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## FREEDOM OF INFORMATION BILL

### House of Lords Third Reading

*21 November 2000*

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

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

# FREEDOM OF INFORMATION BILL

## Third Reading

*This briefing contains notes on selected amendments, all of which the Campaign supports. It also explains in more detail why we do not accept the claim by Liberal Democrat peers that their amendments to clause 2 effectively transform the bill's class exemptions into 'prejudice' exemptions.*

### CLAUSE 35

#### Formulation of Government Policy etc

##### Lord Lucas

Clause 35(4) requires authorities, when applying the clause 2 public interest test, to have regard to “the particular public interest in the disclosure of factual information” relating to decision-making. Lord Lucas’s amendment would extend this duty to also include *the analysis* of such information.

This is in line with the existing Open Government code of practice, which requires government departments to proactively publish:

“the facts *and analysis of the facts* which the Government considers relevant and important in framing major policy proposals and decisions”<sup>1</sup>

The amendment adopts the precise words found in the policy exemption in Ireland’s FOI Act, which excludes from the corresponding exemption:

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<sup>1</sup> Code of Practice on Access to Government Information, Part I, Information the Government Will Release.

“factual (including statistical) information and analyses thereof”<sup>2</sup>

### **Clause 35 – Baroness Whitaker**

This amendment would exclude scientific data, analysis and opinions from the scope of the policy formulation exemption in clause 35(1)(a), and the related exemptions in clause 36 (that is, for disclosures which, in the reasonable opinion of a qualified person, would be likely to inhibit the frankness of advice or exchange of views or otherwise prejudice the effective conduct of public affairs)

The amendment is broadly in line with similar provisions in the Freedom of Information Acts of both Ireland and Australia, both of which exclude not only factual information from the equivalent exemptions but also scientific and technical expert advice. However, the amendment distinguishes between a scientist’s opinion on the data and its implications (which would be disclosable) and a scientist’s recommendations on the policy that should be adopted (which would not be available under the amendment, but might be disclosable under the clause 2 public interest test).

This information would not be subject to any harm test, in line with the Australian and Irish precedents. Where disclosure might harm specific interests, such as commercial interests, or international relations, other exemptions would come into play.

*It may be suggested that such amendments are not required, following the amendments made to clause 2. The appendix to this briefing addresses this argument.*

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<sup>2</sup> Freedom of Information Act 1997 [Ireland], section 20(1)(b)

## CLAUSE 36

### Viscount Colville of Culross

These two amendments both limit the scope of clause 36(2)(c), which exempts information whose disclosure, in the reasonable opinion of a qualified person, would be likely to prejudice the effective conduct of public affairs.

The first amendment limits the scope of the exemption to information about some action which the authority proposes to take in future, which is not caught by clause 22 (information intended for future publication) and where withholding the information is reasonable in the circumstances.

The only two examples which ministers have been able to give of the need for this exemption both fall into this category.

- The first relates to a proposal by English Heritage to list a particular building which, were it disclosed to the owner beforehand, might allow him to destroy the building before listing.<sup>3</sup>
- The other involved the potential examination questions which had been considered by examination boards.<sup>4</sup>

Assuming this information could not be adequately protected under clause 22, the amendment would allow them to be withheld under clause 35(2)(c).

The second amendment would prevent an authority relying on this exemption merely to protect itself from public pressure to influence any decision or action which it intended to take. An authority would not be able to argue, as many might be tempted to do, that

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<sup>3</sup> Hansard, HL, 24/10/00, col. 307

<sup>4</sup> Hansard, HL, 24/10/00 col. 311 and 14/11/00, col. 241

coping with public or media pressure would itself undermine its ability to conduct its affairs effectively.

#### **CLAUSE 45**

##### **Lord Lucas**

This amendment would require the Secretary of State's code of practice to encourage public authorities to make information available to the public electronically. This would be in line with the Government's declared intention of putting "all Government services online by 2005".<sup>5</sup> The bill will be brought into force in stages, starting 18 months after Royal Assent. As a period of up to 5 years to complete the process might follow [clause 87(3)] there will be more than adequate time for authorities to respond to such guidance.

#### **CLAUSE 53**

##### **Lord Mackay of Ardbrecknish/Viscount Astor**

Ministers have argued that the need to answer to Parliament for the exercise of the veto under Clause 53 will provide the main deterrent against its misuse. However, the bill does not require them to notify Parliament when the veto is exercised. This information might not become known until the Information Commissioner's next annual report, many months after the event.

These amendments contain alternative formulas to require each exercise of the veto to be notified to the attention of Parliament or, as appropriate, the Northern Ireland or Welsh Assemblies, as soon as practicable.

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<sup>5</sup> Cabinet Office press release CAB 175/00, 20 April 2000

## APPENDIX

### **The Liberal Democrat amendments: do they transform the ‘class’ exemptions into ‘prejudice’ exemptions?**

Liberal Democrat peers have argued that as a result of their amendments to the public interest test, the bill’s main class exemptions are now subject to a prejudice test ‘in all but name’. They maintain that the main criticism of these exemptions has now been addressed, and that their deal with the government has therefore achieved substantial improvements to the bill.

We fundamentally disagree and believe this interpretation cannot be sustained. There are crucial differences in the way the two kinds of exemption will be interpreted.

1. The harm that would have to be demonstrated under a prejudice test, is the harm caused by releasing the *specific information* requested. Under a class exemption, authorities will be able to argue that there is a *general* public interest against disclosure *of any information within the class*, regardless of the effect of specific disclosure.
2. The veto *cannot* be used to block disclosure under a ‘prejudice’ exemption. The veto *can* be used to prevent any disclosure of information covered by the class exemptions.
3. Statements in Hansard suggest that the Government does not agree with the Liberal Democrats’ view of their amendments. This is significant because without Government endorsement, these views are unlikely to be given weight by the courts.

## 1. The exemptions

There are two types of exemption relevant to this discussion (a third type of exemption found in the bill is not directly relevant here<sup>6</sup>). These are:

**prejudice exemptions** - these apply only where disclosure can be shown to ‘prejudice’ specified interests such as defence,<sup>7</sup> international relations,<sup>8</sup> the economy,<sup>9</sup> crime prevention,<sup>10</sup> immigration controls<sup>11</sup> or prison security.<sup>12</sup> If prejudice *cannot* be shown, the information must be disclosed. If prejudice *is* established, the information will still have to be disclosed under clause 2, if the balance of public interests favours disclosure.

**class exemptions (non-absolute)** – these exempt *all* information within a wide class, regardless of whether the particular disclosure is harmful. These include exemptions for policy formulation,<sup>13</sup> ministerial communications,<sup>14</sup> investigations and proceedings<sup>15</sup> and the effective conduct of public affairs.<sup>16</sup> In these areas, the clause 2 public interest test is the sole basis for disclosure.

### The amendment to clause 2

Previously, clause 2 required information to be disclosed if the public interest in disclosure outweighed the public interest in maintaining the exemption.<sup>17</sup> This meant that

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<sup>6</sup> The third type of exemption are the absolute class exemptions: these do not contain a prejudice test and are not subject to the bill’s public interest test.

<sup>7</sup> Clause 26(1)

<sup>8</sup> Clause 27(1)

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

<sup>10</sup> Clause 31(1)(a)

<sup>11</sup> Clause 31(1)(e)

<sup>12</sup> Clause 31(1)(f)

<sup>13</sup> Clause 35(1)(a)

<sup>14</sup> Clause 35(1)(b)

<sup>15</sup> Clause 30(1)

<sup>16</sup> Clause 36(2)(c). Although this exemption refers to “prejudice” to the effective conduct of public affairs, the fact that the prejudice is determined subjectively (ie “in the reasonable opinion of a qualified person”) indicates that this is closer to a class exemption than a prejudice exemption.

<sup>17</sup> Clause 2(2)(b), before the amendment, provided that the right of access did not apply to exempt information unless “in all the circumstances of the case, the public interest in disclosing the information outweighs the public interest in maintaining the exemption.”

if the public interest for and against disclosure was equally balanced, the information would be withheld. This was clearly unsatisfactory.

The Liberal Democrat amendment reverses the test.<sup>18</sup> Exempt information would be withheld where the public interest in maintaining the exemption outweighs the public interest in disclosure. Thus, in a ‘dead heat’ the information would have to be disclosed. This is a welcome change.

But how significant is it? Lord Goodhart moved an identical amendment, before the Liberal Democrat deal with the Government was reached. He said of it:

“It is fair to say that I doubt whether, in practice, this will make an enormous difference.”

He added:

“In most cases, it will be possible for whomever is adjudicating to come to a decision on whether one interest does in fact outweigh the other. But the fact that the statute calls for maintaining the exemption in cases of equality sends absolutely the wrong signal”.<sup>19</sup>

This was also Lord Falconer’s view at committee stage. He said:

“The noble Lord's amendment would make a difference in a case where the balances were equal. In that case the position would be that the information would not be disclosed because of the way the provision is drafted. We believe that that is very unlikely to happen. The public interest is not susceptible to being weighed in such a way that it would lead to that. There will be an answer one way or another.”<sup>20</sup>

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<sup>18</sup> Clause 2(2)(b) as amended now provides that the right of access does not apply to exempt information unless “in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”.

<sup>19</sup> Hansard, HL, 17/10/00, col. 908

<sup>20</sup> Hansard, HL, 17/10/00, col. 914

## **Burden of proof**

Lord Falconer had this to say about the proposed change to clause 2 and the ‘burden of proof’:

“How does it work in practice? I do not think that it is a burden of proof issue. This is not about fact and whether a case is made out. It is for the public authority to consider what weighs in the balance in favour of disclosure and what weighs in the balance in favour of maintaining the exemption. Whichever is the higher prevails in relation to whether there is disclosure. The courts have repeatedly said that that is not a burden of proof case. The public authority cannot say, "It's not proved where the balance lies". The public authority has to address the issue and come to a conclusion in relation to it.

In accepting the Liberal Democrat amendment, Lord Falconer indicated at report stage that the result would be:

“that information must be disclosed except where there is an overriding public interest in keeping specific information confidential”<sup>21</sup>

But in practice, the same balancing exercise as before will be carried out. The difference will be that in cases of a dead-heat, which everyone accepts will be rare, the information will be disclosed.

**It is *not* the case that before the amendment the *applicant* had to demonstrate that the balance of public interests favoured openness and that now the *authority* has to demonstrate the balance favours withholding. There has been no change in who is required to ‘prove the case’. The decision is an objective one which the authority and subsequently the Commissioner will make after weighing all the circumstances of the case.**

**In practice, the public interest in disclosure will probably not be recognised by the authority unless the applicant spells it out. This situation has not been changed by**

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<sup>21</sup> Hansard, HL, 14/11/00, col. 143

**the amendment, but it is a *practical* consideration, not a legal requirement.**

The limits of this concession can be seen by the response to a similar, but slightly more demanding amendment proposed by Lord Archer of Sandwell. This required that the public interest in maintaining the exemption should “clearly outweigh”, not just “outweigh”, the public interest in disclosure. The Government opposed this amendment because:

“it contains the word ‘clearly’. That is really the only significant difference...Where the public authority had made out the case for not disclosing, but only by a short head, even though it was by a short head – because it was not clear – one would end up having to make disclosure...I invite the noble and learned Lord, Lord Archer of Sandwell, to withdraw his amendment”.<sup>22</sup>

## **1. DOES THE CHANGE AMOUNT TO A “PREJUDICE” TEST?**

According to Lord Goodhart:

“I do not believe that, particularly as a result of our amendment to Clause 2, there is now any significant difference between the public interest test under Clause 2 and the prejudice test which appears in this amendment [to clause 29] and in a number of the other clauses in the Bill...as a result of the amendment accepted to Clause 2, the public interest test is satisfied unless at least some degree of prejudice is shown. If there is no prejudice, there is nothing to balance the public interest in disclosure.”<sup>23</sup>

This argument was repeated elsewhere during the debate<sup>24</sup> and, still more forcefully, in a letter in the *Guardian* in which Lords Goodhart and Lester stated that the amendment:

“means that all exemptions (other than absolute exemptions) are in effect subject to a ‘harm test’. This has been the main demand of the Campaign for Freedom of Information and other organisations.”<sup>25</sup>

This appears to us to be based on simplistic reading of the bill.

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<sup>22</sup> Hansard, HL, 14/11/00, col. 145

<sup>23</sup> Hansard, HL, 14/11/00, col. 218 (emphasis added)

<sup>24</sup> E.g. Hansard, HL, 14/11/00, cols 149 and 228

<sup>25</sup> November 16, 2000

The Liberal Democrat argument will apply where an authority *has no interest at all in advancing any argument against disclosure* of information within a class exemption. In this case, there would be no basis for suggesting that there is any public interest in maintaining the exemption, and the public interest in disclosure would normally be expected to win. The authority would presumably disclose the information voluntarily, and the Commissioner would not need to become involved.

**But where an authority objects to disclosure, it will be able not only to argue that the specific disclosure would have harmful effects, but also that the public interest would be harmed by any disclosure from within the relevant class of documents, regardless of the consequences of the actual information.**

To take an extreme example, no-one would imagine that an FOI request for access to cabinet minutes would be judged on how sensitive the particular meeting had been. It is inconceivable that, because a particular meeting had discussed nothing sensitive and revealed no differences between ministers, ministers would be prepared to see the minutes released. But that is what would be expected to happen if clause 35(1) were a prejudice exemption. In reality, ministers will argue that there is a general public interest in protecting all such documents regardless of their specific contents.

There has never been any secret that this is the government's view:

“It is generally acknowledged that the Government must have time and space to evaluate policy options. That view is shared by all Committee members. The premature disclosure of information in those areas can only hamper and, in some - perhaps even most - instances, prejudice the effective conduct of public affairs. *It follows that, for a significant proportion of the information falling into that category, disclosure will never be justifiable, even under a harm test. It would be dishonest to pretend otherwise.*<sup>26</sup>

The minister added:

“certain categories of information *will always* prejudice the effective conduct of public affairs. Those categories are listed in clause 33(1)(a) to (d)”<sup>27</sup>

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<sup>26</sup> Mr David Lock MP, Parliamentary Secretary in the Lord Chancellor's Department Standing Committee B, 27/1/00, col. 293, (emphasis added)

<sup>27</sup> These are now clauses 35(1)(a) to (d). Mr David Lock MP, Parliamentary Secretary in the Lord Chancellor's Department Standing Committee B, 27/1/00, col. 311 (emphasis added)

Lord Falconer made the same argument in resisting an amendment to introduce a harm test into the policy formulation exemption in what is now clause 35(1)(a). The amendment, he said:

“would mean that difficult questions, the uncomfortable options and unthinkable scenarios would not be debated as frequently or as clearly. Governance would suffer. That is why a class exemption rather than a harm test is the right way to achieve a balance for good and open government...

At the risk of repeating myself, let me say again that the Government believe that the disclosure of certain types of information, such as ministerial communications, Cabinet papers and minutes *would always be likely to prejudice the effective conduct of public affairs*. That is why the Bill provides a class exemption for the interests set out in Clause 33(1).”<sup>28</sup>

This is the basis on which public interest immunity has traditionally been claimed in legal proceedings. In his evidence to the Scott Inquiry, a lawyer from the Treasury Solicitor’s department said:

“...it is regarded as damaging for the public interest that any of this process [ie the process of advising Ministers and decision making] should be exposed...

It would be very difficult to distinguish between degrees of policy advice, whether it is of high or medium level, and the tendency is to regard all advice on policy of significant importance as being within the class. As a result, a cautious approach is followed, and all documents of such nature are claimed to be within the class.

The damage to the public interest, if the class did not exist, would be the exposure of the decision making process.”<sup>29</sup>

Although a more restrictive policy towards claims for PII was announced by the

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<sup>28</sup> Hansard, HL, 24/10/00 Cols 282-3. (emphasis added) Note that clause 33(1) is now clause 35(1).

<sup>29</sup> Quoted in: Sir Richard Scott, ‘The Use of Public Interest Immunity Claims in Criminal Cases’. The Earl Grey Memorial Lecture, University of Newcastle Upon Tyne, 29 February 1996.

government in December 1996, this did not involve a complete renunciation of the right to make class claims.<sup>30</sup> It has clearly not been renounced in relation to FOI.

It will be open to the Government to object to disclosure of information covered by any of the class exemptions by reference to the general public interest in protecting the entire class of information. This is not only possible but likely, given the statements made by ministers during the bill's passage. This would also explain why ministers have refused all efforts to substitute 'prejudice' tests for these class exemptions.

Thus at the report stage in the Commons, Home Office minister Mike O'Brien said:

The Government believe that the removal of a class exemption for such information [about investigations and proceedings] would undermine the effectiveness of both the police and the prosecution services and that it is vital to retain the protection of a class exemption for that category of information...

The right hon. and hon. Members who tabled the amendment may say that surely a prejudice test would meet the concerns. We do not think so. First, in areas of criminal activity and individual liberty, one needs to be very wary of being too quick to assume that no prejudice would be caused. *Introducing a prejudice test would lead to a search for demonstrable prejudice*, with a real risk of injustices being caused or criminal activity being facilitated *where such prejudice cannot immediately be pointed to*.

Furthermore, it is right that the law enforcement agencies *should not be subject to the commissioner's view of what would constitute prejudice in this field. The commissioner cannot be an expert in law and order and so must defer to the views of those agencies in this regard*. Thus, to introduce a prejudice test would achieve little....

*It is essential that, for information held for the purposes of investigations or criminal proceedings, we retain the protection afforded by a class exemption. It is not appropriate to subject this category of information to a prejudice test*, and the Government

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<sup>30</sup> The then-Attorney General, Sir Nicholas Lyell, told the Commons "Ministers will not, for example, claim PII to protect either internal advice or national security material merely by pointing to the general nature of the document. The only basis for claiming PII will be a belief that disclosure will cause real harm." But he went on to confirm that "class reasoning may be said to operate in some claims." Hansard, HC, 18/12/96, cols 949-51

amendments to clause 13 [now clause 2] will in any case ensure that, where there is an overriding public interest in the disclosure of the information, it will be released.”<sup>31</sup>

Such general claims of harm may be made across the class exemptions, even for factual information. Clause 35(4) which refers to the “particular public interest” in disclosing background factual information does not prevent this. It merely establishes that there is always something to be said *for* disclosure of factual information on public interest grounds.

But it does not prevent the government resisting that disclosure *either* on the grounds that it would cause specific harm *or* on the grounds that it would undermine the *general* public interest in protecting the decision-making processes. Even where such claims may appear implausible to the Commissioner, ministers will be able to insist on them through exercise of the veto.

## 2. THE VETO

The veto is the second reason why the class exemptions cannot now be regarded as equivalent to prejudice exemptions.

Any disclosure which the Information Commissioner requires a government department to make on public interest grounds under clause 2, can be vetoed. Since the *only* basis for disclosure of information covered by the class exemptions in clauses 30, 35 and 36 is the public interest, it follows that *all disclosures of information in these areas could be vetoed*.

Under a prejudice exemption, if the authority fails to demonstrate that a disclosure would cause prejudice, the Information Commissioner will be able to order disclosure, and that order *cannot be vetoed*. (Only if prejudice is established, and the public interest test is invoked, could the veto be applied in relation to a prejudice exemption.)

Lords Goodhart and Lester argue that the veto is unlikely to be used because it:

“will put a powerful weapon in the hands of the opposition parties and the media”.<sup>32</sup>

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<sup>31</sup> Hansard, HC, 5/4/00, cols 1067-8

<sup>32</sup> Letter to the Guardian, 16/11/00

But the Government has spent several months defending the inclusion of the veto in the bill itself, in the face of criticism from opposition parties, the media and its own backbenchers. Having been prepared to face down all criticism about the existence of this power, it may not be at all reluctant to cope with the repercussions of its use.

### 3. THE GOVERNMENT'S VIEW

Finally, it is clear that the Government do not share the Liberal Democrat's view, that the class exemptions can now be regarded as 'prejudice' exemptions. Lord Goodhart has himself repeatedly referred to this lack of agreement:

"If we accept that the public has a "particular" interest in the disclosure of factual or background information and then add to that the change in what I would regard as the balance of the burden of proof under Clause 2 - *even if the Government do not strictly accept that* - then we will reach a situation in which the Government will have to overcome a substantial hurdle if they are to withhold factual or background information..."<sup>33</sup>

*I am not sure whether the noble and learned Lord, Lord Falconer, will accept this, but we regard this as being in all but name a prejudice test.*"<sup>34</sup>

"But the question with which I am concerned - *a point which perhaps the noble and learned Lord, Lord Falconer, may be reluctant to put* but which I am not - is this. I do not believe that, particularly as a result of our amendment to Clause 2, there is now any significant difference between the public interest test under Clause 2 and the prejudice test"<sup>35</sup>

"However, as a result of amendments that have been accepted to Clause 2, and on the assumption that our Amendment No. 43 will be accepted, we now have a harm or prejudice test. *It is true that, for better or worse, the Government refuse in so many words to spell out that fact.*"<sup>36</sup>

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<sup>33</sup> Hansard, HL, 14/11/00. Col. 149 (emphasis added)

<sup>34</sup> Hansard, HL, 14/11/00. Col. 149 (emphasis added)

<sup>35</sup> Hansard, HL, 14/11/00, Col. 218 (emphasis added)

<sup>36</sup> Hansard, HL, 14/11/00, col. 228 (emphasis added)

Finally, Lord Falconer himself said, in responding to Lord Goodhart's account of the position in relation to factual background information:

"I do not necessarily accept the way that the noble Lord, Lord Goodhart puts it"<sup>37</sup>

**These exchanges suggest that the Government has indicated to the Liberal Democrats that they are not prepared to endorse the latter's interpretation of the amendments. Government agreement to the *interpretation* would be essential should a court ever require clarification.**

Following the House of Lords ruling in the case of *Pepper v Hart* the courts are able to refer to Hansard for clarification of a passage in a statute that is:

"genuinely ambiguous or obscure or where a literal or prima facie construction leads to a manifest absurdity".<sup>38</sup>

However, the ruling permits only the *minister's* words (or those of the promoter of a private member's bill) to be taken into account.

**This suggests that Lord Goodhart's interpretation of the amendments would be given weight only if endorsed or repeated by Lord Falconer – an endorsement which has clearly been withheld.** The withholding of this endorsement presumably confirms that ministers are reserving the right to oppose disclosure of information within the class exemptions on general grounds, without specific evidence that disclosure would cause actual harm.

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<sup>37</sup> Hansard, HL, 14/11/00, col. 229

<sup>38</sup> Weekly Law Reports, 11/12/92, 1032-1067, at 1042