

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

Freedom of Information Bill: second reading
briefing

2000

This briefing should be read in conjunction with the briefing of the Campaign for Freedom of Information which Liberty supports. While in this briefing Liberty concentrates on areas that are of particular interest to human rights and civil liberties, we wish to make it clear that the concerns that are being expressed by the Campaign in other areas of the bill are also of concern to us.

Background

In 1981 the Council of Europe, which is responsible for the European Convention for the Protection of Human Rights and Fundamental Freedoms, recommended to member states that they implement Freedom of Information Laws.

In 1997 the Chancellor of the Duchy of Lancaster published a White Paper (*Your Right to Know*) which was widely acclaimed as an excellent basis for a Freedom of Information Bill. The Select Committee on Public Administration issued its report on the White Paper in May 1998. It welcomed the proposals as a 'radical advance in open and accountable government' but was concerned with the interaction between data protection and the (now) Human Rights Act. It queried the exclusion of legal advice given to government and recommended that the Security and Intelligence Services should not be excluded, but should be subject to a test of public interest.

The draft bill, published by the Home Office, was a huge disappointment proposing a much more restrictive regime than had previously been promised. It still excluded the legal and policy advice given to government and a blanket exemption of the Security and Intelligence Services. The draft bill was examined again by the Public Administration Select Committee who reported in July 1999. It described the bill as having 'significant deficiencies', which if not remedied, would undermine its potential. Two key conclusions and recommendations were:

"the right of access to information should apply as broadly as possible and exemptions to it should be drawn as narrowly and precisely as possible"

"a statutory freedom of information regime should contain, as much as possible rights of access to information; not undertakings to consider the discretionary release of information;".

Although the select committee felt there was little point in giving a right of access to information held by or relating to the work of the security and intelligence services it recommended that they should be obliged to draw up publication schemes.

General principles

Whilst we welcome the rather meagre concessions made by the Home Office since the publication of the draft bill, Liberty believes that the Freedom on Information bill is still deeply flawed. It lacks a purpose clause and still relies on discretion in the release of information rather than providing clear and unequivocal rights. For this reason we feel that the bill will not serve the purposes of providing the governmental cultural change required for a truly open information regime.

Liberty believes that the intelligence services should be subject to the freedom of information legislation, particularly in relation to the production of a publications scheme, as recommended by the select committee, but they are still completely exempt.

Tests, discretion and class exemption

Tests

We are extremely concerned that the original White Paper's 'substantial harm' test has been replaced by the far weaker test of 'prejudice'. We agree with the Public Administration Select Committee that the test for disclosure in content based exemptions should be 'substantial' or 'significant' prejudice. 'Prejudice' is an altogether weaker test. This was recognised by David Clark the Chancellor of the Duchy of Lancaster, who indicated that the substantial harm test was intended to be a stringent test, analogous to the 'real damage' test of Public Interest Immunity.

Class exemption

The bill still includes wholly unjustifiable blanket exemptions for large amounts of information held by the police and other public bodies involved in investigation, apparently rejecting the recommendations of the MacPherson Inquiry against the creation of a 'class exemption' for information held by the police. In the past, courts dealing with disclosure issues have also come to the conclusion that it is inappropriate to have blanket exemptions in relation to law enforcement. They have held that while it may be appropriate to have exemptions of particular documents or records whose disclosure is damaging, that blanket exemption is wrong. We believe that the government should take this approach in relation to the bill.

Discretion

Exempt information under a harm-test, class exemption or costs exceeding the limit, can be disclosed in the public interest at the discretion of the authority involved. However, the commissioner is not able to order disclosure in the public interest, and can only make recommendations that the relevant authority can reject.

Role and function of the Information Commissioner

Liberty is concerned at the limited powers of the Information Commissioner. We feel that throughout the provisions of the bill, the final decision of whether or not a piece of information is disclosed should be the legal enforceable right of an independent Commissioner

A missed opportunity

This bill could have been used to reform the lack of information surrounding the Official Secrets Act 1989, a reform which has long been part of Labour Party Policy. In 1988 during the passage of that bill through parliament, Roy (now Lord) Hattersley said:

"It cannot be necessary or right to make every item connected with security, not matter how loosely, subject to automatic restriction. It is intolerable that the government alone should be able to define and designate the individuals who are covered by the blanket ban and the categories of work that are to be shrouded in secrecy."

Lord Irvine of Lairg as Shadow Chancellor, writing before the election about the Official Secrets Act described it as :

".. no liberalising measure. It provides no positive rights to information and no freedom of information. It fails to recognise the public interest to know of abuses by the government of its powers... The Government...rejected an amendment...that would have allowed officials to reveal really serious misconduct involving crime, fraud or other gross mispropriety. So there is no public interest defence for whistle-blowers. Newspapers could be prosecuted for disclosing an Irangate in this country."

PART 1

Insertion of a 'Purpose' Clause

The lack of a purpose clause setting out the broad context of the bill establishing the rights to open government is symptomatic of the reluctance to move to a new culture promoting a clear presumption of disclosure.

The Data Protection Registrar said *"there is nothing in the bill itself which sets it in the broader context or indicates that the bill is an instrument promoting disclosure. It does not incorporate the policy approach that openness is to be encouraged."*

Unfortunately the exceptions and qualifications provided in the Bill, actively hinder the achievement of such a change in culture, preventing this country having effective and rigorous freedom of information legislation.

None of our key criticisms of this Bill can be defended by the government on the basis that there is a need to balance to be struck between Articles 8 (right to private life) and 10 (right to freedom of expression) of the European Convention on Human Rights. We of course recognise that these articles (particularly Article 8) may limit any freedom of information proposals but we reject the Government's arguments that Article 8 prevents a wider and more inclusive freedom of information bill. Article 8 of the Convention, like the Data Protection Act 1998, protects the right to privacy. Where a public authority holds information about a private individual and a third party is seeking disclosure there will have to be a balance between these two rights. Sometimes the balance will be a difficult one and that is why the decision should be subject to an appeal to an independent body, the Commissioner.

Because of the conflict that there will be between one person's privacy and another's freedom of information we think that it is crucial that the body and individual promoting one right should be different from the person promoting the other right. This obvious conflict of purpose and aim raises real questions about the sense in making the Data Protection Commissioner also the Commissioner for Freedom of Information.

PART II - Exemptions

Clauses 21, and PART IV Clause 59 - exempt organisations

Interests of national security and public order are protected in other countries by content and interest based exemptions. Because the remit of some organisations such as National Criminal Intelligence Service and MI5 now go well beyond the national security context, they are much more likely to have an impact on individual rights and freedoms. Liberty believes that there should be a range of harm tests available instead of blanket exemptions.

Liberty is particularly concerned about the blanket exclusion of the security services from the provisions of the bill, and believes that they would, at the very least, be able to comply with the provisions of Clause 17, the production of publication schemes. While accepting the importance of national security, it is important that the maximum amount of information to be available without prejudicing the work of the security services. Why for example should information about the administration, budget and composition of the Interception of Communications Act tribunal not be known?

Class based claims of exemption were criticised by Sir Richard Scott in the Arms to Iraq inquiry, and were rejected by the previous government in the context of public interest

immunity certificates, in favour of a "serious harm" test. Under Clause 21, which lists the exempt organisations, Ministers will be able to issue a National Security Certificate saying information directly or indirectly provided by, or related to them, is exempt from the provisions of the bill. Appeals to a tribunal (under Section 59) will only be able to ascertain if the information comes from a relevant security service, and will not be able to determine the merits of whether or not the information should be released.

Clauses 22, and PART IV Clause 59 - national security

Information not covered by clause 21 that "is required for the purpose of safeguarding national security" is not subject to any harm test at all. This is a significant step backwards as, in the government's white paper it was proposed to subject such information to a "harm" test, as is generally accepted in FOI legislation in other countries. The FOI tribunal can also review certificates issued by ministers under this Clause. In this case the tribunal would be required to apply the principles of judicial review (Clause 59, 3) as to whether the Minister had reasonable grounds for issuing the certificate. Various judgements in the European Court of Human Rights have, however, criticised the adequacy of judicial review in relation to national security and ministerial certificates (*Chahal v United Kingdom* and *Tinnelly & Sons and other and McElduff and others v United Kingdom*).

Clauses 28 and 29 (police and) law enforcement exemptions

Liberty is concerned at the implications of exemptions in these two clauses. Clause 28(1) exempts information at "any time.. held", this is likely to hamper any attempt at investigating potential miscarriages of justice, irrespective of the time since the investigation. Clause 29 enters a "prejudice or likely to prejudice" test to areas of law enforcement. In his report on the Stephen Lawrence Inquiry, Sir William MacPherson of Cluny stated:

"Seeking to achieve trust and confidence through the demonstration of fairness will not in itself be sufficient. It must be accompanied by a rigorous pursuit of openness and accountability across Police Services. Essential we consider that the principle that should govern the Police Services, and indeed the criminal justice system, is that they should be accountable under all relevant legislative provisions unless a clear and specific case can be demonstrated that such accountability would be harmful to the public interest. In this context we see no justification for exemption of the Police Service from the full provisions of the Race Relations Act. Chief Officers should be vicariously liable for the actions of their officer. Similarly we consider it an important matter of principle that police services should be open to the full provisions of a Freedom of Information Act. We see no logical grounds for a class exemption for the police in any area."

He therefore recommended:

"9. that a Freedom of Information Act should apply to all areas of policing, both operational and administrative, subject only to the 'substantial harm' test for withholding disclosure.

10. That Investigating Officers' reports resulting from public complaints should not attract Public Interest Immunity as a class. They should be disclosed to complainants, subject only to the 'substantial harm' test for withholding disclosure."

Liberty endorses these recommendations and is disappointed that the Government has chosen to act contrary to recommendation 9, which arose out of a long and careful investigation into the police and police investigations.

Police immunity from blanket exemptions in police investigations, has recently been looked at by the European Court of Human Rights. The judgement in *Osman v United Kingdom*, in the context of police immunity from suit in negligence stated:

"the blanket application of the rule in this manner without further enquiry into the existence of competing public interest considerations only serves to confer a blanket immunity on the police for their acts and omissions during the investigation and suppression of crime and amounts to an unjustifiable restriction on an applicant's right to have a determination on the merits of his or her case against the police in deserving cases."

Clause 33 and 34 - Government policy exemptions

The government's proposals on policy exemption cut at the heart of the problem with the bill and confidence in it. The white paper subjected decision making and policy advice processes in government subject to a simple harm test. Clauses 33 and 34 subject it to a reasonableness test (reasonable opinion for a qualified person) on whether it would be likely to inhibit free and frank advice, exchange of views, or conduct of public affairs. We suggest that this undermines the stated intentions of the government in relation to the reasons for adopting a Freedom of Information Bill.

The white paper, prefaced by Tony Blair stated:

"The traditional culture of secrecy will only be broken down by giving people in the United Kingdom the legal right to know. The fundamental and vital change in the relationship between government and governed is at the heart of this white paper"

"1.1 Unnecessary secrecy in government leads to arrogance in governance and defective decision-making. The perception of excessive secrecy has become a corrosive influence in the decline of public confidence of government. Moreover, the climate of public opinion has changed: people expect much greater openness and accountability from government than they used to.

1.2 That is why we pledged before the election to introduce a Freedom of Information Act. The purpose of the Act will be to encourage more open and accountable government by establishing a general statutory right of access to official records and information. This White Paper sets out proposals for such legislation."

Conclusion

We believe that the government has failed to fulfil its pledges to the nation to deliver " to the people of this country for the first time, ..general statutory right of access to the

information held by public authorities"