

EAST AYRSHIRE COUNCIL
POLICY AND RESOURCES COMMITTEE
FREEDOM OF INFORMATION – CONSULTATION PAPER
23 MARCH 2000

Report by the Solicitor to the Council

1. PURPOSE OF THE REPORT

- 1.1** To advise the members of the main proposals of the consultation paper entitled “Freedom of Information” and to seek authority to respond to the current consultation exercise.

2. BACKGROUND

- 2.1** The Government wishes to “open up” government and pursuant to this commitment the Scottish Executive has published a consultation document on Freedom of Information. The paper proposes legislation, to provide the public with an enforceable right of access to the vast majority of public authority information subject to a number of exemptions. It is proposed that the Scottish version should be in line with the United Kingdom as a whole. Additionally, the Scottish Executive has already introduced a Code of Practice, which it intends should form the basis for the legislation. This code currently has effect on a number of public bodies, although not local authorities. The scope of the new regime is to go further than the provisions of the code. Comments on the consultation are requested to be submitted by 15th March 2000 however arrangements have been made for the member’s comments to be submitted after this date in order to allow consideration of this report.
- 2.2** There are currently a number of statutory provisions already in force which provide the public with a right of access to local authority information. Most notably, sections 50A-K and Schedule 7A of the 1973 Local Government (Scotland) Act which relate to public and press right to access local authorities meetings, together with rights of access to reports and background papers. Additionally, the Local Government (Scotland) Act 1986 imposes requirements to publish local authority information in the interests of accountability.
- 2.3** The proposed legislation is to have effect on Government departments, the vast majority of public bodies within Scotland and local authorities. This report only considers the effect on local authorities in relation to the proposals contained within the paper.

3. THE MAIN PROPOSALS

This section outlines the main proposals contained in the paper and provides a brief summary of the main proposed comments. The Appendix attached contains the full text of the proposed comments which are suggested for submission in response to the paper.

- 3.1 Right of Access. There is to be a statutory right of access offered to the public in respect of official information and documents. Anyone may apply, there is to be simple system for applying for such information and the reply time is to be 20 days. Further, there is to be a statutory duty to publish certain information.

Proposed Comment:

- *The public already have statutory rights to access most local authority information, as contained in sections 50A-K of the Local Government (Scotland) Act 1973. It is not clear what additional information from local authorities will be available to the public.*
- *The ethos behind the existing legislation should be borne in mind when bringing in any new legislation. Consideration should be given to consolidating the relevant legislation including access to personal files and data protection.*
- *There does not appear to be any limit on how far back the information may be requested, practical difficulties may be had if a time limit is not imposed on rights of access to such information.*
- *The suggested response time of 20 days may prove impossible to meet in relation to some requests for information.*

- 3.2 Costs and Charging. The costs of the regime are **not** to be met in full by the applicant. Three options are proposed, first, a discretionary power to charge up to 10% of marginal costs per application with a ceiling of £500; secondly, no charge for requests for information under £100 with full marginal costs for all information over £100 being charged with a ceiling of £500; or, thirdly a mandatory flat rate fee of £10.00 per request.

Proposed Comment:

- *The impact of these new costs should be considered carefully prior to implementation as costs to local authorities for providing this service may be significant.*
- *Consideration should be had to making a distinction between the genuine individual applicant, the vexatious applicant and the company who intends to use the information for commercial use and thus profit from it.*

- *It is suggested there should be a minimum fee as in Data Protection legislation and for information in excess of the minimum recovery of the actual costs of retrieval of the information*

3.3 Tests for Disclosure. A careful balance is to be struck between the right of access and the protection of sensitive information. The public interest in disclosure must be considered. A harm test of “substantial prejudice” is to be used. Policy advice and related information is to be covered by a combination of class-based and content based exemptions.

Proposed Comment:

- *There is to be a requirement to consider where there would be a public interest in disclosure. Unless the exemption in question is “discretionary” then exempt information should not have to be complicated by a further test for disclosure of whether there would be public interest in disclosing such information.*
- *Matters in the paper should not only apply to central government but also to all public authorities.*
- *No justification is given for excluding all communications between ministers but only confidential communications between public authorities.*
- *The proposed test of “whether disclosure would or would be likely to, substantially prejudice the matter set out in the exemption in question” is not wide enough.*
- *The concept of “harm” should also include any individuals who could suffer as a result of the disclosure.*

3.4 Personal Information. Most subject access to personal information is to be accessed under the Data Protection Act 1998. Personal information, which falls outside the Data Protection remit, is to be subject to the Freedom of Access regime.

Proposed Comment:

- *Data protection in relation to unstructured files is to be contained in the new Freedom of Information legislation. The two Acts have different purposes. Tension exists between the separate aims and objectives of Freedom of Information and Data Protection which will be difficult to reconcile. It would be preferable if the legal requirements were aligned within one enactment.*

3.5 Reviews and Appeals. An independent review and appeals mechanism is to be established with an independent Scottish Information Commissioner appointed. The Commissioner is to be granted powers to order the disclosure of information, adjust charges, resolve disputes by mediation and have a right to access documents. For certain

categories of information the final say on disclosure will rest on Scottish Ministers. The Commissioner's decision is to be subject to judicial review although an independent appeals tribunal is to be considered.

Proposed Comment:

- *It will be important to have realistic guidelines that both local authorities and the public can understand.*
- *If access rights are not clearly defined then the potential exists for numerous decisions to be appealed and an increase in challenges in decisions*
- *It will be necessary to consider the costs of administering the appeals procedure.*
- *Where third party rights may have been breached for example in relation to Data Protection issues consideration will have to be had as to what, if any, rights these third persons are to have in terms of the appeals procedure.*

4. CONCLUSION

- 4.1** A statutory right to access to public authority information is in keeping with the concepts of openness, accountability and transparency.
- 4.2** It is a matter of debate whether in terms of local authority information the public will be offered any further real rights of access, as the public already have wide powers to access the vast majority of local authority information.
- 4.3** The legislation is new in as much as for the first time it affords the public a right to access to information held by Government and the Scottish Executive. It is not new for Local Authorities to provide access to information.
- 4.4** It is suggested that the Access to Information legislation should be uniform and apply to public bodies, government and Local Government equally.
- 4.5** It is suggested that consolidation of the relevant enactments including Data Protection should be ensured. The information which is currently exempt from publication would in general terms remain so, in the proposed legislation.
- 4.6** In financial terms the costs of providing access under the new regime should not create a new and onerous burden upon an authority.
- 4.7** Finally, any exemptions to access in relation to government decision making should be extended to the decision making of local government

and the current exemptions contained in the existing legislation be incorporated into the new legislation.

5. RECOMMENDATIONS

That Committee considers the main proposals contained in the paper and the proposed comments; and

- (a) decide upon the terms of the a response to the Scottish Executive in terms of the consultation paper;
- (b) instruct the Solicitor to the Council to respond accordingly; and
- (c) otherwise note the contents of the report.

K R McVey
Solicitor to the Council
7 March 2000

LIST OF BACKGROUND PAPERS

1. “Freedom of Information” Consultation Document

2. Code of Practice on “Access to Scottish Executive Information”

Anyone wishing further information should contact Kate McVey, Solicitor to the Council
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APPENDIX TO FREEDOM OF INFORMATION – CONSULTATION PAPER

1 Right of Access.

Proposed Comment: The public already have statutory rights to access most local authority information. Local authorities already have statutory obligations that their meetings, committees and sub-committees should be open to the public and the press, as contained in sections 50A-K of the Local Government (Scotland) Act 1973. Further, agendas, minutes and reports prepared for these meetings are open for inspection, as are certain background papers where such papers are material to a meeting. Schedule 7A of the 1973 Act contains exemptions in respect of confidential and exempt information, where the disclosure of certain information is forbidden by statute, order of court or where the terms of it have been furnished by a government department. Schedule 7A also covers information which may be exempt, this information relates to individual employees, tenants, clients of an authority, contracts involving an authority, the prevention or investigation of crimes and legal advice. Furthermore, Local Authorities are also obliged to use discretion in deciding whether or not other information is to be withheld from the public and have to bear in mind “the principle of openness” when making these decisions. Additionally, they are bound by numerous other statutes which provide that other types of information must be published or made available on request, this information includes access to personal files, including information relating to social work and housing, access to financial accounts and access to environmental and planning information.

As there are already a large number of statutory mechanisms giving the public power to access information it is therefore not clear what additional information from local authorities will be available to the public. Further, it is unclear whether or not the proposed legislation is to supersede the existing legislation or to fill in any existing “gaps”. The ethos behind the existing legislation should be borne in mind when bringing in any new legislation, this is especially true when considering rules relating to exempt information and charging for the provision of information. Consideration should be given to consolidating the relevant legislation including access to personal files and data protection. It is not helpful for there to be a range of statutes which are not uniform in their requirements.

There does not appear to be any limit on how far back the information may be requested. Currently, 50C of the 1973 Act restricts that information relating to meetings, etc. should only be held for 6 years, practical difficulties may be had if a time limit is not imposed on rights of access to such information. Authorities may be unable to retain all their information for an indefinite period and storage practicalities would

have to be considered. Additionally, the suggested response time of 20 days may prove impossible to meet in relation to some requests for information.

In relation to the proposals that authorities will have a duty to publish information, it should be noted that there is already such a duty in place in relation to local authority information contained in section 88 of the Local Government (Scotland) Act 1973. This duty to publish relates to information regarding local government services, the functions of local government and also explanations and notifications on decisions of polices.

2 Costs and Charging

Proposed Comment: Current legislation offering rights of access, as contained in various statutes, already regulates fee charging with different provisions in place for different types of information. The impact of these new costs should be considered carefully prior to implementation as costs to local authorities for providing this service may be significant. The three proposed charging regimes do not take account of the considerable impact that may result by the introduction of these provisions. Consideration should be had to making a distinction between the genuine individual applicant, the vexatious applicant and the company who intends to use the information for commercial use and thus profit from it.

As currently proposed, there would be nothing to prevent a commercial organisation from requesting for example Property Enquiry Information on a continuous basis, and selling the end product at a profit. Thus local authorities would cease to provide such information directly to the public, and would effectively underwrite the costs of commercial enterprise selling on the information for private gain.

It is suggested there should be a minimum fee as in Data Protection legislation and for information in excess of the minimum recovery of the actual costs of retrieval of the information. Council tax payers should not be required to subsidise either private research or corporate profit.

3 Tests for Disclosure

Proposed Comment: There are three proposed categories for protected information namely, excluded, class-based exemption and content-based exemption. It is noted that even where information falls into a class or content based exemption it is proposed that local authorities will still be required to consider where there would be a public interest in disclosure.

In respect of sections 50 A-K of the 1973 Act and Schedule 7A there are already provisions covering exempt information and Local

authorities already have to bear in mind the principles of openness when exercising their discretion.

Unless the exemption in question is “discretionary” then exempt information should not have to be complicated by a further test for disclosure of whether there would be public interest in disclosing such information as that may prove difficult to put into practice.

The Executive have acknowledged that staged implementation may be required this would be advisable as this would allow authorities to assess the impact of such legislation.

The paper proposes that class based exemption shall include “internal discussion, advice, develop policy and make decisions” it is hoped that the matters in the paper should not only apply to central government but also to all public authorities.

The exemptions are to include “communications between ministers or confidential communications between departments, public bodies and regulatory bodies” it is not clear how “confidential” is to be interpreted and therefore guidance shall be required. Also, no justification is given for excluding all communications between ministers but only confidential communications between public authorities. In keeping with the stated commitment to openness it is considered that all communications in this category be treated in the same way and that communications between ministers should not be treated differently from those of elected members.

Proposed tests for disclosure in respect of the content-based exemptions suggest that a “harm test” be applied. It is considered that the proposed test of “whether disclosure would or would be likely to, substantially prejudice the matter set out in the exemption in question” is not wide enough. The concept of “harm” should also include any individuals who could suffer as a result of the disclosure. The implementation of the Human Rights Act 1998 offers rights of personal privacy and these will impact upon the legislation. It will be important to ensure that the right to access owed to one party does not impinge upon another party’s right to privacy. Currently, many requests by individuals are made which would require disclosure of information on other parties and clear guidelines must be drawn up to ensure that an authority can distinguish when persons have a right to such information.

4 Personal Information.

Proposed Comment: The Government’s Freedom of Information bill is to amend the new Data Protection Act in respect of information held on “unstructured files”. Currently the Data Protection Act does not provide for this type of information, this change will only have effect in England and Wales. The paper however, proposes that the Freedom of

Information Act will amend the law as it applies to Scotland and therefore, data protection in relation to unstructured files is to be contained in the new Freedom of Information legislation. It should be noted that the two Acts have different purposes. The Data Protection Act affords protection to individuals in relation to the use of personal information whereas the proposed Freedom of Information legislation is to provide openness and rights of access. Where parties are aggrieved in relation to data protection held on unstructured files rights of appeal may be markedly different to that of persons relying on the protection afforded to them under the Data Protection Act. This tension between the separate aims and objectives of Freedom of Information and Data Protection will be difficult to reconcile, and is likely to cause practical difficulties for Local Authorities and other bodies affected by the legislation. It would be preferable if the legal requirements were aligned within one enactment.

5 Reviews and Appeals

Proposed Comment: It will be important to have realistic guidelines that both local authorities and the public can understand. If access rights are not clearly defined then the potential exists for numerous decisions to be appealed and therefore an increase in challenges in decisions. It will be necessary to consider the costs of administering the appeals procedure. Where third party rights may have been breached for example in relation to Data Protection issues consideration will have to be had as to what, if any, rights these third persons are to have in terms of the appeals procedure.

The legislation should provide that all public authorities are entitled to ask for a ministerial certificate and this right should not be confined to the Scottish Executive.

AGENDA