Commission on Freedom of Information: Development and Passage of FoI Bill

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Introduction

This document has been prepared by the Secretariat to the Independent Commission on Freedom of Information at the request of the Chair, and provides background information on the development and passage of the Freedom of Information Bill ('the Bill').

Its particular focus is on the development of the provisions relating to what are now sections 35, 36 and 53 of the Act, and on the powers of the Information Commissioner to determine appeals on sections 35 and 36.

Development of the FoI Bill

Your Right to Know, December 1997

In December 1997, the Labour Government published *Your Right to Know: The Government's Proposals for a Freedom of Information Act,* Government Command Paper CM 3818.

This Paper proposed a wide statutory right to information from nearly all public bodies (and privatised utilities, private bodies carrying out public functions, and public services performed under contract). It proposed that there would be a £10 fee for making a request, in line with the existing £10 fee for personal data, and further reasonable charges for providing information. It was proposed that higher fees would apply to commercial requestors and these would subsidise lower charges for members of the public. It was proposed that there would be 7 "specified interests" (exemptions). The presumption would be to release material unless the disclosure of the information would cause "substantial harm" to one of those specified interests. The Bill would include factors to be considered for each of the 7 areas in determining whether "substantial harm" would occur.

The Paper proposed that the 7th specified interest[1] would protect the "integrity of the decision making and policy advice process in government". The Paper notes that this kind of material (in particular Cabinet material) is the subject of strict protection in other jurisdictions, but instead proposes that all of this material could be released under FoI. There would, however, be a lower threshold to refuse a request. Where disclosure of the information would cause "harm", then it could be withheld. In assessing whether harm would arise, the paper suggests that factors would be considered such as the need to maintain the principle of collective agreement, the political impartiality of officials, the importance of free and frank internal discussion, and the extent to which the decisions in question have already been announced. The paper notes:

> "…we see the factors determining the harm test here as likely to apply particularly to high-level government records (Cabinet and Cabinet Committee papers, Ministerial correspondence and policy advice intended for Ministers…"

Any decision to withhold on the basis of harm or substantial harm would also be subject to a separate consideration of the public interest. If the information was exempt, officials would still have a discretion to release it if it was in the public interest to do so.

The Information Commissioner would have wide-ranging powers to make binding determinations on appeal. There would be no onwards appeal right from the Commissioner, but the Commissioner's decisions would be subject to judicial review. The Paper explains

[1] The other six are: national security, defence and international relations; law enforcement (including civil proceedings); personal privacy; commercial confidentiality; safety of individual, public or environment; and information supplied in confidence.

that the intention of having a short appeal chain was to prevent public authorities appealing simply to delay the release of contested information.

The Paper considers, but rejects, the possibility of a veto. It argues that a veto would undermine the authority of the Information Commissioner and erode public confidence in the legislation.

UCL Constitution Unit's Commentary on the White Paper, January 1998

In January 1998, the Constitution Unit published a commentary on the proposals. It highlighted the potential resource burdens of the Act. It also queried whether Cabinet papers were to be released, and if not whether it would make sense (as with other jurisdictions) for there to be a category exemption for Cabinet papers. The Commentary goes on to note:

> "The White Paper offers a very generous FOI regime – probably the most generous yet seen amongst countries that have introduced Freedom of Information. It is almost too good to be true. That is the central concern: that this is an unreal White Paper which has been brought out without full understanding or wholehearted commitment on the part of Departments or their Ministers, or proper consultation of the other public bodies which will be affected. It is an aspirational White Paper, in which the staffing and resource implications are never mentioned; but without adequate resources FOI risks becoming a hollow shell" (p.1, Robert Hazell).

Public Administration Committee's Third Report (on Your Right to Know), 19th May 1998

The Public Administration Committee's report of 19 May 1998 generally welcomed the White Paper proposals. The Committee said it recognised the need to deter vexatious requests, but it thought that the power to charge fees to process requests was sufficient, and a fee to also make a request was unnecessary.

The Committee considered that the proposals for protecting decision-making and policy advice were "not unreasonable". It noted:

> "A balance has to be struck somewhere between the conflicting aims of allowing government decision-making to be properly scrutinised, and of preserving the ability of governments to discuss policy in a reasonably calm and deliberate fashion." (para 68)

The Committee also recommended that there should be a clearer exposition within the Act of what constitutes the "public interest", in order to give general guidance to departments and the Information Commissioner.

In oral evidence to the Committee the Home Secretary, the Rt Hon Jack Straw said:

> "The second issue is the issue about who should decide the public interest…My view is that the public interest is quintessentially in a Parliamentary democracy a matter for Ministers to propose and then explain themselves to the House of Commons or to the other place. That is how you get a clear definition of where the public interest lies and on which Ministers have to, as it were, put themselves at the mercy of Parliament and public opinion, and I do not think you get both clarity on the public interest and also evolution of it quite that way if it was left to officials…What I would say, however, is that we are going to consider whether an explicit power should be provided in the Bill to the Commissioner to recommend disclosure on public interest grounds in clause 14…It is also worth bearing in mind that where the equivalent of a Commissioner is given

powers over public interest matters in overseas legislation, it is often with some kind of Ministerial override leaving final decisions with Ministers and sometimes with the courts…

…Most overseas regimes have a fall-back whereby a Minister can overrule what the Commissioner or equivalent has decided, there is an executive override. If you do not do that you are essentially giving huge political power to a Commissioner...the Commissioner has the power to make recommendations about the exercise of the discretion and there will be a body of his/her decisions building up jurisprudence there, but the final decision should be one on which Ministers or the public authority should have the final discretion and in the case of Ministers, if we refuse to disclose something we will have to answer for that to Parliament."

Government Response Public Administration Committee's Third Report, 21st July 1998

The Government published its response to the Public Administration Committee's report on 21 July 1998. It stated that all of the exemptions (including for decision-making and policy advice) would be available to all public bodies. It reaffirmed the intention to charge an access fee, but had decided against charging higher fees for commercial requests.

Blair Reshuffle, 27th July 1998

In 27 July 1998 Prime Minister Blair carried out his first reshuffle. David Clark, the Chancellor of the Duchy of Lancaster, was sacked and responsibility for Freedom of Information moved to the Rt Hon Jack Straw at the Home Office.

Draft FoI Bill, May 1999

In May 1999 the Government announced the publication of a draft FoI Bill and consultation paper (Freedom of Information: Consultation on Draft Legislation; cm 4355). The draft Bill was widely criticised for retreating from the proposals set out in the White Paper. The Bill went further than the White Paper in covering police forces and authorities, and in abandoning the proposed exemption in respect of civil litigation, but was narrower in other respects:

- the serious harm and harm tests had been replaced with a test which considered whether disclosure would, or would be likely to, prejudice one of the protected interests
- Where information was exempt, or where a request exceeded the cost limit, public authorities would have a discretion to consider whether the information should in any event be released in the public interest. If the discretion was to be exercised, public authorities could impose conditions on how the information would be used or disclosed by the recipient.
- policy formulation was to be protected by a class- rather than prejudice-based exemption (although there was also a prejudice-based exemption for effective conduct of public affairs)
- although there would be a statutory appeal to the Information Commissioner, and then to the tribunal and on to the High Court, the Commissioner could not make a binding determination on the public authority's public interest discretion (clause 43(7))
- Clause 36 provided a power to create a new exemption in order to withhold information which was not otherwise exempt where it was in the public interest to do so. The exercise of this power required Ministers to consult the Information Commissioner and

then obtain the affirmative resolution of both Houses. The paper explained that this was considered to be a preferable alternative to having a government 'veto'.

- Under clause 37, information of various kinds would be exempt, even if its release would not cause prejudice, if the information, when combined with some other information, would cause prejudice ('jigsaw' or 'mosaic' effect)
- Public authorities would be required to respond to requests within 40 days of receipt (unlike 20 days in the predecessor Access Code)
- The consultation proposed that there would not be a fee for making a request, but a fee would be chargeable for locating and disclosing the information. The fee would be 10% of the staff costs incurred, which was anticipated to be £10 or less in most cases.

The consultation paper stated:

> "In one area, policy advice and the decision-making process in central Government, the White Paper proposed a simple harm test, reflecting the need for public authorities to have time and space to formulate and develop new policies. There was no expectation that Freedom of Information legislation would lead to the disclosure of Cabinet papers and minutes, law officers' advice, inter-Ministerial correspondence on developing policy, or information about the operation of a Minister's private office. The Bill puts it beyond doubt by creating a class exemption for this kind of information…in place of the simple harm test. The latter would have created potential uncertainty and costs without extending access." (p.37)

The Rt Hon Jack Straw, introducing the Bill to the House of Commons, said:

> "As to policy advice, there was never any expectation that Cabinet documents, inter-ministerial correspondence and official papers on developing policy would ever be disclosed under a freedom of information regime. As the White Paper said: 'Now more than ever the Government needs space and time in which to assess arguments and conduct its own debates with a degree of privacy.' Moreover, it is worth bearing in mind the fact that the product of such private deliberations is almost always a public announcement of policy."

House of Lords Select Committee Report on Draft FoI Bill, 27th July 1999

On 27 July 1999 the House of Lords ad hoc select committee published its report on the draft Bill. It highlighted the lack of a purpose clause, and the introduction of class- rather than prejudice-based exemptions, but accepted the need for a class-based exemption for policy advice. The Committee also noted the inability of the Information Commissioner to overrule the government on the public interest, saying;

> "The most important single amendment needed is to give the Information Commissioner a public interest override power…to overrule a ministerial decision under clause 14, and to order disclosure. At the very least there should be a power for the Commissioner to publish an opinion that a discretionary refusal to disclose was wrong on the merits, rather than simply to issue a decision notice about the procedure followed" (para 64)

The Committee also recommended that the prejudice test was changed to a "substantial prejudice" test.

House of Commons Public Administration Committee Report, 29th July 1999

On 29 July 1999, the Public Administration Committee published its report in the draft Bill. It recommended that: a purpose clause be added, the Information Commissioner should have the power to make binding decisions on the public interest, and that public authorities should only refuse to exercise their public interest discretion where there is a compelling argument against disclosure and they must give proper reasons.

The Committee also argued that the policy formulation etc exemption was too ill-defined to be a class-exemption, and factual information used in policy formulation should not be exempt. The Committee argued that the exemption for the operation of a Ministerial private office was too wide. The Committee accepted that communications between Ministers and Cabinet should be subject to a class-based exemption. The Committee found:

> "We accept that there is a role for class-based exemptions in a few narrowly-defined areas where there may be high demand for information and a low likelihood that it will ever be disclosed or where there is a clear need for definite protection. The security and intelligence services, and Cabinet papers, are the obvious examples."

Government Response to the Public Administration Committee, 27th October 1999

The Government responded to the Public Administration Committee on 27 October 1999. It rejected the call for a purpose clause, but agreed that officials should give reasons for refusing to disclose under the public interest. It also agreed that the exemption for policy formulation etc should include a reference to the public interest in disclosing factual information, but it rejected the suggestion to exclude factual information from the scope of the exemption.

The Government also agreed to lower the time limit for answering requests from 40 days to 20 working days, and removed the provision relating to the jigsaw/mosaic effect.

Introduction of the FoI Bill in the Commons, 18th November 1999

On 18th November 1999 the Government introduced the FoI Bill. The Bill included 23 exemptions and a power to designate further exemptions subject to affirmative resolution. Clause 13 of the Bill allowed public authorities to exercise a discretion to release exempt information, or information withheld under the cost limit, where they considered it to be in the public interest to do so. This discretion did not apply to a small number of 'absolute' exemptions[2].

The Information Commissioner had the power to make a binding determination over such matters as whether the cost limit had been correctly applied, whether someone was vexatious, or whether information fell within the scope of an exemption. The information Commissioner did not have the power to make a binding determination in respect of a public body's discretion under clause 13, although he could order them to consider the exercise of their discretion if they had not done so, or order them to have regard to certain matters.

Beyond the Information Commissioner lay an appeal right to the Information Tribunal, and then onwards via a statutory appeal to the High Court.

[2] Covering information available to the public by other means, information relating to national security bodies, court records, personal data, information provided in confidence, and information subject to a statutory bar on disclosure.

Public Administration Committee Report, 3rd December 1999

The Commission noted that the Bill as introduced did not give an "explicit statement that unless there is a compelling argument to the contrary the public interest should be regarded as coming down in favour of disclosure" as it had recommended. It noted that the power to consider discretionary disclosure applied to all exemptions except 2 in the draft Bill, but in the final Bill 7 exemptions had been made absolute, with no public interest discretion applying. The power to create a new exemption by order was limited to creating only prejudice-based exemptions.

Second Reading (Commons), 7th December 1999

Introducing the Bill, the Rt Hon Jack Straw explained that where information was withheld on the basis that it concerned the formulation of government policy, or where it would prejudice the effective conduct of public affairs, there was an appeal to the Information Commissioner. The Commissioner could rule on whether material fell within the exemption, and whether prejudice was likely.

Mr Straw went on to explain that only where the Commissioner and a Tribunal had agreed that information was exempt would clause 13 come into play. It was only after a refusal had been upheld that officials would need to consider exercising their discretion to release information in the public interest, and that discretionary decision was not something the Commissioner could overrule. It appears therefore that a two-stage process was envisioned. Mr Straw said:

> "I should like clearly to make this point, as there has been huge misunderstanding about the commissioner's powers…Only if the commissioner and the tribunal agree that information is exempt, and that the public authority is therefore under no duty whatever to publish, does the discretionary disclosure power and duty under clause 13 arise. In such a case—for reasons that I shall be happy to explain--the power of the commissioner and of the tribunal is limited to a recommendation, albeit a very powerful one."
>
> and:
>
> "It is only where the tribunal and the commissioner have themselves said that the Minister is not under a duty to release the information that the issue of discretion arises. However, even though the Minister or public authority is not under a duty to release the information, the Minister is under a duty to consider releasing information, and the commissioner can make a recommendation to that effect."
>
> and:
>
> "the discretionary power comes into play only after the Minister has been told by the commissioner that he or she has no duty to release information. If the Minister has such a duty and the commissioner orders the release of information, that is the end of the matter: the information must be released."

During the debate the Conservative Opposition tabled a motion that the House decline to give the Bill a second reading on the basis that it was more restrictive than the non-statutory Access Code that preceded it.

In the debate that followed the House expressed concern about 5 main issues:

- The lack of a purpose clause in the Bill
- The need to have an exception from the class-exemption for policy formulation etc for the factual information used to make a decision

- Whether the exemption for policy formulation etc should be prejudice- rather than class-based
- That the 'prejudice' test was a lower hurdle for withholding information than the 'substantial harm' test
- The inability of the Information Commissioner to overrule the government's decision on the public interest

In closing, Mike O'Brien (junior minister) said:

> "Government is still too secret, but the public interest is also served by some recognition of a right to privacy, some rights to commercial confidentiality and the right to develop an efficient policy advice system within Government--as well as the right to know. None of those values is absolute. There can be no absolute right to privacy, confidentiality or internal Government debate, any more than there is an absolute right to information in all circumstances. Those are rights for the balancing."

Commons Committee, 21st December 1999 – 10th February 2000

The concerns at Second Reading were reiterated. The Lib Dems (Robert Maclennan/David Heath) and Conservatives (John Greenaway) tabled amendments to introduce a 'purpose clause' and to create a presumption that information would be released unless it was in the public interest to withhold it.

On Clause 13 (discretionary public interest disclosure), the Lib Dems tabled an amendment to ensure that the discretion to release under the public interest applied to all of the exemptions in the Bill (i.e. to make all the 'absolute' exemptions 'qualified'). The Government tabled amendments to make more two more exemptions 'absolute' (Parliamentary privilege and personal data).

The Conservatives said they accepted that there may be a need for class exemptions, but said that the public interest discretion needed to be 'strengthened' and the Commissioner's enforcement powers in respect of discretionary disclosure needed to be enhanced.

Labour backbenchers (Mark Fisher) tabled amendments aimed at turning the Clause 13 *discretion* to release where it was in the public interest into a *duty* to do so. The Government said it would consider the amendment and bring forward its own amendment at Report, but reiterated its view that it should be Ministers rather than the Commissioner who should have the final word on the public interest.

Conservatives tabled amendments to reintroduce a 'substantial harm' test (first mooted in "Your Right to Know") into the public interest discretion at Clause 13.

There was general support across the House for the principle that advice to Ministers should be exempt from disclosure. There was generally strong support for disclosing factual information that had informed a policy decision. Both Lib Dems and Conservative tabled amendments to provide, in the exemption for policy formulation etc, a clearer carve out for factual information. The Government said it would consider the issue further.

Lib Dems went on to seek amendments to impose a 20 day time limit for consideration of the public interest discretion (the Bill said the decision must be made in a "reasonable" time).

On the Clauses relating to appeals, Conservatives tabled amendments to clauses 48 and 50 to give the Commissioner the power to determine appeals on the exercise of the Clause 13 public interest discretion.

The Government argued that the Commissioner's power to make a recommendation in respect of public interest disclosure was sufficient. The Government argued that Ministers would take very seriously a recommendation by the Commissioner on the public interest, and would only reject such a recommendation in exceptional circumstances and with the collective agreement of their Cabinet colleagues:

> "What happens if an authority decides not to disclose information under clause 13, notwithstanding the commissioner's recommendation under clause 48? As with the parliamentary ombudsman, we expect the recommendations to be followed. The commissioner can also name and shame a public authority that does not follow a recommendation. In addition, as the hon. Member for Ryedale said, a judicial review challenge is available to an applicant who believes that a public authority's decision is contrary to case law and administration. Judicial review remains an option. The courts would need to take into account the fact that the Information Commissioner has taken a view on a decision. The idea that there is no legal recourse is wrong. More importantly, if a Minister's decision not to disclose information because it might be embarrassing goes against the Information Commissioner's recommendation, he would have to ensure that he had the collective support of the Cabinet and probably the whole Government. His decision would have serious implications. It would almost certainly require a debate on the Floor of the House and someone would probably be hauled before a Select Committee. There would be a great deal of controversy. It is inconceivable that Ministers would take such a decision lightly. It would not happen; it is not real politics" (Mike O'Brien, Committee)

Both Labour backbenchers, Conservatives and Lib Dems criticised the fact that public interest discretion decisions were to be made not only by ministers, but by a wide range of public bodies. They argued that while the Government would expect to abide by the recommendations of the Information Commissioner about the exercise of the public interest discretion, other public bodies may be much less willing to listen.

During the debates on clause 50 (the right of appeal to the Information commissioner), the issue of determining the public interest arose again. Once again, the Minister offered strong reassurances that the government would almost always comply with the Commissioner's view of the public interest where information fell within an exemption:

> "It would be rare for a Minister to overrule a recommendation by the Information Commissioner. Indeed, it is our intention that that should be the case because, in reaching a decision, a Minister would take proper legal advice as well as advice from officials. The advice that he received would then be subject to the view formed by the Information Commissioner and, in deciding whether to disclose information, any Minister would weigh heavily the commissioner's opinion. For the Minister to go against the view of the Information Commissioner would be an exceptional course of action. It is possible to conceive of such a situation, but it would be rare." (Mike O'Brien, Committee)

Commons Report and Third Reading, 4-5th April 2000

At Report, the Government tabled significant amendments to Clause 13 (public interest discretionary disclosure) and simultaneously introduced new clause 6, the executive veto. This was the key moment in the Bill that signalled a substantial change to the previously envisaged scheme.

First, the Government gave the information Commissioner a power to make a binding decision in respect of the public interest. The then Home Secretary Jack Straw introducing the amendments said:

> "…Originally under clause 13, we proposed that the commissioner would have a power to make a recommendation for disclosure, but not an ability to order it…As a result of many representations, not least those made on Second Reading by my hon. Friend the Member for Stoke-on-Trent, Central (Mr. Fisher) and many other hon. Members, I recognised the concern in the House about the fact that in the scheme of a statutory right to know it looked slightly odd that there should be provision only for the commissioner to make a recommendation. It was up to the public authority whether to accept it…."

Second, the amendments placed a duty rather than a discretion on officials to consider, in respect of qualified exemptions, whether the public interest lay with withholding or releasing.

> "As a result of the representations, we have in many ways fundamentally changed the structure of clause 13…we have made it a duty, not a discretion, on the public authority to consider whether the public interest in disclosure outweighs the public interest in the matter not being disclosed. Where the public authority decides that the balance of public interest is in favour of disclosure, it is under a duty to disclose. If it comes to a contrary view, the matter can go to the commissioner and he can order disclosure. That is the scheme of the Bill."

Third, the power of the Commission to make a binding determination on the public interest would be balanced by the executive having a final veto. This scheme was modelled on the Scottish FoI Act, Mr Straw said:

> "As I said earlier, on Second Reading, a number of my hon. Friends suggested that the provisions in clause 13, as it then stood, were not satisfactory because too much discretion was in the hands of Ministers. In turn, my hon. Friends drew attention to the fact that there was no such discretionary regime proposed in the Scottish Executive's White Paper, which had helpfully come out just a few days before. Instead, it had provisions for an Executive override, so that there would be an equivalent to clause 1 on the duty to provide information and then the equivalent to part II in which there are exemptions and exclusions and a duty to provide information if ordered to do so. There was also a discretionary provision in which there was a balancing test between the public interest in favour of disclosure and the public interest against. The commissioner would be able to order that. However, Scotland took the approach that there would ultimately be a right of Executive override in 15 areas where, notwithstanding a decision by the commissioner or his equivalent to order disclosure, the Scottish Executive meeting collectively could decide to issue a certificate overriding that order because they felt that it was in the public interest to do so…We have broadly--although not in every particular, for good reasons--adopted that scheme under new clause 6 and the other amendments. We have moved away from discretionary disclosure: we have placed a duty on the Minister to release the information if he or she judges that public interest is in favour of disclosure, not against it; and we have given the commissioner the power to order disclosure."

It is worth noting that the veto was only available where the government disagreed with the Commissioner's view of the public interest, and it referred explicitly to overturning decision notices in relation to clause 13. It was not available where, for example, the government disagreed with the Commissioner about the 'prejudice' test, or about the scope of an exemption. The text of subsection (1) of the veto when it was introduced was as follows:

> "52. - (1) A decision notice or enforcement notice which relates to a failure to comply with section 13 in relation to any one or more requests for information shall cease to have effect if, not later than the twentieth working day following the day on which the notice was given to the public authority, the accountable person in relation to that authority gives the Commissioner a certificate signed by him stating that he has on reasonable grounds formed the opinion that the authority did not fail to comply with section 13 in relation to that request or those requests."

Under this scheme, there was to be no power for the government to appeal against the Commissioner's decision on the public interest. The power to veto was considered to be sufficient protection where there was a disagreement with the Commissioner about where the public interest lies. The absence of any onward appeal to the tribunal or court means that, when conceived and introduced by Commons amendment, the veto was intended only to be exercised following a decision of the Information Commissioner.

Fourth, although the amendments would have allowed the executive veto to be exercised by any minister (or local authority council), the Government undertook to bring forward further amendments in the Lords to restrict the ability of Ministers to wield the veto to Cabinet Ministers only. Mr Straw said:

> "…In the Bill, new clause 6 and the other Government amendments, we propose that the decision in respect of any public authority, other than a local government authority, should be made by a Minister of the Crown…However, I have received representations to the effect that decisions in respect of the Executive override both by central Government and, separately, in respect of local government, would not be made at a high enough level. Where central Government is concerned, I accept the burden of the argument that has been put to me. Therefore, I propose--it will have to be done in the other place, but it will be done--that those parts of the amendments that speak of Ministers of the Crown will be replaced by a definition of a Cabinet Minister"

Mr Straw rejected the idea that the Bill should explicitly state that a Cabinet Minister must consult his Cabinet colleagues before using the veto, but he proposed that there should be guidance in the Ministerial Code setting out how Cabinet colleagues should be consulted. Mr Straw also gave an undertaking to consider further whether local authorities should have the power to issue an executive veto, and at what level of seniority that should be.

Contrary to the position taken in Committee by Mr O'Brien, Mr Straw emphasised that under the discretionary public interest scheme, public authorities would have frequently rejected the recommendation of the Information Commissioner on public interest disclosure. He contrasted this with the executive veto, which would be used only sparingly:

> "There will be a significant difference in the occasions on which public authorities would routinely have rejected a recommendation from a commissioner under clause 13, which may have been many, and the number of occasions under the new proposed structure, including the changes that I announced this evening, where a Minister would have decided to consult his or her Cabinet colleagues and then publicly have issued an exemption certificate."

Speaking later on the new clause to introduce the veto and other amendments to the Commissioner's powers, he said:

> "To refresh the recollection of the House, under the original scheme, at the point where the commissioner or tribunal had said that a public authority was not under a duty to disclose information because it was not covered by an exemption or exception under part II of the Bill, there was a procedure for what was described as "discretionary disclosure". The public authority would have to balance the public interest in disclosing the information against the public interest in its not being disclosed. There could be what amounted to an appeal to the commissioner by an applicant whose application had been unsuccessful at that stage, but, as the Bill originally proposed, the commissioner would not make a decision or issue an order, but simply make a recommendation. Hon. Members are aware that, as a result of representations that were made to us, we have changed the Bill, partly in its text and partly by tabling amendments on Report so that the commissioner will have a power to order disclosure subject only to Executive override in the limited circumstances which I described yesterday and to which I referred earlier today." (Rt Hon Jack Straw)

Other amendments

A group comprising Conservatives (David Lidington, Richard Shepherd), Lib Dems (Robert McLennan), and Labour backbenchers (Mark Fisher) tabled amendments to insert a 'purpose clause' into the Bill.

Labour backbenchers (Tony Wright) and Lib Dems (David Heath) tabled amendments to eliminate the power to create new exemptions by statutory instrument.

The Conservatives (Nick Hawkins) also tabled amendments to provide businesses with the right to ensure that information on them held by public authorities was accurate, and to remove from the scope of the Act business information held before the coming into force of the Act.

Labour backbenchers (Tony Wright) tabled amendments to convert the absolute exemptions into qualified ones subject to the public interest discretion.

The Conservatives (Nick Hawkins) also tabled amendments to replace the Information Commissioner with an Ombudsman who was an Officer of Parliament, with appeal rights to a parliamentary committee.

The Lib Dems (David Heath) tabled amendments to change the test of 'prejudice' in certain exemptions to a test of "substantial prejudice", and (Robert McLennan) to remove parts of clause 34 (exemption for prejudice to the effective conduct of public affairs) from the Bill.

Further amendments were tabled by Labour backbenchers to convert the class-based exemption for policy formulation into a prejudice-based exemption.

All sides of the House continued to support the principle that advice to Ministers should not be released. But both Labour and Conservative (David Davis) backbenchers tabled amendments to exclude factual information and policy options (but not advice) from the exemption for policy formulation.

The Government tabled amendments which required that, in deciding whether or not it was in the public interest to release factual information used to inform policy, regard was to be had to "the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking". This was intended to make it more likely that factual information would be released, while allowing it to be withheld if there was a strong public interest in doing so.

Lords Second Reading, 20th April 2000

At Lords Second reading, Lord Falconer introduced the Bill and explained the veto power:

> "Clause 52 sets out the exception to the duty to comply with decision or enforcement notices. This is the so-called executive override provision. It is important to note the limitations on this provision and the amendments which my right honourable friend the Home Secretary announced would be tabled in this House at Committee stage. First, this is not a general override of the commissioner's decisions; it applies only to decisions taken under Clause 13. Secondly, the Minister must explain publicly why he has chosen to disagree with the commissioner. Thirdly, the decision is subject to judicial review and the commissioner will have the locus to seek such a review. Thus, this is not an easy provision for Ministers to use. Moreover, we are committed to tabling an amendment at Committee to restrict the use of the override to Cabinet Ministers or the Attorney General and to explore ways to reflect on the face of the Bill that the

decision to use the executive override will be taken collectively. We are also looking at how the provision relates to local authorities." (my emphasis)

Lords from across the political spectrum highlighted several continuing concerns with the Bill:

- The wide range of exemptions in the Bill and the complexity of the scheme
- That exemptions that were class-based rather than prejudice-based
- That exemptions that were based on prejudice rather than the higher bar of 'significant harm'
- That exemptions that were absolute and not subject to the public interest test
- The need to exclude from protection under the policy formulation exemption factual information (and Lib Dems also wanted to exclude from protection the policy options)
- The need for a purpose clause in the Bill
- Whether it was appropriate for the executive to have a veto

Although there was some acknowledgment that the Bill had been 'improved' in the Commons, most peers said the government needed to go considerably further. Lord Armstrong of Ilminster (Crossbench) was one of the only voices offering support for the Bill, and urged the government to stick to its principles and proceed cautiously. He said access rights would be impossible to reverse once given; but access might be extended in the light of experience.

Lords Committee, 17-25th October 2000

Lords introduction version of Bill:

http://www.publications.parliament.uk/pa/ld199900/ldbills/055/2000055.htm

The public interest discretion

The Government introduced a range of amendments prepared over the summer to clarify the drafting of the Bill. The first of these brought together the right to information in clause 1 with the duty to disclose in the public interest under clause 13. The new clause made clear that exempt information was only to be released if the exemption was qualified and if the public interest balance favoured disclosure. However, this does not appear to have removed the envisioned 'two-stage' process of applying exemptions. Requests would be refused under an exemption, and then, only where the Commissioner and tribunal agreed that information was exempt would officials separately consider whether it was nonetheless in the public interest to release.

Policy formulation etc exemption

Labour (Lord Archer, Baroness Kennedy), crossbench (Lord Colville) and Conservative (Lord Mackay of Ardbrecknish) peers tabled amendments to limit the exemption for civil and criminal investigations so that it did not apply to information where there was not an active investigation, and to convert it from a class exemption to a prejudice-based one.

Conservatives (Lords Mackay, Norton, Lucas) tabled amendments to change the class-based exemption for policy formulation etc into an exemption based on "substantial prejudice". Further amendments were to require that harm would need to be demonstrated to "the frankness and candour of internal discussion". They were supported by Labour (Lords Archer, Brennan, Borrie), Lib Dem (Lord Goodhart) and crossbench (Lord Williamson) peers.

The Government tabled an amendment to the exemption for policy formulation etc. This amendment (which introduced what is now section 35(2)) prevented the exemption being relied on in respect of statistical information which was used to provide an informed background to a decision once the policy decision had been taken. This exclusion applied to information concerning policy formulation and Ministerial communications. However, there was still provision for statistics to be withheld under the exemption for 'prejudice to the effective conduct of public affairs' (section 36), and in respect of statistics the exemption could be applied by officials rather than Ministers as was normally the case.

Conservatives (Lord Lucas) sought to amend the Government's amendment to exclude factual rather than statistical information from clause 33 once a decision had been taken. Labour (Lord Archer) and the Lib Dems (Lord Goodhart) spoke in support of there being a clearer carve out for factual information.

Prejudice to the effective conduct of public affairs exemption

Lib Dems (Lords Lester and Goodhart) tabled amendments to remove the requirement that the exemption is exercised by a 'qualified person' (e.g. a Minister). This was because the Government had stated that under this exemption the Information Commissioner was unable to consider for himself the question of whether prejudice would occur, but was limited only to reviewing the reasonableness of the qualified person's decision about prejudice. In all other exemptions Commissioner could determine, on appeal, whether a particular exemption applied or not (including whether prejudice was likely to occur), and whether the public interest lay with release or withholding.

Labour (Lord Archer) and Lib Dems (Lords Lester and Goodhart) tabled amendments to limit the exemption to prejudice to collective responsibility, advice and deliberations, and to remove the 'catch all' limb of the exemption.

The Government (Lord Falconer) gave an insight into the relationship between the exemptions in the Act and the role played by the exemption for 'prejudice to the effective conduct of public affairs':

> "The approach we have adopted in relation to exemptions is as follows. Where there is a particular interest that we regard as being sensible to protect by use of an exemption, that is then spelt out. Clause 34 (section 36) is the catch-all clause. Its provisions lay down a test, not specifically targeted in the manner of the previous exemptions, but in place to catch those matters identified which would not be caught by any of the targeted exemptions."(Lords Committee, 21 October 2000)

The veto

The Government had already made amendments in Committee to combine clause 13 (the public interest discretion) with clause 1. In making this change, they also made consequential changes to the drafting of the Ministerial veto. Previously it had been explicitly linked to overturning a decision in respect of the public interest under clause 13, but it now said that any decision notice could be overturned on reasonable grounds. This significant change does not appear to have prompted any specific attention within Parliament.

The Government (Lord Falconer) then tabled further amendments to the power to veto in clause 52. These limited the right to exercise the veto to Cabinet Ministers or the senior Ministers in the devolved assemblies. Lord Falconer also gave an undertaking that it would only be exercised after consultation with Cabinet colleagues. Lord Falconer reiterated that the veto power explicitly only applied to disagreements with the Information Commissioner about the public interest.

The Government also tabled amendments to allow the government to appeal to the tribunal where it disagreed with the Information Commissioner's decision about the public interest (previously it only had the power to veto, but not appeal). The intention appeared to be to provide an alternative to vetoing the Information Commissioner's decision. Lord Falconer said:

> "That should ensure that disagreements between the commissioner and such authorities are litigated in the tribunal and, if necessary, by the courts, rather than recourse being had to Clause 52." (Lords Committee, 25 October 2000)

Although the amended clause did allow the veto to be exercised following a determination by a tribunal or court (due to the way that the "effective date" was defined), no one in Parliament appears to have debated or questioned the veto being exercised in relation to a decision by a tribunal or court.

The Conservatives (Lord Lucas) tabled amendments that were similar to the Government's, and also (Lord Cope) tabled a new clause to give the Information Commissioner the power to determine the public interest on appeal. Labour (Lord Archer, Brennan) and Conservatives (Lord Cope, Norton) tabled amendments to remove the Ministerial veto from the Bill.

Crossbenchers (Lord Colville) tabled amendments to limit the veto to applying only to certain exemptions.

Other amendments

Conservatives (Lords Lucas and Mackay) and Liberal Democrats (Lord McNally and Lord Lester of Herne Hill) tabled amendments to introduce a purpose clause into the Bill. Some Labour Lords (Lords Brennan, Dubs and Richard) spoke against a purpose clause.

The Government also made aspects of the exemption for personal data qualified rather than absolute; and abolished clause 38 which allowed additional exemptions to be created by statutory instrument.

Conservatives tabled amendments to make all exemptions qualified rather than absolute.

Lib Dems (Lord Goodhart) and Conservatives (Lord Lucas) tabled amendments to amend the public interest test so that where interests were tied, the default would be to disclose.

Conservatives (Lord Lucas) tabled amendments to make explicit that officials could not ask why a requestor was seeking particular information.

The Bill included a provision which allowed for information to be amended or deleted after it was requested where it was already intended that the information would be amended or deleted. This provision was drawn from Data Protection legislation. The Lib Dems tabled amendments to delete this provision for fear it might be used inappropriately.

Conservatives (Lords Mackay, Lucas) tabled amendments to ensure that any public bodies not listed in Schedule 1 would be covered by the Act; and to ensure that public authorities must assist applicants in making requests for information.

Lord Falconer tabled a Government amendment to add additional bodies to the scope of the Act.

Conservatives (Lord Cope) moved an amendment imposing an obligation on the Secretary of State to keep the list of bodies in the Bill up to date.

Lord Falconer tabled Government amendments (Nos. 57 to 59, 61, 62, 68) concerning the operation of freedom of information in the devolved administrations in Wales and Northern Ireland.

Conservatives (Lord Archer) moved an amendment about whether information is covered if the Act is not mentioned in the request. Conservatives (Lord Cope) moved amendment on third party commercial interests.

Conservatives (Lord Cope) tabled an amendment to ensure that the Secretary of State would make regulations regarding fees for requests. The amendments intended that fees apply in prescribed cases; placed a limit of 10% of the cost of complying with the request on the fee; or a fee at a level accessible by the public. A further amendment related to requests being refused if the cost of meeting them exceeds the appropriate limit. The amendments were withdrawn.

The Government tabled an amendment providing that a public authority may charge for the communication of any information not required under Clause 1(1) because the cost of compliance exceeds the appropriate limit and is not required by law.

Lib Dems (Lord McNally) tabled an amendment impose a 20-day limit on the time limit extension afforded for considering the public interest (the limit was 'a reasonable time').

Conservatives (Lord Lucas) tabled an amendment so that requestors would be entitled to information in electronic format.

Conservatives (Lord Cope) moved an amendment enabling public authorities to apply to the tribunal for an order designating a requestor a "vexatious applicant".

Conservatives (Lord Mackay) tabled amendments to provide for an Information Ombudsman to police the Act instead of the ICO backed by a parliamentary Committee to report back to Parliament, and on the membership of the information tribunal.

Lib Dems (Lord Goodhart) moved an amendment to delete a provision that would make it a criminal offence for the information commissioner to disclose personal information about the handling of complaints.

Conservatives (Lord Mackay) moved an amendment to require that local authorities in particular publish agendas, minutes, background papers and reports three days before a meeting as part of their publication scheme.

Conservatives (Lord Mackay) tabled a new clause to require public authorities to publish a list of any manuals used in the carrying out of their functions. Also an amendment allowing information intended for future publication to be exempt information only if, in addition, the authority made a clear commitment to publish that information within three months.

Conservatives (Lord Lucas), supported by the Lib Dems, tabled probing amendments on how the provisions around "neither confirming nor denying" that information was held.

Lib Dems (Lord Goodhart) sought to amend the exemption for information provided by the security services from an absolute class-based exemption to an absolute prejudice-based exemption.

Conservatives (Lord Mackay), supported by Lib Dems (Lord Lester), attempted to increase the prejudice test to one of "substantial prejudice" in both the exemption for prejudice to international relations, and that for prejudice to the economy. The Lib Dems also sought to increase the test to "substantial prejudice" for the exemption for prejudice to commercial interests.

Conservatives (Lord Mackay) tabled an amendment to exclude information provided by the European Union from the protection afforded by the exemption for the prejudice to international relations.

Conservatives (Lords Mackay, Norton) sought to debate the exemption protecting relations within the UK by opposing its inclusion within the Bill. They argued that the protections afforded for policy development etc, prejudice to the conduct of public affairs and information provided in confidence ought to be sufficient.

Conservatives (Lord Mackay) tabled amendments to the exemption for information that would prejudice the economy to define the specific matters that would have to be prejudiced, such as the collection or assessment of tax.

Conservatives (Lord Lucas) tabled amendments to require public authorities to consider asking data subjects for consent to release personal data where it was requested under the Act by a third party.

Conservatives (Lord Cope) tabled amendments to the exemption for commercial interests to define 'a trade secret', to exempt commercial information supplied before the Act comes into force, and to extend the exemption beyond 30 years for certain commercially sensitive information.

Both Conservatives (Lord Cope) and Labour (Lord Archer) tabled amendments to balance commercial prejudice against any public interest in disclosure. Labour (Lord Young) tabled an amendment to exclude from the exemption information that would allow consumers to make informed choices.

The Government removed clause 43 from the Bill by opposing it standing part. This removed the power in the Bill to create new exemptions by statutory instrument.

Conservatives (Lord Lucas) tabled a new clause to ensure that information concerning meetings held by Ministers could not be exempt under most of the exemptions under the Bill.

Conservatives (Earl of Northesk) tabled an amendment to include a purpose provision in respect of the Information Commissioner's role, and to extend the Data Protection Act 1998 to companies.

The Government (Lord Falconer) tabled amendments to allow the Information Commissioner to pass information to other ombudsman.

Lords Report, 14th November 2000

Copy of Bill as amended in Lords Committee:

http://www.publications.parliament.uk/pa/ld199900/ldbills/120/2000120.htm

There appears to have been a deal struck between the then Government and the Lib Dems (Lords Goodhart, Lester and McNally) at Report Stage. This seems principally in order to avoid the Bill being finalised in the session's wash up, which was imminent. The Government accepted Lib Dem amendments which:

- altered the drafting of the public interest test so that the presumption was in favour of disclosure, unless there was an overriding interest in withholding
- imposed a statutory duty on public authorities to offer advice and assistance to requestors

- in relation to the exemption for policy formulation etc, weighted the public interest balance in favour of the release of factual information used to inform decisions (what is now s.34(4))
- clarified that the duty to confirm or deny could only be set aside if there was an absolute exemption, or a qualified exemption and the public interest lay with neither confirming nor denying

Conservatives (Lord Lucas) tabled an amendment to make the absolute exemption for information provided in confidence qualified and subject to a public interest test.

Lord Falconer moved technical Govt amendments updating the public authorities list of bodies.

Conservatives (Lord Mackay) tabled an amendment to remove the Secretary of State's power to restrict, by statutory instrument, the information covered by the Bill in respect of particular bodies listed in Schedule 1.

Lord Bassam of Brighton tabled technical Govt amendments clarifying the term "publicly-owned company and removing an order making power.

Conservatives (Lord Lucas) tabled an amendment to ensure that requestors could make requests by email and didn't have to use their real name. The Government (Lord Bach) reassured that requests by email would be accepted, and that real names need not be used.

Conservatives (Lord Mackay) moved amendments on: requiring the SofS to specify in regulations cases in which fees might/might not be charged, to set a maximum fee and say how it should be calculated: a provision to avoid SofS discretion and allow Parliament to establish the boundaries of fee regulations: a provision creating a presumption that there would be no fee; a provision linking the fees level which do not prevent public access.

In response Lord Bach (Labour) said "the Government have published their draft fees regulations. The policy is that the maximum fee should be 10 per cent of the marginal costs of seeking and finding the information. We reckon that that is a fairly generous subsidy."

Conservatives (Lord Mackay) moved amendments to require decisions on public interest grounds to be taken within the same 20-day period as decisions on whether an exemption applies.

Lib Dems (Lord Goodhart) tabled an amendment about the timetable for making a decision about where the public interest lies in relation to a qualified exemption (the Bill required decisions to be in a reasonable period). The amendment required a public authority to give an estimate of the time it will take to reach a decision. The Govt accepted the amendment and in addition agreed to add a reference in the Secretary of State's code of practice under Clause 44 to the desirability of complying with estimates given.

Conservatives (Lord Mackay) moved an amendment where an authority would be obliged to comply with a request, regardless of the cost, where it is in the public interest.

Conservatives (Lord Norton of Louth) tabled an amendment that removed reference to the power of an authority to publish its publication scheme "as it thinks fit" and stipulates instead that the publication shall be in paper and electronic form and copies of the publication scheme would be free of charge.

Conservatives (Lord Lucas) tabled an amendment to allow the requestor to choose the format in which it receives information - in particular electronically.

Conservatives (Lord Mackay) moved an amendment which allowed openness in relation to information about the activities of the EU, including information relating to intra-EU political debate.

Labour (Lord Archer) tabled an amendment that introduced a prejudice test in relation to the exemption for information from confidential sources in relation to investigations.

Crossbencher (Viscount Colville of Culross) tabled an amendment that would make relevant the amount of time that had elapsed in weighing the public interest in relation to the exemption for prejudice to crime prevention or detection.

Conservatives (Lord Mackay) moved an amendment to make the class-based exemption for the formulation of government policy etc subject to a test of prejudice. This would allow the Commissioner to overrule the government, and his decision about prejudice could not be vetoed. Lord Falconer pointed out that the public interest test which applied would be similar to having a prejudice test.

Conservatives (Lord Mackay) tabled an amendment to provide that bodies which are defined as government departments merely because they exercise statutory functions on behalf of the Crown are not entitled to invoke the policy formulation exemption. This would be restricted to ministerial government departments. A further amendment would limit the veto to ministerial government departments only.

Labour (Lord Archer) tabled an amendment to leave out the words “in the reasonable opinion of a qualified person” in the exemption for prejudice to the effective conduct of public affairs. This was intended to allow the Commissioner to determine prejudice rather than simply deciding if the qualified person’s decision was reasonable.

Conservatives (Lord Mackay) tabled an amendment relating to the Data Protection exemption which would require the public authority to take reasonable steps to ask whether consent will be given by the individual subject to the request.

Conservatives (Lord Mackay) tabled an amendment to make the absolute exemption for prejudice to commercial interests into a qualified one subject to a public interest test.

Conservatives (Lord Lucas) tabled an amendment that there be a general duty to public authorities to respond promptly with all the matters in the Bill: and a further amendment to make it a requirement for the code of practice to include guidance concerning the desirability of making information available on the internet.

Conservatives (Lord Norton of Louth) tabled an amendment that the SofS shall consult other bodies as he deems appropriate before issuing or revising a code of practice (rather than just the Information Commissioner).

Conservatives (Lord Mackay) tabled an amendment which restricted the veto so that it could only be exercised if there would be serious harm to the public interest if it was not exercised. Lord Mackay said:

> “The new test I am proposing would make judicial review a much more realistic safeguard. Under the Bill as it stands, a Minister would be entitled to such wide discretion in exercising the veto that it is difficult to imagine circumstances in which the courts would normally set aside a veto, so long as he could offer any public interest argument against disclosure. The courts would not look at whether the Minister had reached the right decision in the balancing exercise. The additional test would require the Minister to demonstrate to a court that he had reasonable grounds for believing that disclosure would cause "serious harm".”

Also Lord Mackay tabled an amendment requiring the Minister to lay a copy of the veto certificate before Parliament. Lord Norton also tabled an amendment requiring a copy of the veto certificate to be laid before Parliament and approved by both Houses.

Lib Dems (Lord Clement-Jones) moved an amendment to ensure that the Data Protection Act 1998 does not prevent the medical data of individuals being used for certain medical research purposes, notably, but not solely, in relation to cancer registries.

Lords Third Reading, 22nd November 2000

Conservatives (Lord Lucas) tabled amendments to make it easier for a requestor to receive information in electronic form.

Labour (Baroness Whitaker), supported by the Conservatives (Lord Lucas) moved an amendment to exclude scientific, medical or technical data, and analysis and opinions about that data, from the exemption for formulation of government policy, and the exemption for prejudice to the effective conduct of public affairs (s.36).

Crossbenchers (Viscount Colville of Culross), supported by Conservatives, moved amendments on the scope of the exemption for prejudice to the effective conduct of public affairs (s.36). He sought to narrow the 'catch all' provision at 36(2)(c) so that it only caught the kind of information given in two examples by Lord Falconer, which concerned preventing the premature release of information. He also sought to exclude from 'prejudice' any risk of the public attempting to lawfully influence a public authority.

Conservatives (Lord Mackay) tabled an amendment to provide that the Ministerial veto had to be provided to Parliament. Govt accepted the amendment that the accountable person should lay a copy of the certificate in each House.

Conservative Lord Norton moved an amendment that the certificate issued by the Minister (veto) had to be confirmed by both Houses and for a joint Committee to have sight of the veto material on a confidential basis, but this was rejected in favour of Lord Mackay's amendment.

Liberal Democrats (Lord Clement-Jones) tabled an amendment in relation to the Data Protection Act fair processing principles to protect confidentiality around cancer health registries.

Commons Consideration of Lords Amendments, 27th November 2000

All Lords amendments were accepted and the Bill was passed.