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FREEDOM OF INFORMATION (AMENDMENT) BILL

Report Stage (continued) May 18, 2007

BRIEFING No 2

This Briefing supplements our earlier briefing of April 18 which is available on the Campaign's web site together with press and other comment on the bill.[1]

David Maclean MP's private member's bill would (a) remove both Houses of Parliament from the scope of the Freedom of Information Act and (b) create a new exemption to allow public authorities to refuse to disclose communications between themselves and MPs.

The Bill has been justified as a measure needed to protect the privacy of MPs' constituents. Last week the Leader of the House, Jack Straw, said the measure was *"about protecting the rights of our constituents to correspond with us in confidence"*.[2] The Parliamentary Labour Party committee has supported it on the grounds that it is necessary to keep "MPs casework confidential".

These statements describe a problem which does not exist. Any MP's letter concerning an individual constituent is already exempt under the Act's existing exemptions.

Moreover, these comments fail to explain why the Bill seeks to remove Parliament itself from the FOI Act. Parliament does not hold MPs' correspondence (it is held by individual MPs and the authorities with whom they correspond). Excluding Parliament from the Act could have no effect on the treatment of constituency correspondence.

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[1] http://www.cfoi.org.uk/macleanbill.html#campaignsresponse
[2] Hansard, Business of the House, 10 May 2007

At least two separate exemptions in the Freedom of Information Act already protect such correspondence:

- The exemption for personal information (section 40(2)) exempts information about an identifiable individual whose disclosure would breach the Data Protection Act. This would cover any information about a constituent's personal or family circumstances. The only foreseeable circumstances in which it might be disclosed would be where the constituent consents to the disclosure or where the constituent has previously made the information public himself, for example, in the course of a campaign to remedy a perceived injustice.

- The exemption for information whose disclosure would be a breach of confidence at common law (section 41) provides a second layer of protection. A constituent providing personal information to his MP, and an MP passing that information on to a public authority, would in each case be communicating information in circumstances which create an obligation of confidentiality. The information would be exempt unless it was already in the public domain.

In addition, an authority which wrongly discloses it, whether in response to an FOI request or otherwise, would expose itself to the risk of (a) enforcement action for breach of the Data Protection Act and (b) action in the courts for breach of confidence.

The Information Commissioner's office has told to us that in nearly two and a half years since the Act came into force it has not received a single complaint either from an MP or from a constituent concerning the improper disclosure of such correspondence.

Mr Maclean himself has acknowledged that constituency correspondence is already exempt. At the bill's committee stage he said:

> Clearly if one writes to a public authority and gives the personal details of a constituent, such as their CSA claim, information relating to their children and so on, that information should be protected. It should quite clearly be protected under the current Act. However, inadvertently, someone may release it. This measure would remove that small problem.[3]

However, an official who inadvertently overlooks the Act's existing exemptions would be just as likely to overlook the additional exemption proposed by this Bill.

In our experience, authorities are extremely protective of the personal data which they hold. Even those who have little knowledge of the FOI Act recognise that disclosure of personal data about private citizens would breach data protection legislation, which has been in force since 1987.

The 'constituents' privacy' justification was strongly advanced by Mr Straw in the House of Commons last week:

> It was never an anticipation of this or the other place that a consequence of the freedom of information legislation would be that confidential Members' correspondence on behalf of constituents would be at risk of publication. That was never, ever the intention. Publication of such matters would drive a coach and horses through the relationship that we have with

[3] Freedom of Information (Amendment) Bill Committee, 7 February 2007, col. 7

> constituents. It is all very well for some people to say that there are some exemptions, but the truth is that the way that some journalists and the Information Commissioner are acting means that that intention is not being met in practice by the Information Committee.

We are mystified by that statement and by the unjustified suggestion that the Information Commissioner is in any way responsible for the disclosure of MPs' constituency correspondence. We closely monitor the Commissioner's decisions and guidance and have never seen anything to suggest that he has ever required or encouraged authorities to release such material.

This suggestion is all the more implausible in light of the Information Commissioner's responsibility for enforcing the Data Protection Act as well as the Freedom of Information Act.

In recent decisions he has held that exemption for personal information in section 40(2) of the FOI Act applies to:

- the names of people signing a petition to a local authority concerning an allegedly "undesirable tenant"[4]
- the name of an informant who notified a local authority of a potential breach of planning requirements at someone's property[5]
- information relating to a Home Office decision to grant indefinite leave to remain in the UK to a named individual[6]
- information about the age, length of service and pay scale position of council employees taking voluntary retirement which, though not naming those involved, could allow their identities to be deduced[7]
- information about a pupil referred to in minutes concerning a disciplinary hearing against a teacher (the teacher had consented to the disclosure of his own personal data)[8]
- the names of members of the public responding to a public consultation exercise about a right of way.[9]

These, and many other decisions, give no support to the view that an MP's correspondence on behalf of an private individual could legitimately be disclosed under the FOI Act.

Even where the substantive information about the constituent is public already, the mere fact that he had asked his MP to intervene on his behalf would itself be exempt personal data.

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[4] Decision Notice FS50086626
[5] Decision Notice FS50093233
[6] Decision Notice FS50081574
[7] Decision Notice FS50129941
[8] Decision Notice FS50068004
[9] Decision Notice FS50082424

Mr Straw last week made a further point when he said:

> "the original intention—which had all-party agreement—was that Parliament should be exempted from [the FOI Act], as is the case in respect of many other Parliaments".

The FOI laws that do extend to their countries' Parliaments include those of Ireland, South Africa and India. As recently as this week the Speaker of the New Zealand House of Representatives called for the New Zealand Official Information Act (OIA) to be extended to the New Zealand Parliament. The Speaker, a former Attorney General, Minister of Labour and Minister of Commerce said:

> Let me state at the outset that I personally find it anomalous that the administration of Parliament is not subject to the OIA, with suitable protections for the privacy of communications between Members of Parliament and their constituents and agencies that they petition on behalf of the public. As a Minister I was well accustomed to the scrutiny of the OIA….
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> I personally see much merit in the proposal. It would make little difference to current practice relating to parliamentary proceedings. It would, in my view greatly improve parliamentary administration if there was the discipline of the OIA provisions, with the necessary provisos of protecting the privacy of constituents.[10]

Ireland's Freedom of Information Act, passed in 1997 already applies to the Irish Parliament. The pattern of disclosure in Ireland closely anticipated what has since occurred in the UK. While information about private citizens' personal affairs is protected, information about MPs' expenses are disclosed.

Several months before the UK FOI Bill was introduced in December 1999, the Irish Information Commissioner ruled that detailed information about Irish MPs' expenses should be released because:

> the public interest in ensuring accountability for the use of public funds greatly outweighed any right to privacy which the members might enjoy in relation to details of their expenses claims.[11]

This decision was well known to those following FOI issues in the UK. It would have been known both to the UK Parliamentary authorities and to the Home Office. It was in fact the then Home Secretary (Mr Straw) who was responsible for bringing Parliament within the FOI Act's scope.

It appears that the Bill is primarily prompted by the discomfort caused to MPs by the release of their expenses claims and, perhaps, by requests for related but more detailed information. We appreciate that some of these may appear intrusive and that the coverage of MPs' expenses may sometimes appear ungenerous.

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[10] "Parliament and Official Information", Keynote address by the Hon Margaret Wilson, at the Information Law Conference, Wellington, New Zealand, May 15 2007. www.parliament.nz/en-NZ/Admin/Speaker/Speeches/2/1/b/21b14c4e36124af5bbb846fc79aad4be.htm

[11] Information Commissioner of Ireland, Case 99168. Mr Richard Oakley of The Sunday Tribune newspaper and the Office of the Houses of the Oireachtas

However, the detailed expenses of ministers, judges, chief constables, councillors, civil servants, local authority chief executives and other public figures and officials are all disclosable under the Act. Examples of these were included in our earlier briefing.[12] The case for excluding the expenses of MPs alone, when those of the whole public sector are potentially available, has not been made.

For Parliament to exclude itself from the Act would send a deeply negative message to the rest of the public sector. It will suggest that MPs consider that the drawbacks of compliance outweigh the public benefit. That would make it harder for those conscientious officials who are trying to persuade their colleagues to adopt an open approach and reinforce the views of authorities which are themselves resisting disclosure.

Campaign for Freedom of Information
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[12] http://www.cfoi.org.uk/pdf/Report_Briefing.pdf