2. Freedom of Information Bill 2014 – Second Reading approved

The Acting Attorney General to move:

That the Freedom of Information Bill 2014 be read a second time.

The President: Turning now to the Freedom of Information Bill for Second Reading and clauses, I call on the learned Acting Attorney General.

The Acting Attorney General: Thank you, Madam President.

I am pleased to be able to move the Second Reading of the Freedom of Information Bill 2014. The purpose of the Bill, as I outlined to Hon. Members at its First Reading, is to give residents of the Isle of Man a legally enforceable right of access to information which is held by public authorities, in support of the principle that such information should be available to the public to promote the public interest, but subject to exceptions to that right of access which are necessary to maintain a balance with the rights of privacy, effective governance and value for the taxpayer.

I would firstly like to thank Hon. Members for their contributions during the First Reading stage of the Bill and I would like to introduce my remarks today at this Second Reading stage by addressing the matters which I said I would seek to clarify today.

The first matter I would like to address is the query made by the Hon. Mr Downie with reference to the Cabinet Office and its inclusion in schedule 1 under the Bill, as one of the two public authorities which will be subject to the Act if it is passed.

Mr Downie first commented, correctly, that the Cabinet Office is not in itself a legal entity, so by inference there is the question of how it could be treated as a public authority. The Bill simply defines 'public authority' as having the meaning given by section 6(1), which in turn identifies that the public authority can be:

'(a) a person;
(b) a body;
(c) a publicly-owned company;
(d) the holder of any office.'

The 'Cabinet Office' we know is simply a convenient reference, which we all understand, to the Office of the Chief Secretary and his staff which perform such functions as are given to the Chief Secretary. Whether the Cabinet Office is a legal entity or not would not affect the statutory responsibilities which the Chief Secretary as the holder of his office has, as is anticipated by the Bill. It matters not therefore that the Cabinet Office *per se* has no legal existence by name, as that would not impact on the overarching legal obligations of the Chief Secretary as the holder of his office.

Mr Downie also mentioned a concern relating to the status of the Council of Ministers' minutes and record of its proceedings which are currently kept by the Cabinet Office, and which are currently automatically confidential and whose release require the specific leave of the Chief Minister under section 6(2) of the Council of Ministers Act 1990. This was a concern also voiced by other Hon. Members. This position will not change for information prior to the start of the Freedom of Information regime, which is currently proposed as 11th October 2011. For information created after that date the position will change and that is provided for under clause 69 of the Bill, which in turn gives effect to schedule 4. In that schedule of part 3, the paragraph numbered 14 inserts a new subsection in the Council of Ministers Act 1990, which ends the automatic confidentiality on that date – 11th October 2011. From that provision taking effect, as is the case in other jurisdictions with a Freedom of Information regime, the Bill creates as a matter of principle a number of qualifying exemptions to the release of Council papers by applying such information: those exceptions relating to the 'formulation of policy' and the 'conduct of public business'. It is generally accepted, as a matter of public policy, that governments must retain the ability to have high-level policy discussions

in a safe place to enable them to provide effective government. Requests for information concerning the Council of Ministers will, therefore, have to be considered on a case-by-case basis; but as I have said, from 11th October 2011 and that provision taking effect, there will be no longer an automatic exclusion.

Mr Downie also voiced concern about what he described as the Chief Minister's right of veto under the Bill. The Chief Minister's functions under the Bill are limited and very much a long-stop provision. But there is, I suggest, only one situation where the Chief Minister has any direct personal veto and this is where he can certify the national interest needs to be protected in any particular case. Here, of course, he must act reasonably in the context of guidelines the Council of Ministers has issued, and as I mentioned at the First Reading, his decisions could be challenged before the court. It is important to note that the Minister for Home Affairs also has this same power, so it is not simply a power which the Chief Minister enjoys.

Then, under section 47 of the Bill, the Chief Minister can also sign a certificate to say that he, again acting reasonably, does not consider a failure to comply with a particular request for information has arisen under the Freedom of Information regime. What section 47 requires the Chief Minister to do, however, before exercising this power of veto – if it is called that – is to first consult with the Council of Ministers and also with the Attorney General, so he does not have a free hand. Such a certificate must also then be laid before Tynwald at the next available sitting. There are therefore, in my view, sufficient safeguards concerning the exercise of this power by the Chief Minister, which power must also be exercised taking into account the published guidelines in respect of the Freedom of Information regime, which the Council of Ministers is obliged to issue.

I do appreciate that my comments that any alleged abuse of these powers of veto can always be charged before the courts do not necessarily give much comfort in view of the attendant costs of doing so. I suggest, however, that in the round the situation where this might arise and become an issue can fairly be described as remote.

A number of Hon. Members have raised concerns about what the actual drivers for this Bill are; and again, by inference from that question, their concern perhaps about the issue of whether it might necessarily be desirable to introduce legislation when it appears the current Code of Access to Government Information 1996 is working well – a point made by a number of Hon. Members.

It might be helpful if I address briefly the options that were considered by the Council of Ministers, which were threefold: firstly, to do nothing and rely upon the existing 1996 Code on the basis that it has worked well, and since it was introduced, over the years, there have only been 46 instances of formal complaints that a Government agency had refused access to information sought, and of those complaints five were upheld when the Commissioner ruled that the Government agency concerned ought to have properly released the information. Those statistics do not perhaps signal any pressing problem or need with reference to public access to information. The Code has certainly served the Island well; however, it does not amount to a statutory right of access to information held by public authorities, which statutory right is becoming the norm in most other developed jurisdictions across the globe, both by large and small countries. I am told that some 90 countries now adopt a statutory regime of one type or another. By its very nature, therefore – and a point well made by the Lord Bishop – the Bill and its provisions have had to be more prescriptive and precise than the existing non-statutory code, and as a consequence we have before us a rather complex piece of proposed legislation, which to many others outside this Court might even prove difficult to read and follow. A statutory regime perhaps inevitably results in more onerous administration than a non-statutory code. The Bill puts the rights of access on a firmer footing. It does create bureaucracy, which was a concern voiced again by many Hon. Members, but the Council of Ministers has sought, by introducing the provisions of the Bill gradually by first operating a pilot scheme in the Cabinet Office and DEFA, to roll out the rights gradually and to learn from doing so and thus hopefully streamline the process.

The second option was – and which is of course the preferred route – to introduce a Freedom of Information Act which reflects the balance between transparency and the right to privacy, and a

balance with reference to the financial implications of the rights of access. As I explained at the First Reading, the Bill seeks to address the issue of mitigating cost by introducing a phased introduction so it does not cover all public authorities from day one; by having the statutory right of access to information created on or after 11th October 2011; by only giving the statutory right of access to residents of the Isle of Man; by providing a cost threshold over which a public authority can refuse to release the request for the information; by having a flexible fees regime; and also then by having a streamlined complaints procedure, which includes a mechanism to resolve disputes through informal means; and also having the saving achieved by proposing the use of an existing regulator, the Data Protection Supervisor, to enforce the obligations under the Act. These flexibilities have in turn made the drafting, and so the Bill, complex. However, access in some other jurisdictions is even more complex and even more fragmented. In the UK, for example, in addition to the Freedom of Information statutory regime, public authorities and requesters also have to manage access through environmental information regulations and re-use of public service information regulations. Under the Bill the way that information can be requested, the review of a request and the enforcement procedures are stipulated; some existing bars to production are removed, such as the amendment to the statutory confidentiality of Council of Ministers, which an example of the change. The Council of Ministers have not sought to introduce an over-complicated Act or in any way to make its provisions disproportionate to the spirit and practice of the existing code.

The third option that could have been adopted would have been actually to introduce a more expansive, and so more expensive, Freedom of Information Act without the balancing parameters designed to balance the statutory rights of access to information with the potential cost issue, and the protection of rights of privacy, *and* the legitimate exemptions to any rights of access. In this regard, the Council of Ministers' agreed approach was the balanced approach, as it considered the expansive approach would result in a potentially disproportionate burden on the public purse, especially in the current economic climate.

There have been two separate public consultations on the approach adopted now, which were in 2011 and 2014, which have helped inform the process. I am instructed that the Council of Ministers had another driving force in bringing forward this legislation and had in mind the following: the Agenda for Change and its commitment to open, transparent accountability in line with policy priorities given by the executive to Tynwald. It had in mind increasing efficiency, accountability and openness and it is expected that these two objectives will prove a catalyst for better information and records management across Government – smarter working and streamlining processes – which is likely to bring financial benefits and potential financial benefit to local companies in having better and more reliable information released, either as a direct result of requests or the greater culture of openness. It had in mind promoting the Island's good reputation to the international community, demonstrating the Island is a responsible, well-regulated, co-operative jurisdiction that strives to meet international standards. It had in mind providing more information about how taxpayers' money is spent, of enabling better scrutiny of public services, of providing better access to the public in the context of informed public discourse, which in turn enables the public to better participate in the issues. And finally, it had in mind assisting local businesses to develop ideas and informed business decisions.

By way of comparison, Freedom of Information law came into force in Jersey from 1st January 2015, a somewhat similar Bill to our own in that they are introducing their law providing powers in regulations to cap the cost that can be reasonably incurred for answering a Freedom of Information request, enabling an authority to refuse a request if the cost would exceed that amount. Also, as it rolls out its law Jersey is not at this stage setting a fee for answering requests – and this is currently CoMin's proposal at this point.

A number of Hon. Members made comments about there being terms in the Bill which they believed might warrant definition. It was noted that the expression 'the person' was not defined. 'Person' is defined under the Interpretation Act 1976, but that definition simply says it 'includes any body of persons, corporate or unincorporate'. It follows that the common legal interpretation of a

person will be adopted, namely that it means or refers to any entity that is recognised as having legal personality to enter into legal relations. We do not need a statutory definition for the purposes of the Bill, in my view.

Separately, certain Members questioned whether the expression 'resident' needed to be defined. I found no definition in statute of the word 'resident', and frankly that does not surprise me as the expression is used for many diverse purposes, and in those diverse situations common law often holds the answer. So, for example, in taxation terms, whether a company or indeed a person is deemed resident in the Island, the courts have considered and they have applied tests as to what is to be applied in reaching a conclusion in that regard. In the case of the Freedom of Information regime, the matters which a public authority might consider in terms of the residency test will, of course, be informed by the code of practice which the Council of Ministers is obliged under the Bill to issue and which must be laid before Tynwald. Rather than try and be prescriptive by offering in the Bill a statutory definition, I would respectfully suggest that we should leave it to the regime through the code of practice to deal with this matter where the residency rules might change from time to time.

As I mentioned at the First Reading, there may well be instances where someone might seek to get around the residency exemption by, for example, hiding behind a Manx resident company. That is a risk which I acknowledged, but I mentioned that if an authority had evidence which you could reasonably rely upon it might be justified in refusing such request as an abuse of process. Under the Tynwald Commission for Administration Act 2001, a member of the public making a complaint must also be resident in the Island at the time that the complaint was made, and as I understand it, there has been no difficulty in that regard.

Another specific question was asked as to what information could be requested of the Cabinet Office, no doubt having in mind the wide range of responsibilities the Cabinet Office has. The simple answer to that is that all information held by the Cabinet Office is open to be requested. I have also already mentioned the change of law insofar as it relates to the Council of Ministers' records. Any request made of the Cabinet Office would have to be considered and a decision made as to whether the specific request triggered the need to decline the request if it fell within the exemptions where it was necessary; for example, to maintain a balance between the rights of privacy, effective government and value – that is the cost to the taxpayer.

A legitimate concern which a number of Hon. Members raised at the First Reading was the issue of costs the Freedom of Information regime proposed, notwithstanding the mitigation of cost issues already factored into the Bill. In the Chief Minister's statement to the House of Keys on 12th November 2013 he advised the working estimate for the implementation was up to £500,000 per annum for the initial stages. It is proposed that, rather than each public authority having to have Freedom of Information experts in-house, a central advisory unit be established to help support the process and deal with all necessary training and development. The decision-making will of course remain with each public authority, so the cost estimate the Chief Minister gave did not take into account the compliance costs of each public authority. Within this regard, each public authority already has potential compliance costs when a request is made under the existing code.

Statistics were sought by the Cabinet Office to endeavour to help inform the Council of Ministers as to what level of requests might be reasonably expected to be received upon implementation of a Freedom of Information regime. There is no direct comparison, but of course the statistics elsewhere, and indeed here, might have spikes because of local issues. The headline figures I have been given, however, are: in Scotland the average costs per request are £216, internal reviews £419, and appeals £1,344. Our proposed legislation is similar to Scotland in not providing for a tribunal stage. These figures do not include the supporting infrastructure costs, training and administration systems, which in our case are included in the £500,000 per year I have referred to. In our case there will also be additional costs in the office of the Data Protection Supervisor necessitated by the expansion of his current role on becoming the Information Commissioner.

The way a public authority firstly prepares for the Freedom of Information regime applying to them and thereafter how they handle a request will have a significant impact on cost. The code of practice, which the Bill requires the Council of Ministers to publish after its approval by Tynwald, will provide best practice for dealing with requests. The power under the Bill to charge fees is flexible. The existing code does not provide for a charge to be made for simple requests but does allow, when a request is complex and where it would require extensive research, for a charge to be made if notified in advance. A fee basis can be introduced, but they have not as yet been set or proposed, as I have mentioned. It is not, however, the Council of Ministers' intention to propose any fee which might price people out of the Freedom of Information market. They will be fair and reasonable and the flexibility under the Bill enables the fees to be waived or refunded. The fees regulations introduced under the Bill are subject to Tynwald approval, so Tynwald can debate the issue fully in due course.

At the First Reading stage I commented it was my understanding that it was not envisaged the Freedom of Information regime would be self-funding but rather it had been brought forward by the Council of Ministers on the basis that, in introducing a statutory right to information, it came with an inevitable cost. This cost would eventually be shared between the applicant and the taxpayer. I have explained today that essentially the taxpayer will have to meet the central costs of administration, training and development of the regime for certain. If those central costs were to be re-applied to the applicants the concern is that, in view of the relatively small number of requests likely to be received, the Freedom of Information significantly or wholly self-funding would result in fees of such a high level that recouping costs would deter requests with a strong public interest, and so it would defeat the purpose of the Act.

Concern was raised at the First Reading stage as to whether there would be any conflict between the Data Protection legislation and its rights and the Freedom of Information legislation and the separate rights it provides. The current Data Protection Supervisor, the Bill proposes, will become the Information Commissioner and so be responsible for both the regulation of the Data Protection rights and Freedom of Information rights. The Bill was consulted on, on the basis that the Data Protection regime and the Freedom of Information regimes were complementary and would work in parallel. Although it might be thought of as a complex interaction, Freedom of Information does not contravene Data Protection, and the exemption regime under the Freedom of Information is designed to interweave with Data Protection. The Bill was also consulted on with the Data Protection Supervisor widely when it was under its development. I am instructed that the Data Protection Supervisor is content that there is no conflict, which Members have probably been right to raise.

The Bill is made up of eight parts and four schedules.

Part 1 is the introduction and contains the key definitions.

Part 2 details the right of access to information held by public authorities.

Part 3 sets out absolutely exempt information.

Part 4 sets out qualified exempt information.

Part 5 deals with review and enforcement under the Bill.

Part 6 is about the Information Commissioner and their functions.

Part 7 is about publication schemes and the code of practice.

Part 8 contains supplementary provisions.

Further information is contained within the Bill's four schedules.

Schedule 1 lists the public authorities which fall within the scope of the Act.

Schedule 2 deals with the appointment and the terms of office of the Information Commissioner.

Schedule 3 sets out the Information Commissioner's powers of entry and inspection.

Schedule 4 deals primarily with the amendment and repeal of existing enactments.

Guidance around the practicalities of responding to requests will be issued to enable public authorities to have systems in place to ensure the efficient processing thereof. There is work to do in

this regard, work that the Cabinet Office is already undertaking, and the pilot phase of the Act's implementation will assist greatly in clarifying the position and refining working practices.

Madam President, I beg to move that the Freedom of Information Bill 2014 be read a second time.

The President: The Hon. Member, Mr Coleman.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

The President: The Hon. Member, Mr Turner.

Mr Turner: Thank you, Madam President.

I thank Her Majesty's Acting Attorney General for a very detailed response to the points that we raised last week. I have to say from the content of the Second Reading I am more concerned now than I was before.

If I just first of all reiterate the primary role of this Council, which is to consider and advise on new legislation, which has usually been initiated in the other place – and what I would like to do is propose that this Bill be reviewed by a committee of this Council, because I think there are a number of issues that it creates. Certainly, from the information we have had from the learned Attorney, there are a lot of unknowns in this Bill. Cost is one of the issues, but I think we also need to understand exactly what sort of animal it is going to create because I think again the complexity of the Bill is one that needs unravelling.

He mentioned that Jersey has just brought in similar provisions, but did Jersey have the same system that we had with the Code of Access to Information? Will this Bill, for example, see the abolition of that current procedure? If so, the public I think will be worse off, because at the moment they have a vehicle where they can apply for information. There is a system there which can then be determined by the High Bailiff, who has on numerous occasions ruled against a Department and information has been made available.

The questions I really want to know are: will this in fact result in *less* information being available because of costs and charges?

And then we have to look at the other thing: what are we creating here? We have the Agenda for Change wanting efficiency: well, this is not going to bring efficiency and it is certainly not going to bring smarter working. We have got a decreasing workforce.

We all support the principles of information and I think it is important that this is properly unravelled and considered – and that is the primary role of this Council. I think we would be doing the Bill a disservice and the people who are going to have to use this legislation a disservice if we were to simply take it through without unravelling the complexities of it.

We look at the Government constantly putting extra charges onto people: we are putting £1 on taxis, we are putting car parking charges up, road taxes are going up considerably, rate increases, toilet taxes, pre-school abolished, student fees. All of these costs are coming down on the public because we are saying we have got no money, yet we can pass some legislation here which is a completely open-ended, bottomless pit. We do not know what it is going to cost.

I think there are so many issues with this Bill which need to be investigated, challenged and set out in a proper report so that we understand exactly what this Bill is going to achieve. I think we need to be careful what we wish for. No doubt if it was successful in going to a committee there may be some huffing and puffing that the Council is being in some way obstructive, but I do not see that at all. I think we all support the principles of what we are trying to achieve here, but we need to know is it actually going to achieve what it says in the title. Freedom of Information Bill – yes, of course we all support that, but the devil is in the detail and once you start going into the detail it may be that the people whom this Bill is aimed to assist… it may well be so complicated that it puts them off seeking the information that they may well have a right to. I think that is vitally important.

I do not think, by a committee investigating this matter, it would cause undue delay in the scheme of things – it has been a long time coming. I think therefore the time a committee would spend investigating and taking evidence… And not just a consultation, because we know Government consultations, we have them coming out of our ears, and we know the sort of levels of responses we get. If it is something that a small number of people are particularly interested in you will get responses, but we have a population of over 80,000 people out there and the majority will not respond to any of the consultations.

I think this is going to have a severe financial impact on Government, on all the Departments. The learned Attorney mentioned the figure, which did not even include the training and all the other things that are going to come with this. I think we need to know more about how this Bill is going to unravel, be it the idea of the Data Protection Supervisor becoming the Information Commissioner… It horrifies me. I can see staff numbers increasing, I can see a whole office being created there and rafts of bureaucracy. They admitted in the First Reading this will create bureaucracy. It certainly will. And yet all of us, those of us who are in Government Departments, are seeing pressure on our staff, reduction in numbers. I am being told that we have got to reduce numbers, and here we are passing a Bill which is going to result in an unknown increase in staff. I think we need to know more about it.

No doubt those who are keen to just grab headlines will dress this move up as 'we don't want Freedom of Information, we want secrecy, we don't want transparency'. That is utter nonsense. I fully support open and transparent government. We have a system in place, which is the Code, and it is working. We may wish to put that on a more statutory footing, but again I do not think we know enough and this appears to be a *very* complex vehicle.

I would urge Members of the Council not to be seeing this as a negative move here today but a positive one that this Council could be better informed by a report by a committee, and I would like Members to seriously consider this and support the move for a committee of this Bill. It is vitally important. It is a vitally important piece of legislation. We need to make sure it leaves here, if at all, in the best possible form. I would urge Members to support that it be moved to a committee of the Council.

The President: Could I ask the Hon. Member for clarification as to the size of the committee he proposes?

Mr Turner: Madam President, I had a look through the Standing Orders and there is very little information. I would suggest a committee of three Members be formed. I think three Members of this Council would be able to deal with the matter efficiently and in a reasonable timescale to ensure we get a precise report that will both inform those inside this Council who have to move this Bill forward and also those outside so they are aware of exactly what we are putting through here today.

The President: Thank you.

Do any further Members wish to speak to the Second Reading?

The Hon. Member, Mr Butt.

Mr Butt: Thank you, Madam President.

The previous speaker does make some important points, some of which I agree with; but the only parts I really agree with are the fact that the cost is open-ended, and we knew that from the very beginning. We have in the past passed Bills in here when we did not know what the cost was going to be – for example, the Auditor General Bill. They were passed without knowing what the costs were going to be – it was open-ended, and obviously this is as well.

The other point he makes, which I do agree with, is that for those who are pressing for Freedom of Information this is not going to be the panacea they expect it will be. It is obviously complex and complicated because, as the Attorney said last week, there has to be a balance and by bringing the

balance in it has made it very complicated and complex. The public out there who think this will be the way to get information without any problems at all will be disappointed.

Having said that, I do not support the principle of it going to a committee. I do not see what a committee can achieve more than has already been done in the consultation in the past. What will we unravel as a committee? Will we find out what the costs are? We will not be able to find out the costs because they are so open-ended.

In terms of the actual Second Reading I would like to thank the Attorney General for taking seriously the concerns raised last week: he has obviously put a lot of time and research into answering every query piece by piece. Again, I am grateful for that because his explanation today has personally helped me to actually deal with the clauses more easily if we come to the clauses stage today. Before that, it was a complex matter which was hard to understand in some areas. He has taken a lot of time and effort to explain in detail to us what everything means and what our queries were, and I would like to thank him for that.

I appreciate bureaucracy is going to be increased here, costs are going to increase, but I think that is something we have to accept. Our role is to scrutinise legislation and I think the previous speaker, Mr Turner, made some very good points, but I do not see what we are going to achieve by putting this to a committee beyond what has already been worked through over many years. The first Bill we had was the Freedom of Information Bill 2011 – it has been worked on ever since then and I do not see what we can achieve as a committee other than making sure that we scrutinise every clause, should it go ahead today.

Thank you, Madam President.

The President: The Hon. Member, Mr Coleman.

Mr Coleman: Thank you, Madam President.

I agree with the previous speaker: I think that to go to a committee at this stage would be premature. I think through the Attorney General's speech he mentioned the code of practice, and the code of practice is 'this is how we go about doing things'. This Bill is the framework that surrounds how we will be actually physically doing it, applying for information. That is when the fees will be determined and all of us will have the opportunity on voting on that code of practice when it comes to Tynwald for approval.

As such, I actually support the Second Reading – obviously, because I seconded it – but also, individually, I see this as a considerable step forward. I will not be supporting the move to a committee because I think it is premature. We do not yet know how it is going to work. That will come with the code of practice, which will be put to Tynwald subsequently.

Thank you.

The President: The Hon. Member, Mr Downie.

Mr Downie: Thank you, Madam President.

Could I first of all start by saying how grateful I am to the Attorney, who has gone the extra mile this morning and gone over the notes and provided us with a lot more insight into the Bill – it is much clearer now. However, I am still not happy, really, that there is not some sort of an appeal process. I think saying to people, 'Yes, you have got the right to go for a petition of doleance'… that is £20,000 to £30,000 now in this day and age, and the court costs really, in my opinion, are quite ridiculous. We should have a system in place where there can be an independent person who can deal with an appeal. That happens in other jurisdictions; they have provided for that in their system.

I listened very carefully to what my hon. colleague, Mr Turner, said. He brought up some very good and salient points, but if we were to go to a committee, Hon. Members, what are we going to finish taking evidence from? Half a dozen people, the same two or three people from PAG who have been pushing for this. *(Interjections)*

No, I think the argument we have got to look at is: is the Bill actually necessary? The existing system would appear to be working at the present time, and if people really are wanting information they can get it. There have been times when they have been refused information and they have gone off into the courts, but in a low-cost way, and they have been told that they are entitled to the information.

Mr Turner: That's the point.

Mr Downie: What we really need is a hybrid of that, and I am not so sure that the Bill we have got before us is perhaps over-complicating things.

I know this is being rolled out as the panacea in all these other jurisdictions around the world, but I am sure my colleague, Mr Corkish, if he speaks, will give you a very famous quote from Tony Blair about Freedom of Information; but maybe he is not the right person – Tony Blair I mean – to be talking about that because he is about to fall victim of his own trap, as it were.

I am happy to deal with the Bill as it comes along. If there are areas that we are concerned about perhaps we should be looking to bring in amendments. There has been an awful lot of work done here and, as has been stated, Tynwald will still be the final arbiter when the various orders come before it and the codes and so on. So really it is up to us to make it work.

Thank you, Madam President.

The President: The Hon. Member, Mr Corkish.

Mr Corkish: Thank you, Madam President.

The offering by my hon. colleague, Mr Turner, merits some comment from me. I have always been aware of the problems. This is not an easy Bill at all, but neither is this the first time that a difficult Bill has come before this Council. I believe that the Bill is fraught with so many problems, it will throw up so many grey areas as regards the Agenda for Change – help to reduce Government, a slimmer Government? Certainly not; it is more resource.

Referring specifically to Mr Turner's view that a committee should be formed to review because of the complexity of this Bill, I do not know whether a committee could even *begin* to unravel the complexity of this particular Bill.

And at the suggestion of my good friend and colleague, Mr Downie… and if I may, with your indulgence, Madam President, Jack Straw brought in this Bill, reluctantly he says, in the UK. Both he and Mr Blair were protesting against the Freedom of Information which they brought in. In Mr Blair's words, he believed the Bill to be 'utterly undermining of sensible government', and I think because we have the Government Code on Access to Information, which we all agree is working, it may appear that this really is… okay, I will use the phrase 'pandering to modernism' and all the rest of it of (**Mr Braidwood:** Rolls-Royce.) Government, but it may be perhaps using a hammer to crack a nut. So, whilst I agree with the sentiments expressed by my hon. friend, Mr Turner, I think referring it to a committee would serve little use.

Thank you, Madam President.

The President: The Hon. Member, Mr Crowe.

Mr Crowe: Thank you, Madam President.

I would like also to thank the learned Attorney for his Second Reading and for clarifying many other points that we raised at the First Reading, including 'residency' and 'person', including 'company' and 'corporations' etc.

I think what we have is a Bill where it is to be introduced in a very cautious way, with only two public authorities named and with a long lead-in time. I think the Bill, if it goes through the clauses stage and Third Reading, will allow Government and Tynwald to look at it closely and take it in shall

we say 'baby steps' one at a time and to work it through so that all the bumps are ironed out as they go along.

We may not have a perfect Bill, but we have something that I think is reasonable for the time we live in. I think the future will tell us, or tell whoever is sitting in these seats or in Tynwald… If it does need amending, obviously amending legislation can be brought forward to improve it or delete parts that are not workable.

So I would support the Second Reading, Madam President.

The President: The learned Acting Attorney to reply.

The Acting Attorney General: Thank you, Madam President, and thank you to Hon. Members for your very constructive and helpful observations.

If I could just firstly deal with Mr Turner's call for a committee and speak briefly against that proposal – and in doing so perhaps I can answer a number of the concerns which he voiced. There is a fundamental misunderstanding insofar as the existing code is concerned. That is not going to be abolished, and as I had hoped I made clear at the First Reading, that in fact is going to be enhanced to ensure that it is running in parallel with a Freedom of Information regime if it should be introduced under this Bill, because of course we have the pre-2011 people who are precluded from enjoying the statutory rights under the Bill so the code will still operate for them – and I think that is important. It will also continue to operate for all other Departments until they are brought in to the confines – if that is the right expression – of the Act under schedule 1 and, as has been pointed out, it is only the Cabinet Office and DEFA who will be the immediate people who will be brought in so have to comply with the provisions of the regime.

Jumping forward – if I may, because it is a relevant time to do so – to the comments made by Mr Crowe, as I did say, this is a step-by-step approach and that is key to firstly controlling costs and to secondly ensuring that it is rolled out in an appropriate fashion. Tynwald will always remain controlled in the expansion of the regime because the bringing in of other Departments has got to be approved by Tynwald. The code of practice which has been referred to is again key, and that has got to be approved firstly by the Council of Ministers and then by Tynwald itself. So that gives Tynwald the opportunity to monitor and to help the development of the regime as it moves on in time and hopefully expands. As it does expand, the problems might become bigger and they will have to be addressed at that stage. But it is key to emphasise that the code is not abolished; it runs in parallel and in fact will be looked at again to ensure that it runs in a way which complements the Freedom of Information regime.

I have already said that the code has worked well. There have, as I have indicated, been 46 occasions since it was introduced in 1996 when there has been a challenge. There has not been any evidence really of any abuse coming out of people seeking to use that code to access information, because there have only been five occasions where the Commissioner has in fact ruled against a Department for having failed to comply with a request.

It is the honest belief, I am instructed, of the Council of Ministers that the introduction of the code will provide an opportunity, will provide a catalyst for better information, better record-keeping, and with that better efficiency throughout Government. The Departments which are the target for having to be brought into the regime immediately – the Cabinet Office and DEFA – clearly are already preparing for that by having to tidy up their record management to ensure that they can deal with any requests that are made. The devil will be in the detail, as the Hon. Mr Turner says, but that is where it comes out in the code of practice, which as I have said the Council of Ministers has *got* to introduce – it is not an option, and they have *got* to lay it before Tynwald – that will inform the process as it develops.

The Hon. Mr Turner is of course correct that it is the function of you, Hon. Members in Council, to scrutinise legislation, and I am personally looking forward to your scrutiny of the clauses as we go through this Bill – which is a difficult Bill, it is complex, but I am sure with your help it can be, if

necessary, knocked into shape. I can see no benefit in broadening that discussion beyond this Council and as we work through the clauses today.

I am grateful to the Hon. Mr Butt for his support of the principle of not going to a committee, but he quite fairly again is concerned, as no doubt other Members are, as to the issue of cost. I can do no more than say the two things I have said – that the Chief Minister has indicated a cost of £500,000 a year into the central administration of this, so he has been open about that. There will be costs with reference to the Departments as they are made subject to the regime in having to comply with requests, and the only point we can make there, because it is immeasurable, is that they are already having to budget, or have that cost in mind in having to comply with requests under the code. The central cost of training is incorporated into the £500,000, so that is already dealt with.

But it will not be, as Mr Butt fairly points out, a panacea to those who are looking for absolute freedom of information. We cannot afford that and I tried to make that point: we cannot afford a regime which would be so expensive because it would be that open cheque book which you, Hon. Members, are concerned to avoid. Council of Ministers has tried to address that by bringing in controls, by bringing in the restriction as to when people make a request from – which is October 2011 – and the other matters to which I have made reference.

I thank the Hon. Mr Coleman for firstly seconding the Second Reading and for his support, and certainly for his support for the matter to move on for Hon. Members' consideration of the clauses.

To you, Mr Downie, again I am very grateful for your supportive comments as to the concept. The appeals process is addressed under the Bill. It is not all-singing, all-dancing, and I accept that because, as I have indicated, like Scotland, we are not going to have a tribunal process. The reason for that is that it is an expensive process. It is something that may have to develop in time, but at this point in time the advice which we have given is that the Bill is human rights compliant.

There is an appeal process against the decision of the public authority firstly through the Information Commissioner; and if he is conflicted, to the Tynwald Administration Commissioner. And, of course, as you have seen, or will see, in the Bill there is encouragement to make use of mediation to try and seek to resolve any issues. But as you fairly said, Mr Downie, the ultimate appeal at the moment is before the courts and that can be a quite expensive exercise. We will have to see how that develops. All that I can say is that hopefully those circumstances might be remote, but I could be wrong.

Mr Downie: Can I just ask a further question, Madam President?

The President: Well, technically, no – but I will allow it in the interests of understanding the Bill.

Mr Downie: When a position becomes untenable between a person seeking information and it starts to become a civil matter, would that person qualify for legal aid? And is that another cost that is going to have to be borne by the taxpayer?

The Acting Attorney General: I can address that, Madam President, in broader terms, if I may. The mere fact of having a civil right of action does not qualify you for civil legal aid. That will be a question of the applicant's resources, so it is a question of whether or not they have the financial means to either fall in or fall out of the scheme. So there is going to be nothing overarching here, as planned, which would give anybody an absolute right.

I do not know if that is helpful, but essentially, before you can obtain civil legal aid you have got to actually have an income which does not exceed certain thresholds and capital as well.

Mr Downie: I am aware of that and I am also aware of the increased legal aid costs to Government, which are spiralling out of control at the moment; and I am just worried it might be opening the floodgates up here as well.

A Member: That is true.

The President: Would you like to continue?

The Acting Attorney General: To the Hon. Mr Corkish, I thank you for your support to the proposals of the Bill and for supporting the matter being dealt with by Council today, as opposed to being sent to a committee.

To Mr Crowe, thank you again for your support for the Second Reading and for the matter moving on to the clauses stage. I have already mentioned the issues you raised with reference to the control of expansion of the Bill; and also confirmation, which is of course the case, that this is being approached on a step-by-step basis.

Madam President, I would move the Second Reading of the Bill.

The President: The motion is that the Bill be read a second time. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

We turn now to the clauses.

Mr Turner: Madam President – oh, sorry.

The President: I understand you would like to…

Mr Turner: Sorry, Madam President, I was going to ask about the committee, but there was no seconder, so…

The President: No, there was not a seconder for that committee. *(Laughter)*

Mr Turner: So there was no vote. *(Interjections)*

The President: No.

Mr Turner: I apologise.

Freedom of Information Bill 2014 –
Consideration of clauses commenced

The President: Turning to the clauses, then: clauses 1 and 2.

The Acting Attorney General: Thank you, Madam President.

Clauses 1 and 2 are the short title and the commencement provisions of the Bill.

Clause 1 gives the Bill its short title.

Clause 2: under this clause, the Council of Ministers may by order introduce different parts of the Act on different dates for different purposes. Such an Order may make such consequential, incidental, supplemental, transitional and saving provisions as the Council of Ministers considers necessary or expedient.

Madam President, I beg to move that clauses 1 and 2 do stand part of the Bill.

The President: Mr Coleman.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

The President: The Hon. Member, Mr Turner.

Mr Turner: Thank you, Madam President.

Under clause 2(2), would that be the Order which brings in the Cabinet office and DEFA as the first agencies of Government being transitional from the code?

The Acting Attorney General: Madam President –

The President: Does any other Member wish to speak to clauses 1 and 2?

Would you like to reply, sir?

The Acting Attorney General: Thank you, Mr Turner.

I do not believe so. The Order, under subsection (2), as it says, will be 'consequential, incidental, supplemental, transitional and saving provisions' as might be considered necessary. The Bill as published has in schedule 1 the named Departments that will actually be caught. So that will come in on the Appointed Day Order. Any additional ones would have to be approved by Tynwald. *[Inaudible]*

The President: Do you wish to –

Mr Turner: I would, just for clarity, Madam President, thank you.

I appreciate they are in the schedule but I was not sure whether there still had to be the Order to bring that provision in. I think the learned Attorney said it will come in on the Appointed Day Order.

Thank you.

Mr Braidwood: Of that section.

The President: The motion is, Hon. Members, that clauses 1 and 2 stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clause 3.

The Acting Attorney General: Thank you, Madam President.

Clause 3 sets out the purpose of the Freedom of Information Bill 2014.

It is the Council of Ministers' desire to provide a balance in the Act between providing a legally enforceable right of access and the potential impact of doing so, and this is reflected in this purpose clause.

I beg to move that clause 3 do stand part of the Bill.

The President: The Hon. Member, Mr Coleman.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

The President: The Hon. Member, Mr Downie.

Mr Downie: I wonder if the Attorney could give us some examples of what can and cannot be disclosed under the exceptions to the right of access. For example, if DEFA is going to be one of the first Departments in, will we immediately be seeing requests for the names of all those businesses and individual farmers receiving Countryside Care payments and so on? Or will that remain commercially sensitive to the Department?

I accept that taxation, National Insurance, Social Care and all those payments are going to be ring-fenced anyway – that will be taken out of it – but there are other elements I think… we need to know what is likely to be disclosed here.

Thank you.

The President: The learned Acting Attorney to reply.

The Acting Attorney General: Madam President, I thank the Hon. Mr Downie for his question.

It is going to be very difficult to progress through the Bill if I have to answer specific questions as to whether a particular piece of information is disclosable or not. That is not my decision. At the end of the day it will be for the Department to do its own balancing act as to whether or not any of the exemptions apply. When we come to deal with the clauses with regard to absolute exemptions we can then look at the specific matters for which the public authority will be entitled to refuse a request. Then when we look at the qualified exemptions there are certain factors which a Department would have in mind, one of which will be the right to privacy. We do not know, for example, in the context of the specific question you posed as to what commitments a Department might have made already to keep that information private… we do not know that. We do not know whether there are any confidentiality provisions in place or in force, so all I can say is – and not, you might think, just trying to avoid the issue – that I will not be able to necessarily give you a definitive answer to a question of that nature.

So I do not know if that helps, but that is my problem. I cannot give you the answer to whether or not, in that specific instance, DEFA would be under any obligation or considered to be under obligation to publish the names of those people who actually benefit under the scheme.

The President: The motion is that clause 3 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clause 4.

The Acting Attorney General: Thank you, Madam President.

Clause 4 states that the Bill will only apply to information created on or after 11th October 2011, the start of the current administration as marked by the election of the Chief Minister. This date can be moved back to an earlier date by the Council of Ministers by order, and that Order would be subject to Tynwald approval.

The clause confirms that the Act will operate in addition to the Code of Practice on Access to Information 1996 and that it will not amend the operation of the Public Records Act 1999 or the access rights created by it.

I beg to move that clause 4 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks

The President: The motion is that clause 4 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clauses 5, 6, 7 and schedule 1.

The Acting Attorney General: Thank you, Madam President.

I am grouping clauses 5, 6 and 7 as they have natural links and all deal with definitions and meanings within the Bill.

The Act will encompass a number of specialist and specific terms which are given clarity in the interpretation clause, which is clause 5.

Clause 6 gives the meaning to the term ‘public authority’, as only public authorities listed in schedule 1 of the Act fall within its scope. Adding public authorities to the schedule is the main

mechanism through which the Council of Ministers will phase the Act's introduction. This clause defines a public authority as any of the following as listed in schedule 1: a person, a body, a publicly owned company, or the holder of any office.

A 'publicly owned company' is defined as:

> '(a) a company in which one or more public authorities owns, whether directly or indirectly, shares or other interests which, when taken together, enable them to exercise more than half the number of votes in a general or other meeting of the company on any matter; or
> (b) a company to the extent that it performs functions or exercises powers conferred on a public authority under an enactment.'

The definition of a public authority can be subject to any qualification set out in schedule 1.

I outlined at Second Reading the Council of Ministers' thinking behind the phased implementation of the Act, with the two public authorities listed in schedule 1 – the Cabinet Office and the Department of Environment, Food and Agriculture – forming the pilot for this phased implementation.

Further clarity on the meaning of a public authority is given by clause 7, which confirms that schedule 1 has effect of defining 'public authority' and that the schedule may specify that the Act only applies to information of a specified description. In such cases nothing in the Act applies to any other information held by the authority.

The Council of Ministers, with the exception of adding the Lieutenant-Governor, who is excluded under clause 7(6), may by order amend schedule 1, and that Order may modify any provision of this Act that Council considers necessary or expedient to modify the operation of this Act in relation to those whom the amendment to schedule 1 relates, and make such consequential, incidental, supplemental and saving provisions as Council considers necessary or expedient.

Before making an Order to amend the schedule, Council must consult every person to whom the amendment relates and any other appropriate person.

I beg to move that clauses 5, 6, 7 and schedule 1 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks

The President: The Hon. Member, Mr Downie.

Mr Downie: Yes, Madam President.

Clause 7(6), the Lieutenant-Governor may not add to the list of public authorities: I take it then that any information about the Lieutenant-Governor would be available under the UK freedom of information legislation as he is an employee of the Crown.

Mr Coleman: There are also Crown privileges.

Mr Downie: So does Crown privilege apply there, or does that mean this is an area that nobody is allowed to ask a question on?

The President: If no other Member wishes to speak, I call on the learned Acting Attorney to reply.

The Acting Attorney General: Thank you, Madam President.

As far as the Lieutenant-Governor is concerned and the UK freedom of information regime, that certainly does not apply here on the Island. I do not know the UK legislation to the extent that I am going to address it in this way: our legislation only deals with information that is held by the authority of whom you are making a request. If a request is made in the UK under the UK Freedom of Information Act, I can assume it would not apply here in the Isle of Man – it would have no teeth because we are outside the jurisdiction. If there is information in the UK relating to His Excellency, held by a public authority there, then that of course would be considered under their legislation.

If a request is made here, as you are aware, the Lieutenant-Governor cannot be firstly added as a public authority, and secondly, under the clauses which we will consider later, there is already a Crown exemption, an absolute exemption, and a qualified exemption may apply as well. So a request would be considered; and to answer your general point, I believe it would be declined under those provisions. But I would leave it at that, Madam President.

The President: The motion is that clauses 5, 6 and 7 and schedule 1 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clause 8.

The Acting Attorney General: Thank you, Madam President.

Clause 8 provides for the right of access to information held by public authorities.

The main access point into the statutory freedom of information regime is through this clause, which provides that, subject to this Act and in accordance with its provisions, every person who is resident in the Island has a legally enforceable right of access to information held by a public authority.

Information is so held if it is held by a public authority, otherwise than on behalf of another person; or, if it is held by another person on behalf of the public authority, then it certainly applies also.

Under this clause there is no requirement for a public authority to firstly create or derive information, undertake research into or analyse information, or undertake substantial research or collation.

Public authorities can lawfully disclose any information which they hold, even if there are grounds to refuse a request under the Act.

I beg to move that clause 8 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks

The President: The Hon. Member, Mr Crowe.

Mr Crowe: Thank you, Madam President.

Could I ask the learned Acting Attorney: if a person who is resident could be a relative of a person who has left the Island, but would be the subject of the request for Freedom of Information… so they might have been living here since October 2011, left the Island, but a family member is still living on the Island. Would that qualify for a request from a close relative?

The President: The learned Acting Attorney to reply.

The Acting Attorney General: My immediate answer to that, Madam President and Mr Crowe, is that they would not qualify for the request for information because they are not resident at the time the request is made. However – and I am going to run back to the code of practice – as I have said, the code of practice will help inform the process.

If we take the analogy with the Tynwald Administration Act, you have got to be actually resident at the date that you make the application. If that is to be followed into this legislation, the situation you have just described would not qualify the person because they are not here at the time the request is made.

The President: The motion is that clause 8 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clauses 9 and 10.

The Acting Attorney General: Thank you, Madam President.

I have grouped these two clauses together as they relate to requests for information.

Clause 9 states that an Island resident wishing to obtain access to information held by a public authority may request the information.

The request must be in the form prescribed by the Chief Secretary, who may specify different forms for different public authorities, and be accompanied by a fee as prescribed by the regulations, if any such fee is prescribed. The form may be transmitted by electronic means.

An applicant is required to provide their name, an address for correspondence and an adequate description of the information requested in a legible manner which is capable of subsequent reference.

Under clause 10 it is stated that a request for information is taken to relate to information held at the time when the request is received. A public authority can take account of any amendment or deletion to that information, but only if that amendment or deletion would have occurred regardless of the request.

I beg to move that clauses 9 and 10 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks

The President: The Hon. Member, Mr Braidwood.

Mr Braidwood: Thank you, Madam President.

Madam President, I realise under schedule 1 at the moment it is only the Cabinet Office and DEFA who are named. I do feel that there will be a lot of requests for information to public authorities, particularly local authorities if it is to do with things such as housing and people wondering what the situation is for when they will be given some residence.

Do we know how long it would be before some local authorities are added to a schedule? I appreciate it is going to be very difficult for the Acting Attorney General to give a time schedule, but we have already seen two, and I think for a lot of the information there will be a lot of requests going to local authorities. I am just wondering how long it will be for this softly-softly approach initially before other local authorities are added to the schedule.

Mr Turner: They must have a time schedule on the Island.

The President: The Hon. Member, Mr Downie.

Mr Downie: Thank you, Madam President.

I think it would be reasonable at this point to ask what the fees are likely to be, because the policy of the present Government is trying to be cost effective. If we are talking about a £½ million, some sort of a fee structure just pales into insignificance.

I think, in fairness, what has to be teased out today is what is going be considered as reasonable here. If we set the fees too high people will be complaining; if we set the fees too low it is going to become subject to abuse and the world and his wife will be submitting an application. I think it is important just to add a little bit of a flesh to the bones and get some indication of what the Council of Ministers are looking to as the fee structure for this.

The President: The Hon. Member, Mr Turner.

Mr Turner: Thank you.

Just to build on Mr Downie's query, it is interesting as well that once you start charging fees for anything you are adding more costs, (**Mr Downie:** Correct.) because there are processing costs in dealing with that. So I think the whole thing has to be taken in context.

Getting back to my earlier comments about the unknown here, there was a statement earlier on about the user-pays principle. Of course, as we do not know how many users are going to access this you cannot simply divide up the £½ million between the number of applications you think you are going to get, because –

Mr Braidwood: Could get a hundred people.

Mr Turner: – if you get a hundred people it could be quite an expensive fee process.

So I think we have to accept that regardless of whatever the level of fee is going to be… And we could just say that they might not know that yet, but they must have some sort of plan in place, including Mr Braidwood's question of what is the timescale.

Most Departments, when they bring forward legislation like this, do have a plan behind it as to their desired timescale. Obviously things change and it might not work exactly to the timetable, but they certainly, I would imagine, have some sort of plan on when different agencies are going to become part of it. So it is more to build on the comments that have been made and just to say that obviously, once you start charging fees for something, there are additional costs in the processing of those and we just have to accept that is what this is going to create.

The President: The Hon. Member, Mr Corkish.

Mr Corkish: Thank you, Madam President.

I just want to build on what Mr Downie... I was going to wait until clause 68 regarding fees. I did mention it at the First Reading.

I was interested to learn from the Acting Attorney General in his opening remarks that the Scottish model ranges from £216 to £1,344. I was just wondering whether we are looking at… Has he got any inclination as to whether we are looking at the same range of fees for this service?

Thank you, Madam President.

The President: The learned Acting Attorney General to reply.

The Acting Attorney General: Thank you, Madam President; and thank you, Hon. Members, for your constructive observations.

The Hon. Member, Mr Braidwood: the schedule with reference to the extension of the regime to local authorities is that it is proposed for local authorities to introduce them in January 2018. So they will have the benefit of, hopefully, what we can learn from the pilot scheme and any other Departments that might be added in advance of them.

The Hon. Member, Mr Downie, and the question of fees: I have tried my best to answer that because the reality is we do not actually know and I think I have been quite frank with that. I have been frank also that it is not envisaged by the Council of Ministers that we will reach a stage where the cost of the regime will be self-financing by fees that are raised.

There will be a central cost to administration and that has been indicated at some £500,000 per annum. The question, then, of what the public authorities may have to incur by the cost of compliance: because it is very much demand driven we cannot estimate what that is likely to be – we can only draw the analogy by reference to the existing Code of Access, where they have that contingent cost which they are able to meet as and when the circumstances arise.

But there are mechanisms in the Bill to help, and this really turns to both Mr Turner and Mr Corkish as well. Under section 11(3) of the Bill there is the practical refusal reason, and under 11(3)(f), where:

> 'the public authority estimates…'

–- and you can decline, this is a certain exemption –

'…that the cost of searching for or preparing (or both) the information to give to the applicant would exceed the amount prescribed by regulations made for the purposes of this paragraph;'

I bring that to Hon. Members' attention because, in the UK, their regulations, and so their cap of the costs which a public authority can or ought to allow themselves in a sense to incur, is capped at £600 – that is for a public authority. For a local authority it is capped at £450. So regulations have been brought in under the UK regime which are designed to try and put a cap on the cost which authorities might have to incur.

So we do not know whether there… And I think yes, there will be spikes of interest and matters will be raised where public authorities here will have many requests to address in Manx terms. There will be other times when they have got very little – and, as I think I told you that under the existing Code, in the years since 1996, there have only been 46 issues raised.

So we do not know what is going to happen and I cannot be more frank than that. It is recognised by the Council of Ministers that there is a cost, the central costs are accommodated under the £500,000 which will deal with matters such as training and support; and the regulations, which again Tynwald will see through the code of practice will introduce a cap which public authorities here ought to impose when dealing with requests.

I hope that is of assistance.

The President: The motion is that clauses 9 and 10 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clause 11.

The Acting Attorney General: Thank you, Madam President.

Clause 11 states that a public authority must give an applicant the information which they request in accordance with the Act.

The public authority may refuse to give the requested information if it is absolutely exempt information covered by a provision in part 3 of the Act; or if it is qualified exempt information covered by a provision in part 4, and, crucially, where the public interest in maintaining the exemption outweighs the public interest in disclosing the information. To be clear, if public interest considerations are in balance, the information will be disclosed.

Information can also be refused, firstly, if the applicant has not upon request provided additional information or fees within 28 days, as required under clause 14; and secondly, if a practical refusal reason applies. These are mechanical reasons for refusing a request and include if the public authority does not hold or cannot find the requested information after taking reasonable steps to do so, and if the request is vexatious, malicious, frivolous, misconceived or lacking in substance.

Madam President, I would like to say a few words about the provisions in respect of vexatious requests. The Bill includes more descriptions around this term than the UK Act does. However, given that there is now a growing amount of case law around the use of the description 'vexatious' in the UK, it is important to have a little bit more flexibility and discretion in a jurisdiction of the Isle of Man's relative size.

Our public authorities do not have the same resources as those in neighbouring jurisdictions, so it is important that there are mechanisms in place to achieve the balance, which the purpose clause of the Bill enshrines – namely, exceptions to the right of access to maintain a balance with effective government and value to the taxpayer.

There is nothing unusual about terms around 'vexatious' not being defined on the face of the Act. Instead, the code of practice under clause 60, which must be drawn up in consultation with the Information Commissioner, will have to make provision in respect of the matters which a public authority may have to have regard to when determining whether a request for information falls into these categories. Whilst it is anticipated that the ordinary definition of the words will be used, it is important to note that any definition will only be of limited use, as determining whether or not one of these factors is relevant depends on the circumstances of the case.

Public authorities will not be able to pluck out of the air their interpretation of the terms if seeking to refuse on these grounds, and there are opportunities within the Act for a public authority's decision in this regard to be reviewed.

These provisions are primarily about the request, not the requester, but we have to recognise that dealing with unreasonable requests can place a strain on the limited resources that we have, diverting them from day-to-day business or from responding to legitimate requests, and it is the minimisation of this strain which we are seeking to address here.

I beg to move that clause 11 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

The President: The Hon. Member, Mr Turner.

Mr Turner: Thank you, Madam President.

I must admit I am getting more concerned about this Bill as we go through it, because I would like the Acting Attorney maybe to explain… We talk about 'vexatious requests', but every day Government and Government Departments, local authorities and the various agencies receive thousands of requests for information as part of daily business. What is to stop, when this comes in, Departments then just not providing the information and saying, 'Oh, you will have to make a request, that will fall under this legislation'? Because the majority of requests for information are general matters that are just dealt with as part of the day-to-day business. What will stop Departments and agencies saying, 'Now, when people ask for information, you will have to make an application – we will charge a fee,' and *all* information then suddenly falls under this system, and then when people pay the fee they give them the information. What is going to stop that sort of abuse when information is given out every day as part of that Department's business?

The President: The Hon. Member, Mr Downie.

Mr Downie: Just carrying on from Mr Turner: it might seem a hypothetical question at this moment in time, but seeing how these things develop a life of their own I would just like the Attorney to give a categoric assurance that, whatever the outcome of this piece of legislation, we are not going to find ourselves in a situation where Members of Tynwald, when they are asking a question about a matter, are asked to refer to the freedom of information legislation and to put an application in in the normal way. That is what would worry me. There is no reference in this Bill to Members.

The President: The Hon. Member, Mr Coleman.

Mr Coleman: Thank you, Madam President.

I just have a comment, really, and it is about the definition of 'qualified exempt information'. It says the exemption 'outweighs'; the Scottish legislation says 'significantly outweighs' and I just wonder why we went for the easier path rather than the more stringent Scottish path.

Mr Corkish: Och aye!

The President: Yes, learned Acting Attorney General to reply.

The Acting Attorney General: Yes, thank you, Madam President.

What we have already seen under the Bill is the process, the gateway through which a request for information is made, and I think I have referred specifically to the form which has to be completed. There will be a process, which will supported by the code of practice – which I emphasise

again has got to be issued – which will set out the practice which has got to be adopted by those people requesting information and by the public authorities dealing with requests.

It is not designed, this legislation, to stop people carrying on their ordinary day-to-day business and to the extent that Departments and their officers and officials are dealing with requests on a daily basis, as Mr Downie refers to. That is not the purpose of this. This is a formal process for information, a statutory right for information, which I suggest will be the fall-back position. If you find yourself in a situation where you are making requests to a Department, which you might ordinarily or in practice have been doing, and you have hit a brick wall, you will issue a Freedom of Information formal request under the Act, and that is what this is all about.

It is a bureaucracy, it is a process, it is new to what we have, but it is nothing different to somebody making a formal request under our existing Code of Access. They use that when they have hit a brick wall, and that seems to be the case.

So the information is there. It could be abused, admittedly, but that is why we do have the supporting code of practice, which has got to be issued. The process encourages proactive publication, which I have already referred to, so Departments in advance of the code actually applying to them – the Freedom of Information code – are encouraged as part of the roll-out, the pilot scheme, to tidy up their information and to publish it, and then the Information Commissioner is there also to regulate and support and control the good practice which the code addresses.

So although you have raised realistic concerns, they are concerns which the process itself will take steps to support and regulate.

To my learned colleague, Mr Coleman, I do not know the answer to that, I am sorry. If it is an issue I can come back at the Third Reading, but I have no idea… as a matter of policy the Council of Ministers might have gone off in one direction as opposed to another.

Thank you, Madam President.

The President: The motion is that clause 11 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clause 12.

The Acting Attorney General: Thank you, Madam President.

This clause states that a public authority must respond to requests for information promptly, and in any event within the standard processing period defined as ending on the day that is 20 working days, including that on which the public authority receives the request. Another period can be prescribed by regulation, but only with Tynwald approval.

The clause also defines 'respond to a request for information'.

I beg to move that clause 12 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

The President: The Hon. Member, Mr Turner.

Mr Turner: Thank you, Madam President.

This follows on, really… 'A public authority must respond to a request' etc. The definition of information is listed in the definitions. It is basically all information that is held, and it does come back… The learned Attorney did not really answer the question of what would stop a Department actually not answering any query. They could just say, 'We're not going to answer anything now in future – you'll have to put an application in under this and pay the fee.' I think that is the problem, whereas those who have been championing this, some of the more fanatical on the subject of freedom of information who are wanting to get down into all sorts of detail… As Mr Butt said, they think this might be the panacea, but what we could have, and there is nothing…. I still cannot see anything in here where a Department could see it as a moneymaking exercise and say, 'We're not

answering *any* requests,' when there are thousands every day as part of normal business. It does actually cover… and it means a Department could actually, for every single thing that comes through the door, turn round and say, 'You'll have to put in a request and the fee is going to be £200.'

I think that is one of the flaws that seems to be coming out of this. There is nothing in there to safeguard that. Where does information as part of your daily business in Departments start and end, and where does the deeper information begin? Because there is nothing which says what exactly is the purpose of this – because this covers all information. Somebody could write to a Department for very trivial matters and do so every day, and Departments could think, 'Well, we haven't got time to deal with these sort of things anymore, so if anybody writes in we'll just have a policy that you will have to make a request.' I think again we have got this process which covers all requests for information.

I think this could actually be a worse piece of legislation for the public. We have seen how Departments are very keen to raise revenue. I would not put it past any Department having strict regimes in place.

The President: The Hon. Member, Mr Butt.

Mr Butt: Thank you, Madam President.

In regard to the last point, I hope that the code of practice might cover that as to when or how these requests are answered.

I have got a query though for the mover. The public authority must respond to a request for information within a certain time, or in any event within the standard processing period. Where is the sanction for the authorities if they do not respond in time? Is there a sanction for the Information Commissioner to actually make them comply with this?

Mr Braidwood: Yes, there is.

Mr Butt: I cannot see one later in the Bill, but there may well be.

The President: The learned Acting Attorney General to reply.

The Acting Attorney General: Thank you, Madam President.

I do apologise to the Hon. Member, Mr Turner, if I have not answered his question, which he has repeated again.

I am thankful to Mr Butt for reminding us of the code of practice, which will set out the code which the public authorities must comply with. I have already said that code has got to be issued by the Council of Ministers – it is not optional – and it has also got to be approved by Tynwald, and its purpose is to set out best practice. So I can only hope that the drafts of that code of practice, and when both Council of Ministers and Tynwald come to approve it, do focus on the the concern which Mr Turner has. There is nothing, as he quite rightly says, to stop them simply putting up the shutters – this is a public authority – currently in any event and refusing… to be unco-operative. I am sure he, like me, can go back some years when some of the Departments have been unco-operative, but the code of practice and a diktat from above ought to ensure that that does not happen.

With reference to Mr Butt's query with reference to the sanction on a public authority for failing to comply, as we will see when we come to other clauses in the Bill, the Information Commissioner, if a public authority has not complied, then is able to issue a compliance notice and there is the ultimate default, which we will come to see later, of a fine being imposed for non-compliance. So there are teeth to this legislation, which we will see.

Thank you, Madam President.

The President: The motion is that clause 12 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clause 13.

The Acting Attorney General: Thank you, Madam President.

This clause deals with extending the processing period for responding to requests involving qualified exempt information.

The clause applies if, in responding to a request during the standard processing period, the public authority is considering whether it may refuse to give the applicant the information requested because the information is qualified exempt information. This clause recognises the potentially complex and time-consuming processes involved in determining whether or not a qualified exemption should be engaged.

There are safeguards for the applicant. For example, if the extended processing period is applicable, the public authority must give reasonable notice to the applicant about the progress of a request to ensure that requests are not forgotten about. Also, authorities have to respond as soon as is reasonable in all the circumstances and the clause sets parameters for determining this period, including whether responding would substantially or unreasonably interfere with the day-to-day operations of the public authority.

I beg to move that clause 13 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

The President: The motion is that clause 13 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clause 14.

The Acting Attorney General: Thank you, Madam President.

Clause 14 deals with a public authority's ability to request additional information about fees and states that a public authority may request information from an applicant that it reasonably requires in order to clarify the exact nature of the request.

An authority can also request the information to prove residency if it believes on reasonable grounds that the applicant is not resident on the Isle of Man. To be clear on this point, it is not intended that this will involve complex processes or expensive bureaucracy and could be as simple as supplying a utility bill.

An authority is able to require that the applicant pays fees in addition to any fees that may be payable with the initial request, calculated in accordance with regulations in order to comply with the request. The level of fees will be subject to Tynwald approval and could be charged in circumstances where the work involved in complying with the request is more than an initial fee if charged, but less than the overall cost limit above which the request could be refused. The additional information and/or fees have to be provided within 28 days of the notice; otherwise it constitutes a reason for which a public authority may refuse to give the applicant the information requested.

I beg to move that clause 14 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

The President: The Hon. Member, Mr Downie.

Mr Downie: I just want to make a point on this particular clause and really explain to the Attorney that I will be very reluctant to support the Third Reading of this Bill unless we receive from the Cabinet Office, or whoever is responsible for this Bill, some sort of a draft fees order.

We have already agreed to an initial fee, and here we are hiking up the fee again and additional fees on top. We need to know where we are coming from here. I am absolutely amazed that we can have got so far with this Bill without having some sort of an indication of what these fees are likely to be. I think, as people who are representing the public in this manner… I think they have a right to know what sort of fees are going to be envisaged here.

I cannot believe that any Department in Government is progressing a Bill that is going to require people to pay what could be substantial amounts of money… to know what the draft fees order is likely to be. We have just had all this with the sewerage charges debate and everything else, and at least there was a fee there, there was something we could get a grip of. But you are asking us to vote for something today, and really we are all in the position where we are prepared to put our head on the block for a figure that is so far undisclosed. I think we need to know what the ballpark figure is likely to be for the initial fee and the increase, should any increase be deemed necessary by the public authority.

The President: The Hon. Member, Mr Turner.

Mr Turner: Yes, again, I think Mr Downie's point builds on what I was saying before: that you could have Departments making up their own revenue streams here to deal with queries. I think Mr Downie has a very good point and I think we need to, albeit in draft form, have an idea of what is happening.

I cannot believe, as I said earlier on, that a Department bringing forward legislation has not got some plan in place. When we took the driving licence through earlier on, the Department of Infrastructure already had its plan of how it was going to progress after the legislation was brought in, and Departments do that. If they have not got a plan, then I am afraid it says something for this legislation. So I would be very surprised and I would also reiterate that we need to have an idea of what these fees are going to be, because certainly this clause enables the Departments to do exactly what I was warning about just previously.

The President: The Hon. Member, Mr Coleman.

Mr Coleman: Thank you, Madam President.

I think I will speak in favour of, in many ways, the *lack* of information on fees. If you have situations where someone is going to write in and ask for information and I want a copy of every planning approval for the last 10 years, you have no idea of how many there are going to be, you have no idea how much labour is going to be involved in pulling them out – this is assuming that it is not fully computerised – and you have no idea how long it is going to take to actually process that request. So what is going to walk through the door? It could be like the exit gate of a Noah's Ark. *(Interjection by Mr Turner)* It is just going to be different most of the time. *(Interjection by Mr Corkish)* What may be a rate in one Department for picking out a piece of information, or what happens if people ask for plans where the photocopying is of a different size – all that sort of stuff. I have sympathy in saying that being too prescriptive with this is going to actually be a disservice.

Thank you, Madam President.

The President: The learned Acting Attorney General to reply.

The Acting Attorney General: Thank you, Madam President.

If I could firstly thank the Hon. Mr Coleman for his very helpful comments on how I am going to address the issues which the Hon. Mr Downie and Mr Turner have raised – with which I have every sympathy, I might add, because there is a lack of information about what fees might be charged under this regime. I thought I had tried my best to address that previously.

This particular clause of course is talking about additional fees and this provision, which I mentioned very briefly, is simply there as an enabling provision, that if there was an initial fee – which I will come to in a moment – paid, this gives the public authority the opportunity to increase that fee if the cost of compliance exceeds the initial estimate. But that does not answer the problem, because of course all I can say on that one is that the regulations or the code of practice again I am sure will ensure that people act properly and reasonably in actually fixing any additional fees.

Back to the fundamental issue of fees *per se*, you have information to the extent of the £500,000 a year, which there has been measured, calculation of that being needed and being a cost to the central administration of this regime. As the Hon. Mr Coleman has reminded us… *[Inaudible]* trying to assess the volume of requests beyond that and then the actual costs to each Department, which I am sure will be different the one part to another, in actually complying with a request is an immeasurable figure, and all that I have been able to do and all that the accounts… *[Inaudible]* have been able to do is to give you examples of what it costs elsewhere.

I will take back – as I must, Mr Downie – your comments with reference to your challenge to the support potentially of the Third Reading on the basis of fees and how… obviously, I will take instructions on that.

Thank you, Madam President.

The President: The motion is that clause 14 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clause 15.

The Acting Attorney General: Thank you, Madam President.

This clause, which is 'Duty to provide advice and assistance' is very important as it requires public authorities to remain in a meaningful dialogue with requesters, so that under this clause they must give reasonable advice and assistance to persons who wish to make or who have made a request for information.

I beg to move clause 15 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

The President: Hon. Member, Mr Downie.

Mr Downie: I think this is a helpful clause, but leading on from clause 14, where I said I was reluctant to support the Third Reading until we had an indication of what these draft fees might be, my hon. colleague Mr Coleman made reference to a person going into the Planning Division or Infrastructure and asking for a list of all the planning applications that had been passed for the last 10 years. Well, if I was in that Department I would say, 'Yes, you go online and you go to such and such a reference,' because they are all in the public domain. That information, together with all of the appeals and the decisions made at planning appeal are all there.

I understand the point he was making but I think, to be fair, a lot of queries that people have could be dealt with in a very sensible way to avoid lots of the problems that the Bill tends to deal with, because there should, in my opinion, be very little that a member of the public cannot be given if he goes about it in the right way.

That has been part of the problem, I think, in the last few years, because when I was first elected to Tynwald Court it was fairly easy to get information. We did not have conflict between different parties. This is a thing that has come within the last few years and I think that in supporting the legislation, or trying to support it, we have got to be aware that lots of these requests will be for what we would term fairly minor matters. But part of the problem is the way they have been dealt with, and when you say no to a person it immediately puts their hackles up and they either go off to the courts here and appeal or they go and ask a Member of Tynwald, or whatever.

So I think this is an important clause to support because there is in here a duty to provide advice and assistance and if it is dealt with in the proper way it will remove two thirds of the problems, in my opinion.

The President: Hon. Member, Mr Turner.

Mr Turner: Thank you, Madam President.

I read this clause in a slightly different way to Mr Downie. I read it as they have a duty to provide advice and assistance to people making a request under this legislation, so whilst I agree with Mr Downie the whole point is that the majority of this information they should be able to just deal with, the duty really – and I look to the learned Attorney – is that this particular clause says:

> 'A public authority must give reasonable advice and assistance to persons who wish to make, or who have made, requests for information held by the public authority.'

It could be read that the request for information is just a request for information, but the whole idea of this Bill is requests for information under this Bill, so it might be that they do not have to be helpful unless they are making an application under this Bill, in which case it could be, 'Yes, here's the form and write us out a cheque while you're doing it, thank you very much.'

Mr Downie: Yes, for an undisclosed amount.

Mr Turner: 'We'll fill the amount in later.'

The President: The Hon. Member, Mr Butt.

Mr Butt: Thank you, Madam President.

I disagree with this view. This does not say anything about this particular Act; it says any information held by a public authority. This is a very helpful clause, which I will support, obviously.

If anybody knows how the Civil Service works over here in particular, civil servants do all they can to avoid having Data Protection requests or Freedom of Information requests. They do everything they can to avoid that, and this actually gives them the *carte blanche* to say, 'We will be reasonable and we will assist and we will not become subject to a Freedom of Information request.'

Under the current code of practice I think we have had 26 in the last 19 years – that means two and a half a year or three – because civil servants probably have been quite helpful and co-operative over the years in making sure that people do get information when they can.

Mr Turner: So we don't need this, then.

Mr Butt: Well, that is… sorry, but I think this clause actually is one of the most important clauses of the Bill because this will, I think, provide the stimulus to members of public authorities to deal with people reasonably and give them assessments.

The President: Hon. Member, Mr Corkish.

Mr Corkish: Just very briefly, Madam President, I also see the value of this, but I think this is differentiating between the normal information given as against the more probing information – but perhaps that is not clear.

Mr Turner: We do not know where that ends.

Mr Corkish: Yes, where does this end – which goes back to the question: do we need the Freedom of Information Bill? Is it difficult to differentiate between a normal information request as opposed to a more probing… I suppose is the… but I see this as a valuable clause.

The President: The Hon. Member, Mr Coleman.

Mr Coleman: Thank you, Madam President.

I think I would just firstly like to point out that if the information is available online there is an absolute exemption. If it is available on any other… by a register or a book or online, (**Mr Braidwood:** Libraries.) in part 3 of this there is an absolute exemption, so that does not really apply.

I agree with everyone who says that this is a very important clause, and I actually see it being a fee mitigation clause because if you go in and you say, 'I need to know this piece of information,' and they say, 'Well, you can either have it in this brief part and this brief précis of it, or you can have it in the full part,' if you have 200 of them it might save quite a lot of money by taking the précis. So, as long as the information being provided can help mitigate, which would also probably mitigate the workload in the individual Department, then I think that will be beneficial to everybody, especially the people who wish to make use of this Act.

The President: A short clause, but… *(Laughter)*

I ask the Attorney to reply.

The Acting Attorney General: Madam President, I am very grateful for the Hon. Members' detailed consideration of what I said right at the outset: it is an important clause and it is designed, as I have said, to create an opportunity, but it is a statutory duty on the authorities to enter into meaningful dialogue with requesters, and I think that is the teeth of it.

This is not just simply relying on the goodwill or the spirit of the civil servants or Department Members that the public are making requests of; they are actually under now a statutory duty to give advice and assistance, which is unusual but it is there for that purpose. It is one of the main mechanisms through which adversarial interaction between the authorities and the requesters can be minimised and it will be informed again – and I have to keep coming back to this – by the best practice which will be set out in the code of practice, which the Council of Ministers are obliged to issue.

Thank you, Madam President.

The President: The motion is that clause 15 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clause 16.

The Acting Attorney General: Thank you, Madam President.

Under this clause an authority can comply with a request for information by any reasonable means; however, the clause also allows the applicant to express a preference at the time of making a request for the manner in which they wish to receive the information, and the authority must, where reasonably practical and with regard to all the circumstances, including cost, provide it in this preferred manner.

The means by which an applicant can express a preference for receiving requested information include the provision of a copy in permanent form or in another form acceptable to the applicant. In circumstances where the authority determines that it is not reasonably practicable to give effect to a preference, it must notify the applicant of the reasons why.

I beg to move that clause 16 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

The President: The motion is that clause 16 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clauses 17 and 18.

The Acting Attorney General: Thank you, Madam President.

In grouping these clauses together, they both relate to situations when information requests are refused.

When refusing a request for any of the reasons set out in clause 11, a public authority must give the applicant a refusal notice under clause 17. An authority is not obliged to give a refusal notice in relation to a request for information if it has done so in respect of a previous identical or substantially similar request and it would, in all the circumstances, be unreasonable to expect it to serve a further such notice in relation to the current request.

Clause 18 sets out the content of a refusal notice to ensure consistency and clarity for requesters. There are a number of matters which such notices have to incorporate, including the reason why an authority is not required by the Act to provide the applicant with the requested information, and if the information is absolutely exempt information or qualified exempt information it must state, if not otherwise apparent, why the exemption applies.

Refusal notices also have to provide details of the next steps that the applicants can take if they do not agree with a decision of the public authority. The first step is to complain to the authority and seek an internal review of the decision.

I beg to move that clauses 17 and 18 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

The President: The motion is that clauses 17 and 18 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clause 19.

The Acting Attorney General: Thank you, Madam President.

Clause 19 states that nothing in the Act requires a public authority to confirm or deny whether it holds information of the description specified in the request if a confirmation or denial would itself be absolute exempt information or qualified exempt information, other than if the only reason for refusing to confirm or deny whether it holds the information is that the information is accessible by other means.

If an authority refused to confirm or deny whether it holds information, it must give the applicant a refusal notice. In such circumstances, the refusal notice does not need to state the other means by which the information may be accessible; or if an authority's claim is in respect of a qualified exemption, state the reasons for claiming that such exemption applies in respect of the balance of public interest.

I beg to move that clause 19 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

The President: Hon. Member, Mr Downie.

Mr Downie: I wonder if the Attorney could give us an opinion on the last two clauses – the content of the refusal notice and the confirming or denying of existence. If a person goes to a Department and is told categorically, point blank, 'We have no information – we are giving you a refusal notice,' and then at the end of the day it turns out, when an appeal is launched, that the Department were actually holding out, what recourse is there for that person who has made the

application? Does that then become an offence under the Civil Service Act, or is it a problem that the Minister has to deal with himself? It just seems to me to be a little one-sided here.

The President: The Hon. Member, Mr Coleman.

Mr Coleman: Thank you, Madam President.

I must confess when I read this I was a bit confused about what it was about, and then I thought about it and I thought, 'Well, suppose someone put in a Freedom of Information request about whose communications were being intercepted?' By saying we do not have this information it might not be the truth, and if you admit it then it admits that someone is actually being looked at. That is how I read it and that is how I saw the efficacy of that particular clause. It took me a while!

The President: The learned Acting Attorney General to reply.

The Acting Attorney General: If I could start, Madam President, by thanking the Hon. Mr Coleman for his helpful comments in explaining what this clause is about.

If I could then just turn to Mr Downie and his query, the whole object – well, not the whole object… one of the consequences of this legislation is to impose a statutory duty on the public authority to comply with a request, and if it fails, for whatever reason, and if, for example – the point you have made – it is found to be in possession of information which it has not disclosed, that will come out of the review process, which ultimately might be the finding of the Information Commissioner, and I will say loosely the finding of fault. That is an offence under the Act, so there are the teeth to the legislation. So the Department – the officer who has committed the offence, who could have hidden the information, for example – will be guilty of an offence under the Act. So that is why this has got to be…

The legislation is complex because it is actually moving beyond what we have at the moment, which is the non-statutory code of conduct, into a statutory regime, because offences will flow from this for non-compliance.

Thank you, Madam President.

The President: The motion is that clause 19 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clause 20.

The Acting Attorney General: Thank you, Madam President.

Clause 20 deals with the absolute exempt information.

The Act is designed to supplement not duplicate the usual flow of information to the public. As such, this clause places an absolute exemption on information that is reasonably already accessible free of charge or on payment other than by requesting information under the Act.

Clause 20 sets out the circumstances under which information is taken to be reasonably accessible, including if it is available in public libraries or archives or if it is available on the internet or from any other reasonable accessible source. Information is not reasonably accessible merely because it is made available voluntarily by a public authority otherwise than under a publication scheme, if any.

I beg to move that clause 20 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

The President: The motion is that clause 20 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clauses 21, 22, 23 and 24.

The Acting Attorney General: Thank you, Madam President.

I am grouping together the clauses 21, 22, 23 and 24 as they all deal with types of information which is absolutely exempt information in instances which we might describe as institutional-type exemptions, rather than personal.

Clause 21 places an absolute exemption on court records and similar documents. This exemption contains three branches and covers information held by a public authority only because it is contained in a document which is either: firstly, filed with or otherwise placed in the custody of a court or served upon or by a public authority for the purposes of legal proceedings; secondly, created by a court or a member of the administrative staff of a court for the purposes of legal proceedings; or thirdly, placed in the custody of or created by a person conducting an inquiry or arbitration for the purposes of the inquiry or arbitration. The clause contains interpretive provisions to explain the meaning of terms contained within it.

Clause 22 deals with parliamentary privilege in business and places an absolute exemption on parliamentary privilege and business information. As a result, information is absolutely exempt if exemption from the obligation to disclose under the Act is required to avoid an infringement of the privilege of Tynwald, the House of Keys or Legislative Council. Likewise, information is absolutely exempt if its disclosure would or would be likely to, in the reasonable opinion of the appropriate person, for non-statistical information, prejudice the effective conduct of parliamentary business. A certificate signed by the appropriate person – Madam President in relation to Tynwald and the Legislative Council, and the Speaker in relation to the House of Keys – is conclusive evidence that the exemption is required to avoid an infringement of privilege or prejudice or likely prejudice to the effective conduct of parliamentary business.

Clause 23 deals with one of two exceptions covering communications with the Crown – the other being qualified exempt communication required under clause 38. This clause focuses – this is clause 23 – the absolute exemption on information which relates to the communications with the Queen, the heir to, or the person who is for the time being second in line of succession to, the throne. The exemption also covers communications with the Lieutenant-Governor, who is not a public authority under the Act.

Clause 24 places an absolute exemption on information if it is confidential information obtained under the provisions of an international agreement about the exchange of information for the purposes mentioned in clause 32(3). Those purposes include to ascertain whether a person has failed to comply with the law and to ascertain whether a person is responsible for conduct that is improper. Information is only considered confidential while the terms on which the information was obtained require to be held in confidence or the circumstances in which the information was obtained make it reasonable for the state, organisation or court to expect that it will be held in confidence.

I beg to move that clauses 21, 22, 23 and 24 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

The President: The Hon. Member, Mr Turner.

Mr Turner: Thank you, Madam President.

I just wonder would this Freedom of Information Bill, in particular to do with court information… On the peripheries of the court we have the Coroners, and they do not just deal with court information. Would this particular Bill also cover the work of the Coroners?

The President: The learned Acting Attorney General to reply.

The Acting Attorney General: Thank you, Madam President.

It would certainly cover the work of the Coroners in the context of the exercise of their statutory duty where they are dealing with court orders. I do not know what other matters you might have in mind. I am sorry… *[Inaudible]* question. I will pick up on that.

The President: If the Hon. Member wishes to illustrate, he can clarify that point.

Mr Turner: Well, obviously the Coroners do undertake other duties as well, including enforcement of debts, seizing property, coroners' auctions, sales and various things. So it may be that somebody has a request for information about some of those processes or correspondence, the way in which things have been handled. Some of that information may well fall under the exemptions under court information, but I just wondered whether they would be classed as an authority where people would request information. Some of that information may of course be refused under the provisions, such as 21, but I just wondered whether it covered their work.

The Acting Attorney General: Thank you, Hon. Mr Turner, for that clarification.

If the Coroner was performing a function such as serving a process within court proceedings, it will in my view be caught. They would not be caught *per se* unless they were joined into the Act under schedule 1, and they could be brought there clearly as a holder of an office. If that did happen, then of course they would be subject to the provisions of the Freedom of Information regime.

If I could just say again I do not want, if I can avoid it, to answer specific examples, but in all of the examples which you have mentioned, Mr Turner – through you, Madam President – I could not see why they ought to be necessarily exempt from disclosure because that is in the information that they are holding in the office that they are undertaking, but not necessarily relating to a court process.

Thank you.

The President: The motion is that clauses 21, 22, 23 and 24 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clauses 25, 26 and 27.

The Acting Attorney General: Thank you, Madam President.

I am grouping together these clauses – 25, 26 and 27 – of the Bill as they are of the nature of more personal as opposed to institutional absolute exempt information.

Clause 25 seeks to prevent the unreasonable disclosure of personal information, and in order to be compatible with the Data Protection Act 2002 it amends amendments to that Act, including the definition of data has to be made…

A person cannot use Freedom of Information to request personal information about themselves and therefore such requests are subject to an absolute exemption through this clause.

The clause also places an absolute exemption on personal sensitive information and on a deceased person's health records.

In respect of third-party personal information – that is personal information which is not the requester's own – the clause places an absolute exemption in three circumstances, including when disclosure of third-party personal information held in a relevant filing system would contravene any of the data protection principles – for example, fair and lawful processing. The new definition of 'data' in the Data Protection Act allows protection through this clause of personal information about third parties in an unrelated manual file. However, the amendments to the Data Protection Act do not extend all the rights of that Act to unstructured or manual data held by public authorities. This clause also ensures that third-party personal information cannot be released to a requester if that third party was unable to request their information through the access rights in the Data Protection Act. The right to information under Freedom of Information does not trump the right to privacy under the Data Protection Act.

Clause 26 places an absolute exemption on information if it was obtained by an authority from another person, including another public authority, and crucially its disclosure would constitute a breach of confidence actionable by that or any other person.

Clause 27 deals with information the disclosure of which is restricted by law. The Act is not an alternative route to bypass disclosure restrictions provided by other statutes, so this clause places an absolute exemption on information if its disclosure by the public authority holding it is prohibited by or under any other statutory provision. Information is also absolutely exempt if its disclosure is incompatible with EU obligation that applies to the Island or if disclosure would constitute a contempt of court.

I beg to move that clauses 25, 26 and 27 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

The President: The Hon. Member, Mr Crowe.

Mr Crowe: Thank you, Madam President.

Can I just ask for clarification on a person's health records, because it appears that currently you can apply for details of your personal health records, which are released to you. (**A Member:** A deceased.) I think for living persons you can apply for your personal health records, and yet clause 25(1)(a) appears to say that it is 'personal data of which the applicant is the data subject', as though you cannot apply for your own health records. Or am I reading a double negative in there?

Mr Braidwood: Madam President, following on from Mr Crowe's observations, I think for your own medical records there is a certain date that… Pre that date on the medical records – I think it is a few years ago now – you cannot see your own medical records. Post that date you can and you are allowed to see your own medical records. I think that is why doctors do not write little notes anymore about the person!

Another thing as well is you get personal data for your own creditworthiness. On this, there might be something in the information which is incorrect on your record, which could jeopardise… if you were going for a job application, say that was for a local authority or for Government, and because of the incorrect information it could, as I said, jeopardise your job prospects.

So it is rather a strange one that you cannot… I can understand, if there have been police investigations or something else into your background previously, that you do not want to see, you cannot see, particularly if it is for drugs or whatever; but it just seems that we can do something and then at other times we cannot at all, to have our own information on ourselves.

The President: The Hon. Member, Mr Turner.

Mr Turner: Thank you, Madam President.

Just to follow on, I mention this because I think… and I think maybe the learned Attorney may have the answer to this, but as I understand it, it is to take the personal data out of this because they are able to make a data subject access request through the Data Protection Act, so it removes it from this. The mechanism to obtain your personal data is through that process. I think I have got that right.

The President: The learned Acting Attorney General to reply.

The Acting Attorney General: Madam President, if I could firstly –

The President: Sorry, Mr Coleman, did you wish to speak?

Mr Coleman: Yes, Madam President. It is just a short thing, and that is that after many years sitting on the independent review body for the National Health Service I became aware that your health records are actually your property. Your personal records are your own property.

The President: Reply, sir.

The Acting Attorney General: Madam President, I am very grateful firstly to the Hon. Mr Turner for dealing with that slight problem I might have faced, but I did actually note that yes, this is personal information as opposed to the information which you would be seeking under the Freedom of Information Act, where… and this is a perfect example, Mr Braidwood, of the two regimes working in complementing each other. So the data protection legislation is enhanced changing the definition of data protection for personal information that will run in parallel to the rights under the Freedom of Information Act.

Dealing with Mr Crowe's query with reference to the health records, I am very grateful to the Hon. Member, Mr Coleman, for reminding us of our right to our medical evidence in medical records in any event, which is why of course that is exempt under this legislation.

The access to deceased persons' medical records I can mention. That access is dealt with or enabled to a personal representative through the Access to Health Records and Reports Act 1993 and that person has statutory rights already to access information concerning medical records relating to a deceased person. That is with reference to next of kin and matters of that nature, and of course powers of attorney and administrators of wills similarly have access to information as well.

Thank you, Madam President.

The President: The motion is that clauses 25, 26 and 27 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

At that point, Hon. Members, we will adjourn. The adjournment will be until 2.30.

The Council adjourned at 1.03 p.m. and resumed its sitting at 2.30 p.m.

Freedom of Information Bill 2014 – Consideration of clauses concluded

The President: Please be seated, Hon. Members.

We will continue with consideration of the Freedom of Information Bill, and we have reached clauses 28, 29 and 30.

The Acting Attorney General: Thank you, Madam President.

We are now dealing with part 4 of the Bill, 'Qualified Exempt Information', and I am grouping together clauses 28, 29 and 30 of the Bill as they deal with qualified exemption of information in situations which look outwards when considering the Island's interests.

Clause 28 deals with national security and defence. This clause contains two limbs: the first prevents the disclosure of information which is required to safeguard national security; and the second protects information where the disclosure of which would or would be likely to prejudice the defence of the British Islands or the capability, effectiveness or security of any relevant forces.

The national security limb of this exemption differs from other qualified exemptions as it allows the Chief Minister or the Minister for Home Affairs to certify that the exemption applies, and certification is conclusive evidence of that fact, which means that there is no automatic right of review by the Information Commissioner. The certification can describe information in a general way and may be expressed to have a prospective effect – that is it can be prepared in the expectation of future requests.

Unlike the national security element of the exemption, which is class based – that is information just has to fall within the criteria of the exemption –the defence limb of this exemption is prejudice based. As a result, in order for the defence qualified exemption to be engaged, a public authority has to demonstrate that release of the requested information will either cause prejudice or be likely to cause prejudice – the latter being set at a lower threshold than the former.

Only after a public authority is satisfied in this regard can it begin the public interest test to assess whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. The same process has to be followed for all prejudice-causing exemptions.

Clause 29 places a qualified exemption in respect of international relations. It has three interlinked branches which seek to protect information, the disclosure of which may detrimentally affect the Island's international relations.

The first two branches are prejudice based and cover information which would or would be likely to prejudice relations between the Island and the United Kingdom or any other state, or an international organisation or Court, or the interests of the Island abroad, or the promotion or protection of any such interest. The third branch covers confidential information if it is obtained from the same categories as in the first branch. The information obtained from a state organisation or court is confidential whilst, firstly, the terms on which it was obtained require it to be held in confidence or the circumstances in which it was obtained make it reasonable for the state etc to expect that it would be so held.

Clause 30 deals with the economy and commercial interests. Growing the economy is one of the Government's national priorities, so it is vital that the Act does not undermine efforts to deliver on this national priority. This clause covers two related subjects and provides that information is qualified exempt if its disclosure would or would be likely to prejudice, firstly, the economic interests of the Island; secondly, the financial interests of the Island; and thirdly, the ability of the Government to manage the national economy.

Information is also qualified exempt if, firstly, it constitutes a trade secret or its disclosure would, or be likely to, prejudice the commercial interests of a person, including the public authority holding it. Commercial interests are not defined in the clause, but it is intended that they will be interpreted broadly and will be dependent on the circumstances of the particular context.

Madam President, I beg to move that clauses 28, 29 and 30 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

The President: The motion is that clauses 28, 29 and 30 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clauses 31, 32 and 33.

The Acting Attorney General: Thank you, Madam President.

In grouping together clauses 31, 32 and 33, I do so as they deal with qualified exempt information, but in this case on the nature of regulatory or investigative nature.

This exemption in clause 31 serves to ensure that the Act cannot be used to circumvent the rules of disclosure governing criminal investigations and proceedings. It covers information in two separate branches.

Firstly, information is qualified exempt if it has at any time been held by the authority for the purposes of, firstly, an investigation which it has a duty to conduct to ascertain whether a person should be charged with an offence, or a person charged with an offence is guilty of it; secondly, an investigation conducted by the authority that in the circumstances may lead to criminal proceedings being instituted; or finally, any criminal proceedings that the authority has the power to conduct.

The second branch is the exemption covers information if it was obtained or recorded by the authority from confidential sources for the purposes of its functions – and that could be relating to the investigations set out, which I have mentioned already; the criminal proceedings that it has the

power to conduct; investigations, other than those set out as mentioned, that are conducted by the authority under other legal powers for the purposes set out in clause 32(2); or civil proceedings that are brought by or on behalf of an authority, which arise out of investigations mentioned within the exemption.

Clause 32 is the law enforcement exemption and turns on the likely effect of disclosure, rather than the source of the information or the purpose for which it is held, which are covered by the previous clause.

The exemption will be available to a wider range of authorities, as it is not limited to those which have a duty or power to conduct criminal investigations or prosecutions. It is also broader than the exemption under clause 31 as it is relevant to information which authorities hold for the law-enforcement purposes of other bodies, not only for their own purposes.

Information is qualified exempt information if its disclosure would or would be likely to prejudice a number of matters, including the prevention and detection of crime and the apprehension and prosecution of offenders.

Information is also qualified exempt if its disclosure would or would be likely to prejudice the exercise by any authority of its functions for any of the purposes listed in the clause, or any civil proceedings brought about as a result of the exercise of such functions. The purposes include to ascertain whether a person has failed to comply with the law and to ascertain whether regulatory action under any enactment is justified.

Clause 33 addresses the issue of audit functions. The exemption under clause 33 is intended to protect the effectiveness of the audit functions of certain public authorities, but it is not likely to be one that is engaged regularly.

This clause provides for information to be qualified exempt if it is held by a public authority which has functions in relation to the audit of the accounts of other public authorities or in relation to the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions, and its disclosure would prejudice or be likely to prejudice any of the matters mentioned.

Madam President, I beg to move that clauses 31, 32 and 33 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

The President: The motion is that clauses 31, 32 and 33 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clause 34.

The Acting Attorney General: Thank you, Madam President.

Clause 34 relates to the 'Formulation of policy' and the purpose clause of the Bill recognises that exceptions to the right of access to information are necessary to maintain a balance with effective government. This exemption is designed to retain what has been referred to as a 'safe space' for the Government to formulate and develop policy and for Ministers to collectively engage in the policy-making process in the knowledge that these discussions are protected from unjustified disclosure.

Clause 34 provides that information is qualified exempt information if it is held by a Government Department or the Cabinet Office and it relates to the formulation or development of government policy; communications between Ministers, including the proceedings of the Council of Ministers and its committees; the provision of legal advice or the request for such; and the operation of a ministerial private office.

The exemption does not extend to statistical information used to provide an informed background to a policy decision once that decision has been made.

In determining whether or not to engage this exemption, regard must be had to the public interest in disclosing factual information used to provide an informed background to decision-making.

I beg to move that clause 34 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

The President: The Hon. Member, Mr Butt.

Mr Butt: Thank you, Madam President.

I think I know the answer to this question but I just want to make it clear. A Tynwald Scrutiny Committee, Parliamentary Committee, which goes to a Department and asks for background information as to how their policies were arrived at – is it possible that the Department could then say, 'Sorry, you will need to apply under the Freedom of Information Act rather than through the normal processes'? Could they try to stop the Committee from making enquiries? I suspect not, but I would just like to have that cleared up so we are certain.

Mr Braidwood: The 1874 Act… *[Inaudible]* as well.

Mt Butt: It should be.

The President: The learned Acting Attorney General to reply.

The Acting Attorney General: Thank you, Madam President.

I can confirm for the Hon. Mr Butt that the Act is not designed to circumvent the powers of a Tynwald Select Committee, so they would not be sent to exercise rights under the Act.

Mr Butt: As long as that is on record. Thank you.

Mr Downie: As long as it is on the record, yes.

The President: Clause 35 – oh, sorry, I had better move 34, hadn't I. The motion is that clause 34 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clause 35.

The Acting Attorney General: Thank you, Madam President.

This is the exemption which all public authorities can use in relation to the similar types of information which are covered by the previous exemption. The exemption recognises that all authorities need a safe space for internal discussion, thinking and policy development. It is a prejudice-based exemption, unlike the previous exemption, which is class based.

This clause creates a qualified exemption on information if its disclosure would or would be likely to, firstly, prejudice the work of the Council of Ministers; secondly, inhibit the free and frank provision of advice; thirdly, inhibit the free and frank exchange of views for the purposes of deliberation; or finally, otherwise prejudice the effective conduct of public business.

I beg to move that clause 35 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

The President: The motion is that clause 35 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clause 36.

The Acting Attorney General: Thank you, Madam President.

Clause 36 creates a qualified exemption if the disclosure of information would or would be likely to endanger the physical or mental health of an individual or the safety of an individual. The use of the term 'endanger' is more relevant to the subject matter of this exemption than 'prejudice', although the use of the term does not represent a significant departure from the test of prejudice integral to the assessment of other exemptions.

In spite of its title, the exemption is not aimed at information in relation to what might commonly be thought of as health and safety matters, such as establishing the cause of an accident, which could be covered elsewhere. The exemption is more focused on protecting the health or safety of an individual and could cover, for example, information that would allow individuals to be located or identified and consequently targeted for their beliefs or practices.

I beg to move that clause 36 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

The President: The motion is that clause 36 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clause 37.

The Acting Attorney General: Thank you, Madam President.

This clause exemption contains two limbs.

Subsection (1) covers information relating to ongoing research by an authority or on behalf of an authority when disclosure would or would be likely to prejudice the authority or the person carrying out the research or the subject matter of the research.

Subsection (2) provides for a qualified exemption if disclosure would or would be likely to prejudice the wellbeing of a cultural, heritage or natural resource, a species of flora or fauna or a habitat of a species of flora or fauna.

I beg to move that clause 37 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

The President: The Hon. Member, Mr Turner.

Mr Turner: Just a comment, an observation, I suppose: this could be used if Manx National Heritage were to be handed some items of treasure trove, for example. Quite often the exact location of where those items have been found is kept confidential, for the obvious reason that they do not want people heading out there with shovels and metal detectors digging up the property. So I suppose this is one example of how the likes of Manx National Heritage may be able to protect the information for sensitive heritage or cultural resources. Am I right? If the learned Attorney could maybe confirm that.

The President: The learned Attorney to reply.

The Acting Attorney General: Yes, Madam President.

I am grateful to the Hon. Mr Turner for raising that point, which really, yes, demonstrates the value of this type of exemption.

But just simply whilst we stop this point, all of these exempt or qualified exemptions are matters where the public authority has got to form a view, and it will really help in forming a view here that they can then step back and see, quite rightly, it says 'protect that resource, which needs protecting.'

The President: The motion is that clause 37 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clauses 38 and 39.

The Acting Attorney General: Thank you, Madam President.

I am grouping these two clauses, 38 and 39, together as they are each linked to comparable absolute exemptions in clauses 34 and 35 respectively.

Clause 38 relates to the comparative absolute exemption of communications with the Crown under clause 24, and clause 39 in turn relates to the absolute exemption of personal information under clause 25.

Under clause 38 information is qualified exempt if it relates to communications with a member of the Royal Family or the Royal Household, other than communications covered by the linked absolute exemption. The exemption also covers information relating to the conferring by the Crown of any honour or dignity.

Under clause 39 information is qualified exempt if it constitutes personal data of which the applicant is not the data subject and disclosure of the information, if not requested under this Act, would require contravention of section 8 of the Data Protection Act 2002 – the right to prevent processing likely to cause damage or distress. The terminology defined in the Data Protection Act 2002 has the same meaning in this clause as they have in that Act.

I beg to move that clauses 38 and 39 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

The President: The motion is that clauses 38 and 39 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clause 40.

The Acting Attorney General: Thank you, Madam President.

Clause 40 creates a qualified exemption for information in respect of which a claim to legal privilege could be maintained, and that is in legal proceedings.

I beg to move that clause 40 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

Mr Braidwood: Just one brief point, Madam President, particularly on legal privilege. I do not think there is any actual definition… from what I can gather in the UK it is that they are trying to expand the meaning of 'legal privilege' to cover a lot of things that lawyers do, so that they cannot be answerable. I am just am wondering if the learned Acting Attorney General has heard of this from the UK, where generally there was a definition of legal privilege but they seem to be wanting to expand it.

The President: Reply, sir.

The Acting Attorney General: I am grateful to the Hon. Mr Braidwood for raising that point.

I am aware that certainly there are steps being taken in the UK to help clarify the areas where legal professional privilege applies. I am aware of recent decisions from tribunals there which have stretched the interpretation of that. I am not aware, however, as we sit here today, of any steps being taken on the Island, but I am sure the Law Society and others will be keeping a weather eye on developments in that regard. I am grateful for the comment.

The President: The motion is that clause 40 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clause 41.

The Acting Attorney General: Thank you, Madam President.

This deals with information for future publication.

It is not the intention of the Act to undermine an authority's routine publication policy. This exemption provides a qualified exemption for information which will be published at a future point by a public authority or someone else, whether or not a date for publication has been determined.

There are safeguards in the clause. For example, information has to be held with a view to future publication when the request is made and it has to be reasonable in all the circumstances that the information be withheld from disclosure until the future date of intended publication.

I beg to move that clause 41 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

The President: The motion is that clause 41 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clauses 42 and 43.

The Acting Attorney General: Thank you, Madam President.

We have moved on to part 5 of the Bill, which is relating to review and enforcement.

Clauses 42 and 43 are identical in their effect but for the public authority to which they relate.

A core feature of the Act is the right for requesters to seek an independent review of a public authority's decision in respect of a request for information or whether it has acted in accordance with the Act's requirements. Clause 42 gives effect to this right and creates the concept of a review applicant for those who seek redress through the Information Commissioner.

The Commissioner must make a decision as soon as practicable, although there are criteria which have to be met, without which the case need not be reviewed. These include whether the review applicant submitted a valid request, or whether the review applicant has not exhausted the complaints procedure provided by a public authority which is responding to a request for information.

Linking to clauses that have already been considered, the Commissioner must not make a decision if satisfied that the application would require him or her to challenge the conclusiveness of a parliamentary or national security certificate. The Commissioner has to explain to the review applicant the reasons for not making a decision in those circumstances, and in any other case the Commissioner must notify their decision via a decision notice, the contents of which are specified in the clause and include the right of appeal to which the timeframes in the notice have to be aligned.

The Information Commissioner will be a public authority under the Act once it is fully implemented and so an alternative review mechanism is required for review applicants seeking redress for decisions on disclosure taken by the Commissioner. Clause 43 proposes that, in these circumstances, the Tynwald Commissioner for Administration would undertake the role of the Information Commissioner as set out in clause 42.

I beg to move that clauses 42 and 43 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

The President: The motion is that clauses 42 and 43 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clause 44.

The Acting Attorney General: Thank you, Madam President.

Clause 44 deals with alternative dispute resolution. Reducing the potential for an adversarial situation to arise in respect of decisions on disclosure under the Act is a key aim of the Council of Ministers. This clause provides for the Commissioner at any time to attempt to resolve a referred matter by negotiation, conciliation, mediation or another form of alternative dispute resolution, termed in the Bill an 'ADR process'. If, after an ADR process has been conducted, the Commissioner makes a decision under formal processes, regard must be had to the outcome of the ADR process.

I beg to move that clause 44 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

The President: The motion is that clause 44 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clause 45.

The Acting Attorney General: Thank you, Madam President.

Clause 45 deals with information notices.

This clause sets out powers for the Commissioner in circumstances where he or she has received an application for a decision or reasonably requires information for the purpose of determining whether an authority has complied with or is complying with part 2 of the Act, or for determining whether the practice of the authority conforms with the code of practice.

In such circumstances, the Commissioner may serve an information notice on an authority. The clause specifies the content and scope of these notices, and timescales therein must align with the right to appeal. The Commissioner can cancel a notice at any time.

An authority is not required to provide information that is a communication between advocate and client in connection with the giving of legal advice to the client in respect of their obligations, liabilities or rights under this Act, or in respect of potential proceedings under the Act.

I beg to move that clause 45 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

The President: The motion is that clause 45 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clause 46.

The Acting Attorney General: Thank you, Madam President.

This clause provides that in circumstances where the Commissioner is satisfied that an authority has failed to comply with a requirement under part 2 of the Act they may serve an enforcement notice on the authority requiring it to take the steps specified therein in order to so comply.

The notice must set out the provision with which the Commissioner is satisfied that the authority has failed to comply and the reasons why, and the timescales therein must align with the right to appeal. The Commissioner may cancel a notice by informing the public authority.

An enforcement notice is a legal order the Information Commissioner can make to require a public authority to address its failure to comply with part 2 of the Act. In practice, this is most likely to be used where there is systematic or repeated non-compliance. An enforcement notice cannot be used purely in relation to a breach of the code of practice, which is unrelated to a breach of the Act.

I beg to move that clause 46 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

The President: The motion is that clause 46 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clause 47.

The Acting Attorney General: Thank you, Madam President.

This clause allows for a decision or enforcement notice served on a Government Department or the Cabinet Office, which relates to a failure of a request for information to comply with clause 8 in respect of absolute exemption information or qualified exempt information, to cease to have effect if the Chief Minister, after consulting the Council of Ministers and the Attorney General, signs a certificate that he or she, on reasonable grounds, formed the view that there was no failure.

This is a long-stop power with necessary safeguards attached to it. For example, the Chief Minister must give the certificate to the Commissioner not later than the 30th working day following the effective date, laying a copy of it before Tynwald at the next available sitting and notify the applicants of the reasons for his opinion as soon as reasonably practicable after signing the certificate.

The Council of Ministers has undertaken to publish a policy on the use of the power in this clause and there is an expectation that its use will be in exceptional circumstances or cases, rather than on a routine basis.

I beg to move that clause 47 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

The President: The motion is that clause 47 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clause 48.

The Acting Attorney General: This clause provides for the Commissioner, in most circumstances, to certify in writing to the High Court that a public authority has failed to comply with a decision notice, an information notice or an enforcement notice once the timeframe for appealing the notice has expired. The court must enquire into the matter and may deal with the public authority as if it had committed a contempt of court.

I beg to move that clause 48 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

The President: The motion is that clause 48 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clause 49 and schedule 3.

The Acting Attorney General: Clause 49 and schedule 3 deal with powers of entry and inspection.

Clause 49 provides that schedule 3 has effect in relation to the Commissioner's powers of entry and inspection. The schedule sets out the Information Commissioner's powers of entry and inspection and the issuing of warrants in three parts.

Part 1, 'Issue of warrants', sets out the power to grant warrants by a judge, the matters that must be satisfied and the requirement to issue certified copies thereof.

Part 2 relates to 'Execution of warrants'. It sets out the powers in relation to the use of reasonable force, the requirement for a warrant to be executed at a reasonable hour, requirements in relation to occupied premises and receipts for items seized.

Part 3,'Matters exempt from inspection and seizure', sets out the information that is excluded from the schedule and details the position in respect of communications between advocate and

client and information consisting partly of matters in respect of which powers under the schedule are not exercisable.

Part 4 is the supplementary provisions in respect of the return of warrants, offences and interpretation of the schedule.

I beg to move that clause 49 and schedule 3 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

The President: The Hon. Member, Mr Turner.

Mr Turner: Thank you, Madam President.

I would like some clarity here. With the new Information Commissioner effectively morphing from the previous role of Data Protection Supervisor, that role already has a number of powers associated with it. Are the powers here being granted solely for the purposes of the freedom of information provisions in this Bill, or is there anything in this which effectively gives these powers to him in his entirety in this new titled role?

The President: The Hon. Member, Mr Coleman.

Mr Coleman: Thank you, Madam President.

In passing other legislation through this body we had the situation where search warrants for executed goods were removed and we did not actually have the right, prior to passing some legislation, to go through the documentation outside of the premises that the information was seized from. Can the hon. Attorney General just confirm that we are not in a similar situation to the one we had with ordinary police search and seizure?

The President: Mr Downie.

Mr Downie: Yes, Madam President, just a quick one.

I can understand this perhaps being used in the context of a local authority or something like that, but I would like to know what the procedure is if it is being done in a Government Department, when the issue is being discussed by the Council of Ministers and all of a sudden the Commissioner comes in and raids a particular Government Department. I just cannot see how that can possibly work; and, from the public's point of view, how that can be transparent and seen as part of the system. It is much too close, I think.

The President: The learned Acting Attorney General to reply, please.

The Acting Attorney General: Thank you, Madam President, and I thank Hon. Members for their constructive comments.

Dealing first with Mr Turner's point, as I have already said, it is planned that the provisions of this Act, as it has been designed, are complementary to those under the Data Protection Act, so there is nothing here which either enhances the role of the Information Commissioner wearing, glibly, his Data Protection Act hat, or alternatively the other way as well. He would have to exercise powers under each of the separate pieces of legislation at the moment when exercising or using the warrant – not an ideal situation perhaps and something that would change in time. It quite often happens, when you have a merger of two regulators, that you have this challenge going forward and it may well be that a new set of rules will have to be written to cover any problems in the future – but that is for the future.

With reference to the Hon. Mr Coleman's question concerning the police powers and seizure of information obtained under warrant, I am certainly aware of the difficulties which have arisen

elsewhere. I cannot answer with any certainty that those problems have been addressed under this Bill, but I can certainly look at that and it is a matter I think I can come back at the Third Reading and address, if I may.

To the Hon. Mr Downie, yes, I can see the point he raises. It is perhaps an inevitable consequence of having the Information Commissioner and saving the cost of using the Data Protection Supervisor for the combined role. There may be questions going forward whilst this process unravels as to the issue of transparency. As things stand at the moment, however, the Data Protection Supervisor does have the powers to be walking into Government Departments using his powers under the data protection legislation, so in a sense there is nothing new there, just that he will now be wearing another hat, and that is something that we might have to look at.

I thank Hon. Members for their comments.

The President: The motion is that clause 49 and schedule 3 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clause 50.

The Acting Attorney General: Thank you, Madam President.

Clause 50 deals with the rights of appeal against notices and provides for a review applicant or a public authority to appeal to the High Court on a point of law against a decision notice. A public authority can also appeal on the same basis against information or enforcement notices. All appeals must be made in accordance with rules of court.

I beg to move that clause 50 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

The President: The motion is that clause 50 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clause 51.

The Acting Attorney General: Thank you, Madam President.

Clause 51 deals with a public authority's power to claim late exemption, as from time to time the issues that public authorities have to consider in relation to whether or not an exemption applies, particularly a qualified exemption, will be highly complex. It is unlikely therefore that, despite best efforts, all public authorities will get the decision on which exemption applies right first time every time. This clause entitles a public authority to claim that requested information, which is the subject of proceedings under clauses 42, 43 and 50, is absolutely exempt or qualified exempt whether or not the authority made that claim at an earlier point in the process.

As with many other aspects of the Bill, this clause contains safeguards to balance out its potential effects. These safeguards include, for example, the ability for the Commissioner or the High Court to refuse the claim if satisfied on reasonable grounds that there has been undue delay by the public authority in making the claim.

I beg to move that clause 51 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

The President: The motion is that clause 51 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Now another group of clauses in part 6: clauses 52, 53, 54 and schedule 2.

The Acting Attorney General: Thank you, Madam President.

Part 6 deals with the Information Commissioner.

Clause 52 provides that the Isle of Man Data Protection Supervisor, appointed under section 4 of the Data Protection Act 2002, is appointed and is known as the Isle of Man Information Commissioner.

During Second Reading I was asked about the additional costs that are to be incurred by the establishment of the new post of Information Commissioner. In this regard I can advise that the office of Data Protection Supervisor's business case has been accepted by Treasury and provides for a total increase in budget for three years of up to £116,000 to cover staff costs and meeting training costs. So that, Hon. Members, is in addition to the £500,000 that I mentioned, and I have that information which I can now share with you.

Schedule 2 has effect and sets out further details of the Commissioner's appointment. The schedule proposes that the Commissioner is appointed by the Council of Ministers, with the approval of Tynwald, for a term of up to five years, automatically eligible for re-appointment for a second term of up to five years. He or she is eligible for re-appointment for a third term if the Council of Ministers is satisfied that it is in the public interest to do so. The Commissioner can only be removed from office following a Tynwald resolution, which itself is subject to certain criteria.

Finally, to be clear about a point on powers and any conflict which was raised during the First Reading, the Act does not give the Information Commissioner any additional regulatory powers under the Data Protection Act 2002. This Bill is concerned with regulating the new statutory freedom of information regime, not the augmentation or otherwise of data protection regulation.

Clause 53 states that the Commissioner is to perform his or her function and exercise his or her powers independently and in so doing is not subject to the direction of Tynwald, its Branches or the Council of Ministers.

Clause 54 sets out the general functions of the Information Commissioner. It is the duty of the Commissioner to perform their functions under the Act and to promote good practice.

The Commissioner must conform with the code of practice in addition to the requirements under the Act in the performance of their functions and the exercise of their powers.

The Commissioner must also provide the public with such information as he or she considers appropriate and may give advice to any person in respect of a number of matters, including the operation of the Act.

In order to maximise the potential for the smooth operation of the Act, the Commissioner may, with the consent of a public authority, assess whether it is following good practice.

I beg to move that clauses 52, 53 and 54 and schedule 2 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

The President: The Hon. Member, Mr Turner.

Mr Turner: Yes, thank you, Madam President.

I am concerned about a couple of provisions in this. First of all, clause 53, 'Independence': I think it is important that there is independence for a role such as this, but this clause effectively puts this individual above the parliament of the Isle of Man, and I have some concerns with that. I can understand the executive not having the ability to meddle and direct the Commissioner, because the majority of what the Commissioner is going to be making decisions on is going to be to do with the operational matters of Government and local government. However, I feel to remove the power of Tynwald to direct is possibly a step too far.

If that was removed, then obviously a direction of Tynwald would require, depending on how it was set out in the Standing Orders, the majority of both Branches or of the Court voting as one, however that was decided, and that would be a major decision for Tynwald, which is meant to be the highest court in the land.

I think it is rather dangerous to create this position that is effectively unaccountable. Tynwald represents the people of the Isle of Man and it is the last stop. So I would like to propose that that clause be amended to remove 'direction of Tynwald' from that clause.

Also, with regard to the schedule, I would like to refer Hon. Members to 'Tenure of office', schedule 2, number 3(2)(a):

'automatically eligible for re-appointment for a second term of up to 5 years on expiry of the term;'

I would like to propose that that section of automatic re-appointment is removed. I do not see why that is there. First of all we are attempting to make the role completely unaccountable, and then it has the automatic right to be re-appointed for a considerable period. I do not think that is in the best interests of the position, or for the public.

I think that also the automatic re-appointment clauses should be removed and I move that they be deleted from the schedule and also the amendment to the clause on independence, which is clause 53.

The President: Hon. Member, I think we need to have these proposed amendments drafted properly, because in the wording you have given us I think there would be some difficulty, on clause 53 certainly, and we need some clarification on what it is you are seeking to remove on 3(2) of schedule 2. So we will give you a moment if you wish to consult with the Clerk.

Mr Turner: Yes, Madam President, thank you.

I beg to move:

Amendments to clause 53 and schedule 2
Page 44, line 11, delete 'Tynwald, its Branches or'
Page 54, in paragraph 3(2) of schedule 2, delete everything after 'The Information Commissioner holds office for a term of up to 5 years'.

The President: The Hon. Member, Mr Downie.

Mr Downie: Yes, just for clarification, really, Madam President.

I can understand my hon. colleague Mr Turner's frustration. When you look at 'Independence' in clause 53, Council of Ministers appoint this Commissioner who then becomes, under this particular clause, a law unto himself. Who does he actually answer to? If there is a disciplinary or something like that, where does he pitch up in all this? And if something got so serious that he was summoned before the Bar of Tynwald, does he tell us to get lost? Or, if he is asked to appear before a Select Committee, do we get the same answer? We really need to nail this down here. Likewise in the schedule, where he is automatically eligible for re-appointment and so on. Somebody will need to manage this person. Someone will need to carry out an annual assessment of his performance and how he is working and whether the policy of Government or Tynwald is being delivered – whether all that is working. I think we are just asking to be hammered on this, because if we unfortunately get the wrong person it is going to make things *very* difficult, I think, in the future.

So I think if we got some more information we might be a little happier with it, but I still think it is something that we have got to consider. It is important.

The President: The Hon. Member, Mr Corkish.

Mr Corkish: Thank you, Madam President.

The Hon. Member, Mr Turner, beat me to the point before I could catch your eye. It was that same point for a term of up to five years, schedule 2, it is automatically eligible for re-appointment – does this mean it is a guaranteed tenure of 10 years?

Mr Braidwood: It could be 15.

The President: Eligible.

Mr Butt: Just eligible.

Mr Corkish: It could be 15. I think it is more explicit for the third period, but is it? I just seek clarification on that point, which may indeed help Mr Turner.

The President: The Hon. Member, Mr Butt.

Mr Butt: Thank you, Madam President.

The Attorney may be able to help me with this. I am fairly sure the Data Protection officer is not subject to direction by Tynwald at the moment – neither is the Deemster, neither is the High Bailiff, neither are the Police Force or the Chief Constable –

Mr Turner: This is a different role.

Mr Butt: – because they are regulators, independently regulating Government processes, and they are put there to be independent. I think if the Attorney can confirm that, that would be useful.

Who do they have to answer to? They should not have to answer to Tynwald or CoMin, or the Chief Minister. They should be independent; that is the whole point of this Act.

As regards the other point about the schedule, about being re-elected, it just says they are automatically *eligible* to be re-elected, not that they *will* be re-elected. So I do not see any danger in that at all. *(Interjections)*

If they have not performed in the first five years, they are eligible but they are not necessarily going to get the job. There will be a process. So I do not think there is any danger in the schedule whatsoever.

Thank you, Madam President.

Mr Turner: There is! *(Interjections)*

The President: The Hon. Member, Mr Coleman.

Mr Coleman: Thank you, Madam President.

I actually follow on from Mr Butt's comments, except that I was going to ask about the FSC and the independent Pensions Authority – whether they are analogous to this type of arrangement. That is a genuine question that I just do not know, so maybe the Acting Attorney General could just help with whether my analogy is correct.

Mr Braidwood: I think also, Madam President, following on from what my hon. colleague in Council, Mr Butt, has said, it is not *automatic* re-appointment; he can be *eligible* for re-appointment –

Mr Turner: It does not say that.

Mr Braidwood: – for a second term, so other people can apply.

And also on the schedule, in section 7, Tynwald can revoke the appointment of the Information Commissioner. It is up to Tynwald. Tynwald can revoke it if they so wish, and depending on 7(3):

> 'The motion must allege one of the following grounds for revocation, namely that the person holding the office of Information Commissioner – '

and it lists a whole list of offences down from (a) to (h).

The President: Mr Turner, you were indicating you wish to speak again.

Mr Turner: I would, if I may, because I think my colleagues may be incorrect, because it says in a later section of the schedule:

> '8 When office of Information Commissioner becomes vacant
> (1) The office of Information Commissioner becomes vacant if the term of appointment of the person holding the office expires and is not renewed.'

which to me appears that they are automatically eligible, but it says it will not become vacant. So I do not see how somebody else *could* apply when you take the two together. I am referring to page 56, section 8 of schedule 2. So if we read that with section 3 on page 54, they hold office for five years but are 'automatically eligible for re-appointment for a second term of up to 5 years on expiry of the term'.

And then look at section 8, where it says:

> 'The office of Information Commissioner becomes vacant if the term of appointment of the person holding the office expires and is not renewed.'

So, reading that, the term is purely in the hands of the person themselves, so there is no ability –

The President: It is the Council of Ministers'… *[Inaudible] (Laughter)*

Mr Coleman: Could I just speak again, Madam President?

The President: Yes.

Mr Coleman: What it says is 'not subject to the direction'. It does not mean to say it is not subject to the appointment or the censorship of those bodies – it is the direction, the direction of their day-to-day operations, what projects they are going to work on. That is how I read that.

Again, when someone is eligible for appointment, it does not mean they are automatically going to be reappointed.

Mr Turner: It says 'automatically' in it.

Mr Coleman: No, they are automatically *eligible*; they are not automatically reappointed. You would advertise.

Mr Turner: I bet you they don't.

The President: I think it is time for the… Did you wish to speak…? *[Inaudible]*

The Acting Attorney General: Thank you, Madam President.

I am very grateful to Hon. Members for their constructive comments and for the debate which has been going on, which has in part answered some of the issues which have been raised.

If I could look at the general proposition of what is the separation of powers between regulators and Tynwald, that is something that is common now with reference to all of the regulators as far as I am concerned, on the Isle of Man, be it the FSC, the Police – which the Hon. Mr Butt has referred to – or the Insurance and Pensions Authority. Those regulators are not accountable, and ought not to be accountable, to Tynwald. They have got to be separate and their powers are separated, and that is consistent here – as is the case with the Data Protection Supervisor at the moment and as will be the case with the Information Commissioner under this Act, if passed. I would say to Mr Turner and to Mr Downie, who had been concerned on this issue, that that separation of powers must be protected and the independence of the Commissioner under this Act is, as the Bill suggests, the right course of action to follow.

The issue of the term of office of the Commissioner has between yourselves, Hon. Members, been addressed: that it is for five years. The Commissioner then is only eligible for reappointment. It is not automatic and I do not read the provision which the Hon. Mr Turner referred to in the schedule in the way that he does, because the five-year term will automatically come to an end at the end of that five years and it will take a step, an action, which will be re-appointment for that to continue or to be renewed if that is to be the case. That is a renewal which is made by the Council of Ministers and it is not an automatic… It is certainly not in the gift of the Commissioner himself just simply to glibly roll over his term.

There is set out in the schedule a procedure for removal and that is in the hands of Tynwald, where it ought to be, and it sets out the grounds upon which that revocation or removal can take place in paragraph 7(3) of schedule 2. It deals with issues where his competency is challenged, where he is incapacitated for whatever reason, where he is being neglectful and basically where he has failed to honour the terms and conditions of his employment, or otherwise acted inappropriately in his office as a regulator, as the Information Commissioner. Hon. Members, I do not actually think that that can go any further or be more generous in giving Tynwald the control which it quite properly ought to have in being able to remove the Information Commissioner if those circumstances arose.

I hope that answers the substantive issues, Madam President, and I beg to move.

Mr Downie: Madam President, can I come back? It does not answer the question, because we are in a similar predicament now with your predecessor. We get ourselves embroiled in these things and there does not seem to be a proper provision to deal with them, and I –

The President: I will stop you there, Mr Downie, because I think this is not… The process for replying to the debate has concluded. The illustration you have given is, I think, very different in terms of being a Crown appointment and so on, and I do not think it is relevant so I am going to stop you there.

The motion before Council is that clauses 52, 53 and 54 and schedule 2 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clauses 55, 56 and 57.

The Acting Attorney General: Madam President, I am grouping clauses 55, 56 and 57 together, all concerning functions of the Information Commissioner.

Under clause 55 the Commissioner may make recommendations to a public authority in writing, specifying the provisions of the code of practice which they believe the authorities are not conforming to together with the steps required to conform, if it appears to the Commissioner that any authority's practice in relation to its functions under the Act does not conform to the code.

As the Act touches upon many public law and other legal concepts, clause 56 provides for the Commissioner to secure appropriate legal support from an advice panel to assist them in their functions under the Act.

Clause 57 states that the Chief Secretary must prepare and maintain a panel of legal practitioners, advocates, barristers or solicitors willing to give advice and assistance to the Commissioner.

I beg to move that clauses 55, 56 and 57 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

The President: The Hon. Member, Mr Turner.

Mr Turner: Thank you, Madam President.

I indicated earlier in this process about concerns over the cost, and now that we have come to the part of this Bill which relates to the Commissioner and the work of the Commissioner I wonder if the Attorney would be able to provide some information about the proposed structure – I understand if he has not got this to hand – maybe for distribution to us next week… the proposed structure of what exactly the office of the Information Commissioner is going to look like. When I say the office, I mean in terms of staffing it.

I understand the role of Information Commissioner is to be outside the auspices of say the Civil Service Commission, or the PSC or as it is going to be. But what about the staffing? What controls are there going to be over headcount? I predicted at the First Reading that what we have here is a vehicle to create a huge empire. We have seen it happen at the Communications Commission. The Communications Commission used to operate with a director and a secretary; it has now got numerous staff and regulation managers and all sorts of things in there. This has got another opportunity to create another one of these empires that are completely unaccountable to anybody. So is the structure of this office, the staffing, going to be subject to rules? Are the staff going to be employed by the Public Service Commission; and if so, how is that going to fit with the controls on personnel numbers?

I mentioned earlier that Departments are being forced to reduce staff numbers. A lot of our staff out there… and I know through my role as Vice-Chairman of the current Civil Service Commission that morale out there is low at the moment. As staff numbers reduce, more workload is going on people, and here we are creating an open chequebook for this office. So I would like some reassurances that, although the Information Commissioner may well be independent, the actual office and set-up is very much going to be under the scrutiny of somebody; and if so, who? Maybe for the next Reading, if the learned Attorney does not have this information, he could provide some sort of skeleton structure on how this office is going to be structured in terms of personnel.

Thank you, Madam President.

The President: The Hon. Member, Mr Downie.

Mr Downie: Thank you, Madam President.

Could I first of all apologise for the comment I made – wrong context – but obviously my concern is who this person… There is a training place to deal with all sorts of people within Government – who is responsible for them, who they are answerable to and so on. But what seems to be lacking here is information about who will deal with the Commissioner, and if issues arise that need to be dealt with we really need to know who will accept responsibility.

In clause 56 he has powers to seek legal advice and assistance from a legal practitioner. There is a panel and all the rest of it. We are already talking huge cost here, some very significant costs. Some of these positions could be demanding allowances up to £170 or £180 an hour for advice on some issues.

The other thing I would like to know is who on the Island have we got who has got experience in these areas; or are we going to go to other jurisdictions where they have had freedom of information and they have developed some expertise and some case law or whatever in that area?

I think it is important we know how all this is going to fit together, because if we get it wrong, as has been said previously, it is going to cost an awful lot of money and it could be very time consuming to try and rectify the problem if you do not get it right to begin with.

The President: The Hon. Member, Mr Butt.

Mr Butt: Thank you, Madam President.

A question for the learned Attorney, which he may not be able to answer today but maybe on the Third Reading he could help us. The current Data Protection officer has been in post for some 13 or 14 years. When this Bill comes into law, is the intention to advertise, because there are post changes, for somebody new and fresh, or is it possible the current incumbent could slip into the role without changing his terms and conditions; or is the plan to start again when this Bill becomes law?

The President: Reply, sir.

The Acting Attorney General: Thank you, Madam President.

Again, I thank Hon. Members for their constructive comments. Dealing first with Mr Turner, I am sorry if I did not make this clear. I thought had addressed, when looking at clause 52, that there will be an increase in cost of some £116,000 to deal with the Data Protection Supervisor's role and his staffing. I do not have a skeleton of how that is made up but I can certainly come back to Third Reading with that information. It has been prepared. The Data Protection Supervisor has made a business case, which has been accepted by Treasury, and that is the figure that I shared with Hon. Members before.

To the Hon. Member, Mr Downie, the Information Commissioner is accountable to Tynwald and if I could encourage Hon. Members to look again at clause 7 of the schedule in the Bill, that really does, when you look at the detail, set out the manner in which Tynwald and its Members have the control of the office with the overarching power to evoke the appointment, on motion, tabled in the name of the Council of Ministers, and then set out the grounds upon which the revocation can be made. So there is a large degree of scrutiny of his role and accountability and you would have seen under the Bill the requirement for him to issue a periodical annual report to Tynwald; so again, even if a motion is presented, the information will be there for Tynwald Members to look at.

To the Hon. Mr Butt, I do not know the answer to the question that he has posed but I will, with pleasure, come back to the Third Reading and advise you, Hon. Members, of the position.

Thank you, Madam President.

The President: The motion is that clauses 55, 56 and 57 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clause 58.

The Acting Attorney General: Thank you, Madam President.

This clause requires the Commissioner to lay an annual report – more often if appropriate – before Tynwald on the exercise of their functions under the Act.

I beg to move that clause 58 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

The President: The motion is that clause 58 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clause 59.

The Acting Attorney General: Thank you, Madam President.

Clause 59 deals with publication schemes. The introduction of a freedom of information regime is, as I have explained, an important milestone in increasing openness and transparency in the Isle of Man. Public authorities should be encouraged to proactively publish as much information as possible.

Proactive publication automatically takes information out of the Act's scope. This clause makes publication schemes optional for public authorities but it also provides an order-making power for the Council of Ministers to require an authority to adopt and implement such a scheme.

The clause sets some parameters for publication schemes, which should be adopted whilst retaining as much flexibility as possible.

I beg to move that clause 59 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

The President: The motion is that clause 59 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clauses 60 and 61.

The Acting Attorney General: These two clauses are grouped together because of their overlap.

Clause 60 requires the Council of Ministers to issue a code of practice providing guidance to public authorities on various administrative matters in order to spread good practice and provide certainty and clarity. It is not to be confused with the current codes of practice on access to information. The clause sets out a number of issues in relation to which the code must make provision, including determination of when information is held by an authority for the purposes of the definition of 'held'; determination of matters to which a public authority may have regard in determining whether a request for information is vexation, malicious, misconceived or lacking in substance; and the determination of the public interest when considering requests concerning qualified exempt information. Before issuing or revising the code, the Council of Ministers must consult the Information Commissioner and the code must be laid before Tynwald.

Clause 61 states that if a public authority complies with its obligations under the code of practice, it is taken to have complied with its requirements, if any, under the Act.

I beg to move that clause 60 and 61 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

The President: The Hon. Member, Mr Crowe.

Mr Crowe: Thank you, Madam President.

Yes, this is a very important piece… *[Inaudible]* in the whole Bill and I would imagine that until this is in place the Bill would have no effect whatsoever. If the learned Attorney can just confirm that.

The President: Reply, sir.

The Acting Attorney General: Thank you, Madam President.

I thank the Hon Member for his comment and quite rightly identifying the significance of this provision. As I have been emphasising throughout, there is a positive obligation on the part of the Council of Ministers to issue this code of practice. It is:

> 'a code of practice that gives guidance to public authorities as to the practice to be followed in the exercise of their functions under this Act.'

I was reading the actual provision. I think it follows from that, Madam President, Hon. Members, that in the absence of this code this Act is going to have very little teeth.

Thank you.

The President: The motion is that clauses 60 and 61 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clause 62.

The Acting Attorney General: Thank you, Madam President.

This clause states that no right of action arises in civil proceedings by reason only of the failure by a public authority to comply with a request for information. The clause does not affect the powers of the Information Commissioner under clause 48 with reference to the failure to comply with notices.

I beg to move that clause 62 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

The President: The motion is that clause 62 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clause 63.

The Acting Attorney General: Thank you, Madam President.

This clause deals with record tampering by a person in a public authority, relevant only after a request for information has been received.

If the applicant is entitled to be supplied with the information under this Act, or indeed the Data Protection Act 2002, and the member of the public authority alters, defaces, erases, destroys or conceals information held by the authority with the intention of preventing the authority from supplying the information, they are guilty of an offence liable on summary conviction to a fine not exceeding £5,000.

I beg to move that clause 63 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

The President: The motion is that clause 63 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clause 64.

The Acting Attorney General: Thank you, Madam President.

The clause sets out confidentiality provisions for the Information Commissioner and their staff for both this Act and the Data Protection Act.

In such circumstances, a person commits an offence if without lawful authority they knowingly or recklessly disclose information obtained in the course of performing their functions which relates to an identified or identifiable individual or business and is not, before or at the time of the disclosure, otherwise publicly available.

The clause also sets out the circumstances under which disclosure is made with lawful authority, including if it is made with the consent of the individual or the person for the time being carrying on the business.

I beg to move that clause 64 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

The President: The motion is that clause 64 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clause 65.

The Acting Attorney General: Thank you, Madam President.

This clause states that if information supplied by a public authority to an applicant under this Act was supplied by a third person, the publication to the applicant of defamatory matter contained in the information is privileged unless the publication is shown to have been made with malice.

I beg to move that clause 65 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

The President: The motion is that clause 65 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clause 66.

The Acting Attorney General: Thank you, Madam President.

This clause stipulates that notices under this Act have to be in writing, which is taken as being so if, firstly, it is transmitted by electronic means; secondly, it is received in legible form; and thirdly, it is capable of being used for subsequent reference.

I beg to move that clause 66 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

The President: The motion is that clause 66 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clause 67.

The Acting Attorney General: Thank you, Madam President.

This clause allows the Council of Ministers to make orders and regulations in accordance with this Act or otherwise as are necessary or expedient to give effect to this Act.

Orders and regulations other than those covered by subsection (4) must be laid before Tynwald as soon as practicable after they are made; and if Tynwald, at the sitting at which they are laid or at the next following sitting, resolves that they be annulled, they cease to have effect.

The exceptions to this general provision – those which require Tynwald approval – include orders under clause 4(4) providing for an earlier application date and regulations prescribing fees for the purpose of clause 68.

I beg to move clause 67 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

The President: The Hon. Member, Mr Downie.

Mr Downie: Thank you, Madam President.

Clause 67 and the following clause 68 are linked.

In clause 67 we are told:

> 'Orders and regulations (other than those covered by subsection (4)) must be laid before Tynwald as soon as practicable after they are made,'

but there is no indication here that the fee structure is going to go to Tynwald.

Reading the next clause, there is nothing in there that indicates that the fees will be coming to Tynwald.

Mr Braidwood: Yes, it does.

Mr Downie: Is that what section 67 means?

Mr Braidwood: Subsection (4).

Mr Downie: Right, well, as long as that is clarified and we are clear that when the Fees Order comes to Tynwald we know what it is all about. As long as we can clarify that, because I would have thought there would have been a paragraph in here to say that it would have to come to Tynwald, as it has in clause 67.

The President: It does refer to regulations.

Mr Downie: Well, why not include it as a… *[Inaudible] (Interjection)*

The President: The learned Acting Attorney General to reply.

The Acting Attorney General: I can confirm that that is the case, Hon. Members.

Mr Downie: Right, I am happy with that.

The Acting Attorney General: Thank you.

The President: The motion is that clause 67 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clause 68.

The Acting Attorney General: Thank you, Madam President.

Clause 68 deals with fees.

This clause sets out the framework for fees chargeable under the Act. The power to charge fees is a recognition that the financial and administrative burden placed on public authorities by information requests is not the sole responsibility of the taxpayer and that this burden should be shared to some degree by the persons making the request.

The Bill contains a flexible fees-making power, but it is a power which has clear parameters. As I stated, although the fees are not yet set – the introduction of the Act is over a year away – it is very important that the level of fees does in no way inhibit the poorest in our community from making a reasonable application.

This clause sets out the framework for fees chargeable under the Act and permits the Council of Ministers to make regulations prescribing the fees payable firstly to public authorities in respect of requests for information and giving access to information in accordance with this Act, or in respect of applications to the Information Commissioner.

The clause also allows regulations to provide for fees by fixing a fee or a rate, process or formula by which a fee may be calculated, providing for different fees for different cases and circumstances and providing the process for making reasonable estimates of fees and notifying the applicant of the estimates.

There are other aspects of the clause which I think are important, including that the regulations may also provide that no fee is payable in certain cases and that a fee must not exceed a maximum amount.

Public authorities will also, if they consider it appropriate, waive the whole or any part of a fee, or refund the whole or any part of the fee.

Finally, the fees regulations will be, as has been highlighted, subject to Tynwald approval, so Hon. Members will have a chance to fully consider the issue of fees at a future date.

I beg to move, Madam President, that clause 68 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

The President: The Hon. Member, Mr Downie.

Mr Downie: Thank you, Madam President.

I think in clause 68(7)(b) where there is a possibility to refund the whole or any part of a fee, this is a good move because if a Department has got it wrong and they go to mediation and the other party makes their case, the person conducting that can award the fees. And if that is going to be what is going to happen, I think that is a good thing for democracy.

The President: The Hon. Member, Mr Crowe.

Mr Crowe: Thank you, Madam President.

Just on subclause (9), where 'regulations may specify the destination of the fees paid', usually fees go into Treasury funds, but is it implied here that the fees might be used to support the running of the administration of the whole Freedom of Information Act?

Mr Braidwood: If it is not specified?

Mr Downie: General revenue. *(Interjections)*

Mr Crowe: No, what I am saying is: is it allowing the fees to be ring-fenced to go to support the Information Commissioner's work?

Mr Braidwood: Madam President, I think it says, following on to 68(10):

'If no destination is specified, fees received are to be paid into and form part of the General Revenue of the Island.'

Mr Crowe: I know, but what I am saying is: can it be set aside to support the running of the Information Commissioner's office?

Mr Braidwood: Madam President, I would presume so. *(Interjections)*

The President: Let's just have one at a time, please.

The Hon. Member, Mr Corkish.

Mr Corkish: Sorry, Madam President.

I think what the learned Attorney said this morning referred to that point, if I remember rightly, that they could be refunded and they would go… I cannot quote you exactly, but would go back to the running of the fund.

The President: The Hon. Member, Mr Turner.

Mr Turner: Thank you, Madam President.

I think this is the clause which gets to the nitty-gritty of the points I was raising earlier, in that we currently have a system where the public has access to information free, namely the Code on Access to Government Information.

We are bringing in this whole legislation here with fees, I think. Whilst the champions of freedom of information are saying how important this is, I think what we are creating here is a Bill that will give people less access to information – they will have to start paying for it. That will weed out a lot of people who genuinely want information but do not want to pay for it. We have seen this in other areas of Government now, where charges have been introduced.

We talk about democracy and access and transparency: I think this is probably the worst piece of legislation we are going to put through that is going to enable it… creating a huge bureaucracy. It is

all about fees; it is all about costs. The end result is we will have a system where yes, those who are prepared to pay for it now will be able to get the same information they could have got before under the free system, the simple system – one that has worked and served us very well.

I think this is the clause, really, that is the nitty-gritty of the whole thing.

The President: The Acting learned Attorney General to reply.

The Acting Attorney General: Thank you, Madam President, and thank you again to Hon. Members for your helpful comments; and again, thank you for resolving some of the issues between yourselves as to the destination *(Laughter)* of where fees might go.

A Member: Treasury again.

The Acting Attorney General: If I could just, please, reiterate that this is simply an enabling power.

I will come back again at the Third Reading to give you what information I can with reference to fees, but I feel sure that it will be to reiterate that there is no actual fee proposal at this time. But I will firm up on the costs, which I have already indicated are the £500,000 a year into the central administration and the £116,000 which I mentioned before with reference to the Data Protection office. I will firm up on that and provide the skeleton staff and breakdown of the £116,000, which the Hon. Mr Turner has requested.

But if I could, please, help you with this information now, because I have the information from the UK and Scotland as to how they deal with fees. If the costs of complying with a request do not exceed £100, they do not charge a fee. If the cost exceeds £100 – this is complying with a request – but is below the £600 cap that I mentioned, the fee payable does not exceed 10% of the difference between the £100 and the projected cost. If the cost of complying with a request exceeds the £600 cap which I mentioned, the authority, as I have said already, does not have to comply with a request. If, however, it chooses to do so, it cannot charge more than the sum of £50 plus an amount by which the projected costs exceed the £600. That is a bit obtuse, but that is the way it works. And when they are looking at the projected costs, they identified the costs of locating information, retrieving information and providing the information. I think, if nothing else, that demonstrates that in the UK and Scotland it is a shared cost – the taxpayer pays part of it and the requester also pays part. I think that was the point I have been trying to make, so I hope that is maybe of some help to Hon. Members.

Thank you.

The President: The motion is that clause 68 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clause 69 and schedule 4.

The Acting Attorney General: Thank you, Madam President.

This clause provides that schedule 4 has effect in relation to consequential amendments to existing legislation, including the Data Protection Act 2002 and the Council of Ministers Act 1990.

The most significant amendment to existing enactments is in respect of the Data Protection Act 2002, which I touched upon when we were considering clause 25.

Paragraph 1 broadens the definition of data within the Data Protection Act to include unstructured manual personal data held by public authorities.

Paragraph 6 removes a public authority's obligation to comply with a data subject's right of access in respect of unstructured personal data unless a subject access request contains a description of the data, and then only if the cost of compliance is below the prescribed limit.

Paragraph 7 removes from the extension of the new definition of data all the substantive effects of the Data Protection Act except those relating to subject access and accuracy, as the general application of that Act to all personal information held by public authorities is not an intended by-product of the Act.

The schedule also contains a transitional provision so that without limiting the provisions of the schedule a reference – in any enactment or document in force or created before the date on which this schedule commences – to the Data Protection Supervisor is taken as reference to the Information Commissioner.

I beg to move that clause 69 and schedule 4 do stand part of the Bill.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

The President: The motion is that clause 69 and schedule 4 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

That concludes consideration of the clauses of the Bill, Hon. Members.