

MEMORANDUM OF UNDERSTANDING ON CO-OPERATION BETWEEN GOVERNMENT DEPARTMENTS AND THE PARLIAMENTARY COMMISSIONER FOR ADMINISTRATION ON THE CODE OF PRACTICE ON ACCESS TO GOVERNMENT INFORMATION

1. This note sets out the understanding between the Government and the Parliamentary Commissioner for Administration (the Ombudsman) on the operation of the *Code of Practice on Access to Government Information* and co-operation between the Ombudsman and Government departments in relation to investigations relating to the disclosure of information under the Code.

The Code

2. The Code, which is non-statutory (which can be found at www.lcd.gov.uk/foi/ogcode981.htm), sets out the Government's policy on handling requests for official information. The Code, which applies to all bodies within the Ombudsman's jurisdiction, will remain in place and form the basis of the Government's policy on the disclosure of information until the right of access provisions of the Freedom of Information Act 2000 come into force on 1 January 2005.

Compliance with the Code

3. All requests for information received by Government departments should be decided in accordance with relevant statute and the Code and dealt with within 20 working days for simple requests or longer when significant search or collation of material is required. All information requests should be handled in accordance with the Code's requirements even if there is no reference to the Code in the request. If information is withheld, the department should specify which exemption of the Code applies: the Ombudsman will criticise departments that fail to cite an exemption. If the information is not held, the department should say so: there is no requirement under the Code for a department to obtain information it does not possess. There should be a presumption that any of the requested information should be provided. In those categories which refer to harm or prejudice, the presumption remains that information should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in making the information available. In order to be as helpful as possible, rather than refuse a request outright, it may be possible in some cases for departments to provide some of the information requested, perhaps in a redacted form, rather than nothing at all. The Code also has provisions for charging. In refusing information, applicants should be advised of their right to seek an internal review of the decision. The Code only gives a right (subject to exemption) to information, not documents.

Internal review

4. If an applicant seeks an internal review of a decision, the outcome of the review must be communicated to the applicant as soon as possible. The expectation is that the review would not be undertaken by the original decision-maker. If the outcome of the review is that the information, or part of it, should not be disclosed, the applicant must be informed

of his or her right to be able to ask a Member of Parliament to refer the case to the Ombudsman.

The role of the Ombudsman

5. The Ombudsman's Office was set up under the provisions of the Parliamentary Commissioner Act 1967 (the Act) to investigate maladministration in central government. The role of the Ombudsman in considering complaints under the Code was set out in the White Paper "Open Government" published in July 1993. The Government's expectation is that the Ombudsman's right of access to information and documents under the Act will apply to investigations carried out in relation to complaints under the Code.

Investigations

6. In general, all information relevant to an investigation is disclosable to the Ombudsman, including the information to which access is sought (even if it is covered by a Code exemption). It is also for the Ombudsman to decide what constitutes relevant information. However, section 8(4) of the 1967 Act allows departments to withhold from the Ombudsman Cabinet or Cabinet Committee papers or papers relating to the proceedings of the Cabinet or Cabinet Committees. For this to be done, the Act requires the production of a certificate, signed by the Secretary of the Cabinet and approved by the Prime Minister.

7. In addition a Minister of the Crown may, under section 11(3) of the 1967 Act, give notice to the Ombudsman that, in respect of any document or information referred to in such a notice, the disclosure of that document or information would be prejudicial to the safety of the State or otherwise contrary to the public interest. In practice, recourse to these sections of the Act is expected to be very rare.

8. It should be emphasised that disclosing information to the Ombudsman is not the same as disclosing information to the applicant. While the Ombudsman may recommend in her report that the specified information should have been disclosed to the applicant, the decision on whether or not to disclose the information rests with the department: the information is never disclosed in the report itself.

Procedures

9. The Ombudsman's preference is to resolve cases informally if at all possible. If, however, the Ombudsman decides to investigate a complaint made to her, the Department will receive a "statement of complaint" setting out what it is the Ombudsman is investigating and seeking disclosure of relevant papers and views about the complaint. The Ombudsman will expect departments to respond in full within **three weeks** of receipt of the statement of complaint. If, exceptionally, a department anticipates that it will have difficulty in replying by the date set by the Ombudsman, it is essential to enter into a dialogue with the investigating officer at the Ombudsman's office as soon as possible.

10. When the investigation has been completed the Ombudsman will send a draft report to the department in question for comment. Departments will be given **three weeks** to reply. Departments should not, **at this stage**, cite new exemptions. As with the statement of complaint, the investigating officer at the Ombudsman's office should be contacted as soon as possible in the event of any anticipated delay in responding to the draft report.

11. The Government undertakes to provide the Ombudsman with all relevant papers as quickly as possible, including papers that would not normally be released under Code exemptions such as those relating to internal advice to Ministers and internal consultation. The Ombudsman may use the background information supplied to her in her report. That said, the Ombudsman will only identify officials or disclose information which would otherwise be exempt under the Code (such as internal advice or consultation) to the extent that it is necessary to do so to make sense of the investigations or conclusions. If departments consider that the draft report contains too much detail about internal procedures, or where they consider the report contains factual errors, they should raise this with the investigating officer. The Ombudsman is independent of Government and the final decision as to what to publish is hers, but she will give careful consideration to concerns raised about draft reports or findings. A copy of the Ombudsman's final report is sent to the referring Member of Parliament and to the department complained against.

Further information

12. Any questions on the guidance should be referred in the first place to departmental openness officers (Mr Ian Cooke, Office of the Rail Regulator, tel. 020 7282 2002) or the Information Rights Division in the Department for Constitutional Affairs on tel. 020 7210 8755. The unit in the Ombudsman's office that investigates Code complaints can be contacted on 020 7217 4085. The Ombudsman can only, however, give general advice and cannot advise on how a particular information request should be handled. All the Ombudsman's Code investigations are published in full, usually twice a year. They can be obtained in hard copy from The Stationery Office or via the Ombudsman's website (www.ombudsman.org.uk).

CABINET OFFICE
Propriety and Ethics team
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