Parliamentary and Health Service Ombudsman

Access to Official Information

Monitoring of the Non-statutory Codes of Practice 1994-2005

HC 59

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Foreword

1. The United Kingdom is a late convert to Freedom of Information (FOI) and the statutory 'right to know'. The USA has had such legislation since 1966 and our Commonwealth relations, Australia, New Zealand and Canada, since 1982; Sweden has had it since 1776. We have slipped behind and it was not until the year 2000 that FOI finally made it to the statute book in this country: even then, it took a further four years for the individual rights of access under that Act to come into force.

2. The reason for this is not hard to find. British Government has traditionally, and rightly, been seen as secretive: generations of civil servants were brought up on the phrase 'the need to know'. The traditional Whitehall attitude was pithily summed up in 'Yes, Minister' by the famous remark that open government is; 'a contradiction in terms. You can either be open or you can have government.'

3. However, a significant shift in the public attitude towards government and the information that it holds about us was reflected by the passing of two major pieces of data protection legislation, in 1984 and 1998. Inevitably, the focus then began to shift towards the non-personal information held by public sector bodies, information about their processes, practices and policies; the enshrining of the European Convention on Human Rights into English law in 1998, giving statutory expression to a wide range of fundamental freedoms, helped to invigorate this development. The passing of a Freedom of Information Act became all but inevitable.

4. Before that happened, but in response to that changing mood, the Conservative Government under John Major decided, as part of the Citizen's Charter initiative, to introduce a non-statutory Code of Practice on Access to Government Information (the Code), which would apply to all those bodies falling within the jurisdiction of the Parliamentary Commissioner for Administration (the Ombudsman). This Code came into effect in April 1994. Sir William Reid, the then Ombudsman, was asked, and agreed, to take on the role of investigating complaints that information which should have been released under this Code had been withheld. In June 1995, in his capacity as Health Service Commissioner, he assumed an identical role in investigating complaints under the very similar NHS Code of Practice (the NHS Code).

5. These two Codes ceased to have effect from 1 January 2005 when the individual rights of access under the FOI Act came into effect. This report looks back over this Office's stewardship of the Codes under three successive Ombudsmen, highlights some of the major cases that the Office has been required to deal with, and attempts to draw some key lessons about freedom of information and how it should be operated. I hope that the report, which I am making to Parliament under section 10 (4) of the Parliamentary Commissioner Act 1967, will not only prove interesting in itself but will also offer some useful guidance at a time when over a hundred thousand public sector bodies are taking their first, tentative, steps into the brave new world of statutory open government.

6. Finally, I would like to pay tribute to all the staff who have contributed to this specialised area of work since 1994 and in particular to John Colmans, the main author of this report, for his leadership of the investigation team.

Ann Abraham
Parliamentary and Health Service Ombudsman
May 2005

1. How the Ombudsman became involved

The White Paper

1. During the 1970s and 1980s there were a number of attempts by Members of Parliament, through the Private Member's Bill process, to place Freedom of Information legislation on the statute book. None of these attempts was successful but, because the drafters of the various bills had usually assigned the Ombudsman a key role in the appeals process, the Ombudsman of the day was given the opportunity to comment on the proposals in each bill. As far as the Code was concerned, although the initial discussions between the Cabinet Office and the Ombudsman about the Ombudsman's possible role in monitoring the Code appear to have begun in February 1993, the first formal announcement of this development came with the publication of the White Paper on Open Government in July 1993.[1] The White Paper announced the Government's intention of launching the Code in April 1994. Paragraph 1.12 outlined the role of the Ombudsman:

'The Parliamentary Commissioner for Administration (PCA), the Parliamentary Ombudsman, has agreed that complaints that departments and other bodies within his jurisdiction have failed to comply with this Code can be investigated if referred to him by a Member of Parliament. When he decides to investigate he will have access to the department's internal papers and will be able in future to report to Parliament when he finds that information has been improperly withheld...'

Paragraphs 4.11 - 4.13 set out the intention to produce similar Codes to cover, respectively, the NHS and local authorities. As it happened, only the first of these came to fruition, with the publication of the NHS Code of Practice in June 1995. This was also monitored by the Ombudsman, in his capacity as Health Service Commissioner.

2. An interesting sidelight, given the difficulties that arose subsequently, is that, in a letter to the Chairman of the Select Committee on the Parliamentary Commissioner for Administration on the day following the announcement of the White Paper, Sir William Reid said that he intended that his investigations of Code complaints would be completed 'in a matter of weeks'.

Jurisdiction

3. A key issue arising early in the discussions with the Ombudsman was that of jurisdiction. Under the provisions of the Parliamentary Commissioner Act 1967, as interpreted by successive Ombudsmen, a complainant is usually required to produce *prima facie* evidence of injustice or hardship resulting from alleged maladministration before the Ombudsman can take on a complaint for investigation, although the Office has a wide statutory discretion in this area. This, it was recognised, could prove to be an obstacle in respect of Code requests, where it might be difficult to demonstrate injustice and where, indeed, the decision to refuse the information request might have been taken perfectly properly without any suggestion of maladministration. The White Paper addressed this point in paragraph 4.19:

'...Whether or not he accepts a complaint for investigation is a matter for the Ombudsman but he has said that, in the context of a failure to provide information in accordance with the Code, this would not mean that the person bringing a complaint would necessarily have to show some demonstrable injury or disadvantage arising from refusal of information. It would be enough to found a complaint that the person or persons concerned had not been given information which, in accordance with the Code of Practice to which the Government is committed, they believed they were entitled to have'.

In paragraph 3 of his interim report covering the early days of his stewardship of the Code Sir William Reid reinforced this point.[2]

Preparation for the Code: staffing

4. An early difficulty facing the Ombudsman was: how many cases was the Office going to receive and how many staff would be needed in order to deal with them? While some guidance could be obtained from experiences in other countries, in particular those Commonwealth countries where Freedom of Information legislation had already been implemented, it was inevitably difficult to make accurate predictions. At one time the possibility of as many as 1,500 cases a year was being canvassed and, in a letter to the Prime Minister of 7 September 1993, Sir William Reid talked of the need for as many as 60 staff to be recruited in order to carry out the expected work.

5. When the Code was launched in April 1994, the directorate set up in the Ombudsman's office to deal with Code cases consisted of: a Deputy Ombudsman (Grade 3): a Director (Grade 5): five investigation units each headed by an Investigation Manager (Grade 7), and ten Investigation Officers (Higher Executive Officer) working on the basis of two per unit. This, with the addition of a small dedicated support unit, amounted to just over 20 people. Although a number of the staff had transferred from elsewhere in the organisation the majority of the staff, including all of the Investigation Officers, were new recruits from a wide range of backgrounds.

Preparation for the Code: other work

6. It was Sir William Reid's view that the **content** of the Code of Practice was essentially not a matter for him: he was, however, concerned to ensure that the requirements placed upon him in respect of his Code responsibilities were consistent with his jurisdiction. To that end, he was in regular contact with the Cabinet Office (the Code's sponsoring department) and served as a member of the Working Party on Open Government set up to oversee the introduction of the Code, commenting as appropriate upon the various drafts. One of the issues clarified as part of that process was that the Ombudsman would not, as a matter of course, be prohibited from investigating a complaint under the Code simply because it related to a matter that would be precluded from investigation by him in respect of a complaint of alleged maladministration.

7. As part of the preparatory process, Sir William and his staff held a number of meetings with Government departments to discuss how he intended to police the Code and to deal with any causes of concern they might have. In addition to this, he wrote to all Permanent Secretaries in April 1994 to confirm how he intended to carry out his investigations under the Code (a copy of that note can be found at Annex A to the interim report).[2] In the letter accompanying that note he set out his expectation that such investigations could be completed within three months. Sir William also asked all bodies within his jurisdiction to let him know how they intended to deal with requests for information under the Code and to provide details of their records and filing systems. In the first couple of months of the Code, staff also attended meetings in a number of departments to explain in more detail the Ombudsman's role. Many departments issued internal notices to their staff to set out how Code requests should be dealt with and the Ombudsman was provided with copies of these.

8. When the Code came into force it was accompanied by an extensive manual on Guidance and Interpretation of the Code prepared by the Cabinet Office.[3] While

commending the Guidance, and noting that he expected departments to make use of it when considering the release of information, Sir William made it clear that, while he would take the Guidance into account, he did not necessarily feel himself bound always to follow it. This approach has been adopted by his successors.

References

1 *Open Government* (Cm 2290) July 1993

2 Parliamentary Commissioner for Administration - Second Report - Session 1994-95 *Access to Official Information: the First Eight Months* (HC 91)

3 *Code of Practice on Access to Government Information: Guidance on Interpretation* Second Edition, Cabinet Office (OPS), 1997

2. Investigations under the Code - basic practice and procedure

1. The Ombudsman carried out investigations into both Codes on the basis of the powers set out in the legislation covering the jurisdiction of both the Parliamentary Commissioner for Administration and the Health Service Commissioner (and, when those functions were being exercised for Scotland and Wales, the relevant legislation covering those posts).

First steps

2. While it was occasionally possible to resolve complaints informally, in most cases they proceeded to full investigation. Such investigations would be carried out in much the same way as those covering traditional maladministration. The process began by the Office issuing a statement of complaint to the body complained of setting out the substance of the complaint, in this case the failure to provide the information sought (which would be described) and, to the extent that they were known, the exemptions under which it had been refused. A response would be invited from that body, normally within three weeks, and relevant papers requested: crucially, these would be expected to include the information sought by the complainant. (Sometimes, usually when the information was contained in a substantial number of files or was particularly sensitive, it would be necessary to examine the information *in situ*). Provision to the Ombudsman of the information in dispute occasionally caused considerable difficulty (see Section 3).

Investigation

3. The next stage of the process involved an examination of the withheld information and making a judgement as to whether some, all or none of it should be released. This involved looking critically at any exemptions cited by the relevant body and deciding whether or not they had been applied correctly. The investigation also examined how the relevant body had handled the request in respect of the Code requirements. At the end of this process a report, setting out the Ombudsman's analysis and recommendation, would be sent in draft form to the body complained against. The purpose of this was twofold; to ensure that the report correctly reflected the factual background and to invite comment on the Ombudsman's recommendations. Again, three weeks were normally set aside for the relevant body's response. (It was not customary to send a copy of the draft report to the complainant, although practice on this is now changing within the Office generally). Following receipt of the relevant body's comments the report would be finalised and issued, although this might be preceded by further discussion and negotiation depending upon the nature of the relevant body's response.

Appeal mechanisms

4. There is no appeal against a decision of the Ombudsman other than through judicial review. However, the Ombudsman reports to Parliament through a Select Committee. Until 1997 that was through the Select Committee on the Parliamentary and Health Service Commissioner: since then it has been through the Select Committee on Public Administration, a Committee with a very much wider brief. The Select Committees have frequently taken evidence from successive Ombudsmen on their stewardship of the Codes. The Select Committee on Public Administration also took evidence from those Government departments which had refused to accept recommendations from the Ombudsman in respect of the release of information following Code investigations (see sections 3 and 4).

Publications

5. The number of cases subject to full investigation by the Ombudsman under the

various Codes was relatively small (a full statistical summary is contained in Appendix 4). This allowed the Office to publish all of these investigations (anonymised where appropriate) and lay them before Parliament on a regular basis. The reports are printed as House of Commons papers and have been regularly published since 1994: a full list is available in the bibliography. All of the reports from 1997 can be found on the Ombudsman's website: earlier reports are available in hard copy from The Stationery Office.

Wider activities relating to the Code

6. The Ombudsmen themselves and their staff have frequently lectured on the Office's work on the Codes and have contributed to training courses: for example, members of the Ombudsman's staff regularly featured as guest speakers on the Civil Service College's 'Open Government' training courses and the Office provided speakers for a number of the roadshows organised by the Department for Constitutional Affairs in the run-up to the FOI Act. The Office has also been represented, where appropriate, on advisory groups and working parties, most recently on the Department for Constitutional Affairs' Advisory Group overseeing the introduction of the new legislation. A number of independent studies which refer to or examine the work of the Ombudsman in this area have also been published; a list is included in the bibliography.

3. A brief account of the Office's involvement in the Codes

The beginning

1. With the launch of the Code in April 1994, the five investigating units of 16 staff were in place to await the arrival of the first cases. These began to appear in the summer of that year but the volume was much lower than anticipated; by the end of November 1994 only 24 complaints had been referred to the Ombudsman, of which nine had been taken on for investigation. In a report published in December 1994[1] Sir William Reid commented on this fact, drawing attention to the general lack of publicity for the Code and to public indifference towards trying to obtain information. As the volume of casework continued to remain at a low level, the number of units dealing with Code cases was reduced from five to two, with many staff being deployed elsewhere in the organisation.

2. For the next couple of years the remaining staff responsible for dealing with Code requests continued to carry out that work while helping, at the same time, to reduce backlogs elsewhere. The volume of Code work remained at a steady, although very low, level. It should, however, be said that some of the cases that were investigated led to decisions of some significance in respect of openness, releasing certain kinds of information into the public domain for the first time; reference is made in more detail to one or two of those cases in the next section.

3. In terms of throughput the time taken to investigate some cases, including one or two of the significant ones, was seriously affected by their complexity. The Ombudsman originally set a target of 13 weeks to complete Code investigations, arguing that such cases ought to be dealt with much more quickly than standard investigations as they would not normally require the untangling of detailed narratives or the application of complex regulations. Indeed, it seemed from the first few cases that were investigated that such a target was not unrealistic.[1] From early 1995 onwards, average case investigation times increased markedly; the four cases reported in 'Selected Cases 1995 - Volume 4'[2] for example, took an average of 29 weeks to complete. This was partly because some were complex cases, often involving the examination of substantial numbers of detailed files: others were clearly regarded by the departments concerned as test cases. This could lead to an unwillingness on their part to re-appraise their position. In paragraph 12 of the section on Access to Official Information in the 1995 Annual Report,[3] Sir William wrote: '...also there is a tendency in some departments to use every argument that can be mounted, whether legally-based, Code-based or at times simply obstructive, to help justify a past decision that a particular document or piece of information should not be released instead of re-appraising the matter in the light of the Code with an open mind'. In addition, investigating staff were still being deployed on other work. As a result, the few investigations that the Office did carry out were being processed more and more slowly.

4. The operation of the Code, and the part played by the Ombudsman in that process, was subjected at about this time to detailed scrutiny by the Select Committee on the Parliamentary Commissioner for Administration, which published the report of its conclusions in March 1996.[4] In his evidence Sir William Reid accepted that an immense change of attitude was required in the public service in order to make openness more effective but he did say; 'I do already discern some changes, and I am satisfied that more information is being made available than in the past'. The Committee noted, with reference to a number of investigations, that intervention by the Ombudsman had resulted in certain classes of information being made available to the public for the first time and commended the

practice of departments circulating summaries of PCA decisions to staff. However, in a trailer for later events, the Committee noted the difficulty that some departments apparently had in responding to the Ombudsman within the timescales specified. Attention was also drawn to the continuing lack of publicity for the Code. In evidence, Sir William said; '...there remains a wholly insufficient level of awareness of the opportunities afforded by the Code to the citizen'. That the Select Committee endorsed this view is borne out by the fact that their recommendation 18 said:

'We recommend that there be a considerable increase in the funds devoted both at central and departmental level to the publicising of the Code'.

Stagnation

5. There was, however, no significant alteration in the Ombudsman's workload. The volume of Selected Cases published in January 1997[5] (although the word 'selected' is somewhat misleading since **all** of the Ombudsman's investigated Code cases have been published) covered only eight cases reported on during 1996. The total reporting time for these cases was 415 weeks, an average of 52 weeks per case. While this was partly explained by the fact that those staff investigating Code complaints were continuing to work on other, non-Code, cases it was also a reflection of the immense complexity of some of the investigations. This led to one of these cases, which related to information sought from the Department of Trade and Industry about the reprocessing of nuclear fuel at Dounreay, taking 104 weeks to complete while another, involving information sought from the Health and Safety Executive about the THORP plant at Sellafield, took 66 weeks. Both cases required the ability to make sense of a mass of complex, often highly technical, information while the THORP case also raised significant issues about the interpretation of the Health and Safety at Work Act.

The National Health Service Code

6. From June 1995 the Ombudsman also took on responsibility for monitoring the National Health Service Code of Practice (Appendix 2) in his capacity as Health Service Commissioner. The NHS Code was heavily based on the Government Code, although it contained rather fewer exemptions (nine as against 15). The Ombudsman's approach to this work was very similar. As with the Government Code, the Ombudsman wrote in June 1995 to all the NHS bodies within his jurisdiction to explain the Office's intended approach to investigations. The Ombudsman told them that failure to provide information that complainants thought themselves entitled to under the NHS Code would be taken as sufficient evidence in itself to allow the Office to take the matter further. In addition Sir William also made it clear that he did not see himself as precluded from investigating a complaint under the NHS Code even if it referred to matters that would normally have fallen outside his remit in respect of a standard investigation.

7. In November 1996 Sir William Reid published his first volume reporting on cases that he had investigated under the NHS Code[6]. Interest in, and awareness of, the NHS Code was even lower than with the Government Code and Sir William drew attention to the fact that, after nearly 18 months, he had only carried out three full investigations (all of which were reported in the volume). He said that his approach to these cases had very much been informed by his approach to investigations under the Government Code and, indeed, specific comments made in some of those latter investigations were directly cited in the reports of the three NHS Code cases. In his

introduction Sir William recognised that the cases had taken much longer to complete than he would have liked, attributing this in part to the fact that, in two out of the three, questions had been raised about his jurisdiction. He noted that the vast majority of the cases that had been referred to him concerned access to personal health records.

8. By early 1997, as complaints about a failure to be allowed to see personal health records could now be dealt with under the new NHS complaints procedure, what had been at best only a trickle ceased to flow at all, to such an extent that no further volumes of investigated cases were ever published and the NHS Code simply faded away.

Casework generally

9. When, on 2 December 1997, Sir Michael Buckley (who had replaced Sir William Reid in January 1997) was examined before the Select Committee on Public Administration (which now had responsibility for the Ombudsman) he confirmed the low level of casework.[7] In response to a question about one particular investigation, which had taken over two years and was still not finally resolved, Sir Michael fully recognised that this was not acceptable. He drew attention to the complexity of the case in question and the more general fact that departments were sometimes unwilling to allow him to see the disputed information in the first place or to accept his verdict if he recommended that this information should be released: sometimes it was a case of both. At a further appearance before the Select Committee on 3 February 1998, Sir Michael said: '...if the Government wants me to act as referee we cannot have a situation in which every time I award a free kick everyone troops off the field for an elaborate investigation of the rule book and to telephone the FA'.[7]

Revival: the Freedom of Information Bill

10. The catalyst in changing this position, to an extent, was the election in May 1997 of a Labour Government whose election manifesto contained a clear commitment to the passing of a Freedom of Information Act. The Government quickly demonstrated that commitment by issuing, in December 1997, the White Paper *Your Right to Know*, setting out their legislative intentions.[8] While this did not lead immediately to an increase in the casework coming into the Office it did ensure that the issue of openness in government began to feature more frequently in the media and it alerted journalists to the existence of the Code, something that they had previously shown surprisingly little interest in using. In particular, *The Guardian* newspaper discovered that the Code could be used to tease out a considerable amount of information from Government departments, leading to a number of stories: they also discovered that the refusal by departments to release such information often resulted in even better stories. Ironically, therefore, it was the announcement of a Bill that would lead to the end of the Code that helped to publicise its existence and increase its greater use.

11. While welcoming the decision to put freedom of information on a statutory footing Sir Michael Buckley, in common with fellow public sector ombudsmen, took the view that creating a new independent complaints investigator (an Information Commissioner) would complicate the situation. Members of the public were often already confused about who to complain to, and Sir Michael reiterated his concerns in paragraph 1.15 of the Office's *Annual Report* for 1997-98.[9] Sir Michael favoured allowing existing public sector ombudsmen to deal with information complaints within their own sector, with a 'college of Ombudsmen' overseeing matters to ensure a consistency of approach.

The Government took the view, however, that the increased number of complaints that would be likely under a legislative scheme covering the whole of the public sector required the creation of an expert, and very visible, appeals machinery and that this would, in fact, help to simplify matters.

Haymes Garth (A32/96)

12. In December 1997 the Office issued its report into the Haymes Garth case.[10] In this case the complainant had asked for a copy of a report commissioned by the Ministry of Defence (MOD) into the refurbishing of Haymes Garth, an official RAF residence, where there had been a substantial failure of financial control. MOD had cited six Code exemptions to justify withholding the information, none of which the Office found applicable: the recommendation was that the factual information contained in the report should be released, although the names of individuals should not be identified. The investigation had taken 63 weeks to complete, a good part of which had involved detailed negotiations with MOD about the findings.

13. The investigation brought to the surface concerns both within MOD and, more widely, in Whitehall about how the Office carried out Code investigations. The Ombudsman also had concerns of his own and it was agreed, following discussion over a lengthy period, that the Office of Public Service would produce a guidance note which would remind bodies covered by the Code of their responsibilities under it, with particular emphasis on practices designed to reduce the length of investigation times. This note was subsequently circulated to departments by the Home Office following their assumption of responsibility for Code matters in the summer of 1998. By then matters had already begun to improve. In paragraph 6.11 of the 1997-98 *Annual Report* [9] Sir Michael Buckley was able to say that, although the influx of cases remained low, the backlog had largely been dealt with. To reflect the investigation position more realistically, new targets had been set: 16 weeks for straightforward cases and 23 weeks for more complicated investigations.

Devolution

14. The election of the Labour Government in May 1997 also took forward the proposals resulting in the creation of the Scottish Executive and the National Assembly for Wales. As part of those developments the Ombudsman agreed that (under transitional arrangements operating from 1 July 1999) the Office would investigate complaints that information requested from devolved bodies had not been released in accordance with the requirements of the respective non-statutory Scottish and Welsh Codes. (These Codes had been revised in 1999 to reflect the position following devolution: the Welsh Code was subsequently revised a second time to bring it more into line with the proposals in the FOI Bill).

15. It was agreed that any cases arising under these Codes would be dealt with, initially, in London because that was where the expertise on the Code was based; the long-term intention was that the Ombudsman's Offices in Edinburgh and Cardiff would deal with such cases direct. As it happened, no investigations were ever carried out under the Scottish Code and only three under the Welsh Code, all of which were handled from London. The Ombudsman's responsibility for dealing with the Scottish Code ended on 1 April 2002 but the London office continued to consider cases under the Welsh Code until 31 December 2004.

Special Report - the Prison Service

16. Section 10 (4) of the Parliamentary Commissioner Act 1967 requires the Ombudsman to lay annually before each House of Parliament

a general report on the performance of his functions under the Act and allows also for other reports (known as special reports) to be laid when appropriate. In March 1999 Sir Michael Buckley laid such a report entitled *Disclosure of Information Relating to Deaths in Prison*.[11] This report set out the results of two investigations relating to the deaths of prisoners in custody (a third would also have been included had the family concerned agreed). The investigations involved not only matters relating to the circumstances in which the prisoners had died but also the refusal of the Prison Service to release copies of the internal inquiry reports to the prisoners' families. A significant outcome of these investigations was that, from 1 April 1999, the Prison Service agreed to release such information as a matter of routine to relevant parties before any inquest took place, although this decision did not operate retrospectively.

Changes and developments

17. Around 1999-2000 a number of changes began to take place in respect of Code investigations. First, the average time for completing investigations began to reduce. The volume of investigated cases published in June 1998,[10] which included 25 investigations, contained three cases which had taken over two years to complete (although one of these was partly an orthodox maladministration investigation) and another eight which had taken over 12 months. These, however, were more or less the last of these long-standing, at times becalmed, investigations. Between 1998 and the end of March 2001 (by this time the investigative year had been brought into line with the financial year) the average throughput time for investigations remained at around the 23 week mark. Along with this welcome development came a noticeable shift in the nature of the complaints received. Although the number of complainants seeking personal information under the Code had always been small these virtually disappeared following the changes made in the Data Protection Act 1998 which meant that this legislation now applied to manual files. However, there was a very measurable increase in complaints being put by journalists and, also, by Members of Parliament.

18. Enhanced interest from the media and from Parliament led to a substantial increase in 'politically sensitive' information requests. Journalists, particularly (although not exclusively) from *The Guardian* had, as mentioned earlier, already seen the possibilities of the Code for pursuing traditional investigative journalism but had also seen the possibilities for readable articles when such requests were refused, particularly at a time when the freedom of information legislation was going through the Parliamentary process and was therefore in the public eye. Likewise, Members of Parliament realised that the Code might provide an opportunity to gain access to information which had been refused by the more traditional route of a Parliamentary Question (the Ombudsman's jurisdiction does not extend to the investigation of complaints about answers to Parliamentary Questions: those are matters for Parliament itself). This development became more pronounced when, partly as a result of pressure from more than one Select Committee over a number of years, Ministers began more regularly to cite Code exemptions when refusing to provide information in response to Parliamentary Questions. Much of the information sought in this area was of a kind which those requesting it fully recognised would cause political difficulty for the department concerned, whatever the strength of the arguments in Code terms might be. The publicity these cases attracted enhanced the visibility of the Code, leading to a small but significant increase in the number of cases referred. This was no doubt assisted by the fact

that, on 13 November 2001, the Government announced that individual rights of access under the Freedom of Information Act would not be brought in until 2005, thus giving the Code another three years of shelf-life.

Delay and disagreement

19. The year 2001 proved a watershed in the history of the Code. Until then, the regular publication routine of occasional volumes of investigated Code cases plus a short chapter on the subject in the annual report had done little to permeate public consciousness. However, two investigations which occupied much of the Office's time and energy during 2001 helped to change that position.

The Robathan case

20. The first of these was the complaint submitted by Andrew Robathan MP, which formed the subject of a Special Report to Parliament, published on 13 November 2001.[12] In this case Mr Robathan had sought from the Home Office information as to how many times Ministers in that department had made declarations of interest to colleagues or sought the advice of the Permanent Secretary in relation to various requirements set out in the Ministerial Code of Conduct. The Home Office refused to provide that information, citing Exemptions 2 and 12 of the Code. The Ombudsman disagreed, arguing that Exemption 2 was designed to cover advice and opinion rather than factual information and that there could not be an unwarranted invasion of privacy of the kind envisaged by Exemption 12 when the information sought related only to a number, not to identifiable individuals. The Ombudsman recommended the release of the information. The Home Office refused, the first time that there had been such a refusal in relation to an Ombudsman's decision in a Code investigation; it was this refusal that had led to the special report. Later, in the *Annual Report* for 2001-02[15] Sir Michael Buckley was also highly critical of the fact that it had taken the Home Office **seven months** to respond to his draft report, allegedly because of the need to consult other departments as well as the Prime Minister.

The Hinduja case

21. In a second case[13] the Office investigated a refusal by the Home Office to provide certain information relating to their dealings with the Hinduja brothers, aspects of which had already formed the subject of a separate inquiry by Sir Anthony Hammond QC.[14] Although the Home Office provided their papers for examination it became apparent that a number of key documents referred to in the Hammond report were not on the files. In addition, a number of papers relevant to the investigation were held by the Cabinet Office, who did not prove responsive to requests for access to them either from the Home Office or from Sir Michael Buckley. Faced with this position, Sir Michael issued a draft report to the Home Office saying that the lack of co-operation from both departments had effectively made it impossible for him to carry out his work properly. This had the effect of producing the relevant papers in short order but, in the same paragraph of the 2001-02 *Annual Report* quoted earlier, Sir Michael made it clear that a delay of **nine months** in simply making the relevant papers available was entirely unacceptable. In his introductory chapter to the report Sir Michael went on to say that, if this were to continue, his ability to conduct Code investigations properly in the future would be open to serious doubt.

The impact of delay

22. In paragraph 5.5 of 2001-02 *Annual Report* Sir Michael noted the impact that these extended delays had inevitably had on overall throughput times. He drew attention to another

frustrating cause of delay, the habit some departments had of citing new exemptions at a very late stage in order to justify withholding information; in one case as late as the issuing of the draft report (A2/01, A4/01 and A6/02 are good examples of this). All of this had conspired to cause investigation throughput times, which had been relatively steady at around the 23 week mark, to regress during that reporting year to 33 weeks.

23. These issues were thoroughly discussed during evidence given to the Select Committee on Public Administration at a hearing on 11 July 2002 at which Sir Michael Buckley, the then Secretary to the Cabinet and the Permanent Secretary of the Home Office all gave evidence.[15]

Continuing delay

24. Following this hearing, and in response to other more general issues relating to the Ombudsman raised in other hearings, the Select Committee issued a report in February 2003.[16] In the section of the report covering Access to Official Information (paragraphs 36-45) the Committee recommended that the Government should reconsider its decision to refuse to release the information requested in the Robathan case (see previous paragraph). This the Government declined to do.[17] The Committee had also expressed great concern at the failure of departments to respond in a timely and adequate fashion to the Ombudsman at various stages of the investigative process. As a result it had also recommended that:

'...the Government should ensure that every organisation within the remit of the Ombudsman has a designated contact, tasked with ensuring the replies to the Ombudsman are both prompt and comprehensive.'[16]

25. The Government accepted this recommendation.[17] In her first annual report as Ombudsman [18] Ann Abraham noted that, although the Office had managed to reduce investigation throughput times more or less to the new targets of 26 weeks for straightforward cases and 30 weeks for more complex ones, delays of the kind set out in the previous year's report and subsequently considered by the Select Committee were continuing to cause difficulties. As a result, towards the end of 2002, she opened detailed discussions with both the Cabinet Office and the Lord Chancellor's Department with a view to preparing a joint Memorandum of Understanding for issue to all bodies within jurisdiction. This Memorandum (a copy is at Appendix 3) set out not only the requirements of the Code in terms of responses to information requests but, more particularly, the Ombudsman's requirements once a case was taken on for investigation. It was hoped that the issuing of this Memorandum, which subsequently took place in July 2003 as part of the Government's response to the Select Committee's recommendations, would ensure a substantial reduction in the delays and frustrations that had bedevilled investigations over the previous two years.

Further difficulties and a novelty

26. While the issuing of the Memorandum of Understanding helped in general to produce a more consistent level of response from departments, it continued to fail to have much impact in those cases involving the politically sensitive areas of Ministerial interests and the Ministerial Code of Conduct. Ironically it was the Cabinet Office, joint signatory to the Memorandum of Understanding, who were by far the principal offender. The case of A7/03,[19] in which the complaint was against both the Department for Constitutional Affairs and the Cabinet Office, involved information requested from nearly 20 departments relating to Ministerial gifts. Following a delay of nearly 16

months, during which time departments were waiting for advice from the Cabinet Office (as guardians of the Ministerial Code) as to how to deal with the matter, the Cabinet Office advised departments to refuse to release it on the grounds that the information was covered by Exemption 12 of the Code (personal privacy). The Ombudsman, in her report, took the view that this exemption had been incorrectly applied and recommended that the information be released. The Cabinet Office, while agreeing to the release of related information, would not release the information sought by the complainant; this therefore became the second case in which there had been a refusal to release information following a recommendation by the Ombudsman in a Code investigation.

Section 11(3) cases

27. Two other cases led to a constitutional novelty. Under section 11(3) of the Parliamentary Commissioner Act 1967 it is possible for a Minister of the Crown to give notice that, in respect of any document or information, in the opinion of the Minister '...disclosure of that document or information, or of documents or information of that class, would be prejudicial to the safety of the state or otherwise contrary to the public interest.' Throughout the duration of the Ombudsman's office there was no evidence to suggest that this power had ever been used before: in 2003 it occurred twice, both times in Code cases. In both instances, the issuing of the notice resulted in the Ombudsman deciding to discontinue her investigation. The first of these was A3/03.[20] The second, A16/03, in which the bodies complained about were the Lord Chancellor's Department and the Cabinet Office, has a more complicated history.

28. In this case, which also related to the private interests of Ministers, a similar notice was issued. As before, the Ombudsman discontinued her investigation. However, in this case the complainant, a journalist, took the step of seeking a judicial review of the Government's decision to issue the section 11(3) notice. Shortly before the hearing was due to take place the Government withdrew the notice, enabling the Ombudsman to re-open the investigation. Once again, however, the departments concerned, in particular the Cabinet Office, handled matters very poorly, resulting in a failure to respond to the Office's recommendations despite repeated promptings. The Ombudsman therefore had to issue a report without the benefit of any substantive comments from the departments.

The future

29. While work on the Code continued, with the number of investigations showing a small but significant increase, attention was also turning towards the approaching implementation of the Freedom of Information Act. As well as continuing to sit on the Advisory Committee set up to oversee the implementation of the Act, the Office began to develop a closer working relationship with the Information Commissioner's Office (ICO). Under the legislation the ICO would adjudicate on those cases where a body covered by the Act had refused to release information requested under it. As part of this process, which continued up to and beyond full implementation on 1 January 2005, ICO staff visited the Ombudsman's Office to find out how they had carried out investigations under the Code. It was also recognised that procedures needed to be put in place for those cases where the Ombudsman received a complaint that should have been more appropriately directed to the Information Commissioner and vice versa. Equally, procedures needed to be established for dealing with those, not infrequent, hybrid complaints which involved both access to information and orthodox maladministration and for determining how they should be dealt with.

These issues formed the subject of a Memorandum of Understanding between the two offices.

The last three months

30. As 31 December 2004 approached the Office found itself, quite ironically given the history of the Code, with more investigations than it had ever had before. While the idea of simply not taking on any more Code work in order to complete everything outstanding before the end of the year had its attractions, it was widely accepted that it would be wrong to create a situation in which, to all intents and purposes, the public would, for several months, have no independent body to which to turn in relation to refusals to release information. It was therefore accepted that the Office would continue to deal with those cases it had already taken on for investigation, with the intention of completing all of them by no later than 31 March 2005.

31. When the reports of those investigations began to issue in early 2005 it became apparent that, even in spite of the more positive approach now expected under the legislative regime, the evidence for this remained elusive in Code cases. As mentioned earlier, when the report on A16/03 was finally issued in February 2005 after chronic delay by the Cabinet Office, Ann Abraham was forced yet again to criticise that department for their reluctance to engage with the issues and for their unwillingness to accept her recommendations. In the same month the Foreign and Commonwealth Office refused to accept a recommendation that the date on which legal advice had first been sought in relation to the legality of a possible invasion of Iraq should be released, providing that the context of the seeking of that advice was also explained (A16/05). The Office's argument, once again, was that Exemption 2 (the only exemption cited) could not be applied to purely factual information. In this case the complainant immediately announced his intention of putting in a request for the same information under the Act. So, how much had really changed remained very much open to question.

32. For the Office, trying to complete all of these investigations by the target date was a demanding task, given that 25 were still uncompleted on 1 January 2005. It was greatly to the credit of the staff concerned that this target was reached, particularly as that total included a number of contentious and sensitive cases. Achieving the target meant that, in the final operational year of the Code, the Office issued the impressive total of 46 investigation reports.

Summary

33. During the decade or so of its existence the Code, and the Ombudsman's policing of it, resulted in a significant enlargement in the kind of information that was routinely released into the public domain. The next chapter looks at some of those cases in more detail. But it was not a smooth process and, although the Ombudsman frequently dragged departments to water, departments often showed a marked reluctance (or outright refusal) to drink. This manifested itself most noticeably through delays in responding to the Ombudsman; very often this was in response to statements of complaint and draft reports but sometimes showed itself in a refusal to even provide the Ombudsman with relevant papers. In the section on Access to Official Information in the first chapter of the Ombudsman's 2003-04 *Annual Report* [21] Ann Abraham confirmed that the issuing of the Memorandum of Understanding appeared to have improved matters in general terms but that there were still too many instances where departments were taking too long to reply: she warned of the implications that this might have for how departments might behave under the

imminent statutory regime. (A fuller report of the first nine months' working of the Memorandum of Understanding can be found in *Investigations Completed July 2003 - June 2004* and an update of the position in the final volume of completed cases.)[19]

References

1 Parliamentary Commissioner for Administration - Second Report - Session 1994-95 *Access to Official Information: the First Eight Months* (HC 91)

2 Parliamentary Commissioner for Administration Ninth Report - Session 1994-95 (HC 758)

3 Parliamentary Commissioner for Administration. *Annual report for 1995* (HC 296)

4 Select Committee on the Parliamentary Commissioner for Administration - Second Report - *Open Government* March 1996

5 Parliamentary Commissioner for Administration - First Report - Session 1996-97

6 Report of the Health Service Commissioner *Selected Investigations - Access to Official Information in the National Health Service* (HC 62) 1996

7 Select Committee on Public Administration - Third Report - *Your Right to Know: the Government's Proposals for a Freedom of Information Act* Volume I

8 *Your Right to Know: The Government's proposals for a Freedom of Information Act* (Cm 3818) 1997

9 Parliamentary Commissioner for Administration *Annual Report for 1997-98* (HC 845)

10 Parliamentary Commissioner for Administration - Fourth Report - Session 1997-98 (HC 804)

11 Parliamentary Ombudsman *Disclosure of Information Relating to Deaths in Prison* (HC 342)

12 Parliamentary Ombudsman *Access to Official Information: Declarations Made Under the Ministerial Code of Conduct* (HC 353)

13 Parliamentary Ombudsman *Investigations Completed February - April 2002* (HC 844)

14 *Review of the Circumstances Surrounding an Application for Naturalisation by Mr S P Hinduja in 1998* (HC 287) March 2001

15 Public Administration Select Committee *Minutes of Evidence* (HC 563 iv) July 2002

16 Public Administration Select Committee *Ombudsman Issues: Third Report of Session 2002-03* (HC 448) February 2003

17 Cabinet Office. Government Response to the Public Administration Select Committee's Third Report of Session 2002-03 'Ombudsman Issues' [HC 448] (Cm 5890) July 2003

18 Parliamentary Ombudsman *Annual Report* 2002-03 (HC 847)

19 Parliamentary Ombudsman *Investigations Completed November 2002 - June 2003* (HC 951)

20 Parliamentary Ombudsman *Investigations Completed July 2003 - June 2004.* (HC 701)

21 Parliamentary Ombudsman *Annual Report 2003-04* (HC 702)

4. The cases

1. If any of the work of the Ombudsman on policing the Codes of Practice is found to have any enduring value it will be the work done through the investigation of individual cases. What this section looks at is around 20 such cases which, in one way or another, are of significance or interest and not all of which will necessarily have been widely noted at the time. The volumes of investigated cases do however contain many others worth looking at beyond those set out here. The cases are set out below and have been divided into four categories.

The landmark cases

2. In Section 3 mention has already been made of a number of cases that played a significant role in the history of the Office's involvement in the Codes. They will not be referred to again here but they do, for obvious reasons, fall into the category of landmark cases. Others that might also be described in this way would certainly include **A4/94**.[1] This was the first full Code investigation that the Office completed.

Proposed Birmingham Northern Relief Road Scheme

3. The information sought was the report of an Inspector who carried out an inquiry into the proposed Birmingham Northern Relief Road Scheme on behalf of the Department of Transport. Although such reports were normally required to be released by law this one was not as the Scheme had been replaced by a new one before such a release became mandatory. The Department cited Exemption 2 (internal discussion and advice) and Exemption 4 (legal proceedings).

4. The Ombudsman found neither of these exemptions to apply. Aside from being the first full case, this investigation is noteworthy as the Department not only agreed to release the information sought but, in future, to release other reports withheld in similar circumstances. The Ombudsman also ruled in this case that, although the Code applied to information and not to documents, if the information was to be released then the easiest way of doing it was by means of the document itself. The Ombudsman also issued the reminder, not (as it turned out) for the last time, that if information were to be refused the exemptions under which the information was being withheld should be clearly cited.

Department of Social Security internal guidance on special payments

5. An investigation which gave the Office particular satisfaction was **A40/95.**[2] This case (the complainant was a well-known journalist in the field of consumer affairs) related to a refusal by the then Department of Social Security to allow him access to their internal guidance on special payments. They cited Exemption 7 (Effective Management and Operations of the Public Service). This guidance was contained in two volumes. Following the intervention of the Ombudsman DSS reconsidered their position and agreed to make both volumes generally available, the first as a priced publication and the second on request.

6. Although not required to rule on the relevance of Exemption 7 the Ombudsman said, in passing, that it was unlikely to be applicable. The Office's view was that, by publishing the information, the Department were now adhering to the requirement in paragraph 3(ii) of Part I of the Code to make such guidance available. This case, and the publicity given to the decision, played a significant part in encouraging a more proactive approach from government departments towards making such internal guidance routinely accessible, in accordance with the Code's intention.

Ilisu Dam Project

7. This report has already shown how the Ombudsman became increasingly involved in having to assess information requests relating to matters of current political controversy. An early example of this was **A31/00**.[3] This was the first of the two cases requesting information relating to the controversial Ilisu Dam project in Turkey. This one involved the Export Credits Guarantee Department, which was supporting a British company involved in the dam project. The complainant had sought information relating to the company's application for export credit support, which the Department had refused to release, citing both Exemptions 13 (commercial in confidence) and 14 (information provided in confidence), as well as the common law of confidence.

8. The Ombudsman decided that the request had also incorporated an Environmental Impact Assessment Report that had been prepared but concluded that this was not a matter for him as a request for this document had already been considered (and turned down) under the Environmental Information Regulations 1992, which took precedence. (This therefore become one of the small number of Code cases which has involved considering the applicability or otherwise of the Environmental Information Regulations). On the key issue the Ombudsman took the view that Exemption 13 did indeed apply to the information sought but that the public interest test in this instance operated in favour of disclosure. However, the Department obtained a legal opinion to the effect that, if they were to disclose the information without the consent of the company, which was not forthcoming, they could lay themselves open to legal action for breach of confidence. On that basis, the Ombudsman decided not to recommend release of the information. While the Code clearly stipulated the position in respect of statutory prohibitions, it was silent on common law issues. In an earlier case (**A22/94**)[4] Sir William Reid had ruled, when the Ministry of Agriculture, Fisheries and Food raised a similar argument, that it was not appropriate to support a case for refusing to provide information on grounds that were not referred to in the Code. However, in that case, he had also accepted the Department's argument for not releasing the information under Exemption 13.

Background notes to Parliamentary Questions

9. One of the perennial difficulties for departments under the Code was facing a request for information of a class that had never been previously made available. Traditionally the background notes and proposed replies for Ministers in response to Parliamentary Questions were never made public but in this case, **A25/03**,[5] the complainant, an MP's researcher, had asked the Cabinet Office to see information relating to briefing prepared by officials in relation to Parliamentary Questions asked of that Department by the MP. (Interestingly, under the Data Protection Act, the Cabinet Office had already had to release to the MP personal information about him contained in that briefing.) The Cabinet Office said that such background notes were exempt from release under Exemption 2 of the Code as they were essentially discussion and advice. On review the Cabinet Office, while accepting that much of the background material was factual, argued that releasing it would nevertheless constrain the future provision of full and frank advice in such cases.

10. The Ombudsman said that factual information was not protected by Exemption 2. In the event the Cabinet Office agreed to release the factual information and, in addition, some of the advice while not committing themselves to making a similar response in respect of any

future requests. The Ombudsman's report made it clear that the principal objection had been to the Cabinet Office attempting to withhold information on the basis of a class exemption: each item of information needed to be dealt with on its individual merits. This did not prevent, following some inaccurate press reporting, departments assuming that in future all such background information now had to be routinely released if requested; a degree of reassurance that this was not what the ruling meant had subsequently to be provided.

The heavyweights

Reprocessing of nuclear fuel at Dounreay

11. A feature throughout the operation of the Code has been the 'heavyweight' case; those investigations where the common features were on the one hand, the complexity and volume of the material and, on the other, the political sensitivity surrounding it. The outcome, not infrequently, was a very lengthy and often disputatious investigation. A good early example of that was **A1/95.**[6] This was an immensely complex case, put by an interest group who asked the Department of Trade and Industry six specific and very wide-ranging questions about the reprocessing of nuclear fuel at Dounreay. Some information was provided, for which the Department charged the complainant £375. The Department refused to release the remaining information, citing Exemption 13 (commercial in confidence) in respect of some of it but also citing the fact that some of the background papers sought were in fact papers of Cabinet Committees or sub-committees. There is a statutory bar on the Ombudsman's access to such papers. The Department concluded that Exemption 13 had been correctly applied and that the charge of £375 was reasonable. This case took the best part of two years to complete, occasioned primarily through the nature of the information sought and the breadth of material that therefore needed to be considered in order to decide the extent to which the Code had been correctly applied.

12. While broadly endorsing the Department's approach the Ombudsman concluded that more might have been done to manage the complainant's expectations at the outset, an early example of the value of attempting to focus a request whenever possible. There were two other interesting aspects to this case; it was one of the very few occasions on which the Ombudsman was required to rule on the issue of charging, and the Ombudsman also commented unfavourably on the Department's review system, which was subsequently reduced to a single stage process.

Sale and export of a multi-purpose riot gun

13. Another contentious case was **A30/95.**[2] In this case the complainant had sought information from the Department of Trade and Industry about the sale and export of a multi-purpose riot gun. The Department had refused, citing Exemptions 1(b) (international relations or affairs) and 13 (commercial in confidence). This case, which was considered in the wake of the Scott Report on the export of defence-related equipment to Iraq (and to which many references are made in the Ombudsman's report), contained a number of interesting aspects. The Department, when asked to provide to the Ombudsman the information that formed the subject of the complaint, claimed that they could not realistically do so because it was mostly contained on manual files that could not be searched without an unreasonable expenditure of time and effort.

14. The Ombudsman's investigation confirmed this to be the case. There was, however, more recent information held on computer databases and, after some difficulty, some information relating to these products was obtained (after the Ombudsman's staff had taken the opportunity of

interrogating the database themselves). The manufacturing company argued that under Exemption 13 the information should not be released but the Ombudsman took the view that unless it could be shown that individual sales were covered by a confidentiality clause the information ought to be made available. This view was eventually accepted. While recognising the complexity of the case, the Ombudsman criticised the Department for lengthy and avoidable delays, particularly in carrying out the computer searches.

Development of policy leading to the Human Rights Act 1998

15. The passing of the Human Rights Act 1998 was a major landmark of the Labour administration that took office in 1997. In this case (**A33/02**)[7] the complainant, a peer, requested information relating to the development of policy, from both the Home Office and the Lord Chancellor's Department, leading up to the passing of the legislation. This information was refused under Exemption 2 (internal discussion and advice). Both departments argued that there were no public interest grounds in releasing the information.

16. The Ombudsman's staff considered some 69 files of documentation but many other files were withheld from examination because they were, in effect, Cabinet papers as they had been prepared for the Cabinet Committee developing policy in this area and this therefore became one of those few cases in which the Cabinet Secretary served a notice under section 8(4) of the Parliamentary Commissioner Act 1967 to prevent the Ombudsman from seeing the papers. (A similar notice was served in **A23/99**).[8] The Ombudsman accepted that most of the information did fall within Exemption 2 but believed, unlike the departments, that there clearly was a public interest in this matter and that the application of the harm test should allow at least some of that information to be released. This recommendation was accepted.

NAO Report into the al Yamamah Arms Contract

17. A case which once again involved finely balanced aspects of the public interest test was **A10/04**[5]. The complainant in this case had requested from both the Ministry of Defence and the Foreign and Commonwealth Office information relating to a National Audit Office report into the al Yamamah arms contract, including the report itself. There were a number of interesting facets to this case, not least the fact that the NAO report had been made to Parliament through the Public Accounts Committee and thus fell under that part of Exemption 15 that covered Parliamentary privilege - the only time that this particular aspect had arisen in a Code case.

18. The Ombudsman, as part of the investigative process, confirmed through its current Chairman that the Public Accounts Committee still wished the report to be kept secret. As well as Exemption 15, Exemptions 1(b) (relations with a foreign power) and 2 (internal discussion and advice) had also been cited. While again recognising the existence of a strong public interest the Ombudsman took the view that the harm test in this case operated in favour of withholding most of the information sought although some additional information was released into the public domain. Part of the Ombudsman's thinking in this case was dictated by the fact that a Memorandum of Understanding had been signed in 1986 between the United Kingdom and Saudi Arabia governments and was still in force: this contained an explicit commitment that classified information should not be released.

Advice on purchase of smallpox vaccine

19. An almost intractable case was **A14/03**.[5] which was characterised by, and substantially delayed as a result of, the Department of Health's unwillingness to engage with the investigation. In this case the complainant had asked the Department for information relating to the work of the Joint Committee on Vaccination and Immunisation in respect of the advice they had given about an appropriate strain of smallpox vaccine for purchase by the United Kingdom. The Department cited four exemptions; 1(a) (defence, security and international relations), 2 (internal discussion and advice), 7 (effective management and operations of the public service) and 13 (commercial confidentiality).

20. Although, at the end of the day, some information was released, prompted in part by the fact that a National Audit Office report about the procurement of vaccines had effectively put the story into the public domain, the Ombudsman was critical not only of the way in which the Department had handled the request itself but of their unwillingness to respond to her investigation. This manifested itself to the extent that, even at the end of the process, the Department had still failed to answer some of the points raised by the complaint. (Bizarrely, it was only after the investigation had concluded that the Department decided to release further information, although still without dealing with all of the outstanding issues).

Legality of military intervention in Iraq

21. One case that should not be overlooked is **A35/04**.[5] This was the case in which the complainant had asked to see all the documents drawn up by the Attorney General that had provided advice on the legality of military intervention in Iraq. This case, although highly controversial, caused relatively little difficulty for the Ombudsman. The Cabinet Office, from whom the information had been sought, had cited Exemptions 4(d) (legal professional privilege) and 2 (internal discussion and advice) to justify withholding the information. As Exemption 4(d) is an absolute exemption which does not require the consideration of harm, the Ombudsman, satisfied that all the information sought fell within that exemption, was able to conclude that the information should not be released.

Releasing information

Application for a grant under the SMART Award Scheme

22. One of the Office's achievements, through a succession of cases, has been to press successfully for the release of information which might not otherwise have found its way into the public domain. It was never the Ombudsman's role to act as a crusader for openness but indirectly, through making judgements about whether or not the Code has been correctly applied, the Ombudsman's report has led to new information being released or changes made which will lead to the release of more information in the future. For example, in **A11/99**,[9] the Department of Trade and Industry refused to release information to an unsuccessful applicant for a grant under the (then) competitive SMART award scheme, although they had provided him with some additional information in response to his first request. Included in the information sought by the applicant was; access to his own file, including the advice that had been given by specialist advisers in respect of his application; details of all the other grant applicants and for further information as to why his application had been unsuccessful. The Department cited Exemptions 2 (internal advice), 7(a) (discretionary grants) and 13 (commercial in confidence).

23. The Ombudsman accepted that the Department had correctly applied the exemptions to the information sought but did take the view that more information should have been provided to the complainant to explain why

his application had not been successful. As a result the Department agreed to revise their guidelines to ensure that in future unsuccessful applicants to the scheme would routinely receive fuller explanations as to why they had not been awarded a grant. This was an example of an investigation where, although the Ombudsman had been unable to significantly assist the individual complainant, an outcome was obtained that would hopefully benefit future applicants in terms of the amount of information made available.

Information about the drug Myodil

24. A case in which the Ombudsman's intervention led to information being released without breach of confidentiality or privacy was **A13/99**.[8] In this case the complainant was seeking information from the Medicines Control Agency about a drug known as Myodil. The Agency told the complainant that most of the information they held had originated from the company manufacturing the drug and they were therefore withholding the information under Exemptions 13 (commercial in confidence) and 14 (information given in confidence). Information held in internal papers was also being withheld, under Exemption 2 (internal discussion and advice).

25. Following an approach by the Ombudsman the company agreed that much of the information sought could now be released but they were concerned that individuals referred to in papers and through the operation of the yellow card drug scheme (for the reporting of adverse reactions to drugs) should not be identifiable. In this case therefore much of the information was ultimately released through the simple processes of anonymisation (in respect of the papers) and summaries (in terms of the adverse reaction reports), thereby enabling information to be provided in accordance with the Code without breaching either confidentiality or privacy. This 'creative' approach to the provision of information, particularly in cases where the release of actual documents might involve difficulties, was successfully followed in a number of cases.

Second Investigation into the Ilisu Dam Project

26. The issue of the Government's involvement in the Ilisu Dam project in Turkey produced a second investigation, **A26/01**.[10] This involved a request to the Foreign and Commonwealth Office for copies of correspondence between them and the Department of Trade and Industry on matters relating to human rights issues in Turkey. This information was refused under Exemption 1(b) (international relations and affairs) and Exemption 2 (internal discussion and advice). Following the Ombudsman's investigation (involving some 25 files) it was decided that, although much information was already in the public domain, some of the information was clearly covered by the two exemptions cited: however, there was also a strong public interest in information about a highly controversial issue being made available. The Ombudsman's recommendation, bearing in mind that the Code afforded no right to documents, was that a summary of the information contained in the documents sought by the complainant should be prepared and released. This was accepted by the Department.

Information about a consultation exercise

27. One particularly pleasing outcome of an investigation is when information is released not just to the requester but into the public domain more widely. In **A13/02**[11] the Department of Health had been asked to provide information relating to a consultation exercise; in particular the complainant had asked to know how many responses they had received where confidentiality had been requested and for sight of all the responses where confidentiality had not been requested. This was refused under Exemption 10 (publication and prematurity) and

Exemption 14 (information given in confidence).

28. The Ombudsman found Exemption 10 to apply to some of the information but not Exemption 14, while recognising that it might be reasonable to withhold the addresses of individuals who had responded on a non-confidential basis, as opposed to organisations. Following the publication of their analysis of the responses to the consultation the Department not only released the information to the complainant on the basis described above but published on their website all of the replies received where confidentiality had not been requested.

Incidents and accidents involving British nuclear weapons

29. There is a general acceptance of the principle that, in most cases, information decreases in sensitivity as it ages. In **A12/03**[5] a complainant requested from the Ministry of Defence information relating to various incidents and accidents involving British nuclear weapons since 1960. The department refused, citing Exemption 1 (defence, security and international relations). Part of the Department's argument was based on the NATO policy that the presence of nuclear weapons in a particular place at a particular time should neither be confirmed nor denied. The Ombudsman pointed out that the release of some information about some of these events had in effect already breached that policy, although the Department subsequently explained that this was not quite the case. The Ombudsman, while recognising that the information fell within the exemption, nevertheless took the view that there was a strong public interest; equally, it was unlikely that significant harm would be caused by the release of information about accidents and incidents, some nearly 40 years old, and all relating to obsolete weapons systems. This was particularly the case when some information, not all of it accurate, had already entered the public domain: releasing the correct information might end damaging speculation. Following lengthy discussion the Department agreed to make the information available.

Odds and ends

30. This section describes a number of cases which either raised unusual issues or were interesting for their subject matter. Included here is one of the very few NHS Code cases the Office investigated.

Tailored versions of the Code

31. Some departments, particularly smaller ones, never quite grasped the fact that the Code was a given document and the Ombudsman investigated one or two cases where it was discovered that a body had simply adapted the Code for their own purposes. In **A43/96**[2] the Commission for New Towns had not taken the Code as published in 1994 but had tailored it to meet their own requirements. As part of his judgement the Ombudsman made it clear, as in other cases where this issue arose, that the Code could not be modified in this way and that organisations were required to abide by the Code as published in 1994 (and as subsequently amended in 1997).

Underground and bus ticketing services and revenue collection

32. The Ombudsman frequently had to deal with cases where Departments succumbed to the temptation to cite, at a very late stage, exemptions that they had not previously thought of, usually when their initial arguments had not found favour. One such was **A2/01**.[3] This case involved a request to the Department of the Environment, Transport and the Regions for information relating to a decision in respect of the awarding of a contract relating to ticketing services and revenue collection on London Underground and Buses. The Department refused

to release that information, citing Exemption 2 (internal discussion and advice). Although accepting that the information fell within that exemption the Ombudsman concluded that the public interest test operated in favour of disclosure and this was recommended in the draft report. At that stage the Department cited three more exemptions; 7 (effective conduct of public affairs), 13 (commercial in confidence) and 14 (information provided in confidence). The Ombudsman accepted that Exemption 13 did apply to the information sought but strongly criticised the Department for failing to put their full case in terms of exemptions at the outset. A similar case, involving this time a statutory prohibition which was only declared at the time the draft report was issued, was A4/01.[10]

Vexatious and voluminous complaints

33. Vexatious and voluminous complaints (Exemption 9) presented a particular difficulty. **A9/02**[12] was a prime example. The complainant, a former solicitor who had moved to Australia, bombarded the Legal Services Commission over a period of several months with a succession of e-mails seeking information relating to a range of law cases for which he claimed he was owed fees by the Commission. The Commission held 23 volumes of papers relating to the complainant's company. The e-mails, sent over a period of several months, totalled several hundred and an estimate covering one week chosen at random suggested that it would have taken between 28 and 30 hours work to furnish all the information sought through that week's e-mails. The Commission had on several occasions tried to persuade the complainant to focus his requests more narrowly to make it easier for them to deal with but the complainant proved unable or unwilling to respond.

34. The Commission applied Exemption 9 and the Ombudsman had no difficulty in endorsing this view. This was a relatively straightforward case (although it is not surprising to learn that the complainant's view was very different) but others have proved less so, for example **A3/97**[2] where the volume of requests, although extensive, was fewer and where the complainant appeared to be interested in engaging in a debate about policy while ostensibly pursuing information requests, thus tending towards the vexatious. All cases involving this exemption have been contentious and there is little doubt that this is an area where it is very difficult to establish objective criteria by which the categorisation of someone as voluminous/vexatious can be easily undertaken.

Rendlesham Forest incident - UFOs

35. An interesting aspect of investigating Code complaints was the enormous breadth of subject-matter covered by the requests. The belief that government departments are sitting on a wealth of unreleased and potentially de-stabilising information about UFOs, alien landings and X-file related phenomena is one that dies hard and was put to the test on a couple of occasions. One such was the case (**A29/02**)[13] where the Ministry of Defence had been asked to release information relating to the famous Rendlesham Forest incident (recently alleged to have been a hoax). Although the Department had disclosed substantial documentation about this incident they had refused to release three documents, citing Exemption 2 in justification (internal advice and discussion). The Ombudsman noted that the information in the documents, which were background notes and draft briefing for Ministers in response to a Parliamentary Question, clearly fell within the exemption. The Department had argued that, as the information contained in the documents was already in the public domain, no public interest would be served by releasing it

36. The Ombudsman took the view that there was no public interest being served in the continued protection of information that was mostly already in the public domain and which

was, in addition, over 20 years old: where could the harm lie? The Department re-considered and accepted this view, releasing the information not only to the complainant but to others who had previously requested it and been refused. The Ombudsman received several congratulatory e-mails from members of the UFO community following this decision, including one from Alaska.

Information about the supply of drugs

37. Finally, a case investigated under the NHS Code, **J7/95/96**.[14] In this case the complainant had requested from Leicester Royal Infirmary NHS Trust information relating to the supply to a ward of two specified drugs and ward records of the running balances of those two drugs. The Trust refused the request under Exemption (ii) (request too general and unreasonable) and Exemption (vi) (personnel management). They also said that the information was of a kind that was beyond the ambit of the Code.

38. The Ombudsman held that the first exemption did not apply as, although the complainant had been in regular contact over a range of matters, he had only written twice in relation to this particular subject. The Ombudsman also held that the second exemption did not apply either: although it related to a personnel issue (the suspension of a nurse) providing the information would not interfere with the personnel function. The Ombudsman rejected the argument that the Code could not be held to apply to the information sought as the Code related to all information held by the body concerned and it could only be withheld if a case could be made out by reference to particular exemptions. The case took some time to complete, due in part to having to deal with the Trust's view that the complaint was outside the Ombudsman's jurisdiction (he did not agree).

References

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2 Parliamentary Commissioner for Administration Fourth Report - Session 1997-98

3 Parliamentary Ombudsman *Investigations Completed April - December 2000* (HC 126)

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5 Parliamentary Ombudsman *Investigations Completed July 2003 - June 2004* (HC 701)

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11 Parliamentary Ombudsman *Investigations Completed July 2001 - January 2002* (HC 585)

12 Parliamentary Ombudsman *Investigations Completed February - April 2002* (HC 844)

13 Parliamentary Ombudsman *Investigations Completed May - October 2002* (HC 115)

14 Report of the Health Service Commissioner *Selected Investigations - Access to Official Information in the National Health Service* (HC 62) 1996

5. Key themes and conclusions

1. The 11 years in which the Codes have been in operation have been a period of major change in how public bodies approach the whole question of information. Some of those changes have, as mentioned earlier in this report, resulted from legislation. Others have resulted from developments the outcomes of which might not have been widely predicted in the early 1990s - principally the massive growth in the internet: every public sector body has a website and on that website you will find details of the publication scheme which that body has been required to produce under the Freedom of Information Act. Yet there are many who still say that, fundamentally, nothing has changed: whatever might be said in public, in private the same old habits and attitudes persist. Is this, from our experience, true and, if it is, where is there still room for improvement?

The culture shift

2. In his evidence to the Select Committee on Public Administration on 11 July 2002 the then Secretary to the Cabinet, Sir Richard Wilson, said: 'Experience shows that there is no piece of information, however small, that cannot become significant'.[1] This dictum is essentially unarguable and its application has formed part of the traditional, instinctive response of British bureaucracy when faced with a request to release information that it would rather withhold, along with a range of justifications to rationalise that response. This is not, of course, to fail to recognise the reality that there is information that should not be released. Of course there is and, in many of the cases examined by this Office over the years, the original judgement that information should be withheld has been supported. It is however unquestionably the fact that most of these cases began in departments with an instinctive reaction - no. Only once that decision had been taken was a justification then sought in terms of Code exemptions.

3. Under the Codes, and even more so under the Act, that will not do. It is not now possible to operate under the ancient principle of the 'need to know'; now there is a 'right to know', an expectation that information will be released and withheld only if there is a clear justification supported by exemption. It also needs to be recognised that people want information when they want it, not when someone else thinks it appropriate for them to have it: a generation accustomed to instant access to information through the use of search engines will soon become frustrated at the sometimes very slow pace of official response. But, is it actually happening in practice?

4. The evidence is mixed. There is absolutely no doubt that much more information is now freely available in the public domain than ever before. Departments will also, in ways they would not have done ten years ago, frequently respond positively to requests for information that is not routinely released. But this has been fortuitous rather than planned. What there was certainly minimal evidence of during the Code's existence was any attempt from the centre to either publicise it or encourage people to use it. It was launched in a muted, understated way. Some publicity was given to it, and more followed after criticisms from the Select Committee but, once the Freedom of Information White Paper was published in 1997 there was a very strong sense that the Codes were already perceived as history (although they turned out to have another seven years still to run). It is instructive that, in answer to a Parliamentary Question, the Lord Chancellor's Department admitted that spending on publicising the Code of Practice for the years 1998-2001 inclusive amounted to the grand sum of £0.[2]

5. In such circumstances it is not surprising that the Code was barely known outside the small circle of those with a professional interest in

information matters, with the result that investigative journalists and MPs became its chief users. It is hard not to come to the conclusion that, not only did virtually nobody know that the Code existed, but that this state of affairs suited government perfectly well. It certainly was the prime (although not the only) factor in the persistently low caseload that the Office experienced and it could certainly be argued the Codes failed to take off because there was insufficient enthusiasm from those who created them in fostering the climate that would allow them to succeed. Openness lacked champions. Successive Ombudsmen have always taken the view that this was not their role; their role was to police the Codes, although the publicity afforded to some of the Office's Code judgements clearly helped make people more aware of their existence. Promoting the Codes, and encouraging their use, was primarily seen as the role of government. That was not a role that was ever effectively fulfilled. It remains to be seen now whether such champions will emerge within government for the Freedom of Information Act.

Lack of expertise

6. In the early days of the Code procedural failures by departments in dealing with Code requests were frequent, despite the central guidance produced by government and, indeed, the assistance of this Office. The most common mistake by far was a failure to recognise the requirement that **any** information request made after the Code was launched was deemed to be a Code request even if the requester had not referred to the Code or may not even have been aware of its existence. The outcomes were that departments often ignored the Code requirement that requests should be dealt with in 20 working days or, if information was to be refused, paid no attention to the requirement that it should be refused only by reference to particular exemptions: there was also a chronic inability to distinguish between documents and information. As a result poor handling formed a prominent feature of many of the early investigations and departments were frequently criticised for their failure to observe the Code's requirements.

7. As familiarity with the Code increased, major departments which had by now dealt with a good number of requests began to perform much better and the Ombudsman was able to commend departments such as the Ministry of Defence and the Department of Trade and Industry for their appropriate handling. But problems still persisted. Certainly small departments or non-departmental public bodies, which rarely faced Code requests, were often unsure how to deal with them when they did arrive, passing them not infrequently to their legal advisers whose attitude towards the non-statutory Code was not always couched in the appropriate spirit. Departments with widely dispersed or regionally based workforces had similar problems: while central headquarters might understand the requirements of the Code, local offices might not. A particular difficulty encountered in one or two cases was a tendency to regard the Code not as a given document but as a draft that could be improved upon to meet the specific needs of the organisation: cases A43/96 and A7/98 constitute good examples of that. In many of these cases resources, or the lack of them, also played a part: those dealing with Code requests were often doing so as just one of a wide range of administrative tasks and had, as a result, been able to develop no specific expertise in this area.

8. There is, based on our experience, no substitute for establishing a dedicated resource for dealing with information requests, a resource that can call on legal advice and the advice of specialists when appropriate but which is fundamentally self-standing. This resource needs

to have access to, and the active support of, senior staff in the organisation given that the advice of such senior staff is almost inevitably going to be needed in cases of particular sensitivity. It is probable that only the biggest organisations will be able to afford that and many bodies covered by the Freedom of Information Act, and dealing with information requests for the first time, may be struggling to cope even with the help of the excellent explanatory material and guidance now widely available. Given that most straightforward information about an organisation is now routinely accessible, it is inevitable that individual access requests are much more likely to target areas where there may be a reluctance to release. The judgement and sensitivities required to handle such requests effectively can only be built up over time.

The public interest test

9. The operation of the public interest test has proved to be one of the most difficult aspects of carrying out Code investigations. Departments believed that, as the experts in the particular subject covered by an information request, they were best placed to take a view as to where the public interest lay in terms of whether information should be released and they did not always take kindly to that view being challenged. Challenging that position was not always easy for the Ombudsman either. The difficulty was rarely in agreeing whether or not a public interest existed: that was usually common ground. The difficulty lay in making the judgement as to whether or not the harm caused by releasing the information would outweigh that public interest. Such judgements were often very finely balanced. The Ombudsman started from the assumption, which was built into the Code, that information should be released. The general approach then was to look at the case that the department had made for not releasing the information. That case was usually supported by documentation, although an unwillingness to provide such documentation in a number of cases made it much harder for the department to support their case and for the Ombudsman to then fairly assess it. Having considered all the information that was available, the Ombudsman's role was to then make a judgement: in some instances, making such judgements would have tested the abilities of Solomon.

10. In considering the harm test over the years, Ombudsmen have looked at a number of issues. One has been the age of the information. There is a general assumption that, as information ages, its sensitivity will decrease and it was that aspect of the information sought that played a part in the judgements in such cases as A29/02, A5/03 and A12/03: here the information related to matters that were, in effect, concluded and where it was felt that the risk of harm in releasing the information was now more or less non-existent. However, even information a number of years old may still not be appropriate to release if it relates to matters that remain subject to current sensitivities (A10/04).

11. In general terms, the Ombudsman has recognised the importance of withholding advice and opinion in respect of matters that are, at the time the request was made, matters of public debate and controversy; successive Ombudsmen have always recognised the need for Ministers and officials to be able to think frankly and in private. However, in a number of cases (for example A26/01), through the provision of summaries, it has proved possible with the right approach to release some information even about matters of continuing sensitivity, although not necessarily as much as the requester might have wanted. In this case, which related to British involvement in the Ilisu dam project in Turkey, it was recognised that, while there was much in the files that could not be released, there was nevertheless a public interest that needed to be

satisfied and that this interest could be appropriately met by providing a summary of the relevant information. This is not the only case in which such an approach has proved possible. Where the Ombudsman has drawn the line has been in the attempt to use Exemption 2 to protect factual information. Consequently, although the Ombudsman has accepted the need to withhold advice in a good number of cases, in many of those same cases there has been a recommendation to release the factual information contained in reports, minutes, letters and briefing papers. By and large, such recommendations have been accepted.

12. Clearly, therefore, the key factors are; is there a public interest and, if there is, would the release of all or part of the information help to inform public understanding or the general debate? If those criteria are met, what might the harm be in releasing the information and would that harm outweigh the public interest? Inevitably, this Office has only seen a small proportion of requests made under the Code: there may be many instances where the public interest assessment has been carried out and information has been released as a result. In the cases this Office has seen, however, it has been too often the case that this exercise has not been done. The response has either been an instinctive reaction that the information should not be released or, as in A25/03 for example, an attempt to secure a class exemption for a particular kind of document and the information contained in it, in this case briefing notes prepared for Ministers in response to Parliamentary Questions. Throughout the duration of the Code one of this Office's most frequent tasks, in respect of those exemptions that involve a harm test, has been to remind departments that they cannot rely on class exemptions, that they must make the case for withholding information each time on its individual merits and that they must start from the basis that information should be released.

13. It is still difficult to be confident that this lesson has been fully learned. The Code was, after all, only introduced in 1994. Many of those required to apply it were brought up in a culture where there was no right to have information released: it is worth issuing the reminder that it has only been since 1998 that individuals have had the right to see information held by departments on manual files **about themselves**. It is therefore not surprising that Ministers and officials have had difficulty in adapting to a culture where there is now a right to see information that has always previously been concealed. Making that shift is proving to be a slow journey, full of lengthy halts. The impression after a decade of the Code is that, while departments are now much more receptive to arguments relating to the public interest **when reminded of the need to consider them**, the initial instinct to say no remains close to the surface. Under the Act, the need to consider the public interest is even more specific. It is to be hoped that the policing of the Code by this Office has meant that at least some public sector bodies will have been through their teething pains already over this particular issue. Time will tell.

The exemptions

14. During the course of the Code the Office had the opportunity to consider all the exemptions in practice, with one exception; disappointingly, no case ever arose involving Exemption 3 (communications with the Royal Household). Some of these exemptions, in particular Exemptions 2 (internal discussion and advice), 4 (law enforcement and legal proceedings), 13 (third party's commercial confidences) and 14 (information given in confidence) were cited again and again. All of them created their own particular difficulties of interpretation, and those interested in specific exemptions will perhaps find it most helpful to look at individual cases in which they arose; there is however a point to be

made about the general approach to the use of exemptions on the basis of the cases we have looked at.

15. In general, the overall verdict on the use of exemptions might be - fair, but could do much better. In the early days the main problem was to persuade departments to think in terms of exemptions at all: when faced with requests departments too often resorted to 'it's confidential' or 'we never release that kind of information' or just 'no', without any explanation. When departments did engage with the exemptions it was sometimes hard to discern the presence of a thought process; it seemed clear that any exemption that looked as if it might have some applicability, however minimal, was simply stuck on. This practice was routinely criticised by the Office, in individual cases and in annual reports, particularly early on. As a result departments, most notably those where Code requests began to form a fairly regular feature of the landscape, started to apply the exemptions as they were meant to. The outcome of this was decisions where there had been a clear attempt to identify the information that the department were not prepared to release and to justify that decision in terms of appropriate exemptions. Such departments were also learning, again following strictures issued in a number of cases, not to apply too many exemptions to the information withheld: if the case was strong enough one, or at most two, exemptions ought to be sufficient to cover it. However, what one might call the early behaviour patterns continued to manifest themselves in those cases involving departments with little or no Code experience.

16. In some cases as well, departments were clearly determined to play the 'exemptions game' to the extent that, if the Ombudsman was disinclined to accept the applicability of the exemptions initially quoted, they would find others. This led to departments varying their cases, sometimes as late as the draft report stage. This was deeply frustrating for the Office as this tactic invariably occurred in cases which had already proved difficult and where there had already been delays; the need at a very late stage to look at an alternative exemption (and any exemptions cited had, to be fair to the department, to be given proper consideration) was not helpful and suggested that the principal aim was to protect the information at all costs. This, again, did not suggest that departments were approaching the Code and the release of information in the right spirit.

The 'exemption 9' complaints

17. A particular difficulty under the Code, both for departments and for the Ombudsman, has been dealing with the voluminous and vexatious request. The difficulties are in both defining it and in determining how it should be dealt with.

18. Typically, complaints falling into this category do not come from MPs, the media or pressure groups; they come from individuals. Such individuals normally have a long-running dispute against a particular department by which they are personally affected (A9/02), are in dispute with a department over a matter of public policy (A19/04) or are in a dispute with someone else in which a department has an interest or a statutory responsibility (A14/00). Obtaining information is rarely, in such cases, an end in itself: the purpose is either to effect a change in policy or to provide ammunition in furtherance of a dispute. Under the Code motive is not normally a factor to be taken into account. If an individual is not really asking for information but is setting out propositions in the form of questions and inviting the department concerned to agree or disagree with them that has not been, in our view, a legitimate use of the Code. Equally, if a complainant is seeking to obtain information in order to pursue a legal action then our approach has usually been to remind the complainant that

the Ombudsman is unlikely to investigate a complaint where there is a clear right to a legal remedy (which it is reasonable to expect him to pursue), particularly as pursuing such an approach is likely to lead to the release of the information sought through the process of discovery. In many of the latter cases the intention is clearly identified by the complainant's need for documents as opposed to information.

19. In defining what constitutes a voluminous request we have always sought to see the extent of the information the complainant has asked for and to try and establish how difficult it would be for the department to find that information and how much doing that would cost them in time or money. In defining what constitutes a vexatious request our approach, in some cases, has been to establish whether or not the complainant is pursuing an agenda beyond the simple pursuit of information. If, for example, the intention is clearly to use the Code to try and effect a change of Government policy then we have argued that there are other, more appropriate, ways of pursuing that objective. In other cases we have reached the conclusion that the complainant has been pushing the issue to such an extent that the Department have done all that they reasonably can in terms of providing information and that it is not reasonable to expect them to do more, as they will never be able to give the complainant satisfaction.

20. The problem with this area is that it is, inevitably, subjective. Individuals described as, or whose complaints are described as, voluminous and/or vexatious never willingly accept that definition. All public organisations have their share of complainants who will pursue particular issues indefinitely if allowed to: to those individuals what they are doing seems perfectly reasonable. As there are no criteria beyond a Wednesbury* test of reasonableness to decide if the categories have been appropriately applied in individual cases, they will continue to take time to resolve and the outcomes will be frequently disputed. This is particularly so because the FOI Act, while referring specifically to the position of the vexatious complaint, does not define it. In the continuing dialogue between the aggrieved individual and the state, this is likely to remain an uncomfortable area of tension.

Conclusions

21. Any views the Ombudsman might express after 11 years of policing the Code need first of all to be seen in the light of the fact that the Ombudsman only sees the disputed cases: much information has no doubt been routinely released since 1994 to the satisfaction of all concerned. Many of those disputed cases, too, involved areas of political sensitivity or controversy where there were no simple answers. Matters have been additionally complicated by the fact that, particularly in recent years, the Code has been increasingly used to obtain information for political purposes, a situation not catered for by the Code but one which it would be unrealistic not to expect departments to take into account when considering the possibility of release. However, even allowing for all of that, there has been little evidence to suggest that departments embraced the opportunity for greater openness offered by the Code with much enthusiasm.

22. A number of reasons can be found for this. To begin with it was a non-statutory Code, without the force of legislation. It was launched very quietly, without much encouragement to anyone to use it, certainly without any obvious enthusiasm even from its creators. There was no clear champion within government and virtually no publicity. The Code was also being policed by the Ombudsman whose recommendations in this area, as with all Ombudsman recommendations, were not binding; departments could refuse to implement them if they thought it right to do so. In practice, Ombudsman recommendations are

* a legal test to identify a decision so unreasonable that it could not be supported.

rarely rejected, and such rejections that do occur are usually then subjected to close examination by the Select Committee, but the option exists (and was followed in a number of Code investigations).

23. In addition, the process was slow. A requester would have needed two unsuccessful bites at the cherry with a department before being able, through a Member of Parliament, to approach the Ombudsman. All of this inevitably took time and, as has been said before, when people want information they usually want it now. It would not be surprising, therefore, if some requesters simply decided that they had had enough. Fourthly, and in recent years most crucially, it appeared that departments became increasingly reluctant to release information in those cases where the requester was likely to use it to embarrass the government or to pursue a party political agenda. In a number of high-profile cases this led to lengthy wars of attrition between complainants, departments and this Office which have, at the end of the day, benefited nobody very much.

24. This absence of overt enthusiasm for releasing information, although understandable for all of the above reasons, has been both a pity and a little short-sighted. There are two reasons for this. First, put simply, if you refuse to release information, people think you have something to hide. Everyone other than the zealot recognises that there are cases where, clearly, information should not be released but people find it hard to understand why, when a reasoned case for releasing information has been made, departments will nevertheless not accept it. This is not to say that the Ombudsman is always right and departments always wrong, particularly in areas involving something as intangible as the public interest test. But it is difficult not to conclude, in some cases, that the true reason for not releasing information is not the one given to the Ombudsman under the Code but one informed by quite different considerations. That can only serve to reduce people's faith in the integrity of the entire process.

25. Secondly, what has happened on those occasions when sensitive information has been released? There might indeed have been coverage in the press, some of it doubtless critical, but usually much less negative coverage than in those cases where information has been withheld. What there has not, however, been is any revolution in the streets, any rushing to the barricades. In the vast majority of cases where departments have taken a deep breath and released something they never wanted to release, nothing much has happened: the world has somehow managed to keep on turning. In general, the more information you release, the more positive will be the view held by the public of your organisation, and the less difficulty you are likely to experience under the new legislation. This message still seems a difficult one for some organisations to accept.

What have we achieved?

26. So, to conclude, what has the Ombudsman achieved in eleven years of Code investigations? Three things in particular come to mind. First, we have helped to educate departments into understanding that traditional approaches to the provision of information are no longer acceptable. The expectation now is that information **will** be provided. Both the Code and the Act are based upon that assumption. Information can only be withheld if the argument for withholding it is linked to exemptions and the complainant will have the opportunity to have the strength of those exemptions tested by an independent person. That is a massive change in a very short timescale and there are still notable pockets of resistance to it. We have, and should recognise that we have, moved a very long way forward.

27. Second, through the cases we have investigated, we have for the first time in this country explored all the key issues that arise in the consideration of freedom of information. We have made extensive forays into the difficult territory of the public interest test. We have looked at class exemptions and set out what needs to be thought about when citing exemptions. We have looked at how information can be most effectively released. We have established basic good practice for the handling of information requests. We have tried to provide some guidance in the difficult area of vexatious complaints. We have tried to persuade people to follow the spirit, rather than the letter, of the Code. Not all of these attempts have been successful. But, because all of these cases are available in the public domain, they do provide a valuable place from which to start for those coming to these issues for the first time. Much of what we have looked at under the Code will have to be looked at again under the Act. Hopefully, what we have done will provide some useful help and guidance to those engaged in that process.

28. Thirdly, we have assisted in the release of a great deal of information, much of it of a kind not previously accessible to the general public. Some of the cases through which we have achieved this are set out in Sections 4 and 5 and I will not repeat them here. Inevitably, the cases with which we have been involved have often been at the cutting edge. But the Office can be proud of the fact that, through the investigations it has carried out, information of a kind not previously made available has, rightly, found its way into the public domain. Achieving that has sometimes been both frustrating and painful. But the Ombudsman's policing of both Codes between 1994 and 2005 has played a substantial part in changing for the better the way in which the organisations over which it has jurisdiction think and behave when approaching the question of freedom of information. That is no bad legacy.

References

1 Public Administration Select Committee (HC563-iv) 25 July 2002

2 *Hansard* 19 March 2002 (Col 183W)

Appendix 1. The Code of Practice on Access to Government Information

Part I

Purpose

1. This Code of Practice supports the Government's policy under the Citizen's Charter of extending access to official information, and responding to reasonable requests for information. The approach to release of information should in all cases be based on the assumption that information should be released except where disclosure would not be in the public interest, as specified in Part II of this Code.

2. The aims of the Code are:

- to improve policy-making and the democratic process by extending access to the facts and analyses which provide the basis for the consideration of proposed policy;
- to protect the interests of individuals and companies by ensuring that reasons are given for administrative decisions, except where there is statutory authority or established convention to the contrary; and
- to support and extend the principles of public service established under the Citizen's Charter.

These aims are balanced by the need:

- to maintain high standards of care in ensuring the privacy of personal and commercially confidential information; and
- to preserve confidentiality where disclosure would not be in the public interest or would breach personal privacy or the confidences of a third party, in accordance with statutory requirements and Part II of the Code.

Information the Government will release

3. Subject to the exemptions in Part II, the Code commits departments and public bodies under the jurisdiction of the Parliamentary Commissioner for Administration (the Ombudsman):[1]

i) to publish the facts and analysis of the facts which the Government considers relevant and important in framing major policy proposals and decisions; such information will normally be made available when policies and decisions are announced;

ii) to publish or otherwise make available, as soon as practicable after the Code becomes operational, explanatory material on departments' dealings with the public (including such rules, procedures, internal guidance to officials, and similar administrative manuals as will assist better understanding of departmental action in dealing with the public) except where publication could prejudice any matter which should properly be kept confidential under Part II of the Code;

iii) to give reasons for administrative decisions to those affected;[2]

iv) to publish in accordance with the Citizen's Charter:

- full information about how public services are run, how much they cost, who is in charge, and what complaints and redress procedures are available;

- full and, where possible, comparable information about what services are being provided, what targets are set, what standards of service are expected and the results achieved.

v) to release, in response to specific requests, information relating to their policies, actions and decisions and other matters related to their areas of responsibility.

4. There is no commitment that pre-existing documents, as distinct from information, will be made available in response to requests. The Code does not require departments to acquire information they do not possess, to provide information which is already published, or to provide information which is provided as part of an existing charged service other than through that service.

Responses to requests for information

5. Information will be provided as soon as practicable. The target for response to simple requests for information is 20 working days from the date of receipt. This target may need to be extended when significant search or collation of material is required. Where information cannot be provided under the terms of the Code, an explanation will normally be given.

Scope

6. The Code applies to those Government departments and other bodies within the jurisdiction of the Ombudsman (as listed in Schedule 2 to the Parliamentary Commissioner Act 1967).[3] The Code applies to agencies within departments and to functions carried out on behalf of a department or public body by contractors. The Security and Intelligence Services are not within the scope of the Code, nor is information obtained from or relating to them.

Charges

7. Departments, agencies and public bodies will make their own arrangements for charging. Details of charges are available from departments on request. Schemes may include a standard charge for processing simple requests for information. Where a request is complex and would require extensive searches of records or processing or collation of information, an additional charge, reflecting reasonable costs may be notified.

Relationship to statutory access rights

8. This Code is non-statutory and cannot override provisions contained in statutory rights of access to information or records (nor can it override statutory prohibitions on disclosure). Where the information could be sought under an existing statutory right, the terms of the right of access takes precedence over the Code. There are already certain access rights to health, medical and educational records, to personal files held by local authority housing and social services departments, and to personal data held on computer. There is also a right of access to environmental information. It is not envisaged that the Ombudsman will become involved in supervising these statutory rights.

The White Paper on Open Government (Cm 2290) proposed two new statutory rights to information:

- an access right to personal records, proposed in Chapter 5;
- an access right to health and safety information, proposed in Chapter 6.

Where a statutory right is proposed but has yet to be implemented, access to relevant information may be sought under the Code, but the Code should not be regarded as a means of access to original documents or personal files.

Public records

9. The Code is not intended to override statutory provisions on access to public records, whether over or under thirty years old. Under s12(3) of the Parliamentary Commissioner Act 1967, the Ombudsman is not required to question the merits of a decision if it is taken without maladministration by a Government department or other body in the exercise of a discretion vested in it. Decisions on public records made in England and Wales by the Lord Chancellor, or in Scotland and Northern Ireland by the Secretary of State, are such discretionary decisions.

Jurisdiction of courts, tribunals or inquiries

10. The Code only applies to Government-held information. It does not apply to or affect information held by courts or contained in court documents. ('Court' includes tribunals, inquiries and the Northern Ireland Enforcement of Judgements Office). The present practice covering disclosure of information before courts, tribunals and inquiries will continue to apply.

Investigation of complaints

11. Complaints that information which should have been provided under the Code has not been provided, or that unreasonable charges have been demanded, should be made first to the department or body concerned. If the applicant remains dissatisfied, complaints may be made through a Member of Parliament to the Ombudsman. Complaints will be investigated at the Ombudsman's discretion in accordance with the procedures provided in the 1967 Act.[4]

[1] In Northern Ireland, the Parliamentary Commissioner for Administration and the Commissioner for Complaints.

[2] There will be a few areas where well-established convention or legal authority limits the commitment to give reasons, for example decisions on citizenship applications (see s44(2) of the British Nationality Act 1981) or certain decisions on merger and monopoly cases or on whether to take enforcement action.

[3] In Northern Ireland the Code applies to public bodies under the jurisdiction of the Northern Ireland Parliamentary Commissioner for Administration and the Commissioner for Complaints, with the exception of local government and health and personal social services bodies, for which separate arrangements are being developed as in Great Britain. Some Northern Ireland departments and bodies are expressly subject to the jurisdiction of the Parliamentary Commissioner under the 1967 Act.

[4] Separate arrangements will apply in Northern Ireland.

Part II

Reasons for confidentiality

The following categories of information are exempt from the commitments to provide information in this Code. In those categories which refer to harm or prejudice, the presumption remains that information should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in making the information available.

References to harm or prejudice include both actual harm or prejudice and risk or reasonable expectation of harm or prejudice. In such cases it should be considered whether any harm or prejudice arising from disclosure is outweighed by the public interest in making information available.

The exemptions will not be interpreted in a way which causes injustice to individuals.

1. Defence, security and international relations

a) Information whose disclosure would harm national security or defence.

b) Information whose disclosure would harm the conduct of international relations or affairs.

c) Information received in confidence from foreign governments, foreign courts or international organisations.

2. Internal discussion and advice

Information whose disclosure would harm the frankness and candour of internal discussion, including:

- proceedings of Cabinet and Cabinet committees;
- internal opinion, advice, recommendation, consultation and deliberation;
- projections and assumptions relating to internal policy analysis; analysis of alternative policy options and information relating to rejected policy options;
- confidential communications between departments, public bodies and regulatory bodies.

3. Communications with the Royal Household

Information relating to confidential communications between Ministers and Her Majesty the Queen or other Members of the Royal Household, or relating to confidential proceedings of the Privy Council

4. Law enforcement and legal proceedings

a) Information whose disclosure could prejudice the administration of justice (including fair trial), legal proceedings or the proceedings of any tribunal, public inquiry or other formal investigations (whether actual or likely) or whose disclosure is, has been, or is likely to be addressed in the context of such proceedings.

b) Information whose disclosure could prejudice the enforcement or proper administration of the law, including the prevention, investigation or detection of crime, or the apprehension or prosecution of offenders.

c) Information relating to legal proceedings or the proceedings of any tribunal, public inquiry or

other formal investigation which have been completed or terminated, or relating to investigations which have or might have resulted in proceedings.

d) Information covered by legal professional privilege.

e) Information whose disclosure would harm public safety or public order, or would prejudice the security of any building or penal institution.

f) Information whose disclosure could endanger the life or physical safety of any person, or identify the source of information or assistance given in confidence for law enforcement or security purposes.

g) Information whose disclosure would increase the likelihood of damage to the environment, or rare or endangered species and their habitats.

5. Immigration and nationality

Information relating to immigration, nationality, consular and entry clearance cases. However, information will be provided, though not through access to personal records, where there is no risk that disclosure would prejudice the effective administration of immigration controls or other statutory provisions.

6. Effective management of the economy and collection of tax

a) Information whose disclosure would harm the ability of the Government to manage the economy, prejudice the conduct of official market operations, or could lead to improper gain or advantage.

b) Information whose disclosure would prejudice the assessment or collection of tax, duties or National Insurance contributions, or assist tax avoidance or evasion.

7. Effective management and operations of the public service

a) Information whose disclosure could lead to improper gain or advantage or would prejudice:

- the competitive position of a department or other public body or authority;
- negotiations or the effective conduct of personnel management, or commercial or contractual activities;
- the awarding of discretionary grants.

b) Information whose disclosure would harm the proper and efficient conduct of the operations of a department or other public body or authority, including NHS organisations, or of any regulatory body.

8. Public employment, public appointments and honours

a) Personnel records (relating to public appointments as well as employees of public authorities) including those relating to recruitment, promotion and security vetting.

b) Information, opinions and assessments given in confidence in relation to public employment and public appointments made by Ministers of the Crown, by the Crown on the advice of Ministers or by statutory office holders.

c) Information, opinions and assessments given in relation to recommendations for honours.

9. Voluminous or vexatious requests

Requests for information which are vexatious or manifestly unreasonable or are formulated in too general a manner, or which (because of the amount of information to be processed or the need to retrieve information from files not in current use) would require unreasonable diversion of resources.

10. Publication and prematurity in relation to publication

Information which is or will soon be published, or whose disclosure, where the material relates to a planned or potential announcement or publication, could cause harm (for example, of a physical or financial nature).

11. Research, statistics and analysis

a) Information relating to incomplete analysis, research or statistics, where disclosure could be misleading or deprive the holder of priority of publication or commercial value.

b) Information held only for preparing statistics or carrying out research, or for surveillance for health and safety purposes (including food safety), and which relates to individuals, companies or products which will not be identified in reports of that research or surveillance, or in published statistics.

12. Privacy of an individual

Unwarranted disclosure to a third party of personal information about any person (including a deceased person) or any other disclosure which would constitute or could facilitate an unwarranted invasion of privacy.

13. Third party's commercial confidences

Information including commercial confidences, trade secrets or intellectual property whose unwarranted disclosure would harm the competitive position of a third party.

14. Information given in confidence

a) Information held in consequence of having been supplied in confidence by a person who:

- gave the information under a statutory guarantee that its confidentiality would be protected; or
- was not under any legal obligation, whether actual or implied, to supply it, and has not consented to its disclosure.

b) Information whose disclosure without the consent of the supplier would prejudice the future supply of such information.

c) Medical information provided in confidence if disclosure to the subject would harm their physical or mental health, or should only be made by a medical practitioner.

15. Statutory and other restrictions

a) Information whose disclosure is prohibited by or under any enactment, regulation, European Community law or international agreement.

b) Information whose release would constitute a breach of Parliamentary Privilege.

Appendix 2. The Code of Practice on Openness in the NHS

1. Introduction

This Code of Practice sets out the basic principles underlying public access to information about the NHS. It reflects the Government's intention to ensure greater access by the public to information about public services and complements the Code of Access to Information which applies to the Department of Health, including the NHS Executive. It also builds on the progress already made by the Patient's Charter which sets out the rights of people to a range of information about the NHS.

Because the NHS is a public service, it should be open about its activities and plans. So, information about how it is run, who is in charge and how it performs should be widely available. Greater sharing of information will also help to foster mutual confidence between the NHS and the public.

The basic principle of this Code is that the NHS should respond positively to requests for information, except in certain circumstances identified in the Code. For example, patients' records must be kept safe and confidential.

2. Scope

The Code of Practice covers the following NHS organisations in England: Regional Health Authorities, Family Health Services Authorities, District Health Authorities, Special Health Authorities, NHS Trusts, the Mental Health Act Commission and Community Health Councils. It also covers family doctors, dentists, optometrists (opticians) and community pharmacists.

Specific requirements for most of these organisations are detailed in separate annexes. Organisations not covered in the annexes must apply the general principles of the Code in their dealings with the public.

3. Aims

The aims of the Code are to ensure that people:

- have access to available information about the services provided by the NHS, the cost of those services, quality standards and performance against targets;
- are provided with explanations about proposed service changes and have an opportunity to influence decisions on such changes;
- are aware of the reasons for decisions and actions affecting their own treatment;
- know what information is available and where they can get it.

4. General principles

In implementing the Code, the NHS must:

- respond positively to requests for information (except in the circumstances identified in paragraph 9);
- answer requests for information quickly and helpfully, and give reasons for not providing information where this is not possible;
- help the public to know what information is available, so that they can decide what they wish to see, and whom they should ask;

ensure that there are clear and effective arrangements to deal with complaints and concerns about local services and access to information, and that these arrangements are widely publicised and effectively monitored.

5. Information which must be provided

Apart from the exemptions set out in paragraph 9 below, NHS trusts and authorities must publish or otherwise make available the following information (further details are given in Annexes A, B, C and D):

- information about what services are provided, the targets and standards set and results achieved, and the costs and effectiveness of the service;
- details about important proposals on health policies or proposed changes in the way services are delivered, including the reasons for those proposals. This information will normally be made available when proposals are announced and before decisions are made;
- details about important decisions on health policies and decisions on changes to the delivery of services. This information, and the reasons for the decisions, will normally be made available when the decisions are announced;
- information about the way in which health services are managed and provided and who is responsible;
- information about how the NHS communicates with the public, such as details of public meetings, consultation procedures, suggestion and complaints systems;
- information about how to contact Community Health Councils and the Health Service Commissioner (Ombudsman);
- information about how people can have access to their own personal health records.

6. Response to requests for information

Requests for information, whether made in person or in writing, must be answered promptly. An acknowledgement must be sent within four working days and, where possible, the information should follow within 20 working days.

NHS organisations are not required to make available:

i) copies of the documents or records containing the information (although in some cases it may be simpler to do so if they contain nothing but the information requested);

ii) information which the organisation does not possess (e.g.comparable data with other organisations);

iii) individual copies of documents or other forms of information which are already widely publicly available.

If the information is not to be provided under the terms of the Code, an explanation must be provided within 20 working days of receipt of the request.

Each NHS organisation must publish the name of an individual who has responsibility for the operation of this Code of Practice. This should be a senior officer directly accountable to the Chief Executive of the organisation. Details of how to request information through this individual must also be publicised locally.

7. Charging for information

NHS Trusts and Authorities may make a charge for providing information but are not required to do so. It is recommended that charging should be exceptional but that where charges are made the following ground rules should be observed:

a) no charge for individuals enquiring about services or treatment available to them; press and other media; Community Health Councils; MPs; Local Authorities; Citizen's Advice Bureaux;

b) for requests from people not listed above, no charge for the first hour and a charge not exceeding £20 per hour for each hour thereafter.

8. Personal health records

The NHS must keep patients' personal details confidential but people normally have a right to see their own health records. Depending on who made the records, patients can obtain access through the relevant Trust, Health Authority, family doctor or dentist. Access must be given within the timetable in the Access to Health Records Act 1990 (or, for records held on computer, the Data Protection Act 1984). Under these Acts, patients may be charged for access to their records.

9. Information which may be withheld

NHS Trusts and Authorities must provide the information requested unless it falls within one of the following exempt categories:

i) Personal information. People have a right of access to their own health records but not normally to information about other people.

ii) Requests for information which are manifestly unreasonable, far too general, or would require unreasonable resources to answer.

iii) Information about internal discussion and advice, where disclosure would harm frank internal debate, except where this disclosure would be outweighed by the public interest.

iv) Management information, where disclosure would harm the proper and effective operation of the NHS organisation.

v) Information about legal matters and proceedings, where disclosure would prejudice the administration of justice and the law.

vi) Information which could prejudice negotiations or the effective conduct of personnel management or commercial or contractual activities. This does not cover information about internal NHS contracts.

vii) Information given in confidence. The NHS has a common law duty to respect confidences except when it is clearly outweighed by the public interest.

viii) Information which will soon be published or where disclosure would be premature in relation to a planned announcement or publication.

ix) Information relating to incomplete analysis, research or statistics where disclosure could be misleading or prevent the holder from publishing it first.

10. Complaining about the provision of information

People may wish to complain about a decision to refuse to provide information, a delay in providing information or levels of charges. In the first instance, complaints should be made within three months to the local individual responsible for the operation of the Code (see paragraph 6 above). If the complainant remains dissatisfied, a complaint should be made to the Chief Executive of the organisation, or the Chief Executive of the Family Health Services Authority in the case of family doctors, dentists, pharmacists and optometrists (opticians). Community Health Councils may be able to help people to pursue their complaint. NHS Trusts and Authorities must acknowledge complaints within four working days and reply within 20 working days.

The NHS Trust or Authority will provide people with information about how to take their complaint further to the Health Service Ombudsman if they remain dissatisfied. However, the Ombudsman does not investigate complaints about the withholding of information by family doctors, dentists, pharmacists, optometrists (opticians) or Community Health Councils.

11. Implementation of the Code of Practice

The NHS organisations described in paragraph 2 above must implement the Code of Practice from 1 June 1995. Detailed guidance notes, to help them respond to requests for information in accordance with the Code, will be available by the implementation date.

Annex A

NHS Trusts

1. Introduction

This Annex describes the information which NHS Trusts must publish or make available. It also lists examples of information which it is recommended should be made available as a matter of good practice, either through publication or on request.

2. Information which must be published

The following are the documents which Trusts must publish by given dates:

- an annual report describing the Trust's performance over the previous financial year, and including details of board members' remuneration; the report should be written and presented in a way that can be readily understood by the general public;
- an annual summary of the Trust's business plan, describing the Trust's planned activity for the coming year;
- a summary strategic direction document (not published annually), setting out the Trust's longer term plans for the delivery of health care services over a five year period; and
- audited accounts published annually.

In addition to the documents described above, NHS Trusts must also make available, on request:

- the register of board members' private interests required under the Code of Accountability for NHS boards;
- such information as is required by the Patient's Charter and NHS performance tables.

2.1 Public Meetings - NHS Trusts must hold at least one public meeting a year. An agenda, papers, the accounts and the annual report must be publicly available at least seven days in advance of the meeting. Provision must be made for questions and comments to be put by the public. Public meetings must be held in readily accessible venues and at times when the public are able to attend. Providing the public with access to more frequent general meetings or to board meetings is good practice already followed by an increasing number of Trusts.

3. Good practice in providing information

3.1 Examples of additional information which may be published

- quarterly board reports (financial, activity, quality and contract information);
- Patient's Charter

    local performance against national targets;

    local performance against local targets;
- information on service changes;
- agenda and papers relating to other meetings held in public in addition to the Annual Public Meeting.

3.2 Examples of information which may be available on request

The following list is a guide to some of the information which is routinely held by most NHS Trusts. Much of the information will be detailed in the previous year's annual report. Where more up-to-date information is available, this may be given:

- patient information leaflets;
- description of facilities (numbers of beds, operating theatres etc.);
- performance against Patient's Charter national and local standards and targets;
- waiting times by specialty;
- detailed information on activity;
- broad conclusions of clinical audit;
- number and percentage of operations cancelled, by specialty;
- price lists for extra-contractual referrals;
- information about clinicians (including qualifications, areas of special interest, waiting times for

appointment);

- areas which have been market-tested, with details of decisions reached;
- tenders received by value, but not by name of tenderer;
- information on manpower and staffing levels and staff salaries by broad bandings;
- policies for Trust staff, e.g.equal opportunities, standards of conduct;
- environmental items, e.g. fuel usage;
- volume and categories of complaints and letters of appreciation (without identifying individuals), and performance in handling complaints;
- results of user surveys and action to be taken;
- standing orders and waivers of standing orders;
- standing financial instructions;
- external audit management letter, and Trust response, at the time when response is made;
- details of administrative costs;
- funds held on trust, such as bequests and donations;
- performance against quality standards in contracts;
- clinical performance, by specialty, e.g. proportion of surgery done on day surgery basis, by condition;
- performance against national and local targets for in patient and day case waiting times;
- names and contact (office) numbers of board members and senior officers;
- basic salaries, i.e. excluding PRP and distinction awards, of staff, by bandings and in anonymised form;
- response times for ambulances;
- information about the use of outside management consultants, including expenditure.

4. Procedures for obtaining information

Trusts must ensure that people know whom to ask for information. They must publish the name of the person responsible, along with full details of how to go about obtaining information and how to complain if the information is not provided. The person responsible should be a senior officer who is directly accountable to the Chief Executive of the Trust.

Annex B

Purchasers of health care: District Health Authorities and Family Health Services Authorities

1. Introduction

1.1 Purchasers have an essential role in the successful development of local services and achieving a strategic balance of care. The purchasers covered by this Annex are District Health Authorities, Family Health Services Authorities and District Health Authorities and Family Health Services Authorities acting jointly. (Annexes C and D give complementary advice for General Practitioner Fundholders.)

1.2 This Annex describes the information which they must publish or make available. It also lists examples of information which it is recommended is made available as a matter of good practice, either through publication or on request.

2. Information which must be published

2.1 District Health Authorities/Family Health Services Authorities

The following are the documents which Authorities must publish by given dates:

- an annual report, describing the performance over the previous financial year, and including details of board members' remuneration; the report should be in a form that can be readily understood by the general public;
- an annual report by the Director of Public Health;
- an annual report on performance against Patient's Charter rights and standards;
- a full list of General Medical Practitioners, General Dental Practitioners, pharmacists and optometrists in their locality;
- papers, agendas and minutes of board meetings held in public;
- audited accounts published annually;
- a strategy document (not published annually) setting out the health authority's plans over a five year period. They must consult with the public before and after developing the strategy.

In addition to the documents described above, authorities must also make available, on request:

- annual purchasing plans;
- contracts with providers, both NHS and non-NHS;
- the register of board members' private interests required under the Code of Accountability for NHS boards;
- such information as is required by the Patient's Charter.

2.2 Public Meetings - District Health Authorities and Family Health Services Authorities must hold all their board meetings in public, though there is provision for certain issues (e.g.personnel and commercial matters) to be taken in a private part of the meeting. The agenda for these meetings must always be provided to the press and on request to members of the public. Public meetings must

be held in easily accessible venues, and at times when the public are able to attend.

2.3 Consultation - District Health Authorities must consult with the Community Health Council and other interested parties on any plans to change the service which they purchase or plan for their residents. They must publish well in advance a timetable to enable the public to know when and how they can influence the commissioning process.

3. Good practice in providing information

3.1 Examples of additional information which may be published

- information on services purchased by the Authority;
- information about consultation exercises undertaken and outcomes;
- full reports of any user or attitude surveys and action to be taken;
- total available financial resources;
- District Health Authority allocation;
- Family Health Services Authority allocation;
- proposed and actual expenditure on services, analysed by:
    - providers;
    - contracts (including by specialty, if available);
    - treatments purchased separately from contracts (extra contractual referrals);
- changes in providers and contracts from previous years;
- performance against quality standards in contracts;
- clinical performance, by specialty, of providers contracted with, e.g.proportion of surgery done on day surgery basis, by condition;
- performance against national and local targets for in-patient and day case waiting times;
- numbers of complaints dealt with and response times;
- names and contact (office) numbers of Authority board members and senior officers;
- basic salaries i.e. excluding PRP and distinction awards, of staff, by bandings and in anonymised form;
- information about the use of outside management consultants, including expenditure.

3.2 Examples of information which may be available on request

- future year resource plans;
- information about expenditure on different types of healthcare, such as primary, secondary or community care;

- price comparisons of all providers used by the purchaser;
- total expenditure per head of population;
- costs of authority administration;
- standing orders and waivers of standing orders;
- standing financial instructions;
- external audit management letter, and response, at the time when the response is made.

4. Procedures for obtaining information

Authorities must ensure that people know whom to ask for information. They must publish the name of the person responsible, along with full details of how to go about obtaining information and how to complain if the information is not provided. The person responsible should be a senior officer who is directly accountable to the Chief Executive of the Authority.

Annex C

General Medical Practitioners, General Dental Practitioners, Community Pharmacists and Optometrists.

1. Introduction

1.1 This Annex describes the information which General Medical Practitioners, General Dental Practitioners, Community Pharmacists and Optometrists must publish or make available. It also describes the information about these services which Family Health Services Authorities must provide. In addition, the Annex lists examples of information which it is recommended Family Health Services Authorities should publish or make available on request as a matter of good practice.

General Medical Practitioners, General Dental Practitioners, Community Pharmacists and Optometrists provide services to the public which are paid for by the NHS. The public should therefore have access to information about services they provide. Although they are self-employed independent contractors, and cannot therefore be required to publish sensitive information about their businesses, their contracts for services specify information that is important to patients and which must be made available.

2. Information which must be published

The following are the statutorily required documents which must be published.

2.1 General Medical Practitioners

Practice leaflets - Essential information for patients about individual doctors' practices is published in practice leaflets which can be obtained from the practice or the Family Health Services Authority. These must contain the following information:

- name, sex, medical qualifications and date and first place of registration of the General Practitioner;
- details of availability (including arrangements for cover when the General Practitioner is not available), appointments system and how to obtain an urgent appointment or home visit;

- arrangements for obtaining repeat prescriptions and dispensing arrangements;
- frequency, duration and purpose of clinics;
- numbers and roles of other staff employed by the practice, and information about whether the General Practitioner works alone, part-time or in partnership;
- details of services available - for example, child health surveillance, contraception, maternity, medical, minor surgery, counselling and physiotherapy;
- details of arrangements for receiving and responding to patient's comments and complaints;
- geographical boundary of the practice area;
- details of access for the disabled.

In addition, some leaflets also:

- contain information about Patient's Charter standards;
- contain information detailing any other professional staff employed by the practice, including their registration status;
- are available in languages other than English which are commonly used locally.

2.2 General Dental Practitioners

Practice Leaflets - Essential information for patients about individual dental practices is published in practice leaflets which can be obtained from the practice or the Family Health Services Authority. These contain:

- name, sex and date of registration as a dental practitioner;
- address, opening hours and details of partners/associates;
- whether a dental hygienist is employed;
- details of access to the premises;
- whether only orthodontic treatment is available;
- with consent, whether the dentist speaks any languages in addition to English;
- General Dental Practitioners are required to inform patients of any emergency arrangements in place.

2.3 Charges

General Dental Practitioners must provide patients with individual costed treatment plans. They must display a notice of the scale of NHS charges and information about entitlement to exemption from or remission of charges.

It is good practice:

- to provide information about their cross-infection control procedures, giving examples as appropriate.

2.4 Community Pharmacists

Practice Leaflets - Pharmacists are not obliged to produce practice leaflets but those dispensing more than 1500 prescriptions a month normally do so. These leaflets detail the range of services available to the public and, if produced, must contain the following information:

- a list of services provided by the pharmacist;
- name, address and telephone number of the pharmacy;
- normal opening hours and arrangements for out of hours services and emergencies;
- procedures for receiving comments on services provided.

As good practice:

an increasing number of Community Pharmacists make health promotion leaflets available to the public.

2.5 Optometrists

Optometrists are not currently required to produce practice leaflets, but many do so as a matter of good practice.

Results of Eye-Tests - Optometrists must provide patients with a copy of the results of their eye-tests (i.e. their prescription) or a statement that no prescription is required.

2.6 Family Health Services Authorities

Directory of Local Services - A list of all General Medical Practitioners, General Dental Practitioners, Community Pharmacists and Optometrists must be published by Family Health Services Authorities. This contains details of all Practitioners in the area and includes information about out of hours services by pharmacists. Local General Practitioner Practice Charters are also available from Family Health Services Authorities.

Changing Family Doctors

Information must be provided to help people wishing to change their family doctor. It is good practice to publish this information in a leaflet.

2.7 Personal records

All Family Health Services Authority contractors must allow a patient access to their own health records under the Data Protection Act 1984 and the Access to Health Records Act 1990.

3. Information from Family Health Services Authorities

A Family Health Services Authority is well placed to take an overview of primary care services in its area and the following indicates additional information which may be provided.

3.1 Information about General Medical Practitioners

Within the restriction outlined in paragraph 1.2 about confidential contractual information, Family Health Services Authorities (or Health Commissions) may make available aggregate information about General Medical Practitioners in respect of:

Spend:

- expenditure on General Medical Services;
- prescribing.

Numbers:

- average list size of General Medical Practitioners;
- primary health care teams;
- aggregated numbers of district nurses, health visitors and midwives attached to practices;
- aggregated number of practice nurses.

Service Information:

- aggregated numbers of fundholding practices;
- aggregated levels of immunisation;
- aggregated levels of screening for cervical cytology;
- percentage of practices achieving top targets for smears and vaccinations;
- achievement of health promotion targets (percentage achieving band 3);
- time taken to transfer medical records;
- information about type of premises (e.g.main surgeries, branch surgeries);
- percentage of practices with General Practitioner Practice Charters in place.

Initiatives:

- initiatives to promote the work of primary care teams;
- involvement of General Practitioners in purchasing.

Complaints:

- numbers;
- response times;
- people's rights as patients;
- how people can make complaints.

3.2 Information about Dentists

- Numbers and location of NHS dentists, including details of late opening and specialist services offered.

3.3 Information about Community Pharmacists

Numbers and location of pharmacists, and those offering:

- late opening;
- oxygen supplies;
- supplies to residential homes;
- health promotion information;
- out of hours services for urgent prescriptions;
- needle exchange facilities.

3.4 Information about Optometrists

Numbers and location of optometrists, and those offering:

- late opening;
- domiciliary visits to carry out sight tests.

4. Information which must not be disclosed without the agreement of individual family health service contractors

- Commercially sensitive data relating to the operation of a practice as a business, e.g.salaries, buildings;
- information on specific practices, where the disclosure has not been agreed with the practices concerned.

5. Procedures for obtaining information

5.1 Information about individual General Medical Practitioners, General Dental Practitioners, Pharmacists and Optometrists and their practice leaflets must be available from the practice. Family Health Services Authorities must ensure that people know whom to ask for additional information. The Authority should publish the name of the person responsible. This should be a senior officer who is directly accountable to the Chief Executive of the Authority.

5.2 Complaints about failure to obtain information should be dealt with as far as possible by the practice. If the complainant remains dissatisfied, he/she should be directed to the Family Health Services Authority. The assistance of the Community Health Council may also be sought. At present the Health Service Ombudsman does not investigate complaints against family doctors, dentists, optometrists (opticians) or pharmacists.

Annex D

General Practitioner Fundholders

1. Introduction

This Annex extends Annex C and describes the additional information which General Practitioner Fundholders, as purchasers of services, must publish or make available. The requirements of Annex C relating to General Medical Practitioners also apply to General Practitioner Fundholders, in their role as providers of General Medical Services (GMS).

2. Information which should be published

The following are the documents which General Practitioner Fundholders should publish or make available by given dates:

- plans for major shifts in purchasing;
- annual practice plan describing how the practice intends to use its fund and management allowances over the coming year and demonstrating the practice's contribution to national targets and priorities as well as any locally-agreed objectives. The plan should include an outline longer term view and may optionally include the practice's primary health care team charter (Practice Charter) and plans for the practice's general medical services (GMS) activity;
- Practice Charter (if available and not included above);
- annual performance report;
- audited annual accounts.

Consultation

General Practitioner Fundholders must ensure that a copy (or a summary) of their major shifts in purchasing intentions, annual plans, Practice Charter (if separate) and performance reports is available at their practice for consultation by patients. A copy of the above documents should be sent to the Family Health Services Authority and a copy (or a summary) to the local Community Health Council.

In addition, General Practitioner Fundholders are required to produce annual accounts for audit. Once audited, these are public documents and are available for inspection at the Family Health Services Authority.

General Practitioner Fundholders are developing a range of models for involving patients in service planning. The NHS Executive will be publishing examples of best practice in this area later in 1995. General Practitioner Fundholders should ensure that they have effective complaints procedures in place.

3. Procedures for obtaining information

3.1 Information about individual practices should be requested direct from the practice. Complaints about failure to provide information should be dealt with as far as possible by the practice.

3.2 If the complainant remains dissatisfied he/she should be directed to the Family Health Services Authority. The assistance of the Community Health Council may also be sought. At present the

Health Service Ombudsman does not investigate complaints against family doctors, dentists, optometrists (opticians) or pharmacists.

3.3 Requests for information which is not about an individual practice should be directed to the Family Health Services Authority. They must ensure that they publicise the name of the officer within the Family Health Services Authority who is responsible for providing this information and for the operation of the Code of Practice. This should be a senior officer who is directly accountable to the Chief Executive of the Authority.

Appendix 3. Memorandum Of Understanding On Co-Operation Between Government Departments And The Parliamentary Commissioner For Administration On The Code Of Practice On Access To Government Information

1. This note sets out the understanding between the Government and the Parliamentary Commissioner for Administration (the Ombudsman) on the operation of the Code of Practice on Access to Government Information and co-operation between the Ombudsman and Government departments in relation to investigations relating to the disclosure of information under the Code.

The Code

2. The Code, which is non-statutory (which can be found at www.dca.gov.uk/foi/ogcode981.htm), sets out the Government's policy on handling requests for official information. The Code, which applies to all bodies within the Ombudsman's jurisdiction, will remain in place and form the basis of the Government's policy on the disclosure of information until the right of access provisions of the Freedom of Information Act 2000 come into force on 1 January 2005.

Compliance with the Code

3. All requests for information received by Government departments should be decided in accordance with relevant statute and the Code and dealt with within 20 working days for simple requests or longer when significant search or collation of material is required. All information requests should be handled in accordance with the Code's requirements even if there is no reference to the Code in the request. If information is withheld, the department should specify which exemption of the Code applies: the Ombudsman will criticise departments that fail to cite an exemption. If the information is not held, the department should say so: there is no requirement under the Code for a department to obtain information it does not possess. There should be a presumption that any of the requested information should be provided. In those categories which refer to harm or prejudice, the presumption remains that information should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in making the information available. In order to be as helpful as possible, rather than refuse a request outright, it may be possible in some cases for departments to provide some of the information requested, perhaps in a redacted form, rather than nothing at all. The Code also has provisions for charging. In refusing information, applicants should be advised of their right to seek an internal review of the decision. The Code only gives a right (subject to exemption) to information, not documents.

Internal review

4. If an applicant seeks an internal review of a decision, the outcome of the review must be communicated to the applicant as soon as possible. The expectation is that the review would not be undertaken by the original decision-maker. If the outcome of the review is that the information, or part of it, should not be disclosed, the applicant must be informed of his or her right to be able to ask a Member of Parliament to refer the case to the Ombudsman.

The role of the Ombudsman

5. The Ombudsman's Office was set up under the provisions of the Parliamentary Commissioner Act 1967 (the Act) to investigate maladministration in central government. The role of the Ombudsman in considering complaints under the Code was set out in the White Paper "Open Government" published in July 1993. The Government's expectation is that the Ombudsman's right of access to information and documents under the Act will apply to investigations carried out in relation to complaints under the Code.

Investigations

6. In general, all information relevant to an investigation is disclosable to the Ombudsman, including the information to which access is sought (even if it is covered by a Code exemption). It is also for the Ombudsman to decide what constitutes relevant information. However, section 8(4) of the 1967 Act allows departments to withhold from the Ombudsman Cabinet or Cabinet Committee papers or papers relating to the proceedings of the Cabinet or Cabinet Committees. For this to be done, the Act requires the production of a certificate, signed by the Secretary of the Cabinet and approved by the Prime Minister.

7. In addition a Minister of the Crown may, under section 11(3) of the 1967 Act, give notice to the Ombudsman that, in respect of any document or information referred to in such a notice, the disclosure of that document or information would be prejudicial to the safety of the State or otherwise contrary to the public interest. In practice, recourse to these sections of the Act is expected to be very rare.

8. It should be emphasised that disclosing information to the Ombudsman is not the same as disclosing information to the applicant. While the Ombudsman may recommend in her report that the specified information should have been disclosed to the applicant, the decision on whether or not to disclose the information rests with the department: the information is never disclosed in the report itself.

Procedures

9. The Ombudsman's preference is to resolve cases informally if at all possible. If, however, the Ombudsman decides to investigate a complaint made to her, the Department will receive a "statement of complaint" setting out what it is the Ombudsman is investigating and seeking disclosure of relevant papers and views about the complaint. The Ombudsman will expect departments to respond in full within **three weeks** of receipt of the statement of complaint. If, exceptionally, a department anticipates that it will have difficulty in replying by the date set by the Ombudsman, it is essential to enter into a dialogue with the investigating officer at the Ombudsman's office as soon as possible.

10. When the investigation has been completed the Ombudsman will send a draft report to the department in question for comment. Departments will be given **three weeks** to reply. Departments should not, **at this stage**, cite new exemptions. As with the statement of complaint, the investigating officer at the Ombudsman's office should be contacted as soon as possible in the event of any anticipated delay in responding to the draft report.

11. The Government undertakes to provide the Ombudsman with all relevant papers as quickly as possible, including papers that would not normally be released under Code exemptions such as those relating to internal advice to Ministers and internal consultation. The Ombudsman may use the background information supplied to her in her report. That said, the Ombudsman will only identify officials or disclose information which would otherwise be exempt under the Code (such as internal advice or consultation) to the extent that it is necessary to do so to make sense of the investigations or conclusions. If departments consider that the draft report contains too much detail about internal procedures, or where they consider the report contains factual errors, they should

raise this with the investigating officer. The Ombudsman is independent of Government and the final decision as to what to publish is hers, but she will give careful consideration to concerns raised about draft reports or findings. A copy of the Ombudsman's final report is sent to the referring Member of Parliament and to the department complained against.

Further information

12. Any questions on the guidance should be referred in the first place to departmental openness officers or the Information Rights Division in the Department for Constitutional Affairs on 020-7210-8755. The unit in the Ombudsman's office that investigates Code complaints can be contacted on 020-7217-4085. The Ombudsman can only, however, give general advice and cannot advise on how a particular information request should be handled. All the Ombudsman's Code investigations are published in full, usually twice a year. They can be obtained in hard copy from The Stationery Office or via the Ombudsman's website (www.ombudsman.org.uk).

Appendix 4. Statistical information

Investigations completed by year (and outcome)

Year	Number of complaints Investigated	Complaints Upheld	Complaints Partially Upheld	Complaints Not Upheld
1994	5	2	2	1
1995	9	7	1	1
1996	12	3	2	7
1997-98	26	8	11	7
1998-99	20	11	6	3
1999-00	16	3	12	1
2000-01	17	7	8	2
2001-02	20	6	8	6
2002-03	16	7	8	1
2003-04	21	9	5	7
2004-05	46	9	17	20
Totals	208	72	80	56

Note:

(i) Ten investigations in this list concerned complaints about maladministration as well as a refusal to provide access to government information.

(ii) Year 1997-98 covered the period from 1 January 1997 to 31 March 1998.

(iii) Outcome refers to the decision as to whether or not the Ombudsman upheld the complaint as referred to her.

Investigations completed by department.

Department	Investigations
Home Office	18
Ministry of Defence	17
Department of Trade and Industry	17
Department of Health	14
Department of the Environment, Transport and the Regions	13
Inland Revenue	10
Foreign and Commonwealth Office	10
Department of Transport	10
Cabinet Office	8
Department of Social Security	8
HM Treasury	5
Department for Education and Employment	5
Charity Commission	5
Health and Safety Executive	5
Scottish Office	5
Department of Environment	4
Ministry of Agriculture, Fisheries and Food	3
Legal Services Commission	3
Department for Work and Pensions	3
HM Customs and Excise	3
Welsh Office	3
Commission for Social Care Inspection	3
Lord Chancellor's Department	2
Northern Ireland Office	2
Department for Education and Skills	2
Office of the Deputy Prime Minister	2
Department for International Development	2
HM Land Registry	2
Arts Council for England	2
Office for Standards in Education	2
Export Credits Guarantee Department	2
Higher Education Funding Council for England	2
Data Protection Registrar	1
Department of Culture, Media and Sport	1
Legal Aid Board	1
Biotechnology and Biological Sciences Research Council	1
Housing Corporation	1
Commission for Racial Equality	1
Commission for the New Towns	1
Department for Constitutional Affairs	1
Department for National Heritage	1
Department of the Registers for Scotland	1
Disability Rights Commission	1
Economic and Social Research Council	1
National Endowment for Science, Technology and the Arts	1
Coal Authority	1
English Sports Council	1
Cardiff Bay Development Corporation	1
Total	**208**

Notes:

(i) Ten investigations in this list concerned complaints about maladministration as well as a refusal to provide access to government information.

(ii) The table only includes the principal department complained against. Eight of the cases shown also involved investigations against other departments. One each against the Foreign Office, the Home Office and HM Treasury, two against the Department of Trade and Industry and three against the Department for Constitutional Affairs.

(iii)The departments were those in existence at the time of the complaint and several have now either ceased to exist or evolved into new departments.

Code of Practice on Access to Government Information - exempt categories of information

A number of categories of information are exempt from the commitments to provide information in the Code. In those categories which refer to harm or prejudice, there is a presumption that information should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in making the information available.

References to harm or prejudice include both actual harm or prejudice and risk or reasonable expectation of harm or prejudice. In such cases it should be considered whether any harm or prejudice arising from disclosure is outweighed by the public interest in making information available.

The Code states that exemptions should 'not be interpreted in a way which causes injustice to individuals'.

Separate tables are provided for each of the exemptions - excluding those where the Ombudsman received no complaints of breaches of the Code. Each table shows on the left what part of the exemption applies (a, b, c, etc. where applicable) and the numbers of the individual cases citing that

1. Defence, security and international relations

Exemption of the Code	Number of times exemption cited
a) Information whose disclosure would harm national security or defence.	8
b) Information whose disclosure would harm the conduct of international relations or affairs.	18
c) Information received in confidence from foreign governments, foreign courts or international organisations.	4

2. Internal discussion and advice

Exemption of the Code	Number of times exemption cited
Information whose disclosure would harm the frankness and candour of internal discussion, including: - proceedings of Cabinet and Cabinet committees; - internal opinion, advice, recommendation, consultation and deliberation; - projections and assumptions relating to internal policy analysis; analysis of alternative policy options and information relating to rejected policy options; - confidential communications between departments, public bodies and regulatory bodies.	80

3. Communications with the Royal Household

Exemption of the Code	Number of times exemption cited
Information relating to confidential communications between Ministers and Her Majesty the Queen or other Members of the Royal Household, or relating to confidential proceedings of the Privy Council.	0

4. Law enforcement and legal proceedings

Exemption of the Code	Number of times exemption cited
a) Information whose disclosure could prejudice the administration of justice (including fair trial), legal proceedings or the proceedings of any tribunal, public inquiry or other formal investigations (whether actual or likely) or whose disclosure is, has been, or is likely to be addressed in the context of such proceedings.	8
b) Information whose disclosure could prejudice the enforcement or proper administration of the law, including the prevention, investigation or detection of crime, or the apprehension or prosecution of offenders.	12
c) Information relating to legal proceedings or the proceedings of any tribunal, public inquiry or other formal investigation which have been completed or terminated, or relating to investigations which have or might have resulted in proceedings.	11
d) Information covered by legal professional privilege.	11
e) Information whose disclosure would harm public safety or public order, or would prejudice the security of any building or penal institution.	4
f) Information whose disclosure could endanger the life or physical safety of any person, or identify the source of information or assistance given in confidence for law enforcement or security purposes.	1
g) Information whose disclosure would increase the likelihood of damage to the environment, or rare or endangered species and their habitats.	2

5. Immigration and nationality

Exemption of the Code	Number of times exemption cited
Information relating to immigration, nationality, consular and entry clearance cases. However, information will be provided, though not through access to personal records, where there is no risk that disclosure would prejudice the effective administration of immigration controls or other statutory provisions.	1

6. Effective management of the economy and collection of tax

Exemption of the Code	Number of times exemption cited
a) Information whose disclosure would harm the ability of the Government to manage the economy, prejudice the conduct of official market operations, or could lead to improper gain or advantage.	4
b) Information whose disclosure would prejudice the assessment or collection of tax, duties or National Insurance contributions, or assist tax avoidance or evasion.	3

7. Effective management and operations of the public service

Exemption of the Code	Number of times exemption cited
a) Information whose disclosure could lead to improper gain or advantage or would prejudice: - the competitive position of a department or other public body or authority; - negotiations or the effective conduct of personnel management, or commercial or contractual activities; - the awarding of discretionary grants.	18
b) Information whose disclosure would harm the proper and efficient conduct of the operations of a department or other public body or authority, including NHS organisations, or of any regulatory body.	17

8. Public employment, public appointments and honours

Exemption of the Code	Number of times exemption cited
a) Personnel records (relating to public appointments as well as employees of public authorities) including those relating to recruitment, promotion and security vetting.	5
b) Information, opinions and assessments given in confidence in relation to public employment and public appointments made by Ministers of the Crown, by the Crown on the advice of Ministers or by statutory office holders.	3

9. Voluminous or vexatious requests

Exemption of the Code	Number of times exemption cited
Requests for information which are vexatious or manifestly unreasonable or are formulated in too general a manner, or which (because of the amount of information to be processed or the need to retrieve information from files not in current use) would require unreasonable diversion of resources.	18

10. Publication and prematurity in relation to publication

Exemption of the Code	Number of times exemption cited
Information which is or will soon be published, or whose disclosure, where the material relates to a planned or potential announcement or publication, could cause harm (for example, of a physical or financial nature).	14

11. Research, statistics and analysis

Exemption of the Code	Number of times exemption cited
a) Information relating to incomplete analysis, research or statistics, where disclosure could be misleading or deprive the holder of priority of publication or commercial value.	4
b) Information held only for preparing statistics or carrying out research, or for surveillance for health and safety purposes (including food safety), and which relates to individuals, companies or products which will not be identified in reports of that	0

12. Privacy of an individual

Exemption of the Code	Number of times exemption cited
Unwarranted disclosure to a third party of personal information about any person (including a deceased person) or any other disclosure which would constitute or could facilitate an unwarranted invasion of privacy.	29

13. Third party's commercial confidences

Exemption of the Code	Number of times exemption cited
Information including commercial confidences, trade secrets or intellectual property whose unwarranted disclosure would harm the competitive position of a third party.	32

14. Information given in confidence

Exemption of the Code	Number of times exemption cited
a) Information held in consequence of having been supplied in confidence by a person who:	25
- gave the information under a statutory guarantee that its confidentiality would be protected; or	
- was not under any legal obligation, whether actual or implied, to supply it, and has not consented to its disclosure.	
b) Information whose disclosure without the consent of the supplier would prejudice the future supply of such information.	16
c) Medical information provided in confidence if disclosure to the subject would harm their physical or mental health, or should only be made by a medical practitioner.	0

15. Statutory and other restrictions

Exemption of the Code	Number of times exemption cited
a) Information whose disclosure is prohibited by or under any enactment, regulation, European Community law or international agreement.	14

None

Exemption of the Code	Number of times exemption cited
None	34

Notes:

(i) These are exemptions cited by departments, not necessarily those considered by the Ombudsman.

(ii) Departments often cited more than one exemption when refusing to provide access to information.

(iii) 'None' refers to cases where no exemptions were cited by the department, e.g. they failed to consider an information request under the Code but, following the Ombudsman's intervention, decided to release the information.

Code of Practice on Access to Government Information - exemption by case number

Exemption 1	
Defence, Security and International Relations	
1(A)	A0042_95
	A0012_03
	A0003_94
	A0014_03
	A0021_04
	A0040_04
	A0003_95
	A0002_05
1(B)	A0030_95
	A0021_96
	A0002_00
	A0026_01
	A0005_03
	A0012_03
	A0010_04
	A0009_04
	A0033_04
	A0040_04
	A0003_05
	A0029_04
	A0045_04
	A0039_04
	A0002_05
	A0043_04
	A0020_05
	A0026_05
1(C)	A0015_99
	A0045_04
	A0009_04
	A0031_05
Total = 30	

Exemption 2			
Internal discussion and advice			
A0001_94	A0013_99	A0015_02	A0029_04
A0004_94	A0016_99	A0019_02	A0021_04
A0012_95	A0021_99	A0021_02	A0012_04
A0025_95	A0023_99	A0022_02	A0045_04
A0029_95	A0031_99	A0029_02	A0032_04
A0032_95	A0002_00	A0031_02	A0007_04
A0036_95	A0008_00	A0032_02	A0031_04
A0041_95	A0014_00	A0033_02	A0039_04
A0003_96	A0029_00	A0002_03	A0036_04
A0015_96	A0002_01	A0009_03	A0002_05
A0032_96	A0016_01	A0016_03	A0043_04
A0041_96	A0020_01	A0019_03	A0042_04
A0006_97	A0026_01	A0037_03	A0016_05
A0013_97	A0028_01	A0025_03	A0001_05
A0015_97	A0030_01	A0029_03	A0031_05
A0026_97	A0032_01	A0003_04	A0028_05
A0002_98	A0002_02	A0014_04	A0013_05
A0004_98	A0005_02	A0010_04	A0034_05
A0007_98	A0006_02	A0014_03	A0009_05
A0011_99	A0011_02	A0035_04	A0035_05
Total = 80			

Exemption 4			
Law enforcement and legal proceedings			
4(A)	A0043_96		A0023_01
	A0008_99		A0001_04
	A0027_99		A0036_04
	A0020_01		A0043_04
	A0033_01		A0042_04
	A0010_02		A0028_05
	A0032_02	4(D)	A0004_96
	A0036_04		A0013_97
4(B)	A0001_94		A0002_98
	A0034_94		A0027_99
	A0008_94		A0015_02
	A0035_95		A0032_04
	A0023_99		A0016_05
	A0027_99		A0024_03
	A0036_99		A0035_04
	A0003_00		A0045_04
	A0023_01		A0020_04
	A0036_04	4(E)	A0017_94
	A0042_04		A0027_97
	A0010_05		A0031_03
4(C)	A0001_94		A0029_05
	A0004_94	4(F)	A0029_05
	A0032_96	4(G)	A0041_95
	A0013_97		A0021_99
	A0008_99		**Total = 49**

Exemption 5
Immigration and nationality
A0036_99
Total = 1

Exemption 6	
Effective management of the economy and collection of tax	
6(A)	A0007_94
	A0006_02
	A0011_02
	A0003_04
6(B)	A0007_94
	A0026_97
	A0039_03
Total = 7	

Exemption 7			
Effective management and operations of the public service			
7(A)	A0005_94	7(B)	A0005_94
	A0009_94		A0040_95
	A0044_95		A0041_95
	A0005_96		A0006_97
	A0032_96		A0027_97
	A0001_97		A0008_00
	A0006_97		A0020_02
	A0002_01		A0019_03
	A0020_01		A0021_03
	A0025_01		A0022_03
	A0027_02		A0018_04
	A0031_03		A0015_04
	A0006_04		A0014_04
	A0005_04		A0014_03
	A0031_05		A0034_04
	A0017_05		A0036_04
	A0002_05		A0011_05
	A0007_04	Total = 35	

Exemption 8	
Public employment, public appointments and honours.	
8(A)	A0018_96
	A0032_96
	A0010_02
	A0027_02
	A0028_02
8(B)	A0032_96
	A0011_05
	A0013_05
	Total = 8

Exemption 9
Voluminous or vexatious requests
A0036_95
A0021_97
A0003_97
A0007_99
A0027_99
A0007_00
A0014_00
A0014_01
A0024_01
A0009_02
A0027_02
A0015_03
A0011_04
A0019_04
A0031_04
A0004_05
A0038_05
Total = 18

Exemption 10
Publication and prematurity in relation to publication
A0030_96
A0042_96
A0001_97
A0013_01
A0016_01
A0017_01
A0018_01
A0019_01
A0006_02
A0011_02
A0013_02
A0020_02
A0003_04
A0031_04
Total = 14

Exemption 11
Research, statistics and analysis
A0025_95
A0035_95
A0041_96
A0023_99
Total = 4

Exemption 12
Privacy of an individual
A0007_94
A0005_95
A0028_95
A0044_95
A0032_96
A0026_97
A0014_00
A0025_00
A0004_01
A0013_01
A0025_01
A0028_01
A0032_01
A0010_02
A0015_02
A0021_02
A0027_02
A0028_02
A0007_03
A0015_03
A0016_03
A0007_04
A0042_04
A0028_05
A0013_05
A0029_05
A0004_05
A0034_05
A0035_05
Total = 29

Exemption 13	
Third party's commercial confidences	
A0022_94	A0032_01
A0001_95	A0028_02
A0009_95	A0021_03
A0025_95	A0040_03
A0029_95	A0041_03
A0030_95	A0015_04
A0005_96	A0014_04
A0021_96	A0006_04
A0025_97	A0014_03
A0011_99	A0029_04
A0013_99	A0023_04
A0016_99	A0036_04
A0039_99	A0002_05
A0031_00	A0001_05
A0002_01	A0029_05
A0004_01	A0035_05
Total = 32	

Exemption 14			
Information given in confidence			
14(A)	A0007_94		A0020_04
	A0029_95		A0036_04
	A0032_95		A0010_05
	A0044_95		A0031_05
	A0034_96		A0021_05
	A0006_97	14(B)	A0005_94
	A0015_97		A0007_94
	A0017_99		A0009_95
	A0008_00		A0036_95
	A0031_00		A0006_97
	A0002_01		A0025_97
	A0004_01		A0004_01
	A0025_01		A0025_01
	A0013_02		A0013_02
	A0015_02		A0015_02
	A0019_02		A0021_02
	A0027_02		A0019_03
	A0003_03		A0008_04
	A0018_04		A0014_04
	A0006_04	**Total = 41**	

Exemption 15
Statutory and other restrictions
A0032_95
A0034_96
A0037_96
A0007_99
A0018_99
A0004_01
A0014_01
A0025_01
A0019_02
A0015_03
A0018_04
A0010_04
A0002_05
A0029_05
Total = 14

None	
A0019_94	A0034_99
A0004_95	A0038_99
A0011_95	A0041_99
A0020_95	A0005_00
A0024_95	A0019_00
A0014_96	A0030_00
A0017_96	A0007_01
A0027_96	A0031_01
A0029_96	A0018_02
A0033_96	A0003_03
A0038_96	A0017_03
A0005_97	A0013_04
A0011_97	A0030_05
A0023_97	A0006_05
A0029_97	A0015_05
A0005_99	A0038_04
A0012_99	A0019_05
Total = 34	

Cases where departments have not complied with the Ombudsman's recommendations

Case Reference	Department	Subject
A.28/01	Home Office	Refusal to release the number of times Ministers had made declarations of interest and sought advice in accordance with guidelines set out in the Ministerial Code of Conduct
A.7/03	Cabinet Office and Lord Chancellor's Department	Refusal to release information relating to the acceptance of gifts by Ministers in accordance with the Ministerial Code of Conduct (the Ministerial Code)
A.14/03	Department of Health	Refusal to provide information about the awarding of a contract to supply a stock of smallpox vaccine
A.16/03	Cabinet Office and Department for Constitutional Affairs	Failure to provide information relating to potential Ministerial conflicts of interest under the Ministerial Code
A.16/05	Foreign and Commonwealth Office	Refusal to provide the date on which the Government first sought legal advice about the legality of military intervention in Iraq
A.34/05	Cabinet Office	Refusal to provide information about a business breakfast meeting hosted by the Prime Minister

Appendix 5. Bibliography

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Parliamentary Commissioner for Administration *Selected Cases 1997 Volume 3* (HC 132) (Cases: A32/95; A4/96; A15/96; A27/96; A29/96; A33/96; A41/96)

Parliamentary Commissioner for Administration Fourth Report Session 1997-98 Volume 1(HC 804) (Cases: A42/95; A43/96; A32/96; A15/97; A29/95; A30/96; C945/96; A11/97; A21/97; A42/96; 3/97; A34/96; A37/96; C431/96; C39/95; A26/97; A5/97; A13/97; A18/96; A29/97; A40/95; A38/96/A29/95; A30/95; A21/96; A6/97)

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