

Office of the Data Protection Supervisor's

response to

Consultation on Freedom of Information

A draft Bill

## **Introduction**

The Office of the Data Protection Supervisor (ODPS) welcomes the opportunity to provide a response to the proposed Freedom of Information Bill.

The ODPS welcomes the intention of the Bill to promote openness and transparency in public authorities and notes the effort that has been made to simplify the provision of the Bill when compared to equivalent legislation in other jurisdictions.

The ODPS has set out its comments to the draft clauses below.

These comments include comparison with the Freedom of Information Act 2000 ("FOIA") and also with CETS205 - Council of Europe Convention on Access to Official Documents ("the Convention.")

**The ODPS does not require this response to be kept confidential**

## **Comments on draft Bill.**

### **1. Clause 5: Public Authority**

The ODPS notes that the Council of Ministers, as confirmed in paragraph 3.3.2 of the summary of provisions, is not to be included in the list of public authorities. Therefore if the Bill is enacted as drafted no requests for information will be able to be made to Council of Ministers, as a "request for information" can only be made to a public authority. ( See sub clauses 4(1) & 7(1))

The ODPS also notes that sub clause 5 (8) prevents the Council of Ministers from being added to the list of public authorities by Order at a later date.

In contrast, in the UK, FOIA applies to information held by the UK Cabinet.

In addition, subsection 6(2) of the Council of Ministers Act 1990 makes proceedings confidential but it does not prevent the supply of information with the leave of the Chief Minister.

It seems that the exclusion of Council of Ministers from the list of public authorities is unlikely to meet the standard set down in Article 3 to the Convention. (Appendix A)

The ODPS therefore suggests that in the interests of openness and transparency that the Council of Ministers should be included in the list of Public Authorities.

### **2. Clause 10: Fees**

The ODPS notes the intention set out in clause 10(1) and confirmed in paragraph 3.6 of the summary of provisions to prescribe and levy a fee for all requests.

In contrast, the current code of practice does not levy a fee and no fee is charged in the UK until the cost of compliance reaches a certain level.

It seems to the ODPS that the intention to prescribe and levy a blanket fee for all requests is unlikely to meet the standards set down in Article 7 of the Convention. Article 7.1 states that inspection shall be free of charge while Article 7.2 states a fee may be charged for a copy of the official document which should not exceed the actual costs of reproduction and delivery of the document.

The ODPS is also mindful of the current strain on public finances and the costs incurred by public authorities when properly administering the receipt of a fee. It may be difficult to set a fee level which is not restrictive to a person wishing to make a request for information but does not result in additional cost to the public authority in administering receipt of that fee.

The ODPS therefore suggests that whether or not a fee should be charged for all requests should be carefully reconsidered.

### **3. Sub clause 11(2): Time for Compliance**

The ODPS notes the intention as described in sections 3.7.1 and 3.7.2 of the summary of provisions. The stated intention accords with the provisions set out under subsection 10(2) of FOIA, that is, the time for compliance stops and starts again when the additional fee or information is received.

However contrary to the stated intention it seems that, as sub clause 11(2) is currently drafted, a public authority could wait 19 working days and then either inform the applicant that an additional fee is required or request further information and thereby effectively reset the time for compliance and gain a further 20 working days to comply with the request.

The method of calculation set out in subsection 10(2) of FOIA is accepted as providing a fair and consistent approach to the time for compliance. It also helps to ensure that public authorities deal with requests promptly as they are required to do under the provisions of sub clause 11(1).

The ODPS suggests that in accordance with the intention stated in the summary of provisions and in the interests of fairness and consistency that clause 11(2) be redrafted to make a similar provision to that set out in subsection 10(2) of FOIA.

### **4. Sub clause 11(5): Time for Compliance**

The ODPS does not see the need for this sub clause.

If a public authority fails to comply with a request within the time specified by sub clause 11(1), a person is still entitled to apply to the Information Commissioner for a decision

under sub clause 48(1)(a). Therefore the applicant appears to have an effective remedy and there is no need to treat the failure as a refusal to supply the information.

The ODPS is concerned that sub clause 11(5) permits a public authority that ignores its obligations and does not respond to a request to be treated in the same manner as a responsible public authority which has fully complied with its statutory obligations but in doing so properly issued a refusal notice.

This seems unfair to responsible public authorities and the ODPS would suggest that sub clause 11(5) is removed.

### **5. Sub clause 11(3): Time for Compliance**

Sub clause 11(3), as it is drafted, does not seem to have any effect as it seems to apply after the public authority has refused to comply with the request.

The ODPS assumes that the intention of sub clause 11(3) is to provide the public authority with additional time beyond the 20 working days specified in sub clause 11(1) to properly consider where the balance of public interest lies when the information requested falls within a qualified exemption.

The ODPS also notes that, similar to the equivalent provision in FOIA, sub clause 11(3) does not specify a time limit for such further consideration.

In the UK, the equivalent provision in FOIA has been the subject of considerable criticism and it has even been suggested that the provision has been used to intentionally delay disclosure of information as it permits an open ended time limit for consideration.

As the Bill requires information to be supplied promptly, which includes any consideration of public interest, the ODPS considers that additional time over and above the 20 days for consideration of the public interest should only be necessary in limited circumstances.

The ODPS believes that the provision should be amended to include the requirement to inform the applicant of the continued consideration of public interest (see comment on sub clause 11(4) below), providing a date by which this will be achieved and a date by which the information will be supplied or refused. If it is refused, a refusal notice should then be issued.

The ODPS also believes that the provision should be amended to provide specific time limits for such consideration. In additional and exceptional circumstances, maybe where expert legal advice is required, a further extension certified by the Minister or other appropriate person could be applied.

## **6. Sub clause 11(4): Time for Compliance**

Sub clause 11(4) appears to require a public authority to provide a refusal notice even though it is still considering where the balance of public interest lies for information which falls within a qualified exemption.

Clause 16 sets out the contents of a "refusal notice". However, in the circumstances envisaged by sub clause 11(4), a public authority will not be in the position to provide a refusal notice in accordance with clause 16.

The public authority will not have completed its public interest considerations and therefore would be unable to provide the content specified in clause 16(3). In addition it seems pointless to require the public authority to provide the particulars set out in sub clause 16(1)(c) in such circumstances.

The ODPS believes a different notice, as described in the comments on sub clause 11(3) above, should be provided to the applicant.

## **7. Sub clause 11(6): Time for compliance**

The ODPS notes the provisions of clause 71, Subordinate legislation.

The ODPS suggests that either by regulation under clause 71 or by amendment to sub clause 11(6) the working day should be defined differently for schools so that the working day refers to days upon which the school is open to pupils.

## **8. Clause 14: Publication Schemes**

The ODPS notes that the Information Commissioner will not have a role in agreeing publication scheme as he has in England. The ODPS concurs with this proposal as it helps preserve the Information Commissioner's independence.

The ODPS is surprised that the draft Bill does not make publication schemes mandatory and believes that if publication schemes are optional then public authorities are unlikely to adopt and maintain such schemes thereby rendering the provision meaningless.

As a consequence, IOM Government could lose an important and significant benefit of FOI legislation, as publication schemes in other jurisdictions have helped to modernise and transform the manner in which public authorities are accountable to its citizens and deal with people. For example, publication schemes have led to considerable amounts of information being readily available on the internet which in turn has resulted in reduced queries and significant savings to public authorities. A further benefit of a publication scheme is that once information which has been made available through that scheme it becomes absolutely exempt information.

Put simply the more information included in a publication scheme the less impact requests have on the resources of the public authority.

However the ODPS is also aware that when FOI legislation was first introduced in the UK, public authorities published a considerable amount of unnecessary information by "second guessing" what requests would be made. This occurred as publication schemes were required to be established prior to the introduction of a person's right to make a request.

The ODPS would therefore suggest that clause 14 is modified so that Council of Ministers may by Order specify which public authorities shall adopt and maintain a publication scheme.

This modification would provide flexibility permitting publication schemes to be introduced as and when Council of Ministers consider a particular public authority or group of public authorities should adopt and maintain a publication scheme.

#### **9. Clause 17: Information a Public authority may refuse to supply and Clause 26: Primary duty of public authority to supply information.**

Sub clause 17(2) and sub clause 26(3) both make provisions which permit a public authority to refuse to comply with a request for that information.

However the clauses do not state whether or not the public authority may also refuse to comply with a person's right, set out in sub clause 7(1)(a), to be informed in writing by the authority whether it holds information of the description specified in the request. ("Duty to confirm or deny")

In FOIA, the similar provision to sub clause 7(1)(a) is set out in subsection 1(1)(a) .

Under FOIA, certain exemptions include a specific provision stating that the duty upon a public authority to confirm or deny whether information exists, as required by sub section 1(1)(a), does not arise.

It is not clear whether or not it is intended that the exemptions from the duty to supply the information requested also provides an exemption from the duty to "confirm or deny". Clause 7(3) appears to provide an exemption from the entire request but the summary of provisions seems to suggest otherwise for in a number of places it does not state the exemption applies to the duty to confirm or deny.

There is no provision in the Convention which requires a public authority to confirm or deny it holds information. In our opinion, the duty to confirm or deny under FOIA seems to be a somewhat unnecessary duty to place upon a public authority.

The ODPS would suggest that as persons making a request could be confused between the provisions of FOIA and this Bill, that clause 7(3) should be amended to be explicit. For example clause 7(3) instead of stating: "A public authority need not comply with the request..." could refer sub clause 7(1) instead.

**10. Clause 21: Parliamentary privilege &  
Clause 22: Parliamentary business**

These exemptions require a certificate to be signed as conclusive evidence that the specific exemption is required.

As the certificate must be treated as conclusive evidence that the exemption is required the Information Commissioner is unable to make a contrary decision. Similarly the Tribunal would be unable to make a contrary decision.

Therefore an alternative appeal mechanism, other than a Petition of Doleance, should be provided in the Bill. That is, there should be an appeal mechanism similar to that set out in clause 58 for National security certificates.

The absence of a review mechanism means that this exemption may not meet the standard envisaged by Article 8 of the Convention.

The ODPS therefore suggests that an appeal mechanism to the Tribunal for all certificates issued is provided in the Bill.

**11. Clause 23: Absolutely exempt personal information &  
Clause 38: Qualified exempt personal information  
(See also Omission from Bill)**

The ODPS welcomes the clarity of Clauses 23 and 38 when compared with FOIA. However the provisions of sub clause 38(3), as a qualified exemption, are a cause for concern.

Clause 38(3) relates to information which is exempt from a data subject's right of access under the Data Protection Act (DPA). As drafted, clause 38(3) would require a public authority to consider whether the information, even though the information is exempt from the data subject's right of access, should be provided to another person under a freedom of information request in the public interest. That is, a public authority could find itself in the position where it refuses the data subject access to his personal data but provides that personal data to another person.

The ODPS believes it would be fundamentally wrong for a public authority to consider providing the information to another person under a freedom of information request when it would not provide the information to the data subject.

Therefore, the ODPS recommends that the provisions of clause 38(3) are removed and added to clause 23. For example, sub Clause 23(2) could be amended as follows:

*(2) Information is also absolutely exempt information if it constitutes personal data of which the applicant is not the data subject; and either –*

*(a) the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles, or*

*(b) the information is exempt from section 5(1)(c) of the data protection Act 2002 ( data subject's right of access to personal data).*

An additional concern is that clause 38 makes no reference to consideration of the data protection principles when a public authority is considering whether or not to disclose information in the public interest.

The following scenario may help put this concern into context:-

- a) A public authority receives a request under the Freedom of Information Act to which the provisions of clause 38 applies.
- b) The information the public authority holds is personal data which is also inaccurate. (Note: It is not unusual for a public authority to hold personal data about a data subject which is inaccurate as it is lawful to do when this is how the personal data was provided by either the data subject or a third party.)
- c) As currently drafted the public authority is not required to consider whether the disclosure of this inaccurate personal data under a freedom of information request contravenes the data protection principles.
- d) However the public authority must consider whether the data subject would be entitled to prevent disclosure under section 8 of the DPA on the grounds that it would cause substantial damage or distress to the data subject or another person.
- e) The public authority considers the freedom of information request and concludes that due to the inaccuracy of the personal data, damage and distress may well be caused to the data subject but also determines that it is unlikely that the damage and distress will be substantial.
- f) The public authority therefore decides to disclose the inaccurate personal data.

The ODPS believes that it is essential that the public authority is required to properly consider whether any disclosure of personal data would contravene any of the data protection principles and therefore strongly suggests that clause 38 be amended to include proper consideration of the data protection principles.

For example clause 38 could be amended to read:

*(1) Information is qualified exempt information if it constitutes personal data of which the applicant is not the data subject; and either*

*(a) the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles, or*

*(b) the data subject would be entitled under section 8 of the Data Protection Act 2002 to prevent its disclosure on the ground that it would cause , or be likely to cause, substantial damage or substantial distress to the data subject or another person.*



## 12. Clause 35: Conduct of Public business

The provisions of clause 35 raise a number of significant concerns as it negates important provisions of the Bill.

The provisions of sub clause 35(1)(a) appear to be based upon sub section 36(2)(a)(i) of FOIA . As the Bill does not currently include the Council of Ministers as a public authority (see comment on clause 5 above), it seems that there is no need for sub clause 35(1)(a).

At present, clause 35 makes provision for a Minister or person authorised by that Minister to sign a certificate certifying the exemption is required. This provision can be applied not only to information held by the Council of Ministers but also to information held by any public authority.

In contrast, section 36 of FOIA only permits a certificate to be signed by the Speaker in relation to information held by the House of Commons or the Clerk of Parliaments in relation to by information held by the House of Lords. For all other relevant public authorities no certificate is required and it is the *“reasonable opinion of a qualified person”* which determines whether or not the exemption should apply.

The exemption provided by clause 35 is likely to be one of the most frequently relied upon exemptions when a public authority refuses to provide information, as is the case for the equivalent FOIA exemption.

As previously mentioned (see comment to clause 21 and clause 22 above) a certificate is conclusive evidence that the exemption is required thereby preventing the Information Commissioner and Tribunal from making any contrary decision.

The ODPS believes that it would be wrong to permit all public authorities to be able to sign such a certificate and thereby negate all effective remedies available to an applicant. In addition the ODPS believes that the provisions of clause 35 are unlikely to meet the requirements of Article 8 of the Convention.

The ODPS would strongly suggest that clause 35 is redrafted so that in relation to a request for information held by the Council of Ministers (if the intention is to include the Council of Ministers as a public authority for the purposes of the Bill) a certificate may be signed by, for example, the Chief Minister or, with the leave of the Chief Minister, the Secretary to the Council of Ministers.

In the case of information held by any other public authority the ODPS believes that the exemption can be applied if it is considered necessary in the reasonable opinion of the appropriate person, where the appropriate person is the Accounting Officer or similar person, but there should be no provision for a certificate and the clause should be redrafted accordingly.

### **13. Clause 42: Excessive Cost of compliance.**

The ODPS notes that sub clause 42(2) was awaiting advice.

Article 7.2 of the Convention states a fee should only apply to the cost of reproduction and delivery of a copy of the information. Therefore failure to return a fee when a request is refused is unlikely to meet the standard set out in Article 7.2

The ODPS suggests that if any fee is levied then that fee should be returned if there is a refusal to supply information and sub clause 42(2) should be amended accordingly.

### **14. Clause 43: Vexatious Requests.**

The ODPS notes that the Bill attempts to provide some interpretation of what may form a vexatious request. Usually the ODPS would welcome such interpretation but in this case the ODPS believes that vexatious should not be defined and thereby have its normal meaning.

Vexatious requests are regularly considered by the Information Commissioner and Tribunal in England, and as a result a helpful and pragmatic definition of vexatious requests has been established. (A relevant advice note from the UK Information Commissioner is attached as Appendix B)

As drafted, the provisions of both 43(3)(a) & 43(3)(b) must be met. The following points demonstrate that these provisions are unlikely to be met:

- (i) If the person making the request has paid a fee, as required, then it appears the person has demonstrated "a real interest in the information sought".
- (ii) A public authority is not in a position to know why a person seeks the information and therefore is not in a position to determine whether the information is "sought for a bad or illegitimate reason." To create a power for a public authority to establish the purpose for which a person seeks information is contrary to Article 4 of the Convention.

The ODPS therefore recommends that the clause 43(3) is removed.

### **15. Clause 47: General Functions of the Information Commissioner.**

There is a typographical error in sub clause 47(2): "her" should read "he".

As suggested at the last public consultation, the Bill does not specifically make the IOM Data Protection Supervisor the Information Commissioner. The ODPS therefore suggests that a further sub clause should be added to clause 47 stating for example:

*(5) In exercising functions under subsection (1) or (2) in relating to information comprising personal data, as defined by the Data Protection Act 2002, the Information Commissioner must consult the Isle of Man Data Protection Supervisor.*

#### **16. Clause 48: Application for decision by the Information Commissioner.**

Sub clause 48(1)(b) prevents the Information Commissioner from making a decision as to whether or not the refusal to comply with a request for information was justified when the request relates to absolutely exempt information.

This also means the Tribunal will be unable to consider whether or not such a refusal was justified. No alternative appeal mechanism has been provided.

No such equivalent provision exists in FOIA.

Absolute exemptions for security matters, parliamentary privilege and parliamentary business already contain provisions for the issuing of certificates which are conclusive proof that an exemption is required. These certificates already prevent the Information Commissioner and Tribunal from considering whether the refusal was justified and therefore this provision when read in conjunction with the other absolute exemptions seems unnecessary.

The absence of a proper review mechanism for absolute exemptions means that the provisions may not meet the standard envisaged by Article 8 of the Convention.

The ODPS there recommends that the phrase "*other than absolutely exempt information*" is removed from sub clause 48(1)(b).

#### **17. Schedule 1: Public Authorities.**

The ODPS believes it should be included in the list of public authorities.

#### **18. Schedule 3: Powers of Entry and inspection.**

The ODPS does not understand the intention of Paragraph 8 of Schedule 3 as it appears to negate the principle reason why the Information Commissioner would wish to exercise a warrant.

Paragraph 8 specifically prevents the Information Commissioner from inspecting the information that would have been sought by the relevant request and therefore the Information Commissioner is unlikely to achieve through the exercise of a warrant the purposes envisaged by sub paragraph 1(1) of Schedule 3 .

The equivalent provision in FOIA only prevents the Information Commissioner from exercising a warrant to inspect information relating to the security services or the safeguarding of national security.

The ODPS suggests that Paragraph 8 of Schedule 3 should be amended to refer to sections 19(1) and 27(1) only in the same manner as the equivalent provision in FOIA

## **Omission from Bill**

In the view of the ODPS there is a serious omission from the Bill that must be addressed.

In FOIA there are some specific and extremely important provisions set out in sections 68 to 70 which make amendments to the UK Data Protection Act 1998.

Similar provisions must be applied to the IOM Data Protection Act. In particular it is essential that the definition of data is extended in a similar manner to that in section 68 of FOIA.

The reason for this extension can best be explained by way of a simple example:

- a) A person makes a complaint about a dilapidated private house to a public authority.
- b) The public authority makes enquiries and the owner states he has been unable to look after the property due to a medical condition and to prove this the owner provides confirmation from his doctor of his medical condition. (The owner did not state that the information was provided in confidence.)
- c) The public authority takes no further action and files all the correspondence in a file marked "dilapidated housing".
- d) The person who initially complained to the authority makes a request for information.
- e) As the information does not fall under the definition of "personal data" as currently set out in section 1 of the DPA, the relevant exemption from disclosure provided by Clause 38, under the draft Bill which would usually prevent supply of the "personal data" will not apply.
- f) The public authority therefore finds itself in the position that in order to comply with the request it must supply the information relating to the medical condition of the owner, to the applicant.

Modification of the definition of "data", and the subsequent extension to the definition of "personal data", would mean that this information is "personal data" for the purposes of the Bill and therefore the exemption provided by Clause 38 would apply.

However this modified definition of data creates other issues for a public authority with regard to compliance with a request for personal data under section 5 of the DPA. If these issues are not addressed compliance with such section 5 requests under the DPA would become onerous for a public authority. Sections 69 and 70 in FOIA resolve these issues.

It is essential to have similar provisions in this Bill to those set out in sections 68 to 70 of FOIA and the ODPS is happy to assist the drafting of appropriate provisions.

# **Appendix A**

CETS205

Council of Europe Convention on Access to  
Official Documents  
("the Convention.")



Council of Europe Treaty Series - No. 205

## Council of Europe Convention on Access to Official Documents

Tromsø, 18.VI.2009

# **Appendix B**

Advice note

from the

UK Information Commissioner

Vexatious or Repeated Requests

## Freedom of Information Act



Information Commissioner's Office  
Promoting public access to official information  
and protecting your personal information

## Vexatious or repeated requests

The Freedom of Information Act 2000 (FOIA) gives rights of public access to information held by public authorities. This is part of a series of guidance notes to help public authorities understand their obligations and to promote good practice.

This guidance will help public authorities understand when a request can be considered vexatious or repeated under section 14 of the FOIA, and how to use that section. See also [Vexatious requests – a short guide](#).

It first explains when requests may be vexatious (page 2) or repeated (page 8). It will then cover how to refuse these requests (page 10) and other procedural and good practice issues (page 10).

This guidance replaces Awareness Guidance 22.

### Overview

- Under section 14(1), public authorities do not have to comply with vexatious requests. There is no public interest test.
- Deciding whether a request is vexatious is a balancing exercise, taking into account the context and history of the request. The key question is whether the request is likely to cause unjustified distress, disruption or irritation. In particular, you should consider the following questions:
  - ▶ Could the request fairly be seen as obsessive?
  - ▶ Is the request harassing the authority or causing distress to staff?
  - ▶ Would complying with the request impose a significant burden?
  - ▶ Is the request designed to cause disruption or annoyance?
  - ▶ Does the request lack any serious purpose or value?
- Under section 14(2), public authorities do not have to comply with repeated requests for the same information from the same person. There is no public interest test.
- If the cost of compliance is the only or main issue, you should consider section 12 instead (exemption where cost of compliance exceeds appropriate limit).
- Remember that you can also avoid unwanted requests by voluntarily publishing any frequently requested information.

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