Britain's Freedom of Information Act — a charter for state secrecy

Jean Shaoul
3 July 1999

The introduction of “right to know” legislation was one of Prime Minister Tony Blair's key election promises. A Labour government would be open, accountable and transparent, he said. But the long-awaited draft Freedom of Information (FoI) Bill not only fails to fulfil this pledge, it is entirely retrogressive. The FoI bill strips the White Paper, published 18 months ago, of its few progressive features.

The new draft bill creates a right of access to records, including personal files, held by public bodies and some private bodies carrying out public functions or contracts, inside a 40-day period. But there is a long list of exemptions (22 to be precise). These include the secret services, international relations, law enforcement, internal policy advice—including background or factual documents prepared for central government, the privatised utilities, and the findings of health and safety investigations.

In addition, information can be kept secret when its release “would prejudice the effective conduct of public affairs”, a clause which replaces the “substantial harm” proviso in the original draft. This formulation is so vague that it will make it far easier for the authorities to argue against disclosure. Such a claim will not be subject to judicial review by the courts. The current code of good practice devised by the Tory government states that information that could remain secret should be placed in the public domain if there is a strong public interest argument for doing so. Thus the new bill undermines existing provisions.

The Freedom of Information Bill also means:

* The government will be free to invoke “commercial confidentiality” to preserve its secrets.

* Information whose disclosure is not itself harmful can be suppressed if, combined with any other confidential information, it would be “prejudicial”.

* Government may withhold information on the basis of the (assumed) motives for the request, or if it is too costly to provide it.

* Even when information is released, ministers may prohibit the recipient from publishing it. The bill also enables ministers to create new exemptions at short notice, by parliamentary order.

* An Information Commissioner, with no power to override government refusals to disclose, will supervise the public's “rights”.

Access to information from health and education services will be easier, and even actively encouraged. But in the context of government policies that are allowing such services to wither on the vine, this simply constitutes another means to legitimise the privatisation and/or closure of so-called “failing services”.

It will be impossible to obtain a copy of a health-and-safety report carried out after a fatal accident at work, even if the employer's safety practices were found to be negligent. Food inspection reports will not be placed in the public domain, neither will the evidence submitted to government advisory committees that formulate policy on such matters as genetically modified foods. Corporations lobbied the government and won the right to keep virtually all commercial information out of the public domain.

The US introduced a statutory right to access information in 1966, and most western countries followed suit in the 1970s and early 1980s. Britain has lagged far behind the rest of the world. In Australia, most applications have been to see personal files. It has been difficult, if not downright impossible, to access other information, as successive governments have used their ministerial certificates and delaying tactics to

block access.

In the US, 50-60 percent of requests are from companies seeking information about their competitors. FoI legislation has spawned a huge private industry in government information. Companies have been set up which specialise in selling information or asking for data on behalf of companies or individuals who do not want to ask for it publicly themselves.

However, the 1966 law did not give companies advance notice of the release of information or the right to object. Major corporations fought and won a series of high-profile court cases, and the government amended the legislation to provide corporations with "reverse FoI rights". This is a vital weapon for corporations in strengthening their hand against consumers and downsizing government. British corporations are already complaining that such "reverse FoI" provisions are absent from the UK bill.

Most commentators have put the British Bill's lack of progressive content down to government "obsession" with secrecy. But the government is not only shielding its own activities, it is also shielding the activities of big business.

Not surprisingly, the bill says not one word about the panoply of legislation, conventions and codes that prevent the publication of government documents, and which make Britain the most secretive of all the "democratic" countries. It leaves intact more than 100 statutes that make disclosure of information a criminal offence.

At the heart of government secrecy lies Section 2 of the Official Secrets Act. The original Act, rushed through parliament in 40 minutes at the height of the Agadir crisis in 1911, when war with Germany loomed, gave blanket protection for every single piece of information inside Whitehall. It was only after a string of high profile cases in the 1970s and 1980s, and the prospect of a likely successful challenge before the European Commission of Human Rights by civil rights campaigners, that Section 2 was replaced. The new legislation, introduced in 1989, is slightly less restrictive, but correspondingly, more enforceable.

Press freedom is bound by the gagging system of "D notices", the 1934 Incitement to Disaffection Act, contempt of court, Crown privilege and even, on occasion, the law of confidence which was originally designed for trade secrets. Deprived of independent right of access to information about public affairs, under the "lobby system" journalists are only provided information in the form of unattributable briefings by ministers and their spokesmen. It is an ideal system for spreading disinformation, flying government kites, rubbishing political opponents and, most of all, burying the truth.

It is simply not possible in Britain to call up officials who know the facts and ask about them without getting special clearance. Every ministerial department has a public relations office that relates nothing more than what is contained in the day's press releases, and these are often inaccurate.

Government papers automatically stay sealed for 30 years, and some "sensitive" papers are closed even longer—for up to 100 years. Documents considered too sensitive to ever see the public light of day (for example, those concerning the abdication of Edward VIII in 1936) stay closed *forever*, as do all post-war documents mentioning the activities of MI5 and MI6. Some documents are known to be withdrawn from public records offices soon after release.

Increased restrictions on the public's right to know go hand in hand with the dismantling of the welfare state, increased police budgets and powers, oppressive immigration and asylum laws, and other incursions against civil liberties. The new bill will strengthen the British establishment's ability to operate in secrecy from its own citizens.