NORTHERN IRELAND HUMAN RIGHTS COMMISSION

RESPONSE TO THE DRAFT FREEDOM OF INFORMATION BILL, 1999

To the Select Committee on Public Administration &
The Freedom of Information Unit, Home Office

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NORTHERN IRELAND HUMAN RIGHTS COMMISSION
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DRAFT FREEDOM OF INFORMATION BILL 1999

The Northern Ireland Human Rights Commission welcomes the publication of the Draft Freedom of Information Bill as a step towards achieving greater openness in government and a more participatory democracy. The Commission believes that effective access to government-held information and the ability to participate in the democratic process are essential for the full realisation of the fundamental rights of every person.

The Commission also commends the government for first publishing the Bill in draft form to encourage greater public participation in the legislative process, and hopes that this will be a practice that will be consistently used in drafting legislation on matters of public concern.

The Commission is, however, greatly concerned about the content of the Draft Bill, and in particular about the government's departure from its position in the White Paper on freedom of information. Whereas the White Paper represented a progressive and positive approach to access to government-held information, the current draft contains provisions that provide worse protection for citizens than even the current non-statutory Openness Code.[1] It is regrettable that this Draft Bill is not, in fact, '*a radical measure*' containing '*clear and robust access rights*' as proclaimed in the commentary to the Draft Bill.

Effective legislative entrenchment of open government is not only necessary for the effective functioning of the Commission as a human rights watchdog in Northern Ireland, but also for the rebuilding of the trust between the people of the region and its government – both locally and nationally. The Commission therefore hopes that its concerns in this regard will be considered in the re-drafting of the Bill in its further legislative stages.

PART I

1. The Commission welcomes the introduction of the **duty on all public authorities to provide publication schemes** that will be approved by the Information Commissioner.[2] It believes that this is an important provision to encourage the establishment of a culture of openness in government and a pro-active dissemination of information in the public interest.

2. The Commission furthermore strongly supports the establishment of a **general right to access to information**,[3] and believes that this will greatly encourage the establishment of a rights-based culture in public affairs.

3. The Commission is, however, concerned about those provisions in Part I of the Bill that regulate the **discretionary disclosure of exempt information**. Whereas the requirement that this discretion be exercised in the public interest is

[1] The Code of Practice on Access to Government Information 1994
[2] Clause 6
[3] Clause 8

commendable, the provision that the public authority may then place any manner of **restriction on the use or the disclosure of the information** seems problematic.[4] If it is indeed in the public interest to divulge the information in question, it should in principle be allowed, without the possibility of a gagging order restricting further use of the information.

4. The proposed **time limit of forty days** for response to information requests[5] furthermore represents an unhappy departure from the current position. The Open Government Code provides for a deadline of twenty days which not only seems workable, but which is far more responsive than the proposed forty days. The Commission is aware of the fact that the Data Protection Act 1984 also provides for a forty-day time limit for personal data requests[6] and proposes that this too should be standardised to twenty days for greater consistency.

PART II

The Commission proposes that the following amendments to Part II of the Bill will be necessary to ensure effective access to information in the public interest:

1. **The re-introduction of the 'substantial harm' test** as proposed in the White Paper, instead of the toothless 'likely prejudice' test currently in the Draft Bill. This test should be applicable to *all* proposed exemptions, with possible exception of the personal health exemption in clause 30, for which the 'likely endangerment' test seems appropriate. The consistent application of the substantial harm test throughout all the proposed amendments would not imply, as suggested in the commentary to the Draft Bill[7], that the test could not be interpreted flexibly in the context of each relevant provision. A proper harm test would still require that the circumstances of each case would have to be considered in determining whether the harm that would follow from publication is, in fact, substantial.

   Some categories of information for which a substantial harm test would be particularly suited include:
   - Information regarding national defence[8]
   - Information relating to international relations and UK interests abroad[9]
   - Information that affects relationships within the UK[10]
   - Information that affects the national economic or financial interests[11]
   - Law enforcement information[12]
   - Information that could affect the commercial interests of another person [13]

[4] Clause 14(6)
[5] Clause 10
[6] Section 21(6)
[7] §35 of the Commentary to the Draft Bill in the Home Office Consultation Document
[8] Clause 21
[9] Clause 22
[10] Clause 23
[11] Clause 24
[12] Clause 26
[13] Clause 34(2)

2. **The scrapping of all class exemptions and the consistent use of only exemptions based on the subject matter of the information.**

   The Commission recognises that there are instances in which it would be legitimate for government to withhold information from the public. All such instances would, however, require a careful consideration of the public interest in each case. Exemption would, furthermore, only be justifiable if the *subject matter* of the information necessitates its secrecy. No public authority should be granted blanket exemption regardless of the content of the requested information or the potential harm that its release could cause. The current draft of the Bill proposes that the following classes of information should be excluded regardless of harm:

   - Ministerial communications[14]
   - Information related to the work of private ministerial offices[15]
   - Law officers' advice
   - Court records[16]
   - The security services [17]and
   - Communications with the Royal Household[18]

   This proposed approach to exempting information is unhelpful as it does not encourage a balancing of interests, and undermines the principle that information should be disclosed *unless* the public authority can demonstrate that its disclosure would cause harm.

   These blanket exclusions should be removed from the Bill, and the substantial harm test should be applied in all cases, as mentioned in §1 above.

3. **The Bill should contain a general public interest override**. The public interest is the guiding principle for access to information, and indeed for exemptions to public access. It seems clear, therefore, that the ultimate test of whether access should be allowed should not lie in the mechanical application of a check-list, but that an applicant should always, in the last instance, be able to argue that, in spite of applicable grounds of exemption, the public interest should require the release of information. The old Openness Code seemed to recognise this approach by stating:

   > *'In those categories which refer to harm or prejudice, the presumption remains that information should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in making the information available.*

4. **The exemption of information regarding investigations should be radically restructured**.[19] The above-mentioned proposal regarding the introduction of a general public interest override is particularly relevant in this instance. Access to information should be allowed in cases where the information in question is related to a investigation and where it would be in the public interest to disclose. Of course, these provisions should in all cases be subject to the fair trial and

[14] Clause 28(1)b
[15] Clause 28(1)d
[16] Clause 28(1)c
[17] Clause 18
[18] Clause 29
[19] Clause 25

private life provisions in the European Convention on Human Rights.[20]

In this light, clause 25(2)(a)(I), which allows for the exemption of all information regarding the investigation of *'any improper conduct,'* is unacceptable, as it could permit the exemption of information that falls well within the public's right to know.

All information relating to the investigation of the causes of accidents, as well as investigation aimed at securing the health, safety and welfare of people in and outside the workplace, should be freely available to the public.

5. The Commission is particularly concerned about the provisions in the Draft Bill regarding information related to the **formulation of government policy**.[21] In order to increase public participation in a modern and democratic government, it is essential to ensure greater access to the processes in terms of which policy is made. The current proposals do not facilitate such participation. Instead, they place new hurdles in the way of those members of civil society wishing to contribute to the legislative process. It further proposes to exclude all policy information regardless of the absence of possible harm or the public interest in releasing the information.

   The work of the Northern Ireland Human Rights Commission itself is centred around its obligation to advise the government in Northern Ireland on the human rights implications of legislation and policies[22] as well as to review the adequacy and effectiveness of law and practice in Northern Ireland relating to the protection of human rights[23]. It would be essential for the effective fulfilment of this statutory duty to have access to the advice and background information on which the government bases its decisions affecting human rights in the region.
   The Commission is further concerned with the duty of Ministers to certify that proposed legislation is compatible with the Human Rights Act 1998[24]. In order for participants in the legislative process to be able to challenge these statements of certification, and for these statements to amount to more than a mere process of rubberstamping, it would be essential to allow access to the advice on which such declarations are made.

   The Draft White Paper seems to be a departure from the position on the policy process contained in the White Paper, which determined in §3.12:

   > *'We propose that decision on disclosure of policy advice be made against a test of simple harm. Unlike previous UK administrations we are prepared to expose government information at all levels to Freedom of Information legislation.'*

   The Commission hopes that the government will not depart from their original commitment, and that both a harm test and a public interest override will be included in the provisions governing access to policy information.

   Ireland's Freedom of Information Act of 1997 provides a good example of a progressive, but workable approach to access to policy information. According to

[20] Articles 6 and 8
[21] Clause 28
[22] Section 69(3) of the Northern Ireland Act 1998
[23] Section 69(1) of the Act
[24] Section 19 of the Act

the Act[25], policy advice may only be withheld if disclosure is shown to be contrary to the public interest. Only matters that

- are related to the 'deliberative process' of the authority *and*
- the disclosure of which would be contrary to the public interest

are exempt under the Irish approach. The Act furthermore excludes a list of information that is not included under the exemption:

- factual and statistical material and its analysis
- scientific and technical advice
- internal rules and guidelines used in taking decisions that affect individuals
- reasons for a decision of a public authority
- reports dealing with the effectiveness of a public authority.

The Commission proposes that this approach is far more grounded in the public interest and in the interest of democracy than the current position on policy information in the Draft Bill.

6. The creation of a legislative escape route via clause 36 of the Draft Bill, whereby **additional exemptions can be included through *ex post facto* orders,** seems to go against the principle of legal certainty and undermines the government's own aim of establishing *'clear and robust access rights*'. The essence of open government requires that it should be decided *in principle* what the categories of information are to which the public should be allowed free access, and that this should be adhered to, regardless of whether the administration at the time finds this agreeable. To allow a government to change the rules of access even after a request has been made will not encourage accountability in government and will not engender the public's faith in those processes that affect their lives.

7. **The catchall exemption clauses in the Draft Bill should be removed.** Clauses 19(3) and 37 contain over-broad exemptions that would make it possible to refuse the release of completely 'innocent' information on ground that it could, in combination with other unreleased information, have the effect that it would fall under one of the other exemptions. These wide exemptions are open for abuse, do not encourage effective access to information and should be scrapped.

8. All references to the disapplication of the duty on public authorities to confirm or deny whether they hold specific information should be removed from the Draft Bill. It is essential for applicants to know whether a certain authority holds the information they require in order to decide what further legal remedies to explore in the exercise of their rights.

9. The Commission is furthermore concerned about the exemption of **information that the public authority plans to publish at a future indeterminate date**[26], as this provision may not address the information needs of applicants.

PART III

[25] Section 20(1) of the Act
[26] Clause 17

The Commission believes that it would be beneficial to include an **enforceable duty on public authorities to provide advice** to those persons seeking to exercise their right to access to information in the legislation itself and not in the code of practice to be issued by the Secretary of State.[27]

PART IV

The current version of the Draft Bill determines that the **Information Commissioner may not require the public authority to disclose particular information**,[28] but may only send the decision back for reconsideration. This provision, which is another departure from the White Paper, not only weakens the position of the Commissioner, but dilutes the requirement that the public interest should be considered in reaching a decision. It should be possible for the Commissioner, as it is for the Parliamentary Ombudsman at the moment, to require that information be released in the public interest[29].

[27] Clause 38(2)
[28] Clause 45(2)
[29] The Openness Code, Part II, Reasons for Confidentiality