



12 March 1998

Dear Robert Cayzer,

ILPA is an association of about 760 individuals, firms and other organisations that provide immigration advice and representation. We have prepared the attached comments on the Freedom of Information White Paper. I apologise that they have been submitted a little late, but I hope that it will still be possible for the government to take account of ILPA's views before reaching its conclusions on its proposed legislation.

yours sincerely,

Andrew Nicol QC

chair of ILPA

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Comments of the Immigration Law Practitioners' Association  
on the **Freedom of Information White Paper**

The White Paper

1. The White Paper (*Your Right to Know: The Government's Proposals for a Freedom of Information Act*) proposes a general statutory right of access to government information which would cover both personal information and internal government policy documents. The Government has asked for comments by February 28<sup>th</sup>.

The Association

2. ILPA was founded in 1984. Its aims are to

- i) promote and improve the advice given and representation afforded to immigrants;
- ii) provide information to members on the law and practice relating to immigration and nationality;
- iii) secure a non-racist, non-sexist, just and equitable system of immigration and nationality law.

3. ILPA broadly welcomes the government's wish to provide a right of access to information held by public authorities in connection with their public functions.

The Association's interests

4. There are a number of proposals in the White Paper which are of interest to the Association and our members. In particular, we note -

The proposed right, exercisable by any individual, company or body, to records or information held by a public authority in connection with its public functions (para 2.6).

The proposal to publish explanatory material on dealings with the public (para 2.18).

The proposal for a general right to reasons (ibid).

The Association is particularly interested in making available, inter alia, two broad types of document-

a. Policy documents

5. Applicants for immigration and asylum who fall outside the provision of the Immigration Rules are sometimes able to rely on specific policies under which the Secretary of State grants leave to enter or remain in the UK to certain categories of persons. These policies are available to applicants or their representatives in a haphazard, unpredictable way. Some (notably the DP/ policies) are now public documents, available from the Home Office Immigration and Nationality Department (IND). Other policies come to light in the form of written answers in Hansard. Some may be placed in the libraries of the Houses of Parliament. Some may be sent to particular organisations or consultees including the Association, while others are sent to particular solicitors, sometimes in the context of specific cases. This method of disclosure is highly unsatisfactory and, in our view, prejudicial to applicants not least because it may favour those applicants whose advisers are 'in the know' at the expense of other advisers who may be highly professional but who have been simply left out of the distribution process.

b. Procedural manuals

6. The Secretary of State plans to publish or make available instructions to immigration staff. (Home Office Press Release 382/97, 30th December 1997). This decision is welcome. It could include, inter alia, the publication of guidance to interviewing and presenting officers and to officers making first substantive decisions. We look forward to the publication of such material. However, this exercise of an administrative discretion to publish information, whether under the Code of Practice on Access to Government Information or otherwise, is no substitute for a statutory right to information.

7. Some of the material to be disclosed and the material which might be disclosed under a Freedom of Information Act may come under the category of instructions issued to immigration officers under Sch 2 of the Immigration Act 1971.

#### Reasons

8. There is of course a considerable body of case law on the right to reasons for administrative decisions, much of which has concerned reasons for immigration cases.

#### The proposals

9. The White Paper precludes a statutory right to both information about the work of the IND and to reasons for administrative decisions made by the immigration authorities. Para 2.21 of the White Paper proposes to **exclude** from the provisions of a Freedom of Information Act -

'information relating to the investigation and prosecution functions of the police, prosecutors, and other bodies carrying out law enforcement work such as the Department of Social Security or the Immigration Service.'

10. The current 'right' to information, which does not appear to have been fully tested, is governed by the Code of Practice on Access to Government Information. The second edition of the Code gives a discretion to the government to keep information about immigration and nationality matters confidential but says that such information will be provided, though not through access to personal records, 'where there is no risk that disclosure would prejudice the effective administration of immigration controls or other statutory provisions'. The White Paper appears much more restrictive.

11. The White Paper justifies the proposal to exclude information about immigration matters by stating that legislation ' . . .

. . . should not undermine the investigation, prosecution or prevention of crime or the bringing of civil or criminal proceedings by public bodies.' (para 2.21).

The White Paper continues-

'The investigation and prosecution of crime involve a number of essential requirements. These include the need to avoid prejudicing effective law enforcement, the need to protect witnesses and informers, the need to maintain the independence of the judicial and prosecution processes and the need to preserve the role of the criminal court as the sole forum for determining guilt. The Act will also exclude information relating to the conduct or commencement of civil proceedings.'

12. We do not think that the proposal to exclude information about immigration matters is justified. Firstly, the justification is couched largely in terms of the criminal law and in terms of the 'judicial' process. Whilst there are criminal offences in the Immigration Acts, most of the material which would be excluded relates to administrative law and to executive decision-making functions such as the making of decisions outside the rules. We do not seek to undermine the function of the Secretary of State to administer a proper system of immigration control.

13. Nor do we seek to interfere with the workings of the immigration appellate authorities or the courts. In our view, the harm test proposed in the White Paper is adequate.

14. Social security law is of course closely linked to immigration law and particularly affects asylum seekers. In our view, there is no justification for excluding these two areas from the scope of a Freedom of Information Act whilst including within the Act information about other government functions which, like immigration and social security, also involve fundamental rights and encompass issues of both criminal and administrative law and questions such as false identity and fraud. We have in mind requests for information about the policies and procedures of bodies such as HM Customs and Excise or local authorities, for example as Housing Benefit or

Council Tax Benefit authorities and requests for reasons for the decisions made by those bodies.

15. We believe that information about the work of the immigration and indeed the social security authorities should be subject to exactly the same freedom of information regime as other functions of government.

16. Similarly, an individual's right of access to information about their own case should not be any different because their file relates to an immigration matter. The effect of the Act as envisaged would be to create three separate regimes for the giving of reasons. Firstly, some requests for reasons would be covered by the right to reasons under the Act. Other requests would be affected by the proposed substantial harm tests. Requests for reasons in immigration and social security cases would continue to be dealt with under existing principles. This is unsatisfactory.

17. Requests for reasons for immigration and social security decisions, like requests for information, should be under the same regime as requests in other policy areas. In the event that the IND or the Secretary of State took the view that a particular request for information should be refused, or that reasons in a particular case should not be given, it would of course be open to them to refuse to disclose the information or the reasons and open to the individual to appeal to the Commissioner.

18. We hope that our views will be taken into account and we look forward to being involved in any further consultations.