PRIME MINISTER

Lord Soames reports on the freedom of information campaign's proposal to press for open government legislation on the basis recently initiated in Canada.

He proposes that Ministers should stress that this approach could not be adopted without major costs in bureaucracy, and would offer little in the way of new access to information. But he sees little likelihood of the freedom of information lobby being satisfied with this kind of response.

MP

MS.

20 October 1980

Civil Service Department,
Whitehall,
London, SW1A 2AZ

With the Compliments

of the

Lord President of the Council

Civil Service Department
Whitehall London SW1A 2AZ
01-273 4400

17 October 1980

The Rt Hon William Whitelaw, CH, MC, MP
Secretary of State for the Home Department
50 Queen Anne's Gate
LONDON SW1H 9AT

Dear Home Secretary,

OPEN GOVERNMENT: NEW PRESSURES FOR LEGISLATION

I am writing to you as Chairman of H Committee about a new challenge to our position on open government.

2. In June 1979, we took our stand on the policy laid down in the Croham directive and resisted moves to create a statutory right of access to official information (H(79)2nd meeting). I have no reason to suppose we would wish to change that position. I should welcome views, however, on how we might best sustain it in the light of the latest developments.

3. Michael Shersby, who is currently Chairman of the Freedom of Information Campaign, came to see Paul Channon recently. He wanted to sound out how we would respond to the idea of open government legislation based on a Bill recently tabled in the Canadian Parliament. Later, he wrote to Paul Channon to say that he hoped the Government would agree not to oppose a Private Member's Bill on these lines. He warned that there was likely to be sizeable backing for such a Bill, both on our own back benches and among our supporters in the country. He noted that 38 Conservative Members had supported Clement Freud's Bill in the last Parliament. I suspect that quite a few of the new Conservative Members would also support such legislation. The TUC have also written to draw attention to the Canadian Bill. There can be no doubt that most of the Opposition would back open government legislation.

4. The Canadian Bill is superficially innocuous. A note on its main provisions is attached. Key points are:

a. it applies to departments of the federal government and federal fringe bodies;

b. it does not necessitate prior amendment of the Canadian Official Secrets Act;

c. the Government is required to publish a "description" of all classes of records held by each government body;

d. there are exemptions not only for records containing information about defence, diplomatic exchanges, security, law enforcement, confidential commercial matters, personal information etc but also for Ministers' papers and records of officials' consultations;

e. complaints against non disclosure will be investigated by an Information Commissioner, who will report to Parliament;

f. the Courts will have power to order the disclosure of documents.

5. Michael Shersby places particular emphasis on rights of access to the records of local government, which is not covered in the Canadian Bill. We must proceed on the assumption that the proponents of a UK Bill will expect it to extend to local as well as central government.

6. Because the Canadian Bill appears so moderate it will be difficult for us to present arguments of principle against it that are likely to sway public opinion. The provisions enabling the Courts to overrule decisions by Ministers are, of course, a constitutional nonsense. I would expect this view to command a good deal of support in Parliament. But the advocates of a UK Bill might be willing to drop the provisions for judicial review, relying instead on an "Information Commissioner" reporting to Parliament, rather like our PCA. I am sure we could not oppose a UK Bill simply on grounds of the differences between the Canadian constitution and our own. More importantly, I do not believe we could count on all the Canadian exemptions (summarised in 4 d. above) surviving in Committee - especially if it was a Private Member's Bill.

7. I need not rehearse the general arguments against a statutory right of access to Government records in this country. To my mind, the main factor that we have to put over to those who propose such legislation is the monstrous bureaucratic apparatus that even a Bill on the Canadian lines would entail. It would mean, for a start, making indexes of millions of Government documents. Contrary to popular belief, no such indexes exist at the moment. It would be necessary to identify, locate and retrieve papers, distinguish exempt from non-exempt material, and where necessary sever the former from the latter (a major problem, it is said, in the United States). There would doubtless have to be public offices where documents could be examined. The consequences for Whitehall alone would be intolerable: they would be quite as bad for local authorities. The work entailed would, in my view, effectively frustrate both the objectives we have announced for reducing the size of the Civil Service, and the staff reductions which we are expecting local authorities to achieve. Michael Shersby's contention is that any increase in manpower and costs would be outweighed by public scrutiny of central and local government activities, leading to major savings. I believe this to be quite unrealistic.

8. There are I believe three messages that we must get across to Michael Shersby and our supporters. The first of these is that the Bill he has in mind would create a new and massive bureaucracy. The second is that all that the country would get in return would be a statutory right to information of a kind which we are already pledged to make available, under the terms of the Croham Directive, as confirmed in Paul Channon's statement in the Commons on 20 June 1979. The third (although I doubt if it would be wise to make too much of it) is that the new Select Committees we have created have greatly increased the volume of information made available by the Government.

9. But I do not believe it will be easy to get these points across convincingly in public. We are likely to get the response that the Croham Directive is not working effectively, which could well create demands for its revision and strengthening. If we were unable to get our message across persuasively, I think we would be bound to come under sustained and damaging pressure to introduce our own legislation or to give a fair wind to a Private Member's Bill based on the Canadian model.

10. I thought it right, therefore, that I should inform colleagues of the position. Unless I hear to the contrary within the next two weeks, I will assume that my colleagues agree that we should turn Michael Shersby's request down.

11. I am sending copies of this to the Prime Minister, the other members of H Committee and the Chief Whips (Commons and Lords) and to Sir Robert Armstrong.

Yours sincerely,

(Private Secretary)

for SOAMES

SUMMARY OF THE CANADIAN BILL

(Notes: (a) this is not a comprehensive summary but an outline of what appear to be the essential features of the "access to information" provisions;

(b) because these appear in Schedule I, references are to paragraphs and not to clauses;

(c) underlinings are CSD's.)

General

1. The Bill applies to departments of the Federal Government and to the other "government institutions" listed in a schedule (federal quango and public companies) but not to provincial or municipal government. (Two of the provinces have their own legislation.)

2. The Bill provides for access to records and not just to information

3. No-one may be prosecuted for disclosing records in good faith pursuant to the Act, notwithstanding any other Act of Parliament (para 71) (this is understood to override general prohibitions on disclosure in the Canadian Official Secrets Act).

4. Nevertheless, existing particular statutory prohibitions on the disclosure of information continue to apply where these leave no room for discretion (para 25(1)).

5. The administration of the Act is to be kept under permanent review by a Parliamentary committee (para 72). One of its duties will be to review the need for the existing statutory prohibitions on disclosure and to report to Parliament within three years (para 25(2)).

6. Retrospection is to be subject to limitations: disclosure may be refused during the first 2 years after the Act comes into force of records that existed more than 2 years before it came into force, and similarly during the first 5 years of 5 year old records (para 28).

7. The "head of the government institution" means the Minister or, in the case of a non-departmental body, the person so designated by order (para 3).

Duties of the Government

8. A "designated Minister" (designated by the Governor in Council) must publish and keep up to date (para 5):

a. a description of the organisation, responsibilities, "programs and functions" of each division or branch of each government institution,

b. a "description of all classes of records" held by each,

c. a description of all administrative manuals,

d. the address of the officer to whom requests for access to records should be sent.

9. The designated Minister must "cause to be kept under review the

nner in which records....are maintained and managed to ensure compliance with the provisions of this Act", and issue directives and guidelines (para 68).

10. The Governor in Council may make regulations about procedures for the examination of records, fees etc (para 74).

11. The head of every government institution must present an annual report to Parliament on the administration of the Act (para 69).

Compliance with requests for access

12. Requests, which must be in writing (para 6), should normally be complied with in 30 days (para 7), though the time may be extended on certain grounds (para 9). A copy of the record is to be provided where practicable; otherwise the applicant is to be given an opportunity to examine it (para 12). Fees will normally be charged, subject to statutory maxima (para 11). Where part of a record contains material exempted from disclosure, the head of the institution must disclose any part that can reasonably be severed from the part containing such material (para 26).

Exemptions

13. The Bill provides for exemption (either mandatory or discretionary) of records containing information:

a. obtained in confidence from foreign governments, international organisations, and provincial, municipal or regional governments or their institutions (para 13),

b. the disclosure of which "could reasonably be expected to be injurious" to the conduct of federal-provincial affairs (para 14)

c. the disclosure of which "could reasonable be expected to be injurious" to the conduct of international affairs or defence (para 15),

d. obtained for the purposes of law enforcement or the suppression of crime, including "any other information the disclosure of which would be injurious" (para 16),

e. the disclosure of which "could reasonable be expected to threaten the safety of individuals" (para 17),

f. relating to financial, commercial, scientific or technical matters, if the information "has substantial value...", and information of which the disclosure "could reasonable be expected to be materially injurious to the financial interests of the Government of Canada" (eg proposed changes in bank rate, taxes, property dealings etc) (para 18),

g. relating to persons, in accordance with the definition of "personal information" in the Privacy Act (para 19).

The interests of "third parties" are safeguarded (para 20 and passim).

14. The Bill also provides (para 21) that the head of a government institution "shall refuse to disclose":

a. Privy Council and Cabinet documents,

b. "records used for or reflecting consultations among Ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy", or

c. draft legislation,

unless disclosure is authorised by the Prime Minister or the record is more than 20 years old.

15. The Bill also provides (para 22) that the head of a government institution "may refuse to disclose any record...that contains

(a) advice or recommendations developed by or for a government institution or a Minister of the Crown,

(b) an account of consultations or deliberations involving officials or employees of a government institution, a Minister of the Crown or the staff of a Minister of the Crown...",

subject to the 20-year rule. (These exemptions do not, however, apply to

"an account of, or a statement of the reasons for, a decision made in the exercise of a discretionary power or in the exercise of an adjudicative function affecting the rights of a person".)

Complaints to the Information Commissioner

16. Where access is refused the head of the institution must cite the specific provision in the Act on which the refusal is based. Failure to provide access within the time limits in the Act is deemed to be refusal (para 10).

17. Complaints will be investigated by the Information Commissioner. He is to be appointed by the Governor with the approval of the Senate and the House of Commons. His powers and duties will be broadly similar, mutatis mutandis, to those of the UK Parliamentary Commissioner for Administration; but he will not be precluded (as the PCA normally is) from questioning the merits of decisions taken by Ministers and other heads of government institutions. "No... record may be withheld from the Commissioner on any grounds" (para 37(2)).

18. The Commissioner will have no powers of enforcement. If he upholds the complaint he will report his findings and any recommendations to the head of the institution with a request, where appropriate, for compliance within a specified time or else for reasons why the recommended action will not be taken (para 38(1). Where access is still refused the Commissioner must inform the complainant that he has the right to apply to the Court (para 38 (5)). He will report to Parliament annually and may also make special reports (paras 39 and 40).

view by the Federal Court

19. Either the complainant (provided that his complaint has first been investigated by the Commissioner), or the Commissioner himself, or a "third party" within the meaning of the Act, may apply to the Court for a review of the matter (paras 42-45). "No...record may be withheld from the Court on any grounds" (para 47). There will be no exceptions, though the Court must take every reasonable precaution to avoid the disclosure of protected material (para 48).

20. The burden of proof will be on the government institution (para 49).

21. Where the Court finds that there was no entitlement to refuse access, or that there were no "reasonable grounds" in terms of expectation of injury (see paragraph 13 above), "the Court shall...order the head of the institution to disclose the record or part thereof, subject to such conditions as the Court deems appropriate, to the person who requested access to the record, or shall make such other order as the Court deems appropriate" (paras 50 and 51).

22. The Act will be binding on the Crown (para 73.)

Home Affairs
– Open Government
May 1979