The Campaign for Freedom of Information

Suite 102, 16 Baldwins Gardens, London EC1N 7RJ
Tel: 020 7831 7477
Fax: 020 7831 7461
Email: admin@cfoi.demon.co.uk
Web: www.cfoi.org.uk

FREEDOM OF INFORMATION BILL

House of Lords Committee Stage

BRIEFING 1

Clauses 1 – 18

12 October 2000

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

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

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INTRODUCTION

The Freedom of Information Bill still suffers from fundamental weaknesses. It will allow enquirers to be frustrated by provisions which allow authorities to withhold information without good reason. Indeed, in certain important respects, the bill is weaker than the existing Open Government code, introduced by the Conservatives in 1994. Government departments could operate in *greater* secrecy under the bill than they do at present.

However, in other areas the bill's approach is often helpful. The range of bodies covered is wide; the right of access would apply retrospectively; the charging regime is relatively modest; authorities can be required to publish information proactively; and the enforcement mechanism, involving an Information Commissioner, is accessible. A small number of key changes could turn this into an effective Freedom of Information Act.

The problems are the bill's wide exemptions. Some only allow authorities to withhold information where disclosure would 'prejudice' interests such as defence, international relations or commercial interests. This is a weaker test than the 'substantial harm' proposed in the 1997 white paper,[1] but at least it puts the onus on the authority to show that disclosure would cause some harm. If they cannot, the Commissioner could order disclosure. Authorities would have to comply, unless they appealed to the Tribunal.

But other exemptions allow wide classes of information to be withheld, regardless of the consequences of the actual disclosure.[2] By allowing *harmless* information to be concealed, these exemptions undermine the basic FOI principle – that the public is entitled to any information unless the authority shows disclosure would be damaging. The bill rubs this point home, by allowing authorities to refuse to even confirm the *existence* of information covered by these class exemptions. Those that most concern us apply to information about policy formulation; the investigations of safety and other prosecuting authorities; and the near-class exemption for information which in the authority's subjective opinion would 'prejudice the effective conduct of public affairs'.

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[1] 'Your Right to Know', December 1997, Cm 3818

[2] Class exemptions apply to bodies dealing with security [clause 21(1)], Information in confidence from other governments [clause 25(2)], Investigations and proceedings [clause 28(1)], information relating to confidential informants [clause 28(2)] the Court records & inquiry records [clause 30(1) and 30(2)(b)], Parliamentary privilege [clause 32(1)], Formulation of government policy [clause 33(1)(a)], Ministerial communications [clause 33(1)(b)] Law officers' advice [clause 33(1)(c)], Ministers' private offices [clause 33(1)(d) Communications with Royal Family [clause 35(1)(a)], Honours [clause 35(1)(b)], Information in confidence [clause 39(1)], Legal professional privilege [clause 40(1)], Trade secrets [clause 41(1)], Disclosures prohibited by statute [clause 42(1)(a)].

In these areas, the only chance of obtaining information will be under the bill's public interest test. This requires disclosure where 'the public interest in disclosing the information outweighs the public interest in maintaining the exemption'. However, this important provision reverses the burden of proof. Instead of having to disclose information unless it is shown to be harmful, information would be withheld unless there is an overriding public interest in openness.

There are other problems with the public interest test. Several so-called 'absolute' exemptions are not subject to it at all. There is no fixed time period for decisions on the issue, so authorities may delay requests almost indefinitely. Finally, an enforcement notice served by the Commissioner on a government department could be vetoed by ministers - an ultimate trump card. Government amendments would remove the veto from local authorities, which is welcome. But its availability to ministers remains a matter of concern. The white paper explicitly rejected any such approach, stating: "*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.*"[3]

Of the class exemptions, the most startling protects all information relating to the formulation of government policy[4] – not just civil service advice, but factual information, its analysis, research findings, scientific assessments, evidence of health hazards, reports on overseas practice, cost data, technical assumptions, consultants' studies and untested assertions fed into the system by lobbyists. There may be an important debate to be had about the effect of disclosure on civil service *advice*. But this exemption appears to start somewhere else, with the assumption that policy-making is none of the public's business in the first place.

The government's only concession is a proposal to exclude *statistics* from this exemption, but only where they relate to a decision *which has been taken.* This miniscule change highlights the fact that even statistics about an undecided matter can be suppressed.

These provisions are a dismaying retreat from the existing Open Government code.[5] The code requires departments to publish the facts and analysis of facts on which decisions are based. It allows other policy information, including advice, to be withheld only if (a) disclosure would harm the frankness of internal discussion and (b) that harm outweighs the public interest in openness. This initial presumption of openness unless harm is shown is not found in the bill. To elicit even the most innocent fact, a public interest case would have to be made and won.

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[3] Your Right to Know, paragraph 5.18

[4] Clause 33(1)(a)

[5] Code of Practice on Access to Government Information, available on the Home Office website at http://www.homeoffice.gov.uk/foi/ogcode981.htm

No-one should be surprised if ministers and officials vigorously oppose disclosure, arguing that the facts and analysis may be misleading, that their premature disclosure could undermine decision-making, and that the public interest will be damaged in ways those outside Whitehall could not be expected to grasp. Even if the Commissioner would take a different view, the bill ensures that it may be months before a complaint can reach her. And of course, there is always the veto.

A second class exemption exempts all information obtained during investigations or inspections by prosecuting authorities. As well as the police and Crown Prosecution Service it covers safety bodies such as the Health & Safety Executive, the Railway Inspectorate, Nuclear Installations Inspectorate, Civil Aviation Authority, Marine & Coastguard Agency, Environmental Health Officers, Trading Standards Officers and the Drinking Water Inspectorate. Even MAFF, as the prosecuting authority for some animal welfare and BSE legislation, would be covered.

All information relating to investigations would be exempt even if disclosure could not prejudice legal proceedings – for example because a decision not to prosecute had been taken, or it was clear that no offence had been committed. After a trial, information would still be exempt. Access would be possible only on grounds of overriding public interest. The recently retired director general of the Health & Safety Executive has said the HSE does not require such comprehensive protection. Yet, the government insists on an exemption that could prevent the public learning about the failings which later led to the Paddington rail crash, the falsification of nuclear test data by BNFL or MAFF's disastrous handling of the BSE crisis.

A third exemption applies to information which 'in the reasonable opinion of a qualified person' – normally a minister or official - would be likely to inhibit the frank provision of advice or exchange of view or otherwise 'prejudice the effective conduct of public affairs'. By giving legal weight to the authority's opinion, these decisions will largely be immune from challenge by the Commissioner, except on the limited grounds that the opinion was irrational or perverse. Home Office minister Mike O'Brien has said that this exemption protects "*the right of the public to have an effective public administration*". This, he said, was an issue which only ministers or persons authorised by them – but not the Commissioner – could understand: "*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."[6]

The Parliamentary Ombudsman has reported that, under the code, 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"*.[7] The catch-all exemption for the 'effective conduct of public affairs' is likely to be a regular tool in the hands of unhelpful authorities, valued for it vagueness and near-immunity to challenge.

The government stresses that a change to a more open culture is essential for FOI to work. But these exemptions build the old culture into the heart of the bill. They must be amended if the legislation is to succeed.

[6] Mike O'Brien, Committee stage of the FOI Bill, Standing Committee B, 27/1/00 [Part II], col. 321
[7] Parliamentary Ombudsman, 5th Report, 1997-98, HC 845, June 1998

PRIORITY AMENDMENTS IN BRIEF

Some 350 amendments have been tabled for the House of Lords committee stage. The great majority of these are helpful, but we would give particular priority to a small number of overriding importance.

These are outlined first and described more fully later, along with an account of the other amendments tabled.

1. POLICY FORMULATION

Introduce a harm test into the policy formulation and related class exemptions.

This could be done by any of three amendments tabled by Lord Mackay of Ardbrecknish. These would require authorities to show that disclosure would (1) "substantially prejudice the formulation or effective implementation of present or future government policy" or (2) "prejudice" any of the interests referred to in clause 33(1), or (3) "harm the frankness and candour of internal discussion" – the test used in the code of practice exemption.

Exclude factual information from the policy formulation exemption.

An amendment tabled by Lord Archer of Sandwell would achieve this. However, the code of practice effectively requires disclosure of both facts and analysis of the facts – so a slight extension of this amendment would be desirable.

2. EFFECTIVE CONDUCT OF PUBLIC AFFAIRS

Delete the clause 34 exemption for information which would 'prejudice the effective conduct of public affairs'

Lord Archer's amendment would achieve this by deleting clause 34(2)(c). A further amendment by Lords Goodhart & Lester of Herne Hill would delete the phrase 'in the reasonable opinion of a qualified person' from the related amendments in clause 34(2).

3. INVESTIGATIONS AND PROCEEDINGS

Introduce a test of harm into the clause 28(1) class exemption for information obtained by prosecuting authorities.

Lord Archer's amendment to clause 28(1) would introduce a test of whether disclosure would 'substantially prejudice' investigations or proceedings. This is the test that the Macpherson report into the Stephen Lawrence murder inquiry recommended should apply to the police under FOI. Amendments tabled separately by Lord Lucas of Crudwell and Lord Mackay would introduce a test of 'prejudice'. A more limited alternative would be to retain the class exemption but only until any investigations or proceedings had concluded, as proposed in amendments by Lords Goodhart & Lester and Lord Colville of Culross.

4. PUBLIC INTEREST DISCLOSURE

Remove the ministerial veto over the Commissioner's rulings on public interest disclosure.

This could be done by voting against clause 52. Lord Lucas has indicated that he intends to oppose this clause. (Removing the veto would still allow ministers to challenge decisions of the Commissioner by appeal to the Tribunal and thereafter to the court on a point of law.)

Require decisions on the public interest to be taken within a fixed time period.

This could be done by *opposing* Lord Falconer's amendment (to clause 9, page 5, line 35) which would allow decisions on the public interest to be taken within 'such time as is reasonable in the circumstances'. Decisions on the public interest would then be subject to the 20 working day limit for dealing with the question of whether information is exempt.[8]

Extend the public interest test to those exemptions not presently covered by it.

A series of amendments by Lord Lucas would achieve this. An amendment by Lord Mackay would have the same effect, and also extend the public interest test to requests refused on grounds of cost.

[8] Clause 9(1)

INDIVIDUAL AMENDMENTS
CLAUSE-BY-CLAUSE

This paper covers the amendments tabled to clauses 1-18. Subsequent papers will deal with the remaining clauses.

LONG TITLE

Lord Archer – long title - page 1, line 1

This amendment would change the long title of the bill from 'a Bill to *make provision for* the disclosure of information' to 'a Bill to *facilitate* the disclosure of information'. This would, helpfully, change the long title from a purely neutral description to one which indicates that the Bill has a positive purpose.

BEFORE CLAUSE 1

Purposes clause

New clauses, setting out the purposes of the Bill, have been tabled by Lord Lucas of Crudwell ('to enable and encourage the provision of information') and Lord Mackay of Ardbrecknish ('to facilitate public access to information'). These are helpful, though the more explicit purpose clause tabled by Lords Goodhart and Lester of Herne Hill, is likely to prove a more powerful stimulus to openness.

The Goodhart/Lester clause states:

> (" .--(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, and
> (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.")

It would have a number of benefits:

- It would set the tone of the Act, as a measure intended to promote greater openness and accountability;
- it would act as a counterweight to the long and potentially overwhelming list of exemptions, occupying 13 full pages of the bill;
- it would encourage authorities to exercise any discretion under the Act in favour of disclosure;
- it would serve as a 'tie-breaker' in cases where the case for and against disclosure appeared evenly balanced;
- it would aid in interpreting the bill's public interest test.

Authorities may find it difficult to interpret the bill's public interest test. They may find it easy to see the 'public interest in maintaining the exemption', since caution about disclosure is a deeply ingrained aspect of the official culture. It will often be harder for officials to envisage in equally concrete terms what the 'the public interest in disclosing the information' means. A statutory reference to the public interest purposes of the Act will help to redress the balance.

Purpose clauses appear in most overseas FOI laws, the most notable example being New Zealand's.[9] The UK Open Government code also contains such a provision.[10] The FOI white

[9] 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."

[10] The preamble to the code states: "This Code of Practice supports the Government's policy under the Citizen's Charter of extending access to official information, and responding to reasonable requests for information. The approach to release of information should in all cases be based on the assumption that information should be released except where disclosure would not be in the public interest, as specified in Part II of this Code. The aims of the Code are: to improve policy-making and

paper implied such a provision.[11] The Scottish Executive is considering including a purpose clause in the forthcoming Scottish FOI legislation.[12]

The House of Commons Public Administration select committee recommended such a provision for the bill:

> 'Purpose clauses can be used to indicate clearly which of two or more competing values should be uppermost when a decision is made. In this Bill, such a clause could have the effect of encouraging Commissioner, Tribunal and judges to lean towards disclosure. Perhaps more important, though, it could influence those people in departments and other authorities who actually have to operate the legislation…
>
> The effect of adding a purpose clause would be to encourage an authority to exercise its discretion under clause [13][13] in favour of disclosure, and indeed, we have recommended above that if clause [13] is to be retained, a specific requirement to regard the public interest as being in favour of disclosure should be inserted within it….The effect of the inclusion of a purpose clause would be much greater than this, though. A purpose clause would influence the exercise of every discretion under the Act, including the discretion to charge; the manner in which publication schemes are published (clause [17(4)]);the nature of the model publication schemes issued by the Commissioner and of the 'practice recommendations' under clause [47(1)]; the meaning of 'a reasonable interval' in clause [12(2)] and so on. But we have also said that we would prefer that, instead of the discretionary system set up under clause [13], there should be a requirement within each of the exemptions that an authority should balance the harm caused by disclosure against the public interest in disclosing information. In these circumstances, a purpose clause could play a useful role in making explicit the weight that should be given to the different interests which need to be taken into account. It would then contribute to the

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the democratic process by extending access to the facts and analyses which provide the basis for the consideration of proposed policy; to protect the interests of individuals and companies by ensuring that reasons are given for administrative decisions, except where there is statutory authority or established convention to the contrary; and to support and extend the principles of public service established under the Citizen's Charter. These aims are balanced by the need: to maintain high standards of care in ensuring the privacy of personal and commercially confidential information; and to preserve confidentiality where disclosure would not be in the public interest or would breach personal privacy or the confidences of a third party, in accordance with statutory requirements and Part II of the Code.' *Code of Practice on Access to Government Information, 2nd edition, 1997*

[11] The white paper stated that the bill's public interest provision would involve a test of whether 'the decision is in line with the overall purpose of the Act, to encourage government to be more open and accountable'. *Your Right to Know,* Cm 3818, December 1997, paragraph 3.19

[12] 'An Open Scotland: Freedom of Information, a Consultation', Scottish Executive,SE/1999/51, paragraph 4.8.

[13] References to clause numbers (in square brackets) refer to the current version of the bill. The original text referred to the draft bill's clauses.

> rebalancing that we are suggesting…Furthermore, a purpose clause is more than a legal instrument (which seemed to be the Home Secretary's view). It also sets the tone and spirit of the legislation, and encourages those charged with making it work to view it positively, rather than as a regulatory chore. We recommend that the Bill should contain a clear statement indicating what it is intended to achieve and indicating a presumption in favour of disclosure.'[14]

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

> 'The Data Protection Registrar argued that a purpose clause was required to make clear the balance that should be struck between privacy and Freedom of Information, and especially to ensure that the inbuilt advantages which privacy possesses – from the European Data Protection directive and the European Convention on Human Rights – would not overwhelm the right to information. She argued that the balance should be defined in the Act, and not left to the Information Commissioner and Tribunal.'[15]

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

> 'A straightforward purpose statement in this Bill would be helpful to all, especially those making decisions about disclosure in relation to any exemption, not just the personal information exemption. The Bill would benefit from such a statement; there could be no ambiguity about what was intended.'[16]

CLAUSE 1

Lords Lester/Goodhart – clause 1(6) – amendments to requested records

This amendment, which we support, would delete the last four lines of clause 1(6). These allow an authority to amend or delete information from a record before disclosing it if it intended to make that amendment or deletion before it received the request.

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[14] Public Administration select committee, HC 570-I, July 1999, paras 55 and 59.
[15] HC 570-I, paragraph 56
[16] 'Freedom of Information: Consultation on Draft Legislation' Response of the Data Protection Registrar, June 1999.

Clause 75 of the bill would make it an offence to deliberately destroy a record in order to prevent its disclosure.

However, an authority which could show that it intended to destroy the record *before* the request was received, would not commit an offence. In fact, they would be entitled to carry on and destroy the record, even after receiving the request. At best, this shows a lack of concern for the interests of the requester. At worst, it opens a loophole which could be abused by a policy of holding certain sensitive information for fixed periods only, so that even if a request is received while a record is still held, it can then be destroyed, without committing an offence.

The Government argues that without this provision authorities would be unable to update their records and be forced to disclose inaccurate, out of date information, a surprising interpretation.[17] No-one proposes that authorities should be prevented from updating their records. The suggestion is merely that, in the unlikely event that an FOI request is received for a record that is about to be destroyed, the authority refrain from destroying it – and release it to the applicant.

Lord Lucas – after clause 1(7) – reasons for requests

This amendment by Lord Lucas would prohibit authorities from asking applicants why they have applied for information or what they intend to do with it.

The *draft* FOI bill, published for consultation in May 1999, allowed authorities to refuse to disclose information under the bill's public interest test unless applicants told them what they planned to do with it.[18] The government subsequently dropped these heavily criticised provisions. However, authorities could still *ask* applicants why they wanted the information – even though they could not insist on answers as a precondition to disclosure. This amendment would prevent them asking.

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[17] During the bill's Commons committee stage, Home Office minister Mike O'Brien said: 'In many cases, information held by authorities will require constant updating and revision in the light of changing circumstances and more up to date analysis of facts. Without the provision, authorities would be obliged to communicate unrevised information to applicants without any additions or deletions that would be required to bring it up to date. The amendment would therefore have the effect of requiring authorities to communicate incorrect and out of date information to the applicant.
Far from being otiose…the clause is important. If it were deleted, normal record management within large operations would be almost impossible. They could never update; they would have to maintain things as they always were.'

[18] Clause 14(4) of the Draft Bill, published in 'Freedom of Information. Consultation on Draft Legislation', Home Office, Cm 4355

AFTER CLAUSE 1

Lord Lucas – new clause - Authority to consider partial disclosure of exempt information

This new clause would require an authority which has refused to disclose information (presumably because it is exempt) to consider whether the information can be made disclosable, for example, by summarising it or making deletions.

To an extent, the bill already provides this, since the bill provides a right of access to *information* rather than *documents*. Where passages of a document are exempt, the right of access would automatically apply to the remaining information. This presumably explains why there is no explicit duty on authorities to delete exempt information and disclose the rest.

However, it is not clear that the bill would necessarily require an authority to summarise information in order to allow disclosure of information that would otherwise be exempt. The applicant is entitled to *ask* for information in summary form [clause 10(1)(c)] but where it does not occur to the applicant to do so, the authority is not apparently under any obligation to offer to do so, in order to permit the disclosure of information that could otherwise be withheld. This amendment would ensure that they did – a useful provision, particularly in the absence of a statutory duty to assist applicants.

Lords Lester/Goodhart – new clause – protection of records

This new clause requires an authority to take reasonable steps to protect a requested record until the request has been finally determined.

Someone in an authority who *deliberately* destroyed a record in order to block its disclosure, would commit an offence under clause 75. The *accidental* destruction of a record would rightly not be an offence. However, it is right that authorities should be required to protect records against accidental destruction. This amendment would create such a duty.

NEW CLAUSE AFTER CLAUSE 1

'Effect of Exemptions' / 'Disclosure In The Public Interest'

The bill's public interest test is currently found in clause 13. However, the government is proposing to move the public interest test (with relatively minor changes) into a new clause after clause 1 ('Effect of Exemptions') and to delete clause 13. This section of the briefing discusses both the proposed new clause and the amendments to clause 13.

The first part of this section summarises all the relevant amendments; the second part deals with them individually

A. 'Effect of Exemptions' – Summary of amendments

The public interest test is an essential aspect of the bill. It requires exempt information to be released if the public interest in disclosure outweighs the public interest in maintaining the exemption. This allows the *benefits* of disclosure, not just the possible harm, to be taken into account. For the class exemptions which automatically exempt information regardless of harm, the public interest test provides the only chance of obtaining information.

The public interest test has been improved since the bill was first introduced. It is no longer a purely discretionary provision. The Commissioner can now issue enforcement notices requiring disclosure on public interest grounds. However, the provision still suffers from serious defects:

- Ministers have a right of veto over any notice requiring a government department to release information on public interest grounds;
- The public interest test does not apply to some exemptions, including some class exemptions.
- There is no time limit within which decisions on the public interest must be taken.

The Government's amendments to the public interest test provisions do not directly address these defects. A limited degree of progress is made on the veto – which would be removed from local authorities, and junior ministers, but would still be available to cabinet ministers. This is dealt with in amendments to clause 52.

1. Government amendments *(see page 16)*

Lord Falconer's new clause after clause 1 ('Effect of exemptions') would:

- Clarify that the Information Commissioner can review an authority's decision on public

interest disclosure on its merits, a helpful move

- Slightly extend the public interest test to cover a small class of personal data, a small improvement
- Remove the slight possibility that the public interest test could apply to information held by Parliament, for which exemption was claimed under clause 34.

2. The public interest in disclosing factual information (see page 17)

Several amendments deal with the way in which the public interest test applies to factual information relating to decision-making, which would be exempt under clause 33.

- Lord Falconer's new clause would remove the duty on authorities to have particular regard to the public interest in disclosing the factual background to policy-making, a retrograde step.
- Lord Lucas's amendments would require authorities to have regard to the public interest in disclosing factual information.
- Other closely related amendments have been tabled to clause 33, including Lord Falconer's amendment excluding *statistical* information relating *to decisions which have been taken* from the scope of that exemption; Lord Lucas's excluding *all* statistical information; and Lord Archer's amendment excluding all *factual* information. (These are dealt with in a later section of the briefing.)

3. How the balance of public interest is determined (see page 19)

Amendments tabled by various peers would:

- allow information to be withheld only if the public interest in disclosure is 'substantially outweighed' by the public interest in maintaining the exemption (Lord Lucas)
- create a 'prima facie' presumption that the balance of public interest favours disclosure of matters that are no longer under active consideration (Lord Lucas)
- reverse the onus of proof in the balancing test, so that the presumption is that information would be disclosed unless the public interest in withholding information outweighs the public interest in disclosure; the bill puts this the other way round at present. (Lords Goodhart & Lester).

These are all helpful; the first of these three amendments would probably have the greatest impact.

4. Time limit for disclosure (see page 21)

- Lords Goodhart & Lester propose to delete the provision which gives authorities an unspecified 'reasonable period' to decide whether to disclose on public interest grounds. This is an essential amendment.
- This issue may be debated with clause 9, which deals with time limits. (See the section of

this paper dealing with that clause for details.)

5. Extending the public interest test to all exemptions *(see page 21)*

- A series of amendments by Lord Lucas would extend the public interest test to each of the eight exemptions to which it does not apply, in part or in whole.
- A single amendment by Lord Mackay would have the same effect, but also extend the public interest test to information which has been refused on cost grounds – a further positive element
- Amendments by Lord Colville would extend the public interest test to certain of the eight exemptions only

B. 'Effect of Exemptions' – Individual amendments

1. GOVERNMENT AMENDMENTS

The main effects of the Government amendments are:

- to delete clause 13 and move the public interest test into a new clause after clause 1 ('Effect of Exemptions'). This would put the public interest test immediately after the right of access, clarifying the bill's structure. However, the complex language in which these provisions are drafted continues to obscure their purpose.
- To omit the words 'where…it appears to the authority' from the equivalent of clauses 13(3) and 13(4)(b) where they prefaced the public interest test. These implied that the public interest test was a subjective test, raising doubts as to whether the Commissioner could substitute her decision on this question for the authority's. The Home Office has previously indicated that it was not intended to limit the Commissioner's powers in this way, and this change helpfully clarifies this.
- The public interest test would be *extended* to cover the limited class of personal information which might be exempt under clause 38(3)(a)(ii).[19] Most personal data would

[19] A notice under section 10 of the Data Protection Act can be issued to protect an individual from substantial and unwarranted damage or distress caused by the processing of his or her personal data. A section 10 notice can be served by the individual himself and becomes binding, if the body on whom it is served agrees to it, without the intervention of the Data Protection Commissioner or the court. As the bill stands, such information is exempt and not subject to the bill's public interest test. This raises the possibility that an individual (e.g. a senior official accused of malpractice) and an authority could collude to protect information about that individual's activities from disclosure under the FOI bill. The individual need only serve a section 10 notice, and if the authority agrees to it, the personal data involved would automatically become exempt, regardless of any countervailing public interest in

still *not* be subject to the public interest test. This could prove over-restrictive, particularly where the information relates to public officials acting in that capacity. (Such information would still be 'personal data' and subject to a presumption against disclosure, in clause 38.)

- To remove the possibility that in some circumstances the public interest test might apply to information held by Parliament, which was being withheld under clause 34 (collective responsibility, frankness of advice, effective conduct of public affairs).[20]
- Those exemptions to which the public interest test does *not* apply would now be described as 'provisions conferring absolute exemption'

2. PUBLIC INTEREST DISCLOSURE OF FACTUAL INFORMATION

All information relating to the formulation of government policy would be exempt under an extraordinarily sweeping class exemption in clause 33(1). This is not limited to advice, recommendations or exchange of view but applies to *all* information relating to policy formulation, including factual information and its analysis. Such information could be obtained only under the bill's public interest test, which itself would subject to a ministerial veto.

The equivalent exemptions under most FOI laws apply to *advice* and the exchange of *views*, not to *factual* information. Factual information is explicitly excluded from the scope of the corresponding Australian exemption.[21] Ireland's FOI Act excludes not only factual and statistical information, but their analysis. Both laws also exclude scientific and technical advice from the scope of this exemption.

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disclosure. Making such information subject to the bill's public interest test should provide some safeguard against this prospect.

[20]Information held by Parliament is covered by the bill, subject to an exemption for Parliamentary privilege. Where the Parliamentary authorities claim that information is exempt because clause 34 applies (e.g. on the grounds that in their 'reasonable opinion' disclosure would inhibit frank advice, or prejudice the effective conduct of public affairs) they could do so in one of two ways. (1) They could just maintain that the information is exempt, in which case the Commissioner could review the decision and consider whether bill's public interest test has been complied with; or (2) They could issue a conclusive certificate under clause 34(6), in which case the Commissioner cannot review the decision or apply the public interest test. In some cases, the Parliamentary authorities might be content for their decisions under clause 34 to be reviewed, and would claim exemption without issuing a certificate. The government's amendments now remove that option. The public interest test would *never* apply to information withheld by Parliament under clause 34.

[21] Freedom of Information Act 1982 [Australia], sections 36(5) and 36(6)(a)

The UK Open Government code is also considerably in advance of the bill:

- Once a decision has been taken, departments are expected to publish the underlying 'facts and analysis of the facts'
- Policy information can be withheld only if disclosure would 'harm the frankness and candour of internal discussion'[22]
- Policy information should nevertheless be disclosed if "any harm or prejudice arising from disclosure is outweighed by the public interest in making information available".

In his rulings under the code, the Parliamentary Ombudsman has refused to allow purely factual material to be withheld, commenting that this exemption "is intended to protect advice, not factual information".[23] He has accepted that frank opinions "which depend upon candour for effectiveness, would be substantially less useful if it were thought they would be made available to a wider audience". But while upholding the exemption for such material he has recommended disclosure of, at least, passages of "internal comment and advice" where these would not harm frankness.[24]

The bill fails to make these distinctions and permits departments to withhold information which they would be required to publish under the code. Such information could be obtained only on a balance of public interest test.

This is in itself an extremely weak provision. Remarkably, the government is proposing to omit this provision from its new clause ('Effects of Exemptions'), leaving the bill even weaker.

Lord Falconer – new clause – deletion of the reference to factual background information

The government's new clause ('Effects of exemptions') drops the provision in clause 13(5) which requires authorities 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 informed background to decision-taking'.

[22] Code of Practice on Access to Government Information, Exemption 2
[23] Parliamentary Ombudsman, Case A.8/00, HC 494, May 2000
[24] Parliamentary Ombudsman, Case A.2/00, HC 494, May 2000.

This is in itself a rather weak provision. It merely steers authorities and the Commissioner in the direction of disclosing factual information relating to decision-taking. However, by dropping it, the government is weakening the bill still further – a remarkable response to the sustained criticism it has received on this issue.

The government appears to be compensating for deleting this provision by excluding statistical information from the policy formulation exemption in clause 33. However, only statistics relating to decisions *which have been taken* would be excluded from the exemption: other statistics could still be withheld under clause 33. Clause 13(5), however, encouraged the disclosure of *all* factual information – *before* decisions were taken as well as afterwards.

The effect of these amendments is to conspicuously highlight the fact that statistics about undecided matters *can* be withheld under clause 33 – a proposition so implausible that most officials would probably not otherwise have considered it.

A related change is proposed to clause 34, making it more difficult to withhold statistics under the exemptions in that clause. (The clause would apply to statistics *without* the proviso that the decision would depend on the "reasonable opinion of a qualified person".) However, this makes clear that even statistics relating to decisions which had been taken could be withheld under clause 34 if the broad tests there were satisfied.

This would not be possible under Ireland's FOI Act, which excludes factual information and statistical information, and the analysis of such information, from the relevant exemption altogether. Neither would it be possible under the UK code, where the corresponding exemption is regarded as not applying to factual information at all.

Lord Lucas has tabled amendments to Lord Falconer's amendment, reinstating a broader version of clause 13(5), requiring authorities to "in particular, have regard to the public interest in communicating to the applicant factual information." A series of related amendments have been tabled to clause 33 itself.

3. DETERMINING THE BALANCE OF PUBLIC INTEREST

Lord Lucas – public interest must be substantial – amendment to Lord Falconer's new clause 'Effect of Exemptions'

This amendment, which we support, would not allow information to be withheld under the public interest balancing test unless the public interest in *withholding* the information was

"substantial". The clause, as Lord Lucas proposes to amend it, would then require disclosure if:

> 'in all the circumstances of the case, the public interest in disclosing the information outweighs, *or is not substantially outweighed by*, the public interest in maintaining the exemption"

Where the balance of public interests only marginally favoured withholding information, the information would have to be disclosed. The public interest *against* disclosure would have to clearly predominate before information could be withheld. This would be a significant improvement to the bill.

Lords Lester/Goodhart – reversing the public interest test's burden of proof - amendment to Lord Falconer's new clause 'Effect of Exemptions'/and to Clause 13

At present, the bill requires an authority to disclose information, or confirm whether it holds information, if the public interest in disclosure "outweighs the public interest in maintaining the exemption". That is, the case for disclosure would have to be shown to be greater than the case for secrecy. This amendment reverses the burden of proof, so information could be withheld only if 'in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information'. This would be a helpful change in the same direction as the previous amendment.

Lord Lucas - the public interest test and active decisions - amendment to Lord Falconer's new clause 'Effect of Exemptions'

This amendment would require authorities, in reaching a decision on the public interest, to have regard to whether any matter was 'no longer under active consideration'. This would be a helpful steer in the direction of giving access once decisions or matters had been settled.

This will be most relevant in relation to exemptions relating to the policy-making,[25] decisions on whether to institute proceedings and legal proceedings themselves,[26,27] or negotiations over contracts,[28] where the balance of public interest factors is likely to shift once the decision, proceedings or negotiations are completed.

[25] Clauses 33 and 34(2)(b)
[26] Clause 28
[27] Clause 30
[28] Clause 41(2)

4. TIME LIMIT FOR DISCLOSURE

Lords Goodhart & Lester – time limit for decisions on public interest – page 8, line 10

See also amendments to clause 9

The Goodhart/Lester amendment would delete clause 13(6) which allows authorities to decide on the question of public interest within an unspecified 'reasonable' time, instead of the bill's normal 20-day time limit. We strongly support this amendment.

Note that this issue may debated in the context of clause 9. See the relevant section of this briefing.

5. EXTENDING THE PUBLIC INTEREST TEST

Lord Lucas – amendment to Lord Falconer's new clause 'Effect of Exemptions'

Lord Mackay – clause 13, page 7, line 17

Lord Colville – amendments to clause 13

Eight of the bill's exemptions are not subject to the public interest test. We support amendments by Lord Lucas and Lord Mackay which would extend the public interest test to these. Lord Colville's amendment would extend it to certain of these exemptions.

Lord Mackay's amendment goes further and would also extend the public interest test to information refused on cost grounds under clause 11. We welcome this, which would reinstate a provision which was originally part of the bill but was deleted by the government in the Commons.

Taking account of the changes that would be made by the government's proposed amendments, the exemptions[29] to which the public interest test does *not* apply would be:

Clause 19 – information already reasonably accessible to the applicant

[29] The list is that proposed in the government amendments to clause 13. For the most part this is the same as the list of exemptions in clause 13(2). The changes are: (a) the public interest test would be removed from clause 34 for information held by Parliament; (b) it would be extended to a limited class of personal data under clause 38; (c) it would no longer apply to information exempted by an order under clause 43, as the government is proposing to delete this clause.

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 34 – prejudice to the effective conduct of public affairs (in relation to information held by Parliament only)

Parts of clause 38 – personal data

Clause 39 - information provided in confidence

Clause 42 – disclosures prohibited by statute

It is right in principle that *any* decision to withhold information should be capable of being challenged if the public interest in disclosure is great enough.

The implications of bringing the remaining exemptions within the scope of this test vary depending on the exemption.

Clause 19 exempts information which is already reasonably accessible to the applicant, including all information which authorities are required to make available by law. However, such information is sometimes subject to prohibitive photocopying or other charges.

- In 1996 MAFF told a requester under the Environmental Information Regulations 1992 that the fee for releasing the *names* of 26 firms found to have breached BSE regulations would be at least £1300, and could be as high as £6,500.[30]
- Some local authorities have charged as much as £13 for a single A4 photocopy[31].
- Patients who ask for photocopies of their medical records can be charged £50, even if

[30] MAFF wrote to the enquirer: "The cost of taking this enquiry further has been calculated. The work involved would include the Ministry making enquiries to local authorities seeking information on premises where unsatisfactory visits had been recorded. This work would incur costs of approximately £1,293. In addition, depending on the situation at such premises, i.e. whether investigations are continuing, prosecution action being taken, etc., we may need to seek advice from the Ministry's legal Division on whether information on such cases can be released. This could add up to an extra £5,195 depending on the number of cases on which advice would need to be sought." Letter to Alan Watson, 13/12/96

[31] Council for the Preservation of Rural England, Public Access to Planning Documents, January 1994.

only a single sheet is provided.[32]

Allowing access under the bill, would allow the bill's charges to be substituted if, on a case by case basis, it was in the public interest to do so.

Clause 21 exempts all information supplied by or relating to specified bodies with security functions. These include the Security and Intelligence Services, the tribunals dealing with complaints against these services, and the National Criminal Intelligence Service (NCIS).

None of these bodies is itself covered by the bill. The purpose of the exemption is to protect information held by *other authorities* which relates to them, or has been supplied by them. It applies regardless of whether disclosure would harm national security or the work of the specific bodies. Information with no security implications, for example about massive overruns on the cost of building of new headquarters for the security services, would be withheld, however great the public interest in openness.[33,34]

Clause 30 is a class exemption for court records and records relating to public and other statutory inquiries. It applies to information held by public authorities *other than* courts, tribunals and statutory inquiries (which are not themselves subject to the bill). The exemption contains no harm test and would apply even where disclosure could not prejudice proceedings – for example, because they have been completed or abandoned. It would mean that unpublished tribunal rulings, such as those of the Vaccine Damage Tribunal, could not be

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[32] This is the fee permitted under the Data Protection Act 1998. An amendment which would limit such fees has been tabled to the bill by Baroness Masham

[33] This issue was raised during the bill's Commons report stage by Mr David Davis MP, the chairman of the Public Accounts Committee: "Some years ago, my predecessor as Chairman of the Public Accounts Committee… (Mr. Sheldon), attempted to bring into the public domain the massive overspends on the MI5 and MI6 headquarters…the right hon. Gentleman failed to persuade the Government of the day to allow those matters to be made public. I, too, tried and failed to persuade the Government of the day to do that. Eventually, the two of us, together with the Chairman of the Intelligence and Security Committee… managed to persuade the Government to concede the right to publish National Audit Office reports on the matter. One might have presumed that the secrecy arose from serious security considerations. It fell to me to approve the excisions from the two NAO reports: I can tell the House that they amounted to about half a dozen lines. Why did it take 10 years, three Privy Councillors, two ex-Ministers and three Select Committee Chairmen to get the Government to make the matter public? The reason was not political--it had nothing to do with which party was in power; it had to do with the interests of Whitehall. Those reports revealed that the Cabinet Secretary of the day, the permanent secretary to the Treasury of the day, the permanent secretary to the Property Services Agency of the day and the heads of the two secret agencies involved had all agreed, for two years, not to tell the Prime Minister what was happening. On that basis, they managed to resist publicity for 10 years.' *Hansard, HC debates, 4/4/00, col. 875*

[34] Note that NCIS has important non-national security functions, eg relating to issues such as football violence and counterfeiting; they issue press releases; and they hold national conferences to which journalists are invited.

obtained from the Department of Health. Military board of inquiry reports could not be obtained from the Ministry of Defence.[35] Unpublished reports of planning inquiries would be exempt.[36] Documents such as public interest immunity certificates, would always be exempt, even where they did not themselves contain sensitive information.

Ideally, this class exemption should be amended to apply only where disclosure would *prejudice* the proceedings involved. The alternative approach would be to make this exemption subject to the public interest test.

Clause 32 is a class exemption for Parliamentary privilege.

Clause 34, insofar as it applies to Parliament, would not be subject to the public interest test. The Parliamentary authorities would be able to withhold information which in their opinion would prejudice the frankness of advice or the effective conduct of public affairs. The exemption would be invoked by a conclusive certificate which could not be reviewed and would not be subject to the public interest test. It is not clear why this provision should be needed in these terms, given the separate class exemption for information whose disclosure would breach Parliamentary privilege.

Clause 38 exempts personal data from access, if disclosure would breach any of the data protection principles.[37] No public interest test applies. For information held about the ordinary citizen this is unlikely to cause difficulty. However, the DPA makes no distinction between personal information about someone's private life, and information which identifies a public official acting in that capacity. The official's *name* is 'personal data' under the Data Protection Act (DPA) and there will be a presumption against identifying the author of an official document, the identity of an civil servant taking a particular decision, or the names of officials present at a meeting, unless it is shown that to do so does not breach any of the principles.[38]

Amongst other things, these require that any disclosure is lawful, fair, disclosed only for a purpose which is compatible with the purpose for which the information was obtained and

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[35] Where fatal accidents are involved these are made available to the next of kin, though not to the public. Inquiry reports into non-fatal accidents are not disclosed even to the injured person.

[36] The Parliamentary Ombudsman's first ruling under the Open Government code was in favour of the disclosure of the report of a planning inquiry, into the Birmingham Northern Relief Report, which had not been published because the planning application had been withdrawn just before the report's publication, in order to submit a revised application.

[37] These are set out in Schedule 1 to the Data Protection Act 1998

[38] If there are *other* grounds for protecting such information, e.g. to protect an authority's decision-making processes or the safety of someone at risk of attack, other exemptions already address these concerns.

that either the individual *consents* to the disclosure or that it is *necessary* for one of a number of specified reasons.[39] None of these unambiguously justifies identifying public officials, acting in that capacity, although on a case by case basis the complex provisions of the DPA may permit this to be done.[40] However, where authorities do not *wish* to identify names, it may be difficult to require them to do so.

The Data Protection Commissioner has expressed concern about this issue, and has herself proposed that the exemption for personal data be redrafted so as to incorporate a public interest test.[41]

Clause 39 exempts information whose disclosure would constitute an actionable breach of confidence. In effect, this exempts any information which an authority has agreed to accept from a third party in confidence, so long as it is not already publicly available, or trivial.

Authorities may have good reason for agreeing to confidentiality, for example to obtain essential information which would not otherwise be given to them. But they may not have good reasons. They may agree to confidentiality merely to avoid embarrassment or criticism. An authority could agree with a commercial lobbyist to treat all communications from them as confidential, merely for their mutual convenience. Such information would then be exempt under clause 39.

Clause 39 does incorporate the public interest test which the courts themselves apply under the law of confidence. However, that is likely to be more restrictive than the bill's public interest test. The courts have held that an obligation of confidentiality may be set aside (or in some cases may not have arisen at all) where the information reveals the existence of crime, fraud, serious misconduct, danger to the public or other matters of such importance that 'it may fairly be regarded as vital in the public interest that a person possessing such information should be free to disclose it to an appropriate third party'.[42]

This is a narrower public interest test than the bill's, which is likely to give more weight to a

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[39] These reasons are set out in Schedule 2 to the Act.

[40] For example, names could be disclosed where this was 'necessary for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or…for the exercise of any other functions of a public nature exercised in the public interest by any person'. [Paragraphs 5(c) and (d) of Schedule 2 of the DPA]. On a case by case basis such reasons could be used to justify identifying officials, depending on the interpretation placed on them. However, authorities which do not want to identify officials could argue that if they can discharge their functions adequately without identifying names and that it would breach a data protection principle for them to do so.

[41] Evidence to the House of Commons Public Administration select committee, 22/6/99, Q.181. http://www.publications.parliament.uk/pa/cm199899/cmselect/cmpubadm/570/90622p08.htm

[42] R. G. Toulson & C.M. Phipps, 'Confidentiality', Sweet & Maxwell, 1996, page 79

wider range of issues, including the need to promote accountability, informed public debate and public understanding of the work of public authorities.

The common law test also takes particular account of the *identity* of the person to whom the information is disclosed. The courts may hold that although wrongdoing exists, a disclosure is justified only if made to the police or a regulatory body. The bill's test is likely to give weight to the public interest in disclosure to the public at large. If necessary, it could be applied only to information obtained *after* the Act's commencement.

There are precedents for legislation setting aside common law obligations of confidentiality. An individual's right of access to his or her own personal information under the Data Protection Act includes the right to see information supplied about him or her by third parties, regardless of any obligation of confidentiality.[43] Only the *identity* of an individual supplying such information could be protected.

The Food Standards Act 1999 gives the Food Standards Agency powers to publish confidential information, which override any obligation of confidentiality. The Agency has powers to obtain information about *'food premises, food businesses or commercial operations being carried out with respect to food'*.[44] In pursuit of its functions, which include providing information to the public, to assist them making '*informed* decisions about food',[45] it is free to publish 'any…information in its possession (whatever its *source)'*[46]. It must *'consider whether the public interest in the publication of the advice or information in question is outweighed by any considerations of confidentiality attaching to it.'*[47] This formulation makes clear that the agency is not restricted by a common law obligation of confidentiality, and can apply a much broader 'balancing of public interests' test of the kind proposed in this amendment.

Clause 42 exempts information whose disclosure is prohibited by statute. Some 250 such prohibitions were identified in 1993[48] and the number is now likely to be considerably greater. Indeed, the most bizarre example is contained in the bill itself, which would make it a criminal offence for the Information Commissioner herself to disclose certain information,

[43] Section 27(5) of the Data Protection Act 1998 states: 'Except as provided by this Part, the subject information provisions shall have effect notwithstanding any enactment or rule of law prohibiting or restricting the disclosure, or authorising the withholding, of information.'
[44] Food Standards Act 1999 sections 10(1)(a) and 10(2)(a)
[45] Food Standards Act 1999 section 7(2)
[46] Food Standards Act 1999 sections 19(1)(c)
[47] Food Standards Act 1999 section 19(4)
[48] *Open Government* white paper, Cm 2290, 1993.

including information to which the public's right of access would apply[49]. These would take precedence over the bill's right of access. They include restrictions which prevent the disclosure of information about the safety of pharmaceuticals[50] and information about the welfare of laboratory animals.[51] The government is currently reviewing these with a view to repealing those it considers unnecessary. However, previous reviews of this kind, both in the UK and overseas have not succeeded because of the difficulty of examining such large numbers of complex provisions,[52] leaving large numbers of unjustifiable restrictions in place.[53] A more effective approach would be to allow these restrictions to be overridden on public interest grounds, on a case by case basis. This is an approach adopted in the Queensland FOI Act.[54]

CLAUSE 2

Lord Mackay – definition of 'public authority' – page 2, line 16

We support this amendment, which extends the definition of 'public authority' to include bodies which receive at least half their funding from government or government funded bodies; and bodies of whom a majority of members are appointed by government, or which is under the control of another public authority.

Lord Mackay – information held on behalf of an authority – page 2, line 26

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[49] See paragraph 19 of Schedule 2, which extends to the Information Commissioner a secrecy provision applying to the Data Protection Commissioner under section 59 of the Data Protection Act 1998.

[50] Medicines Act 1968, section 118

[51] Animals (Scientific Procedures) Act 1986, section 24

[52] A Cabinet Office review of the UK restrictions in 1993 was defeated by the scale of the task. Similar reviews in Australia and Canada, following the introduction of their FOI laws, were also never completed and existing restrictions were left in place.

[53] According to the Australian Law Reform Commission: 'A major hindrance to achieving the open government promoted by the FOI Act is the continued existence of what is often referred to as the 'secrecy regime'. This regime, which had its origins in the belief that it was in the public interest to keep the workings of government secret, prohibits the disclosure of information obtained in the course of an official's duty, often regardless of the nature of the information or the effect its disclosure might have. The continuation of this regime alongside the FOI Act sends mixed messages to officers about what information they are authorised to disclose.' ALRC, Report 77, 'Open government: a review of the federal *Freedom of Information Act 1982*', 1995.

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

At present, the right of access applies to *any* information held by or on behalf of an authority by another person. This amendment would limit the right of access to information which was held on behalf of an authority by another person 'on a contractual or agency basis' only. This could *exclude* some information currently subject to the bill from access.

SCHEDULE 1

Schedule 1 lists the bodies subject to the bill. Some changes to the Schedule are proposed by Lord Falconer, and these are generally helpful.

- A few bodies which are apparently regarded as having been privatised would be *removed* from the Schedule (e.g. Commonwealth Institute, Cardiff Bay Development Corporation, Port of London Authority).

- A number of bodies would be *added*. These include the Commission for New Towns; Community Health Councils; the Council for Professions Supplementary to Medicine; the General Chiropractic Council; the General Dental Council; the General Medical Council; the General Osteopathic Council; the UK Central Council for Nursing, Midwifery and Health Visiting; London Transport Users Committee; the Insurance Brokers' Registration Council; the Civil Service Commissioners for Northern Ireland; the Northern Ireland Civil Service Appeals Board; the Northern Ireland social fund commissioner.

Definitions of various educational bodies have been changed, so as to define the governing body or its managers, as the public authority.

AFTER CLAUSE 2

Lord Mackay of Ardbrecknish – duty to assist applicants

(*See also*: Lord Lucas, new clause after Clause 9)

The two new clauses proposed by Lord Mackay and the third proposed by Lord Lucas, would place authorities under a statutory duty to assist applicants.

In one of Lord Mackay's amendments the duty is to assist applicants in making requests; in the other the duty is to assist applicants in understanding access and complaints procedures.

Both are welcome, though Lord Lucas's new clause is preferable as it provides a broader duty to assist any person who seeks to exercise their rights under the Act, having regard to any guidance issued by the Secretary of State under clause 44.

Most FOI laws including those of New Zealand,[55] Australia[56] and Ireland[57] place authorities under a statutory obligation to assist requesters. The Irish Act treats this duty as of such importance that it is also specified in its long title.[58]

Under the bill authorities would be *encouraged*, but not required, to provide assistance in accordance with guidance in the Secretary of State's code of practice under clause 44.[59] Failure to comply with this code could result only in a non-enforceable 'practice recommendation' issued by the Commissioner under clause 47(1). Failure to comply with a statutory duty to assist could, on the other hand, result in a legally binding decision or enforcement notice.[60]

A legal obligation would also make it more likely that authorities recognise that they have an obligation to assist, and act accordingly. Applicants would be more likely to recognise that

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

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

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

[58] The long title of Ireland's *Freedom of Information Act 1997* describes it as 'An act to enable members of the public to obtain access, to the greatest extent possible consistent with the public interest and the right to privacy, to information in the possession of public bodies and to enable persons to have personal information relating to them in the possession of such bodies corrected and, accordingly, to provide for a right of access to records held by such bodies, for necessary exceptions to that right and *for assistance to persons to enable them to exercise it…'*

[59] Clause 44(2)(a) states that "The code of practice must, in particular, include provision relating to…the provision of advice by public authorities to persons who propose to make, or have made, requests for information to them"

[60] Under clauses 49 (3)(b) or 51(1)

they were entitled to assistance and to challenge any failure to provide it.

The government has previously rejected attempts to establish a statutory duty to assist, arguing that placing small authorities under the same duty as large departments could pose unreasonable burdens on them. The minister explained that leaving this matter to the code of practice would:

> 'allow the definition [of the kind of assistance required] to be set out at greater length to take account of the differences between public authorities'[61]

In fact, the draft code of practice which the Home Office has published, contains no reference to the different levels of assistance that might be appropriate from different kinds of authorities.[62]

Lord Lucas's new clause (after clause 9) by combining a statutory duty to assist, with a duty to have regard with any relevant guidance in the code of practice, appears to combine the best features of both approaches.

CLAUSE 3

Lord Falconer – National Assembly of Wales – various amendments, pages 2 & 3

Clause 3 deals with the circumstances in which further bodies can be added to Schedule 1, and made subject to the bill's requirements. For the purposes of this clause, the Welsh Assembly is treated as a government department [clause 3(8)]. These amendments delete that definition and refer separately to the Welsh Assembly. They also provide various duties of consultation in relation to the proposed scheduling of Welsh and Northern Ireland authorities.

Lord Mackay – Amendment of Schedule 1 - Page 2 line 27

Clause 3 *allows* the Secretary of State to add bodies to the Schedule of public authorities which are subject to the bill if they meet certain conditions. This amendment, which we support, would *require* him to do so.

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[61] Mike O'Brien, Committee stage of the FOI Bill, Standing Committee B, 11/1/00 [Part I], col. 17

[62] Home Office, Draft Code of Practice on the Discharge of the Functions of Public Authorities under Part I of the Freedom of Information Act 2000'. www.homeoffice.gov.uk/foi/dftcp00.htm

To be scheduled under this provision a body must meet both of two conditions.

(a) It must be established by Royal prerogative or by legislation, *and*

(b) appointments to it must be made by the Crown, ministers or government departments.

CLAUSE 4

Lord Mackay – Further power to designate public authorities – page 3 line 14

Clause 4 allows the Secretary of State to add bodies to the Schedule of authorities subject to the bill if they (a) exercise functions of a public nature, or (b) carry out an authority's functions under contract. This amendment, which we support, would *require* the Secretary of State to schedule such bodies.

Lord Mackay – consultation before designating authorities – page 3, line 26

This amendment would require the Commissioner to be consulted before a new body is scheduled and would require that consultees be given at least 20 working days in which to respond.

CLAUSE 6

Lord Mackay – power to limit the right of access in relation to certain authorities – page 4 line 16 / page 4 line 18

Clause 6(3) allows the Secretary of State by order to limit the right of access to specified information held by any authority. The Government describes these provisions as 'relatively benign…housekeeping measures', which allows it to amend the bill to take account of authorities' changing functions.[63] However, these powers could be used to severely limit the right of access, by excluding most information held by an authority from the scope of the bill. Following criticism of this provision, the government amended the bill so that orders under clause 6(3) would have to be made by positive resolution.[64]

The amendments, which we support, would (a) remove the Secretary of State's power to remove information from the scope of the bill under clause 6(3)(a); and (b) remove his power

[63] *Hansard, HC, 4 April 2000, col. 885*
[64] Clause 80(2)(a)

to amend (ie possibly extend) any existing restriction.

Lord Falconer – new duties to consult – page 4, line 20

This would lay down new duties to consult in connection with the proposed scheduling of Welsh or Northern Ireland authorities.

CLAUSE 7

Lord Archer of Sandwell – request for information – page 4, line 4

At present, any written request for information to a public authority would be a valid request under the Act, even if the requester does not mention the Act. This amendment would require the requester to specify that the request was made under the Act.

Some FOI laws contain such a provision, but it has disadvantages. Many requesters will not know of the Act's existence. They will ask for information without realising they have a right to it. As the bill stands, authorities would have to comply with the Act in such cases and if they refuse information, cite the relevant exemption and notify the applicant of the Act's right of appeal. This will assist applicants who do not appreciate their rights, and add to pressure on authorities to operate more openly.

The bill's approach reflects the position under the Open Government code which "applies to all requests for information - whether or not applicants specifically label their requests as requests under the Code".[65]

AFTER CLAUSE 7

Lord Mackay – new clause – third party commercial interests

This new clause would require authorities to notify a third party whenever a request is received for information which relates to that party's commercial interests. The third party would have to be given a reasonable opportunity to make representations as to whether the information is exempt and the authority would be required to have due regard to any such representations. If the authority then proposes to disclose the information it would first have to give notice of that fact to the third party.

It is reasonable that third parties whose interests may be affected by a disclosure should be

[65] Home Office, Code of Practice on Access to Government Information. 1999 Report, paragraph 10

consulted. The government proposes that this should be dealt with by a provision in the code of practice issued by the Secretary of State under clause 44.

There may be a case for a statutory requirement, but the present amendment appears to impose a duty to consult in cases where it would not be necessary. For example, it is unnecessary to consult where the authority has no intention of disclosing the information any way – though this would be required under the new clause. Equally, consultation would be unnecessary where the information is already publicly available, though this too would be required. There will be many other cases where information 'relates' to a company's commercial interests, but has no capacity to 'prejudice' those interests – including cases where the Information Commissioner has previously ruled that similar information is disclosable.

CLAUSE 8

Lord Mackay – fees – four amendments – page 5, lines 18, 19 and 23

These amendments, which we support, would:

- *require* instead of *permit* the Secretary of State in his regulations under clause 8(3), to specify the cases in which fees may *not* be charged, to set a maximum fee and to say how fees should be calculated

- require free access to be given for requests other than those which the regulations specify may attract fees (this reverses the assumption in 8(4)(a))

- require that fees are set low enough to facilitate public access to information

- limit fees to 10% of the cost of complying with a request.

CLAUSE 9

Lord Mackay – extension of 20 day time limit when third parties are consulted – page 5, line 29

This amendment relates to Lord Mackay's new clause after clause 7, which would require authorities to consult third parties whose commercial interests may be affected by a request.

Where such consultation takes place, this amendment would extend the 20-working day limit for complying with requests by a further 10 working days.

Lord Mackay – removal of power to extend 20 day time limit – page 5, line 36

The bill requires an authority to comply with a request promptly and in any event not later than 20 working days from its receipt [clause 9(1)]. However, the Secretary of State has the power by regulations to extend this 20 day period to a period of up to 60 working days. This amendment would delete that power, and we support it.

Lords Goodhart & Lester – time for compliance with request – page 5, line 28

This amendment would replace the unlimited time period for disclosing information in the public interest, with a 20 day time limit. We *strongly* support it.

[However, the redrafting of clause 13 means that the intended effect would be better achieved by opposing the government amendment described immediately below.

The bill allows decisions to be taken in a two-stage process, over two different time-scales.

- A 20-working day limit is provided for complying with requests in general.[66]

- An unspecified period, which need only be 'reasonable in the circumstances' is allowed for disclosing exempt information in the public interest.[67]

What should be a single decision – whether or not to disclose - may trickle out over a prolonged period, with no clear end point. First, applicants will be told that information is exempt. There will then follow a further, open-ended wait, to discover if the authority is prepared to release it on public interest grounds. This will be particularly noticeable with the class exemptions, where the initial decision will *always* be a refusal (as the information will by definition be exempt) and the only chance of access will be on public interest grounds.

The provision is likely to be exploited by obstructive authorities, and encourage others to relax their standards, resulting in almost unlimited delays and undermining confidence in the legislation.

It may also make the appeals process unworkable. If a single request is dealt with in two

[66] Clause 9(1)
[67] Clause 13(6). This period would be retained under the government's corresponding amendments to clause 9.

separate stages, applicants will be entitled to make *two* separate appeals, at each of the *three* stages of appeal. One request may lead to two applications for internal review[68], two complaints to the Commissioner and perhaps even two complaints the Tribunal. It will be in the applicant's interests to 'double up' on complaints in this way, so that as soon as the first part of a decision is issued, a complaint is started – rather than allowing weeks or months to pass, only to receive a refusal on public interest grounds.

There is no reason to believe that considering the public interest in disclosure is itself particularly time consuming. If there are difficulties in complying with a 20-day period, this is likely to occur because records cannot be found or third parties have to be consulted.

No overseas FOI Act provides extra time for public interest decisions; nor does the UK code, which also contains a public interest test. Home Office figures indicate that 92% of code requests are currently dealt with within the code's 20 day limit, or the tighter limits which some departments set for themselves.[69]

Lord Falconer – period for reaching decisions on the public interest – page 5, line 35

We oppose this amendment, which would allow authorities to reach decisions on public interest disclosure within an unspecified period which is 'reasonable in the circumstances'. Without this amendment, public interest decisions would have to taken within the same 20-working day period as decisions on whether information is exempt.

AFTER CLAUSE 9

Lord Lucas – assistance by public authority

This new clause, which we support, would require authorities to assist people in exercising their rights under the bill. It has been described earlier.

[68] The Secretary of State's code of practice is likely to encourage authorities to set up complaints procedures for reviewing decisions with which applicants are dissatisfied [clause 44(1)(e)]. The Commissioner would not be required to deal with a complaint unless the applicant has 'exhausted' any such complaints procedure [clause 49(2)(a)]

[69] Home Office. 'Code of Practice on Access to Government Information; 1999 Report, paragraph 19

CLAUSE 10

Lord Lucas – means by which information is to be provided – page 6, line 15

The bill sets out a number of alternative ways in which information should be communicated to an applicant and provides that the applicant's preference should as far as is reasonably practicable be followed. The first of these is to provide information in permanent form or another form acceptable to the applicant. Lord Lucas's amendment would substitute a requirement to give access in 'a form specified by the applicant', giving greater control to the applicant over the form in which information is provided.

Lord Mackay – access in Braille – page 6, line 15

This amendment helpfully specifies that the form in which the applicant may require access to be given, if practicable, would include Braille and large print.

CLAUSE 11

Lord Mackay - appropriate limit – page 6 line 36

Lord Lucas – appropriate limit – page 6 line 39

Authorities would be able to refuse requests if the cost of meeting them exceeds the 'appropriate limit', which ministers have indicated will be set at £500. Ministers have said that in calculating whether this figures has been reached, only the marginal costs of locating and retrieving the information will be taken into account, not the time spent deciding whether the information can be released.[70] This should provide for relatively modest fees.

However, where the cost of compliance exceeds £500, authorities will be under no obligation to disclose, regardless of the applicant's readiness to pay and, more importantly, regardless of the public interest in the release of the information.

Lord Mackay's amendment, which we support, addresses these two points (and Lord Lucas's addresses the first of them). It would require the authority to give access to requests whose cost exceeds this limit if (a) the applicant is prepared to pay the excess costs, or (b) disclosure would be in the public interest.

Overseas FOI laws do not allow information to be refused merely because a predetermined cost limit would be exceeded, but normally require the authority to show that compliance

[70] Mike O'Brien, Hansard, House of Commons, Standing Committee B, 18/1/00, col. 113

would cause 'substantial and unreasonable' disruption to their work.[71] The requirement that disruption must be 'unreasonable' as well as substantial indicates that it would vary depending on the circumstances. Thus, where the disruption resulted from the authority's failure to keep its records in good order, an authority might nevertheless find itself required to comply.

Typically, overseas laws also allow fees to be reduced or waived altogether where disclosure is in the public interest – a particularly important provision. Evidence indicating serious malpractice or danger to public safety should not remain secret merely because the cost of releasing the relevant documents exceeds a predetermined threshold.

Public interest fee waivers were proposed in the UK white paper.[72] Provision for them could be made under clause 8(4)(a), but the government has not so far given any indication that it intends to do so.

Lord Mackay – appropriate limit – page 6, line 42

This amendment would prevent the Secretary of State setting the 'appropriate limit' above £500. This amendment would tend to restrict access (since a higher limit would bring larger requests within the scope of the Bill).

Lord Mackay – appropriate limit – page 7 line 6

This is a helpful amendment which would put on the face of the bill a commitment given by ministers, that the 'appropriate limit' would be based on the marginal costs of the time spent locating requested information and would not take account of the time spent considering whether the information could be disclosed.[73]

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[71] Thus under Ireland's 1997 FOI Act, requests can be refused if compliance would 'cause substantial and unreasonable interference with or disruption of' the authority's work [section 10(1)(c)]. The test under Australia's 1982 FOI Act is whether compliance would 'substantially and unreasonably divert the resources of the agency from its other operations' [section 24(1)(a)]

[72] This stated: "We are prepared to give the Information Commissioner…the power to review and adjust individual charges or charging systems, or to waive a charge if disclosure is considered to be in the wider public interest. For example, the Commissioner might consider that there is a compelling public interest in disclosure which could go by default if the applicant could not afford to meet the charge being levied". *Your Right to Know*, Cm 3818, paragraph 5.12

[73] "We have already announced that we are minded to set the appropriate limit for authorities at £500, and to restrict the cost that can be included in that calculation to the marginal cost of locating and finding the information in question. For information to be disclosed under clause 1, we have further made it clear that the charge to applicants will not exceed 10 per cent. of those marginal costs.
…marginal costs include the costs of staff time involved in locating the information, but do not include the costs of staff time involved in preparing the information or considering whether an exemption applies. Disbursements may be charged in addition to the 10 per cent. of the marginal

Lord Lucas – charges for more than one request – page 6 line 44

This amendment, which we support, limits an authority's power to aggregate costs for the purpose of deciding whether the appropriate limit has been exceeded.

Regulations under clause 11(4) would allow the costs of several *different* requests to be aggregated when calculating whether the appropriate limit is met. Several different requests made by the same individual, or by different people apparently acting in concert or as part of a campaign, can be aggregated in this way and refused if their *total* costs exceed the limit.

The intention is presumably to prevent an applicant evading the cost limit by deliberately splitting a single request into several smaller requests. But the effect may be to prevent other requesters using the Act. Representative bodies which deal with a range of issues may find that the costs of all requests they make on all matters are aggregated, effectively limiting them to one FOI request at a time. Membership organisations may be prevented from encouraging their members to use the Act because the costs of different peoples' unrelated requests may be aggregated, to deny all of them the information they want.

This amendment permits costs to be aggregated only where (a) it is clear that the requester has deliberately split one request which would have exceeded the £500 limit into a series of smaller requests, and (b) the requests are made within one month of each other

AFTER CLAUSE 11

Lord Falconer – new clause after clause 11 – fees for disclosure where compliance exceeds the appropriate limit

Authorities can refuse to provide information where the costs of doing so would exceed the appropriate limit, although they would be free to provide it if they wished. This new clause would give them the power to charge for providing information in these circumstances. However, it does not require them to provide the information to someone who is willing to pay.

Lord Lucas – amendment to the above new clause

This amendment would explicitly permit additional fees to be charged to an applicant who

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costs." *Home Office minister Mike O'Brien, Hansard, House of Commons, Standing Committee B, 18/1/00 cols 113 and 116*

proposes to publish information in which the authority holds the copyright.

CLAUSE 12

Lord Falconer – page 7, line 8

Minor point, consequential on the redrafting of clause 13

Lord Mackay – leave out subsection (2) – page 7, line 10

This amendment, which we support, would delete clause 12(2). The clause allows an authority to refuse a request which is identical, or substantially similar, to an earlier request from the same person which it has complied with, unless a 'reasonable interval' has passed.

This provision is not needed to deal with vexatious requesters, since clause 12(1) deals with these. It could however become an obstacle to people who may have good cause to regularly apply for similar information. Journalists, community groups and others who are monitoring a developing situation might repeat a request previously made perhaps three or six months earlier and be refused on the grounds that the authority considered it unreasonable to deal with a repeat request until an interval of, say, a year had passed.

Ministers have argued that this is necessary to protect authorities, particularly small authorities, from the burden of dealing with repeated requests and has indicated that a request for the same information, made 'every few months', could be unreasonable, if the circumstances have not changed.[74]

We think the power to refuse substantially similar requests is unnecessary and open to abuse. Given that vexatious requests can be refused altogether, there seems little reason for a power to refuse substantially similar requests. Where information has not changed since the last request, requesters will probably be satisfied with a statement to that effect. Where new information has been added, why should the authority not give access to it? People are unlikely to make such requests unless they need information. A power to refuse such requests appears unnecessary and open to abuse.

No such restriction appears in the openness code or, so far as we are aware, in any other

[74] Mike O'Brien. Hansard, House of Commons, Standing Committee B, 18/1/00, col. 122

country's FOI law. Clause 12(2) appears identical to a provision in the Data Protection Act,[75] which (unlike the bill) contains no other grounds for refusing vexatious requests.

Lord Mackay – vexatious applicants – page 7, line 9

This would permit an authority to ask the Information Tribunal for an order declaring an individual as a vexatious applicant if he 'habitually and persistently requests information without any reasonable grounds'.

The bill currently allows vexatious *requests* to be refused, but does not refer to vexatious *applicants.* The proposed definition does not seem to closely follow the test that the courts would apply in declaring someone a vexatious litigant (an individual who persistently pursues a legal action which has no reasonable chance of success and is brought in order to annoy someone).

We would not wish to see habitual and persistent requesters denied rights under the Act, or authorities (or the Tribunal) taking into account whether or not applicants have reasonable grounds for making requests.

AFTER CLAUSE 12

Lord Falconer – Forwarding of certain requests relating to transferred public records

This new clause would require the Public Record Office (and other records bodies) to transfer requests for records held by them which involve decisions on disclosure in the public interest to the responsible minister or authority.

CLAUSE 13

Amendments to this clause have been discussed in relation to the new clause after clause 1.

[75] Section 8(3) of the Data Protection Act 1998 states: 'Where a data controller has previously complied with a request made under section 7 by an individual, the data controller is not obliged to comply with a subsequent identical or similar request under that section by that individual unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.'

CLAUSE 14

Lord Falconer – oppose clause 14 stand part

The government's redrafting of the bill's provisions on public interest disclosure make this clause unnecessary.

Lord Mackay – fees – various amendments

These amendments are similar to those tabled by Lord Mackay to clause 8 which also deals with fees.

AFTER CLAUSE 14

Lord Lucas – new clause – publication of information

This amendment would permit an applicant to publish information obtained under the Act, on the Internet or in other format, provided any fees required have been paid. One effect of this may be to provide that copyright restrictions cannot then be used to prevent dissemination of released information.

CLAUSE 15

Lord Lucas – duty to acknowledge request to which clause 12(2) applies – page 9, line 17

Normally, authorities must give reasons when refusing a request. However, under clause 15(6), authorities do *not* have to give reasons, and could ignore a request altogether without an acknowledgement, if (a) the refusal is for the reasons set out in clause 12, and (b) the applicant has been given a reason in relation to a *previous* refusal, and (c) it is unreasonable to expect the authority to give reasons in these circumstances.

Clause 12 applies both to vexatious requests (where this may be justified) and to requests refused because they are identical or substantially similar to previous requests with which the authority has complied recently. In these cases, authorities should *not* be able to ignore requests. The amendment would not allow reasons, or even an acknowledgement, to be refused in relation to 12(2) requests. It would have to be 'reasonable in the circumstances' for the authority to ignore the request, but in our view it would *always* be unreasonable to ignore such requests, and this option should not exist. We therefore support this amendment.

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

(a) A request is made in January for particular information, which is supplied.

(b) In February, the applicant makes a request which is refused on the grounds that it is substantially similar to the January request, and a reasonable interval has not elapsed. The applicant is not told how much of a 'reasonable interval' to allow before making a further request.

(c) In March, the applicant makes a further request. The request is ignored, and the letter not even acknowledged, as permitted under clause 15(6) (unless it is 'unreasonable' in the circumstances).

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

Lord Falconer – page 8, line 39

This amendment redrafts clauses 15(2) and (3) to reflect the redrafting of the bill's public interest test. The provisions deal with the information that must be given to an applicant when the authority (a) concludes that the balance of public interest favours withholding information or (b) has not reached a decision on the public interest test at the end of the 20-day period allowed for deciding whether information is exempt.

The redrafted provisions do not appear to make any substantive change to the existing 15(2) and (3). However, they incorporate the unwelcome provision allowing decisions on the public interest to be taken over a prolonged and unspecified time, instead of within the 20-day period provided in clause 9(1).

Lord Falconer – page 9, line 12

This requires authorities to give an applicant notice when requests which are made for records held by the Public Record Office or similar body are transferred to the minister or authority responsible for the matter.

SCHEDULE 2

Lords Goodhart/Lester – Data Protection Act – secrecy offence – page 60, line 42

This amendment, which we support, deletes a provision which would make it a criminal offence for the Information Commissioner to disclose certain information. Remarkably, the offence could be committed by disclosing information to which the public would have a right of access under the bill itself.

Paragraph 19 of Schedule 2 of the bill extends a secrecy provision which applies to the Data Protection Commissioner under section 59 of the Data Protection Act (DPA) to the Information Commissioner.[76] The restriction applies to unpublished information about an identifiable individual or business obtained by the Commissioner for the purposes of the Act. Its disclosure without the consent of the person involved would be an offence unless it was (a) necessary for the discharge of the Commissioner's functions or (b) necessary in the public interest, having regard to the rights, freedoms or legitimate interests of any person. The difficulty is that 'necessary' is a strict test. A disclosure which is helpful or desirable may not be 'necessary'.

If the Commissioner's functions can be discharged properly *without* releasing the information, disclosure may not be 'necessary' for those functions. The public interest justification would presumably protect a disclosure made to the applicant or someone else with a direct interest but disclosures to the press and public at large might not be held to be 'necessary' in the public interest.

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[76] Section 59 of the Data Protection Act 1998 states:
59. - (1) No person who is or has been the Commissioner, a member of the Commissioner's staff or an agent of the Commissioner shall disclose any information which- (a) has been obtained by, or furnished to, the Commissioner under or for the purposes of this Act, (b) relates to an identified or identifiable individual or business, and (c) is not at the time of the disclosure, and has not previously been, available to the public from other sources, unless the disclosure is made with lawful authority.
(2) For the purposes of subsection (1) a disclosure of information is made with lawful authority only if, and to the extent that- (a) the disclosure is made with the consent of the individual or of the person for the time being carrying on the business, (b) the information was provided for the purpose of its being made available to the public (in whatever manner) under any provision of this Act, (c) the disclosure is made for the purposes of, and is necessary for, the discharge of- (i) any functions under this Act, or (ii) any Community obligation, (d) the disclosure is made for the purposes of any proceedings, whether criminal or civil and whether arising under, or by virtue of, this Act or otherwise, or (e) having regard to the rights and freedoms or legitimate interests of any person, the disclosure is necessary in the public interest.
(3) Any person who knowingly or recklessly discloses information in contravention of subsection (1) is guilty of an offence.

The presumption would be that the Commissioner could not identify any minister, civil servant or company official with whom she had held discussions, or about whom requests for information had been made, unless the specified conditions were met. Similarly no information about an identifiable business, including publicly owned businesses like the Post Office or BNFL or companies like Group 4 which are undertaking contracts on behalf of government departments could be identified, unless the conditions are met.

The most objectionable element of the restriction is that it contains no harm test. The offence is not limited to the disclosure of trade secrets or commercially damaging information, but could be caused by a *harmless* disclosure of information about an identifiable business. The perverse consequence would be that information about a business which an *authority* would *have* to disclose under the bill (because it did not reveal a 'trade secret' or 'prejudice the commercial interests' of the business concerned[77]) could result in the Commissioner being convicted of a criminal offence if *she* disclosed it.

The Information Commissioner designate, Elizabeth France, expressed concern at the implications of this provision as the Data Protection Bill went through Parliament:

> 'The effect of clause 54 [78] is potentially to criminalise disclosures of information relating to an identifiable business in circumstances where it could not sensibly be maintained that this could cause any harm. For example, where a journalist queries the lawfulness of a company's processing activities, a member of the Commissioner's staff could commit a criminal offence simply by confirming that the company had discussed the processing in question with the Registrar because this disclosure is clearly not absolutely necessary for the discharge of the Commissioner's functions under the Act. The Registrar has always sought to be as open as possible with the Press. She is aware of no evidence that this has caused any individual or company significant harm. She is therefore concerned that this clause could require her and her staff to be unnecessarily guarded in future.'[79] that this clause could require her and her staff to be unnecessarily guarded in future.'[80]

It has been government policy since the Conservatives' 1993 *Open Government* white paper,

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[77] Clause 41(2)
[78] Now section 59
[79] *Data Protection Registrar, 'Data Protection Bill. Criminal disclosures by the Commissioner's Staff.' 29.1.98*
[80] *Data Protection Registrar, 'Data Protection Bill. Criminal disclosures by the Commissioner's Staff.' 29.1.98*

that newly created statutory restrictions on disclosure should wherever possible contain 'harm tests'.[81] The FOI bill is itself intended to be accompanied by the repeal of excessive statutory restrictions[82].

The government maintains that it is obliged by the Data Protection (DP) Directive to create this offence – a view which the Data Protection Commissioner has disputed.[83] Whatever the legal position in relation to the DP Act, the offence cannot be required in relation to the Commissioner's *Freedom of Information* functions, since these do not flow from the directive. The rationale for extending the offence appears to be based on an unnecessary preference for consistency.

As far as we know, there have no complaints of improper disclosure by the Data Protection Registrar/Commissioner or her staff over the many years that they have operated, despite the fact that until a few months ago they were not subject to any statutory prohibition on disclosure. The idea that the Commissioner cannot be trusted to handle her FOI responsibilities without this new restriction is deeply implausible.

Imposing an unnecessary restriction on the Commissioner which may undermine her ability to explain how she is applying a *Freedom of Information Act* will be counterproductive. Any suggestion of unnecessary *secrecy* on the part of the Information Commissioner herself could damage the credibility of the legislation.

Lords Mackay/Astor – composition of Tribunal

This amendment makes some changes to the composition of the Tribunal, substituting a duty to consult the Advocate General in Scotland for the existing duty to consult the Lord Advocate and requiring the appointment of members to take account of the interests of each part of the UK.

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[81] 'The Government proposes to assess the case for harm tests in all future legislation on disclosure…The presumption will be in favour of inclusion of a harm test unless there are compelling public interest arguments against it'. *Open Government* White Paper, Cm 2290, July 1993 , paras 8.37 to 8.40

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

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

CLAUSE 16

Lord Mackay intends to oppose clause 16, which establishes the Information Commissioner and Information Tribunal.

AFTER CLAUSE 16

Lord Mackay – new clause – Information Ombudsman and Parliamentary Information Committee

This new clause proposes that enforcement of the bill should not be dealt with by the Information Commissioner but by a newly created officer, the Information Ombudsman. A Parliamentary Information Committee, appointed from members of both Houses of Parliament, would be established. Amendments to subsequent clauses (not individually listed below) substitute a reference to the "Ombudsman" for each of the bill's references to the "Commissioner".

This may imply concern at the bill's proposal that the Data Protection Commissioner should become the Information Commissioner and be responsible for both the FOI Act and the Data Protection Act (DPA).

There is a tension between the DPA's right of privacy and the FOI bill's right of access. In some cases the balance in our view unduly favours privacy at the expense of accountability. However, this flows primarily from the nature of legislation rather than the identity of the enforcement body. The government argues that this is inevitable, given that the DPA results from an EU directive which must take precedence over national legislation. However, the data protection directive makes explicit provision for FOI legislation in its final recital, which states

> '(72) Whereas this Directive allows the principle of public access to official documents to be taken into account when implementing the principles set out in this Directive'[84]

We hope the bill's exemption for personal information (clause 38) could be made subject to the bill's public interest test, which would do much to correct the imbalance.

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[84] Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data

Some countries combine the roles of FOI and privacy commissioners in the way proposed here; others separate the responsibilities. It is important that the way in which tension between the two conflicting statutes is resolved is dealt with as openly as possible, rather than internalised within a single body. This is a further reason for objecting to the proposed restriction on disclosure. should be dealt with as openly as possible by the Information Commissioner, rather than internalised within the workings of a single authority. This is a further reason why the DPA secrecy obligation (referred to above) should not be extended to the Information Commissioner.

CLAUSE 17

Lord Mackay - local authority publication schemes – page 10, line 23

This amendment would apply a new enforcement mechanism to local authorities' existing duties to make public agendas, minutes, reports and background papers relating to council and committee meetings. A local authority's duty to make these papers publicly available would have to be included in its publication scheme. Authorities will be required to comply with their publication schemes [clause 17(1)(b)], so any failure to make them available could be dealt with by the Information Commissioner using her enforcement powers.

This would be a significant advance over the status quo, as the existing disclosure requirements (in Part VA of the Local Government Act 1972) can only be enforced by going to court.

The amendment would also bring papers relating to local authority executives (created under the Local Government Act 2000) within the scope of an authority's publication scheme. The amendment would require minutes to include a summary of discussions, describing substantive comments made by the participants, motions tabled and the way each participant voted on any issue. This goes substantially beyond the existing requirements for minutes. However, authorities would not have to publish information which is exempt under the 1972 Local Government Act.

Lord Lucas – publication scheme and manuals not exempt – page 10, line 29

This amendment provides that a publication scheme and any associated manuals or guidelines for staff on the effect and operation of the FOI Act cannot be exempt under the Act.

AFTER CLAUSE 18

Lord Mackay – new clause – Manuals

This new clause, which we support, would require authorities to make publicly available the internal manuals they use in dealing with the public. This is a standard feature of overseas FOI laws such as those in the Canada, Australia, New Zealand, the USA and Ireland.[85] They ensure that people can see the rules and guidance under which authorities deal with them, helping to ensure that they are treated fairly.

A broadly similar provision appears in the Open Government code of practice. However, it is not repeated in the bill. The Commissioner would presumably be able to impose an equivalent duty as a condition of approving an authority's publication schemes [clause 17(1)(a)] if she wished to – but equally she could allow the existing requirement to lapse without being replaced.

The openness code requires government departments and other bodies subject to the Parliamentary Ombudsman's jurisdiction:

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

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[85] Similar provisions appear in FOI laws in Canada, Australia, New Zealand, the USA and Ireland. Section 16 of Ireland's Freedom of Information Act 1997 states:

16.—(1) A public body shall cause to be prepared and published and to be made available in accordance with subsection (5)—

(a) the rules, procedures, practices, guidelines and interpretations used by the body, and an index of any precedents kept by the body, for the purposes of decisions, determinations or recommendations, under or for the purposes of any enactment or scheme administered by the body with respect to rights, privileges, benefits, obligations, penalties or other sanctions to which members of the public are or may be entitled or subject under the enactment or scheme, and

(b) appropriate information in relation to the manner or intended manner of administration of any such enactment or scheme. [continued over]

…..

(5) A publication referred to in subsection (1) or (2) shall be made available for inspection free of charge, and for removal free of charge or, at the discretion of the head concerned, for purchase, at such places as the head concerned may determine and the head shall cause notice of those places to be published in such manner as he or she considers adequate for the purposes of this section and if the publication relates to a local authority or a health board, a copy of it shall be given to each member of the authority or board.

of the Code"[86]

The government's guidance on the code states:

> 'Departments should plan for the progressive release of all the guidelines and other material used in their dealings with the public. This need not mean publication where departments consider that the level of interest would not justify it, or where the guidelines in question are voluminous, but eventually the aim should be to make all guidelines available for purchase or inspection on request.'[87]

The FOI white paper proposed to continue these duties. It stated:

> 'the Act will impose duties upon public authorities to make certain information publicly available, as a matter of course. These requirements…will be broadly along the lines of those in the *Code of Practice*, namely…explanatory material on dealings with the public'.[88]

However, the bill does not do this.

The government has previously resisted amendments along these lines, arguing that while such a duty may be appropriate for large authorities it would be burdensome for small bodies. The present amendment reflects that concern. It does not apply to all public authorities, but primarily to those authorities who are currently subject to this requirement under the UK openness code and the equivalent Scottish and Welsh codes (ie those bodies subject to the jurisdiction of the Parliamentary, Scottish, Welsh and Northern Ireland Ombudsmen). The new clause would extend this duty to local authorities. But it leaves it to the Information Commissioner to decide which other bodies should also have to meet these requirements.

In theory, manuals could be obtained on a case by case basis by making individual FOI requests for them. However, this hit and miss approach would not be an adequate means of bringing such important material into the public domain. Many people who might benefit from access to such manuals will not realise that they can be obtained in this way and will not seek them. This amendment ensures they are available in advance of a request, so are

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[86] Code of Practice on Access to Government Information, 2nd Edition, January 1997, 'Information the government will release'.

[87] Code of Practice on Access to Government Information, Guidance on Interpretation, 2nd edition, 1997, Part I, paragraph 31

[88] '*Your Right to Know, Cm 3818, paragraph 2.18*

readily to hand when they are needed.

The amendment would ensure that these materials were made public systematically, so that everyone knew the basis of decision-making affecting them. Potential deficiencies in these materials, such as arbitrary or unfair procedures or guidance which misinterpreted statutory requirements, would be more likely to be detected by MPs, advice agencies and other interested parties, and corrected.

The Campaign for Freedom of Information

Suite 102, 16 Baldwins Gardens, London EC1N 7RJ
Tel: 020 7831 7477
Fax: 020 7831 7461
Email: admin@cfoi.demon.co.uk
Web: www.cfoi.org.uk

FREEDOM OF INFORMATION BILL

House of Lords Committee Stage

BRIEFING 2

Clauses 19 – 28

17 October 2000

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

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

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FREEDOM OF INFORMATION BILL

BRIEFING PAPER 2

CLAUSES 19-28

GENERAL ISSUES

1. 'SUBSTANTIAL PREJUDICE'

Many of the bill's exemptions allow information to be withheld where disclosure would be likely to 'prejudice' particular interests. This is a weaker test than the test of causing 'substantial harm' which the white paper had proposed.[1] Select committees of both Houses of Parliament have recommended replacing 'prejudice' by 'substantially prejudice', and the Scottish Executive has since done so in its own FOI proposals.

A series of amendments, from all sides of the House, which we support, seek to bring the bill into line with this approach. Thus:

- Lords Goodhart & Lester propose an amendment to clause 81, the interpretation clause, defining 'prejudice' throughout the bill as 'prejudice which is real, actual and of significant substance'

- Lord Archer of Sandwell proposes to insert a test of 'substantially prejudice' into the class exemption for investigations and proceedings in clause 28(1).

- Lord Mackay of Ardbrecknish proposes a 'substantially prejudice' test for exemptions on international relations (clause 25), the economy (clause 27), law enforcement (clause 29) and policy formulation, ministerial communications, law officers' advice and ministerial private offices (clause 33(1)).

[1] *Your Right to Know*, December 1997, Cm 3818

- Lords Lester of Herne Hill & Goodhart propose the same test for the commercial interests exemption in clause 41(2).

The white paper

Under the Open Government code of practice, most exemptions apply when disclosure would "prejudice" or "harm" particular interests. The white paper described the code's tests as "*insufficient*"[2] and proposed that the bill's tests should instead be "*set in specific and demanding terms*".[3] This would be done by allowing information to be withheld only where disclosure would be likely to cause *'substantial harm'* to protected interests. The only exception would be for policy formulation and internal discussion, where a test of 'simple' harm would apply.

The then Chancellor of the Duchy of Lancaster, Dr David Clark MP, explained that this test was intended to ensure that to withhold information "*There has got to be real damage caused by that particular release."*[4]

The substantial harm test was seen as analogous to the revised public interest immunity (PII) test adopted in response to the Scott report.[5] The background papers to the white paper noted that substantial harm:

> "would clearly be more stringent (and so provide greater openness) than the Code of Practice on Access to Government Information (which normally exempts on the basis of simple "harm" or "prejudice") and would be closer to the "real damage" test of PII. Practical experience of applying a "real damage" test in litigation indicates that it results in a substantial reduction in the volume of material which would be withheld."[6]

[2] Cm 3818, para. 3.6
[3] Cm 3818, para. 3.7
[4] Evidence to the Public Administration select committee, 16/12/97
[5] This provided that in seeking a court's agreement to withhold information from legal proceedings, the government would have to show that disclosure would cause "serious harm". The then Attorney-General stated: "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 document. The only basis for claiming PII will be a belief that disclosure will cause real harm…a document will not attract PII simply because it falls into a pre-defined category." *Sir Nicholas Lyell, Hansard, HC Debates, 18.12.96, col 950*
[6] "*Your Right to Know – Background Material*", Cabinet Office, January 1998, paragraph 100

The select committees

The House of Lords select committee, chaired by Lord Archer of Sandwell, which considered the draft FOI bill recommended replacing the 'prejudice' test by a test of 'substantially prejudice' for many exemptions.

> "we believe that "prejudice" alone is not sufficient to justify exempting information from public access. We would amend the draft Bill wherever "prejudice" is the test for exemption, to require that disclosure "would substantially or would be likely substantially to prejudice" a protected public interest. Clauses 21 (defence), 22 (international relations), 23 (relations within the United Kingdom), 24 (the economy), 26 (law enforcement), and 28(3) (decision-making) should be amended accordingly."[7]

The House of Commons Public Administration select committee came to a similar conclusion.

> 'There is no reason why different tests should not be used in different circumstances, as they are in much of the overseas legislation…We believe that it would be right under certain of the exemptions to say that only "substantial" or "significant" prejudice should be allowed to prevent disclosure. We recommend that the harm tests for the exemptions in clause 22 (international relations), clause 23 (relations within the UK), clause 24 (economy), and clause 34 (commercial interests) should refer to "substantial" or "significant" "prejudice".' [8]

Scotland

The Scottish Executive's proposals for a Freedom of Information Act adopt a test of whether disclosure would "substantially prejudice" particular interests. Its 1999 consultation document stated:

> 'We propose that the harm test be demanding and that it be whether disclosure would, or would be likely to, substantially prejudice the matter set out in the exemption in question. Our use of 'substantial prejudice' is intended to make clear that information covered by a content-based exemption should be disclosed unless the prejudice caused by disclosure would be real, actual

[7] Report from the Select Committee Appointed to Consider the Draft Freedom of Information Bill, Session 1998-99, July 1999, HL 97, paragraph 32. Clause numbers refer to those in the draft FOI bill.
[8] Select Committee on Public Administration, Third Report, Session 1998-99, July 1999, HC 570-I, paragraph 71. Clause numbers refer to those in the draft FOI bill.

> and of significant substance. This means that, in those circumstances in which the test is applied, public authorities would be required to consider whether…the disclosure of information would or would be likely to give rise to prejudice of significant substance.'[9]

In explaining the UK bill's test of 'prejudice' the Home Secretary indicated that he regards it as meaning that:

> "the prejudice has to be real, actual or of 'substance'."[10]

The Scottish Executive use a similar form of words, but with two differences: the prejudice would have be of 'significant' substance and the terms are joined by an 'and' instead of an 'or':

> "the prejudice caused…would be real, actual *and* of significant substance"

Wales

A similar move has already taken place in Wales. The First Secretary of the Welsh Assembly, Rhodri Morgan, has said that decisions under the Assembly's openness code[11] would be assessed against a 'substantial harm' test:

> 'The Government has introduced its Freedom of Information Bill, which will give people new statutory rights to access information…subject to a test of whether harm is likely to be caused as a result. I want to go further in Wales and test for a strong likelihood of substantial, rather than simple, harm. I have consulted the Parliamentary Ombudsman and he is content that we should adopt this as the test to be applied in Wales. He will therefore use substantial harm as the basis for a finding of maladministration, if people are wrongly denied access to the information that they have requested".[12]

Overseas legislation

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[9] "*An Open Scotland. Freedom of Information in Scotland. A Consultation.*" Scottish Executive, November 1999, SE/1995/51, paragraph 4.11
[10] *Hansard,* HC Debates, 24/5/99, col 22
[11] National Assembly for Wales, Code of Practice on Public Access to Information, First Edition, 1999
[12] Rhodri Morgan, Statement on Freedom of Information, 21 March 2000

Overseas FOI laws in certain exemptions adopt stricter harm tests, though not across the board:

- The Irish Act's exemption for economic interests applies to disclosures likely "to have a serious adverse affect on the financial interests of the State or on the ability of the Government to manage the national economy".[13]

- The Irish exemption for the commercial information belonging to a public authority protects it only where it is of 'substantial value'.[14]

- The Australian Act's exemption for the financial or property interests of the state apply only where disclosure would have a 'substantial adverse effect' on those interests.[15]

- The Australian exemption for information which would harm the 'proper and efficient conduct' of an agency's operations applies only if disclosure would have a 'substantial adverse effect' on those operations.[16]

- A draft FOI bill for Bosnia and Herzogovina, drawn up by a working party established by the Organization for Security and Cooperation in Europe proposes that even key exemptions for defence, security, crime prevention and an authority's 'deliberative processes' would apply only where disclosure would cause 'substantial harm'.[17]

The above all also allow the disclosure of exempt information which meets these tests on grounds of overriding public interest.

UK legislation

Some UK Acts also use terms analogous to 'substantial harm':

- An individual's right to see his or her own health record under the Data Protection Act 1998 can be restricted only if access would expose that individual or someone else to *'serious harm'*[18]

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[13] Freedom of Information Act 1997 [Ireland], section 31(1)(a)
[14] Freedom of Information Act 1997 [Ireland], section 31(2)(m)
[15] Freedom of Information Act 1982 [Australia], section 39(1)
[16] Freedom of Information Act 1982 [Australia], section 40(1)(d)
[17] http://194.215.227.4/mediares/d20000621b.htm
[18] The Data Protection (Subject Access Modification) (Health) Order 2000, SI 2000, No 413

- The Gas and Electricity Markets Authority established under the Utilities Act 2000 is free to publish any advice or information which would promote the interests of electricity or gas consumers, so long as this does not "*seriously and prejudicially*" affect the interests of any third party.[19] The Gas and Electricity Consumer Council is also free to disclose information subject to this test.

- Information about grants given under the Food Industry Development Scheme 1997 may be disclosed by ministers unless the applicant can show that to do so would cause "*a significant risk of detriment*" to the applicant's commercial interests.[20]

[19] Utilities Act 2000, sections 6(1) and (2)
[20] Food Industry Development Scheme 1997, SI 1997 No 2673

2. THE DUTY TO CONFIRM OR DENY

Every exemption in the bill (other than clause 19) contains a clause allowing authorities to refuse to confirm or deny whether requested information exists. These have been highlighted by a series of amendments proposing to delete many of these, tabled by Lucas of Crudwell.

We appreciate that there may be occasional cases where it may be damaging to reveal that information in fact exists. But the bill exaggerates the significance of this concern, returning to the issue in an apparently obsessive manner with separate references in clauses 20(2), 21(5), 22(2), 24(3), 25(4), 26(3), 27(2), 28(3), 29(3), 30(3), 31(3), 32(2), 33(3), 34(3), 35(2), 36(2), 37(2), 38(5), 39(2), 40(2), 41(3), 42(2) and 43(3)(a).

Some other FOI laws contain an equivalent provision. However it usually applies only to a limited set of exemptions not across the board.[21]No overseas Act adopts the UK bill's drafting technique of constantly repeating the provision in clause after clause.

The effect is to elevate a question which normally will not even occur to officials into the *first* question they will ask on receiving a request. Even the most mundane request may now prompt authorities to consider whether they are entitled to answer evasively, refusing to admit whether the requested information even exists.

Under some exemptions authorities will be able to refuse to confirm or deny only where to do so would 'prejudice' particular interests. But where class exemptions are involved authorities can *always* refuse to say whether they hold the information, at least in their initial response – a pernicious provision. Only at some later, unspecified date, would they have to consider whether an overriding public interest required them to admit to even holding the requested information.[22] Thus:

- A government department will be entitled to evade *any* question about the background to *any* policy decision. Officials will not have to say whether they hold information showing

[21] Under Ireland's Freedom of Information Act 1997, a right to refuse to confirm or deny the existence of records applies only to exemptions dealing with cabinet meetings, legal professional privilege, law enforcement, security, defence and international relations.

[22] Under clause 13 [which government amendments would redraft as a new clause after clause 1] authorities would have to consider whether the public interest in confirming or denying the existence of information outweighs the public interest in not doing so. But this decision would not have to be taken at the time of the initial refusal, but could be deferred until some later unspecified time that was 'reasonable in the circumstances'.

whether they have costed a policy, assessed its possible impact, monitored previous initiatives, engaged consultants, commissioned research, thought about alternatives or created, considered or received any kind of relevant material. This is explicitly permitted under clause 33(2). No such provision applies under the present code.

- Safety inspectors will not have to reveal when they last inspected a dangerous site, whether they took readings or measurements, whether their visit was announced to owners in advance or made without warning, whether they looked at the part of the premises about which the requester is concerned or whether they were satisfied or dissatisfied with what they found. This is explicitly permitted under clause 28(3).

- Ministers would not have to say whether they had received the report of a statutory inquiry, made private submissions to it or intervened in legal proceedings, for example, by signing a public interest immunity certificate. This is permitted by clause 30(3). In this case, no public interest test would apply – authorities would *never* be required to confirm the existence of such documents.

The evasive responses encouraged by these provisions contrasts with the absence of any statutory duty under the bill to *assist* applicants, a basic feature of most other FOI laws. The government says the need to be helpful can be addressed by guidance under the Secretary of State's code of practice.[23] But in light of the statutory right to be evasive, this must be inadequate.

The dogged way in which this provision has been inserted into each exemption[24] produces some strange results. Authorities are not required to confirm or deny whether they hold exempt *environmental* information.[25] Yet environmental information is exempted not because it disclosure could be damaging, but because it will be accessible under a separate, stronger right of access than the bill's.[26] Another provision allows authorities to refuse to confirm or deny the existence of information which is exempt on the grounds that it is due to be published at some future, perhaps unspecified, date.[27] It is hard to conceive of circumstances

[23] Clause 44(2)(a)
[24] Except one, clause 19 which exempts information accessible to the applicant by other means
[25] Clause 37(2)
[26] New regulations on access to environmental information will be made in order to comply with the so-called 'Aarhus Convention'. Clause 37(1)(a) and clause 73
[27] Clause 20(2)

in which an authority should find it necessary to refuse to confirm that it holds such information.

Ministers have previously offered examples which they believe illustrates the need for this provision but these usually involve issues that can be dealt with under other provisions[28], or which illustrate a wish to avoid embarrassment rather than harm. Thus it has been suggested that this provision would be necessary to allow to the Home Office to refuse to confirm that it 'holds information on the consequences of legalising cannabis" as this might "send misleading signals about drugs or the police".[29] But FOI legislation *should* provide access to such research, contributing to more informed discussion about such issues.

[28] For example, there may be a case for not confirming whether documents calculating the impact of a particular tax change exist, an example cited by ministers in relation to this exemption, but which can be dealt with under clause 29(1)(d) which deals with tax assessment.

[29] Mr David Lock, Parliamentary Secretary, Lord Chancellor's Department, Hansard, Standing Committee B, Thursday 20 January 2000, col. 207

INDIVIDUAL AMENDMENTS BY CLAUSE

CLAUSE 19

Information accessible to public by other means

Clause 19 exempts information which is already reasonably accessible to the applicant, even if it is accessible only on payment of a charge. The government argues that this is necessary to prevent FOI being used to circumvent charges for access under other regimes. The exemption is not subject to the bill's public interest test but which we think it should be, so that where existing charges are excessive the more modest charge under the bill could be substituted (provided this was in the public interest). Further comments are on page 22 of our *Briefing No 1*.

No. 125 Lord Lucas – availability of information in electronic format – restriction on publication

Lord Lucas's amendment, which we support, would not allow information to be withheld under this exemption if the information was only available to the applicant in manual form and the applicant reasonably required it in electronic form.

This amendment does not itself *require* the authority to provide information to the applicant in electronic form (Authorities are already required to do this under clause 10(1)(a), so long as it is reasonably practicable.)

However, it does prevent the authority *refusing* to give access, on the grounds that the information is already publicly available, if the form in which it is available is unsuitable for the applicant.

The amendment also provides that information cannot be refused under clause 19 if the information is already accessible to the applicant but subject to restrictions which prevent him publishing the information.

CLAUSE 20

Information intended for future publication

No. 126 Lord Mackay – irrevocable commitment to publish within 3 months – page 11, line 44

No. 127 Lords Goodhart & Lester – public commitment to publish within 3 months – page 11, line 44

Clause 20 exempts information which the authority intends to publish at some future date, and it is reasonable in all the circumstances to withhold the information until that date. However, the date need not be specified, which implies that this may prove an open ended exemption.

Lord Mackay's amendment would limit the exemption to cases where the authority has made 'an irrevocable public commitment' to publish the information within the next three months. Lords Goodhart & Lester propose to limit the exemption to cases where the authority has made a 'public commitment' to publish within three months.

No. 128 Lord Lucas – delete the right to refuse to confirm or deny – page 12, line 6

Clause 20(2) provides that the duty to confirm or deny the existence of information to which this exemption applies does not arise if to do so would lead to the disclosure of information which is itself exempt under this provision. Lord Lucas proposes to delete this provision, and we support his amendment.

Clause 20(2) is itself unnecessary and circular. It only applies if confirming that exempt information exists would involve *the disclosure* of such exempt information. Since the authority already has the power to withhold exempt information, this appears superfluous.

CLAUSE 21

Information supplied by or relating to bodies dealing with security matters

The security and intelligence services in the USA, Canada and New Zealand are subject to those countries FOI laws. However, these bodies are not covered by the UK bill.

Clause 22 goes further, and exempts any information held by an authority which *is* subject to the bill, if it *relates to* the work of specified bodies with security responsibilities, or *has been supplied* directly or indirectly by any of them. The bodies include MI5, MI6, GCHQ, the special forces, the tribunals dealing with complaints about the security and intelligence services and the interception of communications, and the National Criminal Intelligence Service.

The exemption applies regardless of whether disclosure would harm national security or the work of the specified bodies. It may apply merely because information has passed through the hands of these bodies. However, as the security service takes on more law enforcement and computer security functions previously carried out by the police or civil servants, these areas of work would be removed from the scope of the bill.

- Both NCIS and the security service play a role in monitoring the threat to Whitehall computers from hackers and viruses. The security service in particular has taken over some functions previously carried out by the government's computer agency, the CCTA. Information about such matters could now be refused merely because it has come from, or passed through the hands of, the security service, even though disclosure has no adverse implications for its work.
- The security service has been involved in security audits of departments such as the Department of Social Security,[30] and investigations of large scale benefit fraud. Information about these matters would thereby become exempt.
- The issues dealt with by the National Criminal Intelligence Service include football hooliganism and counterfeiting (a press release warning consumers of counterfeit 'Furby'

[30] The then Under Secretary of State for Social Security, in a letter published in the Guardian on 24 September 1997 confirmed that 'Currently, the security service is involved in an audit of security procedures in the DSS as part of its publicly acknowledged role as principal adviser to government on protective security and practice. This involves the examination of the department's internal management and systems controls."

toys appears on its web site), so information on these subjects might thereby become exempt.

No. 129 Lords Lester & Goodhart – addition of a 'prejudice' test – page 12, line 12

This amendment, which we support, would limit the exemption for information about, or supplied by, the specified bodies to cases where disclosure would 'prejudice the functions of any of those bodies'.

No. 130 Lord Lucas – ministerial certificate - page 12, line 16

The exemption in clause 21 can be asserted by a conclusive ministerial certificate, under clause 21(2).

Lord Lucas's amendment, which we support, provides that a minister need not sign such a certificate if, in his opinion, no significant harm would be caused by the release of the information. Although this would not create a harm test, it would serve as a useful reminder to ministers that they are not obliged to issue certificates, or to withhold such information. The Scott Report revealed that some ministers wrongly believed they were under a *duty* to sign Public Interest Immunity certificates even if they did not believe that preventing disclosure of the information in question was in the public interest.[31]

CLAUSE 22

National security

Clause 22 exempts information in cases where 'exemption…is required for the purpose of safeguarding national security'. The exemption may be established by a conclusive ministerial certificate, though the Information Tribunal could review the decision to issue a certificate on judicial review grounds, and quash it if the minister did not have 'reasonable grounds' for its issue.

[31] The Scott Report found that more than one minister "did not regard himself as having a discretion to decline to claim PII for documents which fell within the 'advice to Ministers' class." Sir Richard Scott concluded: "The proposition that a Minister is ever under a legal duty to claim PII in order to protect documents from disclosure to the defence notwithstanding that in the Minister's view the public interest requires their disclosure to the defence is, in my opinion, based on a fundamental misconception of the principles of PII law." *Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecution, HMSO, 1996 paragraphs G13.46 and G18.54*

No. 131 Lord Lucas – deletion of the right to refuse to confirm or deny – page 13, line 1

This amendment would delete clause 22(2), which allows authorities to refuse to confirm or deny whether information exists where this is required for the purpose of safeguarding national security.

CLAUSE 23

Certificates under sections 22 and 23

No. 132 Lord Lucas – certificates cannot themselves be exempt – page 13, line 13

Lord Lucas's amendment provides that a certificate issued under clause 22 (bodies with security functions) or clause 23 (national security) cannot itself be exempt information.

An authority which refuses access to information would, under clause 15, have to state that it was doing so, specify the exemption on which it was relying and say why it applies. But there is no explicit duty to reveal that a ministerial certificate has been issued. This amendment would provide that the certificate itself could never be considered exempt, making it less likely that its existence could be concealed from the applicant. More explicitly, it would mean that a separate FOI request asking for copies of all such certificates which had been issued could not be refused.

CLAUSE 24

Defence

No. 133 Lord Lucas – deletion of the right to refuse to confirm or deny – page 13, line 30

This amendment would delete clause 24(3), which allows authorities to refuse to confirm or deny whether information exists where to do so would be likely to prejudice defence interests.

CLAUSE 25

International relations

Clause 25(1) exempts information whose disclosure would be likely to prejudice relations between the UK and any other state, international organisation or international court; or which would prejudice the interests of the UK abroad or the promotion of those interests.

No. 134 Lord Mackay – change harm test from 'prejudice' to 'substantially prejudice' - page 13, line 34

This amendment, which we support, would allow information to be withheld under clause 25(1) only where disclosure would be likely to "substantially prejudice" the interests set out in the clause. The two select committees which examined the draft FOI bill both concluded that this exemption should be subject to such a test.

See the beginning of this paper for more discussion of the bill's harm tests.

No. 135 Lord Mackay – exclusion of information about the EU from the scope of the 'confidential information' exemption – page 13, line 41

Clause 25(2) exempts information supplied in confidence by another state, international organisation or international court. Lord Mackay's amendment, which we support, would exclude from the exemption information supplied in confidence by the EU and its institutions.

There is widespread concern about the excessive secrecy of EU institutions. This is particularly significant as these deliberations lead to decisions which in effect become UK law.

The amendment would disallow clause 25(2) in relation to information obtained from the EU and its institutions. This would not mean that no such information could be withheld. Clause 25(1) would still apply to information whose disclosure was likely to *prejudice* the UK's relations with the EU or a member state or *prejudice* the UK's interests abroad.

A separate exemption, clause 39, exempts confidential communications between one *UK* public authority and another. That, however, imposes a stricter test than clause 25(2), since it adopts the test of whether the information is subject to a common law obligation of confidentiality and cannot be invoked merely by the authority supplying the information

writing 'confidential' on the document, as appears to be the case under clause 25(2).[32]

No. 136 Lord Lucas – deletion of the right to refuse to confirm or deny – page 14, line 6

This amendment would delete clause 25(4), which allows authorities to refuse to confirm or deny whether information exists where to do so would be likely to prejudice the interests referred in clause 25(1) or to reveal any confidential information obtained from another state or international organisation. (The second part of this provision, contained in clause 25(4)(b) in any case appears redundant, since it does nothing more than allow authorities to withhold exempt information.)

CLAUSE 26

Relations within the United Kingdom

Clause 26 exempts information whose disclosure would prejudice relations between any of the devolved administrations, or between any of them and the UK government.

The purpose of this exemption appears to be to allow the UK government to hold private internal discussions on matters which, if disclosed, might cause such offence to a devolved institution or to public opinion as to prejudice relations between the administrations.

Ministers have suggested that the exemption might be needed if, for example, UK civil servants were commenting to UK ministers in critical terms on how the Scottish Executive was dealing with an outbreak of food poisoning or other health issues.[33] UK government plans to deal with moves towards independence for Scotland might be another example.

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[32] The exemption would only apply to information whose disclosure would constitute an actionable breach of confidence. This could not arise if the information was already in the public domain, or was trivial or, in the case of information supplied in confidence by government (and perhaps other public authorities), unless disclosure would damage the public interest. (This was the conclusion of the House of Lords in the 'Spycatcher' case. [1990] 1 A.C. 109)

[33] During the bill's Commons committee stage, Mr David Lock the Parliamentary Secretary to the Lord Chancellor's Department said: 'Let us suppose that an E. coli outbreak takes place in one of the Scottish regions and that a civil servant from the Department of Health in London writes a report to his Minister in this Administration, perhaps relying on information provided by the Scottish Executive, which may be highly critical of the handling of the outbreak and of how the Scottish Executive is handling health issues generally. If that information were to be disclosed before the Scottish Executive had had an opportunity to consider it, respond to it and make appropriate preparations for its being made public, that may jeopardise our good relations with the Scottish Executive.' *Hansard, Standing Committtee B, 25/1/00 col 249*

However, it is not clear why a special exemption for such matters is required. The combination of clause 33 (formulation of government policy/ministerial communications), clause 34 (reasonable opinion of a qualified person would inhibit frankness of advice or prejudice the effective conduct of public affairs) or clause 39 (information exchanged in confidence between public authorities) seem more than adequate for such circumstances.

The exemption also highlights the fact that both the Welsh Assembly and Scottish Executive have introduced or are proposing to introduce more demanding openness regimes than this bill provides.

The Scottish Executive's recent proposals for a Scottish FOI Act will go *beyond* the present Westminster bill in important respects.[34] In particular:

1. Substantial prejudice. For exemptions involving a test of harm, the Scottish test would be whether disclosure would 'substantially prejudice' the relevant interest, a stricter test than the bill's 'prejudice'.[35]

2. Ministerial veto. Scotland's Information Commissioner would be able to make *binding* rulings on public interest disclosure of information covered by the *harm-tested exemptions.* There would be no form of ministerial veto over these[36]. The UK bill allows a ministerial veto over *all* public interest notices applying to government departments, whether the exemption involves a harm test or a class exemption.

3. **Factual information** relating to policy decisions would *have to be disclosed* unless it would 'substantially prejudice' collective responsibility or frankness and candour. In the UK bill this information is subject to the class exemption for policy formulation[37].

4. Reasonable opinion of a qualified person. The Scottish proposals have no equivalent of clause 34, which allows UK authorities to withhold information which in their "reasonable opinion" would prejudice collective responsibility, inhibit frank advice or prejudice the

[34] '*An Open Scotland. Freedom of Information: A Consultation',* Scottish Executive, November 1999.
[35] '*An Open Scotland*, paragraph 4.11
[36] However, a ministerial veto would apply in relation to *class* exemptions in Scotland, which cover many of the same areas as the UK bill's class exemptions
[37] Clause 33(1)

effective conduct of public affairs.[38] These decisions would be immune from challenge, unless they were unreasonable to the point of irrationality.[39] None of the Scottish exemptions give legal weight to an authority's opinions.

However, the Scottish Act will *not* allow direct access to information which Whitehall departments supply to the Scottish Executive. The Scotland Act itself precludes the Scottish Parliament from attempting to establish such a right of access.[40] The Memorandum of Understanding between the UK Government, Scottish Ministers and the Cabinet of the National Assembly for Wales[41] states that each administration will respect the confidentiality of information supplied to it by any other.[42] A series of bilateral 'concordats' between UK departments and the new administrations, reinforce this approach.[43]

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[38] Clause 34(2)

[39] That is, they could be challenged only if they failed to meet the judicial review test of 'reasonableness'

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

[41] SE/99/36, Laid before the Scottish Parliament by the Scottish Ministers, October 1999

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

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

The Scottish Executive consultation paper says:

> 'It is not expected that the majority of information passed to the Scottish Executive by Whitehall will be deemed to be held in-confidence'[44]

We think it much more likely that *everything* passed by UK government departments to their Scottish counterparts, other than published material, will be supplied in confidence, and not become publicly available in Scotland.

However, the more open Scottish system is likely to increase the pressure for greater openness by English public authorities, particularly where equivalent authorities, dealing with the same kind of information, operate on both sides of the border to different standards.

Lords Lucas, Mackay, Goodhart & Lester have indicated that they intend to oppose clause 26

No. 137 Lord Lucas – deletion of the right to refuse to confirm or deny – page 14, line 36

This amendment would delete clause 26(3), which allows authorities to refuse to confirm or deny whether information exists where to do so would be likely to prejudice relations between any of the administrations.

CLAUSE 27

The Economy

Clause 27 exempts information whose disclosure would be likely to prejudice the economic interests of the UK or any part of it or the financial interests of any administration in the UK.

No. 138 Lord Mackay - harm to management of the economy, etc – page 14, line 40

Lord Mackay's amendment would substitute the corresponding exemption from the Open Government code of practice.

[44] *An Open Scotland*, paragraph 1.6

No. 140 Lord Lucas – deletion of the right to refuse to confirm or deny – page 15, line 1

This amendment would delete clause 26(3), which allows authorities to refuse to confirm or deny whether information exists where to do so would be likely to prejudice the interests referred to in the clause.

CLAUSE 28(1)

Investigations and Proceedings

We regard clause 28(1) as deeply unsatisfactory. It contains one of the bill's widest and most restrictive class exemptions, providing a blanket, indefinite exemption for information held in connection with investigations carried out by prosecuting authorities, including not just the police but also safety, environmental and consumer protection agencies. The exemption extends to information about routine inspections, where no offence is suspected or found.[45]

- The exemption applies even where there is no conceivable risk to legal proceedings or law enforcement. It would apply in cases where no offence has been committed and prosecution is not possible. It would also apply after a trial is over.
- The results of safety inspections of the railways, nuclear plants and dangerous factories would be permanently exempt. This is the information that most people assume FOI legislation exists to provide.[46]
- Authorities would not even be required to confirm that they hold any requested information,[47] let alone disclose it, except on grounds of an overriding public interest.

Amendments

We strongly support amendment 148 tabled by Lord Archer of Sandwell to limit this exemption to information whose disclosure would 'substantially prejudice' legal proceedings or investigations. The next best would be amendments 151 and 146 tabled separately by Lord Mackay and Lord Lucas to apply a test of 'prejudice'.

Failing these, the alternative would be to allow the class exemption to remain only so long as proceedings or investigations have not been completed, as proposed in amendments 155 and 145 tabled by Lord Colville of Culross and Lords Goodhart & Lester. Once proceedings were over exemptions in clause 29 would be available in cases where disclosure might prejudice the administration of justice or law enforcement.

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[45] Clause 28(1)(b) brings purely routine visits, carried out in order to offer advice rather than investigate a suspected offence, within the scope of the exemption.

[46] Clause 28(1)(b) brings purely routine visits, carried out in order to offer advice rather than investigate a suspected offence, within the scope of the exemption.

[47] Clause 28(3)

In serious cases, investigations may continue for years, perhaps because of failures by the investigating authorities – as in the case of the Stephen Lawrence murder enquiry. Allowing information to be disclosed *during* this period, where it would not prejudice proceedings, may help to rectify such shortcomings.

The scope of the exemptions

Clause 28(1) applies to information which has 'at any time' been held by a prosecuting authority for the purposes of instituting or conducting criminal proceedings, or in connection with investigations which, in the circumstances, *could* have led to a prosecution.

The class exemption applies *in addition to* the raft of related exemptions in clause 29, which cover almost every conceivable risk of prejudice to law enforcement, the administration of justice or the work of regulatory bodies.[48]

The prosecuting authorities covered by the exemption include the police, Serious Fraud Office, Crown Prosecution Service, Customs and Excise, Inland Revenue, Benefits Agency and Department of Trade & Industry.

Safety authorities

It also applies to a enormous range of safety, environmental and consumer protection authorities. These include the Health & Safety Executive (which includes the Railway, Nuclear Installations, Mines, Agriculture and other Inspectorates), Fire Authorities, the Drinking Water Inspectorate, the Environment Agency, Trading Standards Officers, Environmental Health Officers, the Director General of Water Services, the Civil Aviation Authority, the Maritime and Coastguard Agency and – in relation to functions including farm animal welfare and BSE, the Ministry of Agriculture, Fisheries and Food.[49]

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[48] Clause 29 contains a list of exemptions which apply where disclosure would be likely to: 'prejudice the prevention or detection of crime', 'prejudice the apprehension or prosecution of offenders', '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' or '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…[or] whether any person is responsible for any conduct which is improper…[or] whether circumstances which justify regulatory action in pursuance of any enactment exist or may arise…[or] ascertaining a person's fitness or competence in relation to the management of bodies corporate…[or] the cause of an accident….[or] securing the health, safety and welfare of persons at work…[or] the protection of persons other than persons at work against risk to health or safety'.

[49] Taken from a list of authorities supplied by ministers to members of the House of Commons standing committee dealing with the FOI Bill.

Many of these bodies devote a substantial part of their time to preventative work. Yet information obtained during routine inspections for this purpose would be exempt, regardless of its contents, despite the fact that it is most unlikely to ever be used in evidence in proceedings and certainly does not need the protection of a class exemption.

This is a point which some of the authorities themselves have made. The then-Director General of the Health and Safety Executive, Jenny Bacon, told the Public Administration select committee in July 1998: "*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.*"[50]

The exemption means there would be no right to know about problems like BNFL's falsification of nuclear quality control data, farmers that that fail to comply with BSE rules,[51] 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 on the other hand, ignore or even condone, dangerous practices.

The public interest in disclosing information about the above safety problems may seem self-evident *now*, with the benefit of hindsight. But anyone seeking that information *before* disaster struck would have found the public interest case difficult to demonstrate, particularly if the companies and authorities both insisted there was no risk. It should be for the *authority* to show that disclosure would be *harmful*, not for the applicant to show that it is in the public interest.

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. So would the inadequacy of the investigation into the murder of Stephen Lawrence. Although much of this information could be capable of prejudicing legal proceedings, information about the police's failings, such as the delays in following up reports identifying the suspects, would probably not prejudice proceedings.

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[50] Public Administration select committee, HC 570-II, Q 826

[51] 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.

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 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.'[52]

It recommended that:

> "a Freedom of Information Act should apply to all areas of policing, both operational and administrative, subject only to the 'substantial harm' test for withholding disclosure"[53]

The rationale for the class exemption

The government has explained the need for a class exemption in terms of the need to ensure that 'future criminal proceedings are not jeopardised by premature disclosure of information'. A second consideration is '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'.[54]

These objectives would be achieved by a 'prejudice' exemption, which would continue to operate so long as future proceedings were possible. As for preserving the courts as the sole forum for determining guilt, it is unlikely that information about identifiable suspects would be disclosed under the bill anyway, given the wide exemption for personal information under clause 38 – an exemption to which the bill's public interest test does not apply.

[52] The Stephen Lawrence Inquiry. CM 4262-I, February 1999, paragraph 46.32
[53] Recommendation 9
[54] See the comments of Mr David Lock MP, Parliamentary Secretary in the Lord Chancellor's Department, Standing Committee B, 25/1/00 column 262

CLAUSE 28(2)

Informants

Clause 28(2) provides a class exemption for information relating to the obtaining of information from confidential sources in connection with investigations not just by prosecuting authorities, but by the range of other regulatory authorities (eg the Charity Commission) whose functions are described in clause 29(2).

The exemption is not restricted to police informants, but would cover many kinds of complainants and whistleblowers, including those who report malpractice by their employers or breaches of planning or environmental controls. The exemption is not limited to the identity of the individual providing information but extends to administrative procedures relating to the handling of such information.

A potential whistleblower who wanted to know whether an authority's arrangements for protecting his identity, or investigating complaints, were adequate might find that he was denied access to the relevant administrative guidelines.

A series of amendments have been tabled. We support amendment 154 tabled by Lords Goodhart and Lester which limits the exemption to information whose disclosure would prejudice the obtaining of information from the same or another confidential source. This recognises that the case for such an exemption rests not just on the effect of disclosure on the particular informant or case but on the willingness of *future* informants to come forward.

The other relevant consideration, the *safety* of the informant or of others, is already protected under a separate exemption.[55]

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[55] Clause 36(1)(b)

The Campaign for Freedom of Information

Suite 102, 16 Baldwins Gardens, London EC1N 7RJ
Tel: 020 7831 7477
Fax: 020 7831 7461
Email: admin@cfoi.demon.co.uk
Web: www.cfoi.org.uk

FREEDOM OF INFORMATION BILL

House of Lords Committee Stage

BRIEFING 3

Clauses 33 & 34

19 October 2000

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

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

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FREEDOM OF INFORMATION BILL

BRIEFING PAPER 3

CLAUSES 33-34

1. CLAUSE 33(1)(a)

Clause 33(1)(a) is a sweeping exemption for all information relating to the formulation of any policy. It is not restricted to civil service advice, but includes the background information used in preparing policy, including the underlying facts and their analysis.

There would be no right to know about purely descriptive reports of existing practice, research reports, evidence on health hazards, assumptions about wage or inflation levels used in calculating costs, studies of overseas practice, consultants' findings or supporting data showing whether official assertions are realistic or not. Departments would not even have to confirm whether any such information existed.[1] Any request for information about the justification for a government policy could be refused under this exemption.

The sole basis for disclosure would be the bill's public interest test. This may seem enough to elicit disclosure of background information, but it should not be assumed that officials will agree.

Ministers clearly consider that disclosing even *statistics* about matters on which final decisions have not been taken may be damaging to the public interest.[2] If this is their starting point, then it cannot be assumed that *any* factual information will willingly be disclosed, without the public interest case against release being made. The Commissioner might give such arguments short shrift. But taking any complaint to the

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[1] Clause 33(2)

[2] Amendment 172 proposes that statistics about decisions *which have been taken* will be removed from the policy formulation exemption. But *other* statistics will still be exempt.

Commissioner will probably involve a delay of months,[3] and may even end in a veto. Many applicants will not bother.

The bill is considerably more restrictive than the Open Government code and will allow information that now has to be disclosed to be kept secret. The bill would be substantially strengthened by adopting the code's approach. A variety of amendments would provide this. Amendment 175A most closely reflects the code's approach.

The Code's approach

The openness code, introduced by the Conservative government in 1994,[4] contains three relevant provisions:

- it requires departments to publish the facts and analysis of the facts underlying policy decisions and proposals, once decisions are announced;[5]
- it allows policy-related material to be withheld only if disclosure would 'harm the frankness and candour of internal discussion';[6]
- it requires information whose disclosure *could* harm frank discussions to be disclosed if that harm is outweighed by the public interest in openness.[7]

The code's proactive publication duties require departments to publish the facts and analysis of facts underlying major policy decisions when these are announced. The guidance on this

[3] Delay is likely (a) because there is no time limit for decisions on the public interest [Clause 9(2A)], (b) before complaining to the Commissioner, a department's internal complaints process must have been exhausted [Cause 49(2)].

[4] Code of Practice on Access to Government Information, available on the Home Office web site at http://www.homeoffice.gov.uk/foi/ogcode981.htm

[5] 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)

[6] Exemption 2 of the code, entitled 'Internal discussion and advice' 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."

[7] Part II of 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."

provision, issued by the last government, states: "The assumption is that the factual and evaluative information which formed the basis for Ministerial decisions, including expert analysis and scientific appraisal where relevant, should be shared with Parliament and the public."[8]

The reference to the publication of facts and analysis is reinforced by the corresponding code exemption. Where a specific request is made, the information must be disclosed unless government can show this would harm the frankness of discussions. Even then an overriding public interest may require disclosure. The Parliamentary Ombudsman, who enforces the code, has regularly rejected arguments that factual information can be withheld under this exemption, noting that it "is intended to protect advice, not factual information."[9,10,11]

But under the bill:

- there is no requirement to publish the facts and analysis behind government decisions.
- The relevant exemption contains no test of harm.
- The sole basis for any disclosure will be the bill's public interest test. Under the code, this is a further obstacle to the *withholding* of information. Under the bill, it may allow objections to be raised to the most elementary disclosure.

The white paper

The white paper envisaged something much closer to the code, than the present bill. It rejected a class exemption for policy material stating "We are prepared to expose government information at all levels to FOI legislation."

Whereas most exemptions were to be based on a test of whether disclosure would cause 'substantial harm' it accepted the case for a lower threshold in this area. Information about policy would be available, subject to *'a test of simple harm'*, that is, '*would disclosure of this*

[8] Cabinet Office. 'Guidance on Interpretation. Code of Practice on Access to Government Information/, 2nd edition 1997, Part I, paragraph 18.
[9] Parliamentary Ombudsman, Case A.8/00, HC 494, May 2000
[10] "Policy documents or submissions to Ministers may contain sensitive material which is caught by the exemptions in Part II of the Code, but I have seen documents obtained as a result of investigations by my staff which contained facts and analysis of the facts, which I saw no reason to withhold under a blanket refusal."[10] Parliamentary Ombudsman. Selected Cases, April-October 1998, Vol 2, Access to Official Information, 2nd report session 1998-99, HC 5
[11] "It is first of all important to emphasise that this exemption is intended to protect advice, not factual information." Case No: A.31/99, HC 21, Dec 1999

information cause harm?'[12]

It added: *"We…see the decision-making and policy advice interest as designed primarily to protect opinion and analytical information, not the raw data and factual background material which have contributed to the policy-making process."*[13]

Overseas

FOI laws normally operate on the assumption that any exemption in this area exists to allow frankness in the giving of advice or exchange of views. It is assumed that the *facts* do not need to be withheld for this purpose.

Ireland's FOI Act explicitly excludes not just factual information but its *analysis* from the scope of the equivalent exemption, which:

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

The exemption in the Irish Act in fact goes considerably beyond this.[14]

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[12] Your Right to Know, Cm 3818, paragraph 3.12

[13] Your Right to Know, Cm 3818, paragraph 3.13

[14] Section 20 of Ireland's Freedom of Information Act 1997 reads, in full:

20.—(1) A head may refuse to grant a request under section 7 — (a) if the record concerned contains matter relating to the deliberative processes of the public body concerned (including opinions, advice, recommendations, and the results of consultations, considered by the body, the head of the body, or a member of the body or of the staff of the body for the purpose of those processes), and (b) the granting of the request would, in the opinion of the head, be contrary to the public interest –

and, without prejudice to the generality of paragraph (b), the head shall, in determining whether to grant or refuse to grant the request, consider whether the grant thereof would be contrary to the public interest by reason of the fact that the requester concerned would thereby become aware of a significant decision that the body proposes to make.

(2) Subsection (1) does not apply to a record if and in so far as it contains—

(a) matter used, or intended to be used, by a public body for the purpose of making decisions, determinations or recommendations referred to in section 16,

(b) factual (including statistical) information and analyses thereof,

(c) the reasons for the making of a decision by a public body,

(d) a report of an investigation or analysis of the performance, efficiency or effectiveness of a public body in relation to the functions generally or a particular function of the body,

(e) a report, study or analysis of a scientific or technical expert relating to the subject of his or her expertise or a report containing opinions or advice of such an expert and not being a report used or commissioned for the purposes of a decision of a public body made pursuant to any enactment or scheme.

The ***Australian*** FOI Act's exemption for 'internal working documents':

> 'does not apply to a document by reason only of purely factual material contained in the document'[15]

Factual information is only one example of a wider range of material explicitly excluded from policy exemptions. Both the Australian and Irish laws also exclude *scientific or technical expert advice* from this exemption.[16,17]

Other material is also often excluded from these exemptions. Examples of information which cannot be withheld under other policy formulation exemptions includes: scientific research,[18] field research[19], 'expert opinion or analysis' in *any* field,[20] a feasibility or technical study,[21] plans and budgetary estimates,[22] an efficiency study,[23] an economic forecast,[24] a public opinion poll,[25] an environmental impact statement,[26] product testing results,[27] an appraisal,[28] a valuator's report[29] and advice from an external consultant or person other than a government official.[30]

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[15] Freedom of Information Act 1982 [Australia], section 36(5)

[16] The 'deliberative processes' exemption in the Irish Act "does not apply to a record if and in so far as it contains…a report, study or analysis of a scientific or technical expert relating to the subject of his or her expertise or a report containing opinions or advice of such an expert and not being a report used or commissioned for the purposes of a decision of a public body made pursuant to any enactment or scheme." (Freedom of Information Act 1997 [Ireland] section 20(2)(e))

[17] The 'internal working documents' exemption in the Australian Act "does not apply to reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, whether employed within an agency or not, including reports expressing the opinions of such experts on scientific or technical matters'[Freedom of Information Act 1982 [Australia], section 36(6)(a))

[18] Freedom of Information Act 1985 [Manitoba], section 39(2)(c)

[19] Freedom of Information and Protection of Privacy Act 1987 [Ontario],Freedom of Information and Protection of Privacy Act 1992 [British Columbia], section 13(2)(j).

[20] Freedom of Information Act 1992 [Queensland], section 41(2)(c)

[21] 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)

[22] 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)

[23] 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)

[24] Freedom of Information and Protection of Privacy Act 1992 [British Columbia], section 13(2)(e)

[25] Freedom of Information and Protection of Privacy Act 1992 [British Columbia], section 13(2)(b)

[26] Freedom of Information Act 1985 [Manitoba], section 39(2)(a); Freedom of Information and Protection of Privacy Act 1987 [Ontario], section 13(2)(d)

[27] 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)

[28] Freedom of Information and Protection of Privacy Act 1992 [British Columbia], section 13(2)(d)

[29] Freedom of Information and Protection of Privacy Act 1987 [Ontario], section 13(2)(c)

[30] Access to Information Act 1985 [Canada], section 21(2)(b)

Scotland

The bill's approach to facts has been rejected by the Scottish Executive's proposals for an FOI Act. This retains a class exemption for policy information, but removes factual information from that exemption. Such information, it is proposed, would have to be disclosed unless it would 'substantially prejudice' collective responsibility, or the frankness of internal discussion, advice or exchange of views.[31]

The 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*' should normally be published once decisions have been taken.

Lord Butler

Lord Butler, the former cabinet secretary, told the ad hoc 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.'[32]

Lord Burns

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

[31] 'An Open Scotland', Scottish Executive, SE/1999/51, November 1999, Annex C, page 77
[32] Report from the Select Committee Appointed to Consider the Draft Freedom of Information Bill, Session 1998-99, HL 97, Q. 357

> 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.'[33]

The benefits of openness

The fact that openness in this area may be feasible and beneficial seems barely to feature in the government's approach.

- The publication of the minutes of the monthly meetings between the Chancellor and the Governor of the Bank of England in 1994, since extended in relation to the Monetary Policy Committee minutes is an example of the positive benefits that may result from disclosure which goes beyond facts and analysis.[34]
- The Welsh Assembly has found it possible to publish their cabinet minutes on the Internet, only 6 weeks after they take place. These may not deal with the same range of issues as the UK cabinet, but involve considerable detail about policy formulation.
- The Food Standards Agency has been encouraged to publish its advice to ministers, and given express statutory authority to do so.[35,36]

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[33] Public Administration select committee, Session 1998-9, HC 570, Evidence 22/6/99 Q. 140

[34] According to one commentator. "The minutes of the Monetary Policy Committee may be a sanitised version of what actually happened, but they are presumably a reasonable semblance of the truth and always make fascinating reading. From the Bank of England's perspective, their greatest purpose is to lend credulity and accountability to its decision-making, for almost invariably they show the committee to have acted in a thoroughly sensible and pragmatic manner.

This transparency is all the more important in the present circumstances, with interest rates still high and growth declining, for it explains and justifies the policy stance. We may not agree with it, but at least we can see how the MPC is arriving at its decisions. The Bank of England gets a pretty rough press as things are, but without these minutes it would be a good deal rougher and unforgiving." 'Outlook' column, *Independent* business section, 15.10.98

[35] Food Standards Act 1999, section 19(1)(a)

[36] 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*.' 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

Facts: the definitional problem

The Home Secretary has said on several occasions that he favours the disclosure of background factual material, and that the only obstacle to providing for this is the difficulty in defining what is meant by 'factual information'.[37] He later added that the difficulty was

> '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".'[38]

This argument must be treated with some scepticism. The bill itself used the term 'factual information' in clause 13(5), undefined, and without any apparent difficulty. (This provision was deleted by the government's redrafting of clause 13, but Lord Falconer has promised to reinstate it.[39])

However, the bill's reluctant approach to the disclosure of *statistics* now confirms that it is something more fundamental than a drafting problem which is preventing progress.

Lord Falconer's amendment No 172 proposes that statistical information should be removed from the scope of the policy formulation exemption, *but only in relation to a decision which has been taken.* Statistics relating to matters which are *still under consideration* or have been dropped without a decision can still be withheld under this exemption, subject to the public interest test.

The definition of 'statistical information' is clearly not the issue. The government appears so profoundly insecure about the consequences of openness that it insists on the freedom to argue that releasing *statistics* could damage the public interest. This is frankly incomprehensible, not least because departments already have the power to resist the premature release of statistics under clause 20.[40]

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[37] In evidence to the House of Commons Public Administration select committee Mr Straw said: "There remains this continuing issue of factual or background information which I think is important and which I think on the whole ought to be disclosed." Q 1076, 21/7/99

[38] HC Debates, 5/4/99, Columns 1026-7

[39] *Hansard*, House of Lords, 17/10/00, column 901. Lord Falconer said, "we have concluded that Clause 13(5) has been omitted in error. The noble Lord, Lord Lucas, has tabled Amendment No. 14 which proposes to insert a similar provision. Therefore, although the provision is deleted from the draft that I am dealing with, when we reach Report stage we intend to insert a provision similar to that proposed in Amendment No. 14"

[40] Clause 20 allows requests to be refused if they relate to information intended to be published at some future date and it is reasonable in the circumstances to delay disclosure until that date.

If this is the government's frame of mind, it cannot be assumed that *any* factual information relating to policy will be released without serious consideration of whether to oppose disclosure on public interest grounds. Inviting officials and ministers to approach decisions in this way will lead to delays, foster obstructiveness and undermine any effort to produce a more open culture. Given that the facts cannot be withheld under the code at present, the bill could lead to a *more secretive* culture.

Of course, the Information Commissioner may not be prepared to accommodate such an approach and seek to require a higher standard of openness. But this is not a matter which should be left to the Commissioner; it is something on which the legislation itself should express a view.

The amendments

The great majority of amendments to clause 33 are helpful; and many overlap. We support them all.

Factual information

Several amendments would remove factual information from the scope of the exemption**. Amendment 173** would remove factual information from the exemption after a decision has been taken. **Amendment 174** would do so regardless of whether the decision had been taken – a preferable approach.

Harm test

Other amendments would make the *four* exemptions in clause 33(1) subject to a test of harm. **Amendments 169-171** insert a 'prejudice' test before each of the four exemptions. **Amendment 175** inserts a test of 'substantially prejudice'.

Combined approach

A single amendment which combines these approaches can be found in **Amendment 175A.** Although it largely overlaps with earlier amendments, it has the advantage of referring to factual information *and the analysis of factual information* - a provision in the Open Government code not dealt with in any of the other amendments. It would also introduce a 'prejudice' test into three of the four exemptions in clause 33.

2. 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 gives *all* authorities a more general exemption for information which could *'prejudice the effective conduct of public affairs'*.[41] 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*'[42] or involved '*unreasonableness verging on an absurdity'*[43].

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."[44]

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"[45]

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[41] Clause 34(2)(c)
[42] Lord Diplock in Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374
[43] Lord Brightman in *R v Hillingdon LBC ex p. Puhlhofer* [1986] 1. AC 484 at 518
[44] Home Office. "Freedom of Information. Preparation of Draft Legislation. Background Material', 1999, page 12
[45] Mike O'Brien, Committee stage of the FOI Bill, Standing Committee B,27/1/00 [Part II], col. 321

This deeply objectionable exemption is capable of fundamentally undermining the bill's right of access. A minister who claims that disclosure would 'prejudice' defence, international relations or the economy[46], would have to demonstrate the prejudice *objectively*, or risk having 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 itself is in most cases then protected against challenge (though would still be subject to the bill's public interest test)/

There is every reason to expect authorities to abuse this provision, based on experience with the Open Government 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 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'[47]

The Ombudsman was still complaining about this phenomenon in 1998, after the new government took office:

> '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'[48]

Comparable precedents

The Code

The exemption is considerably worse than the equivalent provision in the Open Government code, which exempts information whose disclosure

> 'would harm the proper and efficient conduct of the operations of a…public body'.[49]

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[46] Clauses 24, 25 and 27
[47] Parliamentary Ombudsman, Annual Report for 1995, pages 50-51
[48] Parliamentary Ombudsman, 5th Report, 1997-98, HC 845, June 1998
[49] Code of Practice on Access to Government Information, Exemption 7(b)

This harm has to be *objectively* demonstrated, and must also outweigh the public interest in disclosure.

Australia

The equivalent Australian exemption is even more robust. This exempts information whose disclosure would:

> 'have a *substantial adverse effect* on the proper and efficient conduct of the operations of the agency'[50]

This of course involves the equivalent of a 'substantial harm' test. It must be objectively demonstrated; and is also subject to a public interest override.

New Zealand

New Zealand's *Official Information Act 1982* has an even more directly comparable provision, 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:

- Is limited to damage to the conduct of public affairs resulting from harm to the frank expression of opinions or the exposure of officials to improper pressure – it is not open ended as in the UK bill;
- it requires objective evidence of harm, the authority's "opinion" is irrelevant
- requires that it be "necessary" to withhold information for one of these reasons, a stricter test than the bill's.

This test too is subject to a public interest override.[51]

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[50] Freedom of Information Act 1982 [Australia], section 40(1)(d)

[51] 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"*.

The select committees

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'**[52]

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**"[53]

The amendments

Amendment 187 would delete the whole of clause 34(2)(c), the exemption referring to 'prejudice to the effective conduct of public affairs'.

Amendments 184 and 189 would delete the proviso that all decisions under the clause depend on the 'reasonable opinion of a qualified person'. (Note that the government is proposing to do this in relation to statistical information only in **Amendment 191**)

We support both these sets of amendments.

Lord Mackay of Ardbrecknish and Viscount Astor intend to oppose the clause itself.

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[52] Public Administration Select Committee, Third Report Session 1998-99, HC 570, paragraph 90
[53] HL 97, paragraph 35.

The Campaign for Freedom of Information

Suite 102, 16 Baldwins Gardens, London EC1N 7RJ
Tel: 020 7831 7477
Fax: 020 7831 7461
Email: admin@cfoi.demon.co.uk
Web: www.cfoi.org.uk

FREEDOM OF INFORMATION BILL

House of Lords Committee Stage

BRIEFING 5

Clauses 37 – 43

25 October 2000

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

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

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FREEDOM OF INFORMATION BILL

BRIEFING PAPER 5

CLAUSES 37 – 43

This paper deals with various exemptions. It does not deal with clause 52, the ministerial veto, which is dealt with in Briefing Paper 4

CLAUSE 37

ENVIRONMENTAL INFORMATION

Clause 37 (to which we do *not* object) exempts environmental information to which there is a right of access under separate regulations. These regulations would be made under clause 73 and would implement the so-called 'Aarhus Convention'.[1]

There is already a separate right of access to environmental information held by public authorities, under the Environmental Information Regulations 1992 and 1998, which implement an EU directive.

The government initially proposed to incorporate these regulations into the FOI bill.[2] However, it abandoned this after apparently realising that the FOI bill was so weak that it failed to comply either with the EU directive or the Aarhus Convention.

The Convention, for example

- sets out a series of exemptions, all of which incorporate a test of harm, which is that disclosure must '*adversely affect*' the interest concerned.[3] Because the bill's *class* exemptions do not contain a test of harm they fail to comply with this provision.

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[1] The United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters.

[2] The Home Office consultation paper on the Draft FOI bill stated "It is intended to revoke the current environmental information regime as set out in the Environmental Information Regulations 1998 and replace it with the FOI right', Cm 4355, May 1999, paragraph 54

[3] Article 4(4)

- states that the exemptions must be *'interpreted in a restrictive way, taking into account the public interest served by disclosure'*. This requires the public interest to be taken into account across *all* the exemptions, not just some – as under the bill. It also requires the government to interpret the exemptions narrowly, a provision which appeared in one of the amendments proposing to establish a purpose clause – which the government has rejected.

From an environmental point of view, a separate free-standing right to information which avoids these limitations is clearly worth having. However, it is regrettable that the FOI bill has fallen so far behind its original aspirations as to make this necessary.

Clause 37 exempts environmental information covered by the new regulations. However, it is subject to the bill's public interest test. This appears to mean that environmental information which is *not* disclosed under the forthcoming environmental regulations might still be obtained under the *bill's* public interest test, a helpful provision.

CLAUSE 38

PERSONAL INFORMATION

We remain concerned about Clause 38 which exempts personal data from access, if disclosure would breach any of the data protection principles.[4] For information held about the ordinary citizen this is unlikely to cause difficulty. However, the DPA makes no distinction between personal information about someone's private life, and information which identifies a public official acting in that capacity.

The official's *name* is 'personal data' under the Data Protection Act (DPA) and there will be a presumption against identifying the author of an official document, the identity of an civil servant taking a particular decision, or the names of officials present at a meeting, unless it is shown that to do so does not breach any of the principles.[5] There are ways round this, but they involve obtaining the individual's consent, or demonstrating that at least one of the other conditions in Schedule 2 of the Act has been met. If the authority itself does not *want* to

[4] These are set out in Schedule 1 to the Data Protection Act 1998

[5] If there are *other* grounds for protecting such information, e.g. to protect an authority's decision-making processes or the safety of someone at risk of attack, other exemptions already address these concerns.

disclose the information, it may be difficult to argue that it is required to.[6] In these circumstances, disclosure would have to be shown to be 'necessary' in the applicant's interests or those of third parties, and not outweighed by the individual's interests – a complex balancing test.[7]

The same problems would arise in relation to the identity of an individual acting on behalf of a representative body. A letter from the Director-General of the CBI to a government department might well have to be released with the author's name and title deleted, *on data protection grounds*, unless he consented. There might be reasons for protecting the *contents* of such correspondence, but the privacy of the author should not be an issue in such circumstances.

There are also likely to be problems where information about safety problems caused by *sole traders* is sought. Any information obtained by safety authorities about a business which is carried on by an individual, rather than a corporate body, would be personal data, and exempt under this clause – unless disclosure could be shown not to breach any of the data protection principles. Again, there may be ways round this, but these are likely to be complex. We fear that many authorities will adopt the simpler, if unjustified, precaution of deleting all information which identifies any individual from any document before disclosure.

Some of the obstacles could be overcome by obtaining the consent of the individual concerned, but nothing in the bill requires an authority to ask for consent.

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[6] For example, in many cases, the disclosure would have be justified by showing that it was 'necessary for the exercise of any functions of the Crown, a Minister of the Crown or a government department' [Data Protection Act 1998, Schedule 2, paragraph 5(d)]. But if the department itself does not want to disclose the individual's identity and argues it can discharge its functions without doing so, this provision may not be sufficient to allow disclosure.

[7] Disclosure would have to be justified on the grounds that it was 'necessary for the purposes of legitimate interests pursued by…[the applicant or third parties] except where the processing [*ie disclosure]* is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject." [Data Protection Act 1998, Schedule 2, paragraph 6]

CLAUSE 39

INFORMATION PROVIDED IN CONFIDENCE

Clause 39 exempts information obtained from a third party whose disclosure would constitute an actionable breach of confidence. An enforceable obligation of confidence is surprisingly easily established. The public authority merely needs to agree, explicitly or implicitly, to accept information from someone else in confidence. If the information is not already publicly available already, or trivial, it will be subject to a obligation of confidentiality – and exempt.

The common law does provide a public interest test.[8] However, as ministers have acknowledged the common law public interest test is likely to be less helpful to applicants than the bill's public interest test.[9] But the government has rejected amendments to apply the bill's test instead.

In most cases, if an authority and a third party agree to communicate in confidence, the information will be exempt under clause 39. The third party may be a company, lobbyist, trade body, professional association, private individual or even another public authority. The two parties may have good reason for such an agreement, it may be the only basis on which the authority can learn about matters which are essential to its work and would not otherwise be disclosed.

On the other hand, the confidentiality may be because both parties know they would face criticism and opposition if their actions were publicly known – and need to avoid embarrassing questions. Lobbyists trying to influence government will particularly appreciate this exemption.

Sometimes there will be no compelling reason for confidentiality at all. It may just be the way things have always been done, perhaps because one party wrongly assumes the other requires it. This may later be damaging to the authority if it comes under pressure to explain its behaviour and find that it has unwittingly tied its own hands. It may be unable to explain

[8] The courts may not enforce the obligation of confidence where to do so would conceal wrongdoing, danger to the public or other matters of substantial public interest.

[9] According to Home Office minister Mike O'Brien: 'Case law has produced a type of public interest test, although not of the level used in the Bill…the common law of confidence contains a public interest test, so that no duty of confidence arises if it is contrary to the public interest, but I do not claim that that interest test is of as high a standard as the one in the Bill'. Hansard, Commons, Standing Committee B, 1 February 2000, column 362-3

itself without the third party's consent, which may not be forthcoming.

This is what happened some years ago, when MAFF found itself unable to reveal the results of its tests of microwave ovens which showed that a high percentage failed to heat food to safe temperatures. It was reduced to publishing its findings in anonymous form, and advising that each customer should phone the manufacturer of their microwave individually to ask if it was on the list. The resulting outcry contributed to the lasting damage to MAFF's reputation.

We would like to see this exemption modified, so as to prevent information being *unnecessarily* accepted in confidence. To take a minor example. Some seminars on policy issues take place under 'Chatham House rules', preventing any of the participants or their comments being publicly identified. It is common to find that in practice no-one says anything that they would not have said, or have not previously said, 'on the record' anyway. An unnecessary obligation of confidence has been agreed by everyone, in the mistaken belief that it was essential to some other participant.

If information is likely to be supplied to a public authority anyway, there should be no need to accept it in confidence. This may be the case where a safety or environmental authority obtains information under its legal powers, and does not need to rely on a voluntary disclosure. Alternatively, the third party may be providing the information in order to further its own interests, because it is lobbying for a change in policy, and would continue to do so, even if the information was made public. Of course, if disclosure would *prejudice* the third party's commercial interests or involve personal information about an individual the exemptions in clauses 41 and 38 apply, so information harmful to third parties would in any case be protected.

The amendments that follow address these and related concerns.

Nos. 209 and 211. Lords Goodhart & Lester – conditions for accepting information in confidence – page 22, lines 41 and 44

The amendment, which we support, has two effects:

- it requires an authority to give explicit notice to the person supplying it with information that it is willing to accept it in confidence. This avoids confusion that may arise as to whether information has or has not been accepted subject to an *implicit* agreement of confidentiality.
- it provides that the authority shall only give that notice if it (a) requires the information

for the proper discharge of its functions and (b) believes on reasonable grounds that the information will not otherwise be supplied to it.

Without such provision, the bill would be entirely silent on when it might be appropriate to enter into obligations of confidentiality. The draft code of practice, to be issued under clause 44, deals only with confidentiality clauses in *contracts*. It says nothing about when it is appropriate to accept information in confidence otherwise. Ministers have previously said that guidance on this matter will be given by the Information Commissioner, presumably under clause 46(2)(b) which deals with good practice.[10] But ministers cannot commit the Commissioner to issuing guidance on any particular matter; and any guidance which she actually produced could not be enforced.

No 210. Lord Lucas – no confidentiality between public authorities – page 22, line 44

This amendment, which we support, would prevent clause 39 applying to information which has been supplied to the authority in confidence by *another public authority.*

Such information is explicitly caught by clause 39(1)(a). Clause 79(1) provides that one *government department* may not claim that this exemption prevents it disclosing information supplied to it in confidence by another government department. But it would apply to information which a government department receives from another public authority; and to information which other authorities exchange between themselves.

This is a remarkable provision for several reasons.

First, several FOI laws, including Ireland's[11] and Australia's,[12] explicitly exclude information

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[10] 'One of the key protections will be the guidance given by the Information Commissioner to public authorities that they should not be complicit in creating a culture of secrecy by their use of the common law, and that they should receive information only on a confidential basis if that is appropriate and justifiable.' Home Office Minister Mike O'Brien, House of Commons, Standing Committee B, 1 February 2000, column 362

[11] Section 26 of Ireland's Freedom of Information Act 1997 states:

"26.—(1) Subject to the provisions of this section, a head shall refuse to grant a request under section 7 if…(b) disclosure of the information concerned would constitute a breach of a duty of confidence provided for by a provision of an agreement or enactment (other than a provision specified in column (3) of the Third Schedule of an enactment specified in that Schedule) or otherwise by law.

(2) Subsection (1) shall not apply to a record which is prepared by a head or any other person (being a director, or member of the staff of, a public body or a person who is providing a service for a public body under a contract for services) in the course of the performance of his or her functions unless disclosure of the information concerned would constitute a breach of a duty of confidence that is provided for by an agreement or statute or otherwise by law and *is owed to a person other than a*

supplied in confidence by other public authorities from the scope of the equivalent exemption.

Second, the bill's other exemptions already provide grounds for withholding information exchanged between authorities, for example clause 34[13] and in some cases clause 33.[14]

Third, the bill would in any case allow the applicant to apply for the information directly to the authority supplying it. With few exceptions, all public authorities will be subject to the Act. So, unless it is exempt under a different provision, this information would have to be disclosed by the originating authority, *provided the applicant realises this and applies for it to that authority.* But applicants may not do so, and therefore be frustrated by this provision.

Authorities are under no statutory duty to assist applicants. An authority may refuse a request on these grounds without explaining that the information has been supplied by an authority which is itself subject to the Bill. Indeed, there is no obligation on it to even *identify* the authority involved.

The draft of the Secretary of State's code of practice under clause 44 refers to the transfer of requests to other authorities – but only in connection with information which the authority itself *does not hold.* It does not propose that requests should be transferred in cases where the other authority has supplied information in confidence.

No. 230. Lord Lucas – written requests for information to be treated as confidential – new clause after clause 43

This amendment, which we support, deals with a series of exemptions relating to confidential information, namely: confidential information supplied by another state, international

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public body or head or a director, or member of the staff of, a public body or a person who is providing or provided a service for a public body under a contract for services."

[12] Section 45 of Australia's Freedom of Information Act 1982 states:

45. (1) A document is an exempt document if its disclosure under this Act would found an action, by a person other than the Commonwealth, for breach of confidence.

(2) Subsection (1) does not apply to any document to the disclosure of which paragraph 36 (1) (a) applies *[internal working documents]* or would apply, but for the operation of subsection 36 (2), (5) or (6), being a document prepared by a Minister, a member of the staff of a Minister, or an officer or employee of an agency, in the course of his duties, or by a prescribed authority in the performance of its functions, for purposes relating to the affairs of an agency or a Department of State unless the disclosure would constitute a breach of confidence owed to a person or body other than:

(a) a person in the capacity of Minister, member of the staff of a Minister or officer of an agency; or

(b) an agency or the Commonwealth.

[13] Clause 34 applies, in part, to information which in the authority's opinion would prejudice the free and frank provision of advice (from any source) or the free and frank exchange of views for the purposes of deliberation, or otherwise prejudice the effective conduct of public affairs.

[14] Information supplied to a government department by another authority in connection with policy formulation would be exempt under clause 33.

organisation or court [Clause 25(2)]; information whose disclosure would constitute an actionable breach of confidence [clause 39]; information subject to legal professional privilege [clause 40][15] and trade secrets and information whose disclosure would prejudice commercial interests [clause 41].

In each case the amendment provides that information would only be exempt if the supplier of the information had made a *written request* for it to be held in confidence.

It also places a duty on authorities to *consider* asking the originator of the information for permission to release the information.

The person supplying the information may originally have asked for it to be held in confidence, but no longer require confidentiality at the time an FOI request is made. Circumstances may have changed; a confidential negotiation may have been completed and been announced; the supplier of the information may even have published it himself. Yet the authority to whom the request is made may be completely unaware of this. If it refuses the request without checking with the supplier of the information, it may be unnecessarily withheld.

In the Commons, the government rejected amendments which would have *required* authorities to ask a third party for consent to disclose; and which provided that if consent was refused, that refusal would be valid for a period of 12 months. This amendment takes the less prescriptive approach of merely requiring the authority to *consider* asking for consent.

No. 232. Lord Lucas – guidance on accepting information in confidence – page 24, line 36

This amendment, which we support, relates to clause 44, which provides for guidance to be issued by the Secretary of State in a code of practice. It would require the code of practice to deal with the circumstances in which it would be appropriate for authorities to receive information in confidence.

This question is not currently mentioned in clause 44; nor is it addressed in the draft code of practice which has been circulated.

[15] The amendment may not be strictly relevant in relation to information covered by legal professional privilege, where the privilege belongs to the client (presumably, the public authority) and not the lawyer advising the client.

CLAUSE 41

COMMERCIAL INTERESTS

No 215. Lord Mackay – definition of trade secret – page 23, line 8

This amendment, which we support, would define trade secret as 'confidential trade information which if disclosed to a competitor would cause harm to its owner'.

This is a helpful definition. At present, 'trade secret' is used in clause 41(1) but not defined. It is a class exemption and must be intended to protect information whose disclosure would *not* prejudice the owner's commercial interests, and could not be protected under clause 41(2). However, it is hard to see that a company could have a trade secret whose disclosure would *not* prejudice its commercial interests.

Lord Mackay's definition would (a) limit the term to information relating to trade (b) require that it be confidential (c) insert a test of harm and (d) specify that the harm must occur through the use that a competitor would make of the information.

No. 217. Lord Lucas – prejudice to an unreasonable degree – page 23, line 10

This amendment, which we support, would insert the words 'to an unreasonable degree' into clause 41(2) so that it exempted information whose disclosure "would prejudice *to an unreasonable degree* the commercial interests of any person".

This would bring the exemption into line with similar exemptions for commercial interests in existing UK legislation. A range of environmental and safety statutes require information about identifiable companies to be made public unless disclosure would "prejudice to an unreasonable degree" their commercial interests. In some cases the test is whether a *trade secret* would be prejudiced "to an unreasonable degree".

This phrase appears in:

- The Control of Atmospheric Pollution (Appeals) Regulations 1977[16]
- The Food and Environment Protection Act 1985[17]

[16] This permits the Secretary of State to withhold from a local authority in the course of an appeal any information given by the appellant which "would *prejudice to an unreasonable degree* any private interest relating to a trade secret" (The Control of Atmospheric Pollution (Appeals) Regulations 1977, SI 1977 No 17)

- The Water Resources Act 1991[18]
- The Clean Air Act 1993[19]
- The Control of Major Accident Hazards Regulations 1999[20].

It is implicit that the governments of the day – and they span a period of more than 20 years – believed that "prejudice" alone was an inadequate test, either because it would be triggered by an almost insignificant degree of prejudice; or because some degree of prejudice to commercial interests was an inevitable but sometimes necessary result of disclosure.

"Prejudice" is one of the less demanding terms used in UK legislation.

- The Competition Act 1998 (Directors Rules) Order 2000 exempts from disclosure "commercial information the disclosure of which would, or might, *significantly harm the legitimate business interests* of the undertaking to which it relates"[21]
- The Food Industry Development Scheme 1997 allows the minister to disclose information unless this would 'give rise to a *significant risk of detriment* to the applicant's commercial interests'[22]
- An identical provision appears in the Marketing Development Scheme 1994[23]

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[17] Various sections of the Food and Environment Protection Act 1985 require public registers of environmental information to be established, from which information can be withheld only if disclosure would "prejudice to an unreasonable degree some person's commercial interests." [eg section 14(2)(b)]

[18] Section 191B of the Water Resources Act 1991 allows information to be withheld from public registers only if disclosure would "prejudice to an unreasonable degree" the commercial interests of the person concerned.

[19] Section 37 of the Clean Air Act 1993 allows a person served with a notice requiring him to disclose pollution data to appeal against it to the Secretary of State on the grounds that it would "*prejudice to an unreasonable degree* some private interest about a trade secret"

[20] These regulations allow information to be withheld from public registers about sites using large volumes of hazardous materials only if disclosure would "prejudice to an unreasonable degree the commercial interests" of the person to whom it relates. Control of Major Accident Hazards Regulations, Schedule 8, paragraph 18

[21] Rule 30(1)(c)(i)

[22] Section 10(2)

[23] Section 6(3) of the Marketing Development Scheme 1994 (SI 1994 No 1403) states "No person may be paid a grant under this Scheme unless he has given to the appropriate Minister his written consent to the use by that Minister (in a public report made by him concerning the operation of the Scheme) of information about the proposal for which the grant is sought, provided that no disclosure under this sub-paragraph shall give rise to *a significant risk of detriment to the applicant's commercial interests.*"

Nos. 214 and 219 (Lord Mackay) and 218 (Lord Archer and Baroness Thornton) – public interest test

These amendments, which we support, insert a public interest test into both clause 41(1) which exempts trade secrets [Lord Mackay] and clause 41(2) which exempts information which would prejudice commercial interests [Lord Mackay and Lord Archer/Baroness Thornton]

Both these provisions are already subject to the bill's public interest test. But that test can be vetoed under clause 52. *The public interest test inserted by these amendments could not be vetoed – as it does not flow from clause 13.* The Commissioner's decisions could not be overruled, though they could be appealed against to the Tribunal.

No 221. Lords Goodhart/Lester – public interest factors – page 23, line 11

This amendment, which we support, highlights the factors to which special consideration should be given when considering the clause 13 public interest test in relation to clause 41(2). Structurally, it resembles clause 13(5) in requiring authorities to 'in particular have regard' to the public interest in specified matters.[24]

In this case the public interest factors that must in particular be considered is the public interest in ensuring

(a) the effective oversight of public funds – this would in particular be a factor in relation to the making of grants or the awarding of contracts.

(b) that the public is adequately informed about risks to health and safety or the environment – another area where commercial confidentiality is frequently found to be an obstacle; and

(c) that regulators are discharging their responsibilities effectively.

No 220. Lord Young of Dartington – informed consumer choice – page 23, line 11

Clause 41(2) has a vast scope. It applies if a disclosure would prejudice *anyone's* commercial interests – even if that person was not the person who supplied the information in question.

[24] In 13(5) the requirement was for the authority 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 informed background to decision-taking'.

For example, the commercial interests of the suppliers of Perrier water would have been disclosed by the revelation, a few years ago, that the product had been contaminated by chemicals. A report showing that a particular brand of clothes were made by children working in a developing country under dangerous conditions could be withheld on the grounds that this would prejudice the firm's commercial interests, as consumers might boycott the product.

Such information might at present be disclosed under the bill's public interest test – subject to the clause 52 veto. This amendment, which we support, would remove such information from the scope of the exemption altogether.

No 222. Lord Mackay – exemption for commercial information supplied before commencement – new clause after clause 41

This amendment would exempt all information supplied to an authority by a company or commercial organisation before the Act came into force. However, in the case of government departments, such information is already subject to a right of access under the Open Government code of practice, so the effect would be to remove from access information which is currently available. The code itself was retrospective when introduced; so were the Environmental Information Regulations 1992 when they were brought in.

CLAUSE 42

PROHIBITIONS ON DISCLOSURE

Nos. 223-225. Lord Lucas – removing restrictions in disclosure imposed by statute, Community obligations or courts

We support amendment 223 which would prevent existing statutory restrictions taking priority over the bill's right of access. There are some 400 of these. The government is reviewing these with a view to amending or deleting any found to be unnecessary. However, previous reviews of this kind, both in the UK and overseas have not succeeded because of the difficulty of examining such large numbers of complex provisions,[25] leaving large numbers of unjustifiable restrictions in place.[26] A more effective approach would be to allow these restrictions to be overridden on public interest grounds, on a case by case basis. This is an approach adopted in the Queensland FOI Act.[27]

CLAUSE 43

POWER TO CONFER ADDITIONAL EXEMPTIONS

Clause 43 allows the Secretary of State to create new exemptions by Parliamentary order. These could apply retrospectively, to requests which had already been received but not answered.

The government is now proposing to delete this clause, which we welcome.

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[25] A Cabinet Office review of the UK restrictions in 1993 was defeated by the scale of the task. Similar reviews in Australia and Canada, following the introduction of their FOI laws, were also never completed and existing restrictions were left in place.

[26] According to the Australian Law Reform Commission: 'A major hindrance to achieving the open government promoted by the FOI Act is the continued existence of what is often referred to as the 'secrecy regime'. This regime, which had its origins in the belief that it was in the public interest to keep the workings of government secret, prohibits the disclosure of information obtained in the course of an official's duty, often regardless of the nature of the information or the effect its disclosure might have. The continuation of this regime alongside the FOI Act sends mixed messages to officers about what information they are authorised to disclose.' ALRC, Report 77, 'Open government: a review of the federal *Freedom of Information Act 1982*', 1995.

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

The Campaign for Freedom of Information

Suite 102, 16 Baldwins Gardens, London EC1N 7RJ
Tel: 020 7831 7477
Fax: 020 7831 7461
Email: admin@cfoi.demon.co.uk
Web: www.cfoi.org.uk

FREEDOM OF INFORMATION BILL

House of Lords Committee Stage

BRIEFING 4

Clause 52

23 October 2000

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

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

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FREEDOM OF INFORMATION BILL

BRIEFING PAPER 4

CLAUSE 52 - THE VETO

The white paper explicitly rejected any form of ministerial veto over disclosure, saying "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".[1]

However, clause 52 gives ministers the right to veto any order by the Commissioner requiring the government to release information on public interest grounds. The public interest test is not a *supplement* to the bill's right of access. It is the *sole* right of access in many crucial areas covered by class exemption. In these areas, the veto gives ministers the unacceptable power to prevent *any* disclosure. We support amendments that would delete clause 52 altogether.

Clause 13[2] provides that many of the bill's exemptions will be subject to a public interest test. This will require authorities to disclose exempt information if:

> 'in all the circumstances of the case, the public interest in disclosing the information outweighs the public interest in maintaining the exemption'.[3]

The public interest test will be enforced by the Commissioner. But any notice requiring government departments to disclose information on these grounds could be vetoed by ministers.

The veto would, however, be removed from local authorities and, apparently, most other public bodies too – a welcome move, which the Home Secretary proposed in the Commons.[4]

But it is not clear what kinds of bodies will be designated by order as able to ask ministers to exercise a veto on their behalf. It will be important that ministers clarify their intentions on this.

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[1] *Your Right to Know. The Government's proposals for a Freedom of Information Act.* Cm 3818, December 1997, paragraph 5.18

[2] Following government amendments, this will become a new clause 2.

[3] A related provision will require authorities to confirm or deny whether they hold exempt information in cases where the duty to confirm or deny does not apply.

[4] Hansard, HC 4 April 2000, column 1095

We remain concerned at the use of the veto by ministers themselves. The power is not restricted to cases where substantial harm to essential state interests may be involved: it is much more likely to be used to prevent embarrassment to ministers. In particular, the veto will be capable of stifling *any* disclosure in areas covered by the class exemptions. In these classes, *all* information will be exempt; the public interest test provides the only basis for disclosure. The veto allows any disclosure, however trivial or vital, to be vetoed.

The use of the veto in areas covered by class exemptions would allow the suppression of *any* information relating to:

- **the formulation of policy, including the facts and analysis underlying decisions**[5]
- **ministerial communications, ministers' private offices or law officers' advice**[6]
- **information which departments, *in their subjective opinion*, assert could prejudice collective responsibility, inhibit the exchange of views or prejudice the effective conduct of public affairs.**[7]
- **Information obtained during inspections or investigations by government departments with prosecution powers.**[8] **This includes the information which MAFF obtains in the course of enforcing BSE regulations.**

The veto could also block disclosure of information covered by the 'prejudice' exemptions. But the veto would not apply to the Commissioner's decision on whether 'prejudice' would be likely. It would only come into play in relation to the *subsequent* decision on whether to disclose that information on public interest grounds.

[5] Clause 33(1)(a)
[6] Clause 33(1)(b) to (d)
[7] Clause 34
[8] Clause 28(1)(b)

The implications of the veto

Our concerns about the veto are that:

- It could be abused, to protect ministers from embarrassment
- It confirms the principle of ministerial control over information – something that FOI legislation should remove
- It may signal to officials and ministers that a fundamental change in culture is not necessary
- It may distort the development of case law, allowing ministers to block decisions without proper cause – instead of appealing against them to the Tribunal.
- It undermines the authority of the Commissioner.

The 'democratic' case for the veto

The government argues that it would be "undemocratic" for a Commissioner to be able to compel an elected government to disclose information against its wishes.

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."[9] 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."[10]

These are arguments that might be relevant were the Commissioner able to force the government to change its *policy.* But the Commissioner could only require the government to tell the public *what the policy is.* Requiring ministers to tell the truth is not 'undemocratic'.

Moreover, equally 'unelected' judges are able to require ministers to disclose information, in the course of litigation, even though ministers may claim (by issuing a public interest immunity certificate) that disclosure is damaging to the public interest.

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[9] Committee stage of the FOI Bill Standing Committee B, 8/2/00 (morning) col. 431.
[10] Standing Committee B, 18/1/00 (afternoon) col. 143

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.[11] These decisions are just as important, and raise just as keen issues of principle, as the decisions on the bill's public interest test.

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 would not allow any veto over the Scottish Commissioner's decisions where *harm-tested* exemptions are involved.[12] A veto would apply in relation to the class exemptions, though this would require the *collective* decision of the whole cabinet, a potentially difficult requirement given Scotland's coalition government.

Ireland's FOI Act permits a ministerial veto in only four areas: security, defence, international relations or law enforcement.[13] There is *no veto* over the Act's public interest tests, which apply to policy advice amongst other exemptions.[14]

New Zealand's legislation contains a veto which can only be exercised by an Order in Council, a procedure requiring the approval of the whole cabinet. The veto must be published in the official *Gazette***,** laid before the House of Representatives and may be challenged in the High Court on the grounds that it is wrong in law. The costs of any such challenge must be paid by the Crown – regardless of the outcome – unless the action was unreasonable.

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[11] Clauses 24 , 25 and 27

[12] Scottish Executive, 'An Open Scotland. Freedom of Information, a Consultation', November 1999, SE/1999/51 Paragraph 6.5

[13] 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) disclosure would adversely affect the interest in question *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).*

[14] 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.

Safeguards?

The government argues that there are three safeguards against the veto's abuse: (a) judicial review; (b) collective cabinet agreement and (c) Parliamentary and public pressure.

Judicial review

The cost of judicial review will rule this remedy out for most applicants.

Judicial review itself would only allow a court to consider whether the decision was procedurally correct and was 'reasonable' in judicial review terms, that is, not irrational. It would not set aside a decision merely because the minister had come to the wrong decision. So long as *any* public interest argument, however feeble, had been made out against disclosure, the veto would probably stand – even if the case for disclosure was obviously greater.

Collective cabinet agreement

The government's amendments restrict the veto to a cabinet minister or the Attorney General – removing it from junior ministers.[15]

The Home Secretary has promised to require that cabinet colleagues be consulted before a veto is issued, and that this should be required on the face of the bill if possible or, failing that, under the Ministerial code.[16] However, there is no reference to a collective cabinet veto in the government amendments, so the latter, weaker, option is presumably to be adopted.

A collective cabinet veto, as is required in New Zealand and proposed in Scotland, may sometimes be a safeguard. Cabinet ministers will be reluctant to associate themselves with a veto issued merely to conceal a colleague's mistakes. But it is unlikely to be effective where the cabinet has a *collective* interest in suppressing information, for example, where revealing the information could undermine a key policy or damage the government's public standing.

Public and Parliamentary pressure

Adverse public reaction to use of the veto is likely to restrain its use. However, governments have always been willing to justify acting to withhold information, despite criticism, as their continuing use of injunctions for breach of confidence indicates. Ministers may well be prepared to justify overruling the Commissioner, arguing that they are uniquely placed to consider where the balance of public interest lies.

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[15] In relation to the Welsh or Northern Ireland Assemblies or any designated Welsh or Northern Ireland authority, the veto would be exercised by the Welsh First Secretary or the Northern Ireland First Minister jointly with the deputy First Minister.

[16] Hansard, HC Debates, 4 April 2000, column 922 and 5 April 2000 column 1106

The Home Secretary argues that the veto "will not be used all that often, and only in extremis".[17] Similar arguments were put forward as the New Zealand legislation was introduced. The then Minister of Justice suggested that 'it would be a very brave Minister indeed who resorted to this device save in the most exceptional circumstances'.[18]

In fact the New Zealand veto was put to immediate use and exercised 14 times in the Act's first four years.[19] Vetoed information included labour market forecasts, unemployment estimates, an evaluation of computer use in schools, information about the proposed establishment of an investment bank and the successful tender price for wall plugs.[20]

According to a leading commentary on the New Zealand Act, the initial experience:

> 'showed that public criticism of the responsible Minister by the Opposition was easily stigmatized as political point scoring, and, in any event, easily weathered. In truth, members of Parliament do not ordinarily cross the floor on such issues nor, as the Danks Committee [whose report led to the Act] thought, are incidents of non-disclosure by veto punished by the electorate at the next election.'[21]

In 1987 the New Zealand veto was made much more difficult to use, requiring a collective cabinet decision and the funding of the costs of applicants who judicially reviewed veto decisions. Since then it has rarely been exercised - though a change in government since the early vetoes may be at least partly responsible. The restrictions found in the New Zealand Act have not been repeated in the UK bill.[22]

Abolishing the veto

We believe the veto power should be removed from the bill. This would not force Ministers to comply with what they regarded as mistaken Commissioner decisions. These could be challenged under the bill's elaborate appeals procedures. Thus ministers could:

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[17] Hansard, HC Debates, 4 April 2000, column 925

[18] Quoted in Baragwanath 'The Official Information Act – A Real Change in Direction?',1984 New Zealand Law Conference – Principal Papers, p 67

[19] New Zealand Law Commission, Report 40, paragraph 353

[20] 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

[21] Freedom of Information in New Zealand., I Eagles, M Taggart, G. Liddell, OUP 1992, p. 569-570

[22] In particular, there is no requirement that the cabinet agree to each veto; the formality of having to exercise the veto through an Order in Council is not proposed; and there is no provision for applicants' costs at judicial review to be paid by the Crown.

- Challenge any notice on its merits by appeal to the Information Tribunal[23] (a body whose composition is determined by ministers)[24]
- Appeal against the Tribunal's decision to the High Court on a point of law;[25]
- Judicially review any 'unreasonable' decision of the Commissioner.

Other changes

If the veto cannot be removed, a number of changes might help to limit the scope for abuse, such as:

- Permitting the veto to be used only where disclosure would involve 'substantial damage' to the public interest. At present, the veto could be used because ministers believed that on balance there was a marginal disadvantage to disclosure. The Home Secretary himself has said that decisions will involve 'fine judgements about what would be fully in the public interest'.[26]
- Requiring formal cabinet endorsement of any veto; if for constitutional reasons this is impractical, the agreement of the Prime Minister and perhaps other specified ministers could be required;
- Ensuring that the costs of any legal challenge to the veto were met by the Crown. The fact that in New Zealand the applicant's costs are guaranteed is thought to have helped to restrain ministers from using the veto.[27]

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[23] Clause 56

[24] 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)].

[25] Clause 58

[26] Hansard, HC Debates, 7 December 1999, Column 726

[27] According to the New Zealand Law Commission: "the special regime by which the Crown bears the costs of a challenge to the veto in the courts, may be a deterrent to a government contemplating the veto. The justification for the special costs regime was that, but for the veto, the information would have been released in accordance with the independent opinion of the Ombudsmen…following a fair procedure, in which the agency had a full opportunity to present its case…the Act aimed to make a challenge to the veto power accessible to the party most affected – the requester." Law Commission, Report 40, Review of the Official Information Act 1982, October 1997, paragraphs 360-361