# The Campaign for Freedom of Information

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# FREEDOM OF INFORMATION BILL

## House of Lords Report Stage

*13 November 2000*

**This paper describes some of the key amendments tabled for the Freedom of Information Bill's report stage in the House Lords.**

**But it also seeks to explain why the Campaign for Freedom of Information is so deeply disappointed at the agreement which has apparently been reached between the Liberal Democrats and the Government over the Bill**.

As we understand it, in return for modest concessions on four amendments, the Liberal Democrats will support the Government during the bill's remaining stages. This implies that they will *not* support further moves to improve the bill. If this proves to be the case, the continued efforts of Labour, Conservative and Crossbench peers are unlikely to succeed. The bill will become law with its serious defects intact.

The four amendments in themselves are helpful. But they represent only limited progress on issues of mainly secondary importance and do not, in our view, address the bill's key shortcomings. We cannot see how they justify ending all serious efforts to amend the bill, particularly at this critical stage.

The need for significant improvements has been the subject of all party agreement at all stages of the bill's passage, in both Houses. Until now, it seemed likely that significant changes would be secured at report stage in the Lords. Presumably, that will not now happen. This might be explained if the bill itself was in danger – or would be endangered were substantial amendments to be made. We do not believe this to be the case.

No-one can predict to what extent any improvements secured in the House of Lords would ultimately be retained in the final Act. However we cannot understand why it should be thought that the limited changes represented by the four amendments are the maximum that could be achieved, or are so valuable that the prospect of losing them could not be contemplated.

**THE FOUR AMENDMENTS**

The first of the four amendments involves a change to the structure of the public interest test in clause 2. At present, information would be disclosed only if the public interest in disclosure 'outweighs the public interest in maintaining the exemption'.[1] This means that if the public interest for and against disclosure was absolutely evenly balanced, the information would be withheld. The amendment would reverse the position, so that in a 'dead heat', the information would be disclosed. Lord Falconer has suggested that the need for this will rarely arise:

> "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."[2]

This was also the view of Lord Goodhart when he proposed a similar amendment at committee stage. He said:

> "It is fair to say that I doubt whether, in practice, this will make an enormous difference. 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.'[3]

We agree that the signal is wrong and that the change is desirable. However, the practical effect of this amendment is apparently likely to be limited.

The second amendment is effectively one which government had already promised to make. It reinstates a provision which appeared in the bill at second reading but was deleted by government amendments in committee. Lord Falconer told peers that the deletion was made "in error" and indicated that the provision would be restored.[4]

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[1] Clause 2(2)(b)
[2] Hansard, HL,17/10/00, column 914
[3] Hansard, HL, 17/10/00, col 908
[4] Hansard, HL,17/10/00, cols 901 and 915

The original provision, in what was clause 13(5) of the bill, required authorities to "in particular have regard to the public interest" in disclosing background factual information relating to decisions. This did not provide an absolute right to factual information, but was a steer that the issue should be considered under the public interest balancing test. The Liberal Democrat amendment is identical except that it refers to "the particular public interest" in such disclosure.[5]

This change leans further towards access. However, the decision to make an amendment on broadly these lines is one to which the government was publicly committed beforehand.

The third amendment would place authorities under a statutory duty to assist applicants. This is an improvement on the weaker duty to assist, which otherwise would appear in guidance under the Secretary of State's code of practice.[6]

The fourth amendment deals with the time allowed for decisions on public interest disclosure. The bill sets no fixed time for these decisions, which can be taken within an unspecified "reasonable" period.[7] The amendment would require authorities to give applicants an estimate of how long any delay will be. This is slight progress, though we believe a fixed time period is required

The amendments all represent progress. The question is whether they represent such substantial progress, in terms of the remaining outstanding issues, as to justify ending any real pressure for further improvements. In our view, they do not.

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[5] Clause 13(5) of the bill, which the government deleted and then promised to restore stated that when considering the public interest balancing test in relation to policy information, an authority "shall, 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 informed background to decision-taking".

The Liberal Democrat amendment proposes that "regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking"

[6] Clause 44(2)(a)

[7] Clause 10(2)

## THE OUTSTANDING ISSUES

Some of the remaining key issues, and the amendments which address them, are described below. This is not a comprehensive account.

A major concern about the bill relates to a number of 'class' exemptions, which exempt all information within wide classes, regardless of whether the particular disclosure would cause harm. In these areas, access will only be possible if there is an overriding public interest in disclosure. But any order by the Commissioner requiring government to disclose on public interest grounds could be vetoed by ministers.

Three class exemptions are of particular concern.

## 1. POLICY FORMULATION

Clause 34 exempts all information relating to policy formulation, including the facts on which decisions are taken, scientific advice on potential health hazards, research findings and technical assumptions. Only statistics about decisions which have been taken would be excluded from this exemption.[8] Most of the information whose suppression featured in the BSE crisis would be caught by this elastic provision.

**Baroness Whitaker** proposes an amendment to remove factual and statistical information, and its analysis, from the scope of this and the related exemptions in clause 34. The amendment is based on the 'deliberative processes' exemption in Ireland's 1997 FOI Act. The Irish Act states that the corresponding exemption:

> 'does not apply to a record if and in so far as it contains…factual (including statistical) information and analyses thereof'.[9]

The amendment would bring the bill into line with the UK Open Government code where the equivalent exemption applies to 'internal discussion and advice'. The Parliamentary Ombudsman has repeatedly rejected arguments that factual information can be withheld

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[8] Clause 34(2)
[9] Freedom of Information Act 1997 [Ireland], Clause 20(2)(b)

under this exemption, ruling that

> "it is intended to protect advice, not factual information".[10]

The amendment allows factual information to be withheld in one situation, where the selection of facts themselves would indicate a decision which was about to be taken, and to disclose this prematurely would be contrary to the public interest.

**Lord Mackay of Ardbrecknish** proposes to make the class exemptions in clause 34 subject to a test of 'prejudice'. Information could only be withheld if disclosure would prejudice the formulation of government policy, ministerial communications or the operation of ministers' private offices. The fourth exemption in this group, for Law Officers' advice, would not be affected.

This would bring the bill into line with the code of practice, where policy information is withheld only if disclosure is likely to 'harm the frankness and candour of internal discussion'[11] and there was no overriding public interest in disclosure.[12]

## 2. THE EFFECTIVE CONDUCT OF PUBLIC AFFAIRS

Clause 35(2)(c*)* is what Lord Falconer has described as a 'catch-all' exemption.[13] It protects any information whose disclosure:

> 'would in the reasonable opinion of a qualified person be likely to prejudice the effective conduct of public affairs'.

The qualified person will be a minister or official. The bill places no limit on the matters that can be caught by this exemption. By giving legal weight to an minister's *opinion* about what causes prejudice, the decision is protected from review by the Commissioner

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[10] Parliamentary Ombudsman, Case A.8/00, HC 494, May 2000

[11] Exemption 2 of the code applies to "Information whose disclosure would harm the frankness and candour of internal discussion, including: proceedings of Cabinet and Cabinet committees; internal opinion, advice, recommendation, consultation and deliberation; projections and assumptions relating to internal policy analysis; analysis of alternative policy options and information relating to rejected policy options; confidential communications between departments, public bodies and regulatory bodies."

[12] 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".

[13] Hansard, HL, 19/10/00, col 1281

unless it is irrational. The exemption is considerably worse than the equivalent provisions in the Open Government code,[14] or overseas FOI laws.[15]

Home Office minister Mike O'Brien has explained that:

> '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".[16]

We do not believe a self-respecting legislature would accept this objectionable principle on the face of a Freedom of Information Bill.

**Lord Archer of Sandwell** proposes two amendments to this clause. One would delete clause 35(2)(c) altogether, removing the exemption for information whose disclosure would prejudice the effective conduct of public affairs.

A separate amendment would delete the reference to 'reasonable opinion of a qualified person' from the whole series of exemptions in clause 35. A decision to withhold information under any of these provisions would have to be demonstrated objectively, and could be overturned by the Commissioner on the merits of the case.

## 3. INVESTIGATIONS AND PROCEEDINGS

Clause 29(1*)* exempts information held in connection with criminal investigations and proceedings, including information held by a safety and other prosecuting authorities in connection with investigations or inspections which could have led to a decision to prosecute.[17]

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[14] Exemption 7b of the code exempts information whose disclosure 'would harm the proper and efficient conduct of the operations of a…public body'. This is an objective test, which does not depend on an authority's opinion.

[15] Section 40(1)(d) of the Australian FOI Act exempts information whose disclosure would 'have a *substantial adverse effect* on the proper and efficient conduct of the operations of the agency'. This is the equivalent of a 'substantial harm' test and again makes no reference to an authority's'opinions'.

[16] House of Commons, Standing Committee B, 9th Sitting, Part II, 27/1/00, column 321

[17] clause 29(1)(b)

The exemption applies even if it was decided *not* to prosecute, perhaps because no offence was found. Information can be withheld even if there is no possibility of prejudice to legal proceedings. It applies to all leading safety authorities, including the Railway Inspectorate, Nuclear Installations Inspectorate, Civil Aviation Authority, Maritime & Coastguard Agency, Environmental Health Officers, Drinking Water Inspectorate and even MAFF, which retains some prosecution functions in relation to BSE.

During the committee stage Lord Falconer appeared to suggest that routine inspections by such bodies were not caught by this exemption. He later confirmed that they were indeed caught.[18]

The danger of this exemption is that it would protect evidence of hazards which safety authorities observe, but fail to act on. Complacent authorities would be shielded from scrutiny. The Health & Safety Executive's former director general, Jenny Bacon, has said her agency did not require this exemption, and that "a prejudice tested exemption would provide sufficient protection".[19]

**Lord Archer of Sandwell** proposes such an amendment. Information covered by clause 29 would be exempt only if disclosure 'would be likely to prejudice any such investigation or proceedings'. The amendment would require authorities to consider in particular whether such prejudice would be caused by deterring witnesses from making statements or giving evidence. Ministers have indicated that it is this concern which has led to the class exemption.[20]

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[18] Hansard, HL, 24/10/00, col 274

[19] Evidence to the House of Commons Public Administration select committee, HC 570-II, Q.826

[20] According to Lord Falconer: 'the DPP and the Serious Fraud Office said that if we did not have an exemption in relation to criminal proceedings we would increase greatly their difficulties in getting witnesses to come forward and give statements in the course of criminal investigations. People have great anxiety about giving statements to the police or the Serious Fraud Office. They fear what may happen to them in relation to the giving of that evidence. They fear what may happen if there is an acquittal. They fear that what they said will come out. They fear that material they have given to the police in the course of their investigations which is not then used in the criminal proceedings might come out in some way or other'. Hansard, HL, 19/10/00, col 1297

## 4 THE PUBLIC INTEREST TEST

Information within these three exemptions can still be disclosed under clause 2 if the public interest in disclosure outweighs the public interest in maintaining the exemption. Valuable though this provision is, there are two objections to it as the sole basis for disclosure.

First, the test requires that someone must demonstrate an overriding public interest in openness. But the presumption in favour of disclosure should not have to be established by the requester: it should be inherent in the legislation. It should be for the *public authority* to demonstrate that disclosure would be *harmful*, an entirely different approach.

This is the approach adopted other exemptions, including those for defence, international relations, the economy and law enforcement. In these areas, an authority resisting disclosure must demonstrate that it would 'prejudice' the interest concerned. If prejudice cannot be shown the Commissioner can order disclosure – and the order cannot be vetoed (though it can be appealed against). If prejudice *can* be shown, the public interest test then comes into play. If this principle can be followed in relation to these essential state interests there is no reason why it cannot be extended to the three exemptions above.

Second, any notice issued by the Commissioner requiring government to disclose on public interest grounds can be vetoed by ministers. Ministers could always ultimately overrule the Commissioner under these exemptions.

A final problem is that disclosure under the bill's public interest test does not have to take place within any fixed time period. Decisions on whether information is *exempt* must be taken within 20 working days. But decisions on whether to disclose information on public interest grounds can take place over an unspecified 'reasonable' time.[21] This may led to substantial delay. Neither the UK code of practice, nor any other FOI law, nor the Aarhus Convention (which the government has signed) allows additional time for consideration of the public interest, though time limits can be extended where the volume and complexity of the records involved requires this.

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[21] Clause 10(3)

**Lord Mackay of Ardbrecknish** has tabled an amendment that would require decisions on the public interest to be taken within the same 20 day period as decisions on whether information is exempt.

Not all of the bill's exemptions are subject to the clause 2 public interest test.[22] **Lord Lucas of Crudwell** proposes to extend the bill's public interest test to information which is exempt on the grounds that its disclosure would constitute an actionable breach of confidence [clause 40]. In most case, a legally binding obligation of confidence would arise merely because a third party and an authority agree between themselves that their communications will be in confidence.[23] This makes it remarkably easy for the two parties to ensure that their exchanges are exempt from access, perhaps because they know they would attract criticism. Information subject to an obligation of confidentiality would be subject to a public interest test under the common law of confidence. However, this is likely to be more restrictive than the clause 2 public interest test.[24]

## 5. THE VETO

The bill makes the exercise of the veto relatively easy. It can be issued by a cabinet minister after consulting his cabinet colleagues. The obligation to consult does not appear in the bill itself and will presumably be required under the Ministerial code. There is no suggestion that the cabinet will meet to discuss or endorse any veto. The proposal is merely that cabinet colleagues be *consulted* before it is exercised.

**Lord Archer of Sandwell** proposes an amendment that would restrict the veto to cabinet documents and minutes only. This would remove the veto altogether in relation to most information.

**Lord Mackay of Ardbrecknish** proposes an amendment that would impose an additional test before the veto could be used. Ministers would have to have reasonable grounds to believe that if the disclosure went ahead, there would be "serious harm to the

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[22] These so called 'absolute exemptions' are listed in clause 2(3)

[23] The exceptions to this principle arise if the information is already publicly available, is trivial, or concerns serious wrongdoing.

[24] According to Home Office minister Mike O'Brien 'Case law [for breach of confidence] has produced a type of public interest test, though not of the level used in the Bill…the common law of confidence contains a public interest test, but I do not claim that that interest test is of as high a standard as the one in the Bill." Hansard, HC, Standing Committee B, 1/2/00, cols 362-3

public interest". This is the test adopted by the last government in deciding whether to claim public interest immunity and continued by the present government.[25]

**Lord Mackay of Ardbrecknish** has tabled a further amendment to give Parliament a formal role in approving the veto. Ministers have repeatedly said that Parliamentary scrutiny will be a significant deterrent against unnecessary use of the veto.[26] In fact, the bill does not require Parliament to be told when a veto is issued. The *applicant* would be informed, and the veto certificate would be served on the Commissioner, but Parliament would not be informed until it received the Commissioner's annual report. The amendment provides that a veto would automatically lapse unless approved by a resolution of both Houses of Parliament within 20 sitting days.

**Lord Mackay of Ardbrecknish** also proposes to limit the range of bodies able to ask a minister to exercise a veto on their behalf. A veto can be served in relation to notices served on government departments or other bodies designated for this purpose. However, the definition of 'government department' includes non-ministerial bodies which exercise statutory functions on behalf of the Crown.[27] These include bodies such as the Health & Safety Executive and the Food Standards Agency. Lord Mackay's amendment would remove these bodies from the definition of 'government department' for the purposes of clause 52.

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[25] In December 1996, following the Scott report, the then Attorney General, Sir Nicholas Lyell, announced: "Under the new approach, Ministers will focus directly on the damage that disclosure would cause. The former division into class and contents claims will no longer be applied. Ministers will claim public interest immunity only when it is believed that disclosure of a document would cause *real damage or harm to the public interest...*

The new emphasis on *the test of serious harm* means that 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 documents. The only basis for claiming PII will be a belief that disclosure will cause real harm." (emphasis added) [Hansard, HC, 18/12/96, col 949-950]. The present government has said that it is following "the same approach to public interest immunity".[Jack Straw, 3/3/99, col. 7610

[26] Lord Falconer said in the House of Lords on 25/10/00 that the veto: 'will be available only on the signature of a senior member of the Government…we can be sure that this House and the other place will hold such signatories accountable for their actions' [col. 441]. 'A Minister making any such decision would be required to inform the applicant of the reasons for his decision and, as I said, would be accountable to Parliament, his Cabinet colleagues, his constituents, members of his own party and the wider population for that decision' [col. 442]. 'Ministers would expect to have to explain to Parliament the grounds on which the certificate has been requested and approved' [col 444].

[27] Clause 83