



THE OFFICE OF THE

**Data Protection Registrar**

Formal response to the Freedom of  
Information Position Paper R.C.  
55/2004

January 2005



## **1. Introduction.**

On Tuesday 21<sup>st</sup> December 2004 the Privileges and Procedures Committee presented a Position Paper on Freedom of Information to the States. Members of the States and the public have been asked to comment on the report. The Paper itself sets out the Committees proposals for a Freedom of Information Law (FOIL) to replace the current Code of Practice. One of the reasons I have been specifically asked to comment is the proposal in the Paper to charge this department with responsibility of overseeing the Law and I am grateful for the opportunity for input at this early stage. My comments are limited to the issue of creating the role of Information Commissioner by combining data protection and freedom of information as well as the inevitable resource considerations for my department and staff. The desirability of such legislation in a political and social context, being a matter for the States, is not commented on.

## **2. Linkage between the two regimes**

Paragraph 12 of the Paper proposes that official monitoring and oversight of the FOIL should be the responsibility of the Data Protection Registrar thus creating the role of Information Commissioner.

Data protection and freedom of information are seen as complimentary rights (two sides of the same coin) in modern democratic societies. Both rights are aimed at limiting and checking the power of public and private controllers. If there is concurring data protection and freedom of information legislation in force much depends on the clear delineation and linkage between the two regimes. National experience illustrates the difficulties however these can be overcome if legislators adopt a uniform approach to information legislation. Even in jurisdictions with concurring data protection and freedom of information statutes a decision has to be made with regard to a uniform or partisan oversight mechanism. Whereas in the early days of information legislation much was said in favour of separate agencies overseeing data protection and access to information (confidence building by single-issue institutions?) recent experience points in the opposite direction. The UK Information Commissioner is but the latest example of a modern uniform approach to the implementation of information legislation.

FOIL in general terms is intended to help achieve the level of 'open government' which is craved at the highest of political levels. One of the ideas is that FOIL will be used as a tool with which public bodies will be forced to be more transparent about their day to day operations and functions. The



desired effect of this is to make such public bodies even more accountable for their actions – but this time, accountability is to be a primary feature of the relationship of the public body with members of the public and not just with other government departments. FOIL is, however, much more than that. Its aims overlap with Data Protection – both encourage, indeed compel, the free flow of information. Fundamentally, they both set out to protect the rights of individuals to know more information about themselves and the matters affecting their lives.

Both data protection and access to information are enshrined in the Charter of Fundamental Rights of the European Union. Neither prevails as a matter of principle, they have to be carefully balanced on a case-by-case basis. This task is, therefore, probably best performed by a single agency with a combined remit.

Therefore, whilst the Paper does not elaborate on the reasons for its conclusion that giving FOIL to the Data Protection Registrar is both logical and convenient, I concur with that view as I see the synergy of the two statutes as leading naturally to the responsibility for the policing and enforcement of these pieces of legislation resting with one regulatory body.

### **3. Oversight of Regulator**

I anticipate some concern may be expressed that by putting FOI with the Data Protection Registrar there would be a bias towards privacy protection. The goals of the proposed new Information Commissioner must be clear – to promote open, accountable government *and* encourage a privacy-friendly environment. Such arguably competing values may result in an inherent tension, so a certain amount of balancing will be required. Clearly any such tension and balance will be more problematic with a dual regime. Creating the role of single Commissioner will serve to promote consistency, certainty and reduce conflict. Due to the discretion and latitude which must by the very nature of the role be afforded to the Commissioner, ensuring that there is an objective review of decisions made will be essential. To that end I support the recommendation that an Information tribunal be set up (paragraph 13).

### **4. Resource Implications**

The Paper does not go into detail regarding the resource implications of implementing FOIL. I appreciate that this is due to the fact that it will be dependent on how far the States agree on going with the Law. Indeed, as the Paper mentions, it is difficult to predict the volume of work such a Law may



produce. The issue of resources is, needless to say, an important consideration for my department which is a small team currently functioning on a very limited budget. I would request that should the Law be progressed, a fully detailed review of possible implications be carried out.

We have, at the department, many years of experience of public sector departments and it is true to say that the standards of records management varies enormously. It is my view that once a department had a robust data protection regime, any moves towards a legal framework for FOI should not be overly problematic. Whilst there are many departments who are to be commended on their standards, there are also many that have a lot of work still to do to. Records management is one of the most important areas of any government body and requires commitment, knowledge and direction. The Paper cites Education as an example of a department that has come a long way in terms of its record management strategy. It is imperative that such experience is shared throughout States departments to help move towards an efficient and compliant environment with a minimum of resource implications. This does not detract from the importance also of recognising the culture change that will be required across the States. It will be important to change the mindset from compliance as a 'necessary evil' to a new and improved way of protecting data assets which will help to ensure operational efficiency as well as open, accountable government. When any organisation views records management as a strategic differentiator, streamlined productivity is an added benefit. The Committee should not underestimate the work required in this regard, but the rewards it has the potential to yield will be felt across government.

The public sector needs to prepare properly for a new FOI regime. Staff must be educated to handle information properly and in accordance with the Law and to have a positive approach to the public's right to know. This can only be achieved by comprehensive training in the rights and responsibilities that exist. As with the introduction of any new legislation, resource issues will need to be addressed. However, if we can continue to work actively towards a data protection compliant culture within government, we will be a long way towards a regime that will be able to cope with freedom of information.

## **5. Consultation**

Any FOI Law will clearly have an enormous impact on all public sector departments, but - something which can be overlooked - it can also have significant implications for private sector companies (for example if they contract with public authorities - a good example was cited in the Sunday Times of 02<sup>nd</sup> January; 'Harrods first to fall to data law'). It is important, therefore, to ensure that the private sector are fully aware of the proposals and are encouraged to comment.



## **6. Conclusion**

FOI has been a part of our life at the Data Protection Office for some time now, largely because people frequently (and wrongly) assume that we have responsibility for it (the Code of Practice) and call us for advice. We also liaise regularly with Information Commissioners in other jurisdictions and so are familiar with FOI issues elsewhere. FOI is not a new or unknown concept for us and for the reasons already stated, I consider it complimentary to Data Protection. Should the States decide that freedom of information legislation is desirable and is to be the responsibility of the Data Protection Registrar I am confident that both my department and I will rise to the challenge.

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06<sup>th</sup> January 2004



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