The Committee will meet at 9.45am in Committee Room 4.

1. **Freedom of Information (Scotland) Bill (in private):** The Committee will consider its final draft report at Stage 1 of the Bill.

Lynn Tullis
Clerk to the Committee, Tel 85246

The following papers are attached for this meeting:

**Agenda item 1:**
Draft Stage 1 report on the Freedom of Information (Scotland) Bill (private paper) J1/02/1/1
Correspondence from the Lord Advocate regarding the Freedom of Information (Scotland) Bill J1/02/1/2
Correspondence from the Scottish Executive regarding the Freedom of Information (Scotland) Bill J1/02/1/3
Correspondence from the Campaign for Freedom of Information in Scotland regarding the Freedom of Information (Scotland) Bill J1/02/1/4
Papers not circulated:

Agenda item 1:
Members may wish to consult the Freedom of Information (Scotland) Bill available from document supply or on the Scottish Parliament web-site at the following address: http://www.scottish.parliament.uk/parl_bus/legis.html#36

Papers for information circulated for the 1st meeting, 2002

Minutes of 35th meeting, 2001  J1/01/35/M
Christine Grahame MSP  
Convener  
Justice 1 Committee  
Room 3.11  
Committee Chambers  
EDINBURGH

12 December 2001

Dear Convener,

FREEDOM OF INFORMATION (SCOTLAND) BILL.

Thank you for your letter of 6 December. As requested by the Committee, I enclose a copy of my opening statement. I am sorry that I was not able to meet yesterday's deadline. It is a pity that these important issues have to be dealt with in such a short timescale, and I share your concern on this point.

In your letter you asked me to provide the Committee with examples of when a decision taken by the Lord Advocate or a Procurator Fiscal would fall within the terms of section 48 of the Bill. Perhaps I should start by commenting on why there is such a provision in the Bill.

The basis and justification of preserving the independence of the Lord Advocate in connection with the discharge of the functions as public prosecutor was discussed during the passage of the Scotland Bill. Section 48(5) of the Scotland Act provides:

"Any decision taken by the Lord Advocate in his capacity as the head of the systems of criminal prosecution and investigation of deaths in Scotland shall continue to be taken by him independently of any other person."

The inclusion of the reference to "systems of criminal prosecution and investigations of deaths" illustrates that the provision is not restricted to the decision of the Lord Advocate in any particular case. It is intended to encompass any decision of the Lord Advocate as head of the prosecution system whether it relates to issues of an operational, policy or administrative nature.

Section 48 of the Freedom of Information (Scotland) Bill provides that no application may be made/
made to the Commissioner for a decision under Section 47(1) as respects a request for review made to

(a) the Commissioner;

(b) a Procurator Fiscal; or

(c) the Lord Advocate, to the extent that the information requested is held by the Lord Advocate as head of the systems of criminal prosecution and investigation of deaths in Scotland.

The Lord Advocate’s role as public prosecutor gives me wide discretionary powers under both common law and statute. In that capacity I am empowered

(a) To instruct Chief Constables with regard to reporting of offences so that consideration can be given to the question of prosecution.

(b) To instruct Chief Constables with regard to the investigation of offences.

(c) To investigate serious and complex frauds.

(d) To determine whether or not a public prosecution should be brought and, if so, except where a statute has determined this, whether the offence should be prosecuted summarily or on indictment.

(e) To determine the conduct of any prosecution.

(f) To determine whether or not to concur in any private prosecution.

(g) To contribute to the development of criminal law by bringing issues appropriate to its development before the courts.

(h) To appeal against unduly lenient sentences.

In relation to the investigation of deaths, the functions of the Lord Advocate and the Procurator Fiscal, acting on his behalf are under the common law and in terms of the Fatal Accident and Sudden Deaths Enquiries Act 1976 (c.14) in connection with the investigation of deaths occurring in Scotland and the holding of public enquiries into such deaths.
Section 48 of the Bill would be applicable when I, or those acting on my behalf, had taken a decision that it was in the public interest to withhold certain information held by this Department for one of the functions listed above. At that stage it would not be open to the Commissioner to review such a decision.

When considering whether to release material under the freedom of information regime there has to be a balance between the disclosure of information and the proper protection of sensitive information. In terms of section 34 of the Bill (Investigations by public authorities) which affords a class exemption, I am obliged under section 2(1)(b) to consider whether in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption. In other words the exemption is not absolute and this balancing exercise must be carried out in each case where there is a request for the release of information.

Similarly that same exercise must be carried out if the request for information covers material that would fall into the "law enforcement" exemption under section 35 of the Bill. However under that particular section I must also consider whether the provision of the information would substantially prejudice one of the purposes specified in that section.

In relation to Mr. Matheson's question regarding information held for the purposes of a Fatal Accident Inquiry under the 1976 Act, the material likely to be held will consist of information ingathered by the relevant Procurator Fiscal in the course of preparation for the inquiry. This will include information from civilian, expert and police witnesses, reports, photographs, sketches etc. This list is not exhaustive.

As stated above, although a class exemption applies it is not absolute and there is still an obligation to consider whether there is a public interest in favour of disclosure rather than in maintaining the exemption.

I trust that this answers your points please advise me if there is any other matter that you wish me to clarify.

Sincerely,

[Signature]

[Colin D Boyd]
[approved by the Lord Advocate and signed in his absence]

029/dec
FREEDOM OF INFORMATION (SCOTLAND) BILL
DRAFT STATEMENT FOR JUSTICE 1 COMMITTEE
5December 2001

Convener, and members of the committee, I am grateful to you for your invitation to give
evidence on the Freedom of Information Bill and more particularly how I perceive that it
will impact on the functions of Crown Office and the Procurator Fiscal Service.

As a Scottish public authority we recognise the need for an effective statutory freedom of
information regime and the right of the public under that regime to access information
held by such authorities.

Crown Office and Procurator Fiscal Service will have a statutory duty to comply with the
provisions of Freedom of Information legislation. This includes complying with positive
obligations imposed on public authorities including the requirement to publish certain
information, to respond to requests within particular time periods and to comply with any
codes of practice issued by the Scottish Information Commissioner. It is only in relation
to the matters that fall within Section 48(5) of the Scotland Act that the Scottish
Information Commission is excluded from reviewing any decision of the Lord Advocate.

In relation to decisions made in response to a request under Freedom of Information
legislation, I as Lord Advocate am obliged in all cases to consider whether the public
interest in maintaining the exemption outweighs the public interest in disclosing
information. Further to invoke the exemption provided by Section 35 (law enforcement)
there is a requirement to satisfy the harm test of substantial prejudice in relation to any of
the purposes specified.

I am aware that there has been a great deal of discussion regarding the exemptions
currently afforded in terms of the Bill and how they might be invoked by the Prosecution
authorities and I would like to take this opportunity to comment upon them.
Section 34

Insofar as Crown Office and the Procurator Fiscal Service is concerned, this exemption will encompass all investigations made for the purpose of submitting a report to the Procurator Fiscal and investigations carried out or instructed on behalf of the Procurator Fiscal.

From a law enforcement perspective the retention of a class-based exemption in perpetuity is essential for an effective criminal justice system. There are a number of reasons for this and I propose to highlight some of them:

☐ Information provided by witnesses or victims is for the purposes of a criminal investigation and possible proceedings. Subsequent disclosure for another purpose would undermine public confidence in the criminal justice system. Witnesses and people under investigation should not be inhibited from co-operating in criminal investigations by the possibility that information provided may be disclosed and that their identity is revealed to the public outwith the protection of the court.

☐ The possibility of disclosure would undermine the informant system, and with so much serious crime being detected via confidential information and undercover sources, these intelligence sources must be protected.

☐ There is a need for uniformity and consistency in order to maintain cross border co-operation in relation to the investigation and prosecution of crime. Many of the law enforcement agencies that submit reports to the PF are subject to the FOI Act 2000:
  • HM Customs
  • Health and Safety Executive
  • Benefits Agency

The UK Act provides a general class exemption to last in perpetuity. Such an exemption requires to be compatible between the two jurisdictions to avoid operational difficulties for such agencies and to provide certainty and consistency.
Disclosure of any aspect of a criminal investigation may prejudice or bar future criminal procedure.

Victims of crime
Freedom of Information legislation provides a general right to any person to seek information and does not therefore restrict access to persons with a legitimate interest.

I recognise that victims and witnesses have a right to be given information about criminal proceedings and Crown Office and the Procurator Fiscal Service is committed to providing information to victims and witnesses about the progress of a case in response to individual requests. The recently established Victim Liaison Office will provide victims and witnesses with case progress information and general information regarding the criminal justice system.

Provision of reasons for decisions not to initiate (or to discontinue) proceedings
The long standing policy of the Crown not to provide reasons is based upon the fact that statements and reports are confidential. Crown Office and the Procurator Fiscal Service is however sympathetic to victims who may wish more information for reasons for decisions taken by the Crown and there may be situations where information can be made available, in private, to victims of crime. Disclosure in these circumstances will be assessed on a case by case basis.

For example, what if a girl under the age of 16 made an allegation of rape, but the Crown subsequently discontinued proceedings because she withdrew the allegation but also asked that this was not disclosed to her parents. The Crown would be bound by such a decision and there would be a duty of confidentiality to the complainer.

It is difficult to legislate in advance but the Crown must also consider the protection of individuals.
Section 34(2)(a) - Exemption for FAI until the conclusion of the proceedings

The purpose and role of the Fatal Accident Inquiry would be seriously undermined if information obtained and generated for the purposes of such inquiry was not covered by a class based exemption. The holding of a Fatal Accident Inquiry does not preclude criminal proceedings and an exemption of this nature is necessary to avoid any possible prejudice to a criminal trial.

Section 34(2)(b) - Exemption for investigation to ascertain the cause of death of a person

The right of the family and relatives to maintain privacy in relation to information of a personal and medical nature of deceased persons is considered to outweigh any public interest.

A class exemption is required to protect the Article 8 rights of relatives and the family of deceased persons. Information concerning the circumstances of the death including copies of post mortem reports will be provided to those with a legitimate interest including relatives and medical practitioners.

Section 48

I am aware that there are criticisms of the following:

- The scope and extent of the exclusion.

- Lack of accountability of the Lord Advocate.

- The exclusion is “out of line” with UK Law Officers.

There are legal, constitutional and policy reasons underpinning the need for such a provision.
Constitutional position

☐ In terms of the Scotland Act 1998, the Lord Advocate in his capacity as head of the Systems of Criminal Prosecution and investigation of deaths in Scotland is to take any decision independently of any other person.

☐ In terms of section 27(3) of the Scotland Act 1998 in any proceedings of Parliament, the Law Officers may decline to answer any question or produce any document relating to the operation of the system of criminal prosecutions, in any particular case, if answering the question or producing the documents might prejudice criminal proceedings or would otherwise be contrary to the public interest.

☐ The fact that Parliament is itself precluded from questioning the Lord Advocate or requiring the production of any document in the circumstances provided by Section 27(3) acknowledges that it is inappropriate for any person or any body to intervene or interfere with the independent exercise of the Lord Advocate’s discretion in relation to his prosecution functions. It is clear that the intention of the Scotland Act was that final decisions for such matters should rest solely with the Lord Advocate.

UK Position

Section 30 of the Freedom of Information Act 2000 provides a general exemption for investigation and proceedings conducted by public authorities in similar terms to that proposed in the Scottish legislation.

Section 31 provides an exemption if disclosure would be likely to prejudice various aspects of law enforcement as specified in Section 31(1) and (2). This is a lower threshold than is applicable in Scotland where the Law Officers would require satisfy a harm test of substantial prejudice before relying on the exemption.

In terms of Section 53(2) of the Freedom of Information Act 2000, any decision, notice or enforcement notice issued by the Commissioner shall cease to have effect if an accountable person provides the Commissioner with a Certificate signed by him stating
that he has on reasonable grounds formed the opinion that in respect of the request or requests concerned, there was no failure to comply with the general requirement to provide information.

An accountable person includes the Attorney General and the Advocate General for Scotland. Thus in any dispute between the Commissioner and the Attorney General as to whether disclosure would be in the public interest, the Attorney General may invoke the procedure outlined in Section 53 to exempt himself from complying with the decision or notice or enforcement notice. Accordingly, in relation to both Scottish and UK Law Officers, there is provision to ensure that independence in relation to prosecutorial functions is maintained.
At the 29th session of the Justice 1 Committee on Tuesday 30 October, Executive officials gave evidence at Stage 1 on the Freedom of Information (Scotland) Bill. Members indicated that they would find it helpful to be provided with examples of the use of Ministerial certificates in other Freedom of Information regimes and we agreed to try and assist in this regard. I sent you a holding reply on 30 November.

It might be helpful if I begin by summarising the approach in the Bill to Ministerial certificates. Section 52 provides for the circumstances when a certificate could be issued to make void a decision notice or enforcement notice issued by the Scottish Information Commissioner requiring the disclosure of exempt information. Section 52 applies to 6 (of 17) exemption categories (as specified in that section). If such a certificate is not issued within 30 working days of the giving of the Commissioner’s notice, the notice would have effect. The Executive’s policy is that a decision to issue a certificate overriding a Commissioner’s notice should be taken by collective decision of the Scottish Ministers. The approach to confer on the First Minister the function of signing a certificate – after consulting the other Members of the Executive – delivers this policy insofar as it is possible to do within the terms of the Scotland Act (Section 52). After issuing a certificate to the Commissioner, the First Minister would be required to lay a copy before the Parliament and, in relation to a decision notice, advise the applicant making the request for information (to which the Commissioner’s notice relates) of the reasons for the First Minister deciding to issue the certificate.

I would direct Members to the Policy Memorandum which accompanied the Bill (paragraphs 129 – 131) for further commentary on section 52. As is the case generally with Ministers’ decisions, the First Minister’s decision to issue a certificate could, of course, be subject to judicial review.
To complete the picture, I would refer to the national security element of the exemption at section 31, where provision is made for a certificate to be issued by a member of the Scottish Executive certifying conclusively that exemption is required for the purpose of safeguarding national security. It is the Executive’s policy to provide for appeals against a section 31 certificate to be considered by the special national security panel of the Information Tribunal (as established by the UK Freedom of Information Act 2000). This would deliver common appeal arrangements for national security material, as found in Section 60 of the UK Freedom of Information Act 2000. It is intended to deliver this aspect of policy by means of an order under Section 104 of the Scotland Act 1998 (paragraphs 77-79 of the Policy Memorandum refer).

In relation to overseas experience of Ministerial ‘override’ or ‘veto’ certificates, the attached Annex provides information on the arrangements in Ireland, New Zealand, Australia and Canada. I apologise for the time it has taken to obtain this information. Our colleagues in New Zealand in particular have experienced difficulty tracking down details about the use of certificates in New Zealand between 1982 and 1987 (simply because of the passage of time and movement of personnel). The equivalent ‘conclusive certificate’ under the Australian FOI Act appears to have been used more frequently than in New Zealand (though less so recently), although our colleagues in Australia have not provided the total number of certificates issued. It will be noted that in Australia such ‘conclusive certificates’ are issued by individual Ministers.

I hope this is helpful.

Yours sincerely

KEITH CONNAL
Head, Freedom of Information Unit
MINISTERIAL CERTIFICATES IN OVERSEAS REGIMES

Ireland

The Irish Freedom of Information Act came into effect in April 1998. The Irish legislation provides for an Information Commissioner with powers to order disclosure of information, but for certificates to be issued by individual Ministers precluding consideration of an appeal by the Commissioner. Such certificates can be exercised only in relation to a limited number of exempted categories of information and, as they can be issued by Ministers individually, must be reviewed by the Taoiseach and two other specified Ministers after 6 months (and before 12 months).

There have been 3 Ministerial certificates issued to-date, each signed by the Minister for Justice. Two of these were reported in the Information Commissioner’s Annual Report for 2000 (Chapter 2 and Appendix 2 of the Report) and the third was signed in the past few months.

The first certificate concerned an FOI request for records relating to a joint Department of Justice / Garda Siochana Implementation Strategy Group which was looking at the question of enhanced cooperation between the Garda Siochana and the police authorities in Northern Ireland (in the context of the Patten Report on policing in Northern Ireland). The second concerned a request for records related to a review for a continuing need for the Special Criminal Court. The third concerned records relating to telephone intercepts.

New Zealand

The Official Information Act was introduced in 1982. The Act included provisions on Ministerial certificates, exercisable by Ministers individually. In a revision to the Act in 1987 the use of such certificates was limited to a collective decision of the New Zealand Government. The Official Information Act is overseen by the Parliamentary Ombudsman, who has power to recommend that information should be disclosed. In general, Ombudsman recommendations are accepted and a decision to reject the Ombudsman’s recommendation needs to be made by an Order in Council.

We have been advised that prior to 1987 Ministers individually issued 14 certificates. Examples provided to us of the type of information withheld include unemployment forecasts, tender prices, information about a geothermal field, printout of the electoral roll and notes of discussions relating to a district rural water supply scheme. Reasons given for the information being withheld included protection of the political neutrality of officials, confidentiality of advice tendered to Ministers, maintenance of the effective conduct of public affairs, protection of free and frank expression of opinions and advice, information supplied in confidence and protection of information about commercial activities of Ministers.

Since 1987, when the Act was amended to require a collective decision, no certificates have been issued.
**Australia**

The Freedom of Information Act 1982 (which operates at a federal level) contains provisions for ‘conclusive certificates’ to be issued by individual Ministers for a range of exemptions, including: national security, defence and international relations; relations with states; Cabinet documents; Executive Council documents; and internal working documents (where to withhold information is in the public interest).

Examples provided to us of the type of information for which certificates have been issued include:

- Treasury estimates of budget receipts for future years;
- briefings to a Minister on an ongoing investigation into alleged conspiracy to defraud the Government;
- advice to a Minister on proposed policy for World Heritage listing of certain land;
- advice to and deliberations of the Foreign Investments Review Board (FIRB); proposals for changes to Government's foreign investment policy; FIRB deliberations on a proposed take-over by a foreign corporation;
- economic forecasts and projections of government revenue and expenditure;
- submissions to and deliberations of Cabinet e.g.; policy options for dealing with politically motivated violence; replacement and location of nuclear reactor; proposals for waterfront reform; and
- documents containing negotiations between Ministers concerning an application for a tax exempt status for a medical practitioner’s representative body.

The Act has been reviewed recently but we understand that any amendments made in 2002 will not affect the exemption provisions or the provision for ‘conclusive certificates’.

**Canada**

The Access to Information Act 1982 (which operates at a federal level) is overseen by an Ombudsman, who can make recommendations about disclosure of information. As such recommendations can be rejected, the Act has no provision for Ministerial certificates.

(We understand that the Canadian Government has introduced a Bill to deal with the threat of terrorism, and that this Bill will allow certificates to be issued prohibiting the disclosure of information required to protect international relations, national defence or security. The new Bill will provide that the Access to Information Act would not apply to such information).
The Veto

FOI laws, such as those in the USA, Canada and South Africa have no veto provisions. They are enforced by the courts whose decisions cannot be overridden by ministers. However, a ministerial veto does exist in Australia, New Zealand and Ireland. This paper describes the use of the veto in those jurisdictions.

Australia

The Commonwealth Freedom of Information Act 1982 provides a ministerial veto in relation to the exemptions for:

- security, defence and international relations (s. 33)
- relations between the Commonwealth and the States (s. 33A)
- Cabinet documents (s. 34)
- Executive Council documents (s. 35)
- Internal working documents (s. 36)

These exemptions can be used either with or without a veto. If a veto is used, it prevents the appeals tribunal from reviewing the exemption claim on its merits.

The veto was frequently used particularly in the Act's early years, often for internal

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1 Canada combines an Information Commissioner, who can only recommend disclosure, with a second layer of appeal to the federal court.
2 There is no Information Commissioner under the Australian Commonwealth Act. Complaints go either to the Ombudsman, who has no powers to compel disclosure, or to the Administrative Appeals Tribunal.
working documents. In the second year of the Act’s operation, there were 20 vetoes, 14 based on the internal working documents exemption. In the following two years the veto was exercised 28 times. The Treasury alone was responsible for some 40% of all vetoes during this period.

Information whose disclosure was vetoed included:

- Information about the expected costs to the private sector of a proposed national identity card.
- Documents relating to the Australian Bicentennial Authority.
- Information about the projected size of Government revenue and expenditure.
- Cabinet documents relating to an alleged social security benefits conspiracy.
- A submission to the Cabinet about a review of the effectiveness of certain Aboriginal health programs.
- Internal working documents about the transfer of taxation administration policy from one minister to another.
- Internal working documents about the establishment of a government working party on superannuation.
- Government decisions to increase the excise on spirits in the 1978-79 budget (i.e., some years before the 1982 FOI Act came into force).

Where a certificate has been issued, the Administrative Appeals Tribunal is limited to considering the narrow question of whether there were reasonable grounds for

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3 The internal working documents exemption applies to opinion, advice, recommendations, consultations or deliberations relating to an agency’s deliberative processes, whose disclosure would be contrary to the public interest. Factual information and scientific or technical reports cannot be withheld under the exemption. [Freedom of Information Act 1982 [Australia], section 36]
the certificate. If it finds none, the minister must reconsider the decision – but is free to confirm the original veto.

The tribunal has explained:

‘To be “reasonable” it is requisite only that they be not fanciful, imaginary or contrived, rather that they be reasonable; that is to say based on reason, namely agreeable to reason, not irrational, absurd or ridiculous...It follows that it is a heavy thing for the Tribunal to reject a certified claim....’

Where a certificate is issued in relation to the internal working documents exemption, where the test is whether disclosure would be “contrary to the public interest”:

“I am not to consider whether the public interest considerations in favour of disclosure outweigh public interest considerations in favour of non disclosure. I am not to consider whether, in issuing the certificate, the Minister displayed an undue level of sensitivity. I am only concerned, as I have said, to establish whether there exist reasonable grounds for the claims.”

This is relevant to the Freedom of Information (Scotland) Bill, where a government veto is available for the policy formulation exemption (amongst others) which is also based on a public interest test. The veto could be judicially reviewed, but only on similarly restrictive grounds.

The conclusive certificate provisions have always been contentious. The Parliamentary committee which considered the Freedom of Information Bill in 1978 concluded:

“There is no justification for such a system tailored to the convenience of ministers and senior officers in a Freedom of Information Bill that purports to be enacted for the benefit of, and to confer rights of access upon, members of the public. This can only confirm the opinion of some critics that the bill is dedicated to preserving the doctrine of executive

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8 Deputy President of the Administrative Appeals Tribunal, B J McMahan, 25/7/94, in the case of Gary Charles Corr v Department of the Prime Minister and Cabinet, No A93/140 AAT No 9655.

9 Section 29(1)
autocracy."\textsuperscript{10}
In 1994 two officials from the Attorney General’s department, writing in a personal capacity, concluded:

“The provisions for conclusive certificates are now anachronisms with little if any relevance to the contemporary world of FOI decisions. Time has proven that the substantive exemption provisions, without the added strength of certificates, are in fact more than adequate to the task of the exemption of genuinely sensitive documents.

To some extent, the certificate provisions are a hangover from the days before FOI, when the feared impact of the legislation was clearly exaggerated. With reference to the FOI maturity gained by 1994, rather than the FOI terrors apprehended in 1982, we may conclude that the certificate provisions have outlived whatever usefulness they may once have had. The provisions should be removed from the Act, enabling the AAT to reach a determinative decision on the merits of the exempt status of documents.”

The Australian Law Reform Commission concluded in 1995 that:

“It is inappropriate that a Minister is able to issue a conclusive certificate in respect of deliberative process documents. Decisions to withhold documents revealing deliberative processes, which are in the majority of cases the decisions of officials, should always be reviewable.”

New Zealand

A veto under New Zealand’s Official Information Act 1982 can be exercised in relation to all classes of exempt information. When the legislation was introduced, the then Minister of Justice suggested that:

‘it would be a very brave Minister indeed who resorted to this device save in the most exceptional circumstances’.

As in Australia, the veto was used several times in the Act’s first few months. After the Act’s first four years, the Ombudsman (who is the enforcement body) had
made 92 formal recommendations, 14 of which had been vetoed.\textsuperscript{14}

Vetoed information included:

- the successful tender price of wall plugs
- labour market forecasts
- estimates of unregistered unemployed
- an evaluation on the use of computers in schools
- evaluation reports and a contract relating to a Post Office switching tender
- a proposal to establish an investment bank as part of the Development Finance Corporation\textsuperscript{15}

According to a leading commentary on the New Zealand Act, the initial experience:

‘showed that public criticism of the responsible Minister by the Opposition was easily stigmatized as political point scoring, and, in any event, easily weathered. In truth, members of Parliament do not ordinarily cross the floor on such issues nor, as the Danks Committee [whose report led to the Act] thought, are incidents of non-disclosure by veto punished by the electorate at the next election.’\textsuperscript{16}

Most vetoes during the early years were issued during the National Government administration. Although technically exercised by an individual minister, in fact these vetoes were all notified to the Cabinet first.\textsuperscript{17}

The Labour government which came to power in 1984 was committed to removing the veto. However, the change was strongly resisted by the Chief Ombudsman, who argued that to allow the Ombudsman to overrule ministers would fundamentally undermine the nature of his office.\textsuperscript{18} As a result, the veto was retained but the procedures for its use were tightened up. Amendments introduced
in 1987 require that:

- the veto can only be exercised by the Governor General by Order in Council – which in effect requires the decision to be taken by the cabinet collectively;¹⁹
- the veto cannot be exercised on grounds not raised at the time of the Ombudsman’s investigation;²⁰
- the veto and reasons for it must be published in the Gazette;²¹
- the veto can be reviewed by the High Court on the grounds that the government exceeded its powers was otherwise wrong in law;²²
- the applicant’s costs in bringing a High Court review, be paid for by the Crown, regardless of whether or not the challenge is successful.²³

Since these changes, the veto has not been used.

Ireland

Ireland’s Freedom of Information Act 1997 contains a veto for exemptions for law enforcement, confidential informants, security, defence, international relations or matters relating to Northern Ireland.²⁴

Other exemptions, such as that for policy advice, are not subject to any veto. The Information Commissioner’s decisions in these areas is final, subject to appeal to the High Court on a point of law.²⁵

To exercise the veto, a cabinet minister issues a certificate stating that he satisfied that:

- the information is exempt under one of the specified exemptions, most of which contain harm tests, and
- the record is “of sufficient sensitivity or seriousness to justify” a veto.²⁶
A certificate must be reviewed by the Taoiseach (prime minister) jointly with prescribed other ministers no later than every 6-12 months.

The certificate can be reviewed by the High Court on a point of law.\textsuperscript{27}

The High Court can order the public body to pay the costs of an unsuccessful applicant if it considers that the point of law was of ‘exceptional public importance’ or in other circumstances.\textsuperscript{28}

Only two certificates have been issued since the Act came into force, both by the Minister for Justice, Equality and Law Reform during 2000. The first certified that information was covered by exemption relating to Northern Ireland and international relations, the other was issued on grounds of the security of the state.\textsuperscript{29}

**Conclusion**

Both the Australian and New Zealand governments made significant use of the veto, particularly in the early years. On the face of it, the vetoed documents were not exceptionally sensitive. The veto has been rarely used in Ireland, though this may partly be explained by the fact that its use is restricted to key state interests (defence, international relations, security and law enforcement) and is not available in other areas (such as policy advice) where it has proved most difficult for ministers to resist.

The prospect of Parliamentary criticism does not appear to have deterred ministers from exercising the veto. (In the UK context, a decision by ministers to overrule the Parliamentary Ombudsman under the open government code recently attracted little comment in Parliament, despite the fact that it was the first time such a recommendation had been rejected.\textsuperscript{30})

Some overseas FOI laws operate perfectly well without a veto. We hope the Scotland bill will be amended to remove the veto provision.
If it is retained:

- it should not be available in relation to policy formulation (as in Ireland);

- ministers should have to demonstrate that the consequences of disclosure would be exceptionally serious (as in Ireland). This would be in line with the statement in *An Open Scotland* that the veto was intended for use in relation to "information of exceptional sensitivity or seriousness". The veto should not be available merely because the First Minister disagrees with the Commissioner’s findings.

- the costs of any judicial review of a certificate should be met from public funds (as in New Zealand and as permitted in Ireland). This is justified by the fact that ministers are overturning a legal right to information, after it has been upheld by the Information Commissioner.

December 28 2001