PUBLIC LAW IN A MULTI-LAYERED CONSTITUTION

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THE EXEMPTIONS

General Points

The efficacy of an enforceable right of access to official information could be undermined if there are extensive exceptions from the general principle of openness. Exemptions are a feature of all overseas freedom of information legislation.[68] Lessons from overseas also indicate that the sharpest debates concern the exemptions. This is hardly a surprise, as it is the exceptions to the principles of freedom of information that endanger the likelihood of achieving greater transparency.

Part II of the FOIA sets out the circumstances where a public authority is under no duty to provide information. In some circumstances, an authority is entitled to refuse even to state whether or not the information is held. Exemptions to the right of access are features of all freedom of information legislation. In fact, such exempt categories largely coincide. The purpose of the exemption provisions is to balance the objective of providing access to government information against legitimate claims for protection.[69] Inevitably, a tension exists between the principle of a right to know and any claim a government is permitted to make to resist disclosure of a document or information. The scope of exemptions in freedom of information legislation and the degree of independent supervision are crucial. If the exemptions are too extensive, they make a mockery of such legislation. In effect, the efficacy of any system of freedom of information is judged by the extent of departures permitted from the general principle of access to official information.

In the White Paper, the Government proposed that 'the test for disclosure [of exempt material] under freedom of information should be based on an assessment of the harm that disclosure might cause, and the need to safeguard the public interest.'[70] In order to guarantee that decisions on disclosure would be based on a presumption of openness, the appropriate test for most categories of information should be a substantial harm test.[71] This set a high hurdle for the public authority to establish. This formulation suggested that it would be necessary to demonstrate that substantial harm would flow from the release rather than merely could do so. Only a limited number of interests were to be protected by the harm test and disclosure was to be assessed on a 'contents basis' rather than a 'class

[68] For example the FOIA in the USA has nine exemptions which protect classified national defence and foreign relations information, internal agency rules and practices, information prohibited from disclosure by another law, trade secrets and confidential business information, interagency or intra-agency communications protected by legal privileges, information covering personal privacy, information compiled for law enforcement purposes, information relating to the supervision of financial institutions and geological information. The Access to Information Act in Canada provides for 14 exemptions including information obtained in confidence, advice, protecting the economic interests of Canada, solicitor-client privilege and notice to third parties.

[69] See discussion in ALRC, above n 59, at para 8.1.

[70] White Paper, above n 8, at para 3.4.

[71] *Ibid* at para 3.7. A small category of public bodies, for example Parliament and the security services, were to be excluded from the legislation.

basis.'[72] The seven exemptions in the White Paper, in contrast to the 15 set out in the 1994 Code of Practice, were national security, defence and international relations, law enforcement, personal privacy, commercial confidentiality, the safety of the individual, the public and the environment, information supplied in confidence and decision-making and policy advice.

The FOIA departs from the White Paper suggestions on a number of important issues. In those areas dealing with a harm exemption, the Act has adopted the far weaker test of 'prejudice' or 'is likely to prejudice.'[73] The two Select Committees recommended that the appropriate test should be 'substantially prejudice' for at least some of the exemptions.[74] During parliamentary debates, the Home Secretary stated that the test referred to a probability of harm and not a possibility.[75] The same point was made in the Consultation Document (on the Bill) where it was stated that 'the prejudice must be real, actual or "of substance"'.[76] If this is the test considered appropriate, it seems a missed opportunity for the government to have failed to qualify the word prejudice by either 'serious' or 'substantial.' In contrast, the Scottish legislation has adopted the 'substantial harm' test.[77]

In stark contrast to the proposals in the White Paper, the FOIA (as well as the FOISA) introduces a key distinction between 'class' and 'harm based' exemptions. As set out in the White Paper, the harm-based exemption requires the public authority to show that disclosure of the requested information would, or would be likely to, cause prejudice to the protected interest specified in the exemption. Class-based exemptions permit all information within a particular class to be withheld, regardless of any harm. This includes information relating to security and intelligence, formulation of government policy, court records, parliamentary privilege, legal privilege, communications with Her Majesty, trade secrets, vexatious requests, costly requests, investigation and proceedings carried out by a public authority, prohibitions on disclosure because it would breach, for example, the Official Secrets Acts or lead to contempt of court and material supplied in confidence.[78]

The Act draws a further distinction between those provisions in Part II that confer an absolute exemption and those that provide for a non-absolute or qualified exemption. Where information falls within the scope of an 'absolute' exemption, it excuses the public authority from an obligation to communicate it to an applicant and the duty to confirm or deny. In contrast, where the information falls within

[72] The reference to contents and class-based exemptions is borrowing terminology from public interest immunity claims.

[73] See FOIA, ss 24, 26, 27, 28, 29, 31(2), 33, 36, 38, 43.

[74] HC 570, para 71; HL97, para 25.

[75] HC Deb, 7 December 1999, vol 340, col 717.

[76] Cm 4355, 1999 para 36.

[77] See FOISA, ss 28, 30, 32, 33, and 35.

[78] FOIA, s 23 (security and intelligence), s 35 (formulation of government policy), s 32 (court records), s 34 (parliamentary privilege), s 42 (legal privilege), s 37 (communications with Her Majesty), s 43(1) (trade secrets), s 14 (vexatious requests), s 12 costly requests, s 30 (investigation and proceedings carried out by a public authority), s 44 (breach of other statutory provision or lead to contempt of court), s 41 (material supplied in confidence). Note also class exemptions where information is accessible from another source (FOIA, s 21) and where personal information is covered by the Data Protection Act 1998 (FOIA, s 40(1)).

the scope of a qualified exemption, a public authority is required to release the information unless 'in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.' The FOIA also provides for 'public interest disclosures' for information falling under some of the class exemptions and almost all of the harm exemptions.[79] The effect of the public interest test is to deter the public authorities from automatically withholding requested information because it falls within an exemption. As a consequence, public authorities must engage in a balancing exercise to weigh up the effects of disclosure in each individual case. Access on public interest grounds is the only means to seek the disclosure of qualified class exemption information.

The public interest is not defined in the FOIA. Arguably the identifying and weighing of public interests would have been easier with a clearly stated purpose clause. Nevertheless, as section 1 of the FOIA sets out a general right of access to information, the presumption should be in favour of disclosure. Information should only be withheld if the public interest in withholding it is greater than the public interest in releasing it. It does seem, however, that the public interest test will vary in its application to harm-based and class exemptions. If an authority was seeking to withhold information under a harm-based exemption, it must identify the harm that would flow from the release of information and then show, in addition, that the specific harm outweighs the public interest in disclosure; whereas in relation to a class-based exemption, the authority could argue that the disclosure would have harmful effects but also 'that the public interest would be harmed by any disclosure from within the relevant class of documents, regardless of the consequences of releasing the actual information in question.'[80]

This chapter will now explore in greater detail the exemption provisions of most relevance to the constitutional themes of this chapter: on the one hand, promoting accountability in government and on the other, the issue of governmental transparency in the economic era of contracting out and privatisation.

Policy Advice

A highly controversial issue in most freedom of information legislation is whether decision-making and policy advice should be disclosed. Such information will be of great interest to the media, opposition MPs and pressure groups as well as individual citizens. Achieving greater transparency in government requires more of this type of information to be released but this is precisely the sort of material that most governments seek to keep confidential. Premature disclosure of policy advice could genuinely interfere with the government's ability to develop policy. Nevertheless some internal discussion could be disclosed without harm and would be

[79] FOIA, s 2.

[80] Campaign for Freedom of Information, *Briefing Notes on FOI Bill*, House of Lords ,Third Reading, 21 November 2000, 10.

consistent with the open government principle. Considered assessments of a publicly announced policy are highly unlikely to be harmful to policy development. The decision of the Government to release the minutes of the monthly meetings between the Chancellor of the Exchequer and the Governor of the Bank of England, just six weeks after the meeting had taken place, has not been detrimental to the decision-making process.[81]

Section 35 of the FOIA is a class exemption that includes virtually all information relating to the formation of government policy. More specifically, it exempts information held by government or the National Assembly of Wales if it relates to the formulation or development of policy; ministerial communications; advice or requests for advice by the law officers; or the operation of any ministerial private office. The duty to confirm or deny does not arise in relation to information falling within these categories. During the passage of the Bill through Parliament, one minor concession was made: once a decision has been taken, statistical information 'used to provide an informed background' to the formulation of government policy or which relates to 'ministerial communications' may be disclosed.[82] There is no doubt that it is impossible for governments to operate and develop policies in a goldfish bowl but the sweeping effect of these exemptions go far beyond what is necessary to achieve this aim.

The public interest test is applicable to this exemption. Section 35(4) is the only provision in the FOIA that provides some specific guidance on how the public interest balancing test should be exercised. It provides that in carrying out the balancing exercise, 'regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.'[83] This section assumes that it is feasible to distinguish between policy advice and the factual information upon which that advice is based. Indeed the 1997 White Paper had drawn this distinction and suggested that factual and background material should be made available. Even if the public interest test is understood to signal strongly that factual information should be made available in the public interest, there is no guarantee of disclosure.[84]

The policy advice exemption is further buttressed by section 36. This is another wide-ranging, harm-based exemption intended to shield the conduct of public affairs from excessive scrutiny. The breadth of this exemption is truly astonishing, especially when considered in conjunction with the section 35 class exemption that seems to cover the same ground. It exempts government information or information held by any public authority that would, or would be likely to, prejudice the maintenance of the convention of collective responsibility or inhibit (a) the free and frank provision of advice, or (b) the free and frank exchange of views

[81] Campaign for Freedom of Information, *Key Issues* (1997), 6. Compare the decision of *Burmah Oil Co v Bank of England* [1980] AC 1090.

[82] FOIA, s 35(2). The wording in FOISA, s 29(2) is the same.

[83] FOISA, s 29(3) is very similar.

[84] See M Supperstone and T Pitt-Payne, *The Freedom of Information Act 2000* (London, Butterworths, 2001), 45.

for the purposes of deliberation, or (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs. Birkinshaw aptly states that this final clause 'could [potentially] cover just about everything and is truly reminiscent of the spirit of the Official Secrets Act.'[85] The Campaign for Freedom of Information have concluded:

> There would be no right to know about purely descriptive reports of existing practice, research reports, evidence on health hazards, assumptions about wage or inflation levels used in calculating costs, studies of overseas practice, consultants' findings or supporting data showing whether official assertions are realistic or not.[86]

There are a number of problems with this clause. Who defines the scope or ambit of the convention of collective responsibility for the purposes of freedom of information? The underlying purpose of the convention is to preserve the appearance of Cabinet solidarity. If the purpose of the convention is not kept in mind it is easy to transform the convention into a general rule of 'cabinet secrecy'.[87] What if there is no disagreement among ministers? How then can collective responsibility be affected by disclosure of Cabinet discussions? Does the widespread practice of ministerial leaks undermine the unanimity principle underlying the convention?

The exemption also seeks to preserve the efficacy and frankness of Civil Service advice. After a policy decision has been made and acted upon, it is hard to justify such a broad limitation on disclosure. Civil servants fear the loss of their anonymity. Yet in order for the FOIA to achieve its aim of promoting democracy, policy advice and alternative policy proposals must be disclosed in order to foster public debate. Without this information, the new legislation is merely paying lip service to freedom of information principles. Increased transparency in decision-making could even be beneficial for governments—for example, background material could show a policy decision was made for objective reasons and not for short-term political gain. Knowledge that analysis may be exposed to outside scrutiny could even improve the quality of advice. All this material could be adequately protected by a harm test. The equivalent exemptions in the FOISA are similar but the 'substantial prejudice' test promises a more powerful right of access than in the FOIA.

The exemptions in sections 35 and 36 potentially undermine the purpose of the FOIA. It is true that information which falls within both these exemptions are subject to the public interest test. If, however, it is information held by a government department and the Commissioner orders release on the grounds of public interest, the ministerial veto could still prevent the disclosure of the information.[88]

[85] P Birkinshaw, *Freedom of Information: The Law, the Practice and the Ideal* (3rd edn, London, Butterworths, 2001), 314.

[86] Campaign for Freedom of Information, *Briefing Notes on FOI Bill*, House of Lords Committee Stage, 19 October 2000, 1.

[87] See analysis in I Eagles, M Taggart and G Liddell, above n 58, at 348 and *et seq.*

[88] See discussion below.

Investigations and Proceedings by Public Authorities

A further controversial class exemption covers information held by public authorities such as the police, prosecuting authorities and a wide range of regulatory bodies such as health and safety executive officers.[89] The purpose of the exemption is to exempt investigations relating to the conduct of legal proceedings as well as information obtained from confidential sources relating to certain investigations and proceedings. The exemption applies to information which has 'at any time been held' relating to investigations that may lead to criminal proceedings. In a response to the recommendations of the Public Administration Select Committee *Report on the Freedom of Information Draft Bill*, the Government argued that this exemption was necessary 'to preserve the judicial process and to ensure that the criminal courts remain the sole forum for determining guilt.'[90] The potential effect of this exemption is to provide protection for any evidence of wrong-doing, incompetence or default. Miscarriages of justice and reports into accidents could be shielded from scrutiny. As the Campaign for Freedom of Information commented: 'The results of safety inspection of the railways, nuclear plants and dangerous factories would be permanently exempt. This is the information that most people assume FOI legislation exists to provide.'[91] It seems that the Government has already forgotten the questions raised by the Macpherson Report into the Stephen Lawrence murder inquiry. The report proposed: '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.'[92] It is harder to justify the need for such a broad class exemption when section 31 already permits information to be withheld in circumstances where it might 'prejudice the administration of justice' or 'the prevention or detection of a crime.' This harm-based exemption should ensure that no information is released which could damage law enforcement or crime detection.

The public interest test is of considerable importance in this context as it is the only way that this type of information may be released under the FOIA.[93] Even if an authority has concluded that the information falls within the protected class, the public interest test must be considered. The Commissioner can also assess whether, in the public interest, this information should be released. As a considerable amount of this information will not be held by a government department, his or her decision will not be subject to the ministerial veto.

[89] FOIA, s 30. FOISA, s 34 is also a class exemption.

[90] Government Response to the Public Administration Select Committee on the FOI Draft Bill, 22 October 1999.

[91] *Briefing Notes on FOIA Bill*, House of Lords Committee Stage, 19 October 2000.

[92] *The Stephen Lawrence Inquiry: Report of an Inquiry by Sir W Macpherson* (Cm 4262, 1999), Recommendation 9.

[93] The public interest test is set out in FOIA, s 2.

Commercial Interests

The availability of commercial information under the FOIA is likely to be a hotly contested exemption. It is in this context that the public/private divide raises especially difficult questions. To what extent will the FOIA apply to organisations carrying out public functions or services under contract? The FOIA provides two exemptions to protect the confidentiality of commercially sensitive information. The underlying rationale of protecting commercial information is that it is an important factor in the success of the market economy.[94] According to this argument, release of sensitive information, such as tender prices, will not increase competition, rather it will irreparably damage the process and may lead to the withdrawal of parties from the process. In other words, it will ultimately render the market less competitive.[95]

There are also important public interest considerations that favour disclosure of commercially sensitive information. Information about the terms of government contracts and grants and the standards of performance of public functions contracted out to private bodies is essential to enhance accountability in government and to ensure effective oversight of public expenditure. The very opportunity for secrecy carries with it a risk of abuse. Arguably public information access considerations should not be diluted where the public is the ultimate recipient of the 'public' service, even where supplied through a private organisation.

Section 41 is designed to protect information provided in confidence. It covers information received from another body or person in confidence.[96] Information is exempt where disclosure by the public authority holding it 'would constitute a breach of confidence actionable by that or any other person.'[97] At first glance this section appears to be absolute (the section 2 public interest test does not apply) and there is no requirement to show prejudice. Section 41, however, retains the equitable action for breach of confidence which contains an inherent public interest test and perhaps a need to show detriment.

A duty of confidence may be imposed by an express or implied contractual term but it may also exist independently of any contract. Equity may intervene to restrain disclosure where confidential information comes to the knowledge of a confidant, in circumstances where he or she has knowledge, or is held to have agreed, that the information is confidential.[98] In order for a breach of confidence claim to succeed, three criteria must be satisfied, as described by Megarry J in *Coco v A.N. Clark (Engineers)*:[99]

[94] M McDonagh, 'FOI and Confidentiality of Commercial Information' [2001] *Public Law* 256.

[95] *Ibid.*

[96] Note FOIA, s 81(2). This exemption cannot be used to deny access to information exchanged between government departments unless the duty of confidence is owed to another person or body. FOISA, s 36 (confidential information) is very similar to FOIA, s 41.

[97] FOIA, s 41(1).

[98] *Attorney General v Observer Ltd and others* [1990] 1 AC 109 (the 'Spycatcher' case).

[99] [1969] RPC 41 at 47.

> First, the information itself ... must 'have the necessary quality of confidence about it.' Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.

Public authorities hold a vast amount of confidential information supplied from private bodies. This information is supplied for various reasons such as under a statutory obligation or as the result of a tender for a contract. Are public authorities exempt from the duty to disclose this information? Has the information been imparted in circumstances importing an obligation of confidence? This aspect of the confidentiality test has evolved significantly in recent years, largely due to the influence of Article 8 of the European Convention on Human Rights. In particular, there is no need to construct an artificial relationship of confidentiality: the obligation will arise whenever the party subject to the duty knows or ought to know that the other person can reasonably expect his privacy to be protected.[100] These developments suggest that the exemption in section 41 is very broad and would apply to any information that is inherently confidential.[101]

Special considerations arise where the party seeking to rely upon breach of confidence is the Crown, since the justification for private citizens—that the protection of their private lives is inherently worthy of protection—cannot apply, and so the burden of proof is placed upon the Crown to show that the protection of a confidential relationship would be in the public interest.[102] Thus any public authority seeking to rely on the confidentiality doctrine would have to satisfy this additional test. As a consequence the scope of the exemption is more limited in circumstances where information has been obtained by a public authority in confidence from another public authority.

Although section 41 is not subject to the section 2 public interest test, the courts will not enforce an obligation of confidence if it would be contrary to the public interest. [103] What is unclear is whether this public interest test is the same as the one under the FOIA. During parliamentary debates, it was considered that the public interest test in an action for breach of confidence was more limited than the public interest test in the FOIA.[104] The section 2 public interest test starts with the presumption that the public have a right to access information. The public interest test in the law of confidentiality appears to be narrower and, the court has held,

[100] *Douglas v Hello!* [2001] QB 967 and *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109.

[101] See the discussion in J Wadham, J Griffiths and B Rigby, *Blackstone's Guide to the Freedom of Information Act 2000* (London, Blackstone Press, 2001), 82–84.

[102] *Guardian (No 2)*, above n 100, at 256 and 283. Lord Griffiths regarded this as equivalent to a requirement that the Crown must show that detriment to the public interest is required. It remains unclear whether detriment to the party to whom the duty is owed is necessary (whilst Rose J in *X v Y* [1988] 2 All ER 648 at 657 and Simon Brown LJ in *R v Department of Health, ex parte Source Informatics* [2001] QB 424 suggested that there is no such requirement, Lightman J in *Campbell v MGN* [2002] EWHC 328 (Ch) unreported at 40 and Lord Keith and Lord Griffiths in *Guardian (No 2)* at 255 and 270 suggested that this was required, but that the criterion was fulfilled very easily).

[103] See eg *Gartside v Outram* (1856) 26 LJ Ch 113 and *Lion Laboratories v Evans* [1985] QB 526

[104] HL Deb, 25 October 2000, vol 618, cols 413–419.

does not include everything that the public is interested in.[105] In those circumstances where the defence of iniquity is relied upon, the court will consider whether more limited disclosure, for example to the police, would suffice to satisfy the public interest.[106] Although there are differences between the two tests, it seems likely and preferable that the underlying principles of FOIA and the Human Rights Act 1998 will influence the future development of the breach of confidence public interest test.[107] In Ireland, which has a similar exemption in their freedom of information legislation, the Information Commissioner has applied the same public interest considerations to the action for breach of confidence as are relevant to balancing the public interest test under the statute.[108]

There is a danger, when entering into contracts, that public authorities implicitly accept obligations of confidence or are pressured into confidentiality agreements by private companies or organisations. Pursuant to section 45, the Lord Chancellor is required to issue a Code of Practice providing guidance to public authorities on administrative matters concerned with the discharge of their functions under the legislation. The Code, still in draft form, requires public authorities to refuse to accept unjustified obligations of confidentiality, 'so that information relating to the terms of the contract, its value and performance will be exempt from disclosure unless this is commercially unavoidable.'[109] It goes on to state that the acceptance of such confidentiality must be for good reasons and capable of being justified to the Commissioner. The only guidance for public authorities on public sector contracts is set out in the Code of Practice. The consequences of a breach of the Code are not set out in the FOIA. The Commissioner will not be able to enforce compliance if a public authority fails to adhere to the Code. Robert Hazell observes that relegating key elements to codes of practice is a negative signal to public servants: 'Even if the legal effect is essentially the same, the political effect is different. Civil servants are very astute in reading political messages.'[110]

In order to avoid any 'implicit' acceptance of obligations of confidence, it would be preferable for public authorities to inform all parties in advance of what sort of information will be disclosed. The National Consumer Council suggests that public authorities should not give undertakings that they will accept information in confidence unless there are compelling reasons to do so. They suggest that if confidentiality is accepted then it should be explicit, in writing and expressed with a date for expiry or review.[111] This last clause is important as commercial sensitivity

[105] *Lion Laboratories v Evan* 1985] QB 526, 537.

[106] *Francome v MGN* [1984] 1 WLR 892, 898 and *Guardian (No 2)* above, n 100.

[107] Note also, Human Rights Act 1998 s 12. In order to obtain injunctive relief to prevent a public authority from releasing confidential information, a strong case on the merits at the injunction application stage would have to be shown. See *A v B Plc* [2002] 3 WLR 542 and *Douglas v Hello!* [2001] QB 967.

[108] *Re McAleer and Sunday Times and Department of Justice, Equality and Law Reform*, Information Commissioner, unreported, Decision No 98158, 16 June 2000 cited in McDonagh, above n 94, at 261.

[109] Draft Code of Practice on the Discharge of the Functions of Public Authorities under Part 1 of the Freedom of Information Act 2000 ('Code of practice under s 45').

[110] R Hazell, *Commentary on Draft Freedom of Information Bill* (Constitution Unit, 1999), 23.

[111] National Consumer Council, *Guidance on the Release of Commercially Sensitive Information by Public Authorities* (London, 2001), 5.

may decline over time. There is widespread agreement that marking documents 'confidential' should not be sufficient. The Irish Information Commissioner has recently considered the equivalent confidentiality provision in the Irish Freedom of Information Act. In considering whether prices relating to a tender competition for the supply of army trucks were given in confidence, the Commissioner concluded that there must be a mutual understanding between the parties. He added:

> Indeed, one would have to question, having regard to the coming into force of the Freedom of Information Act, how any public body could have an understanding that the details of its expenditure of public money would be kept confidential.[112]

Commercial information is also protected by the exemption in section 43. It provides that a public authority is exempt from the duty to communicate information where information 'constitutes a trade secret' or where disclosure 'would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).' Trade secret is not defined in the FOIA. There is no generally accepted definition in English law. The House of Lords Select Committee defined it as 'information of commercial value which is protected by the law of confidence.'[113] In any event, the sweeping scope of the phrase 'likely to prejudice the commercial interests of any person' will include a trade secret whatever definition is accepted. In fact, the breadth of sections 41 and 43 suggests that there is very little commercial information that will not fall within one of these exemptions. Relying on section 43(2), public authorities could even refuse to disclose information as it is 'likely to prejudice commercial interests' of the public authority itself. The standard of proof may be relatively easy to satisfy. Some commentators have concluded: 'The potential for self-serving reliance upon the exemption in such circumstances is clearly great; particularly where so many public authorities are increasingly involved in commercial ventures.'[114]

Both trade secrets,[115] a class exemption, and commercial interests,[116] a harm-based one, are subject to the overriding public interest test in section 2.[117] The capacity of the FOIA to deliver greater transparency in the commercial dealings of public authorities may depend to a considerable extent on robust decisions of the Information Commissioner. The Campaign for Freedom of Information expressed concern that this provision would prevent disclosure of information such as poor safety records or the sale of dangerous goods.[118] Although information of this kind would fall under the exemption, the public interest override

[112] *Henry Ford & Sons Ltd, Nissan Ireland and Motor Distributors Ltd and the Office of Public Works*, Information Commissioner, unreported, Decision No 98058, 16 June 2000.

[113] *Report from the Select Committee appointed to consider the Draft Freedom of Information Bill*, 27 July 1998, para 45. Note also judicial interpretations of the term in *Faccenda Chicken v Fowler* [1987] 1 Ch 117 (per Neill LJ) and *Lansing Linde v Kerr* [1991] 1 WLR 251.

[114] J Wadham *et al*, above n 101, at 107.

[115] FOIA, s 43(1).

[116] FOIA, s 43(2).

[117] FOISA, s 33 has a similar structure but the relevant harm test must satisfy the higher threshold of 'prejudice substantially'.

[118] Campaign for Freedom of Information *Bill Briefing Notes on FOIA* House of Lords Committee Stage, 19 October 2000, 1.

should ensure that this type of information is disclosed. Nevertheless, it would have been preferable for section 43 to be limited to protecting information that could result in serious commercial disadvantage.[119]

Disclosure through the public interest test provides the only opportunity for access to an enormous amount of information held by public authorities, especially information falling within many of the class exemptions.[120] Where harm-based exemptions are involved, information whose disclosure could lead to prejudice might still be disclosed on the grounds of overriding public interest. As a consequence, public authorities must engage in a balancing exercise to weigh up the effects of disclosure in each individual case. The test requires evidence that the public interest in maintaining the exemption in question is greater than the public interest in releasing it. The public interest test strengthens both the oversight and the instrumental role played by the FOIA. In this sense, it is a mechanism for improving public authority decision-making.

Some of the key factors that should be taken into account when considering the release of commercially sensitive information by public authorities have been suggested by the National Consumer Council. They conclude that 'public interest' in this context should include:

(1) the need to ensure that the expenditure of public funds is subjected to effective oversight, in particular so that the public obtain value for money and to avoid fraud, corruption and the waste or misuse of public funds;
(2) the need to keep the public adequately informed about the existence of any danger to public health or safety or to the environment;
(3) the need to ensure that any statutory authority with regulatory responsibility for a third party is adequately discharging its function.[121]

The Irish Information Commissioner has considered similar issues in determining whether information that fell within the scope of the commercial information exemption should be released in the public interest.[122] An additional factor that he considered was the public interest in requesters exercising their rights under the Irish legislation. In effect, he was confirming the democratic rights underpinning the legislation.

At the very least, it would seem prudent for public authorities contracting with private bodies to carry out a public function to ensure that appropriate arrangements are made to supply public information access rights. The Australian Law Reform Commission has recommended that the Freedom of Information Commissioner should provide guidance to authorities on what arrangements are advisable in particular contacting out situations. In addition, the Commission suggests that the Commissioner should monitor contracting out agreements and

[119] McDonagh, above n 94, at 263.

[120] Security and intelligence (FOIA, s 23) is an important exemption not subject to the public interest test.

[121] National Consumer Council, above n 111, at 17.

[122] *Henry Ford & Sons Ltd and the Office of Public Works*, above n 112, at 18–19. See also McDonagh, above n 94, at 264–66.

report on whether satisfactory arrangements are being made in relation to the accessibility of relevant information.[123]

THE INFORMATION COMMISSIONER AND INDEPENDENT SCRUTINY

An effective and independent system of enforcement of the public right to access is essential if a freedom of information system is to operate effectively. The Information Commissioner is given a prominent place under the FOIA. The critical factor is the Commissioner's powers of independent scrutiny and enforcement. Without this feature in a freedom of information system, there will be minimal public confidence in its operation. The Commissioner is given the power to substitute his or her judgment for that of a public authority in relation to whether information falls within an exemption as well as the public interest balance. The most important power of the Commissioner is the enforcement notice which 'requir[es] the authority to take, within such time as may be specified in the notice, such steps as may be so specified for complying with those requirements.'[124] If a public authority fails to comply with the notice, the FOIA provides that the Commissioner may certify this failure to the High Court, which may deal with the authority as if it had committed a contempt of court.[125] There are also provisions for appeal to the Information Tribunal.[126]

Although the Commissioner has the power to order the disclosure of nearly all information on public interest grounds, such a decision could be overridden by a ministerial veto.[127] This veto will be exercised by an 'accountable person', usually a Minister of the Crown who is a member of the Cabinet.[128] This feature of the legislation has the potential to undermine the operation of the public interest override and the independent scrutiny of the freedom of information operation. The existence and scope of the ministerial override strikes at the heart of freedom of information legislation as it maintains ministerial control over disclosure. The fear is that this power could be abused to protect ministers and public authorities from embarrassment. Even if an authority has been negligent or complacent, it may avoid scrutiny. The only remaining option would be to seek judicial review. The ministerial veto power is a critical weakness at the heart of the legislation.

[123] Australian Law Reform Commission, *Open Government: A Review of the Federal Freedom of Information Act 1982* (Canberra, 1995), 202.

[124] FOIA, s 52(1).

[125] FOIA, s 52(2).

[126] FOIA, s 57. There is no equivalent tribunal in Scotland.

[127] FOIA, s 53 applies to decision or enforcement notices served on public authorities by the Information Commissioner relating to a failure on the part of the authority to comply with the duty to communicate information. The minister is given the power to issue a certificate to the Commissioner stating that he has formed the opinion that there was no such failure. Where the minister issues such a certificate, the Commissioner's notice will cease to have effect.

[128] FOIA, s 53(8).

CONCLUSION

It is difficult to predict with any certainty the impact of the new freedom of information legislation in the United Kingdom. Some of the problems outlined above suggest that it may not ensure that the culture and practices of secrecy in government and other public authorities are set aside for good. The right of access is eroded by the wide exemptions, especially in the areas of policy advice, information from investigations and commercial information. The public interest test provides the only opportunity to access a considerable amount of exempt material but the existence of a ministerial veto makes it possible to conceal harmless information. This feature of the FOIA will encourage judicial review applications. A strong commitment to openness would give the independent Information Commissioner a public interest override and the power to order disclosure with few exceptions. The new legislation hardly signifies a new relationship between the state and its citizens.

Yet even with its limitations on rights of access, it is likely that the FOIA will improve the accountability of government to some extent. Decision-makers will be acutely aware that their decisions must be based on relevant factors. The reaction of those at the 'coal face' who are responsible for implementing the new legislation is also crucial. A successful education programme stressing the democratic underpinnings of freedom of information is one way of attempting to change the culture of secrecy that has characterised governance in the United Kingdom. Changing the attitude of those who are responsible for making freedom of information decisions may be one of the most important factors in determining the success or failure of this legislation. Access to information must be perceived not as a threat but as an opportunity for government and public authorities as well as citizens.

In sum, freedom of information holds out the promise of a new constitutional arrangement but this legislation contains devices ensuring that secrecy can be maintained by a government or public authority determined to do so. The doctrine of ministerial responsibility remains at the centre of the FOIA through the operation of the ministerial veto, yet this convention can still operate as an effective cloak for secrecy. This constitutional reform, with its object of democratic renewal, may not have gone far enough. The deeper constitutional structures that maintain the culture of secrecy have not been disrupted, even if, as a result of the more generous freedom of information regime which exists in Scotland, the overall provision for freedom of information now reflects the differential structure of the British constitution. In consequence, there will be some increased oversight and accountability as a result of this new legislation but it could prove to be more cosmetic than a fundamental constitutional reform.

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Accountability and the Public/Private Distinction

PETER CANE

INTRODUCTION

THERE IS A paradox in legal thinking about the organisation of social life and, in particular, about the relationship between 'the governors and the governed.'[1] On the one hand, the public/private distinction seems alive and well. The 1977 reforms of judicial review procedure (originally found in RSC Order 53 and now in CPR Part 54) are still firmly in place, and there is now a specialist Administrative Court in England. These changes are widely considered to have precipitated the introduction of the public/private distinction into English administrative law and to have marked the end of its long love affair with Dicey, who famously rejected the distinction. The distinctions between public and private bodies and public and private functions have an important place in EC law (where, for instance, directives have direct effect only against organs of the state) and in the provisions of enactments such as the Public Supply Contracts Regulations 1995, SI 1995/201, the Human Rights Act (HRA) 1998 and the Freedom of Information Act 2000. English courts are disinclined to apply the (private) law of tort in unmodified form to organs of government. In the USA, the public/private distinction is deeply entrenched in the jurisprudence of the US Supreme Court, where the 'state action' doctrine marks the boundary of application of the Bill of Rights.[2] The picture is similar in Australia where, for instance, the Administrative Appeals Tribunal exercises statutory jurisdiction to review decision-making by government officers and bodies; and where judicial review, under the Commonwealth Administrative Decisions (Judicial Review) (ADJR) Act 1977, is available only in respect of 'decisions of an administrative character made under an enactment.'

[1] To adopt a somewhat question-begging but not unhelpful phrase.

[2] J Freeman, 'The Private Role in Public Governance' (2000) 75 *New York ULR* 543, 575–80; D Barak-Erez, 'A State Action Doctrine for an Age of Privatization' (1995) 45 *Syracuse LR* 1169. For a recent contribution to the parallel Canadian debate on the reach of the Charter, see A Reichman, 'A Charter-Free Domain: In Defence of *Dolphin Delivery*' (2002) 35 *UBCLR* 329.

On the other hand, by contrast, there is a common view amongst scholars that as a means of understanding and analysing social life, the public/private distinction is outmoded as a result of the 'revolutions' popularly and compendiously referred to by terms such as 'Thatcherism,' 'Reaganism,' 'the new public management' (NPM) and 'the regulatory state.' According to stronger versions of this view, what has happened is not just that relations between the public and private spheres have become more complex and multi-faceted in the wake of 'privatisation' of 'public' utilities, contracting-out of the provision of 'public' services, joint 'public/private' infrastructural projects (under the Private Finance Initiative (PFI), for instance),[3] corporatisation of government business enterprises,[4] creation of administrative ('Next Steps') agencies and 'internal markets' (most notably within the NHS), and a wide variety of 'responsive' alternatives to traditional command-and-control regulation.[5] Rather, the two spheres have become inextricably interwoven in a process better analogised to the scrambling of an egg than to the weaving of a two-stranded rope.

There are at least three different lines of criticism of the public/private distinction to be found in the legal literature. One is that the distinction is descriptively inaccurate, or at least unhelpful, as a way of explaining legal and social structures and institutions. A second criticism is that scholars who think about control of and accountability for the exercise of power in terms of the public/private distinction tend to focus on formal and hierarchical avenues of accountability and control, such as judicial and parliamentary supervision, at the expense of other less formal and non-hierarchical mechanisms. A third strand of criticism of the public/private distinction is more explicitly normative. It says that legal procedures and rules of legal liability and accountability should not distinguish between governor and governed, public bodies and private bodies, public functions and private functions, because all subjects of the law, whether they be individual citizens, commercial corporations, government agencies, or whatever, should be equal before the law.

That, then, is the paradox: public/private is dead. Long live public/private! How can this legal schizophrenia be explained? One possibility might be to say that to the extent that the law is built on a public/private distinction, it is simply out of step with (or lagging behind) political developments. It might be argued, for instance, that measures such as the Australian ADJR Act are products of a past era that should be scrapped and replaced with something more consonant with the way the world works.[6] However satisfying such a response might be in the case of a piece of legislation that predated the neo-liberal revolution of the 1980s and 1990s and is now about 25 years old, it hardly seems adequate to explain, for instance, the struc-

[3] M Freedland, 'Public Law and Private Finance: Placing the Private Finance Initiative in a Public Law Frame' [1998] *PL* 288.

[4] M Allars, 'Private Law but Public Power: Removing Administrative Law Review from Government Business Enterprises' (1995) 6 *Public Law Review* 44. For a discussion of many of these various phenomena from an American perspective see J Freeman, above n 2.

[5] N Gunningham and P Grabosky, *Smart Regulation* (Oxford University Press, 1998), ch 2.

[6] This is Dawn Oliver's view about judicial review procedure: D Oliver, 'Public Law Remedies and Procedures: Do We Need Them?' [2002] *PL* 91.