



Department for  
Constitutional Affairs  
Justice, rights and democracy

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**To:** Alisdair Roberts  
Campbell Public Affairs Institute  
Syracuse University

**No. of pages (inc this):** 15  
**Date:** 14 July 2004

**Fax:** 001 253 541 9867

**From:** Robert Murphy

**Tel:** 0207 210 8070

**Subject: Code of Practice on Access to Government Information request**

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Dear Professor Roberts,

Thankyou for your fax dated 28 June 2004, in which you request copies of:

- the minutes of the FOIPG meeting of 24 January 2003 and;
- the paper discussed at the FOIPG meeting of 24 January 2003.

I am pleased to send you copies of the documents you requested.

The FOIPG minutes have been redacted in parts to remove details of internal discussion, under Exemption 2 of the Code of Practice on Access to Government Information. It is our view that the disclosure of the information in those areas could reasonably be expected to harm the frankness and candour of internal discussion.

The minutes have also been redacted to remove personal information, under Exemption 12 of the Code of Practice on Access to Government Information. It is our view that the disclosure of the information would represent unwarranted disclosure of personal information and would constitute an unwarranted invasion of privacy.

Under the Code of Practice on Access to Government Information you may, if dissatisfied, ask us to review the Department for Constitutional Affairs treatment of your request. If you wish to do so, please write to Mosun Hassan, Access Rights Unit, Department for Constitutional Affairs, Clive House, 70 Petty France Lane, London SW1H 9HD or email her at [Mosun.hassan@dca.gsi.gov.uk](mailto:Mosun.hassan@dca.gsi.gov.uk).

If you should remain dissatisfied following this internal review, the Code provides for you to take your complaint, through a Member of Parliament to the Parliamentary Commissioner for Administration (the Ombudsman). Complaints will be investigated at the Ombudsman's discretion.

Kind regards,

A handwritten signature in black ink, appearing to read 'R. Murphy', with a long, sweeping underline that extends to the right and then curves back under the signature.

**Robert Murphy**  
Policy Implementation and Advice  
Information Rights Division

**Freedom of Information Practitioner's Group**

**Minutes** of a meeting held at the Lord Chancellor's Department, Selborne House, Victoria St, London SW1 on **24<sup>th</sup> January 2003 at 2pm**

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Changes to the ways of working and terms of reference for the Senior Group on Information Policy – paper by LCD (FOI PG (03) 1)

Proposed plans for developing guidance – paper by LCD (FOI PG (03) 2)

Proposals for co-ordinating guidance – paper by LCD (FOI PG (03) 3)

Update on progress on the Environmental Information Regulations - DEFRA

Spring Roadshows

Other Business

- Contact details
- Creation of a cross-Whitehall disclosure log
- Code of Practice Monitoring Report update
- Training/awareness plans

**NEXT MEETING**

**Friday 25th April 2pm-4pm**  
**7<sup>th</sup> Floor Conference Rooms**  
**Lord Chancellor's Department**  
**Selborne House**  
**54-60 Victoria St**  
**London SW1E 6QT**

**Items 1 : Minutes from the last meeting**

1. The minutes of the last meeting were agreed with no changes.

**Item 2: Matters arising from the minutes**

2.

[REDACTED]

[Exemption 2: Internal discussion and advice]

**Item 3: Changes to the ways of working and terms of reference of the Seino Group on Information Policy – paper by LCD (FOI PG (03) 1)**

3. [REDACTED] [The Director] informed the Group of the changes to the ways of working of the Senior Group on Information Policy. [REDACTED]

[REDACTED] [Exemption 2: Internal discussion and advice]

4. Speaking to this paper, [REDACTED] [a DCA official] added that the main changes would be a reduction in the number of regular meeting of the Senior Group with meetings only called to discuss issues of strategic importance. More of the routine work of the Group would be done by correspondence and more formalised reporting procedures would be in place to enable the work of the practitioners' groups to feed into the Senior Group programme. These changes would mostly affect the FOI PG secretariat and were unlikely to have a significant effect on FOI PG members.

**Item 4: Proposed plan for developing guidance – paper by LCD (FOI PG (03) 2)**

5.

[REDACTED]

[REDACTED] [Exemption 2: Internal discussion and advice]

6. It was proposed that some of this work would be undertaken by subgroups of departments with an interest or expertise in a specific issue. The Group was asked if it was content with the order of priorities suggested in the paper, and if departments would like to volunteer to lead work on the various subgroups.
7. While the Group was generally content with both the list of priority areas, and the suggested order it was suggested that international relations be added as another category for priority guidance. There was also some concern that guidance on the application of the public interest test should be given more emphasis. In response to this LCD pointed out guidance on the application of

the public interest test would be informed by developing guidance on more specific issues first, although it was recognised that this was a central issue.

8. MOD volunteered to lead work on the development of guidance on national security issues and suggested that this would need to be done in conjunction with the Data Issues Lawyers Group who were interested in taking forward work on the national security certificates under sections 23 and 24 of the Act. The Cabinet Office also asked to be involved in developing guidance on national security issues.
9. It was suggested that the DTI might be best placed to take the lead on developing guidance on commercial prejudice. The DTI agreed that they should be involved in this area but thought the work would be led by the Office of Government Commerce. As the OGC is not represented at FOI PG HM Treasury said that they would raise this issue with them. It was agreed that these departments would decide between them who was to lead on developing guidance in this area.
10. The PRO asked whether guidance would just consider the sensitivity of current records or whether it would be extended to cover historical records as well. It was recognised that this question of scope would need to be considered as a general issue when developing guidance. The MOD also pointed out that with regard to the national security exemptions there was a need for parallel guidance on environmental information regulations which could also be relevant in other areas. LCD added that there may also be a need for parallel guidance on data protection issues.
11. During discussion of the policy advice exemption the National Assembly for Wales pointed out that their current pilot scheme to publish the factual and analytical elements of ministerial submissions would be included in their publication scheme from December this year. Any guidance in this area which would take the NAW scheme as a starting point may therefore need to be considered at a slightly later date. It was recognised that this was potentially problematic area as it was not as clearly defined as other areas.
12. The Crown Prosecution Service voiced a particular concern over the application of the public interest test under FOI to personal information contained in the records of criminal cases, which are currently protected by the 30 year rule. LCD pointed out that while there is a right to third party information under the FOI Act, this is circumscribed by the need for disclosure to be compatible with data protection principles. It was agreed however that there was a need to tease out the kinds of personal information that can be disclosed under FOI.
13. It was suggested that the CPS should be involved in the subgroup looking at personal information. The PRO suggested that a useful starting point for developing guidance in this area was the draft code of practice under section 51 of the Data Protection Act. It was also mentioned that the Office of the Information Commissioner had produced a paper on this issue which might be of assistance.

14. Summing up the discussion [redacted] [the Director] said that the next step would be for LCD to produce a programme of work and circulate it to members of the Group in advance of the next meeting. It was made clear that LCD would have a role in supporting the work of the subgroups, and that the whole group would have the opportunity to comment on any guidance produce before it was adopted.

### **Action Points**

- **International relations to be added as a category for priority guidance**
- **LCD to produce a programme of work for the various sub-groups and distribute it to the Group before the next meeting**
- **HMT/OGC/DTI to decide who is to take the lead on developing guidance for the commercial interest exemption.**

### **Item 5: Proposals for co-ordinating responses under the Open Government Code – paper by LCD (FOI PG (03) 3)**

15. [redacted] [The Director] briefly discussed the tensions which formed the background to this paper. On the one hand there was an increasing level of anxiety at permanent secretary level regarding the interpretation of the Code of Practice on Access to Government Information. However the proposed solution; that FOI PG be consulted before deciding whether or not to disclose information, raised operational problems which would put pressure on time limits for responding to requests and would create substantial additional work for officials. The Group were invited to discuss the options proposed in the paper in order to see if these issues could be resolved.
16. It was generally agreed that there was a need for some form of consultation, although there were concerns about the impact this would have on dealing with code requests within the twenty day deadline. It was pointed out that in order to overcome this the cases which would require consultation would need to be identified as early as possible. The Food Standards Agency added that while it would too time-consuming to consult all FOI PG members it would be possible to consult with LCD.
17. [redacted] [The Head of Division] suggested that this issue was at least in part due to the fact that the current guidance notes on interpretation of the Open Government Code were not sufficiently clear. It was proposed that the guidelines should be updated to enable the better identification of the issues for consideration when deciding whether or not to disclose information. The revised guidelines would also explicitly state the types of case which should be referred to LCD, who could then decide to either issue guidance, or in exceptional cases consult with FOI PG. While this approach seemed the most practical way forward it was acknowledged that it would take time to redraft the guidelines.

### **Action Points:**

- **LCD to start work on modifying existence guidance**
- **Secretariat to report to SG IP on proposed direction**

**Item 6: Update on progress with Environmental Information Regulations**  
**- DEFRA**

18. Steve Mee updated the Group on the progress that had been made in developing a communications campaign to raise awareness of the Environmental Information Regulations. The messages and target audience of the campaign had not changed since the discussion at the last meeting of the Practitioners' Group. The issue was now to determine the potential demand for awareness raising material and staff training to enable the most effective targeting of resources.
19. There were some questions on the likely time-scale for the implementation of the new draft regulations, and whether the communications campaign would fit with the timetable for implementation of the FOI Act. In response DEFRA made it clear that the proposed communication campaign was primarily aimed at raising awareness of rights and responsibilities under the current EIRs that have existed since 1992. There would however be no real inconsistency with the message of this campaign and the likely content of the new regulations.
20. It was pointed out that while some departments hold a large amount of environmental information others hold very little, mainly information relating to accommodation issues. In light of the divergent amounts and types of environmental information held it was agreed that departments should consider their potential exposure under EIRs, and the specific areas of exposure, both for themselves and any NDPBs or agencies they are responsible for and inform DEFRA. It was proposed that DEFRA would have awareness raising workshop dates in time for the next meeting.
21. [REDACTED] [A DEFRA official] updated the group on the progress that had been made in drafting the new regulations. The consultation on the draft regulations had been completed and the responses analysed. The negotiations on the European Directive on Public Access to Information had also been successfully concluded. The UK had achieved most of its negotiating objectives and the Directive was adopted in December 2002. Work on the draft regulations was still in progress as it was necessary to make some technical changes and clarify certain ambiguities. The current draft regulations were shorter than the original version and there was a greater synthesis with the provisions of the FOI Act.
22. DEFRA asked for expressions of interest from those departments willing to comment on the current draft regulations as soon as possible. It was agreed that the specific concern of the PRO regarding the application of the regulations to public records, and the concern of MOD on the role of the Information Tribunal in relation to national security issues would be resolved by correspondence. LCD asked that they be copied in to this correspondence.

**Action Point**

- **Departments to consider potential exposure under EIRs, and where exposure comes up and to inform DEFRA within 1 month in order for them to sort out workshop dates in time for the next meeting**
- **Expressions of interest for commenting on current draft regulations to be submitted to DEFRA by 31<sup>st</sup> January (to Jayne Boys)**
- **DEFRA, MOD (and PRO) to copy in LCD on any correspondence**

**Item 7: Spring Roadshows – oral update by LCD**

23. Lee Hughes briefly updated the Group on the position with regard to the planned series of spring roadshows. LCD had decided to contract out the running of the events this year, but there had been delays with the tendering process and the contract had still not been awarded, although a decision was expected imminently.
24. It was likely that the series of roadshows would begin in March and cover a wide range of topics including FOI, Data Protection, Privacy and Data Sharing, EIRs and Records Management. They would be held in each Government region, with events also planned for Wales and Northern Ireland. The roadshows would be free of charge and Departments were asked to encourage people to participate.

**Item 8: A.O.B**

25. The Group were asked to check the contact details that had been circulated and inform the secretariat of any inaccuracies.
26. LCD informed the Group that the FCO had asked what steps were being taken to develop proposals for a disclosure log. The PRO had expressed an interest in taking the lead on this work. A paper would be prepared in time for the next practitioners' group meeting.
27. LCD announced that the questionnaires for the 2002 Monitoring Report on the Code of Practice on Access to Government Information had been circulated to departmental openness contacts on the 14<sup>th</sup> January. Departments were asked to check that the appropriate person in organisation, and any bodies they were responsible for had received this questionnaire. The deadline for responses is the **Friday 14<sup>th</sup> March**.
28. It was also acknowledged that some members of the Group were keen that the Group start to address the issue of training staff. LCD said that a paper would be produced in time for the next meeting
29. DFES expressed a concern about whether it had been clarified that certain associated bodies would be covered by the FOI Act. LCD replied that there would need to be regular stocktaking exercises to establish which bodies were included in the definition of public bodies for the purposes of the Act. Departments were asked to let LCD know about any bodies they were responsible for whose FOI status was unclear.

30. 



[Redacted]

[Exemption 12: Personal Information]

**Action Points**

- **FOI PG Secretariat to produce papers on disclosure logs and training in time for the next meeting**
- **Departments to check they have received the questionnaire for the 2002 monitoring report and to respond by 14<sup>th</sup> March**

**Lord Chancellor's Department  
January 2003**

**FOI PRACTITIONER'S GROUP****Co-ordinating the disclosure of information under the Open Government Code**

Paper by the Lord Chancellor's Department

Introduction

1. There is currently concern at the centre of Government regarding two particular issues relating to the disclosure of information under the Code of Practice on Access to Government Information:
  - i) The lack of consistency across departments in considering where the public interest in disclosure lies; and
  - ii) The release of information in contravention of the constitutional conventions mentioned in the Code.
2. The Practitioners' Group has been asked to discuss the most appropriate way of dealing with these issues. This paper sets out a range of proposals for discussion.

The "public interest" test

3. The basic principle governing disclosure, as stated in the general guidance on interpretation of the Open Government Code, is that information should be released unless the harm likely to arise from disclosure would outweigh the public interest in making the information available.<sup>1</sup> The public interest in disclosure must therefore be considered even if there is a prima facie argument that the information falls within one of the categories of exemption which refer to harm or prejudice.
4. The guidance on interpretation of the Code provides some guidelines on deciding how the public interest in disclosure should be balanced against any potential harm. For instance:
  - there is a clear public interest in releasing information which would assist the understanding of existing or proposed policy;
  - the potential embarrassment to civil servants or ministers should not be a reason for withholding information;
  - the potential harm of releasing information will reduce over time and should be considered at the time the request is made rather than by reference to when the relevant decision was taken;
  - the balance of the public interest in disclosure cannot always be decided on the basis of whether the disclosure of particular information would cause harm, but on certain higher order considerations such as the need to preserve the confidentiality of internal discussions.
5. While in some instances it is relatively straightforward to decide where the balance of the public interest in disclosure lies there are inevitably cases where

<sup>1</sup> Paragraph 2. Part 1 of the *The Code of Practice on Access to Government Information Guidance on interpretation, Second Edition (1997)*

the decision is a difficult one. Where there is the potential for more than one interpretation of the public interest this can result in different decisions being taken across Government. There is a growing concern that this is undermining the operation of the Code as it can create controversial precedents on the release of information.

### Constitutional Conventions

6. The guidance on interpretation of the Open Government Code covers a number of areas where conventions may restrict the disclosure of information. These conventions include:
  - the withholding of certain reasons for decisions;
  - protecting the confidentiality of the internal decision making process, particularly where accounts of conventions are included in:
    - Questions of Procedure for Ministers;
    - the Armstrong Memorandum;
    - the Radcliffe Report; and
    - the Report of the Royal Commission on Standards in Public Life;
  - not disclosing the specific level at which particular decisions were taken, which particular Minister or official took the decision, or the manner in which a Minister consulted colleagues;
  - ensuring the confidentiality of the Cabinet process;
  - preventing a new administration from having access to the papers of a previous administration of a different political complexion "where such access could undermine the doctrine of collective responsibility";
  - withholding any reference to the fact that the Law Officers have been consulted on a particular issue, or to the opinions or advice given by the Law Officers.
7. These conventions constitute a reason under the Code for the relevant information to be withheld as they are based on the presumption that disclosure of the relevant information would be harmful to the public interest *as a general rule*. The reason for protecting the confidentiality of the Cabinet process for example is based on the notion that weakening the principle of private deliberation at the highest level of Government will be harmful to the public interest in the long run.
8. Conversely however in the majority of instances departments still need to decide whether the information should be released, depending on whether there is an overriding public interest in disclosure. The guidance on interpretation of the Code states for instance that the disclosure of information relating to "internal discussion and advice" needs to be considered on a case by case basis, regardless of the particular exemption that may apply<sup>2</sup>.

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<sup>2</sup> paragraph 2.3, Part 2 of *The Code of Practice on Access to Government Information Guidance on interpretation, Second Edition (1997)*

9. The concern that has recently been highlighted surrounding this tension is the potential for government departments to release information on the grounds of public interest, in contravention of constitutional conventions. This may both undermine these conventions and further compound the problem of inconsistent decisions being taken on the disclosure of information across Government.

#### Proposals

10. In order to address these concerns it is proposed that there should be a more collaborative approach across Government both on deciding where the balance of the public interest in disclosure lies, and the appropriate weight that needs to be given to constitutional conventions in deciding this.
11. The specific suggestion has been made that where these issues arise in considering whether or not to release information under the Open Government Code the matter should be referred to the FOI Practitioners' Group. This is so that all departments are made aware of the issue, have an opportunity to express their views in as far as the decision to disclose affects them, and can bear the result of the decision in mind when considering similar cases.
12. We are aware that some departments feel that this is inappropriate and that it would create unnecessary work. In light of this we would welcome discussion on the following range of options in order to determine an agreed way forward:
  - i) That no amendments are made to the way in which these cases are currently dealt with, i.e. Individual departments take their own decisions on disclosure as before.
  - ii) That FOI PG develop and agree written guidelines on dealing with the disclosure of information which could be withheld under a particular convention.
  - iii) That Departments consult LCD when dealing with the disclosure of information which could be withheld under a particular convention.
  - iv) That Departments consult all FOI PG members before making a decision on the release of information that could be withheld under a convention.
13. These options are neither intended to be mutually exclusive, nor exhaustive and Departments are invited to make alternative suggestions. If it is agreed that some form of consultative arrangement is the best solution the Group are invited to make suggestions as to the actual procedures for consultation.