

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

Liberty's Briefing:

Freedom of Information (Amendment) Bill

May 2007

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at

<http://www.liberty-human-rights.org.uk/publications/1-policy-papers/index.shtml>

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Introduction

1. The Freedom of Information (Amendment) Bill 06-07 (the Bill) is a private member's bill introduced by David Maclean MP.¹ The Bill has been unopposed by the Government whose official position has been neutral. The Bill sets out to exempt Parliament from the Freedom of Information Act 2000 (the Act). It would achieve this by amending the Act in two ways:

- a) Removing both Houses of Parliament from the list of public bodies in Schedule 1; and
- b) Making communications between Members of the House of Commons and public bodies exempt from the Act.

The Bill, currently at Report stage in the House of Commons, ran out of time on Friday 21st April during the first day of report stage. The Bill is tabled to be debated again on Friday 18th May.

2. No substantive justifications have been given for the changes and we are not, therefore, convinced of the need to amend the Act in the way this Bill proposes. In Liberty's view the many exemptions that already exist under the Act (discussed below) already offer adequate protection against any requirement to disclose information in inappropriate situations. If it were established that existing exemptions do not offer adequate protection in a particular set of circumstances, the best course of action would be to create specific new exemptions to cover those possibilities rather a blanket exemption covering Parliament as a whole.

3. Liberty urges MPs to oppose this Bill which would exempt the very heart of government and the law making process from public scrutiny and accountability. Tony Blair said, while in opposition:

“A Freedom of Information Act would entitle the public to government information and would leave it to government to justify why information

¹ A backbench member of the House of Commons Commission

should not be released. I don't believe that its impact would simply be in the pure matter of legislation, in the detail of the legislation. It would also signal a culture change that would make a dramatic difference to the way that Britain is governed. The very fact of its introduction will signal a new relationship between government and people: a relationship which sees the public as legitimate stakeholders in the running of the country and sees election to serve the public as being given on trust.”²

If they allowed this Bill to pass into law, Liberty fears that parliamentarians would be sending out a clear signal that they consider themselves to be above the law. This would undermine the culture of open and transparent government which the Act was designed to create and severely damage the already eroding public trust and confidence in the democratic process as a whole.

4. This Bill would also fundamentally undermine the credibility of the Act itself. Other public bodies, subject to the requirements of the Act, might legitimately ask themselves why they should continue to abide by a piece of legislation when the body that made that legislation is itself exempt.

Background

5. Following international moves towards greater freedom of information,³ the UK Government published a White Paper entitled “Your Right to Know” in 1997. This formed the basis of the Act which came into effect in January 2005. Under the Act a member of the public may make a request for information to any of the public bodies listed in Schedule 1. Such request may only be refused where an exemption applies (these are discussed below).

² Speech by the Rt.Hon. Tony Blair MP, then Leader of the Labour Party in opposition at the Campaign for Freedom of Information's annual Awards ceremony on the 25 March 1996

³ The Council of Europe, which is responsible for the European Convention for the Protection of Human Rights and Fundamental Freedoms, made a recommendation to all member states that they implement Freedom of Information Laws in 1981.

6. At present both Houses of Parliament are included in Schedule 1 and are, therefore, subject to the requirements of the Act. The inclusion of Parliament was not, however, a Government proposal. Instead, it was recommended by the Public Administration Select Committee report in response to the “Your Right to Know” consultation.⁴ The Home Office draft Freedom of Information Bill, published in May 1999, accepted the case for including Parliament and was accompanied by a consultation document which noted that discussions, regarding the inclusion or otherwise of both Houses of Parliament, were continuing with the House authorities.⁵ A further report from the Public Administration Select Committee on the draft Bill strongly supported the extension of the Bill to Parliament⁶. The FoI Bill was therefore introduced with the two Houses of Parliament included within Schedule 1.

Removal of both Houses of Parliament from Schedule 1

7. Liberty does not believe there to be any substantive justification for Mr Maclean’s proposal to amend the Act by removing both Houses of Parliament from the list of public bodies in Schedule 1. Given the amount of consideration that was given to this question when the Act was initially debated it is very surprising that these proposals have progressed this far.
8. The most high profile public concern about the impact of these proposals is the right to request information relating to MPs’ expenses. At present the Act allows requests for information on all sorts of matters, including expenses claimed by officials and officers across the whole of the public sector including ministers, councillors, senior civil servants, the judiciary, the police and local authority executives. The case has not been made for exempting Members of the Houses of

⁴ “Your right to Know: The Government’s proposals for a Freedom of Information Act”, 1997-98, HC 398, Recommendation 16

⁵ Freedom of Information: Consultation on draft legislation Cm 4355 May 1999 Home Office para 53

⁶ HC 570 1998-99 para 24

Parliament alone, whilst continuing to allow other public figures and senior officials to remain subject to requests under the Act.

9. We appreciate that the coverage of expenses claims in the press may sometimes fail to recognise or explain legitimate reasons for such expenditure leading to unjust criticism of a particular Member. However, we consider removing Parliament completely from the scope of the Act to be a disproportionate reaction to this potential problem. Liberty fears that preventing the public from being able to make requests for information about MPs' expenses may exacerbate public loss of confidence and mistrust in MPs. We are not satisfied by the voluntary undertaking to publish details of expenditure by Members of the Houses of Commons and as yet, no public commitment has been made from the House of Lords regarding the publication of expenses of its Members. Furthermore Liberty is concerned that the publications schemes of both Houses would no longer be approved by an independent body in the form of the Information Commissioner.

10. Access to information about parliamentarian's expenses is not the only matter for concern. If Parliament were removed from the scope of the Act this would deny the public the right to see all sorts of other information, the disclosure of which may be in the public interest. This could, for example, include:
 - Advice or evidence given to Parliamentary Select Committees or other communications with industry or other stakeholders;
 - Briefing documents and research prepared by the House of Commons or the House of Lords libraries;
 - Information about works of art, antiquities or historical documents within the Palace of Westminster;
 - Security arrangements; and
 - Administrative matters such as information pertaining to the salaries of Parliamentary staff, contracts agreed with cleaners or other sub-contractors. numbers of public visitors to Parliament, details of alcohol or food consumed.

Where there is good reason why this type of information should not be made public we take the view that there would most likely already be adequate protection offered by the Act's existing exemptions (discussed below). In the unlikely event that there is no suitable existing exemption for a particular situation, we believe that the solution should be the creation of a new exemption to cover those specific circumstances rather than a blanket exemption for Parliament as a whole.

Members' Communications

11. The Bill proposes a new exemption to cover all communications⁷ between Members of the House of Commons⁸ and the public bodies listed in Schedule 1⁹. The aim of this new exemption is to ensure that Members' communications with public bodies cannot be accessed by means of a freedom of information request made to the public body (individual MPs already being exempt from the Act). Liberty does not consider that a special case has been made to exempt MPs' communications with public bodies when the communications of other public officials such as those working in the NHS, schools and the education service, local authorities, Government departments, the police etc enjoy no such special protection.
12. The debate at Committee stage in the House of Commons focused almost exclusively on the need to protect individual constituents. Liberty is not however, aware of any individual examples of improper disclosure nor of any complaints from constituents about such improper disclosure resulting from the Act. Furthermore, Liberty takes the view that individual constituents are adequately protected by the exemptions that already exist under the Act (discussed below) and,

⁷ Originally the Bill was drafted as 'correspondence' but was amended in Public Bill Committee to 'communications' to include email and other forms of communication.

⁸ Originally the Bill was drafted as relating to correspondence between 'Members of Parliament' and public bodies but was amended in Public Bill Committee to refer to Members of the House of Commons only, in the debate David Maclean said at Column 5; "If those in the other place consider that there is a problem with their correspondence of the same magnitude as we have discovered with ours, I leave it to them to amend the clause."

⁹ The exemption for Member's communications is to be inserted into the Act at S. 34 (to become part of the absolute exemption relating to parliamentary privilege, discussed below) as S. 34A.

in particular the protection against disclosure of personal information protected by the Data Protection Act 1998. Liberty is concerned that making communications between Members and public bodies exempt from the Act will add nothing extra to the protection of individual constituents who are already well protected by the Act. It could, in fact, exempt from disclosure Members' communications with public bodies on matters relating to a whole range of policy issues the disclosure of which may well be of public interest.

13. During debates Mr. Maclean expressed concern about inadvertent disclosures of personal data, despite accepting that constituents were already protected under the existing exemptions under the Act.¹⁰ Liberty takes the view that, if a matter already falls within an exemption, it is unnecessary to create a new exemption. We would also draw to MPs' attention, the protection that the Data Protection Act 1998 offers to individuals in respect of personal information held about them by public bodies. Applying Mr Maclean's rationale would suggest that any new exemption is just as likely to be overlooked as applicable existing ones.

14. Mr Maclean also expressed concerns about the need to protect disclosure of information in which an MP has privately expressed concerns about the veracity of a constituent to a public authority.¹¹ This is a red herring and, in reality, this concern would not be addressed by the Bill. When requested by a third party i.e. not the constituent to which the personal comment refers, information of this kind would fall within the exemption for personal data under S. 40(2) of the Act (discussed below).¹² When requested by the constituent themselves, the Act would not, in fact, be relevant. A person wishing to obtain information about him or herself would make the request under the DPA, not the Act. This Bill would not in any way amend the DPA and would not, therefore, have any effect on the ability of

¹⁰ Freedom of Information (Amendment) Bill Committee, 7 February 2007, cols. 7 and 8.

¹¹ Freedom of Information (Amendment) Bill Committee, 7 February 2007, col. 8

¹² The situation regarding what makes data 'personal' within the meaning of 'personal data' under the DPA is now much clearer after the judgement in the case of *Michael John Durant v Financial Services Authority* [2003] EWCA Civ 1746 Court of Appeal.

a constituent to obtain, under that legislation, disparaging comments made about them by their MP to a public body.¹³

15. If Parliament agreed to this blanket exemption Liberty fears that the credibility of the Act itself, which has a stated aim of making government more open and accessible, would be undermined. While we appreciate the very real and important need for Members of Parliament to protect the special relationship they enjoy with their constituents and the need, where appropriate, for confidentiality, we consider these relationships to be well protected by the exemptions that already exist under the Act.

Existing exemptions

16. On reading through the debates on this Bill one could be forgiven for thinking that the proposed changes are vitally needed because the Act requires the disclosure of information in all sorts of inappropriate situations. This is, however, very far from the truth. The Act already contains a raft of exemptions which enable a public body listed in Schedule 1 to refuse to comply with a freedom of information request. These apply just as much to Parliament as to other public bodies and it is because of their existence that we consider this Bill to be unnecessary.
17. One of the exemptions which would often apply to the kind of situations used to justify this Bill is the exemption under section 30 for investigations and proceedings conducted by public authorities. Section 30 is a qualified exemption and covers information relating to the obtaining of information from confidential sources. As a qualified exemption, information can only be withheld if ‘in all the circumstances of the case the public interest in maintaining the exemption outweighs the public

¹³ “The Freedom of Information Act does not override the Data Protection Act – freedom of information requests cannot be used to get personal information about people other than the applicant.” ; www.dca.gov.uk/ccpd/faqdp.htm

interest in disclosing the information.’¹⁴ The exemption for law enforcement under S.31 (also qualified) may also be relevant and indeed the issue of law enforcement was raised as a potential problem in Committee debate.^{15 16}

18. During the passage of the Act, the requirement of a public interest test was removed for a number of exemptions making them ‘absolute’¹⁷. Some of these absolute exemptions would apply to Parliament, making the Bill unnecessary. Indeed some are specifically designed to exempt sensitive information held by Parliament. Those which are most likely to apply include:

- *The exemption for parliamentary privilege under S. 34*

This allows Parliament to certify certain information as exempt on a case by case basis. Parliamentary privilege is a matter of constitutional law going back to the Seventeenth Century and is not defined by the Act.¹⁸ Under this exemption a ‘conclusive certificate’ of parliamentary privilege is signed by an ‘appropriate authority’ – either the Speaker in the House of Commons or the Clerk of Parliaments at the House of Lords. The Bill proposes to insert the exemption covering communications within this exemption as S. 34A.

- *The exemption for prejudice to effective conduct of public affairs under S. 36*

This allows Parliament to certify certain information as exempt on a case by case basis¹⁹. For information (other than ‘statistical information’) to be exempt by virtue of S.36, it must in the ‘reasonable opinion of a qualified person’ be capable of either prejudicing or inhibiting various matters listed

¹⁴ S.2(2)(b). The application of the public interest test is decided on a case by case basis, for example it has been successfully used to protect government policy which was said to be still evolving on a particular issue and has failed to stop information being made public when it was successfully argued that dissemination of such information would assist public understanding of an issue subject to national debate.

¹⁵ Freedom of Information (Amendment) Bill Committee, 7 February 2007, col. 11

¹⁶ S.31 covers information held for the purpose of an investigation which could lead or could have led to criminal proceedings as well as any information which if disclosed is likely to prejudice the prevention or detection of a crime or the apprehension or prosecution of offender(s).

¹⁷ Note that the Bill proposes to insert the exemption covering Member’s communications as S.34A within the S. 34 exemption for parliamentary privilege (discussed below) which is one of the absolute exemptions.

¹⁸ For more information see Information Commissioner’s publication Freedom of Information Awareness Guidance No. 28

¹⁹ For more information see Information Commissioner’s publication Freedom of Information Awareness Guidance No. 25

under the Act. The ‘qualified person’ in respect of Parliament is defined in the Act as the Speaker in the House of Commons or the Clerk of Parliaments in the House of Lords.

- *The exemption for personal data under S.40 (2)*
Following the case of *Durant*²⁰ and decisions by the Information Commissioners the operation of the S. 40 exemption is becoming clearer. The key principle seems to be the question of fairness to the third party about whom a request for information has been received. Under the operation of this exemption, once it is established that the information constitutes personal data, it will only be lawfully disclosed with the consent of the individual concerned or if the information is already in the public domain.
- *The exemption for information provided in confidence under S.41:*
In many cases we would expect this exemption to protect all communications between an MP and a public body about a constituent’s personal affairs even if the communications itself were not marked ‘confidential’. This is because the nature of the relationship between a MP and his/her constituent and between the MP and the public body carries an implicit expectation of confidentiality recognisable by the courts.

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²⁰ *Michael John Durant v Financial Services Authority* [2003] EWCA Civ 1746 Court of Appeal.