

# 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](mailto:admin@cfoi.demon.co.uk)

Web: [www.cfoi.org.uk](http://www.cfoi.org.uk)



## FREEDOM OF INFORMATION BILL

House of Lords committee stage

### A GUIDE TO AMENDMENTS TABLED

as of 9 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

**This paper is primarily intended as a guide to the amendments which have been tabled to the Freedom of Information Bill and not as an indication of those we support.**

**We have briefly indicated support for amendments on a handful of key issues of overriding importance. However, the majority of the amendments below are helpful and will be dealt with more fully in a separate briefing.**

### **Before clause 1- Purpose clause**

Lord Lucas of Crudwell proposes a purposes clause (purposes are ‘to enable and encourage the provision of information’) as does Lord Mackay of Ardbrecknish (‘to facilitate public access’). Lords Goodhart & Lester of Herne Hill propose a more explicit purposes clause, which we prefer, setting out the specific objectives (accountability, informed public debate, public participation & public understanding) which the bill is intended to promote.

### **Clause 1 – General right of access of information held by public authorities**

Lord Falconer of Thoroton amendments which make some structural changes to clause 1, resulting from the decision to move the public interest test from clause 13 to a new clause after clause 1. Instead of two separate rights of access (under clauses 1 and 13) access would be regarded as given under clause 1 in all cases

Lord Lucas amendment prohibiting authorities asking applicants why they want information.

Lords Goodhart/Lester amendment removing provision in clause 1(6) which allows authorities to delete information from a requested record before giving access if they had intended to make the deletion before receiving the request.

### **After clause 1 – Effect of exemptions**

Lord Falconer new clause would replace clause 13, which contains the bill’s public interest test. Instead of two separate rights of access (under clauses 1 and 13) access would be regarded as given under clause 1 in all cases. The basic provisions of the public interest test are unchanged. The main differences are:

- The words ‘where it appears to the authority’ which are used in clause 13 are not repeated. This helpfully confirms that the Information Commissioner would be able to substitute her decision for the authority’s on the public interest test.
- The duty on authorities to have particular regard to the public interest in disclosing the factual background to decision-taking would be removed. Instead, amendments to clause 33 remove statistical information relating to a decision which has been taken. As a ‘quid pro quo’ this weakens the bill, in our view.
- The public interest test would be extended to one category of exempt personal data. Most personal data would not be subject to this test;
- The slight possibility that information held by Parliament which is exempt under clause 34 could be subject to the public interest test would be removed.
- The exemptions *not* subject to the public interest test are now described as ‘absolute

exemptions’.

Lord Lucas proposes to amend the government’s new clause to extend the public interest test to 8 exemptions to which it does not currently apply. *We strongly support this amendment.* The 8 exemptions are those for:

- Information accessible to the applicant by other means (clause 19)
- Information relating to the work of bodies dealing with security (clause 21)
- Court records supplied to a public authority (clause 30)
- Information subject to Parliamentary privilege (clause 32)
- Information held by Parliament whose disclosure might, in the opinion of the ‘qualified person’, inhibit advice or prejudice the ‘effective conduct of public affairs’ (clause 34) [However, the public interest test would apply to clause 34 for all other authorities.]
- Personal data, relating to the applicant or whose disclosure would breach a data protection principle (clause 38)
- Information whose disclosure would constitute an actionable breach of confidence (clause 39)
- Information whose disclosure is prohibited by statute, is incompatible with a Community obligation or would involve contempt of court (clause 42)

Lord Lucas’s amendments to the government’s new clause would also:

- change the public interest balancing test which authorities apply in deciding whether to confirm whether they hold exempt information or disclose it, so that information could only be withheld if the public interest in disclosure was ‘substantially’ outweighed by the public interest in maintaining the exemption.
- require authorities to have particular regard to the public interest in disclosing factual information, when applying the public interest test. The government is proposing to delete a provision along these lines currently found in clause 13(5).
- Create a ‘prima facie’ presumption that for matters no longer under active consideration, the public interest in disclosure outweighs the public interest in maintaining the exemption.

### **After Clause 1 – authority to consider partial disclosure of exempt information**

Lord Lucas proposes a new clause requiring authorities which refuse to disclose to consider whether the information can be made disclosable, by making deletions or summarising it.

### **After clause 1 – protection of records**

Lords Goodhart & Lester new clause requiring authorities to take all reasonable steps to prevent the destruction or alteration of a record which may contain requested information until the request has been finally determined.

### **Clause 2 – ‘Public authorities’**

Lord Mackay amendment to extend the range of bodies covered by the Act and to include bodies receiving at least 50% of funds from government and bodies managed by government appointees.

Lord Mackay amendment specifies that records held on behalf of an authority by another person are covered by the Act only where they held by that person on a contractual or agency basis.

## **Schedule 1**

Lord Falconer amendments to the Schedule of authorities subject to the bill.

- A few bodies which are apparently regarded having been privatised would be *removed* from the Schedule (E.g. Commonwealth Institute, Cardiff Bay Development Corporation, Port of London Authority).
- A number of further 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 – Duty to assist**

Two new clauses, creating duties to assist applicants, proposed by Lord Mackay. The first requires authorities to assist applicants in making requests. The second provides a duty to assist applicants in understanding their rights, including the right of complaint to the Commissioner.

Lord Lucas new clause (inserted after clause 9) also provides a duty to assist applicants in exercising their rights, and to have regard to any relevant guidance in the code of practice.

### **Clause 3 – Amendment of Schedule 1**

Lord Roberts of Conwy amendment removes 'National Assembly of Wales' from within the definition of 'government department' adopted in this clause and defines it as a public authority in its own right.

Lord Falconer amendments making separate reference to the Welsh Assembly. New duties to consult the Welsh Assembly and the First Minister and Deputy First Minister in Northern Ireland, in relation to the scheduling of Welsh and Northern Ireland authorities would be created.

Lord Mackay amendment which would *require* rather than *permit* bodies meeting certain criteria to be brought within the scope of the bill. Related amendment requiring, not permitting, bodies to be removed from the bill's scope when they no longer meet these criteria.

### **Clause 4 – Further power to designate public authorities**

Lord Mackay amendment to require, instead of permit, the Secretary of State to schedule private bodies exercising public functions or providing a service on behalf of an authority.

Lord Mackay amendment requiring consultation with the Commissioner before a new body is scheduled. Also requires a person consulted before being scheduled to be given at least 20 working days to respond.

### **Clause 6 – Public authorities to which Act has limited application**

Two Lord Mackay amendments removing the Secretary of State's power to limit the right of access to information held by a particular authority to specified information only.

Lord Falconer amendment creating new duties to consult in relation to any order involving Welsh or Northern Ireland public authorities.

### **New clause after clause 7**

Lord Mackay amendment requiring an authority to consult a third party after receiving a request for information relating to the third party's commercial interests.

### **Clause 7 – Request for information**

Lord Archer of Sandwell amendment limiting the right of access to requests to requests which specifically cite the FOI Act.

### **Clause 8 – Fees**

Lord Mackay amendments which:

- *require*, instead of *permit*, the Secretary of State in his regulation under clause 8(3) to specify when fees may not be charged, to set a maximum fee and say how fees should be calculated
- permit regulations to specify that fees may be charged only in prescribed cases (instead of the bill's current approach which permits regulations to specify that fees may be *waived* in prescribed cases.)
- limit fees to 10% of the cost of complying with the request
- provide that fees must be low enough to facilitate access by the public

### **Clause 9 – Time for compliance with request**

Lord Mackay amendment allowing an extra 10 days where an authority (in accordance with an earlier amendment of his) has to consult a third party.

Lord Mackay amendment deleting Secretary of State's power to make regulations extending the normal 20 day time limit to up to 60 days.

Lord Falconer amendment restating the provision in clause 13(6) which allows authorities a 'reasonable' but unspecified time to reach decisions on disclosure in the public interest.

Lords Goodhart/Lester amendment applies the 20-day response period, instead of the unspecified 'reasonable' period, to decisions on disclosure in the public interest. (Decisions on whether information is exempt must be taken within 20 working days, but decisions on disclosing exempt information in the public interest can be taken over an indefinite 'reasonable' period. This is likely to lead to substantial delays. We *strongly* support this

amendment.)

### **After clause 9**

Lord Lucas proposes a new clause requiring authorities to reasonably assist applicants in exercising their rights, having regard to any code of practice issued by the Secretary of State.

### **Clause 10 – Means by which communication to be made**

Lord Lucas amendment on the form in which information is to be provided.

Lord Mackay amendment permitting applicants to specify that information should be provided in Braille or large print.

### **Clause 11 – Exemption where costs of compliance exceeds appropriate limits**

Lord Mackay and Lord Lucas amendments preventing authorities refusing access where the ‘appropriate limit’ is exceeded if the applicant is prepared to pay the extra cost.

Lord Mackay amendments:

- preventing the appropriate limit being set above £500.
- requiring rather than permitting regulations on how costs are to be calculated
- allowing fees to be calculated only on the basis of the marginal costs of locating and supplying the information (not the costs of assessing documents against exemptions). Ministers have indicated that this is their intention.

Lord Lucas amendment preventing authorities from aggregating several requests for the purpose of calculating whether the appropriate limit has been exceeded, unless a single request has been split into smaller requests for the purpose of evading that limit and are made within 1 month of each other.

### **After clause 11 – fees for disclosure where cost of compliance exceeds appropriate limit**

Lord Falconer new clause giving authorities the power to charge fees where they decide to provide information which they are not obliged to because the costs would exceed the appropriate limit. The Secretary of State would make regulations on fees.

Lord Lucas proposes to amend this new clause to permit fees to be charged to an applicant who proposes to publish information in which the authority holds the copyright.

### **Clause 12 – Vexatious or repeated requests**

Lord Mackay amendment deleting 12(2) which allows authorities to refuse requests which are identical or substantially similar to previous requests from the same applicant unless a reasonable period has elapsed since the last request.

Lord Mackay amendment would permit authority to apply to the tribunal for an order declaring as a vexatious applicant someone who habitually and persistently applies for information without reasonable grounds.

Lord Falconer drafting amendment.

### **After clause 12 – Forwarding of certain requests relating to transferred public records**

Lord Falconer new clause requiring the Public Record Office (and other records bodies) to transfer requests for records held by them which involve a decision on the public interest to the minister or other authority.

### **Clause 13 – Disclosure in public interest**

Lord Falconer will propose to delete clause 13. The provisions would, with relatively minor changes, be incorporated into a new clause after clause 1.

Note that some of the amendments to clause 13 shown below have also been re-tabled as amendments to the government's new clause, after clause 1.

#### *Extension of the public interest test to other exemptions*

Lord Mackay and Lord Lucas amendments would extend the public interest test to 8 exemptions, to which it does not currently apply. [Lord Lucas has also re-tabled his amendment to the government's new clause after clause 1]

The Lord Mackay amendment would in addition extend the public interest test to information withheld because the cost exceeds the appropriate limit.

Lord Colville of Culross amendment (which as originally printed involves various misprints) in its intended form would extend the bill's public interest test to several of these, namely clause 21, 30, 39 and 43.

#### *Information relating to policy-making*

Lord Lucas amendment requiring authorities to have particular regard to the public interest in the disclosure of *any* information providing an informed background to decision-taking, not just *factual* information.

#### *Nature of the public interest balancing test*

Lord Lucas amendment requiring that for information to be withheld the public interest in maintaining the exemption must be 'substantial'.

Lord Lucas amendment requiring authorities to have consideration to whether any matter is still under 'active consideration' by the public authority.

Lords Goodhart/Lester amendment reversing the burden of proof in the public interest balancing test

Lords Goodhart/Lester amendment deleting 13(6), which allows an unspecified 'reasonable' period for disclosing information on public interest grounds.

#### *We regard all of these amendments as extremely helpful*

[Lord Mackay also proposes a further general public interest test, in a new clause after clause 48]

### **Clause 14 – fees for public interest disclosure**

Lord Mackay amendments similar to those in clause 8:

- permitting regulations to specify that fees may be charged only in prescribed cases (instead of the bill's current approach which permits regulations to specify that fees may be *waived* in prescribed cases.)
- providing that fees must be low enough to facilitate access by the public

Lord Lucas amendment permitting additional fees to be charged on publication of disclosed information.

Lord Mackay amendment to 14(3). Intention not clear.

Lord Falconer will propose to delete clause 14 as separate powers to prescribe fees for disclosure in the public interest would not be necessary after the restructuring of Clause 13.

#### **After clause 14**

Lord Lucas new clause providing that an applicant may publish any information obtained by him under the Act, in print or on the Internet or otherwise, provided he has paid the relevant fees under the bill.

#### **Clause 15 – Refusal of request**

Lord Lucas amendment requiring authorities to tell requesters who are refused information under clause 12(2) the reason for the refusal. [Clause 15(6) allows authorities in effect to ignore certain requests including those where the authority has previously, within a reasonable period, complied with an identical or substantially similar request from the same requester.]

Lord Falconer amendment redrafting clauses 15(2) and (3) in light of the proposed deletion of clause 13.

Lord Falconer amendment dealing with the notice which the Public Record Office and other records bodies must give applicants if their request is transferred to the minister or body responsible for the record under the new clause proposed after clause 12.

#### **Clause 16 – Information Commissioner and Information Tribunal**

Lord Mackay intends to oppose clause 16.

#### **After clause 16 – Information Ombudsman and Parliamentary Information Committee**

Lord Mackay proposes a new clause placing enforcement in the hands of an Information Ombudsman and Parliamentary Information Committee. These would replace the bill's Information Commissioner and Tribunal.

Amendments to subsequent clauses (not individually described below) substitute "Ombudsman" for references to the "Commissioner"

#### **Schedule 2 – Information Tribunal**

Lords Goodhart/Lester amendment removing the provision which extends the secrecy provision which applies to the Data Protection Commissioner to the Information Commissioner.

Lord Mackay /Astor amendment substituting a duty to consult the Advocate General for Scotland for 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.

Lord Mackay intends to oppose Schedule 2, which deals with the Commissioner and Tribunal.

### **Clause 17 – Publication schemes**

Lord Mackay amendments requiring that local authority publication schemes must provide for the release of agendas, minutes, background papers and reports, other than those which might be exempt under the existing open meetings provisions of the Local Government Act 1972.

The effect is to (a) apply the provisions of the 1972 Act to meetings of the proposed executives (b) requiring minutes of all meetings to attribute comments to the people making them (c) record how each person voted at meetings, and (d) give the Information Commissioner standing to enforce these disclosure requirements.

Lord Lucas amendment providing that a publication scheme and associated guidance to staff cannot be exempt.

### **Clause 18 - Model publication schemes**

Lord Mackay amendments substituting references to the 'Ombudsman' for references to the 'Commissioner'.

### **After clause 18 – Manuals**

Lord Mackay /Astor new clause requiring certain authorities to make available a list of manuals and other internal documents used in the performance of their functions, and to make copies of these manuals etc available on request and on the Internet. The provision applies to bodies within the jurisdiction of various statutory ombudsmen, most of whom are already subject to such a duty. Other authorities would be covered only if notified by the Information Commissioner.

### **Clause 19 – Information accessible to public by other means**

Lord Lucas amendment providing that information cannot be withheld under clause 19 (exemption for information already reasonably accessible to the applicant) if it is available to the applicant in a non-electronic format and the applicant requires it in electronic form. Also provides that information is not 'reasonably accessible' to the applicant if he is not free to publish it.

### **Clause 20 – Information intended for future publication**

Lord Mackay amendment limiting the scope of the exemption to information which is subject to an 'irrevocable commitment' to be published within the coming 3 months. Similar amendment by Lords Goodhart/Lester except that it applies where there is a 'public commitment' to publish within 3 months.

Lord Lucas amendment deleting the right to refuse to confirm or deny the existence of such exempt information.

### **Clause 21 – Information supplied by, or relating to, bodies dealing with security matters**

Lord Lucas amendment on ministerial certificates. A minister is not required to sign a certificate unless disclosure would cause significant harm.

Lords Goodhart/Lester amendment introducing a harm test, ie whether disclosure would ‘prejudice the functions’ of any of the bodies.

### **Clause 22 – National security**

Lord Lucas amendment deleting the right to refuse to confirm or deny the existence of exempt information.

### **Clause 23 – Certificates under ss 21 and 22**

Lord Lucas amendment providing that a certificate can not itself be exempt.

### **Clause 24 – Defence**

Lord Lucas amendment deleting the right to refuse to confirm or deny the existence of exempt information.

### **Clause 25 – International relations**

Lord Mackay amendment, changing the ‘prejudice’ test to ‘substantially prejudice’

Lord Mackay amendment excluding information supplied by EU members states or institutions from the exemption in 25(2) for information provided in confidence by international organisations.

Lord Lucas amendment deleting the right to refuse to confirm or deny the existence of exempt information.

### **Clause 26 – Relations within the UK**

Lord Lucas amendment deleting the right to refuse to confirm or deny the existence of exempt information.

Lord Lucas intends to oppose this clause.

### **Clause 27 – The Economy**

Lord Mackay amendment, changing ‘prejudice’ to ‘substantially prejudice’

Lord Mackay amendment replacing the exemption in 27(1)(a) and (b) with the wording of a corresponding exemption from the open government code of practice.

Lord Lucas amendment deleting the right to refuse to confirm or deny the existence of exempt information.

## **Clause 28 Investigations and proceedings conducted by public authorities**

### *28(1) information relating to investigations and proceedings*

Lord Colville, Lord Mackay and Lords Goodhart/Lester amendments to delete the reference to information which “has at any time been held” for the purposes of investigations or proceedings and substitute a reference to information which “is being held”.

Lords Goodhart/Lester amendments limiting the exemption to investigations or proceedings which “have not been concluded”.

Lord Colville amendment limiting the exemption to information about *active* investigations or proceedings.

Lord Mackay and Lord Lucas amendments inserting “prejudice” test

Lord Archer amendment inserting “*substantially* prejudice” test

*We strongly support amendments to limit the scope of this exemption, preferably by inserting a prejudice test. Failing that, limiting the class exemption to the period while proceedings or a decision on proceedings are pending would be an advance.*

### *(b) confidential informants*

A series of related amendments deal with the class exemption relating to the obtaining of information from confidential informants in connection with investigations or proceedings.

These limit the exemption to cases where:

- disclosure would prejudice a current investigation (Lord Mackay)
- an investigation or proceedings are active. (Lord Colville)
- disclosure would prejudice a confidential source of information. (Lord Lucas)
- disclosure would prejudice the obtaining of further information from the same or another confidential source. (Lords Goodhart/Lester)

Lord Lucas amendment deleting the right to refuse to confirm or deny the existence of exempt information.

### *Clause 28(5) - interpretation*

Lord Falconer amendment extending the range of military disciplinary proceedings falling within the scope of the class exemptions in 28(1) and (2).

## **Clause 29 – Law enforcement**

Lord Mackay amendment, changing the ‘prejudice’ test to ‘substantially prejudice’

Lord Mackay amendment removing the exemption for information which would prejudice investigations into “improper” conduct [29(2)(b)] and substituting an exemption for investigations of “unlawful” conduct.

Lord Mackay amendment deleting the exemptions prejudice to investigations into a person’s

fitness to be a company director or a member of a profession [29(2)(d)], investigations for the purposes of protecting charities [29(2)(f) and (g)] and investigations for the purpose of protecting worker safety [29(2)(i)]

### **Clause 30 – Court records, etc**

Lord Colville amendments restricting the class exemption to active proceedings or inquiries.

### **Clause 31 – Audit functions**

Lord Lucas amendment deleting the right to refuse to confirm or deny the existence of exempt information.

### **Clause 33 – Formulation of government policy, etc**

Lord Archer amendment excluding factual information from the scope of the policy formulation exemption in 33(1)(a).

Lord Mackay amendments:

- Substituting for the four exemptions in 33(1) the equivalent exemption from the current open government code of practice, which exempts information only if disclosure would ‘harm the frankness and candour of internal discussion’
- making the four exemptions in 33(1) subject to a test of whether disclosure would “substantially prejudice” the formulation or effective implementation of government policy.
- Making these four exemptions subject to a “prejudice”
- making the class exemption for ministerial communications [33(1)(b)] subject to a test of whether disclosure would “materially detriment” the frankness and candour of those communications.

*We strongly support moves to insert a test of harm into these class exemptions and to remove factual information from the scope of the exemptions.*

Lord Falconer amendment removing statistical information from the scope of the class exemptions for policy formulation and ministerial communications *after* a decision has been taken. *[In our view this fails to address the problem and, by highlighting the fact that statistics relating to undecided matters are exempt, may make it worse].*

Lord Lucas amendment substituting the word ‘factual’ for ‘statistical’ in Lord Falconer’s above amendment. Factual information relating to a decision which has been taken could not be exempt under the class exemptions for policy formulation and ministerial communications.

Lord Lucas amendment removing *all* statistical information from the scope of clause 33, not just statistics relating to decisions which have been taken,

Lord Falconer amendments more dealing with the application of the class exemptions for policy formulation, ministerial communications and ministers’ private offices to the Northern Ireland and Welsh Assemblies.

Lord Lucas amendment deleting the right to refuse to confirm or deny the existence of exempt information.

### **Clause 34 – Prejudice to effective conduct of public affairs**

Lord Mackay & Astor intend to oppose the clause

Lord Archer amendment deleting the exemption for prejudice to effective conduct of public affairs [34(2)(c)]

Lords Goodhart/Lester amendment deleting ‘in the reasonable opinion of a qualified person’, which applies to the whole of this clause.

Lord Lucas amendment removing from all public authorities except cabinet ministers or the Welsh first secretary (a) the right to exercise the exemption in clause 34 and (b) the right to refuse to confirm or deny the existence of exempt information.

Lord Lucas amendment removing from the Houses of Parliament the right to issue conclusive certificates preventing their decisions under this clause being reviewed by the Commissioner.

Lord Colville amendment to remove the availability of this exemption from local authorities, the Greater London Authority and public authorities other than those specified in paras (a) to (k) of clause 34(4).

Lord Lucas amendment deleting the right to refuse to confirm or deny the existence of exempt information.

*[We strong support moves to limit the scope of this exemption, by removing the subjective element represented by ‘in the reasonable opinion of a qualified person’ and the broad exemption for information which would ‘prejudice the effective conduct of public affairs’]*

Lord Falconer amendment tightening up clause 34 in relation to statistical information only. To withhold statistical information authorities would have to show *objectively* why disclosure would inhibit the frankness of advice or prejudice the effective conduct of public affairs. The ‘reasonable opinion of qualified person’ would no longer be sufficient to exempt statistical information.

Lord Lucas amendment substituting the word 'factual' for 'statistical' in Lord Falconer's above amendment.

Lord Falconer amendments clarifying the application of clause 34 to the Welsh and Northern Ireland Assemblies.

### **Clause 35 – Communications with her Majesty etc, and honours**

Lord Lucas amendment limiting exemption for honours to information about living persons.

Lord Falconer amendment extending the class exemption for honours to ‘dignities’

### **Clause 36 – Health & Safety**

Lord Lucas amendment deleting the right to refuse to confirm or deny the existence of exempt information.

### **Clause 37 – Environmental information**

Lord Lucas amendment deleting the right to refuse to confirm or deny the existence of exempt

information.

Lord Lucas intends to oppose clause 37.

### **Clause 38 – Personal information**

Lord Mackay amendment deleting main part of the personal information exemption, based on the data protection principles, and substituting an exemption based on Article 8 of ECHR.

Lord Lucas amendment requiring the authority to consider whether the consent of a third party, whose personal data is involved, should be sought for disclosure.

Lord Lucas amendment deleting the right to refuse to confirm or deny the existence of exempt information.

### **Clause 39 – Information provided in confidence**

Lord Lucas amendment removing information supplied in confidence by another public authority from the exemption.

Lord Lucas amendment deleting the right to refuse to confirm or deny the existence of exempt information.

Lords Goodhart/Lester amendment limiting the exemption to information which the authority has given notice, in writing, that it will accept in confidence; and requiring authorities not to give notice unless they require the information to discharge their functions and believe on reasonable grounds that the information will not otherwise be supplied to them. These provisions would not apply retrospectively.

### **Clause 40 – Legal professional privilege**

Lord Lucas amendment deleting the right to refuse to confirm or deny the existence of exempt information.

### **Clause 41 – Commercial interests**

#### *(a) public interest*

Lord Mackay amendment adding a public interest test to the exemption for trade secrets in 41(1).

Lord Archer & Lord Mackay amendments adding a public interest test to the exemption for commercial interests in 41(2).

Lords Goodhart/Lester amendment requiring authorities, in applying the bill's public interest to information which may be exempt under clause 41, to have particular regard to the public interest in ensuring effective oversight of public spending; keeping the public adequately informed about risks to health & safety or the environment; and that statutory regulators are effective.

#### *(b) trade secrets*

Lord Mackay amendment defining a trade secret as 'confidential trade information which if disclosed to a competitor would cause harm to its owner'.

#### *(c) commercial interests*

Lords Goodhart/Lester amendment inserting “substantially” before “prejudice the commercial interests of any person” in 41(2)

Lord Lucas amendment inserting “to an unreasonable degree” into 41(2) so the exemption applies where disclosure would be likely “to prejudice to an unreasonable degree the commercial interests of any person”.

*(d) general*

Lord Mackay amendment exempting information supplied to an authority by a company before the Act’s commencement.

### **Clause 42 – Prohibitions on disclosure**

Lord Lucas amendments deleting the three exemptions in this clause, information whose disclosure is (a) prohibited by statute (b) is incompatible with a Community obligation and (c) would constitute contempt of court.

### **Clause 43 – Power to confer additional exemptions by order**

Lord Falconer will propose to delete clause 43.

Lords Goodhart/Lester intend to oppose clause 43.

Lord Mackay amendments:

- add a ‘reasonableness’ test to the circumstances in which the Secretary of State can make an order creating a new exemption.
- Permit an order creating a new exemption to be made only where disclosure would cause ‘substantial prejudice’ to the public interest (in place of existing ‘adverse effects’)
- Require an authority to comply with a request if it was received before a new exemption was created under clause 43.
- Lord Colville amendment indicating that an order may specify extent to which a duty to confirm or deny under clause 13 applies to the new exemption.

### **After clause 43 – in confidence**

Lord Lucas new clause providing that information is only exempt under specified exemptions referring to confidential information if the supplier of the information has proposed in writing that the information should be confidential. The authority would be required to consider asking the supplier if they will agree to the information being released.

### **After clause 43 – ministerial engagements**

Lord Lucas new clause providing that a record of a ministerial engagement cannot be exempt under clauses 19 (accessible to public by other means), 20 (intended for future publications), 26 (relations within the UK), 27(economy), 33 (formulation of government policy), 34 (effective conduct of public affairs), 38 (personal information) or 39 (in confidence).

### **After clause 43 – names and addresses**

Lord Lucas new clause providing that the names and addresses of people corresponding with

a public authority and the dates of correspondence cannot be exempt under various exemptions.

#### **Clause 44 – Issue of code of practice by Secretary of State**

Lord Lucas amendment requiring the Secretary of State’s code to provide guidance on circumstances in which it would be appropriate for authorities to accept information in confidence.

Lord Lucas amendment providing that the code may contain guidance on how decisions under various provisions of the bill are to be taken.

Lord Mackay /Astor amendment requiring the Secretary of State, before issuing the code, to also consult such other persons as he or the Commissioner thinks fit.

#### **Clause 45 – Issue of code of practice by Lord Chancellor**

Lord Mackay /Astor requiring Lord Chancellor to also consult ‘any other relevant person’ before issuing his code of practice.

Lord Falconer drafting amendment.

#### **Clause 46 – General functions of Commissioner**

Lord Mackay amendment making it a function of the Commissioner to facilitate public access to information.

Lord Lucas amendment requiring the Commissioner to promote “the spirit’ as well as the requirements of the Act.

Lord Lucas amendment allowing the Commissioner to carry out an assessment of an authority’s compliance with good practice *without* the authority’s consent.

Lord Mackay amendments substituting references to the ‘Ombudsman’ (who would be established under Lord Mackay’s earlier amendments) for the ‘Commissioner’

#### **Clause 47 – Recommendations as to good practice**

Lord Mackay amendment substituting legally binding “practice instructions” for practice recommendations, and requiring authorities to comply with them within 90 days.

Lord Lucas amendment providing that a practice recommendation cannot be exempt.

Lord Mackay amendments substituting references to the ‘Ombudsman’ for the ‘Commissioner’.

#### **Clause 48 – Reports to be laid before Parliament**

Lord Lucas amendment allowing the Commissioner to make special reports to Parliament on any subject, not just those relating to his functions.

Lord Mackay amendments substituting references to the ‘Ombudsman’ for the ‘Commissioner’

### **Before clause 49 – public interest determinations**

Lord Mackay proposes that Commissioner should have general power to order disclosure in the public interest of any refused information.

### **Clause 49 – Application for decision by Commissioner**

Lord Lucas amendments extending the Commissioner's powers to use a decision notice to deal with:

- failure to comply with any relevant code of practice
- failure to comply with Part IV of the Act, dealing with historical records
- and to specify steps which an authority must take if it has failed to comply with clause 11 (ie because the cost of providing information exceeds the appropriate limit)

Lord Lucas amendment requiring decision notice to be issued within 20 days of a complaint.

Lord Archer amendment allowing a decision notice involving compliance with clause 13 (public interest test) to be appealed to the Tribunal. (Lord Falconer's amendments would now provide this.)

Lords Goodhart/Lester amendment providing that the Commissioner can substitute his decision for a decision taken by the authority in the exercise of its discretion under the clause 13 public interest test.

Lord Mackay amendment permitting a third party whose commercial interests might be affected by disclosure to apply to the Commissioner for a decision on whether any representations they have made about the application of exemptions (in accordance with a new clause proposed by Lord Mackay after clause 7) have been properly dealt with.

Lord Mackay amendments substituting references to the 'Ombudsman' for references to the 'Commissioner'.

Lord Falconer amendments consequential on the deletion of clause 13.

### **Clause 50 - Information notices**

Lord Mackay amendments substituting references to the 'Ombudsman' for references to the 'Commissioner'.

### **Clause 51 – Enforcement notices**

Lord Archer amendment allowing an enforcement notice involving compliance with clause 13 (public interest test) to be appealed to the Tribunal.

Lords Goodhart/Lester amendments allowing enforcement notice to be issued in relation to an authority's exercise of its discretion under clause 13.

Lord Falconer amendments consequential on the deletion of clause 13.

Lord Mackay amendments substituting references to the 'Ombudsman' for references to the 'Commissioner'.

## **Clause 52 – Veto - Exception from duty to comply with decision notice or enforcement notice**

Lord Lucas intends to oppose the clause (which allows authorities to veto notices issued by the Commissioner to require the disclosure of exempt information on public interest grounds)

Lord Falconer amendments:

- restricting the power of veto over notices served on public interest grounds to (a) government departments, (b) the Welsh Assembly and (c) public authorities designated by order;
- Allowing the veto to be exercised within 20 days of a decision of the Tribunal as well as the Commissioner;
- Requiring the Secretary of State to consult before vetoing a notice which relates to a designated Welsh or Northern Ireland authority;
- Deleting provisions identifying the ‘accountable person’ who would have the power of veto on behalf of local authorities, the Greater London Authority, bodies whose members include local authority councillors and the Houses of Parliament;
- Specifying that in other cases the ‘accountable person’ is limited to a cabinet minister; the Attorney General, the Advocate General for Scotland or the Attorney General for Northern Ireland; the Northern Ireland First Minister and deputy First Minister acting jointly; or the Welsh First Secretary.

Lord Colville proposes to limit use of the veto to the following exemptions only: clause 22 (national security), clause 24 (defence), clause 25 (international relations), clause 33 (formulation of government policy, etc) and clause 34 (effective conduct of public affairs).

Lord Colville amendment limiting the veto to ministers, the Welsh & N Irish first ministers, the Mayor of London, the speaker of the Commons and the clerk of the Lords, but removing it from other bodies designated by ministers.

Lord Lucas amendments would –

- limit use of the veto to cabinet ministers and first officers of NI and Welsh Assemblies
- removes the veto from local authorities and many other bodies

Lord Mackay amendments substituting references to the 'Ombudsman' for references to the 'Commissioner'.

## **Clause 53 - Failure to comply with notices**

Lord Mackay amendment substituting reference to the 'Ombudsman' for reference to the 'Commissioner'.

## **Clause 55 - No action against public authority**

Lord Mackay amendment substituting reference to the 'Ombudsman' for reference to the 'Commissioner'.

### **Clause 56 – Appeal against notices served under part IV**

Lord Hunt of Wirral amendments would limit the right of appeal to the Tribunal to an aggrieved applicant, removing the authority's right of appeal.

Lord Lucas amendment would require appeals to the Tribunal against notices of the Commissioner to be made within 5 days

Lord Archer amendment would allow appeals to the Tribunal against notices involving the clause 13 public interest test

Lord Falconer amendment deleting the provision which prevents authorities appealing to the Tribunal against notices served on public interest grounds.

### **Clause 57 – Determination of appeals**

Lord Lucas amendment requires Tribunal to determine appeals within 20 days

### **Clause 59 – Appeals against national security certificate**

Lord Colville amendment allows the Tribunal to require ministers to give reasons for issuing a certificate under clause 21 (information about bodies with security functions)

### **Schedule 4 - Appeal proceedings**

Lord Mackay intends to oppose Schedule 4

### **Clause 61 – Interpretation of Part VI**

Lord Lucas amendment limits the definition of a 'file' to collections of documents spanning no more than a two year period.

### **Clause 62 – Removal of exemptions: historical records**

Lord Falconer amendment 'declassifying' records relating to honours after 60 years instead of 75 years.

Lord Lucas amendments adds to the kinds of records automatically 'declassified' after 30 years, records which are exempt under clauses 19 (accessible to public by other means), 20 (intended for future publications), 24 (defence), 25 (international relations), 27 (the economy), 37 (environmental information), 39 (information provided in confidence) and 43 (newly created exemptions).

[Note: under the bill as it stands the only exemptions automatically lifted after 30 years are 26 (relations within the UK), 28(1) (investigations), 30 (court records), 31 (audit functions), 33 (formulation of government policy, etc), 34 (effective conduct of public affairs, etc), 35(1)(a) (communications with the Royal Family), 40 (legal professional privilege) and 41 (commercial interests).]

Lord Lucas amendment lifts the law enforcement exemption (which currently applies for 100 years) once all persons who may face prosecution on the basis of the information have died.

Lord Mackay amendment providing that the exemption for commercial interests may

continue to apply to a record after it is 30 years old.

**Clause 63 – Removal of exemptions: historical records in public record offices**

Lord Falconer amendment consequential on the proposed deletion of clause 13.

**Clause 64 – Decisions as to refusal of discretionary disclosure of historical records**

Lord Falconer amendment consequential on the proposed deletion of clause 13.

Lord Falconer amendment reflecting changed status of Northern Ireland ministers.

**After clause 64**

Lord Falconer proposes a new clause requiring the PRO and other records bodies to consult the appropriate authority before deciding that information is not exempt and can be disclosed.

**Clause 65 – decisions as to discretionary disclosure of records in public records offices**

Lord Falconer amendment dealing with requests transferred by the PRO or similar body to the appropriate authority.

- Such requests would be regarded as held by the authority, not the records body.
- An authority which is not itself subject to the bill, would be deemed to be subject to it for the purpose of the transferred request.
- Before refusing a request the authority would have to consult the Lord Chancellor or appropriate N Ireland minister

**Clause 67 – Extension of the meaning of “data”**

Lord Mackay amendment to the Data Protection Act (DPA), extending the definition of ‘personal data’ to include data about a company which is held by a public authority; and changing the definition of ‘data subject’ to include companies. The data protection and FOI rules relating to personal data would thereby be extended to company information.

**After clause 68 – right of access to health records**

Baroness Masham of Ilton amendment to the DPA which would require authorities to give patients access to their health records within 21 days, where the request is limited to information recorded in the previous 40 days. (This reinstates a provision from earlier legislation removed by the DPA in March 2000.)

**Clause 69 – Exemptions applicable to certain manual data**

Baroness Masham amendment to the DPA allowing people to require authorities to include a statement setting out their views about a disputed matter on a manually held health, school, housing or social work record. This also reinstates a former provision.

**After clause 72 – Data protection: charges for subject access**

Baroness Masham amendment limiting the photocopying charges for giving access to manual health records under the DPA to 10p per page.

## **Schedule 6 – Further amendments of the Data Protection Act 1998**

Lord Falconer amendment extending the exemption for honours in the DPA to information about the conferring of ‘dignities’

### **Clause 73 – Power to make regulations on environmental information**

Lord Lucas amendment gives the Secretary of State power to make regulations requiring information to be made available on the internet.

### **Clause 74 – power to amend or repeal enactments prohibiting disclosure of information**

Lord Falconer amendment deleting a reference to clause 13.

#### **After clause 74 – repeal of exemptions**

Lord Lucas new clause would give the Secretary of State power by order to repeal any exemption and extend the clause 13 public interest test to any of the exemptions to which it does not apply.

#### **After clause 74 – disclosure of information between Commissioner and ombudsmen**

Lord Falconer proposes a new clause which authorises the Information Commissioner to disclose information to the various ombudsmen (Parliamentary, NHS, local government, Welsh, Scottish and Northern Ireland) where the information relates to a matter which the ombudsmen could investigate under their statutory powers.

#### **After Schedule 6 – Disclosure of information by Ombudsmen**

Lord Falconer proposes a new schedule to amend the statutes dealing with the powers of the various ombudsmen:

- Extending the restrictions on disclosure which apply to information which they obtain under their powers to information supplied to them by the Information Commissioner
- Authorising them to disclose to the Information Commissioner information which relates the exercise of his functions under either the Freedom of Information Act or the Data Protection Act (the Commissioner will be responsible for both statutes)

### **Clause 75 – Offence of altering etc records with intent to prevent disclosure**

Lord Lucas amendment extends the range of persons who may be subject to this offence to ‘any person’. The offence is currently limited to public authorities and their employees and officers and persons under their control. It also extends the range of actions which would constitute the offence (eg the revised definition would cover obstruction).

### **Clause 76 – Savings for existing powers**

Lord Lucas amendment specifies that an authority not required to follow the bill’s procedures when responding to a request for information.

**Clause 77 – Defamation**

Lord Lucas amendment removes privilege for a disclosure by an authority to an applicant if it is made with ‘substantial negligence’

Lord Falconer amendment deleting a reference to clause 13.

**Clause 79 – Application to government departments, etc**

Lord Falconer amendment redrafting 79(1) and to make separate reference to the Welsh Assembly. The existing reference to the Welsh Assembly as a ‘government department’ in 79(4) would be deleted.

**Clause 80 – Orders and regulations**

Lord Falconer amendment providing that:

- (a) orders designating authorities on whose behalf ministers can exercise the veto under clause 52, and
- (b) regulations on access environmental information under clause 73(3)

would be made under the positive resolution procedure.

References to orders under clause 43 (which is to be deleted) would be removed.

**Clause 81 – Interpretation**

Lords Goodhart/Lester amendment defining “prejudice” as “prejudice which is real, actual and of significant substance”

Lord Falconer amendment clarifying the definitions of various authorities and bodies referred to in earlier amendments, and renumbering an earlier cross-reference.

**Clause 84 – Commencement**

Lord Falconer amendment bringing provisions dealing with the exchange of information between the Information Commissioner and ombudsmen into force two months after Royal Assent.

**Schedule 3 – issue of warrants**

Lord Lucas amendment gives the Commissioner powers to:

- require authorities to decrypt encoded data
- seize equipment containing electronic data if the data cannot be copied

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