Commission on Freedom of Information: International Comparisons

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Introduction

Context

This document has been prepared by the Secretariat to the Independent Commission on Freedom of Information at the request of the Chair, and provides information about comparable access to information regimes. In particular, it seeks to answer the following questions:

1. How do other countries protect Collective cabinet agreement, and sensitive policy advice within the context of their access to information regimes?
2. Do other countries have a power akin to the ministerial override?

We initially chose to compare the following overseas FOI regimes because they have broadly comparable Westminster style constitutions: Australia, Canada, the Republic of Ireland, and New Zealand (the Westminster countries). We subsequently expanded the paper to include the information access regimes in Denmark[1], France, Germany, Spain and the USA.

Background

Over 70 countries have now, to varying degrees, enacted freedom of information legislation which provides their citizens with access to information held by government bodies and public authorities; this right has also been enshrined in the constitutions of over 80 countries.

Additionally, there is an increasing number of treaties, agreements, and work programmes being adopted on a global scale. For example, Articles 10 (Public Reporting) and 13 (Participation in Society) of the United Nations Convention Against Corruption together encourage countries to improve public access to information and to strengthen proactive transparency regimes as a means of fighting corruption.

We have also seen a drive towards transparency in the European space; the Environmental Information Regulations (EIRs) 2004[2] oblige public authorities to make environmental information available proactively, and to make available on request environmental information. Unlike our domestic legislation, the EIRs do not permit a 'ministerial override' and the criteria for withholding information is narrow in scope, and interpreted restrictively.

There are a number of similarities between domestic FOI regimes - most apply to the same administrative bodies and government departments, and to 'recorded' information. Nearly all FOI laws contain provisions setting out categories of information that can be withheld, either absolutely or subject to a test. Common absolute exemptions include: protection of national security and international relations; personal privacy; internal discussions; correspondence received in confidence; and commercial confidentiality.

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[1] In some instances the legislation and effects of it has been translated and interpreted using best endeavours but it is not possible to rule out the risk of some discrepancies between the original and translated texts.
[2] http://www.legislation.gov.uk/uksi/2004/3391/contents/made

Of the four countries which have a Westminster style system, there is a further considerable overlap: each provides a statutory right to access information held by public authorities, and all qualify that right to protect sensitive advice relating to Government policy and decision making. Each country has an Information Ombudsman or Commissioner whose responsibility it is to review decisions and mechanisms of appeal through the courts are available to requesters.

Comparisons

We have looked specifically to compare exemptions in the selected countries which offer similar protection to sections 35 (formulation of government policy) and 36 (prejudice to effective conduct of public affairs) of the Freedom of Information Act (FOIA) 2000. We have also looked at the appeals mechanism available in each country (including the role of the Information Ombudsman or Commissioner) and the utility of a ministerial override, or veto.

Australia

Australia is covered by the Freedom of Information Act 1982. It covers the federal government and the government of the self-governing territory of Norfolk Island.

Fees

Fees are charged for requests. The fees are $15 per hour to search and retrieve documents. Then there is no charge for the first five hours spent deciding whether to grant or refuse a request, including examining documents, consulting with other parties, making deletions or notifying any interim or final decision on the request. After the first five hours the cost is $20 per hour. Disbursements like copying and postage are also chargeable. Access to one's own personal information is free, and charges cannot be levied if a request is not answered within the statutory 30 day deadline.

Protection of Sensitive Information: Exemptions

Information held by, or provided by, intelligence or defence agencies is outside the scope of the Act, as are summaries or digests of that information. The Parliamentary Budget Office[3] is also completely excluded from the Act.

"Cabinet notebooks" are excluded from the scope of the legislation by falling outside the definition of a "document" used by the Act. "Cabinet notebook" is defined as a notebook or other like record that contains notes of discussions or deliberations taking place in a meeting of the Cabinet, if the notes were made in the course of those discussions or deliberations by, or under the authority of, the Secretary to the Cabinet.

"Cabinet documents" are defined as "documents" under the Act, but are absolutely exempt (under section 34). "Cabinet documents" includes documents submitted to Cabinet, Cabinet minutes, briefings on Cabinet documents, or draft Cabinet documents. "Cabinet documents" also includes documents that contain an extract of a Cabinet document, and any document that would reveal Cabinet deliberation or decision (unless it has been officially disclosed). Purely factual information is not exempt, unless its disclosure would reveal Cabinet deliberation or decision, or the existence of the deliberation or decision has not been officially disclosed.

In relation to policy, documents are conditionally exempt (i.e. exempt subject to a public interest test) if they concern deliberation, opinion, advice or recommendation to a Minister or the Government or a government agency (section 36). Purely factual information is not covered by the exemption.

Public Interest Test

Section 11B of the Act partially defines the public interest test so as to include e.g. the need to inform debate on matters of public importance, or promote effective oversight of public expenditure, but to exclude concerns that release may e.g. cause embarrassment, misinterpretation or confusion.

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[3] The role of the PBO is to inform the Parliament by providing independent and non-partisan analysis of the budget cycle, fiscal policy and the financial implications of proposals.

Protection of Sensitive Information: Veto

Until 2009, the FoI Act contained a provision which allowed a minister or senior official to issue a "conclusive certificate" which was taken to establish conclusively that disclosure of an internal working document would be contrary to the public interest. This effectively gave officials and Ministers an ability to veto the disclosure of conditionally exempt material and prevented information being considered by the Administrative Appeals Tribunal, although the Tribunal can review whether the issuing of the certificate was reasonable. The ability to issue a conclusive certificate was removed by the Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009.

Appeals

Where a request is refused, the requestor is entitled to an internal review, followed by an appeal to the Australian Information Commissioner. The Information Commissioner may refer a question of law arising in an appeal to the Federal Court of Australia for decision.

An application for review of a decision of the Information Commissioner may be made to the Administrative Appeals Tribunal. A party may also appeal to the Federal Court of Australia, on a question of law, from a decision of the Information Commissioner.

Canada

Canada has two tiers of access to information legislation. In addition to provincial FOI regimes which govern access to local authority information, the Access to Information Act (ATIA) 1982 operates at a federal level and provides access to information held by government bodies. For the purposes of this document, we will be looking at the federal system.

Fees

There is a fee for making a request of $5 (£2.50). Canadian public authorities can also charge $2.50 per person per quarter hour for every hour in excess of five hours that is spent by any person on search and preparation, and charge for costs involved in copying or formatting the information[4].

Protection of Sensitive Information: Exemptions

Collective agreement

Section 69 of the ATIA puts 'Cabinet Confidences' out of scope of the Act in order to protect collective agreement. Section 69 disapplies the Act from the Privy Council, its subcommittees, the Cabinet and Cabinet subcommittees.

The exclusion is broad in scope and the non-exhaustive list in the act itself excludes for the regime the following types of information for 20 years: memoranda (e.g. Cabinet papers) which contains information about proposals or recommendations; draft memoranda and notes made by officials; briefing documents for the purposes of Cabinet discussions; discussion papers (which include analysis, explanations, policy options etc.); draft legislation; and records used to reflect communications or discussions between Ministers on or about government policy or formulation (e.g. a letter from one minister to another setting out the minister's opinions or decisions or, a record that contains notes taken during informal discussions between ministers).

Section 69 does not apply to factual documents – e.g. newspaper clippings, tables of statistics and reports prepared for use within a department were appended to a memorandum to Cabinet, which fall within the scope of the ATIA.

Safe space

Section 21 of the ATIA sets out a qualified class based exemption which protects specific types of information which relate to internal decision-making processes of government, where the disclosure of which would interfere with the operations of government institutions.

The information protected by this exemption includes advice or recommendations for a Minister, records of consultations or deliberations between officials and/or ministers, plans relating to government negotiations (this includes fall-back positions developed by

[4] http://laws-lois.justice.gc.ca/eng/regulations/SOR-83-507/page-2.html#h-6

government negotiators for the purposes of bargaining in relation to labour, financial and commercial contracts), or unimplemented personnel decisions.

Information is not captured by the exemption if it is factual (e.g. guidelines, instructions). It is also exempt if the requested information relates to a statement of reasons for a decision that is made in the exercise of a discretionary power, or an adjudicative function and that affects the rights of a person[5].

Public Interest Test

The public interest test is undefined in the legislation.

Government guidance sets out that, under section 21, the decision maker has the discretion to apply the public interest test and is called on to consider the impact disclosure will have on the institution's and the government's ability to carry on internal decision-making processes, and to consult and deliberate in a confidential manner and give frank, candid advice[6] (both immediately, and going forward). They are asked to consider questions such whether disclosure could make advice or recommendations less candid and comprehensive; consultations or deliberations less frank; and if it would hamper the ability of the government to develop and maintain strategies and tactics for present or future negotiations.

Protection of Sensitive Information: Veto

The Canadian FoI Act has no veto power akin to the one in the UK FoI Act.

Appeals

Appeals against decisions to withhold information can be made to the Information Commissioner of Canada, although they are unable to direct a department to release the requested information. The Information Commissioner makes a recommendation to the public authority in question.

If the public body rejects the recommendation, the Information Commissioner or the requestor can ask for the Federal Court to review (judicially review) the decision of the public body.

[5] The exclusion applies only to the actual decision itself and the statement or account of reasons supporting it but not to information relating to the process or to the considerations which formed the basis of the reasons supporting the decision.

[6] Section 11.18.2 of Treasury Board Manual: Access to Information (2008) http://www.tbs-sct.gc.ca/atip-aiprp/tools/atim-maai01-eng.asp

Denmark

The Access to Public Information Files Act (PIFA) was introduced in 1985. PIFA gave a right to access paper (but not electronic) records. It extends to all public bodies, but also to some electricity, gas and heating companies, although specific bodies can be exempted by regulations. The Act applies to 'all activity exercised by public administration' including some private sector providers in which the Danish government has more than a 75% share although, under exemptions 12 and 13 of the 2013 Act, their financial and technical information is protection for commercial reasons. The Act also imposes a requirement on public officials to write down information of importance received orally.

In October 2012, cross-party discussions led to an agreement to reform PIFA to introduce an exemption for policy material, and for Ministerial diaries. The reforms also allowed the government to reject requests if they take longer than 25 hours to handle, but there are exceptions to this rule for recognised journalists and researchers. In addition, the reforms allowed requests to be submitted online, and extended the scope of the Act to local and regional authorities and publicly owned companies.

PIFA has now been replaced by the Access to Public Information Act 2013[7] (APIA). APIA is largely the same as PIFA, except for the reforms referred to above.

Fees

We cannot find evidence of a charge for submitting FOI requests in Denmark.

Protection of sensitive information: exemptions

There are exemptions (s.7) for documents produced by an authority for its own use and internal correspondence, but these exemptions do not extend to final documents which record the authority's reasons for a decision.

The Act also contains absolute exemptions for Cabinet papers and minutes, official correspondence relating to the making of laws, material produced for court proceedings, and material gathered for the purposes of national statistics and research. These exemptions did not apply to factual material. National security and international relations are also absolute exemptions.

Sections 23-24: exclusion of internal documents

Since 2013, this absolute exemption now covers internal documents which relate to current or potential future policy advice from officials and ministerial calendars.

[7] https://www.retsinformation.dk/Forms/R0710.Aspx?id=152299&exp=1

https://translate.googleusercontent.com/translate_c?depth=1&hl=en&prev=search&rurl=translate.google.co.uk&sl=da&u=https://www.retsinformation.dk/Forms/R0710.aspx%3Fid%3D152299&usg=ALkJrhi_IxHfVtj4IxEA6C7UxotmSEDF5w#

Section 27: Council of State Protocols

Section 27 is also an absolute exemptions and excludes from the scope of the Act any communications between Ministers in connection with matters of law or other similar political process.

Public Interest Test

As all of the exemptions in Danish FoI Act are absolute, there is no public interest test.

Protection of Sensitive Information: Veto

The Danish FoI Act has no veto power akin to the one in the UK FoI Act.

Appeals

Requesters can appeal against decisions made by public authorities through an internal review. They can also complain to the Parliamentary Ombudsman who oversees the functions of all public authorities. The Ombudsman is able to criticise authorities and direct release, but he cannot order authorities to act on his recommendations.

France

In France, “Act No. 78-753 of 17 July 1978 on various measures for improved relations between the Civil Service and the public and on various arrangements of administrative, social and fiscal nature[8]” sets as a general rule that citizens can demand a copy of any administrative document (in paper, digitised or other form).

The right to administrative documents extends only to completed documents, and preparatory documents for an administrative decision as it is being developed fall outside the scope of the Act.

Fees

There is no fee for making a request.

Protection of sensitive information: exemptions

Article 6 of the Act provides for a range of absolute exemptions. These include specific exemptions in relation, for example, to opinions of the Conseil d’Etat (Council of State: combined Supreme Court and Parliamentary Counsel) and the courts, court documents, Competition Authority investigative documents, accreditation documents of health workers or health institutions, and documents produced by specified contractors.

Article 6 also exempts administrative documents where disclosure would prejudice: national defence, foreign policy, public safety or state security, the economy, the conduct of court proceedings, or investigation into fiscal and customs offences.

Safe space / collective agreement

Article 6 also exempts administrative documents where disclosure would prejudice the secrecy of the deliberations of the Government and other executive authorities (article 6(2)(a)).

This is in addition to the exclusion (above) from scope of the Act of documents relating to an administrative decision that is still being developed.

Public Interest Test

There is no public interest test and so all exemptions are in one sense absolute, but prejudice does need to be demonstrated, which makes the application of the exemptions uncertain.

Protection of Sensitive Information: Veto

[8] Loi n°78-753 du 17 juillet 1978 portant diverses mesures d'amélioration des relations entre l'administration et le public et diverses dispositions d'ordre administratif, social et fiscal

There is no veto in the French legislation.

Appeals

Where a request is refused, the requestor may refer the matter to the independent Commission on Access to Administrative Documents (Commission d'Accès aux Documents Administratifs, or CADA) for an opinion. This appears to be a non-binding recommendation.

The requestor can then appeal the public body's refusal to the administrative court (this appears to effectively by a judicial review). If the requestor remains dissatisfied they may not appeal to the Court of appeal, but may only appeal to the Council of state (Supreme Court).

Germany

In Germany, the "Federal Act Governing Access to Information held by the Federal Government" ("Informationsfreiheitsgesetz") 2005[9] provides a right to access to official information. Drafts and notes which are not intended to form part of a file are excluded from the definition of "official information" (s.2).

It is not entirely clear, but it appears that the German Parliament (Bundestag) is only covered by the Act for the purposes of the performance of its "public administration tasks". The explanatory notes to the Act appear to state that the "control of the Cabinet" (Bundesregierung) falls outside of the public administration task of the Parliament. In Germany the Parliament elects the Head of Government (Chancellor).

Fees

There is no fee for making a request. Requestors can be charged for the costs imposed on the public body in providing the information. Simple written responses are free of charge, but otherwise the cost is €30 or more. For highly complex cases (involving lots of searches and redaction), the fees can reach as much as €500. Typical fees seem to be around the €50-100 region.

Protection of sensitive information: exemptions

Section 3 of the Act provides exemption where disclosure of information would have "a detrimental effect" on: international relations; military or security matters; supervision by financial, competition or regulatory authorities; external financial controls; the prevention of illicit foreign trade; judicial proceedings; or trade and commerce or economic interests of social insurance institutions. Information is also exempt where disclosure might endanger public safety, or for as long as its disclosure might compromise international negotiations or consultations between authorities.

Information is absolutely exempt where it relates to the intelligence services; where it was obtained in confidence; or where information is obtained on a temporary basis from another public body and is not intended to be retained.

Safe space

Under section 3, information is absolutely exempt where it has been 'classified' by the government. The lowest level of classification is "official use only" (*nur für den Dienstgebrauch)*, which is the classification level for documents which, if released, would be detrimental to the interests of the Federal Republic. Further security levels protect information whose release would be harmful, seriously harmful or would endanger the Republic or its vital interests. Documents should only be classified where necessary.

9 http://www.bfdi.bund.de/SharedDocs/IFG/IFGBundesgesetzUndGebuehrenO/TextIFG_EN.pdf?__blob=publicationFile

German caselaw appears to have found that a document cannot be withheld simply because it is marked classified, but the information within the document that is actually classified material may be withheld, if there is a reasonable justification.

Section 4 of the Act ("protection of the official decision-making process") makes exempt drafts relating to rulings, studies and decisions insofar and for as long as the disclosure would obstruct the ruling or an impending official measure. The explanatory notes (s.4(4) to the Act appear to state that this would exempt information about the appointment of civil servants, judges and soldiers, as well as the preparation of legislation in the federal ministries.

Public Interest Test

There is no public interest test and so all exemptions are in one sense absolute. For some exemptions 'detriment' or 'obstruction' does need to be demonstrated, which makes the application of the exemptions uncertain.

Protection of Sensitive Information: Veto

There is no veto power in the German FoI Act.

The explanatory notes to the Act appear to imply that there is an "unwritten exception due to the executive core region". This appears to be a reference to the constitution, and to the executive having a core responsibility to Parliament, and for the will of the government itself, both in terms of the discussions in the Cabinet, as well as in the preparation of Cabinet and departmental decisions. It would appear that the executive could invoke this constitutional responsibility in rare circumstances to prevent the release of information under the Act.

Appeals

Where a request is refused, the requestor may refer the matter to the Federal Commissioner for Freedom of Information. The Commissioner can make a recommendation, and attempt to mediate, but cannot make a binding determination.

A requestor can appeal to the Administrative Court (judicial review) where a request is refused (and the time limit for that appeal continues to run even if the matter is referred to the Commissioner).

The Republic of Ireland

The Republic of Ireland (Ireland) recently introduced the Freedom of Information (FOI) Act 2014 ("the 2014 Act"), replacing the FOI Acts of 1997 and 2003. The Act offers, to varying degrees, protection for sensitive information – including Cabinet discussions and policy advice – through two exemptions.

Fees

A revised fee structure was introduced in the 2014 Act following long standing complaints by members of the public about the cost of submitting requests, legislated for in the 2003 Act. Some articles have predicted that the number of FOI requests halved after the 2003 structure was introduced[10]. Under the 2014 Act requesters do not have to pay to submit a request (was €15), but a subsequent internal review is €30 (was €75), and a referral/review to the Information Commissioner is €50 (was €175)[11].

The scope of the Irish Act excludes from its scope (section 42) records held by the Attorney General, Director of Public Prosecutions, or any records given to a Minister for the purpose of proceedings within Parliament (including committee meetings or answering oral or written questions).

Protection of Sensitive Information: Exemptions

Sections 28 ('meetings of the Government') and 29 ('deliberations of public bodies') of the 2014 Act offer similar protection to sections 35 and 36 of our domestic legislation.

Collective agreement

Section 28 provides protection for records relating to collective agreement. Section 28(2) provides an absolute class based exemption for records concerning statements[12] made at a meeting of "the Government" (i.e. the Cabinet)[13]. This would include, for example, Cabinet minutes.

Section 28(1) provides an absolute exemption for:

- material submitted (or proposed to be submitted) by a Minister to the Cabinet for its consideration (for example, Cabinet or sub-committee papers)
- information or advice to Ministers attending a meeting of the Cabinet and for use by them solely for the purpose of conducting government business at a Cabinet meeting *(the use of the word 'solely' in this context means protection is limited for records which may have also been created or used for other incidental purposes)*, and

[10] http://www.bbc.co.uk/news/uk-politics-18282530

[11] Section 26 of the 2014 Act sets out the fees structure. They are also available here: http://www.citizensinformation.ie/en/government_in_ireland/national_government/standards_and_accountability/freedom_of_information.html

[12] Information which is likely to be captured includes: ministerial observations in memoranda; speaking notes for Minsters; and notes circulated by a Minister during, ahead, or after, a Cabinet meeting.

[13] Records of this type can only be released if directed by the High Court or by the Supreme Court.

- any other Cabinet records *(for example: material such as an agenda for a Government meeting, informal Government decisions, notations and confidential decisions)*

The section 28 exemption is however subject to a public interest test where the Government Department wish to issue a neither confirm not deny response to the request[14].There is also a requirement to consult the leader of the relevant political party who made the decision (if they are no longer in government).

The section 28 exemption does not apply to information relating to a decision of the government made more than five years before the request, or to factual information where the decision to which it relates has been published.

Safe Space

Section 29(1) of the 2014 Act is a class based, qualified exemption, for information that relates to the ‘deliberative’ or ‘thinking’ processes of a pubic body. The qualified exemption is subject to a public interest test.

Information which is likely to be captured by the exemption includes: policy formulation; advice and recommendations; advice to Ministers; briefing papers; and some correspondence between public bodies.

Guidance issued by the Irish government states that the purpose of the section is to:

- protect against undue intrusion into the advisory and decision making processes of FOI bodies;
- create space for the FOI body to consider significant issues; and to
- weigh the public interest factors for and against release

Exclusion from the exemption include the reasons for making a decision, procedures or rules concerning how decisions are made, or guidelines and other factual information.

Public Interest Test

The public interest test is undefined in the legislation.

The government manual[15] on FoI lists a range of public interest factors for and against disclosure that may be applicable in a particular case. For example, the following factors may be in favor of disclosure: disclosure will reveal reasons for decisions; the accountability of administrators and scrutiny of decision making processes; the need for the public to be better informed and more competent to comment on public affairs; the information will make a valuable contribution to the public debate on an issue; the need to ensure democratic control to the greatest extent possible over the increasing regulation by public bodies of the affairs of the ordinary citizen; and accountability for the use of public funds.

The following factors may be against disclosure: the need to preserve confidentiality having regard to the subject matter and the circumstances of the communications; release of

[14] Section 28 provides a discretionary absolute exemption for information falling under subsection 1 and a mandatory absolute exemption for information falling within subsection 2 of that section. However, in respect of information falling within section 28(1) the public interest test must be applied if the Government wish to respond on a NCND basis (see section 28(5).

[15] http://foi.gov.ie/?wpdmdl=1473 (FoI Central Policy Unit Manual, Part 2, p.21)

records would impair a future decision; premature release could contaminate the decision making process; premature release of records would impair the integrity and viability of the decision making process to a significant or substantial degree without countervailing benefit to the public; broader community interests must be considered, as distinct from those of the applicant and the subject of the record; disclosure of records which do not fairly disclose the reasons for a decision may be unfair to the public body and prejudice the integrity of the decision making process; and the need to avoid serious damage to the proper working of government at the highest level.

Protection of Sensitive Information: Veto

The Irish FoI Act has no veto power akin to the one in the UK FoI Act.

Appeals

Where a request is refused, the requestor can appeal to the Information Commissioner. A decision of the Information Commissioner can be appealed on a point of law to the High Court. A decision of the High Court can be appealed to the Supreme Court.

As with the UK FoI Act, the Irish Act contains a provision which allows for the issuing of a certificate. These certificates are available in relation to particularly sensitive information concerning section 32 (law enforcement and public safety) or 33 (security, defense and international relations). Certificates have the effect of removing the right of appeal to the Information Commissioner. Instead the issuing of a certificate can be appealed on a point of law to the High Court. Certificates are reviewed by Parliament, who may recommend that they are revoked.

New Zealand

The Official Information Act (OIA) 1982 starts from the principle that all official information should be available, unless there are good reasons for withholding it.

Alongside the OIA is the Local Government Official Information and Meetings Act 1987, which provides a separate right to information held by New Zealand local authorities.

Fees

Requesters can be charged fees under the OIA, but the charge must be reasonable. Charges can cover the time spent locating and reading the requested information. Under published guidelines, requesters normally won't be charged for the first hour of time spent processing their request (although up to $38 can be charged per 30 minutes thereafter), nor for the first 20 pages of photocopying[16].

Protection of Sensitive Information: Exemptions

The OIA has no absolute class-based exemptions. Section 6 of the OIA provides for a prejudice-based exemption for information the release of which would be likely to prejudice security or defence, or the maintenance of the law (including investigation of offences), or endanger the safety of any person, or seriously damage the economy of New Zealand. The exemptions under section 6 are not subject to a public interest test.

Section 9 of the OIA has a range of other exemptions, all of which are qualified, and subject to a public interest test. These include exemptions to protect trade secrets, personal information, information provided in confidence, legal professional privilege, commercial activities and negotiations.

Section 9's qualified exemption also protects material which relates to collective responsibility (including Cabinet material), official advice to Ministers, ministerial communications and correspondence with the Sovereign. It also separately protects material where that is necessary to protect free and frank expression of opinions by officials and Ministers.

Some Cabinet papers are, unusually, proactively released[17] in New Zealand despite section 9(2)(f)-(g) being a qualified exemption..

Public Interest Test

The public interest test is not defined in the OIA.

The Ombudsman's guidance[18] states that "the phrase 'public interest' is not restricted in any way". It states that in determining the public interest the decision maker should consider, for example: whether the release of information would promote the accountability of Ministers

[16] http://www.justice.govt.nz/publications/global-publications/c/charging-guidelines-for-official-information-act-1982-requests/official-information-act#1

[17] http://www.dpmc.govt.nz/dpmc/publications

[18] http://www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/206/original/part_2d__countervailing_public_interest_considerations.pdf?1344201713

and officials or promote the ability of the public to effectively participate in the making and administration of laws and policies. Decision-makers are also urged to consider the content of the information, the context in which it as created, and the purpose for which it has been requested (if known).

Protection of Sensitive Information: Veto

New Zealand's veto power can be exercised through the making of an Order in Council by the Governor-General, on the request of a Minister, (which in effect requires collective Cabinet agreement). The effect of the Order in Council is to direct an agency not to comply with the decision of the Ombudsman requiring release of requested information.

The veto was used 14[19] times between 1983 and 1987, when it was amended so that:

- it could only be used by the Governor General by Order in Council, which in effect requires the decision to be taken collectively by Cabinet;
- it could only be exercised on the grounds of refusal that the Ombudsman reviewed, and not on the basis of any new reasons;
- the reasons for its use must be published*;*
- the requestor can apply to the High Court for a review of any veto on the grounds that the government exceeded its powers or was otherwise wrong in law;
- the applicant's costs in bringing a High Court review must be paid for by the Crown, regardless of whether or not the challenge is successful (unless the challenge was brought unreasonably or improperly)

According to the New Zealand Cabinet Manual[20], the revised veto has not been used since 1987.

The executive also has, in effect, a second veto power (under section 31) through the issuing of 'certificates'. Where the Prime Minister certifies that the making available of any information would be likely to prejudice security or defence, or international relations, or where the Attorney-General certifies that the making available of any information would be likely to prejudice the prevention, investigation, or detection of offences, then the Ombudsman shall not recommend that the information be made available. There is no appeal against a certificate, but it appears that a certificate could be judicially reviewed (although at a claimant's own expense rather than paid for by the State).

The Local Government Official Information and Meetings Act 1987 also contains a veto power, which a local authority can exercise after a meeting of the council.

Appeals

Appeals against a refusal for requested information are dealt with by the Ombudsman. They investigate and then make a "recommendation" which the public authority concerned has to comply with 21 days later. There is no right of onward appeal. If a public authority disagrees with the Ombudsman's decision, their only recourse is to the veto, or a certificate.

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[19] R Hazell and B Worthy, "Assessing the Performance of Freedom of Information", *Government Information Quarterly* (forthcoming).

[20] http://www.cabinetmanual.cabinetoffice.govt.nz/8.13

Spain

In 1992 Spain passed Law 30/1992 of 26 November on the Legal Regime of Public Administrations and Common Administrative Procedure[21]. Article 37 of that law gives citizens a right to information. This reflects the requirement under section 105b of the Constitution that citizens should have access to information, other than information about security, defence, the privacy of persons or investigation of crimes. In 2015, the new Transparency and Access to Information law came into force.

Fees

There is no fee for making a request.

Protection of sensitive information: exemptions

The Spanish Act has exemptions where disclosure would undermine national security; defence; external relations; public safety; the investigation of crime; equality of parties in legal proceedings; monitoring, inspection or control; economic and commercial interests; and professional secrecy and intellectual property.

The use of the term 'undermine' implies that these exemptions are all prejudice- rather than class-based.

Safe space / collective agreement

The Act exempts (article 14(1)(k)) information where its disclosure would undermine the confidentiality or secrecy of decision-making (prejudice-based exemption).

Requests for information are inadmissible (i.e. absolutely exempt) if they concern information that is "under development", or "opinions, summaries, and communications and reports internal to or between administrative bodies".

Public Interest Test

The Act does not refer to a public interest test, but effectively all of the prejudice-based exemptions are qualified because article 14(2) makes clear that use of the exemptions must be "justified and proportionate" to their object and taking into account the circumstances of the case, especially concurrence of a public or private interests justifying access.

Protection of Sensitive Information: Veto

There is no veto in the Spanish legislation.

[21] Ley 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común.

Appeals

A requestor can complain to the Council of Transparency and Good Governance (Consejo de Transparencia y Buen Gobierno) who can investigate and (it appears) just make a recommendation. A requestor can also appeal to the Administrative Court.

United States

The federal Freedom of Information Act (FOIA) gives a right (section (a)3A) to request information from a federal public body. The FOIA extends to federal public bodies including departments of State and independent regulatory agencies, as well as intelligence agencies. The federal FOIA does not extend to state or local government, or to Congress.

Importantly, the Office of the President, including the “President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President” are not agencies under the FOIA.

Offices within the Executive Office of the President that "wield substantial authority independent of the President" are subject to the FOIA (The Advisory Council on Environmental Quality, for example[22]).

Alongside the right to request information, the Act places an obligation on federal bodies to proactively publish organisational information, including staff manuals, internal policies or procedures and final determinations in cases.

Fees

Each federal agency can levy a charge for complying with requests which must be limited to “reasonable standard charges for document search and duplication” (section(a)4A(ii)(III)). No fee is chargeable if the body fails to comply with the 20-day time limit (section (a)6A), or if the requestor qualifies for a fee waiver.

There is no charge, or a reduced charge, levied if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

Protection of sensitive information: exemptions

There are nine absolute exemptions in the FOIA. These include trade secrets and commercial or financial information obtained from a private source which would cause substantial competitive harm to the source if disclosed, personnel or medical information which would constitute a clearly unwarranted invasion of privacy, law enforcement records, records concerning audit of financial institutions, and geophysical information or maps concerning wells.

Notable is the exemption that allows the government, by Executive Order, to establish a class of absolutely exempt information where it is necessary to keep it secret in the interest of national defence or foreign policy.

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[22] DoJ guidance: http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/procedural-requirements.pdf#p4

FBI records pertaining to foreign intelligence or counterintelligence, or international terrorism, are exempt from FOIA if the existence of the records is classified information.

There is also an exemption for any material the disclosure of which is prohibited by statute (such prohibitions include, for example, technical military information, information about employees or practices of intelligence agencies, sensitive foreign government information, commercial or financial information or trade secrets obtained in confidence, and some contractor bids or proposals).

Collective Agreement

As set out above, the President, the President's advisors, and (for the most part) the Office of the President are all outside the scope of the FOIA.

Safe Space

Exemption 5 of the FOIA makes absolutely exempt "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." On the face of it, this exemption appears to exclude documents filed for the purposes of litigation.

The Supreme Court has, however, ruled that this exemption makes unavailable any material that would normally benefit from "privilege" exempting it from disclosure in civil proceedings. The most commonly invoked privilege is the "deliberative process privilege", the general purpose of which is to "prevent injury to the quality of agency decisions."[23] Specifically, three policy purposes consistently have been held to constitute the bases for this privilege: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are actually adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action.

The Supreme Court has stated, "[t]he deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news.[24]"

In order to invoke the deliberative process privilege, an agency must prove that the document withheld is both predecisional and deliberative. A document is predecisional if it was created "antecedent to the adoption of an agency policy." A document is "deliberative" if it "makes recommendations or expresses opinions on legal or policy matters."[25]

Communications between FoI agencies and the Executive Office is also exempt under the "presidential communications privilege", which exists to protect advisory communications made to the President and his close advisers.

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[23] DoJ FoI guidance: http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption5.pdf#p13

[24] Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8-9 (2001);

[25] Greenberg v. U.S. Dept of the Treasury, 10 F. Supp. 2d 3, 16 n.19 (D.D.C. 1998); nsarchive.gwu.edu/NSAEBB/ciacase/**greenberg**.doc

So, in effect all policy formulation documents are absolutely exempt under US federal FOI law.

Public Interest Test

As all of the exemptions in the FOIA are absolute, there is no public interest test. In 2009 the Attorney General issued a memorandum referring to President Obama's 21 January FoI memorandum. This memorandum made clear that information should not be withheld simply because an exemption technically applied, but only where disclosure would harm one of the interests protected by a statutory exemption.

Protection of Sensitive Information: Veto

There is no veto in the US FOIA.

Appeals

The Office of Government Information Services (OGIS) offers mediation services to FOIA requesters.

Requesters can also appeal to their district court if they are refused information, or if a federal body does not otherwise comply with the FOIA. If the court finds that the circumstances raise questions as to whether a public employee acted capriciously or arbitrarily in withholding information, a Special Counsel will conduct an investigation into the employee's conduct.

Annex A - Table of Comparisons

	Collective agreement	*Policy safe space*	*Public interest test*	*Veto*	*Enforcement*	*Fees*
Australia	Cabinet notebooks are out of scope, and Cabinet documents are absolutely exempt	Qualified class exemption subject to public interest test	Legislation defines elements of the public interest test	Veto in place until 2009 – now abolished	Information Commissioner and onward appeal on point of law to Federal Court	Yes
Canada	Cabinet minutes and papers are excluded from the scope of the Act for 20 years	Qualified class exemption subject to a public interest test	Test is undefined in legislation (but government provides guidance on it)	No veto	Information commissioner can make non-binding recommendation; public authority's decision can be judicially reviewed	Yes, but very low
Denmark	Cabinet minutes and papers are absolutely exempt	Absolute exemption for internal policy documents	None. All exemptions absolute	No veto	Parliamentary Ombudsman can make non-binding recommendation	No
France	Absolute exemption where disclosure would prejudice the secrecy of the deliberations of the Government and other executive authorities Draft documents fall outside scope of the Act		None (although prejudice needs to be demonstrated)	No veto	Independent Commission makes a non-binding recommendation; then JR to Admin Court (and then only onward appeal to Supreme Court)	No
Germany	No specific protection	Exemption for draft or deliberative material if	None (although 'obstruction' or 'detriment' need to	No veto in legislation, but possibly a	Federal Commissioner can make a non-binding recommendation; then	Yes (fee for receiving information;

	(unclear, but possibility that Cabinet is not in scope)	disclosure would obstruct a future ruling or official measure (including legislation)	be demonstrated)	constitutional override	can bring JR in Admin Court	some fees quite high)
Ireland	Cabinet minutes are absolutely exempt; Cabinet papers have a qualified exemption subject to a public interest test	Qualified class exemption subject to a public interest test (exemption inapplicable after 5 years)	Test is undefined in legislation (but government provides guidance on it)	No veto	Information Commissioner and onward appeal on point of law to High Court (and on to Supreme Court)	Request fee abolished 2014; other fees reduced in 2014
Spain	Absolute exemption for most internal government documents Qualified prejudice-based exemption where disclosure would undermine the confidentiality or secrecy of decision-making		Undefined in the legislation	No veto	Council on Transparency can make a non-binding recommendation; then JR to Admin Court	No
New Zealand	Cabinet minutes and papers are subject to a qualified class exemption subject to a public interest test	Qualified class exemption subject to a public interest test	Test is undefined in the legislation (but ombudsman provides some guidance on it)	Executive and local government have a veto, but not used since reforms in 1987. PM can also issue certificate giving effective veto in respect	Ombudsman determines appeals; there are no onward appeal routes. Certificates can be judicially reviewed.	Yes

				of defence, security, international relations, or law enforcement		
UK	Cabinet minutes and papers are subject to a qualified class exemption subject to a public interest test	Qualified class exemption subject to a public interest test	Test is undefined in the legislation (but government and information commissioner provide guidance on it)	Cabinet veto	Information Commissioner, then onward appeals to the First-tier Tribunal, Upper Tribunal, Court of Appeal, and Supreme Court	No
United States	The Office of the President and his personal advisors are outside the scope of FOIA. Communications between FoI agencies and the Executive Office are absolutely exempt	Pre-decision deliberative documents are absolutely exempt	Not applicable	No veto	Appeal to the district court	Yes