms used in the Act and through the use of simplified examples and diagrams to show how a scheme works in practice. Whilst adopting a scheme is a legal requirement of the Act, it is important to stress the many benefits to be gained by the public authority. These are highlighted in paragraph 9 of this paper.

1.2 Section 19(1) of the Act states that it is the duty of every public authority to adopt and maintain a publication scheme, to publish information in accordance with its scheme and, from time to time, to review the scheme. The Information Commissioner (the 'Commissioner') has already published a 'Guidance' paper on complying with the publication scheme requirements of the Act, a 'Methodology' paper which sets out suggested approaches to developing schemes and her 'Approval Documentation' according to which she will determine whether each scheme meets the requirements of the Act. These publications are available from the Commissioner's website at: www.informationcommissioner.gov.uk or from the Commissioner's office.

1.3 A publication scheme is essentially a 'guide' to the information a public authority routinely publishes or intends to publish routinely. It will clearly be helpful to the public's understanding of what an authority does and the services it provides to outline within the scheme the types of information it holds. This will also assist the public in formulating requests for information when the statutory right of access becomes

available from January 2005. However, it is important to be clear that schemes are a **commitment** to pro-active disclosure of information.

1.4 Information is exempt from the Act if it is reasonably accessible to the applicant by other means (s.21). One example where information would qualify for this exemption is if it is made available via the authority's publication scheme. Therefore, where someone wishes to exercise their right of access under the Act by making a written request, but the information requested is available via the authority's scheme, the authority will only be required to refer the applicant to the scheme, and will not have to follow its procedure for dealing with requests. Whilst section 16 of the Act requires authorities to provide advice and assistance to those making requests, the day to day administrative burden of responding to individual requests is certain to be reduced if schemes are comprehensive and easy to use.

1.5 One of the requirements of a scheme is that it identifies the 'classes' of information that a public authority will publish. There has been some confusion as to what a 'class' of information is, and where such 'classes' fit within the scheme itself. The Act does not provide guidance on the meaning of a 'class' of information but in section 19(2) states that a scheme must:

(a) specify classes of information which the public authority publishes or intends to publish,
(b) specify the manner in which information of each class is, or is intended to be, published, and
(c) specify whether the material is, or is intended to be, available to the public free of charge or on payment.

1.6 The issues of structure and classes are considered below.

## 2. How should a scheme be structured?

2.1 How best to structure a scheme is a matter for each authority. Many public authorities already publish information via a website and it might be logical to assume such material will already be organised in a way that is easily accessible to the public. Whether you choose to follow the structure of your website, reflect your organisational structure by department, or adopt an alternative approach, it is important to ensure that your scheme is easy for the public to follow and to locate the information they seek.

2.2 It is also important for a public authority to note the provisions of section 19(3) of the Act when considering what to include in its scheme. This section provides that 'in adopting or reviewing a publication scheme, a public authority shall have regard to the public interest in allowing public access to information held by the authority, and in the publication of reasons for decisions made by the public authority'. The issue of scheme 'content' will be dealt with in a separate 'Practical Guide'.

2.3 The diagram at **Annex I** attempts to show how a public authority's scheme might be broken down and the information it holds organised into classes. For ease of explanation, a function common to all authorities – 'Personnel' - has been used in the example and the scheme has therefore been structured by department.

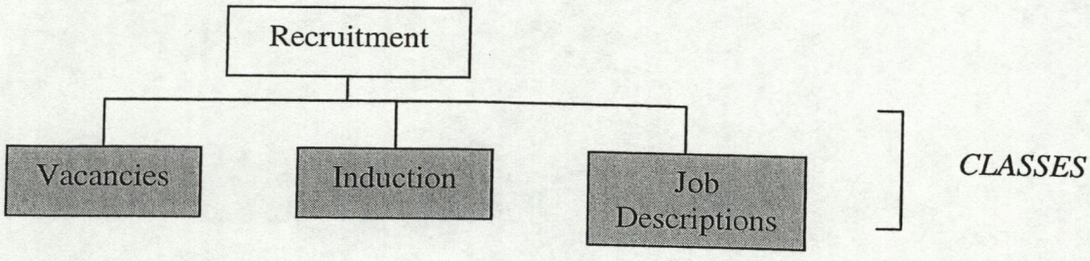
## 3. What are 'classes' of information?

3.1 This guide aims to help clarify what a class of information is and some of the considerations a public authority should take into account when constructing or defining classes. In responses to the Commissioner's consultation on schemes (consultation document of July 2001 and summary of responses available on our website and in hard copy from our office) a number of definitions were suggested. These included '.... a group of information having one or more common characteristics'.

3.2 Including a 'class' of information within a scheme commits the public authority to publishing the information that falls within it. It is therefore important that a public authority, and its staff, understand what material is covered and that the coverage is clear to the user. Where it is intended that certain information is **not** included, this must be clear from the class definition (see paragraph 3.6 below). In some cases it might be helpful to the public authority as well as to users, to include a 'definition' with the class heading.

3.3 In Annex I, classes are shown by the shaded boxes, whereas actual documents falling within each class are boxed with a double line (see below for guidance on defining classes appropriately). Please note that it is the classes and not the documents themselves which need to be listed and submitted to the Commissioner for approval of the scheme.

3.4 Extract from Annex I:




As outlined, by including a class of information, a public authority is committing itself to publishing all the information covered by that class. For example, if a public authority chose to use 'recruitment' as a class of information then the expectation would be that all information held in connection with the recruitment process would be available through the publication scheme. This would clearly not be appropriate, not least because much of the information that might fall under that heading would be personal data held on application forms, the disclosure of which may breach the Data Protection Act 1998.

3.5 Therefore it might be more helpful to split the heading of **Recruitment** down further into; **Vacancies**, **Induction** and **Job descriptions,** for example.

3.6 For ease of explanation these are the titles of the classes used in the diagram. In reality it might be necessary to refine the definition of these classes still further in order for it to be clear what information would be available in that class (see section 5: **How can**

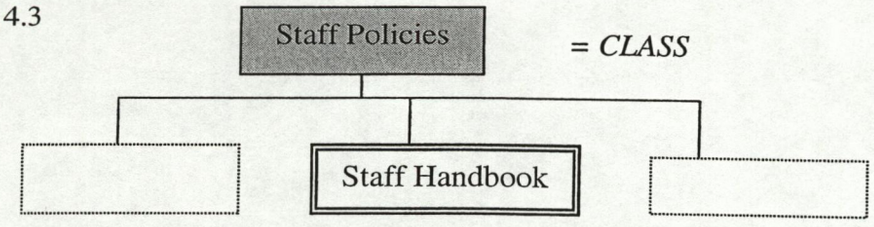
**the definition of a 'class' be refined?**). It is the heading, plus any definition necessary to make clear exactly what is covered, that is the 'class' which should be included in the text document submitted to the Commissioner for approval (see The Information Commissioner's Approval Documentation for Publication Schemes). It will be that refined definition of the class which the Commissioner will consider, when assessing whether a public authority is honouring its commitment to publish information in accordance with its scheme.

## 4. What about 'exempt' information?

4.1 Exemptions are dealt with in Part II of the Act. General guidance on the way the exemptions work will be available on our website, or in hard copy from our office, by end May 2002.

4.2 Some authorities have expressed concern that entire classes of information might have to be left out of their schemes because they consider a small proportion of the information covered is, or might potentially be, exempt information and therefore would not be available under the Act. An example is set out below in 4.3.

4.3




To use an example from Annex I, the class **Staff policies** could be defined as: 'internal policies which collectively establish the procedures that should be followed, and conduct that is expected, by members of staff in the performance of their duties.'

4.4 One of the documents that might fall within this class definition is **Staff Handbook**. Whereas the majority of the handbook might be information that can easily be made public, it may well contain some exempt information. The amount of information that would be exempt may be very limited and so it would be unhelpful to exclude the whole book from the class. The Commissioner intends to adopt an approach that would allow a scheme to accommodate such a situation. Although considering in advance whether an exemption might apply to material covered by their scheme may mean extra work at this stage, there are clearly long-term savings to be gained by the authority, once the right of access becomes available.

4.5 The important point is that where a class includes information from documents that also contain exempt information this is made clear when defining that class. Hence the definition **'staff policies'** given above may be refined as follows:

- 'internal policies which collectively establish the procedures that should be followed and conduct that is expected by members of the authority's staff in the performance of their duties. Some of the material in this class is derived from documents which we consider to contain exempt information. Where this occurs the material will clearly show where information has been withheld and explain

what exemption has been applied and why. Typically information may be withheld if its release would compromise the health and safety of staff or national security. (See Annex II– extract from sample document.)

4.6 Authorities should also bear in mind that some classes will involve new material being published as it is produced. For example a class of information defined as 'the minutes from the meeting of a particular working group or committee', is a commitment to publish existing and future minutes of those meetings. The production of minutes of meetings has been another example of material which may well include exempt information, for example, personal data.

4.7 The Commissioner suggests that minutes could be presented in the following ways:

a) Minutes could be made available with any exempt text blanked out, with details of the exemption the authority considers to apply; or

b) Minutes could be prepared in a way that excludes exempt information in the first place, for example, 'staffing matters were discussed'.

4.8 Authorities must remember, however, that should separate versions of the minutes be held internally, individuals may still exercise their right of access (once this is available) and request the unpublished version, or indeed the blanked out text. Clearly, where an exemption is properly applied, the authority would not be required to release the relevant material in response to the request.

## 5. How can the definition of a 'class' be refined?

5.1 With reference to Annex I, **Vacancies** could be further defined as follows:

- vacancies – 'a complete list of job vacancies that the authority has recruited for *(could be limited to a specific period of time)* and is currently recruiting for.'

5.2 **Induction** could be defined as follows:

- 'the authority's current induction programme for all new staff *(could be extended to cover a specific period of past programmes)*. Where the induction programme contains exempt information, this is clearly shown in the text of the particular document together with an explanation of the exemption relied on. Typically information may be exempt that relates to the authority's security measures or where training in a particular area is based on past case work which might therefore include confidential information or personal data.'

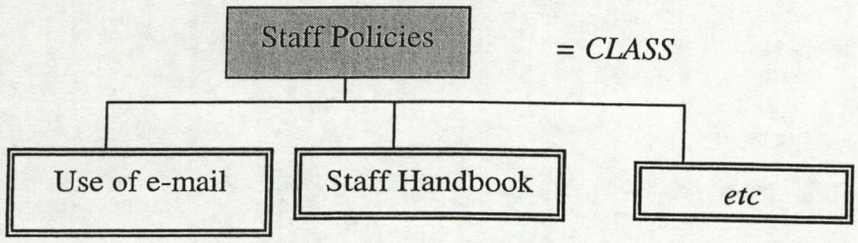
5.3 **Job descriptions** could be defined as:

- 'a copy of the job descriptions relating to all the different job roles performed by the authority's staff. '

## 6. At what level should 'classes' of information be defined?

6.1 Classes of information may appear at different levels within the scheme structure, as shown in Annex I.

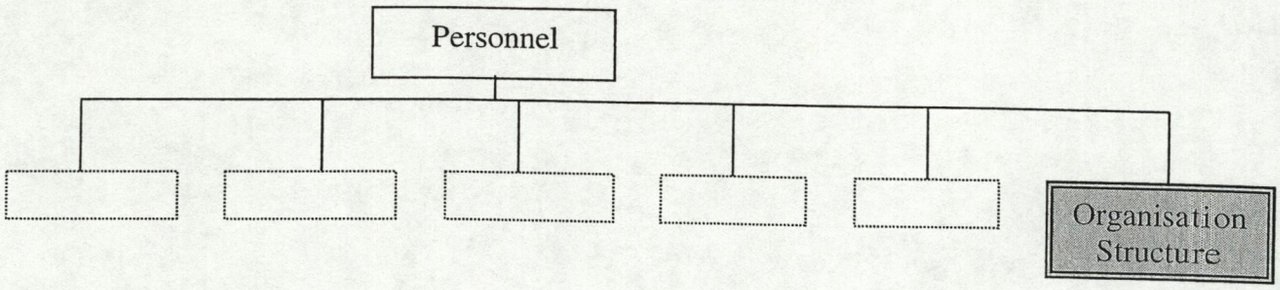
6.2 Looking at **Staff policies** it should be noted that here a class is defined at a higher level in the tree of the public authority's functions than the classes already considered. That is to say that **Staff policies** is a direct subdivision of the heading **Personnel**, whereas **Vacancies**, **Induction** and **Job descriptions** are a subdivision of **Recruitment**, which itself is a subdivision of the heading **Personnel**.




6.3 Indeed it is theoretically possible that further up the tree there is a division that could usefully be used as a class. For example a public authority may wish to make all information held by **Department A** available through its scheme. In such a case **Department A** could be the title of a class.

## 7. How much information should be included in a class?

7.1 A class will include as much or as little information as it defines. As in the example provided at paragraph 6.3 it may cover the work of an entire department. Alternatively, in the case of the class 'Organisation structure' in Annex I, it may only contain one document, i.e. a chart of the organisation's structure, as shown below:




## 8. How should a text document be submitted to the Commissioner for scheme approval?

8.1 The criteria which the Commissioner will adopt when approving schemes are set out in detail in **The Information Commissioner's Approval Documentation for**

**Publication Schemes.** The paper explains what documentation must be submitted to the Commissioner in order for a scheme to gain approval.

8.2 In the example in Annex I, the structure of an authority's scheme is set out as a diagram, with the section which deals with 'Personnel' information highlighted. Annex III shows how this particular section of the scheme would be presented in text format, for approval by the Commissioner.

## 9. Publication schemes – what is the incentive?

9.1 Adopting a scheme is a legal requirement of the Act, but the experience of those authorities which have already run pilot schemes shows there are many benefits to be gained by the authority. Schemes:

- act as an internal communications tool – a central resource of information
- reduce the administrative burden of dealing with requests
- underline the importance of effective records management – essential if an organisation is to meet its business needs
- provide a valuable housekeeping exercise
- provide an opportunity to disseminate information about the work of the organisation, raising public awareness of its objectives, activities and services
- demonstrate to the public a commitment to openness

9.2 Developing a scheme is also the first step in the process of preparing for dealing with requests under the Act.

## 10. What other 'practical guides' does the Commissioner plan to publish?

10.1 The following topics have been suggested for future guides to schemes:

- scheme content (including requirement to consider the public interest in allowing access to information and in publishing reasons for decisions)
- publishing schemes
- accessibility of schemes and the information they cover

10.2 Please refer regularly to our website. The 'Freedom of Information' section will be updated as and when new guidance is available.

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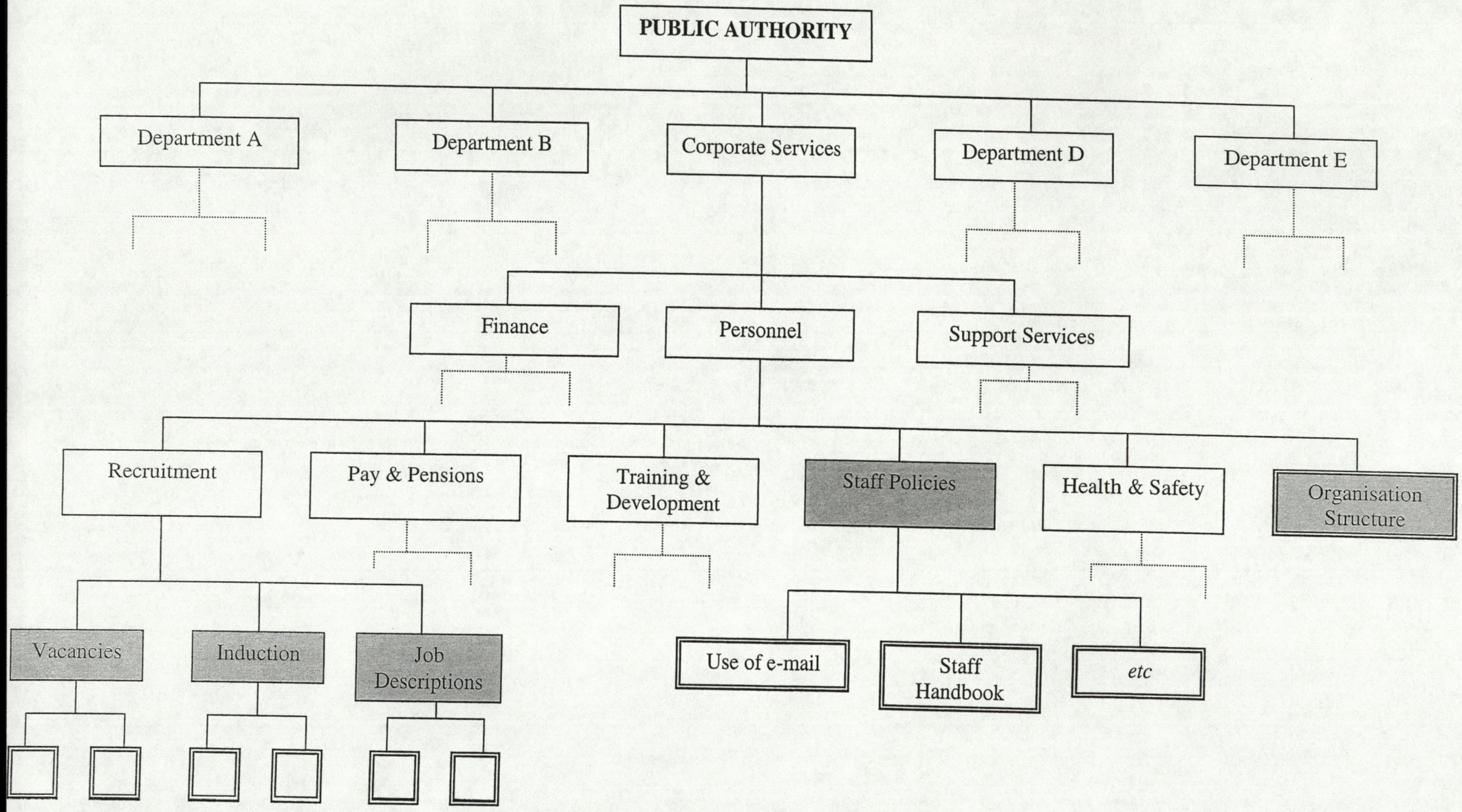
Endnotes

1 The Act applies to public authorities as listed in Schedule 1. There is also a provision in the Act for other authorities to be named later and for organisations to be named as public authorities for relevant parts of their work.

## ANNEX I


PUBLIC AUTHORITY
Department A
Department B
Corporate Services
Department D
Department E
Finance
Personnel
Support Services
Recruitment
Pay & Pensions
Training & Development
Staff Policies
Health & Safety
Organisation Structure
Vacancies
Induction
Job Descriptions
Use of e-mail
Staff Handbook
etc

# ANNEX II

**Extract from sample 'document' ('Staff Handbook'), illustrating use of exemption**

**Section 6:**

**Section 7: Security procedures – in event of terrorist threat**

'This public authority' considers the information contained in this section is exempt information by virtue of section 24 of the Freedom of Information Act, in that it relates to security procedures operated by the authority and has therefore been removed from the text.

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**Section 8:**

e-mail: data@dataprotection.gov.uk Website: www.dataprotection.gov.uk

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Ministry of Defence / Publication Scheme Index / MOD's Pilot Publication Scheme

# MOD's Pilot Publication Scheme

## Introduction

The aim of this pilot Publication Scheme is to explain what information the MOD makes available to the public, and wherever possible provide an easy method of accessing this information. Under the Freedom of Information Act 2000 (the "Act"), every public authority has a duty to specify what information they publish (in terms of information 'classes'), how the information is made available, and whether it is available free of charge or upon payment.

## The MOD's Pilot Publication Scheme

The Ministry of Defence is one of six public authorities preparing pilot Publication Schemes. The pilot scheme does not provide access to the full range of information items (reports, leaflets, CD-ROMs, etc.) that will be available under each class in the full Publication Scheme, as the scope of the pilot has been kept intentionally narrow. The intention of the pilot scheme is to allow the Information Commissioner and MOD to gather feedback from the public and to learn lessons prior to launching a full scheme. Prior to the launch of the full Publication Scheme, the MOD may decide to make revisions based on lessons learned during the pilot phase.

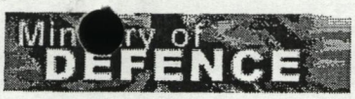
## Search the Pilot Publication Scheme

As well as describing the Classes of Information, our Publication Scheme allows you to browse or search to see what information is available. Having found reference to an information item, you will then be able to access it through this website. Where direct access is not possible you will be told how the information can be obtained.

Before using the Publication Scheme, you may find it useful to read about the diversity of information within the MOD.

## Tell us what you think

We would value your opinion of the MOD's pilot Publication Scheme – please complete our feedback form.



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Ministry of Defence / Publication Scheme Index / Freedom of Information Act 2000

# Freedom of Information Act 2000

**Background**
The Freedom of Information (FOI) Act 2000 received Royal Assent on 30 November 2000. When fully implemented, the Act will supersede the current Code of Practice on Access to Government Information 1997 (the Code of Practice).

**Scope of the Act**
The Act applies to all public authorities. Schedule 1 to the Act gives more details but the term 'public authorities' is defined very widely and it has been estimated that some 75,000 bodies are involved. Within MOD, only the Special Forces and any unit providing assistance to the Government Communications Headquarters are outside the scope of the Act.

**Implementation**
The Act has to be fully implemented across the public sector by 30 November 2005 and the Lord Chancellor (whose Department has lead responsibility for the Act) announced on 13 November 2001 how this will be achieved. For the Ministry of Defence the relevant parts of the implementation timetable are as follows:

- By November 2002 we must bring into effect a Publication Scheme for MOD as a central government department, including all defence Non Departmental Public Bodies (NDPBs) subject to the Code of Practice.
- By June 2003 we must bring into effect a Publication Scheme for the Armed Forces and the MOD Police.
- By February 2004 to have in place a Publication Scheme relating to NDPBs not subject to the Code of Practice.
- By January 2005 we must – along with all other public authorities – answer requests for information within the terms of the individual right of access (see below) given by the Act.

Until the individual right of access comes into force from January 2005, the MOD will continue to follow current policy on Open Government under the current Code of Practice.

**Publication Schemes**
The Act requires each public authority to adopt and maintain a Publication Scheme. The purpose of Publication Schemes is to specify the classes of information that the authority publishes or intends to publish; the form in which this is or will be done; and whether there is any charge for the information. Each scheme must be approved by the Information Commissioner (see below). Although the implementation timetable sets different dates by which different parts of the MOD must have Publication Schemes, it is our intention to create a single scheme that will set out the full range of information published across the whole of MOD, its agencies and military components. In advance of this, the MOD has produced a pilot Publication Scheme.

**Right to Information**
When the individual right of access is implemented it will apply to all types of recorded information held by public authorities regardless of the date of the information. The Act does, however, set out some exemptions to this right. It also places a number of obligations on public authorities about the way in which they provide information. Subject to the exemptions, anyone making a request must be informed whether the public authority holds the information and, if so, be supplied with it – generally within 20 working days. There is also a duty to provide advice or assistance to anyone seeking information (for example in order to explain what is

readily available or to clarify what is wanted).

**Charging**
There is no obligation for a public authority to provide information if the estimated cost of doing so would exceed an 'appropriate limit'. This limit will be set in secondary legislation sponsored by the Lord Chancellor's Department. In general, MOD does not intend to charge for the information included in its Publication Scheme that is directly accessible through its website.

**Right to Appeal**
In any case where a request for information under the individual right of access is denied, it may be possible to appeal against the decision. In the first instance we would want any such appeals to be referred for in-house review by MOD, but there will also be a right of appeal to the Information Commissioner (see below).

**Information Commissioner**
Responsibility for overseeing the operation of the Act rests with the Information Commissioner who is an independent public official responsible directly to Parliament. The first Information Commissioner, Elizabeth France, was appointed on 30 January 2001. As well as approving Publication Schemes and promoting compliance with the Act, the Commissioner has powers of enforcement.

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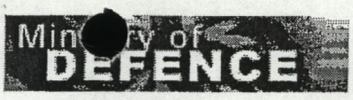

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Ministry of Defence / Publication Scheme Index / Classes of Information

# Classes of Information

The Freedom of Information Act requires a Publication Scheme to specify the classes of information that the public authority already publishes or intends to publish. The information classes in MOD's Publication Scheme are broadly stated and described in a way that gives them wide applicability across MOD: they therefore provide an umbrella for the classification of individual documents released by the areas that produce them. Our intention is to publish as much information as possible on subjects in which there is known to be public interest. However, exemptions under the Freedom of Information Act may prevent some information from being released.

The MOD publishes or intends to publish information under the classes listed below.

**Defence Policy**
Information about the UK's defence policy and strategy, our capabilities, relationship with Allies, other countries, Parliament and other Government departments, and legislation that we sponsor or in which we have a primary interest.

**The Armed Forces and their Activities**
Information about the RN, Army, RAF and their reserve forces, including their organisation, capability and equipment, the conduct of operations and training, and the strategic and political framework within these are undertaken.

**Personnel**
Information about policy and practice concerning serving and former personnel - military and civilian - including numbers, terms and conditions of service, recruitment, pay, rewards, training, welfare and health.

**Buying and Supporting Equipment and Services**
Information about the equipment and services we buy including logistic support arrangements and policy and plans for the replacement or acquisition of equipment and services.

**Sales and Export Support**
Information about the sale of MOD land, equipment, services and information, and the support provided to British industry.

**Finance and Resource Accounting**
Information about financial and accounting policy and management systems, budget and investment plans.

**Planning and Performance Management**
Information about management and planning, targets, incentives, performance and initiatives for promoting efficiency and good practice.

**Research, Science and Technology**
Information about research conducted on behalf of MOD including equipment, medical and academic research work.

**Supporting Services and Infrastructure**
Information about other supporting activities and infrastructure including the defence estate, security, contingency planning, the MOD Police, communications, information use and management, safety, health, environment and fire.

In addition, individual departments may elect to include extra classes particular to

their area of responsibility.

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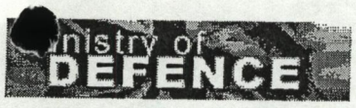

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Ministry of Defence / Publication Scheme Index / The Diversity of Information within the MOD

# The Diversity of Information within the MOD

**The MOD has many elements**
The Ministry of Defence is a very large, diverse organisation encompassing some 90,000 civilians and 200,000 service personnel stationed right around the globe.

The MOD is often associated just with the Navy, Army, RAF and civilian staff at the central London headquarters. In reality however, there are many other parts to the organisation. For example, the Met Office in Bracknell, and the Hydrographic Office in Taunton are both Trading Funds of the MOD. We have over 30 agencies ranging from the British Forces Post Office, the Defence Analytical Services Agency and the Ship Support Agency, to the Defence Procurement Agency which alone has over 4,000 staff.

A wide range of Non-Departmental Public Bodies (NDPBs) are also associated with the MOD and these operate either in an executive or an advisory capacity. Executive NDPBs include the National Army Museum, the Royal Naval Museum and the Oil and Pipelines Agency, while the advisory NDPBs range from the Animal Welfare Advisory Committee to the Armed Forces Pay Review Body and the National Employers' Liaison Committee.

Follow the links for a more detailed description of the organisation and management of the MOD, a full list of our Trading Funds, Agencies and NDPBs.

It follows that a diverse range of activities are carried out by these various elements, and that the information they produce is also enormously varied. However, the Publication Scheme has been structured so that you do not need to know who has responsibility for a particular subject to find out what information is published about it. You will be able to see what is available either by selecting one of the categories of activity in which we are involved (these categories match our classes of information), or by choosing an area of the organisation. You will also be able to specify a type of information (such as speeches) and to search by entering keywords.

**Try it, and tell us what you think**
As this is a pilot, we would appreciate your comments on how well the Publication Scheme has been structured, so try browsing and searching for information, and then take a moment to complete our feedback form.

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# No10 : FOI PUBLICATION SCHEME DISCUSSION

20 JUNE 2002

TESSA STIRLING

KEVIN NICHOLS

# CURRENT POSTION

- Code of Practice on Access to Government Information
- FOIA received Royal Assent on 30 November 2000 and must be fully implemented by 30 November 2005
- Lord Chancellor announced in House of Lords on 13 November 2001 that FOIA would be implemented in stages, and implemented fully by January 2005

# WHAT DOES THIS MEAN ?

- Implementation of FOIA will be through the rolling out of publication schemes by type of public authority, starting with central government in November 2002

- Bringing into force the individual right of access provisions in January 2005

# WHY THIS WAY ?

- To give public authorities time to prepare for the introduction of the individual right of access to information

- To demonstrate that progress is being made through the implementation of publication schemes

# PUBLICATION SCHEMES

- Have to be submitted to the Information Commissioner for approval by 30 September 2002
- Once approved will commit a department to publish information in accordance with the scheme
- Cabinet Office publication scheme to include No.10

# WHAT MUST A PUBLICATION SCHEME SPECIFY ?

- The classes of information which the Department publishes or intends to publish - matter for each Department to determine

- A 'class' is a group of information having one or more common characteristics

- The manner in which information within each class is, or will be, published

- Whether the information is intended to be available free of charge

# ANYTHING ELSE ?

- Due regard has to be given to the public interest in allowing access to information being held and in the publication of the reasons for administrative decisions made by the Department

- Ensure that the Department publishes the facts(and analysis of the facts) which are considered relevant and important in framing major policy proposals and decisions

# "CLASSES" OF INFORMATION

- Types kinds of information to which all departmental publication schemes are likely to provide access:

- Guidance to staff
- Management information
- Public consultation
- Departmental circulars
- Information placed in the Libraries of the House
- Decisions
- Background to policy

- Speeches
- Legislation
- Procurement, grants, loans and guarantees
- Information required to be published under other legislation
- Research reports, risk and impact assessments etc

# WHAT IS IN IT FOR THE DEPARTMENT ?

- Assumption is that the more information is proactively released through a publication scheme, the less the burden will be on the Department when FOIA comes fully into force

# "PUBLISHING" THE PUBLICATION SCHEME

- Every public authority is under duty to publish its publication scheme as it sees fit - Internet websites(s)

- Method of publishing material has yet to be decided - build on existing website(s) ? Need for new websites ?

- Those without access to Internet ?

# PILOT PUBLICATION SCHEMES

- Ministry of Defence
- Department for International Development
- Health and Safety Executive
- Medicines Control Agency
- Public Record Office

# TRAINING

- Important role to play in making FOIA a success and developing a culture of more openness

- Awareness/familiarisation seminars covering publication schemes, Data Protection Act and need for good records management practices

- Options on differing levels of "training" to be put to Cabinet Office Management Board

## PUBLICATION SCHEMES: SPONSORED BY THE CABINET OFFICE

Each publication scheme should include:

**a. Title of the authority operating the scheme, a brief description of the authority's responsibilities and an explanation of the purpose and aims of the scheme.**

eg The purpose is to ensure that information is made available without the need for a specific request. The aim is to publish more information pro-actively and to develop a greater culture of openness.

Legal framework or otherwise within which the authority operates.

The job title at a senior level that contains responsibility for the scheme on behalf of the authority and (if different) the name and job title of the individual who takes responsibility for maintaining the scheme on a day-to-day basis.

**b. The "classes" of information that the authority will proactively publish or which it is intended to publish.**

List and define all "classes" of information, which is for authorities to determine, in a manner that is easily identifiable. Possibilities include:

- Explanatory material on the authority's dealings with the public and other organisations.
- Internal guidance, circulars and procedures on the running of the authority and the interaction on dealing with the public.
- Publication of the facts and analysis of the facts that are considered relevant and important in framing major policy decisions.
- Function and management of the authority:
    - mission, objections and functions;
    - organisation, including who is responsible for what function and how to make contact;
    - information about meetings of the authority, including agendas and minutes of meetings and associated papers or summaries;
    - targets, including any set for standards of service and financial performance, together with results achieved and comparable information; and
    - sources of income and how effectively money is spent.

- Public consultation documents and a summary of responses. Decisions taken in the light of consultation, including a summary of the views expressed and the reasons for rejecting options not adopted.

- Documents placed in the libraries of either Houses of Parliament.

- Keynote speeches or announcements.

- Procurement procedures and policies, including notification of bidding opportunities. Results of performance reviews and a schedule of contracts awarded. (A threshold can be set below which information would not be made available.)

- Regulatory impact assessments.

As a minimum list everything that is already made available to the public.

List any "classes" that are to be published at a later date, giving timescales and reasons for delays.

Identify any "class" that could contain information that may be subject to exemptions and give the reasons.

Provide an overview of the approach used in determining which "classes" are to be included.

**c. The manner in which the information of each class will be, or is intended to be, published.**

For each "class" provide the list of formats that will be made proactively available, eg Internet, print etc.

**d. Whether the material is, or is intended to be, available free of charge or on payment.**

Indicate whether or not a "class" includes chargeable material. (A meeting is planned with Finance and Planning Division to consider whether there is a need for a Cabinet Office charging regime and if so what that charging regime should be.)

Notes

As part of the clearance process the Information Commissioner will want the following:

- details of the due regard that has been given to the public interest in allowing access to the information held;
- examples of the due regard that has been given to the public interest in the publication of reasons for decisions made by the authority;
- details of the specific areas of interest and frequently asked questions that have been considered in determining the "classes" of information;
- details of the information that has not previously been made available or the reasons why no new information is being made available; and
- details if it is decided not to include any information that has been made available in the past.