Open Government is Good Government

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1. It is a genuine pleasure and honour to be invited to deliver my first lecture as a Visiting Professor at Northumbria University. The Law School here has been at the forefront of developments in the field of Information Rights. The Masters programme in Information Rights Law is turning into a resounding success and I am proud to have this association with it.

Introduction

2. In less than three years, Freedom of Information has become a very real part of the fabric of public life in the United Kingdom. With well over 200,000 requests – most from individual citizens - it has struck a chord. Most public bodies have adopted a positive response, embracing the central theme that the public has a right to know what is going on unless there is good reason for secrecy. Much information has been released proactively and most requests are granted. Scarcely a day goes by when there is not a newspaper story along the lines “Information disclosed under the Freedom of Information Act reveals that….” An astonishingly wide range of information has in fact been disclosed stretching from matters of national controversy to those of purely local or technical interest. One real surprise has been how much information was previously kept secret for no obviously good reason.

3. Prophets of doom at both ends of the spectrum were wrong. The law has not been a damp squib, nor has good government proved to be incompatible with transparency. Indeed I intend to demonstrate this evening that it is

increasingly recognised that **open government is good government**.

Progress

4. None of this is to say that implementation has been easy or that there have been no challenges or problems. Generally, and on the detail of many cases, there has been a steep learning curve for everyone. With very limited resources (a grand total of just £4.7 million), however, my office has closed over 5000 complaints, with over 650 formal decision notices. In 2006-7, 39% upheld the complaint and another 35% required some information to be disclosed. The remaining 26% upheld the public authority's rejection of a request. I welcome the wide respect which seems to exist for our decisions, many of which run to many pages of complex and controversial argument. The Information Tribunal is able to provide more detailed analysis on the appeals (a small proportion of the overall total) which it receives from both requesters and public authorities.

5. The types of information disclosed is wide-ranging, as shown by a few examples:

    - toxic waste
    - speed cameras
    - MPs' expenses
    - local authority pension investments
    - Ryanair's airport contract
    - reviews of ID cards
    - airport noise data
    - 1911 Census
    - location of prostitution zones
    - ministerial advice on angling
    - implications of dividend taxation for pension funds.

6. Many examples relate to the spending of public money:

    - Wells Report into the NHS University

- highest paid barristers in legal aid
- university investments in arms companies
- road damage compensation claims
- cost of police merger plans
- police spending on hire vehicles
- councils' spending on agency and temporary staff
- CSA Computer system costs

7. Examples of non-disclosure are just as important:

- deceased patients' records
- details of compensation payments made to residents of a specific road
- Jeremy Thorpe trial investigation files
- dispute between FCO and the Foreign Press Association
- vexatious requests to Birmingham City Council
- commercially sensitive information held by the Post Office
- location of speed cameras

The benefits of openness

8. It is very gratifying that public attitudes towards the benefits of open government have shown dramatic improvements over the last three years. ICO research shows a clear shift from around 50% who saw the specific benefits in 2004 to well over 70% in 2006.

	2004	**2006**
Increases knowledge of what public authorities do	54%	76%
Promotes accountability and transparency in public authorities	53%	74%
Increases confidence in	51%	72%

public authorities		
Provides more opportunities to have a say and contribute	49%	72%
Increases trust in public authorities	51%	69%

9. If the public at large increasingly see the benefits of greater openness, let me now turn to reflect on some of the deeper constitutional, legal, political and administrative considerations which point to the conclusion that open government is indeed good government. There may be a presumption of disclosure, but freedom of information is largely about the possible application of specific exemptions and the weighing of competing public interests. It is inevitable that the boundary lines are still being drawn.

10. I start with the constitutional as it is increasingly recognized that the Freedom of Information reforms can and should be seen as part of the new constitutional settlement which – however fragmented – has been adopted over the past ten years and which continues to develop. It is not an extravagant claim that FoI can now be seen as a defining feature of 21st century democracy – a reminder that democratic governments serve the people who elect them (not the other way round) and that decisions are made for, and on behalf of, citizens whose taxes provide most of the financial resources spent at every level of government and the wider public sector.

11. FoI can thus be seen as an instrument which inhibits an over-bearing, secretive state where politicians – or the "man in Whitehall or in the Town Hall" - know best and people only get told what is going on as a grudging concession or as part of a spin exercise, rather than as an enforceable right. The benefits for citizens go wider. Fundamentally, openness promotes accountability and improves understanding of

policies, decisions and actions. So-called “sunshine government” deters the waste, inefficiencies, maladministration, impropriety, or worse that can so easily occur behind closed doors. As Justice Louis Brandeis famously observed more than 70 years ago: ‘Sunlight is the best disinfectant.’

12. Another American – John Adams, the 2nd President of the United States – went further when he said *“Liberty cannot be preserved without a general knowledge among the people, who have a right….and a desire to know.”* Certainly greater access to information reduces distrust and undermines the scepticism which leads to the attitude that “they must have something to hide” whenever unnecessary secrecy is invoked. In this way, increased openness has a part to play in addressing the widespread political apathy which troubles so many across all parts of the political divide.

13. Of course FoI can be uncomfortable. Last year, as it began to find its feet, I conceded that it could be a troublesome toddler. Sometimes embarrassing or inconvenient information will be disclosed. But this moves us away from the quaint idea that governing is always consistent, straightforward and certain. Well-educated citizens are entitled to be treated as adults who are perfectly aware that government is not always easy and that hard decisions often have to be made in the face of complex and conflicting circumstances and advice. There was perhaps some embarrassment for the then Chancellor of the Exchequer when he was required to publish advice received some 10 years earlier in connection with his decision to abolish dividend tax credits for pension funds. The popular press certainly focused on some the negative effects which had been predicted. But the more mature judgement is that of the Financial Times which wrote a few days after publication:

"The papers are impressive – exactly what one might hope for from the elite of the Britain's civil servants. They set out the arguments. The analysis evolves as more information becomes available. The uncertainties are spelt out. And there is debate within the papers and between them….The Chancellor decided to go ahead. That is the way government works. Civil servants advise, ministers decide – and then live with the consequences politically." (FT 9.4.07)

14. It is of some significance that in his speech accepting nomination as leader of the Labour Party, Mr. Brown recognised that….

> *"to build trust in our democracy, we need a more open forum of dialogue for citizens and politicians to genuinely debate problems and solutions….It is about a different kind of politics - a more open and honest dialogue; frank about problems, candid about dilemmas…."*

It is welcome that **The Governance of Britain** Green Paper, published on 3 July 2007, refers with pride the freedom of information legislation and was introduced by Mr. Brown, on his Parliamentary debut as Prime Minister, with a number of references to increased accountability and the need for "*a more open 21st-century British democracy which better serves the British people."*

15. Of course, a new statutory access regime calls for new ways of doing things. It is widely recognised that culture change is just as important as strict compliance with detailed legal requirements. My judgement is that public sector culture is changing in this respect – probably faster outside Whitehall than within – but has still not yet changed. As I said earlier, the instincts for confidentiality, secrecy and elitism remain deep-rooted and it would be unrealistic to expect overnight Damascene conversions to an instinct of routine openness.

Government policy and the conduct of public affairs

16. If the benefits for citizens and society are reasonably clear-cut what about the perspective of the governing classes – the politicians, the officials and the appointed post-holders? Here the issues can be more complex, but it is here that the real debate takes place. There is, in truth, no longer a serious debate about whether a legal right to know is a good thing. Recognising that no-one has ever argued that ***all*** information held by government and the rest of the public sector should be made publicly available, the real debate is about exactly where and how the lines should be drawn between disclosure and confidentiality. And this debate has moved on from the substance of over 20 exemptions in the Act - settled 7 years ago - to their application in practice.

17. Time forbids a review of how all the many exemptions in the Act are playing out across a myriad of factual situations where request have been made. The overall statistics of Decision Notice outcomes which I presented earlier give an overall impression**,** but it is still too soon to draw meaningful conclusions about which exemptions are easiest to apply, most successfully claimed or most frequently challenged. The crude figures reflect that there is a presumption of disclosure – simply expressed as a duty to provide the requested information unless an exemption applies and (in the case of most exemptions) there is a stronger public interest in maintaining that exemption than in the disclosure.

18. I wish to stay close to my theme of examining the tension (or, rather, the reconciliation) between open government and good government by concentrating on the operation of the two exemptions which are most directly relevant – sections 35 and 36. The details of both sections are somewhat convoluted, but their essence is reasonably straightforward and clear. Section 35 is class-based – prejudice does not have to be shown. It exempts information which relates to the formulation or development of government policy. Section 36 exempts information where, in the reasonable opinion of the qualified

person, such as a minister or chief executive, disclosure would, or would be likely to:

a. prejudice collective ministerial responsibility;
b. inhibit the free and frank provision of advice or exchange of views; or
c. otherwise prejudice the effective conduct of public affairs.

19. At first sight, this is broadly expressed wording. A great deal of Whitehall activity relates to government policy and it may not be difficult in many other circumstances for the necessary opinion to be formed. However, it is crucially important to note that both sections are "qualified". This means that both are subject to the public interest balancing test. This means that – once it has been established that the relevant exemption is engaged - there is a further question. In the words of section 2 of the Act – does the public interest in maintaining the exemption outweigh the public interest in disclosure of the information? The public authority can only withhold if the answer to that question is positive. That conclusion (as well as the application of the exemption itself) can be reviewed by me as Commissioner and then by the Information Tribunal.

20. A similar approach is adopted in the Environmental Information Regulations where the closely related exception (Regulation 12(8)) states that a public authority may refuse to disclose environmental information to the extent that "the request involves the disclosure of internal communications". Article 4(2) of the underlying Directive requires exceptions to be "interpreted in a restrictive way" and the EIRs themselves impose an almost identical public interest test, reinforced by an explicit requirement (Regulation 12(2)) that public authorities "shall apply a presumption favour of disclosure".

Balancing the public interest

21. My office has dealt with a large number of cases involving section 35 or 36, the equivalent EIR provisions and the

associated public interest tests. A number of these cases have been resolved after appeal by the Tribunal, the most significant being:

- DfES v Information Commissioner (EA/2006/0006)
- DWP v Information Commissioner (EA/2006/0040)
- Lord Baker v Information Commissioner and DCLG (EA/2006/0043)
- Office of Government Commerce v Information Commissioner (EA/2006/0068) (currently under appeal to the High Court).
- Friends of the Earth v Information Commissioner and ECGD (EA/2006/0073)

22. The most recent of these decisions (FoE/ECGD), which was promulgated at the end of August 2007, was an EIR case. But, drawing in part upon the previous decisions, it addressed many of the themes relevant to the substance of this lecture. In brief, the case involved information received by ECGD from other government departments about the major Sakhalin oil and gas project. The Tribunal held that these were “internal communications”, but that the public interest test favoured disclosure even though ECGD had not yet made a final decision about its involvement with the project.

23. In line with previous decisions, the Tribunal displayed open scepticism towards some of the arguments used to argue for non-disclosure. It noted that - in the context of its own evolving case law - there has been a consistent reference on the part of public authorities, particularly government departments, to various “themes” including

- the importance of frankness and candour;
- the danger of a form of government cabal;
- the damaging effect of disclosure on difficult policy issues;
- the importance of proper record-keeping;
- damage to exchanges between ministers and civil servants;

- damage to the role of civil servants with regard to the formulation of policy.

24. In this case, the ECGD argued two principal areas of public interest to justify non-disclosure which were characterised by the Tribunal as "collective responsibility" and "candour" respectively. Both, it was argued, required "safe space" for views to be exchanged. But the Tribunal was robust:

> *"There is and can be no immutable rule in terms of reliance upon the collective ministerial responsibility and/or the individual accountability of ministers to Parliament. The Tribunal refutes any suggestion that those notions, either singly or together represent some form of trump card in favour of maintaining the particular exception."*

25. The emerging jurisprudence from my Office and the Tribunal allows a number of principles to be identified:

- each case has to be decided on its own merits – the explicit requirement in both FOIA and EIR for all the circumstances of each particular case to be considered when balancing public interest issues is fundamental;
- there is presumption of – or assumption or default position – of disclosure;
- the "weighing exercise" begins with the scales empty on both sides, but there must be clear evidence to support public interest arguments on either side;
- there is a public interest in understanding the governmental decision-making process and how decisions were made ;
- the content and context of the requested information will invariably be important factors;
- the timing of the request, in relation to the stage of policy formulation, development or implementation, is of "paramount importance";

- the justification for protecting "safe space" is stronger where it relates to the early stages of policy formulation and development;
- it is too broad to claim that views "along the way" to an ultimate ministerial decision should not be subject to public scrutiny, but the lesser accountability of officials against elected representatives is a factor to be given appropriate weight;
- factors in particular cases, such as the importance of the issue or project and the extent of public expenditure, may be more significant (in public interest terms) than the alleged virtues of safeguarding candour and frankness;
- the Tribunal has been more widely sceptical towards "generalised contentions" or arguments based on "inherent risks".

Chilling effects?

26. The Tribunal used strong language on this last point in the most recent FoE/ECGD case:

> *"Reliance is frequently placed on what is said to be "the very real risk" that over time disclosure of the type of information sought will undermine good government, in particular the process of collective policy formulation. This Tribunal remains unimpressed by such generalised contentions. Life after FOIA has changed and had to change….Officials in all public authorities, as well as Ministers in government, should now be fully aware of the risk that in a given case their notes and records, and indeed all exchanges, in whatever form are in principle susceptible to a request or order for disclosure. It is not enough in this Tribunal's view to fall back on a plea that revelation of all information otherwise thought to be inviolate would have some sort of "chilling effect". The Commissioner and the Tribunal have been charged with the responsibility of resolving on a case by case basis*

where the proper balance should be struck regardless of such ulterior considerations."

27. In this and previous cases there has been considerable impatience with concerns expressed about the "secondary signals" or "grave adverse effects" of disclosing even relatively innocuous material. Claims expressed in broader terms about "possible" wider implications of disclosure are not enough. The Tribunal has called for factual evidence about the real harm which would flow from disclosure, not imagined harms. Reliance upon arguments of a generic nature would amount to a blanket exemption and would be inconsistent with the legal requirements for a substantive public interest test in each case. As the ICO guidance dating back almost three years stated:

> *"…there must be some clear, specific and credible evidence that the formulation or development of policy would be materially altered for the worse by the threat of disclosure under the Act….FOI legislation changes the landscape of the government-citizen relationship, and so it must be acknowledged that the public interest in allowing access to that thinking process will sometimes outweigh the public interest in protecting that process."*

28. It is undeniable that the approach taken by freedom of information law calls for changes of approach. The anxieties expressed by government departments - in refusal notices, in representations to my Office and in submissions to the Tribunal – reflect a defence of traditional approaches, echoing perhaps a culture of instinctive secrecy. In the DfES case, it was disappointing that so much reliance was placed on historical materials to support the government's arguments. The Tribunal decision records, for example, that reference was made to the observations of "senior civil servants and cabinet ministers going back to the Attlee administration of 1945 – 51", to the report of the 1968 Fulton Committee on the Future of the Civil Service and to the 1972 Franks Report on Section 2 of the Official Secrets Act 1911. The former Cabinet

Secretary in turn drew upon the words of his own predecessors, Sir William Armstrong and Lord Butler of Brockwell. Another witness "quoted from a 1967 speech of Lord Bridges, another former Cabinet Secretary, warning of the need for "confidence that (the official's) advice will not be disclosed prematurely".

29. The civil service has for a long time known that there would be a statutory right of access - probably since the White Paper of 1997 and definitely since the Act was passed in 2000. In fact – undermining generalised claims of grave consequences from the possibility of disclosure - I am not aware of any hard evidence demonstrating any loss of candour or reduction of record-keeping over the last 10 years.

30. In any event, civil servants are required to follow the Civil Service Code which may soon be placed on a statutory footing:

> *"As a civil servant you…are expected to carry out your role with dedication and a commitment to the Civil Service and its core values: integrity, honesty, objectivity and impartiality. In this Code:*
>
> *'integrity' is putting the obligations of public service above your own personal interests;*
>
> *'honesty' is being truthful and open;*
>
> *'objectivity' is basing your advice and decisions on rigorous analysis of the evidence; and*
>
> *'impartiality' is acting solely according to the merits of the case and serving equally well Governments of different political persuasions.*
>
> "Objectivity" *means that*
>
> *You must:*

provide information and advice, including advice to Ministers, on the basis of the evidence, and accurately present the options and facts;

take decisions on the merits of the case; and

take due account of expert and professional advice.

You must not:

ignore inconvenient facts or relevant considerations when providing advice or making decisions…….

31. Nor is it realistic to suggest that "nothing will get written down". Much care must be taken to ensure that such sentiments do not turn into a self-fulfilling prophecy. As Robert Hazell of the UCL Constitution Unit has observed:

> *"The probability of any individual piece of advice being subject to an FoI request is close to zero. If the possibility of disclosure enters officials' minds, it is likely if anything to improve the quality of the advice; officials will be concerned to demonstrate that the advice is as accurate, thorough and balanced as possible."*

32. Indeed, a 2001 study by the Canadian National Archives concluded that there was "no evidence that the Access to Information Act has altered approaches to record keeping." In fact, it would of course be highly embarrassing if an FoI request revealed an unprofessional absence of records. At a wider level openness deters "sofa government" and reinforces the fundamental principle that officials advise and ministers decide. The real prospect of disclosure improves the chances that advice will be professional, impartial and genuinely objective. It deters the risk that officials will simply provide advice which is wanted or expected. It reduces the risks that no-one will believe anything said by a politician. All these

arguments, indeed, show how open government promotes good government.

Protecting the Crown Jewels

33. Before concluding, however, I need to state my own view that the arguments are not entirely one-way. There *can* be circumstances where open government can threaten good government. These arguments – especially those focused on the so-called "chilling effect" - should not be dismissed and, as Commissioner, I take them seriously. This is an area where perceptions can be as important as substance. I mentioned the dangers of self-fulfilling prophecies earlier. There are dangers if politicians and civil servants get the wrong impression that my Office or Tribunal are ordering disclosure in almost every case, that the exemptions are not taken seriously or that the public interest in disclosure nearly always trumps an exemption. There are a few anecdotal claims that, at least on some occasions of particular sensitivity, material does not get written down or that views are not expressed frankly or fully. And there is a risk of a backlash, with attempts to pull back the boundaries of disclosure, restrict use of the law or otherwise dilute it.

34. The right way forward is to focus on the case-by-case approach which the law mandates. It is not helpful to rely on precedent. Disclosure of one type of material - minutes of meetings or formal advice – does ***not*** immediately place all information of that type at immediate risk of disclosure. My decisions, and those of the Tribunal, are well able to identify those situations where, within the terms of the law, the public interest considerations require non-disclosure. Where the public interest in maintaining the exemption is stronger precisely covers situations where good government requires secrecy.

35. I have already outlined some of the factors to be taken into account – content, context, timing and so on. There must be more than mere assertion or a disguised attempt to exclude entire classes of information. It is necessary to

concentrate on those pieces of information dealing with government policy or the conduct of public affairs which really do require legal protection to avoid disclosure. I like to describe this as the “Crown Jewels” approach, where considerable effort should be taken to isolate and protect material of particular sensitivity - both at the time of its creation and when any disclosure request is made. There will then be stronger assurance from the outset and much greater credibility than if the “grave consequences” arguments are trotted out as a matter of routine.

36. Such an approach also means that it is not necessary to take too literally the need for hard evidence of a “chilling effect” or other adverse consequence. The Act explicitly recognises that there is a public interest in maintaining each of the qualified exemptions. I recognise moreover the problems of adducing evidence to prove a negative in the future. It is not possible to demonstrate conclusively that disclosure of one piece of information item would impact negatively on the future creation of others. Situations where a chilling effect is likely to be self-evident include:

- high-level advice and exchanges where policy development remains “live” at the time of the request;
- subject-matters relating to specific national security, defence, diplomatic or economic issues where it is obvious that damage would be done by disclosure;
- informal exchanges, including “blue-sky thinking” and other contributions at the embryonic stages of policy development or implementation;
- genuinely and necessarily private exchanges where there is an obvious expectation of private space and where routine disclosure would inhibit such exchanges or the written record of them

This list is illustrative and non-exhaustive. A good example of the last situation was my recent Decision (FS50085374) upholding non-disclosure of an e-mail which recorded largely routine points made during an informal lunch between the Permanent Secretary of the DCMS and the chairman of the

BBC. I ruled that there was a real chilling effect, with genuine fears that notes of such meetings – “oiling the wheels of government” - would not be made if they were to be routinely disclosed and concluded that there was no great public interest in disclosure. Another example is FS50091442 where a distinction was made between correspondence between officials (non disclosure), submissions / advice to ministers (disclosure) and ministerial communications (disclosure).

Changing Public Authorities

37. Let me now draw my conclusion together with some pointers for public authorities. As with all change, greater openness can be uncomfortable and challenging. I am the first to acknowledge the positive response which so many public authorities have adopted to freedom of information. But, as the realities hit home, especially on the points I have outlined above, more is needed and the pace of change must accelerate.

38. Departments must move rapidly from a grudging “administrative compliance” to a more positive “proactive compliance”. They must abandon the recalcitrance or obstruction which some can show towards requesters and sometimes towards my Office. They must recognise that there are no real precedents in FoI and that each case must be considered on its own merits. They must be substantially more discriminating in the use of exemptions, ensuring there is no “crying wolf” with a reflex reliance upon every possible exemption. Public interest arguments in particular become devalued and discredited if the same arguments are used for innocuous material. Departments must recognise that routine disclosures tend to be much less controversial than information which has had to be dragged into the open.

39. Corresponding changes are also needed at deeper levels of public administration. Openness should be seen much more as a norm – not just for the democratic and participatory benefits which I have already mentioned, but to improve

efficiency and effectiveness, to improve the quality of decision-making, to avoid waste and to deter dishonesty, impropriety and maladministration. Notes, minutes, advice and other records should normally be written with the possibility of disclosure in mind. (The evidence at the Lord Baker Tribunal hearing clearly demonstrated how the planning process has adapted to greater openness). Where that is unpalatable, officials should question whether such words should be written in the first place. Where confidentiality is demanded, the text should be identified as such and preferably separated from other material.

40. Open government which is approached responsibly and robustly is good government. There is no need to fear open government as a threat to good government. Most cases involve the sort of careful balancing acts which have always lain at the heart of high quality British decision-making. Freedom of information is now a permanent and popular feature of the landscape. But more deeply entrenched culture change is needed – and culture change must always be visibly led from the top. My own view is that it is disappointing that, when he was Prime Minister, Tony Blair did not claim much greater credit for making a reality of freedom of information law. But life has moved on. There are now real opportunities to show that freedom of information must be embraced positively across Whitehall and all other public services.

41. Many commentators have observed that the early years of freedom of information regimes around the world have been accompanied by dire warnings and other worries about the negative impact upon good government. This year, New Zealand celebrates the 25th anniversary of its own Act. Marie Shroff - current Privacy Commissioner and former Cabinet Secretary – delivered a speech in London in 2005 recording the anxious predictions of 1982. Quality advice would be damaged or destroyed. Civil servants would be afraid to offer free and frank advice. Written advice would be replaced by decisions made in smoke filled rooms. Outsiders would be unwilling to contribute because of fear of public exposure. The

civil service would be politicised. Uncanny echoes of sentiments in some quarters in the UK in 2007. She then quoted Mark Prebble, Head of the NZ Civil Service:

> *As a public administrator, requests for information can be a pain. But as a policy advisor and a citizen, I think the Official Information Act is the best and most significant reform of a government system that has been made in recent decades."*

Open government is not always easy government. But it is good government.