# The Campaign for Freedom of Information

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## PUBLICATION OF MPS' AND PEERS' EXPENSES

### Draft Freedom of Information (Parliament) Order 2009

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The Campaign for Freedom of Information hopes MPs and Peers will oppose this draft Order when it comes before both Houses of Parliament on January 22.

The proposed Order would remove information about MPs' and Peers' expenses claims from the scope of the Freedom of Information Act 2000. If approved, the public will not be entitled to any information about such payments other than annual totals, broken down under various headings.

MPs and Peers would then be the only public figures protected from disclosure of the details of their individual expenses payments. Item by item details of claims made by senior police officers, local authority and NHS chief executives, councillors, university vice-chancellors, quango heads, BBC executives, judges, Members of the Scottish Parliament and countless less exalted public servants are available under the FOI Act.

If an official claims expenses for the cost of, for example, attending a conference, their travel, hotel and subsistence costs will be publicly available afterwards under the FOI Act. If an MP or Peer does the same, their expenses will be secret.

Publication of a single figure at the end of the year for the MP's/Peer's annual claims for hotel accommodation has obvious shortcomings. If the total is, say £1,500 there will be no way of knowing whether this represents 20 nights accommodation at £75 a night or two nights at £750. The figure will be meaningless without further details, which would not be available.

Parliamentarians would be unique in avoiding the scrutiny which they themselves have prescribed for the rest of the public sector. Such a move can only damage Parliament's public standing.

**Lack of consultation**

The speed with which this measure is being introduced raises serious questions of propriety. It cannot be right for members of Parliament to legislate to remove information about their own affairs from scrutiny on the basis of a measure introduced with such extreme haste in a manner clearly calculated to avoid public attention or criticism. The draft Order was published only a week before it is due to be voted upon, the debate will be limited to a maximum of two hours and the Order will come into force the day after it is approved. There has been no prior notice that any such move was being considered, no consultation, no discussion of the case for change and no public consideration of possible alternatives. It is unacceptable to remove an existing public right of access to information, which has been upheld by the Information Tribunal and the High Court, in this way[1].

The proposed Order would be made under Section 7(3) of the FOI Act. This allows the Secretary of State to amend Schedule 1 of the Act (which contains the list of public authorities covered by the legislation) to restrict the right of access to specified information held by a particular authority or to remove or amend an existing restriction.

**Concerns during the Bill's committee stage**

At the time of the FOI Bill's committee stage in the Commons, this provision was to have been exercised under the negative resolution procedure.[2] MPs from all sides

[1] I Information Tribunal Information Tribunal Appeals Numbers: EA/2007/0060, 0061, 0062, 0063, 0122, 0123, 0131, Corporate Officer of the House of Commons and Information Commissioner and Ben Leapman, Heather Brooke and Michael Thomas. High Court: Corporate Officer of the House of Commons & Information Commissioner [2008] EWHC 1084 (Admin)

[2] Orders introduced into Parliament under the 'negative resolution procedure' automatically become law after a set period without being debated unless there is enough pressure. Orders introduced under the 'affirmative resolution procedure' must be approved by both Houses of Parliament before

of the House expressed concern that it would allow large swathes of information to be removed from the scope of the Act without proper reason or scrutiny.[3]

In reply the then Parliamentary Under Secretary of State at the Home Office, Mike O'Brien MP, said the clause was:

> *"relatively innocuous and…necessary to give the Secretary power to amend schedules as functions of public bodies change, new ones are created and others cease to exist".*

He added it might be used to deal with freedom of information which had "*inadvertently*" been applied and referred to it several times as a *"good housekeeping"* measure:

> *"The clause does not have the dramatic implications that some have suggested, but it is a fairly mundane and benign provision…it is a good housekeeping provision, which does not merit the fear and concern that some have expressed".*

And he dismissed the concerns expressed by MPs:

> *"If it is being suggested, in a paranoid way, that the Home Secretary might introduce the Bill and then pass further legislation by way of negative resolution to subvert it, that is in the realm of absurdity."*

Although the order making procedure was later changed to require an affirmative resolution, the prospect of substantial restrictions to the Act being introduced with minimal discussion or scrutiny can no longer be dismissed as either 'paranoid' or absurd.

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they come law. The final Act requires that Orders under section 7(3) be approved by affirmative resolution.

[3] Mark Fisher MP (Lab) suggested that it *"allows the Secretary of State to delete any area of information from any part of any organisation listed in schedule 1. It is not paranoia to say that could happen"* (Standing Committee B, Freedom of Information Bill, Third Sitting, 11.1.2000 col. 73). David Heath MP (Lib Dem) expressed concern that it would give the Secretary of State *"the discretion to exclude large areas from public scrutiny, with only the merest nod towards parliamentary proprieties"* (col.69, same sitting) John Greenway MP (Con) suggested that the government must have intended the provision to apply only the list of quangos and other miscellaneous bodies referred to in parts VI and VII of Schedule 1, but not to major public authorities: "*I cannot conceive that the Government would seek to limit, through an amendment to schedule 1, information relating to such public authorities"* he said. (col. 71, same sitting)

**Unseemly haste**

It is hard to see any justification for the speed with which this proposal is being introduced. The fact that detailed disclosure of expenses is required under the FOI Act has been apparent to public authorities since at least January 2005 when the right of access came into force. The House of Commons has appealed against a number of decisions of the Information Commissioner requiring the disclosure of information about expenses (and, indeed, has been the only public authority out of the 100,000 covered by the FOI Act to do so). This has resulted in two decisions by the Information Tribunal, both requiring disclosure.[4] One of these, relating to the disclosure of individual payments under the Additional Cost Allowance scheme, was the subject of an appeal by the House of Commons to the High Court. In May 2008, the High Court upheld the Tribunal's decision.

The legal position has therefore been beyond question for at least 8 months. There has been no subsequent event - certainly no recent development - which now requires Parliament to act at a week's notice without prior discussion.

The consequence of this last minute decision would be that a project to publish documentation relating to all MPs' expenses for the last several years[5] is to be cancelled, despite costs said to be of the order of £1m. Parliament is normally the severest critic of late decisions to cancel projects after substantial expenditure has been incurred.

**Existing protection for information about Parliament**

The draft Order has no implications for information about Parliamentarians' home addresses, which have been excluded from disclosure under the FOI Act since July 2008 as a result of a previous Order.[6]

The same Order also removed from the Act's scope information about expenditure on security arrangements, information about forthcoming or regular travel arrangements (on the grounds that these might involve a risk to members' security) and information about those providing goods or services to a member's residential address.

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[4] Information Tribunal EA/2006/0015 and 0016, Corporate Officer of the House of Commons and Information Commissioner & Norman Baker MP; Information Tribunal Information Tribunal Appeals Numbers: EA/2007/0060, 0061, 0062, 0063, 0122, 0123, 0131, Corporate Officer of the House of Commons and Information Commissioner and Ben Leapman, Heather Brooke and Michael Thomas.

[5] The proactive disclosure envisaged by this exercise is not itself required by the FOI Act which, in relation to such information, only requires that it be disclosed on request.

[6] The Freedom of Information (Parliament and National Assembly for Wales) Order 2008.

Information about MPs' constituency correspondence, which in 2007 featured prominently in debates relating to a private member's bill to remove both Houses of Parliament from the FOI Act[7], is not affected by the present Order.[8]

The FOI Act already contains a specific exemption for information whose disclosure would infringe Parliamentary privilege (section 34). In addition Parliament has additional specific protection under an exemption in section 36 of the Act. This exempts information which, "in the reasonable opinion of a qualified person" would be likely to inhibit (a) the free and frank provision of advice, (b) the free and frank exchange of views for the purposes of deliberation, or (c) would otherwise prejudice the effective conduct of public affairs.

Both Houses of Parliament have in effect secured a power of veto in relation to this exemption. The House authorities, unlike any other body, can issue a conclusive certificate that disclosure of information held by either House would have the prejudicial effects referred to in this exemption. This could prevent any decision which could arguably fall within the exemption from being reviewed by the Information Commissioner or Tribunal. In addition, the public interest test which normally applies to this exemption is set aside in relation to Parliament.

The veto power provided by this mechanism has been used by the House of Commons authorities to prevent the release of the names of MPs' staff, on the deeply implausible grounds that if the public knew who worked in an MP's office, their ability to identify them and address them by name would be so disruptive of their ability to work "without unwarranted interruption" as to prejudice the effective conduct of public affairs by MPs[9].

It seems likely that the actual reason for the House's use of the veto in this case was to prevent the identification family members employed by MPs, a further attempt to prevent examination of their use of public funds.

The draft Order would be a further substantial step in this highly undesirable direction and we hope Parliament will reject it.

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[7] The Freedom of Information (Amendment) Bill 2008 introduced by David Maclean MP. See: http://www.cfoi.org.uk/macleanbill.html

[8] Such information is already protected from disclosure by the FOI Act's exemptions for personal information (section 40) and information whose disclosure would be an actionable breach of confidence (section 41) and possibly by other exemptions as well. The Information Commissioner has issued guidance on the handling of requests for such information: 'Guidance on Dealing with Requests for MPs' Correspondence Relating to Constituents', 6 August 2007.

[9] Information Commissioner, Decision Notice FS50073128, 4 September 2006