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Winner of the 1998 Council of Europe Human Rights Prize

CAJ's submission to the
Public Consultation on the
Freedom of Information Bill

July 1999

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SUBMISSION ON THE FREEDOM OF INFORMATION BILL

July 1999

Submitted on behalf of the applicant by the
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What is the Committee on the Administration of Justice (CAJ)?

CAJ is an independent non-governmental organisation which is affiliated to the International Federation of Human Rights (FIDH). CAJ monitors the human rights situation in Northern Ireland and works to ensure the highest standards in the administration of justice. We take no position on the constitutional status of Northern Ireland, seeking instead to ensure that whoever has responsibility for this jurisdiction respects and protects the right of all. We are opposed to the use of violence for political ends.

CAJ has since 1991 made regular submissions to the human rights organs of the United Nations and to other international human rights mechanisms. These have included the Commission on Human Rights, the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, the Human Rights Committee, the Committee Against Torture, the Committee on the Rights of the Child, the Committee on the Elimination of Racial Discrimination, the Special Rapporteurs on Torture, Independence of Judges and Lawyers, and Extrajudicial, Summary and Arbitrary Executions, the European Commission and Court of Human Rights and the European Committee on the Prevention of Torture.

CAJ works closely with international NGOs including Amnesty International, the Lawyers Committee for Human Rights and Human Rights Watch.

Our activities include: publication of human rights information; conducting research and holding conferences; lobbying; individual casework and legal advice. Our areas of expertise include policing, emergency laws, children's rights, gender equality, racism and religious discrimination.

Our membership is drawn from all sections of the community in Northern Ireland and is made up of lawyers, academics, community activists, trade unionists, students, and other interested individuals.

CAJ was recently awarded the Council of Europe Human Rights Prize in recognition of our work in defence of rights in Northern Ireland. Previous recipients of the award have included Medecins Sans Frontieres, Raoul Wallenberg, Raul Alfonsin, Lech Walesa and the International Commission of Jurists.

Submission on the Freedom of Information Bill

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INTRODUCTION

CAJ welcomed the Good Friday Agreement with its commitments to the rule of law and protection for human rights. The underlying principles of the Agreement were transparency, accessibility and openness regarding the process of governmental decisions. The new dispensation promised by the Agreement promised much in terms of ordinary citizens participating in and accessing information about decisions that would impact significantly on their lives. In this context, the draft Bill on Freedom of Information is disappointing, and represents a retreat from the promising White Paper entitled "Your Right to Know", published in December 1997.

There are positive features of the draft Bill which relate to issues of process. For instance, the Bill broadly defines "information" and "public authority" to allow greater disclosure of information. Every public authority must maintain a "publication scheme" specifying the information the authority intends to publish, which is subject to review by the Information Commissioner. The Commissioner also has the duty to evaluate the actions of the public authorities, in order to ensure that they are properly discharging their functions under the Bill. The Commissioner may make recommendations to the public authority and will report annually to Parliament. The Commissioner also has the power to review refusals to disclose information. Finally, anyone who destroys or defaces a record for the purpose of preventing disclosure is guilty of a criminal offence.

However, CAJ are concerned with several other provisions of the Bill, and believe that they will seriously hinder people's access to information. Most notable are the broad class exemptions and exclusions, some of which are not subject to any harm test. These include exemptions of information relating to the work of security bodies, information regarding investigations and proceedings conducted by public authorities, and information relating to decision-making and policy formation. Some exemptions are subject to a test, but the test is very weak, and does not go beyond showing that disclosure would "prejudice" the relevant interest. Protecting human rights requires transparency concerning governmental processes and these exemptions promote a system of secrecy, where the public is unable to access information that greatly impacts upon their lives.

Additionally, the Bill does not contain a public interest test to permit disclosure of exempt information. A public authority, when considering a request for exempt information, must consider the public interest only as one factor in the midst of all the circumstances of the case. This leaves the Bill completely unbalanced in favour of non-disclosure, for there is nothing in the Bill to combat effectively the exemptions mentioned above.

Some exemptions fall under the historical release provision of the Bill, but in some cases this period of time runs up to 100 years. Furthermore, some exempted categories, such as those relating to economic interests, relations with other States, matters of security and defence, and communications with the monarch, never benefit from historical release.

In addition, the public authority has forty days to comply with a request for disclosure, which is longer than any other country's time limit.

In Part I of the Consultation Document, the Government speaks of promoting openness and a change of culture within the public sector by giving people greater access to information. In its present state, the Bill does not meet these goals. Substantial changes must be made if openness is truly to be achieved, in keeping with the promises the Government has made and the spirit of the Good Friday Agreement.

EXEMPTIONS

The greatest area of concern regarding the Bill involves the exemptions listed under Part II. Several of these exemptions are over-broad, and are subjected only to a weak test or no test at all. The White Paper proposed a test which asked whether disclosure would cause “substantial harm”. The Bill never goes beyond asking whether disclosure “would, or would be likely to, prejudice” relevant matters, and the test does not even apply to some of the exemptions at all.

Additionally, some of the exemptions merely require a Ministerial Certificate indicating that the information requested falls within the exemption, and the Commissioner apparently does not have any authority to question the propriety of issuing the Certificate. Although the Commissioner and the applicant can appeal against the issuance of the certificate, appeal seems an inadequate remedy. The applicant most likely will not know whether the refusal to disclose was legitimate or not. Furthermore, the applicant would appeal to the Tribunal, which would apply the principles of judicial review. This standard seems weak, for it merely asks whether reasonable grounds existed for issuing the certificate.

Exemption of Information Relating to the Work of Security Bodies (s. 18)

This section states that information is exempt if “it was directly or indirectly supplied to the public authority by, or relates to the work of, any of the bodies specified in subsection (3).” This is an example of a class exemption which is not subjected to any sort of harm test. Instead, a certificate signed by the Minister of the Crown is sufficient to certify that the information falls under the exemption.

Some of the bodies in subsection (3), including the Security Service, the Secret Intelligence Service, the Government Communications Headquarters and the special forces are completely exempt from the Bill, as indicated in Schedule 1. Therefore, entire bodies are excluded from the law even if all of their functions do not relate to security. Moreover, the exemption is over-broad because it also applies to information that was supplied to a public authority by a security body, even if the information does not relate to security, and even if it was supplied indirectly.

Additionally, section 14 does not apply to this section. Section 14 applies where a public authority receives a request for information where disclosure is not required because the information is exempt but despite this, the authority may exercise its discretion to disclose the information. In making its decision, the authority must consider all of the circumstances of the case, including whether disclosure would be in the public interest. Section 18 therefore effectively prohibits all public access to the extremely broad range of information that it lists, because the information cannot be disclosed even if it is in the public interest.

In relation to the exemption of information relating to security bodies, CAJ recommends:

- the exemption should be narrowed to apply only to information that relates to security, not to all information supplied by or relating to the work of security bodies
- the exemption should not be a class exemption, and information should only be exempt if there is a substantial risk of harm to a legitimate security interest
- the Commissioner should be able to review the refusal to disclose, regardless of the issuance of a Ministerial Certificate
- although we feel that, as currently drafted, section 14 is an overly weak formulation of the public interest test, we believe that it should be extended to section 18 information.

Exemption of Information Relating to National Security and Defence (ss. 19 & 21)

Section 19 of the Bill exempts information which purpose is the safeguarding of national security. A Ministerial Certificate is conclusive proof that the requested information falls into this category. Section 21 exempts information that would be likely to prejudice the defence of the British Islands or the capability of security forces. Although it is necessary to have a provision regarding national security, there is no reason why there should be two such provisions in the Bill. Additionally, the same problems arise with regard to the issuance of a Certificate as mentioned above.

In relation to the exemption of information relating to National Security and Defence, CAJ recommends:

- the Bill should only contain one provision regarding national security
- the Commissioner should be able to review the refusal to disclose, regardless of the issuance of a Ministerial Certificate
- on appeal, the Tribunal should be able to review all the circumstances of the case, rather than applying the standard of judicial review

Exemption of Information Relating to International Relations (s. 22)

Section 22 exempts information if its disclosure would be likely to prejudice relations between the United Kingdom and other States or any other international organisation. Although it is not unusual in a freedom of information act to exempt information about international relations, section (1)(c) of this provision exempts information that would prejudice “the interests of the United Kingdom abroad”. This appears to be extremely over-broad, for it could exempt all information that relates to international matters.

In relation to the exemption of information relating to International Relations, CAJ recommends:

- section (1)(c) should be removed from the Bill

Exemption of Information Relating to the Economy (s. 24)

Section 24 exempts information that would be likely to prejudice the economic interests of the United Kingdom or the financial interests of the government. We cannot see why the financial interests of the government need be specially exempted. If there are legitimate national financial interests to be protected, we presume they would be protected by the exemption covering economic interests.

In relation to the exemption of information relating to the economy, CAJ recommends:

- the exemption of financial interests of the government should be removed

Exemption of Information Relating to Investigations Conducted by Public Authorities & Law Enforcement (ss. 25 & 26)

Section 25 exempts information if it has been held by a public authority for the purpose of various types of investigations. Section 25 (1) deals with criminal proceedings, and 25 (2) covers ascertaining whether someone engaged in improper conduct, the management of corporate bodies, causes of accidents, protecting charities, and health and safety issues at work. This is a class exemption, so no harm test applies. Section 26 exempts information that would be likely to prejudice the detection of crime, apprehension of offenders, administration of justice, tax collection, operation of immigration controls, and the maintenance of prisons. The two separate provisions therefore essentially cover the same material.

All information gathered during an investigation is exempt, regardless of whether there would be prejudice to an interest, and an authority would not even have to indicate whether it holds this information. This exemption promotes a culture of secrecy and would inhibit the public from finding out even simple facts about investigations. Skepticism about investigative processes is currently an important and controversial issue in Northern Ireland, and a provision such as this one only further erodes the public's confidence in the government. In addition it is possible that this section may conflict with recommendations of the Criminal Justice Review which is currently considering the independence and effectiveness of the prosecution service in Northern Ireland.

Additionally, the exemption regarding health and safety issues at work is of serious concern to employees who have a right to know what is being done about on-the-job risks on a national level. Although employees are already afforded some protection through health and safety legislation, a third party who wants to draw public attention to a problem would not be given the information.

The exemption under 25 (2) covering the causes of accidents would also unfairly prevent someone from finding out simple facts or statistics about accidents that were part of an investigation. For instance, a family member of a person lost in a plane crash could not find out information about the death. There does not appear to be a good reason for withholding this information, for it does not harm law enforcement.

In relation to the exemption of information relating to investigations, the CAJ recommends:

- the exemption of information regarding investigations should be subject to a substantial harm test
- there should only be one exemption covering this material
- this exemption should be narrowed to only include material related to criminal processes

Exemption of Information Relating to Decision Making and Policy Formation
(s. 28)

Section 28 (1)(a) exempts information if it relates to “the formulation or development of government policy”. In the White Paper, a “simple” harm test was applied to policy advice, and the Government in fact stated “we are prepared to expose government information at all levels to FOI legislation”. In the draft Bill there is an absolute exemption, not subject to any sort of harm test. This raises serious concern for the exemption is extremely over-broad, and runs completely counter to the Government’s professions of promoting openness regarding governmental processes. Factual information, statistics and studies about policy formation should be open to the public, to aid the understanding of and evaluation of governmental policy. Under the draft Bill, even information from third parties would be exempt.

Subsection (3) exempts information that would be likely to prejudice “the responsibility of the Ministers of the Crown”, would inhibit “the free and frank provision of advice” or “free and frank exchange of views”, or would prejudice “the effective conduct of public affairs.” Subsection (3) therefore describes, in a more specific way, the information contained in subsection (1) regarding policy formation. However, even the language of subsection (3) is over-broad, for the section applies to advice on any matter, not simply information relating to the development of policy. Furthermore, the exemption of information that would prejudice public affairs appears to be based on New Zealand’s law, but the draft Bill has omitted the four safeguards that accompany the New Zealand exemption. It is also unnecessary to have both sections, particularly when subsection (1) essentially encompasses what is described in subsection (3).

In addition this broad exemption may well conflict with the statutory obligations imposed on public authorities in Northern Ireland by section 75 and schedule 9 to the Northern Ireland Act.

In relation to the exemption of information relating to Decision Making and Policy Formation, CAJ recommends:

- this exemption should be subject to a substantial harm test
- the exemption should eliminate broad classes of information such as “all information relating to the development of policy” and should only include information that would specifically affect policy making

Exemption Relating to Prohibitions on Disclosure (s. 35)

Section 35 exempts information if its disclosure is prohibited by another enactment, if it is incompatible with any Community obligation or if it would be punishable as a contempt of court. This exemption undermines the goal of the Freedom of Information Act, for it makes the Bill secondary to all other existing laws.

In its present state, the Bill makes disclosure of information subject to other secrecy laws. To ensure greater openness and instill confidence in the public, other legislation should be made subject to freedom of information legislation. Disclosure of information should be promoted rather than discouraged.

In fact, no provision exists that affords protection for authorities which may mistakenly release information that should not have been disclosed. The Bill should contain a rule that such authorities will not be sanctioned if they released the information mistakenly and reasonably. Such a provision would promote disclosure by allowing authorities to freely give information as it is appropriate, without the fear of being punished for a mistake made in good faith.

In relation to the Exemption of Information Covered by other Secrecy Laws, CAJ recommends:

- freedom of information legislation should be made superior to other secrecy laws, should they conflict
- a provision should be added to protect reasonable but mistaken disclosures of information by authorities

Power to Confer Additional Exemptions by Order (s. 36)

Section 36 exempts information if it is information to which an order made by the Secretary of State applies. The Secretary of State may not make an order under this section “unless it appears to him that the public interest in conferring the additional exemption outweighs the public interest in allowing public access to

the information”. Section 36 (4)(b) explains that such an order may come into effect in relation to requests for disclosure of information that “have not been complied with by the authority before the commencement day”.

Section 36 (4)(b) raises serious concerns, because the Secretary of State could create an order exempting information after knowing the nature of the request, and in this way could block the request. Although both Houses of Parliament would have to approve the order, this sends a message which conflicts with the avowed aim of the Bill. This section represents a significant retreat from the principles in the White Paper. In fact, the White Paper eliminated any kind of government veto because it would undermine the Commissioner’s power and erode public confidence in the Act.

In relation to the Power to Confer Additional Exemptions by Order, CAJ recommends:

- this section should be removed from the Bill, and there should be no governmental veto power

Effects of Disclosure (s. 37)

Section 37 extends the exemptions of certain other sections of the Bill to information that would not be exempt by itself but would become exempt if other information became available. This applies whether or not the new information is accessible to the public.

Section 37 is an unnecessary “catch-all” provision in the Bill. Where the information is likely to become accessible, it is already covered by the “likely to prejudice” standard present in a number of the other provisions. Where it is not accessible to the public, there is no threat of harm. This provision therefore runs counter to the principle that disclosure should be promoted and information should be accessible, because section 37 could potentially lead to the withholding of information about almost every request under the Bill.

In relation to the Effects of Disclosure Provision, CAJ recommends:

- this section should be removed from the Bill

DISCRETIONARY DISCLOSURES IN THE PUBLIC INTEREST

Section 14 applies where disclosure of information to the applicant would be lawful but is not required. In these cases, the public authority may consider whether to disclose the information, and the authority must take into account “all the circumstances of the case”, including the public interest in having the information disclosed. The authority may refuse a request unless the applicant

supplies further information, and the authority may require the applicant's reasons for the request and for what he/she intends to use the information. A decision must be made within "such time as is reasonable in the circumstances". Furthermore, the authority may reasonably restrict the use of the information. This section does not apply to security information or court records.

The Bill requires a strong public interest test, particularly because of the broad nature of the exemptions, as discussed above. The test identified in Section 14 is inadequate to balance the effect of the exemptions, because the public interest is only one factor to be considered along with all the circumstances of the case. Moreover, disclosure of information is left up to the public authority, which must merely "have regard" for the public interest. The test is ineffective as it is only one factor which needs to be taken into account, is not clearly defined and is subject to the decision of the relevant public authority.

First, we are concerned that an authority may ask for the applicant's reasons for requesting the information and for what the applicant wishes to use the information. This could lead to authorities discriminating between requests. The basic purpose of a Freedom of Information Act is to allow access to information regardless of someone's purpose. The White Paper states that applicants would not be considered on their intentions, but instead on the contents of their requests. An applicant should not have to discuss why he/she is requesting information, except in extreme circumstances, which are not defined here. We also believe it is unreasonable for an authority to impose conditions restricting the use of information after it has disclosed it in the public interest. It must be made clear exactly why these provisions are in the Bill, for they are unnecessarily burdensome to the applicant.

Furthermore, because the provision requires that disclosure of the information be lawful, the Bill is again made inferior to other secrecy laws. As previously discussed, there are several problems with this, for it undermines the strength and impact of the principles behind the Bill. Information cannot be disclosed under this Bill even if the public interest in disclosure is greater than keeping the information secret. Should there be a serious interest in secrecy, the right of appeal would protect it.

Additionally, security information and court records are not subject to the public interest test. This is also of concern, for security matters are often of great public interest. As noted above, security matters in the Bill are essentially untouchable, and there is already a high level of secrecy surrounding them. In this way, the government is sending a message that discourages disclosure rather than promotes it.

Finally, the duties of the public authority are different under this section than in other areas of the Bill, for no apparent reason. Under this section the public authority must make a decision about a request in a "reasonable time". This runs

counter to the provision in section 10, where authorities are required to make a decision within 40 days. Regardless of the fact that 40 days seems extremely long, it is a set time limit, which is missing from the provision in section 14. There does not appear to be a legitimate reason for making this section different by allowing a much more flexible approach and giving the authority greater discretion.

In addition, if a public authority has wrongly refused to release information under section 14, the Commissioner under sections 43(7) and 45(2) may only specify matters that the public authority must consider when making the decision. This inexplicably once again gives the authority greater discretion under section 14 than elsewhere in the Bill where the Commissioner can direct the release of information.

In relation to Public Interest Disclosures, the CAJ recommends:

- the Bill should contain a public interest test where disclosure is required when the public interest in the information is greater than the interest in withholding it
- the obligation on an applicant to disclose his/her reasons for requesting information, and what he/she intends to do with it should be deleted
- even information which may not be lawful should be subjected to a public interest test, thus ensuring that the Bill is not subject to other secrecy laws
- security information should not be excluded from this section
- a specific time limit for decision making should be set
- the Commissioner should have the power to ultimately decide in matters related to public interest disclosures, instead of leaving it to the discretion of the authority.

HISTORICAL RECORDS

Section 54 states that a record becomes a “historical record” 30 years after it was created. Section 55 indicates that information contained in an historical record cannot be exempted by section 23 (relations within the United Kingdom), 27 (court records), 28 (decision-making and policy formation), 33 (legal professional privilege), or 34 (commercial interests). Additionally, information relating to communications with Her Majesty (s. 29) cannot be exempt after 75 years, and information regarding law enforcement (s. 26) cannot be exempt after 100 years. This leaves several exemptions that are not subject to historical release, including security information (s. 18), international relations (s. 22), the economy (s. 24), and investigations and proceedings conducted by public authorities (s. 25).

CAJ believe that all information should be subject to an historical release, but that the time period should not extend to 75 or 100 years.

In relation to Historical Records, the CAJ recommends:

- the time limit for historical release should be subject to a maximum time period of 75 years.
- all provisions should be subject to historical release

THE PROCESS OF OBTAINING INFORMATION

Time Limit

Section 10 of the Bill states that a public authority must comply with a request for disclosure within 40 days beginning with the date of receipt. This period of time is exceedingly long, and in fact, when compared with other systems, it is the longest time period allotted. The United States and New Zealand give 20 days to respond, Ireland gives 28 days, and Canada and Australia allot 30 days. CAJ believe this will significantly slow down the process of obtaining access to information, and that this time limit should be shortened considerably.

In relation to the Time Limit for Decisions, CAJ recommends:

- the time limit should be shortened to 28 days

Fees

Section 9 of the Bill discusses the costs of obtaining information. For instance, the public authority must give the applicant a fees notice, and the authority need not comply with the request until the applicant pays. Additionally, subsection (3) states that any fee must be determined by the public authority “in accordance with the regulations made by the Secretary of State”. Section 12 does not require an authority to comply with a request if the cost of complying with the request “would exceed the appropriate limit”, and different limits may be prescribed in different cases. It is promising that Government policy will not permit an applicant to be charged more than 10% of the cost of finding the records. However, where an authority uses its discretion to disclose information, it has discretion to charge a “reasonable” fee, not subject to the 10% ceiling, and there are no specific regulations for determining the charges. It is unclear in the Bill whether the Commissioner may hear appeals relating to fees, or may require disclosure of information that was considered too costly.

In relation to Fees, CAJ recommends:

- the law itself should contain specific instructions for charging fees, to ensure that the cost of obtaining information will not prohibit anyone from requesting it
- the law should make it clear that the Commissioner has the authority to hear appeals relating to fees

Refusal to Disclose Information

Section 15 states that when a public authority refuses to disclose information, it must give the applicant a notice stating that fact and specifying the exemption in question. However, the authority apparently need not give reasons as to why it decided to withhold the information. The Bill does not specifically indicate who must justify why information was withheld.

In relation to a Refusal to Disclose Information, CAJ recommends:

- it should be made clear in the Bill that the public authority has the responsibility to justify refusals to disclose information

Withholding Self-Incriminating Information

Section 44 requires that the public authority give the Commissioner information necessary to decide a complaint or investigate whether the authority has complied with the requirements of the Bill. Section 44(7), however, indicates that a public authority is not required to give the Commissioner any information if that information would reveal evidence of any offence and would “expose the authority to proceedings for that offence”. The point of the Freedom of Information Bill is to allow greater access to governmental processes, and to expose potential abuses of power. Although private individuals have a right not to incriminate themselves, allowing an authority this protection runs counter to the principle of promoting openness.

In relation to Withholding Self-Incriminating Information, CAJ recommends:

- this section should be removed from the Bill

Assistance of Authorities

Under the Bill, authorities are not required to assist applicants in any way. Section 38 (2)(a) merely states that the Secretary of State shall issue a code of practice providing guidance to public authorities which would include a provision about advice given by public authorities to applicants. The duty to assist is therefore only a recommendation, which underscores the unequal status between applicant and authority. Requiring authorities to help applicants would create a better balance between the two, and would provide the potentially uninformed applicant with a valuable resource.

In relation to the Assistance of Authorities, CAJ recommends:

- authorities should be required to aid applicants in obtaining access to the information they are seeking.