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FREEDOM OF INFORMATION

This paper examines the Freedom of Information Act 2000 as it applies in Northern Ireland. It also provides background material for a debate on whether the Northern Ireland Assembly should enact its own legislation on the subject.

SUMMARY OF KEY POINTS

1. The Freedom of Information Act 2000 applies to Northern Ireland, England and Wales. It provides rights of access to all recorded information held by public authorities.

2. The Act sets out exemptions to the rights of access. If an exemption applies, the rights to information are either withheld or qualified. Exemptions can also apply to the right to be told whether the information exists.

3. Where certain exemptions apply, the Act may require a further test to be applied: the public interest test. If it is in the public interest to disclose the information, the exemption is overridden and information is disclosed.

4. The 'Information Commissioner' is responsible for implementing the Act.

5. The Act has been criticised as too restrictive, and some provisions have caused particular concern. Freedom of information must, however, be balanced with rights of privacy of individuals, rights of confidentiality, and good government.

6. Proponents of freedom of information argue that it can provide:
    - encouraging greater objectivity and accuracy of files;
    - accountability;
    - better quality decision-making by government; and
    - economic benefits, especially for small- or medium-sized enterprises.

7. Opponents of freedom of information argue that it might damage the frankness and candour of discussions and advice, which might inhibit decision-making.

8. 50,000 public authorities will be subject to the Freedom of Information Act. No part of government is yet subject to its provisions. UK government departments, including the NIO, may be ready for implementation by July 2002. No date for implementing the Act in Northern Ireland has been set.

9. The devolved administrations in Scotland and Wales moved rapidly to establish freedom of information regimes which are more open than that provided by the Act. The Scottish Executive has published its own draft Bill. The Welsh Cabinet publishes its papers six weeks after meeting.

10. Freedom of information is a transferred matter under the Northern Ireland Act 1998, and the Northern Ireland Assembly may enact its own legislation on the subject.

11. The Northern Ireland Executive is committed to freedom of information. It intends to publish a consultation paper in 2002. The consultation will consider whether Northern Ireland requires separate legislation.

12. If the UK Freedom of Information Act 2000 is not thought suitable in the Northern Irish context, a debate on freedom of information should consider whether a more, or less, restrictive regime might be more suitable.

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1. INTRODUCTION

Openness is one of the seven principles of public life. The Nolan Committee on Standards in Public Life stated that

> *holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.*[1]

One principal method of achieving openness in government and democracy in society is to guarantee freedom of information: Article 19,[2] which campaigns for freedom of information, has said that

> *what distinguishes democracy from tyranny, and defines the gradations in between, is the degree of freedom with which information, ideas and opinions are free to circulate both vertically – from the people to the authorities by means of election and individual or collective petition, and from the authorities to the people by means of open and responsive government – and horizontally, within institutions and among the people. Anything which restricts that flow, beyond what is absolutely and demonstrably necessary for the defence of society and of individual rights, insults and injures the democratic principle.*[3]

The Freedom of Information Act 2000 ('the Act') is an Act of the UK Parliament and applies to Northern Ireland, as well as England and Wales.[4] But freedom of information is a transferred matter under the Northern Ireland Act 1998, and the Northern Ireland Assembly may enact its own legislation on the subject.[5] It could, for example, alter the UK regime so as to make information held by NI departments and district councils more, or less, accessible. This paper is designed to inform readers of the background to a freedom of information debate.

It does so by presenting:

- some arguments on the advantages and disadvantages of freedom of information;
- an examination of the Act as it will apply here;
- some contentious provisions of the Act, identifying key issues for a freedom of information debate in Northern Ireland;
- developments in Scotland and Wales which diverge form the UK position;
- the Northern Irish position and proposals for local legislation; and
- some final comments.

2. ARGUMENTS FOR AND AGAINST FREEDOM OF INFORMATION

2.1 FOR FREEDOM OF INFORMATION

ADVANTAGES OF FREEDOM OF INFORMATION

Arguments for of freedom of information usually cite key benefits, which include enabling members of the public to:

- find out what information government and other public bodies hold about them, encouraging greater objectivity and accuracy of files, especially personal files;
- participate in an informed way in the discussion of policy issues, thus improving the quality of government decision-making and reducing costs long-term;
- hold government and other bodies to account.[6]

Freedom of information may also yield economic benefits. The European Commission recognises that an atmosphere of openness and availability of information can provide competitive advantage, stating that:

> *without user-friendly and readily available administrative, legislative, financial or other public information, economic actors cannot make fully formed decisions ... the ready availability of public information is an absolute prerequisite for the competitiveness of European industry … In Europe the issue is particularly crucial to SMEs [Small or Medium Sized Enterprises], which have fewer resources to devote to an often difficult search for fragmented information.*[7]

A Westminster Select Committee[8] examined the Australian freedom of information laws, which have been in operation since 1982. It found that

> *standards of administration had improved in that FoI had encouraged objective, reasoned and defensible policy-making.*

It concluded that the Australian Freedom of Information Act 1982

> *has focused decision-makers' minds on the need to base decisions on relevant factors, and to record the decision making process. The knowledge that decisions and processes are open to scrutiny, including under the FoI Act, imposes a constant discipline on the public sector.*[9]

DISADVANTAGES OF SECRECY

It is also argued that a lack of freedom of information has disadvantages. The government stated in its 1997 White Paper on freedom of information, *Your Right to Know*, that:

> *unnecessary secrecy in government leads to arrogance in governance and defective decision-making.*[10]

In reporting on his inquiry into BSE, Lord Phillips concluded that a culture of secrecy and lack of openness may have exacerbated the situation. His report concluded that:

> *had there been a policy of openness rather than secrecy, this would have resulted in a higher rate of referral of cases to MAFF* [the Ministry of Agriculture, Fisheries and Food] *in the earlier part of 1987. This, in turn, might have led to a better appreciation of the growing scale of the problem and hence to remedial measures being taken sooner than they were.*[11]

Article 19 has said that

> *Information is not just a necessity for people – it is an essential part of good government. Bad government needs secrecy to survive. It allows inefficiency, wastefulness and corruption to thrive.*[12]

2.2 AGAINST FREEDOM OF INFORMATION

There are few commentators who argue against the basic principle of freedom of information. The two main arguments against freedom of information are:

- the possibility that the access right might be abused, particularly in a commercial context; and
- the potential damage to frankness and candour, which might inhibit decision making.[13]

The ICM State of the Nation poll[14] found, in October 2000, that only 3% of UK citizens polled thought that there should not be a statutory right to access to information collected by public authorities.*

Most arguments against freedom of information therefore relate only to the degree of openness or access that is provided. A House of Commons Select Committee acknowledged in 1996 that there was:

> *A need to balance the benefits of open government against the rights of privacy of individuals, the rights of confidentiality, and the right of Government to govern … any responsible FOI regime must protect these legitimate rights of privacy.*[15]

The Act uses a series of exemptions in an attempt to achieve that balance. These exemptions are considered below.

The only further debate has been whether freedom of information is best provided for by an Act or by a non-statutory code. The Chancellor of the Duchy of Lancaster argued in 1996 that a code was preferable:

> *First of all, I think the system we have at present, which is a Code plus a number of specific* [Acts] *… provides a much more flexible system. We can amend the Code and we can extend the Code far quicker than we can with legislation; we can be more responsive. Secondly, I think our procedure is cheaper and quicker in delivering action. I think to have the Ombudsman pursue individual concerns that remain after a department has considered a*

* Whereas 79% thought there should be such a right

request which has not been immediately met provides a free, sensible and very efficient service. Thirdly, and finally, I think that to introduce the courts with a general remit to safeguard the provision of information disclosure and transparency would in some way confuse and diminish the accountability of ministers and departments to Parliament.[16]

3. THE UK FREEDOM OF INFORMATION ACT 2000

3.1 SUMMARY

The Act:

- provides rights of access to all recorded information held by public authorities;
- limits that right of access by way of exemptions and a public interest test; and
- requires public authorities to cooperate with requests and to publish schemes showing how they make information available.

3.2 BACKGROUND

Around 40 countries worldwide have freedom of information regimes. The UK's Freedom of Information Act 2000 is one of the most recent, having received Royal Assent on 30 November 2000. It applies to England, Wales and Northern Ireland.[17] No part of government is yet subject to its provisions, although the target date for government departments is April 2002.[18]

It provides for the first time a comprehensive statutory right of access to information held by the government, a guarantee of freedom of information. The Act is intended to replace the voluntary central government *Code of Practice on Access to Government Information*,[19] introduced in 1997 by the then Prime Minister, Rt Hon John Major MP. The *Code of Practice* is only a guide to best practice and does not have the force of law. It also applies in Northern Ireland, and will apply until superseded by the Act coming into force.

In addition to the *Code of Practice*, there are also some statutory schemes granting limited information rights, e.g. to personal medical records.[20] The extensive and important statutory Data Protection regime allowing access to certain personal data held by other bodies. It is overseen by the Data Protection Registrar.[21] The Act transforms that office into the 'Information Commissioner', with equal responsibility for both data protection and freedom of information: this is considered below.

The Act has been criticised. As it passed through Westminster as a Bill, some commentators saw it as fundamentally flawed, and were not satisfied that the flaws were met by amendments. Their arguments were that the Bill was too restrictive, and would result in a law that compared unfavourably with freedom of information in other countries.[22]

3.3 NEW RIGHTS

The Act provides two new rights in relation to information requested from a public authority. A natural or legal person (e.g. a limited company or registered charity) has:

- the right to be told whether the information exists, and
- the right to receive the information.

3.4 PUBLIC AUTHORITIES

The Act applies to *'public authorities'* and those providing services for them. It is estimated that it will apply to 50,000 bodies.[23] A detailed and extensive list of public authorities is contained in Schedule I to the Act.[24] It includes, for example:

- the Northern Ireland Assembly;
- UK and NI government departments;
- the Civic Forum;
- NI District Councils;
- the Northern Ireland Housing Executive;
- the Royal Ulster Constabulary; and
- the Police Ombudsman for Northern Ireland.

The Act allows the Home Secretary to designate other bodies as 'public authorities' so that they become subject to the Act. In designating a Northern Ireland body, he must first consult OFMDFM. [25]

Public authorities are required by the Act to assist a person who makes or proposes to make a request for information.[26]

3.5 TYPES OF INFORMATION COVERED BY THE ACT

'Information' is interpreted broadly. It generally means *'information recorded in any form'*.[27] It therefore excludes information which has not been recorded.

The two new rights apply to information whether or not it relates to the applicant personally. Under Data Protection legislation, a person already has the right to obtain certain information that relates to himself.[28]

Information includes information gathered or held by the public authority before the Act became law: in this sense the Act has retrospective effect.

3.6 IMPLEMENTATION DATE

All provisions of the Act must be brought into force by 2005.[29] Although it was originally intended to bring the Act into force, as regards UK government departments, by April 2002, the government has admitted that they will not be ready before July 2002 at the earliest. This follows a file management review at the Home Office which revealed that documents were *'missing, had been misfiled or could not be retrieved easily.'*[30]

3.7 EXEMPTIONS

The Act sets out 23 exemptions. If an exemption applies, the rights to information are either withheld or qualified. There are two general categories of exemption:

- 'class' exemptions – which apply when the information requested falls into the class described by the exemption, even if disclosing the information would cause no harm; and
- 'contents' exemptions – which apply only when disclosing the information would or would be likely to harm the activity or interest described in the exemption.

For example, information is exempted from disclosure if it relates to an investigation into a criminal offence (a class exemption).[31] And information is exempted from disclosure if disclosure would, or would be likely to, prejudice relations between any of the administrations of the United Kingdom (a contents exemption).[32]

Environmental information is exempted, as it is covered by the United Nations 'Aarhus Convention' and special regulations will be made instead.[33]

Exemptions can apply not only to the right to information but also to the right to be told whether the information exists (described by the Act as the duty on the public authority to 'confirm or deny'). [34]

Exemptions are considered in more detail below.

3.8 THE PUBLIC INTEREST TEST

Where an exemption is deemed to apply, the Act may require a further test to be applied: the public interest test. If it is in the public interest to disclose the information, the exemption is overridden and information is disclosed.

The Act does not apply the public interest test to all its exemptions. Those to which it does not apply are described as 'absolute' exemptions. There are eight absolute exemptions. They include, for example:

- information contained in court records;[35]
- information supplied by or relating to security agencies;[36] and
- information provided in confidence.[37]

The public interest test and absolute exemptions are considered in more detail below.

3.9 CODES OF PRACTICE

The Act[38] requires the Home Secretary to issue a code of practice providing guidance to public authorities on good practice in providing access to information. A draft code has been published.[39]

The Act[40] also requires The Lord Chancellor to issue a code of practice providing guidance to public authorities on good practice in the keeping, management and destruction of their records. A draft code has been published.[41]

3.10 DUTY TO PREPARE PUBLICATION SCHEMES

The Act aims to foster a proactive approach to openness. In addition to making provision for dealing with requests for information, it therefore also requires public authorities to be proactive about releasing information. To this end, they are required to prepare 'publication schemes', which must be approved by the Information Commissioner. A publication scheme must set out:

- the classes of information which the authority publishes;
- the manner in which the information is published; and
- details of any charges for providing information.

3.11 THE INFORMATION COMMISSIONER

The 'Information Commissioner' is responsible for implementing the Act. This is an independent public official, reporting directly to Parliament. The office subsumes the office of Data Protection Registrar, so that a single person is now responsible for both functions, retaining the powers and duties held in relation to data protection, and taking new ones in relation to freedom of information.[42] The current Information Commissioner is Mrs Elizabeth France. As regards freedom of information,[43] her duties include:

- approving and revoking publication schemes;
- promoting good practice;
- promoting compliance with the Act;
- disseminating information and advice about the Act;
- assessing whether a public authority is following good practice; and
- reporting annually to Parliament.

3.12 ENFORCEMENT

Any person who requests information from a public authority but is dissatisfied with its response may ask the Information Commissioner to consider whether it has complied with the Act. The Information Commissioner may issue a 'decision notice', setting out actions which the public authority must take in order to comply with the Act, and serve it on the public authority. She could, for instance, order that it disclose the information requested.[44]

The Commissioner may also serve an 'enforcement notice' on any public authority that has failed to comply with the information request requirements of the Act, requiring it to take specified steps within a specified time. An enforcement notice is different from a decision notice in that it may be issued whether or not any person has complained to the Information Commissioner.

The Information Commissioner also has investigatory powers. Where she requires more information in order to reach a decision, she may serve an 'information notice' on a public authority, requiring it to supply any information she requests in relation to the Act. She may also seek from Court a search warrant allowing her to enter premises and inspect documentation.[45]

Failure to comply with any notice may be referred to the High Court to be treated as a contempt of court.[46] This could result in an unlimited fine, or imprisonment of officers of the public authority.

All notices may be appealed to the independent Information Tribunal,[47] which may uphold, overturn or vary the notice. Either party to that appeal may take a further appeal to the High Court, on a point of law only.

The government has stated that:

> *experience of enforcing data protection legislation suggests that the powers may be rarely needed and used only when informal procedures have failed.*[48]

4. SIX KEY ISSUES

4.1 INTRODUCTION

OFMDFM is committed to considering the need for separate freedom of information legislation in Northern Ireland.[49] It might therefore be considered whether the Freedom of Information Act 2000 is suitable for Northern Ireland – whether Northern Ireland should have a more open regime, or whether more restrictive controls on governmental information should be introduced here.

Six important provisions of the Act that have caused concern are here considered. Two relate to exemptions generally, two to specific exemptions, and two to the public interest test:

4.2 the excessive use of class exemption rather than contents exemptions;
4.3 the low threshold of harm required to activate contents exemptions;
4.4 the exemption for advice relating to the formulation of government policy;
4.5 the exemption for commercially sensitive information;
4.6 the limited operation of the public interest test; and
4.7 the ministerial veto.

4.2 EXCESSIVE USE OF CLASS EXEMPTIONS RATHER THAN CONTENTS EXEMPTIONS

CLASS EXEMPTIONS

The Act contains 13 class exemptions. Where a class exemption applies, no information will be released, even if release could not result in harm or prejudice (although the exemption may then be subject to the public interest test, which is considered below). For example, information is exempt if:

- it is held for the purposes of an investigation into any criminal offence;[50] or
- its disclosure would amount to an actionable breach of confidence.[51]

A class exemption is in effect a presumption that the release of information from such a class would result in harm: it is presumed that disclosure would normally result in harm, and therefore all disclosure is exempt.[52] The government originally intended that the Act would employ no class exemptions. Its White Paper proposed instead that all disclosure *'should be assessed on a contents basis, records being disclosed in a partial form, with any necessary deletions, rather than being completely withheld'*. [53]

The use of class exemptions has been criticised, on the principle that *'information should be automatically released unless disclosure can be proven to be harmful.'* [54]

However, it may be noted that class exemptions are a common device. The Scottish draft Freedom of Information Bill, the Irish Freedom of Information Act 1997 ('the Irish Act') and the Australian freedom of information laws all employ class exemptions.

The House of Commons Select Committee on Public Administration examined the draft Freedom of Information Bill and accepted[55] that there was

> *a role for class-based exemptions in a few narrowly-defined areas where there may be high demand for information and a low likelihood that it will ever be disclosed or where there is a clear need for definite protection.*

In particular, the Select Committee cited the fact that using class exemptions provided certainty, which could be especially important as regards commercially sensitive information. It also noted that

> *there may be situations in which those providing information may be reluctant to give it if there were even a slight chance that it might be revealed in response to a request under the Freedom of Information Act.*

CRITICISM OF EXTENT OF USE OF CLASS EXEMPTIONS IN THE ACT

However, some commentators disagree. For example, the Northern Ireland Human Rights Commission ('NIHRC') recommended *'the scrapping of all class exemptions'*.[56] While recognising that there is a legitimate government interest in withholding information, it stated that

> *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* (NIHRC emphasis).

Employing class exemptions, it suggested,

> *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* (NIHRC emphasis).

The Campaign for Freedom of Information[57] has recently restated and explained its objection to the use of class exemptions: all information should be available unless the Government can show good reason why it should not. Therefore a class exemption is

> *the wrong starting point: access should not depend on the case for disclosure being proved.*[58]

The Library Association[59] states that the use of class exemptions in freedom of information legislation was

> *reminiscent of the culture of extreme secrecy which has characterised British public life under the Official Secrets Act and is utterly against the spirit of freedom of information.*[60]

COMPARISON

The recently adopted EU Regulation on freedom of information in relation to its documents – in force since June 2001 – does not employ class exemptions at all. Instead, access to documents is refused only where disclosure would *'seriously undermine'* certain listed interests.[61]

NORTHERN IRELAND – KEY ISSUES

The matters considered in a Northern Ireland debate on freedom of information might include:

- whether the use of class exemptions is appropriate to the needs of Northern Ireland; and
- whether some classes of information covered by class exemptions in the Act should instead be subject to contents exemptions; or whether further class exemptions are required.

4.3 LOW THRESHOLD OF HARM REQUIRED TO ACTIVATE CONTENTS EXEMPTIONS

CONTENTS EXEMPTIONS AND THE 'HARM TEST'

A contents exemption applies only after examining the contents of the information sought. Generally, they are tested on whether disclosing the information would or would be likely to cause harm to a specific interest (often described as the 'harm test'). For example, information is exempt if:

- its disclosure would, or would be likely to, prejudice national defence;[62]
- its disclosure would, or would be likely to, prejudice relations between any of the administrations of the UK.[63]

Various words could be used to describe the level of harm that will activate a contents exemption: for example 'substantial harm', 'serious harm', or 'prejudice'. Where higher levels of harm are required, exemption will apply less often, and more information will be released.

Most of the contents exemptions in the Act are tested against whether *'prejudice'* would be caused. This is considered to be a relatively low level of harm, and will activate the exemptions more frequently than would other stricter tests.[64]

PREVIOUS GOVERNMENT POSITION

The use of a 'prejudice' harm test in the Act is a weaker harm test than that proposed in the White Paper, which suggested that the test be one of *'substantial harm'*.[65] The Home Office defended the change of policy by saying that *'a single omnibus substantial harm test cannot work properly for the range of exemptions proposed. What is "substantial" in relation to law enforcement, for example, may not be in relation to international relations.'* [66] However, this argument does not explain why the Act applies the single omnibus harm test of 'prejudice' to those contents exemptions that are harm tested.[67]

COMPARISON

The Scottish draft Bill employs a single harm test throughout, at a stricter level: *'substantial prejudice'* is required before its contents exemptions apply. The Campaign for Freedom of Information in Scotland has expressed its approval of this *'more demanding test'*.[68] The Irish Freedom of Information Act 1997 ('the Irish Act') provides several harm tests, each differently worded depending on the gravity of the interest in question. Each, however, appears to be set at a stricter threshold than *'prejudice'*. [69]

RECOMMENDATIONS OF A STRICTER HARM TEST

The NIHRC recommended a single, stricter, standard for the harm test: *'substantial harm'*, to be applied to all exemptions, *'with possible exception of the personal health exemption in clause 30, for which the 'likely endangerment' test seems appropriate."*[70]

Two Westminster select committees also recommended that a stricter test of *'substantial prejudice'* should be employed, for at least some contents-based exemptions.[71]

NORTHERN IRELAND – KEY ISSUES

The matters considered in a Northern Ireland debate on freedom of information might include:

- the threshold at which the harm test is set in the Act;
- whether the Act is too restrictive, and whether some other test should be used, such as 'substantial prejudice'
- whether the test of 'prejudice' provides a simplified system which members of the public and the staff of public authorities can more readily understand, and which provides certainty.

4.4 EXEMPTION FOR ADVICE RELATING TO THE FORMULATION OF GOVERNMENT POLICY

THE EXEMPTION

Section 35 of the Act provides a class exemption – information held by a government department is exempt if it relates to:

- the formulation or development of government policy,
- Ministerial communications,
- the provision of advice by any of the Law Officers or any request for the provision of such advice, or
- the operation of any Ministerial private office.

The exemption covers not only UK governmental business but also Northern Ireland governmental business, including communications between Northern Ireland Ministers, junior Ministers, and the Executive Committee, and advice of the Attorney General for Northern Ireland.[72] It does not extend beyond government departments, and therefore does not apply, for example, to the formulation of local government policy.

The purpose of such an exemption – which is common to most freedom of information regimes – is to prevent a fear of future disclosure from affecting the frankness and candour of the advice given by officials and advisers to Ministers.[73] But it is interesting to note that the Irish Information Commissioner has stated that it has been his experience that *'much of what passes for frankness and candour is subjective and impressionistic comment which is made only because it will never become public.'* [74]

However, the exemption could have the effect of exempting from release all background information on which government policy is based, regardless of whether releasing it would cause harm, and regardless of the public interest. It could exempt, for example:

- factual material and its analysis;[75]
- scientific and technical advice; or
- internal departmental rules an guidelines.

Statistical background information is **not** covered by the exemption, insofar as it relates to formulation of government policy or Ministerial communications, once a decision on government policy has been taken.[76] Statistical information could nonetheless be exempted in relation to a Law Officer's advice or the operation of a Ministerial private office – or indeed under some other exemption.

PREVIOUS GOVERNMENT POSITION

The exemption appears to be more restrictive than the provisions of the *Code of Practice on Access to Government Information,* which employed a harm test by providing that information relating to policy can only be withheld if disclosure would *'harm the frankness and candour of internal discussion'.* [77]

It is also a change from the government position as expressed in its White Paper in 1997:

> *We propose that decisions 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 FOI legislation.*[78]

In evidence to the Select Committee on Public Administration in 1999, the Home Secretary said that *'the issue of factual or background information ... is important and ... I think on the whole ought to be disclosed'.* [79]

CRITICISM OF THE EXMEPTION

The NIHRC expressed particular concern about this exemption.[80] It commented that it does not *'facilitate … public participation in a modern and democratic government'*. It noted also that such provisions restrict the Commission itself from carrying out its statutory duty[81] to advise on the human rights implications of legislation and policy and to review the adequacy of Northern Ireland human rights law and practice:

> *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.*

It suggested that a particular difficulty might arise in relation to the Ministerial certificate of compatibility with the Human Rights Act 1998 that must accompany a Bill presented to the Assembly:[82]

> *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 Select Committee on Public Administration[83] was of the opinion in 1999 that the formulation of government policy, and the operation of Ministerial private offices should not be covered by a class exemption. It recommended a contents exemption instead. It did accept that communications between Ministers, Cabinet proceedings, and the provision of advice by the Law Officers, should be covered by a class exemption.

It further recommended that

> *the exemption for decision-making and policy formulation should specifically not be taken to apply to purely factual information held by public authorities, nor to analysis, if that information has been created in order to inform policy decisions, and that this distinction should be clearly drawn in the Bill.*

The exemption is supported by a further exemption in section 36, which provides a class exemption for information which, in the *'reasonable opinion'* of the public authority holding the information, would be likely to *'prejudice the effective conduct of public affairs'*. This would include prejudice to the work of the Northern Ireland Executive Committee, but is not further defined. The legal weight the section 36 exemption gives to the public authority's opinion means that it could generally be challenged only by way of judicial review. Furthermore, this class exemption is an absolute exemption: the public interest test is not applied.

NORTHERN IRELAND – KEY ISSUES

There has already been an indication that the Northern Ireland Civil Service ('NICS') may be reluctant, on the grounds of Westminster convention, to allow full access to policy formulation information. A recently leaked memo[84] signed by the former Permanent Secretary of the Department of Regional Development referred, amongst other matters, to the Committee for the Environment's

> *wish to see discussion papers at draft stage, in effect to have access to internal working papers. Again, the Committee have a right of access to all papers, but in Westminster a Committee would, by convention, not seek access to working papers.*

The memo referred to the *'difficulties'* created by the lack of *'the sort of conventions about the roles of Ministers, officials, the Assembly, Committees, etc which have been evolved over centuries in Westminster'*. It indicated that the NICS intended to work, with the Executive and the Assembly, to establish conventions appropriate to Northern Ireland.

The matters considered in a Northern Ireland debate on freedom of information might include:

- whether background information should be exempt from disclosure;
- whether disclosure would affect the 'frankness and candour' of civil servants' advice to Ministers;
- whether the exemption should extend to information behind the policy decisions of District Councils, the NIHE or other public authorities.

Members of the Northern Ireland Assembly may wish to consider in any debate what conventions should govern their and their Committees' access to Executive information.

4.5 EXEMPTION FOR DISCLOSURE OF COMMERCIALLY SENSITIVE INFORMATION

THE EXEMPTION

Section 43 provides that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it. The public authority does not have to confirm or deny having the information.

This contents exemption could be used to withhold information about a public authority's dealings with the private sector, for example in relation to tendering or procurement. But it may also have an impact on the availability of information relating to public private partnerships (PPP) or private finance initiatives (PFI).*

The Committee for Finance and Personnel, in its inquiry into the use of PPP in Northern Ireland, considered the importance of information in assessing the value for money of PPP. It observed that

> *it appears that the confidentiality and complexity of deals makes accountability and scrutiny difficult and doubt has been expressed to the Committee about the real knowledge of the full cost of using PPP.*[85]

The Committee concluded that PPP is likely to play an important role in addressing the Northern Ireland infrastructure deficit. Questions of accessibility of information will therefore be important in the economic future of Northern Ireland:

> *value for money has to be demonstrated over the life of a project in taking forward any PPP initiative … Part of this process must involve much greater openness and public accountability of the decision making process.*[86]

The exemption is supported by section 41, which provides a class exemption for information obtained from another person if disclosure would amount to an actionable breach of confidence. As regards a similar provision in the Scottish draft Bill, the Campaign for Freedom of information in Scotland has pointed out that it would allow *'companies or lobbyists to avoid scrutiny merely by agreeing with authorities that their information should be kept secret'.*[87]

* PPP and PFI are methods of funding public services provision by the use of private sector finance

NORTHERN IRELAND – KEY ISSUES

The matters considered in a Northern Ireland debate on freedom of information might include:

- whether, given the anticipated need for PPP in developing public services in Northern Ireland, a less restrictive approach is required;
- whether greater availability of information on PPP contracts might facilitate assessment of value for money; and
- whether private sector engagement with government might be inhibited by such openness.

4.6 THE PUBLIC INTEREST TEST

THE TEST

Once an exemption – whether a class exemption or a contents-based exemption – is deemed to apply, the public authority may be required to proceed to a further consideration: the 'public interest test'. The public interest test is whether

> *in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.*[88]

If the public interest test requires disclosure, the relevant exemption is still deemed to apply, but is overridden.

ABSOLUTE EXEMPTIONS, TO WHICH THE TEST DOES NOT APPLY

Eight of the exemptions in the Act are described as 'absolute' exemptions.[89] The public interest test is not applied if an absolute exemption is deemed to apply.

The eight absolute exemptions include, for example:

- information accessible to an applicant by other means (s 21);
- information provided in confidence (s 41); and
- information the disclosure of which is prohibited by some other law or would constitute contempt of court (s 44).

THREE LEVELS OF TESTING

Some exemptions are therefore tested on two standards before they have the effect of withholding information: a contents test and a public interest test. Some exemptions are subject to only one standard: the public interest test. The absolute exemptions, however, are subject to no test at all – they always apply.

CRITICISM OF THE LIMITED APPLICATION OF THE TEST

The NIHRC has argued that there should be no absolute exemptions at all, and recommended *'a general public interest override'* that would apply to all exemptions:

> *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.*[90]

NORTHERN IRELAND – KEY ISSUES

The matters considered in a Northern Ireland debate on freedom of information might include:

- whether a public interest test should apply to all exemptions, as recommended by the NIHRC; and
- whether the list of absolute exemptions should be extended.

4.7 THE MINISTERIAL VETO

A second objection to the public interest test provided by the Act is that the government may in some cases have the last say – it may override a decision by the Information Commissioner that the public interest test requires disclosure.

POWERS OF THE INFORMATION COMMISSIONER

As noted above, an applicant who is dissatisfied with a public authority's decision may apply to the Information Commissioner to consider whether the authority has complied with the Act in dealing with his request for information. The Information Commissioner may serve a decision or enforcement notice on a public authority requiring it to disclose the information.

However, both decision notices and enforcement notices may be overridden by the government in many cases. This power has been described as the 'ministerial veto'.

THE MINISTERIAL VETO OVERRIDES THE INFORMATION COMMISSIONER

Section 53 of the Act provides that the 'accountable person' – in Northern Ireland this would usually be the First Minister and Deputy First Minister acting jointly or the Secretary of State for Northern Ireland, depending on the public authority involved[91] – may issue a certificate to the Information Commissioner. The effect of the certificate is that the public authority need not comply with the decision or enforcement notice.

The accountable person must have formed the reasonable opinion that, in respect of the request to which the certificate relates, the authority has complied with the Act. The certificate must be laid before Parliament or, as regards Northern Ireland public authorities, the Assembly.

A certificate may be issued only where the information concerned is exempt information. As exempt information will normally be released only when the public interest test dictates that it be released, it therefore appears that a section 53 certificate may only be issued when:

- an exemption is deemed to apply;
- the public authority applies the public interest test and decides that the public interest in maintaining the exemption outweighs the public interest in release;
- the Information Commissioner agrees that the exemption applies but disagrees with the public authority over its application of the public interest test, and serves a notice requiring the public authority to release the information; and
- the accountable person disagrees with the Information Commissioner.

The government states that

> *In practice this will mean that the accountable person has formed a view different from that of the Commissioner on the question of the public interest.*[92]

EFFECT OF THE MINISTERIAL VETO ON THE CONTROL OF INFORMATION

The effect of the certificate is that the public authority need not comply with the Information Commissioner's notice, and therefore need not release the information. The Information Commissioner cannot review the certificate. Nor can the applicant appeal the certificate to the Information Tribunal. Instead, he could take an action in the High Court for judicial review of the ministerial decision to issue the certificate.

The ministerial veto therefore suggests that the public authority, and the Minister to which it is accountable, are better suited to decide where the public interest lies than is the Information Commissioner.

COMPARISON

The Scottish draft Bill and the Irish Act make similar provision for a ministerial veto. However they apply to a more limited number of exemptions.[93]

ARGUMENTS FOR AND AGAINST THE MINISTERIAL VETO

The Home Office has explained why it regards the ministerial veto as necessary. It argued in February 2000 that it would it would be *'profoundly undemocratic'* to allow *an unelected official to overrule the democratically elected Government.*[94]

However, this differed from its opinion stated in the White Paper in 1997:

> *we have considered this possibility [the ministerial veto], but decided against it, believing that a government veto would undermine the authority of the Information Commissioner and erode public confidence in the Act. We believe that our proposals strike the right balance between the sometime competing public interests in disclosing and withholding information.*[95]

The Campaign for Freedom of Information summarises the objections to the ministerial veto:

Our concerns about the veto are that:

- *It could be abused, to protect ministers from embarrassment*
- *It confirms the principle of ministerial control over information – something that FOI legislation should remove*
- *It may signal to officials and ministers that a fundamental change in culture is not necessary*
- *It may distort the development of case law, allowing ministers to block decisions without proper cause – instead of appealing against them to the Tribunal.*
- *It undermines the authority of the Commissioner.*[96]

NORTHERN IRELAND – KEY ISSUES

The matters considered in a Northern Ireland debate on freedom of information might include:

- whether the First Minister and Deputy First Minister, or the Information Commissioner should have the final say regarding disclosure in the public interest;
- whether the Information Commissioner or the Executive is best placed to decide on questions of the public interest;
- whether the existence or use of a ministerial veto might undermine public confidence in the Information Commissioner; and
- given that the public interest decisions of the Information Commissioner can be overridden, whether her other decisions should be capable of being overridden by Ministers.

5. SCOTLAND AND WALES

5.1 SCOTLAND

Parliament, like the Northern Ireland Assembly, has competence to legislate on freedom of information. The Scottish Executive declared its commitment to a Scottish Freedom of Information Act in its document *Partnership for Scotland*, published in May 1999, shortly after the first elections to the Scottish Parliament.[97] The Deputy First Minister, Mr Jim Wallace QC MSP, long a campaigner for freedom of information legislation, restated its importance as a priority for the Scottish Executive in a speech to the Scottish Parliament in June 1999.[98]

The Scottish Executive rapidly published, in July 1999, its own *Code of Practice on Scottish Executive Information*,[99] to operate until a Scottish Act can be enacted. It supplants the UK *Code of Practice*, providing the same level of openness.[100]

Following consultation begun in November 1999, the Scottish Executive published a draft Bill in March 2001. The draft Scottish Bill is generally considered to provide a less restrictive regime than that contained in the UK Act – although in some respects it is more restrictive. The Campaign for Freedom of Information in Scotland confirmed that '*in significant respects it goes beyond the recent UK Freedom of Information Act.*'[101]

5.2 WALES

The UK Act applies in Wales. It will apply, for example, to the National Assembly for Wales. However, the Welsh Assembly also published its own *Code Of Practice On Public Access To Information*[102] in 1999, shortly after its first meeting of 12 May 1999, and revised it in 2001. It supplants the UK *Code of Practice*.

The Welsh Cabinet has also adopted a policy of conducting its business as openly as possible. It publishes the minutes, papers and agendas of its meetings, unless there are overriding reasons not to do so, around six weeks after each meeting.[103] It is interesting to compare this with UK Cabinet and Northern Ireland Executive material, which fall under the exemptions for advice relating to policy formulation or prejudicing the effective conduct of public affairs[104] and would not normally be released for at least thirty years.

It has been said that the Welsh Cabinet policy

> *shatters the taboo that revealing cabinet proceedings before 30 years have passed will fatally undermine decision-making. The minutes reveal business-like, practical and sometimes mundane discussions and suggest that the traditional secrecy in this area may have more to do with protecting mystique than real secrets or highly sensitive discussions.* [105]

6. FREEDOM OF INFORMATION IN NORTHERN IRELAND

6.1 EXECUTIVE COMMITMENT TO FREEDOM OF INFORMATION

The Executive is committed to freedom of information. The Programme for Government states that the Executive will *'modernise government and make it more open and accessible to the public'.*[106] In addition to joined-up government and exploiting the possibilities of electronic government, this will involve

> *improved availability of information about government, and the development of ways to consult more widely about the development of policies, taking full account of the diversity in our society in terms of community background, social class, need and language.*

The Programme for Government indicates that freedom of information legislation will be used to provide greater access to information about government. However, it does not indicate whether the Executive will bring forward its own legislation, or whether it will instead rely on the UK Act, which extends here until the Assembly legislates otherwise.

6.2 AN EXECUTIVE BILL ON FREEDOM OF INFORMATION?

The Executive has not yet decided whether, in its opinion, Northern Ireland requires separate legislation. Nor has it indicated precisely when it will come to that decision. In January 2001, in written answer to Mr David Ford MLA,[107] OFMDFM stated that a consultation paper would be published in 2002. On 19 June 2001, in answer to an oral question of Mr Ford, Mr Mallon MLA, Deputy First Minister, stated that:

> *no decision has yet been taken on separate additional legislation for Northern Ireland. The situation will be reviewed in the light of our experience with the operation of the Freedom of Information Act 2000.*[108]

It would of course also be open to Members of the Northern Ireland Assembly to bring forward a Private Member's Bill.

6.3 IMPLEMENTATION OF THE UK ACT IN NORTHERN IRELAND

Nor does a date for implementing the UK Act appear to have been set for Northern Ireland departments and other bodies. Although in January 2001 OFMDFM indicated that *'the intention is that this legislation will be brought into force in Northern Ireland at the same time as in England and Wales'*, [109] the Deputy First Minister stated in June 2001 that

> *the Executive Committee will be considering this matter shortly with a view to the First Minister and I reaching agreement with the Lord Chancellor on the implementation date to be applied here.*[110]

6.4 IMPLEMENTATION ACTIVITY

INTERDEPARTMENTAL WORKING GROUP

In order to raise awareness and prepare for implementation of the Act, an interdepartmental working group has been established to:

- raise awareness across the NICS;
- assist Departments in preparations for its implementation;
- establish best practice; and
- ensure compliance with all aspects of the new legislation.[111]

FREEDOM OF INFORMATION SECTION, OFMDFM

Currently staffed by one Principal Officer, the Section's aims are to:

- undertake the consultation and to bring forward any required legislation; and
- assist the NICS to implement the UK Act by providing advice and guidance on its operation.

OFMDFM's Equality Scheme indicates that an equality impact assessment ('EQIA') on its freedom of information policy will be carried out in the second year of performing EQIAs, i.e. 2001/2002.[112] The Scheme indicates that OFMDFM believes that freedom of information policy may provide an opportunity to better promote equality of opportunity or good relations as regards all nine of the categories of persons listed at Section 75 of the Northern Ireland Act 1998, by altering policy or working with others in government or the community at large.[113]

Freedom of information policy is not referred to in OFMDFM's current Public Service Agreement, Corporate Plan or Business Plan.

7. FINAL COMMENTS

The UK Freedom of Information Act 2000 provides the first comprehensive statutory right of access to information. It does not however provide the level of access that was originally envisaged by the government and laid out in its White Paper *Your Right to Know*.

The devolved administrations in Scotland and Wales have moved rapidly to establish freedom of information regimes which are more open than that provided by the Act. The Northern Ireland Executive has made clear its commitment to freedom of information, but has as yet given no indication whether it will follow the Welsh and Scottish examples, rely on the UK regime, or promote a more restrictive regime. It has taken no visible steps to introduce a local Code of Practice, and has missed its original target date to begin consultation.

If the UK Freedom of Information Act 2000 is not thought suitable in the Northern Irish context, a debate on freedom of information should consider the fundamental question of whether a more, or less, restrictive regime might be more suitable. The debate might include, amongst other matters:

- whether class exemptions should be used;
- what threshold of harm should activate contents exemptions;
- whether advice relating to the formulation of government policy should be exempted;
- whether commercially sensitive information should be exempted;
- whether the public interest test should apply to all or only some exemptions; and
- the ministerial veto.

Information has been described as *'the oxygen of democracy'*.[114] The right to information has been described as *'central to a mature democracy'*.[115] Freedom of information provides better and more accountable government. A Northern Ireland debate should consider whether and to what extent Northern Ireland could maximise those benefits.

[1] Committee on Standards in Public Life (1995) *First Report* Cm 2850, page 14
[2] Article 19, the Global Campaign for Free Expression, describes itself as 'working worldwide to combat censorship by promoting freedom of expression and access to official information' and is a registered charity in the UK: see http://www.article19.org/
[3] Article 19 (1989) *No Comment – Censorship, Secrecy and the Irish Troubles* London: Article 19
[4] The Scottish Executive elected not to have Scotland subject to the UK Act, and has recently published for consultation its own draft Bill on freedom of information
[5] Opinion of the First and Deputy First Ministers, stated in answer to written question NIA AQO 508/00, 5 January 2001
[6] Select Committee on Public Administration (1999) *Third Report - Freedom of Information Draft Bill* Session 1998/9 HC 570
[7] European Commission (1998) *Green Paper on Public Sector Information in the Information Society* COM(1998)585
[8] The Select Committee on the Parliamentary Commissioner for Administration
[9] Select Committee on the Parliamentary Commissioner for Administration (1996) *Second Report – Open Government* Session 95/96 HC84, London: HMSO, para3 14-16
[10] *Your right to know* Cm 3818 (1997) London: HMSO para 1.1
[11] Report of the BSE Inquiry *Report, evidence and supporting papers of the Inquiry into the emergence and identification of Bovine Spongiform Encephalopathy (BSE) and variant Creutzfeldt-Jakob Disease (vCJD) and the action taken in response to it up to 20 March 1996* (2000) HC 887-1 London: HMSO, Volume 1, chapter 3, para 180. For an interesting discussion of the impact of secrecy on the handling of BSE, see Campaign for Freedom of Information (2000) *BSE and Secrecy: Implications for the Freedom of Information Bill,* at http://www.cfoi.org.uk/opengov.html#labour
[12] At http://www.article19.org/accesstoinformation/
[13] Select Committee on the Parliamentary Commissioner for Administration (1996) *Second Report – Open Government* Session 95/96 HC84, London: HMSO, para 22
[14] ICM (October 2000) *Joseph Rowntree Reform Trust State of the Nation Poll*, at http://www.icmresearch.co.uk/reviews/2000/state%2Dof%2Dthe%2Dnation%2D2000.htm
[15] Select Committee on the Parliamentary Commissioner for Administration (1996) *Second Report – Open Government* para 21
[16] Evidence of Rt Hon Roger Freeman MP, Chancellor of the Duchy of Lancaster, in the Select Committee on the Parliamentary Commissioner for Administration (1996) *Second Report – Open Government* Session 95/96 HC84, London: HMSO, Q. 438
[17] The Scottish Executive has prepared its own draft bill
[18] Now likely to be delayed until at least July 2002, according to the Home Office: see *Missing files delay freedom act*, Guardian, 7 March 2001, at http://www.guardian.co.uk/freedom/Story/0,2763,447767,00.html
[19] Cabinet Office (1998) *Open Government – Code of Practice on Access to Government Information*, second edition, at http://www.homeoffice.gov.uk/foi/ogcode981.htm
[20] The Access to Medical Reports Act 1988 c 28 and the Access to Health Records Act 1990 c 23
[21] The Data Protection Act 1984 c 35 and the Data Protection Act 1998 c 29, which derive from EU Directives and are thus mirrored in all Member States of the EU. Similar measures exist in most commercially-developed jurisdictions
[22] See for example, *Beefing about freedom of information*, Guardian, 9 February 2001; the briefings and other commentary of the Campaign for Freedom of Information at http://www.cfoi.org.uk/; or Liberty (2000) *Freedom of Information Bill: second reading briefing* at http://www.liberty-human-rights.org.uk/
[23] Wadham, J, Griffiths, J and Rigby, B (2001) *Blackstone's Guide to the Freedom of Information Act 2000* London: Blackstone Press, Preface
[24] Schedule I is available at http://www.legislation.hmso.gov.uk/acts/acts2000/20000036.htm. It is interesting to note that this approach – producing a finite list of bodies – differs from that adopted in the Human Rights Act 1998 c 42, which defines 'public authority' but leaves it to the courts to decide whether a body meets the definition. *Blackstone's Guide* (at page 43) suggests that this will result in fewer bodies coming under the freedom of Information Act than the Human Rights Act. Another approach is adopted by section 75 of the Northern Ireland Act

c 47, which applies to bodies subject (under other legislation) to the control of the Ombudsman – some of which must first be designated by the Secretary of State – and any other bodies designated by Secretary of State

[25] Freedom of Information Act 2000 c 36, sections 4 and 5

[26] Freedom of Information Act 2000 section 16

[27] Freedom of Information Act 2000, section 84

[28] Data protection is a reserved matter, while freedom of information is transferred under the Northern Ireland Act 1998 c 47

[29] Freedom of Information Act 2000 section 87

[30] *Missing files delay freedom act*, Guardian, 07 March 2001, at http://www.guardian.co.uk/freedom/Story/0,2763,447767,00.html

[31] Freedom of Information Act 2000, section 30

[32] Freedom of Information Act 2000, section 28

[33] Freedom of Information Act 2000, sections 39 and 74. *The United Nations Economic Commission for Europe Convention on access to information, public participation in decision-making and access to justice in environmental matters* was signed at Aarhus in Denmark in 1998

[34] Freedom of Information Act 2000, section 1 (6)

[35] Freedom of Information Act 2000, section 32

[36] For example, the Security Services, GCHQ or the National Criminal Intelligence Service. Freedom of Information Act 2000, section 23

[37] Freedom of Information Act 2000, section 41

[38] Freedom of Information Act 2000, section 45

[39] Home Office (2001) *Draft Code of Practice on the discharge of the functions of public authorities under Part I of the Freedom of Information Act 2000*, at http://www.homeoffice.gov.uk/foi/dftcp00.htm

[40] Freedom of Information Act 2000, section 46

[41] Lord Chancellor's Department (2001*) Working draft of the Lord Chancellor's Code of Practice on the management of records under Freedom of Information Act 2000*, at http://www.pro.gov.uk/recordsmanagement/CodeOfPractice.htm

[42] Freedom of Information Act 2000, section 18

[43] It has been commented that there may be tension between duties relating to the promotion of access and openness under the freedom of Information Act, and the protection of privacy under the data Protection Acts – especially if an applicant requests information relating to some other individual: see for example *Blackstone's Guide* page 109. The two regimes, however, are intended to be complementary

[44] Freedom of Information Act 2000, section 50

[45] Freedom of Information Act 2000, section 55 and Schedule 3

[46] Freedom of Information Act 2000 section 54

[47] Previously the Data Protection Tribunal, renamed and given new powers and functions by section 18 of the Freedom of Information Act 2000

[48] Explanatory Notes to the Freedom of Information Act 2000, para 179

[49] Northern Ireland Executive Committee (2000) *Programme for Government*, para 7.2

[50] Freedom of Information Act 2000, section 23

[51] Freedom of Information Act 2000, section 41

[52] See, for example, the explanation for the use of class exemptions in the Scottish Executive's draft Freedom of Information Bill: *Freedom of Information – Consultation on Draft Legislation*, laid before the Scottish Parliament by the Scottish Ministers on March 2001, para 35

[53] *Your Right to Know*, para 3.8

[54] See, for example, *The Guardian Freedom of Information campaign*, Guardian, 20 September 1999, at http://www.guardian.co.uk/freedom/Story/0,2763,201195,00.html

[55] Select Committee on Public Administration (1999) *Third Report - Freedom of Information Draft Bill* Session 1998/9 HC 570, paras 62 and 63

[56] NIHRC (1999) *Response to the Draft Freedom of Information Bill*, page 4, at http://www.nihrc.org/update/new_page_1.htm

[57] The Campaign for Freedom of Information *'aims to eliminate unnecessary official secrecy and to give people legal rights to information which affects their lives or which they need to hold public authorities properly accountable'*. It is a UK body supported by, amongst others,

the Church of England Board of Social Responsibility, the Consumers' Association and the Northern Ireland Public Services Alliance: see http://www.cfoi.org.uk

[58] Campaign for Freedom of Information in Scotland (2001) *Briefing for the Scottish Parliament Debate 15/03/01*, page 2, at http://www.cfoi.org.uk

[59] The Library Association is the chartered professional body for librarians and information managers. It *'attaches a high value to freedom of information which is considered to be a core responsibility of its members'*: see http://www.la-hq.org.uk

[60] Library Association (1999) *Freedom of Information: Draft Bill Public Consultation, Response on behalf of The Library Association,* para 3.4.3, at http://www.la-hq.org.uk/directory/prof_issues/foi.html

[61] *Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents*, OJ L 145 of 31.5.2001, p. 43, Article 4

[62] Freedom of Information Act 2000, section 26

[63] I.e. the UK government, the Scottish Executive, the NI Executive or the National Assembly for Wales: Freedom of Information Act 2000, section 28

[64] *The final triumph of all the butchers and whisperers*, Guardian, 25 May 1999

[65] *Your Right to Know*, para 3.7

[66] Home Office (1999) *Freedom of Information – Consultation on Draft Legislation* Cm 4355, London: HMSO

[67] Five contents exemptions are not tested on harm but on some other standard: s22 applies where it is *'reasonable'* not to disclose information intended for future publication; s24 where exemption is *'required to safeguard'* national security; s34 where exemption is *'required to avoid an infringement'* of parliamentary privilege; s36 (2) (b) where disclosure *'would, or would be likely to inhibit'* frank provision of advice or exchange of views; and s38 where disclosure *'would, or would be likely to endanger'* an individual's health or safety

[68] *Briefing for the Scottish Parliament Debate 15/03/01*, page 1

[69] For example: section 21 (b) uses the words 'significant, adverse effect'; section 23 (a) 'prejudice or impair'; or section 24 (1) 'affect adversely'

[70] NIHRC (1999) *Response to the Draft Freedom of Information Bill*, page 3

[71] Select Committee on Public Administration (1999) *Third Report - Freedom of Information Draft Bill* Session 1998/9 HC 570, Vol I paragraph 71; and Report of the Select Committee appointed to consider the draft Freedom of Information Bill, Session 1998/99 HL 97, para 25

[72] Section 35 (5) provides, inter alia, that 'Ministerial communications' includes any communications between Ministers of the Crown, Northern Ireland Ministers or Northern Ireland junior Ministers and proceedings of the Executive Committee of the Northern Ireland Assembly; 'government policy' includes the policy of the Executive Committee of the Northern Ireland Assembly; and 'Law Officers' includes the Attorney General for Northern Ireland.

[73] Scottish Parliament Information Centre (2000) *Freedom of Information in Scotland* Research Paper 00/19 page 23

[74] Office of the Information Commissioner (of the Republic of Ireland) (1999) *Openness and Transparency*, at http://www.irlgov.ie/oic/210e_3c2.htm#A

[75] Although section 35 (4) of the Act requires that when deciding whether an exemption applies, '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.'

[76] Freedom of Information Act 2000, section 35 (2)

[77] *Open Government – Code of Practice on Access to Government Information*, second edition Exemption 2, Internal Discussion and Advice

[78] *Your Right to Know*, para 3.12

[79] Select Committee on Public Administration (1999) *Third Report - Freedom of Information Draft Bill* Session 1998/9 HC 570, evidence given on 21/7/99, Q 1076

[80] NIHRC (1999) *Response to the Draft Freedom of Information Bill*, page 5

[81] Under sections 69(1) and 69(3) of the Northern Ireland Act 1998

[82] Section 19 of the Northern Ireland Act 1998

[83] Select Committee on Public Administration (1999) *Third Report - Freedom of Information Draft Bill* Session 1998/9 HC 570, Vol I paras 83-94

[84] Reported on and reproduced in the column *Inside Stormont*, Belfast Telegraph, 2 February 2001, at http://www.belfasttelegraph.co.uk/cgi-bin/archive/showdoc?docloc=2001/February/02/LEADERS/stormont
[85] Committee for Finance and Personnel (2001) *Seventh Report – Report on the Inquiry into the use of Public Private Partnerships* Session 2000-1 NIA7/00, para 12.2
[86] *Report on the Inquiry into the use of Public Private Partnerships*, page 5
[87] Campaign for Freedom of Information in Scotland (2001) *Briefing for the Scottish Parliament Debate 15/03/01*, page 2, at http://www.cfoi.org.uk/scotland.html
[88] Freedom of Information Act 2000, section 2 (2) (b)
[89] Freedom of Information Act 2000, section 2 (3). All are class exemptions.
[90] NIHRC (1999) *Response to the Draft Freedom of Information Bill*, page 4
[91] Freedom of Information Act 2000, s 53 (8) also defines 'accountable person' in relation to English, Welsh, and UK public authorities.
[92] *Explanatory Notes to Freedom of Information Act 2000*, para 179. From this it may be inferred that where a dispute is over whether or not an exemption should apply, the ministerial veto would not normally be available.
[93] Scottish Executive Draft Bill, sections 28, 31(1)(b), 33, 35, and 40(b)
[94] Evidence of Home Office Minister Mr Mike O'Brien MP, Committee Stage of the Freedom of Information Bill, House of Commons Standing Committee B, Twelfth Sitting, 8 February 2000 (morning), col. 431
[95] *Your Right to Know*, para 5.18
[96] Campaign for Freedom of Information (2000) *Freedom of Information Bill Briefing Paper 4: Clause 52 – The Veto* page 3, at http://www.cfoi.org.uk/opengov.html#labour
[97] Scottish FOI Implementation Group (2001) *Freedom of Information in Scotland – background* SFOI (2001) 1, at http://www.scotland.gov.uk/government/foi/workgroup.asp
[98] *Jim Wallace promises to introduce a Scottish Freedom of Information Bill*, Scottish Office press release 1311/99, 23 June 1999, at http://www.scotland.gov.uk/news/releas99_6/pr1311.htm
[99] Scottish Executive (1999) *Code of Practice on Scottish Executive Information* at http://www.scotland.gov.uk/government/foi/codesofpractice.asp
[100] Comment of Deputy First Minister Mr Jim Wallace, QC, MSP, Scottish Parliament Debates, 23 June 1999, Vol I No 11 column 659
[101] Campaign for Freedom of Information in Scotland (2001) *Briefing for the Scottish Parliament Debate 15/03/01*, at http://www.cfoi.org.uk/scotland.html
[102] National Assembly for Wales (2001) *Code Of Practice On Public Access To Information*, second edition, at http://www.wales.gov.uk/keypubcodespractice/content/codespractice/contents-e.htm
[103] http://www.wales.gov.uk/organicabinet/content/CabMeetings/index.htm
[104] Freedom of Information Act 2000 section 36
[105] *Publication of Welsh cabinet minutes 'shatters taboo'*, Campaign for Freedom of Information press release, 26 April 2000, at http://www.cfoi.org.uk/wales260400pr.html
[106] Northern Ireland Executive Committee (2000) *Programme for Government*, para 7.2
[107] Written answer, NI Assembly, 5th June 2001, Mr Mallon MLA, AQO 508/00
[108] Deb, NI Assembly, 19th June 2001, Mr Mallon MLA, AQO 1612/00
[109] AQO 508/00
[110] AQO 1612/00
[111] AQO 1612/00
[112] OFMDFM (2000) *Equality Scheme*, para 4.5
[113] OFMDFM (2000) *Equality Scheme*, Annexes 3 and 4
[114] By Article 19, the Global Campaign for Free Expression, which describes itself as *'working worldwide to combat censorship by promoting freedom of expression and access to official information'* and is a registered charity in the UK: see http://www.article19.org
[115] *Your Right to Know*, foreword by the Chancellor of the Duchy of Lancaster.

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