Parliamentary Commissioner for Administration

SECOND REPORT—SESSION 1994–95

Access to Official Information: The First Eight Months

Presented to Parliament Pursuant to Section 10(4) of the Parliamentary Commissioner Act 1967

Ordered by The House of Commons *to be printed* 14 December 1994

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Introduction

1. This report fulfils a commitment given to the Select Committee on the Parliamentary Commissioner for Administration which considers the reports I lay before Parliament. It is an interim report to Parliament about my initial experience of considering complaints that, in contravention of the Code of Practice on Access to Government Information (the Code), information which complainants had sought under the provisions of the Code had been denied them. This report, to be updated by my Annual Report for 1994, covers the first eight months of the Code's operation.

Background

2. The Code came into force on 4 April 1994. It applies to all those bodies which are within my jurisdiction under the terms of the Parliamentary Commissioner Act 1967. The concept of the Code was first put forward in the White Paper "Open Government" (Cm 2290) presented to Parliament in July 1993 by the Chancellor of the Duchy of Lancaster at the time. The White Paper argued that a non-statutory code, breaches of which would be policed by the Parliamentary Ombudsman, would have advantages over a Freedom of Information Act creating new statutory rights to information, breaches of which would fall to the courts or a tribunal to consider. The White Paper saw a non-statutory regime based on the Code as potentially less costly for those seeking information and as better preserving Parliament's locus should contentious issues arise. It proposed the creation of two new specific statutory rights: a right of access to personal records and a right of access to health and safety information. Neither proposal has yet reached the statute book. Until those rights are embodied in law I shall treat complaints about denial of information relating to personal records or health and safety matters in the same way as other complaints arising from requests for information under the Code. It is not for me to take sides as between the proponents of a statutory Freedom of Information Act and the authors of the White Paper. My pragmatic decision was to accept the additional task of monitoring the Code of Practice because it was a move in the direction of public access to information held by Government.

3. The Government's decision to introduce a Code has not changed my responsibilities or jurisdiction under the 1967 Act. Now that the Code is in force I regard complaints about failures to abide by it in the same way as I regard other complaints that maladministration on the part of a body within my jurisdiction has led to an unremedied injustice. If I am satisfied that there is a arguable case, I use my powers under the 1967 Act to investigate the complaint. Those powers include, where necessary, sending for departmental papers or taking evidence from Ministers or officials. The one distinction I draw, referred to in paragraph 4.19 of the White Paper, is this. When considering a conventional complaint I expect to be shown some evidence that the complainant concerned has sustained a personal injustice, but when considering complaints about breaches of the Code I am prepared to accept that a refusal to release information which should have been released is itself enough to found a complaint. The White Paper argued that my powers to send for departmental papers, my independence from Government, and my ability to make reports to Parliament would all help to generate confidence in the public and in Parliament in the working of the Code and would preserve Parliamentary accountability. It maintained that that was a better way to influence departmental cultures and reduce the risk of the bodies within my jurisdiction adopting an unduly cautious legalistic approach to requests for information. Time will tell whether that is the case.

Dissemination of awareness of the Code and the Ombudsman's role in relation to it

4. The eight months between July 1993 and April 1994 were used by the Government to canvass opinion on what the Code should contain. The consultation exercise over the content of the Code as proposed in the White Paper provided some advance publicity for it. Over 100 individuals and organisations made representations about its contents and the Campaign for Freedom for Information held a seminar (which one of my Deputies and I attended) to allow its potential impact to be discussed. The Campaign have also been active in promoting awareness of the Code. The Office of Public Service and Science have

distributed over 50,000 copies of the Code to over 1,300 outlets, such as public libraries and Citizens Advice Bureaux. No use has, I understand, been made of paid publicity to advertise the Code. In the face of other news items competing for attention (at the time of its launch for example the evidence being given by Ministers and officials to Lord Justice Scott's inquiry) it is hardly surprising that the launch of the Code attracted only moderate Parliamentary, press and public attention.

5. Since then questions have been asked in Parliament and information given, both about the Code and about the wider implications of Open Government. From time to time these issues have also surfaced in the press. To judge from my postbag, public awareness of the opportunities which the Code offers the citizen to obtain from central government departments and the wide range of non-departmental public bodies within my jurisdiction information, either of a personal or a more general nature, remains low. I note the voluntary disclosures of information about Cabinet Committees, the intelligence services, numerous historical records previously withheld and, increasingly, internal departmental guidance and instruction manuals. So far the individual citizen's attitude to *finding out* information seems apathetic.

6. The Code is a government initiative. It is not for me, an officer of the House of Commons, to seek to promote it. I have thought it proper, however, to seek to ensure that my remit, and the role that I play in investigating complaints about breaches of the Code, are known among those who might need to complain to me. When earlier this year the leaflet "Can the Parliamentary Ombudsman help you?" was revised, it included a new section setting out how complaints about breaches of the Code can be made to me. That new leaflet, over 170,000 copies of which have been distributed to the local offices of government departments, to Citizens Advice Bureaux, public libraries and to solicitors and accountants, as well as to all members of Parliament and their secretaries, contains simple forms which complainants can complete to set out their grievances, whether about conventional failures in administration or about failures to comply with the Code. Many of the complaints now referred to me now come on such completed forms, so I assume the new format is helpful. As well as sending out leaflets, I and my staff have taken opportunities to speak to the press or in public about the service my office provides in relation to the Code; and I have linked public accountability with open government. I shall continue to explain my role in relation to complaints under the Code so that it becomes more widely known and better understood.

7. Public awareness is one aspect. Awareness of their new responsibilities by the staff of departments and the other bodies in my jurisdiction is another. At the time when the Code came into force, I wrote to the permanent heads of each such body about my new role explaining to them how, in accordance with arrangements of which I had already informed the Select Committee—a copy is at Annex A—I intended to operate. Since then certain departments have asked my staff to give presentations to their staff on these subjects. I hope such contacts will help members of the public who will be seeking to make use of the Code and I intend to encourage ways of promoting good practice. I have also asked all bodies within my jurisdiction to supply me with details of the procedures they have set in place to handle (a) requests for information and (b) requests for the internal reviews of decisions to refuse information. It is not for me to endorse departments' procedures (that is to avoid fettering my discretion if I come to investigate a complaint about them) but I will tell bodies within my jurisdiction if arrangements they envisage look out of line with those being adopted by other departments.

Complaints referred to me since the Code came into force

8. Until the Office of Public Service and Science produce their promised report on departmental experiences in operating the Code it will not be known how many requests for information departments have received as a result of the Code or, more significantly from my standpoint, how many initial refusals to supply information have triggered a request for the department concerned to review

that refusal as envisaged in the Code. My impression is that relatively few such requests have been received. That could betoken either a general satisfaction with the amount of information already on offer or a lack of awareness of the opportunities which the Code offers.

9. Since the Code came into effect on 4 April, 22 Members of Parliament have referred to me a total of 24 complaints up to the end of November that their constituents or others have been denied access to government information to which they are entitled under the Code. Only 20 of those complaints have been against bodies within my jurisdiction: the Departments of Transport, Health, Trade and Industry and Social Security, the Scottish Office, the Home Office, the Ministries of Defence, and of Agriculture, Fisheries and Food, the Occupational Health Service (part of the Office of Public Service and Science), the Lord Chancellor's Department, the Inland Revenue, Customs and Excise, the Legal Aid Board, the Health and Safety Executive, and the Office for Electricity Regulation. Four complaints were against organisations which are not currently within my jurisdiction and were consequently rejected.

10. So far I have taken on only nine complaints for investigation, mainly because the complainant or complainants concerned have yet to furnish me with evidence that their requests for information have been made *after* the Code came into force or that they have gone through the internal departmental review process envisaged under the Code. Some complainants I initially had to turn away are now starting to come back to me having gone through the review process. I have recently taken on two complaints on that basis. By the end of November I had completed four investigations. I completed a fifth investigation on 6 December. As I explain at paragraph 23, I decided to discontinue one without completing it. Of the investigations I completed I upheld two complaints totally and two in part. In the other case I rejected the complaint. On 24 November the first three of the reports I have made to Members of my investigations into those complaints they had referred to me were published. I expect to publish more reports periodically. The first five investigations I have completed took an average of 15 weeks to complete from the time that the complaint was first referred to me. (The longest took 20 weeks and the shortest 13 weeks.) That average is a little above my target of 13 weeks, but these first cases have all thrown up new problems, both for the departments concerned and for me. It should be possible to reduce the time taken as familiarity with the issues and knowledge of my procedures spreads both among my staff and within those bodies which are subject to my jurisdiction. If I am to succeed in that aim, the bodies against whom complaints are brought should take no more than three weeks to send me their comments on the complaint and all their relevant papers; also they should not exceed a similar period when asked to comment on the facts that are recounted in the draft report which I have told them that I intend to send to the referring Member.

11. I rejected two cases on the grounds that what was being sought was not so much information as an expression of agreement with the complainant's opinion and a third where the grievance was over the acceptability in the complainant's eyes of the information which had been provided rather that that information had been refused or that incomplete or misleading information had been given.

12. The number of complaints which have been referred to me is much lower than I would have expected based on initial experience in other countries, such as Australia, New Zealand and Canada, which have introduced freedom of information legislation. Although their experiences have been diverse, although there are differences between their regimes and that established in the United Kingdom as a result of the Code, and although certain of those countries experienced a relatively slow start, I should not have been surprised, on the basis of their experiences and bearing in mind the United Kingdom's far larger population, to have received by now up to 200 complaints referred by Members of Parliament. The fact that I have not I attribute to the general lack of awareness of the opportunities to seek information offered by the Code, and to what the average citizen may see as a series of obstacles which need to be overcome before

a complaint can be made to me. There has first to be a written request for information, then a request for a review, then an approach to a Member of Parliament, then acceptance by the Member that the complaint should be referred to me; a sequence which is sufficiently daunting for many to deter all but the most determined seekers after information from going through to the end with it. There is still no sign that the number is likely to increase to the level which, in the light of overseas experience, might be expected.

Issues arising

13. Even so, the complaints which have been referred have already given rise to issues of general interest. I referred in paragraph 9 above to complaints against bodies which are outside my jurisdiction. The National Health Service, and later local authorities, are in due course to be subject to their own Code and monitoring. That still leaves a large number of public bodies outside scope.

14. The Code lays down that the public bodies to whom it applies should offer complainants who are dissatisfied with a decision to refuse them information the right to an internal review of that decision. It is already apparent that the extent to which, and the terms in which, the availability of that process are brought to potential complainants' attention varies widely. Where such notice has been given I have taken the view that the department concerned should have the opportunity to review the decision before I intervene. (It is encouraging to report that the fact that there has been recourse to me, even if premature, has encouraged the body concerned to give the request for a review of the refusal to release information very serious attention.) Where the possibility of an internal review has not been disclosed it will be viewed as insensitive if I require the complainant to go back to the department to seek a review, because departments have now had eight months in which to establish procedures which explain clearly to those who have been refused information the obligations imposed by the Code. It is not good administration to send complainants from pillar to post in their search for information. It was probably inevitable that the introduction of the Code would show up anomalies between departmental practices given the differences between those practices before the Code came into force. Some of the complaints which have been put to me have clearly arisen from transitional difficulties which should become less widespread as familiarity with the obligations in the Code increases and as the results of my first investigations become known.

15. One aspect of the Code which has been criticised by some is that it puts no obligation on a department to let the public have access to *documents* as opposed to *information*. (My right to call for original documents under the 1967 Act is an essential feature of my ability to investigate complaints under the Code.) My remit is to investigate and report whether bodies within my jurisdiction have complied with the requirements of the Code. I would not therefore criticise a body if it had fulfilled its obligations under the Code without releasing copies of documents involved. However I normally construe a request for documents as meaning that a complainant is seeking *all* the information contained in the document specified and, save where all or part of that information can legitimately be withheld under the exemptions contained in Part II of the Code, I normally expect all that information to be released. Thus, while there may be exceptions, there are likely to be a number of occasions when, as in my investigation into the refusal to release the Inspector's report on the Birmingham Northern Relief Road public inquiry, I conclude that the most practical way to release the information sought is to provide a copy of the actual document in which that information is contained.

16. Many of the exemptions in Part II of the Code which departments may pray in aid to justify a refusal to release information sought depend upon there being some harm or prejudice to the public interest should that information be released. Those terms can include both actual harm or prejudice or the risk or reasonable expectation of harm or prejudice. In either case, the test which Departments should apply is whether any harm or prejudice arising or likely to arise from the disclosure would be outweighed by the public interest in making the information available. If such harm or prejudice as might be supposed to exist

should be outweighed by the public interest in releasing the information sought, the exemption should not be relied on to justify a refusal to disclose the information requested. This is the area of the Code which seems most likely to throw up difficult and contentious issues.

17. The five investigations completed have afforded the opportunity to scrutinise closely the meanings of certain exemptions in Part II of the Code. The exemptions I have so far looked at with particular attention include the following:

(i) *Exemption 2: Information whose disclosure would harm the frankness and candour of internal discussion.*
I have held that Exemption 2 cannot apply in perpetuity to information created in the expectation that in the fullness of time it would be released.

(ii) *Exemption 4(b): Information whose disclosure would prejudice ..... the proceedings of any public inquiry ..... or whose disclosure ..... is likely to be addressed in the course of such proceedings.*
I have held that, where the power to order disclosure of information is not within the powers of the person conducting the inquiry and there is no question of that person being bound by the result of an earlier inquiry, the exemption should not be used to withhold information about the outcome of the earlier inquiry.

(iii) *Exemption 4 (c): Information relating to proceedings which have been completed or terminated.*
As at (i) above, I held that this exemption does not apply to information created in the expectation that it is to be released.

(iv) *Exemption 6: Effective management of the economy and collection of tax.*
I did not accept that Exemption 6 should apply in the case of a small property transaction, by now long past (but I did not uphold the complaint on other grounds).

(v) *Exemption 7(a): Information whose disclosure ..... would prejudice the competitive position of a department or other public body or authority [or] negotiations or the effective conduct of personnel management or commercial or contractual activities.*
A relationship between a department and a private sector body may in part be a negotiating relationship. I did not consider that that fact provided grounds for withholding information about other types of transactions between them.

(vi) *Exemption 7(b): Information whose disclosure would harm the proper and efficient conduct of the operations of a department or other public body.*
I accepted that there could be some occasions when the fact that discussions had taken place could be withheld from disclosure. In the case concerned I considered that the identities of those participating need not be disclosed to third parties even though the fact that there had been discussions had been disclosed.

(vii) *Exemption 12: Privacy of an individual.*
I accepted that officially held details of a private property transaction should not be released to a third party, because permission from a party to the transaction was not forthcoming and the details had been supplied when there was a legitimate expectation that they would not be released.

(viii) *Exemption 14: Information given in confidence*

a The release under the Code of information required to be supplied by law could not be said to put at risk the future supply of such information.

b In so far as a representative body could have been said to have supplied information to a department in confidence (in the case concerned it was the identities of those who had engaged in informal discussions with the department) I accepted that that information might legitimately be withheld from a third party under Exemption 14.

Experience suggests that, wherever there is ambiguity or imprecision in the wording used in the exemptions contained in Part II of the Code, there is the potential for difficulty. I have not yet recommended changes in the wording of the Code. However, if it seems to me that persisting injustices might be avoided by making changes in the Code I shall recommend those changes, either to improve the Code's precision or for other reasons.

18. The body of case-related decisions made public through my reports on individual cases should help departments in achieving consistency in their interpretation and implementation of the Code. I record with approval that, at the time of the launch of the Code, the Office of Public Service and Science produced their own guidance for bodies to whom the Code applies and made it public. That guidance should help those trying to understand the intentions behind specific exemptions in the Code as well as the purpose of its more general provisions. I do not regard myself as bound by that guidance, but I shall think the less of those bodies who have made no effort to consult it before deciding to refuse a request for information.

19. The Code does not apply to me. It applies only to bodies within my jurisdiction. Not only does the 1967 Act require me to conduct my investigations in private but I am prohibited under it from disclosing information I have obtained in the course of it save for the purposes of my investigation and the report which I make on that investigation. I have no discretion to amend or to add to my reports once they have been made to the Members who have referred complaints to me. It seemed to me that, were I subsequently to disclose more of the evidence that I had considered than I had thought appropriate to include in my report to the referring Member, that would place me in breach of the 1967 Act. That conclusion is not incompatible with the Code, since exemption 15 in Part II of the Code permits a refusal to release information whose disclosure is prohibited by or under any enactment.

20. No complaint has yet been received by me about the charges that departments have said they may make where information is being sought under the Code. As the Campaign for Freedom of Information have observed, the charges proposed vary widely. The complaints which may be made to me about breaches of the Code can include complaints that information which has been given is incomplete or misleading, or that excessive charges are being required for information sought. So far, most of the complaints which I have received have been that information has been refused, though a few complainants have been concerned that incorrect or misleading answers may have been given. In none of the cases so far put to me have I had a complaint that departments have sought to charge for the information being sought.

21. The charge that misleading or incomplete information has been given can come up in various guises. I have been asked if I am able to validate or vouch for the accuracy of information which Ministers have given in Parliamentary statements, Parliamentary answers and so forth. The answer to that is "no". I can, however, investigate a complaint that, after making a request for information under the Code outside Parliament, a Member of Parliament (or any other complainant) has been given inaccurate or only partial information. Such a complaint in the case of a Member would, however, need to be referred to me by a second Member. It is not possible under the 1967 Act for Members of Parliament to put to me complaints on their own behalf.

22. The rights of members of the public to expect openness as regards the information held by Government cannot be divorced from their rights and legitimate expectations as regards the maintenance of privacy of information they have been required to provide to government bodies. Issue of openness

versus privacy and the balance of competing public interests are notoriously difficult to determine. My counterparts in Australia, New Zealand and Canada have all given much thought to these matters. I shall have their experiences in mind when I encounter issues of that nature.

23. Finally, I record that, save in one special case in which particular considerations applied, I have had no difficulties whatsoever in obtaining their papers from departments, including those papers which contain the information sought by but not released to the complainant concerned; nor have departments been unwilling to accept my assessments and recommendations. I cannot promise that it will be ever thus but experience so far can only be termed "encouraging". The one exception was a case in which the information the complainant was seeking was information of the only kind which statutorily I am debarred from seeing: Cabinet or Cabinet Committee papers. Once I had established to my satisfaction that such papers were involved I decided to discontinue my investigation. Exemption 2 in Part II of the Code specifically covers the non-release of information relating to the proceedings of Cabinet and Cabinet Committees.

Interim Conclusions

24. I offer five interim conclusions:

(i) The Code offers members of the public genuine benefits in terms of obtaining information; but they are not yet fully aware of the Code. Publicising the Code is essentially a matter for Government but I shall make my remit known, so that those who need my services may know that they can call upon my office for help.

(ii) Consistency in interpreting the Code will be vital. I look to the Office of Public Service and Science to ensure that my reports, and the interpretations of parts of the Code they contain, are disseminated to departments and to those who deal with requests for information under the Code.

(iii) My first investigations have taken on average fifteen weeks to conclude. I hope that my target of thirteen weeks on average to complete investigations will be achieved as departments' familiarity with the operation of the Code grows.

(iv) Whether or not the Code is already leading to a change in culture, I welcome the fact that more information is being released even without my involvement.

(v) In my Annual Report for 1993 I gave as an example of maladministration the omission by officials to notify those who thereby lost a right of appeal. The possibility of a review under the Code where information has been refused needs to be made known to the person who requested the information at the time of that refusal, as does the possibility of making a complaint to me if, after the review process, the requester is still dissatisfied.

W K Reid
Parliamentary Commissioner
for Administration

December 1994

Annex A

Code of Practice on Access to Government Information

1. This procedural note relates to the handling of complaints when the Parliamentary Commissioner for Administration (the Ombudsman) decides to undertake an investigation, in accordance with the Parliamentary Commissioner Act 1967, in relation to the Code of Practice on Access to Government Information.

2. The note does not describe the full provisions of the 1967 Act. It cannot bind or fetter the discretion of the Parliamentary Commissioner to carry out his functions in accordance with that Act.

3. In investigating complaints that Departments or public bodies within his jurisdiction have failed to observe the provisions of the Code of Practice on Access to Government Information, the Parliamentary Commissioner will follow the same procedures as for other complaints investigated under the Act:

(i) the Commissioner will afford to the Principal Officer of the Department or authority concerned, and to any other person who is alleged in the complaint to have taken or authorised the actions complained of, an opportunity to comment on any allegations contained in the complaint (section 7(1) of the 1967 Act);

(ii) where a Department or authority has refused to provide information under Part II of the Code, he will expect the relevant considerations to be explained to him;

(iii) he will expect Departments and authorities to produce information and documents relevant to the investigation as required under the Act (section 8(2));

(iv) no obligation to maintain secrecy or other restrictions upon the disclosure of information, whether imposed by any enactment or by any rule of law, shall apply to disclosure of information for the purposes of an investigation, and the Crown shall not be entitled to any privilege in respect of the production of documents or the giving of evidence as is allowed by law in any legal proceedings (section 8(3));

(v) no persons shall be required or authorised to furnish any information or answer any question relating to proceedings of the Cabinet or any Committee of the Cabinet or to produce so much of any document as relates to such proceedings (section 8(4));

(vi) subject to the provisions of section 8(3) no person shall be compelled for the purposes of an investigation to give any evidence or produce any documents he could not be compelled to give or produce in civil proceedings before a court (section 8(5));

(vii) the Commissioner will send copies of reports of the results of his investigations to the Principal Officer of the Department or authority concerned, and to any other person who is alleged in the relevant complaint to have taken or authorised the action complained of (section 10(2));

(viii) the Commissioner has full discretion to set out the facts of the investigation, to explain his reasons for finding maladministration (if he upholds the complaint), to analyse and comment upon any disputed points about the interpretation of the Code, to recommend what information should be published, to criticise the Department (if appropriate), and otherwise to provide a full report on his investigation in accordance with his powers under the Parliamentary Commissioner Act;

(ix) at present, where maladministration has led to unremedied injustice, the role of the Commissioner is to *recommend* redress, but the *giving* of redress is normally a matter for the Department; where a Department accepts that maladministration has occurred—and even in those cases where it does not accept that charge—it is often possible for redress to be provided before the full process of investigation and report has been completed. By analogy, in cases relating to the Code of Practice, Departments may similarly be able to provide information to the satisfaction of the person making a complaint once the Commissioner has indicated that he is going to investigate or during the course of an investigation. In cases where the information in dispute has not been so provided by the Department, the Commissioner (in the light of sub paragraph x below) will not normally look to provide the redress himself by seeking to disclose the disputed information in his reports; if exceptionally he were minded to do so, he would first of all inform the Principal Officer of his intention;

(x) section 11(3) of the Act confers on Ministers a power to give notice in writing to the Commissioner, with respect to any document or information or class of documents specified in the notice, that disclosure "*would be prejudicial to the safety of the state or otherwise contrary to the public interest*" and where such a notice is given nothing in the Act shall be construed as authorising or requiring the Commissioner or his staff to communicate to any person or for any purpose any document or information specified in the notice, or a document or information of a class so specified. Indiscriminate use of section 11(3) could inhibit the ability of the Commissioner to carry out effective review of complaints relating to the Code of Practice on Access to Government Information. Without fettering the discretion of Ministers to use this power if the circumstances so demand, or of the Commissioner to carry out his functions under the Act, neither the Commissioner nor Departments will act in such a way as to make the use of section 11(3) the usual means of resolving differences of opinion between the Commissioner and Departments. Normally the Commissioner will make reasoned recommendations in his report without the specific information which is in dispute thereby being disclosed. Ministers will remain accountable to Parliament for the actions taken or refused in the light of the Parliamentary Commissioner's recommendations;

(xi) The report mentioned above includes as appropriate:

the report of the results of the investigation the Commissioner is required to send to the Member of the House of Commons (or if he is no longer a Member of the House to such other Member as he thinks appropriate) by whose request the investigation was made (section 10(1))

the special report to Parliament that may be made as the Commissioner thinks fit under section 10(3) of the Act if, after conducting an investigation, it appears to the Commissioner that injustice has been caused to the person aggrieved in consequence of maladministration (in these cases usually by a

failure to provide information) and that the injustice has not been, or will not be, remedied; and the annual and other reports made under section 10(4) of the Act.

(For the purpose of the law of defamation, publications mentioned in section 10(5) of the Act are absolutely privileged.)

(xii) Once a report under section 10(3) or 10(4) has been laid before Parliament, it is then a matter for the House, or more usually in the first instance the Select Committee on the Parliamentary Commissioner for Administration, to consider that report and the action to be taken in the light of it. The Commissioner would expect to take account of the views expressed by the Select Committee though he is not statutorily bound by them.

4. The operation of these procedures will be reviewed in the light of the experience gained of them within 24 months of the coming into force of the Code of Practice on Access to Government Information.

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