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## FREEDOM OF INFORMATION BILL

House of Commons Committee Stage

### BRIEFING PAPERS

A set of 10 briefing papers produced during the Bill's committee stage

11 January – 10 February 2000

9 February 2000

**Hon. President:** Godfrey Bradman  
**Co-Chairs:** James Cornford, Neil McIntosh  
**Director:** Maurice Frankel

**Parliamentary Co-Chairs:** Helen Jackson MP  
Archy Kirkwood MP  
Richard Shepherd MP

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## FREEDOM OF INFORMATION BILL

House of Commons Committee Stage

BRIEFING PAPER 1

Amendments tabled to Clauses 1-12 by

**Mark Fisher MP and Robert MacLennan MP**

10 January 2000

**Hon. President:** Godfrey Bradman  
**Co-Chairs:** James Cornford, Neil McIntosh  
**Director:** Maurice Frankel

**Parliamentary Co-Chairs:** Helen Jackson MP  
Archy Kirkwood MP  
Richard Shepherd MP

# INTRODUCTION

**This paper deals with the amendments proposed to clauses 1 to 12 by Mark Fisher MP and Robert Maclellan MP.**

The amendments:

## **Clause 1**

- Place authorities under a statutory duty to assist applicants [*Page 3*]
- Create a purpose clause [*Page 6*]
- Explicitly require authorities to ask for further information needed to handle a request [*Page 14*]
- Place the burden of demonstrating that information is exempt on the public authority [*page 15*]
- Prevent authorities destroying records after a request for access to them has been received [*page 18*]
- Extend the right of access to include unrecorded information [*Page 20*]

## **Clause 3**

- Extend the powers of the Secretary of State to make bodies established by *other* public authorities subject to the bill [*Page 23*]

## **Clause 5**

- Make companies which are part-owned by public authorities subject to the bill [*Page 24*]

**Clause 6**

- Remove the Secretary of State's powers to exclude information about a public authority's functions from the scope of the bill *[Page 25]*

**Clause 8**

- Prevent fees being charged merely for informing applicants whether information exists *[Page 27]*
- Require fees to be 'reasonable' *[Page 28]*
- Where information is available under both the bill and another enactment, allow the applicant to pay whichever regime's charges are lower *[Page 29]*
- Prevent fees being charged for information previously available without charge, or whose disclosure is in the public interest *[Page 31]*

**Clause 9**

- Require authorities to supply information more quickly where the applicant would otherwise be disadvantaged *[Page 35]*

**Clause 11**

- Require authorities which reject requests on cost grounds to offer assistance to the applicant in reformulating the application *[page 37]*
- Require authorities to comply with requests that exceed the cost limit if the applicant is prepared to pay an additional fee *[Page 38]*

**Clause 12**

- Prevent authorities applying the single request cost limit to a series of unrelated requests *[Page 40]*
- Require an authority to notify the Commissioner when exercising certain powers *[Page 42]*
- Prevent authorities refusing information on the grounds they have recently supplied the applicant with similar information *[Page 43]*

## CLAUSE 1

### DUTY TO ASSIST

#### Amendment 18

*Clause 1, page 1, line 12, at end insert –*

*‘( 1A ) A public authority shall take all reasonable steps to assist any person in seeking to exercise any right under this Act.’*

This would place authorities under a statutory obligation to assist applicants. It reflects the approach of most FOI laws, including those of New Zealand,<sup>1</sup> Australia,<sup>2</sup> British Columbia<sup>3</sup> and Ireland.<sup>4</sup> The Irish Act treats this duty as of such importance that it is also specified in its long title.<sup>5</sup>

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<sup>1</sup> Section 13 of the *Official Information Act 1982 (New Zealand)*: “It is the duty of every Department, Minister of the Crown, and organisation to give reasonable assistance to a person, who--(a) Wishes to make a request in accordance with section 12 of this Act; or (b) In making a request under section 12 of this Act, has not made that request in accordance with that section; or (c) Has not made his request to the appropriate Department or Minister of the Crown or organisation [or local authority],---to make a request in a manner that is in accordance with that section or to direct his request to the appropriate Department or Minister of the Crown or organisation [or local authority].”

<sup>2</sup> Section 15(3) of the *Freedom of Information Act 1982 (Australia Commonwealth)*: “Where a person: (a) wishes to make a request to an agency; or (b) has made to an agency a request that does not comply with this section; it is the duty of the agency to take reasonable steps to assist the person to make the request in a manner that complies with this section.”

<sup>3</sup> Section 6(1) of the *Freedom of Information and Protection of Privacy Act 1993 (British Columbia)*: “The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.”

<sup>4</sup> Section 6(2) of the *Freedom of Information Act 1997 (Ireland)*: “It shall be the duty of a public body to give reasonable assistance to a person who is seeking a record under this Act (a) in relation to the making of the request under section 7 for access to the record, and (b) if the person has a disability, so as to facilitate the exercise by the person of his or her rights under this Act.” Section 15(3) provides that an authority may not refuse a request on the grounds that the information has not been adequately described or disclosure would cause substantial unreasonable disruption to the authority’s work unless it has: “assisted, or offered to assist, the requester concerned in an endeavour to so amend the request that it no longer falls within [those provisions]”

<sup>5</sup> The long title of Ireland’s *Freedom of Information Act 1997* describes it as ‘An act to enable members of the public to obtain access, to the greatest extent possible consistent with the public

The Public Administration select committee recommended that “authorities should be obliged in the Bill to give requesters ‘reasonable assistance’”.<sup>6</sup> The government has not accepted this recommendation. The bill currently proposes that this issue be addressed under a non-enforceable code of practice.

There are many ways in which uninformed applicants may make invalid requests unless assisted. For example requests can be turned down if:

- they do not adequately identify the information concerned;<sup>7</sup>
- they are made orally instead of in writing;<sup>8</sup>
- the applicant fails to provide a correspondence address;<sup>9</sup>
- the cost of complying exceeds the “appropriate limit”.<sup>10</sup>

Applicants may also lose their rights of appeal through lack of information:

- authorities which refuse requests are not obliged to inform applicants of their rights of appeal<sup>11</sup> – an astonishing omission
- complaints made after “undue delay” do not have to be investigated by the Commissioner<sup>12</sup>

Requests may also fail because applicants do not know what information exists. Authorities are not required to produce a kind guide to their own information holdings (other than a guide

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interest and the right to privacy, to information in the possession of public bodies and to enable persons to have personal information relating to them in the possession of such bodies corrected and, accordingly, to provide for a right of access to records held by such bodies, for necessary exceptions to that right and *for assistance to persons to enable them to exercise it...*’

<sup>6</sup> Public Administration select committee, HC 570-I, July 1999, paragraph 121

<sup>7</sup> Clause 1(3)

<sup>8</sup> Clause 7(1)(a)

<sup>9</sup> Clause 7(1)(b)

<sup>10</sup> Clause 11(1)

<sup>11</sup> Clauses 15(1) and 15(5)

<sup>12</sup> Clause 50(2)(b)

to *published* information<sup>13</sup>). A duty to assist would help to redress this imbalance of knowledge.

### **The bill's approach**

Under the bill, a code of practice to be issued by the Secretary of State under clause 44 must include a section on:

“the provision of advice by public authorities to persons who propose to make, or have made, requests for information to them”.<sup>14</sup>

However, failure to comply with the code would only result in a *non-enforceable* “practice recommendation” issued by the Commissioner.<sup>15</sup> Making the duty to assist a *statutory* requirement would allow the Commissioner to issue a legally binding decision notice<sup>16</sup> or enforcement notice.<sup>17</sup>

A legal duty would also make it more likely that authorities would *know* that they have such an obligation, and act accordingly in the absence of intervention from the Commissioner. Applicants would recognise that they were entitled to assistance, and be more likely to challenge any failure to provide it.

A statutory duty to assist might then be accompanied by guidance, indicating how assistance might be provided in various situations.

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<sup>13</sup> Clause 17(2)(a)

<sup>14</sup> Clause 44(2)(a)

<sup>15</sup> Clause 47(1)

<sup>16</sup> Clause 50(3)

<sup>17</sup> Clause 52(1)

## PURPOSE CLAUSE

### Amendment 21

*Clause 1, page 1, line 14 after 'sections' insert '[Purposes] and'*

### New Clause 2

*To move the following new clause*

*'Purposes*

*'(1) The purposes of this Act are to extend progressively the right of the public to information held by public authorities to the maximum extent possible, consistent with the need to protect interests specified in exemptions, so as to promote—*

- (a) the accountability of public authorities*
- (b) informed public debate on public affairs*
- (c) public participation in the making of decisions.*
- (d) public understanding of the powers, duties and operation of public authorities.*

*(2) This Act shall be interpreted so as to further the purposes specified in subsection (1) and to encourage the disclosure of information, promptly and at the lowest reasonable cost.'*

These amendments create a 'Purpose Clause', a feature of most overseas FOI laws. The Public Administration Committee strongly favoured such a provision:

*'Purpose clauses can be used to indicate clearly which of two or more competing values should be uppermost when a decision is made. In this Bill, such a clause could have the effect of encouraging Commissioner, Tribunal and judges to lean towards disclosure. Perhaps more important, though, it could influence those people in departments and other authorities who actually have to operate the legislation...*

*The effect of adding a purpose clause would be to encourage an authority to exercise its discretion under clause [13]<sup>18</sup> in favour of disclosure, and indeed, we have recommended above that if clause [13] is to be retained, a specific requirement to regard the public interest as being in favour of disclosure should be inserted within it....The*

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<sup>18</sup> References to clause numbers (in square brackets) refer to the current version of the bill. The original text referred to the draft bill's clauses.

effect of the inclusion of a purpose clause would be much greater than this, though. A purpose clause would influence the exercise of every discretion under the Act, including the discretion to charge; the manner in which publication schemes are published (clause [17(4)]); the nature of the model publication schemes issued by the Commissioner and of the ‘practice recommendations’ under clause [47(1)]; the meaning of ‘a reasonable interval’ in clause [12(2)] and so on. But we have also said that we would prefer that, instead of the discretionary system set up under clause [13], there should be a requirement within each of the exemptions that an authority should balance the harm caused by disclosure against the public interest in disclosing information. In these circumstances, a purpose clause could play a useful role in making explicit the weight that should be given to the different interests which need to be taken into account. It would then contribute to the rebalancing that we are suggesting...Furthermore, a purpose clause is more than a legal instrument (which seemed to be the Home Secretary’s view). It also sets the tone and spirit of the legislation, and encourages those charged with making it work to view it positively, rather than as a regulatory chore. We recommend that the Bill should contain a clear statement indicating what it is intended to achieve and indicating a presumption in favour of disclosure.’<sup>19</sup>

A purpose clause has also been advocated by the Data Protection Registrar, Elizabeth France, who will become the first Information Commissioner. The select committee reported:

The Data Protection Registrar argued that a purpose clause was required to make clear the balance that should be struck between privacy and Freedom of Information, and especially to ensure that the inbuilt advantages which privacy possesses – from the European Data Protection directive and the European Convention on Human Rights – would not overwhelm the right to information. She argued that the balance should be defined in the Act, and not left to the Information Commissioner and Tribunal.<sup>20</sup>

In her response to the draft Bill Mrs France pointed out that while government statements had described the purpose of FOI legislation, the draft Bill itself ‘does not incorporate the policy approach that openness is to be encouraged’ She added:

‘A straightforward purpose statement in this Bill would be helpful to all, especially

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<sup>19</sup> Public Administration select committee, HC 570-I, July 1999, paras 55 and 59.

<sup>20</sup> HC 570-I, paragraph 56

those making decisions about disclosure in relation to any exemption, not just the personal information exemption. The Bill would benefit from such a statement; there could be no ambiguity about what was intended.’<sup>21</sup>

In her oral evidence to the select committee she added:

‘I am in favour of some sort of purpose clause, whether it is a purpose clause at the beginning or...something which goes along with clause [13] as part of the package for discretionary decisions. I think what I find lacking, when I look as the potential enforcement authority, at the FOI Bill is what I could use to hang a view that a discretionary decision had been improperly taken. If you have not got something which says "One of the weights in the balance is the desire to have as much access as possible to public information", something of that kind, then you are lacking something to go with the weight on the other side which says there is a fundamental right to privacy where it is personal data and you lack something to assist decisions on whether a disclosure is obligatory or discretionary. I think it would be very helpful in making judgements about discretionary decisions but it fits also with my view that discretionary decisions should be reviewable in substance, the two are a package if you like. You have a purpose clause, you have a purpose clause in order to help public authorities make discretionary decisions, otherwise how does it know what to weigh? I would agree with Lord Burns that officials will look in detail at what is written in the statute unless a very clear lead is given from the top of the public bodies as to what action is appropriate. If there is nothing there that tells them to weigh in the balance a general interest in disclosure then they will not do so.’<sup>22</sup>

### **The government’s response**

The government responded to the select committee’s call for a Purpose clause with two minor changes:

- it amended the draft bill’s long title, changing it from a bill to “make provision *about* the disclosure of information” to ‘make provision *for* the disclosure of information”

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<sup>21</sup> ‘Freedom of Information: Consultation on Draft Legislation’ Response of the Data Protection Registrar, June 1999.

<sup>22</sup> Oral Evidence, 22.6.99, Q 187

- it changed the order of clauses, making the right of access the first clause

The select committee noted that despite these changes “there is still no clear presumption in favour of disclosure.”<sup>23</sup>

## Overseas Precedent

Purpose clauses are common in overseas FOI laws. The most notable is New Zealand’s Official Information Act 1982 which states:

### “4. Purposes –

The purposes of this Act are, consistently with the principle of the Executive Government’s responsibility to Parliament –

- (a) to increase progressively the availability of official information to the people of New Zealand in order –
  - (i) to enable their more effective participation in the making and administration of laws and policies; and
  - (ii) to promote the accountability of Ministers of the Crown and officials and thereby to enhance respect for the law to promote the good government of New Zealand;
- (b) to provide for proper access by each person to official information relating to that person;
- (c) to protect official information to the extent consistent with the public interest and the protection of personal privacy.

### 5. Principle of availability –

The question whether any official information is to be made available, where that question arises under this Act, shall be determined, except where this Act otherwise expressly requires, in accordance with the purposes of this Act and the principle that the information shall be made available unless there is good reason for withholding it.”

According to one commentary, the New Zealand purpose provisions “ensured that the number, tenor and generality of the exemptions would not overshadow the *raison d’etre* of the Act”.<sup>24</sup> A similar point might be made about the need to counterbalance the large number of exemptions in the UK bill, in which the right of access is set out in 4 lines, followed by over 12 pages of exemptions.

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<sup>23</sup> Public Administration select committee, 1<sup>st</sup> report session 1999-2000

<sup>24</sup> I. Eagles, M. Taggart & G. Liddell ‘Freedom of Information in New Zealand’, Oxford University Press, 1992, page 4.

The ‘Purposes’ clause comes into play in two ways. First, as a “tie breaker” in cases where the arguments for and against disclosure are evenly balanced. In the course of a New Zealand Court of Appeal ruling, the judge noted that:

“If the decision-maker, be he Minister or departmental head or Ombudsman or Judge adjudicating on a claim of denial of right, is in two minds in the end, he should come down on the side of availability of information. I say this...because the Act itself provides guidance in the last limb of s.5”<sup>25</sup>

Second, many of the New Zealand Act’s exemptions contain statutory public interest tests, and the Ombudsman often turns to the Act’s ‘Purposes’ in considering these. Thus, in one case he noted:

‘I also noted that the Trust received public funding. I pointed out that the Official Information Act is an instrument to promote accountability (s.4(a)(ii) of the Act refers) and it would go without saying that one of the primary elements of the accountability of Ministers and officials is their responsibility for expenditure of the funds voted by Parliament. The various provisions of the section headed “*Interpretation*” (s.2 of the Act) must, in my view, be read with that purpose in mind.’<sup>26</sup>

Another case involved information about the background to the resignation of two school officials after allegations of financial irregularities. The Ombudsman reported:

‘The information requested was withheld under several sections of the Act, but the privacy interests of the Principal and the Executive Officer were clearly most at issue...The minutes...showed that the Principal had been required by the Board at the time of his resignation to reimburse a considerable sum of money to it and, because this reflected on his integrity, I was satisfied that there was a privacy interest...

In considering the application of s.9(1) [*by which the privacy exemption may be overridden in the public interest*] I was drawn back to the purposes of the Act set down in s.4(1)(a)(ii) which relate to the accountability of Ministers of the Crown and officials.

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<sup>25</sup> Cooke P, in *Commissioner of Police v Ombudsman* [1988] 1 NZLR, p 391.

<sup>26</sup> Tenth Compendium of Case Notes of the Ombudsmen Vol 2, Wellington, 1993, Case 2098

In this case, there had been no public disclosure by the Board that the expenditure had been for the Principal's personal use and not for the school. I took the view that there is a widely perceived public interest in officials having to account for the expenditure and guardianship of public money...the public interest to be served by the release of the information, in my view, outweighed any privacy interest...because, if it did not, public officials, in circumstances where questionable behaviour remains hidden, may not be held accountable to the wider community<sup>27</sup>

It is worth noting that a Purpose clause would be of much greater value in such cases in the UK, where the individual's interest in privacy is protected not merely by an exemption but by the Data Protection Act, the European Data Protection Directive and the right to respect for private life in article 8 of the European Convention on Human Rights. Concern that these instruments may swing the balance too far in favour of privacy and against FOI underlie the Registrar's support for a Purpose Clause.

### **The amendment**

The amendment contains a series of elements:

It states that the Act is intended to '*extend progressively*' the public's right to information, a term also used in the New Zealand law. This emphasizes that the Act is not intended to be a static instrument, under which once-and-for-all-decisions are taken. Attitudes towards disclosure will change in light of public expectations and developing practice. Relatively cautious decisions taken in the early days may later be modified as the system adapts to greater openness.

The 'progressive' extension of access is particularly relevant to clause 17 which requires authorities to produce 'publication schemes' setting out the information which they publish and intend to publish. These must be reviewed 'from time to time'.<sup>28</sup> Such reviews could be minimal, consisting merely of a check that they do not contain out of date references. The purpose clause would indicate that these reviews should consider how to 'extend' the public's rights to information. The expectation of progressive improvements would also guide the

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<sup>27</sup> Tenth Compendium, Cases C225 and C228

<sup>28</sup> Clause 17(1)(c)

Commissioner in approving publication schemes and issuing, and periodically revising, her own ‘model’ schemes.<sup>29</sup>

The extension of the public’s rights must be *‘to the maximum extent possible, consistent with the need to protect interests specified in exemptions’*. This establishes a modest pro-disclosure presumption to set against the overwhelming anti-disclosure bias found in many of the bill’s exemptions. The bill’s ‘class’ exemptions allow information to be withheld without any evidence that disclosure would be harmful,<sup>30</sup> and to refuse even to admit whether such information exists. A department could not, for example, be required to reveal whether it had costed a newly announced policy, let alone to disclose its cost calculations.<sup>31</sup>

The amendment specifies four interests which the bill is intended to promote:

- (a) the accountability of public authorities
- (b) informed public debate on public affairs
- (c) public participation in the making of decisions, and
- (d) public understanding of the powers, duties and operation of public authorities

The Cabinet Office, which was responsible for FOI until July 1998, envisaged a similar approach, which it anticipated would be drawn on in relation to the public interest test:

‘The definition of “public interest” for these purposes might be set in terms of certain stated objectives of the Act e.g. in promoting better informed discussion of public affairs and the greater accountability of public authorities.’<sup>32</sup>

This approach is already found under the Code of Practice on Access to Government Information (the ‘openness code’) introduced by the last government.<sup>33</sup>

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<sup>29</sup> Clauses 17(1)(a) and 18(1)

<sup>30</sup> See the discussion of the bill’s ‘class’ exemptions on pages 3-5 of the Campaign’s Commons 2nd Reading briefing.

<sup>31</sup> Clause 33(2) allows a government department to refuse to reveal whether it holds any information relating to the development of any policy.

<sup>32</sup> Cabinet Office, ‘Your Right to Know – Background Material’, January 1998, paragraph 105.

<sup>33</sup> The preamble to the Code states: “This Code of Practice supports the Government’s policy under the Citizen’s Charter of extending access to official information, and responding to reasonable requests for information. The approach to release of information should in all cases be based on the

Finally, the Purpose clause requires that the Act be interpreted so as to ‘further the purposes’ specified in it and to ‘encourage the disclosure of information promptly and at the lowest reasonable cost’. This is drawn directly from the purpose clause in the Australian FOI Act.<sup>34</sup>

Purposes clauses are more common in overseas legislation than in the UK, but there are a number of significant examples of their use here, for example in the Arbitration Act 1996<sup>35</sup> and the Crime and Disorder Act 1998<sup>36</sup>. Their use was advocated in the 1975 report of an official committee on the preparation of legislation, which recommended “that encouragement should be given to the use of statements of principle, that is, the formulation of broad general rules”. The feasibility of their general adoption in tax legislation is currently being studied by an Inland Revenue working party<sup>37</sup>.

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assumption that information should be released except where disclosure would not be in the public interest, as specified in Part II of this Code. The aims of the Code are: to improve policy-making and the democratic process by extending access to the facts and analyses which provide the basis for the consideration of proposed policy; to protect the interests of individuals and companies by ensuring that reasons are given for administrative decisions, except where there is statutory authority or established convention to the contrary; and to support and extend the principles of public service established under the Citizen's Charter. These aims are balanced by the need: to maintain high standards of care in ensuring the privacy of personal and commercially confidential information; and to preserve confidentiality where disclosure would not be in the public interest or would breach personal privacy or the confidences of a third party, in accordance with statutory requirements and Part II of the Code.’

<sup>34</sup> Section 3(2) of the *Freedom of Information Act 1982* (Australia) states: ‘It is the intention of the Parliament that the provisions of this Act shall be interpreted so as to further the object set out in subsection (1) and that any discretions conferred by this Act shall be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information.’

<sup>35</sup> Section 1 of the Arbitration Act 1996 states: “The provisions of this Part are founded on the following principles and should be construed accordingly - (a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense; (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest; (c) in matters governed by the part the court should not intervene except as provided by this part.”

<sup>36</sup> Section 37 of the Crime & Disorder Act 1998 states:

“(1) It shall be the principal aim of the youth justice system to prevent offending by children and young persons.

(2) In addition to any other duty to which they are subject, it shall be the duty of all persons and bodies carrying out functions in relation to the youth justice system to have regard to that aim.”

<sup>37</sup> *Tax Law Rewrite: Second Technical Discussion Document. ‘A Purposive Approach to Rewriting Tax Legislation’*, paras 3.9 - 1.,3.10

## FURTHER INFORMATION

### Amendment 19

*Clause 1, page 1, line 17, at end insert 'provided that it has notified the applicant promptly that such further information is required'*

Clause 1(3) allows an authority to refuse a request if it has not been

'supplied with such further information as it may reasonably require in order to identify and locate the information requested'

However, the clause does not require the authority to *ask* the applicant to supply further information. This amendment would require it to do so.

As the bill stands, an authority could simply *ignore* a request which it regarded as too vague without bothering to ask for further details. An authority which receives a request which is not specific enough would not formally have to ask for more information or even acknowledge receipt. [Note that the duty to tell an applicant why his or her request has not been complied with arises only where the authority claims that: the information is exempt,<sup>38</sup> the cost exceeds the 'appropriate limit', the request is vexatious, or the request is identical or substantially similar to a previous recent request by the same applicant.<sup>39</sup>]

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<sup>38</sup> Clause 15(1)

<sup>39</sup> Clause 15(5)

## ESTABLISHING THAT INFORMATION IS EXEMPT

### Amendment 20

*Page 1, Clause 1, line 22 after 'that' insert 'it has established that'*

This would amend clause 1(5) by adding the italicised words below:

'(5) A public authority is not obliged to comply with subsection (1)(b) if, or to the extent that, *it has established that* the information requested is exempt information by virtue of any provision of Part II'

This amendment would place the burden of demonstrating that information is exempt on the authority. In any dispute, the burden of proof would be on the authority – not the applicant or the Commissioner - to show that the information was exempt.

An authority which refuses information claiming it to be exempt must, under clause 15(1), give the applicant notice of this fact, specifying which exemption is involved and giving its reasons.

However, if the applicant is dissatisfied with this decision and complains to the Commissioner under clause 50, it is not clear who is responsible for demonstrating that the information is exempt. The Bill merely states that the Commissioner is to decide whether a request has been dealt with in accordance with the requirements of Part 1.<sup>40</sup> What if an authority simply asserts that the information is exempt, and that it has therefore complied, and invites the Commissioner to accept the assertion or disprove it?

This amendment makes clear that, for the purpose of determining whether an authority has complied with clause 1, it is for the *authority* to show that any information which it claims is exempt actually is exempt.

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<sup>40</sup> Clause 50(1)

Overseas FOI laws, such as Ireland's,<sup>41</sup> Canada's,<sup>42</sup> Australia's<sup>43</sup> and many others contain even more explicit provisions to this effect, and a similar provision, in Part IV or V of the Bill, may also be appropriate. Overseas decisions indicate that such an explicit provisions are of practical value to Commissioners:

'In its submission to me the Department identified examples of information which it thought came particularly within specific exemptions in the Act. However, it made it clear that these were examples and it indicated that there might very well be other information of the same kind scattered throughout the records. I can only suggest that if the Department does not choose, for whatever reason, to identify all parts of records which are of particular concern to it then, having regard to the provisions of section 34(12)(b) of the FOI Act [*which deals with the burden of proof*] it can have no legitimate cause for complaint if I fail to uphold its decision to refuse access.'*(Ireland)*<sup>44</sup>

'Section 67(1) of the Act places the burden of proof on the head of the public body to show that the applicant has no right of access to the record or part of the record, and when I am required to review the actions of the head, the head must discharge this burden of proof in justifying the refusal of access under any section of the Act. Mere statements, as in Alberta Justice's submission, that harm may result from disclosure do not discharge the head's burden of proof. There must be evidence of a causal connection between the disclosure and the harm. The head of the public body should have that evidence before he makes his decision and I must have that evidence in reviewing the head's decision.'*(Alberta)*<sup>45</sup>

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<sup>41</sup>Section 34(12)(b) of the *Freedom of Information Act 1997 (Ireland)* states: "In a review under this section...a decision to refuse to grant a request under section 7 shall be presumed not to have been justified unless the head concerned shows to the satisfaction of the Commissioner that the decision was justified."

<sup>42</sup> Section 48 of the *Access to Information Act 1982 (Canada)* states: "In any proceedings before the Court arising from an application under section 41 or 42, the burden of establishing that the head of a government institution is authorized to refuse to disclose a record requested under this Act or a part thereof shall be on the government institution concerned."

<sup>43</sup> Section 61(1) of the *Freedom of Information Act 1982 (Australia, Commonwealth)* states: "(1) Subject to subsection (2), in proceedings under this Part, the agency or Minister to which or to whom the request was made has the onus of establishing that a decision given in respect of the request was justified or that the Tribunal should give a decision adverse to the applicant."

<sup>44</sup> Information Commissioner (Ireland), Case No 98078

<sup>45</sup> Information & Privacy Commissioner (Alberta), Order 96-006

‘Whether the exemption provisions invoked by the respondent apply to the documents in issue will turn on what are essentially questions of fact - with the material facts being peculiarly within the knowledge of the respondent. Pursuant to s.81 of the FOI Act, the respondent bears the onus of proving the material facts which would attract the application of s.36(1) of the FOI Act to the documents...Having regard to the unsatisfactory state of the evidence, I find that the Department has not discharged the onus imposed on it by s.81 of the FOI Act, in that it has not satisfied me that it is more probable than not that the dominant purpose for the preparation of document 17A was for briefing, or the use of, a chief executive...I therefore find that document 17A is not exempt matter’ (*Queensland*)<sup>46</sup>

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<sup>46</sup> Information Commissioner (Queensland) Decision 96021

## **DESTRUCTION OF RECORDS**

### **Amendment 22**

*Clause 1, Page 1, line 24 leave out subsection (6)*

The amendment would delete clause 1(6), which allows an authority to amend or delete information in a requested record if it intended to make the amendment or deletion before receiving the request.

An authority which receives a request should be required to preserve the record even if it had previously intended to delete or amend it. To allow an authority to knowingly destroy such a record should be unthinkable.

The government's Explanatory Notes on the bill state that this provision:

‘is intended to help ensure that requests for information under the Bill do not interfere with the other day-to-day work of an authority or with sound record management’<sup>47</sup>

This suggests an elevation of administrative convenience far beyond any consideration of the public's rights.

The routine ‘weeding’ of old files before they are transferred to the Public Record Office would not be affected by the amendment. The chances of an FOI request arriving in the short period between a decision to destroy a record, and its destruction date, are minimal. Should it happen, preserving the record would be a simple matter.

The bill contains some safeguard against the deliberate destruction of a requested record in order to prevent its disclosure: this would be an offence under clause 75. However, an authority could circumvent this by a planned policy of destroying all information of a particularly sensitive class within a given time after its creation. If, for example, destructions were planned on a 19-day cycle (ie less than the 20 working day period for responding to access requests), the entire class of records would be protected by clause 1(6). None of the records would ever have to be disclosed under the Act, and no offence under clause 75 would

be committed.

Clause 1(6) may originally have been included in order to provide consistency with the Data Protection Act which contains a similar provision.<sup>48</sup> This allows organisations to proceed with any planned deletion or amendment of a record, even if the subject of the record is known to have applied for access, presumably to allow the automated updating of bank, building society and other computerised files. Such circumstances are unlikely to be reflected in dealing with FOI requests.

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<sup>47</sup> Freedom of Information Bill, Explanatory Notes, Stationery Office, paragraph 26

<sup>48</sup> Data Protection Act 1984, section 21(7); Data Protection Act 1998, section 8(6)

## UNRECORDED INFORMATION

### Amendment 36

*Clause 1, Page 2, line 9, at end insert*

*‘(8) In this Act ‘information’ includes unrecorded information.’*

This amendment would extend the right of access to information which was known to officials but not recorded. A similar right of access to unrecorded information is found in the New Zealand FOI Act.

The bill provides a right of access to ‘information’, a term defined in the Interpretation clause:

“‘information” means information recorded in any form”<sup>49</sup>

The effect of this definition is to exclude *unrecorded* information from access. Authorities could refuse to answer questions about their actions, on the grounds that the information was not on their files, even though the answers were readily available. Such requests might, for example, relate to the reasons for particular decisions or why no action on a particular matter was taken. The information may be common knowledge to those involved.

A duty to provide unrecorded information would be feasible, so long as it is subject to a reasonableness test. A request about recent matters, known to officials who are still in post, could easily be dealt with. This may not be the case where events occurred long ago, or those with direct knowledge have moved on.

Could a right to such information be enforced? The British legal system depends on witnesses testifying in court about matters of which they have direct knowledge. The giving of evidence about unrecorded matters is subject penalties of contempt of court (for refusing to answer)

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<sup>49</sup> Clause 82

and perjury (for answering falsely), without penalising those who genuinely cannot remember.

The effect of the bill as drafted is to encourage authorities *not* to record sensitive information, in order to avoid disclosure. Requiring that *unrecorded* information be disclosed would reduce the incentive to do this and could, therefore, lead to an improvement in record keeping.

### **New Zealand**

A right of access to unrecorded information exists under New Zealand's *Official Information Act 1982*. The courts have confirmed that this right:

‘is not confined to the written word but embraces any knowledge, however gained or held, by the named bodies in their official capacities’. The omission, undoubtedly deliberate, not to define the word ‘information’, serves to emphasise the intention of the legislature to place few limits on relevant knowledge”.<sup>50</sup>

According to a leading commentator:

‘One of the perceived advantages of not restricting a freedom of information regime to documents or records is that there is less incentive to attempt to evade the regime by not recording information in some form. On several occasions where no formal note of decision or of the preceding discussion has been made, the Ombudsman in the course of his investigation under the Act, has asked one or more of the persons involved in the decision making process to provide a written account of what was said or the reasons expressed orally for reaching the decision.’<sup>51</sup>

The government's white paper proposed to follow a similar approach. It stated that the FOI Bill

‘should cover both records and information. And the term “records” should cover all

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<sup>50</sup> Jeffries, J. *Commissioner of Police v Ombudsman* [1985] 1 N.Z.L.R., 578; [1988] 1 N.Z..L.R, 385.

<sup>51</sup> R. Snell, University of Tasmania, <http://www.comlaw.utas.edu.au/law/foi/nz.html>

forms of recorded information including electronic records, tape, film and so on'<sup>52</sup>

The bill does in fact refer to unrecorded information, but only to strengthen authorities' ability to deny access requests. Several of the clauses which allow authorities to refuse to confirm or deny whether requested information exists make it clear that this can be done in order to avoid disclosing 'any information (whether or not already recorded)'.<sup>53</sup>

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<sup>52</sup> 'Your Right to Know', December 1997, paragraph 2.10

<sup>53</sup> Clauses 20(2), 21(5), 25(4) and 40(2).

**CLAUSE 3****BODIES ESTABLISHED BY PUBLIC AUTHORTIES****Amendments 23**

*Clause 3, page 2 line 29 at end insert 'or by another public authority'*

**Amendment 24**

*Clause 3, Page 2, line 36 at end insert 'or by another public authority'*

These amendments extend the Secretary of State's power to add to the list of public authorities subject to the Bill. Clause 3 allows a body to be added to the list of Scheduled authorities if:

- (a) it is set up by legislation, Royal prerogative or by ministers or government departments *and*
- (b) ministers or government departments make one or more appointments to that body.

The amendments would extend these arrangements to bodies which are set up by public authorities *other than* government departments. Thus, a body which was established by a local authority, and to which the local authority made appointments, could also be brought within the scope of the Bill by an Order under clause 3(1).

**CLAUSE 5****PUBLICLY CONTROLLED BODIES****Amendment 25**

*Clause 5, Page 3, line 25 after 'owned' insert 'or controlled'*

**Amendment 26**

*Clause 5, Page 3, line 26 after 'owned' insert 'or controlled'*

**Amendment 27**

*Clause 5, Page 4 line 2 at end insert –*

*'(2A) A company is controlled by the Crown or by a public authority if it is a body in which Ministers of the Crown, government departments, public authorities or publicly owned companies (individually or collectively) own at least fifty per cent of the shares.'*

All publicly-owned companies are subject to the Bill.<sup>54</sup> However, a 'publicly-owned company', is defined as one which is *wholly owned* by a public authority.<sup>55</sup> This amendment brings within the scope of the Bill companies which are *controlled* by a public authority. This is defined as a company in which a public authority, or several authorities, hold at least 50 per cent of the shares.

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<sup>54</sup> Clause 2(1)(b)

<sup>55</sup> Clause 5

## CLAUSE 6

### EXCLUDED INFORMATION

#### **Amendment 43**

*Clause 6, Page 4, line 12 leave out lines 12 and 13*

#### **Amendment 44**

*Clause 6, Page 4, line 14 leave out 'or amending'*

The first of these two amendments would delete clause 6(3)(a) which gives the Secretary of State sweeping powers, effectively to remove public authorities from the Bill's scope altogether, without public consultation or Parliamentary involvement.

Clause 6(3) allows the Secretary of State by order to amend the Schedule of public authorities:

'limiting to information of a specified description the entry relating to any public authority'.

Such an order would specify the functions of the authority to which the Bill *would* apply. Once this had been done, information relating to the authority's other functions would no longer be accessible.<sup>56</sup> This drastic power would allow the government, at a stroke, to remove virtually all information held by any authority from access.

**In theory, the Home Secretary could make an order limiting the right of access to government information to information about the phone numbers and opening hours of departments' public inquiry offices. No other government information would then be available under the Bill. Parliament would not even have to debate such an order.**

This is not an altogether fanciful example. An illustration of how the power might be used can

already be found in Schedule 1, where the entry relating to the Bank of England excludes all the bank's key functions from the bill. The bill does *not* apply to the bank's functions relating to monetary policy, the protection of financial institutions' stability and private banking.<sup>57</sup>

Orders excluding information about authorities' key functions could be introduced under the so-called 'negative resolution' procedure, which allows orders to go through automatically, without explanation or debate, unless an MP or peer objects.<sup>58</sup>

This provision did not appear in the draft Bill.

The second of the two amendments deals with clause 6(3)(b) which allows the Secretary of State by order to amend the Schedule

'by removing or amending any limitation to information of a specified description which is for the time being contained in any entry'

This provision allows the Secretary of State to amend any existing limitation, possibly by widening it. The amendment would delete the words '*or amending*' from clause 6(3)(b). The provision would still allow the Secretary of State to *remove* an existing limitation, but not to amend it.

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<sup>56</sup> Clause 6(4)

<sup>57</sup> Schedule 1, Part IV (page 47 of the bill) provides that the Bank of England is subject to the Bill only 'in respect of information held for purposes other than those of its functions with respect to (a) monetary policy (b) financial operations intended to support financial institutions for the purposes of maintaining stability, and (c) the provision of private banking services and related services.'

<sup>58</sup> Clause 81(3)(a) provides that an order made under clause 6(3) 'shall be subject to annulment in pursuance a resolution of either House of Parliament'

## CLAUSE 8

### FEES FOR CONFIRMING WHETHER INFORMATION IS HELD

#### Amendment 28

*Clause 8, Page 5, line 6, after '(1)' insert '(b)'*

#### Amendment 29

*Clause 8, Page 5, line 8, after '(1)' insert '(b)'*

These amendments would prevent an authority from charging a fee merely for informing applicants whether they *hold* requested information. Fees could then only be charged where information was actually *provided*.

Clause 8(1) allows an authority to notify the applicant of the fee that will be charged for complying with clause 1. Clause 1 contains two separate duties: a duty to inform the applicant if information is held, and a duty to supply the information.

An authority might therefore charge:

- merely for ascertaining that it did not hold the requested information.
  
- for informing the applicant that all of the requested information was exempt

This might be done by requiring an application fee to be paid in advance, as permitted under clause 8(2).

## **‘REASONABLE’ FEES**

### **Amendment 35**

*Clause 8, Page 5, line 11 at end insert ‘reasonable in the circumstances and’*

This amendment would require that any fee charged to applicants must, in addition to complying with the regulations on fees provided for in clause 8(3), be ‘reasonable in the circumstances’.

Without such a provision, the Commissioner could only uphold a complaint about fees if they exceeded the levels prescribed by regulations. This amendment would give the Commissioner the right to intervene where a fee which complied with the regulations was nevertheless unreasonable. Such a power would provide a useful safeguard, particularly as the fee regulations themselves are not presently available.

The amendment would help to ensure that the Commissioner’s powers on fees were in line with those proposed in the white paper, which stated:

‘We are prepared to give the Information Commissioner wide-ranging powers to carry out these important functions effectively...[including] the power to review and adjust individual charges or charging systems, or to waive a charge if disclosure is considered to be in the wider public interest. For example, the commissioner might consider that there is a compelling public interest in disclosure which could go by default if the applicant could not afford to meet the charge being levied’.<sup>59</sup>

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<sup>59</sup> *Your Right to Know*, Cm 3818, paragraph 5.12

## FEES UNDER OTHER SCHEMES

### Amendment 37

*Clause 8, Page 5, line 22, at end insert ‘and that fee is less than the fee that may be charged under this section’*

Clause 8(5) provides that where the Bill applies to information which a public authority is entitled to charge for under some *other* enactment, the fees under that other enactment will apply. The amendment would require the other enactment’s fees to be charged only where they are lower than those under the FOI Bill. The applicant would be able to pay whichever set of fees were *lower*.

The bill permits an authority to refuse to disclose information which is already ‘reasonably accessible’ to the public because there is a statutory duty to disclose it.<sup>60</sup> If it does not invoke this power, and agrees to release the information, it should do so on terms most favourable to the applicant.

Examples might include local authority papers to which there is already a right of access under the Local Government (Access to Information) Act 1985. This allows ‘a reasonable fee’ to be charged for photocopies.<sup>61</sup> However, local authorities have been known to demand extremely high fees for photocopying. A 1997 survey by Friends of the Earth Wales of photocopying charges by Welsh Unitary Authorities reported:

‘The cost of copying a single sheet of A4 ranged from 10p (Swansea) to £5.30 (Isle of Anglesey + VAT). 48% of councils charge £1.00 or more with only 22% charging 20p or less’<sup>62</sup>

A 1994 survey by the Council for the Preservation of Rural England found that:

‘Copying a single A4 sheet - charges ranged from free (7 authorities) to £13 (Essex County Council). 10 local authorities charge £5 or more for a single sheet and 43% charged £1 or more. 31% charged less than £0.35.’<sup>63</sup>

Fees charged under the Environmental Information Regulations 1992 have also caused

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<sup>60</sup> Clause 19(1) and (2)

<sup>61</sup> Local Government (Access to Information) Act 1985, section 100(2)(b).

<sup>62</sup> Friends of the Earth Wales, “A Reasonable Charge? Photocopying charges within Welsh Unitary Authorities”.

<sup>63</sup> CPRE, Public Access to Planning Documents, January 1994.

concern at times. For example, one requester who asked the Ministry of Agriculture, Fisheries and Food for the names and addresses of 26 premises found to have breached standards for the disposal of BSE carcasses was told he might be required to pay some £6,400 for this modest information:

"The cost of taking this enquiry further has been calculated. The work involved would include the Ministry making enquiries to local authorities seeking information on premises where unsatisfactory visits had been recorded. This work would incur costs of approximately £1,293. In addition, depending on the situation at such premises, i.e. whether investigations are continuing, prosecution action being taken, etc., we may need to seek advice from the Ministry's legal Division on whether information on such cases can be released. This could add up to an extra £5,195 depending on the number of cases on which advice would need to be sought."<sup>64</sup>

Following considerable adverse publicity, MAFF subsequently provided the information without charge.

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<sup>64</sup> Letter to Alan Watson, December 1996

## **FEE WAIVERS**

### **Amendment 30**

*Clause 8, Page 5, line 11 leave out ‘subsection (5) and insert ‘subsections (5) or (6)’*

### **Amendment 31**

*Clause 8, Page 5, line 22 at end insert*

*‘(6) No fee for complying with section 1 may be charged for disclosure of information:*

- (a) which prior to the commencement of this Act was provided to applicants without charge; or*
- (b) whose disclosure is in the public interest’*

These amendments would require fees to be waived for information previously available free of charge or where disclosure is in the public interest.

#### *Previously available free of charge*

The first of these requirements would prevent the Act making information more expensive to obtain than at present. This could occur if, for example, authorities were permitted to charge all applicants an application fee, a possibility raised in the white paper.<sup>65</sup>

The government has given brief details of the likely approach to charging. The Explanatory Notes on the Bill state:

‘It is proposed that the regulations governing fees will specify that up to 10% of the reasonable marginal costs of complying with the request may be charged. This will be a maximum figure and there will be no requirement on an authority to use this formula, or indeed to charge anything. The regulations will provide that the additional costs

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<sup>65</sup> This stated: ‘We propose that public authorities covered by the Act should be able to charge a limited access fee per request; this should be no more than £10, to keep it in line with the fee for subject access under Data Protection’. *Your Right to Know*, paragraph 2.31

involved in providing the information in the manner or form requested (disbursements) may be charged in addition to any fee'.<sup>66</sup>

### *Public interest fee waivers*

The amendment seeks to bring the bill into line with most FOI laws, which allow fees to be waived in the public interest. The white paper envisaged a similar approach, stating that the Commissioner would have:

'the power to...waive a charge if disclosure is considered to be in the wider public interest. For example, the Commissioner might consider that there is a compelling public interest in disclosure which could go by default if the applicant could not afford to meet the charge being levied'<sup>67</sup>

The proposed fee regulations<sup>68</sup> could stipulate that fees cannot be charged in certain circumstances, but it is not clear that this is intended to apply to cases where disclosure is in the public interest.

**On the contrary, the government has previously indicated that discretionary disclosures made after considering the public interest would be subject to *higher fees than ordinary disclosures*.**

This is the result of the bill's illogical approach to public interest disclosures. This is discussed in more details on pages 5 to 13 of the Campaign's Second Reading briefing. Briefly, the bill envisages two types of disclosure:

- Information which is not exempt *must* be disclosed. Such *mandatory* disclosures will subject to a charge of no more than 10% of the actual costs, (so long as the actual costs do not exceed the 'appropriate limit' under clause 11).
- Exempt information *may* be disclosed on a *discretionary* basis, where the public interest

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<sup>66</sup> Explanatory Notes, paragraph 49

<sup>67</sup> *Your Right to Know*, paragraph 5.12

<sup>68</sup> Clauses 8(4) and 14(2)

justifies this [clause 13(1) and (4)]. However, a *higher* fee than normal may be charged for discretionary disclosures.

The Home Office consultation paper confirmed that:

‘where an authority uses its discretion, under clause [13],<sup>69</sup> to disclose information, it would also have the discretion under that clause to charge a fee. It is Government policy that this should be set at a level *reasonable in the circumstances and not subject to the 10% ceiling that would apply to fees under clause [8].*<sup>70</sup> (emphasis added)

It would lead to a perverse situation in which:

- A business requester who seeks non-exempt information for a private *commercial purposes*, would obtain it at the 10% rate
- A member of the public who seeks exempt information in order to expose *serious misconduct* by a public authority might have to pay the 100% rate.

#### *The 10% ceiling*

Although charges will normally be limited to 10% of the authority’s marginal costs it is not clear how these will be calculated. The consultation paper stated that the costs in question would be:

‘the marginal cost of locating and disclosing the information’<sup>71</sup>.

At the time, it appeared that the intention was that the costs should *not* include the time spent by staff in assessing whether information was exempt. However, a subsequent Home Office note to the Public Administration select committee stated that:

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<sup>69</sup> Square brackets indicate that the current bill’s clause numbers have been substituted

<sup>70</sup> Home Office, ‘Freedom of Information. Consultation on Draft Legislation’, Cm 4355, paragraph 58

<sup>71</sup> Paragraph 58

‘The costs would relate to locating the information and preparing it for disclosure, for example, any necessary editing to remove exempt information’<sup>72</sup>

If the costs of reading a document line by line against the exemptions, are included in calculating fees, the cost of dealing with a request is far more likely to reach the ‘appropriate limit’ (which, for government departments, is likely to be set at £500).

Once the appropriate limit is reached authorities can charge the full costs. This will mean a leap from a figure capped at £50 (10% of the ‘appropriate limit’) to one which may be well in excess of £500.

An even greater concern is that once the limit is reached, authorities can refuse to disclose information altogether. Clause 11(1) provides that there is no duty to disclose information whose cost exceeds the ‘appropriate limit’.

The basis on which the costs are calculated is therefore not just a matter of how much applicants will have to pay, but whether there is a right to information at all. It is essential that this matter be clarified while the Bill is before Parliament, and not left until fee regulations are introduced.

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<sup>72</sup> HC 570-I, Annex 6, Question 26

## CLAUSE 9

### Amendment 38

*Clause 9, Page 5 , line 38 at end insert –*

*‘(4A)Where an applicant has made a request for information*

- (a) which he intends to use in making a statement or submission in connection with any matter specified in subsection (4B) below, and*
- (b) the statement or submission must be made within a particular period, and*
- (c) the applicant would be placed at a significant disadvantage in making the submission or statement within that period unless the information was supplied before the expiry of twenty working days from the date of receipt of the application*

*the authority shall take all reasonably practicable steps to comply with the request in time to prevent the applicant from being so disadvantaged.*

*(4B ) The matters referred to in subsection (4A) are -*

- (a) the proceedings in any particular matter of a court, tribunal or inquiry or of any investigation carried out by a public authority*
- (b) the taking of a particular decision by a public authority*
- (c) a consultation exercise carried out by a public authority.’*

This amendment requires an authority to try and deal with a request in less than 20 working days, the normal response time<sup>73</sup> if the shorter response time is necessary to prevent the applicant being disadvantaged in connection with specified matters. This would come into play where the applicant needed information in order to make a statement or submission to the proceedings of a court, tribunal or inquiry, or to respond to an authority’s consultation exercise, or to influence a decision due to be taken by the authority.

The duty to process the application more quickly applies only where the applicant would be ‘significantly disadvantaged’ without the information. It is not an absolute duty, and requires

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<sup>73</sup> Clause 9(1)

the authority only to take ‘all reasonably practicable’ steps to comply.

Although the 20 working day period may seem as if it is itself a reasonably short time, the amendment anticipates that some authorities will take significantly longer in dealing with at least a proportion of cases. This is the experience with overseas FOI laws and with the UK open government code. Thus the Medicines Control Agency was recently criticised by the Parliamentary Ombudsman for having taken 16 months to reach a final decision on a code application which should have been dealt with in 20 days.<sup>74</sup> Similar experiences have been reported from overseas.

Some FOI laws do make special provision for requests to be expedited in cases of urgency<sup>75</sup>, though the specific formulation adopted in this amendment is not directly based on any of them.

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<sup>74</sup> Parliamentary Ombudsman. Access to Official Information, 2nd Report, Session 1999-2000, HC 21, case A.16/99

<sup>75</sup> E.g. section 12(3) of New Zealand’s Official Information Act 1982.

## CLAUSE 11

### ASSISTANCE

#### Amendment 39

*Clause 11, Page 6, line 30 at end insert –*

*‘(1A) An authority shall not refuse to comply with a request under subsection (1) unless it has assisted, or offered to assist, the applicant to reformulate the request so as not to exceed the appropriate limit.’*

This amendment is a further attempt to introduce statutory duties on authorities to assist applicants. Clause 11(1) allows an authority to refuse a request where the cost of complying would exceed the ‘appropriate limit’. The amendment would require an authority, before refusing on these grounds, to offer to assist the applicant to produce a more narrowly focused request, which can be dealt with at lower cost.

For example, a request may have been made for data relating to a period of several years. The main element of the cost might arise because the earliest data was no longer easily retrievable. The amendment would merely require the authority to point this out, and suggest that a request focussing on the subsequent period could be complied with. Without such a duty, an unhelpful authority could merely refuse the request on cost grounds, and say nothing else.

This reflects the approach set out in the white paper which stated:

‘In general, the object should be for the public authority to be helpful in dealing with problematic requests so that, if possible, the applicant can obtain the information he or she seeks by one means or another.’<sup>76</sup>

The amendment reflects the approach of Ireland’s FOI Act which permits an authority to refuse a request on grounds that it would cause substantial disruption to its work but *only* if it has first: ‘*assisted, or offered to assist, the requester concerned in an endeavour to so amend the request that it no longer falls within [those provisions]*’<sup>77</sup>

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<sup>76</sup> Paragraph 2.27

<sup>77</sup> Freedom of Information Act 1997 (Ireland) section 15(3)

## **ADDITIONAL FEE**

### **Amendment 32**

*Clause 11, Page 6, , line 30 at end insert –*

*‘(1A) Subject to subsection (1B), subsection (1) does not exempt the public authority from complying with a request if the applicant has indicated that he is willing to pay a reasonable additional fee for the information; and an authority may not refuse to comply with such a request unless it has notified the applicant of the reasonable additional fee which it requires for complying, which may not exceed the cost to the authority of providing the information to the applicant’*

*(1B) Subsection (1A) does not oblige an authority to comply with a request where, because of the large number or volume of records involved, to do so would interfere substantially and unreasonably with the work of an authority.’*

Clause 11(1) allows an authority to refuse a request where the cost exceeds the ‘appropriate limit’. In such a case the authority must then consider whether to make a discretionary disclosure of the information concerned,<sup>78</sup> having regard to all the circumstances of the case and the public interest in disclosure.<sup>79</sup> It cannot, however, be *compelled* to disclose information in these circumstances and the Commissioner could only recommend not require disclosure on public interest grounds.<sup>80</sup>

The amendment would *require* an authority to disclose information where the ‘appropriate limit’ is exceeded, if the applicant is willing to pay a reasonable additional fee not exceeding the cost to the authority of providing the information. However, where the request is so voluminous that compliance would interfere substantially and unreasonably with the authority’s work, it would not have to comply – even if the applicant was willing to pay the

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<sup>78</sup> The duty to consider a discretionary disclosure applies in any case where information is refused on the grounds that it is exempt or that compliance would exceed the appropriate limit. See clause 13(1)(a)(ii)

<sup>79</sup> Clause 13(4)

additional fee.

The test here is that the interference must not only be substantial but also unreasonable. This recognises that in some cases information should be disclosed even if to do so would cause substantial interference to an authority's work. For example, the interference may be the result of the authority's own incompetence in filing its records, in which case the Commissioner could require it to locate them. Alternatively, the records might relate to serious misconduct by the authority, so that the work involved in locating them would be justified despite any interference to its work.

This closely reflects the approach of several overseas FOI laws. Ireland's FOI Act does not permit requests to be refused on cost grounds as such but only where:

'granting the request would, by reason of the number or nature of the records concerned or the nature of the information concerned, require the retrieval and examination of such number of records or an examination of such kind of the records concerned as to cause a substantial and unreasonable interference with or disruption of the other work of the public body concerned'<sup>81</sup>

Australia's Act states:

'The agency or Minister dealing with a request may refuse to grant access to documents in accordance with the request, without having caused the processing of the request to have been undertaken, if the agency or Minister is satisfied that the work involved in processing the request: (a) in the case of an agency - would substantially and unreasonably divert the resources of the agency from its other operations; or (b) in the case of a Minister - would substantially and unreasonably interfere with the performance of the Minister's functions.'<sup>82</sup>

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<sup>80</sup> See clauses 48(1), 50(7) and 52(2)

<sup>81</sup> *Freedom of Information Act 1997 (Ireland)* section 10(1)

<sup>82</sup> *Freedom of Information Act 1982 (Australia)* section 24(1).

## TWO OR MORE REQUESTS

### Amendment 33

*Clause 11, Page 6, line 38 after 'for' insert 'substantially similar'*

If one person makes several requests to an authority, clause 11(4) allows the authority to refuse them (subject to regulations) if the *total cost of all the requests* together exceeds the appropriate limit. This would bar many users from using the Act altogether. The amendment would allow requests to be aggregated in this way only where they all referred to 'substantially similar' information.

An organisation which deals with an authority on a range of issues could find that all the requests it made were aggregated for cost purposes and, because the cost limit was exceeded, all were refused. Consumer, environmental, professional, trade union and business organisations, media bodies, and all representative organisations, might be limited to making one request at a time and waiting until that one had been dealt with before another could be lodged. They would in effect be prevented from using the Act. No overseas FOI law contains anything like this provision.

The white paper proposed that authorities should be able to refuse requests which would:

'result in disproportionate cost or diversion of the public authority's resources'

and suggested a another restriction to deal with

'multiple applications from the same source for related material in order to avoid the previous restriction'<sup>83</sup>

This approach was aimed at requesters who deliberately broke a single large request down in multiple smaller requests so as to avoid the 'disproportionate cost' test. The bill has gone considerably beyond this, allowing all requests from one user to be aggregated. The amendment returns to the white paper approach. It would allow costs to be aggregated only in relation to *substantially similar* requests from one applicant.

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<sup>83</sup> *Your Right to Know*, paragraph 2.26

## CAMPAIGNING REQUESTS

### **Amendment 34**

*Page 6, Clause 11, line 41 leave out lines 41 and 42*

The amendment would delete clause 11(4)(b), which allows requests made by *different* people to be aggregated for cost purposes if they:

‘appear to the public authority to be acting in concert or in pursuance of a campaign’.

This provision would in effect prevent organisations advising their members to use their rights under the FOI Bill. A trade union may want to encourage its members to find out more about safety problems in their industries, and advise them to apply for information about their own workplace hazards to the Health and Safety Executive. The HSE could combine the costs of any two or more requests, and refuse them as soon as the aggregate cost limit was exceeded. A patient self-help group concerned about medical facilities provided by health authorities could run into the same problem if it advised its members to seek information about the treatments, waiting lists, success rates and facilities provided by authorities. All these requests could be aggregated for cost purposes and refused. This provision should have no place in an FOI Bill.

Note that if authorities find they are dealing with requests designed not to elicit information but to disrupt them, they have power to refuse them as ‘vexatious requests’ under clause 12(1).

**NOTIFYING THE COMMISSIONER****Amendment 40**

*Clause 11, Page 6, line 44 at end insert –*

*‘(4A) A public authority which treats the costs of complying with two or more requests in the manner described in subsection (4) must at the time of doing so notify the Information Commissioner of this fact and supply to the Commissioner copies of the requests concerned.’*

This amendment requires an authority to notify the Commissioner each time it aggregates two or more requests for charging purposes under clause 11(4). It does not require the Commissioner to approve the decision, but by drawing it to her attention may permit her to intervene, without awaiting a complaint from an applicant, if she thought the provision was being abused.

## **REASONABLE INTERVAL**

### **Amendment**

*Clause 12, Page 7, line 6 leave out subsection (2)*

This would delete clause 12(2) which allows authorities to refuse a request if the same applicant has recently been supplied with the identical, or substantially similar, information.

A power to refuse ‘substantially similar’ requests, unless a reasonable interval has passed, could however be used oppressively against those who have good reason to make regular requests, eg journalists monitoring the proceedings of a local council.

Clause 12(2) appears to be based on an identical provision in the Data Protection Act<sup>84</sup>, which provides the only grounds for refusing vexatious requests. It is unnecessary in the bill, given that clause 12(1) specifically provides the power to refuse vexatious requests.

Moreover, it would be good practice for authorities to place copies of material released under the bill on their Internet sites and/or in a publicly accessible place, such as their library. If this is available as part of the publication scheme which authorities are required to publish under clause 17, the authority is not subsequently required to deal with a new request for the same information under clause 1(1).<sup>85</sup> It should have no need of the power to refuse an identical or substantially similar request from the original applicant.

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<sup>84</sup> Data Protection Act 1998, section 8(3)

<sup>85</sup> Information appearing on a publication scheme is exempt under clause 19

**Amendment 41**

*Clause 12, Page 7, line 10 at end insert –*

*‘(3) A public authority which has refused to comply with a request in accordance with this section must at the time of doing so notify the Information Commissioner of this fact and supply to the Commissioner copies of the request or requests concerned.’*

This requires an authority to notify the Commissioner each time it refuses to comply with a request under clause 12, on the grounds that it is vexatious or is identical/substantially similar to a recent request by the same applicant.

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## FREEDOM OF INFORMATION BILL

House of Commons Committee Stage

### BRIEFING PAPER 2

Amendments tabled to Clause 13

18 January 2000

**Hon. President:** Godfrey Bradman  
**Co-Chairs:** James Cornford, Neil McIntosh  
**Director:** Maurice Frankel

**Parliamentary Co-Chairs:** Helen Jackson MP  
Archy Kirkwood MP  
Richard Shepherd MP

## **INTRODUCTION**

This paper describes the amendments tabled to clause 13 of the Freedom of Information Bill, dealing with disclosure in the public interest.

It refers to the amendments in the order in which they have been grouped for debate in committee, that is:

*Amendments 79, 45 and 46*

*Amendments 50, 51 and 52*

*Amendment 2*

*Amendments 3, 4 and 97*

*Amendment 80*

## CLAUSE 13

### EXTENDING THE PUBLIC INTEREST TEST

#### Amendment 79

*Clause 13, Page 7, line 17 leave out from 'Part II' to 'or' in line 18*

#### *Purpose*

The duty, under clause 13, to consider the public interest in disclosing exempt information applies to certain exemptions only. The amendment would extend this duty to all exemptions.

#### *Background*

Clause 13(1)(a) requires an authority to consider the public interest in disclosing information which can be withheld because of cost<sup>1</sup> or because it is exempt. However, this duty does not apply to information which is exempt under clauses 19, 21, 30, 38(1), 39, 42, or 43(2). This is a longer list than proposed in the draft bill: ie the scope of the public interest test has been narrowed.<sup>2</sup> It would be narrowed still further by the minister's amendments<sup>3</sup>, which would also remove information covered by clauses 32 and part of 38(2) from the public interest test.

The amendment would bring information exempt under the following clauses within the scope of the public interest test:

*Clause 19 – information already reasonably accessible to the public*

Information which is already 'reasonably accessible' to the public is exempt, even where a charge

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<sup>1</sup> However, it is not clear whether as currently drafted the public interest test in clause 13(4) applies to information refused on cost grounds, under clause 11. This was required under the draft bill [clause 14(3)] and we understand remains the intention.

<sup>2</sup> The public interest test under clause 14(1) of the draft bill applied to all exemptions other than those for security bodies and court records.

<sup>3</sup> Amendments 45 and 46

for it is made. All information which authorities are required by law to make public is held to be 'reasonably accessible'.<sup>4</sup>

The difficulty with this provision is that it defines as 'reasonably accessible' information which in practice may be inaccessible. For example:

- authorities have sometimes refused to supply *photocopies* of information which by law they must make available for *inspection*, insisting that requesters visit the premises in person. To an applicant who lives far from the authority's offices such information is inaccessible, yet the bill defines it as 'reasonably accessible' and therefore exempt. The amendment would allow the applicant to apply for such information under the FOI bill, where a public interest case for doing so existed.
- authorities sometimes make *unreasonable* charges for information which they have to provide by law. These can be challenged in court but, for someone who finds charges for information excessive, the costs of going to law are likely to be prohibitive. The amendment would bring such information within the bill's scope (if public interest grounds for access existed) allowing the bill's charges to apply. Unreasonable charges under the bill could be challenged by complaint to the Commissioner.

Note that in order to deal with these circumstances a further amendment – which has not been tabled – would also be required. Under clause 13(1)(b) the duty to consider making a disclosure in the public interest does not apply to information whose disclosure is already required by law. This provision would also need to be removed in order to address the above problems.

#### *Clause 21 – information supplied by bodies dealing with security matters*

A number of bodies, whose work includes security functions, are not covered by the bill.<sup>5</sup> Information supplied by these bodies to another public authority, or which relates to their work, is exempt under clause 21,<sup>6</sup> and not subject to the public interest test..

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<sup>4</sup> Clause 19(1)(b)

<sup>5</sup> MI5, MI6 and GCHQ are explicitly excluded from the definition of 'government department' in clause 82. The 'special forces' are excluded from the definition of 'armed forces' in Part I of Schedule 1. The other bodies are not listed in Parts V or VI or Schedule 1.

<sup>6</sup> The exemption applies to: the Security Services, the Secret Intelligence Service, the Government Communications Headquarters, the special forces, the Interception of Communications Tribunal, the

The amendment would not bring the bodies *themselves* within the scope of the bill, but would permit access on public interest grounds. Note that the Canadian Security Intelligence Services, the New Zealand Security Intelligence Service and the US Central Intelligence Agency are all subject to their countries' FOI laws. Circumstances where disclosure of material relating to the work of the security service might be justified were envisaged by the Law Lord, Lord Griffiths, in his ruling in the Spycatcher case<sup>7</sup>.

*Clause 30 - information supplied to a public authority by a court, tribunal or inquiry*

Courts, tribunals and statutory inquiries are not covered by the bill and documents relating to their proceedings which are held by public authorities are exempt as a class, regardless of whether disclosure would prejudice legal proceedings. Even the decision of a court or tribunal or the final report of an inquiry are exempt. Given the separate exemptions for information relating to investigations into offences<sup>8</sup> and disclosures which might prejudice the administration of justice<sup>9</sup>, the justification for this exemption is not clear.

The exemption would protect reports of a military board of inquiry held by the Ministry of Defence; decisions of the Vaccine Damage Tribunal held by the Department of Health; and reports of inquiries under statutory powers into child abuse, medical negligence, financial misconduct or other matters of public concern. The amendment would allow access to such materials where the public interest in disclosure outweighed whatever interest the exemption is intended to protect.

*Clause 38(1) - personal data about the applicant*

The FOI bill provides that a request by someone seeking personal information about himself is to be dealt with under the Data Protection Act's right of access to personal data. Such information

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Security Service Tribunal, the Intelligence Service Tribunal, the Security Vetting Appeals Panel, the Security Commission, the National Criminal Intelligence Service (NCIS) and the Service Authority for NCIS,

<sup>7</sup> Lord Griffiths said: 'theoretically, if a member of the [security] service discovered that some iniquitous course of action was being pursued that was clearly detrimental to the our national interest, and he was unable to persuade any senior member of his service or any member of the establishment, or the police, to do anything about it, then he should be relieved of his duty of confidence to that he could alert his fellow citizens to the impending danger.'

<sup>8</sup> Clause 28(1)

<sup>9</sup> Clause 29(1)(c)

is therefore exempt under clause 38(1) of the bill. However, the DPA's right of access contains no public interest test. The transfer of requests from the FOI bill to the DPA may in some cases reduce the applicant's rights<sup>10</sup>.

For example, both the FOI bill<sup>11</sup> and DPA<sup>12</sup> contain similarly worded exemptions for disclosures which might prejudice the health and safety functions of a regulatory authority. While the FOI exemption is subject to a public interest test; the DPA's is not. An employee who believed the Health and Safety Executive (HSE) had been negligent in dealing with hazards to his or her own safety would be able to argue a public interest case for disclosure of exempt information under the FOI bill – but not under the DPA.

The amendment would mean that a request for one's own personal data would not be exempt under the FOI bill if its disclosure was in the public interest. This would create a form of 'dual access' to personal data held by public authorities (although such files held by private bodies would be subject to the DPA alone).<sup>13</sup> A dual access regime was envisaged by the Cabinet Office, in its 'Background Material' to the FOI white paper.<sup>14</sup>

### *Clause 39 - confidential information*

Clause 39 exempts information whose disclosure would constitute a breach of confidence. Indirectly, this exemption incorporates the public interest test found in the civil law of

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<sup>10</sup> Although in some other respects the DPA's access rights are superior.

<sup>11</sup> Information is exempt under the FOI Bill if its disclosure 'would, or would be likely to, prejudice...the exercise by any public authority of its functions for...the purpose of securing the health, safety and welfare of persons at work' [Clauses 29(1)(g) and 29(2)(i)] This exemption is subject to the public interest in clause 13.

<sup>12</sup> Information is exempt under the DPA if it is held for, and its disclosure would be likely to prejudice, the proper discharge of an authority's functions 'for securing the health, safety and welfare of persons at work' [Data Protection Act 1998, section 31(1) and 31(2)(3)]

<sup>13</sup> Such 'dual access' arrangements apply in the US, where people can apply for their own records either under the FOI Act or under the US Privacy Act.

<sup>14</sup> This stated: 'Dual access would mean that some personal information held by public authorities will be accessible by the subject through either the new Data Protection Act or the FOI Act'. It added: 'the possibility of dual access should be made known and the advantages and disadvantages of each system should be pointed out. It will then be for the applicant to specify which means of access they wish to use in each case.' Cabinet Office. *Your Right to Know – Background Material*. January 1998, paragraphs 161 and 165.

confidence. The courts have held that obligation of confidentiality may be set aside (or may not have arisen at all) if the information reveals the existence of crime, fraud, serious misconduct or danger to the public.

Although the term ‘public interest’ is not exhaustively defined under the law confidence, it tends to be a difficult test to meet and one that is too narrow for the purposes of an FOI Act.

The public interest in the context of FOI involves a wider range of issues. Some of these were highlighted in the Purpose clause set out in an earlier Amendment, which referred to the need to promote: (a) the accountability of public authorities; (b) informed public debate on public affairs; (c) public participation in the making of decisions; and (d) public understanding of the powers, duties and operation of public authorities. As previously mentioned, the Cabinet Office’s Background Material to the FOI white paper indicated that it was also thinking along these lines.<sup>15</sup>

A similar approach has been adopted under the Irish FOI Act.<sup>16</sup>

Some of these wider elements of the public interest can be seen in the Parliamentary Ombudsman’s decisions under the open government code of practice. He has held that:

- updated figures about the capital costs of a large project should be disclosed, even if this could result in limited commercial prejudice to the body concerned, because: *‘the public interest, in holding public bodies to account for their use of public funds, is a strong one’*<sup>17</sup>

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<sup>15</sup> ‘The definition of “public interest”...might be set in terms of certain stated objectives of the Act e.g. in promoting better informed discussion of public affairs and the greater accountability of public authorities.’ Cabinet Office, ‘Your Right to Know – Background Material’, January 1998, paragraph 105.

<sup>16</sup> Guidance on the Irish FOI Act notes that public interest claims for disclosure might involve: “the right of the public to have access to information; disclosure will reveal reasons for decisions; the accountability of administrators and scrutiny of decision making processes; the need for the public to be better informed and more competent to comment on public affairs; the information will make a valuable contribution to the public debate on an issue; the need to ensure democratic control to the greatest extent possible over the increasing regulation by public bodies of the affairs of the ordinary citizen; accountability for the use of public funds” *FOI Manual. A Guide to the Freedom of Information Act. FOI Central Policy Unit, Department of Finance, Dublin, April 1998, section 4, page 8*

<sup>17</sup> ‘It may be, however, that disclosure of estimates based on tender information...would be prejudicial, if they became known to potential contractors or other interested parties. After considering all the circumstances of the case, I am prepared to accept that some, albeit limited, prejudice could occur. Once that is accepted as a possibility, it is necessary to go on to apply the harm test. Any prejudice needs to be weighed against the public interest in disclosing information. In this case the public interest, in holding public bodies to account for their use of public funds, is a strong one. Detailed financial information for

- the DTI should release details of exports of an ‘anti riot gun’ of a kind used for torture in some countries, despite the manufacturer’s opposition, noting: *‘I am unconvinced that the harm arising from disclosure in cases where there were no explicit undertakings of confidentiality would outweigh the public interest.’*<sup>18</sup>
- In a case involving the proposed closure of a local fire station, he noted that: *‘There is no doubt that there is a public interest in the complainant and the local interest group having sufficient information in order to represent effectively local interests in the issue.’*<sup>19</sup>
- in a case where it had been alleged that that the public may have been misled about the actual contents of an undisclosed document, the Ombudsman noted that had he found evidence of this: *‘I should have concluded that the public interest in disclosing at least some, and possibly all, of the information was greater than any harm which might result.’*<sup>20</sup>

There are a number of precedents for legislation which extends or overrides the common law obligation of confidentiality, several introduced by the present government.<sup>21</sup> One of the most far-

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the early years of the project is in the public domain: if it is not regularly updated, later developments will make it obsolete and therefore misleading. That cannot be a satisfactory state of affairs. I am satisfied that any prejudice resulting from disclosure of the capital estimates is outweighed by the public interest in having accurate and up-to-date information about expenditure on the project; and, for that reason, those estimates should be disclosed unless they fall within another exemption in Part II of the Code.’ *Parliamentary Ombudsman, 2nd Report, Session 1998-99, Case No A.1/97*

<sup>18</sup> ‘From my staff’s enquiries of the manufacturer of the anti-riot gun, it is clear that Exemption 13 [commercial confidentiality] applies to information about those exports of the anti-riot gun which were made under a contract containing confidentiality terms. Under those circumstances, DTI’s disclosure of details of the type sought would undoubtedly harm the business relationship between the consignee and the manufacturer and hence the latter’s competitive position. Where no such contractual terms exist, it is very difficult to assess how much harm, if any, the competitive position of the manufacturer would sustain if the details sought were released. While I appreciate the manufacturer’s difficulty in agreeing to a general disclosure, I note their comment that the anti-riot gun attracted little or no attention from the defence press during the years in question because sales of it were of ‘no deep financial or strategic significance’. That comment implies that, in the world of defence sales at least, the anti-riot gun is a relatively non-contentious item. As a result, I am unconvinced that the harm arising from disclosure in cases where there were no explicit undertakings of confidentiality would outweigh the public interest.’ *Parliamentary Ombudsman, 4th Report, Session 1997-98, Case No. A.30/95*

<sup>19</sup> *Parliamentary Ombudsman 2nd Report Session 1999-2000, Case No A.31/99*

<sup>20</sup> *Parliamentary Ombudsman, Fourth Report for Session 1997-98, Case No. A.29/95*

<sup>21</sup> The right of access by individuals to information about themselves under *Data Protection Act 1998* includes information supplied in confidence [section 27(5)]. Even information supplied in confidence before the Act’s commencement (or before the commencement of the *Data Protection Act 1984*) is accessible. The *Public Interest Disclosure Act 1998* (a whistleblower protection measure which started life as a private member’s bill) sets out in statute the types of matter about which a protected disclosure of confidential information may be made, and the circumstances in which such disclosures will be protected, without attempting to precisely mirror the tests applied by the courts in breach of confidence cases. It also

reaching is found in the Food Standards Act 1999, which gives the Food Standards Agency wide powers to obtain information about *'food premises, food businesses or commercial operations being carried out with respect to food'*.<sup>22</sup> In pursuit of its functions, which include providing information to the public, to assist them making *'informed decisions about food'*<sup>23</sup> it is free to publish *'any...information in its possession (whatever its source)'*<sup>24</sup>. In doing so, the agency must *'consider whether the public interest in the publication of the advice or information in question is outweighed by any considerations of confidentiality attaching to it.'*<sup>25</sup> The formulation of this provision indicates that the agency is not restricted by a common law obligation of confidentiality, and indeed can apply a public interest test very similar to that proposed in the present amendment.

#### *Clause 42 – disclosures prohibited by statute*

Information whose disclosure is prohibited by statute could also be subject to the bill's public interest test. Such information is exempt under clause 4. The government is currently reviewing existing statutory restrictions, with a view to repealing or amending those not considered necessary. The bill creates an order making power to relax restrictions which interfere with the disclosure of information. Significantly, this can be used to remove restrictions which interfere with disclosure under either clause 1 or clause 13.<sup>26</sup> A simpler way of achieving this result would be to allow the public interest test in clause 13 to override such statutory restrictions.

One advantage of this approach is that it would allow these restrictions to be set aside without the potentially overwhelming task of separately reviewing each provision. Some 250 were identified in 1993.<sup>27</sup> Although the last government was committed to a process of review and repeal, the size of the task defeated it. When the same exercise was attempted in Canada and Australia, each time over a three year period, it also proved impossible to complete, and the restrictions were left

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sets aside any a contractual obligation which attempts to prevent an employee making a disclosure of protected information.

<sup>22</sup> Food Standards Act 1999 sections 10(1)(a) and 10(2)(a)

<sup>23</sup> Food Standards Act 1999 section 7(2)

<sup>24</sup> Food Standards Act 1999 sections 19(1)(c)

<sup>25</sup> Food Standards Act 1999 section 19(4)

<sup>26</sup> Clause 74(1)

<sup>27</sup> 'Open Government' white paper, Cm 2290

in force.<sup>28,29</sup> A simple power to override these restrictions in the public interest would avoid a similar outcome here. This would be broadly in line with the recommendation of the Australian Law Reform Commission.<sup>30</sup> A direct precedent for an FOI Act superimposing a public interest test on existing statutory restrictions can be found in the FOI Act in the state of Queensland in Australia.<sup>31</sup>

[Note that clause 42 also exempts information whose disclosure would constitute contempt of court or would be incompatible with a Community obligation. The amendment may not be capable of overriding these restrictions.]

*clause 43(2) - information exempted by order*

The Secretary of State can create new exemptions by order, which may apply retrospectively to information which has been requested but not yet disclosed. Information exempted under this provision would not be subject to clause 13. The amendment would ensure that it was.

*Minister's amendments*

Amendment 46, tabled by the minister, would add two further exemptions to the list of exemptions *not* subject to clause 13.

The first applies to information exempt under clause 32, on grounds of Parliamentary privilege.

The second applies to information exempt under the first condition of clause 38(2). This provides that personal data about someone *other than* the applicant is exempt if its disclosure would

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<sup>28</sup>“Open and Shut”, Report of the Standing Committee on Justice and Solicitor General on the Review of the Access to Information Act and the Privacy Act, House of Commons, Canada, 1987, page 117

<sup>29</sup>Australian Law Reform Commission/Administrative Review Council, Discussion paper 59, May 1995, para 6.15

<sup>30</sup> “the exemption provisions in the FOI Act represent the full extent of information that should not be disclosed to members of the public. Secrecy provisions that prohibit the disclosure of information that would not fall within the exemption provisions are too broad. The Review considers that repealing s 38 [which exempts such information] will promote a more pro-disclosure culture in agencies.” *Australian Law Reform Commission Report No 77/Administrative Review Council Report No 40. ‘Open Government, a review of the federal Freedom of Information Act 1982’, 1995, para 11.3*

<sup>31</sup> Section 48 of the Queensland Freedom of Information Act 1992 states: “(1) Matter is exempt matter if - (a) there is in force an enactment applying specifically to matter of that kind, and prohibiting persons mentioned in the enactment from disclosing matter of that kind (whether the prohibition is absolute or subject to exceptions or qualifications); and (b) its disclosure would, on balance, be contrary to the public interest.”

contravene any of the data protection principles or it is subject to a notice under section 10 of the DPA 1998, because its disclosure would cause substantial and unwarranted damage or distress to the individual concerned.

It is not clear why the public interest test is excluded from such personal data. The effect in both cases is to limit the opportunity of the FOI bill to establish a public interest case to set against the wide-ranging, and complex exemption for personal data in 38(2). In relation to information covered by a section 10 notice in particular, the public interest provision would help to clarify what is meant by 'unwarranted' damage or distress (ie such damage or distress may be warranted where it is a consequence of a disclosure justified in the public interest).

## **DISCRETIONARY DISCLOSURE**

### **Amendment 50**

*Clause 13, Page 7 line 24 leave out ‘in the exercise of the authority’s discretion’*

### **Amendment 51**

*Clause 13, page 7, line 30 leave out from ‘whether’ to ‘to’ in line 31*

### **Amendment 52**

*Clause 13, page 7, line 34 leave out from ‘shall’ in line 34 to end of line 37 and insert –*

*‘having regard to all the circumstances of the case*

*(a) inform the applicant whether it holds information, and*

*(b) communicate the information to him’*

### **Purpose of the amendments**

These amendments would transform the *discretionary* public interest test in clause 13 to a *mandatory* test. Together with later amendments to the Commissioner’s powers<sup>32</sup>, this would allow the Commissioner to require disclosure on public interest grounds.

Clause 13 requires an authority to consider making a discretionary disclosure of information which it could refuse:

(a) under some of the exemptions<sup>33</sup>, or

(b) on cost grounds<sup>34</sup>.

In making these decisions, the authority must consider whether the public interest in disclosure outweighs the public interest in protecting the exemption.

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<sup>32</sup> Amendments 61 and 62 would remove the restrictions on the Commissioner’s powers found in clauses 50(7) and 52(2)

<sup>33</sup> A discretionary disclosure does *not* have to be considered for information falling within the seven exemptions listed in clause 13(1)(a)(i)

However, these discretionary decisions are not fully reviewable by the Commissioner. In other cases (e.g. on a question of whether information is exempt) the Commissioner can issue a legally binding notice *requiring* an authority to disclose<sup>35</sup>. Where clause 13 is involved, the Commissioner is explicitly barred from requiring disclosure.<sup>36</sup> She can only make a *recommendation* (the so-called ‘discretionary disclosure recommendation’ under clause 48) and tell the authority to reconsider. The authority can reject the recommendation without offering any reason.

Amendments 50 to 53 would *require* authorities to release information where the public interest in openness outweighed the public interest in withholding it. The amendments would make decisions under clause 13 subject to the bill’s normal enforcement procedure.

*Amendment 50* would remove the words ‘in the exercise of the authority’s discretion’ from clause 13(2), so the decision on whether to confirm or deny the existence of exempt information would no longer be discretionary. If the balance of public interest justified it, confirmation would have to be given.

*Amendment 51* would delete the same words from clause 13(3). The decision on whether or not to disclose information would no longer involve the exercise of the authority’s discretion.

*Amendment 52* would remove the reference to ‘the desirability’ of making a disclosure from clause 13(4). The amended clause 13(4) would read:

‘In making any decision under subsection (2) or (3), the public authority shall, having regard to all the circumstances of the case –

- (a) inform the applicant whether it holds information, and
- (b) communicate information to him

wherever the public interest in disclosure outweighs the public interest in maintaining the exemption in question.’

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<sup>34</sup> ie where the cost of disclosure would exceed ‘the appropriate limit’ under clause 11

<sup>35</sup> A ‘decision notice’ can be issued under clause 50(3)(b) or an ‘enforcement notice’ under clause 52(1). Failure to comply with either can be dealt with as contempt of court under clause 53.

<sup>36</sup> See clauses 50(7) and 52(2)

## **Public interest disclosure**

The bill's public interest test applies to information:

- falling within the bill's class exemptions;
- whose disclosure would cost more than the 'appropriate limit'
- which may prejudice commercial interests or trigger any of the other harm-test exemptions, where there is nevertheless an overriding public interest in disclosure.

**The first of these points is particularly significant. The bill contains a long list of class exemptions, all of which permit information to be withheld even if disclosure would cause no harm.<sup>37</sup> A vast amount of information covered by these provisions is subject to no *right* of access at all, and may be disclosed solely at the authority's discretion under clause 13. In this respect the bill is no advance on the non-statutory code of practice introduced by the last government. Indeed, in some areas the bill makes it easier to withhold information than the code.<sup>38</sup>**

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<sup>37</sup> Class exemptions, which allow information to be withheld even if disclosure would not cause harm, apply to: information relating to the formulation or development of government policy, including factual information; all ministerial communications; the obtaining of advice from law officers; ministers' private offices; information supplied by or relating to various security bodies including the National Criminal Intelligence Service; information obtained in confidence from other governments and international bodies; information held by the police or regulators in connection with investigations which could have led to legal proceedings, including cases where any proceedings have ended; records sent to a public authority by a court, tribunal or statutory inquiry, including the ruling or final report of a tribunal or inquiry; information subject to Parliamentary privilege; information about communications with the Royal Family, information about honours, information accepted by a public authority in confidence; information subject to legal professional privilege; trade secrets, information whose disclosure is prohibited by statute or Community obligations; and information which is reasonably accessible to the public available already.

In addition, a number of near-class exemptions apply to information whose disclosure would "in the reasonable opinion" of the authority prejudice the convention of collective ministerial responsibility, inhibit the frank provision of advice or the exchange of views for the purposes of deliberation or prejudice the effective conduct of public affairs." Giving legal weight to the authority's opinion will protect most decisions from challenge by the Commissioner, unless they are unreasonable in judicial review terms, that is irrational. Here too, the public interest test may be the only basis for obtaining information.

<sup>38</sup> The code allows policy information to be withheld only where disclosure would 'harm the frankness and candour of internal discussion'. This provides as a presumption in favour of disclosure, requiring the authority to show that it would cause harm. The bill replaces this with a class exemption for all information relating to the 'formulation or development of government policy' [clause 33(1)(a)].

**The temptation to abuse this discretion will regularly arise wherever disclosure could expose an authority to criticism: for poor judgement, flawed decision-making, concessions to vested interests, misuse of funds or failure to protect the public. Authorities which have fallen short of expected standards would be invited to decide for themselves whether the public interest requires disclosure of their malpractice.**

The Home Secretary has argued that it should be for ministers, accountable to Parliament, to decide whether to disclose exempt information in the public interest. The words of the distinguished Law Lord, Lord Radcliffe may be relevant:

‘The interests of government, for which the Minister should speak with full authority, do not exhaust the public interest.’<sup>39</sup>

The case for leaving it to ministers, answerable to Parliament, might be more plausible if information at least had to be shown to be harmful to be exempt, so that some genuine balancing of competing public interests was involved. But too many exemptions operate without any evidence that disclosure could be harmful. In these cases, there is no complex balancing test – and the only reason for withholding information may be to protect the government from criticism. The partisan nature of Parliament is enough to ensure that a minister in this situation will usually receive Parliamentary backing.

If the Commissioner was all-powerful, the government’s reluctance to give her the power to compel disclosure in the public interest might be more understandable. In fact, authorities already have comprehensive rights of appeal against the Commissioner, to the Information Tribunal.<sup>40</sup> Even her formal requests to an authority for information can be appealed against.<sup>41</sup> The Tribunal’s decisions themselves can be challenged, on a point of law, in the courts.<sup>42</sup> This should give ministers all the protection they need against the possibility of mistaken decisions.

### **The select committees**

The failure to give the Commissioner a power to making binding rulings on the public interest has been criticised by two select committees. The Public Administration select committee

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<sup>39</sup> Glasgow Corp'n v Central Lands Board, 1956 SC (HL) 1 at 18-19

<sup>40</sup> Clause 56(1)

<sup>41</sup> Clause 51(3)

<sup>42</sup> Clause 58

reported:

‘...in other Freedom of Information regimes—and, indeed, in the present Code of Practice on Access to Government Information—authorities are explicitly required to balance the harm which might be caused by disclosure against the public interest, with their decisions on this balance reviewable and reversable [sic] by an Information Commissioner (or, in the case of the Code, by the Ombudsman)...The Bill departs from this model...though the Information Commissioner will be able to determine the question of fact about whether information is, or is not, exempt, she will not be able to determine the question of whether disclosure is in the public interest.

In this crucial sense, the Bill continues the present discretionary system of the Code of Practice—it is "open government" and not "freedom of information"—although without a public interest override.’<sup>43</sup>

The committee suggested that at the very least the Commissioner should be able to make recommendations on disclosure but said that its preferred option was a power to make binding rulings:

‘We believe that it is preferable in Freedom of Information legislation not to leave the question of whether disclosure of information is in the public interest to the discretion of the authority which holds the information. We recommend that, for most of the exemptions, instead of the discretionary disclosure provision in clause [13]<sup>44</sup> there should be a requirement to weigh up the harm caused by disclosure against the public interest in disclosure. The judgement arrived at by the authority could then be reviewed, and revised, by the Information Commissioner. Any exemptions which do not contain the requirement to balance prejudice against the public interest should be subject to the discretionary disclosure provisions of clause [13], also reviewable by the Information Commissioner.’<sup>45</sup>

The House of Lords committee which considered the bill reached a similar conclusion:

‘It is fundamental to Freedom of Information law and practice that government information

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<sup>43</sup> Select Committee on Public Administration, 3rd report Session 1998-99, ‘Freedom of Information Draft Bill’, HC 570-I, paragraphs 31-32

<sup>44</sup> Square brackets indicate that the corresponding clause numbers from the current version of the bill have been substituted

nt bill

<sup>45</sup> HC 570-I, paragraph 44

is seen as belonging to the people, who have a right to see and use the information unless there are good reasons for exempting it. If the ultimate decision whether information is exempt from such a right of access is made by a government Minister or public authority rather than by an independent arbiter, the law may be regarded as a statement of good intentions, but it is not a Freedom of Information Act as that term is internationally understood...To the extent that the draft Bill represents a move from an enforceable public right of access to government information on the one hand to discretionary disclosure on the other, it abandons the Freedom of Information principles expressed in the White Paper. The most important single way to restore those principles is to give the Information Commissioner a public interest override power...to overrule a ministerial decision under clause [13] and to order disclosure.<sup>46</sup>

The Information Commissioner designate, Elizabeth France, the current Data Protection Registrar, has said the ability to make a recommendation on public interest disclosure is an improvement on the draft bill. But she has repeated the view she gave in evidence to the Public Administration committee:

*'In the Registrar's view the preferable solution would be the one she described to the Select Committee. "I think the simple remedy is to allow discretionary decisions to be reviewable and an enforcement notice issued if the Commissioner's view is that in spite of preliminary discussion about the balance the public authority has given, what the Commissioner believes to be the wrong weight [has been given] to some of the elements considered."'*<sup>47</sup>

## **Other jurisdictions**

### *Scotland*

The proposed Scottish FOI Act will allow Scotland's Information Commissioner to make legally binding rulings on disclosure in the public interest, where harm-tested exemptions are involved.<sup>48</sup> This is a major improvement over the UK bill. The test of harm in these cases will be whether

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<sup>46</sup> Report from the Select Committee Appointed to Consider the Draft Freedom of Information Bill. Session 1998-1999, HL 97, paragraph 21

<sup>47</sup> Discretionary Disclosure Recommendations. Comment by the Data Protection Registrar, 16/12/99

<sup>48</sup> Scottish Executive, 'An Open Scotland. Freedom of Information, a Consultation', November 1999, SE/1999/51Paragraph 6.5

disclosure “substantially prejudices” particular interests, a tougher test than the “prejudice” used in the UK bill.

The Commissioner’s rulings on public interest in relation to *class* exemptions will be subject to a collective ministerial veto, which must be approved by the entire cabinet. This is not itself satisfactory though it does represent a modest improvement over the UK veto, which can be exercised by any single minister without reference their colleagues.

### *Ireland*

Ireland’s Freedom of Information Act 1997 contains public interest tests in many of its exemptions.<sup>49</sup> In each case, the Information Commissioner makes a legally binding ruling on the public interest in disclosure. These rulings cannot be overturned by ministers and can be challenged only by appeal to the High Court on a point of law.<sup>50</sup>

The Irish Act does contain some provisions for ministerial certificates, but only in relation to security, defence, international relations and law enforcement – exemptions which do not (with one minor exception<sup>51</sup>) include a public interest test. A certificate prevents a ministerial claim for exemption being reviewed by the Commissioner. However, they can only be issued where a record is “of sufficient sensitivity or seriousness” to justify it<sup>52</sup> and are subject to judicial review on a point of law.<sup>53</sup> They lapse after 6 months unless reviewed and endorsed by the Prime Minister, acting jointly with other prescribed ministers (other than the minister who issued the certificate).<sup>54</sup>

This is a far more limited form of veto than the UK bill, which effectively gives any individual minister and public authority a wide ranging veto wherever disclosure involves an issue of public interest.

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<sup>49</sup> A public interest test applies to the exemptions for policy advice, commercial confidentiality, negotiations, the economic and financial interests of the state and public bodies, personal information, research and the protection of natural resources.

<sup>50</sup> Freedom of Information Act 1997 (Ireland), section 42

<sup>51</sup> One provision in the law enforcement exemption, section 23(3)(b) does contain a public interest test and may be subject to a certificate

<sup>52</sup> Freedom of Information Act 1997 (Ireland), section 25(1)

<sup>53</sup> Freedom of Information Act 1997 (Ireland), section 42(2)(a)

<sup>54</sup> Freedom of Information Act 1997 (Ireland), section 25(7)

### *New Zealand*

New Zealand's Official Information Act 1982 also contains public interest tests for many of its exemptions.<sup>55</sup> The Act is enforced by the Ombudsman, whose recommendations are legally binding. They can, however, be overridden by a collective veto of the whole cabinet. Originally, the Act allowed an individual minister to exercise a veto, but these were issued so regularly the system was overhauled in 1987.

The government had originally argued that political pressure would effectively deter use of the veto and that '*it would be a very brave Minister indeed who resorted to this device save in the most exceptional circumstances*'.<sup>56</sup> The same argument is currently being advanced in the UK to suggest that ministers will not be prepared to ignore the Information Commissioner's recommendations.

In fact, the New Zealand veto was used seven times in the Act's first six months. According to a leading commentary on the Act, the initial experience:

"showed that public criticism of the responsible Minister by the Opposition was easily stigmatized as political point scoring, and, in any event, easily weathered. In truth, members of Parliament do not ordinarily cross the floor on such issues nor, as the Danks Committee [whose report led to the Act] thought, are incidents of non-disclosure by veto punished by the electorate at the next election."<sup>57</sup>

The experience led to a tightening up of the veto procedures in 1987, since when not a single veto has been issued. The process now requires the government to act collectively, setting out the veto in an Order in Council made within 21 days of the Ombudsman's decision. The Order in Council must be published in the official *Gazette* and laid before the House of Representatives. It must state the reasons for the veto and these may not rely on arguments not placed before the

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<sup>55</sup> Exemptions subject to a public interest test include those dealing with the confidentiality of advice, collective ministerial responsibility, the confidentiality of communications with the Sovereign, trade secrets and commercial interests, confidential information, commercial and industrial negotiations, the economy, protection of health and safety, privacy and legal professional privilege. *Official Information Act 1982 (New Zealand), section 9*

<sup>56</sup> The comment was made by the then Minister of Justice.

<sup>57</sup> Freedom of Information in New Zealand', I Eagles, M Taggart, G. Liddell, OUP 1992, p. 569-570

Ombudsman at the time of his investigation.<sup>58</sup> An Order in Council may be challenged in the High Court on the grounds that the decision to issue it was wrong in law. Regardless of the outcome the legal costs of such a challenge must be paid by the Crown, unless the action was unreasonable.

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<sup>58</sup> Official Information Act 1982 (New Zealand), sections 32 and 32A

## **SUBSTANTIAL HARM**

### **Amendment 2**

The Campaign supports this amendment, proposed by the Opposition front bench, which requires an authority to 'have regard to' whether a disclosure of information under clause 13 would cause 'substantial harm'. This appears to refer to the 'substantial harm' test which the FOI white paper proposed should be adopted in relation to virtually all exemptions<sup>59</sup>, but which has been replaced in the bill by the lower test of 'prejudice'.

The amendment may have the effect of encouraging authorities to incorporate a 'substantial harm' test into the balancing exercise in clause 13(4), though it would not require this.

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<sup>59</sup> *Your Right to Know*, Cm 3818, December 1997, paragraph 3.7

## **FACTUAL INFORMATION**

### **Amendments 3 and 4**

These amendments, promoted by the Opposition front bench, would remove the duty to consider making a *discretionary* disclosure of the factual information relating to decision-taking, found in clause 13(5). Instead, the disclosure of such information would be mandatory. This is achieved by excluding such information from the scope of the policy formulation exemption in clause 33(1)(a). This is a welcome move.

### **Amendment 97**

This amendment has a similar purpose, but would exclude more information from the scope of the policy formulation exemption.

## **SUBSTANTIAL HARM & THE PUBLIC INTEREST**

### **Amendment 2**

The following amendment is tabled by the Conservative front bench:

*Clause 13, page 7, line 39, at end insert*

*‘(4A) In making any decision under subsections (2) or (3), the public authority shall also have regard to whether substantial harm would be caused by informing the applicant that it holds the information, or by communicating the information to him’*

This is a helpful amendment which would require an authority to ‘have regard to’ whether a disclosure of information under clause 13 would cause ‘substantial harm’. This invokes the ‘substantial harm’ test which the FOI white paper proposed should be adopted in relation to virtually all exemptions<sup>60</sup>, but which has been replaced in the bill by the lower test of ‘prejudice’.

The amendment may have the effect of encouraging authorities to incorporate a ‘substantial harm’ test into the balancing exercise in clause 13(4), though it would not require this. A proper harm-tested exemption would therefore be preferable.

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<sup>60</sup> The white paper stated: ‘We believe the test to determine whether disclosure is to be refused should normally be set in specific and demanding terms. We therefore propose to move in most areas from a simple harm test [as found in the code] to a substantial harm test, namely will the disclosure of this information cause substantial harm?’ *Your Right to Know*, Cm 3818, December 1997, paragraph 3.7

## DISCRETIONARY DISCLOSURE OF FACTUAL INFORMATION

### Amendments 3 and 4

These two amendments, tabled by the Conservative front bench are also helpful. They overlap partly with Amendment 97 tabled by Robert MacLennan and David Heath (discussed later).

*Amendment 3* would delete clause 13(5), which requires authorities, when considering making a discretionary disclosure of information relating to the ‘development and formulation of government policy’<sup>61</sup> to:

‘have regard to the desirability of communicating to the applicant factual information which has been used, or is intended to be used, to provide an informed background to decision-taking’.

In place of this discretionary approach, *Amendment 4* would exclude factual background information from the scope of the policy formulation exemption altogether. Instead of *encouraging* authorities to *consider* disclosing background factual information the amendment would ensure that such information was not exempt at all. This would be a welcome improvement.

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<sup>61</sup> Clause 33(1)(a)

## **Amendment 97**

Amendment 97 extends the above approach:

*Clause 33, page 18 line 21, at end insert –*

*‘(1A) Information is not exempt by virtue of subsection (1) or section 34 insofar as it consists of –*

- (a) factual information;*
- (b) the analysis or evaluation of, or any projection based on, factual information; or*
- (c) expert advice on a scientific, technical, medical, financial, statistical or other matter’*

This repeats a provision from Mark Fisher MP’s *Right to Know Bill*, introduced as a private member’s bill in 1992 with all-party support and debated for a total of 21 hours on the floor of the House and in committee. The identical provision also appeared in the *Right to Information Bill* introduced by the Labour front bench in 1992, whose sponsors included the then party leader and deputy leader.

The amendment would exclude a range of information, not just factual information, from:

- the policy formulation exemption in clause 33(1)(a)
- the related exemptions for ministerial communications, law officers’ advice and ministerial private offices, also in 33(1)
- the near-class exemption in clause 34, which applies mainly to bodies other than government departments.<sup>62</sup>

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<sup>62</sup> The term ‘near-class’ exemption reflects the fact that authorities’ decisions are largely protected from review, because the harm tests contained in clause 34(2) give legal weight to the authority’s ‘opinion’.

The approach of both sets of amendments reflects that found in the open government code of practice *and* overseas FOI laws. All provide some exemption for policy advice. None defines the term in the bill's all-embracing manner.

### *The code*

The open government code starts with a harm test exemption for internal discussion, which itself involves a more discriminating approach. Thus information is exempt under the code only if its disclosure:

‘would harm the frankness and candour of internal discussion’

This establishes a presumption in favour of disclosure, which an authority seeking to withhold information must overturn by showing harm. No such presumption applies to such information under the bill.

In addition, the code requires authorities to ‘*publish the facts and analysis of the facts*’ which underlie major policy proposals and decisions. It states that such information should normally be made available when proposals and decisions are announced, and should be released proactively by authorities – not merely disclosed if specifically requested. This group of amendments would therefore help to maintain the current position under the code.

### *White paper*

The white paper explicitly proposed to retain the code's approach, and require the pro-active release of ‘facts and analysis which the Government considers important in framing major policy proposals and decisions’<sup>63</sup>

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Decisions could be challenged only on judicial review grounds, that is if they were irrational – but could not be set aside on their merits.

<sup>63</sup> *Your Right to Know*, paragraph 2.18

The white paper proposed that *other* material relating to government decision making should be disclosable subject to ‘a test of “simple” harm (ie “would disclosure of this information cause harm”)’<sup>64</sup>.

It went on to suggest that the exemption itself was:

‘designed primarily to protect opinion and analytical information, not the raw data and factual background material which have contributed to the policy-making process’.<sup>65</sup>

It suggested these could be distinguished, on the lines of:

‘a similar separation envisaged in the...Right to Know Bill’

### *Scotland*

The Scottish Executive has proposed to go beyond the Westminster bill in its recent proposals for a Scottish FOI bill. It proposes that factual information relating to policy formulation should be disclosed so long as to do so would not ‘substantially prejudice’ collective responsibility or the frankness and candour of internal discussion.<sup>66</sup>

### *FOI laws*

FOI laws generally approach this issue *either* by a harm-test exemption, which in practice excludes factual information, *or* by explicitly defining such material as outside the scope of the exemption. Some, such as Ireland’s, combine both approaches.

Thus the equivalent provision under section 20 of Ireland’s 1997 Act:

- Applies only to material relating to an authority’s ‘deliberative processes’
- Applies only where disclosure would be ‘contrary to the public interest’
- Does not apply at all to:

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<sup>64</sup> *Your Right to Know* para 3.12

<sup>65</sup> *Your Right to Know*, paragraph 3.13

<sup>66</sup> Scottish Executive. ‘An Open Scotland. Freedom of Information: A Consultation’, November 1999

‘factual (including statistical) information and analyses thereof...[or to] a report, study or analysis of a scientific or technical expert relating to the subject of his or her expertise’

Similar exclusions are found in many other FOI laws. These variously exclude:

- Factual and statistical material<sup>67</sup>
- Information publicly cited as the basis for a policy<sup>68</sup>
- Scientific research<sup>69</sup> or field research<sup>70</sup> relating to policy formulation
- Expert scientific or technical reports or analysis<sup>71</sup> or ‘expert opinion or analysis’ in any field<sup>72</sup>
- A feasibility or other technical study,<sup>73</sup> plans or budgetary estimates on government programmes<sup>74</sup> an efficiency study,<sup>75</sup> an economic forecast,<sup>76</sup> a public opinion poll.<sup>77</sup>

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<sup>67</sup> Excluded from the exemptions in the FOI laws of Australia (Commonwealth), Ontario, British Columbia, Victoria and Queensland.

<sup>68</sup> British Columbia

<sup>69</sup> Manitoba

<sup>70</sup> Ontario and British Columbia

<sup>71</sup> Australia and Ireland

<sup>72</sup> Queensland

<sup>73</sup> Ontario and British Columbia

<sup>74</sup> Ontario and British Columbia

<sup>75</sup> Ontario, British Columbia and Ireland

<sup>76</sup> British Columbia

<sup>77</sup> British Columbia

## TIME LIMIT FOR DISCRETIONARY DISCLOSURES

### Amendment 80

*Clause 13, page 8, line 1, leave out from 'made' to end of line 2 and insert*

*'promptly and in any event not later than the twentieth working day following the date of receipt; and in this section 'date of receipt' has the same meaning as in section 9(5)'*

The bill encourages authorities to take decisions on exemption in two separate stages, over two different time-frames. Decisions on whether information is exempt should be made within 20 working days.<sup>78</sup> However, decisions on whether to make a discretionary disclosure of exempt information need only be made:

*'within such time as is reasonable in the circumstances'*<sup>79</sup>

This suggests that decisions will trickle out over a prolonged period: first applicants will be told whether information is exempt. If it is, they will have to wait a further period to discover whether the authority has decided to disclose it on public interest grounds. This will obscure the point at which a final decision has been made, complicating any process of appealing to the Commissioner.

No overseas FOI law segregates decisions on exemption and public interest in this way. The decision is taken as a single decision and notified at one point in time. The same is true under the open government, in which all harm tested exemptions are also subject to the code's public interest test. Applicants are notified after a single-stage decision.

The amendment would require decisions on public interest disclosure to be made within the same 20-day period as the decision on exemption.

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<sup>78</sup> Clause 9(1)

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<sup>79</sup> Clause 13(7)

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## FREEDOM OF INFORMATION BILL

House of Commons Committee Stage

### BRIEFING PAPER 3

Amendments tabled to Clauses 14 - 20

20 January 2000

**Hon. President:** Godfrey Bradman  
**Co-Chairs:** James Cornford, Neil McIntosh  
**Director:** Maurice Frankel

**Parliamentary Co-Chairs:** Helen Jackson MP  
Archy Kirkwood MP  
Richard Shepherd MP

## CLAUSE 14

### FEES FOR CONFIRMING INFORMATION EXISTS

#### Amendment 81

*Clause 14, page 8 leave out lines 6 and 7*

This amendment would delete clause 14(1)(a), which allows an authority to charge for informing an applicant whether information which could be the subject of a discretionary disclosure *exists*.

It does not affect an authority's ability to charge for *providing* such information.<sup>1</sup>

A similar amendment has been discussed in relation to clause 8(1),<sup>2</sup> but was resisted by the government.

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<sup>1</sup> Clause 14(1)(b)

<sup>2</sup> Amendments 28 and 29. These would have prevented an authority charging for confirming whether information to which a right of access under clause 1 existed.

## CLAUSE 15

### NOTIFICATION OF RIGHT OF APPEAL

#### Amendment 82

*Clause 15, Page 8, line 30 at end insert –*

*‘(d) describes the right to apply to the Commissioner for a decision under section 50’*

This would require authorities, when refusing a request on the grounds that information is exempt, to notify the applicant of the right of appeal to the Commissioner. Remarkably, the bill omits this essential provision.

Clause 15(1) requires the authority to tell the applicant that information has been refused, to specify the relevant exemption, and to state why the exemption applies. But there is no duty to tell applicants that if they are dissatisfied they can challenge the decision by appeal to the Commissioner. This is a standard requirement of overseas FOI laws.<sup>3</sup> Indeed, some (such as Ireland’s) require the authority to tell requesters of the right of appeal when *acknowledging* requests, before any decision on the release the information has been made.<sup>4</sup>

The government may indicate, as it has on other points, that this is a matter best left to the code of practice under clause 44. This is not an acceptable alternative. It falls into a pattern in which:

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<sup>3</sup> For example, section 10(1) of Canada’s *Access to Information Act 1982* states: ‘Where the head of a government institution refuses to give access to a record requested under this Act or a part thereof, the head of the institution shall state in the notice given under paragraph 7(a) -- (a) that the record does not exist, or (b) the specific provision of this Act on which the refusal was based or, where the head of the institution does not indicate whether a record exists, the provision on which a refusal could reasonably be expected to be based if the record existed -- *and shall state in the notice that the person who made the request has a right to make a complaint to the Information Commissioner about the refusal.*’

<sup>4</sup> Section 7(2) of the *Freedom of Information Act 1997 [Ireland]* states “The head [of a public body] shall cause the receipt by him or her of a request under subsection (1) to be notified...to the requester concerned as may be but not later than 2 weeks after such receipt, and the notification shall include a summary of the provisions of section 41 and *particulars of the rights of review under this Act, the procedure governing the exercise of those rights, and the time limits governing such exercise*, in a case to which that section applies’

- measures which might help applicants in exercising their rights are relegated to non-binding guidance
- provisions which strengthen an authority's ability to withhold information are put on the face of the bill.

Experience under the code of practice has been that departments sometimes ignore the requirements of the government's own guidance, and fail to inform applicants of their rights of appeal. The guidance states:

'When information has been refused, for whatever reason, or if a charge has been made for providing information, the applicant should be informed of his right to request an internal review and ultimately to appeal to the Ombudsman through an MP.'<sup>5</sup>

Despite constant reminders from the Ombudsman, this duty is still not properly observed. The Home Office itself was rebuked by the Ombudsman *three* times in 1999 for failing to deal with requests under the terms of the code. One of these cases involved a failure to inform an applicant of the code's right of appeal.<sup>6</sup>

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<sup>5</sup> Code of Practice on Access to Government Information . Guidance on Interpretation, 2nd Edition, 1997, Part 1, paragraph 65

<sup>6</sup> The Home Office Immigration Service refused to disclose a document on the grounds that 'because it was a Home Office document she would not be allowed a copy of it'. The Ombudsman pointed out that this 'was not, in itself an acceptable reason for refusing information under the Code.' Although most of the requested information was exempt, and could properly have been withheld, some of the information was purely factual, and already known to the applicant – who wanted to check it had been accurately recorded. This information was also refused. The Ombudsman commented "I recognise that this factual information is contained in a document which is described as 'internal'. However, the Code should not be used to support a blanket refusal of a class of information; each case should be dealt with on its individual merits. Moreover, I do not share the Home Office's view that those few sentences could not be extracted from the report. Nor do I see why the date of the report should not be released". The Ombudsman added: 'They should also have mentioned the appeal process available to her under the Code'. [*Parliamentary Ombudsman, HC 21, December 1999, Case A.36/99*]

In another case involving the Fire Service Unit of the Home Office, the Ombudsman commented: 'I find it a matter of concern that, throughout the correspondence...the Home Office made no direct mention of the Code. The Code has now been in operation for five years and both the Ombudsman and his predecessor have made it clear that, if information is to be withheld, it must be withheld in accordance with specific code exemptions. I criticise the Home Office for this failure'. [*Parliamentary Ombudsman, HC 21, December 1999, Case A.31/99*]

In a third case the Ombudsman criticised the Prison Service for failing to deal with a request from a prisoner in accordance with the code. He reported that the 'Director General [of the Prison Service] did not cite any of the exemptions in...the Code in support of the decision to reject Mr G's request for

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full disclosure.’ He noted that an internal Prison Service memorandum recorded that ‘there is nothing on the file which causes us any difficulty or which we would particularly wish to withhold (save for legal advice and advice to Ministers).’ It added that they nevertheless did not want to respond more fully partly because disclosure policy was changing in light of the forthcoming FOI legislation and allowing fuller access ‘could set an unwelcome precedent for other cases while policy remains in a state of flux’. The Ombudsman commented: ‘Three points need to be made about this. First, if the Prison Service’s view was that the file contained nothing untoward how could they then justify withholding the information from Mr G under the Code? In making such a statement it seems clear to me that they did not have a proper regard to their obligations under the Code. Second, the government’s existing commitment to ‘Open Government’ is set out in the Code. A refusal to supply information should therefore be considered with reference to it. I was concerned at the implication that the Prison Service should withhold information until the proposed legislation on ‘Freedom of Information’ has been passed. While the Code continues to be in operation the Ombudsman expects departments and bodies within his jurisdiction to act in accordance with its principles. Third, it may be reasonable, in principle, to advise a Minister that the legal advice and advice to Ministers should not be released ...but they went on to say that all other information on the file should be withheld because Mr G’s request amounted to a ‘fishing expedition’ and because disclosure would set an unwelcome precedent for other cases. Those are not acceptable reasons for refusing to release information as far as the Code is concerned.’ (*Parliamentary Ombudsman, HC 438, May 1999, Case A.15/99*)

## **TWENTY WORKING DAYS**

### **Amendment 83**

*Clause 15, page 8, line 39*

*leave out 'within such time as is reasonable in the circumstances' and insert 'promptly and in any event not later than the twentieth working day following the date of receipt'*

### **Amendment 84**

*Clause 15, page 8, line 40*

*at end insert 'and in this section 'date of receipt' has the same meaning as in section 9(5)'*

These amendments would require authorities to notify applicants of a decision *not* to make a discretionary disclosure within 20 working days, instead of the unspecified 'reasonable' time permitted under clause 15(3).

The amendments are similar to those previously tabled in relation to clause 13(6) and resisted by the government.

## NOTIFICATION OF RIGHT OF APPEAL

### Amendment 85

Clause 15, page 9, line 3 leave out ‘stating that fact’ and insert

- ‘(a) stating that fact, and
- (b) where appropriate (except in relation to a case to which section 12(1) applies) advising the applicant of the steps which he may take to make the request one with which the authority is able to comply, or offering to provide such advice; and
- (c) describing the right to apply to the Commissioner for a decision under section 50’

Amendment 82 sought to require authorities to tell applicants of their rights of appeal when a request is refused on the grounds that information is *exempt*. This amendment deals with information that must be given when requests are refused on *other grounds*.

Clause 15(5) deals with the information authorities must give when refusing a request on cost grounds (under clause 11) or because it is regarded as vexatious (12(1)) or identical or substantially similar to a previous request (12(2)). It requires the authority merely to give the applicant the reason for the refusal.

Under the amendment, they would also have to tell applicants of the right to complain to the Commissioner.

It would also require the authority, where appropriate, to tell the applicant what he or she should do to make a request which can be answered. This would not apply to the maker of a vexatious request, since such a person is presumably concerned to disrupt the work of the authority rather than obtain information.

Depending on the circumstances, this duty to offer advice might involve:

- *if the request exceeded the cost limit, explaining how the request could be brought within that limit.* A request may have been refused because it asked for more detailed information than was readily available. Someone may have asked for *weekly* statistics where only *monthly* figures were to hand. The amendment would merely require the

authority to point out that monthly figures could be supplied without exceeding the cost limit. An unhelpful authority might simply refuse the weekly figures, and say no more.

- *If the request was substantially similar to a previous request, how much of ‘a reasonable interval’ the applicant should allow before applying again.* If the authority does not say (and the bill allows it not to), how is the applicant to know whether he or she should wait an extra week, an extra month, or an extra year? The applicant could simply be left to try again at an unspecified later stage, but if the next request comes too soon the authority would be able – under clause 15(6)(b) – to ignore it, without even acknowledging receipt.

Note that the duty to advise the applicant applies only ‘where appropriate’. It would not apply where it would be unreasonable to do so.

The government may argue, here too, that authorities will act helpfully, if asked to do so in guidance. Experience under the code has shown that authorities frequently do not do so. According to Parliamentary Ombudsmen (former and present):

"there is a tendency in some departments to use every argument that can be mounted, whether legally-based, Code-based or at times simply obstructive, to help justify a past decision that a particular document or piece of information should not be released"<sup>7</sup>

‘there are one or two Permanent Secretaries who are in no doubt that we think they and their departments are really just looking for reasons, clutching at straws one might almost say, to avoid the release of information. We have made our views known in those cases in no uncertain terms.’<sup>8</sup>

‘Frequently, departmental replies to requests for information neither refer to the Code nor, indeed, give the impression that the provisions of the Code have been considered at all...[some departments] adopt a “scatter-gun’ approach and pepper their response with a range of Code exemptions many of which are of no relevance to the case under consideration’<sup>9</sup>

‘Too often, departments quote exemptions in the Code of Practice on Access to

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<sup>7</sup> William Reid, Parliamentary Ombudsman, Annual Report for 1995, page 51

<sup>8</sup> Michael Buckley, Parliamentary Ombudsman, evidence to Public Administration Committee, 2/12/97

<sup>9</sup> Parliamentary Ombudsman, 5th Report, 1997-98, HC 845, June 1998

Government Information (the Code) rather than follow the spirit of the Code and give as much information as they are able.’<sup>10</sup>

“Departments quite often say that the information requested is covered by one or more of the 15 Code exemptions but in the course of the investigation it transpires that they were unable to find the information - or do not possess it.’<sup>11</sup>

‘In two cases investigated this year the Ombudsman found that information which departments claimed could not be found or was not accessible was, in fact, quite easily available’<sup>12</sup>

In each of these cases, the Ombudsman has identified the offending authorities, applying the ‘name and shame’ sanction which the government claims will be effective in ensuring that authorities act helpfully under the FOI bill. The fact that authorities continue to act unhelpfully under the code, despite this tactic, suggests that a statutory duty to provide assistance is needed.

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<sup>10</sup> Parliamentary Ombudsman. Press release, 10/12/98 on publication of Selected Cases on Access to Official Information (2nd report 1998-99, HC 5)

<sup>11</sup> Parliamentary Ombudsman. Press release, 10/12/98 (as above)

<sup>12</sup> Parliamentary Ombudsman, Annual Report 1998-99, HC 572 , July 1999, paragraph 5.3

## DUTY TO GIVE NOTICE

### Amendment 64

*Clause 15, page 9, line 5*

*'after '12' insert '(1)'*

Under clause 15(6), authorities do *not* have to tell applicants why their requests have been refused if the refusal is for the reasons set out in clause 12, and the applicant has been given a reason in relation to a *previous* refusal.

However, clause 12 applies both to vexatious requests, and requests refused because they are identical or substantially similar to previous requests. The amendment would waive the duty to give reasons for vexatious requests (ie those under 12(1)) only.

Under the bill at present, the following scenario could arise:

- (a) A request is made in January for particular information, which is supplied.
- (b) In February, the applicant makes a request which is refused on the grounds that it is substantially similar to the January request, and a reasonable interval has not elapsed. The applicant is not told how much of a 'reasonable interval' to allow before making a further request.
- (c) In March, the applicant makes a further request. The request is ignored, and the letter not even acknowledged. This is permissible under clause 15(6) (unless it is 'unreasonable' in the circumstances).

However, a refusal to even acknowledge receipt of a request would *always* be unreasonable in such circumstances. Presently, it would be regarded as maladministration. It should not be legitimised in this way.

## SCHEDULE 2

### Clause Stand Part debate

#### NEW SECRECY CLAUSE

Schedule 2 of the FOI Bill makes the Commissioner subject to a new prohibition on disclosure of information about to come into force under the Data Protection Act 1998. The Commissioner and her staff could face criminal charges for disclosing certain kinds of information under the FOI Bill. Disclosures could only be made if they were ‘necessary’ for their functions or ‘necessary’ in the public interest. The ‘necessary’ test is a strict one, which may prevent disclosure by the Commissioner in many circumstances. The present Data Protection Registrar, who will become the first Commissioner, has herself expressed concern at it.

Under the section 59 of the DPA, the Data Protection Commissioner (as the Data Protection Registrar will become) will become subject to a statutory prohibition on the disclosure of certain information. Paragraph 19 of Schedule 2 of the FOI bill extends this prohibition to the Information Commissioner. The effect may be to prevent the Commissioner and her staff disclosing information about how or whether they are handling particular complaints, where this involves the release of information about identifiable businesses. This may become relevant where an authority has refused to disclose information about a particular company to an applicant. In some cases, businesses may be public authorities in relation to certain functions. (For example, private bodies with public functions can be brought within the scope of the bill by an order<sup>13</sup> in relation to specified functions. This might apply to bodies like Group 4, in relation to their prison contracts.)

The government maintains that it is obliged by the Data Protection (DP) Directive to create

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<sup>13</sup> Under clause 4(2)(a)

this offence – a view which the Registrar has disputed.<sup>14</sup> Whatever the legal position in relation to the DP Act, the offence cannot be required in relation to the Commissioner's *FOI functions*, since these do not flow from the directive or other Community obligation. The rationale for extending the offence appears to be based merely on an unnecessary preference for consistency.<sup>15</sup>

The prohibition of disclosure, which will apply to the Information Commissioner, in section 59 of the Data Protection Act, states:

Confidentiality of information.

59. - (1) No person who is or has been the Commissioner, a member of the Commissioner's staff or an agent of the Commissioner shall disclose any information which-

- (a) has been obtained by, or furnished to, the Commissioner under or for the purposes of this Act,
- (b) relates to an identified or identifiable individual or business, and
- (c) is not at the time of the disclosure, and has not previously been, available to the public from other sources,

unless the disclosure is made with lawful authority.

(2) For the purposes of subsection (1) a disclosure of information is made with lawful authority only if, and to the extent that-

- (a) the disclosure is made with the consent of the individual or of the person for the time being carrying on the business,
- (b) the information was provided for the purpose of its being made available to the public (in whatever manner) under any provision of this Act,
- (c) the disclosure is made for the purposes of, and is necessary for, the discharge of-
  - (i) any functions under this Act, or
  - (ii) any Community obligation,
- (d) the disclosure is made for the purposes of any proceedings, whether

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<sup>14</sup> Article 28.7 of the Data Protection directive states: 'Member States shall provide that the members and staff of the supervisory authority, are to be subject to a duty of professional secrecy with regard to confidential information to which they have access.' However, the Data Protection Registrar has said: 'The Registrar does not believe that the Directive requires the criminal provisions provided by clause 54 [now section 59] She believes that the existing law combined with appropriate conditions in staff contracts will satisfy the requirements of Article 28.7.' *Data Protection Registrar, 'Data Protection Bill. Criminal disclosures by the Commissioner's Staff.'* 29.1.98

<sup>15</sup> Because FOI requests by an individual for his or her own data will be dealt with under the DP Act, not the FOI bill. The two laws and regimes will remain separate, despite the fact that for convenience they share a single enforcement regime.

criminal or civil and whether arising under, or by virtue of, this Act or otherwise, or

(e) having regard to the rights and freedoms or legitimate interests of any person, the disclosure is necessary in the public interest.

(3) Any person who knowingly or recklessly discloses information in contravention of subsection (1) is guilty of an offence.

The effect of this provision is to expose the Commissioner to risk of prosecution if she discloses information obtained under the FOI Bill about an identifiable individual or business (and the latter will be the real issue) without their consent, unless the information was supplied in order for her to publish it or the disclosure was for the purpose of legal proceedings. In any other circumstance, the Commissioner would have to show that one of two conditions could be met.

The first, is that the disclosure is ‘necessary’ for the discharge of any of the Commissioner’s functions. This is a strict test. If the function can be discharged without releasing the information, disclosure may not be ‘necessary’. It may not be possible to show that it is be ‘necessary’ for the Commissioner to identify a company which was opposing disclosure of information about defective products, safety problems or discriminatory employment practices, if the Commissioner could still discharge her function by referring to it anonymously.

The second is that the disclosure is ‘necessary’ in the public interest, having regard to the ‘the rights and freedoms or legitimate interests’ of any person. This would no doubt protect a disclosure made to the applicant or someone else with a direct interest. But it would leave open the possibility of an offence if disclosure was made to the press or public generally. Again, the problem is that ‘necessary’ means that the rights, freedoms or legitimate interests of any person would be *harmed* if the information could not be disclosed, *and* that this would be contrary to the public interest. Disclosure in the interests of the accountability of the authorities to whom FOI requests are made, or the accountability of the Commissioner herself, may not pass the ‘necessity’ test. A purpose clause, which made clear that the bill was intended to promote accountability, could provide some statutory safeguard. However, the government has resisted such a provision.

**The most objectionable element of the restriction is that it contains no harm test. The offence is not limited to the disclosure of trade secrets or commercially damaging information, but could be caused by a *harmless* disclosure of information about an identifiable business. The perverse consequence would be that information about a business which an *authority* would *have* to disclose under the bill (because it did not reveal a ‘trade secret’ or ‘prejudice the commercial interests’ of the business concerned<sup>16</sup>) could result in the Commissioner being convicted of a criminal offence if *she* disclosed it.**

At the time of the Data Protection Bill’s passage the Registrar commented:

‘The effect of clause 54<sup>17</sup> is potentially to criminalise disclosures of information relating to an identifiable business in circumstances where it could not sensibly be maintained that this could cause any harm. For example, where a journalist queries the lawfulness of a company’s processing activities, a member of the Commissioner’s staff could commit a criminal offence simply by confirming that the company had discussed the processing in question with the Registrar because this disclosure is clearly not absolutely necessary for the discharge of the Commissioner’s functions under the Act. The Registrar has always sought to be as open as possible with the Press. She is aware of no evidence that this has caused any individual or company significant harm. She is therefore concerned that this clause could require her and her staff to be unnecessarily guarded in future.’<sup>18</sup>

Such a restraint on the *Data Protection* Commissioner’s dealings with the press would be undesirable. To restrain the *Information* Commissioner should be unthinkable. It could undermine her ability to explain the basis of her approach. Any suggestion of secrecy on the part of the Commissioner could damage the credibility of the legislation itself.

During the DP Bill’s passage, the government suggested that the Data Protection Commissioner’s general power to disseminate information (and the Information Commissioner would have the identical power) would protect the Commissioner in making

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<sup>16</sup> Clause 41(2)

<sup>17</sup> Now section 59

<sup>18</sup> *Data Protection Registrar, ‘Data Protection Bill. Criminal disclosures by the Commissioner’s Staff.’ 29.1.98*

any necessary disclosures<sup>19</sup>. However, the minister himself suggested that this would allow the publication of ‘anonymised’ information – implying the disclosure of company-specific information would be constrained.<sup>20</sup>

A similar general power to publish information, coupled with a specific prohibition of disclosures appears in the Health & Safety at Work Act. The Health & Safety Commission and Executive have long maintained that this prevents them disclosing information obtained under their powers unless disclosure is strictly necessary for health and safety purposes. In their view this does not permit disclosures to the press or to people whose safety is not directly at risk.

As the Data Protection Bill went through Parliament, a slight improvement on the original proposals was made, after concerns were raised by John Greenway and Richard Shepherd.<sup>21</sup> The then Home Office minister, George Howarth, promised to see whether more could be done to relax the restriction when the FOI bill was introduced.<sup>22</sup> It has been government policy since the Conservatives’ 1993 *Open Government* white paper, that newly created

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<sup>19</sup> Section 52(2) of the Data Protection Act 1998 gives the DP Commissioner the function of arranging for the dissemination of ‘such information as it may appear to him to be expedient to give to the public about the operation of this Act, about good practice, and about other matters within the scope of his functions under this Act’. An identical provision is found in clause 46(2) of the FOI bill.

<sup>20</sup> George Howarth, Parliamentary Under Secretary of State, Home Office, said: ‘Clause 51 places general duties on the commissioner to promote good practice and to disseminate material that she considers appropriate, about the operation of the Act, good practice and any other matters within the scope of his [sic] functions. *Anonymised information* from assessments may appear in one of those contexts...’ (italics added). Hansard (Commons), 2/7/98, col. 603

<sup>21</sup> What is now section 59(2)(e) of the bill originally required that a disclosure would only be lawful if necessary for reasons of ‘substantial’ public interest. The government later agreed to remove the word ‘substantial’. See also the attached correspondence between the Campaign for Freedom of Information and Home Office ministers.

<sup>22</sup> Mr Howarth said: ‘The hon. Gentleman argued that clause 59 could, perhaps, go further, and we did consider whether there was further scope for easing the restrictions that the clause imposes while keeping it consistent with the directive. So far, we have been unable to find a way to do that, but we shall certainly continue to have regard for that point as we continue our work on freedom of information. If we can identify any way in which restrictions can properly be eased, we shall bring forward any necessary amendment in freedom of information legislation. There is scope to revisit the point within that framework, provided that we can find a suitable way to achieve what the hon. Gentleman and the Government want.’ [Hansard, Commons, 2/7/98, col. 603]

statutory restrictions on disclosure should wherever possible contain ‘harm tests’.<sup>23</sup> The FOI bill is itself intended to be accompanied by the repeal of excessive statutory restrictions<sup>24</sup>. Instead, ministers have achieved what should have been unthinkable, and arranged for this unnecessary and damaging provision, so incompatible with the spirit of an FOI Act, to be extended to the FOI Commissioner herself.

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<sup>23</sup> ‘A harm test is a way of ensuring that no-one is penalised for disclosing information if it is not genuinely confidential. It does this by asking whether harm or damage has resulted, or is likely to result, from the disclosure. If the answer is “no”, then a prosecution for unauthorised disclosure of information will not succeed...The Government proposes to assess the case for harm tests in all future legislation on disclosure...The presumption will be in favour of inclusion of a harm test unless there are compelling public interest arguments against it’. *Open Government White Paper*, Cm 2290, July 1993 , paras 8.37 to 8.40

<sup>24</sup> Clause 74. The Home Office consultation document stated: ‘this power allows the Secretary of State to amend or repeal any current bars to disclosure in other legislation to facilitate greater openness. A review of these provisions is under way and some repeals will be included in the legislation, where they have been identified before introduction of the Bill into Parliament’. [paragraph 62]

## CLAUSE 17

### PUBLICATION SCHEMES

#### Amendment 66

*Clause 17, page 10, line 14 leave out ‘it thinks fit’ and insert ‘may be approved by the Commissioner’.*

Clause 17 requires every authority to produce and periodically review a ‘publication scheme’ setting out the information which it publishes and intends to publish. These schemes must be approved by the Commissioner.<sup>25</sup> The Commissioner may also publish or approve ‘model publication schemes’ for particular classes of public authority, which can be adopted without further approval.<sup>26</sup> The Commissioner can take enforcement action against an authority which fails to publish information in accordance with its publication scheme.<sup>27</sup>

Clause 17(4) however creates a surprising loophole. Although the *contents* of a publication scheme must be approved, an authority is free to publish its publication scheme ‘*in such manner as it thinks fit*’. This indicates that the manner of publication will not be subject to review by the Commissioner. An authority could publish its scheme in such an obscure form as to prevent anyone from ever seeing it. There might be just a single copy, accessible only by inspecting it in person in the chief executive’s office, by appointment, on certain days of the week. Alternatively, it could be made available but only for sale, at an exorbitant price.

The amendment would require the Commissioner’s approval for the *manner* of publication, as well as its contents. Approval for the manner of publication is likely to be virtually automatic in most cases, for example by including reference to this in all ‘model schemes’ (For example, local authorities might receive automatic approval if they made copies available for

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<sup>25</sup> Clause 17(1)(a)

<sup>26</sup> Clause 18(2)

<sup>27</sup> This was not a feature of the draft bill, which would have left an authority’s failure to publish material in accordance with its publication scheme, to a non-binding ‘practice recommendation’. The current bill makes compliance with a publication scheme an enforceable duty [clause 17(1)(b)]

inspection at council offices and libraries, and for photocopying at a minimal per page rate. Authorities which have Internet sites might also be required to publish their schemes in this way.) The purpose of the amendment is merely to ensure that an unreasonable or obstructive approach to publication could be properly addressed by the Commissioner.

## DUTY TO PUBLISH GUIDELINES

### Amendment 65

*Clause 17, page 10, line 8 at end insert*

*‘(2A) It shall be the duty of every public authority to publish, subject to subsection (2B), any manuals, instructions, precedents and guidelines used by the officers or employees of the authority, for the purpose of*

*(a) interpreting any enactment, or*

*(b) administering any scheme for which the authority is responsible’*

*and to make adequate reference to the existence of such information in its publication scheme.*

*(2B) An authority shall not be required by subsection (2A) to publish any exempt information unless the public interest in maintaining the exemption in question outweighs the public interest in disclosure.’*

This amendment would require authorities to publish the internal guidance used by officials in their dealings with the public. It reflects an existing requirement of the open government code, which the bill drops – contrary to a commitment in the FOI white paper. A similar provision appears in every English language FOI law, across the world.

The open government code requires authorities:

*‘to publish or otherwise make available, as soon as practicable after the Code becomes operational, explanatory material on departments’ dealings with the public (including such rules, procedures, internal guidance to officials and similar administrative manuals as will assist better understanding of departmental action in dealing with the public) except where publication could prejudice any matter which should properly be kept confidential under Part II [the Exemptions] of the Code.’<sup>28</sup>*

The guidance on the code states:

*‘Departments should plan for the progressive release of all the guidelines and other*

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<sup>28</sup> Code of Practice on Access to Government Information, Part I, paragraph 3(ii).

material used in their dealings with the public. This need not mean publication where departments consider that the level of interest would not justify it, or where the guidelines in question are voluminous, but eventually the aim should be to make all guidelines available for purchase or inspection on request.<sup>29</sup>

Annual reports under the code have described examples of the kinds of guidance released under this provision:

‘In 1994 the Inland Revenue set a target to publish their 45 main guidance manuals by the end of December 1995. Only 5 volumes failed to meet this deadline and these were published by the beginning of February 1996.’<sup>30</sup>

‘The Health and Safety Executive’s rolling programme for preparing existing internal guidance for release was completed on 31 March 1996. All internal guidance which can be released (some 3,500 – 4,000 documents) is now lodged with HSE’s information centres and is available for free public inspection’

‘The Home Office’s Immigration Service Enforcement Directorate received 95 requests for internal enforcement policy guidelines in 1996, all of which were met’

‘The Office for Standards in Education provided all nursery education providers with a copy of the Inspection Notebook used by its Inspectors in 1996’<sup>31</sup>

‘In March the FCO published *Guidance to Desk Officers on Export Licence and Arms Working Party Applications*. This was superseded by the *Criteria to be used in considering licence applications for the export of conventional arms* which was issued in July’

‘All main Child Support Agency guides and manuals are now publicly available’<sup>32</sup>

The FOI white paper proposed to continue these duties.<sup>33</sup> However, the bill omits them. The

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<sup>29</sup> Code of Practice on Access to Government Information, Guidance on Interpretation, 2nd edition, 1997, Part I, paragraph 31

<sup>30</sup> Cabinet Office. Code of Practice on Access to Government Information, 1995 Report

<sup>31</sup> These three examples were amongst those cited in: Cabinet Office. Code of Practice on Access to Government Information, 1996 Report,

<sup>32</sup> These two examples are from the 1997 Report on the code.

provisions on publication schemes *could* be used to continue this programme, but there is no direct reference to it in clauses 17 or 18. It appears the matter would be left entirely to the discretion of the Information Commissioner. She could decide to require the publication of internal manuals as a matter of routine in all cases, by refusing to approve publication schemes which failed to provide for it. Alternatively, she might make no reference to this matter at all, and allow existing practice under the code to be reversed. There is no statutory requirement or guidance on this matter at all – an unsatisfactory state of affairs, particularly in light of the government’s white paper commitment.

The duty to publish guidelines appears, without exception, in all (English language) overseas FOI laws including, the US, Canadian, Australian, New Zealand, Irish, and all the state and provincial laws within Canada and Australia. Government FOI bills in countries from Trinidad and Tobago to South Africa also contain this provision.

The amendment seeks to ensure that the UK bill does not reverse the existing code requirement. In line with practice under the code, it allows guidance which might include exempt information (e.g. law enforcement material which might assist offenders to evade detection) to be withheld, subject to a public interest test. The drafting broadly in line with a number of overseas precedents<sup>34</sup>. The amendment would require authorities to ‘make adequate reference’ to the existence of these guidelines in their publication schemes, thus making this requirement subject to the Commissioner’s powers of approval of publication schemes.

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<sup>33</sup> ‘the Act will impose duties upon public authorities to make certain information publicly available, as a matter of course. These requirements...will be broadly along the lines of those in the *Code of Practice*, namely...explanatory material on dealings with the public’ *Your Right to Know*, Cm 3818, paragraph 2.18

<sup>34</sup> E.g. Section 16(1) of Ireland’s *Freedom of Information Act 1997*, which states: ‘16.—(1) A public body shall cause to be prepared and published and to be made available in accordance with subsection (5)— (a) the rules, procedures, practices, guidelines and interpretations used by the body, and an index of any precedents kept by the body, for the purposes of decisions, determinations or recommendations, under or for the purposes of any enactment or scheme administered by the body with respect to rights, privileges, benefits, obligations, penalties or other sanctions to which members of the public are or may be entitled or subject under the enactment or scheme, and (b) appropriate information in relation to the manner or intended manner of administration of any such enactment or scheme.’

## INDEX OF DISCLOSED INFORMATION

### Amendment 86

*Clause 17, page 10, line 8 at end insert*

*‘(2A) It shall be the duty of every public authority:*

- (a) to maintain an index identifying all information disclosed by it in response to requests under section 1, other than information whose disclosure to a person other than the person to whom it was disclosed would involve the disclosure of information which is exempt under sections 38 or 41;*
- (b) to make adequate reference to the existence of that index in its publication scheme*
- (c) to make copies of information referred to in the index available to any person on request on payment of a reasonable fee which may not exceed the cost of copying the information and posting (or otherwise delivering it) to that person’.*

This would require authorities to maintain an index of information which they have previously disclosed under section 1. The result would be a guide to the actual disclosures made to past requesters, available for public inspection.

The index would describe information which had already been ‘vetted’ to remove exempt details, and could easily be provided to a subsequent requester. It would also help to educate potential users as to the kind of disclosures that they might expect.

The index would not include references to disclosures of *personal* information, disclosed to someone seeking information about his or her own private affairs. Such information would be exempt under clause 38 if a third party applied for it. Nor would it include information which a business had applied for about its own affairs (e.g. an inspection report on its premises) if its disclosure to a third party might prejudice the company’s commercial interests.<sup>35</sup>

Making disclosed information available to the public at large and not just the individual requester, would ensure that it served the wider public interest. Applicants will sometimes fail

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<sup>35</sup> And be exempt under clause 41

to make good use of the information they receive, perhaps because it arrives too late to be of use, or because it proves too complex for them to handle or because they lack the means to disseminate it. Making the existence of this information more widely known ensures that the work that may have gone into processing a particular request is more likely to benefit the community.

It will also educate potential users, by revealing what is held *and* disclosable. Unlike many overseas FOI laws, the bill creates no duty on authorities to publish guides to the types of records they hold. This rolling index will help to fill the gap.

It will also ensure that requesters can see what kind of information is likely to be exempt, since a pattern of blanking out particular types of information (e.g. the names of private individuals, or the identities of chemicals being tested where these would reveal commercial secrets) will often be discernible. Prospective applicants who see how exemptions have been applied in previous cases will be less likely to be suspicious when they find similar information withheld from them, and less likely to mount fruitless challenges.

The amendment is based on the FOI 'reading rooms' which US federal agencies maintain, at which indexed copies of previous disclosures can be inspected. The 1996 amendments to the US FOI Act, require agencies to publish on the Internet disclosed documents which are likely to be the subject of subsequent requests. This form of publication is not specified in the amendment, but would be subject to the Commissioner's approval – which would permit Internet publication to be progressively encouraged.

## CLAUSE 19

### Information accessible to the public by other means

#### Clause stand part

An earlier amendment, to clause 13(1), proposed to extend the bill's public interest test to information which was exempt under clause 19 on the grounds that it was 'reasonably accessible to members of the public'.

Part of the argument for doing so, is that clause 19 defines as 'reasonably accessible' information which an authority has to disclose by law. But in practice, such information may be *inaccessible* despite the legal duty, either because of high costs, or because of unnecessary obstacles created by the authority.

The point is illustrated by the following judgment, which refers to a case in which a local authority refused to supply photocopies of documents which they were required by law to make available. Instead, applicants were compelled to visit the authority's offices and inspect such documents in person. The practice was challenged by judicial review, and the following is an extract from the judgement:

"...it is common ground that mere access to documents, that is to say an ability to inspect them at the Respondent's premises, was of singularly little practical value to the Applicant or his advisers. It is accepted that the taking of copies and the ability to study them elsewhere is essential to making efficient use of them..."

"...the Applicant was, in my judgment, entitled to copies of the documents as and when first requested, and he did not get them. He was entitled to them so that his solicitor (and if he saw fit) any expert consulted by him could use them to prepare representations for consideration by the sub-committee...Bereft of that material until a late stage, I believe the Applicant was deprived of the opportunity to make proper, full and meaningful representations..."

"It is of course, well recognised that busy councillors justifiably and lawfully place considerable reliance on their officers' views, but that does not permit them to

abrogate responsibility for giving adequate consideration to the gist of any objections..."

"the Applicant was improperly fettered in his opportunity to make considered, full and timeous representations to the committee occasioned by the failure to furnish him with copies of documents necessary to this purpose. There is no justification for this failure..."

"I am satisfied that there was here a failure to afford proper opportunities to make representations and that there was a failure to consider such that were made. On each basis, I regard that failure as rendering the determination of the sub-committee unlawful."<sup>36</sup>

Most applicants, however, will not be in a position to challenge such unreasonable restrictions by going to court. The FOI bill could provide a means of addressing such obstructiveness, by allowing the new right of access to be used to obtain documents already covered by a previous but difficult to enforce requirement.

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<sup>36</sup> R v Rochdale Metropolitan Borough Council, ex p Brown. QBD 26.7.96, Mr Justice Ognall, [1977] Env. L.R. Part 1, Sweet and Maxwell, 100-113

**CLAUSE 20****INFORMATION INTENDED FOR PUBLICATION****Amendment 87**

*Clause 20, page 11, line 29*

*leave out '(whether determined or not)' and insert 'which has been determined'*

Clause 20 exempts information intended to be published in the future, whether or not there is an intended publication date. The amendment would restrict the exemption to information intended to be published at a particular date. It would limit the scope for authorities to make spurious claims that they intended to publish the information, but could not say when.

Requiring them to have a date in mind, would make it possible for the applicant to reapply for the information when that date arrived. Any failure to then disclose the information would then be far more difficult to substantiate.

**DUTY TO CONFIRM OR DENY****Amendment 88**

*Clause 20, page 11, line 35 leave out subsection (2).*

Clause 20(2) allows authorities to refuse to confirm or deny the existence of information intended to be published in future, if doing so would disclose information which was itself intended to be published. The provision contains no test of harm, and it is difficult to conceive of a situation in which confirming or denying the existence of such information could be harmful. The amendment would delete clause 20(2).

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## FREEDOM OF INFORMATION BILL

House of Commons Committee Stage

### BRIEFING PAPER 4

Amendments tabled to Clauses 25 - 30

25 January 2000

**Hon. President:** Godfrey Bradman  
**Co-Chairs:** James Cornford, Neil McIntosh  
**Director:** Maurice Frankel

**Parliamentary Co-Chairs:** Helen Jackson MP  
Archy Kirkwood MP  
Richard Shepherd MP

## CLAUSE 25

### INFORMATION IN CONFIDENCE FROM OTHER GOVERNMENTS

#### Amendment 90

*Robert Maclennan MP/David Heath MP*

*Clause 25, page 13, line 31 at end insert –*

- (3A) For the purposes of this section, information which has been obtained from a State, organisation or court more than 12 months before –*
- (a) the date of receipt of the request under section 1(1), or (if later)*
  - (b) the date on which consent under this subsection was last sought from that State, organisation or court in relation to that information*

*shall not be confidential unless the public authority which holds it has sought the consent of that State, organisation or court for its disclosure under this Act and consent has been refused.'*

Clause 25 contains two separate exemptions. *Clause 25(1)* exempts information whose disclosure would 'prejudice' the UK's relations with other governments or international bodies or prejudice the UK's interests abroad. *Clause 25(2)* exempts 'confidential' information supplied by one of these bodies.

However, information which another government regarded as confidential at the time it was supplied may no longer be sensitive at the time of the request. This amendment requires the authority to *ask* the government or body which supplied the information if it still regards it as confidential.

The definition of 'confidential' in clause 25(3) states that information is confidential at any time while the terms on which it was obtained require it to be treated as such and at 'any time':

‘while the circumstances in which it was obtained make it reasonable for the State, organisation or court [*which from which the information was obtained*] to expect that it will be so held’

This suggests that information may be exempt merely because the UK government *assumes* that the other government expects it to be kept confidential.

The UK government may never have been *told* that the other government required confidentiality. Or it may not have realised that the other government subsequently no longer regarded it as sensitive and disclosed it in its own country. A matter may have been sensitive only while an agreement was being negotiated but not afterwards. Or the government itself may have changed and reversed, or even denounced, its predecessor’s policy.

In some cases the UK government may be projecting its *own* sensitivities about disclosure onto other governments, more open than itself. This is regularly illustrated by the frequency with which the US government releases information about issues affecting Britain, which are confidential here.

In at least one open government case, the Parliamentary Ombudsman has established that information which the UK government has refused to disclose on the grounds it constituted ‘intergovernmental consultation’ involved material which the foreign government concerned was happy to allow to be disclosed.<sup>1</sup>

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<sup>1</sup> The case involved a prisoner serving a sentence in a foreign country who had been repatriated to the UK to serve his sentence here, as permitted under an international convention. He later claimed that the term he was required to serve in the UK was longer than the Prison Service had led him to believe. and applied to see his file under the code. The request was refused, though no code exemptions were cited. During the Ombudsman’s investigation, the Prison Service raised a series of objections to disclosure, one of which was that the file included ‘intergovernmental consultation’ about his application for repatriation. Such material could have fallen within a code exemption for ‘Information received in confidence from foreign governments’.

However, the Prison Service did not ask the other government whether they regarded this material as confidential. The Ombudsman did. He reported: ‘my investigation has revealed that the foreign government have no objection to the disclosure to Mr G of any of the information they sent to the Prison Service about his transfer. Whether or not the information was considered to be confidential before Mr G’s transfer, it seems to me that the foreign government’s comments, which I very much welcome, are an indication that confidentiality is no longer an issue. In my view, therefore, there is no information on the file which can be withheld under this exemption.’ *Parliamentary Ombudsman, HC 438, May 1999, Case A.15/99.*

There is an obvious solution: to *ask* the other government. The amendment provides this.

It states that information received more than 12 months ago is *not* confidential under clause 25(2) unless the authority has asked the other government or body if it will agree to disclosure, and the other government has refused. If the other government refuses, consent would not have to be sought for at least another year, even if a subsequent request for that information is received.

## EUROPE

### Amendment 67

*Robert MacLennan/David Heath*

*Clause 25, page 14, line 5*

*At end insert 'but for the purpose of subsection (2) does not include the European Union and its institutions'*

This amendment would remove automatic protection under clause 25(2) for information supplied in confidence by the European Commission and other EU institutions. The fact that the information had been supplied to the UK government in confidence by the EU would not in itself be sufficient for it to be exempt. However, such information could be exempt under clause 25(1) if its disclosure would *prejudice* relations between the UK and the EU or with another state.

There is widespread concern at the excessive secrecy of EU institutions. This secrecy would be reinforced by automatically exempting any EU document merely because it was marked 'confidential'.

A separate exemption, in clause 39, exempts confidential communications between *domestic* public authorities. However, that exemption cannot be invoked merely by writing 'confidential' on the document. The information must have been obtained in circumstances which impose a legal obligation of confidentiality on the recipient. This is not the case under clause 25(2). All that is needed is for the UK government to assume that the European Commission 'expected' it to be held in confidence.

The European Commission and Council of Ministers are subject to EU disclosure rules. If anything, these have highlighted the excessive secrecy of those bodies. Of the 9 cases so far decided by the European Court of Justice (ECJ), the decision to withhold information has been upheld in only two cases.

For example, *Statewatch* organisation, which monitors secrecy in the EU, was told that documents covered by the access rules would not be *sent* to it and could be obtained only by

visiting Brussels to inspect them in person.

The restrictive nature of EU norms was illustrated by a case involving the Swedish journalist's trade union magazine, *Journalisten*. The journalists applied under the Swedish FOI legislation for a set of twenty EU documents mainly dealing with discussions on the Europol convention, which at the time had not been finalised. Sweden's Ministry of Justice and Police Authority, released 18 of the 20 documents. But when the magazine applied to Brussels for the same documents under the EU Council of Ministers' transparency rules only *four* were handed over.

The union later challenged the Council's secrecy before the ECJ which noted that:

"...the first reply from the Council - sent to the applicant in French although the applicant had written the initial request in German - confined itself to citing [all the exemptions] in support of its view that the documents were subject to 'the principle of confidentiality'.<sup>2</sup>

The court later found that the Council had responded to the requests in such inadequate terms that the it was unable to judge whether the tests laid down in the Council's own rules had been applied at all. It ruled that the Council's decision:

'must therefore be annulled without there being any need to consider the other grounds raised by the applicant or to look at the contents of the documents themselves'.<sup>3</sup>

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<sup>2</sup> Case T-174/95 *Svenska Journalistförbundet v. Council* [1998] ECR II-2289.

<sup>3</sup>

## CLAUSE 26

### RELATIONS WITHIN THE UK

#### Amendment 91

*Robert Maclellan MP/David Heath MP*

*Clause 26, page 14, line 10 leave out clause 26.*

This amendment would delete the exemption for information whose disclosure would prejudice relations between any of the devolved administrations, or between any those administration and the UK government. It raises the question of the justification for this exemption. It also draws attention to the differences in the likely rights of access under the Scottish and UK FOI regimes.

The Scottish Executive's recent proposals for an FOI Act indicate that in certain areas the Scottish legislation will go *beyond* the present Westminster bill.<sup>4</sup> In particular:

- **Substantial prejudice.** Scottish authorities would have to show that disclosure would cause 'substantial prejudice', under harm test exemptions, rather than the weaker test of 'prejudice' in the UK bill.<sup>5</sup>
- **Public interest.** Scotland's Information Commissioner will make *binding* rulings on when information covered by a harm test exemption (though not the class exemptions) should be disclosed in the public interest. The UK Commissioner can only make non-enforceable recommendations<sup>6</sup>

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<sup>4</sup> 'An Open Scotland. Freedom of Information: A Consultation', Scottish Executive, November 1999.

<sup>5</sup> 'We propose that the harm test be demanding and that it be whether disclosure would, or would be likely to, substantially prejudice the matter set out in the exemption in question. Our use of 'substantial prejudice' is intended to make clear that information covered by a content-based exemption should be disclosed unless the prejudice caused by disclosure would be real, actual and of significant substance. This means that, in those circumstances in which the test is applied, public authorities would be required to consider whether, in relation to the exemption in question, the disclosure of information would or would be likely to give rise to prejudice of significant substance.' *An Open Scotland*, paragraph 4.11

<sup>6</sup> 'the independent Scottish Information Commissioner will need to be provided with wide ranging powers, [including]...A power to order disclosure of information...in the public interest. We consider that this

- **Factual information** relating to policy decisions will have to be disclosed unless it would ‘substantially prejudice’ collective responsibility or frankness and candour.<sup>7</sup> In the **UK bill** this information is subject to the class exemption for policy formulation<sup>8</sup>.
- **Opinions.** Under the Westminster bill authorities can withhold information which in their “*reasonable opinion*” would inhibit frank advice or prejudice the effective conduct of public affairs.<sup>9</sup> These decisions would be immune from challenge, unless they were unreasonable to the point of irrationality.<sup>10</sup> None of the Scottish exemptions give legal weight to an authority’s opinions.

But the Scottish proposals repeat some of the central class exemptions in the UK bill, particularly those for policy formulation and investigations. In these areas, the Commissioner’s views on public interest can be overruled by ministers. The fundamental flaw of the UK bill is therefore extended to Scotland.<sup>11</sup>

The Scottish proposals nevertheless contain a number of important advances over the UK bill: Scottish public authorities will have to operate with much greater openness than their English counterparts.

This does not mean that information which the UK government is *unwilling* to disclose will become available from Scottish authorities. The Scottish Act will *not* apply to information supplied in confidence by Whitehall departments. Indeed, the Scotland Act itself precludes the

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power is essential in order to ensure public confidence in the statutory Freedom of Information regime. The Scottish Information Commissioner’s powers would be enforceable through the courts. The Commissioner’s powers would be subject to the exception that the Scottish Ministers, by collective decision of the Cabinet, would have power to issue a certificate overriding the Commissioner in certain limited specified areas’. *An Open Scotland*, paragraph 6.5.

<sup>7</sup> *An Open Scotland*, Annex C, the Exemptions

<sup>8</sup> Clause 33(1)

<sup>9</sup> Clause 34(2)

<sup>10</sup> That is, they could be challenged only if they failed to meet the judicial review test of ‘unreasonableness’ under which the courts will not challenge an authority exercising a discretion unless its decision is irrational or perverse.

<sup>11</sup> A ministerial veto would, however, be exercised by the collective decision of the whole cabinet – a slight improvement over the UK bill, where individual ministers can ignore the Commissioner’s recommendations, without reference to their colleagues.

Scottish Parliament from even attempting to establish such a right of access.<sup>12</sup>

Agreement to this effect is found in the Memorandum of Understanding between the UK Government, Scottish Ministers and the Cabinet of the National Assembly for Wales<sup>13</sup> which states that each administration will respect the confidentiality of information supplied to it by any other.<sup>14</sup> A series of bilateral ‘concordats’ between UK departments and the new administrations, reinforce this approach.<sup>15</sup>

But any information supplied by Whitehall departments to Scottish authorities which is *not* given in confidence will be disclosable under the Scottish FOI law. The Scottish consultation paper says:

‘It is not expected that the majority of information passed to the Scottish Executive by

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<sup>12</sup> The Scotland Act 1998 provides that the Scottish Parliament has competence to legislate on Freedom of Information in relation to “information held by -(a) the Scottish Parliament (b) any part of the Scottish administration (c) the Parliamentary corporation (d) any Scottish public authority with mixed functions or no reserved functions--*unless supplied by a Minister of the Crown or government department and held in confidence.*” (italics added) The Scotland Act 1998 (Modification of Schedules 4 and 5) Order 1999

<sup>13</sup> SE/99/36, Laid before the Scottish Parliament by the Scottish Ministers, October 1999

<sup>14</sup> Paragraph 11 of the Memorandum of Understanding states: ‘*Confidentiality.* Each administration will wish to ensure that the information it supplies to others is subject to appropriate safeguards in order to avoid prejudicing its interests. The [four] administrations accept that in certain circumstances a duty of confidence may arise and will between themselves respect legal requirements of confidentiality. Each administration can only expect to receive information if it treats such information with appropriate discretion. In particular the administrations accept: (a) it is for the administration providing the information to state what, if any, restrictions there should be upon its usage; (b) each administration will treat information which it receives in accordance with the restrictions which are specified as to its usage; (c) disclosure of information will be subject to the Code of Practice on Access to Government Information (or equivalent devolved regimes) and in due course the requirements of future freedom of information régimes: sub-paragraphs a. and b. will apply to all information and difficult cases may be referred back to the originator for consideration; and (d) some information will be subject to statutory or other restrictions: this may mean that there will be restrictions on the category of persons who may have access to some material, for example under the Official Secrets Act; and there will be a common approach to the classification and handling of sensitive material.’

<sup>15</sup> Thus the concordat between the Ministry of Agriculture, Fisheries and Food and the Scottish Executive states ‘Both parties agree to maintain the confidentiality of discussions and of any information received from the other...and both parties must agree before confidential information received by one from the other is disclosed to a third party’. *Main Concordat between the Ministry of Agriculture, Fisheries and Food and the Scottish Executive* <http://www.scotland.gov.uk/concordats/default.asp>

Whitehall will be deemed to be held in-confidence'<sup>16</sup>

In theory, information not directly available from Whitehall could be obtained in Scotland, given the stronger provisions of Scotland's proposals. In practice, information travelling north *without* an 'in-confidence' label may be unlikely to include anything not already publicly accessible from Whitehall.

Even if Whitehall's confidences are not disclosable in Scotland, a more open Scottish system could lead to parallel bodies north and south of the border making different decisions about similar information. If Scottish authorities operate more openly, as the proposals suggest, and this openness is seen to not be damaging, English authorities may come under strong pressure to follow suit.

So what is the explanation for clause 26? It is apparently not to protect the confidentiality of information supplied to UK departments by devolved administrations. This is already protected by clause 39, which exempts information subject to an obligation of confidentiality obtained:

'from any other person (including another public authority)'<sup>17</sup>

Another explanation might be that the clause prevents Whitehall being forced to disclose UK government plans that might be politically contentious in Scotland or were intended to block proposals of the Scottish Executive or Parliament.

However, it is difficult to envisage information of this kind which would not already be protected by other exemptions.

- Decisions relating to the economy, investment or taxation are exempt under clause 27, if disclosure would prejudice the economic interests of the UK, or any part of it or the financial interests of any of the UK's administrations.
- Information which might prejudice any person's commercial interests, including a public authority's, is exempt under clause 41.

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<sup>16</sup> *An Open Scotland*, paragraph 1.6

<sup>17</sup> Clause 39(1)(a)

- Almost any other contentious option could be withheld under the umbrella exemptions for the ‘formulation or development of government policy’,<sup>18</sup> the ‘free and frank exchange of views’<sup>19</sup> or the ‘effective conduct of public affairs’.<sup>20</sup>

The bill contains no special provision to protect information that might prejudice relations between other kinds of public bodies: central government and local authorities, NHS bodies and the Department of Health or between government departments and private industry. This is presumably not because the government assumes permanent harmony between these but because the many existing exemptions cover the situation already.

This amendment therefore raises a question: in what circumstances, not already covered by existing exemptions, could a disclosure prejudice relations between the UK government and devolved institutions?

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<sup>18</sup> Clause 33(1)

<sup>19</sup> Clause 34(2)(b)

<sup>20</sup> Clause 34(2)(c)

## CLAUSE 28

### INVESTIGATIONS

#### Amendment 57

*Mark Fisher MP*

*Clause 28, page 14, line 39 at end insert*

*‘and,*

*if its disclosure under this Act would, or would be likely to, prejudice any of those purposes’*

Amendment 57 would insert a harm test into clause 28(1). The clause is a class exemption for information held by the police, prosecuting authorities and a wide range of regulatory bodies, including those responsible for health & safety, consumer protection, trading standards, planning and many other matters. (The full range of bodies covered is likely to be substantial, and ministers might be invited to produce a list.)

The exemption applies to information which has ‘at any time been held’ for the purpose of an investigation which could have led to proceedings for an offence, or was held by a prosecuting authority in connection with proceedings which it may bring.

Information remains exempt even

- if the authority later recognises that no offence had been committed, and brings no charges
- if the information has no direct bearing on any proceedings and could be disclosed without prejudice
- *after* any prosecution has concluded

The exemption protects authorities from proper scrutiny. It will allow evidence of dangers to the public to be withheld, obstruct efforts to remedy miscarriages of justice, and allow complacent or incompetent authorities to avoid exposure.

The exemption would protect:

- information obtained by authorities investigating transport disasters, such as the Paddington rail crash or the sinking of the Marchioness ferry, where safety offences may have been committed.
- investigations into nuclear safety problems, such as the falsification by British Nuclear Fuels staff of safety checks on nuclear fuel rods sent to Japan. The information, which led the Japanese customer to cancel substantial orders with BNFL, was revealed by the press but could have been suppressed under the bill.<sup>21,22</sup>
- police information which confirms the existence of child abuse at children's homes, but do not lead to prosecutions. Information such as the number of former residents who had given statements confirming abuse would be exempt, as would details indicating that the police had failed to properly investigate allegations
- The recent deportation of the alleged war criminal Konrad Kalejs has led to suggestions that the UK authorities failed to discover evidence that would have supported bringing war crimes charges against him, because they did not contact their US counterparts. All information about the extent and adequacy of such inquiries would be exempt.<sup>23</sup>

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<sup>21</sup> "A consignment of nuclear fuel is to be returned to Britain from Japan after revelations that British Nuclear Fuels falsified data about its quality. BNFL's Japanese customer, Kansai Electric Power, said last night that it has ordered the return of the mixed uranium oxide (Mox) fuel, which arrived in Japan in December...The announcement is another embarrassing blow to BNFL which last month had to admit it had given the Japanese false assurances about the quality of its Mox fuel...Kansai Electric had planned to use the fuel in an experimental reactor...but it decided to withdraw its application to load the fuel after it emerged that BNFL had wrongly assured the Japanese authorities that the consignment's safety data had not been falsified'. *'British nuclear fuel rejected by Japanese', Independent, 12/1/00*

<sup>22</sup> "There have always been inconsistencies in BNFL's case. At first the company said only 11 batches of fuel were involved and then increased this to 22, while still denying any had gone to Japan. The nuclear installations inspectorate was sent to look at the case and has now told the government that this claim appears not to be true: some falsified batches did go to Japan. In the great tradition of the nuclear industry this damning information will be kept secret and the Japanese will not be officially told either. The NII position is that 'no one in Britain is endangered by the falsified safety checks, the only people who might have been were Japanese and they are outside our jurisdiction so we have no obligation to publish'." *'Knee-jerk reactors', Analysis, Paul Brown, Guardian, 9.12.99*

<sup>23</sup> 'The home secretary is to deport the suspected war criminal Konrad Kalejs, rather than attempt to prosecute him, without requesting to see the most authoritative body of evidence against him...The main body of evidence against Mr Kalejs was gathered by the US justice department which yesterday confirmed

- Information about the inadequacy of the police inquiry into the murder of Stephen Lawrence would be protected from disclosure. The police would not have to disclose the date on which they were first informed of the identities of the murder suspects, or reveal how many separate reports of their identities they received.
- Someone falsely arrested or stopped and searched by police would not be entitled to know the description of the actual suspect which had been circulated by the police. The victim of an attack would not be entitled to know whether the police had received a description of the assailant or whether they had interviewed everyone known to have witnessed the incident.

The extent to which the police would be shielded from scrutiny under the bill was criticised by the Macpherson report into the Stephen Lawrence murder inquiry. The report argued that to public confidence in the police required “a vigorous pursuit of openness and accountability across Police Services”. It went on:

“we consider it an important matter of principle that the Police Services should be open to the full provisions of a Freedom of Information Act. We see no logical grounds for a class exemption for the police in any area”<sup>24</sup>

The draft bill’s class exemption (which has since been somewhat narrowed<sup>25</sup>) attracted wide criticism from bodies ranging from the Commission for Racial Equality<sup>26</sup> to the Royal Society for the Protection of Birds.<sup>27</sup> Although the scope is not as all-embracing as it originally was,

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that it had received no request for Britain for the information it holds. Sources in the US expressed amazement that no request had been made to supply evidence, including statements from victims of the unit and officers who say they served alongside Mr Kalejs...Mr Straw defended his decision by saying that a thorough investigation by officers from the Metropolitan police had not found enough evidence to arrest Mr Kalejs. He said that there was the political will to prosecute alleged war criminals: “the police have pursued their inquiries assiduously. They have concluded that there is at present no grounds on which they can make an arrest.”’ *‘Deportation, not trial, for Nazi war crimes suspect. Guardian, 4.1.00*

<sup>24</sup> ‘The Stephen Lawrence Inquiry. Report of an Inquiry by Sir William Macpherson of Cluny’, Stationery Office, CM 4262-I, February 1999, para 46.32.

<sup>25</sup> In that investigations which could not lead to proceedings for an offence are no longer subject to a class exemption

<sup>26</sup> ‘Such exemption could be seen to provide some degree of impunity for organisations or institutions whose conduct has been examined and found to be at fault.’ *Commission for Racial Equality. Response to the Home Office consultation on the Draft Freedom of Information Bill, 21/7/99.*

<sup>27</sup> ‘The RSPB would be concerned, for example, if this exemption resulted in information on the unlawful killing of wild birds being withheld’. Royal Society for the Protection of Birds, *Response to the Home Office consultation on the Draft Freedom of Information Bill, 19/7/99.*

investigations into anything likely to give rise to public concern remain subject to a class exemption.

The class exemption itself is superfluous. All necessary interests are protected under clauses 29(1) and (2), which exempt information whose disclosure would ‘prejudice’:

‘the prevention or detection of crime...the apprehension or prosecution of offenders...the administration of justice...the assessment or collection of any tax...the exercise by any public authority of its functions for any of the purposes specified in subsection (2)...[which include] the purpose of ascertaining whether any person has failed to comply with the law’<sup>28</sup>

*Amendment 57* would insert a similar ‘prejudice’ test into clause 28(1).

The amendment is supported by the Law Society, who have issued their own briefing on it. It is in line with the recommendations of the Public Administration select committee, which reported:

‘We believe there is no need for the comprehensive exemption for investigations in clause [28]<sup>29</sup> In particular, the fact that the exemption will continue to be effective well after an investigation is completed is unnecessary for most purposes. The information the exemption covers is already covered by the clause [29] law enforcement exemption which itself protects the investigatory functions of authorities. If it is felt necessary that there should be further protection for investigations, this might be provided by means of an exemption for information which would prejudice the conduct of existing or future investigations, or legal proceedings, as appears in other Freedom of Information legislation abroad.’<sup>30</sup>

## **Amendment 68**

*Robert MacLennan MP/David Heath MP*

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<sup>28</sup> Clause 29(1) paragraphs (a) to (g) and Clause 29(2)(a)

<sup>29</sup> Square brackets indicate that clause numbers refer to the current bill.

<sup>30</sup> Public Administration select committee. ‘Freedom of Information Draft Bill’ 3rd Report, Session 1998-99, HC 570, paragraph 82.

*Clause 28, page 14, line 31 leave out 'has at any time been' and insert 'is'*

**Amendment 69**

*Robert Maclennan MP/David Heath MP*

*Clause 28, page 14, line 39 at end insert:*

*'so long as a decision as to whether to charge any person with an offence arising from that investigation is still under consideration, or any proceedings referred to in paragraphs (a) to (c) have not been concluded.'*

These amendments offer an alternative approach to clause 28(1). They retain the class exemption, but limit the time over which it can apply. Under this approach, all information relating to an investigation into a possible offence is exempt, but not indefinitely. The exemption would lapse either:

- (a) once a decision not to bring charges had been made; or (if charges were brought)
- (b) once the proceedings were over.

In both cases, disclosure would then be governed by clause 29(1). Information whose disclosure *prejudiced* law enforcement, the administration of justice, regulatory functions or any of the other interests protected in 29(1) would still be exempt.

These amendments are also supported by the Law Society.

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**AMENDMENT 92**

*Robert Maclellan MP/David Heath MP*

*Clause 28, page 15, line 10 leave out line 10 and insert*

*‘(b) its disclosure under this Act would be likely to*

- (i) prejudice the obtaining of information from confidential sources, or*
- (ii) prejudice the safety of any individual who has (or who is associated with or related to an individual who has) provided information in confidence to a public authority for any such purpose’*

Clause 28(2) contains a class exemption for all information relating to the ‘obtaining of information from confidential sources’. It applies not just to the police but to the wide range of regulatory bodies referred to in clause 29(2), from the Charity Commission<sup>31</sup> to the Health & Safety Executive.<sup>32</sup> The confidential sources involved are not just police informants, but whistleblowers of all kinds.

The exemption does more than just protect the *identity* of confidential informants. It covers any information about the obtaining of information from informants, including administrative guidelines such as those which:

- deal with the rewards offered to informants for information leading to arrests or the recovery of stolen property, or
- describe when an authority will guarantee anonymity to whistleblowers who approach it.

The case for disclosing such information should be self-evident. Indeed, some potential whistleblowers may not be prepared to come forward at all unless they can satisfy themselves that guidelines of this kind exist, and are adequate. As it stands, the exemption may sometimes deter whistleblowers from contacting public authorities.

The exemption would also needlessly protect the identity of individuals who have already gone

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<sup>31</sup> Clause 29(2)(f)

public, such as informants who have given evidence in open court, or whistleblowers who have been sacked after being identified by their employer.

Amendment 92 would replace this class exemption by a harm test. It would protect information only if disclosure would prejudice:

- the obtaining of information from confidential sources or
- the safety of an informant or that of his family or associates.<sup>33</sup>

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<sup>32</sup> Clause 29(2)(i)

<sup>33</sup> The latter may not strictly be necessary since information which would expose an informant to danger is already exempt under clause 36(1)(b).

**Amendment 93**

*Robert Maclellan MP/David Heath MP*

*Clause 28, page 15, line 12 leave out lines 12 and 13 and insert -*

*'which is held for any of the purposes or functions set out in subsections (1) or (2) if, or to the extent that, compliance would or would be likely to prejudice any of those purposes or functions'*

Clause 28(3) allows an authority to refuse to confirm or deny the existence of information falling within either of the two class exemptions which precede it, which are those

- for information which has at any time been held for the purpose of an investigation [28(1)]
- relating to the obtaining of information from confidential sources [28(2)]

Its effect may be to reinforce an entirely unnecessary degree of secrecy. The Health and Safety Executive would not have to disclose whether it had begun to investigate a fatal accident. A planning authority would not need to say whether it had received a complaint about an illegally erected structure.

The amendment would allow an authority to refuse to confirm or deny the existence of information only where to do so would *prejudice* the functions set out in clauses 28(1) and (2).

## CLAUSE 30

### COURT, INQUIRY & TRIBUNAL RECORDS

#### **Amendment 94**

*Robert Maclennan/David Heath*

*Clause 30, page 17, line 11 at end insert*

*'and*

*its disclosure under this Act would, or would be likely to, prejudice any proceedings as are described in paragraphs (a) to (c).'*

#### **Amendment 95**

*Robert Maclennan/David Heath*

*Clause 30, Page 17, line 18 at end insert*

*'and*

*its disclosure under this Act would, or would be likely to, prejudice the conduct of that inquiry or arbitration.'*

#### **Amendment 96**

*Robert Maclennan/David Heath*

*Clause 30, Page 17, line 20*

*leave out lines 20 to 21 and insert 'to which subsections (1) or (2) apply if, or to the extent that, compliance would or would be likely to prejudice any of the proceedings referred to in this section'*

*Amendment 94* would insert a harm test into the class exemptions in clause 30(1) which protects information contained in court or tribunal documents relating to particular proceedings. The exemption applies to such records held by a public authority, not to the records of courts or tribunals themselves. It includes but is not limited to proceedings to which the authority is a party (only clause 30(1)(b) applies in that situation). Subparagraphs (a) and (c) apply to court documents held by a public authority, in *other* circumstances.

The exemption would permit access to such documents, so long as disclosure would not prejudice the proceedings in question. The separate exemptions in clauses 29(2)(c) and (h) would protect information whose disclosure could prejudice the administration of justice or civil proceedings brought by a regulatory body. Documents relating to *criminal* proceedings brought by the authority are covered by clause 29(1).

On effect of the amendment would be to allow access to documents such as military board of inquiry reports held by the Ministry of Defence.<sup>34</sup> Board of inquiry reports into *fatal* accidents are now available to the next of kin of the family of the deceased, though not to anyone else. If an earlier accident appeared to have also been caused by the same problem, that report would not be available to those affected by the later incident.

There is no access at all to board of inquiry reports into *non-fatal* accidents.

*Amendment 95* would insert a harm test into the exemption in clause 30(2), which protects documents relating to a statutory inquiry, regardless of whether disclosure would cause harm. Even the *final report* of such an inquiry would be exempt, though by definition the disclosure of such a document could not prejudice the proceedings which led to it.

There would therefore be no right of access to the reports of inquiries into serious misconduct such as child abuse or medical negligence.

The examples of board of inquiry reports and inquiries into child abuse were raised during the debate on clause 13. The public interest test in clause 13 does not apply to information exempt under clause 30. The minister's reply ignored these examples. He merely stated minister merely asserted that clause 30 deals with court records:

'Clause 30 deals with court records. The normal rules should apply to the release of those records. If an applicant requires disclosure of information contained in court records, it is for the courts to determine what should be made available. For that reason, if an authority has established that the information falls into that class, there should be no reason for the authority to consider further whether to release it in the public interest. That is a matter for the courts to decide. We should not take away the court's authority to decide this issue. [18 January, 2000]

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<sup>34</sup> Subject to clause 24, which exempts information which would prejudice defence

It should be clear that the scope is far wider than that. This exempts information held by public authorities in connection with their functions – in many cases in connection with inquiries which they themselves have set up.

The amendments would protect such information only if disclosure would *prejudice* the proceedings of the court, tribunal or inquiry.

*Amendment 96* would make the corresponding change to clause 30(3), which allows an authority to refuse to confirm or deny whether it holds a record relating to the proceedings of a court, tribunal or inquiry. Why should an authority refuse even to acknowledge the existence of such documents? What public interest is served by giving the Department of Health the right to refuse to say whether it holds the report of an inquiry into the failure of a social services department to protect children from abuse? The amendment would allow this provision to be exercised only if confirming or denying was itself likely to prejudice the proceedings in question.

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## FREEDOM OF INFORMATION BILL

House of Commons Committee Stage

### BRIEFING PAPER 5

Amendments tabled to Clauses 33 - 38

27 January 2000

**Hon. President:** Godfrey Bradman  
**Co-Chairs:** James Cornford, Neil McIntosh  
**Director:** Maurice Frankel

**Parliamentary Co-Chairs:** Helen Jackson MP  
Archy Kirkwood MP  
Richard Shepherd MP

**CLAUSE 33****POLICY FORMULATION****Amendment 59***Mark Fisher**Clause 33, page 18, line 16*

*leave out 'it relates to' and insert 'its disclosure under this Act would, or would be likely to, prejudice'*

This amendment would introduce a test of harm into each of the *four* class exemptions in clause 33(1).

This clause is one of the most contentious in the bill. It removes from the *right* of access all information relating to:

- (a) the formulation or development of government policy
- (b) Ministerial communications
- (c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or
- (d) the operation of any private ministerial office

No information within any of these four massive categories would *have* to be disclosed under the bill as it stands. There would be no presumption in favour of openness. On the contrary, the presumption is in favour of secrecy. Ministers would not need to show that disclosure would be harmful: they do not have to meet any kind of test whatsoever, other than to show that the information falls within one of these classes. Between them, these exemptions permit the development of policy to take place in absolute secrecy should ministers wish it.

The only basis on which disclosure might take place would be a discretionary disclosure on public interest grounds, but even if the Commissioner recommended such a disclosure, ministers would not be obliged to comply.

These provisions do not target civil service advice, let alone sensitive advice. Nothing that crosses the desks of ministers or their advisers in connection with the policy would have to be disclosed, even after decisions had been taken, announced and implemented.

There has been widespread anxiety at the implications. Factual information on which decisions are based, scientific advice and modest exchanges between officials on minor matters would all be edited out. Submissions from lobbyists would also be covered by this provision.<sup>1</sup>

The exemption implies that any public insight into the workings of government is by definition likely to be damaging. It takes no account of the possibility that it may lead to more informed debate, better public understanding of complex decisions, reassure the public that issues have been thoroughly examined or expose weaknesses in official thinking to informed scrutiny. The prospect of such scrutiny may itself ensure greater rigour in analysis.

The experience of the publication of the minutes of the meetings between the Governor of the Bank of England and the Chancellor of the Exchequer and, subsequently, of the bank's Monetary Policy Committee, have shown that even high level advice on particularly sensitive matters can be disclosed without harm. On the contrary, there have been considerable benefits in terms of reassuring a sceptical audience that decisions are soundly based.

At second reading Dr Tony Wright MP the chairman of the Public Administration select committee said, in relation to this clause:

'I do not think that the House will think that that is the proper way to proceed. The barricades have gone up with a vengeance. Nobody denies that the Government need a thinking, deliberating space. They need a confidential arena in which policy discussion can take place and policy decisions be made. However, nobody should deny that there is equally a public interest in knowing the background information that shapes those policies. That is the key distinction which the Bill fails to recognise'<sup>2</sup>

The approach is particularly strange in light of the 'Modernising Government' white paper which proposes a new approach to policy making involving:

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<sup>1</sup> As well as those for information supplied in confidence [clause 39] and information which might prejudice commercial interests [clause 41]

‘more new ideas, more willingness to question inherited ways of doing things, better use of evidence and research in policy making’<sup>3</sup>

A key element is ‘*involving others in policy making*’. The public and outsiders should be involved ‘*early in the policy making process*’. Such aspirations are undermined by the bill.

This clause could be amended in one of two ways: by excluding factual and similar material from its scope altogether, or by making the exemption itself subject to harm test. Some overseas FOI laws, notably Ireland’s, adopt *both* approaches.<sup>4</sup>

The first approach was discussed during the committee’s debate on clause 13, and involves excluding factual information from the scope of this exemption. The former Cabinet Secretary, Lord Butler, told a House of Lords select committee that he had satisfied himself that such an approach would be feasible.<sup>5</sup>

This is already the position under the open government code of practice which requires that departments publish the ‘facts and analysis of the facts’ underlying policy decisions.

The second is to make clause 33(1) subject to a harm test, and that is what Amendment 59 proposes. This would also allow the facts relating to decisions to be disclosed, since to do so is not likely to be capable of prejudicing decision-making. But it also allows a wider range of other information to become available, on a case by case test of whether disclosure would be prejudicial.

This too is already required under the open government code, which allows policy material to be withheld only where disclosure would:

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<sup>2</sup> Hansard, Commons, 7/12/99, col. 752

<sup>3</sup> Modernising Government, Cm 4310, March 1999, paragraph 6

<sup>4</sup> Section 20(1) of Ireland’s FOI Act applies only where disclosure of deliberative material would ‘contrary to the public interest’ and also excludes from the scope of this exemption: factual information and its analysis and scientific or technical expert advice.

<sup>5</sup> “when we were coming up to the 1997 election, knowing what the government policy was in this matter, my senior colleagues and I gave some thought to how we could regularly structure submissions to Ministers in a way that would enable us easily to separate the background which was publishable from, as it were, the subjective advice which was confidential. It would take a bit of training and changing practice to do that, but I think that people could very readily adapt to that.” [Report from the Select Committee Appointed to Consider the Draft Freedom of Information Bill, Session 1998-99, HL paper 97, Q.357]

‘harm the frankness and candour of internal discussion’<sup>6</sup>

The white paper explicitly rejected a class exemption for policy advice, stating:

‘we are prepared to expose government information at all levels to FOI legislation’

It proposed that such material should be available subject to:

‘a test of “simple harm” ie “would disclosure of this information cause harm”?’<sup>7</sup>

Amendment 59 would achieve this. Mundane exchanges between officials, for example about the implementation date for a decision which has been announced, are technically ‘advice’ but there may be no possibility of prejudice from their disclosure.

Other types of advice may need to be protected, at least for a time. It may be unhelpful to try and force untested new ideas, ‘thinking the unthinkable’ into the public, particularly if those involved have not had time to consider whether the proposals are desirable or feasible. But the internal evaluation of options becomes more disclosable as the options become more concrete. Once decisions are taken, then the analysis which led to them, may be disclosable without harming the decision-making process. The amendment does not *require* post-decisional disclosure, but on a case by case assessment of whether disclosure would cause prejudice, it may become more likely.

Under both the New Zealand and Irish FOI laws the approach has been that the analysis of options is protected while decisions are under consideration. Individual officials are not exposed to the lobbying that might result from outsiders having access to their advice as it is developed. But once decisions have been taken, there is less of a presumption that disclosure will be harmful.<sup>8</sup>

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<sup>6</sup> Exemption 2, Code of Practice on Access to Government Information.

<sup>7</sup> Your Right to Know, Cm 3818, paragraph 3.12

<sup>8</sup> The New Zealand approach, according to a former Ombudsman, is “to recognise that at certain stages of the policy making process information must be protected for the sake of the process. Those withholding provisions protect the process rather than the information...But once the process has been completed it no longer requires confidentiality; then the emphasis frequently changes in favour of disclosure”. *Nadja Tollemache. Paper at a seminar on 16/5/89 organised by the Institute of Policy Studies on the Official Information Act 1982.*

Access helps the public to see the basis for the decisions, what factors have been taken into account, whether real objections have been addressed and whether the stated account of the benefits of their proposals are supported by the internal assessments.

The former Chancellor of the Duchy of Lancaster, Dr David Clark MP, said at the bill's second reading:

'I can understand why advice on current issues between Ministers and their advisers should not be made public. However, I do not understand the background – by introducing an exempt category, we are possibly defending publicly weak Ministers and weak advisers...

If Ministers and their advisers felt that, at some time in the future, their advice – honestly and openly given – together with the background papers that they drew up should be made available – this has been the experience overseas – there would be a better quality of advice. That relates to both factual and analytical material'<sup>9</sup>

A 'prejudice' test would also apply to clause 33(1)(b) which currently exempts all *ministerial communications*, even those which relate to administrative matters and not policy.

The extraordinary blanket exemption for information about ministers' *private offices*<sup>10</sup> - which would allow the number of staff employed to be kept secret - would be replaced by one for disclosures which would *prejudice* the operation of such an office.

It would be of interest to know what type of information the class exemption relating to ministerial offices is intended to cover. This is not evident, given that communications between a minister and his private office about *policy* is separately exempted. The Home Secretary's reference to this at Second Reading did not clarify the issue.<sup>11</sup>

Finally a prejudice test would apply to the giving of *law officers' advice*. Where the advice

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<sup>9</sup> Hansard, Commons, 7/12/99, col. 742

<sup>10</sup> Clause 33(1)(d)

<sup>11</sup> The Home Secretary said at Second Reading: "It has been accepted by people on all sides of the argument, and in all sensible freedom of information regimes of which I am aware, that policy advice and information on policy formulation – *the way in which Ministers communicate with their private office, for example*, should be exempt. We have therefore said that it should be exempt.' (italics added [Hansard, Commons, 7/12/99, col. 720])

related to an issue on which the government might face legal challenge, it would be exempt. In other circumstances – for example, advice on the steps that must be taken to comply with a new court ruling or European directive – the advice may be disclosable without risk of harm. Greater access to such advice was advocated at second reading by the chairman of the Public Accounts committee.<sup>12</sup>

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<sup>12</sup> Mr David Davis said: ‘Having been a Minister, I know that Law Officers’ advice is virtually set in tablets of stone. It would be great to the advantage of Parliament to know precisely what the Law Officers’ advice was, because that sharply constrains Government’s decision making and options...Although I appreciate that, over time, the Law Officers and other lawyers have made the current arrangements to suit themselves, I do think that it is necessarily worth while for us to continue with those arrangements’ [Hansard, Commons, 7/12/99, cols 775 & 776]

### **Other amendments to clause 33**

A number of amendments to this clause. have been tabled by the Conservative front bench. These seek to amend clause 33 to reflect the approach of the equivalent provisions of the Code of Practice on Access to Government Information. This would lead to a significant improvement.

*Amendment 134* would replace clause 33(1) with the text of exemption 2 from the openness code. The effect would be to allow information relating to policy discussions to be withheld only where disclosure would ‘harm the frankness and candour of internal discussion’

*Amendment 136* would require authorities, making decisions under clause 33(1) to have regard ‘to the overriding public interest in the publication of facts and analysis of the facts which the Government considers relevant and important in framing major policy proposals and decisions’. This is the form of words used in the openness code. The effect would be to indicate to the Information Commissioner, in considering whether to recommend that a discretionary disclosure of information within clause 33(1) should be made, that disclosure of facts and analysis should be regarded as a matter of overriding public interest.

*Amendment 137* would omit the definitions in clause 33(3), other than that for a ‘government department’, as these would presumably be redundant if amendment 134 were accepted.

**CLAUSE 34****Amendment 98***Robert Maclennan/David Heath**Clause 34, page 19, line 2, leave out from ‘if’ to ‘disclosure’ in line 3***Amendment 100***Robert Maclennan/David Heath**Clause 34, page 19, line 18, leave out ‘in the responsible opinion of a qualified person’***Amendment 101***Robert Maclennan/David Heath**Clause 34, page 19, line 21, leave out from beginning to end of line 22 on page 20*

Clause 34 contains a series of near-class exemptions, in which the tests of harm concerned are determined by reference to ‘the reasonable opinion of a qualified person’. These amendments remove that qualification. This would eliminate the subjective element of these decisions, and expose decisions under this clause to proper review by the Commissioner.

*Amendment 98* deletes the words “in the reasonable opinion of a qualified person” from the exemption itself. *Amendment 100* deletes the same words from clause 34(3), which allows authorities to refuse to confirm or deny the existence of information based on the same test. *Amendment 101* deletes clause 34(4) which sets out in great detail the definition of who a ‘qualified person’ is in relation to each kind of public authority.

Unlike clause 33 (which applies only to government departments) clause 34 applies to government departments and *other* public authorities. It provides those other authorities with an exemption for their internal deliberations, though it also goes considerably beyond this. The key elements apply to information which in the authority’s ‘reasonable opinion’ would inhibit the frankness of advice or exchange of views or ‘otherwise...prejudice the effective

conduct of public affairs'.<sup>13</sup>

The last of these tests is itself a cause for concern. It offers a poorly defined catch-all, which allows Ministers and other authorities to argue that disclosures would be harmful to 'public affairs' at large.

The exemption appears to be based on a provision in New Zealand's *Official Information Act 1982* which allows information to be withheld in order to "maintain the effective conduct of public affairs".<sup>14</sup> However, the New Zealand provision contains no less than four separate safeguards against abuse, all of which are absent from the UK bill.

The New Zealand provision:

- (i) applies only if the damage to the conduct of public affairs would result from harm to the frank expression of opinions or by exposing officials to improper pressure – it is not open ended as in the UK bill
- (ii) requires objective evidence of such harm, the authority's "opinion" – which is given legal weight in the UK bill - is irrelevant
- (iii) requires that it be "necessary" to withhold information for one of these reasons, a stricter test than the bill's, and
- (iv) requires that the information be disclosed if the harm is outweighed by the public interest. This public interest test is legally binding, unlike the bill's.

The overwhelming flaw of this provision is that, by giving legal weight to the authority's

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<sup>13</sup> Clause 34(2)(b)

<sup>14</sup> Section 9(2)(g) of the Official Information Act 1982 permits information to be withheld where this is '*necessary to...maintain the effective conduct of public affairs through (i) the free and frank expression of opinion by or between or to Ministers of the Crown or officers and employees of any Department or organisation in the course of their duty; or (ii) the protection of such Ministers, officers, and employees from improper pressure or harassment.*' Under section 9(1) such information

*opinion*, decisions are largely protected from review by the Commissioner. The Commissioner would be required to apply to judicial review test, of ‘reasonableness’ which allows the court to overturn a decision only if a decision is ‘*irrational*’ or ‘*outrageous in its defiance of logic*’<sup>15</sup> or involved ‘*unreasonableness verging on an absurdity*’<sup>16</sup>. The Commissioner would *not* be able to overturn a decision which was wrong because it involved an exaggerated view of the harm a disclosure would cause, or even if it was “*founded on a grave error of judgement*”<sup>17</sup> so long as there was something – however feeble - that could be said in favour of the decision.

The result would be that in most cases authorities will be able to operate without fear of challenge by the Commissioner. The government’s background material on the draft bill confirms that this is designed to limit the Commissioner’s ability to intervene. It states:

“by making the harm test subjective (the reasonable opinion of a Minister), the Commissioner, in practice, could intervene only if he or she could show that the Minister’s action was unreasonable in the sense of being irrational or perverse.”<sup>18</sup>

A Home Office lawyer told the Public Administration Committee that Ministers had decided:

‘that it would not be right to subject the actual decision, as to whether it fell within the exemption, to a review by the Commissioner’<sup>19</sup>

**If the Secretary of State for Defence withholds information, wrongly claiming disclosure would ‘prejudice’ the country’s defences<sup>20</sup>, the Commissioner can overturn his decision. She can set aside the Foreign Secretary on the question of whether international relations could be prejudiced<sup>21</sup> and the Chancellor of the Exchequer on the question of**

must nevertheless be released if “*the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available*”.

<sup>15</sup> Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374

<sup>16</sup> Lord Brightman in *R v Hillingdon LNC ex p. Puhlhofer* [1986] 1. AC 484 at 518

<sup>17</sup> Halsbury’s Laws of England Vol. 1(1), 4th ed. 1989 paragraph 77

<sup>18</sup> Home Office. “Freedom of Information. Preparation of Draft Legislation. Background Material’, 1999, page 12

<sup>19</sup> House of Lords, Session 1998-99, Report from the Select Committee appointed to consider the draft Freedom of Information Bill, HL 97, Q. 97

<sup>20</sup> Clause 24(1)(a)

<sup>21</sup> Clause 26(1)

**prejudice to the economy<sup>22</sup>. But Ministers will be able to claim that the “conduct of public affairs” be damaged *without* such scrutiny. Hundreds of smaller bodies, including local authorities, NHS trusts, quangos, advisory committees, museums, consultative bodies and others will be equally free to deny the public information without effective challenge.**

The Public Administration select committee called for the ‘reasonable opinion’ test to be dropped, saying:

‘Our main concern about this subsection is that information is exempt if in the “reasonable opinion” of a Minister (or outside central government the authority itself) it would prejudice one of the interests specified in the subsection. There will be little room for the Commissioner to argue that the Minister’s or the authority’s opinion was not reasonable. Therefore it will generally be their interpretation of prejudice, not the Commissioner’s, which will prevail...we suspect that if the authority’s interpretation of prejudice is allowed to prevail, it will be very rare that any information is allowed to emerge on the decision-making processes of government. **We recommend that the Commissioner be enabled to test the correctness with which the exemption for the deliberations of public authorities is claimed, as she will be for the other exemptions**’<sup>23</sup>

The House of Lords select committee also concluded that this exemption “*goes too far*”, and added:

‘The test should be an objective one, reviewable by the Information Commissioner’<sup>24</sup>

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<sup>22</sup> Clause 27(1)

<sup>23</sup> Public Administration Select Committee, Third Report Session 1998-99, HC 570, paragraph 90

<sup>24</sup> HL 97, paragraph 35.

**Amendment 99***Robert Maclennan/David Heath*

*Clause 34, page 19, leave out lines 6 and 7*

This amendment deletes clause 34(2)(a)(i), which exempts information which in the authority's reasonable opinion would be likely to

“prejudice...the maintenance of the convention of the collective responsibility of Ministers of the Crown”.

This exemption appears to be superfluous, because:

- (a) all information held by a government department relating to policy formulation is exempt under clause 33(1)(a)
- (b) any record of communications between ministers held by a government department is exempt under clause 33(1)(b)
- (c) any document held by any *other public* authority which describes the conflicting views of different ministers will presumably have been supplied to that authority in confidence and be exempt under clause 39.

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**Amendment 70***Robert Maclennan/David Heath*

*Clause 34, page 19, line 10, leave out 'inhibit' and insert 'prejudice'*

The test of harm in clause 34(2)(b) is whether in an authority's opinion a disclosure

'would be likely to *inhibit* (i) the free and frank provision of advice or (ii) the free and frank exchange of views for the purposes of deliberation'

Amendment 70 proposes to substitute the word 'prejudice' for 'inhibit' in this passage.

'Inhibit' appears to be a weaker test than 'prejudice'. 'Prejudice' at least carries the implication that harm would be done. The Minister has said that it is more than just an implication. In committee on January 26 he said:

'The terms "prejudice" and "harm" are, in law more or less synonymous'

He added:

'The reason we decided to use the word "prejudice" is straightforward; it is because lawyers will be more familiar with the word "prejudice" than with the word "harm".'

However, the word 'inhibit' does not mean to 'harm', it implies something less than 'prejudice'. It is also almost certainly less familiar to lawyers than 'prejudice'. This amendment would substitute the clearer and arguably stronger of the two terms.

**CLAUSE 35****Amendment 71****Robert Maclennan/David Heath**

*Clause 35, page 20 line 26 at end insert 'on any living individual'*

Clause 35(1)(b) is a class exemption for all information about the honours system. There is no harm test and no attempt to limit its scope to particular types of information. It is far wider than the equivalent code exemption which applies to:

'Information, opinions and assessments given in relation to recommendations for honours'<sup>25</sup>

All information, including purely administrative details about the honours system, would be exempt without any test of harm. The passage of time would not improve the prospect of disclosure. This information would be withheld from the Public Record Office for *75 years*. This is an explicit provision of clause 62(3).

The amendment would limit the scope of the exemption to information about living individuals.<sup>26</sup> Administrative arrangements relating to the honours system and information about deceased individuals considered for honours would not be explicitly protected.

Several other exemptions will continue to apply:

Confidential assessments supplied by third parties would still be subject to clause 39, which protects information supplied in confidence.

Internal assessments of the suitability of someone considered for an honour would presumably be exempt under clause 34(2)(b), which protects information whose disclosure in the authority's reasonable opinion would inhibit the free and frank giving of advice or exchange of views. However, this exemption would not justify withholding information for 75 years.

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<sup>25</sup> Exemption 8(c)

Information about deceased individuals considered for honours would not be protected as such. Such information is not exempt under clause 38, the personal information exemption. That is based on the Data Protection Act, which only protects information about *living* individuals. If it is considered that *deceased* individuals, or their families have some privacy interest, this requires measures applying well beyond those who have been considered for honours, and should be addressed elsewhere in the bill.

This is a modest amendment. It would remove the 75-year class exemption, and in particular improve the chances of obtaining access to administrative information about the honours system. Other information about identifiable candidates could still be withheld under other overlapping exemptions, though only as long as the harm tests referred to in them are met.

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<sup>26</sup>Although such information is already largely protected under the personal information exemption in clause 38).

**CLAUSE 38****Amendment 148***Mark Fisher**Clause 38, Page 21, line 8 at beginning insert 'Subject to subsection (5A) below'***Amendment 149***Mark Fisher**Clause 38, Page 21, line 43 at end insert*

*'(5A) For the purposes of subsection (3), a disclosure of information shall not contravene any of the data protection principles or section 10 of the Data Protection Act 1998 merely because it identifies an individual, or relates to an identifiable individual, who is*

- (a) a public official*
- (b) a public contractor, or*
- (c) a representative of an organisation*

*acting in that capacity.*

*(5B) Subsection (5A) does not apply to information relating to the health, salary or disciplinary record of an individual.*

*(5C) In this section –*

*'public official' means a Minister of the Crown, a Crown Servant or an employee or office-holder of a public authority or of an administration in the United Kingdom (within the meaning of section 26(2)), or an individual who is appointed by any of the above to any body;*

*'public contractor' means an individual providing services under contract to a public authority or an individual employed by or providing services under contract to a public contractor in relation to such a contract;*

*'representative of an organisation' means an individual who is communicating with a public authority on behalf of an organisation.'*

Clause 38(2) of the FOI Bill exempts personal information about a third party, if disclosure would contravene various provisions of the Data Protection Act (DPA) 1998. The DPA however makes no distinction between personal data about public officials acting in

that capacity, and personal data about an official's private life. The former may be withheld where on a common sense basis it is quite inappropriate to do so. These amendments are intended to ensure that information about public officials, public contractors and representatives of organisations, *acting in those capacities*, is not withheld.

The DPA embodies a strong presumption that *all* information about identifiable individuals will be protected, including information which does not involve what anyone would normally regard as private.<sup>27</sup> This might include the name of the author of an official document, the identity of the minister who took a particular decision or the names of those representing public authorities at a meeting. In future, such information could be withheld on *data protection* grounds.<sup>28</sup> If there are *other* grounds for sometimes protecting such information (for example to protect the safety of someone at risk of attack, or an authority's policy making functions) appropriate exemptions exist elsewhere in the bill.

Other FOI laws have at limited the scope for such confusion by drafting more narrowly defined exemptions. Sometimes these expressly refer only to disclosures which involve 'an invasion of privacy' or incorporate a statutory public interest test. This is also the approach of the open government code.<sup>29</sup> However, the government argues that the EU Data Protection Directive, on which the Data Protection Act is based, does not permit this. The minister's earlier amendment to clause 13 removes the bill's public interest test from personal data.

The exemption for personal information in clause 38 provides that any information about an identifiable individual (other than the applicant) will be exempt if its disclosure

- (a) contravenes any of the eight data protection principles<sup>30</sup>, or
- (b) would breach section 10 of the DPA,<sup>31</sup> or

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<sup>27</sup> Although the Data Protection Act applies to 'personal data' the definition of 'personal' in section 1(1) covers any data relating to an identifiable individual. An individual's name is personal data.

<sup>28</sup> It might be argued that such details should be withheld to protect an someone's safety or an authority's policy-making or negotiating functions, but other exemptions already address such concerns

<sup>29</sup> The code's exemption for 'Privacy of an individual' applies to 'Unwarranted disclosure to a third party of personal information about any person (including a deceased person) or any other disclosure which would constitute or could facilitate an unwarranted invasion of privacy.' This exemption is also subject to the code's public interest test.

<sup>30</sup> Set out in Part I of Schedule 1 of the DPA

- (c) would reveal information which the subject of the information would not himself be allowed to see if he applied for it under the DPA.

The first of these restrictions is the most significant. The data protection principles and the statutory provisions on their interpretation occupy nearly seven full pages of small print in the Schedules to the Data Protection Act. They are complex and obscure. Even the simplest request may require an authority to struggle with a tortuous series of tests, requiring detailed knowledge of the Act and expert legal advice. Many authorities will be tempted to adopt the simpler alternative of *never* disclosing information about identifiable individuals, and automatically delete all names from documents requested under the FOI bill, including those of officials acting in their official capacity.

For a flavour of what will be involved, take the *first* data protection principle. This requires that:

Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless

- (a) at least one of the conditions in Schedule 2 is met, and
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

The disclosure of information itself is defined as ‘processing’.<sup>32</sup> So the disclosure must be ‘fair’ and ‘lawful’. The tests relating to *fairness* occupy a full page of Schedule 1. They depend, in part, on whether the individual knows that data about himself might be disclosed.<sup>33</sup> So before authorities can disclose information about staff doing their jobs they will first have to ensure that staff have been notified of this possibility.

Staff may have to be given other information as well, depending on the circumstances and on whether the disclosed information was supplied to the authority *by* the official or were obtained *about* the official from other sources.<sup>34</sup>

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<sup>31</sup> This applies to data which if disclosed by the authority would cause substantial and unwarranted damage or distress to the applicant or to another individual. Section 10 applies only if the applicant has served notice on the authority requiring it not to disclose the information for this reason..

<sup>32</sup> DPA, section 1(1)

<sup>33</sup> Paragraph 2 of Part II of Schedule 1, DPA

<sup>34</sup> This is the distinction made in paragraphs 2(1)(a) and (b) of Part II of Schedule 1

Suppose a member of the public visiting a police station alleges that he has seen a prisoner being mistreated by a police officer, in the presence of other officers, and complains about this. Suppose he subsequently makes an FOI request about the incident. There may be complex issues of whether any disclosure is fair to (a) the prisoner (a reasonable question, since the prisoner has a clear privacy interest) (b) the alleged assailant (c) the witnesses and (d) the investigating officers. Just mentioning the *names* of any of these would mean that ‘personal data’ is involved, and a complex fairness test must be applied. Yet there is surely no *privacy* interest in relation to the last three categories. If there are other public policy grounds for not disclosing certain information about such allegations or investigations, they are not the result of privacy concerns.

Leaving this example, the Data Protection Act requires that in addition to meeting the general tests of fairness and lawfulness and least one of the specific conditions in Schedule 2 of the Act *must* be met. One of these is that the individual consents to the disclosure. If he or she does not, then the disclosure must be shown to be *necessary* for at least one of a series of purposes.

One is to comply with any legal obligation on the authority. Is the requirement to comply with the FOI Act itself such an obligation? The bill does not require a disclosure of information which breaches a principle – but this principle permits disclosures which are required by law. This itself is a paradox of mind-twisting complexity.

A disclosure could also be made if it is ‘necessary’ for the exercise of a Minister’s functions or those of a government department.<sup>35</sup> But what is ‘necessary’ for these purposes? If the Minister himself argues that he can fulfil his functions *without* disclosing the personal data, would an applicant be able to show that he was mistaken?

Another test is whether disclosure is ‘necessary for the purposes of the legitimate interests’ of the applicant.<sup>36</sup> This is more relevant. But ‘necessary’ is a strict test. The applicant may have to show that he cannot pursue his legitimate interests without the information. Even if he can show this, the data would not be released if disclosure was ‘unwarranted...by reason of prejudice to the rights and freedoms or legitimate interests of the data subject’.

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<sup>35</sup> Paragraph 5(c) of Schedule 2

<sup>36</sup> Paragraph 6(1) of Schedule 2, DPA

This provision, at least, can be clarified by the Secretary of State who has explicit power to make an order specifying the circumstances in which disclosure can take place.<sup>37</sup> It would be of interest to know if he intends to do so.

If the personal data involves what the Act describes as ‘sensitive personal data’ then the disclosure must *also* meet at least one of a separate list of conditions in Schedule 3 of the Act.<sup>38</sup>

All these steps involve just the *first* data protection principle. There are seven more to go. The *second* data protection principle states that:

‘Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes’

The Act adds that:

‘In determining whether any disclosure of personal data is compatible with the purpose...for which the data were obtained, regard is to be had to the purpose...for which the personal data are intended to be processed by any person to whom they are disclosed’<sup>39</sup>

This means the authority is required to find out *why* the applicant wants the information and then assess whether the applicant’s *intended use* of the information is compatible with the purpose for which the authority obtained it.

Is a journalist’s purpose, in reporting on a story which involves named officials ‘compatible’ with the authority’s purpose in holding information about the identity of its employees? That is the kind of – frankly mystifying – test which authorities will have to apply.

These, and many other tests, will have to be applied to simple requests involving basic

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<sup>37</sup> Paragraph 6(2) of Schedule 2, DPA states: ‘The Secretary of State may by order specific particular circumstances in which this condition is, or is not, taken to be satisfied’.

<sup>38</sup> Sensitive personal data is defined in section 2 of the Act and refers to data relating to an individual’s racial or ethnic origin, political opinions, religious beliefs, trade union membership, health, sexual life and whether he has been convicted of or faces proceedings for any offence.

<sup>39</sup> Paragraph 6, Part II, Schedule 1, DPA.

information about identifiable public officials. Rather than pay the legal bills associated with these complexities, authorities are likely to take the easy route and automatically black out the names of staff from documents released under the bill.

The Data Protection Registrar has herself expressed concern at these restrictions:

‘It is the Registrar’s view that in practice very little information is likely to be disclosable under these provisions...It is a matter for Ministers and Parliament whether very limited disclosure of personal information to third parties is consistent with the objectives of Freedom of Information...

The draft Bill treats all third party requests for access to personal information in the same way. It makes no distinction between what is public and what is private. Yet it would be possible to make this distinction between an official’s public activities i.e. between personal information relating to an official in the course of his duties, and his private life, ie. that relating to him as a private individual. Drawing this distinction would permit different approaches towards disclosure of information about officials, depending on whether the information related to public activities which might be disclosable, or to private life which should usually receive the same protection afforded to individuals not in the public service. This would extend the quantity of personal information potentially available to third parties.’<sup>40</sup>

The government has argued that the EU Data Protection Directive itself binds its hands, and that it is not free to adopt an approach which distinguishes between personal data on private individuals and personal data relating to public officials acting in that capacity. However, the Registrar has maintained that Recital 72 of the Directive, inserted in response to the Swedish government’s concerns that the directive might undermine its own FOI legislation, provides the legal basis for such a distinction. It states:

‘whereas this Directive allows the principle of public access to official documents to be taken into account when implementing the principles set out in this Directive’

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<sup>40</sup> Data Protection Registrar. ‘Freedom of Information: Consultation on Draft Legislation’, June 1999.

Amendments 148 and 149 are an attempt to allow information about officials in their public capacity to be disclosed without the tortuous requirements of the present exemption. It states that there is no breach of the data protection principles (or the restriction in section 10 of the Act) if what is disclosed is information about:

- A public official acting in that capacity
- A public contractor, providing services to an authority, acting in that capacity. Where a public authority has contracted out its functions – eg the running of a school, or prison services – to a private contractor, the contractor’s personal data is subject to a similar test
- The representative of an organisation communicating with a public authority in that capacity. This attempts to ensure that the identity of the individual who signs a letter to a public authority on behalf of an organisation – the Director General of the CBI, for example – is not withheld on privacy grounds.

For the avoidance of doubt, clause (5B) in the amendment provides that information relating to the health, salary or disciplinary record of the individual is not automatically disclosable under these provisions. Such information might be disclosable, but only after going through the tests set out in clause 38.

**Amendment 150**

Mark Fisher

*Clause 38, page 21, line 28 at end insert -*

*(4A) Where information is exempt under section 38(3)(a)(ii) by virtue of a notice given by the authority under section 10(3)(a) of the Data Protection Act 1998, an application for review of that notice may be made to the Commissioner by the person who has made a request under section 1.*

*(4B) The Commissioner shall not undertake a review under this section unless he has given the relevant person notice in writing that an application has been made and offered the relevant person an opportunity to make representations to him about the application within such reasonable time as may be set out in the notice*

*(4C) If after reviewing the notice and taking account of any representations made by the relevant person the Commissioner is satisfied that the disclosure of the information in accordance with this Act would not cause substantial damage or substantial distress to the relevant person, or that any such substantial damage or substantial distress would not be unwarranted, the information shall not be exempt by virtue of section 38(3)(a)(ii) of this Act, and the Commissioner shall inform the authority and the relevant person accordingly.*

*(4D) Where information is exempt under section 38(3)(a)(ii) by virtue of an order made by the court under section 10(4) of the Data Protection Act 1998, an application may be made to the court by a person who has made a request under section 1 and, if the court is satisfied that the disclosure of the information in accordance with this Act would not cause substantial damage or substantial distress to the relevant person, or that any such substantial damage or substantial distress would not be unwarranted, the court may vary or revoke the order accordingly.*

*(4E) A court shall not make an order under subsection (4) unless it has given the relevant person notice in writing that an application has been made and offered the relevant person an opportunity to make representations to it about the application within such reasonable time as may be set out in the notice*

*(4F) In this section, the “relevant person” means the person who gave notice under section 10(1) of the Data Protection Act 1998 and any other person mentioned in that notice in respect of whom that notice was given.*

This is a long probing amendment. It addresses one of the three grounds on which personal information may be withheld under clause 38, that is that disclosure would contravene section 10 of the Data Protection Act 1998.

Section 10 allows an individual to serve a notice on a ‘data controller’ (in the present context,

this would be a public authority) requiring it not to process or carry on processing personal data about himself. In this context the ‘processing’ would be an anticipated disclosure.<sup>41</sup> Thus, an individual could serve a notice on a public authority requiring it not to disclose personal data about himself.

A section 10 notice can only be served if:

- the anticipated disclosure ‘is likely to cause substantial damage or substantial distress’ to the applicant or to someone else; and
- that damage or distress would be unwarranted.<sup>42</sup>

An authority which receives such a notice must reply within 21 days, either to confirm to the applicant that it will comply with the notice, and not make the disclosure, or setting out its reasons for believing the notice to be unjustified.<sup>43</sup> In the latter case, the applicant can apply to the court and if the court considers the notice to be justified it can order the authority to comply with it.<sup>44</sup> There are certain circumstances in which a notice cannot be served.<sup>45</sup>

Clause 38(3)(a)(ii) of the bill exempts from access under the FOI bill any personal information to which a section 10 notice applies. At first sight, it is not clear that the FOI applicant can challenge such a notice if he or she thinks it is unjustified. This amendment provides a right of appeal.

There are two parallel procedures. The first is set out in clauses (4A) to (4C) of the amendment. Where an authority has accepted the data subject’s section 10 notice, the amendment would allow the applicant to apply to the Commissioner for a review of the

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<sup>41</sup> Section 1(1), DPA 1998

<sup>42</sup> Section 10(1), DPA

<sup>43</sup> Section 10(3), DPA

<sup>44</sup> Section 10(4), DPA

<sup>45</sup> A notice cannot be served where the processing complies with any of the first four data protection principles, which are set out in Schedule 2 of the DPA. These apply where: (1) the individual has consented to the processing (2) the processing is necessary to comply with a contract (3) it is necessary to comply with a legal obligation on the data controller or (4) it is necessary to protect the vital interests of the data subject.

notice. The Commissioner must notify the person who obtained the notice<sup>46</sup> and allow him or her to make representations. If the Commissioner finds that disclosing the information would *not* cause unwarranted substantial damage or distress, the Commissioner can state this. The result would be that section 10 did not apply, and the data could be disclosed under the FOI bill.

The second procedure applies where a section 10 notice has been enforced by a court order. In this case, the FOI applicant could ask the *court* to review the notice. The court could vary or revoke the notice under the procedure described in clauses (4D) to (4E) of the amendment.

The reason this amendment is a probing amendment, is that section 10 *can* be set aside, where a disclosure is sought for journalistic, literary or artistic purposes. Section 32 of the Data Protection Act makes clear that for this to apply, the data controller must:

‘reasonably believe[s] that, having regard in particular to the special importance of the public interest in freedom of expression, publication would be in the public interest’<sup>47</sup>

It is not clear how these provision interplay, and whether the public interest test in clause 32 is available to anyone other than journalists and authors, who may seek such information for good reason. Would this public interest provision be available to Members of Parliament, for example? Would it be available to a campaigning organisation which would not normally be regarded as operating within what the Data Protection Act describes as ‘the purposes of journalism’?<sup>48</sup>

It may help to outline a hypothetical scenario. Suppose Robert Maxwell learnt that an FOI request is about to be made to a public authority for information about himself. He could take steps to pre-empt any disclosure by serving a section 10 notice claiming that he would be exposed to substantial and unwarranted damage or distress.

An alternative scenario might arise if the section 10 notice is served by an employee or official of the public authority. Allegations of financial misconduct, negligence or abuse of

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<sup>46</sup> Or the person on whose behalf the notice was obtained. It may have been obtained by someone on behalf of both himself and another person, for example, his or her spouse. The amendment uses the term ‘relevant person’ to cover both of these.

<sup>47</sup> Data Protection Act 1998, clause 32(1)(b)

<sup>48</sup> Section 3(a)

authority may have been made against this person. The individual could try to block any FOI disclosure by securing a notice. The authority itself might be all too happy to help suppress disclosure, particularly if it was accused of being party to the malpractice, and willingly agree to the abide by notice.

The amendment sets out a process for challenging these notices. Whether these are in fact necessary may depend on the public interest provision in clause 32, its scope, who may benefit from it, and its ability to cope with the range of circumstances that FOI requests may give rise to.

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**Amendment 151***Mark Fisher*

*Clause 38, Page 21, line 7 at end insert –*

*‘(1A) Any request or part of a request for information to which subsection (1) applies shall be treated as a request under section 7(2) of the Data Protection Act 1998 and the date on which the request was received under this Act shall be the date on which it was received for the purpose of that Act.’*

Clause 38 exempts personal data to which a right of access exists under the Data Protection Act (DPA)1998.

This amendment considers the possibility that an authority might refuse to provide information, citing this exemption, but not proceed with processing the request under the Data Protection Act either, or at least, not immediately. The authority might take the 20 working days that the bill allows<sup>49</sup> to decide that the information is exempt, but then consider that it had a further *forty* days, the time allowed under section 7(10) of Data Protection Act to respond to the request.

This amendment makes clear that the DPA’s forty day period runs from the date on which the FOI request (or what appears to be an FOI request) is actually received.

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<sup>49</sup> Clause 9(1)

# The Campaign for Freedom of Information

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## FREEDOM OF INFORMATION BILL

House of Commons Committee Stage

### BRIEFING PAPER 6

Amendments tabled to Clause 39

27 January 2000

**Hon. President:** Godfrey Bradman  
**Co-Chairs:** James Cornford, Neil McIntosh  
**Director:** Maurice Frankel

**Parliamentary Co-Chairs:** Helen Jackson MP  
Archy Kirkwood MP  
Richard Shepherd MP

## CLAUSE 39

### Amendment 153

Robert Maclennan/David Heath

*Clause 39, page 22, line 12 at end insert –*

*‘(1A) Information is not exempt under this section unless the authority has sought the consent of the person from whom it was obtained to communicate the information in response to a request under this Act and that consent has been refused.*

*(1B) Subsection (1A) does not apply if, within the previous 12 months, the consent of that person was sought and was refused in relation to the same information.’*

Clause 39 exempts information which has been obtained by an authority from any other person, including another public authority, in circumstances imparting a legal obligation of confidentiality.

Amendment 153 raises the question of how long information obtained in confidence *remains* confidential. The answer, presumably, is as long as the person who supplied it *requires* it to be kept confidential. But how is the authority to know how long the supplier requires confidentiality?

The information may have been highly confidential in the supplier’s eyes *at the time* but only because it related to some current negotiation or forthcoming announcement. Since then the supplier’s interest in protecting the information may have evaporated. The supplier may even have made it public itself – though there may be no reason for the authority to know this.

The amendment follows the pattern of a similar amendment proposed to clause 25. It merely requires that the authority ask the supplier for consent to disclose the information. To avoid unnecessary pestering, such a request would not have to be made more than once a year.

**Amendment 154***Robert Maclennan/David Heath**Clause 39, page 22, line 12 at end insert*

*‘(1A) Information is not exempt under this section if an obligation of confidentiality has been entered into after the commencement of this Act in circumstances in which the code of practice under section 44 provides that to enter into such an obligation would be inappropriate’*

**Amendment 157***Robert Maclennan/David Heath**Clause 44, page 23, line 45, leave out ‘and’ and insert –*

*‘(dd) the circumstances in which it is not appropriate for a public authority to accept information from another person in confidence, and’*

Amendment 157 requires the Secretary of State to address the question of confidentiality in the code of practice which he issues under clause 44. In particular, it requires him to identify in what circumstances authorities should *not* accept information in confidence. This is, notably, an issue on which clause 44 is presently silent.

Compliance with this aspect of the code would in effect then become binding on authorities. Amendment 154 provides that an authority which accepted information in circumstances contrary to the guidance would not have entered into an obligation of confidentiality. The information would not be exempt.

The advantage of this approach is that the requirements would be set by the Secretary of State – the amendment does not seek to dictate them. It might for example be appropriate to make clear that consultation documents should not permit information to be supplied in confidence unless disclosure of the information involved would harm the supplier’s commercial position or reveal personal information about an individual. The details would be left to the Secretary of State, who no doubt would want to consult widely beforehand.

Once these terms were set they would be available for all to see. Those supplying information to authorities, the authorities themselves, and the public, would know the circumstances in which confidentiality might apply, and the circumstances in which it would not.

One particular advantage could be to the relationship between commercial lobbyists and

government. Their dealings could be regulated by such guidelines, ensuring a much greater degree of transparency in an area which at present is a source of real concern to many people.

**Amendment 158***Mr Ian Cawsey*

Clause 39, page 22, line 12 at end insert

*'(1A) in relation to information obtained after section 1 comes into force, no actionable breach of confidence can be committed within the meaning of subsection (1) above unless, prior to receiving the information, the public authority holding it confirmed in writing to the person who subsequently gave it that it was willing to receive it in confidence*

*(1B) a public authority shall not give the confirmation referred to in subsection (1A) above unless it requires the information in order properly to discharge its functions and believes on reasonable grounds that the person concerned will not give it unless he receives the confirmation'*

This amendment seeks to clarify the circumstances in which an authority becomes subject to an obligation of confidentiality. It addresses the widespread concern that information will be withheld from the public under the bill because authorities have accepted information in confidence when they did not mean to or should not have done so.

It is remarkably easy to enter into an obligation of confidentiality and equally easy for one side to believe that an obligation exists when the other does not. In addition the law of confidence is acknowledged to be particularly complex. The circumstances in which an enforceable obligation arises may not be clear even to the participants themselves.

Government departments and public authorities have long dealt with outside bodies, particularly the industries which they regulate, on an assumption that *everything* that passes between them is in confidence. Habits exist that will be difficult to break. Indeed, neither side may have any real incentive to break them. Such practices could easily continue once the FOI Act is in force.

The amendment requires the public authority to carefully consider, before accepting information, whether it is prepared to accept in confidence. It requires the authority to express *in writing* its willingness to accept the information on these terms, and it requires the authority to *withhold* its consent unless two conditions are met.

The first is that it requires the information in order to properly fulfil its functions. The second is that it believes, on reasonable grounds, that without the information it will not be able to discharge its functions.

If the information is not *required*, the authority should in any case be wary about accepting it in confidence. It may find that it is subsequently unable to defend its actions, should they come under criticism, because of undertakings needlessly given to third parties. There may be complaints that an authority is failing to enforce some requirement properly. The authority may have acted conscientiously but been misled by the regulated person, yet not be able to acknowledge this fact.

The problems for authorities themselves were well illustrated several years ago when the Ministry of Agriculture, Fisheries and Food published findings showing that a high proportion of domestic microwave ovens failed to heat food to a safe temperature when used in accordance with the manufacturers' instructions. To widespread disbelief, MAFF published the data anonymously, refusing to identify which brands were safe and which were not. Customers were told to contact the manufacturers individually to confirm whether their own oven was on the 'at risk' list. It transpired that MAFF had accepted free samples of the ovens from the manufacturers, for testing, and in return had agreed not to publicly identify individual brands in their findings. The resulting outcry was catastrophic for MAFF's public credibility.

This amendment may help authorities keep themselves out of such trouble in future. Perhaps more to the point, it would help the public obtain information of this kind which should not have confidential in the first place.

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## FREEDOM OF INFORMATION BILL

House of Commons Committee Stage

BRIEFING PAPER 7

Clause 39 (*continued*)  
&  
Amendments to Clauses 41 – 43

31 January 2000

**Hon. President:** Godfrey Bradman  
**Co-Chairs:** James Cornford, Neil McIntosh  
**Director:** Maurice Frankel

**Parliamentary Co-Chairs:** Helen Jackson MP  
Archy Kirkwood MP  
Richard Shepherd MP

**CLAUSE 39**  
**(continued)**

**General**

A further point is that clause 39 is *not* subject to the bill's public interest test.<sup>1</sup>

A public interest test does exist under the common law of confidentiality. However, this usually requires the existence of serious malpractice, such as crime, fraud, misconduct or danger to the public. Although this is not an exhaustive account of the circumstances in which the test might apply, it is likely to be difficult to meet.

An earlier amendment<sup>2</sup> attempted to extend the bill's public interest test to information covered by clause 39. This would have allowed the Commissioner, and the courts, to adopt a wider public interest test. Precedents for such an approach were mentioned in Briefing Paper 2 and include the Food Standards Act 1999. The Act gives the Food Standards Agency considerable powers to obtain information from food companies, and allows it to publish

“any...information in its possession (whatever its source)”<sup>3</sup>.

Its power to publish is restricted only by the obligation to:

‘consider whether the public interest in the publication of the advice or information in question is outweighed by any considerations of confidentiality attaching to it’<sup>4</sup>

This is highly significant, because it makes clear that the Agency can publish information subject to an obligation of confidentiality on *wide* public interest grounds, *not* limited to those which exist under the law of confidence itself. A wide public interest test of this kind is required under the bill, and should be enforceable by the Commissioner.

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<sup>1</sup> Clause 13(1)(a) excludes this exemption from the scope of the bill's public interest test

<sup>2</sup> Amendment 79

<sup>3</sup> Food Standards Act 1999, section 19(1)(c)

## CLAUSE 41

### PREJUDICE COMMERCIAL INTERESTS

#### Amendment 155

*Robert Maclennan/David Heath*

*Clause 41, page 22, line 25 leave out subsection (2) and insert –*

*(2) Information is exempt information if it is information*

*(a) which the person from whom it was obtained consistently treats as confidential, and*

*(b) the disclosure of which would cause significant financial loss to that person.*

*(2A) Information is exempt information if it is information which relates to the financial affairs of the public authority which holds it*

*(a) which that authority consistently treats as confidential, and*

*(b) the disclosure of which would cause significant financial loss to the authority.’*

This amendment would replace clause 41(2), which exempts information whose disclosure would be likely

“to prejudice the commercial interests of any person (including the public authority holding it).”

This clause suffers from a number of serious weaknesses.

First, It applies to any information obtained from *any source*. There is no sense that what is protected is information which *belongs* to a particular company. An authority could withhold test results which it has obtained from its own laboratories or which it had obtained from

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<sup>4</sup> Food Standards Act 1999, section 19(4)

independent sources.

Second, the information need not even be *confidential*. Information that had previously been released by the authority or by the company in the past could be withheld. A company might, for example, have disclosed the information at a trade conference, or revealed it to a sympathetic financial journalist, but wish it to be withheld from a campaigners critical of its approach. The exemption would permit this.

Third, the exemption puts the avoidance of commercial ‘prejudice’ above all other considerations. Companies or authorities which behave badly *should* be prejudiced. A free market, and a free society, requires that companies should pay a price for selling dangerous or substandard products, knowingly misleading consumers or using manufacturing practices which consumers would not tolerate (such as cruelty to animals or using forced prison labour). The bill would allow information to be withheld *in order* to protect companies from facing the consequences of their own malpractice. Examples of malpractice protected by arguments of ‘commercial confidentiality’ are common.<sup>5</sup>

Fourth, the absence of a binding public interest test denies the public an essential safeguard. An authority could of course reveal exempt information if it chose to. But authorities sometimes fail to recognise any public interest in telling the public what is going on, or have a direct incentive not to disclose, because they themselves may face criticism as a result.

The *discretionary* nature of the test opens the door to collusion between a company with something to hide, and an authority which faces criticism for not have tackled the problem

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<sup>5</sup> The problem is illustrated by this press report: ‘A massive batch of medicines used by millions went on sale contaminated with a potentially fatal drug...The tablets, including hormone replacement therapy supplies, were found to contain penicillin – deadly to a significant proportion of the population who have a severe allergy to it.

And although health watchdogs who discovered the blunder immediately recalled all supplies from pharmacies across Britain, they refused to issue a public warning. The tablets which also included angina and arthritis treatments, were made by a leading pharmaceutical firm which supplied 45 per cent of all unbranded drugs last year. It has Labour peer Baroness Falkender and former Tory health minister Gerry Malone among its directors.

A secret inquiry by the government’s Medicines Control Agency into how the contamination occurred at London based Regent GM Laboratories is still under way. The MCA has suspended the company’s licence to make pharmaceuticals. The firm’s grip on the market is so large that the pharmaceutical trade press reported massive shortfalls in drugs available in high street chemists since the suspension of its licence.

*Despite the incident being uncovered more than nine months ago the Department of Health refuses to reveal its findings, saying it must respect Regent GM’s commercial confidentiality.’ (italics added)* [“‘Deadly” pills sold at chemists after drugs firm bungle’, Express, 5/10/99]

itself. A complacent or negligent regulatory body, which failed to take action when it should have, may have just as much interest as the company in avoiding disclosure.

Equally, if ministers approve arms exports to repressive regimes, the minister and the arms exporter may have a common interest in avoiding publicity. The Scott report revealed several examples in which departments in fact advised companies to keep quiet about their exports.<sup>6</sup> A department which makes unjustified concessions to vested interests will also find it has a common interest with the party concerned in avoiding scrutiny.

Most countries' FOI laws have enforceable public interest tests *as part of* their commercial confidentiality exemptions, which can be used to require disclosure where the authority itself resists it. The Irish FOI Act's commercial interests exemption contains *two* enforceable public interest tests. The first requires disclosure where:

‘the public interest would, on balance, be better served by granting than by refusing to grant the request’<sup>7</sup>

The second requires disclosure where this is:

‘necessary in order to avoid a serious and imminent danger to the life or health of an individual or to the environment’.<sup>8</sup>

Finally, the test of ‘prejudice’ is itself particularly weak. The equivalent provision in the US Freedom of Information Act applies if a disclosure

‘would cause substantial harm to the competitive position of the person from whom the information was obtained’.<sup>9</sup>

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<sup>6</sup> The Scott report found that one senior official had noted that “‘if it becomes public knowledge that the [machine] tools are to be used to make munitions deliveries will have to stop at once...” and that “...[the companies] must...renounce publicity and lobbying for their own good.”’. A second passage in the Scott report said: ‘...in a Note...relating to the provision by Tripod Engineering Ltd of an Aviation Medical Centre for the Iraqi Air Force and to advice which had been given by the Commandant of the RAF’s Institute of Aviation Medicine, Lord Trefgarne’s Assistant Private Secretary said that “it should be suggested gently to Tripod Engineering that the involvement of the IAM should not be given any publicity.”[Volume I, paragraphs D2.35 and D2.36, pages 227-8]

<sup>7</sup> Freedom of Information Act 1997 [Ireland] Section 27(3)

<sup>8</sup> Freedom of Information Act 1997 [Ireland], section 27(2)(e)

<sup>9</sup> This is the test set out by the Court of Appeals for the District of Columbia Circuit in what is considered to be the leading case on the issue: *National Parks and Conservation Association v Morton* (1) 498 F.2d 765 (D.C. Cir. 1974)

This contains *three* features missing from the draft bill's exemptions:

- (a) it uses the white paper's 'substantial harm' test, which is considerably stronger than 'prejudice'
- (b) it applies only where the harm is to a person's *competitive* position. Where there is no competition, for example in a monopoly, the exemption could not be invoked.
- (c) it requires that the harm be caused to the person who *supplied* the information.

The test is also weaker than that in some UK legislation. For example, the Environmental Protection Act 1990 requires companies' pollution data to be entered on public registers unless to do so would 'prejudice to *an unreasonable degree* the commercial interests of the person concerned'.<sup>10</sup> The use of 'unreasonable' envisages that some prejudice may be unavoidable or even desirable, a clear improvement on the bill.

Amendment 155 addresses a number of these concerns.

- (a) It applies only where the person whose commercial interests might be affected is the person who supplied the information.
- (b) It applies only if the information was confidential to the person, and consistently treated by it as such. A company which shares information with sympathetic journalists could not ask a public authority to withhold it from potential critics.
- (c) It applies a more rigorous harm test, that disclosure would cause 'significant financial loss' instead of the considerably vaguer 'prejudice commercial interests'.

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<sup>10</sup> Environmental Protection Act 1990, section 22(11).

## TRADE SECRETS

*John Greenway*

### Amendment 140

This amendment, tabled by the Conservative front bench, would define the term ‘trade secret’. It adds a necessary degree of clarity to this ambiguous term, which is used in clause 41(1). This exempts information ‘if it constitutes a trade secret’.

It is commonly assumed that a ‘trade secret’ is something like the formula of Coca Cola or the method of making it. That is, a secret manufacturing process or formula which if obtained by a competitor would remove a significant commercial advantage enjoyed by its owner.

But if this, or something like it, is the definition, what does it add to clause 41(2)? Clause 41(2) already protects information whose disclosure would ‘*prejudice the commercial interests of any person*’. As long as disclosure of the information could cause prejudice it does not matter

- whether or not it is *confidential*
- whether or not it *belongs* to the person whose commercial interests might be at risk
- whether or not it relates to the *manufacture* or *sale* of goods

That offers enormously wide protection. To separately protect something called a ‘trade secret’ is either redundant (in which case it could be omitted altogether) or it adds something not provided by the broad protection in clause 41(2).

Clause 41(2) contains only one condition: that disclosure of the information in question should be ‘likely’ to ‘prejudice the commercial interests of any person’. What extra protection could possibly be provided? **The only logical explanation is that the term ‘trade secret’ applies to information whose disclosure may *not* prejudice someone’s commercial interests.**

Far from being a narrow class of commercially damaging information, the implication is that a ‘trade secret’ extends to information which could not be shown to meet even a low test of harm. It is a *class* exemption. In this case, it is all the more vital that the limits of this class

are defined.

A number of Acts already refer to the disclosure of ‘trade secrets’. But the Law Commission, in a 1997 report on trade secrets observed:

‘We are unaware of any authority on the construction of the phrase in these provisions’<sup>11</sup>

The Law Commission went on to propose a new statutory offence of misusing trade secrets. It proposed a definition, whose essential elements were that it applied to information which:

- (a) its owner wishes to keep secret, and
- (b) is not generally known, and
- (c) has some economic value which derives from the fact that it is not generally known.<sup>12</sup>

The bill therefore protects three different types of information about businesses held by a public authority:

- (1) information supplied to and accepted by the authority in confidence<sup>13</sup>
- (2) information (whether or not confidential) which could prejudice anyone’s commercial interests<sup>14</sup>
- (3) information not generally known (but not necessarily confidential) which has economic value as a result (but whose disclosure would not necessarily prejudice anyone’s commercial interests)

The case for protecting the wide class of information referred to in (3) is far from clear. On the contrary, it could lead to a general presumption that non-confidential information held by businesses would be exempt.

Amendment 140 would define a ‘trade secret’ as:

‘any confidential trade information which if disclosed to a competitor would cause harm

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<sup>11</sup> Law Commission. ‘Legislating the Criminal Code: Misuse of Trade Secrets’, Consultation Paper 150, 1997, paragraph 4.1

<sup>12</sup> Law Commissioner, Consultation Paper 150, paragraphs 9.4, 9.7 and 9.10

<sup>13</sup> Clause 39

<sup>14</sup> Clause 41(2)

to its owner'

This adds several important qualifications namely, (a) that the information be confidential (b) that it relates to trade (c) that disclosure would be likely to cause harm to its owner and (d) that the harm would arise because of the use made of it by a competitor.

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## CLAUSE 42

### PROHIBITIONS ON DISCLOSURE

#### Clause stand part

Clause 42 exempts any information whose disclosure (a) is prohibited by law (b) is incompatible with a Community obligation or (c) would constitute contempt of court.

The first of these is probably the most significant. Information whose disclosure is prohibited under a large number of statutory prohibitions would be exempt from access under the bill. The government is currently reviewing these individually, with a view to repealing those which are not required. The Home Office consultation paper stated:

‘some repeals will be included in the legislation, where they have been identified before introduction of the Bill into Parliament’<sup>15</sup>

The Home Office supplied the Public Administration committee with an ‘interim’ list of 29 statutory provisions which it intended to repeal or amend and a further 26 which it regarded as flowing from international legal obligations, which could not be removed.<sup>16</sup> However, this accounts for only a minority of the 250 or so statutory restrictions identified in the 1993 *Open Government* white paper.<sup>17</sup> The government might be asked if it is in a position to identify any further restrictions that are to be repealed; and whether it has an updated list of those in existence.<sup>18</sup>

The list of candidates for repeal supplied to the Public Administration committee did *not* include section 118 of the Medicines Act 1968. This is one of the most unacceptable of all statutory restrictions. It prevents the Medicines Control Agency, the Committee on Safety of Medicines and the Department of Health from disclosing:

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<sup>15</sup> Home Office. ‘Freedom of Information. Consultation on Draft Legislation’. Cm 4355, May 1999, paragraph 62

<sup>16</sup> Select Committee on Public Administration, 3rd report 1998-99, HC 570-1, Annex 6, page cxxxv.

<sup>17</sup> Cm 3818, Annex B

<sup>18</sup> Until 1992, it was believed that there were only about 80 statutory restrictions on disclosure. The review of restrictions undertaken in relation to the *Open Government* white paper of 1993 revealed the number had increased to 250. As new offences are often created by new legislation, this total may itself be considerably out of date.

‘any information obtained by or furnished to him in pursuance of this Act...unless the disclosure was made in the performance of his duty’

This has led to quite unacceptable secrecy about the basis for medicines licensing decisions, in which the official bodies involved refuse to disclose any information about the basis for their decisions. It can be seen at its most extreme when basic information about medical products which have harmed patients is refused.

In the mid 1990s, it was discovered that “Boneloc” – a new medical cement used in hip replacement operations – rapidly disintegrated within the body, causing the new joint to fall apart painfully. Operations which relied on Boneloc were 14 times more likely to fail than those using alternative cement products. The Department of Health’s Medical Devices Agency issued a formal ‘hazard warning’ about Boneloc in April 1995, but specific information was refused, as this Parliamentary Question illustrates:

**Mr Flynn:** To ask the Secretary of State for Health, what is his calculation of the total number of patients on whom Boneloc cement was used; and where in the United Kingdom it was used.

**Mr Sackville:** Section 118 of the Medicines Act precludes the disclosure of information which is provided about products in accordance with the provisions of the Act.<sup>19</sup>

It would be of interest to know what the government intends to do about this secrecy provision. Its retention would cause widespread concern.

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<sup>19</sup> Written Answers, 30.10.95, col 45

## CLAUSE 43

### RETROSPECTIVE EXEMPTIONS

#### Amendments 141-146

*John Greenway*

These amendments, tabled by the Conservative front bench, involve significant restrictions to the scope of clause 43. Amendment 146 would delete the *whole* of that clause. These are welcome proposals.

Clause 43 allows the Secretary of State to exempt information at short notice by Parliamentary order. This provision can be used to trump any request which government has received, and cannot refuse under existing exemptions. The bill explicitly permits an order to apply to information which is the subject of an *existing request*.<sup>20</sup> This is a deeply objectionable provision. Given the large number of sweeping exemptions throughout the bill it is also redundant.

The Public Administration committee found this provision unacceptable, reporting:

‘We believe that it is altogether inappropriate to insert such a provision into a Freedom of Information Act. There is no such provision in any other Freedom of Information Act of which we are aware. We recommend that clause 36 [*as it then was*] is removed from the Bill.’<sup>21</sup>

The House of Lords select committee which considered the draft bill said:

‘We do not understand why, in a Bill with wide exemptions based on the class of information or of the harm which its disclosure might cause, there needs to be a reserve power for a Minister to create a new exemption to deal with an unwelcome request for information, or why the new exemption should have retrospective effect to justify a refusal. In our opinion **clause 36 should be deleted completely**. If, despite this recommendation, the Government continues to believe that such a power is necessary, then it should be exercised in a specific situation only if the Information Commissioner agrees. At the very least the power should not be made retrospective.’<sup>22</sup>

The Government has ignored these recommendations.

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<sup>20</sup> Clause 43(4)

<sup>21</sup> HC 570, paragraph 112

<sup>22</sup> Emphasis in original text. House of Lord, Session 1998-99. Report from the Select Committee Appointed to Consider the Draft Freedom of Information Bill. HL 97, paragraph 33.

**Amendment 164***Robert Maclennan/David Heath**Clause 43, page 22, line 42**Leave out from 'to' to 'as' in line 43 and insert 'prejudice the carrying out of such functions'*

This amendment proposes a slight restriction on the scope of clause 43. However, it would not remove the objectionable element of the clause, and should not be seen as an alternative to the more radical approach set out in the earlier amendments.

The amendment reflects a recommendation of the House of Lords Select Committee on Delegated Powers and Deregulation, which the government has only partly adopted. The committee noted that clause 43:

‘is a significant power which will be viewed apprehensively by those who fear that the Establishment will have little enthusiasm for disclosure’<sup>23</sup>

It recommended that the power to create new exemptions should be limited to exemptions containing a test that *‘disclosure of the information would prejudice the public interest’*.<sup>24</sup> The intention was to prevent new *class* exemptions being created. Instead, new exemptions would have to incorporate a *‘prejudice’* test.

In response to this recommendation, the government added clause 43(1)(b) which requires newly created exemptions to be formulated so that they apply only where disclosure would be likely *‘to have such effects adverse to the public interest as may be specified in the order.’*

This omits the explicit reference to *‘prejudice’* which the Delegated Powers Committee proposed. One implication is that new exemptions could provide a harm test *weaker* than *‘prejudice’*.

This raises the prospect of new near-class exemptions, such as those in clause 34(2). These allows information to be withheld where *‘in the reasonable opinion of a qualified person’* disclosure would have particular effects. The formulation protects decisions from review

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<sup>23</sup> 21st Report, paragraph 15

<sup>24</sup> paragraph 17

unless they are so unreasonable as to be irrational. Most decisions taken under such an exemption would probably be immune from review by the Commissioner.

The amendment would allow new exemptions to be created only for information whose disclosure:

‘would be likely to prejudice the carrying out of such functions as may be specified in the order’

This is intended to ensure that new exemptions contain straightforward tests of ‘prejudice’, which would at least ensure that decisions to withhold information could be reviewed by the Commissioner on their merits.

**Amendment 156***Robert MacLennan/David Heath**Clause 43, page 23, line 27*

*At end add 'and shall publish any representations made to him by the Commissioner'*

Clause 43(6) requires the Secretary of State to consult the Information Commissioner before creating a new exemption by order. This amendment merely requires the Secretary of State to publish the Commissioner's recommendations on any such proposal.

The Commissioner may well wish to publish her recommendations anyway. This amendment *ensures* that they are published, and would help to highlight any reservations the Commissioner might express.

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## FREEDOM OF INFORMATION BILL

House of Commons Committee Stage

### BRIEFING PAPER 8

Amendments to Clauses 44 and 46

1 February 2000

**Hon. President:** Godfrey Bradman  
**Co-Chairs:** James Cornford, Neil McIntosh  
**Director:** Maurice Frankel

**Parliamentary Co-Chairs:** Helen Jackson MP  
Archy Kirkwood MP  
Richard Shepherd MP

## CLAUSE 44

### CODE OF PRACTICE

#### Amendment 165

*Robert Maclennan/David Heath*

*Clause 44, page 24, line 2 at end insert 'and*

- (f) the giving of notice of the rights of complaint under this Act to persons who have made requests for information'*

Clause 44 requires the Secretary of State to issue a code of practice containing guidance for public authorities. The code *must* address a number of matters, set out in Clause 44(2). This amendment proposes to add to that list. It would require the Secretary of State to issue guidance on what applicants should be told about their rights to complain under the Act.

The amendment returns to the bill's remarkable failure to require authorities to notify unsuccessful applicants of the right to complain to the Commissioner. This is an absolutely standard provision in Freedom of Information laws, and the fact that it remains contentious here is a depressing reflection on the UK proposals.

The issue was raised during an earlier amendment to clause 15. This proposed that authorities should have to tell people whose requests they refuse that they have a right of complaint to the Commissioner.

The Parliamentary Secretary to the Lord Chancellor's Department argued that this would be dealt with under the existing provisions of clause 44.<sup>1</sup> Presumably he was referring to paragraph (e) of clause 44(2), which requires that the code of practice deals with:

*'the provision by public authorities of procedures for dealing with complaints about the handling by them of requests for information'*

This is an extremely limited provision. It would merely encourage authorities to set up their own internal complaints procedures. It may be implicit – it is certainly not *explicit* – that authorities would be expected to tell unsuccessful applicants about these procedures.

But nothing in the bill either requires, or even encourages, them to tell applicants of the right to complain to *the Commissioner*. This amendment would do so.

When the issue was discussed previously, the Parliamentary Secretary expressed concern that informing people prematurely might lead to the Commissioner being swamped by complaints which should, initially, have been made under an authority's internal procedure.

It is difficult to see why this should be a problem. Under the open government code, authorities are expected to tell unsuccessful applicants that a two stage complaints procedure exists. This merely involves saying that if they are unhappy at a decision they can ask for it to be reviewed internally. Thereafter, if still dissatisfied, they will be free to ask an MP to take their complaint to the Parliamentary Ombudsman. That is a simple message to communicate.

The danger of mentioning the first stage only, and deferring reference to the Commissioner until later, is that it will undermine public confidence in the Act. People will assume that *only* right they have is internal review. Many will have no confidence in such a remedy, assuming – fairly or unfairly – that it will be biased against them. They may not bother with it at all and abandon their complaints altogether.

People should know from the *outset* that they also can turn to the Commissioner. Knowing that, they are far more likely to give the internal procedure a try. This should not be merely a matter for guidance, but should be a legal requirement. Why should such a modest proposal be so difficult for the government to accept?

Ministers have several times referred to the dangers of this approach. They have claimed it would be bureaucratic, and burdensome for small authorities. If these bodies cannot give applicants a one sentence notification of their rights, when refusing them information, it is doubtful whether they will be capable of complying with any provision of the Act at all.

More than once ministers have argued that this kind of requirement would oblige a GP to tell

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<sup>1</sup> Standing Committee B, Sixth sitting, Thursday 20 January 2000, col. 162

a pharmaceutical company of its right to appeal. This misses the point in spectacular fashion. Pharmaceutical companies will be responsible for a tiny proportion, if any, of a GP's requests. Moreover, they know their rights already, and have expensive lawyers to lodge complaints if they are not fairly treated. It will be the *ordinary* public whose rights will be undermined by allowing authorities to withhold information without mentioning the right of complaint.

This issue should be dealt with on the face of the bill. But as a fall back, Amendment 165 proposes that it should be referred to in the code of practice.

**Amendment 166***Robert Maclennan/David Heath**Clause 44, page 24, line 2, at end insert 'and –*

- (f) *the collection and publication of statistics by public authorities concerning requests under this Act with which they have not complied'*

This amendment would require the Secretary of State to provide guidance on the collection and publication of statistics by authorities.

The amendment is deliberately modest in scope. It does not suggest that authorities monitor *all* requests, including those that they comply with fully. It directs itself only to monitoring of *refusals*. In many ways, those are the crucial figures. Without such information, obstructive authorities or those where decisions are in the hands of untrained staff, will go undetected.

The recent report of the Advisory Group on Openness in the Public Sector, which was chaired by the Parliamentary Under Secretary of State in the Home Office, came out in favour of such monitoring. It said:

*'the essence of monitoring on Freedom of Information is to identify cases in which information is not provided in response to an application, and establish whether the reasons for not doing so are sound and the number of decisions overturned.'*<sup>2</sup>

It went on to recommend that authorities should monitor their own refusals:

*'so that senior managers can determine whether requests for information are being dealt with satisfactorily.'*

It also called for complaints to the Information Commissioner to be monitored, and added:

*It would be useful to have a regional or national picture of requests for information that are refused by authorities and allowed after consideration by an authority's own complaints system. This would enable targets to be set for improving performance. The networks dealing with Freedom of Information would seem best placed to collect such statistics and make them available to the Home Office or the Information Commissioner*

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<sup>2</sup> Advisory Group on Openness in the Public Sector, Report to the Home Secretary, December 1999, paragraph 2.45

as required.<sup>3</sup>

As these passages are found in a report signed by the minister, the government is unlikely to have any difficulty with the thrust of Amendment 166. If there is any hesitation, then it may perhaps be whether the keeping of statistics should be dealt with in the Secretary of State's code of practice or left to the Commissioner's discretion to require as part of the publication schemes under clause 17.

It may be that a requirement to collect and publish statistics under a publication scheme would be the *more* effective route, since the Commissioner will be able to take enforcement action against an authority which fails to comply.<sup>4</sup> Failure to comply with the Secretary of State's code, on the other hand, can result only in a non-binding 'practice recommendation'.<sup>5</sup>

However, the committee is in some difficulty, as the Commissioner does not even exist as a legal entity at present, and cannot indicate what will be required.

In these circumstances dealing with statistics *both* under the Secretary of State's code of practice and under publication schemes, should the Commissioner later decide to, may be the best approach.

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<sup>3</sup> Paragraph 2.47

<sup>4</sup> Authorities are explicitly required to publish information in accordance with their publication schemes [clause 17(1)(a)] and a failure to do so may lead to enforcement action under clause 52.

<sup>5</sup> Under clause 47(1)

**CLAUSE 46****Amendment 167***Robert Maclennan/David Heath**Clause 46, page 25, line 10 at end insert**(2A) The Commissioner shall make publicly available, in such form as he considers appropriate, adequate details of*

- (a) the outcome of every investigation which he has carried out following an application under section 50; and*
- (b) any practice recommendation given under section 47(1)*
- (c) any discretionary disclosure recommendation given under section 48(1)*
- (d) any decision notice served under section 50(3)*
- (e) any enforcement notice served under section 52(1); and*
- (f) any action which he has taken under clause 53.*

*(2B) The details referred to in subsection (2A) shall include the name of any public authority to which they refer but the Commissioner is not required by that subsection to identify any individual who has exercised or sought to exercise any right under this Act or to make public any information the disclosure of which would be contrary to the public interest.'*

This amendment would require the Commissioner to publish details of the results of her investigations into complaints, and her formal decisions under the Act. Such publication is standard practice overseas. Generally, all decisions of Information Commissioners can now be found on the Internet. The Parliamentary Ombudsman's reports on open government cases have all been formally published, and all but the earliest cases are also available on the Internet.

Why should it be necessary to *require* the Commissioner to publish such information, as opposed to leaving it to her discretion?

One reason is the secrecy provision in the Data Protection Act, discussed earlier.<sup>6</sup> The bill would make it a criminal offence for the Information Commissioner to disclose information

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<sup>6</sup> Standing Committee B, Sixth Sitting, Thursday 20 January 2000, Part I, cols 174 onwards

about an identifiable business or individual without their consent, unless one of a number of strict requirements was met. In particular, it would have to be ‘necessary’ in the public interest or for the Commissioner’s functions. The government have said they are looking at this provision again. But as the bill stands, the Commissioner could be committing an offence by publishing information which might identify which Permanent Secretary or which minister is involved in an issue; or which public authority which is also a ‘business’ is involved in a complaint. *[Note: the relevant pages of the Campaign’s earlier briefing on this issue are attached]*

But no offence could be committed if the publication was

‘made for the purposes of, and is necessary for the discharge of any functions under this Act’.<sup>7</sup>

This amendment would ensure that all the information specified in paragraphs (a) to (f) *had* to be published, in the discharge of the Commissioner’s functions. It could therefore not involve an offence under the new secrecy clause. As a result, the Commissioner could not be restrained from revealing the *name* of an authority she had investigated, even if the authority was a business (such as a publicly owned corporation).

The amendment allows the Commissioner to publish the information ‘in such form as he considers appropriate’. She can publish ‘adequate details’ rather than full documents if she chooses. This would help to minimise any burden.

However, there is no obligation on the Commissioner to publish the names of individual applicants, or any other information whose disclosure would be contrary to the public interest.

The amendment combines maximum openness about the work of the Commissioner with a means of avoiding the unnecessary and oppressive provisions of the new secrecy clause.

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<sup>7</sup> Section 59, Data Protection Act 1998, which contains the offence that will be extended to the Information Commissioner as a result of paragraph 19 of Schedule 2 of the FOI bill.

**THIS IS AN EXTRACT FROM BRIEFING PAPER 3 WHICH DEALT WITH THE NEW  
SECRECY CLAUSE**

*This issue has already been debated, but may be helpful to have to hand in connection with Amendment 167*

**NEW SECRECY CLAUSE**

Schedule 2 of the FOI Bill makes the Commissioner subject to a new prohibition on disclosure of information about to come into force under the Data Protection Act 1998. The Commissioner and her staff could face criminal charges for disclosing certain kinds of information under the FOI Bill. Disclosures could only be made if they were 'necessary' for their functions or 'necessary' in the public interest. The 'necessary' test is a strict one, which may prevent disclosure by the Commissioner in many circumstances. The present Data Protection Registrar, who will become the first Commissioner, has herself expressed concern at it.

Under the section 59 of the DPA, the Data Protection Commissioner (as the Data Protection Registrar will become) will become subject to a statutory prohibition on the disclosure of certain information. Paragraph 19 of Schedule 2 of the FOI bill extends this prohibition to the Information Commissioner. The effect may be to prevent the Commissioner and her staff disclosing information about how or whether they are handling particular complaints, where this involves the release of information about identifiable businesses. This may become relevant where an authority has refused to disclose information about a particular company to an applicant. In some cases, businesses may be public authorities in relation to certain functions. (For example, private bodies with public functions can be brought within the scope of the bill by an order<sup>8</sup> in relation to specified functions. This might apply to bodies like Group 4, in relation to their prison contracts.)

The government maintains that it is obliged by the Data Protection (DP) Directive to create

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<sup>8</sup> Under clause 4(2)(a)

this offence – a view which the Registrar has disputed.<sup>9</sup> Whatever the legal position in relation to the DP Act, the offence cannot be required in relation to the Commissioner's *FOI functions*, since these do not flow from the directive or other Community obligation. The rationale for extending the offence appears to be based merely on an unnecessary preference for consistency.<sup>10</sup>

The prohibition of disclosure, which will apply to the Information Commissioner, in section 59 of the Data Protection Act, states:

Confidentiality of information.

59. - (1) No person who is or has been the Commissioner, a member of the Commissioner's staff or an agent of the Commissioner shall disclose any information which-

- (a) has been obtained by, or furnished to, the Commissioner under or for the purposes of this Act,
- (b) relates to an identified or identifiable individual or business, and
- (c) is not at the time of the disclosure, and has not previously been, available to the public from other sources,

unless the disclosure is made with lawful authority.

(2) For the purposes of subsection (1) a disclosure of information is made with lawful authority only if, and to the extent that-

- (a) the disclosure is made with the consent of the individual or of the person for the time being carrying on the business,
- (b) the information was provided for the purpose of its being made available to the public (in whatever manner) under any provision of this Act,
- (c) the disclosure is made for the purposes of, and is necessary for, the discharge of-
  - (i) any functions under this Act, or
  - (ii) any Community obligation,
- (d) the disclosure is made for the purposes of any proceedings, whether criminal or civil and whether arising under, or by virtue of, this Act or otherwise, or

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<sup>9</sup> Article 28.7 of the Data Protection directive states: 'Member States shall provide that the members and staff of the supervisory authority, are to be subject to a duty of professional secrecy with regard to confidential information to which they have access.' However, the Data Protection Registrar has said: 'The Registrar does not believe that the Directive requires the criminal provisions provided by clause 54 [now section 59] She believes that the existing law combined with appropriate conditions in staff contracts will satisfy the requirements of Article 28.7.' *Data Protection Registrar, 'Data Protection Bill. Criminal disclosures by the Commissioner's Staff.'* 29.1.98

<sup>10</sup> Because FOI requests by an individual for his or her own data will be dealt with under the DP Act, not the FOI bill. The two laws and regimes will remain separate, despite the fact that for convenience they share a single enforcement regime.

(e) having regard to the rights and freedoms or legitimate interests of any person, the disclosure is necessary in the public interest.

(3) Any person who knowingly or recklessly discloses information in contravention of subsection (1) is guilty of an offence.

The effect of this provision is to expose the Commissioner to risk of prosecution if she discloses information obtained under the FOI Bill about an identifiable individual or business (and the latter will be the real issue) without their consent, unless the information was supplied in order for her to publish it or the disclosure was for the purpose of legal proceedings. In any other circumstance, the Commissioner would have to show that one of two conditions could be met.

The first, is that the disclosure is 'necessary' for the discharge of any of the Commissioner's functions. This is a strict test. If the function can be discharged without releasing the information, disclosure may not be 'necessary'. It may not be possible to show that it is be 'necessary' for the Commissioner to identify a company which was opposing disclosure of information about defective products, safety problems or discriminatory employment practices, if the Commissioner could still discharge her function by referring to it anonymously.

The second is that the disclosure is 'necessary' in the public interest, having regard to the 'the rights and freedoms or legitimate interests' of any person. This would no doubt protect a disclosure made to the applicant or someone else with a direct interest. But it would leave open the possibility of an offence if disclosure was made to the press or public generally. Again, the problem is that 'necessary' means that the rights, freedoms or legitimate interests of any person would be *harmed* if the information could not be disclosed, *and* that this would be contrary to the public interest. Disclosure in the interests of the accountability of the authorities to whom FOI requests are made, or the accountability of the Commissioner herself, may not pass the 'necessity' test. A purpose clause, which made clear that the bill was intended to promote accountability, could provide some statutory safeguard. However, the government has resisted such a provision.

**The most objectionable element of the restriction is that it contains no harm test. The offence is not limited to the disclosure of trade secrets or commercially damaging information, but could be caused by a *harmless* disclosure of information about an identifiable business. The perverse consequence would be that information about a business which an *authority* would *have* to disclose under the bill (because it did not reveal a ‘trade secret’ or ‘prejudice the commercial interests’ of the business concerned<sup>11</sup>) could result in the Commissioner being convicted of a criminal offence if *she* disclosed it.**

At the time of the Data Protection Bill’s passage the Registrar commented:

‘The effect of clause 54<sup>12</sup> is potentially to criminalise disclosures of information relating to an identifiable business in circumstances where it could not sensibly be maintained that this could cause any harm. For example, where a journalist queries the lawfulness of a company’s processing activities, a member of the Commissioner’s staff could commit a criminal offence simply by confirming that the company had discussed the processing in question with the Registrar because this disclosure is clearly not absolutely necessary for the discharge of the Commissioner’s functions under the Act. The Registrar has always sought to be as open as possible with the Press. She is aware of no evidence that this has caused any individual or company significant harm. She is therefore concerned that this clause could require her and her staff to be unnecessarily guarded in future.’<sup>13</sup>

Such a restraint on the *Data Protection* Commissioner’s dealings with the press would be undesirable. To restrain the *Information* Commissioner should be unthinkable. It could undermine her ability to explain the basis of her approach. Any suggestion of secrecy on the part of the Commissioner could damage the credibility of the legislation itself.

During the DP Bill’s passage, the government suggested that the Data Protection Commissioner’s general power to disseminate information (and the Information Commissioner would have the identical power) would protect the Commissioner in making

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<sup>11</sup> Clause 41(2)

<sup>12</sup> Now section 59

<sup>13</sup> *Data Protection Registrar, ‘Data Protection Bill. Criminal disclosures by the Commissioner’s Staff.’ 29.1.98*

any necessary disclosures<sup>14</sup>. However, the minister himself suggested that this would allow the publication of ‘anonymised’ information – implying the disclosure of company-specific information would be constrained.<sup>15</sup>

A similar general power to publish information, coupled with a specific prohibition of disclosures appears in the Health & Safety at Work Act. The Health & Safety Commission and Executive have long maintained that this prevents them disclosing information obtained under their powers unless disclosure is strictly necessary for health and safety purposes. In their view this does not permit disclosures to the press or to people whose safety is not directly at risk.

As the Data Protection Bill went through Parliament, a slight improvement on the original proposals was made, after concerns were raised by John Greenway and Richard Shepherd.<sup>16</sup> The then Home Office minister, George Howarth, promised to see whether more could be done to relax the restriction when the FOI bill was introduced.<sup>17</sup> It has been government policy since the Conservatives’ 1993 *Open Government* white paper, that newly created statutory restrictions on disclosure should wherever possible contain ‘harm tests’.<sup>18</sup> The FOI

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<sup>14</sup> Section 52(2) of the Data Protection Act 1998 gives the DP Commissioner the function of arranging for the dissemination of ‘such information as it may appear to him to be expedient to give to the public about the operation of this Act, about good practice, and about other matters within the scope of his functions under this Act’. An identical provision is found in clause 46(2) of the FOI bill.

<sup>15</sup> George Howarth, Parliamentary Under Secretary of State, Home Office, said: ‘Clause 51 places general duties on the commissioner to promote good practice and to disseminate material that she considers appropriate, about the operation of the Act, good practice and any other matters within the scope of his [sic] functions. *Anonymised information* from assessments may appear in one of those contexts...’ (italics added). Hansard (Commons), 2/7/98, col. 603

<sup>16</sup> What is now section 59(2)(e) of the bill originally required that a disclosure would only be lawful if necessary for reasons of ‘substantial’ public interest. The government later agreed to remove the word ‘substantial’. See also the attached correspondence between the Campaign for Freedom of Information and Home Office ministers.

<sup>17</sup> Mr Howarth said: ‘The hon. Gentleman argued that clause 59 could, perhaps, go further, and we did consider whether there was further scope for easing the restrictions that the clause imposes while keeping it consistent with the directive. So far, we have been unable to find a way to do that, but we shall certainly continue to have regard for that point as we continue our work on freedom of information. If we can identify any way in which restrictions can properly be eased, we shall bring forward any necessary amendment in freedom of information legislation. There is scope to revisit the point within that framework, provided that we can find a suitable way to achieve what the hon. Gentleman and the Government want.’ [Hansard, Commons, 2/7/98, col. 603]

<sup>18</sup> ‘A harm test is a way of ensuring that no-one is penalised for disclosing information if it is not genuinely confidential. It does this by asking whether harm or damage has resulted, or is likely to result, from the disclosure. If the answer is “no”, then a prosecution for unauthorised disclosure of

bill is itself intended to be accompanied by the repeal of excessive statutory restrictions<sup>19</sup>. Instead, ministers have achieved what should have been unthinkable, and arranged for this unnecessary and damaging provision, so incompatible with the spirit of an FOI Act, to be extended to the FOI Commissioner herself.

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information will not succeed...The Government proposes to assess the case for harm tests in all future legislation on disclosure...The presumption will be in favour of inclusion of a harm test unless there are compelling public interest arguments against it'. *Open Government White Paper*, Cm 2290, July 1993 , paras 8.37 to 8.40

<sup>19</sup> Clause 74. The Home Office consultation document stated: 'this power allows the Secretary of State to amend or repeal any current bars to disclosure in other legislation to facilitate greater openness. A review of these provisions is under way and some repeals will be included in the legislation, where they have been identified before introduction of the Bill into Parliament'. [paragraph 62]

**Amendment 168**

*Robert Maclennan/David Heath*

*Clause 46, page 25, line 11*

*Leave out from 'may' to 'authority' in line 12 and insert 'assess whether any public'*

Clause 46(3) provides that the Commissioner 'may, with the consent of any public authority, assess whether the authority is following good practice'.

Amendment 168 removes the requirement that the Commissioner has *the consent* of the authority in order to carry out such an assessment. Such assessments involve checking whether the terms of the codes of practice under clauses 44 and 45 are being complied with. The Commissioner would be able to assess compliance without consent.

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## FREEDOM OF INFORMATION BILL

House of Commons Committee Stage

### BRIEFING PAPER 9

Amendments to Clauses 50 - 52

7 February 2000

**Hon. President:** Godfrey Bradman  
**Co-Chairs:** James Cornford, Neil McIntosh  
**Director:** Maurice Frankel

**Parliamentary Co-Chairs:** Helen Jackson MP  
Archy Kirkwood MP  
Richard Shepherd MP

## CLAUSE 50

### Amendment 169

*Robert Maclennan/David Heath*

*Clause 50, page 26, line 33, leave out 'exhausted' and insert 'taken reasonable steps to raise the matter in accordance with'*

Clause 50(2)(a) requires the Commissioner to investigate a complaint

'unless it appears to him...that the complainant has not exhausted any complaints procedure which is provided by the public authority in conformity with the code of practice under section 44'

The complainant would normally have to 'exhaust' an internal complaints procedure before he or she could be certain that the Commissioner would look into a complaint.<sup>1</sup>

The amendment would remove the duty to '*exhaust*' the internal procedure, and require only that the applicant '*had taken reasonable steps to raise the matter in accordance with*' the internal procedure.

This recognises that some authorities may introduce unreasonably complex and long-winded internal procedures. Requiring the applicant to 'exhaust' these may place impossible obstacles in the applicant's path. It is not known what kind of internal appeals processes will be set up, since these will be a matter for the code of practice under clause 44. However, an authority which adopts an *unreasonable* complaints mechanism which does *not* comply with the code cannot be forced to change it by the Commissioner, who will only be able to issue a non-binding practice recommendation.<sup>2</sup>

When the open government code was introduced, most departments adopted a single stage

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<sup>1</sup> Clause 50(1) may not *prohibit* the Commissioner from accepting a complaint which has *not* exhausted the internal complaints procedure. But it indicates that this will normally be expected, regardless of whether the complaints process or the handling of the complaint has been reasonable.

<sup>2</sup> Clause 47(1)

process of internal review. However, a few, such as the Department of Trade and Industry and Ministry of Defence, required applicants to go through *two stages* of internal review before they could approach the Ombudsman – first to the official who took the original decision, then to a more senior person (though these procedures have since been revised). On one occasion, the DTI *took 97 working days* to deal with a complaint under this 2-stage procedure.

The Northern Ireland Office originally had a process involving as many as *four* separate appeal stages. Its Environment Department's procedure stated:

“The formal procedure for internal review of appeals against disclosure of information is as follows. Initial appeal will be to the Grade 7 in charge of the Branch which dealt with the request. Heads of Division may wish to review the decision to deny access to the information at this stage in conjunction with the Central Management Branch, or as necessary with the Departmental Solicitor. If not satisfied with this review, the applicant will be entitled to ask the Under Secretary with lead policy responsibility to review further the decision to refuse access. If the applicant is still not satisfied the Permanent Secretary may be asked to arbitrate and in extremis the case may be referred to the Minister. If the applicant is still not satisfied the Ombudsman may be involved in reviewing the Department's decision.”

In some cases, the use of an internal complaints process may itself be unreasonable. If the initial decision to refuse a request is taken by a junior minister, is the applicant expected to apply to the Secretary of State for a review? Who does the applicant appeal to if the initial decision was made by Secretary of State?

Applicants should not have to ‘exhaust’ an *unreasonable* appeal process. Note that the Commissioner will have no direct power to require an unreasonable complaints process to be changed. This will be subject only to a non-binding practice recommendation. The amendment would provide that ‘reasonable efforts’ to comply with the complaints procedure would be sufficient.

**Amendment 61***Mark Fisher**Clause 50, page 27, line 19, leave out subsection (7)***Amendment 62***Mark Fisher**Clause 52, page 28, line 29 leave out subsection (2)*

These amendments would give the Information Commissioner the power to order disclosure on public interest grounds.

Clause 50 allows the Commissioner to issue a *decision notice* in response to an individual's complaint, which can compel an authority to comply with the Act. Clause 52 provides for *enforcement notices*, which can be used in the absence of a specific complaint. But clauses 50(7) and 52(2) provide that neither notice can be used to compel the disclosure on *public interest* grounds. All the Commissioner can do is require an authority to *reconsider* a decision, taking account of particular matters,<sup>3</sup> and issue a non-binding 'discretionary disclosure recommendation'.<sup>4</sup>

Amendments 61 and 62 remove these restrictions. The Commissioner would have the same power in relation to questions of public interest as she has in determining whether information is exempt.

The amendments address the crucial weakness at the heart of the bill. Vast areas of information will be exempt under the bill's class exemptions, even though disclosure may not be capable of causing harm. The only chance of disclosure will be if the authority chooses to make a discretionary disclosure in the public interest. If it decides not to, and the matter goes to the Commissioner, she will only be able to recommend, not require, disclosure.

In other areas, the potential harm may be clearly outweighed by a much greater public interest in disclosure. But the public authority, not the Commissioner will have the final say.

A related point on which clarification might be sought is the extent to which the public interest test will apply where information is refused on cost grounds. Clause 13(1)(a)(ii)

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<sup>3</sup> Clause 50(7) and 52(2)

<sup>4</sup> Clause 48

indicates that this will occur. But the balancing test in clause 13(4) deals only with cases where exempt information is involved. It does not apply to information refused on cost grounds. This may only be a drafting oversight.

Where the class exemptions are involved, the bill provides a discretionary system of disclosure similar to that in the open government code. This is a point made by the House of Lords select committee which reported:

“If the ultimate decision whether information is exempt from such a right of access is made by a government Minister or public authority rather than by an independent arbiter, the law may be regarded as a statement of good intentions, but it is not a Freedom of Information Act as that term is internationally understood”<sup>5</sup>

The Public Administration select committee said:

“In this crucial sense, the Bill continues the present discretionary system of the Code of Practice—it is ‘open government’ and not ‘freedom of information’”<sup>6</sup>

Other countries’ Freedom of Information laws do not distinguish between decisions on whether an exemption applies, and whether the public interest nevertheless justifies disclosure. A single binding decision is made by the enforcing body.

The proposed Scottish FOI Act will allow Scotland’s Information Commissioner to make legally binding rulings on disclosure in the public interest, where harm-tested exemptions are involved.<sup>7</sup> This is a major improvement over the UK bill. The test of harm in these cases will be whether disclosure “substantially prejudices” particular interests, a tougher test than the “prejudice” test used in the UK bill.

In Scotland, the Commissioner’s rulings on public interest in relation to *class* exemptions will be subject to a collective ministerial veto, which must be approved by the entire cabinet. This is not a satisfactory solution, but it does at least represent a modest improvement over the UK veto, which can be exercised by any single minister without reference their colleagues.

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<sup>5</sup> Report from the Select Committee Appointed to Consider the Draft Freedom of Information Bill. Session 1998-1999, HL 97, paragraph 21

<sup>6</sup> Select Committee on Public Administration, 3rd report Session 1998-99, ‘Freedom of Information Draft Bill’, HC 570-I, paragraphs 31-32

<sup>7</sup> Scottish Executive, ‘An Open Scotland. Freedom of Information, a Consultation’, November 1999, SE/1999/51 Paragraph 6.5

Ireland's Freedom of Information Act 1997 contains public interest tests in many of its exemptions.<sup>8</sup> In each case, the Information Commissioner makes a legally binding ruling. These rulings cannot be overturned by ministers and can be challenged only by appeal to the High Court on a point of law.<sup>9,10</sup>

New Zealand's Official Information Act 1982 also contains public interest tests for many of its exemptions.<sup>11</sup> The Act is enforced by the Ombudsman, whose recommendations are legally binding. They can, however, be overridden by a collective veto of the whole cabinet. Originally, the Act allowed an individual minister to exercise a veto. The government had argued that political pressure would effectively deter use of the veto and that '*it would be a very brave Minister indeed who resorted to this device save in the most exceptional circumstances*'.<sup>12</sup> The same argument is currently being advanced in the UK to suggest that ministers will not be prepared to ignore the Information Commissioner's recommendations.

In fact the New Zealand veto was exercised seven times in the first six months of the Act's life. They were issued so regularly the system was overhauled in 1987, to make the veto more difficult to exercise. The new restrictions have been so successful that not a single veto has been used since 1987.<sup>13</sup> There is no parallel to these restrictions in the UK bill. On the

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<sup>8</sup> A public interest test applies to the exemptions for policy advice, commercial confidentiality, negotiations, the economic and financial interests of the state and public bodies, personal information, research and the protection of natural resources.

<sup>9</sup> Freedom of Information Act 1997 (Ireland), section 42

<sup>10</sup> The Irish Act does contain some provisions for ministerial certificates, but only in relation to security, defence, international relations and law enforcement – exemptions which do not (with one minor exception) include a public interest test. A certificate prevents a ministerial claim for exemption being reviewed by the Commissioner. However, they can only be issued where a record is "of sufficient sensitivity or seriousness" to justify it and are subject to judicial review on a point of law. They lapse after 6 months unless reviewed and endorsed by the Prime Minister, acting jointly with other prescribed ministers (other than the minister who issued the certificate).

<sup>11</sup> Exemptions subject to a public interest test include those dealing with the confidentiality of advice, collective ministerial responsibility, the confidentiality of communications with the Sovereign, trade secrets and commercial interests, confidential information, commercial and industrial negotiations, the economy, protection of health and safety, privacy and legal professional privilege. *Official Information Act 1982 (New Zealand), section 9*

<sup>12</sup> The comment was made by the then Minister of Justice.

<sup>13</sup> The process now requires the government to act collectively, setting out the veto in an Order in Council made within 21 days of the Ombudsman's decision. The Order in Council must be published in the official *Gazette* and laid before the House of Representatives. It must state the reasons for the veto and these may not rely on arguments not placed before the Ombudsman at the time of his

contrary, the bill's arrangements are *weaker* than those which the New Zealand government itself rejected in 1987.<sup>14</sup>

The Information Commissioner designate, Elizabeth France, the current Data Protection Registrar, has said the ability to make recommendations on public interest disclosure is an improvement on the draft bill (which did not provide for this). But she has repeated the view she gave in evidence to the Public Administration committee:

'In the Registrar's view the preferable solution would be the one she described to the Select Committee. "I think the simple remedy is to allow discretionary decisions to be reviewable and an enforcement notice issued if the Commissioner's view is that in spite of preliminary discussion about the balance the public authority has given, what the Commissioner believes to be the wrong weight [has been given] to some of the elements considered."<sup>15</sup>

By allowing authorities the final say on whether disclosure is in the public interest, the bill would allow authorities to cover up their own misconduct. Under the bill:

- British Nuclear Fuels would have the final say on the public interest in disclosing evidence about its own failure to tackle nuclear safety problems at Sellafield
- The Bristol Royal Infirmary would decide whether it was in the public interest to reveal that its surgeons were responsible for the deaths of children undergoing heart surgery
- Dame Shirley Porter would decide whether it was in the public interest to reveal details of Westminster City Council's unlawful council house sales policy. Doncaster Council would decide whether the public interest justified revealing the illegal expenses claims made by councillors
- Ministers who had misled Parliament would decide themselves whether it was in the public interest to reveal the true position. The Scott inquiry reveals how ineffective this

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investigation. An Order in Council may be challenged in the High Court on the grounds that the decision to issue it was wrong in law. Regardless of the outcome the legal costs of such a challenge must be paid by the Crown, unless the action was unreasonable.

<sup>14</sup> Under the original New Zealand Act, the Ombudsman's recommendations were *legally binding* unless vetoed by a minister. Under the bill, the Commissioner's recommendations on public interest are not legally binding at all. Moreover, they can simply be ignored – there is no requirement on a minister or authority even to formally reject them.

<sup>15</sup> Discretionary Disclosure Recommendations. Comment by the Data Protection Registrar, 16/12/99

remedy is likely to be.

If an authority felt that an enforcement notice on the question of public interest was unjustified, it could appeal against it to the Tribunal,<sup>16</sup> and subsequently challenge the Tribunal's decision on a point of law in court.<sup>17</sup> This would provide the Government with a far greater degree of protection than exists in other countries.<sup>18</sup>

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<sup>16</sup> Clause 56

<sup>17</sup> Clause 58

<sup>18</sup> For example, Ireland's Information Commissioner makes legally binding decisions on issues of public interest which cannot be challenged on their merits at all. The only right of appeal is to the High Court on a point of law.

## CLAUSE 51

### Amendment 170

*Robert Maclennan/David Heath*

Clause 51, page 27, line 40

*after 'information' insert '(whether or not already recorded)'*

This amendment would allow the Information Commissioner to use an information notice to obtain *unrecorded* information and not just existing records.

Clause 51(1) allows the Commissioner to issue a notice requiring a public authority to supply her with '*such information relating to the application, to compliance with Part 1 or to conformity with the code of practice*' as is specified in the notice.

However, the information she can demand is limited by the definition in clause 82. That states:

“information” means information recorded in any form’

The Commissioner will not therefore be able to insist that authorities supply information which is known to them but not recorded. If files which were ‘signed out’ to a particular official can no longer be found, the Commissioner will not be able to insist that the official accounts for their absence. If an official claimed that particular information would prejudice a company’s commercial interests, but did not ask the company itself, the Commissioner will not be able to ask why the official felt able to take such a decision without consultation.

The Commissioner should have the power to *question* officials, under oath if necessary. Comparable bodies, in the UK and overseas, have such powers. The Parliamentary Ombudsman has:

‘the same powers as the Court in respect of the attendance and examination of witnesses (including the administration of oaths or affirmation and the examination of witnesses

abroad) and in respect of the production of documents'<sup>19</sup>

An inspector from the Health and Safety Executive has the power:

'to require any person whom he has reasonable cause to believe to be able to *give any information* relevant to any examination or investigation...*to answer...such questions* as the inspector thinks fit to ask and to sign a declaration of the truth to his answers'<sup>20</sup>

The Comptroller and Auditor General has:

'a right of access at all reasonable times to all such documents as he may reasonably require...and shall be entitled to require from any person holding or accountable for any such document *such information and explanation* as are reasonably necessary for that purpose.'(emphasis added)<sup>21</sup>

Canada's Information Commissioner has the power:

'to summon and enforce the appearance of persons...and compel them to give *oral or written evidence* on oath'<sup>22</sup>

Ireland's Information Commissioner has the power:

'to require any person who, in the opinion of the Commissioner, is in possession of information, or has a record in his or her power or control, that, in the opinion of the Commissioner, is relevant to the purposes aforesaid *to furnish to the Commissioner any such information* or record'<sup>23</sup>

The lack of this power may leave the UK's Commissioner unable to properly pursue a necessary line of questioning, and allow authorities to refuse to answer questions without good reason. This amendment would correct that defect.

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<sup>19</sup> Parliamentary Commissioner Act 1967, section 8(2)

<sup>20</sup> Health & Safety at Work Act 1974, section 20(2)(j)

<sup>21</sup> National Audit Act 1983, section 8(1)

<sup>22</sup> Access to Information Act 1982 [Canada] section 36(1)

<sup>23</sup> Freedom of Information Act 1997 [Ireland], section 37(1)(a)

**CLAUSE 52****Amendment 171***Robert Maclennan/David Heath*Clause 52, page 28, line 24*after 'I' insert 'or with a practice recommendation under section 47(1)'*

This amendment would make the Commissioner's practice recommendations legally binding.

A practice recommendation can be issued where an authority fails to comply with the codes of practice issued by the Secretary of State under clause 44 or by the Lord Chancellor under clause 45. A practice recommendation might be made because an authority is-

- behaving obstructively and failing to advise applicants how to exercise their rights<sup>24</sup>
- recklessly disclosing trade secrets without consulting the owner of the data as envisaged in guidance<sup>25</sup>
- agreeing to confidentiality clauses in contracts without good reason<sup>26</sup>
- refusing information without informing applicants of their rights to complain<sup>27</sup>

In such cases the Commissioner could only issue a non-binding practice recommendation under clause 47(1). An authority which ignored a recommendation and continued to act contrary to the guidance would face no penalty. This amendment would allow the Commissioner to issue an enforcement notice in relation to such infractions. If the authority thought a notice was unjustified, it could challenge the notice by appeal to the Tribunal.<sup>28</sup> Otherwise, it would be obliged to comply.

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<sup>24</sup> See clause 44(2)(a)

<sup>25</sup> Clause 44(2)(c)

<sup>26</sup> Clause 44(2)(d)

<sup>27</sup> Clause 44(2)(e)

<sup>28</sup> Clause 56

# The Campaign for Freedom of Information

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## FREEDOM OF INFORMATION BILL

House of Commons Committee Stage

BRIEFING PAPER 10

Remaining amendments

8 February 2000

**Hon. President:** Godfrey Bradman  
**Co-Chairs:** James Cornford, Neil McIntosh  
**Director:** Maurice Frankel

**Parliamentary Co-Chairs:** Helen Jackson MP  
Archy Kirkwood MP  
Richard Shepherd MP

## CLAUSE 61

### **Amendment 177**

*Robert MacLennan*

Clause 61, page 31, line 7, leave out subsection (2).

Part VI of the bill brings the arrangements for access to historical records into a common system with FOI. The FOI bill will apply retrospectively, to old records, including those which have not reached the normal 30 year date for release in the Public Record Office. Individual old records can be applied for under the Act, and complaints about non disclosure made to the Commissioner. This is a significant advance on the old system.

Clause 61(1) provides that a record becomes a ‘historical record’ 30 years after it was created. This is the point at which many records will become publicly available. However, clause 61(2) provides that where records are filed together, the 30 year period starts from the date at which the *last* record in the file was created. Amendment 177 would repeal clause 61(2), so that records become ‘historical records’ after 30 years regardless of the age of the surrounding paperwork,

A record created in 1971 would, if filed on its own, become a ‘historical record’ in 2001. But if it was kept in a file to which records were added until, say, 1985, it would not become a historical record until 2016. It would be withheld from the public for 45 years instead of 30 years.

Clause 61(2) is identical to section 10(2) of the 1958 Public Record Act, which has the effect of allowing files in the Public Record Office to be withheld from the public until 30 years after the *whole file* was closed. This allows the PRO to release files when the whole file is at least 30 years old – allowing it to deal with the release of entire files rather than individual documents. There is presumably a significant administrative savings in allowing the routine ‘declassification’ of an entire year’s worth of government records to be based on the age of the file rather than the age of each individual document in it.

However, clause 61(2) does not appear to be restricted to decisions about the *annual* release of documents in the PRO – though ministers might be asked to confirm that this is the case. Clause 61(2) appears to include FOI requests for *individual* records. If someone asks for a *specific* document which itself is 30 years old, that document might be released if filed on its own. But if it is in a folder with more recent papers, it could be withheld until the more recent papers reach the age of 30 years. This would be highly unsatisfactory.

There is another cause for concern. At first glance, clause 61(2) appears to deal with *paper* files. But might it also apply to *computerised* files as well? The provision refers to records created at different dates which for administrative purposes are:

‘kept together in one file or other assembly’

Computerised files presumably count as an ‘assembly’ of records. The term is not defined but appears to mean any collection of records. Could it include *all* the records held on a computer system? If the system involved a network, does the network become an ‘assembly’? Could the clause mean that no electronic records become historical records until 30 years after the *computer system itself* ceases to be used? This would clearly be unacceptable. It raises the question of whether the concept of ‘an assembly’ of records makes sense at all in the electronic age.

## CLAUSE 62

### Amendment 178

*Robert MacLennan*

#### Clause 62, page 31, line 13

*leave out from 'section' to end of line 13 and insert 26, 27, 28(1), 30, 31, 32, 33, 34, 35(1)(a), 37, 40, 41 or 42(1)(a)'*

This amendment adds to the list of exemptions which are automatically lifted once a record becomes a historical record.

The list of exemptions lifted after 30 years is set out in clause 62(1). It covers:

- Information which might prejudice relations between devolved administrations [clause 26]
- Information covered by the class exemption for investigations [clause 28(1)], although such information could still be withheld under clause 29 if disclosure would prejudice law enforcement or other interests
- Information covered by the class exemption for records supplied to an authority by a court or tribunal [clause 30]
- Information which could prejudice an authority's auditing functions [clause 31]
- Information covered by the class exemption for the development of government policy [clause 33]
- Information which in an authority's reasonable opinion could prejudice the effective conduct of public affairs [clause 34]
- Communications with the Royal Family [clause 35(1)(a)]
- Legal professional privilege [clause 40]

- Information which might prejudice commercial interests [clause 41]

It is far from clear why these exemptions should be lifted after 30 years, while certain others continue well past that date, in some cases, indefinitely.

Amendment 178 would add three more exemptions to the list of those that cease to apply when a record becomes a historical record. These are:

### **Clause 27 – the Economy**

Clause 27 applies to information whose disclosure would prejudice the economic interests of the UK or the financial interests of any devolved administration.

Could information which might have prejudiced the country's economic interests *30 years ago* still do so today? It is difficult to believe that anything discussed by Harold Wilson's government in 1970 could damage the economy if disclosed today. If economic issues to do with negotiations over Europe were involved, and these were still thought sensitive today – an unlikely conclusion anyway – the sensitivity would surely be on grounds of harm to international relations not the economy. This exemption could presumably be lifted after 30 years.

### **Clause 32 – Parliamentary privilege.**

This would presumably apply to such things as notes of the private deliberations of select committees, and drafts of their reports. If the public can see cabinet documents once they are 30 years old, it is hard to see why a select committee's internal minutes, and similar materials, could not also be released

### **Clause 37 – environmental information**

Environmental information is exempt under the bill merely because a separate, better right of access to it is expected to arise under regulations implementing the Aarhus Convention. However, these regulations will themselves contain exemptions which will allow much environmental information to be withheld. The bill appears to allow records containing information about the environment to be withheld long after the 30 year cut-off. Indeed, they can apparently be withheld indefinitely. The amendment would prevent

them being withheld after 30 years.

Clause 62, page 31, line 17

*Leave out 'section' and insert 'sections 24, 25, 29 and'*

At present, the bill lifts certain exemptions after particular lengths of time:

- A number of exemptions are lifted after 30 years<sup>1</sup>
- One exemption, about the conferring of honours, is lifted after 75 years.<sup>2</sup>
- A further exemption, for information which would prejudice law enforcement or the other matters referred to in clause 29, is lifted after 100 years.<sup>3</sup>

All other exemptions could in theory apply indefinitely.

This amendment would move three exemptions – for defence,<sup>4</sup> international relations,<sup>5</sup> and harm to law enforcement and other interests protected by clause 29 - from the indefinite category (in the case of the first two) and the 100 year category (in the case of the third<sup>6</sup>) to the 75 year category. All three amendments have harm tests, so information could be disclosed at any time if the disclosure would not prejudice the interest concerned. This amendment proposes that in any case these exemptions should automatically lapse once a record reached the age of 75 years.

That is itself an extremely modest proposal. In today's context it would mean that no record created *before 1925* could be withheld on the grounds of prejudice to Britain's defences, international relations or law enforcement. It seems inconceivable that such concerns could still require secrecy after all that time.

The one possible justification for prolonged secrecy would be if someone's safety could

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<sup>1</sup> Clause 62(1)

<sup>2</sup> Clause 62(3)

<sup>3</sup> Clause 62(4)

<sup>4</sup> Clause 24

<sup>5</sup> Clause 25

<sup>6</sup> See clause 62(4)

be endangered, for example, if the families of informants faced reprisals decades after the event. For this reason exemption 36, for information which could endanger an individual's safety, would continue to apply indefinitely. These amendments do not seek to lift clause 36 after any time, even 100 years.

## Amendment 179

Robert Maclennan

Clause 62, page 31, line 20, at end insert –

*‘(3A) Information contained in a historical record cannot be exempt information by virtue of section 21 unless its disclosure would, or would be likely to, prejudice national security’*

Clause 21 contains a class exemption for all information supplied by, or relating to specified security bodies. Such information:

- remains exempt indefinitely under the bill
- is not subject to the bill’s public interest test.<sup>7</sup>
- is exempt regardless of harm. Although the clause contains provision for a ministerial certificate, the certificate merely indicates that the information *relates to* the specified bodies. Unlike the certificates which may be issued under the following clause [22(3)] they do not signify that a minister believes that national security could be endangered by disclosure.

Amendment 179 would allow the class exemption for information about these bodies to continue for 30 years. However, once the record became a ‘historical record’ (ie became 30 years old), it could be withheld only if its disclosure would prejudice national security.

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<sup>7</sup> Clause 13(1)(a) expressly excludes clause 21 from the public interest test

## Amendment 180

Robert MacLennan

Clause 62, page 31, line 20, at end insert-

*‘(3A) Information contained in a historical record cannot be exempt information by virtue of section 38(2) after the end of a period of seventy-five years beginning with the year following that in which the record containing the information was created unless its disclosure would cause substantial distress to the individual to whom it relates or that individual’s descendants’<sup>8</sup>*

This amendment should be regarded as a probing amendment. It raises the question of how long personal information is to be exempt. Clause 62 makes no reference to this class of information.

Under the bill at present, the exemption for personal data in clause 38 applies only to information about *living* individuals.<sup>9</sup> Once the individual had died, clause 38 no longer applies.

The information would have to be disclosed unless *another* exemption applied. Some personal data obtained by government is subject to a statutory prohibition on disclosure: this applies to information supplied to the Inland Revenue or Department of Social Security. This information would be exempt under clause 42(1)(a).

Some personal data may have been obtained subject to an obligation of confidentiality, and be exempt under clause 39. However, where it had been obtained from and related to an individual who had died, the exemption would not apply. An obligation of confidentiality presumably could not exist towards someone who had died.

The current Public Record Office policy on disclosure of personal information was set out in the 1993 *Open Government* white paper.<sup>10</sup> This provides that records containing personal information will normally be closed to the public from between 40 and 100 years. The decision on disclosure will depend on whether disclosure would cause

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<sup>9</sup> This is because the term ‘personal data’, is defined in clause 38(7) as having the same meaning as in section 1 of the Data Protection Act 1998. That makes clear that only information about a living individual can be ‘personal data’

‘substantial distress’ to the individual concerned or his or her descendants, or would expose the individual to danger.

It is not clear whether the white paper criteria will continue to operate once the FOI bill is in place, or whether alternative criteria will be adopted. The amendment seeks to probe this, by proposing to limit the protection for personal data to a maximum of 75 years, unless disclosure thereafter would cause substantial distress – the 1993 white paper test.

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<sup>10</sup> Cm 2290, Annex C

## Amendment 181

Robert Maclennan

Clause 62, page 31, line 20 at end insert -

*‘(3A) Information contained in a historical record cannot be exempt information by virtue of section 39 -*

- (a) if was obtained from another public authority, or*
- (b) unless its disclosure would constitute a breach of good faith.’*

The bill makes no specific reference to when information supplied in confidence becomes a ‘historical record’. Presumably, information would remain exempt so long as disclosure might still constitute an actionable breach of confidence.

The amendment lifts this exemption after 30 years for information supplied in confidence by another public authority. Once the 30 year point had been passed, such information could no longer be withheld on those grounds.

Information supplied in confidence by anyone else, would only be exempt after 30 years if the disclosure at that point would (a) constitute an actionable breach of confidence *and* (b) be a breach of good faith.

The reference to ‘breach of good faith’ is taken from the current PRO criteria. Under these criteria, information can only be withheld for longer than 30 years if its disclosure ‘*would cause actual harm*’<sup>11</sup>

The harm test, for information supplied in confidence, is that disclosure would be a breach of good faith. This test was established under the 1993 white paper, which stated that one of the permitted categories of extended closure would apply to:

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<sup>11</sup> *Open Government*, Cm 2290, paragraph 9.12

‘information supplied in confidence the disclosure of which would or might constitute a breach of good faith’<sup>12</sup>

It may be unlikely that an obligation of confidentiality would continue to apply to information supplied more than 30 years previously. Where it did, the second test – that there be a breach of good faith – would also now apply.

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<sup>12</sup> *Open Government*, Cm 2290, paragraph 9.15

**Amendment 183**

*Robert MacLennan*

Clause 62, page 31, line 21 leave out subsection (4).

This amendment would delete clause 62(4). This provides that information covered by the law enforcement exemption in clause 29 ceases to apply after 100 years. A previous amendment (No 182) makes this redundant, by setting a 75 year limit for such information.

## CLAUSE 75

### **Amendment 174**

*Mark Fisher*

Clause 75, page 37, line 14 at end insert

*‘or the information is information which could be communicated to the applicant in accordance with section 13’*

### **Amendment 175**

*Mark Fisher*

Clause 75, page 37, line 19 at end insert

*‘or which could have been communicated to him in accordance with section 13’*

Clause 75 makes it an offence for a person to alter or destroy a record with the intention of preventing its disclosure to an applicant.

However, the offence is limited to the destruction of records to which the applicant has a *right of access* under section 1 of the bill.<sup>13</sup> It does not extend to information which might be disclosed under the discretionary disclosure provisions in clause 13. There is no *right* to such information, which would only become available if disclosed on public interest grounds under clause 13. The destruction of such records would apparently not be an offence.

This means that an official or minister could deliberately destroy a record relating to the formulation or development of government policy, or to investigations which could lead to proceedings for an offence, in order to block access by an applicant. The official may fear that pressure from the Commissioner might be difficult to resist, and that the easiest way to avoid the pressure is to destroy the record itself. The bill provides no sanction against such behaviour.

Amendments 174 and 175 would extend the offence to information which could be disclosed under clause 13.

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<sup>13</sup> It also applies to the destruction of records to which the applicant has a right under section 7 of the Data Protection Act, ie personal information about the applicant.

## CLAUSE 85

### Amendment 176

Mark Fisher

Clause 85, page 40, line 39.

*leave out 'five' and insert 'three'*

The bill's right of access does not come into force at any particular date. Instead, it is envisaged that it will be phased in, perhaps starting 18 months after Royal Assent. The first tranche of authorities made subject to the bill are likely to be government departments and possibly other authorities currently subject to the open government code.

Other classes of authority may be brought in by stages later. These might, for example, allow the phased extension of the Act to local authorities, NHS bodies, education bodies, the police, quangos and others.

Clause 85(3) provides that any parts of the Act not in force *five* years after Royal Assent, automatically come into force at that date. This suggests that it may take five years to bring the Act fully into force.

No public authority should require that length of time to prepare for this legislation. Serious questions should be asked about the accountability and/or competence of any authority which claimed that it could not comply within a much shorter period.

This amendment would require the Act to be fully implemented within *three* years, not five years, of Royal Assent.

## NEW CLAUSE 5

Mark Fisher

To move the following new clause:

‘ (1) The Secretary of State may by order provide that –

- (a) information of such description as may be specified in the order is not exempt by virtue of this Act or by virtue of any provision of this Act as may be specified in the order;
- (b) any provision of this Act by virtue of which information is exempt shall be repealed or shall apply only in relation to information of the description specified in the order;
- (c) information which is exempt by virtue of any provision of this Act as may be specified in the order shall cease to be exempt unless its disclosure would, or would be likely to, prejudice the exercise by a public authority of any function as may be specified in the order;
- (d) any provision of this Act by virtue of which the duty to confirm or deny does not arise shall be repealed or shall apply only in relation to such information, or in such circumstances, as may be specified in the order.

(2) An order under this section may make different provision for different cases.

(3) No order shall be made under this section unless a draft of the order has been laid before, and approved by a resolution of, each House of Parliament.’

- Throughout the bill, the Secretary of State has the power by order to restrict rights of access. For example:
- He can create new exemptions retrospectively including, remarkably, new exemptions to deal with requests that have already been received and not yet replied to. <sup>14</sup>
- He can amend Schedule 1, to limit the right of access to information held by any authority to specified information only. <sup>15</sup>
- He can extend the 20 day period authorities have for responding to requests, to any

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<sup>14</sup> Clause 43(1)

<sup>15</sup> Clause 6(3)

longer period.<sup>16</sup>

Ministers have explained that these provisions give them the freedom to respond to changed circumstances and the flexibility to adapt the bill if new problems come to light. The Parliamentary Secretary to the Lord Chancellor's Department told the committee on February 1st that they needed clause 43, the power to create additional exemptions, in its present form because;

'there may be some areas of information that have not yet been considered, but would legitimately need protection. The Government should also ensure that they are able to protect, in the future as well as now, all information that it would not be in the public interest to disclose.'

And in rejecting an amendment to restrict the scope of the Secretary of State's powers he said:

'it would limit unacceptably the operation of clause 43. The Government would not have sufficient flexibility to respond to changes in circumstances'

But flexibility may need to be practised in the opposite direction too. Ministers may suddenly discover that the Act contains loopholes, allowing *too much* information to be withheld. They may find that some of the safeguards that now seem necessary are over-elaborate, and can be dispensed with. They may find that bodies over which they have no direct control are acting more secretively than they should, exploiting exemptions in ways that had not been expected. They may find that they were more fearful of freedom of information than they needed to, and can safely dispense with some of its restrictions.

Ministers should not have to wait for the time for primary legislation, to bring about such changes. This new clause would give the Secretary of State same the flexibility to *improve* the public's rights that he now has to *restrict* them. It would allow him, by order, to:

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<sup>16</sup> Clause 9(3)

- Provide that specified information is *not* covered by a particular exemption<sup>17</sup>
- Repeal a particular exemption, or apply it more narrowly to specified information only<sup>18</sup>
- Replace a class exemption by a harm test exemption<sup>19</sup>
- Remove or restrict the right of authorities to refuse to confirm or deny the existence of information.<sup>20</sup>

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<sup>17</sup> New Clause 5, paragraph 1(a)

<sup>18</sup> New Clause 5, paragraph 1(b)

<sup>19</sup> New Clause 5, paragraph 1(c)

<sup>20</sup> New Clause 5, paragraph 1(d)

## CLAUSE 81

### **Amendment 186**

*Robert Maclennan/David Heath*

Clause 81, page 38, line 31 after '3(1)' insert 'or 3(5)'

### **Amendment 187**

*Robert Maclennan/David Heath*

Clause 81, page 38, line 35 leave out subsection (4)

Clause 81 deals with the procedures for making orders and regulations. It provides that some will be dealt with by affirmative resolution and others by negative resolution.

However, some provisions will apparently not be laid before Parliament until *after* they have been made. The explanatory memorandum – and its not clear whether it is correct – states at page 37:

'An order under clause 3(5) and regulations under clauses 8(fees), 9 (time for complying with request for information) and 14(1) (fees for discretionary disclosures) have to be laid before Parliament after being made'

However, clause 81(4) appears to provide that the only orders that will be dealt with under this provision are orders under section 3(5). [*Ministers might be asked if they can confirm that this is so.*]

Clause 3(5) provides that the Secretary of State may by order amend Schedule 1 to remove any authority which (a) has ceased to exist or (b) is no longer covered by either of the two

conditions in clauses 3(2) or 3(3). These allow bodies to be added to the schedule if they are either:

- Established by statute, Royal prerogative or set up by ministers; or
- Are bodies to which ministers make one or more appointments.

Two questions arise.

First, although a body may cease to exist, applications for its records may still be made. Assuming the Scott Inquiry, for the sake of argument, was covered by the Act, people may still be interested in applying for its records even after it has ceased to exist. If the Scott inquiry is subsequently removed from the Schedule, are its records still accessible under the Act? If so, who will such applications be made to?

Second, under what circumstances might a body to whom ministers make appointments cease to be such a body? Is this such a clearly defined, unequivocal, phenomenon, that bodies can be removed from the schedule and the Act without Parliament being consulted at the time, and only informed *after* the event?

These two amendments would require orders under section 3(5) to be subject to the negative resolution procedure, so that Parliament is consulted *before* they take effect.