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## FREEDOM OF INFORMATION BILL

**Briefing for Lords Second Reading, 20 April 2000**

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# **CAMPAIGN FOR FREEDOM OF INFORMATION**

## **Freedom of Information Bill**

### **Briefing for Lords 2nd Reading 20/4/00**

Serious concerns remain about the Freedom of Information (FOI) Bill. Although some improvements have been made to the heavily criticised draft bill published in May 1999, it still suffers from substantial defects.

On the positive side, the bill applies extremely widely, to a great number of public authorities at central, regional and local level. Charges for information seem likely to be modest.

**But the number and scope of the bill's sweeping exemptions provide an unacceptable bias against disclosure.**

#### **HARM-TEST EXEMPTIONS**

Some of these are *harm-tested* and apply only if authorities can show that disclosure would 'prejudice' particular interests. A number of these exemptions are too broad. But if the Information Commissioner appointed under the bill does not agree that prejudice would be caused, she<sup>1</sup> will be able to order disclosure.

#### **CLASS EXEMPTIONS**

But a large number of 'class exemptions' protect all information within a given class *even if the particular disclosure would not cause harm*. Access could be refused purely to avoid scrutiny or embarrassment. These exemptions allow authorities to operate in unjustified secrecy, and sometimes in greater secrecy than is possible under the current openness code introduced by the last government.<sup>2</sup>

A list of the main exemptions follows on **pages 6-7**. This paper concentrates on just three of the class exemptions:

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<sup>1</sup> The Information Commissioner will also be responsible for enforcing the 1998 Data Protection Act. The first Information Commissioner will be Elizabeth France, the present Data Protection Commissioner.

<sup>2</sup> The Code of Practice on Access to Government Information was introduced in April 1994. As this paper makes clear some of the bill's provisions are weaker than the code provisions they will replace.

**Clause 33(1)(a) exempts all information about the formulation of government policy, including the facts on which decisions are based.**<sup>3</sup> This would permit ministers to suppress unpublished research, statistics, opinion polls, costings, descriptions of the scale of a problem or scientific advice on health hazards. In effect it would allow ministers to refuse to answer any questions about the basis for their decisions. [See page 8]

**Clause 34(2)(c) exempts any information which in an authority's 'opinion' would 'prejudice the effective conduct of public affairs'.**<sup>4</sup> This exemption is determined by the "opinion" of a "qualified person" (ie a minister or official). This phrasing is explicitly designed to prevent the Commissioner challenging the authority's decisions. This deeply objectionable exemption is likely to be a catch-all, used by authorities to circumvent the bill's right of access. [See page 17]

**Clause 28(1) exempts all information about both routine safety inspections and more substantial investigations into potential hazards.** A class exemption protects all information about individual premises obtained by bodies able to bring legal proceedings, such as the Health & Safety Executive (HSE) and other safety authorities, even if disclosure could not harm investigations or legal proceedings (eg because no offence had occurred, or because any trial was over). The same exemption also protects information held by the police, including that which does not in itself relate to the guilt or innocence of any person, but reveals failures of the kind that occurred in the investigation into the Stephen Lawrence murder. [See page 21]

**Authorities can even refuse to confirm or deny *the existence* of information to which a class exemption applies. A department could refuse to confirm whether it holds any factual information relating to a decision.**<sup>5</sup> It could even refuse to say whether it has costed a new policy - an absurd degree of secrecy. These provisions must undermine the claim that the bill is likely to change the 'culture of secrecy'.

## **MINISTERIAL VETO AND THE PUBLIC INTEREST**

**The bill requires authorities to disclose exempt information where the public interest favours openness – but the Commissioner's power to order disclosure on these grounds is subject to a ministerial and local authority veto.** The government's 1997 white paper explicitly rejected any such veto. [See page 27]

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<sup>3</sup> Clause 33(1)(a)

<sup>4</sup> Clause 34(2)(c)

<sup>5</sup> Clause 33(2)

## **OTHER CONCERNS**

The Campaign has a number of other concerns, not dealt with in this paper, but fully documented in briefings produced during the bill's Commons stages.<sup>6</sup> These include:

### **Substantial harm**

The government's white paper proposed that to withhold information authorities should have to demonstrate that disclosure would cause 'substantial harm'. The Scottish Executive's FOI proposals adopt an equivalent test, that disclosure must 'substantially prejudice' the interest concerned.<sup>7</sup> The bill adopts the weaker test of 'prejudice'.

### **Confidential information**

The bill exempts information which is subject to an obligation of confidentiality.<sup>8</sup> In most cases this will apply if an authority agrees to accept information from another person in confidence. The government has rejected amendments to discourage authorities from accepting information in confidence when this is not essential to their work.

### **Commercial interests**

Information will be exempt if its disclosure would 'prejudice' any person's commercial interests<sup>9</sup> - even if the authority generated the information through its own research or testing, and even if the 'prejudice' is caused by revealing that a company sold substandard or dangerous products.

### **Personal information**

The bill's exemption for personal information is so strict that authorities may decide that even the names of civil servants or local authority councillors, acting in their official capacities, should be blanked out of documents before they are disclosed.<sup>10</sup>

### **Retrospective exemptions**

Ministers will be able to create new exemptions by Parliamentary order in time to block *existing*

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<sup>6</sup> These are available on the Campaign's website at [www.cfoi.org.uk](http://www.cfoi.org.uk)

<sup>7</sup> Scottish Executive, *An Open Scotland*, November 1999

<sup>8</sup> Clause 39

<sup>9</sup> Clause 41(2)

<sup>10</sup> Clause 38(2)

requests, a provision not found in any other FOI law.<sup>11</sup> They will also be able to remove any information from the bill's scope by Parliamentary order.<sup>12</sup>

### **Purpose clause**

Many FOI laws contain a clause setting out the Act's purposes. These encourage authorities to lean towards the release of information where the arguments for and against disclosure are equally balanced. However, the government has rejected such a provision claiming that a pro-disclosure purpose clause would make the FOI bill "unbalanced".<sup>13</sup>

### **Gagging clause**

The Information Commissioner will be subject to a 'gagging clause' and could commit an offence by disclosing certain information which a member of the public would be able to obtain under the bill itself – a farcical situation.<sup>14</sup>

### **Destruction of records**

Authorities will be able to destroy records which someone has applied for, provided they had planned to do so before the request was made.<sup>15</sup>

### **Internal guidance and Reasons**

Some specific provisions of the openness code are likely to be weakened by the bill.

- The code requires government bodies to make available the internal guidance that they use in dealing with the public. The bill drops this requirement. An equivalent duty could indirectly be introduced if the Commissioner insists on it - but there is no guarantee that the Commissioner will do this.<sup>16</sup>
  
- The code requires central government bodies to automatically give people reasons for

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<sup>11</sup> Clause 43

<sup>12</sup> Clause 6(3)(a)

<sup>13</sup> Mike O'Brien, Standing Committee B, 11/1/00, cols 28-30

<sup>14</sup> Paragraph 19 of Schedule 2 extends a secrecy clause in the Data Protection Act 1998 to the Information Commissioner.

<sup>15</sup> Clause 1(6)

<sup>16</sup> Under clause 17, authorities must produce 'publication schemes' setting out the information which they publish or intend to publish. The Commissioner must approve these, and could insist on authorities undertaking to publish certain types of information.

administrative decisions affecting them.<sup>17</sup> This requirement will be lost when the bill becomes law, replacing the code. Instead, people will have to make specific FOI requests for the reasons for decisions affecting them.<sup>18</sup>

## **Commencement**

The Act may not come fully into force until 5 years after it is passed.<sup>19</sup>

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<sup>17</sup> The code states: “Subject to the exemptions in Part II, the Code commits departments and public bodies under the jurisdiction of the Parliamentary Commissioner for Administration (the Ombudsman)...to give reasons for administrative decisions to those affected”. A footnote adds: “There will be a few areas where well-established convention or legal authority limits the commitment to give reasons, for example certain decisions on merger and monopoly cases or on whether to take enforcement action.” Code of Practice on Access to Government Information, Part I, paragraph 3(iii)

<sup>18</sup> The bill contains a separate provision requiring authorities to specify the information which they publish or intend to publish. In doing so they must have regard to ‘the public interest in the publication of reasons for decisions’ [clause 17(3)]. However, this relates to *policy* decisions, not decisions relating to particular individuals.

<sup>19</sup> Clause 84(3)

## **HARM TESTED EXEMPTIONS**

**The following exemptions require evidence that disclosure would cause some form of harm, usually ‘prejudice’<sup>20</sup>**

Defence<sup>21</sup>

International relations<sup>22</sup>

Relations with the devolved administrations<sup>23</sup>

The economy<sup>24</sup>

Crime prevention & detection<sup>25</sup>

The administration of justice<sup>26</sup>

Tax collection<sup>27</sup>

Immigration controls<sup>28</sup>

Prison security<sup>29</sup>

The exercise of various regulatory functions<sup>30</sup>

Certain civil proceedings<sup>31</sup>

Audit functions<sup>32</sup>

Public safety<sup>33</sup>

Commercial interests<sup>34</sup>

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<sup>20</sup> In most cases, these exemptions apply where disclosure would ‘prejudice’ the interest concerned

<sup>21</sup> Clause 24(1)

<sup>22</sup> Clause 25(1)

<sup>23</sup> Clause 26(1)

<sup>24</sup> Clause 27(1)

<sup>25</sup> Clause 29(1)(a)

<sup>26</sup> Clause 29(1)(c)

<sup>27</sup> Clause 29(1)(d)

<sup>28</sup> Clause 29(1)(e)

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

<sup>30</sup> Clause 29(1)(g)

<sup>31</sup> Clause 29(1)(h)

<sup>32</sup> Clause 31(1)

<sup>33</sup> Clause 36(1)

<sup>34</sup> Clause 41(2)

## **CLASS EXEMPTIONS<sup>35</sup>**

**The following exemptions apply regardless of whether the information concerned would cause harm if disclosed.**

Bodies dealing with security<sup>36</sup>

Information in confidence from other governments<sup>37</sup>

Investigations and proceedings<sup>38</sup>

Court records & inquiry records<sup>39</sup>

Parliamentary privilege<sup>40</sup>

Formulation of government policy<sup>41</sup>

Ministerial communications<sup>42</sup>

Law officers advice<sup>43</sup>

Ministers' private offices<sup>44</sup>

Collective responsibility<sup>45</sup>

Conduct of public affairs<sup>46</sup>

Communications with Royal Family<sup>47</sup>

Honours<sup>48</sup>

Information in confidence<sup>49</sup>

Legal professional privilege<sup>50</sup>

Trade secrets<sup>51</sup>

Disclosures prohibited by statute<sup>52</sup>

Retrospective exemptions<sup>53</sup>

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<sup>35</sup> These exemptions apply to all information in the specified classes

<sup>36</sup> Clause 21(1)

<sup>37</sup> Clause 25(2)

<sup>38</sup> Clause 28(1)

<sup>39</sup> Clause 30(1) and 30(2)(b)

<sup>40</sup> Clause 32(1)

<sup>41</sup> Clause 33(1)(a)

<sup>42</sup> Clause 33(1)(b)

<sup>43</sup> Clause 33(1)(c)

<sup>44</sup> Clause 33(1)(d)

<sup>45</sup> Clause 34(2)(a)

<sup>46</sup> Clause 34(2)(c)

<sup>47</sup> Clause 35(1)(a)

<sup>48</sup> Clause 35(1)(b)

<sup>49</sup> Clause 39(1)

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

<sup>51</sup> Clause 41(1)

<sup>52</sup> Clause 42(1)(a)

<sup>53</sup> Clause 43

## **Section 1**

### **THE POLICY FORMULATION EXEMPTION**

#### **Clause 33(1)**

**Clause 33(1) is a gigantic class exemption for all information about policy formulation, including the facts on which policy is based. It also exempts all information about ministers' private offices, and all references to ministerial communications or the obtaining of Law Officers' advice. No harm test would apply.**

Clause 33(1) is the widest blanket exemption in the bill. It applies to 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 broad categories would have to be disclosed under the bill as it stands. Between them, these exemptions permit the development of policy to take place in absolute secrecy should ministers wish it.**

Clause 33(2) adds a further unacceptable twist: it permits departments to refuse to even confirm or deny whether requested information exists.

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 the decision had been taken and implemented. This includes purely factual information. The only chance of access would be under the clause 13 public interest test.<sup>54</sup>

**This is a fundamental retreat from the white paper, which rejected a class exemption for policy material stating “We are prepared to expose government information at all levels to FOI legislation.” It added that information about policy discussions would be available, subject to ‘a test of simple harm’, that is, ‘would disclosure of this information cause harm?’<sup>55</sup>** (This contrasted with the more stringent ‘substantial harm’ test proposed for other exemptions.)

### **Defining the facts**

**The Home Secretary maintains that ‘factual information’ cannot be defined, and that this definitional problem prevents the information being excluded from the exemption. The argument is spurious, since the bill already uses the term ‘factual information’.**

Rejecting an amendment on factual information, Mr Straw argued:

‘the Government face a genuine difficulty in putting together a form of words that separates what I think that people are talking about - basic statistical data, which are already published; although there are not much such data, there are some - from the analysis of that data and policy advice...The difficulty with the amendment is essentially a linguistic one, about what is meant by factual information. The word fact encompasses a huge sphere of human activity. ‘Words and Phrases Legally Defined’ states: “Everything in the cosmos is a fact or a phenomenon”.’<sup>56</sup>

In fact clause 13(5) requires an authority, when withholding information under the policy formulation exemption, to:

**‘in particular have regard to the public interest in communicating to the applicant *factual information* which has been used, or is intended to be used, to provide an**

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<sup>54</sup> Clause 13(5) contains a steer requiring authorities to have regard to the public interest in disclosing factual information relating to decision-taking. But the information is still exempt. Ministers can refuse to disclose it and could veto any order that the Commissioner might make.

<sup>55</sup> Your Right to Know, Cm 3818, paragraph 3.12

<sup>56</sup> HC Debates, 5/4/99, Columns 1026-7

**informed background to decision-taking’.**

The term ‘factual information’ is used here without definition, indicating that whatever the objection is, it is not one of drafting.

The remarkable exemption for factual information is a substantial retreat from:

- **the current position under the openness code**
- **The Scottish Executive’s FOI proposals**
- **Overseas FOI laws**
- **The 1977 Croham directive**
- **The Cabinet Secretary’s view of what would be feasible**

## **1. The code**

The openness code, introduced by the last government in 1994, deals with facts in two ways:

- it requires departments to publish the facts and analysis of the facts underlying policy decisions and proposals;<sup>57</sup> and
- it requires information relating to policy discussions to be disclosed unless departments show that to do so would ‘harm the frankness and candour of internal discussion’.<sup>58</sup> This provides little scope for withholding facts.

The bill would therefore allow information which currently has to be disclosed, to remain secret in future.

## **2. Scotland**

The Scottish Executive’s proposals for an FOI Act exclude factual information from the scope of the policy formulation exemption. It could be withheld if disclosure would ‘substantially

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<sup>57</sup> The code states: ‘Subject to the exemptions in Part II, the Code commits departments and public bodies under the jurisdiction of the Parliamentary Commissioner for Administration (the Ombudsman)...to publish the facts and analysis of the facts which the Government considers relevant and important in framing major policy proposals and decisions; such information will normally be made available when policies and decisions are announced’. Code of Practice on Access to Government Information, Part I, paragraph 3(i)

<sup>58</sup> Code of Practice on Access to Government Information, Exemption 2

prejudice' collective responsibility or the frankness of internal discussion, advice or exchange of views.<sup>59</sup>

This approach should be capable of addressing any concerns which the government may have that disclosing factual information might sometimes reveal the content of internal discussions.

### 3. Overseas FOI laws

Many overseas FOI laws explicitly exclude factual information from the scope of their policy exemption. The equivalent exemption in Ireland's FOI Act:

'does not apply to a record if and in so far as it contains...factual (including statistical) information and analyses thereof'<sup>60</sup>

The Australian exemption:

'does not apply to a document by reason only of purely factual material contained in the document'<sup>61</sup>

Many FOI Acts exclude a much wider range of material from any policy advice exemptions, including: scientific research<sup>62</sup> or field research<sup>63</sup>, expert scientific or technical reports or analysis<sup>64</sup>; 'expert opinion or analysis' in *any* field,<sup>65</sup> a feasibility or technical study,<sup>66</sup> plans and budgetary estimates,<sup>67</sup> an efficiency study,<sup>68</sup> an economic forecast,<sup>69</sup> a public opinion poll,<sup>70</sup> an

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<sup>59</sup> 'An Open Scotland', Scottish Executive, SE/1999/51, November 1999, Annex C, page 77

<sup>60</sup> Freedom of Information Act 1997 [Ireland], section 20(2)(b)

<sup>61</sup> Freedom of Information Act 1982 [Australia], section 36(5)

<sup>62</sup> Freedom of Information Act 1985 [Manitoba], section 39(2)(c)

<sup>63</sup> Freedom of Information and Protection of Privacy Act 1987 [Ontario], section 13(2)(h); Freedom of Information and Protection of Privacy Act 1992 [British Columbia], section 13(2)(j).

<sup>64</sup> Freedom of Information Act 1982 [Australia], section 36(5)(a); Freedom of Information Act 1997 [Ireland], section 20(2)(e)

<sup>65</sup> Freedom of Information Act 1992 [Queensland], section 41(2)(c)

<sup>66</sup> Freedom of Information and Protection of Privacy Act 1987 [Ontario], section 13(2)(g); Freedom of Information and Protection of Privacy Act 1992 [British Columbia], section 13(2)(i)

<sup>67</sup> Freedom of Information and Protection of Privacy Act 1987 [Ontario], section 13(2)(i); Freedom of Information and Protection of Privacy Act 1992 [British Columbia], section 13(2)(l)

<sup>68</sup> Freedom of Information Act 1997 [Ireland], section 20(2)(d); Freedom of Information and Protection of Privacy Act 1987 [Ontario], section 13(2)(f); Freedom of Information and Protection of Privacy Act 1992 [British Columbia], section 13(2)(g)

<sup>69</sup> Freedom of Information and Protection of Privacy Act 1992 [British Columbia], section 13(2)(e)

<sup>70</sup> Freedom of Information and Protection of Privacy Act 1992 [British Columbia], section 13(2)(b)

environmental impact statement,<sup>71</sup> product testing results,<sup>72</sup> an appraisal,<sup>73</sup> a valuator's report<sup>74</sup> and advice from an external consultant or person other than a government official.<sup>75</sup>

#### **4. The 1977 Croham directive**

The bill falls short of the so-called 'Croham directive' issued under the last Labour government in 1977. This provided that 'factual *and analytical material*' (emphasis added) should normally be published once decisions have been taken.

#### **5. The Cabinet Secretary**

Lord Butler, the former cabinet secretary, told a House of Lords select committee in July 1999 that:

'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.'<sup>76</sup>

### **BENEFITS OF OPENNESS**

Clause 33(1) 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 or 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.

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<sup>71</sup> Freedom of Information Act 1985 [Manitoba], section 39(2)(a); Freedom of Information and Protection of Privacy Act 1987 [Ontario], section 13(2)(d)

<sup>72</sup> Freedom of Information Act 1985 [Manitoba], section 39(2)(b); Freedom of Information and Protection of Privacy Act 1987 [Ontario], section 13(2)(e); Freedom of Information and Protection of Privacy Act 1992 [British Columbia], section 13(2)(h)

<sup>73</sup> Freedom of Information and Protection of Privacy Act 1992 [British Columbia], section 13(2)(d)

<sup>74</sup> Freedom of Information and Protection of Privacy Act 1987 [Ontario], section 13(2)(c)

<sup>75</sup> Access to Information Act 1985 [Canada], section 21(2)(b)

<sup>76</sup> Report from the Select Committee Appointed to Consider the Draft Freedom of Information Bill, Session 1998-99, HL 97, Q. 357

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 sensitive matters can be disclosed without harm. There have been considerable benefits in terms of reassuring a sceptical audience that decisions are soundly based.<sup>77</sup>

Lord Burns, the former Permanent Secretary at the Treasury told the Public Administration select committee:

'I think officials can live under whatever regime they are asked to live under, providing it is clear just what the nature of the regime is. Certainly, whilst I was in Treasury, there was no pressure from the officials' side to wish the Government to go slow on this issue. I have to say personally that I was slightly surprised that there has not been a greater effort made to enlarge the area of what I consider work which is releasable, in terms of the description of what is background information, what is analysis, etc, and to limit to a greater degree what I would consider to be general policy advice. When I was preparing for the election and thinking about these issues, I had expected a bigger shift in that direction than we have, in fact, seen.'<sup>78</sup>

The bill already looks dated, having been overtaken by a series of initiatives which acknowledge the benefits of greater insight into the policy formulation process.

- The 'Modernising Government' white paper proposes a new approach to policy making involving: *'more new ideas, more willingness to question inherited ways of doing things, better use of evidence and research in policy making'*<sup>79</sup> A key element is *'involving others in policy making'*. The public and outsiders should be involved *'early in the policy making process'*. Yet there is no support for this principle in the FOI bill.

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<sup>77</sup> "The whole process is systematic and transparent in a way that would have been unthinkable only ten years ago....Fears that divided votes would undermine the credibility of the Committee have proved unfounded. Differences of view there have been. Over the past two years – 24 meetings in total – there have been only 4 occasions when the Committee has been unanimous. But explaining openly to the public the nature of the uncertainties and difficulties in judging the appropriate level of interest rates has proved successful. Indeed, it has added credibility to the nature of the process." *Mervyn King, Deputy Governor of the Bank of England, Address to the joint luncheon of the American Economic Association & the American Finance Association, Boston Marriott Hotel, 7/1/00*

<sup>78</sup> Public Administration select committee, Session 1998-9, HC 570, Evidence 22/6/99 Q. 140

<sup>79</sup> Modernising Government, Cm 4310, March 1999, paragraph 6

- The Food Standards Agency has been given express statutory authority to publish its advice to ministers.<sup>80</sup> Government guidance states: *'The Agency's express ability to publish any of its advice to Ministers will be an important factor in its influence and independence: although Ministers would not be obliged to accept the Agency's advice, they would normally be expected to explain their reasons for not doing so.'*<sup>81</sup> This recognises that differences of opinion between ministers and advisers may be better acknowledged and explained, rather than concealed.
- The Advisory Committee on Pesticides has decided to publish minutes of its meetings within three weeks of them taking place. It states: *'The published minutes will record the advice offered to Ministers with a summary of the discussion. However, Members of the Committee have also requested that a detailed "attributable" record of the discussion during the meeting should also be produced. This detailed record will be approved by the Committee at the following meeting...and will be published in addition to the minutes.'*<sup>82</sup>
- Advice on mergers is to be published. The Trade and Industry Secretary announced recently *'that the Office of Fair Trading are looking at ways of publishing the Director General's advice on key mergers. I believe that it is also important to provide transparency in cases where Ministers take decisions on competition cases. The DGFT publishing a summary of his advice to the Secretary of State on merger referral cases will go a long way towards achieving that.'*<sup>83</sup>
- The Welsh First Secretary, Rhodri Morgan, has announced that cabinet minutes of the Welsh cabinet will be published on the Internet, 6 weeks after the meeting takes place. The first minutes are expected to be published on May 25 this year.<sup>84</sup>

This is not to say that all such advice could be published: the case for allowing confidential discussions of policy options is widely recognised. It allows untested ideas to be discussed, and participants to disagree with each other without having to consider how such disagreements would rebound on them if repeated in the press or by opposition politicians.

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<sup>80</sup> Food Standards Act 1999, section 19(1)(a)

<sup>81</sup> Explanatory Notes to the Food Standards Act 1999, prepared jointly by the Ministry of Agriculture, Fisheries and Food, Department of Health, Scottish Executive, National Assembly for Wales and the Department of Health and Social Services in Northern Ireland

<sup>82</sup> Pesticides Safety Directorate, 'Open Procedures for the Advisory Committee on Pesticides', 22/3/00

<sup>83</sup> A New Era in Competition. Speech by Stephen Byers, Secretary of State for Trade and Industry, Social Market Foundation, 28 February 2000

<sup>84</sup> National Assembly of Wales, Press release, 'Greater Openness at the Assembly – Rhodri Morgan', 13/3/00

**But nor is *absolute* secrecy for all aspects of the policy process required. A number of countries' FOI laws work on the assumption that once decisions have been made, some of the previously confidential policy material can often be released without harm, including descriptions of the options under consideration and their analysis. This is the case in both New Zealand<sup>85</sup> and Ireland.<sup>86</sup>**

The basis for such an approach is already found in the openness code, which permits policy material to be withheld only where disclosure would 'harm the frankness and candour of internal discussion'. The white paper's proposed 'simple harm' test appears to have intended something equivalent, and the background material to it published by the Cabinet Office indicate the approaches that were being considered.<sup>87</sup>

The Home Secretary himself endorsed this approach three months after assuming responsibility for FOI. Mr Straw was asked what steps he was taking to improve the

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<sup>85</sup> According to the head of one New Zealand agency: "A large number of briefing papers to ministers are now published, and these include, for example, most of the briefing papers from departments to an incoming government, but it is not unusual for ministers to introduce policies which ignore or run counter to the advice of their officials. Where this happens there is often comment in the media that ministers have not adopted the advice of their officials. Ministers may be called upon to justify their policies, which they usually do by reference to the democratic process and the need to take into account the wishes of their electors. The situation does not appear to be particularly embarrassing to either the ministers or the departments involved. Indeed it could be argued that one of the consequences of the Official Information Act is that it has helped to reduce the politicization of the public service by making it more obvious if advice is partisan." *Judith Aitken, Chief Executive of New Zealand's Education Review Office, In: A McDonald & G Terrill, editors, 'Open Government, Freedom of Information and Privacy' Macmillan, 1998.*

<sup>86</sup> Section 20 of Ireland's Freedom of Information Act 1997 exempts 'matter relating to the deliberative processes of the public body' *provided* that disclosure would be 'contrary to the public interest'. The Information Commissioner makes legally binding rulings under this exemption, not subject to any form of veto. A number of classes of information cannot be withheld under this exemption at all, including factual and statistical material and its analysis, scientific or technical expert advice and the report of a performance or efficiency study.

<sup>87</sup> The Cabinet Office material states:

"two possible ways forward which take account of the fact that not all advice is sensitive... might be:

(A) Narrow exclusion with a purpose-built harm-test beyond that. This would involve a narrowly-based total exclusion perhaps on the lines of the "Cabinet confidences" exclusion which exists - uniquely - in the Canadian legislation...For other policy advice and consideration (more broadly drawn) there would then be a more widely-based harm test than for other specified interests, involving not only scrutiny for "contents" damage, but also requiring those determining harm to "have regard" to such considerations as the public interest in preserving privacy in matters affecting or likely to endanger the collective responsibility of Ministers, the anonymity and non-political status of officials, and the integrity of the advice processes of Government. This would allow disclosure of, for example, technical or professional advice on health, safety or environmental matters, or analytical papers not containing advocacy or advice.

(B) Specific "contents" harm-test, and purpose-built public interest override. This course would dispense with an absolute exclusion and would rely on a harm-test related to specific "contents" damage which would result (e.g. to national security) from disclosure, but with a public interest override "having regard" (as in the wider harm test described in (A) above) to collective responsibility, anonymity and non-political status of officials and the integrity of the advice process. The disclosure pattern would be broadly as for A, but with more risk of higher-level policy papers emerging into the public domain, particularly on appeal to a commissioner or the courts." *Cabinet Office. 'Your Right to Know – Background Material', January 1998, paragraph 111.*

transparency of “interdepartmental communication on policy development”, and replied:

“Information on the policy development process will be covered by the Act but, as the White paper ‘Your Right to Know’ made clear, this information could be withheld if *disclosure would cause harm* to the decision-making and policy advice processes.”<sup>88</sup>  
(emphasis added)

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<sup>88</sup> Hansard, Written Answers, 21/10/98, col. 1151

**Section 2**

**PREJUDICE THE EFFECTIVE CONDUCT**

**OF PUBLIC AFFAIRS**

**Clause 34**

Clause 34 contains a near-class exemption which would allow authorities to withhold almost any information, with minimal risk of scrutiny by the Commissioner.

Unlike Clause 33, which applies only to government departments, clause 34 can be used by government departments and *other* public authorities. It gives the latter, in particular, an exemption for their internal deliberations, protecting information which would prejudice collective responsibility or inhibit the frankness of advice or exchange of views. But it also contains a more general exemption for information which could '*prejudice the effective conduct of public affairs*'.<sup>89</sup> This is a vague concept, which the bill does not attempt to define.

**Crucially, the prejudice is not determined objectively. The test is whether in 'the reasonable opinion of a qualified person' – usually a minister or official – the prejudice would exist. By giving legal weight to an individual's *opinion* those opinions could not normally be challenged by the Commissioner.**

The Commissioner would be limited to applying the judicial review test, of whether the opinion was 'reasonable'. A decision could only be set aside if it was '*irrational*', '*outrageous in its defiance of logic*'<sup>90</sup> or involved '*unreasonableness verging on an absurdity*'<sup>91</sup>. It could not be overturned merely because it involved an exaggerated view of the harm of disclosure, even one "*founded on a grave error of judgement*"<sup>92</sup> so long as there was something that could be said, however feeble, in its favour.

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<sup>89</sup> Clause 34(2)(c)

<sup>90</sup> Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374

The background material published by the government confirms that this is the intention:

“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>93</sup>

**According to Home Office minister, Mike O’Brien: “The Government consider that only a qualified person can have a full understanding of the issues involved in the decision-making processes of a public authority...we do not consider that it would be right for the prejudice caused by that sort of information to be determined by the Commissioner”<sup>94</sup>**

This deeply objectionable exemption is capable of fundamentally undermining the bill’s right of access. Authorities would be able to justify withholding information on the grounds that secrecy improves efficiency, speeds up decisions or otherwise helps them go about their work.

**A minister who claims that disclosure would ‘prejudice’ defence, international relations or the economy<sup>95</sup>, would have to demonstrate the prejudice objectively, or have the decision overturned by the Commissioner. To circumvent this, all the minister needs to do is *also* claim that the disclosure would *in his or her opinion* prejudice the effective conduct of public affairs. The decision immediately becomes armour-plated against challenge.**

The same test would be available to local authorities, quangos, NHS trusts, primary schools and others, who will all be able to assert that *in their opinion* disclosure would prejudice ‘public affairs’. They too will be able to back up specific claims for exemption with this all-purpose catch-all.

There is every reason to expect this, based on experience with the openness code. According to the Parliamentary Ombudsman’s 1995 annual report:

‘I have had cases in which four or more different Exemptions have been put to me as reasons for not releasing the information sought. That strikes me as over-defensive...there is a tendency in some departments to use every argument that can be mounted, whether

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<sup>91</sup> Lord Brightman in *R v Hillingdon LNC ex p. Puhlhofer* [1986] 1. AC 484 at 518

<sup>92</sup> Halsbury’s Laws of England Vol. 1(1), 4th ed. 1989 paragraph 77

<sup>93</sup> Home Office. ‘Freedom of Information. Preparation of Draft Legislation. Background Material’, 1999, page 12

<sup>94</sup> Mike O’Brien, Committee stage of the FOI Bill, Standing Committee B,27/1/00 [Part II], col. 321

<sup>95</sup> Clauses 24, 25 and 27

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...I have found it time-consuming to have to consider a whole series of different defences, even when many of them prove to have no real foundation.’<sup>96</sup>

The Ombudsman was still complaining about this phenomenon in 1998:

‘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>97</sup>

The select committee which oversaw the Ombudsman’s work commented:

‘To scatter excuses like so much gun fire, in the hope that some exemption might hit the target, is to undermine the spirit and purpose of the Code and to show disregard for the rights of the individual requester.’<sup>98</sup>

Clause 34 will be subject to the public interest test in clause 13, but the balancing test will be slanted against disclosure – and ultimately subject to a veto under clause 52.

The exemption is considerably worse than the equivalent provision in the openness code, which exempts information whose *disclosure* ‘would harm the proper and efficient conduct of the operations of a...public body’.<sup>99</sup> This harm has to be *objectively* demonstrated. It must also be greater than the public interest in disclosure.<sup>100</sup>

The nearest parallel appears to be 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”. However, the New Zealand provision contains three separate safeguards against abuse, all of which are absent from the UK bill.

The New Zealand exemption: (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

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<sup>96</sup> Parliamentary Ombudsman, Annual Report for 1995, pages 50-51

<sup>97</sup> Parliamentary Ombudsman, 5th Report, 1997-98, HC 845, June 1998

<sup>98</sup> Select Committee on the Parliamentary Commissioner for Administration, 2nd Report, Session 1995-96, Open Government, para 111

<sup>99</sup> Code of Practice on Access to Government Information, Exemption 7(b)

<sup>100</sup> The code states: ‘In those categories [of exemption] which refer to harm or prejudice, the presumption remains that information should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in making the information available.’ [Part II, Reasons for Confidentiality]

pressure – it is not open ended as in the UK bill (ii) requires objective evidence of such harm, the authority’s “opinion” is irrelevant (iii) requires that if it be “necessary” to withhold information for one of these reasons, a stricter test than the bill’s. Even if the information meets these criteria, it must still be disclosed if there is an overriding public interest in openness.<sup>101</sup>

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>102</sup>

The House of Lords select committee chaired by Lord Archer of Sandwell also concluded that this exemption “*goes too far*”, adding:

**‘The test should be an objective one, reviewable by the Information Commissioner’**<sup>103</sup>

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<sup>101</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 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>102</sup> Public Administration Select Committee, Third Report Session 1998-99, HC 570, paragraph 90

<sup>103</sup> HL 97, paragraph 35.

### **Section 3**

## **INVESTIGATIONS AND PROCEEDINGS**

### **Clause 28(1)**

- **Clause 28(1) is a blanket exemption which protects all information about investigations by the police, health & safety inspectors and other regulators even if disclosure could not harm legal proceedings or law enforcement**
- **Access would be possible only on grounds of overriding public interest – and even then ministers can veto disclosure.**

Clause 28(1) contains one of the bill's widest and most restrictive class exemptions. It provides blanket, indefinite protection for information held in connection with investigations carried out by the police, prosecutors or regulatory authorities with the power to bring proceedings for an offence.

**The scope of the exemption itself is breathtaking given that it applies to bodies responsible for public safety and environmental and consumer protection. The effect will be to deny the public access to the very information that most people assume an FOI Act is meant to provide.**

The bodies covered include the Health & Safety Executive, Environmental Health Officers, Trading Standards Officers, Fire Authorities, the Drinking Water Inspectorate, the Environment Agency, the Director General of Water Services, the Maritime and Coastguard Agency, the Civil Aviation Authority, the Inland Revenue, Customs & Excise, the Crown Prosecution Service, the Benefits Agency, the Department of Trade & Industry, the Ministry of Agriculture Fisheries and Food, the Housing Corporation, the National Crime Squad and the Serious Fraud Office.<sup>104</sup>

Clause 28(1) applies to information collected by an authority with the *power* to bring legal proceedings, even if the information itself relates to a matter about which there are not and will

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<sup>104</sup> Taken from a list of authorities supplied by ministers to members of the standing committee dealing with the FOI Bill.

not be any proceedings. Most safety and consumer protection authorities deal with most problems without prosecuting.

### **Safety authorities**

**Information obtained during a formal investigation or just a routine safety inspection would be exempt. There is no requirement to show that disclosure would prejudice the investigation, legal proceedings or any other interest. Authorities would not even have to confirm or deny whether information covered by this exemption *existed*.**<sup>105</sup>

A note on a file stating that an inspector visited a site, was impressed with everything he saw and left, would be exempt under clause 28(1). So would information showing that the authority had failed to notice, or apparently condoned, serious risks to public safety.

**There would be no right to know about problems like BNFL's falsification of nuclear quality control data, abattoirs that fail to comply with BSE rules,<sup>106</sup> trains that ignore warning signals, dealers who sell dangerous cars or caterers responsible for food poisoning incidents. There would be no right to see whether safety bodies who monitor these problems are vigilant or ignore, or even condone, dangerous practices. The only chance of learning anything would be under the bill's 'public interest' test. This is inappropriate in such circumstances.**

**The case for the class exemption is difficult to understand given the substantial protection provided by other provisions.**

The 'obtaining of information from confidential sources' is covered by a separate class exemption in *clause 28(2)*.

*Clause 29(1)* contains a comprehensive list of additional exemptions, covering information whose disclosure would be likely to:

- 'prejudice the prevention or detection of crime'
- 'prejudice the apprehension or prosecution of offenders'

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<sup>105</sup> Clause 28(3)

<sup>106</sup> The new Food Standards Agency will have substantial powers to publish information about BSE or food hazards *if it chooses*. But if it does not, the bill fails to provide a right of access.

- ‘prejudice the administration of justice’
- ‘prejudice the assessment or collection of any tax or duty’
- ‘prejudice the operation of the immigration controls’
- ‘prejudice the maintenance of security and good order in prisons’<sup>107</sup>
- ‘prejudice the exercise by any public authority of its functions for the purposes of...ascertaining...whether any person has failed to comply with the law...whether any person is responsible for any conduct which is improper...whether circumstances which justify regulatory action in pursuance of any enactment exist or may arise...a person’s fitness or competence in relation to the management of bodies corporate...the cause of an accident...securing the health, safety and welfare of persons at work...protection persons other than persons at work against risk to health or safety’<sup>108</sup>

This is not an exhaustive list.

**To insert a ‘class’ exemption on top of this is excessive – a view shared by some of the agencies themselves. Jenny Bacon, Director General of the Health & Safety Executive, told the Public Administration select committee: “We note that [the provision] is a class exemption. The [Health & Safety] Commission feel that in respect of health and safety matters a prejudice tested exemption would provide sufficient protection for these matters.”**<sup>109</sup>

### **Other prosecuting authorities**

Information about contentious decisions not to prosecute would be exempt, even if the request was limited to probing what information the authority had considered. The recent deportation of the alleged war criminal, Konrad Kalejs, led to suggestions that the UK authorities had failed to ask their US counterparts what evidence they held against this individual. Authorities would not

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<sup>107</sup> Clauses 29(1)(a) to (f)

<sup>108</sup> Clauses 29(1)(g) and 29(2)

<sup>109</sup> Public Administration select committee, HC 570-II, Q 826

have to confirm whether any such contacts had taken place.<sup>110</sup>

Questions about failures to disclose evidence to defendants, the source of repeated miscarriages of justice, would not have to be answered. A recent report by the Crown Prosecution Service Inspectorate confirmed widespread failure of police and prosecutors to comply with the disclosure rules under the Criminal Procedure and Investigations Act 1996 [CPIA]:

*“What is clear is that the CPIA is not at present working as Parliament intended; nor does its present operation command the confidence of criminal practitioners. We find that in a significant proportion of contested cases CPS compliance with CPIA procedures is defective.”<sup>111</sup>*

## **The police**

Information which might indicate that the police had failed to react to evidence of serious crime, for example by failing to interview key witnesses or ignoring warnings of child abuse at children’s homes, would be exempt. The inadequacy of the investigation into the murder of Stephen Lawrence would be shielded from disclosure. Although some of this information could be capable of prejudicing legal proceedings, information about police delays in following up

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<sup>110</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 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>111</sup> The report also found “There was also concern about the skill and ability of the [police] disclosure officer, and sometimes his determination or intention, to draw the attention of the prosecutor to material which may fall within the tests for primary and secondary disclosure...

“...we found almost universal lack of faith by other practitioners within the criminal justice system as to the skill and ability of the prosecutor, or more frequently the resources of the CPS, to undertake its duties fully and reliably...

“At more than one site, CPS staff told us they are concerned about whether disclosure officers are identifying correctly material which might undermine the prosecution case. In particular, they are not satisfied that ‘negative’ material is being identified. By this we mean material that either indicates that someone else was responsible for the offence, or does not support the prosecution case against the defendant. For example, fingerprint evidence that reveals that another person has had contact with a package of controlled drugs, or that examination has failed to prove that the defendant’s fingerprints are on the package....Some prosecutors told us that they are also concerned that the police do not follow up lines of enquiry that might reveal material which might undermine the prosecution case. This is particularly important in circumstances where the effect might be to provide support for an innocent explanation (eg one put forward by a suspect when interviewed).” *Crown Prosecution Service Inspectorate. ‘The Thematic Review of the Disclosure of Unused Material’* March 2000, paragraphs 1.6, 3.38, 3.39, 3.40 and 4.103

reports is unlikely to do so. It certainly could not once a case had been concluded, but even then would still be exempt.

**The Macpherson report into the Stephen Lawrence murder inquiry recommended there should be *no* class exemption for the police.** It argued that re-establishing 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 as 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>112</sup>

### **The rationale**

The government describe the blanket exemption in clause 28(1) as a ‘reasonably narrow exemption’ dealing with ‘certain specified conditions’. It justifies it on the grounds that disclosure might prejudice ‘future criminal proceedings’<sup>113</sup>. In fact, the exemption is anything but narrow – and applies regardless of any prejudice.

Ministers argue that what is essential is to reassure authorities that information will be protected in all circumstances. But it acknowledges that such information may be disclosed under the bill’s public interest test – thus *removing* any such assurance.<sup>114</sup>

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<sup>112</sup> The Stephen Lawrence Inquiry. CM 4262-I, February 1999, paragraph 46.32

<sup>113</sup> In committee, David Lock, the Parliamentary Secretary in the Lord Chancellor’s Department said: ‘the Government believe that a class exemption is essential in relation to such information in order to ensure that future criminal proceedings are not jeopardised by the premature disclosure of information and, in relation to investigations not proceeded with and to information not produced in court, to preserve the criminal courts as the sole forum for determining guilt. Information that is disclosed in court is, of course, in the public domain.’ *Standing Committee B*, 25/1/00 (afternoon), cols 260 and 261-2

<sup>114</sup> David Lock said in committee: ‘it is right that the statutory bodies that are given specific duties to carry out investigations should be able to carry out those investigations and collect information in such a way that they can assure anyone who provides information that, in certain circumstances, it will be kept confidential, subject to the public interest test under clause 13.’ *Standing Committee B*, 25/1/00 [afternoon]

## **Potential solutions**

There are three potential solutions:

- (1) make clause 28(1) subject to a harm test, so that information would be exempt only so long as disclosure would ‘prejudice’ the investigations or proceedings referred to in the clause.
- (2) retain the class exemption but only for ‘live’ investigations. Once a final decision not to bring charges has been taken, or any proceedings have concluded, the class exemption would end. Information could then be disclosed, subject to a ‘prejudice’ test.
- (3) remove safety and consumer protection authorities from the class exemption, and apply a ‘prejudice’ exemption to their work.

The first two of these solutions were proposed in amendments during the bill’s Commons committee stage. They were supported by the Law Society, which stated: *‘the fact that the exemption will continue to be effective well after an investigation is completed is unnecessary for most purposes.’*

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## Section 4

### PUBLIC INTEREST DISCLOSURE & THE VETO

#### Clauses 13 and 52

**Clause 13 introduces the bill's public interest test, an important provision. It requires authorities to disclose some kinds of exempt information where there is an overriding public interest in openness. But the Commissioner's decisions on public interest could be overridden by a ministerial or local authority veto under Clause 52.<sup>115</sup> The existence and scope of the veto is a matter of real concern**

Clause 13 applies where information has been withheld under some, but not all, of the bill's exemptions.<sup>116</sup> It provides that:

'Where...it appears to the authority that, in all the circumstances of the case, the public interest in disclosing the information outweighs the public interest in maintaining the exemption in question the public authority shall communicate the information to the applicant.'<sup>117</sup>

The Information Commissioner will be able to enforce disclosure in the public interest by issuing a decision or enforcement notice.<sup>118</sup> Generally, notices can be challenged by appeal to the Information Tribunal. There will be *no* right of appeal against a notice relating to disclosure in the public interest. Instead, it could be vetoed by a minister, a local authority, the Mayor of

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<sup>115</sup> The duty to disclose on public interest grounds, and the veto allowing authorities to formally overrule the Commissioner, were introduced into the bill at its Commons report stage. Previously the bill provided for 'discretionary' disclosure, under which the Commissioner could recommend but not require disclosure in the public interest.

<sup>116</sup> Eight of the bill's exemptions are not subject to the public interest test, though the justification for excluding them is not self-evident in all cases. The eight are: *Clause 19* – information already reasonably accessible to the applicant; *Clause 21* – information supplied by bodies dealing with security matters; *Clause 30* – information supplied to a public authority by a court, tribunal or inquiry; *Clause 32* – Parliamentary privilege; *Clause 38(1) and part of 38(2)* – personal data about the applicant; *Clause 39* – information subject to an obligation of confidentiality; *Clause 42* – disclosures prohibited by statute; *Clause 43(2)* – information retrospectively exempted by order.

<sup>117</sup> Clause 13(4)(b)

<sup>118</sup> A decision notice, under clause 49, is issued in response to a complaint by a requester. An enforcement notice, under clause 51, can be issued in other circumstances. Both may require an authority to take specified steps to comply with the bill's requirements. Failure to comply with a notice could be dealt with as contempt of court under clause 53.

London, the First Secretary of the Welsh Assembly and specified others.<sup>119</sup> Most public authorities would have to ask a minister to exercise the veto on their behalf. The Home Secretary has undertaken to make further amendments to the availability of the veto (see below).

### **The role of public interest disclosure**

The significance of these provisions varies with the type of exemption.

Where *harm tested exemptions* are involved, the public interest test raises the prospect that information whose disclosure could cause prejudice might nevertheless be disclosed on grounds of overriding public interest, a valuable provision.

Where *class exemptions* are involved, all information, including entirely harmless information, can be withheld. Access is possible only on public interest grounds. In these areas, the public interest test will often be an unsatisfactory basis for access.

Instead of requiring the *authority* to show why the information should not be disclosed, it effectively requires the *applicant* to show why it should. Instead of a relatively simple test – would this disclosure cause harm? – it involves a complex test, identifying the public interest in disclosure and balancing it against the public interest in ‘maintaining the exemption in question’.<sup>120</sup>

The absence of a *purpose clause* of the kind found in many overseas FOI laws, makes this exercise even more difficult. A purpose clause sets out the objectives which the Act is intended to promote and may require authorities to interpret the legislation so as to favour disclosure where competing interests are otherwise closely balanced. New Zealand’s Act is notable for its purpose

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<sup>119</sup> A certificate would have to be issued within 20 working days of the Commissioner’s notice. It would state that the ‘accountable person’ has on reasonable grounds reached the opinion that the authority did *not* fail to comply with clause 13. The complainant must be given the reasons for the decision. Once a certificate is issued, the notice ceases to have effect.

A certificate could presumably be judicially reviewed on the grounds that the minister had exceeded his or her powers (eg by issuing the certificate *after* the permitted 20 day period) or had acted unreasonably in the ‘Wednesbury’ sense. It could be set aside only if the decision was so far outside the range of options that it would not have been considered at all by a reasonable minister. A minister whose instincts favoured secrecy and led him or her to veto disclosures that most cabinet colleagues would have allowed to be made could still be acting ‘reasonably’ in judicial review terms.

<sup>120</sup> Clause 13(4)(b)

clause.<sup>121</sup> An amendment promoting such a clause has been debated at the bill's committee and report stages in the Commons,<sup>122</sup> but opposed by the government on the grounds that it would create 'too strong a presumption in favour of disclosure' which would leave the bill 'unpredictable and uncontrollable'.<sup>123</sup>

As result, authorities have little guidance as to how to approach the public interest test, and particularly that part of it which refers to the public interest *in disclosure*. Given that the public interest in *withholding* information will often be self-evident, perhaps even second nature to officials, the bill's public interest test still falls short of what is required – even before the effect of the veto is considered.

### **Time allowed for decisions**

The construction of the public interest test causes a further significant problem. The openness code (which, like overseas FOI laws, contains a public interest test) envisages a *single* decision on whether exempt information should be disclosed in the public interest.

The bill, however, splits this decision into two, which operate over separate time frames. An

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<sup>121</sup> Sections 4 and 5 of New Zealand's Official Information Act 1982 state:

*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."

<sup>122</sup> The following amendment was proposed to the bill at committee and report stages in the Commons:

*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.'

<sup>123</sup> Mike O'Brien, Standing committee B, 2<sup>nd</sup> sitting (morning) 11/1/00

authority must decide (a) if requested information is exempt and, if so (b) whether there is an overriding public interest in its disclosure. The first decision must be taken within 20 working days, but the public interest decision can be taken over a longer, unspecified ‘reasonable’ time.<sup>124</sup> Decisions may therefore trickle out in two stages, with no final time limit and no indication to applicants of how long they are expected to wait. This is a serious defect, likely to generate delay and uncertainty.

An authority asked for factual information about a policy decision could take 20 days to inform the applicant that the information is exempt;<sup>125</sup> but perhaps several weeks more to decide whether to disclose it in the public interest. Such extended delays, which may be arise with a substantial proportion of requests, could undermine public confidence in the legislation.

### **The veto**

The weight attached to the public interest test in compensating for the bill’s class exemptions, makes the prospect of a ministerial veto all the more unwelcome.

**The case for a veto is in any case far from self-evident. It was explicitly rejected by the government in 1997, when the white paper stated: “We have considered this possibility, but decided against it, believing that a government veto would undermine the authority of the Information Commissioner and erode public confidence in the Act”.**<sup>126</sup>

There are serious concerns about the existence of any veto:

- it could be abused, to protect ministers or authorities from embarrassment
- its existence reasserts the principle of ministerial control over disclosure that FOI legislation should remove
- it implies that the Commissioner cannot be trusted to uphold legitimate claims for exemption
- its use will distort the development of case law, leaving voids where a veto has replaced the careful distinctions which should be left to the Commissioner and Tribunal

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<sup>124</sup> Clauses 9(1) and 13(6)

<sup>125</sup> Under clause 33(1)(a)

<sup>126</sup> *Your Right to Know. The Government’s proposals for a Freedom of Information Act.* Cm 3818, December 1997, paragraph 5.18

## **The right of appeal**

The need for a veto is all the more difficult to understand given the elaborate rights of appeal that the bill already allows. An authority which is unhappy with a notice issued by the Commissioner could:

- Challenge the decision on its merits by appeal to the Information Tribunal;<sup>127</sup>
- Appeal against the Tribunal's decision to the High Court on a point of law;<sup>128</sup>
- Judicially review the Commissioner if a decision appeared to be 'unreasonable'

Why should ministers require the right to *veto* decisions, rather than *appeal* against them? The suspicion must be that they want to be able to avoid disclosure for reasons that are too weak to persuade the Tribunal (whose members ministers themselves appoint<sup>129</sup>) or court.

## **The veto and democracy**

**The government justifies the veto by arguing that it would be “undemocratic” for the Commissioner to be able to compel ministers to disclose information in the public interest. According to Home Office minister Mike O’Brien, this would: “artificially and unnecessarily, create a democratic deficit. A democracy must mean something...Some of the arguments that we have heard, seeking to shift the balance towards allowing an unelected official to overrule the democratically elected Government, are profoundly undemocratic.”<sup>130</sup> And he added “I regard the history of the development of democracy in this country as one of giving the people’s representatives power and in many ways taking it away from officials of the Crown. We must ensure that the Bill contains a little democracy.”<sup>131</sup>**

**But the Commissioner could not force the government to change its *policy* – only ensure that the public knew what it was. Requiring ministers to tell the truth cannot be ‘undemocratic’.**

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<sup>127</sup> Clause 56

<sup>128</sup> Clause 58

<sup>129</sup> The Data Protection Tribunal will become the Information Tribunal [clause 16(2)]. Its chairman and deputy chairmen are appointed by the Lord Chancellor; its members are appointed by the Secretary of State. [Data Protection Act 1998, section 6(4)].

<sup>130</sup> Committee stage of the FOI Bill Standing Committee B, 8/2/00 (morning) col. 431.

<sup>131</sup> Standing Committee B, 18/1/00

In any case, the Commissioner already has the power to compel ministers to disclose against their wishes. The Commissioner could overrule the Defence Secretary, the Foreign Secretary or the Chancellor of the Exchequer if she did not accept their claims that information would ‘prejudice’ defence, international relations or the economy.<sup>132</sup> **These decisions involve significant issues of public interest, even if the term itself is not used – yet ministers have no veto here.**

A more limited veto might be more acceptable if it was restricted to cases where *having accepted that information would prejudice essential interests such as defence or foreign relations* the Commissioner nevertheless sought to order disclosure on wider public interest grounds.

**But under the bill, the veto can be used to block the disclosure of harmless – but perhaps embarrassing – information, such as the facts which underlie government decisions. The possibility of a veto over such information, where there is no prospect of harm to essential state interests, is unacceptable.**

### **Other Jurisdictions**

FOI laws in jurisdictions such as the **USA, Canada** and **British Columbia** contain no ministerial veto. Where a veto does exist, it is usually far more limited than in the UK proposals.

**Scotland’s** FOI proposals will allow the Scottish Information Commissioner to make binding rulings in the public interest, in relation to *harm-tested* exemptions.<sup>133</sup> There would be no veto in these cases.

The harm test itself would be whether disclosure would ‘substantially prejudice’ specified interests, a far tougher test than the bill’s ‘prejudice’. This will apply to a range of important exemptions, including the factual information underlying policy decisions.<sup>134</sup> The ‘substantially prejudice test’ combined with a public interest power over which ministers have no veto, are a

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<sup>132</sup> Clauses 24, 25 and 27

<sup>133</sup> Scottish Executive, ‘An Open Scotland. Freedom of Information, a Consultation’, November 1999, SE/1999/51 Paragraph 6.5

<sup>134</sup> Factual information relating to policy decisions could only be withheld if disclosure would ‘substantially prejudice’ collective ministerial responsibility or the frankness of internal discussion, advice or the exchange of views.

Other ‘substantially prejudice’ exemptions subject to a public interest test but no veto include: the prevention of crime, national security, defence, international relations, immigration controls, the management of the economy, the assessment and collection of taxes, the authority’s competitive position, its commercial or contractual activities, personnel management, the proper and efficient conduct of the authority’s operations, the competitive position of a third party, and disclosures which would substantially prejudice the future supply of information. *An Open Scotland*, Annex C,

particularly forceful combination.

The Scottish bill will also contain *class* exemptions, and in these areas the Commissioner's public interest rulings will be subject to a veto, exercisable only by the whole cabinet. Given Scotland's coalition government, this could prove to be an additional hurdle.

**Ireland's** Freedom of Information Act 1997 permits a ministerial veto in only four areas: information prejudicial to security, defence, international relations or law enforcement.<sup>135</sup> Many other exemptions, including policy advice, are subject to a public interest test, *and no ministerial veto*.<sup>136</sup> The only right of appeal in such cases, is to the High Court on a point of law<sup>137</sup> – a far more limited provision than the UK proposals.

**New Zealand's** legislation contains a veto which, it was expected, would only be used in the most exceptional cases. Robert Hazell of the Constitution Unit has noted:

“The Danks committee [whose report led to the legislation] said that the veto ‘would doubtless be invoked only in compelling cases’; and the Attorney-General said it would be a brave minister who exercised the veto power. But in the first year of the Act's operation there were eight vetoes...A number of the vetoes were of doubtful legality, but none were challenged in the courts.”<sup>138</sup>

Some of the disclosures vetoed in New Zealand illustrate the potential dangers of this approach. They included:

- Labour market forecasts
- Estimates of the number of unregistered unemployed people
- Information relating to the proposed establishment of an investment bank

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<sup>135</sup> Certificates must be issued by a cabinet minister and automatically lapse after 6 months unless reviewed and endorsed by the Taoiseach acting jointly with prescribed other ministers. The certificate can only be issued if (a) the information is *and* (b) the matter is of ‘sufficient sensitivity or seriousness’ to justify a certificate. The certificate may be challenged in the High Court on a point of law and a public authority can be required to pay the costs of an unsuccessful applicant. Freedom of Information Act 1997 [Ireland], sections 25(1), 42(2)(a) and 42(6).

<sup>136</sup> Ireland's Commissioner can order the disclosure in the public interest of exempt information relating to 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>137</sup> Freedom of Information Act 1997 [Ireland], Section 42(1). The court can order the public authority to pay the costs of an unsuccessful applicant, [section 42(6)]

<sup>138</sup> Robert Hazell, Freedom of Information in Australia, Canada and New Zealand, Final Report to the Cabinet Office September 1987. Country Report. New Zealand, at para. 2.14..

- A contract relating to a Post Office tender
- An evaluation of computer use in schools
- The successful tender price of wall plugs<sup>139</sup>

All of these vetoes were apparently notified to the cabinet before being issued.

**Concern about the abuse of the veto in New Zealand led to the arrangements being revised in 1987. Since then, a veto can only be exercised if (a) it is agreed by the whole cabinet (b) published in the official *Gazette* (c) introduced by an Order-in-Council and laid before the House of Representatives (d) the Order in Council may be challenged in the High Court on the grounds that the decision to issue it was wrong in law, and (e) the costs of any such challenge must be paid by the Crown – regardless of the outcome – unless the action was unreasonable.**

Since then, no veto has been issued.

### **Further government amendments**

At report stage, the Home Secretary undertook to:

- amend the bill to make it clear that only a cabinet minister or the Attorney General (but not junior ministers) could exercise the veto;<sup>140</sup>
- require some form of collective consultation before a veto is exercised. Mr Straw suggested this could be written into the ministerial code; and that if possible some statutory reference to this effect would be included in the bill;<sup>141</sup>
- reconsider whether a veto should be available to local authorities.<sup>142</sup>

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<sup>139</sup> M Taggart 'Freedom of Information in New Zealand', in N. Marsh (editor) 'Public Access to Government Held Information: A Comparative Symposium', London, Stevens & Son, 1987

<sup>140</sup> HC Debates, 4/4/00, cols 921-2

<sup>141</sup> The Home Secretary said: "I also told the House yesterday that we would ensure that written into the memorandum of guidance for Ministers was clear guidance as to how they ensured that, except in the area of quasi-judicial decision-making, decisions would be subject to collective agreement. I wish to inform the House that we are giving further and urgent consideration to whether it will be possible to write such provisions into the Bill. If we can do that, we will." *HC Debates*, 5/4/00, col 1096

<sup>142</sup> The Home Secretary said: "we have three options. The first is to keep the arrangement as it is; the second is to prevent local authorities from issuing exemption certificates because the decisions are not of the same level as would arise for central Government; and the third is to accept that an exemption certificate might be needed in certain circumstances, but to say that the decision should be taken by a Minister rather than the local authority. I am pleased to tell the House that I have ruled out the third of those options, because if exemption certificates are issued the individual or body with an interest in the information being withheld should be prepared to stand up and answer for it. I am not in favour of Ministers making the decision for local authorities." *HC Debates*, 4/4/00: Col 929

## **What else is needed?**

These measures would make the veto more difficult to use. But they do not go far enough. The ideal solution is for no veto at all, in line with the government's original proposals.

If a veto is retained:

- it should be limited to the essential state concerns. It should only be available where the Commissioner orders disclosure in the public interest of information exempt on grounds of prejudice to interests such as defence, international relations or the economy.<sup>143</sup>
- It should not be available to protect other matters such as relations between devolved administrations,<sup>144</sup> investigations,<sup>145</sup> audit functions,<sup>146</sup> the formulation of government policy,<sup>147</sup> the effective conduct of public affairs<sup>148</sup> or commercial interests.<sup>149</sup>
- A veto should be subject to the additional restrictions required under New Zealand's FOI law. That is, it should be exercisable by the cabinet as a whole and set down for debate in Parliament. These are designed to make the veto difficult to use, so that it is resorted to only in cases of overriding importance.
- The veto should be removed from local authorities and devolved assemblies. A veto in their hands would be of particular concern, given local authorities' track record of refusing to comply with recommendations of the Local Government Ombudsmen. Historically they have rejected about 6 per cent of Ombudsman recommendations.<sup>150</sup>

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<sup>143</sup> Clauses 24, 25 and 27. Note that the public interest test does not apply where national security is concerned: such matters are either excluded from the bill altogether [clause 21] or subject to a separate form of ministerial certificate [clause 22].

<sup>144</sup> Clause 26

<sup>145</sup> Clause 28

<sup>146</sup> Clause 31

<sup>147</sup> Clause 33

<sup>148</sup> Clause 34

<sup>149</sup> Clause 41

<sup>150</sup> Local Government Ombudsman, Summary Annual Report for the Year Ended 31 March 1996