

Top Copy on: Security, May 29,
Reform of the Official Secrets Act

THE PRIME MINISTER

You have asked for my personal views on how the Government might approach the issues of the future of the Official Secrets Acts and Open Government. I have now had the opportunity to consult the Director of Public Prosecutions and officials not available to me when in Opposition, and also to discuss the matter with the Home Secretary. My views on both these matters are set out below.

The reform of the Official Secrets Act

✓ I continue to be of the view that our legislation for the reform of Section 2 of the Official Secrets Act 1911 should follow in general the proposals in the Franks' Report. Whilst in Opposition I put forward certain views as to the detailed implementation of these proposals and recommended some changes in them. My present views on these points, in the light of my discussions since assuming office, are set out in the annex to this minute.

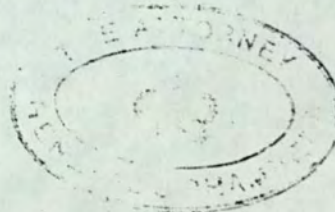
Open Government

We did not study this matter in depth whilst we were in Opposition. I have, however, read the Report on Overseas Practice produced by the Civil Service Department. In view of the general

considerations in Section X of that Report, I think that we should proceed with caution and that it would be most unwise to commit ourselves to public rights of access to official information as extensive as provided for in the United States model. Our present approach, I consider, should be to institute a code of practice. In the longer term this might have to be on a legislative basis.

I am sending a copy of this minute to the Home Secretary, the Lord President, the Minister of State, Civil Service Department, and to Sir John Hunt.

M.H.



23 May, 1979

Law Officers' Department,
Attorney-General's Chambers,
Royal Courts of Justice.

BACKGROUND NOTE - OPEN GOVERNMENT

May '79

General Issues

"Open Government", in the form most often urged by its supporters, means a right of access to information held by public authorities, preferably to individual files and documents. This right of access entails a basic shift of power, from the executive's discretion to withhold such information to the applicant's right to obtain it, at the initiative of the applicant, and at the time he chooses. It is most generally embodied in legislation.

2 Supporters are drawn from a wide range of interests - the media; academics; consumer protection organisations; environmental and other pressure groups; civil liberties lobbies; and increasingly back-benchers both in Parliament and local government. The demand is fuelled by the knowledge that a number of other Western democracies - Sweden, Norway, Denmark, USA, the Netherlands and France - have established freedom of information regimes, and others - Australia and Canada - are contemplating legislation.

3 The demand for "open government" and "freedom of information" has become a convenient symbol of reform in quite varied areas. Consumer information about, for example, car safety, is regarded as inadequate and Government is blamed for suppressing data it may, or may not, have on such questions. Access to documents will not give such information without radical rethinking of the role of Government in the consumer protection field. Similarly, concern for the privacy of the individual, and especially the use made of computerised data held about him by both the public and private sector, ranks high among supporters of freedom of information, but this subject can be delineated and dealt with separately.

4 But some of the most vocal and committed supporters of access to government documents wish to be able to participate in the decision-making process. They wish to be able to assess the available options for themselves, to be satisfied a Minister has received adequate advice and has examined the issues thoroughly, and of course they wish to influence the final decision. The media, pressure groups, and back-benchers are largely supporters of freedom of information for these reasons. Only a right of access would satisfy their demands since they wish to have the initiative in requesting documents and information.

5 There is still some confusion over the relationship between reform of Section 2 of the Official Secrets Act 1911, and freedom of information. The various groups mentioned above would not deny the reform of Section 2, indeed most would actively support it. But any reform which would more clearly restrict and define categories of information subject to criminal sanction if given unauthorised release, would not go far enough towards making available on demand other categories of documents which at present are released on the discretion of Ministers. Hence a wider Bill is sought alongside any move to reform Section 2.

Exempt Matter

6 Most supporters do not deny that certain areas of government activity need to remain "secret" - exempt from the provisions of freedom of information legislation. There is dispute over the degree of exemption desirable, but there are several areas common to most proposals. Defence and the security of the state; dealings with other countries, though not necessarily where EEC business is concerned; information privileged in a court; information disclosure of which would be prejudicial to law and order, including prosecution of crime; and where individual privacy would be invaded. An important area in dispute is information given in confidence to the Government, by persons or organisations outside government.

7 Another disputed area is advice given by officials to Ministers, and working papers containing internal argument and analyses of policy before a decision on each issue has been taken. Some proponents, such as the Outer Circle Policy Unit, wish to see such material made available before a decision is taken, and others argue for access after a major policy decision.

Ministerial Accountability and Open Government

8 Clearly, advice given to Ministers, and Cabinet papers submitted for inter-Departmental and inter-Ministerial, form a nucleus of documents central to the working of the Executive. If made available, the mutual trust and confidence between Ministers and their advisers, and the collective responsibility of Ministers, would be severely eroded. Supporters of the release of such documents argue vigorously that they need these documents for a sufficient understanding of policy so that additional "watchdogs" may criticise the Executive.

9 But Ministers are accountable to Parliament, and it is Parliament who should be in the best position to examine policy and debate it. The recent

report of the Select Committee on Procedure makes a number of proposals for reforming the Select Committee system, and it may be that some back-bench supporters of access to official documents may be satisfied by whatever proposals are agreed in due course on the position of Select Committees, if they strengthen the powers of the Legislature to effectively monitor the activities of the Executive.

The Present Position on Release of Official Information

10 Departments release a vast quantity of information in the form of consultative documents, press releases, publications and in reply to specific requests, either from MPs or members of the public.

11 In July 1977, the then Head of the Civil Service, Sir Douglas Allen, issued a Directive to Departments requesting them to make background and analytical information available on major policy decisions. The presumption would in future be that such material would be released unless there were overwhelming reasons to the contrary. (A copy of this Directive, usually referred to subsequently as the "Information Directive", is annexed to this Note.)

12 Since then, Departments have complied, and increasingly such papers are released or published where before a Department might have given no thought to such public availability. It is, however, less than two years since the Directive was issued, and results have been modest rather than dramatic. This is as much a result of the nature of the exercise - some policy studies take a long time to complete - as it is of the timescale and evolutionary character of the whole operation. There are clearly papers for release 'in the pipeline', but it is difficult to assess how many more will be forthcoming, or even should be forthcoming, over each Department's work.

13 The previous Government, in its White Paper "Reform of Section 2 of the Official Secrets Act 1911" (Cmnd 7285), promised to consider possible ways forward on open government, in the light of a more detailed study of overseas practice. On 30 March 1979 the report on Overseas Practice was published, written by CSD officials, and simultaneously a Green Paper on Open Government (Cmnd 7520) was issued. In the Green Paper the previous Government concluded that a possibly way forward would be a draft Code of Practice (modelled on the 'Justice' proposals) to be studied by a Select Committee. The Green Paper did not commit itself to whether this would be embodied in legislation or not.

14 In January 1979 Mr Freud, having won first place in the Private Members' Ballot, introduced an Official Information Bill, which was drafted by the Outer Circle Policy Unit. It created, in Part I, a right of access to official documents subject to certain exemptions, and was retrospective in application. It repealed Section 2 of the Officials Secrets Act and replaced it, in Part 2 of the Bill, with measures based on the Franks Commission findings. This Bill had considerable cross-bench support; it emerged largely unscathed from Standing Committee and was due for Report Stage on 6 April, but fell with the dissolution.

15 A non-legislative Code of Practice to be monitored by the Parliamentary Commission was proposed in July 1978 by 'Justice', a group comprising amongst its members two retired Permanent Secretaries and an ex-Parliamentary Commissioner for Administration. While the administrative nature of such a Code has the attraction of flexibility, the provisions almost inevitably mirror those in draft legislation, and carry the same difficulties of the initiative being with the inquirer and not with the Government. Supporters of full-blooded freedom of information legislation view such Codes as inadequate, however, since the right of access for them needs clear statutory backing, with the minimum of Ministerial discretion remaining, and that able to be challenged either by the Courts or some independent body such as the Parliamentary Commissioner. The question of who monitors Ministerial decisions under any scheme of access is a complex and difficult one, with important constitutional implications.

Resources

16 Any system of access to documents is potentially expensive and bureaucratic because of the need for (a) indexing, cataloguing and other administrative arrangements to enable applicants to identify the document they wish to see and to provide facilities to enable them to do so; (b) machinery and arrangements to distinguish between exempt material and disclosable material, and to ensure that only the latter is released. The administrative consequences would become particularly severe if a system of access was to have retrospective application.

Current Action

17 The Lord President is at present considering the question of open government, and will be putting forward proposals shortly on how best to proceed.



CIVIL SERVICE DEPARTMENT

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Sir Douglas Allen GCB

Head of the Home Civil Service

6 July 1977

Dear Head of Department

DISCLOSURE OF OFFICIAL INFORMATION

During the Debate on the Address on 24 November last, the Prime Minister announced that it would be the Government's policy in future to publish as much as possible of the factual and analytical material used as the background to major policy studies. A copy of the relevant part of the Prime Minister's speech is attached. I am writing in terms which the Prime Minister has specifically approved to let you know how his statement affects present practice and to ask you to ensure that your Department gives effect to it. You may wish to let your Minister see this guidance drawing particular attention to paragraph 10.

2. The change may seem simply to be one of degree and of timing. But it is intended to mark a real change of policy, even if the initial step is modest. In the past it has normally been assumed that background material relating to policy studies and reports would not be published unless the responsible Minister or Ministers decided otherwise. Henceforth the working assumption should be that such material will be published unless they decide that should not be. There is of course no intention to publish material which correctly bears a current security classification or privacy marking; at the same time, care should be taken to ensure that the publication of unclassified material is not frustrated by including it in documents that also contain classified material.

3. In effect, what is proposed is an increase in the already considerable amount of material put out by Departments. The additional material will mainly consist of deliberate presentations in the later stages of discussion and development of new policy. Some of these will probably, as now, take the form of Green Papers. Some may have kindred form, like the recent Orange Paper on Transport. While most material will be released on the initiative of the Department, probably through HMSO, some of lesser importance, or of interest to a limited audience, may well be put out through other means such as publication in magazines or in response to specific requests in the same way that a good deal of unpublished material is already made available to bona fide researchers. In some cases it may be preferable simply to publicise the existence of certain material which would be made available to anyone who asked. Consideration should also be given to the issue of bibliographies or digests so that interested parties are advised what material is available.

4. In adopting the working assumption described in paragraph 2 above for policy studies, including PARs, the normal aim will be to publicise as much as possible of the background material subject to Ministerial decision once they have seen the study and reached their conclusions on it. When Ministers decide what announcement they wish to make, therefore, they will also wish to consider whether and in what form the factual and analytical material may be published, since there may, as the Prime Minister made clear in his statement, be circumstances in which Ministers will not wish to disclose such material.

5. It is not the intention to depart from the present practice of not disclosing PARs nor identifying them publicly; any question of releasing PAR material in circumstances not covered by a Ministerial decision should be referred to the Treasury.

6. In his November statement the Prime Minister said that it was the Government's wish to keep to a minimum the cost to public funds of the new initiative on disclosure. One inhibition to the publication of background material in the past has been that it has often been incorporated in submissions to Ministers which could not be published in their entirety. Re-writing material specially for publication is wasteful and expensive in staff time. Therefore when policy studies are being undertaken in future, the background material should as far as possible be written in a form which would permit it to be published separately, with the minimum of alteration, once a Ministerial decision to do so has been taken. It will generally assist Ministers to reach their decisions on publications if they can see an identifiable separate part of the report appropriately written for this purpose.

7. The form and way in which material is released will have to be considered on each occasion. The cost of any extra printing, or publishing, falls under present arrangements on the HMSO Vote, and HMSO is of course affected by the current restrictions on public expenditure in the same way as other Departments. HMSO is also responsible for deciding what prices should be charged for published material. You should ensure that discussions with HMSO are initiated at the earliest possible opportunity on any proposal which will add to expenditure. The following particular considerations should also be borne in mind:

i. Great care should be taken to keep costs to a minimum. If copies are to be run off in advance of demand, the quantity should be carefully and prudently assessed, to avoid waste rather than to offer instant response. (But of course, there is a countervailing need to aim where appropriate for the economics of longer reproduction runs. The right balance here may be difficult and decisions should not be left to too low a level).

ii. In general, double printing should be avoided, eg the published form of the material should be the same as that used internally (and the same print).

iii. There should be a charge for all material, at a price set by HMSO for each item, to include all aspects of reproduction and handling, but not of course any of the costs of the primary study itself.

.../iv.

iv. As regards Crown Copyright, attention is drawn to CSD General Notice GEN 75/76 dated 12 August 1975 (and corrigendum of 8 October 1976).

8. The Government's decision on this question is in a form which should not involve substantial additional work but which could all too easily be lost to view. There are many who would have wanted the Government to go much further (on the lines of the formidably burdensome Freedom of Information Act in the USA). Our prospects of being able to avoid such an expensive development here could well depend on whether we can show that the Prime Minister's statement had reality and results. So I ask all of you to keep this question of publicising material well on your check-list of action in any significant areas of policy formulation, even at Divisional level; and to encourage your Ministers to take an interest in the question.

9. Since the Prime Minister may well be asked what effect his announcement has had on the amount of information made available, I should be grateful if you could arrange to have some kind of record kept of the relevant items made available by your Department. Where the material is of an unusual kind, or of a variety not usually made available in the past, it would be useful if a copy could be sent to CSD. In cases where it has been decided not to publish material which might be expected to be of considerable public interest, I suggest that the reasons should be briefly recorded.

10. The greater publicising of material can hardly fail to add to one cost - that of responding to the additional direct correspondence to which it may well give rise. In a Service operating under tight resource constraints, it may not always be possible to afford to give to such additional correspondence the kind of full and studied replies to which we have long been accustomed within the sort of timescale that has hitherto been customary. Nevertheless, Departments must do their best in these matters, and should inform a correspondent if the timescale for a reply is likely to be longer than normal.

11. I am copying this to Heads of Departments as on the attached list.

Yours sincerely

Douglas Allen