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Chapter 11

Obtaining information from an overmighty subject

The parliamentary experience

Howard Davis

1 Introduction

Reluctant public authorities can be compelled to disclose information under the terms of the Freedom of Information Act 2000. Scheduled authorities have a duty to disclose information, subject to various exemptions, in a process where disputes are resolved by the Information Commissioner subject to appeal before the First Tier Tribunal. Statutes dealing with specific matters may also impose duties of disclosure on public bodies—such as regulations giving effect to the Aarhus Convention.[1] The Act's provisions do not limit the purposes for which the information is obtained, and there is an absolute prohibition on using the Act to obtain personal information. Disclosure can be a major resource for journalists, pressure groups, authors, and others seeking to further public discussion on public affairs. This link between freedom of information and effective advocacy on public affairs is recognised in human rights law. Freedom of information is, in a qualified way, an incident of freedom of expression. The qualification links disclosure to the core purpose of freedom of expression and, thereby, limits it to the furtherance of public discourse on public affairs.[2]

Compelling information from reluctant private or commercial bodies is more difficult. The obvious causes of this relate to private interests and the protection of property, privacy, and commercial confidentiality which place private and commercial bodies into a different legal category from public bodies.[3]

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1 Under s 39 Freedom of Information Act 2000 Aarhus regulations are made under s 74 Freedom of Information Act 2000 or, like the Environmental Information Regulations 2004, under section 2(2) European Communities Act, implementing Council Directive 2003/4/EC(2); these will be retained EU law under s 2 European Union (Withdrawal) Act 2018.

2 *Magyar v Hungary* (2020) 71 EHRR 2, see, in particular, paragraphs 157 *passim*; the case refers, *inter alia*, to *Claude-Reyes v Chile* Inter-American Court of Human Rights Judgment of September 19, 2006, see paragraphs 84–87.

3 As acknowledged, conversely, in Laws J's (as he then was) seminal statement in *R v Somerset County Council ex p Fewings* [1995] 1 All ER 513, 524 on the difference between private and public action—and in, for example, judicial analysis of 'public authority' and 'public function' in respect of the

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And yet, obviously, private commercial interests are politically important. Self-interested corporate decisions can have significant public effects; corporations pursue their interests through political advocacy and campaigning (though the latter is regulated at least during the election window), and the overall effects of the commercial media on the nature and direction of political discourse have long been, and continue to be, matters of concern.[4] A recent development is the involvement of commercial corporations in moving beyond advocacy to the exercise of power in pursuit of public purposes.[5] Of particular importance is that commercial Internet corporations have platforms which may facilitate the engagement of others in prohibitable actions in the public sphere, such as, it is alleged, interferences with elections (the Digital, Culture, Media and Sport Select Committee—DCMS SC—inquiry into 'fake news' in this context is discussed later) or the encouragement and organisation of illegal or democratically damaging acts of protest.[6] The willingness of such companies to disclose information on these matters and to cooperate with formal investigations is an ongoing question of concern. The contractual power of the companies is such that they can dictate the terms of cooperation even to public authorities.[7]

The involvement of private, commercial interests in public affairs seems to have become more prominent in the twenty-first century. This can be explained, no doubt, mainly by the interrelated themes of the balance of private and public power that serves economic globalisation and by the patterns of power and ownership that have grown up to serve the Internet.

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This involvement raises the subsidiary question of obtaining and disclosing information of relevance to public discourse from reluctant commercial organisations. This question, in this chapter, is considered by a brief discussion of rules of disclosure in private law and the powers of regulatory bodies. The principal focus is on parliamentary procedures, particularly those of the UK Parliament, for compelling disclosure of information from reluctant commercial bodies for the purpose of advancing public discourse on important public

application and convention rights under the Human Rights Act 1998 and the decisions etc that are amenable to judicial review under CPR Part 54.

4 E.g. Jamie Smyth, 'Murdoch's News Corp accused of undermining democracy', *Financial Times*, April 12, 2021 reporting an attack on News Corporation by Malcolm Turnbull (former Australian PM) for 'eroding democracy in the US and Australia by dividing people and undermining institutions with lies and populist right wing ideology'.

5 In 2021, in the US, Major League Baseball boycotted Georgia as a venue for major games, doing so in support of those opposing changes to that state's election laws, see Sam Levine, 'Major League Baseball pulls All-Star Game from Georgia over Voting Law', *The Guardian*, April 2, 2021; representatives of Coca Cola and Delta Airways made critical interventions in the same dispute.

6 For example, in relation to the occupation of the Capitol in Washington, DC, on January 6, 2021—*The Financial Times,* March 25, 2021, and April 13, 2021.

7 For example, over Covid-19 tracing: Leo Kelion 'NHS Covid-19 app update blocked for breaking Apple and Google Rules', *BBC News*, April 12, 2021, www.bbc.co.uk/news/technology-56713017

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issues. In theory, Parliament, on the basis of its privileges, can break through the proprietorial protection enjoyed by commercial and private bodies. But as will be seen, the practice is more complex.

2 Disclosure by regulatory and legal methods

2.1 The parliamentary commissioner

The parliamentary commissioner, in the course of investigating a scheduled public authority for alleged 'maladministration' causing injustice to an individual (or a breach of duty under the Victims Code), can compel information or documents from ministers and departments but also from 'any other person,' if such would be relevant to the investigation and her powers and sanctions are referenced to those of a court.[8] This allows a possible route to public disclosure since the consequent report is, *inter alia*, made to the appropriate MP and a more general report may be laid before Parliament.[9] But any disclosure of private information will be secondary to the main aim—which is the investigation of a public authority. Furthermore, the commercial or contractual transactions of government departments are not matters for the Ombudsman to investigate, which limits the likelihood that publicly significant information, held by private or commercial bodies, will be disclosed.

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2.2 Regulatory agencies

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Compelling information from reluctant private or commercial bodies can also be done by statutory regulators.

Their powers to compel disclosure relate to the purposes of the legislation they enforce. The Electoral Commission, for example, enforcing the Political Parties, Elections, and Referendums Act 2000, can compel the disclosure of documents from regulated persons (such as political parties and candidates), which relate to income and expenditure. Where an offence under the act is suspected its powers are greater and include not just requiring documents but also the provision of information and explanations. This includes a power to require attendance at a meeting and to answer questions. Disclosure can be enforced by a document disclosure order or an information order from a court. It is an offence, under Schedule 19B(13) not to comply. If the requirement is in the form of a court order, the punishment is either under Schedule 19B or for contempt of court, but not both.[10]

8 Parliamentary Commissioner Act 1967, section 8(1), (1A) and (2).
9 Parliamentary Commissioner Act 1967, section 10.
10 Political Parties, Elections and Referendums Act 2000, section 146 and Schedule 19B; Schedule 20.

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The Information Commissioner's Office also has extensive powers to obtain information not just from controllers and processors of information (where this is necessary for carrying out the Commissioner's functions) but also from 'any person' where this is necessary to investigate certain alleged failures of data protection which would justify an enforcement notice.[11]

The general point remains that regulators are there to supervise the application of the law in the regulated area. They are not there to bring information into the public space or to publish compelled information in order to advance public debate. Information obtained is used for the purposes of investigation. Where a monetary penalty is imposed a public, reasoned judgment is given which reflects and may refer to compelled information—but the aim is to explain the decision rather than to bring information into a public space in order to facilitate public deliberation. The Electoral Commission is seeking to increase its powers of compulsion so that it can obtain relevant information outside the context of a particular investigation and from bodies such as suppliers of digital platforms that it does not regulate. But quite properly, the purpose is not contribution to political debate, rather it is to enable earlier interventions which might prevent unlawful activity by regulated persons in an election or referendum in the first place.[12]

2.3 Litigation

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Compelling information from private and commercial bodies can be done in the context of litigation through discovery, particularly as required under CPR Part 31. Predominantly this involves disclosure of documents within the control of the parties.[13] Other statutory provisions exist for obtaining information from third parties if it appears to the court (not the parties) to be relevant to the proceedings.[14] A court may also order disclosure from a third party innocently 'mixed up' or 'involved' in the alleged wrongdoing which is the subject of the proceedings and who can be said to have a 'duty to assist'.[15] Disclosures are limited by professional legal privilege. Furthermore, a private person may seek to avoid disclosure on public interest grounds in which case a judicial hearing based on public interest immunity principles can take place.[16]

11 Data Protection Act 2018 Part 6, see in particular section 142 linked to section 149.

12 The Electoral Commission, 'Digital Campaigning: increasing transparency for voters', (5. Enforcing the Rules (EC June, 2018)), *The UK Electoral Commission, London, UK* (2018)

13 Civil Procedure Rules (CPR) Part 31.8

14 S 34 Senior Courts Act 1981, s 53 County Court Act 1984 facilitated by CPR Part 31.17 (where the documents are necessary to dispose of the case 'fairly').

15 That is, a *Norwich Pharmacal* order—see *Norwich Pharmacal v Customs and Excise Commissioners* [1974] AC 133, especially at 175, per Lord Reid; discussed by Tomlinson LJ in *NML Capital v Chapman Freeborn Holdings* [2013] EWCA Civ 589, paragraph 25.

16 CPR Rule 31.9, which allows an ex parte application and a procedure. This does not affect the procedure for a public interest immunity claim discussed in *Al Rawi v The Security Services* [2011]

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Before disclosed documents have been used in the hearing, their use is restricted to the purposes of the litigation by CPR Rule 31.22. Once they are read in or by the court or used at a public hearing, they are in a different position. CPR 31.22(2) does not prohibit further use, and by implication, such documents in the public domain can be used for private or political purposes by the litigants or anyone else, subject to a power with a party or document owner to seek a court order restricting further use.[17]

Independently of CPR 31, CPR 5(4C)(2) permits 'non-parties' (i.e. not excluding media or pressure groups) to seek access to documents forming the 'records of the court'. On top of this is an inherent common law power to grant disclosure to others of the 'parties' written submissions and arguments' and to 'documents which have been placed before the court and referred to during the hearing',[18] even against the interests of a party to the litigation. In *Cape Intermediate Holdings Ltd v Dring*, the UK Supreme Court (applying the Court of Appeal judgment in *Guardian News and Media v City of Westminster Magistrates Court*[19]) took CPR 5(4C)(2) as a minimum on which the common law, in suitable situations, may build. If, applying only the rules, the media (for example) can properly be refused access, the common law provides the framework for the applicant to persuade a court to order otherwise. The common law acts as an independent and overriding ground on which a third party can seek such documents against the wishes of a party or any other information supplier. The principle behind this is 'open justice'. Importantly, from the point of view of facilitating political discourse, the Supreme Court refused to confine the justification of 'open justice' to the scrutiny of the way the courts operate and the holding of judges to account. Open justice justifies the disclosure of documents placed before the court in so far as they help to explain 'why decisions are taken', and this requires that the public may 'understand the issues and the evidence adduced in support of the parties' case'[20]. This is a powerful freedom of information principle available to the media, pressure groups, individual MPs, or anyone, justifying disclosure on the grounds of a general contribution to public and political debate, even against the wishes of those who produced the documents. But it is a right to seek, not a right to obtain in any circumstances. If disclosure is resisted, the applicant must still give reasons

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UKSC 34. See *D v NSPCC* [1978] AC 171, 220 for authority that public interest claims are not confined to state agencies (though in that case the NSPCC had statutory powers).

17 This replaces an implied obligation against further public use of documents read in court upheld by the House of Lords in *Home Office v Harman* [1983] 1 AC 280. Any such implied obligation is replaced by the absence of a ban on further use subject to the power of litigants or owners to seek a limiting order in CPR 31.(2); this was confirmed in *Marlwood Commercial Inc v Kozeny* [2004] EWCA Civ 798, see paragraph 10.

18 *Cape Intermediate Holdings Ltd v Dring* [2019] UKSC 38, 44.

19 [2012] EWCA Civ 420.

20 *Cape Intermediate Holdings Ltd v Dring* [2019] UKSC 38, 43.

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why the open justice principle, albeit in this broad sense, requires disclosure and that these reasons outweigh arguments to the contrary. Arguments resisting disclosure can relate to harm done not just to the judicial process but also harm to the 'legitimate interests of others'—such as protecting privacy, confidentiality, national security, or the rights of minors. There are also practical arguments (e.g. that the documents are no longer available). This disclosure to a third party under either CPR 5(4C)2, or 'open justice', depends upon a properly exercised judicial discretion which (as in *Cape*) is subject to appeal.

Cape widens the 'open justice' principle so that significant weight can be given, in any judicial balancing exercise, to the contribution of the disclosed information to public debate on the underlying general issue which, in some aspect, had come before the court. This relates disclosure to the central, political, purpose of freedom of expression and also extends it to compelling disclosure from unwilling private or commercial bodies.

But there remain two major limits. Firstly, the documents will be those limited by the interests of the litigants, and second, disclosure can be resisted if the balance of factors so requires. The relative weight of the rights and interests of the discloser and of others will be measured through judicial eyes—the judicial function is to do justice in the particular case, not to further political debate in a democracy. In any event, this is the disclosure of documents and information; it has nothing to do with compelling attendance or providing opportunities for questioning and cross-examination.

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3 Parliament

Compelling information from reluctant private individuals or commercial bodies can be done, as outlined in the previous section, in the context of litigation and regulation. But the point of these contexts is not, directly, the advancement of public understanding and the moving forward of political debate. This is a function of pressure groups, the media, and Parliament. But only the last of these claims the authority to compel disclosure of documents and information, including from private persons. These powers work best in a voluntary manner; in so far as they involve compulsion they have been shown to be limited, noticeably in the inquiry into 'disinformation and "fake" news' by the Commons DCMS SC, concluded in 2019.

3.1 The underlying privilege

House of Commons claims, as part of its customary law, 'that it is entitled to demand the use of every means of information which may seem needful, and, therefore, to call for all documents which it requires'[21]. The information is for

21 Josef Redlich, *The Procedure of the House of Commons* Volume 2, (London: Archibold Constable & Co Ltd, 1908): 39.

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its legislative and scrutiny functions but, directly or indirectly, is, through publication, also a pervasive source of information for broader public deliberation. Most information is received by the House from the government (willingly or at least because legally bound) in the form of Command Papers and Act Papers or through answers to questions. But each House can also seek papers through a 'motion for a return'. This is done by a 'humble address' to the Sovereign if the information is sought from the Privy Council or a department headed by a secretary of state; otherwise by an order of the House.[22] The humble address gives some constitutional basis, the exercise of the executive prerogative, for a refusal to provide the information,[23] but it is also likely to be a proceeding in Parliament which makes the information privileged, thus also protecting the government.

3.2 Select committees

The undisputed 'right of the House to summon any subject of the state as a witness, to put questions to him and to examine any memoranda in his possession'[24] remains but has been largely delegated to select committees.[25] Select committees have only the purposes and powers given them by Standing Orders[26] and, it seems, have no inherent powers to do things incidental to their express powers.[27] SO152 authorises the setting up of select committees, such as DCMS, whose purpose is 'to examine the expenditure, administration and policy' of government departments. SO152(4) sets out the general powers of these select committees which, famously, include the power '(a) to send for persons, papers and records . . . and to report from time to time', and SO135(1) authorises such committees with these powers to publish names of witnesses and evidence.

In sending for 'persons, papers and records', select committees cannot exercise powers that belong only to the whole House (such as the humble address)[28] and will be subject to general restraints on parliamentary publications such as the *sub judice* rules.[29] Otherwise their powers to seek information are not expressly limited.

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22 Op Cit. 7.31.
23 Op Cit. page 41–2.
24 Op cit. page 39.
25 Erskine May, *Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 25th edition, (2019), 38.1. Seeking out and publishing written and oral evidence is one of the distinguishing 'key characteristics' of select committees.
26 Ibid.
27 Richard Gordon QC and Amy Street, *Select Committees and Coercive Powers—Clarity or Confusion?* (London: Constitution Society, 2012) 23–26.
28 That is, they have no power to order a secretary of state to produce papers.
29 Found in the Orders and Resolutions appended to the Standing Orders. See Erskine May, note 25, 38.25, which gives the example of the suspension of an inquiry on sub judice grounds—Committee

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The scope of a select committee's power to seek information and compel witnesses has been subject to considerable discussion and debate since the inception of the modern system, in 1979, and before. The discussion has focused on obtaining information and evidence from ministers, civil servants, and MPs.[30] This is because, although there is strong political pressure and practice for cooperation, the constitutional and procedural impediments in this area, such as the 'Law Officer's convention',[31] or the complex rules relating to civil servants,[32] remain and can be used to limit disclosure if political circumstances dictate.

But the power to send for persons papers and records applies to private persons and their papers too. Erskine May refers to the production of papers from 'private bodies or individuals', and there is no obvious reason why this principle should not also apply to persons as witnesses. This power is described as unlimited, subject only to a test of relevance defined in terms of the 'order of reference'—the powers delegated to the committee by Parliament[33] In the case of departmental select committees, formally, these powers relate to examining 'the expenditure, administration and policy' of the linked government department and of associated public bodies.[34] In practice, select committees have wide discretion to interpret their powers as they see fit.[35] It is now widely recognised that select committee activity has gone beyond ex post scrutiny of government departments and public bodies and can now have a broader public purpose of promoting parliamentary and public deliberation on public affairs. In evidence to the Committee of Privileges, it was suggested that select committees were becoming 'agent[s] of change': investigating, on their own motion, issues of public concern and promoting public awareness and change.[36] Inquiries may also move beyond policy to the behaviour of named

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of Privileges 1st Report session 2016–17 Conduct of Witnesses . . . paras 10–15; see also Committee of Privileges 1st Special Report 2014–15 paras 2–5. These are in the context of the phone hacking scandal.

30 The First Report of the Select Committee on Procedure 1977–1978, Appendix C Memorandum by the Clerk of the House, 'Powers of Select Committees to send for Persons, Papers and Records'. For subsequent parliamentary actions, see the list of later committee reports and the analysis and discussion in Richard Kelly, *Select Committees: evidence and witnesses,* Briefing Paper 6208, House of Commons Library, June 2, 2016.

31 House of Commons Procedure Committee, 'The House's power to call for papers: procedure and practice', Ninth Report of Session 2017–2019, HC 1904

32 'Giving evidence to select Committees—guidance for civil servants,' Cabinet Office (2014), this guidance, known as the 'Osmotherley Rules', has never been accepted by Parliament (House of Commons Liaison Committee, 'The effectiveness and influence of the select committee system', Fourth Report of Session 2017–2019, HC 1860, paragraph 175).

33 Erskine May, note 25, 38.11.

34 Erskine May, note 25, 38.32; Standing Order 152(1) and (2).

35 Erskine May, note 25, 38.11, see note 1 for Speaker's authority on this.

36 See the evidence of John Benger (Clerk of the House) and Mark Hutton (Clerk of the Journals): Committee of Privileges, *Oral Evidence: Select Committees and Contempts,* (July, 2019) HC 864.

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individuals. The questioning can be hostile, and the published report contain apparent findings of fact and judgments of improper behaviour made against individuals[37]—a feature which may affect witness cooperation. Such findings against named individuals result from a political process which is not 'fair' in a judicial sense and which, since protected by parliamentary privilege, cannot be challenged in court. In this context, the televising of select committee hearings has enhanced the political significance and public awareness of select committees which, again, may sometimes alter the conditions for cooperation.

3.3 Non-cooperation and enforcement

Evidence and information from private and commercial persons is normally forthcoming on the basis of willing cooperation, and in any case, the constitutional impediments mentioned previously relating to MPs, including ministers, and to civil servants do not apply. It is evident, however, that in the twenty-first century, lack of cooperation by private and commercial bodies has become an additional focus of concern.[38] This can be the pitting of some very powerful people and organisations, with large resources and well advised, against the committee.[39] Examples are the refusal of Irene Rosenfeld of Kraft Foods in 2011 to answer questions from the Business, Innovation, and Skills Select Committee about the takeover of Cadburys;[40] the misleading of the Digital, Culture, Media, and Sport Select Committee by two News International journalists, which ended in them being found in contempt of Parliament in 2016;[41] and Sir Philip Green, who, in 2016, initially declined to give evidence before the Work and Pensions Select Committee on the grounds of the alleged bias of the chairman.[42] In 2021, Lex Greensill was accused of disrespect by refusing to appear before a select committee investigating consequences of the collapse

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37 For example, House of Commons Digital, Culture, Media and Sport Committee, 'Combatting doping in sport,' Fourth Report of Session 2017–2019, which in paragraph 110 states its 'belief' that drugs were used to enhance named cyclists' performances (albeit without violating the relevant code). In part the committee relied on confidential material (paragraph 98).

38 Though problems existed before, see for example House of Commons Liaison Committee, second report of session 2012–2013 *Select Committee Effectiveness, resources and powers,* Vol II *Additional Written Evidence*, Evidence of the Clerk of the House Ev w77, paragraph 2 and fn 115, on the investigation into Robert Maxwell.

39 Committee of Privileges, 'Oral Evidence: Select Committees and Contempts' (July 2019), HC 864, answer of Dr Benger to question 5.

40 Business Information and Skills select committee, 6th Report 'Is Kraft Working for Cadbury?' HC 871, section 2, (2011).

41 House of Commons Committee of Privileges, 'Conduct of Witnesses before a select committee: Mr Colin Myer, Mr Tom Crone, Mr Les Hinton, and News International', First Report 2016–2017, September 13, 2016, HC 662.

42 'BHS collapse: Sir Philip Green demands "biased" MP Frank Field resign', *BBC News,* June 11, 2016 www.bbc.co.uk/news/business-36506266.

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of Greensill Capital.[43] A new standard of refusal was set in 2018 by the 'open defiance' of Dominic Cummings before the Digital, Culture, Media, and Sport Select Committee in 2018.[44]

In the absence of cooperation, the power 'to send for' persons, papers, and records, other than on the basis of a humble address, can take imperative form, as an order or summons. The process for dealing with a reluctant witness is that the committee, through its chair, requests the attendance of the witness. A process of negotiation follows. If the witness still refuses, then 'an order for attendance is issued by the committee, signed by the chair, and then served upon the witness by the Serjeant at Arms or the Serjeant's representative'. The next stage of compelling a reluctant witness is for the committee, through the chair, to report the matter to the House, ask the speaker to give the matter precedence. The House can then express an immediate view or refer the matter to the Committee of Privileges. If the matter is referred, the Committee of Privileges reports back to the House, which debates the matter and decides whether contempt has been committed and, if so, what the sanction should be.[45] The clerk to the House has recorded an increasing incidence of refusals to cooperate by private persons in particular. This is indicated by an increase in the number of summonses issued.[46]

Erskine May offers no formal definition of contempt but locates its essence in actions or omissions which obstruct or impede the workings of Parliament and parliamentarians. Examples from the Commons Journal include those who did not comply with a committee's order for attendance or who have 'disobeyed or frustrated orders for the production of papers'.[47] Refusing to answer questions, refusing to produce documents, destroying documents, prevaricating, misleading, suppressing the truth, and so on are all examples of contempt.[48] Significantly, Parliament's right to seek information claims to outweigh otherwise legally valid reasons to refuse disclosure. Erskine May cites examples of

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43 Kalyeena Makortoff, 'MPs accuse Lex Greensill of "disrespect" over refusal to attend steel inquiry', *The Guardian,* June 16, 2021 www.theguardian.com/business/2021/jun/16/mps-accuse-lex-greensill-disrespect-steel-inquiry.

44 Committee of Privileges, 'Oral Evidence: Select Committees and Contempts' (July, 2019), HC 864, answer of Dr Benger to question 2.

45 House of Commons Liaison Committee, second report of session 2012–2013, 'Select Committee Effectiveness, resources and powers, Vol II Additional Written Evidence', Ev w77, Written Evidence of the Clerk of the House (Robert Rogers, as he then was), paragraph 14; see also Erskine May, note 25, 38.33

46 Committee of Privileges, 'Oral Evidence: Select Committees and Contempts', HC 864, July 2019, answer of Dr Benger to question 2: one summons issued between 1992 and 2007, since 2007, 11 or 12.

47 Erskine May, note 25, 38.57, fn 1 and 2.

48 Erskine May note 25, 15.5, fns 1–7. In 1947 the House of Commons resolved that 'the refusal of a witness before a Select Committee to answer any question which may be put to him is a contempt of this House' (CJ 1946–7): 378.

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requiring witnesses to answer questions even if they might thereby become liable for a civil action or an answer would breach legal professional privilege[49] or would involve self-incrimination or prejudice a defence, or an answer would be in breach of a promise of confidentiality owed to a third party—though these are limited to the extent that a matter is *sub judice* in terms of the House's policy thereon.[50] A reluctant witness can ask for the evidence to be heard in private and for it not to be published or for publication to be limited. This is a matter for the committee to decide; it is not a matter of the witness' legal rights.

3.4 Two cases

The experience of the DCMS SC in writing its report on 'Disinformation' or 'fake news', particularly in the context of digitally delivered threats to the integrity of elections and referendums,[51] provides examples of the problems that can be faced by parliamentary inquiries from reluctant commercial witnesses. The committee needed to obtain information about their practices from commercial organisation such as Facebook, who have a facilitating role in the digital activity under scrutiny, and from various individuals more directly involved. A noticeable feature of both the Final Report but, especially, of an interim report issued in July 2018 was the failure of some of these organisation and individuals to cooperate fully with the committee and provide the information it sought. This included Facebook and the campaign director, during the EU Referendum, of Vote Leave, Dominic Cummings. Neither had any legal obligation to disclose information to Parliament, though Mr Cummings was subject to the regulatory jurisdiction of the Electoral Commission, and both were obliged to adhere to data protection law. This failure of cooperation raises the issue of compelling information from private persons and commercial organisations when it is necessary or desirable, not just for a regulatory purpose, but also to further public deliberation.

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Two cases stand out.

The first illustrates, albeit in an extreme way, the important point that Parliament is through and through a political institution acting independently of legal forms. The committee sought evidence from Ted Kramer, an American citizen whose company was involved in a court case with Facebook. Case documents had been sealed by a Californian court, but it seems the committee discovered that Mr Kramer had links to these documents on his computer and, when he came to London, ordered their disclosure. A detailed summary of

49 See HC Deb March 4, 1828, vol 18 cc966–75, where this seems to be the case given the understanding that what is said is protected by parliamentary privilege (cited Erskine May, Op cit, 38.36, note 8).

50 Erskine May, note 25, 38.36, fns 5–12.

51 House of Commons Digital Culture Media and Sport Committee, 'Disinformation and "Fake News": Final Report', Eighth Report of Session 2017–2019, HC 1791, February 18, 2019.

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the injuncted Facebook emails was then made and published on the committee's website. Mr Kramer's affidavit account[52] is that he had been subjected to a semi-coercive parliamentary process with which he cooperated under a threat of punishment and in fear of reputational damage. On this account Mr Kramer enjoyed few, if any, of the procedural protections that a legal process would require, and he was pressurised to disclose injuncted material.

Mr Kramer's affidavit account can be contrasted with that given by Facebook, which suggests a much more cooperative relationship with the committee and, perhaps, explains some of the peculiarities of the case, such as the lack of legal advice sought by Mr Kramer. Rather than an illustration of Parliament exercising its coercive powers of arrest and sanction, it may, in fact, be a graphic illustration of the political context of select committee work[53]

The second dramatic event associated with this report relates to Dominic Cummings, the campaign director of Vote Leave. He openly refused to give evidence to the committee.[54] The committee then went through the disciplinary procedures open to it and outlined previously, and these resulted in a resolution of the House to censure and admonish (in his absence) Mr Cummings for contempt of Parliament.[55]

3.5 The problem

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The House was aware of the feebleness of this as a penalty. Particularly so in respect of a person who has contempt for the institution since a reprimand with no punitive consequences may reinforce the contemptuous attitude. In evidence submitted to the Liaison Committee in 2012–2013,[56] the Clerk of the House (now Lord Lisvane) discusses (a) admonishment at the bar of the House—calling to the bar of the House, for a humiliating and public dressing-down by the speaker—last done in 1956 to a journalist and obviously open to the threat of bad media publicity; (b) imposing a fine—not done since 1666 and whose existence has been severely doubted by the courts;[57] and (c) impris-

52 *Six4Three v Facebook* Case No Civ 533328, Plaintiff's Brief in response to November 20, 2018, Order—thanks to Jamie Fletcher for his help in identifying the relevant materials.

53 See, for example, Guido Fawkes, 'Damien's Dodgy Data Discovery', November 26, 2018 https://order-order.com/people/ted-kramer/.

54 House of Commons Treasury Committee, 'The economic and financial costs and benefits of the UK's EU membership', First Report of Session 2016–2017 HC 122, Chapter 7, para 236 where the behaviour of Dominic Cummings (along with Matthew Elliott, also of Vote Leave) before the committee is described as 'appalling'.

55 HC Deb vol 657, col 962 (April 2, 2019).

56 House of Commons Liaison Committee, second report of session 2012–2013 *Select Committee Effectiveness, resources and powers,* Vol II *Additional Written Evidence*, Evidence of the Clerk of the House Ev w78–79, paragraphs 19–27.

57 Ibid—the Clerk cites *R v Pitt* and refers to *R v Chaytor* [2010] UKSC 52, where the Supreme Court referred to the power to fine as 'theoretical' (paragraph 61).

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onment until the end of the Parliamentary session—last done in 1880.[58] These penalties, which have been used against private persons, have gone out of use as being inappropriate in a rights-conscious age. Parliamentary procedures are not consistent with standards of fairness required by, for example, the common law and the European Convention; public opinion would hold Parliament in widespread contempt if it defended its failure to meet such standards simply by reference to parliamentary privilege. Central to the problem is the necessarily political nature of Parliament's activities and the fact that 'contempt' has no objective definition—a person is in contempt if Parliament says they are. Erskine May notes that in 1978 the House resolved to use its penal powers sparingly and only when essential for the conduct of business and that since then there has been a marked diminution of the use of penal powers. Nevertheless, it is there argued that penal powers have a continuing relevance as a useful deterrent to achieve cooperation,[59] and many MPs are anxious that there should be an effective sanction for contemptuous behaviour.[60]

3.6 Possible solutions

The previous investigations into the powers of select committees have resulted in three possible approaches to the question of giving Parliament punitive powers to enforce it ability to obtain information.[61]

The first approach, to do nothing, has been rejected. MPs see the necessity of reasserting penal powers in order to confirm the authority of Parliament. The context for this, significantly though not exclusively, relates to uncooperative corporate and private persons who are capable of doing serious damage to Parliament's authority. The Liaison Committee's report of 2019 makes this clear. It refers to the 'key issue' of these times being in relation to private persons expressing contempt. Mere admonishment seems to be insufficient to deter those who 'lack a sense of public obligation' or have no other motive, such as the defence of a share price.[62] But the committee is frank; there is no parliamentary agreement between the other two options.

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58 Ibid—this was done to a non-member called Grissel (paragraph 22).

59 Erskine May, note 25, 11.21.

60 In the debate on Dominic Cummings (April 2, 2019), the chair of the DCMS select committee (Damien Collins MP) argued that there should be an effective 'real world' consequence for contempt, such as finding that a person was not fit and proper to hold certain positions—such as being a political advisor. A little under four months later, Cummings was appointed as special advisor to Boris Johnson PM (HC Deb vol 657, col 950).

61 These options were suggested in Richard Gordon QC and Amy Street, note 27, 74–84 and adopted by the clerk in his evidence to the committee in 2012, House of Commons Liaison Committee, second report of session 2012–2013 *Select Committee Effectiveness, resources and powers,* Vol II *Additional Written Evidence* Ev W 78 Written Evidence of the Clerk of the House (Robert Rogers, as he then was), para 46 and footnote 132.

62 House of Commons Liaison Committee, 'The effectiveness and influence of the select committee system', Fourth Report of Session 2017–2019, HC 1860, paragraphs 179–186.

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A second position is to move the process of imposing sanctions away from Parliament to some other body. This would require legislation. Suggestions include the creation of discrete, Parliamentary institutions and procedures—similar to the current system for dealing with expenses (the Independent Parliamentary Standards Authority, established under the Parliamentary Standards Act 2009). Any such statutory body would be subject to judicial review and hence the possibility of a developing engagement by the courts in previously privileged Parliamentary matters.[63] This engagement might encompass procedural protections for witnesses (as may have been absent in Mr Kramer's case) who allege they have been the victims of oppressive parliamentary behaviour.[64] Extending statutory regulation in problem areas could also be the basis for sanctions.

More strongly canvassed is empowering the courts to punish for contempt. Parliament, through its internal procedures, might make a finding of contempt. It would then be for the courts to hear, determine, and punish for the statutory criminal offence of being in contempt. The advantage is that judicial standards of fairness, in common law or under the convention, would be fully protected and the constitutional propriety of locating punishment as a judicial function maintained.

There is an off-the-peg model available, which is the system used by the Scottish Parliament.[65] Sections 23 of the Scotland Act 1998 allows the Scottish Parliament or a committee to 'require' the attendance of witness and the production of documents concerning matters within the responsibility of any MSP. Section 25 makes it a summary offence punishable by imprisonment to refuse to attend, give answers, provide information, etc. The process was used for the first time in January 2021 in relation to confidential and private evidence possessed by the Scottish Crown Office and Procurator Fiscal Service (COPFS).[66] Although it seems that some evidence was disclosed, the probable limits of this model are indicated by the Crown Office's assertion of its duty to make a public interest assessment before disclosure, to stress legal limits to disclosure which are not overridden by section 23, and to warn of the need for careful consideration before publication.[67] The UK government was sceptical

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63 Richard Gordon QC and Amy Street, note 27, 82–83.

64 Under the Irish Constitution, the Irish Supreme Court has declared that there is no absolute barrier to questioning the actions of a Parliamentary Committee in court. By its oppressive questioning, the committee in question was found to have acted outside its terms of reference and, hence, unlawfully (*Kerins v McGuiness* [2019] IESC 11, and [2019] IESC 42; discussed in Tom Hickey, 'Justiciability and proceedings in the Oireachtas: the case of Angela Kerins', (2020) *Public Law* 610–620.

65 Adopting this system is advocated by Keith Vaz MP Liaison Committee Second Report ev w 73 Select Committee Effectiveness, Resources and Powers.

66 Severin Carrell, 'Scottish Parliament orders prosecutors to release Salmond leak evidence', *The Guardian*, January 22, 2021.

67 COPFS, 'Response to the Scottish Parliament committee request', Accessed August 20, 2021, www.copfs.gov.uk/media-site-news-from-copfs/1927-response-to-scottish-parliament-commit-

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as to its usefulness more widely because it is so closely integrated with the particularities of the Scottish system. It also illustrates the more general problem of transferring penal sanctions to the courts. Such a process will necessarily involve the imposition of judicial standards of fairness.[68] In a sense, that is the point, but the consequence may be a degree of inhibition on Parliament's powers to obtain information. As mentioned in the previous section, Erskine May exemplifies the power of Parliament to require disclosure of information which might be legally protected by, for example, confidentiality or legal professional privilege, and thus disclosure could not be compelled in court.[69] The Scottish system, as the COPFS response indicates, denies the Parliament the power to require disclosure, which might be refused on such grounds,[70] and such a denial would be a likely requirement of any system giving penal power to the judiciary.

More generally, the problem with the legislation approach, as is widely recognised, is that it is hard to think that the courts can do this job, whether supervising an independent, statutory, parliamentary institution through judicial review or themselves administering punishment as under the Scottish system, without a considerable degree of questioning Parliamentary judgments in a way which Parliament may find inhibiting and damaging to its role of bringing information into the public domain to advance political discourse. Without amendment of Article 9 of the Bill of Rights, allowing appropriate questioning in courts of debates and proceedings in Parliament, it is not improbable that proceedings would often be stayed. Another issue, though one which does not get full discussion, is the extent to which empowering judicial supervision of punishment for contempt will impact on a committee's freedom to publicise the information that it has obtained. There is, therefore, scepticism about the legislative approach from both Parliament[71] and government[72].

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The third position is that Parliament should reassert and keep its singular authority over punishment for contempt but do so in a way that is consistent with fair procedures. The strength of the argument is that these are Parliament's privileges which it should keep responsibility for under separation

tee-request (last). The assertion by COPFS of its legal duty is in a letter, November 10, 2020, to the convener of the committee, Linda Fabiani MSP, https://archive2021.parliament.scot/HarassmentComplaintsCommittee/General%20documents/Letter_to_L_Fabiani_MSP_05.11.20(1).pdf (last accessed August 20, 2021).

68 *Parliamentary Privilege* April 2012, Cm 8318, para 275 *passim*.

69 Erskine May, note 25, 38.36, fns 5–12.

70 The Scotland Act 1998, s23(9) allows a person to refuse to answer if she or he could refuse to answer in a Scottish Court.

71 House of Commons Liaison Committee, *Select committee effectiveness, resources and powers,* Second Report of Session 2012–2013, para 133—this emphasises the constitutional distinctions and differences of purpose between Parliament and the courts as a reason for resisting placing parliamentary privilege on a statutory basis and allowing the courts to punish for contempt.

72 *Parliamentary Privilege,* April 2012, Cm 8318, para 273–279.

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of powers—Parliament's purposes, including enhancing public and legislative knowledge and discourse, are different from the courts. At the least, on this view, the House of Commons, and the Lords if necessary, should set out clearly and with detail people's obligations in respect of the power to send for 'persons, papers and records'. But to go further and assert its authority through reinvigorating its power to punish for contempt, it would be necessary to change standing orders in a radical way so that members would have to accept the restraints inherent in procedures that echo judicial fairness.[73] Otherwise those in contempt would have a remedy for breach of the convention,[74] and in any case, parliamentary assertion of its privileges in oppressive ways would weaken, not strengthen, its authority.

Reassertion of its penal powers by the House of Commons was the solution most favoured by the Joint Committee on Privilege in its report, responding to the government's command paper of parliamentary privilege. It fully recognised the need to embody fair procedures such as automatic referral of alleged contempt to the Committee of Privileges, a clarification of witnesses' rights, provisions as to bias, etc, and a suggested draft standing order detailing these was attached to the report.[75] Whether these procedures could achieve a proper balance between fairness and effectiveness so that, for example, the possible need for significant players to recuse themselves or the imposition of limits on publicity does not render nugatory a select committee's work remains an open question. Indeed, in 2019, the Liaison Committee thought that enthusiasm for such changes was waning. In its view, some form of statutory force is necessary if Parliament's penal powers are to be restored.[76]

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4 Conclusion

The presumption of this chapter has been that significant social, economic, and political power is exercised by private and commercial bodies, many with a vast international presence, and that the power to obtain information from them which relates to public concerns would be in the public interest. The normally available procedures for doing this are relatively weak in comparison with those relating to public authorities. Private and commercially held information can be disclosed to relevant parties in the course of legal proceedings and when

73 A point made by the government in its green paper on Parliamentary Privilege, *Parliamentary Privilege* April 2012, Cm 8318, para 261.

74 In *Demicoli v Malta* (1992) 14 EHRR 47. Parliament is not subject to an action brought in the UK under Section 7, Human Rights Act, 1998 (Human Rights Act (1998) section 6, 3).

75 House of Lords House of Commons Joint Committee on Parliamentary Privilege Report of Session 2013–14, HL Paper 30, HC 100 (reply to the government's green paper *Parliamentary Privilege* cm 8318). The draft Standing Order is at annex 3).

76 House of Commons Liaison Committee, 'The effectiveness and influence of the select committee system', Fourth Report of Session 2017–2019, HC 1860, paragraph 186.

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needed for effective regulation. But such disclosures are limited by the interests of litigants, rights relating to property and confidentiality, and the purposes of regulation. Further publication for public purposes can be restrained in various ways; such challenges are judicial and so likely to be examined in the context of legal and not political priorities.

These legal and regulatory limitations focus attention on Parliament—the institution whose main purposes include public deliberation on public affairs. Parliament has traditional powers of seeking and publicising information to contribute to its own legislative task and to public understanding. Parliamentary action, driven by political objectives and relatively independent of legal constraints, can be a means by which the limits imposed by private rights on the informed deliberation of the public interest may be lessened. But this requires the authority of Parliament to be respected. Challenges to this authority arose in the context of parliamentary inquiries into the campaigns of disinformation ('fake news'), which may have affected the outcome of various elections, including the 2016 EU referendum. In this and other contexts, some possessors of private powers have appeared overmighty and contemptuous of Parliament. They have created a problem founded on the inability of Parliament to maintain its authority, including by reasserting its power to punish for contempt. This problem has yet to be satisfactorily resolved.

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