

HOUSE OF LORDS

Select Committee on the Constitution

5th Report of Session 2006–07

Freedom of Information (Amendment) Bill

Report

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Select Committee on the Constitution

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To examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution.

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Freedom of Information (Amendment) Bill

Introduction

1. The Committee is appointed “to examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution”. The subject matter of the Freedom of Information (Amendment) Bill, which has at present no date for Second Reading, is of constitutional significance. We consider that aspects of the bill raise broad questions of principle about principal parts of the constitution. We draw these matters to the attention of the House. The merits of the policy pursued by this bill will be for the House as a whole to consider.
2. Two constitutional principles are at issue. One is the effective accountability of public authorities, an element of which is the right of members of the public and journalists to have access to official information unless there is a compelling public interest against disclosure. The other is the ability of members of both Houses of Parliament to deal with grievances brought to them by individuals on the basis of trust and confidentiality, which is a key part of the democratic process. Both these principles affect the reputation of Parliament. That reputation is at risk if Parliament is seen to be seeking exemptions from the normal mechanisms of accountability to which other public institutions are now subject. But it is also the case that public confidence in Parliament will be undermined if members of the public cannot call upon parliamentarians to help them with problems for fear of sensitive personal information being open to public examination.
3. The bill seeks to amend the Freedom of Information Act 2000. The 2000 Act established legal rights to request and obtain access to information held by public authorities listed in Schedule 1. There are however three main ways in which citizens, journalists and others may be barred from having access to information held by public authorities.
 - The first is in situations where the public authority in question is not listed in Schedule 1. So, for example, the Security Service and the Secret Intelligence Service are exempt. The bill proposes to amend Schedule 1 by omitting “The House of Commons” and “The House of Lords”, thus completely removing Parliament from the ambit of the 2000 Act.
 - A second way of barring access to information is to exempt from disclosure a whole category of information or record. The bill proposes to create a new class of exempt information: that which is “held only by virtue of being contained in any communication between a member of the House of Commons, acting in his capacity as such, and a public authority” (clause 1(3)).
 - Third, there are “contents-based” exemptions. Here the public authority must look at each piece of information requested and apply a public interest test by assessing whether disclosure “would, or would be likely to, prejudice” a number of specified interests. These include, for example,

the administration of justice (section 31 of the 2000 Act). The bill does not propose to create any new exemptions of this type.

4. The 2000 Act is legislation of constitutional importance. As such, any proposal to amend it should proceed with caution and proportionality lest it produces unintended consequences. The legal relationship between citizen and state should not be altered without proper investigation and deliberation. Private Members' Bills have a useful role to play in drawing attention to problems and on occasion improving the statute book. It must, however, be open to doubt whether the passage of a Commons Private Member's Bill is a satisfactory method of bringing about constitutional reform, particularly a reform that will have a very significant impact on both Houses of Parliament. At the very least it presents a stark contrast to the manner in which the 2000 Act came to be enacted—preceded by a White Paper and pre-legislative scrutiny by committees in both Houses. **In several respects we believe that the Freedom of Information (Amendment) Bill does not meet the requirements of caution and proportionality in enacting legislation of constitutional importance.**

Excluding both Houses of Parliament from the Freedom of Information regime

5. We draw to the attention of the House the fact that the bill will remove the House of Commons and the House of Lords altogether from the statutory regime for freedom of information contained in the 2000 Act. Clause 1(2) of the bill removes both Houses from the list of public authorities subject to the 2000 Act set out in Schedule 1.
6. It is unclear how this provision is related to the main issue highlighted by the bill's proponents, namely the need to prevent public authorities from disclosing information sent to them by MPs about their constituents. Sensitive personal information about members of the public is unlikely to be disclosed by the House of Commons or the House of Lords for the simple reason that neither House holds such information; it is **Members** of Parliament who hold such correspondence and **Members** are not public authorities for the purposes of the 2000 Act.
7. One consequence of excluding both Houses from the list of public authorities is that they will no longer be subject to the statutory requirement under the 2000 Act to adopt and publish a "publication scheme".¹ Both Houses have such publication schemes that operate under the protection provided by sections 34 and 36 of the 2000 Act, which provide that information can be withheld if disclosure would infringe the privileges of Parliament or might be prejudicial to the effective conduct of public affairs. David Maclean MP, who introduced the bill to the House of Commons, revealed during Public Bill Committee and Third Reading that assurances had been given by the Speaker of the House of Commons that, if the bill received Royal Assent, the publication scheme of the House of Commons—which includes members' allowances and travel costs—would not be withdrawn.²

¹ For current schemes see http://www.parliament.uk/parliamentary_publications_and_archives/commons_foi.cfm and http://www.parliament.uk/parliamentary_publications_and_archives/freedom_of_information_in_the_house_of_lords/foi_lords_scheme.cfm

² HC Deb 7 February 2007 Col 7; HC Deb 18 May 2007 col 915.

8. **During the passage of the Freedom of Information Bill in 2000 there was careful consideration of whether the administrative functions of the House of Commons and House of Lords should or should not be exempt from the Act. The decision was taken that they should not be exempt. We are unaware of any compelling case, based on constitutional principle, to change that decision. We take the view that voluntary undertakings, even those given by the Speaker of the House of Commons or those that might be given by the House of Lords authorities in the future, cannot be regarded (from a constitutional point of view) as a satisfactory substitute for a legally enforceable right to access to information.**

Protecting personal information of members of the public from disclosure

9. In relation to the other main aspect of the bill—which seeks to provide firmer guarantees against the inappropriate disclosure of personal information contained in MPs’ letters to public authorities—we draw three points to the attention of the House.
10. First, we note that during the bill’s passage through the House of Commons, several MPs referred to actual or hypothetical situations in which personal information about constituents contained in letters or emails from MPs to public authorities had been—or might be liable to be—disclosed by the public authority following requests under the 2000 Act. However, opponents of the bill say that where this has happened or might happen, disclosure would be contrary to the terms of the 2000 Act in its current form as there ought to be an assessment by the public authority to ensure that disclosure does not contravene relevant class and contents-based exemptions.³
11. Whilst we are not aware of any examples of MPs’ correspondence being wrongly disclosed in this way, we do draw attention to a possible role for the Information Commissioner. The 2000 Act established this office, setting out a duty “to promote the observance by public authorities of the requirements of this Act” (section 47) and a right to lay reports before each House of Parliament (section 49). One way forward may be for the Information Commissioner to conduct a thorough investigation into the concerns raised by MPs about their constituency casework correspondence and to lay a report before both Houses for further consideration. **We believe that the House may be in a better position to assess the nature and extent of the problem, and any proposed remedies, in the light of a report by the Information Commissioner.**
12. Second, clause 1(3) of the bill is in some respects far too widely drawn. It includes communication **on any matter** between Members of the House of Commons and public authorities. This will create a class exemption which is far wider than the mischief about which concerns are expressed. MPs write to public authorities about many matters unconnected to complaints by

³ These exempt from disclosure: personal information about an identifiable individual whose disclosure would breach any of the data protection principles in the Data Protection Act 1998 (section 40); information whose disclosure would be a breach of confidence at common law (section 41); information whose disclosure would be likely to prejudice the prevention or detection of crime, the apprehension or prosecution of offenders, the administration of justice, the assessment or collection of tax, the operation of immigration controls, the maintenance of prison security or other regulatory functions (section 31); and information held by authorities in connection with criminal proceedings or investigations (section 30).

aggrieved constituents. The House will wish to consider whether this is a proportionate restriction on the right to freedom of information.

13. Third, clause 1(3) of the bill is also in some respects too narrowly drawn. It makes no provision for the better protection of communications by members of the House of Lords. It is undoubtedly the case that MPs receive many more approaches from individuals with problems, but it should not be overlooked that many peers are also asked to assist individuals with grievances or problems. Moreover, if in the future the composition of the House of Lords is altered to include elected members, members of the House of Lords may have “casework”.
14. **The disclosure of correspondence between members of both Houses of Parliament and public authorities on the subject of individuals is a serious matter and should be explicitly prohibited. However, we do not believe that this mischief is addressed in a sufficiently proportionate and specific manner in clause 1(3) of the bill.**