c.c. B. Ingham

Chancellor of the Duchy of Lancaster

PRIME MINISTER

OFFICIAL INFORMATION

I am sorry not to have replied sooner to your Private Secretary's letter of 9 November about guidance to departments on disclosure of official information. But your point that it might be wiser to let sleeping dogs lie and that we should raise false expectations if we offered guidance which went only a little further than the Croham directive suggested to me that it would be worth taking time for a more fundamental reconsideration of the options open to us. We should then be better placed to consider whether, and if so when, we wanted to make any move on disclosure of information.

The Options

I believe our main choices are:

a. to do nothing

b. to issue revised guidance to officials in support of our present stance; or

c. to take an initiative which advances our policy eg by introducing a Code of Practice.

I do not regard legislation to provide a public right of access to information as a realistic option. It would strike at the principle of Ministerial accountability to Parliament rather than the Courts, and at the authority of Parliament as the body responsible for calling Ministers to account, and would give the judiciary the final say about what information Ministers should disclose.

Doing nothing has attractions. Our record of openness in government is good (though there are many who will dispute that) and there are respectable arguments for maintaining our present line. At Annex B is material which we put together in response to your general questions about the effects of our policy so far and the answers to our critics. We do not have to take any action at present.

Nevertheless, I believe that there are sound management reasons for consolidating and reissuing the guidance to officials. They do not know as much as they should - if anything - about our policy.

If our pledge to make available "as much information as possible" is to be implemented we need to make quite sure that our policy is fully understood within the Civil Service. The Croham directive does not deal at all with the question of responding positively and sympathetically to reasonable requests for information, and there is a need for guidance to Departments on this. But I accept that if we do issue revised guidance for management reasons, our action would be open to the objections which you have pointed out, ie we risk waking the dogs, and will be told that we have not done enough.

It is this dilemma, coupled with doubts about the longer term credibility of our position particularly in the run-up to an Election, and a belief that we could do more to meet legitimate concerns, that leads me to think that some new initiative ought to be considered. There is genuine unease among reasonable members of the public about the availability of information on matters directly affecting them, particularly in the environment and consumer fields (health hazards , safety of drugs, environmental planning, pollution, and so on). There are good reasons why all the information held by the Government cannot be freely disclosed. But it would help to reassure the public - and our own Back Bench - if there were clear instructions to departments about responding to requests for information of this kind, and an established framework within which all issues concerning disclosure of information could be handled.

In considering a more substantial move, we have been guided by some "fundamentals". These are that we should not concede legislation conferring a statutory right to information; should offer nothing on access to key working documents recording discussions between Ministers or with their advisers and officials; should ensure that Parliament continues to be the forum where any disputes about disclosure of information are settled; and should minimise resource costs. On the other hand, if a new move is to win us some credit with advocates of more open government, we need to be able to demonstrate that there has been some shift in the "onus of proof" as to whether information should be disclosed; that an independent referee is available to arbitrate if it appears that information has been withheld unnecessarily; and that some concession has been made on the provision of information about the factors taken into account in reaching policy decisions.

A Code of Practice

These considerations have led us back to the idea of a Code of Practice, along the lines proposed in 1978 by Justice, a respectable and respected organisation. This would offer a systematic commitment on the Government's part to the provision of information, without incurring the adverse consequences of giving statutory rights of access to documents; a Code can draw the distinction between information and documents.

Attached at Annex A is an outline of how such a Code might look. This is a basis for discussion only; a final version could well look very different. The outline is based on the assumption that a breach of the Code would be "maladministration" within the meaning of the Parliamentary Commissioner Act 1967, and thus subject to the jurisdiction of the PCA. A mechanism for dealing with complaints is not of course a necessary concomitant of a Code. But the Law Officers took the view in 1978 that breach of an administrative Code was likely to constitute "maladministration", so it might be difficult to exclude the PCA in any case. It would seem sensible to make a virtue of necessity and openly build him into the system; the existence of an independent arbiter would add greatly to the presentational effect of the Code, without I believe proving too onerous either for Ministers and their Departments or for the PCA.

A Code of Practice could be introduced simply by a statement in both Houses, but might have more force if the Government were to introduce a Parliamentary Resolution, reaffirming our policy on open government and undertaking that Ministers and officials would be guided by the Code. This, together with the use of the PCA, would put the Code on a solid Parliamentary footing.

The political considerations

In his statement on 20 June 1979, Paul Channon said that a Code of Practice would be open to many of the same objections as legislation. This is still true up to a point - eg there would be some resource costs - though I do not think that the objections are the fundamental ones. But our policy has now been in operation for two and a half years and I believe that we should be on safe ground in saying that the introduction of a Code of Practice represents not a reversal of Government policy but a logical and desirable extension of it. Nonetheless, I recognise that there has to be good reason for taking any such new initiative, and careful consideration of possible timing.

Parliamentary interest in freedom of information legislation is containable at present; we have not so far had another Private Member's Bill. However, there is a distinct likelihood that developments expected in the near future will revive interest. These include promulgation of the recent Council of Europe Recommendation on access to information, expected any time now; publication of the White Paper on data protection (an issue strongly linked with open government in the public mind); and publication of the White Paper replying to the Wilson Report on Modern Public Records.

Moreover, I have not the least doubt that pressure for legislation will build up in the run-up to the General Election, if not before. All the other major Parties are committed to some move (probably

legislation) on disclosure of information. (Taking a longer view, a fairly radical move at some time during the next few years seems inevitable). The question is whether we can turn the present unstable situation to our advantage, provide a basis that will help to forestall legislation, and win some political credit in doing so. By introducing a Code we should reaffirm and strengthen our policy and demonstrate our belief in the role and importance of Parliament, as well as giving departments a strong lead on what is expected of them. There will no doubt be some who would continue to agitate for legislation, but the more reasonable advocates of open government, particularly among our own supporters, may be persuaded that a Code of Practice gives what is necessary and goes as far as is desirable. I think that this is a line which we would have good prospects of holding, at the expense of the Parties advocating more radical measures.

Timing is of course crucial. The absence of much current activity points two ways. A new move by the Government may arouse interest, and be seen as the thin end of a wedge, opening the way to future legislation. On the other hand, an initiative taken of our own accord in our own time should bring us full credit, where apparently giving in to pressure would enable the freedom of information lobby to claim success for themselves.

One possible course would be to have a Code of Practice in readiness, but keep it for introduction whenever the time seemed most opportune; for example shortly before the Election, (or perhaps as a Manifesto pledge, though I think that would give us less political mileage). In any case, a Code would require a lot more work. If the idea finds favour at all, it is not too soon to be undertaking the work.

Whatever course is adopted, action or inaction, will affect all our colleagues. I would see considerable benefit in a "Second Reading" kind of discussion in Cabinet, to explore the options, consider whether any new initiative is called for and if so on what timescale. This would enable us to decide on what lines new work, if any, should proceed. If you agree that this would be helpful, I should be happy to put a paper round to our colleagues, with a view to a discussion perhaps some time in the next month.

Janet Young

BARONESS YOUNG

9 March 1982

ANNEX A

OFFICIAL INFORMATION: A CODE OF PRACTICE

AIM

1. This Code of Practice supports the Government's policy of making as much information as possible publicly available, and of responding to reasonable requests for information wherever possible.

SCOPE

2. The Code applies to the Ministers and officials of all Government departments and authorities to which the Parliamentary Commissioner Act 1967 applies.

COMPLAINTS OF NON-OBSERVANCE

3. Non-observance of the Code will prima facie be subject to investigation by the Parliamentary Commissioner for Administration. Complaints may be made to him in the normal manner provided for in the 1967 Act, and he may deal with them according to the procedures provided in the Act.

INFORMATION MADE AVAILABLE - GENERAL

4. Except in circumstances specified in this Code, there will be no presumption that documents, as distinct from information, will be made available.

5. So far as is reasonable and practicable, all requests for information and for documents will be met. But there will be no presumption that documents created before the coming into effect of this Code, or information derived from them, will be made available.

6. Requests will be responded to within a reasonable time; and if the information cannot be provided, or cannot be provided in the form requested, an explanation will be given.

SPECIFIC INFORMATION TO BE MADE AVAILABLE

7. Each department or authority will publish from time to time a statement of its aims, functions and organisation; and its powers and duties as they may affect private citizens or

organisations in the private sector. The statement will include guidance on where information may be obtained, and will set out the charges, if any, which may be made for providing information or documents.

8. As soon as is practicable after this Code comes into effect, each department will make publicly available its guidance to officials in their dealings with the public, including codes, interpretations, rules, procedures, and similar administrative manuals; subject to the exclusion of any material covered by the exemptions in paragraphs 12-13 below.

9. Departments will be particularly concerned to ensure that as much information as possible is made available, in response to individual requests and otherwise, about matters affecting public health and safety, the environment, planning proposals, and similar matters which may directly affect the private citizen.

10. Wherever possible documents setting out the factual and analytical background to important decisions about policies and programmes will be released. In so far as these documents may not provide a coherent explanation of the factors taken into consideration and the options examined, Ministers will provide the necessary additional information to assist public understanding of the reasons for the decisions, when they are announced to Parliament or otherwise publicised.

11. When new legislation is introduced in Parliament by the Government, the Department responsible will make available the 'notes on clauses' explaining the Bill's provisions.

12. This Code does not apply to release of the following:

1. communications by or to Her Majesty the Queen or any member of the Royal Households;

2. proceedings of the Privy Council;

3. proceedings of the Cabinet or of its Ministerial or official committees;

4. other processes of consultation within government between Ministers, their advisers and officials;

5. information whose disclosure is prohibited by Act of Parliament;

6. information whose disclosure would be liable to prejudice

a. the security, defence or international relations of the United Kingdom, or

b. the entrusting of information in confidence to the Government by other Governments or by foreign or international agencies;

7. information whose disclosure would represent contempt of court or of Parliament, or render any person liable to proceedings for defamation, or reveal matters which are subject to solicitor/client privilege;

8. personal information about individuals.

13. Release of all other kinds of information is covered by the Code; but restrictions may be necessary in the public interest where, for example, disclosure would be liable to

1. prejudice the economic interests of the United Kingdom;
2. prejudice the maintenance of law and order or the investigation of offences;
3. prejudice the commercial activities of the Government or of other public or private bodies, or the conduct of industrial relations;
4. result in material loss to individuals; or
5. represent a breach of confidence.

14. Other reasons for not responding to requests for information may be that

1. it will soon be generally available;
2. it is unobtainable, or could only be obtained by extensive research;
3. the request can reasonably be regarded as frivolous or vexatious.

15. [Provision declaring the relationship between disclosure in accordance with the Code and obligations under the Official Secrets Act 1911 - on which legal advice is needed].

Management and Personnel Office

March 1982

ANNEX B

GENERAL QUESTIONS ABOUT GOVERNMENT POLICY ON DISCLOSURE OF INFORMATION

1. The following notes deal with the general questions of the effects of our policy and our response to criticisms of it.

Assessment of the effect of the disclosure policy

2. We cannot make any quantitative assessment of the effect so far of our policy. We have told Parliament that it is not possible to distinguish material published under the Croham directive from material that would have been published in any case, and it is equally difficult to say with certainty (except perhaps in a few cases) that particular material has been disclosed as a direct result of our policy, and would not have been disclosed otherwise. Apparently departments no longer maintain the kinds of record suggested in paragraph 9 of the Croham directive because of these difficulties - a change endorsed by Paul Channon.

3. Nor is the number of formal publications a helpful indicator. Comparison of the number of HMSO and departmental publications issued in previous years, and the number issued since our policy was announced, would be misleading, because an increasing amount of material is not being "published" in the formal sense but is being made available by other means, for good cost-reduction reasons. For example, a number of consultative documents have recently been circulated only to those people and organisations with a direct interest, whereas they might previously have been published as Green Papers. They are available generally - copies are put in the Parliamentary Libraries, and members of the general public can see copies on request - but they do not, of course, show up in the statistics of formal publications. The new information technology will almost certainly further decrease the reliance placed upon formal publication.

4. This is not a bad thing; there is no virtue in publishing large quantities of information if a lot of it is not of general interest. What we have to do is to make it easy for those who want particular information to find it; and we have taken measures to improve our "information about information".

5. The most outstanding demonstration of our favourable disposition towards open government has been the setting up of the departmental Select Committees, and the response by Ministers and departments to their requests for memoranda and oral evidence. Committees are able to say what information they are interested in, over the whole area of Government policy, and departments can respond comprehensively and systematically. This is a good example of how increased availability of information need not depend upon access to specific documents.

6. There are also some notable instances of disclosure - in whatever form - of information of a kind that would probably not have been released by previous Administrations. Examples are Michael Heseltine's publication of his Department's MINIS; Patrick Jenkin's undertaking to publish the DHSS Supplementary Benefits Code; the Ministry of Defence's memorandum on the future of the UK strategic nuclear deterrent; the Rayner reports; the Government evidence to the Megaw Inquiry; and publication of a number of individual reports on sensitive issues.

Response to criticisms of the Government's policy

7. A lot of the criticism focuses upon our refusal to legislate, rather than upon alleged Government secrecy as such. This is based on a misconception: that "freedom of information" legislation would provide for the disclosure of Ministers' and officials' working papers. It would not, and we need to take a robust line in saying so. No British Government could do its job without privacy for Cabinet papers, exchanges between Ministers, and officials' advice to Ministers: all the current Commonwealth "freedom of information" Bills protect information of this kind. (In the United States the protection is inadequate, and the President is having to introduce remedial measures.) We should use every opportunity to secure acceptance that non-factual documents relating to decision-making processes must remain protected; to rebut the belief that legislation would confer to this kind of document; and to foster the idea that legislation is not necessary to ensure that the Government fulfils its undertaking to make available as much information - not necessarily in documentary form - as can properly be disclosed.

8. The activists will point out that three Commonwealth countries are introducing legislation. The reply to this is that we believe a statutory public right to information, which would give to the judiciary the final say as to what documents should be released, would strike a double blow at the principle that the primary duty of the Executive in accounting for its decisions is to Parliament; and hence would detract from the role and authority of Parliament. Secondly, none of the Commonwealth Bills has yet been enacted (in fact each of them has run into difficulties) and we are unimpressed by their example in the absence of experience as to how the new regimes will operate in practice.

9. Finally, much of the current criticism is directed at the Official Secrets Act and protection of the privacy of personal information. These, of course, are separate questions, and we should take care to prevent them - and the issue of breach of confidence - from being confused with our policy and record on 'open government'.

Management and Personnel Office
March 1982