

## **Draft Bill**

### **A) Introduction**

1. Positive Action Group (P A G) is an IOM political lobby group which has been campaigning, since its formation in 2006, for a Freedom of Information Act. We contributed to the Preliminary Public Consultation in February 2007
2. The current 'Code of Access to Government Information' is inadequate and we welcome this move to replace it. In the last 2 years P A G has made 2 innocuous requests to government under the Code. Both were refused. Following complaint the information was released on the recommendation of the Commissioner. In both cases there was nothing in the information that was prejudicial to government. We believe that this Bill will shift the culture of government to be more accepting of the "right to know" by the public.
3. Comment has been made on 25 of the 73 clauses in the Bill by direct reference to the draft legislation rather than the summary of the provisions given the consultation document.
4. When considered appropriate reference is made to the UK FOI Act upon which this Draft Bill is modelled.
5. Similarly reference is made to the Scottish FOI Act.
6. Recently the States of Jersey published a Report ["Draft Freedom of Information \(Jersey\) Law 201](#)". We refer to this and recommend it for excellent background information on FOI.
7. P A G wholeheartedly endorses the [Office of Data Protection Supervisor's response](#) to this consultation.

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## **B) Executive Summary**

1. The incorporation of exemptions from public scrutiny is the most controversial and critical aspect of any FOI legislation. We have serious concern about a fundamental concept within the Bill, that of the test of “prejudice” that enables public authorities to refuse providing information. It is used extensively in Part 4 (Qualified Exempt Information) and as commonly interpreted provides too low a threshold to justify rejecting requests. It goes to the heart of whether the legislation is truly open, fair and meaningful.

The Scottish FOI Act adopts a more robust test, by using “prejudice substantially” and we strongly suggest that it be incorporated in this IOM legislation. Its use will significantly safe-guard the public interest when access to information is requested.

2. The exclusion of the Council of Ministers as a public authority is a major weakness in the Bill and should be reconsidered.

3. It is clearly intended that a system of fees be introduced to process requests. A request fee is not levied under the existing Code and should not be under this legislation, for straightforward requests. There should be no application fee for any request. P A G deplors the fact that within the consultation document no indication of the level of fees has been given (cf. Jersey Report).

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## **C) Detailed Submission**

### **Clause 5 – Meaning of public authority**

*“(9) Schedule 1 does not affect the operation of section 6(2) of the Council of Ministers Act 1990 (proceedings of council to be confidential).”*

## **Comment**

Clause 5 defines “a public authority” to which requests for information can only be made [4(1), 7(1)]. It thus excludes CoMin whose proceedings are confidential (except by referral to the Chief Minister). The Government Cabinet in the UK is subject to the UK FOI Act , and the Scottish Act. So far it has vetoed disclosures of Cabinet or Cabinet Committee meetings. Nevertheless the legal mechanism is in place.

In the interest of transparency and the spirit of the Bill, CoMin should have an unqualified inclusion as a public authority.

## **Clause 6 – Meaning of publicly-owned company**

*(2) The Council of Ministers may by order specify that this Act applies only to information of a specified description held by a publicly-owned company.*

## **Comment**

Not ideal to do this by order.

e.g. Ministers can in effect change the Schedule to take a company which has been fully subject to the Act and amend the definition so that it applies to it.

e.g in relation to the amount it spends on postage!

## **Clause 7 – General right of access to information held by public authorities**

□ □ □ □

*(6) A public authority may also refuse to comply with a request for information if the information came into existence before 1 September 1996, unless the information –*

*(a) is open information; or*

*(b) is contained in a record created on or after that date.*

## **Comment**

a) The existing Code of Practice is fully retrospective. The Bill should provide for this, as otherwise it would remove an existing right. Full retrospection exists under the UK and Scottish Acts.

b) The principle of retrospection should apply to all government information. However, a scheme of phased-in retrospection may be acceptable for local authorities and similar bodies. This would enable them to adapt to the requirements of the legislation over a number of years

## **Clause 10 - Fees**

*(5) A fee imposed under subsection (2) -*

*(a) must be determined by the public authority in the prescribed manner; but*

*(b) where provision is made by or under another enactment as to the way in which it is to be determined, must be determined in that way.*

*(6) Regulations made for the purpose of subsection (5)(a) may, in particular, provide –*

*(a) that no fee is to be payable in prescribed cases; and*

*(b) that any fee is not to exceed such maximum as is specified in, or is to be determined in accordance with, the regulations*

### **Comment**

P A G is opposed to an across the board imposition of fees. There should be no prescribed application fee. No fee is levied under their existing Code. It is a significant omission that no indication of likely fees accompanies the Bill. (cf. States of Jersey Report). Similarly no indication of the cost of fee collection administration is given in the Impact Assessment (Appendix 2). It may well be that complicated requests may require a charge to be levied.

*(8) Regulations made for the purposes of this section may create offences and impose penalties for the provision of false or misleading information in connection with a request for information.*

### **Comment**

This sub clause is confusing and ambiguous as it is not clear who would be implicated in any offence. Is it an official who deliberately releases false information to a requester? If so it needs to be stated that the offence is committed for the provision of false or misleading information in response to a request for information.

## **Clause 11 – Time for compliance**

*(3) If a public authority refuses to comply with a request for qualified exempt information in the circumstances set out in section 26(3), the authority is not required to comply with the request until such time as is reasonable in all the circumstances.*

### **Comment**

At 11(1) there is a 20 working day limit which does not apply for any request which the authority is considering refusing under a qualified exemption. That is, an unspecified additional period of time is permitted to answer requests where the public interest test comes into play.

This could lead to indefinite delays and is not in the public interest. The Bill should reflect the Scottish Act which does not have this.

All requests, including those involving qualified exemptions, must be dealt with within the same 20 working day period.

## **Clause 12 – Manner of compliance**

*(3) The means are –*

*(a) the provision of a copy of the information in permanent form or in another form acceptable to the applicant;*

*(b) the provision of a digest or summary of the information; and*

*(c) the provision to the applicant of a reasonable opportunity to inspect a record containing the information.*

## **Comment**

The clause means an applicant would not be entitled to a photocopy of a document containing the requested information. Clause 12(3)(a) allows the authority to print out or retype the information - it does not permit a photocopy to be insisted on.

Insert a provision allowing the requester to specify a photocopy.

The authority would still not be obliged to provide one if that would not be “reasonably practicable” (clause 12(4)), so there is no reason to regard such a provision as onerous.

## **Clause 14 – Publication schemes**

14 *Publication schemes*

(1) *A public authority may–*

*(a) adopt and maintain a publication scheme relating to the publication of information by the authority.*

## **Comment**

Amend to require authorities to produce publication schemes (as in UK and Scottish Acts)

An advantage of FOI is that the service provided by authorities can be improved via feedback from the results of requests.

For consistency publication needs to be on a mandatory basis.

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## **Clause 18 – Information accessible to applicant by other means**

(1) *Information is absolutely exempt information if it is reasonably accessible to the applicant, whether free of charge or on payment, other than by requesting it under section 7(1).*

(2) *Without limiting subsection (1), information is taken to be reasonably accessible if –*

(a) *it is available in public libraries or archives;*

(b) *it is available on the internet or from any other reasonably accessible source;*

(c) *it is made available under a publication scheme; or*

(d) *the public authority which holds it, or any other person, is obliged by law to supply it to members of the public on request.*

### **Comment**

(1) implies that the key consideration is that information is reasonably accessible to the individual applicant?

(2) then undermines the focus on the individual applicant, by saying the information is deemed to accessible if it can be obtained in any of the 4 specified ways.

Something that may be accessible to person A, who has internet access, may not be accessible to person B, who does not.

Something available in the library may be accessible to person C, who can walk or drive there,

but not to person D who is disabled and housebound.

It is in the public interest for information to be accessible to every member of society

## **Clause 20 – Court information**

*(3) Information is absolutely exempt information if it is held by a public authority only by virtue of being contained in a document –*

*(a) placed in the custody of; or*

*(b) created by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration*

### **Comment**

Clause 20(1) exempts court documents. Clause 20(3) applies the same exemption to any statutory inquiry. Clarification should be given about the exemptions

e.g. in the IOM is there a procedure permitting anyone to ask the courts to authorise the release of documents relating to a case, and Deemsters have power to do so?

Moreover where the document has been read out in open court it seems reasonable to expect it to be regarded publicly available thereafter.

Similarly clarification is necessary for Inquiries, as the definition in subclause (4) means that this provision applies to any statutory Inquiry, even one that takes place in public.

P A G strongly recommends that greater consideration be given to absolutely exempt information in relation to Court information. The overriding consideration must be the public



interest.

## **Clause 22 – Parliamentary business**

22 *Parliamentary business*

(1) *Information is absolutely exempt information if its disclosure under this Act would, or would be likely, in the reasonable opinion of the appropriate person specified in subsection (3), to prejudice the effective conduct of public affairs.*

### **Comment**

Tynwald would enjoy two absolute exemptions, one for parliamentary privilege and the other for effective conduct of public affairs.

Such provisions serve create to a barrier between elected representatives and the electorate they serve. It is not appropriate for the IOM, especially with its long democratic tradition. The much younger Scottish Parliament does not even have the concept of parliamentary privilege and the exemption of effective conduct of public affairs is a qualified not absolute exemption in relation to it.

This should be the case in the IOM.

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## **Clause 27 – National security**

(2) *A certificate (a “national security certificate”) signed by the Chief Minister (or, in the absence of the Chief Minister, by the Minister for Home Affairs) certifying that refusal to supply the information (or information of a specified description which includes that information) is necessary to safeguard national security is conclusive evidence of that fact*

### **Comment**

The necessity for including the bracketed phrase “or information of a specified description which includes that information” is not apparent.

A refusal to release, or to confirm or deny, is only triggered by the information affecting national security. If that information is contained with information which does not itself affect national security, it seems reasonable to disclose the information which does not affect national security, but withhold that which does.

Neither the UK nor the Scottish Acts include the phrase.

### **Clause 31 – Investigations and legal proceedings**

(1) *Information is qualified exempt information if it has at any time been held by a public authority for the purposes of –*

(a) *an investigation which the authority has power to conduct to ascertain whether a person –*

(i) *should be prosecuted for an offence; or*

(ii) *prosecuted for an offence is guilty of it; or*

(b) *an investigation, conducted by the authority, which in the circumstances which may lead to criminal proceedings being instituted*

## **Comment**

The UK equivalent of this states that the exemption only applies if it leads to criminal proceedings which the authority has the power to conduct.

31(1) retains the qualification (“which the authority has the power to conduct”) but 31(2) drops it, perhaps in attempt to simplify. But the simplification extends the exemption substantially. The effect is that while 31(1) can only be invoked by an authority with a statutory duty to prosecute or recommend prosecution, 31(2) can be invoked by any ordinary authority.

An authority which has had a break-in, and computers stolen, could invoke 31(2) although it has no role in relation to instituting criminal proceedings, its just trying to investigate what happened. Is there anything on our CCTV? Was a window broken? These “investigations” could trigger the exemption.

The UK model, which has been departed from here, does not permit this. Only the police, or the Health & Safety Executive, or another prosecuting authority can invoke the equivalent of 31(2).

*(3) Information is qualified exempt information if it is obtained or recorded by a public authority for the purposes of civil proceedings, brought by or on behalf of the authority, which arise out of investigations mentioned in subsection (1) or (2)*

## **Comment**

This also widens the exemption beyond what the equivalent UK exemption permits. Now, an IoM authority carrying out the kind of informal “investigations” referred to above can withhold the information if it is contemplating some form of civil action.

The equivalent UK provision only applies where the information relates to the obtaining of information from *confidential sources*, ie informants. This qualification has been stripped out of the Bill, substantially widening its scope, without obvious justification.

## **Clause 34 – Formulation of policy**

*(3) In making a determination under section 26(3) (primary duty of public authority to supply information) in connection with information which relates to the formulation or development of government policy, regard must be had to the public interest in disclosing factual information used to provide an informed background to decision-taking.*

### **Comment**

The equivalent UK provision is as follows:

*(4) In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used to provide an informed background to decision-taking.*

It expressly steers disclosure in favour of disclosure of factual information which either has been used, *or is intended in future to be used*, in decision-taking. That is, it applies both to decisions which have been taken, and those still under consideration.

The IoM provision may be intended merely to simplify the drafting, but it weakens/removes the emphasis on disclosure of factual information about forthcoming decisions.

## **Clause 38 – Qualified exempt personal information**

*(2) The first condition is that the data subject would be entitled under section 8 of the Data Protection Act 2002 to prevent its disclosure on the ground that it would cause, or be likely to cause, substantial damage or substantial distress to the data subject or another person.*

### **Comment**

There is a drafting ambiguity here. Section 8 of the IoM Data Protection Act allows a data subject, to object to disclosure, if

*(a) the processing of those data or their processing for that purpose or in that manner is causing or is likely to cause substantial damage or substantial distress to him or to another, and*

*(b) that damage or distress is or would be unwarranted*

Clause 38(2) repeats only part of the statutory definition in section 8 of the DPA, ie it omits the reference to the fact that the damage or distress must be “unwarranted”. This is the kind of drafting ambiguity that can cause problems. It would be better either to repeat the whole of the definition from section 8 DPA, or merely refer to s 8 and not repeat just part of the definition. That is, the problem would be avoided by saying;

*“(2) The first condition is that the data subject would be entitled under section 8 of the Data Protection Act 2002 to prevent its disclosure.”*

## **Clause 42 – Excessive cost of compliance**

*(1) A public authority may refuse to comply with a request for information if it estimates that the cost of doing so would exceed the prescribed amount.*

### **Comment**

P A G suggests that this be amended to read:

*“A public authority may refuse to comply with a request for information if it reasonably estimates that the cost of doing so would exceed the prescribed amount”.*

It would be helpful to be given an indication of what cost limit CoMin intends to set - and how the cost of complying with any request will be calculated.

Under the UK legislation, the cost limit is £600 for central government and £450 for all other bodies, calculated at a standard rate of £25/hour. This provides 24 hours staff time for central govt and 18 hours for other bodies. Crucially, only the time spent locating, retrieving and

extracting the information can be taken into account.

The fees regime under the Scottish Act is different and perhaps more favourable. The cost limit is £600 for all authorities, not just central govt. The hourly standard charge is £15/hr. This means requests can only be refused if they require more than 40 hours work. However, requesters can be asked to pay 10% of the costs, once the first £100 have been exceeded. This obviously exposes much more information to the right of access.

*(3) However, where the authority is not required to comply with the request by virtue of subsection (1), it may nevertheless do so on payment of a fee determined by the authority.*

### **Comment**

This permits an authority to comply with a request where it is not required to do so, if the applicant pays what will presumably be an extra fee. Clarification is required as to when information is disclosed in this way, whether the Commissioner has any jurisdiction to investigate complaints.

Clause 48 allows the Commissioner to investigate a complaint that a request has not been complied with in accordance with the Act. However, if information is disclosed when disclosure is not required, this may be regarded as a discretionary disclosure, not one required under the Act. Is this then outside the Commissioner's jurisdiction? It is possible that an applicant would not be able to challenge any withholding of information from the disclosed information - despite having paid what may turn out to be a high fee for it.

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### **Clause 43 – Vexatious requests**

*(1) A public authority need not comply with a request for information if it considers the request to be vexatious*

### **Comment**

There is no reason for the words "if it considers" to be in this provision. Its effect is give weight to the authority's opinion and make it harder for the Commissioner to override the authority's decision. "If it is vexatious" is sufficient.

(3) *A request may be vexatious if –*

(a) *the applicant has no real interest in the information sought; and*

(b) *the information is being sought for a bad or illegitimate reason, which may include a desire to cause administrative difficulty or inconvenience.*

### **Comment**

Neither the UK nor the Scottish Act has a statutory definition of “vexatious”, as in this clause. The definition itself is not particularly objectionable. However, the definition is not exhaustive. A request could be regarded as vexatious in entirely different circumstances.

To avoid confusion (3) should be removed

### **Clause 44 – Repeated requests**

(1) *This section applies if –*

(a) *an applicant has previously made a request for information to a public authority that it has complied with; and*

(b) *the applicant makes a request for information that is identical or substantially similar.*

### **Comment**

Preferable that (b) should state: “the applicant makes a request to that authority for information that is identical or substantially similar”.

This would prevent authorities refusing a request on the grounds that the applicant has previously applied to a *different* authority for similar information.

### **Clause 45 – Code of practice**

*(2) The code must, in particular, make provision in relation to –*

*(a) the determination of the public interest when considering requests concerning qualified exempt information;*

#### **Comment**

The definition of public interest would be better left to the Commissioner, rather than a code of practice issued by the Council of Ministers. It just opens the door for ministers to do something unhelpful and require the Commissioner and Tribunal to have regard to that.

The Commissioner will probably produce some guidance on the public interest test.

### **Clause 47 – General functions of the Information Commissioner**

*(2) The Information Commissioner must provide the public with such information as her or she considers appropriate*

#### **Comment**

Typing error!

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### **Clause 48 – Applications for decision by the Information Commissioner**

*(1) A person may apply to the Information Commissioner for a decision on –*

*(a) whether a request for information has been complied with in accordance with this Act; or*



*(b) whether a refusal to comply with a request for information, other than absolutely exempt information, was justified.*

**Comment**

(b) is unnecessary, since it is already covered by (a).

Moreover, it raises the question of why (b) appears to exclude the possibility of seeking a decision on a refusal to comply with a request for absolutely exempt information (i.e. was the authority correct to find that the absolute exemption applied). The answer may be that this falls within (a) but in that case so does a request involving a qualified exemption.

*(3) However, the Information Commissioner need not do so if he or she is satisfied that –*

*(a) the applicant has not exhausted any complaints procedure provided by the relevant public authority;*

**Comment**

The word relevant should be omitted

*(d) the application has been withdrawn, abandoned or previously determined by the Commissioner*

**Comment**

The phrase “previously determined by the Commissioner” should be removed.

The harm that may be done by disclosure changes with time, as does the relative public interest for or against disclosure. The fact that the Commissioner may have ruled, say, two years ago that the same request should be refused does not mean that the same decision should stand 2

years later.

What if the applicant has complained to the Commissioner, say, 3 months ago, and since made a new identical request to the authority and had the same answer? If he now complains to the Commissioner, the Commissioner can check whether anything has changed since his last decision. If he finds nothing has changed, he just issues a one paragraph decision notice to that effect restating his earlier findings. If he finds something significant has changed, he reaches a new decision. There's no need for him to have the power to refuse to look at the new complaint.

*(4) The Information Commissioner must –*

*(a) if subsection (3) applies, notify the applicant that no decision will be made and the grounds for not doing so; or*

*(b) in any other case, give notice of the Commissioner's decision (a "decision*

*notice") to the applicant and the public authority*

### **Comment**

In the spirit of the Act there should be a requirement to publish the decision notice

*(5) Subsection (6) applies if the Information Commissioner decides that a public*

*authority –*

*(a) has failed to comply with this Act; or*

*(b) was not justified in refusing to comply with the request for information.*

**Comment**

(b) is unnecessary. This will provide consistency with the recommendation for Clause 48(1)

**Clause 50 – Information notices**

*(7) This section does not oblige a public authority to give the Commissioner information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.*

**Comment**

This is extremely damaging - and not found in the UK or Scottish Acts. Under clause 39, Legal professional privilege (LPP) is a qualified exemption. That means that information which is subject to LPP (generally legal advice) can be requested under the Act and may have to be disclosed on public interest grounds.

It may well be quite difficult to succeed with such a case, because strong weight is given to the public interest in protecting the confidentiality of legal advice.

But if someone complains to the IoM Information Commissioner about a refusal to disclose legal advice the Commissioner will not be able to require the authority to show the disputed legal advice to him (which he would do by issuing an Information Notice, if the information was not voluntarily handed over). This is the effect of clause 50(7). As a result he cannot satisfy himself that it is in fact legal advice; and he cannot investigate whether the balance of public interest favours disclosure or not.

The equivalent provision in the UK Act is far, far narrower. It reads as follows:

*(5) An authority shall not be required by virtue of this section to furnish the Commissioner with any information in respect of-*

*(a) any communication between a professional legal adviser and his client in connection with the giving of legal advice to the client with respect to his obligations, liabilities or rights under this Act, or*

*(b) any communication between a professional legal adviser and his client, or between such an adviser or his client and any other person, made in connection with or in contemplation of proceedings under or arising out of this Act (including proceedings before the Tribunal) and for the purposes of such proceedings.*

The Scottish Act has the same provision, but framed differently. What this means is that the UK/Scottish Commissioners cannot see any legal advice which an authority have been given about the authority's own obligations under the FOI Act or about how they should handle any Tribunal or court case brought under the FOI Act. But they can see any other legal advice.

All that is protected under the UK/Scottish provisions is legal advice on whether the authority is applying the FOI Act correctly. This means that if someone asks a UK public authority for its legal advice on, say, a planning application, that advice might be disclosable on public interest grounds. If the Commissioner needs to see the advice to rule on a complaint, he is entitled to it.

That would not be the case under the IoM Bill.

## **Clause 51 – Enforcement notices**

*(2) The steps must be within the time specified in the notice*

### **Comment**

Should presumably read “be taken within”

## **Clause 52 – Failure to comply with notices**

*(1) The Information Commissioner may certify in writing to the High Court that a public authority has failed to comply with –*

*(a) a decision notice by not taking any steps it is required to take under the notice;*

### **Comment**

Suggest that the words... “by not taking any steps it is required to take under the notice;” be left out. However, the Commissioner should be able to refer any failure to comply with a decision notice to the High Court, including a failure to comply with a time limit.

### **Clause 60 – Historical records**

*(1) Unless an order under subsection (3) provides otherwise, a record becomes a historical record 30 years after the end of the calendar year in which it was created.*

### **Comment**

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That has also been the position in the UK, but the UK Act was amended earlier this year to allow the 30 year period to gradually be reduced to 20 years. The Amendment has not yet been brought into force.

We strongly urge that the period be fixed at 20 years to enable the public to have access to what is recent historical information.

This would be consistent with paragraph 1 of Schedule 4 of the Bill which allows access to information relating to meetings of the Council of Ministers to be released after 20 years.

### **Clause 67 – record tampering**

*(1) Subsection (2) applies if –*

*(a) a request for information has been made to a public authority; and*

*(b) the applicant is entitled to be supplied with the information under this Act*

*(2) A person to whom this subsection applies commits an offence if he or she alters, defaces, blocks, erases, destroys or conceals a record held by the public authority, with the intention of preventing the authority from supplying the information to the applicant*

**Comment**

It seems logical to extend (b) by adding ...”or the Data Protection Act”

An anomaly may arise if this clause is confined to a public authority. It needs to include private bodies as well.

***Schedule 3 – Powers of entry and Inspection***

*8 The powers of inspection and seizure conferred by a warrant issued under this Schedule are not exercisable in respect of information which is*

*(a) absolutely exempt information; or*

*(b) qualified exempt information, in circumstances where a request for information has been refused.*

**Comment**

Schedule 3 gives the Commissioner the power to seek a warrant to enter premises and seize material relevant to an authority’s failure to comply with the Act or commission of an offence under it.

The powers do not allow the Commissioner to seize any exempt information which the authority is refusing to disclose.

## **PAG Submission to Consultation on Freedom of Information Bill**

Written by PAG

Monday, 20 September 2010 12:14

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In the UK there is a warrant power, but the only information which cannot be seized is information which is claimed to fall under the exemptions dealing with security bodies or national security (Clauses 19 or 27) or information about the authority's legal advice on compliance with the FOI Act.

The IOM Bill transforms this limited immunity into a right to withhold any information whose disclosure the authority is resisting.

The Bill should reflect the UK position.

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**W Roger Tomlinson**

**Chair – P A G**

**September 2010**

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