RESEARCH PAPER 99/98
3 DECEMBER 1999

The *Freedom of Information Bill*

Bill 5 of 1999-2000

This Bill introduces a right of access to information held by a wide range of public authorities, including central government, local government, public bodies and Parliament. It is due to be debated on second reading on 7 December. Information relating to personal details comes within data protection legislation also amended by this Bill. Research Paper 99/99 The *Freedom of Information Bill: Data Protection Issues* deals with this aspect of the Bill. The Government issued a draft *Freedom of Information Bill* in May 1999, and the Bill now introduced into Parliament has been redrafted to reflect some of the criticisms made of that. The Bill will apply to Wales and Northern Ireland but not to Scotland. The Bill will replace the non-statutory *Code of Practice on Access to Government Information*, and consequent amendments to the parliamentary resolution on accountability passed in March 1997 will be necessary.

Oonagh Gay

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Summary of main points

The *Freedom of Information Bill* introduces a statutory right to request access to government information. There are defined exemptions, and an additional public interest test which public authorities must apply in considering whether to release information, even if it falls within an exemption. Information containing personal details comes within the data protection legislation, also amended by this Bill. Research Paper 99/11 The *Freedom of Information Bill: Data Protection Issues* examines this aspect in greater detail.

A new office of Information Commissioner is created, which will absorb the functions of the Data Protection Registrar, currently Elizabeth France. The Commissioner will be able

- To examine complaints that public authorities have not carried out their duties under the Act
- To examine the decisions on the extent of exemptions and enforce disclosure where she judges it appropriate, by means of a decision or enforcement notice.
- To recommend to public authorities that they reconsider their duty in relation to the public interest, but without an enforcement power

Appeals are to be heard by the Information Tribunal, which will take over the functions of the Data Protection Tribunal. Appeals on a point of law may be heard by the courts.

The Bill also integrates the provisions for access to public records with the FOI legislation. Special provisions apply to environmental information accessible through regulations to be made following the Aarhus Convention. This topic is dealt with in an Appendix

A number of areas in the Bill have generated controversy, and the Public Administration Committee and a Lords select committee on the draft bill made a series of criticisms. The Bill now introduced has been redrafted to reflect some of the concerns, but not all the criticisms have been met. There is continuing concern over:

- the duty on authorities to consider a discretionary release of information, and absence of powers for the Commissioner to enforce a decision that such information be released
- the breadth of some exemptions, in particular those relating to policy formulation and advice

The Bill will apply to Parliament, although there are provisions for the Speaker or the Clerk of the Parliaments to certify in cases where releasing information would infringe the privileges of Parliament, or where there was likely to be prejudice to the effective conduct of public affairs.

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I Introduction

Research Paper 97/69 *The Code of Practice on Access to Government Information* describes the current non-statutory Code which applies to requests for information held by Government. Research Paper 98/48 *The Data Protection Bill* describes the data protection legislation which will apply to individuals seeking copies of information held about themselves. The new *Data Protection Act 1998* comes into force in 1 March 2000 and Research Paper 99/99 The *Freedom of Information Bill: Data Protection Issues* looks at the implication of the Bill in respect of personal information relating to individuals.

Research Paper 99/61 *The Continuing Debate* provides much of the background to the debate on introducing legislation on Freedom of Information (FOI). The most active critic of the Government's proposals for FOI has been the Campaign for Freedom of Information (the Campaign), a long-established pressure group. It issued a briefing paper on the bill on 23 November[1] which is referred to in this Paper.

The *Freedom of Information Bill*[2] was published on 19 November 1999. It sets out the revised government proposals, but also contains new provisions applying freedom of information and data protection to Parliament.

II An Outline of the Scheme

The Bill creates a statutory right to information which will supersede the non-statutory *Code of Practice on Access to Government Information.* It also amends the *Data Protection Act 1998* and the *Public Records Act 1958*. The right to information under the FOI bill relates generally to non-personal information. Individuals who wish to obtain records held about themselves will use the data protection legislation. According to the *Explanatory Notes*, the Bill:

- provides a right of access to recorded information held by public authorities;
- creates exemptions from the duty to disclose information; and
- establishes the arrangements for enforcement and appeal.

Only information recorded is covered.[3] The public authority does not need to be the originator of the information, but only information which is not held on behalf of another person or authority (clause 2(2). Coverage is intended to be wide, as the *Explanatory Notes* state:

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1 Campaign for FOI Queen's Speech Briefing 23 November 1999

2 *Explanatory Notes* were published as Bill 5 - EN

3 see CFOI briefing 23 July 1999. 'Further views on the Government's Draft Freedom of Information Bill' for detail on the implications of providing access to 'recorded' information only

> 29. The Bill is intended to have wide application across the public sector at national, regional, and local level. In view of the large number of bodies and offices intended to fall within the scope of the Bill it is not feasible to list each body individually. Public authorities are, therefore, designated in one of the following ways-
> a) on the face of the Bill (in Schedule 1), using generic descriptions where appropriate, which specifies the principal authorities in national and local government, together with the principal public authorities relating to the armed forces, national health service, education, the police and other public bodies and offices;
> b) by order under clause 3(1) adding to Schedule 1 any body or the holder of any office that satisfies certain specified conditions;
> c) by order under clause 4 adding any person that satisfies certain conditions and that appears to the Secretary of State to exercise functions of a public nature or is providing under a contract with a public authority any service whose provision is a function of that authority; or
> d) by reference to the definition of a publicly-owned company in clause 5.

The applicant is required to describe the information sought, but does not need to supply the reason for the request. Applicants do not need to have British citizenship or to have residence here(clause 7). Fees will be payable, with details set out in regulations. They will specify that up to 10 per cent of the 'reasonable marginal costs' of complying with the request will be charged (clause 8).[4] Authorities must comply with the request within 20 working days after the relevant fee is paid (clause 9). The manner of communication is dealt with in clause 10. Where the cost of compliance exceeds the appropriate limit the authority is exempted from providing the information. The limits are to be prescribed by the Secretary of State (clause 11). Clause 12 relieves the authority from complying with vexatious or repeated requests. Under certain circumstances the obligation in clause 1 (1)(a) to confirm or deny that it holds the information does not apply.

A. Public interest discretionary disclosures

Authorities must consider whether to exercise their discretion to release the information even where it is covered by an exemption.[5] They are to have regard to all the circumstances and to the desirability of informing the applicant 'wherever the public interest in disclosure outweighs the public interest maintaining the exemption in question' (clause 13(4)). A fee may be charged for such discretionary disclosures (clause 14). Further detail on public interest discretionary disclosures is given in Part IV of the Paper.

Clause 15 requires a public authority to inform an applicant of a refusal of a request, and to state reasons for its decision. But it is not obliged to do so where the statement would involve the disclosure of exempt information.

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4 see CFOI Briefing 23 July 1999 'Further Views on the Government's draft Freedom of Information Bill' for detail on its arguments about the appropriate level of fees

5 there are seven exemptions where this duty does not apply. See Part IV for further details

B. The Information Commissioner

Clause 16 provides for the Information Commissioner to take over the functions of the Data Protection Registrar in relation to data protection legislation. The clause also renames the Data Protection Tribunal as the Information Tribunal. The Government did not accept the Public Administration Select Committee recommendation in July that the Committee should have the right to interview prospective applicants and make recommendations to the House.[6] Clause 16 has transitional provisions enabling the current Registrar, Elizabeth France, to continue in post after Royal Assent.

C. Publication Schemes

Each public authority is given a duty to adopt and maintain a publication scheme, to be approved by the Commissioner. These schemes are intended to be guides to an authority's publications and policy. A school, for example, would indicate what policy documents it held. Clause 18 offers authorities the option of 'off the shelf' schemes prepared by the Commissioner or others.

D. Exempt Information

Part II of the Bill sets out various exemptions.

- Information accessible to the public by other means (clause 19)
- Information intended for future publication(Clause 20)
- Information supplied by, or relating to, bodies dealing with security matters (clause 21)
- National Security (clause 22) Certificates may be issued by minister of the crown which is conclusive proof that the information is covered by clauses 21 and 22
- Disclosure of information likely to prejudice UK defence (clause 24)
- Disclosure of information likely to prejudice UK international relations (clause 25)
- Disclosure of information likely to prejudice relations between any two administrations within the UK (clause 26)
- Disclosure of information likely to prejudice UK economic interests (clause 27)
- Investigations and proceedings conducted by public authorities for criminal proceedings or civil actions arising from such investigations (clause 28)
- Disclosure of information likely to prejudice law enforcement (clause 29)
- Court records (clause 30)
- Disclosure of information likely to prejudice audit functions (clause 31)

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6 HC 571 1998-99

- Information exempted for the purpose of avoiding an infringement of parliamentary privilege. Certificates signed by the Speaker or Clerk of the Parliaments will be conclusive proof that the exemption applies(clause 32)
- Formulation of government policy, including the operation of a ministerial private office (clause 33)
- Disclosure of information likely to prejudice the effective conduct of public affairs, in the reasonable opinion of a qualified person (clause 34)
- Communications with Her Majesty and honours (clause 35)
- Disclosure of information likely to endanger the physical or mental health of any individual (clause 36)
- Environmental legislation, subject to a separate scheme under clause 73 (clause 37)
- Personal information relating to the applicant. This is covered by the *Data Protection Act 1998* (clause 38)
- Information provided in confidence (clause 39)
- Legal professional privilege (clause 40)
- Disclosure of information likely to prejudice the commercial interests of any person (clause 41)
- Statutory or EU prohibitions on disclosure or disclosure punishable by contempt of court (clause 42)

The Secretary of State has power to create additional exemptions by order under clause 43 relating to information whose disclosure would have particular effects 'adverse to the public interest'.

Further detail on exemptions, including those relating to policy formulation and advice, and parliamentary privilege is given in Part IV of the Paper.

E. Roles of the Secretary of State and Lord Chancellor

Both have duties to issue codes of practice for public authorities in relation to freedom of information and management of records (clauses 44 and 45)

F. Role of the Commissioner

The Commissioner has a duty to promote good practice by authorities and to promote the observance of the legislation. The Commissioner may issue a practice declaration where there are infringements of the code of practice, and take action where an authority has not informed an applicant that it holds information under clause 13. She may issue a discretionary disclosure recommendation, specifying information which ought to be disclosed. The Commissioner is required to lay an annual report before Parliament (clauses 46-49).

G. Enforcement

The Commissioner is responsible for enforcement. Clause 50 permits any person to complain to the Commissioner about a lack of compliance by an authority. The Commissioner has power to serve a **decision notice** stating whether the authority has failed to comply with the requirement of the legislation, and the steps and timescale necessary to comply. Under clause 50(7) decision notices which relate to an authority's failure properly to consider the use of their discretion under clause 13 cannot require the disclosure of information, but can require the authority to make a proper decision in accordance with clause 13, and can specify matters that the authority must have regard to when doing so.

Clause 51 gives the Commissioner power to issue an **information notice** to obtain from an authority information required to reach a determination as to whether the authority has complied with the legislation. An **enforcement notice** can be issued under clause 52 if the Commissioner is satisfied that the authority has failed to comply with Part I of the Bill. The notice would require the authority to take action to comply within a specified time. These powers are modelled on those available to the Data Protection Commissioner. The Commissioner may certify that there has been a failure to comply with a notice and court may deal with the matter as if it were a contempt of court (Clause 53). There are powers of entry and inspection in Schedule 3 and clause 54, but clause 54 ensures that there is no right in the bill to an injunction or to sue for damages for breach of statutory duty.

There does not appear to be any specific prohibition on decision, information or enforcement notices being served against the Speaker or the Clerk of the Parliaments. However, certificates from either would appear to offer conclusive evidence that information was covered by the parliamentary privilege exemption (clause 32) or the exemption for the effective conduct of public affairs (clause 34(6). Further detail is given in Part IV.

H. Appeals

Authorities may appeal against decision, information or enforcement notices to the Information Tribunal (clause 56). Appeals may only be allowed on the following two grounds, as set out in the *Explanatory Notes* to clause 57:

- that the notice against which the appeal was brought was not in accordance with the law; or
- where the notice involved the exercise of discretion by the Commissioner, that he should have acted differently.

Under clause 58 any party to an appeal may appeal from a decision of the Tribunal to a court on a point of law. The Commissioner, or any person whose request is affected, may appeal to the Tribunal against a national security certificate issued under clauses 21 and 22. The Tribunal is specially constituted to hear such appeals under Schedule 4. The

Tribunal may quash a certificate if it finds that the information that either the information was not exempt under clause 21 or if the minister did not act reasonably in issuing the certificate under clause 22. The appeals procedures are set out in Schedule 4 and follow the precedents of the data protection legislation.

I. Public Records

Part VI of the Bill is intended to integrate the provision for access to public records under the *Public Records Act 1958* with FOI. The 1958 Act does not extend to Scotland, where a different regime operates.

The 1958 Act sets out the responsibilities of the Lord Chancellor, as the minister responsible for public records, the powers and duties of the Keeper of Public Records and the general rules covering the access to and selection, preservation and destruction of, public records.

The *Public Records Act 1967* set the statutory closure period after which records are made available to public inspection at 30 years, except for certain defined reasons. Applications from departments for extended closure or retention of documents beyond 30 years are put to the Lord Chancellor who is advised by the Advisory Council on Public Records. This is a 'representative group of historians, readers, IT persons and lawyers', as described by the Public Administration Select Committee.[7] The Council also hears appeals against extended closure or retention. At present its powers are limited to making non-binding recommendations on disclosure. The 1993 white paper *Open Government* [8] gave more specific guidance on the criteria for extended disclosure and the retention of documents in departments. This are currently set out in Annex 5 of the July Public Administration Select Committee report.[9]

Historical records are defined in clause 61 as records which are 30 years old. A number of exemptions set out in Part I of the Bill will not apply in respect of information contained in records more than 30 years old (clause 62). The exemptions disapplied are set out in the *Explanatory Notes* as follows:

> relations within the United Kingdom (clause 26);
> criminal investigations and proceedings (clause 28(1));
> court records, etc (clause 30);
> audit functions (clause 31);
> formulation of government policy etc (clause 33);
> prejudice to effective conduct of public affairs (clause 34);
> communications with Her Majesty etc (clause 35(1)(a));
> legal professional privilege (clause 40); and

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7 HC 570 1998-99 para 150
8 Cm 2290 1993
9 HC 570 1998-99

> commercial interests (clause 41).
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> In addition, the exemption relating to honours (clause 35(1)(b)) is disapplied in respect of information contained in a record which is 75 years old, and the law enforcement exemption (clause 29) is disapplied in respect of information contained in a record which is one hundred years old. [10]

The Public Administration Committee recommended that the exemptions for investigations, honours and communications with Her Majesty should cease to apply after 30 years, believing that it was not sufficient to rely on discretionary disclosures in the public interest.[11] The Bill has been amended so that the exemptions for communications with Her Majesty and investigations (clause 28) now cease after 30 years. The honours exemption remains at 75 years, and law enforcement at 100 years (clause 62).

Further exemptions will also not apply where the historical records are held in the Public Record Office (clause 63). There is corresponding provision for Northern Ireland. The *Explanatory Notes* for Clause 63 state:

> 199. Under *subsection (1)*, the exemption for information accessible to the public by other means does not apply in these cases. This is despite the fact that the Keeper of Public Records will continue to be under an obligation under section 5(3) of the Public Records Act 1958 to arrange reasonable facilities for public inspection and copies *as well* as complying with the duties under the Bill. Nor does the exemption for information intended for future publication apply.
>
> 200. *Subsection (2)* provides that, where records are in the Public Record Office, although the exemption from clause 1 relating to information supplied by, or relating to the work of, bodies dealing with national security matters will continue to apply, the discretionary disclosure provisions of clause 13 will come into effect in respect of this information.

Decisions as to the refusal of discretionary disclosure of historical records are dealt with in clause 64, as the *Explanatory Notes* set out:

> This clause relates to the case of a public authority which holds information contained in a historical record which is *also* a "public record" as defined by the Public Records Act 1958, and where that information is exempt from the Bill's right of access under clause 1. In these circumstances, clause 13 of the Bill requires the authority to consider whether to exercise any discretion it has to disclose the information to an applicant making a request for information. This clause provides that where the authority is minded to refuse that request, it must consult the Lord Chancellor before doing so. Corresponding provision for Northern Ireland is included.

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10 *Explanatory Notes* Clause 62

11 HC 570 1998-9 para 146.

Discretionary disclosure of information by the Public Record Office under clause 13 which has been transferred to it by another authority is subject to the consent of the relevant authority under clause 65. A refusal to grant disclosure under clause 13 is presumably subject to challenge by the Commissioner in the same way as for any other authority. Clause 66 and Schedule 5 makes amendments to the *Public Record Act 1958*. The role of the Lord Chancellor's Advisory Council under the 1958 Act is extended to the giving of advice on FOI legislation and its application to historical records. But it will no longer hear appeals against disclosure; these will be the responsibility of the Commissioner.

The 1958 Act had instituted a regime for access to and closure of records largely based on the discretion of the Lord Chancellor. Schedule 5 amends the 1958 Act, so that the largely discretionary access regime is replaced by the statutory FOI scheme. However aspects of the 1958 Act's requirements on consultation and consent between the Public Record Office and the relevant government departments are retained in respect of discretionary disclosure of information. There is also power to extend the meaning of public records in the 1958 Act. There is corresponding provision for Northern Ireland, through amendments to the *Public Records Act (Northern Ireland) 1923*.

J. Personal records held by public authorities

Part VI deals with amendments to the *Data Protection Act 1998*. The 1998 requirements on rights of subject access and data accuracy are extended to all personal information held by public authorities with some modifications and exemptions. For further details see Research Paper 99/99 The *Freedom of Information Bill: Data Protection Issues.*

K. Environmental Information

Clause 73 gives power to the Secretary of State to make regulations to implement the United Nations Economic Commission for Europe (UNECE) Convention on access to information, public participation in decision-making and access to justice in environmental matters, which the UK signed at Aarhus in 1998 (the Aarhus Convention), insofar as the Convention relates to the provision of access to environmental information.

These regulations will form a free-standing regime, and all such environmental information as is available under the regulations will be exempted from the main provisions of the Bill under clause 37. See Appendix for further details.

L. Power to repeal enactments prohibiting disclosure of information

A series of enactments specifically prohibit the disclosure of information, and the Secretary of State is given power in clause 74 to amend or repeal such enactments by order. Such orders are subject to the affirmative procedure. There is no official list of

enactments which are affected available at present. The 1993 white paper *Open Government*[12] listed 200 enactments which contained statutory prohibitions on disclosure

M. Offence of altering records with intent to prevent disclosure

Clause 75 creates this new offence which cannot be committed by a Government department, but can be committed by a civil servant.

N. Copyright and Defamation

Issues of copyright and defamation are dealt with in clauses 77 and 78. Each government department is treated as a separate public body under clause 80, but this does not enable a department to claim that a breach of confidence has occurred when information is disclosed by another department.

O. Extent of the Bill

FOI is a devolved matter[13] and so this bill will not apply to the Scottish Parliament, the Scottish Administration or Scottish public authorities with mixed functions or no reserved functions (clause 79). The environmental information provisions of clause 73 also do not apply; the Scottish Parliament has legislative competence here. The provisions apply to the National Assembly of Wales and extend to Northern Ireland under clause 86. Freedom of Information is a devolved subject under the *Northern Ireland Act* and so with the creation of devolved government in Northern Ireland, the Bill may need amendment, should the Northern Ireland Assembly consider that it should legislate in respect of Northern Ireland, including Northern Ireland public bodies.

On 25 November 1999 the Scottish Executive published its own proposals for FOI legislation *An Open Scotland* which were hailed by the Campaign as providing a significantly better FOI Act than the rest of the UK. The Campaign highlighted the following areas as significant improvements:[14]

> **Substantial prejudice.** To withhold information Scottish authorities would in most cases have to show that disclosure would cause 'substantial prejudice' to particular interests. The Home Secretary has rejected this test and the UK bill has the weaker test of "prejudice", which makes it easier to withhold information.

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12 Cm 2290 1993

13 for background on devolved and reserved matters see Research paper 99/xx *Devolution and Concordats*

14 *Campaign for FOI* Press Release 'Scotland overtakes UK on Freedom of Information'

> **Public interest.** In some, but not all, areas Scotland's Information Commissioner will have the final say on when disclosure is in the public interest. Under the UK bill, the Commissioner *never* has the final say, and can always be overruled by ministers or authorities.
> **Facts behind policy decisions.** The Scottish proposals would require ministers to publish the facts and analysis behind policy decisions, unless to do so would substantially prejudice the frankness of discussions or collective responsibility. The Westminster bill allows ministers to suppress this information, even if disclosure would cause no harm at all.
> **Opinions.** The Westminster bill allows authorities to withhold information which in their "opinion" would prejudice the effective conduct of public affairs. Giving legal weight to authorities' opinions renders them largely immune from challenge. None of the Scottish exemptions give weight to an authority's opinions, and this particular exemption does not appear at all.
> **Ministerial vetoes.** Like the UK bill, the Scottish proposals contains some class exemptions which allow information to be withheld without evidence that it would cause harm. This applies to policy advice (though more narrowly defined than in the UK bill), investigations which could lead to prosecutions, and information supplied to an authority in confidence. In these areas the Scottish proposals also allow ministers to overrule the Commissioner on whether disclosure of such information is in the public interest. The Campaign said this was an "unwelcome reflection of the UK proposals". However, a ministerial veto would require the support of the whole Scottish cabinet - an improvement over the UK proposals which permit individual ministers and authorities to ignore any ruling by the Commissioner on public interest.

The Scottish consultation document[15] set out the boundaries between FOI in Scottish legislation and in UK legislation:

> 1.7 A key aspect of the policy on Freedom of Information in the context of devolution is that any public authority should operate only a **single** Freedom of Information regime. The policy does not hinge on whether the information held concerns reserved or devolved matters. **All information held by the above bodies in Scotland will come under the Scottish Freedom of Information regime, subject to the exception for in-confidence UK information.**
> 1.8 Government Departments and other reserved bodies operating in Scotland (such as the Department of Social Security and the Ministry of Defence) would be subject to the UK Freedom of Information legislation. Cross-border public bodies, such as the Forestry Commission, would also be subject to the UK legislation.

Jim Wallace, Deputy First Minister said, in response to questions, following his statement on 25 November[16]:

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15 *An Open Scotland* SE 1999/51 November 1999
16 *Scottish Parliament Official Report* 25 November 1999

> Ms Cunningham also asked about the operation of two regimes. That was anticipated in the devolution settlement in that this Parliament was given the power to make arrangements for freedom of information with respect to the bodies for which we have responsibility. The scheme does not apply to particular pieces of legislation but to the departments that are responsible for holding the information, so if it was an immigration matter that would be likely to go to the Home Office and therefore would be subject to the UK bill, or if it was to do with social security, that would be the UK department as well. If documents relating to reserved subjects are in the hands of the Scottish Executive they would be subject to the Scottish freedom of information regime, with the important proviso that we would not have the power to disclose documents that are the property of UK departments and marked "In confidence" and the application would go to the originating UK department.

Under clause 26 of the Bill information is exempt if its disclosure would be likely to prejudice relations between any administration in the United Kingdom. This will presumably protect negotiations conducted by the various devolved administrations with Whitehall.[17]

P. Commencement

Aspects of the bill come into force immediately after Royal Assent, such as the designation of public authorities and approval of publication schemes. Clause 85(3) and (4) provide that all other provisions must come into force within five years.

Q. Financial Effects

The *Explanatory Notes* set out the Financial Effects and Effects on Public Service Manpower:

> FINANCIAL EFFECTS OF THE BILL
> 279. The estimated cost to public funds of implementing the proposals in the Bill will fall within the range of £90 million to £125 million per year. This figure includes the cost of processing requests for information (including the costs to public authorities of the review and appeals process), the costs of making information available to the public under a scheme for the publication of information, the costs of training programmes within public authorities and costs borne centrally by the Home Office and the Information Commissioner and Tribunal. These costs will be spread across the public sector as a whole and will be absorbed within existing resources.
> 280. The cost of setting up and running the Office of the Information Commissioner is estimated to be up to £6.5 million per year depending on the

[17] Research Paper 99/84 *Devolution and Concordats* provides background on the main mechanisms by which consultation and negotiation will be carried out. This includes a Joint Ministerial Committee with representatives from the devolved administrations

level of business. This cost will be met from within agreed Home Office Departmental Expenditure limits as agreed for the relevant period.

EFFECTS ON PUBLIC SERVICE MANPOWER

281. Implementing the Bill will require diversion of up to ten Home Office staff from other duties for up to five years. There will be a need for an ongoing central unit in the Home Office to oversee the legislation.

282. The Office of the Information Commissioner will be an expansion of the existing Office of the Data Protection Registrar. Up to 150 additional staff will be required to undertake the duties imposed by this Bill.

283. The proposals in the Bill are not anticipated to have a significant impact on manpower levels elsewhere within the public sector.

III The December 1997 White Paper and the Draft Bill

Research Paper 99/61 summarised the original proposals for Freedom of Information (FOI) contained in the White Paper of December 1997.[18] A draft bill was presented to Parliament on 24 May 1999, which contained several differences with the White Paper proposals:

- There were several more exemptions in the draft Bill, but this was partly explained by the fact that some of the areas excluded from the scope of the legislation set out in the white paper were transformed into exemptions, such as criminal investigations and public sector employee records. The exclusions in the draft Bill included the security services, the special forces and GCHQ.
- The 'substantial harm' test was replaced with a test which exempts information where disclosure would 'prejudice' or would be likely to prejudice particular interests.
- The public interest test remained but became a test to be applied by public authorities, when deciding whether exempt information should be disclosed on a discretionary basis, It is the authority which is required to make the decision but it may refuse to make a decision unless told what use the applicant intends to make of the information, and it may place restrictions on the use of any information disclosed.
- Some exemptions were 'class' based, such as information relating to the formulation of government policy.
- Decision making and advice were to be exempt if disclosure would undermine the conventions of collective responsibility in the 'reasonable opinion' of a minister.
- Ministerial certificates were to be issued to exempt information relating to national security, the security services and special forces, and GCHQ. It will be possible to appeal to a new tribunal against the certificates.
- Appeals would be possible from the decisions of the Commissioner to a new tribunal and then on a point of law to the High Court and ultimately to the Lords.

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[18] *Your Right to Know* Cm 3818

- The Information Commissioner and the Data Protection Commissioner would be combined into a single office and the Data Protection Tribunal would be merged with the new information tribunal.

There were many areas where the draft Bill was broadly in line with the white paper proposals:

- The term 'information' was broadly defined to include not only documents but information held in electronic form. However information not 'recorded' was not covered. Information held by a public authority is covered by the Bill, whether or not the authority was the original author of the information is included, as long as it is not held on behalf of another person. In New Zealand 'information' is not defined and commentators consider as a result that its scope is considerably broadened.[19]
- The legislation would be retrospective in effect, so that records already in existence would be covered. Further work was to be carried out on how to dovetail the FOI scheme with historical records, but a number of exemptions would be disapplied for such records.
- A wide range of public bodies would be included, and there was power for the Secretary of State to apply FOI to other bodies with functions of a public nature. However privatised utilities would only be subject where they hold information relating to a public function. The possibility of extending FOI to Parliament itself and bodies accountable to it was raised.
- Fee levels would be specified in regulations (with the amounts likely to be lower than proposed in the white paper) and an authority would be allowed 40 days for a response, to align the time period with that for Data Protection (it is 20 days under the Code of Access).
- Authorities would have a duty to adopt and maintain 'publication schemes' for the proactive disclosure of information. However the white paper envisaged a more extensive duty to make information available.
- Personal information would be exempt if it is personal information about the applicant or disclosure would contravene the data protection principles.
- There would be a power for the Secretary of State to amend or repeal enactments prohibiting disclosure of information.
- A new offence of altering records with intent to prevent disclosure, would be created, going beyond white paper proposals.

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[19] 'Open Government in New Zealand' in *Open Government: Freedom of Information and Privacy* ed Andrew McDonald and Greg Terrill The Danks Committee, which preceded the introduction of legislation in New Zealand, considered that information should not only include 'recorded data, but knowledge of a state of fact of affairs by officers of the agency in their official agency' (*Towards Open Government* p 62)

The draft Bill was the subject of pre-legislative scrutiny by the Public Administration Select Committee. It issued a critical report in July 1999.[20] In addition, a Lords select committee also issued a report, containing a series of criticisms.[21] Over the summer, there were indications that the Government would make a number of amendments to the draft bill to meet some of the criticisms, but on other more fundamental points there was no intention to compromise. The Government issued a summary of responses to the draft bill on the Home Office internet website in October 1999.[22] 2,231 submissions were made, but 1850 of these were from supporters of the National Anti-Vivisection Society. A table showed which provisions of the draft bill were commented on by individual respondees. Copies of all the responses were placed in the Library.[23]

The Government's response to the Public Administration Select Committee report was published on 26 October 1999.[24] The response:

- altered the system under which authorities have to consider whether to release information by making them balance the public interest in disclosure of the information against the public interest in withholding;
- allowed the Commissioner to review that decision and to recommend what the outcome should be;
- reduced to 20 days the time allowed to deal with an application;
- removed the right of an authority to put conditions on how information which they have disclosed to an applicant is used; and
- removed provisions which would have allowed the Government to create new class-based exemptions.

The Committee issued a response to the Home Office reply on 9 November,[25] which reiterated its continuing opposition to a number of Government proposals. In particular, the report noted:

> Nevertheless, we are disappointed that the Government has not amended the basic structure and scheme of the draft Bill. In particular we regret that:
>
> - there will still be no clear presumption in favour of disclosure;
> - the Commissioner will not be able to overrule an authority's decision not to release information using its discretionary power to do so, even if he or she believes that there is a public interest in disclosure. The decision on whether or not information should be disclosed in the public interest (if it is not legally required) will continue to be one taken by Ministers;

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20 HC 570 1998-99
21 HL Paper 97 1998-99
22 *Report on the Public Consultation Exercise on the draft Freedom of Information Bill*
23 Dep 99/1681
24 HC 831 of 1998-99
25 HC 925 of 1998-99

- there will continue to be a large number of *class-based* exemptions in the Bill, rather than *contents-based* exemptions—for example covering information on "the formulation or development of government policy", or on the "operation of ministerial private offices". A class-based exemption acts as a blanket restriction on certain types of information; with a contents-based exemption, information can only be withheld if it can be shown that its disclosure would result in prejudice;
- the test in the case of the contents-based exemptions will be whether disclosure will result in "prejudice", not "substantial" or "significant" prejudice, and will therefore be too weak to result in much disclosure;
- the exemptions remain too broad, in particular that for decision-making and policy formulation, and that relating to commercial interests. As a result the amount of information that will become available will be relatively small.

> We hope that the Government will take note of our disappointment about these aspects of their response, and take the opportunity to look afresh at them before the Bill is introduced.

The report contained an annex which listed the recommendations made by the Committee in its July report to which the Government had agreed or partly agreed.

The Government response to the July report accepted that the maximum length of response should be reduced from the 40 days stated in the draft bill to 20 working days. The Commons and Lords select committees both criticised Clause 44(7) which provided that a public authority was not required to supply information in response to an information notice from the Information Commissioner if that information would expose the authority for proceedings for an offence, other than an offence under the Bill.[26] In its response, the Government agreed to remove Clause 44(7) from the Bill.

Key areas of controversy are discussed below in Part IV, but this Paper does not offer a comprehensive guide to the select committee reports.

By the end of the parliamentary session 1998-9 195 MPs had signed an EDM[27] sponsored by the Chairman of the Public Administration Committee, Tony Wright, calling for substantial improvements to the draft bill.

The Public Administration Select Committee issued a report on the Bill on 3 December. [28] It expressed disappointment that the amended provisions on public interest disclosures and policy formulation did not meet all the Committee's earlier criticisms. It stated:

> ..two issues are fundamental: the failure to strike a proper balance between disclosure and access in relation to the formulation of government policy; and the

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[26] HC 570 para 135 HL Paper 97 paras 48-49
[27] EDM 901 1998-99
[28] HC 78 1999-2000

> failure to give the power to the Information Commissioner to order disclosure of exempt information on public interest grounds. We hope that the House will remedy these failures during its consideration of the Bill.

The report contained an annex which set out the changes from the draft bill to the bill on a clause by clause basis.

IV The *Freedom of Information Bill* – Key Areas of Controversy

This Part examines the main issues in the Bill which have led to continuing controversy over the form and extent of FOI. The changes to data protection legislation are discussed in Research Paper 99/99 The *Freedom of Information Bill: Data Protection Issues*.

A. Purpose Clause

The Public Administration Select Committee report expressed concern that the Bill lacked a clear statement of purpose. The Committee complained that the Government did not fully appreciate the difference between open government and freedom of information:

> 28. In recent years, successive governments have made significant advances in providing information about the processes of government and in opening up government to public scrutiny. Some argue that the Code of Practice has already had an effect on the culture of government. The Home Office's Consultation Document accompanying the draft Bill provides examples of cases in which the present Government has published, without any obligation to do so, documents relating to departmental rules, the facts and analysis behind policy decisions, and other matters. This sort of voluntary openness has sometimes been called "open government"—the title given to the Green Paper of 1979 and the White Paper of 1993. But it is a big leap from this to a proper right of access to information. As Mr Straw told us, "there is a profound difference between a non-statutory Code which is there by the grace and favour of Ministers, and a statutory framework which is there whether Ministers like it or not and which has been passed by Parliament and has all the force of law".This is a central distinction.
>
> 29. The Bill does create a statutory right to information. Yet, as many of our witnesses have pointed out, that right is so hedged about with qualifications and exemptions that it will not cover a large amount of information which the public might want. For much that the public might want to know, it will continue to be within the power of the authority which holds it to decide whether or not to release it. Under the provisions of the Bill, for example, there would be a right to obtain only some of the documents listed in the Home Office Consultation Document as examples of material released voluntarily by the Government. The draft Bill, in short, perpetuates what Robert Hazell describes as a tendency to adopt the "paternalistic model of open government, with the government deciding what we need to know". In three crucial ways, the draft Bill has more in common with non-statutory open government regimes than with statutory Freedom of

> Information ones. First, as long as the disclosure of information could cause prejudice, the authority cannot be forced to release it, even if it may be in the public interest to do so. Second, there will be no general statutory obligation on authorities to publish reasons for administrative decisions; nor to release the facts and analysis behind policy. Third, some of the other matters which are laid down as duties in other Freedom of Information regimes are left to be included in a non-statutory Code of Practice.

The Government response promised some redrafting[29]:

> **Purpose clause**
> **We recommend that the Bill should contain a clear statement indicating what it is intended to achieve and indicating a presumption in favour of disclosure (paragraph 59).**
> The Government proposes to amend the long title of the Bill and to rearrange the clauses in the Bill so that what was clause 8, which the Government hopes is a clear statement of the Bill's intention and creates a presumption in favour of disclosure, subject to the exemptions, becomes clause 1. The Government believes that these amendments, together with the other amendments proposed in the light of the responses set out in this document, achieves the correct balance between openness and other competing rights such as privacy and confidentiality.

The Bill title has been redrafted from a Bill to make provision *about* the disclosure of information to make provision *for* the disclosure of information. The right to information is now set out at the beginning, in Clause 1. The Public Administration latest report however complains that 'there is still no clear presumption in favour of disclosure'[30]

B. Application of the Public Interest Test

Clause 14 of the draft bill required public authorities to consider exercising their discretion to release information which falls into one of the exempt areas. An authority was required to have regard to the public interest in freedom of information when considering whether to exercise its discretion. The Information Commissioner would be able to issue a notice requiring the authority to reconsider its decision, but she would not be able to require the authority to release the information. The Government's response in October accepted the Committee's recommendations:

- that authorities should not have the power to require applicants to state the reason for their request, and that it should not be able to impose restrictions on its release (Clause 14(4)b and 14(6))

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[29] for convenience, the Committee recommendations are printed in bold, with the accompanying Government response for this Part of the Paper

[30] HC 78 1999-2000 para 4

- that the bill be amended to state that unless there is a compelling interest to the contrary, the public interest should be regarded as coming down in favour of disclosure
- that authorities be required to give their reasons for not disclosing under clause 14
- that the Commissioner should require authorities to take a decision under the public interest test, should specify the matters to which the authority should have regard and should have the power to recommend the decision it should come to.

However, the Government did not accept that there should be an explicit requirement to weigh up harm caused by disclosure versus the public interest in disclosure:[31]

> **We believe that it is preferable in Freedom of Information legislation not to leave the question of whether disclosure of information is in the public interest to the discretion of the authority which holds the information. We recommend that, for most of the exemptions, instead of the discretionary provision in clause 14 there should be a requirement to weigh up the harm caused by disclosure against the public interest in disclosure. The judgement arrived at by the authority could then be reviewed, and revised, by the Information Commissioner. Any exemptions which do not contain the requirement to balance prejudice against the public interest should be subject to the discretionary disclosure provisions of clause 14, also reviewable by the Information Commissioner (paragraph 44).**
>
> The public interest in disclosure needs to be carefully balanced by Ministers, who are accountable to Parliament, or other qualified persons against the public interest against disclosure set out in the exemptions in the Bill. In appropriate cases the courts can intervene through judicial review. Nonetheless the views of the Commissioner will also be an important factor to take into account and the Government will amend the Bill to ensure that these views are heard.

Nor did the Government accept that there should be a power for the Commissioner to require disclosure under Clause 14. The Committee response stated:[32]

> The Commissioner will not be able to overrule an authority's decision not to release information using its discretionary power to do so, even if he or she believes that there is a public interest in disclosure. The decision on whether or not information should be disclosed in the public interest (if it is not legally required) will continue to be one taken by Ministers

The Lords select committee commented as follows:[33]

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31 HC 831 1998-99 Government Response The original select committee recommendations are reproduced for ease of reference

32 HC 925 1998-99

33 HL Paper 97 1998-99

20. Lord Williams emphasised that the draft Bill would indeed impose a duty on a Minister or public authority to consider the public interest, but this would be in clause 14, in deciding whether or not to make a discretionary disclosure of exempt information. Clause 14 therefore did "quite a bit in terms of empowerment and entitlement". However, the shift from the position taken in the White Paper became apparent to us only when a close reading of the draft Bill was supplemented by the responses of Lord Williams and his officials in oral evidence. In addition to the duty imposed by clause 14, Lord Williams emphasised that the Information Commissioner could issue a decision notice under clause 43 directing the Minister to consider the public interest in making a decision about whether or not to disclose. But, he said, the final decision in such cases must rest with the relevant Minister alone, because he alone was politically accountable:

"I believe that it is a reasonable argument to say that at the end of the day it is Ministers who ought to be accountable to the public for the discharge of their duties in these difficult areas. The alternative view, which I recognise and understand, is that an outside person ought to be able to do that. I do not think Ministers in these tricky areas are willing to accept that. In fact, I know they are not. I do not think that makes it weak."

We have noted that the power of Ireland's Information Commissioner to make such binding rulings overriding ministerial decisions is not circumscribed in this way. The Irish Commissioner has power to review and overrule ministerial decisions that information is exempt. This reflects the conviction that government information is to be regarded as public property. In our opinion clause 14 should require public authorities to balance the public interest against the harm caused by disclosure rather than merely having regard to it.

21. It is fundamental to Freedom of Information law and practice that government information is seen as belonging to the people, who have a right to see and use the information unless there are good reasons for exempting it. If the ultimate decision whether information is exempt from such a right of access is made by a government Minister or public authority rather than by an independent arbiter, the law may be regarded as a statement of good intentions, but it is not a Freedom of Information Act as that term is internationally understood. As the Bill is at present drafted, a Minister may decide that the public interest in disclosure does not override the harm which may result from the disclosure. In Freedom of Information jargon, the power of an Information Commissioner to overrule that decision is known as "public interest override". **To the extent that the draft Bill represents a move from an enforceable public right of access to government information on the one hand to discretionary disclosure on the other, it abandons the Freedom of Information principles expressed in the White Paper. The most important single way to restore those principles is to give the Information Commissioner a public interest override power in clause 44 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.** As the Home Secretary said in a lecture on 12th May 1999: "Good government depends on rigorous external scrutiny and challenge".

The Campaign for Freedom of Information continued to argue for the Commissioner to make the final decision.[34]

1. Public Interest Discretionary Disclosure – The Bill's Provisions

Clause 13 has been redrafted to reflect the Government response. In particular subsection 4 now reads:

> (4) In making any decision under subsection (2) or (3), the public authority shall have regard to all the circumstances of the case and to the desirability of-
> (a) informing the applicant whether it holds information, and
> (b) communicating information to him,
> wherever the public interest in disclosure outweighs the public interest in maintaining the exemption in question.

This introduces a specific balancing test which is intended to reflect the wording in the non-statutory code. Other changes to the clause are:

- restrictions on its application to certain exemptions, in particular information accessible by other means, personal information, information provided in confidence, prohibitions on disclosure, additional exemptions[35]
- the removal of the right to request reasons from the applicant
- removal of the right to impose conditions on the release of the information
- a new duty on the authority to consider the desirability of communicating factual information used, or to be used to provide an informed background to decision making
- provisions ensuring that discretionary disclosures do not apply to information prejudicial to the effective conduct of public affairs which are the subject of a certificate from the relevant officer of Parliament

A decision under the clause must be made 'within such time as is reasonable in the circumstances' (6(7)). A similar provision appeared in the draft bill. The Campaign have complained that these public interest decisions could be delayed and decisions 'could trickle out in a two stage process, obscuring the point at which a final decision not to disclose has been made'.[36]

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34 CFOI 22 October 1999 'Substantial defects' remain in Freedom of Information proposals'

35 the security services and court records were already not subject to discretionary disclosure under the draft bill, and remain outside its scope

36 CFOI *Queen's Speech Briefing* 23 November 1999

The latest Public Administration report regretted the absence of a more explicit statement that the public interest should be regarded as being in favour of disclosure unless there was a good reason not to disclose. It also drew attention to the fact that seven categories of exemption will not now be subject to the discretionary disclosure provision, rather than the two in the draft bill. [37]

2. The Power of the Commissioner to Recommend a Public Interest Disclosure

The Bill sets out the changes made in the Government response. In particular **Clause 50(7) and 52(2)** give the Commissioner power to issue a decision or enforcement notice

- to require the authority to make a decision in accordance with clause 13
- to specify matters to which the authority must have regard

The Commissioner has power to serve an information notice under **Clause 51** to require the authority to provide the relevant information, so that the Commissioner can ascertain whether the authority has complied with clause 13, as well as other aspects of the bill. This provision replicates that in the draft bill.

The latest report from the Public Administration Select Committee comments on the lack of enforcement power for the Commissioner as follows: 'We do not believe that this is consistent with moving from a code-based to a statutory framework for Freedom of Information'.[38]

The Campaign briefing argues that it is not sufficient to rely on the likelihood that the Commissioner's decisions will be accepted, in the same way as those of the Parliamentary Ombudsman. The briefing instances examples of cases where departments refused to accept the findings of the Ombudsman, and of particular difficulties with acceptance of findings related to the current *Code of Practice on Access to Government Information.*[39]

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37 HC 78 1999-2000
38 HC 78 1999-2000
39 CFOI *Queen's Speech Briefing* 23 November 1999

In his statement to the Scottish Parliament[40], Jim Wallace, the Deputy First Minister laid stress on the fact that the Scottish Information Commissioner would have power to order the disclosure of information in the public interest. However, in limited and specified circumstances the Scottish Ministers would be able to issue certificates protecting information of exceptional sensitivity. This is similar to the Irish FOI Act, where certificates may be issued in relation to law enforcement, security and international relations.[41] The areas covered included aspects of policy advice, law enforcement, international relations, legal proceedings and law enforcement, public appointments and honours.

The Campaign briefing[42] also draws a comparison with the FOI legislation in the Republic of Ireland; the Irish Commissioner can order disclosure for exemptions where there is a public interest test. Ministerial certificates in Ireland cannot be issued in relation to exemptions with a public interest test.

C. Exemptions: Contents v Class

The draft bill contained exemptions which were class based; that its, information which fell into a certain category would be exempt. There were also contents based exemptions where an individual piece of information would be examined to ascertain whether harm would result if it were released. The contents based exemptions required the authority to consider whether disclosure 'would or would be likely to prejudice' the exercise of functions, or privacy of the individual, dependent on the relevant exemption. The Public Administration Committee report set out the types of exemption by class or contents in the draft Bill as follows. Reference to the application of s14 is to the application of the public interest discretionary disclosure, now clause 13 of the Bill. Note that the clause numbers have changed in the Bill before Parliament:

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40 *Scottish Parliament Official Report* 25 November 1999

41 Decisions by an individual Irish minister are reviewable by other members of the government or the courts. See 'Freedom of Information in Ireland' in *Open Government: Freedom of Information and Privacy* ed Andrew McDonald and Greg Terrill 1998. See also the Public Administration Select Committee report and the Lords Select Committee report for further information on the operation of FOI in Ireland

42 CFOI *Queen's Speech Briefing* 23 November 1999

CLASS-BASED EXEMPTIONS*				
		When Exemption to ceases to have effect	**Does duty to confirm or Deny apply**	**Does S.14 Apply ?**
Cl. 16	INFORMATION REASONABLY ACCESSIBLE TO THE PUBLIC	30 years	Yes	Yes
Cl. 17	Information intended for future publication	30 years	Not if it would be reasonable to withhold the information	Yes
Cl. 18	Information supplied by, or relating to the work of, bodies dealing with security matters	No limit	No	No
Cl. 22 (2)	Confidential information obtained from another state or international organisation	No limit	Not if it would involve any disclosure	Yes
Cl. 25	Information relating to investigations and proceedings conducted by public authorities	No limit	No	Yes
Cl. 27	Court records	30 years	No	No
Cl. 28 (1)	Information held by government departments relating to decision-making and policy formulation etc	30 years	No	Yes
Cl. 29	Information relating to communications with Her Majesty, etc, and honours	No limit for communications with Her Majesty, 75 years for honours	No	Yes
Cl. 31	Personal data	No limit	No for information About the requester; not if it would contradict the data protection principles for information about someone else	Yes
Cl. 33	Legal professional privilege	30 years	Yes	Yes
Cl. 34 (1)	Trade secrets	30 years	Not if it would prejudice commercial Interests	Yes

CONTENTS-BASED EXEMPTIONS*				
Clause	**Subject**	**When Exemption ceases to have effect**	**Whether duty to confirm or deny applies**	**Does S.14 Apply**
C1.19	Information required for the purpose of safeguarding national security	No limit	Not if it would involve any disclosure	Yes
Cl. 21	Defence	No limit	Not if it would prejudice	Yes
Cl. 22	International relations	No limit	Not if it would prejudice	Yes
Cl. 23	Relations within the UK	30 years	Not if it would prejudice	Yes
Cl. 24	Economic or financial interests	No limit	Not if it would prejudice	Yes
Cl. 26	Law enforcement	100 years	Not if it would prejudice	Yes
Cl. 28 (3)	Free and frank provision of advice etc	30 years	Not if it would prejudice (in the opinion of a reasonable person)	Yes
Cl. 30	Health and Safety	No limit	Not if it would prejudice	Yes
Cl. 32	Information provided in confidence, disclosure of which would be actionable	No limit	Not if it would constitute a breach of confidence	Yes
Cl. 34 (2)	Commercial interests	30 years	Not if it would prejudice	Yes
Cl. 35	Prohibitions on disclosure	No limit	Not if it would itself be prohibited	Yes

In addition to those shown, clause 36 allows the Secretary of State to exempt information by order. When the exemption ceases to have effect, and whether the duty to confirm or deny applies, can be specified in the Order. Whether this provision is a class-based or contents-based exemption depends on whether the Secretary of State chooses to exempt a whole class of documents.

The Public Administration Committee response deplored some class-based exemptions in the bill, particularly in relation to the formulation and development of government policy. It also considered that certain exemptions remained too broad, for example that relating to commercial interests.

The Government response maintained the need for class based exemptions:[43]

> **Class exemptions**
> **We accept that there is a role for class-based exemptions in a few narrowly-defined areas where there may be a 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 obvious examples. There is an argument for class-based exemptions in areas where the slightest possibility of disclosure could be directly detrimental to important public interests. But such exemptions should be very few; they should be clearly defined; and they must be clearly justified (paragraph 63).**
> The Government believes that the class based exemptions set out in the Bill are indeed small in number, clearly defined and are fully justified.

The Government did not agree with the Lords[44] and Commons[45] committees that the test should be 'substantial' or 'significant' for certain tests:

> **The harm test**
> **There is no reason why different tests should not be used in different circumstances, as they are in much of the overseas legislation. We believe that it would be right under certain of the exemptions to say that only "substantial" or "significant" prejudice should be allowed to prevent disclosure. We recommend that the harm tests for the exemptions in clause 22 (international relations), clause 23 (relations within the UK), clause 24 (economy), and clause 34 (commercial interests) should refer to "substantial" or "significant" "prejudice". We also recommend that for each of the contents-based exemptions the harm caused by disclosure should be explicitly balanced against the public interest in disclosing the information (paragraph 71).**
> The Government considers that the prejudice test as drafted in the Bill states their intentions clearly and is consistent with the way this term is used in other legislation such as the Data Protection Act 1998 and the Local Government Act 1972. The Government believes that to preface the word 'prejudice' within the test with 'substantial' or 'significant' would add an unquantifiable standard which may itself cause confusion. The Government proposes to include, within clause 14, a greater steer to public authorities in balancing the public interest in the exercise of their discretion to disclose.

Clause 25, which exempted investigations and proceedings into accidents, health and safety at work, misconduct of charities etc was the subject of criticism from both the Commons and the Lords select committees.[46] The Government response accepted many

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43 HC 831
44 HL Paper 97 para 32
45 HC 571 paras 64-65
46 HC 870 paras 78-82 and HL Paper 97 paras 24-26

of the arguments that the exemption was drawn too broadly, but maintained a class exemption for criminal investigations.[47] Criticism of the so-called 'jigsaw clause' whereby an authority may refuse to provide information if, when put together with another piece of information, it would enable the applicant to arrive at information which would be exempt[48], was also answered by an agreement by the Government to remove the clause. The Government agreed to amend clause 36, which gave the Secretary of State power to add new exemptions by order, after a recommendation from the Lords Select Committee on Delegated Powers and Deregulation that the power should be limited to those containing a prejudice test.[49] Both the Lords and the Commons committees recommended that the clause be deleted in total.[50]

On other exemptions the Government response did not accept the need for redrafting. In particular, it defended the commercial interest exemption:[51]

> **Commercial interests**
> **We recommend that the commercial interests exemption be replaced by a narrower test (while preserving the existing class exemption for trade secrets) or else, as we have already recommended, is limited to what would cause "substantial" prejudice (paragraph 105).**
> **We recommend that in this clause there should be an explicit public interest test to be balanced against the prejudice arising from disclosure (paragraph 106).**
> The White Paper said 'relations between public authorities and the private sector need to rest on two-way openness and trust'. The scope of the draft Bill is already wide and potentially includes a sizeable proportion of private sector organisations in relation to functions they carry out of a public nature as well as information held by public authorities about private organisations. The exemptions must be capable of working effectively for all public authorities and the Bill must not jeopardise the position of private organisations operating in a commercial environment. The Government believes that the Bill as drafted provides the correct degree of protection both in the sort of information protected and the level of harm required for an exemption to apply. In every case where the exemption applies the authority is required to consider any discretion it may have to disclose information where it is in the public interest to do so (clause 14).
> Clause 14 means that the balancing of the public interest in respect of discretionary disclosures already forms a distinctive step in authorities' consideration of applications for the disclosure of information, and the step has been given greater clarity and weight by the amendments to strengthen clause 14.

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47 HC 831
48 HC 570 para 116
49 HC 831
50 HL Paper 97 para 33 HL 571 para 112
51 HC 831

1. Exemptions- The Bill's Provisions

The Bill does not remove the class exemptions which had appeared in the draft bill. The Campaign has expressed disappointment that the redrafted **clause 28** on investigations still exempts information held for investigations by the police and regulatory bodies. It appears that information can be exempted even after criminal prosecutions have taken place. However the clause has been restricted in scope so that it now applies to criminal investigations, or civil proceedings arising out of such investigations. Security matters continue to be exempted as a class under **clause 21**.

In relation to the contents exemptions, there is no material change to **clause 41** which relates to commercial interests.

The latest Public Administration Select Committee report made the following comments:[52]

> In the draft Bill there was a class-based exemption on information relating to civil proceedings, statutory or other investigations (other than criminal investigations) including investigations into the causes of an accident or under the Companies Acts. After criticism from the Committee and others, the Government has made information relating to regulatory law enforcement functions (including the investigation of accidents) subject to a contents-based, rather than class-based exemption. Information relating to criminal investigations and proceedings, however, remains a class-based exemption, which is quite widely drawn.
>
> The Committee criticised the very widely drawn protection for information relating to the formulation of government policy, and information which would prejudice the commercial interests of any person. These remain in the Bill.
>
> The Committee's recommendation that the test for contents-based exemption should be whether disclosure would result in "substantial" or "significant" prejudice has not been incorporated into the Bill, which makes the test weaker than it should be.
>
> The Committee also criticised the existence in the Bill of a power to confer additional exemptions by order. Although this has been amended so that it is possible to create only additional contents-based exemptions, the power still exists in the Bill as introduced.
>
> Some of the exemptions may continue in existence for a long time after information has become (under the terms of the bill) "historical". For example, information relating to regulatory law enforcement functions may continue to be closed for up to one hundred years.

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[52] HC 78 1999-2000

The Scottish consultation paper[53] proposed both contents and class-based exemptions[54], but promised that contents-based exemptions would be subject to a test of 'substantial harm', echoing the phrase used in the UK White Paper of December 1997.[55]

D. Decision Making and Policy Formulation

Both select committees drew attention to the breadth of this exemption[56], but the Government response continued to emphasise the essential nature of the class based exemption:

> **Decision making and policy formulation**
> **We accept that communications between Ministers, Cabinet and Cabinet Committee proceedings, as well as the provision of advice by law officers, should be covered by a class-based exemption in the Bill. We doubt, however, that information relating to "the formulation or development of government policy" is a sufficiently well-defined class. Nor do we believe that a class-based exemption for the operation of Ministerial private office is appropriate. We recommend, instead, that information that needs to be protected under these two headings should be covered under the contents-based exemptions in subsection (3) (paragraph 89).**
> **We recommend that the Commissioner be enabled to test the correctness with which the exemption for the deliberations of public authorities is claimed, as she will be for the other exemptions; and that the subsection be subject to an explicit public interest override (paragraph 90).**
> **We therefore recommend that the exemption for decision-making and policy formulation should specifically not be taken to apply to purely factual information held by public authorities, nor to analysis, if that information has been created in order to inform policy decisions, and that this distinction should be clearly drawn in the Bill (paragraph 93).**
> The Government believes that it is essential that the class based exemptions for the formulation and development of Government policy and the operation of Ministerial private offices remain. Freedom of Information must allow for the efficient and effective conduct of public affairs. Where a prejudice test is appropriate, the Government believes that the views of Ministers, or relevant qualified persons, should only be capable of being overturned if they are unreasonable. Though the Government does not agree that the exemption for decision making and policy formulation should exclude factual and background information, it recognises that there may be less sensitivity about the disclosure of such material. The Government therefore proposes to provide for an express condition within the discretionary disclosure clause, requiring Departments specifically to consider the public interest in the disclosure of this information.

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53 *Freedom of Information: A Consultation Paper* November 1999

54 class based exemptions were set out in Annex C and included aspects of international relations, policy advice, law enforcement and public appointments and honours. These would also be subject to ministerial certificates

55 *Your Right to Know* Cm 3818

56 HC 570 paras 83-94 HL Paper 97 paras 34-5

The exemption for decision-making and policy formulation extends not only to central government, but also to the public authorities covered by the bill. As well as a class exemption for Cabinet communications, information was exempt under the draft bill if

> 28(3) In the reasonable opinion of a qualified person, disclosure of information under this Act… would, or would be likely to, inhibit-
>
> (b) (i) the free and frank provision of advice, or
>
> (ii) the free and frank exchange of views for the purposes of deliberation, or
>
> (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

1. Decision Making and Policy Formulation – The Bill's Provisions

The Bill introduces some changes from the draft bill. Clause 28 of the draft is split into two clauses: **Clause 33 (formulation of government policy)** and **Clause 34 (effective conduct of public affairs)**. There are no material changes of policy in the redrafting, however. Clause 33 is a class exemption. Clause 33 (1) states:

> **33.** - (1) Information held by a government department is exempt information if it relates to-
> (a) the formulation or development of government policy,
> (b) Ministerial communications,
> (c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or
> (d) the operation of any Ministerial private office.

The draft bill referred to 'communications between Ministers of the Crown, including in particular , proceedings of the Cabinet, or any committee of the Cabinet'.[57] The new definition is intended to clarify that communications between ministers are exempt, even if not forming part of cabinet committee papers.

Clause 34 now extends to the Houses of Parliament, but with a certification system to protect information falling into this exemption. The provisions in Clause 32 exempting information where necessary to avoid an infringement of the privileges of either House are also relevant. Clause 34 also adopts an additional test that information is exempt if the 'reasonable opinion of a qualified person' is that disclosure would be likely to prejudice the effective conduct of public affairs. This replicates the provision in the draft bill. The *Explanatory Notes* state that the exemption applies to information if:

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[57] Clause 28(1)(b), Cm 4355

> its disclosure:
> would, or would be likely to, prejudice the maintenance of the convention of collective ministerial responsibility,
> would, or would be likely to, prejudice the work of the Executive Committee of the Northern Ireland Assembly,
> would, or would be likely to, inhibit the free and frank provision of advice or exchange of views, or
> would otherwise prejudice, or would be likely to otherwise prejudice, the effective conduct of public affairs.

Qualified persons are defined as ministers for government departments, the Presiding Officer for the Northern Ireland Assembly and the First Secretary for the National Assembly for Wales. For other public authorities the relevant minister can authorise another person. For local authorities and public bodies this is likely to be the relevant chief executive.

As noted above, the latest Public Administration Select Committee report continued to criticised the 'very widely drawn protection for information relating to the formulation of government policy' and hoped that the Bill would be amended to address 'the failure to strike a proper balance between disclosure and access '.[58]

The Campaign briefing[59] argues that the exemptions relating to ministerial private offices, communications between ministers are 'blanket' class exemptions, with the conduct of public affairs exemption receiving particular criticism (p 3):

> **The conduct of public affairs**. A near-blanket exemption applies to information which, in the authority's "reasonable opinion" would be likely to "prejudice the effective conduct of public affairs". The latter term is not defined, and offers wide scope for withholding information. But its most worrying aspect is that it gives legal weight to the authority's ***opinion***. As a result, most decisions could not be challenged by the Commissioner, even if they were plainly wrong, for example because the authority had a clearly exaggerated view of the consequences of disclosure. Decisions could be overturned only on the judicial review test of "reasonableness", that is, that the authority's decision was absurd or irrational. This provision appears to be based on an exemption in New Zealand's FOI Act, but that contains no less than four safeguards against abuse - all of which have been omitted from the UK bill. [60]

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58 HC 78 1999-2000

59 CFOI Queen's Speech Briefing 23 November 1999

60 The CFOI briefing states :'The four safeguards are as follows: Section 9(2)(g) Official Information Act 1982 (New Zealand). This exemption (i) requires objective evidence that disclosure would be harmful, the authority's "opinion" is irrelevant (ii) permits only two specific types of harm to be taken into account: harm to the frank exchanges of opinions by officials or ministers, and the need to protect officials from improper pressure or harassment - the UK bill is open ended on this point (iii) the withholding of information must be "necessary" for one of these purposes, a strict test and (iv) even if

The Campaign also expressed disappointment that the formulation of the government policy class exemption had not undergone significant redrafting, despite commitments from Jack Straw on the desirability of allowing disclosure of factual or background information.[61]As noted above, there is a new duty on authorities to have regard to the desirability of releasing such information when considering the discretionary public interest disclosure under clause 13.

The Campaign argue that the current *Code* still allows more information on policy formulation to be released than the equivalent provisions in the Bill;[62]

> This represents a retreat from the position under the openness code (*the Code of Practice on Access to Government Information*) introduced by the Conservatives in 1994. Under the code:
> Information relating to policy can only be withheld if disclosure would "harm the frankness and candour of internal discussion". This initial presumption, that information should be available unless disclosure can be shown to be harmful, is not found in the bill.
> Even if disclosure would be harmful, the Ombudsman can still recommend disclosure if the public interest in openness outweighs any harm.
> The facts and analysis of the facts relied on in reaching decisions must be published by departments.

However the July Public Administration Committee report maintained that comparisons with the Code overstated the case, since FOI legislation gave statutory rights in place of the discretionary system of the Code.[63]

The Campaign briefing draws attention to the original 1997 white paper provisions which introduced a 'harm' test. It also contrasted the FOI legislation in Ireland where only the 'deliberative processes' of an authority are exempt and the exemption only applies where disclosure is shown to be 'contrary to the public interest'. Nor does the exemption apply to factual information or scientific or technical advice.[64]

The Scottish consultation paper referred to an exemption for policy advice which would be a combination of contents and class based exemptions[65]with a duty to publish factual background information. Ministerial certificates would be used to protect very sensitive information.

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all these conditions are met the information must still be revealed if the harm is outweighed by the public interest in disclosure'

61 HC 570 1998-0 Q 1076

62 p 2

63 HC 570 paras 28-29

64 *Freedom of Information Act 1997*, section 20

65 para 4.18

E. FOI and Parliamentary Privilege

The Bill extends FOI to Parliament, but a key exemption is the certification system under clause 32. The Speaker or the Clerk of the Parliaments has power to issue a certificate to avoid an infringement of the privileges of Parliament.

The Bill does not attempt a definition of Parliamentary privilege. The extent of privilege was most recently examined in the report of the Joint Committee on Parliamentary Privilege in April 1999.[66] The report summarised the key components as follows:

> Parliamentary privilege is, in its detail, a complex, technical and somewhat arcane subject. This is partly because of its historic origins and partly because of the multifarious functions of Parliament. Parliament is a legislative and deliberative assembly. Its main constitutional role is to enact the law and, in the case of the House of Commons, to grant supply (that is, make financial provision for the expenses of government). Parliament is also 'the grand inquest of the nation': it is the forum where any grievance may be aired, however small or great. It is the place where the government is called to account by representatives of the whole nation. John Stuart Mill described one task of the legislature as 'to watch and control the government: to throw the light of publicity on its acts'. Ministers can be required to explain to Parliament what is done by them in their capacity as ministers or by their departments, so that members of Parliament can, where necessary, criticise the way public affairs are being administered and public money is being spent. So Parliament must be able to consider any matter it chooses and, principally through its committees, investigate any matter. If there is a national emergency it is only through Parliament that effective action can be taken. The two Houses need sufficient power and authority both to carry out their everyday business and, occasionally, to deal with extraordinary and extreme situations.
>
> 12. **Freedom of speech** is central to Parliament's role. Members must be able to speak and criticise without fear of penalty. This is fundamental to the effective working of Parliament, and is achieved by the primary parliamentary privilege: the absolute protection of 'proceedings in Parliament' guaranteed by **article 9 of the Bill of Rights 1689**. Members are not exposed to any civil or criminal liabilities in respect of what they say or do in the course of proceedings in Parliament. There is no comprehensive definition of the term proceedings in Parliament, although it has often been recommended there should be. Proceedings are broadly interpreted to mean what is said or done in the formal proceedings of either House or the committees of either House, together with conversations, letters and other documentation directly connected with those proceedings.
>
> 13. The other main component of parliamentary privilege is still called by the antiquated name of **'exclusive cognisance'** (or 'exclusive jurisdiction'). Parliament must have sole control over all aspects of its own affairs: to determine for itself what the procedures shall be, whether there has been a breach of its

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[66] HL Paper 43 HC 214 1998-9 The report was debated in the Commons in October (HC Deb 27 October 1999 vol 336 c1020- 1074

> procedures and what then should happen. This privilege is also of fundamental importance. Indeed, acceptance by the executive and the courts of law that Parliament has the right to make its own rules, and has unquestioned authority over the procedures it employs as legislator, is of scarcely less importance than the right to freedom of speech. Both rights are essential elements in parliamentary independence.
>
> 14. Parliament's right to regulate its own affairs includes the **power to discipline its own members** for misconduct and, further, **power to punish anyone**, whether a member or not, for behaviour interfering substantially with the proper conduct of parliamentary business. Such interference is known as contempt of Parliament. This falls within the penal jurisdiction exercised by each House to ensure it can carry out its constitutional functions properly and that its members and officers are not obstructed or impeded, for example by threats or bribes. The sanctions available are reprimand, imprisonment for the remainder of the session and, possibly in the House of Lords, but probably not in the House of Commons, a fine of unlimited amount. Even in the House of Lords the power to impose a fine has not been used in modern times. Members of the House of Commons are also liable to suspension for any period up to the remainder of the Parliament (though there is no modern case of suspension for anything like this length). Members so suspended usually forfeit their salaries for the period of their suspension. Members of the House of Commons can be expelled, although it is over 50 years since the power of expulsion was last used.]
>
> 15. Another aspect of Parliament's right to regulate its own internal affairs concerns the application of legislation to activities taking place within the Houses of Parliament. In 1934 the courts decided, in the *A P Herbert* case, that the sale of alcohol in the precincts of the House of Commons without a justices' licence was a matter relating to the internal affairs of the House and that no court had power to interfere. Since then, Acts of Parliament have been taken not to apply within the precincts of either House in the absence of express provision that they should apply. Among the legislation taken not to apply are the Health and Safety at Work etc. Act 1974 and the Data Protection Acts 1984 and 1998. In practice Parliament voluntarily abides by some of these statutory provisions.

The Joint Committee recommended that there should be legislation clarifying that, in respect of matters not directly and closely related to proceedings in Parliament, that there should be a principle of statutory interpretation that, in the absence of a contrary expression of intention, Acts of Parliament bind both Houses.[67] It also recommended legislation to define certain key concepts such as 'proceedings in Parliament' and to restrict the scope of exclusive cognisance (sole control over internal affairs).[68]

The report of the Public Administration Select Committee on the white paper *Your Right to Know*[69] considered that the administrative functions of Parliament should be subject to FOI and hoped that the Joint Committee on Parliamentary Privilege would review the

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67 para 251
68 para 376
69 HC 398 1997-98

question in its report. The Joint Committee's report on parliamentary privilege did not address the issue, but in correspondence with the Home Secretary, the chairman, Lord Nicholls, considered that FOI should not apply to Parliament itself.[70] As the proposals on Parliament did not form part of the draft bill, the Public Administration Committee did not make specific comment in its report of July 1999.[71]

There are a number of administrative functions in Parliament which would not be considered as coming within the term Parliamentary privilege. These include personnel matters, information services with no direct connections with proceedings in Parliament, catering, and other household activities. Records containing personal information relating to staff or members would come within the data protection legislation. See Research Paper 99/99 The *Freedom of Information Bill: Data Protection Issues* for further details.

Internal House documents directly relating to proceedings in Parliament were considered by the Joint Committee to be within the definition of 'proceedings in Parliament'. The Joint Committee also considered that exclusive cognisance could well apply to arrangements made by Black Rod and the Serjeant at Arms for the security and proper functioning of the two Houses, and action taken by either House to implement decisions of the Speaker or relevant committee on for instance, the use of committee rooms or the rules governing parliamentary groups.[72] There has been some uncertainty as to whether registration of Members' interests is a proceeding in Parliament.[73]

The certification procedure outlined in clause 32 is not one of the exemptions excluded from the duty in clause 13 to consider whether the public interest in disclosure outweighs the public interest in maintaining the exemption. If the conclusion is that disclosure is justified, then the information is released, notwithstanding the exemption. If the information is not released, then the Commissioner would appear to have the power to serve an information notice under clause 50 requiring the Speaker or Clerk of the Parliaments to release the information so that she can make a judgement as to whether there has been compliance with the legislation. She would also appear to have the power to make a recommendation to the Speaker or Clerk of the Parliaments that the information be released under clause 13, but this recommendation cannot be enforced by the Commissioner.

There is another certification power under clause 34(6) to protect the disclosure of information which would be likely to prejudice the free and frank provision of advice, or

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70 see HL Paper 43 HC 214 Volume III p181

71 HC 570 1998-99

72 para 117

73 HL Paper 43 HC Paper 214 1998-9 para 122. See also *Hamilton v Al Fayed* [1999] 3 All ER 317 CA where the Court of Appeal held that the proceedings Commissioner for Standards and the Standards and Privileges Committee constituted proceedings in Parliament. The decision in the Court of Appeal is discussed in *Public Law* Autumn 1999 'The Courts in conflict with Parliament?' The House of Lords judgement on the case has not yet been published but it is understood that it does not differ from the Appeal Court on the question of the Commissioner and the Committee being proceedings in Parliament

the effective conduct of public affairs. Such material would presumably cover items such as confidential advice from officers of the House to Members. In this subsection the Speaker or Clerk of the Parliaments has to certify 'in his reasonable opinion'. It is therefore unlikely that a further examination of the information under clause 13 would result in disclosure, as once again Parliament would be using its judgement as to the public interest in deciding between disclosure or not. This presumably is the reason why clause 34(6) is specifically removed from the duty to consider a discretionary disclosure under clause 13(7).

The possibility of judicial review of certificates issued by the Speaker or Clerk of the Parliaments is not specifically excluded by the Bill's provisions. There may be occasional circumstances where there will be strong public interest reasons for disclosure, for example in cases of possible corruption. The question of advice for the Speaker and Clerk of the Parliaments also arises. There is no statutory provision for an advisory panel.

V FOI and Accountability to Parliament

The *Code of Practice on Access to Government Information* is specifically referred to in the parliamentary resolution on accountability passed in March 1997. The resolution states:

> MINISTERIAL ACCOUNTABILITY TO PARLIAMENT
>
> *[Relevant documents: Second report from the Public Service Committee of Session 1995-96, on ministerial accountability on responsibility (HC 313), the Government's response thereto (HC 67 of Session of 1996-97) and the first report from the Public Service Committee of Session 1996-97, on ministerial accountability and responsibility (HC 234).]*
>
> *Motion made, and Question put forthwith, pursuant to Order [19 March],*
>
> That in the opinion of this House, the following principles should govern the conduct of Ministers of the Crown in relation to Parliament:
>
> (1) Ministers have a duty to Parliament to account, and be held to account, for the policies. decisions and actions of their Departments and Next Steps Agencies:
>
> (2) It is of paramount importance that Ministers give accurate and truthful information to parliament, correcting any inadvertent error at the earliest opportunity. Ministers who knowingly mislead Parliament will be expected to offer their resignation to the Prime Minister:
>
> 3) Ministers should be as open as possible with Parliament, refusing to provide information only when disclosure would not be in the public interest, which should be decided in accordance with relevant statute and the Government's Code of Practice on Access to Government Information (Second Edition, January 1997);

> (4) Similarly, Ministers should require civil servants who give evidence before Parliamentary Committees on their behalf and under their directions to be as helpful as possible in providing accurate, truthful and full information in accordance with the duties and responsibilities of civil servants as set out in the Civil Service Code (January 1996).

The parliamentary resolution was not debated by the Commons but is the culmination of work by the Public Service Committee on ministerial accountability. A similar resolution was passed in the Lords.[74] The Public Administration Committee has published two reports[75] which examine the parliamentary questions not answered by Government on an annual basis; the most recent report notes that a number of departments are failing to cite the Code exemptions, and that there has been little improvement since the previous year's report

There are similar references to the Code in the Osmotherly Rules, and the *Guidance on Answering Parliamentary Questions: Basic Do's and Don'ts* which offer guidance to civil servants giving evidence before select committees.[76]

The role of the Code was addressed by the Parliamentary Ombudsman in his first report on the operation of the Code[77]

> 21. The charge that misleading or incomplete information has been given can come up in various guises. I have been asked if I am able to validate or vouch for the accuracy of information which Ministers have given in Parliamentary statements, Parliamentary answers and so forth. The answer to that is "no". I can, however, investigate a complaint that, after making a request for information under the Code outside Parliament, a Member of Parliament (or any other complainant) has been given inaccurate or only partial information. Such a complaint in the case of a Member would, however, need to be referred to me by a second Member. It is not possible under the 1967 Act for Members of Parliament to put to me complaints on their own behalf.

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74 HL Deb 20 March 1997 vol 579 c 1055-1062

75 *Ministerial Accountability and Parliamentary Questions* HC 820 1997-98 and HC 821 1998-99

76 *Departmental Evidence and Response to Select Committees* January 1997. For background on these guidance notes see Research Paper 97/5 *The Accountability Debate: Codes of Guidance and Questions of Procedure for Ministers*

77 HC 91 1994-95

The Information Commissioner will not be bound by the MP filter rule which applies to cases dealt with by the Parliamentary Ombudsman. However the Commissioner would presumably be inhibited from examining the accuracy of Parliamentary Answers by the question of parliamentary privilege. [78] There would be nothing to stop the Commissioner from examining a complaint from a Member if the original request was repeated in a letter outside Parliament and an unsatisfactory response was considered to have been given.

The parliamentary resolution and Government guidance documents are likely to need redrafting a later stage to take account of a new statutory FOI regime.

[78] However it has become increasingly common in judicial review proceedings for the subject of a ministerial statement made in Parliament to be the subject of attention. The Joint Committee on Parliamentary Privilege recommended that Article 9 of the Bill of Rights should not be interpreted as precluding the use of proceedings in Parliament for the purpose of judicial review of governmental decisions (HL Paper 43 HC Paper 214 1998-9 para 55)

Appendix Access to Environmental Information[79]

As interest in the environment increases and confidence in official bodies to look after public interest decreases there is a growing demand for access to information. One of the areas where this demand is very noticeable is information about the environment. There have been a number of stories regarding damage, or potential damage, to the environment. These stories are often based on information that may, or may not, be that being used by the Government. Environmental Non-Governmental Organisations such as Friends of the Earth believe the information used by the Government to make decisions affecting the environment should be freely available for others to judge the validity of those decisions.

Currently this function is governed by regulations.[80] The 1992 Regulations came into force on 31 December 1992 and implement the 1990 EU Directive on Public Access to Environmental Information (90/313/EEC). The *Environment Protection Act 1990* is also important in this area as it made a wide range of environmental information held by enforcement agencies, such as the Environment Agency, publicly available on Public Registers. (The Environment Agency has booklets which describe the types of information that it will provide).[81]

The Directive entitles the public to access information about the environment that is held by government and public authorities in their own, or other, Member States. This access is limited by exemptions to information on the grounds of commercial confidentiality or national security. The Campaign for Freedom of Information believes that the wording of the Directive allows these exemptions to be utilised too freely: that the information must only relate to, for example, national security rather than harm it.[82]

Within the confines of the exemptions, any information relating to the state of water, air, soil, fauna, flora, land and natural sites should be available for public scrutiny. Also available should be information on activities which are likely to adversely affect these environmental concerns or to protect them. Such information should be supplied within two months of a request and reasons must be given for refusal.

Matthew Taylor MP introduced a Private Members Bill, *Access to Environmental Information*, on 8 February 1999 which was not given a second reading. Friends of the Earth supported the introduction of the Bill:

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79 Supplied by Stephen McGinness, Science and Environment Section

80 *Environmental Information Regulations 1992* (SI 3240)

81 Access to environmental information: "Protecting the environment starts with checking the facts", Environment Agency, March 1999 and "Public registers of environmental information", Environment Agency, March 1999

82 http://www.cfoi.org.uk/envregslordsev.html

> The Bill, if passed, would lead to the generation of neighbourhood pollution maps, so that people can see what pollution is released into their area by factories, rubbish tips, transport and other pollution sources. It would enable them to see which pollution sources are the largest and what the health impacts may be. The Bill has been introduced as a means of making the Government deliver on their Election promise to introduce "comprehensive pollution inventories".[83]

It is the intention of the Government to implement changes in public access to environmental information to allow the ratification of the UNECE Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (sometimes called the Aarhus Convention). The convention was adopted in Denmark in June 1998 and covers information held by public authorities. The Convention has not yet come into force, requiring ratification by 16 countries and so there is, as yet, no legal requirement to introduce the legislation or come into line with the requirements of the Convention. A copy of the Convention is available on the UNECE website.[84]

The main requirements of the Convention are: access to information, public participation, and access to justice. The definition used by the Convention for environmental matters is wider than that used in current UK Regulations. The definition includes even those issues related to decisions regarding the environment such as land use planning, health and safety and economic issues. There is also provision within the Convention to cover information relating to biodiversity and genetically modified organisms. There are projects listed within the Convention in which public participation is obligatory, mainly relating to developments involving, for example, waste management and energy. Finally, there are provisions intended to make it easier for the general public to act, through the courts, in response to infringement of national environmental law.

There are also tighter requirements, within the Convention, for response to requests for information. Information will have to be provided within one month rather than two and there remains a right to appeal in case of a refusal for access.

Clause 73 gives the Secretary of State power to issue regulations to implement the information provisions of the Aarhus Convention. Under **clause 37** information is exempt information if the public authority holding it is obliged to make the information available through regulations under clause 73.

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83 http://www.foe.co.uk/factorywatch/intros/news.html

84 http://www.unece.org/env/europe/ppconven.htm