

Independent Commission on Freedom of Information: Responses from organisations to Call for Evidence: R – Z

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Updates to this document

This document was updated on 16 December 2015 to correct a typographical error in the title of the Tax Payers’ Alicance submission (at page 70).

The Radio Independents Group (RIG)

About RIG

The Radio Independents Group (RIG) is the trade body for the independent audio-led production sector in the UK. RIG provides business affairs support, policy representation, and negotiates terms of trade with the BBC. RIG also produces the annual Radio Production Awards¹, which uniquely recognise and celebrate the production skills of radio and audio producers across the whole industry. In association with the Department for Business Innovation & Skills and Creative Skillset, RIG has also established RIGtrain², a £350,000 training programme which is on course to reach more than 800 learners over a period of 18 months between November 2014 and March 2016.

Radio producers and FOI

RIG's members are involved in making radio content across all genres, much of which is currently for the BBC's networks.

This includes factual and documentary programmes. Indie documentary makers often have a background in journalism and are themselves frequent users of the Freedom of Information Act to obtain facts and figures which enable them to give the listener a more complete insight into the circumstances around the story they are presenting.

How the Freedom of Information works

The experience of RIG members is that the overall FOI regime works well. We are not aware of any incidences which have caused a policy to be damaged or have to be revised simply because some detail was made available via freedom of information. Rather the introduction of the FOI Act was made on the sound principle that the policies and operations of public bodies, including public service broadcasters, should as far as reasonably possible, be open to public scrutiny, in order that said policy could be improved upon prior to implementation.

The Question of a Veto

We are cautious about recommending any extensions to having a veto on disclosure – any executive will have a natural instinct to act in a way they may see as protecting their department and staff, but this is not necessarily in, and may well be in conflict with, the best interests of the public.

The costs of FOI

We also are not comfortable with the suggestion that councils are being overburdened by FOI, and would point to the fact that if something is in the public domain it might be that important flaws are discovered which could have caused the loss of much greater sums of money had they not been identified and addressed.

We also find disingenuous the position quoted in your consultation document, from Kent County Council, which stated that:

'the resources to deal with these requests have not increased and there is concern that the pressure that FOIA puts on local authorities that are already under budgetary constraints is diverting valuable resources away from arguably more important council services, such as social care, education and highways.'

We would argue that the cost of sourcing the answers to FOI requests are not going to amount to the type of sums needed to make a material difference to the services described, and by logical extension that argument could be applied to any other activity that the council undertakes.

The public's right to know is just that – a right – and we do not feel that it should be curtailed. Public money continues to be spent on other aspects of democracy and in fact we are seeing an increase in terms of more elected local mayors and other such institution. In this context it is important that these new positions are held to account.

¹ <http://www.radioindies.org/index.php/services-open-to-all-new/rigradio-academy-radio-production-awards>

² <http://www.rigtrain.co.uk/>

The BBC and FOI

One particular issue we wish to raise is in respect of the exemption which currently applies to the BBC.

Schedule 1, Part VI of the FOIA lists the exemption as follows:

‘The British Broadcasting Corporation, in respect of information held for purposes other than those of journalism, art or literature’.

This is a very important provision, which in principle RIG supports. It is vital that information gathered by the BBC for investigative journalism, for example, is protected from premature disclosure to those under investigation, and that journalists can protect their sources. Equally it means that information compiled for, say, the content of arts programmes does not need to be disclosed to rival broadcasters. However since the BBC’s purpose is programme-making, it can take the position that almost any information it holds is “held for the purpose of ... journalism, art or literature”. We are quite sure that was never the intention of the legislators, but it has in effect caused the BBC’s viewers, listeners and suppliers to be unable to obtain information that any reasonable person outside the BBC would regard as NOT “held for the purpose of ... journalism, art or literature”.

The BBC has responded in a highly limited fashion to RIG’s request for detailed information on its commissioning of programmes from independent producers. The BBC does this on the grounds that such information is exempt, and it has offered only the inadequate summary information published in the BBC Annual Reports plus the occasional verbal disclosure of a rounded figure in meetings.

A request made by RIG in 2009³, asking for details of the BBC’s commissioning from independent suppliers was turned down on the same grounds, though it is difficult to understand why the information requested was in any substantial way held for the purposes of journalism, art or literature. The information requested is detailed in Appendix 1, and concerned issues such as the spend of radio budgets on in-house and out- of-house production respectively. Such information is important to assist our members make informed judgements on planning the future of their businesses.

The BBC response was that:

‘the information you requested falls outside the scope of the Freedom of Information Act’

RIG notes that prior to this there were very similar requests which were upheld, for example relating to BBC Radio 1 budgets⁴.

A 2010 request under FOIA⁵ obtained the information that 48% of the total number of requests received by the BBC since 2005 were for information not covered by the Act. This seems a high number of rejections although without proper analysis we obviously cannot determine how many had genuine ‘journalism, art or literature’ reasons for being turned down.

To conclude, RIG completely supports the continuation of the exemption in order that journalists to carry out their work, and for commissioners to plan schedules in confidence these aspects are crucial to the everyday running of the BBC, and indeed to underpinning our democracy.

We therefore suggest simply amending the exemption by changing Schedule 1, Part VI to read:

‘The British Broadcasting Corporation, in respect of all information held, other than information held primarily and directly for purposes of journalism, art or literature’.

This will enable us, among other things, to get a clearer picture of the relative spend on in-house and out-of-house production which is a useful measure going forward to establish how that public money is spent.

³ Ref: RFI20090643

⁴ Ref: FS50090393

⁵ Ref: RFI20100549 dated 18/19 April 2010

Appendix 1 – Radio Independents Group FoI Request

BBC radio's programme production for each of the last three years (calendar or financial)

BBC ref RFI20090643

For each UK network (i.e. Radios 1, 2, 3, 4, 5) national network (Radio Wales, Scotland and the Northern Ireland stations) and digital networks (IXtra, 6 Music etc)

- The total number of hours broadcast
- The total number of hours of originations
- The total number of hours defined as "eligible" for independent supply
- The total number of hours bought from independent suppliers
- The total overall budget of the network
- The total production budget of the network (i.e. the budget available to in house and independent suppliers, excluding network and other central costs)
- The total spend on programmes bought from independent suppliers

The Renewable Energy Foundation

The Renewable Energy Foundation is profoundly disappointed that the Government should seek to water down the Freedom of Information Act. We consider it indicates an unjustifiable lack of trust in the good sense of the public to understand the complexities and subtleties of decision making.

Question 1: What protection should there be for information relating to the internal deliberations of public bodies?

There need be no more protection than there is at the moment.

For how long after a decision does such information remain sensitive?

Once a policy has been decided upon and published, the information related to the internal deliberations should be considered historic and therefore no longer sensitive. It appears that Government departments may be embarrassed to reveal the range of options or facts – or perhaps the paucity of options or facts – considered in informing a policy decision. The existence of the FoIA and the possibility that the information upon which a policy decision is based will become public knowledge encourages good Government.

Should different protections apply to different kinds of information that are currently protected by sections 35 and 36?

No.

Question 3: What protection should there be for information which involves candid assessment of risks?

REF believes that there should not be a special category to justify withholding of information classified by Government departments as a “candid assessment of risks”. Our own experience involves a case whereby DECC claimed to have had exchanges which were honest and frank, and where participants played ‘devil’s advocate’ to lead to robust discussions and decisions. These exchanges were subsequently released following an appeal to the Information Tribunal. In fact the information was anodyne and did not contain information that could remotely be described as an honest and frank discussion of the facts relating to the policy. What was revealed was that a policy decision had been made without any assessment of the risks of that policy. In attempting to withhold that information, a deceptive illusion was given that the policy was founded on a robust and candid debate of the issues.

For how long does such information remain sensitive?

We would argue that Government departments are unnecessarily coy about policy debates and that if the relevant data were made public earlier, better decisions would be made. For example, the current FoI regime tends to permit the withholding of information prior to a policy being announced. This can lead to policies being based on a misunderstanding of the facts and any correction is not

possible after the event.

Question 4: Should the executive have a veto (subject to judicial review) over the release of information?

No. There are already sufficient layers of protection with the Information Commissioner and the First Tier (Information Rights) and Upper Tribunal to ensure that a good decision regarding release of information is made. There is no need for an executive veto at all.

If so, how should this operate and what safeguards are required? If not, what implications does this have for the rest of the Act, and how could government protect sensitive information from disclosure instead?

The government needs to accept and trust that the decision makers at the three levels (Information Commissioner, First Tier and Upper Tribunals) are able to recognise and decide what is genuinely sensitive information. The government would also have recourse to the further 3 layers of High Court, Appeal Court and Supreme Court. So in fact there are 6 layers of vetting possible if information is truly sensitive.

Question 5: What is the appropriate enforcement and appeal system for freedom of information requests?

Our experience is that the current system of Information Commissioner and Tribunals is excellent. In almost all cases that we have appealed to the Information Commissioner, we have been content that the ensuing decision was a fair one. In the one case, where we were not happy that the decision at that level was reasonable, our appeal to the Information Tribunal resolved our primary problem.

Question 6: Is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know?

The value of the FoIA is immeasurable. It leads to a better informed public, a more engaged public and better policy decisions. We note that there is no suggestion that Environmental Information Regulations should be revised in an analogous way to that proposed for the FoIA, so in fact, there would still need to be public resources devoted to disseminating information related to decisions by public authorities.

It appears to us that much of the so-called 'burden' is self-inflicted by the public authorities. In our experience, there is very often a knee-jerk refusal to provide the requested information at the first instance. We then find that a request for an internal review almost always results in most of the requested information being released.

It is also clear that government departments deploy the same justifications to refuse releasing information that have been demonstrated to be unfounded in previous information requests. In other words, it seems that public authorities are not learning from experience and that many requests are

being refused which should not be and this inevitably leads to unnecessary costs and effort.

Or are controls needed to reduce the burden of FoI on public authorities?

No - with the exception that public authorities need to become more willing to be frank with the information they possess and more efficient with its dissemination.

If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities?

Controls are not justified.

Which kinds of requests do impose a disproportionate burden?

There is no thorough analysis in the section on Burdens on Public Authorities in the Consultation document. For example, it is not possible to establish whether some requests would not have been made if more information was routinely published on public websites and/or made more easily located on those websites. For example, REF has made requests for data that change with time. If we want the latest set of that data, we have to make repeated requests for it. Clearly, information of this type should be published on a website.

Our experience has revealed that government records are woefully badly maintained. In a recent request, it has taken more than 2 years for DECC to satisfy a straightforward request for information. In that case, DECC officials claimed that all relevant material had been located when the request was initially submitted. However, during the process of an appeal to the Information Commissioner and Information Tribunal requiring further searches, more and more material was apparently found. To date, there have been 9 occasions when extra material covered by the original request has had to be released by DECC.

During the Tribunal, the evidence presented by DECC indicated that electronic searches for data were not always possible, in spite of two different bespoke computer systems being procured for maintenance of that data. In this age where global information is readily obtained by anyone using freely available search engines, it beggars belief that government departments cannot store and locate their own data.

These experiences lead us to believe that the 'burden' does not signal a problem with the FoIA but rather a problem with record keeping by the public authorities. A careful analysis of FoI requests would almost certainly indicate that any perceived problem would be removed by:

- Publishing on a website that data which is likely to be requested and/or requested multiple times thus removing the need for an FoI request
- Improving the organisation of how data and information is stored by public

authorities and ensuring that electronic searches of that data, using the routine tools freely available, is possible

- A re-education of public officials to overcome what we perceive to be an unhealthy desire to withhold often quite anodyne information from the public.

Reprieve

Introduction

As a registered charitable organisation working to prevent the use of the death penalty and human rights abuses perpetrated in the 'War on Terror,' Reprieve welcomes this opportunity to respond to the Commission on Freedom of Information's ('the Commission') call for evidence.

The Freedom of Information Act 2000 ('FOIA') is a pillar of government transparency and accountability, which has been used to reveal a large number of matters of public interest. Many examples of these, beyond the scope of Reprieve's work, have been listed elsewhere, for example in the submission of the Information Commissioner,⁶ and on the websites of the Campaign for Freedom of Information and the FOI Directory.⁷

With respect to Reprieve's work specifically, FOIA has played an important part in exposing UK involvement in illegal practices – such as 'rendition' and torture – and in abuses overseas which it is British policy to oppose – notably the death penalty. Further detail on these issues is provided below. Reprieve is therefore concerned that any restriction of the FOIA will make it more difficult to expose UK Government involvement in wrongdoing or in activities which go against publicly-stated policy. This evidence is divided into three main areas: first, our concerns over the Commission itself; second, examples of where FOIA has proved important to Reprieve's work; and third, our response to the specific questions set out by the Commission.

In summary, Reprieve is in broad agreement with the views expressed by (among others) the Information Commissioner, Campaign for FOI, and a wide range of civil society and media organisations. There is no case for restricting FOIA. The protections which the Government and the Commission claim to need already exist. Furthermore, Reprieve strongly believes that the FOIA is not currently being enforced as effectively as it should, especially with reference to delays over FOIA responses.

Concerns over the Commission

With respect, Reprieve believes that the Commission's review of FOIA has – so far – not been handled well.

Membership

The Commission is doubtless already aware of concerns raised in the media that a number of the Commissioners have either already expressed strong views on the need to restrict FOIA, and/or their experience is overwhelmingly that of those who will have been on the receiving end of FOIA requests. There is of course room for a range of views on any such Commission, but Reprieve is concerned that the voice of members of the public, civil society or journalism – groups which view FOIA as a vital tool – was not represented. From the start, the Commission therefore suffered from being one-sided. This is of course the responsibility of the Minister who made the appointments – however, the Commission could perhaps have considered ways of addressing this imbalance.

Consultation

⁶ See pp21-23 on benefits of FOI: <https://ico.org.uk/media/about-the-ico/consultation-responses/2015/1560175/ico-response-independent-commission-on-freedom-of-information.pdf>

⁷ See: <http://www.foi.directory/foi-in-the-media/>

The Government announced the establishment of the Commission on 17 July 2015, with an intention that it would “publish its findings by the end of November.”⁸ On this timescale, it is bewildering that no reference to a call for evidence was made until two months later, on 15 September 2015, and that issuing that call for evidence took a month further, being published on 9 October 2015. Although we understand that there has since been a slight extension of the Commission’s timeframe, it is surprising that a consultative body working on a timescale little longer than four months should take nearly three months to issue a call for evidence.

Worryingly, it is far from clear that the Commission intended to make the call for evidence from the start – the September timing of the announcement, coming in the wake of media coverage around this problem, suggests otherwise;⁹ Reprieve had also written to the responsible Cabinet Office Minister, Matthew Hancock, on 12 August 2015 asking if submissions of evidence to the Commission would be possible. We did not receive a response until 4 September 2015. Again, it is hard to see why it took nearly a month to answer a simple – and one would hope obvious – question. It should not be necessary to mount a campaign simply in order to engage with a supposedly consultative body.

In summary, Reprieve is concerned about how seriously the Commission is taking this consultation; and the very short timescale provided to those who wish to respond, which will certainly damage the process.

Transparency

To date the Commission has suffered from a distinct lack of transparency. The Commission itself is not subject to FOIA. The Government has refused to answer any questions about the Commission, including who was considered for a position as Commissioner.¹⁰ The Commission’s public engagement has been largely limited to a secret briefing with selected journalists who were not allowed to attribute comments to named individuals – a situation which the *Times* described as leading to officials being ‘ridiculed.’¹¹

FOIA’s importance to Reprieve’s work & the public interest

To assist the Commission below are a few examples of where the FOIA has been an important part of Reprieve’s work.

UK & UN indirect funding for the death penalty

One strand of Reprieve’s work concerns how UN counter-narcotics programmes in countries such as Iran and Pakistan contribute to the handing down of death sentences for non-violent offences in those countries. This is a matter of clear public interest as the UK is funding or has funded those programmes, and has a stated policy of opposing the death penalty in all circumstances.

Reprieve has made a number of FOIA requests aimed at establishing the scale of this funding, and the safeguards (if any) which are in place to prevent in contributing to the death penalty and other serious human rights abuses. Reprieve is attempting to determine whether the Government has held to its policies as set out in the Overseas Security and Justice Assistance (‘OSJA’) guidance. The

⁸ See Lord Bridges’ Written Statement: <https://www.gov.uk/government/speeches/freedom-of-information-new-commission>

⁹ See, for example, ‘Is review of Freedom of Information law a stitch-up by ministers?’ Daily Mail, 4 Sept 2015: <http://www.dailymail.co.uk/news/article-3221788/Is-review-Freedom-Information-law-stitch-ministers.html>

¹⁰ Ibid.

¹¹ See: ‘Freedom of information? Don’t quote us,’ *The Times*, 10 Oct 2015: <http://www.thetimes.co.uk/tto/news/politics/article4581895.ece>

case is currently in the Information Tribunal.¹² It represents an important example of how FOI has a part to play in ensuring that the Government is transparent in its spending of public money, and is held to its policies on human rights and the death penalty.

UK involvement in the Senate torture report

When the Senate Select Committee on Intelligence ('SSCI') first published its report on the CIA torture programme, 10 Downing St denied that the UK Government had made any requests to the US regarding the content of the report. However, FOIs submitted by Reprieve showed that there had been a large number of meetings between key Government figures and members of the SSCI throughout the period when it was compiling its report. While the content of those meetings remained secret, their existence forced the UK Government to correct its original statement, and admit that requests had been made for redactions to the report.¹³ This is a strong example of the role of FOIA in keeping the Government honest.

UK embedded pilots in US bombing campaigns

An investigation conducted by Reprieve using FOIA requests into the role of 'embedded' UK personnel in the armed forces of other countries revealed earlier this year that UK pilots had been bombing Syria, despite the Government having told Parliament otherwise.¹⁴ The pilots were embedded with the US Air Force at the time, an issue of which the vast majority of Members of Parliament and the media were unaware. The same investigation also raised concerns over the possible involvement of UK drone pilots in the US covert drone programme in Pakistan.¹⁰ Reprieve believes that there is a strong public interest in having transparency over what conflicts UK personnel are involved in, regardless of one's view of the conflicts themselves.

The Commission's consultation questions

The questions asked by the Commission can be broken down in two categories. First, they seek to determine whether FOIA grants sufficient protection for government deliberations. These are questions one to four. Second, they look at whether the FOIA system—from request to appeals—works as intended and ask whether requesters should pay for transparency. These are questions five and six.

In short, FOIA functions as it was intended to—a view supported by the Information Commissioner's Office ('ICO'). Suggestions by the Government and members of the Commission that FOIA does not provide a safe space for deliberation are unsubstantiated. Introducing costs for FOIA requesters would only stifle requests.

The questions raised by the Commission have been considered in full debates of Parliament (when FOIA was first passed and subsequently amended) and by Parliamentary committees (in post-legislative scrutiny). It is difficult to see how circumstances are any different now than they were at the time Parliament took these issues on board.

Protection for Government deliberations

¹² See: 'Foreign Office faces claims aid to Pakistan could be supporting death penalty', *The Telegraph*, 27 Jul 2015: <http://www.telegraph.co.uk/news/worldnews/asia/pakistan/11761485/Foreign-Office-faces-claims-aid-to-Pakistan-could-be-supporting-death-penalty.html>

¹³ See for example 'US hid UK links in CIA torture report at request of British spy agencies', *The Guardian*, 12 Dec 2014: <http://www.theguardian.com/us-news/2014/dec/11/cia-torture-report-british-spy-agencies-discussed-redactions>

¹⁴ See 'Syria air strikes conducted by UK military pilots', BBC News, 17 July 2015: <http://www.bbc.co.uk/news/uk-33562420>

The thrust of questions one to four and the manner in which they are framed suggests the Commission would like to see an expansion of existing exemptions to disclosure under FOIA. However, as the Information Commissioner's submission notes, these protections already exist and the Government already gets its way in the overwhelming majority of cases.¹⁵

The Commission states—without reference to any source for this statement—that “[s]ome have argued” that the ‘uncertainty’ created by the ICO, tribunals and courts disagreeing with the Government about where public interest lies pushes officials to adopt ‘informal systems’ of decision making. The suggestion therefore is that in response to the lawful exercise of FOIA, civil servants are prepared to adopt unethical and undemocratic measures.

The Commission refers to a passage from the Justice Committee's Post Legislative Scrutiny where it expresses views on the impact that the mere risk of disclosure has on government deliberations, presumably as support for its claim.

However, the Justice Committee speaks of the supposed ‘chilling effect’ merely in hypothetical terms. It accepts that the risk of disclosure ‘could’ result in ‘unwelcome behaviour,’ not that it will.

In his own submission the Information Commissioner makes clear there is ‘limited evidence’ to suggest that the risk of disclosure has the ‘chilling effect’ as alleged by Government. He adds that any fear of disclosure officials might have is ‘often driven by a misunderstanding of how FOIA is operating in practice.’¹⁶ The Upper-Tribunal confirmed these views in a recent judgment where Government lawyers called FOIA disclosures the ‘pollutant of publicity’. It described the Cabinet Office key witness giving evidence on the supposed ‘chilling effect’ as ‘evasive and disingenuous’ and her evidence as ‘of no value whatsoever’.¹⁷

The above arguments apply with equal force to concerns regarding the collective responsibility of the Cabinet. Further, and importantly, the Commission provides fundamentally flawed cases of where existing FOIA protections are allegedly insufficient.

For example in relation to a request pertaining to cabinet minutes of January 1986, the ICO and First-tier Tribunal ordered the release of the minutes. In response the ‘Government neither appealed, nor exercised the veto’. FOIA not only allows the Government to appeal ICO decisions but also provides a veto on ICO and tribunal decisions as an ultimate power for the Government to block the release of information. FOIA therefore works as expected and there is sufficient space for the Government to prevent the disclosure if it firmly believes that release would be harmful.

Criticisms regarding the uncertainty around the scope of the Cabinet veto are unfounded. The Supreme Court, in its March 2015 decision, was clear that the Cabinet veto could be exercised in only two distinct circumstances. First, when there is ‘a material change of circumstances since the tribunal decision’. Second, where ‘the decision of the tribunal was demonstrably flawed in fact or in

¹⁵ See ‘Concern mounts over UK role in Pakistan drone attacks,’ *The Observer*, 13 Sept 2015:

<http://www.theguardian.com/world/2015/sep/12/uk-role-in-pakistan-drone-attacks-concern-mounts> ¹¹ See p. 5 paragraph 13 of the ICO's submission

¹⁶ See pp 6-7, paragraphs 17-19 of the ICO's submission

¹⁷ See: ‘Government loses ‘pollutant of publicity’ FOI case’, *BBC News*, 16 Nov 2015:

<http://www.bbc.co.uk/news/uk-politics-34813936>. The case is available at:
http://www.informationtribunal.gov.uk/DBFiles/Decision/i1666/EA-2013-0119_12-11-2015.pdf

law'.¹⁸ The Supreme Court also made clear that the notion a Government decision is reviewable by courts is of 'constitutional importance'.¹⁹ If the veto is to exist, it must be judicially reviewable (as it currently is).

The Commission claims the Supreme Court judgment casts doubt on how 'Parliament had understood it would work when its provisions were being enacted' (emphasis added). This is untrue. The decision is in disagreement with the Government's interpretation of its powers—not on Parliament's intention for the veto.

The evidence sought on the question of the Cabinet veto is symptomatic of broader problems with the Commission's call for evidence. It is introducing confusion where there is clarity. It paints certain issues as unresolved where matters have been settled by extensive debates in Parliament and post-legislative scrutiny.

The FOIA system

Finally the Commission asks whether the FOIA appeal and enforcement system works adequately and whether requesters should be made to pay for information. The answers to these questions are simple: 'sometimes' to the first (as Government departments still often refuse or delay responses on questionable grounds) and an unequivocal "no" to the second.

The ICO plays a role beyond mere enforcement and appeal. He is an independent watchdog and part of his role is to assist public bodies in complying with their duties under FOIA. He develops a better understanding of FOIA within public bodies thereby reducing its operational costs. His independence and reason for being allow him to make submissions to the Commission and any other body which seeks to re-evaluate FOIA. If courts were the only recourse they could not fulfil this crucial role. The informality of the appeal process to the ICO means FOIA at most stages is easily accessible to the public at large—not just a select few with knowledge of the law.

The Commission's questions on the ICO demonstrate a fundamental misunderstanding of FOIA. Indeed the Commission states that where the ICO finds against a public authority and orders the release of information 'it can be unclear, at the culmination of the appeal or any onward appeal, whether the requestor is even still interested in the requested information.' Whether a requester is personally interested in the information sought is largely irrelevant to the question of whether information should be released.²⁰ The question to be asked at all times is: 'does the public have an interest in this information?' It is not: 'does the individual requester care about this information or this appeal?'

FOIA requests by journalists are a prime example. To the individual journalist the information sought may or may not matter on a personal level. He or she makes the request because he or she believes the public has a right to know and the public will be interested.

¹⁸ *R(on the application of Evans) v Attorney General* [2015] UKSC 21, paragraph 71, available at: https://www.supremecourt.uk/decided-cases/docs/UKSC_2014_0137_Judgment.pdf

¹⁹ *R(on the application of Evans)*, paragraph 54

²⁰ See: 'Consideration of the identity or motives of the applicant', ICO Guidance: <https://ico.org.uk/media/for-organisations/documents/1043418/consideration-of-the-identity-or-motives-of-the-applicant.pdf>

Similarly, on the question of charging requestors for information the Commission shows a fundamental disregard for the purpose of FOIA and the effects of levying charges. Jack Straw—who currently sits on the Commission—previously sought to introduce fees for requests.²¹ He was clear that his only goal was to reduce the volume of requests.²² The direct result of Mr Straw’s proposals—adopted by the Commission—would be to handle requests based solely on the requester’s ability or willingness to pay, without any consideration to the merits of a request or the public interest in disclosure of the information sought. Fees for requests would only serve to limit transparency. As the ICO points out in paragraphs 64-67 of his submissions, they would not help cover the costs of operating FOIA. There is, therefore, no sensible reason to charge for information that belongs to the public.

²¹ See: ‘Post-legislative scrutiny of the Freedom of Information Act 2000’, *House of Commons Justice*

²² *Committee*, 26 Jul 2012, p. 30, paragraph 70:

<http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/96.pdf>¹⁸ Ibid. p. 31, paragraph 72

Request Initiative

Request Initiative is a non-profit research organisation that works to empower civil society by revealing the structures that underlie our systems of power and governance. It is founded on the principle that a functioning democracy is enhanced where there is equality in the information shared between institutions and citizens.

Request Initiative uses information law, primarily the Freedom of Information Act (FOIA), to perform investigations both on its own behalf and for leading UK charities, as well as promoting wider transparency by training journalists and campaigners in its methods.

Request Initiative was founded in 2010 by Journalist Brendan Montague who has worked for the *Sunday Times*, the *Mail on Sunday*, and the *Daily Mail*, and is now Editor of the investigative environmental news blog *DeSmog UK*.

Brendan Montague and cofounder Lucas Amin authored “FOIA without the Lawyer”, a guide to Freedom of Information (FOI) published with the Centre for Investigative Journalism.

Request Initiative believes that the FOIA is a crucial tool in holding the government to account and that the public interest is, and should remain, integral to the FOIA.

Internal discussion

Request Initiative’s experience of the ‘safe space’ surrounding internal discussion is that the current FOIA offers adequate protection. Sections 35 and 36 are both wide-ranging and cover anything that ‘relates to’ the formulation and development of government policy. The Information Commissioner’s well-established position²³ is that it is clearly in the public interest for government to be capable of making policy effectively and that this is specifically relevant where a live policy is disclosed. We often find that, even in cases with an extremely strong public interest, the Information Commissioner’s Office (ICO) is unlikely to decide in favour of disclosing information.

Some recent examples of information unearthed by Request Initiative that had crucial information withheld because of either section 35 or section 36 include an article titled ‘BP and Shell Benefit From ‘Strategic’ Relationship With Government’. In this case, UK Trade & Investment (UKTI) stated that some of the information covered by the request was covered by section 35(1)(a), Policy Development. Even though UKTI noted that “there is a public interest in understanding sanctions policy and decision-making”, they took the view “that there is a significant public interest in withholding the information requested in the interests of both the free and frank provision of advice to Ministers and civil servants and the free and frank exchange of views for the purposes of deliberation”²⁴. In addition: “On balance, [UKTI] consider the public interest in an effective UK

²³ The Department for Education and Skills v The Information Commissioner and the *Evening Standard* (EA/2006/0006).

²⁴ UKTI Internal Review Response FOI2015/09518 17/11/15.

sanctions policy outweighs the public interest in sight of detailed underlying information on that policy.” We acknowledge that this information may need to be withheld now, but believe that it is critical that this information may be disclosed once the issue is no longer live, and that the public interest test remains an integral consideration of disclosure.

Charges

Recently, Request Initiative completed a project with the health charity Sue Ryder. Sue Ryder’s ‘Dying doesn’t work 9 to 5’³ campaign²⁵ involved sending the same FOI request to all 211 Clinical Commissioning

Groups in the UK. These FOI requests highlighted that “only 8% of local health services provide a comprehensive package of dedicated 24/7 advice and support which includes a specialist helpline and coordination service for people dying and their carers”, and that “56% of areas do not offer a dedicated 24/7 palliative helpline or coordination service for carers and people who are dying”.²⁶

This is information

which was previously unpublished. Introducing a charge for individual FOI requests would make work like this impossible for smaller charities and non-profits like ourselves. And, unfortunately, there is no other way to collect the data: it is not routinely aggregated and there is no one singular body that holds the information, and even if there were, a singular FOI request for the quantity of data would most likely be beyond the cost limit.

A similar project for the housing charity Shelter highlighted the amount, and poor condition of, temporary accommodation being used in London. The FOI request found evidence of families living in insecure, temporary accommodation for long periods of time, being placed in temporary accommodation far away from their local area, and living in temporary accommodation with significant rent shortfalls as a result of being caught by the benefit cap²⁷. Again, this information could only be exposed via a series of requests, in this case to all London boroughs.

Another particular area that Request Initiative would like to highlight is the weakness of some of the government’s disclosure schemes, which gives rise to the importance of being able to submit multiple FOIs. For example, the recent Department of Energy and Climate Change (DECC) disclosure log on ministerial meetings with external organisations – the “Edward Davey meetings with external

²⁵ <http://www.sueryder.org/how-we-help/Policy-and-campaigns/Our-campaigns/not-9-to-5>

²⁶ <http://www.sueryder.org/how-we-help/Policy-and-campaigns/Our-campaigns/not-9-to-5/facts>

²⁷

http://england.shelter.org.uk/professional_resources/policy_and_research/policy_library/policy_library_folder/research_temporary_accommodation_in_london

organisations: Jul to Sep 2014”²⁸publication – listed the ‘Purpose of Meeting’ for all 12 meetings between

July and September as ‘to discuss energy and climate change’. This lack of information forces an increased number of FOI requests by Request Initiative and other organisations that wish to understand the internal workings of the government.

The ‘cost limit’

In Request Initiative’s experience of the FOIA, we have found that the cost limit can be reached surprisingly easily, particularly where information is held at several different locations, or in unindexed files, or when there is no central document storage system (which seems to be the case in a number of government departments). This is especially the case when looking for governmental communications. The exemption can also often be more strictly enforced by different public bodies with little explanation of how the limit came to be reached.

Request Initiative also considers the Commission’s consideration of deciding whether to release information, or redacting exempt information, in assessing whether the cost limit has been reached particularly damaging. This would make it possible to refuse requests because of the amount of redactions required, which would mean heavily redacted documents would not even be viable for release. This change would dissuade people from asking for information on topics likely to be considered exempt, such as communications with third parties, or commercial information. Request Initiative believes that the information most likely to be exempt is also the most valuable and the most likely to hold the government to account. For example, a recent report acquired through the FOIA by Request Initiative for Greenpeace may well have been dismissed as exceeding the cost limit and never considered for release. This was the Draft Shale Gas Rural Economy Impacts paper, which originally contained 63 redactions within 13 pages²⁹, and was later released in full after a decision by the ICO.

Tribunal fees

Request Initiative already relies upon the work of a number of lawyers working pro bono in order to continue with cases that we believe are strongly in the public interest and have been withheld

²⁸

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/468551/Edward_Davey_-_meetings_with_external_organisations_-_July_-_Sept_2014.pdf

²⁹

<http://www.dailymail.co.uk/news/article-2722407/The-fracking-cover-Defra-censors-key-report-63-times-13-pages-described-comical-campaigners.html>

incorrectly. We would most likely not be able to appeal cases without them. Any further charges introduced at this stage would make our ability to appeal even less likely.

Fees introduced at this stage would also negatively impact individuals, smaller charities and non-profits. In early 2015, the arts activism charity Platform, supported by Request Initiative, won a case in the Information Tribunal, where it was released, for the first time, how much money BP donated to Tate over a 17-year period. The total of £3.8m, given in annual amounts varying between £150,000 and £330,000

– an average of £224,000 a year – was called a “considerable sum” by Tate and an “embarrassingly small” figure by Platform. In situations like this, where small charities and non-profits are attempting to hold multinational corporations and British institutions to account, the fees will be a significant sum to one party yet the other would have no difficulty challenging decisions that they do not agree with.

The Royal Historical Society

To Whom It May Concern:

Submission from the Royal Historical Society

The RHS has conducted a brief consultation among academic historians and historical researchers in response to this call for evidence.

We would like, first, to affirm our commitment to transparent and accountable government, both as historians and as citizens. As practising historians, we understand this commitment not only in terms of FOI but also as an eventual release of all documentation so that the official record may be as complete as possible. While the latter affects all historians and historical researchers, FOI has a particular impact on contemporary historians and it is clear from our consultation that FOI is now an essential tool for them.

Historians who make regular use of FOI feel that the current legislation has worked reasonably well, both for academics and for PhD students. It is also clearly the case that significant historical work is being published as a result of existing FOI provisions and that this work could not have been undertaken without the FOI legislation. The RHS is therefore concerned that additional restrictions, such as fees or some kind of limit, for example on grounds of cost, would affect and even restrict this kind of research, which often looks at important and sensitive areas, for example the Northern Irish Troubles.

While there is some feeling that a scholar needs to develop an expertise in making requests and using the FOI provisions, this is not seen as complex. The RHS also feels that the same is true of many kinds of research access. However, there does seem to be an issue with timeliness. Historians report that FOI requests regularly take longer than the stipulated period, sometimes much longer. There thus already seems to be a 'lag' in terms of the current legislation in that the process is slower than it should be and the RHS is very concerned that further restrictions are only likely to exacerbate this. Clearly, this is a particular issue for work that needs to be completed in a timely fashion (e.g. the current History and Policy project on historical child sex abuse).

The RHS recognises that there is a balance to be struck. FOI legislation may have led to some self-censorship of official documents but we have not heard concerns about 'chilling' and would see appropriate access to documentation as the priority. FOI requests are also refused, or redacted, for example under the Section 38 or Section 40 exemptions and, clearly, there is a need to protect individuals. However, we would urge that the public interest be construed as widely as possible so as to facilitate academic research and scholarship into serious and timely contemporary issues. Such work will be to the benefit and interest of the public as well as to historians and students.

Yours faithfully,

Professor Mary Vincent

Vice-President, Royal Historical Society

The Royal Historical Society,

UCL Gower Street,

London WC1E 6BT

020 7387 7532

Royal Marsden NHS Foundation Trust

Dear Sir/Madam,

The Royal Marsden NHS Foundation Trust welcomes the call for evidence issued by the Independent Commission on the Freedom of Information Act (FOIA) 2000. We believe the Commission is right to seek stakeholders' views on the practical operation of the FOIA 2000 and as such, we have provided our response below.

Please note that the Trust will not be answering all six questions the Commission has put forward but rather will focus on responding to the following question:

'Is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know? Or are controls needed to reduce the burden of FOI on public authorities? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kinds of requests do impose a disproportionate burden?'

As a public sector health organisation, The Royal Marsden is firmly committed to the principles of openness and transparency as it is these principles which help hold the organisation to account to the community it serves. There are several ways in which the Trust demonstrates this commitment e.g. the Trust holds Member's Events whereby members of the Trust and also general members of the public are invited to visit the Trust and learn about its business, latest developments as well as its forward plans. The publication of key documents is also another way in which the Trust commits to being open and transparent such as the publication of the Annual Report and Accounts as well as the publication of senior meeting papers. Indeed the principles of openness and transparency are fundamental to the Foundation Trust model and are deeply embedded in the culture of our organisation.

Unfortunately the Freedom of Information Act 2000 is not an output that the Trust can use as an example of how it adheres to these principles because of how the legislation is being used, or abused as some may say.

In preparing this response, the Trust consulted its senior management to gather their views on the effect of the FOIA. It is clear that the demand on staff time and resource is growing in terms of responding to FOI requests but also, there is a growing sense of frustration amongst staff because the majority of FOI requests are from journalists seeking information for an article (which gives rise to other concerns that are noted later in this response) but also individuals wanting information for commercial purposes. The Trust receives an average of 36 FOI requests per month for 2014/15 compared to an average of 26 FOI requests for 2012/13. In the last 12 months, less than half of the total FOI requests received by the Trust were from members of the public, with journalists and commercial requestors making up the majority of the remaining thirty-eight per cent (it is quite likely that this number may be even higher because not all requestors will reveal the purpose of their request and of course nor are they obliged to under the law).

Some have pointed out that the FOIA has helped discover improper business conduct and therefore it should not be diminished. However the government noted in the white paper 'Your Right to Know' that the aim of the FOIA was a more open government based on mutual trust. There is a question as to whether the Act is serving its original purpose or gives rise to the contrary. A key concern with regard to the FOIA is that the legislation limits our ability to build trust with general members of the public because our organisation can only provide that information which is being requested. In other words, if a journalist requests X, Y and Z for an article but the Trust is unaware of this and does not provide the relevant context and this is subsequently released into the public domain then this can in effect mislead the public and cause unfounded concerns on the part of the community, as well as reputational damage which the Trust has to use resource and time to dispel.

In conclusion, The Royal Marsden NHS Foundation Trust reiterates that it remains firmly committed to the principles of openness and transparency but does not believe the FOIA is a proportionate means of achieving this legitimate aim. Encouraging organisations to publish more information on their websites is perhaps a more meaningful way of providing general members of the public access to

Independent Commission
on Freedom of Information

information about public sector organisations as opposed to providing this to one individual who requests it and who quite often, has an ulterior motive than simply serving the public interest.

We hope that by taking part in this consultation and sharing feedback from our staff with regard to the FOIA, we have made a useful contribution in improving the practical operation of the Act in such a way that can better serves its original purpose.

Yours sincerely,

Syma Dawson

Trust Secretary

The Royal National Institute of Blind People (RNIB)

20th November 2015

About us

We are the largest organisation of blind and partially sighted people in the UK and welcome this opportunity to respond to the consultation.

We are a membership organisation with over 13,500 members who are blind, partially sighted or the friends and family of people with sight loss. More than 80 per cent of our Board of Trustees are blind or partially sighted. We encourage members to be involved in our work and regularly consult with them on government policy and their ideas for change.

We campaign for the rights of blind and partially sighted people in each of the UK's countries. Our priorities are to:

- Be there for people losing their sight.
- Support independent living for blind and partially sighted people.
- Create a society that is inclusive of blind and partially sighted people's interests and needs.
- Stop people losing their sight unnecessarily.

We provide expert knowledge to business and the public sector through consultancy on improving the accessibility of information, the built environment, technology, products and services.

Thank you for providing RNIB with the opportunity to respond to the Independent Commission on Freedom of Information 'Call for Evidence'.

At RNIB we make extensive use of FOIs in our campaigning work and would face real difficulties in supporting and advocating for blind and partially sighted people if the scope of FOIs was reduced. We use general FOIs as well as one-off requests.

Please find our response below. We have focused on responding to question 6 which is most relevant to our use of FOIs.

“Question 6: Is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know? Or are controls needed to reduce the burden of FOI on public authorities? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kinds of requests do impose a disproportionate burden?”

“Is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know?”

We think all considerations of the cost of the FOI Act must take into account the pivotal role FOI has played in bringing information of significant public interest into the public domain. For example, FOI enabled information to be released showing the denial of access to treatments that CCGs and hospital trusts were legally obliged to provide to people losing their sight. This has aided RNIB's efforts to help prevent avoidable sight loss in the UK population.

More detailed insights on uses of FOI by RNIB

FOI in relation to Children and young people and their families (CYPF)

Background

- Each year since 2013, RNIB has used FOI to obtain information from local authorities in England on the policies and practices relating to the specialist educational provision for blind and partially sighted children and young people.
- Prior to 2013 this information was collected less frequently via questionnaire surveys to heads of local authority vision impairment (VI) education services.
- The VI education service is the key service for co-ordinating and providing specialist support to children and young people and their families.
- Many VI services have been adversely affected by public sector cuts and a key aim of the FOI request was to benchmark existing provision in each LA against future policy decisions and to monitor changes over time.
- A second key aim has been to find out the effects of the Children and Families Act 2014 and the new Special Educational Needs and Disability (SEND) Code of Practice on provision for children and young people with vision impairment and their families.

Why is it better to obtain this information through FOI?

Response rates are better: We have had a 100% response rate for 2013 and 2014 and it looks likely that this will also be the case for 2015. This means that we have information from every local authority in England which enables much more meaningful comparison across LAs and regions. In contrast, only around two thirds of LAs responded to the questionnaire surveys that were not carried out under FOI. In 2011 – a time when major changes were being introduced to VI services in response to public sector cuts – only 27% of LAs in England responded.

Findings using FOI can be more widely used: the non-FOI surveys are subject to research ethics guidelines in relation to confidentiality and anonymity of the respondents (i.e. individual heads of VI education services). Although the published version of the FOI report does not name individual respondents or LAs, RNIB has more freedom to use and share the information in a way that is of greater benefit to children and young people with VI and their families.

What are the benefits of the information obtained through FOI and how do we use it?

- No other organisation or public sector department collects this type or level of information about educational provision for children and young people with vision impairment. The information is therefore likely to be of use to government at both local and national level because it:
- Enables LAs to compare their policies and practices with those of other LAs across the country
- Provides information that will be of use to DfE and DoH when monitoring how the SEND reforms are being implemented
- Provides information that has been used by organisations such as the National Sensory Impairment Partnership (NatSIP) in developing and revising its national guidelines for education services that support children and young people with sensory impairment
- One of the questions we ask is about number of children and young people on VI education service caseloads. This information is more reliable than the statistics published by DfE on numbers of pupils with VI identified as SEND. That is because our data reflects the actual number of children and young people receiving specialist education provision, as opposed to the School Census data which for various reasons, excludes/omits some groups of pupils.
- The information enables RNIB to hold individual local authorities to account where it is evident from their FOI response that they are failing to adequately support children and young people with VI and their families. For example, where staffing levels are clearly insufficient to support the number of children and young people on the caseload; where policy changes have meant that some children and families are being denied specialist support

- The information also enables RNIB to identify LAs that are introducing innovative ways of working and share this across the specialist education sector and with parents
- By knowing what is happening in other, comparable LAs, enables RNIB to respond in a more informed way to LA consultations on reviews of VI education services
- The key benefactors of this information are children and young people with vision impairment and their families.

FOI in relation to adults of working age

Background

- RNIB has obtained statistics from DWP relating to blind and partially sighted people of working age:
- Number of Employment Support Allowance (ESA) claimants and the outcomes of their Work Capability Assessments (WCA)
- Number on the government funded Work Programme, and their employment outcomes
- Number being supported under the Access to Work scheme and the type of support received
- Although some of the published DWP statistics include a breakdown by type of health condition, it is important to be aware that some of these are acute, rather than chronic, long term disabling conditions. For this reason, RNIB's FOI requests have required a further breakdown of the statistics relating to people in the administrative category 'Diseases of the Eye and Adnexa' that excludes people with short term, acute conditions.

What are the benefits of the information obtained through FOI and how do we use it?

- Blind and partially sighted people of working age are a numerically small population but with very specific support needs. Their experiences and outcomes are likely to be subsumed within the much larger population group(s). Policies and practices that are relevant to some disability/health condition groups may be inappropriate for other groups. The information obtained under FOI therefore ensures that we get a much better understanding of how government policies are affecting this low incidence, high needs group
- The information obtained under FOI has been used to inform RNIB's response to several government consultations to ensure that the specific needs of blind and partially sighted claimants are represented:
 - Annual reviews of the WCA
 - Access to Work consultation
 - Work and Pensions Select Committee review on the Work Programme
- The information is also used to inform RNIB/Action's services for people of working age with sight loss.

“are controls needed to reduce the burden of FOI on public authorities?”

We think one practical way for public authorities to reduce burdens is for them to make more information routinely available in the first place via their website.

We regularly face barriers in finding and obtaining policy documents, minutes of meetings and equality impact assessments. Some organisations provide this kind of information online, but unfortunately many don't, or they provide ineffective search tools which amounts to the same thing.

A significant proportion of information we request is on behalf of individuals, or groups, to assist in the investigation of potential discrimination complaints. If information was more easily available then it would be much easier to retrieve information necessary to establish whether a person/group does in fact have a legitimate complaint and what their prospects of success would be.

We would also be concerned about any "controls" being imposed on FOIs, such as charges. Attaching a price to information that may relate to the way blind and partially sighted people receive or don't receive services, is likely to create inequalities in access and transparency. Cost is likely to deter legitimate FOIs being made in the public interest.

“Which kinds of requests do impose a disproportionate burden?”

In our experience it is not so much that the FOI is disproportionate, it is the fragmented systems and data collections where relevant information is distributed, that necessitates multiple FOI requests to be made.

For example, in our experience of supporting blind and partially sighted people in securing equal access to health and social care services, we often need to make multiple FOI requests to CCGs, hospital trusts and other bodies such as NHS England.

In addition, while we recognise FOIs create a workload for public authorities we also observe raised workload caused by errors or inefficiencies in the process. For example, after submitting FOIs we frequently are forced to invest more time to chase authorities to secure a response, and/or resolve problems caused by incorrect reading of the questions by the authority. Attention to the efficient running of the FOI process should reduce burdens.

Conclusion

We would be very concerned about any change that restricts the way FOI's currently work. We do not believe any changes that amount to restrictions would be in anyone's interests. While it may be possible to obtain information through disclosure, this approach results in unnecessary escalation and unnecessary costs for all concerned.

Thank you for providing us with this opportunity to share our views. Please don't hesitate to contact us for further information using the contact details below.

Hugh Huddy, Policy and Campaigns Manager, RNIB.

Hugh.huddy@rnib.org.uk

Telephone 020 7391 2008

The Royal Statistical Society (RSS)

Dear Lord Burns,

The Royal Statistical Society (RSS) is a learned society for statistics, a professional body for statisticians and a charity which promotes statistics for the public good. We were first founded as the Statistical Society of London in 1834, and became the Royal Statistical Society by Royal Charter in 1887. There are more than 6000 members of the RSS around the world, of whom some 1500 are professionally qualified as Chartered Statistician. We are active in a wide range of areas both directly and indirectly relevant to the study and application of statistics.

The Royal Statistical Society's interest in this review is primarily that freedom of information (FoI) should continue to operate as an important mechanism for data access in the public interest.

Whilst we welcome the steps taken by government to put more information in the public sphere, we believe that the growth of open data published by government is complementary to the right to information set out in the FoI Act, rather than a replacement for it.

In our [Data Manifesto](#), we advocate the need for "citizens to have access to good quality local data".³⁰ FoI has established an important complementary process, in which the public can be actively involved in identifying data for publication. In practice, data has often only been released as a result of FoI requests. Open data cannot really be considered open if the Government has total control over what data sets are released and that is why freedom of information is so crucial. FoI provides the legal right to information, and with it, the required enforcement process provided by the Information Commissioner. Without this in many cases, many data sets would not have become open, for example, food hygiene ratings and MOT failure rates.

We are aware that a balance must be struck between public access and the need for a "safe space" for Ministers and officials to discuss frankly and privately the formulation of policy. We fully support the need for protected discussion and debate, and believe this is already safeguarded by Section 35 (Formulation of government policy, etc.) and Section 36 (Prejudice to effective conduct of public affairs) of the FoI Act.

With regard question six of the Commission's call to evidence on the cost of the Act, we note that an organisation can already refuse a request if it will cost over a certain amount. Making policy when resources are tight is difficult, so our *Data Manifesto* calls for evidence to be used to inform choices between options in important policy areas, and for government to publish the data and evidence that underpin any new policies it announces. The plans for new policy proposals should include the costs of making the underlying evidence available to the public. Also, the cost of FoI needs to be considered in the context of public spending overall. We believe it is a small cost for increasing public trust in decisions made that affect everyone's day to day lives. We are aware of a number of instances where RSS fellows have used FoI to scrutinise data claims in the public interest – for example we have written about one [here](#).²

If you would like to discuss these issues further, [please get in touch](#) using the details at the top of this letter.

Best wishes,

Hetan Shah
Executive Director
Royal Statistical
Society

³⁰ The Royal Statistical Society (2014) 'Data Manifesto' [webpage], Available at: www.rss.org.uk/manifesto
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Russell Group of Universities

Lord Burns Chairman

Independent Commission on Freedom of Information Post point 9.54, 9th Floor
102 Petty France London, SW1H 9AJ

Email foi.commission@justice.gsi.gov.uk

20 November 2015

Dear Lord Burns,

I am writing on behalf of the Russell Group of Universities in relation to your call for evidence on the Freedom of Information Act (2000).

The Russell Group provides strategic direction, policy development and communications for 24 major research-intensive universities in the UK. We aim to ensure that policy development in a wide range of issues relating to higher education is underpinned by a robust evidence base and a commitment to civic responsibility, improving life chances, raising aspirations and contributing to economic prosperity and innovation.

Russell Group universities play an important part in the intellectual life of the UK and have a positive impact on the social, economic and cultural well-being of their regions and the UK as a whole. Our aim is to ensure that our universities have the optimum conditions in which to flourish and continue to make a positive impact through their world-leading research and teaching.

As you will be aware, the Freedom of Information Act (2000) extends compliance with the Act to universities and other higher education providers supported by public funding (Schedule 1, part IV, paragraphs 53 and 55). In practical terms, this means that any higher education providers in receipt of funding from the Higher Education Funding Council for England (HEFCE), the Higher Education Funding Council for Wales (HEFCW) or the Department for Employment and Learning - Northern Ireland (DELNI) are subject to FOI. This includes our universities.

We believe that this requirement has resulted in unintended consequences. In particular, the FOI requirement has created a competitive imbalance in the UK higher education market and increasingly burdensome reporting requirements for our universities.

Your review is therefore very timely and we hope that you will agree with our recommendation that universities should now be exempted from the Freedom of Information Act (2000).

Please allow me to expand on the two key points noted above:

Market imbalance

Since the enactment of the Freedom of Information Act (2000) there has been considerable growth in the number of 'private' higher education providers (referred to as 'alternative providers'). These new institutions are not in receipt of funding from HEFCE, HEFCW or DELNI. Consequently, alternative providers are not subject to FOI. Many new alternative providers are designated for Student Loans Company eligibility meaning that their students attract publicly-financed student loans, in the same way as universities and other publicly supported higher education providers.

In this new market environment, universities and alternative providers are in competition for the same students and the same private-sector partnerships to augment their educational offering. The imposition of FOI regulation on universities, including the Russell Group universities, puts

established providers at a significant disadvantage compared to alternative providers in the higher education market. Furthermore, this continued imbalance contravenes the UK Competition and Market Authority's stated desire for "market neutrality" in higher education regulation³¹.

It is important to point out that the Department for Business, Innovation and Skills (BIS) has suggested removing universities from FOI compliance requirements. The recently published Green Paper on higher education regulation, *Fulfilling our potential: teaching excellence, social mobility and student choice*, also notes this market imbalance. The BIS Green Paper notes that universities and other publicly-supported higher education providers are increasingly supported by private financing and are effectively not public bodies for the purposes of FOI:

There are a number of requirements placed on HEFCE-funded providers which do not apply to alternative providers. Many derive from treating HEFCE-funded providers as 'public bodies'. This is despite the fact that the income of nearly all of these providers is no longer principally from direct grant and tuition fee income is not treated as public funding. Alternative providers are not treated as public bodies. As a result there is an uneven playing field in terms of costs and responsibilities. For example, the cost to providers of being within the scope of the Freedom of Information Act is estimated at around £10m per year.³²

Universities take their responsibility to provide information to students and the public very seriously. They are subject to numerous regulatory requirements on information reporting, including financial health reporting, publication of data on student satisfaction and graduate employment and publication of information on courses of study. The additional responsibilities created by FOI represent an unnecessary burden. Furthermore, changes in funding of higher education and the emergence of a private sector of higher education provision mean that continued application of the Freedom of Information Act to universities is unfair.

Cost burden

The FOI burden on universities varies considerably. Some universities face over 400 enquiries a year. Typically Russell Group universities experience higher rates of FOI requests compared to other universities. Based on data returned to us from Russell Group universities we know the number of FOI requests submitted to our universities has more than doubled since 2010, from 3,314 to over 7,000 annually.

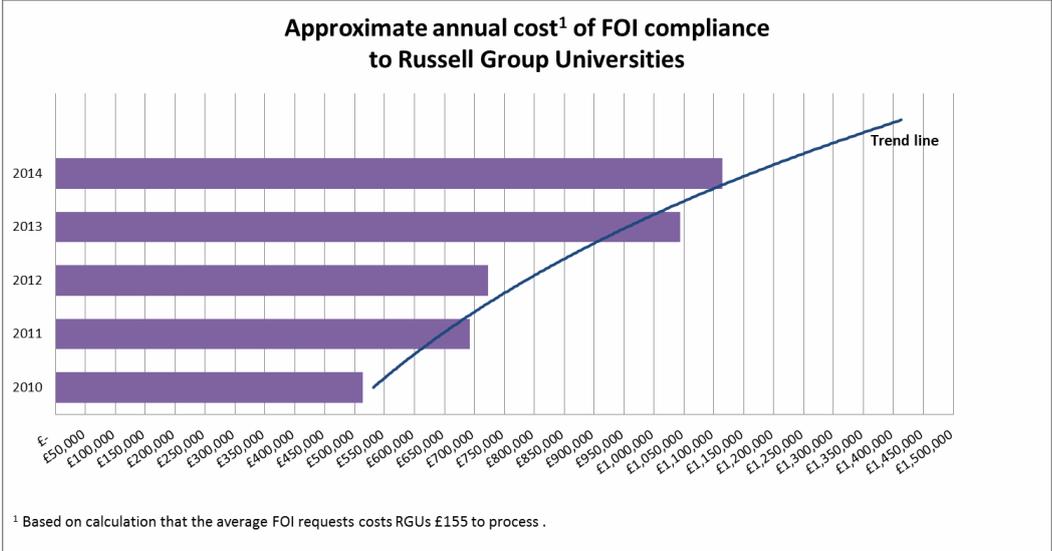
We have calculated that the average cost to our universities to process FOI requests is £155 per request. Using this estimate, the cost of processing FOI requests to Russell Group universities has grown from £514,000 in 2010 to £1.1 million in 2014.

Based on the rate of growth in FOI requests to our universities, we expect that this burden will soon breach

£1.25 million per year for Russell Group universities alone. This growth is illustrated by the figure below:

³¹ CMA (2015) *An effective regulatory framework for higher education*. https://assets.digital.cabinet-office.gov.uk/media/550bf3c740f0b61404000001/Policy_paper_on_higher_education.pdf

³² See <http://www.legislation.gov.uk/ukpga/2000/36/schedule/1/paragraph/53>



I hope you can appreciate the significant burden these costs place on our universities compared to alternative providers who have no such requirement. Furthermore, this is a growing burden, which means that the imbalance between universities and alternative providers is increasing. Universities are already highly accountable and take their reporting responsibilities to the Funding Councils, HESA, QAA, OFFA, the Charity Commission, Research Councils, BIS, Health Education England, the Home Office, the Department of Health and a wide-range of Professional, Statutory and Regulatory Bodies very seriously, so the addition of FOI reporting requirements is an unnecessary extra burden.

Our recommendation is therefore that universities should now be exempted from the Freedom of Information Act (2000) to address the market imbalance that has been created, to recognise that the cost burden has grown unreasonably and, critically, to reflect that universities are not public bodies. We appreciate this opportunity to submit evidence to the Independent Commission on Freedom of Information. The review is timely and our team would be more than happy to discuss these issues with you or your staff in more detail if you wish, so please do not hesitate to contact us.

Yours sincerely,
Dr Tim Bradshaw
Director of Policy

Save FOI UK

Responsibilities of Public Authorities

[As](#)¹ [with](#)² [the](#)³ post-legislative⁴ scrutiny⁵ [for](#)⁶ [the](#)⁷ Freedom⁸ of⁹ Information¹⁰ [Act](#)¹¹ [in](#)¹² 2012,¹³ [and](#)¹⁴ [unlike](#)¹⁵ [when](#)¹⁶ the¹⁷ Freedom¹⁸ of¹⁹ Information²⁰ Act²¹ was²² passed²³ in²⁴ 2000,²⁵ there²⁶ is²⁷ [now](#)²⁸ a²⁹ large³⁰ corpus³¹ of³² successful³³ [and](#)³⁴ unsuccessful³⁵ requests³⁶ against³⁷ which³⁸ to³⁹ test⁴⁰ any⁴¹ [proposals](#)⁴² for⁴³ exemptions.⁴⁴ Which⁴⁵ existing⁴⁶ FOI⁴⁷ requests⁴⁸ would⁴⁹ your⁵⁰ [new](#)⁵¹ "Burns⁵² restrictions"⁵³ affect? ⁵⁴

1:

http://www.oxfordmail.co.uk/news/14025041.Your_Right_to_Know__Today_s_Oxford_Mail_dedicated_to_protecting_the_public_s_right_to_freedom_of_information/

2: <https://twitter.com/grifferz/status/645344953254678528>

3: <http://the-hug.org/2232>

4: <http://www.thestar.co.uk/news/local/the-top-5-stories-brought-to-you-by-the-star-using-the-freedom-of-information-act-1-7476488>

5: <http://www.bbc.co.uk/news/uk-politics-33974674>

6: <https://twitter.com/willperrin/status/654294262784335872>

7:

<https://www.facebook.com/441699912704995/photos/a.442025239339129.1073741828.441699912704995/470584649816521/?type=3>

8: https://twitter.com/38_degrees/status/655854389349879809

9: <http://www.cleanhighways.co.uk/wp-content/uploads/2015/11/FOI-example-1.pdf>

10: <http://www.birminghammail.co.uk/news/midlands-news/freedom-information-stories-you-would-10328329>

11: <https://twitter.com/davidottewell/status/659364046056128512>

12: https://www.whatdotheyknow.com/request/content_filtering_software_137

13: <http://order-order.com/2015/10/29/9-stories-grayling-wants-to-keep-secret/>

14: http://jenpersson.com/?attachment_id=4597

15: http://www.huffingtonpost.co.uk/2015/11/14/things-we-wouldnt-have-learnt-if-we-couldnt-foi-universities_n_8531624.html

16: https://twitter.com/louise_eld/status/656862631001784320

17:

<https://www.dropbox.com/s/cmw2pll0wvxdeou/BrightonHoveFOIRedactedDataDJCroydon.pdf?dl=1>

18: https://www.whatdotheyknow.com/request/drm_notice_of_complaint_2

19: https://www.whatdotheyknow.com/request/ico_website_favicon_cost

20: https://www.whatdotheyknow.com/request/mps_with_criminal_records

21: <https://www.dropbox.com/s/85ogh3qmaqxtqov/SaveFOI.CarersLivingWage.pdf?dl=1>

22: https://www.whatdotheyknow.com/request/pip_centrally_hosted_assessment

23: https://www.whatdotheyknow.com/request/the_number_of_workless_household

24: https://www.whatdotheyknow.com/request/uns_announced_inspection_of_chil

25: https://www.whatdotheyknow.com/request/use_of_solice_enterprises

26: https://www.whatdotheyknow.com/request/who_appointed_the_parliamentary

27: https://www.whatdotheyknow.com/request/why_are_welsh_complainants_allow

28: http://issuu.com/catfordstreettrees/docs/catfordstreettrees_-_savefoi?e=18868724/31482019

29: https://www.whatdotheyknow.com/request/bylaws_3

30: https://www.whatdotheyknow.com/request/domain_name_registration

31: https://www.whatdotheyknow.com/request/human_rights_to_travel

32: https://www.whatdotheyknow.com/request/legal_advice_on_provision_of_dat

33: https://www.whatdotheyknow.com/request/legal_status_of_dwp_policies

34: <http://www.disabilitynewsservice.com/dwp-told-to-publish-esa-deaths-report-after-two-year-delay/>

35: https://www.whatdotheyknow.com/request/lgo_investigations_72

36: https://www.whatdotheyknow.com/request/local_government_act_1888

37: https://www.whatdotheyknow.com/request/location_of_posters_with_qr_code

38: https://www.whatdotheyknow.com/request/maladministration_exactly_what_i

39: https://www.whatdotheyknow.com/request/organogram_data

40: https://www.whatdotheyknow.com/request/terahertz_full_body_scanners_lin

41: https://www.whatdotheyknow.com/request/total_annual_figures_for_comprom_69

- 42: <https://philrogers.wordpress.com/2015/07/23/emails-between-cambridgeshire-county-council-and-kora/>
- 43: https://www.whatdotheyknow.com/request/total_cost_of_richard_penns_inve
- 44: https://www.whatdotheyknow.com/request/treatment_of_freedom_of_informat_33
- 45: https://www.whatdotheyknow.com/request/unlawful_retention_of_innocent_p_8
- 46: https://www.whatdotheyknow.com/request/diabetes_information
- 47: https://www.whatdotheyknow.com/request/number_of_requests_for_review
- 48: https://www.whatdotheyknow.com/request/et_cost_2
- 49: https://www.whatdotheyknow.com/request/foi_cerner_millennium
- 50: https://www.whatdotheyknow.com/request/foi_request_re_common_purpose_ch
- 51: https://www.whatdotheyknow.com/request/ipcc_2

In⁵⁵ public,⁵⁶ it⁵⁷ is⁵⁸ clear⁵⁹ that⁶⁰ [those](#)⁶¹ wishing⁶² to⁶³ exempt⁶⁴ themselves⁶⁵ from⁶⁶ FOI⁶⁷ do⁶⁸ not⁶⁹ reject⁷⁰ the⁷¹ principle⁷² [of](#)⁷³ FOI⁷⁴ applying⁷⁵ to⁷⁶ others,⁷⁷ [but](#)⁷⁸ do⁷⁹ reject⁸⁰ it⁸¹ applying⁸² [to](#)⁸³ themselves.⁸⁴ Be⁸⁵ they⁸⁶ universities,⁸⁷ be⁸⁸ they⁸⁹ cabinet⁹⁰ ministers,⁹¹ be⁹² they⁹³ parish⁹⁴ councillors.⁹⁵ Power⁹⁶ [craves](#)⁹⁷ secrecy,⁹⁸ the⁹⁹ very¹⁰⁰ [thing](#)¹⁰¹ that¹⁰² the¹⁰³ Freedom¹⁰⁴ of¹⁰⁵ Information¹⁰⁶ [Act](#)¹⁰⁷ was¹⁰⁸ created¹⁰⁹ to¹¹⁰ address.¹¹¹ This¹¹² is¹¹³ [special](#)¹¹⁴ pleading¹¹⁵ of¹¹⁶ the¹¹⁷ most¹¹⁸ brazen¹¹⁹ kind.¹²⁰

- 52: <https://www.dropbox.com/s/fqz1o3jrm9dn4n/where-does-my-money-go.pdf?dl=1>
- 53: <http://www.mind.org.uk/news-campaigns/news/people-receiving-esa-due-to-their-mental-health-more-likely-to-be-punished-than-helped-into-work/>
- 54: https://www.whatdotheyknow.com/request/no_contract_return_to_sender_add
- 55: https://www.whatdotheyknow.com/request/no_cycling
- 56: https://www.whatdotheyknow.com/request/process_and_results_of_croydon_c
- 57: https://www.whatdotheyknow.com/request/special_payments_unit_glasgow_no
- 58: <https://www.dropbox.com/s/zz81zisy43o0zuy/debtresistance.pdf?dl=1>
- 59: https://www.whatdotheyknow.com/request/evidence_based_protocols_3
- 60: https://www.whatdotheyknow.com/request/guidelines_for_investigations
- 61: <http://www.themedwire.co.uk/2015/02/23/students-blow-drying-their-hair-could-be-costing-you-over-700k-a-year-in-false-fire-call-outs/>
- 62: https://www.whatdotheyknow.com/request/reading_leonard_cheshire_the_liv
- 63: https://www.whatdotheyknow.com/request/student_protests_and_military_pe
- 64: https://www.whatdotheyknow.com/request/why_use_disclaimers_in_foi_respo
- 65: https://www.whatdotheyknow.com/request/total_annual_figures_for_comprom_134
- 66: https://www.whatdotheyknow.com/request/eea_family_permit_applications_i
- 67: https://www.whatdotheyknow.com/request/alleged_campaigns_10
- 68: https://www.whatdotheyknow.com/request/alternative_dispute_resolution_2
- 69: https://www.whatdotheyknow.com/request/arrests_and_charges_arising_from
- 70: https://www.whatdotheyknow.com/request/ice_investigations
- 71: https://www.whatdotheyknow.com/request/calendars_at_christmas_to_inmate
- 72: https://www.whatdotheyknow.com/request/care_quality_commission_atos
- 73: http://m.oxfordmail.co.uk/news/14024913.FOI_How_we_pushed_for_20mph_to_be_policed/
- 74: https://www.whatdotheyknow.com/request/dame_julie_mellors_working_diary
- 75: https://www.whatdotheyknow.com/request/decent_homes_figures_2
- 76: https://www.whatdotheyknow.com/request/deletion_of_emails_over_six_mont
- 77: https://www.whatdotheyknow.com/request/file_information_on_why_the_ico
- 78: <http://www.bbc.co.uk/news/uk-politics-34813936>
- 79: https://www.whatdotheyknow.com/request/fixed_cctv_camera_locations_33
- 80: https://www.whatdotheyknow.com/request/home_office_circular_462004_surv
- 81: https://www.whatdotheyknow.com/request/how_to_calculate_earliest_possib
- 82: https://www.whatdotheyknow.com/request/pace_and_purpose
- 83: <http://pimediaonline.co.uk/news-investigations/ffs-how-much-does-ucl-spend-on-the-upkeep-of-jeremy-bentham/>
- 84: <https://www.whatdotheyknow.com/request/reserves>
- 85: https://www.whatdotheyknow.com/request/roker_pods
- 86: https://www.whatdotheyknow.com/request/super_premium_service_2
- 87: https://www.whatdotheyknow.com/request/telephone_recording_devices
- 88: https://www.whatdotheyknow.com/request/time_limits
- 89: https://www.whatdotheyknow.com/request/timeline_for_processing_ilr_set

90: https://www.whatdotheyknow.com/request/tube_stations_above_and_below_gr
91: <https://westwayconcern.files.wordpress.com/2015/11/foi-request-1.pdf>
92: https://www.whatdotheyknow.com/request/the_point_film_facility
93: https://www.whatdotheyknow.com/request/kings_hedges_drive_private_or_pu
94: https://www.whatdotheyknow.com/request/long_residence_time_spent_outsid
95: https://www.whatdotheyknow.com/request/fisher_organisation ltdfmcbltd
96: https://www.whatdotheyknow.com/request/highgate_escalator_failure_corre
97: <http://epigram.org.uk/news/2015/02/university-spends-20k-on-vcs-far-east-trip>
98: https://www.whatdotheyknow.com/request/audio_recording_wcas_rpf_27_to_r
99: https://www.whatdotheyknow.com/request/avoidance_of_replying_to_request
100: https://www.whatdotheyknow.com/request/decision_not_to_release_david_ke
101: http://transitiontownwestkirby.org.uk/files/ttwk_foi_allotment_report.pdf
102: https://www.whatdotheyknow.com/request/email_and_postal_address_of_ukvi
103: https://www.whatdotheyknow.com/request/decisions_whether_or_not_to_inve
104: https://www.whatdotheyknow.com/request/delivering_leaflets_where_a_no_l
105: https://www.whatdotheyknow.com/request/deticavirgin_media_snooping_on_c
This¹²¹ submission¹²² contains¹²³ many¹²⁴ [footnotes](#)¹²⁵ to¹²⁶ experiences¹²⁷ of¹²⁸ organisations¹²⁹
covered¹³⁰ [by](#)¹³¹ FOI.¹³² Does¹³³ the¹³⁴ committee¹³⁵ believe¹³⁶ there¹³⁷ no¹³⁸ equivalents¹³⁹ in¹⁴⁰
organisations¹⁴¹ that¹⁴² are¹⁴³ not¹⁴⁴ [covered](#)¹⁴⁵ [by](#)¹⁴⁶ the¹⁴⁷ Act?¹⁴⁸
These¹⁴⁹ experiences¹⁵⁰ suggest¹⁵¹ that¹⁵² the¹⁵³ operation¹⁵⁴ of¹⁵⁵ the¹⁵⁶ Freedom¹⁵⁷ of¹⁵⁸
106: https://www.whatdotheyknow.com/request/email_address_for_101_non_emerge
107: <http://www.redbrick.me/news/featured-news/library-fines-which-universities-make-the-most-money/>
108: https://www.whatdotheyknow.com/request/foi_case_number_41739
109: https://www.whatdotheyknow.com/request/islington_leonard_cheshire_the_l
110: https://www.whatdotheyknow.com/request/email_sent_to_sutton_guardian_ne
111: https://www.whatdotheyknow.com/request/police_incident_3
112: https://www.whatdotheyknow.com/request/police_injury_award_pensions
113: https://www.whatdotheyknow.com/request/fs50197952_lord_ashcroft
114: <http://www.bbc.co.uk/news/uk-33651212>
115: https://www.whatdotheyknow.com/request/policy_on_destruction_of_informa
116: https://www.whatdotheyknow.com/request/pupil_uniform_questionnaire
117: https://www.whatdotheyknow.com/request/allotments_and_waiting_lists_230
118: https://www.whatdotheyknow.com/request/radioactive_poisoning_of_the_peo
119: <https://www.dropbox.com/s/6bf6h43yant0jzf/national-pupil-database.pdf?dl=1>
120: https://www.whatdotheyknow.com/request/training_by_common_purpose_payme
121: https://www.whatdotheyknow.com/request/jsa_claims_to_be_done_online
122: https://www.whatdotheyknow.com/request/ufo_activity_over_the_ukfrom_jan
123: https://www.whatdotheyknow.com/request/backlog_of_applications
124: https://www.whatdotheyknow.com/request/negligence_in_childrens_services
125: <https://overcast.fm/+ETSRZC5bk/>
126: https://www.whatdotheyknow.com/request/pankina_determinations_timescale
127: https://www.whatdotheyknow.com/request/parking_transactions
128: https://www.whatdotheyknow.com/request/risks_to_pedestrians_on_footpath
129: https://www.whatdotheyknow.com/request/asylum_seekers_allocated_to_port
130: https://www.whatdotheyknow.com/request/parking_restrictions_a35_honiton
131: <http://www.theguardian.com/uk-news/2015/jul/22/raf-personnel-assigned-us-unit-carrying-out-drone-strikes-reprieve-charity>
132: https://www.whatdotheyknow.com/request/child_concession
133: https://www.whatdotheyknow.com/request/public_conveniences_west_end_que
134: https://www.whatdotheyknow.com/request/publishing_bus_working_timetable
135: https://www.whatdotheyknow.com/request/sell_off_of_broadmoor_hospital
136: https://www.whatdotheyknow.com/request/tv_licensing_searches
137: <https://www.dropbox.com/s/jy4y7fag5dmz2sb/mobile%20libraries%20SaveFOI.pdf?dl=1>
138: https://www.whatdotheyknow.com/request/childrens_social_services_compla_3
139: https://www.whatdotheyknow.com/request/adam_smith_roundabout_kirkcaldy
140: https://www.whatdotheyknow.com/request/council_tax_to_the_regional_asse_2
141: https://www.whatdotheyknow.com/request/alumni_giving
142: https://www.whatdotheyknow.com/request/animal_experimentation_at_porton
143: https://www.whatdotheyknow.com/request/dms_medical_training

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- 144: https://www.whatdotheyknow.com/request/payment_phone_line
- 145: <http://www.bbc.co.uk/news/uk-england-birmingham-34778671>
- 146: <http://www.birminghammail.co.uk/news/midlands-news/west-midlands-polices-19k-drones-10445507>
- 147: https://www.whatdotheyknow.com/request/council_debt_2
- 148: https://www.whatdotheyknow.com/request/council_spokesperson
- 149: https://www.whatdotheyknow.com/request/complainant_information_stored
- 150: https://www.whatdotheyknow.com/request/lioness_law
- 151: https://www.whatdotheyknow.com/request/meaning_of_the_word_declined_whe
- 152: https://www.whatdotheyknow.com/request/open_standards_when_specifying_i
- 153: https://www.whatdotheyknow.com/request/signal_post_telephones_metropoli
- 154: https://www.whatdotheyknow.com/request/council_tax_prosecutions_pre_pos_12
- 155: https://www.whatdotheyknow.com/request/when_a_premium_application_servi
- 156: https://www.whatdotheyknow.com/request/when_the_fos_tells_lies
- 157: https://www.whatdotheyknow.com/request/when_to_charge_schedule_5_header
- 158: https://www.whatdotheyknow.com/request/when_was_castle_ward_caravan_par

Information¹⁵⁹ Act¹⁶⁰ is¹⁶¹ in¹⁶² no¹⁶³ way¹⁶⁴ controversial,¹⁶⁵ on¹⁶⁶ any¹⁶⁷ side,¹⁶⁸ for¹⁶⁹ the¹⁷⁰ vast¹⁷¹ majority¹⁷² of¹⁷³ Government¹⁷⁴ operations¹⁷⁵ or¹⁷⁶ requests,¹⁷⁷ even¹⁷⁸ when¹⁷⁹ responses¹⁸⁰ show¹⁸¹ Ministers¹⁸² may¹⁸³ have¹⁸⁴ inadvertently¹⁸⁵ misled¹⁸⁶ Parliament.¹⁸⁷ The¹⁸⁸ only¹⁸⁹ time¹⁹⁰ FOI¹⁹¹ is¹⁹² controversial¹⁹³ is¹⁹⁴ when¹⁹⁵ the¹⁹⁶ reasons¹⁹⁷ for¹⁹⁸ a¹⁹⁹ decision²⁰⁰ are²⁰¹ deliberately²⁰² opaque,²⁰³ misleading,²⁰⁴ or²⁰⁵ even²⁰⁶ false.²⁰⁷

- 159: http://huffingtonpost.co.uk/2014/09/15/osborne-robin-hood-tax-challenge_n_5811216.html
- 160: http://www.yorkpress.co.uk/news/13785055.Top_up_council_payments_to_be_scrapped/
- 161: https://www.whatdotheyknow.com/request/allotment_waiting_lists_110
- 162: https://www.whatdotheyknow.com/request/allotments_and_waiting_lists_296
- 163: https://www.whatdotheyknow.com/request/baroness_uddins_misappropriation
- 164: https://www.whatdotheyknow.com/request/esa_related_documents
- 165: <https://twitter.com/guyshrubsole/status/616272640064516097>
- 166: https://www.whatdotheyknow.com/request/firo_decision_times_after_biomet
- 167: https://www.whatdotheyknow.com/request/incorrect_or_negligent_foi_answe
- 168: https://www.whatdotheyknow.com/request/information_on_translation_inter
- 169: https://www.whatdotheyknow.com/request/phso_complaint_forms_presumed_de
- 170: https://www.whatdotheyknow.com/request/council_taxpensions
- 171: https://www.whatdotheyknow.com/request/re_opening_a_case_closed_by_the
- 172: <http://www.inquirelive.co.uk/news/article-9021/kent-wheel-cost-54800/>
- 173: https://www.whatdotheyknow.com/request/recording_calls
- 174: https://www.whatdotheyknow.com/request/schools_within_london_borough_of
- 175: https://www.whatdotheyknow.com/request/seto_form_guidance_in_define_lea
- 176: https://www.whatdotheyknow.com/request/who_owns_the_crown_estate
- 177: https://www.whatdotheyknow.com/request/zero_hour_contracts_18
- 178: <http://theboar.org/2015/05/07/a-rise-in-reports-of-sexual-assault-has-not-led-to-the-same-rise-in-charges-in-leamington-spa/>
- 179: https://www.whatdotheyknow.com/request/146_queen_victoria_st_scientolog
- 180: https://www.whatdotheyknow.com/request/bnp_teachers_120
- 181: https://www.whatdotheyknow.com/request/bus_transfer_vouchers
- 182: https://www.whatdotheyknow.com/request/companies_breaking_minimum_wage
- 183: https://www.whatdotheyknow.com/request/complaints_initiated_by_a_counci
- 184: https://www.whatdotheyknow.com/request/compromise_agreements_5
- 185: http://www.oxfordmail.co.uk/news/13948252.EXCLUSIVE__Prime_Minister_David_Cameron_clashes_with_Oxfordshire_County_Council_over_cuts_to_frontline_services
- 186: https://www.whatdotheyknow.com/request/corporate_governance_committee_m
- 187: https://www.whatdotheyknow.com/request/off_street_parking_places_order_4
- 188: https://www.whatdotheyknow.com/request/people_in_annual_report
- 189: https://www.whatdotheyknow.com/request/shoplifting_and_petrol_station_d
- 190: https://www.whatdotheyknow.com/request/the_number_of_people_who_have_ha
- 191: https://www.whatdotheyknow.com/request/address_of_freehold_title_that_c
- 192: <http://www.cleanhighways.co.uk/wp-content/uploads/2015/11/FOI-example-2.pdf>

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- 193: https://www.whatdotheyknow.com/request/board_meetings_in_private_and_ma
- 194: https://www.whatdotheyknow.com/request/clarification_of_the_permitted_a
- 195: https://www.whatdotheyknow.com/request/clerks_expenses
- 196: https://www.whatdotheyknow.com/request/court_action_against_vulnerable
- 197: https://www.whatdotheyknow.com/request/information_relating_to_the_clos
- 198: https://www.whatdotheyknow.com/request/everton_email
- 199: https://www.whatdotheyknow.com/request/lgo_investigations_19
- 200: https://www.whatdotheyknow.com/request/pier_pavilion_llandudno_latest_u
- 201: https://www.whatdotheyknow.com/request/search_warrants_5
- 202: https://www.whatdotheyknow.com/request/secret_parish_emails
- 203: https://www.whatdotheyknow.com/request/tourism_spending
- 204: https://www.whatdotheyknow.com/request/wirral_cctv_spy_car_locations_at
- 205: <http://epigram.org.uk/science/2015/05/nukes>
- 206: https://www.whatdotheyknow.com/request/atos_influence_on_tribunals_evid
- 207: https://www.whatdotheyknow.com/request/cheshire_west_and_chester_15_min
- 208: https://www.whatdotheyknow.com/request/consultancy_fees_paid_by_eddc
- 209: https://www.whatdotheyknow.com/request/housing_benefits_6
- 210: https://www.whatdotheyknow.com/request/icos_own_publication_scheme
- 211: https://www.whatdotheyknow.com/request/jobsearch_evidence_4

At²⁰⁸ that²⁰⁹ point,²¹⁰ the²¹¹ question²¹² this²¹³ committee²¹⁴ will²¹⁵ answer²¹⁶ is²¹⁷ whether²¹⁸ Government²¹⁹ should²²⁰ have²²¹ even²²² more²²³ reasons²²⁴ to²²⁵ refuse²²⁶ to²²⁷ provide²²⁸ factual²²⁹ information²³⁰ on²³¹ request²³² from²³³ citizens.²³⁴ In²³⁵ which²³⁶ case,²³⁷ we²³⁸ ask,²³⁹ for²⁴⁰ each²⁴¹ of²⁴² the²⁴³ requests²⁴⁴ footnoted²⁴⁵ in²⁴⁶ this²⁴⁷ part²⁴⁸ of²⁴⁹ our²⁵⁰ submission,²⁵¹ which²⁵² ones²⁵³ do²⁵⁴ you²⁵⁵ think²⁵⁶ shouldn't²⁵⁷ have²⁵⁸ been²⁵⁹ answered? ²⁶⁰

medConfidential and savefoi.UK
November 2015, coordinator@saveFOI.UK

medConfidential ran a website at saveFOI.UK encouraging people to write about their experiences of FOI. The stories linked in this submission are just some of them.

- 212: <https://twitter.com/jessicaelgot/status/664561712583045120>
- 213: https://www.whatdotheyknow.com/request/merseyside_acf_walton_vale_meeti
- 214: https://www.whatdotheyknow.com/request/new_swimming_baths_on_the_jesson
- 215: https://www.whatdotheyknow.com/request/personal_information_held
- 216: https://www.whatdotheyknow.com/request/prosecution_over_broken_cross_br
- 217: https://www.whatdotheyknow.com/request/questions_for_council_tax_and_bu
- 218: <https://www.whatdotheyknow.com/request/tros>
- 219: <https://westwayconcern.files.wordpress.com/2015/11/foi-request-2.pdf>
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- 221: https://www.whatdotheyknow.com/request/contract_with_descisys_for_coins
- 222: https://www.whatdotheyknow.com/request/cost_of_cambridgeshire_transport
- 223: https://www.whatdotheyknow.com/request/costs_49
- 224: https://www.whatdotheyknow.com/request/exeter_cyclepath_double_lock_to
- 225: https://www.whatdotheyknow.com/request/footpaths_2
- 226: <https://www.dropbox.com/s/wgs91bllgofp9m2/Education%20and%20FOI%20request2.pdf?dl=1>
- 227: https://www.whatdotheyknow.com/request/initial_date_of_hsmp_application
- 228: https://www.whatdotheyknow.com/request/is_the_nhs_supply_chain_is_opera
- 229: https://www.whatdotheyknow.com/request/list_names_and_job_title_for_bol
- 230: https://www.whatdotheyknow.com/request/mental_health_complaints
- 231: https://www.whatdotheyknow.com/request/photography_in_courts_new
- 232: https://www.whatdotheyknow.com/request/total_annual_figures_for_comprom_299
- 233: https://www.whatdotheyknow.com/request/quotes_on_using_your_identity_ca
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- 235: https://www.whatdotheyknow.com/request/sector_7_taxi
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239: <http://www.grimsbytelegraph.co.uk/NELC-refuses-respond-data-breaches-FOI/story-27584435-detail/story.html>
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244: https://www.whatdotheyknow.com/request/lgo_investigations_136
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247: https://www.whatdotheyknow.com/request/was_thiomersal_used_as_a_preserv
248: https://www.whatdotheyknow.com/request/cctv_linked_street_microphone_pi
249: https://www.whatdotheyknow.com/request/cctvcrime_statistics_2
250: https://www.whatdotheyknow.com/request/service_standards
251: <https://www.dropbox.com/s/60cpde5r9t2lscp/SaveFOIMobilityComponent.pdf?dl=1>
252: https://www.whatdotheyknow.com/request/silver_bear_ltd
253: https://www.whatdotheyknow.com/request/universal_jobmatch_implementation
254: https://www.whatdotheyknow.com/request/universal_jobmatch_maintenance_c
255: https://www.whatdotheyknow.com/request/to_whom_do_i_make_an_official_co
256: <http://www.computing.co.uk/ctg/news/2338431/nhs-reveals-it-has-only-spent-gbp13m-on-caredata-to-date>
257: https://www.whatdotheyknow.com/request/key_stage_2_results_pupils_enter
258: https://www.whatdotheyknow.com/request/complaints_devonport_park
259: http://jenpersson.com/wp-content/uploads/2015/11/NPD_FOI_submissionv3.pdf
260: http://issuu.com/exepose/docs/issue_12v2/1

Sense About Science

Dear Lord Burns

Independent Commission on Freedom of Information

Sense About Science is conducting an inquiry, led by the former appeal court judge the Rt. Hon. Sir Stephen Sedley, into concerns that government departments sometimes fail to publish the research they commission for policy promptly and in accordance with their own guidelines. The inquiry will report in Spring 2016, but I want to bring the points below, from initial scoping and evidence, to your attention, in case your commission is not aware of them.

The internal deliberations of public bodies: Should different protections apply to different kinds of information that are currently protected by sections 35 and 36? (Q1)

Removing the public interest test from Sections 35 and 36 suggests a blanket exemption of the deliberations for policy development, which would include related research commissioned by government.

- Independent research organisations and funders, such as the Wellcome Trust, are telling us that their rules require open publication of research, including research they undertake in partnership with others such as government. Restrictions on freedom of publication would prevent them entering into these contracts.
- You might also consider – in light of the public fuss that already occurs when government-commissioned research is withheld and in light of the research community's support for open science – whether restrictions would make it hard to attract top researchers to government commissions. Our inquiry is already hearing from researchers whose experience of withheld research have made them reticent to work with government again.
- You might consider, too, whether it is defensible for government to insist on data sharing in other contexts
- Researchers and civil servants have shared with us good examples where complex, uncertain and potentially controversial research has been published promptly and in full, and communicated with the public. These show that exemption of research for policy development is unnecessary, and any desire for exemption may be better addressed by improving communication skills and learning across departments to communicate research better. (A matter for our inquiry recommendations rather than yours!)

Your commission should comment on how section 35 and 36 protections would distinguish between strategic advice for policy development and the underlying evidence. It is questionable whether the public interest would ever be served by such a blanket exemption, which would be over-inclusive and would result in government withholding information that could easily be published to improve public discussion.

Protection for information that involves candid assessment of risks (Q3)

It's important that risks relating to matters of national security and defence are assessed candidly. Arguments that you have heard in favour of increased exemptions from FoI include the possibility of publication creating a chilling effect on this candour.

- However, researchers involved in Ministry of Defence and other security related agencies have told our inquiry that with carefully managed publication, redacting specific information but publishing the rest, even very sensitive risk analysis on things such as readiness for terror attacks can be communicated without compromising security.

- As some defence-related information is already in the public domain, or can easily be obtained, tighter exemptions around sensitive information could put government in a ridiculous position of withholding data that are openly available through other channels. Even in the highly sensitive example of FOI requests to release previous versions of a dossier on weapons of mass destruction in Iraq, the Information Tribunal concluded that “the ‘chilling effect’ would have been quite limited, given that the Hutton Report had not only put into the public domain a great deal of information on the subject but had also provided a detailed description of the circumstances in which the Dossier had been prepared, so that the public was in a good position to place the Williams draft into its correct context.”
- Government departments often find out about the research conducted in other parts of government through its release into the public domain.

Blanket exemptions on risk assessments relating to the delivery of major government projects would also harm public scrutiny. Such assessments are an essential part of the chain of reasoning behind government decisions, forming part of the case for or against a policy. As the Philips inquiry into the government’s handling of the BSE crisis showed, it is better to communicate candid assessments of risks, even if there is uncertainty, than to cover them up.

Fear of losing control of the way difficult topics are discussed is understandable, and may lie behind the desire to withhold sensitive information. But this risks undermining and trivialising the concept of information that is genuinely sensitive on grounds of national security. Exempting all sensitive information could encourage department personnel to behave as dolts who cannot distinguish between such information and that which they can readily publish without causing harm. An indistinct definition of national security is of no benefit to any party.

Executive veto over the release of information (Q4)

The Commission should clarify how any Ministerial veto would affect the publication of research commissioned by government, with reference to other protocols and the guidelines that cover the publication of government research and with reference to conditions of research contracts, which stipulate that findings should be published promptly and in full. Which arrangements would prevail – contractual agreements, ministerial and civil service codes, or a veto?

I hope your Commission reflects on the need to maintain and strengthen the public’s right to scrutinize the evidence underlying government decisions, as I know do many colleagues in the research community and in government who advocate openness on the use of evidence in public life.

Yours sincerely

Tracey Brown

Director, Sense About Science

Sheffield City Council

This document outlines Sheffield City Council's response to the Independent Commission of Freedom of Information Call for Evidence.

The Council has reviewed the terms of reference for the Commission and focused on responding to questions highlighted by the Commission in the Call for Evidence document. The response provides the Council's response to the questions we feel are relevant to a Local Authority such as Sheffield.

Risk Assessments

The question raised by the Commission is:

Question 3: What protection should there be for information which involves candid assessment of risks? For how long does such information remain sensitive?

This is a timely consideration for the Council as it has received its first request for comprehensive risks assessments across a range of Council services. Through the processing of this request it has been clear that there is a general reluctance from senior risk owners within the organisation to provide full and unfettered access to the Council's risk registers via and FOIA response. The general view that has been that the release of information would possibly lead to a reduction of candour in the recording of risks and reluctance to record risks comprehensively if they are likely to be released under an FOIA request.

While the Council has reviewed the likely application of current exemptions such as Section 43 Commercial Interests and Section 38 Health and Safety these exemptions only provide for very limited redactions of the information held. The Council has also reviewed the application of Section 36 Prejudice to effective conduct of public affairs and the applicability for such documentation; we have considered that the threshold for the application of a Section 36 exemption would be unlikely to be met due to the reasoning being primarily focused on reputational risk and the potential effect of such a disclosure in the future recording of risks.

Upon consideration by the Council's FOI experts it is clear that the arguments of the senior risk owners may be valid there is no applicable exemption to allow for the refusal of information. It is also important to note at this stage that a number of the risks recorded do not hold particularly sensitive information and would not be considered relevant for exemption for any reason. We are aware that this particular request has been sent to number of local authorities and as a result the wider picture of collated risks across all Councils could lead to wider security concerns than those considered by a single local authority. There is no central coordination of FOI requests and responses within local authorities nationally where such concerns can be communicated for 'national' requests.

The Council does believe that such a disclosure could have a significant impact on the handling and recording of risks in future in regard to the candour and openness of individual portfolios. The Council considers the issues raised are those similar to the impact of the "safe space" considerations that can be considered in the processing of requests under the Environmental Information Regulations 2004. In particular the provisions for regulation 12(4)(d) *the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data*. It could be arguable that any recorded risk should have a finite timescale, i.e. if a risk has been raised then organisationally ever effort should be made to ensure remedies are in place until the risk is removed or accepted as general business.

Consequently the Commission may seek to review whether provision for the following options should be made:

- All live risks to be exempt from disclosure under a new suitable exemption
- Allow for the exemption of live *sensitive* risks when confirmed to a suitable level with the Public Authority
- Strengthen Section 36 to allow specific consideration of risk registers and their effect on the effective conduction of public affairs

In regard to the specific timescales within which requests should remain exempt from disclosure, it would appear pertinent for this to be linked to the point at which the risk is removed or accepted and removed from the relevant corporate risk register. The Public Authority would retain the option to apply other exemptions at this stage if there was a sound case behind it. As risk registers should be organic documents with changes made regularly as risks are identified, mitigated or removed from the registers such a process may best support the continued candour and appropriate assessment of risks.

Appropriate enforcement for requests

The question raised by the Commission is:

Question 5: What is the appropriate enforcement and appeal system for freedom of information requests?

Sheffield City Council has a history of handling FOI complaints through the provision of an internal review process. The Council has also been involved in a number of complaints which have been raised with the Information Commissioner's Office (ICO).

	2013/14	2014/15	2015/16 (to 30 Oct 15)
FOIA Requests	1518	1713	1170
Internal Reviews	Not recorded	58	55
ICO Contacts*	27	11	7
Decision Notices	4	4	2
First Tier Tribunal (Decision)	N/A	N/A	1

*This includes all recorded contact from the ICO on FOI matters

As noted above the Council has seen a real increase in the number of internal reviews over the last financial year. It appears that members of the public are keen to exercise their right to appeal the decision making of their initial FOI response. Over the last year the number of review has risen from 3% of requests received to 5% which in itself requires further review and cost to the Council in order to review formally the initial decision.

The Council notes that efforts could be made to formalise the internal review process above and beyond the Code of Practice under Section 45 allowing for a consistent approach by Public Authorities and also allow for easier initial assessment by the ICO prior to approaching the Public Authority. Any activity to aid the pace in the review process would be encouraged. The Council is aware that the ICO will also have limited resources however we are aware on occasion of a lengthy lag in terms of the conclusion of an internal review and then receiving a complaint via the ICO. As noted in the Commission's Call for Evidence any protracted timescales in the processing of a request can lead to a reduction in the interest and value of the information to the requestor.

For example in reference to the risk assessments discussed earlier in this response the Council is likely to be amending its risk on a regular basis as new risks are identified, mitigated and closed. It is likely that records asked for in an initial FOI would be completed different by the end of the internal review, ICO and tribunal process, if appropriate. The initial information would then be of little value, and the Council's considerations of sensitivity may reduce considerably as the time lag occurs.

The Council understands that the ICO often tries to informally resolve complaints instead of issuing formal decision notices against the authority concerned wherever possible. However, the Council understands that where the ICO finds in the favour of a Public Authority they will ask the complainant if they would like to withdraw their complaint at that point rather than issue a formal decision notice. In this regard the Council feels there would be a benefit in also asking this request of the Public Authority

as a decision notice can aid authorities in noting the ICO's position on the application of exemptions of processing of requests. It would also be useful for the ICO to highlight and promote decision notices and tribunal decisions which are sector specific and would aid other public authorities, possibly via its newsletter.

In respect to ICO Decision Notices which find against the Council there is now likely to be less appetite to challenge the notice to the first tier tribunal due to the costs involved in proceeding with the appeal. The largest consideration and pressure being cost restrictions faced by the Council and as a lesser consideration of the public backlash in spending public monies in support of such a challenge.

The Council also considers that the burden created by individuals seeking a resolution to the later appeal stages of the First Tier and Upper Tribunals can lead to a further burden and a continuation of complaints on principle rather than a legitimate purpose (not something that can always be factored into decision making with cases).

An example of this is of a Sheffield City Council FOI request which the Council refused as being vexatious and where the ICO did not uphold the complaint from the requestor. The requestor proceeded to first tier tribunal at public expense and within the final judgement noted "... *they (his requests/complaints) took on a life of their own*". This judgement notes how a case can go too far in terms of appeals and an individual with little likelihood of success was able to approach the tribunal for his appeal at significant cost to the public purse and with little benefit to him or the process.

Details of this tribunal judgement can be found at:

[http://www.informationtribunal.gov.uk/DBFiles/Decision/i1572/Newton,%20Haydn%20EA.2014.0179%20\(05.06.2015\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i1572/Newton,%20Haydn%20EA.2014.0179%20(05.06.2015).pdf)

The Council does believe that the appeal process could benefit from more appeals being considered in an arena where legal precedent is set. This will allow for the legislation to develop and build, this should be with the support of the ICO to allow them to create more tailored guidance to assist public authorities and ensure consistency in decision making.

Burden on the Authority

The question raised by the Commission is:

Question 6: Is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know? Or are controls needed to reduce the burden of FOI on public authorities? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kinds of requests do impose a disproportionate burden?

Sheffield City Council supports the purpose and provision of the Freedom of Information Act. The legislation has been a useful tool for members of the public to access information in a manner which aids openness and transparency. It has encouraged staff to consider the information they record and how it could eventually enter the public domain. It has also helped to highlight where records are not maintained or are in an unstructured format which would benefit for review of ongoing action to improve our own records management. A good example of our commitment is to transparency is illustrated on our open data platform <http://data.sheffield.gov.uk>.

The cost threshold for dealing with FOI requests remain the same since the inception of the Act and as detailed within the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (SI 2004 No. 3244). This 18hour £450 limit remains and the Council does still rely on the cost refusal for 8% of cases closed (Financial Year 15/16 to 30 Oct 15). This can be due to the breadth of a request, aggregation of previous requests or due to the way data is held which makes the collation of data to prepare a response go over cost. We do note frustration that the cost exemption does not allow specifically for the redaction of information, the application of exemptions or on

occasion the signification internal consultation in the processing of a request. A small number of requests will be received which require a very challenging review of an exemption and it's applicability which may require the interaction with a wide range of specialists as per the risk register request detailed earlier in this response. This leads to a highly disproportionate amount of time being spent on an FOI request often causing a request to go late or cause a not on effect to the timeliness of other responses.

Although the cost threshold does allow for the aggregation of requests received by an individual on a specific subject area it does not allow aggregation of requests which are not linked. Requestors have on occasion bombarded authorities with requests on subjects which are not linked and this does not allow for a refusal specifically on cost grounds in regard to Section 12. In this situation the Council would consider the application of Section 14 (vexatious) however the Council does feel that to label a requestor as vexatious can inflame the relationship with a requestor and lead to further complaint than a simple cost refusal is likely to do. We also believe that the threshold for the application of a vexatious decision should be quiet high due to the impact on a requestor, and it would be far harder to refuse requests in this manner solely on cost grounds. To aid the management of a wider consideration in terms of cost and disproportionate impact of individual requestors there would likely need to be a set limit for cost associated to an individual's requests. As a result consideration would need to be made whether all requestors should as a matter of standard process provide a valid proof of identity when submitting a request to avoid the use of pseudonyms.

The Council feels that charging for requests would be disproportionate and likely to lead to further burden on the Council in terms of the administration of payments likely to outweigh any revenue stream or the actual work completed. We feel that any nominal charge would be viewed as a method of discouraging requestors and is likely to disenfranchise members of the public, particularly those with less disposable income.

The Council believes that the provisions and exemptions within the Act could be reviewed in terms of requests stimulated as a result of an FOI disclosure. On a number of occasions the Council has received requests for information under the FOI for information produced as a result of an FOI. This would encompass the emails, meeting notes and other information/or metadata, created through the processing of an FOI. When requests are made in this manner there is clearly no suitable exemption under the Act but it would seem such a request is only made to 'catch out' the authority and any concerns by the requestor should be raised via an internal review or through the Information Commissioner's Office.

The Commission's review of the appeals process and associated charges within other Countries is interesting for consideration. We would encourage a way to discourage frivolous internal reviews due the time taken to complete the review and respond to a requestor which can impact on other FOI requests. The code of practice notes that an internal review should be completed even where just dissatisfaction is indicated; this could be an offhand comment from the requestor which was made without the intention of a formal review being instigated, but an internal review should still be progressed.

Requests made for commercial gain do cause a signification burden on the authority. In the Financial Year 15/16 to 30 Oct 15, Sheffield City Council has logged 18% of its requests received as originating from businesses. The Council does acknowledges that a number of these maybe for reasonable purposes but it also considers that some are frivolous and cause undue expense on the Council, and we are sure other public authorities. A particular concern is requests from recruitment services organisations or sales teams who regularly request organisational charts and contact details for staff in certain area or across the Council. Due to the regular movement of staff we always have to consider these requests and seek information which can often include the collation of data of a number of different sources. This information can only be requested in order to seek sales contacts however any information in this manner is likely to be of low commercial value. As a public authority any contracted service requires appropriate consideration through an appropriate procurement process and the Council has begun to note to requestors that any release of contact details for staff should not be used for marketing purposes in accordance with the Data Protection Act and the Privacy and Electronic Communications Regulations 2003. The Council also finds that the same businesses will continue to request information regularly even when we have previously confirmed the information to be exempt from disclosure i.e. in the terms of certain public health funeral and business rates information in

particular. Section 14 (2) allows for the refusal of repeat requests however the timescales are not defined only a "reasonable internal" which is then considered by the Public Authority concerned in reference to guidance from the ICO.

The Council is also aware of commercial organisations now specifically making requests for information to sell on access to the responses they have received even attempting to sell the service to other public sector organisations at public expense. We would suggest that this process is in itself incompatible with the intentions of the Act where the purpose is transparency and not allow financial gain for the onward transfer or access of FOIA disclosures, which should essentially be in the public domain.

We believe some burden on authorities could be reduced with a rationalisation of requirements under the FOIA and associated transparency provisions. For example there remains a demarcation between the publication scheme and the Transparency Code of local authorities. Closer review between the ICO and the DCLG could have resulted in a more joined up approach and a clearer guidance to Councils; as the latest version of the Transparency Code is not clear on all the new requirements for publication.

Conclusion

The Council remains committed to transparency and openness in regard to the information it holds. The Freedom of Information is a useful tool and should be maintained for use by the public at large. We do feel that the legislation could be reviewed and amended to support Public Authorities and cope with the burden of requests as noted within our response.

Society of Editors

Independent Commission on Freedom of Information 9.54
9th Floor
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19 November 2015

Dear Lord Burns

Society of Editors Freedom of Information Commission submission

The Society of Editors campaigns for the public's right to know and media freedom and is making this submission because it opposes what is clearly an apparent attempt to weaken the Freedom of Information Act.

The Society has nearly 400 members in national, regional and local newspapers, magazines, broadcasting, digital media, media law and journalism education.

The Act has been a tremendous success and has greatly increased transparency in government. By exposing abuse of power, waste of money and official complacency it has improved governance at national and local levels, saved money and saved lives. There are thousands of examples of how the media, nationally and locally, has used the Act for the benefit of the public and indeed to improve transparency and the work of authorities covered by the Act. A small number of these are included in the attached list.

The Society is deeply disappointed that the Commission's terms of reference concentrate on negative aspects of FOI and no attempt has been made to study its overwhelmingly positive contribution to public life over the past decade. By failing to address that success, it is hugely disappointing that the review appears to have been established with the intention of watering down and restricting the effectiveness of the Act.

The Society has already expressed its concerns about the composition of the Commission, which appears to consist of critics of FOI and does not feature anyone who might have spoken up for the Act.

Comments made by government ministers also appear to have pre-judged the issue.

The Leader of the House of Commons Chris Grayling appeared to wish to keep the public in the dark when he told the House of Commons: "It is, on occasion, misused by those who use it as, effectively, a research tool to generate stories for the media, and that is not acceptable". In fact, providing information for the public is precisely what the media does in playing its vital role in society.

Justice Secretary Michael Gove also demonstrated his animosity to FOI when he said: "Citizens should have access to data and they should know what is done in their name and about the money that is spent in their name, but it is also vital that the conversations between Ministers and civil servants are protected in the interests of good government."

It appears that Mr Gove wishes to allow the release of basic data but never to give the public who elected him an indication of why decisions have been taken in their name.

This pursuit of a "safe space" for decision making is misguided and unnecessary. It is misguided because if applied through the use of a blanket exemption it would pull down the shutters on the transparency that the Government and Parliament has pledged to encourage.

It is unnecessary because sufficient exemptions and protections already exist to safeguard sensitive discussions in the formation of policy.

Maurice Frankel of the Campaign for Freedom of Information made this plain when he said: "The Information Commissioner and Tribunal already take steps to ensure that advice is protected where disclosure would harm the public interest. But it does not adopt a blanket approach.

"Mr Gove should know this: earlier this year the Tribunal ruled that the advice he had received as Education Secretary before cancelling Labour's Building Schools for the Future programme should not be disclosed. Releasing it would expose the working relationship between ministers and officials and undermine the future provision of frank advice, it said. But in other cases it has ordered

disclosure, particularly where the advice is anodyne or old or the arguments for confidentiality are implausible.”

The Information Commissioner Christopher Graham has also emphasised the respect of his office and the Tribunal for the “safe space”, although in many cases the need to preserve it will diminish with the passage of time, which is right because the public should ultimately know why decisions have been taken.

There also appears to be little evidence available of the “chilling effect” on discussions that is said to result from FOI. The Justice Select Committee said in 2012: “We are not able to conclude, with any certainty, that a chilling effect has resulted from the FOI Act.”

Similar arguments apply to the alarming claims made against the release of Cabinet minutes and risk registers. Put simply, the evidence shows that they are not released until the time is right to do so. Critics – apparently including Government ministers – who appear to wish they should never be released, are not acting in the spirit of open government, which the Conservative Party declared itself in favour of at the General Election.

The Conservative manifesto said: “Transparency has also been at the heart of our approach to government”. Applying that to Freedom of Information now would show good intent on the part of the government.

The Society of Editors’ greatest concern is over the loaded questions being asked about the “burden” imposed by FOI. Sadly the Justice Secretary’s view was echoed and enhanced by a local council chief who said the media used the FOI Act to “make mischief”. That is a disgraceful way of describing the role of local media in particular in exposing waste and malpractice on behalf of the public.

It seems wholly wrong to consider the “burden” without taking into account the “benefits” that have resulted from FOI. If a similar lopsided study was undertaken of other areas of government activity it would be difficult to justify any spending at all, from defence and education to health and policing.

The fact is that the “burden” of FOI is almost vanishingly small when weighed against the budgets of the organisations covered by FOI.

It is claimed that many FOI requests may be frivolous. This is not the case: the overwhelming majority from media organisations represent responsible journalism in the public interest.

And every editor can cite examples where FOI requests, submitted in pursuit of serious investigations, have exposed matters of public interest. In many cases, the stories have led to official action to reduce waste and protect lives.

The Society can understand why government at all levels may find it potentially embarrassing for these requests to be made but that is no reason why the clock should be turned back to a time when secrecy was the order of the day.

It has to be said that if the Government made good on its promise to increase transparency the “burden” would reduce because information would be released as a matter of course.

To respond to this alleged “burden” by imposing charges for FOI requests would make it much more difficult for media organisations, charities and citizens to submit requests. We know that in Ireland the imposition of charges led to a collapse in requests and it would do serious harm if a similar thing happened here.

Some serious inquiries involving FOI require questions to be submitted to organisations nationwide. Imposing charges – possibly totalling thousands of pounds per request – would prevent many media organisations and others from asking the questions. That might suit the organisations that do not like activities to be exposed to daylight but it would not serve the public interest.

Independent Commission
on Freedom of Information

The Commission will no doubt be peppered with responses from local government organisations, the police and others all protesting about the “burden” imposed by FOI. They would say that, wouldn't they? The fact is that the costs involved are a small price to pay for the huge benefits that have resulted from responsible use of FOI.

Public bodies may squirm when their shortcomings are exposed by FOI but the Commission should be considering how others who spend public money should similarly be held to account.

In 2014 the Public Accounts Committee of the House of Commons underlined the power of the Freedom of Information Act to expose waste and improve governance. Its report called for the extension of FOI to private sector contractors carrying out public services as part of the solution to the scandals of overcharging and incompetence surrounding G4S, ATOS, Serco and Capita.

So it would be wholly wrong to use charges to throw a cloak of secrecy over the bodies currently subject to FOI.

There appear to be conflicting accounts of the actual cost of complying with FOI requests. They all have one thing in common: the numbers are very small in relation to the overall amounts of public money that is being spent. In addition it seems that costs are being incurred in answering FOI requests which should be dealt with by already well-resourced press offices. In many cases those costs would be avoided if authorities routinely released information that the public are entitled to know.

Basing its calculations on Ministry of Justice data on FOI spending in central government, Press Gazette estimated the cost of all departments complying with FOI at £5.6m a year. That is of the same order of magnitude as the reported cost of supplying biscuits to Whitehall ministries – apparently £3m per year.

Imposing charges would mean that cash-strapped media organisations, particularly those serving local communities, would be priced out of making FOI requests, commercial organisations with deeper pockets would continue to make use of the Act, which would surely run counter to the intentions of Parliament. In effect, FOI would become a useful research tool for corporations pursuing their commercial agendas.

The Society of Editors believes that Freedom of Information has greatly increased transparency in government and greatly benefited society.

Now is not the time to shackle it. Instead, society should be considering how to build on the success of FOI.

As the Information Commissioner stated: “My contention, based on the facts, is that the Act is working effectively. The interesting questions are about how to keep FOIA effective for the future – not how to limit its effect today”.

The real issue is that many official organisations remain committed to needless secrecy rather than transparency. Too often they take the easy option of telling the public as little as possible. In fact the easy - and correct - option should be to release as much information as possible unless there is an extremely good reason for it to remain confidential. Such reasons are usually a matter of common sense.

The review should do all it can to turn the default switch for the release of information to 'on' rather than 'off'. That would be a service to the public and indeed authorities which claim it costs too much to tell the public what is done in their name and with their money.

Yours sincerely,

Bob
Satchwell

Executive
Director

Annex A

Contrary to Chris Grayling's assertion that journalists are guilty of "misusing" freedom of information laws to "generate" stories, journalists in the national, regional and local and broadcast press use the transparency legislation to access public information that is being kept secret and to relay this information in the public's interest.

Here are just a few examples examples of public interest journalism produced in the wake of freedom of information requests include:

MPs expenses

West Midlands Police being forced to release problem profiles of child sexual exploitation predators: [Birmingham Mail](#)

NHS gives contraceptives to girls aged 10: [The Times](#)

South Yorkshire Police warned of Sheffield's 'very entrenched sexual exploitation problem' in 2006 – but failed to act: [Sheffield Star](#)

Alton Towers accident figures show more than 30 incidents over last three years: [Coventry Telegraph](#)

Croydon University Hospital had spent £130,000 defending an employment tribunal, then hired a £5,000 per day QC to fight its damning verdict that it sacked a senior doctor for whistleblowing following a patient's death: [Croydon Advertiser](#)

Huge Pay Deals for Public Sector Fatcats: [Daily Mail](#)

FOI request prompted hospital to investigate Jimmy Savile's trips with patients, report says: [FOI Directory](#)

Met accused of "failing to engage public" in body camera trial after just ONE Londoner gives feedback: [Mayor Watch](#)

Exposed: inmates on the run from Ford Prison: [The Argus](#)

Review of safety ordered at tram lines where cyclist was killed: [Croydon Advertiser](#)

Prince Charles's 'black spider memos' show lobbying at highest political level: [The Guardian](#)

Child deaths at Birmingham's crisis-hit social services department more than doubling in four years – despite council claims that there had been no increase: [Birmingham Mail](#)

Murder and robbery among 6,000 offences committed by London rioters since 2011: [London Evening](#)

[Standard](#)

Lariam: Hundreds of British soldiers suffering from mental illness after being given anti-malarial drug: [The](#)

[Independent](#)

British police take 67 return flights to Portugal as cost of Madeleine McCann search nears £9million: [Daily Mail](#)

Soaring levels of sex offences and violence committed by under-10s: [Birmingham Mail](#)

Around 240,000 books and records disposed of after £50m revamp of Manchester Central Library: [Manchester Evening News](#)

A rise in murders and rapes by foreign nationals: [Birmingham Mail](#)

Only 40 of 250 returning jihadis in UK face prosecution: [The Sun](#)

Independent Commission
on Freedom of Information

Clare's Law: 1,300 domestic abuse disclosures made: [BBC News](#)

Prison Service spends over £2,500 on funeral for child-killer: [ITV News](#)

Two children aged 7 and 8 suspected of rape as figures reveal almost 1000 alleged child criminals last year: [Manchester Evening News](#)

Flop Soundwaves concert ditched after £60,000 loss: [The Shields Gazette](#)

Local councils now employ at least 3,400 comms staff – more than double the total for central government: [Press Gazette](#)

Head teacher given £10,000 pay rise despite falling grades and poor Ofsted reports: [Croydon Advertiser](#)

Surrey Downs Clinical Commissioning Group

Re: Independent Commission on Freedom of Information - Call for Evidence

NHS Surrey Downs Clinical Commissioning Group ("SD CCG") has a budget of more than £350 million a year to commission health care from local hospitals, community services, social care, ambulance services, mental health services and other providers for a population of over 300,000.

Since our establishment in April 2013, we have received 540 FOi requests: 141 in 2013, 196 in 2014, and 203 in 2015 to date. We have worked with our Freedom of Information team to evaluate the requests that we have received since our establishment. We set out below a number of areas where we consider the FOi Act could be improved so as to meet its originally intended purpose and to control the way that public monies are spent in responding to such requests.

Commercial Interests

Of the 540 requests received, 115 are logged as being from commercial companies. This equates to 21% of all FOi requests received to date. This is a low estimate of the actual number of commercial requests, since the nature of many individual requests appear to be of a commercial nature (e.g. requesting financial and contractual information about commonly procured services, or contact details for employees). NHS Commissioning Groups are already required to publish a list of their contracts under the NHS (Procurement, Patient Choice and Competition) (No.2) Regulations 2013. There is also a significant regulatory regime around the procurement of health services which ensures transparency about a commissioner's intentions. The aiding of commercial market research was not the original purpose of the Act and is a substantial burden on public authorities. We would urge you to consider how best to reduce and/or curtail requests which are clearly of a commercial nature.

It may also be in the public interest to require any requester to disclose any direct or associated commercial interests and introduce an exemption where in certain circumstances requests of a commercial nature may be declined.

Media

Of these 540 requests, 96 are logged as being from the media. This equates to 18% of all FOi requests received to date. Again, this is believed to be a low estimate of the actual number, since many 'individual' requests appear to originate from a journalist. It may be in the public interest for the originating organisation to be disclosed. Over time this might encourage media organisations to improve the efficiency of their interaction with public bodies. In many instances, the Act is used to generate stories about the NHS which are taken out of context, sensationalised and published without obtaining a balanced view. Perhaps journalists could be required to reveal their identity and purpose, allowing those affected a specific period of time in which to give a response?

18 Working Hour Limit

From the amount of requests we receive, we consider that the 18 working hour limit imposes an unreasonable burden on public authorities. In the ten years that the FOi Act has been in force, the number of requests received by organisations has increased exponentially, placing a correspondingly large burden on public authorities. In our case, on average, if each request was to take the full 18 working hours, it would equate to having 1.5 WTE employees solely responding to FOi requests. Whilst each request in reality does not take the full 18 working hours, it means our employees have to find a significant number of hours each week to respond to FOi requests. It is worth noting that it is usually requests of a commercial nature that approach this limit.

Section 12

Section 12 does not include the time taken to respond to requests in their entirety. It may take five minutes to locate a report requested under the FOi Act, but this does not include the time required to read and redact it. If the report is substantial, this can take a further 50 working hours, involving different employees. Those 50 hours are not accounted for under section 12 which appears illogical and unreasonable. If a report is not proactively published then it is not unusual for the redaction to be both significant and time consuming. In such cases, an applicant may find they receive a document so heavily redacted it is of no use. Surely public authorities could be given some discretion to deny requests that require substantial amounts of time to read, consider and redact? Limits could also be placed on the number and/or size of documents that may be requested at any one time.

To further alleviate this disproportionate burden it may be effective to reduce the appropriate limit from 18 working hours to 6 working hours. The estimated 6 working hours is taken from the average time we have taken to respond to focused requests that appear to be of a genuine public interest. These suggestions also take into account a requestor's ability to submit further requests after a 60 working day period.

In conclusion, although we fully support the intended spirit of the FOI Act, we believe that in its current form the burden imposed on public authorities is neither justified nor proportionate. Whilst we consider that the public has a right to the transparency which this Act seeks to provide, in reality, it is abused by both commercial organisations and the media. It is right therefore, that clear and considered restrictions should be placed on those making the requests under this Act, so as to reduce the burden currently imposed on public authorities.

Yours sincerely

Matthew Knight
Chief Financial Officer

Sheffield City Council

What protection should there be for information relating to the internal deliberations of public bodies? For how long after a decision does such information remain sensitive? Should different protections apply to different kinds of information that are currently protected by sections 35 and 36?

The FOIA in its current form does not provide adequate protection for information relating to the internal deliberations of public bodies. This oversight should be addressed by introducing an FOIA exemption which is equivalent to the EIR exception for internal communications³³.

It is recognised that public authorities need to be able to protect a “private thinking space”. Local authorities need this space to create and consider think-pieces, internal briefs and draft ideas. They also need to communicate and discuss such content using electronic means. The FOIA does not provide adequate protection for this space. The constant threat of public disclosure is leading to “chilling effects” on frankness, creativity and candour in our internal communications. We consider these effects to be detrimental to the public interest.

In relation to environmental information, protection of the “private thinking space” has been provided for by regulation 12(4)(e) of the Environmental Information Regulations which concerns “internal communications”. In explaining the rationale for drafting this provision in the corresponding EU Directive, the European Commission noted:

“It should also be acknowledged that public authorities should have the necessary space to think in private. To this end, public authorities will be entitled to refuse access if the request concerns [...] internal communications.”

The ICO guidance on EIR regulation 12(4)(e) confirms:

“The underlying rationale behind the exception is that public authorities should have the necessary space to think in private”³⁴

We recognise that the public interest in protection of the “private thinking space” must also be weighed up against the public interest in disclosure of the information requested. We find that the public interest test provides an essential, and effective, qualification of the EIR exception for “internal communications”³⁵.

However, the ICO also recognises that:

“The exception has no direct equivalent in the Freedom of Information Act 2000”³⁶

We can find no reason for this inconsistency between the regimes. The arguments for protecting our “private thinking space” are no more valid for information which is environmental than for information which is not.

The ICO mentions that:

“...many arguments about protecting a private thinking space will be similar to those made under section 35 (formulation of government policy) and section 36 (prejudice to effective conduct of government affairs) of FOIA.”

³³ Regulation 12(4)(e) of the Environmental Information Regulations 2004

³⁴ https://ico.org.uk/media/for-organisations/documents/1634/eir_internal_communications.pdf
Paragraph 10

³⁵In ICO guidance, Decision Notices and relevant case law

³⁶ https://ico.org.uk/media/for-organisations/documents/1634/eir_internal_communications.pdf
Paragraph 12

However, the FOIA exemptions mentioned above do not provide local authorities with adequate means for protecting their “private thinking space” (and nor were they intended to).

Question 5: What is the appropriate enforcement and appeal system for freedom of information requests?

We find that the existing enforcement and appeal system for FOI requests works well and see no reason to modify it.

Internal reviews are conducted by our Information Governance Team. They involve in depth, independent investigation of the processes and reasoning behind certain FOI responses.

In all but exceptional cases, our internal reviews resolve complainant’s issues by:

- providing additional explanation, advice and assistance about the decisions we made; and/or,
- by modifying the decisions we made.

This gives us a second chance to satisfy our customers; and prevents unnecessary escalation of appeals to the ICO.

The lessons learnt from reviews are then fed back to the information request team allowing us to constantly improve the FOI responses we provide to the public.

Question 6: Is the burden imposed on public authorities under the Act justified by the public interest in the public’s right to know? Or are controls needed to reduce the burden of FOI on public authorities? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kinds of requests do impose a disproportionate burden?

As a public authority we support the principle that “the public has a right to know” what we are doing, and why. We take this responsibility seriously and consider it a core part of our obligation to serve the public interest. We therefore find that much of the significant burden imposed on us by the Act is justified.

We consider that most of the numerous requests we deal with are a legitimate exercise of the public’s right to access the information we hold. We would not support controls which would restrict this fundamental right.

However, we also find that the Act, in its current form, does not provide sufficient safeguards to prevent abuse of this right.

In our experience of the Act there is an unresolved tension between:

1. the public’s right to enjoy *free and unlimited* access to information, and
2. The *limited* resources available to provide this information³⁷

Currently, any member of the public may monopolise these limited resources by submitting excessively frequent and demanding requests³⁸. Since there are always a few individuals ready to take advantage of this situation we find that we are obliged to devote a very significant proportion of the limited resources of our information requests team to responding to the multiple and frequent requests from *a very small number of individuals*.

³⁷ The resources (i.e. man-hours) are limited by the tight budgetary constraints on the spending of Local Authorities, and the competing demands of their core public service functions.

³⁸ In certain exceptional cases the exemption for vexatious requests may be applicable. However, most of the excessively frequent and demanding requests we receive are not “vexatious”.

This inevitably reduces the resources available, and increases delays, for all the other, less demanding requesters. The FOIA burden imposed by certain individuals is disproportionate and unfair because it allows the excessive demands of the few to act to the detriment of those who are less demanding.

The Act could be therefore be improved by providing controls, and / or disincentives to address the problem of excessive use of the limited resources available to a public authority to respond to FOI requests.

Controls on frequency of requests

Suggestion 1

The right to receive an FOI response at no charge, and within 20 working days, is limited to one FOI request per requester in any one 3 month period.

Responses to further FOI requests from the same requester within the same three month period: will incur a fee (eg of £50) if provided within 20 working days

Or

Will not incur a fee and may be delayed until 3 months after the previous request

Disincentives for burdensome requests

Sometimes single requests contain multiple separate questions relating to different pieces of information held by the authority.

Some requests are much broader than others in terms of the scope of information they relate to.

The ability to charge for providing responses to excessively burdensome requests would encourage requesters to focus their questions and be more specific about the information they require.

This would allow a fairer, and more efficient, use of the limited resources available to respond to information requests.

Suggestion 2

The right to receive an FOI response at no charge, and within 20 working days, is limited to FOI requests requiring less than 5 staff hours to respond to.

For FOI responses exceeding this 5 hour limit, authorities may charge a reasonable hourly rate³⁹ to the requester in order to recover the additional staff costs/overheads attributable to the supply of the requested information.

³⁹ Based on the charging principles established in the Environmental Information Regulations and the recent CJEU judgement 6/10/2015 East Sussex County Council v Information Commissioner

South Norfolk Council

Background

South Norfolk Council welcomes the call for evidence from the Commission on Freedom of Information.

We have a strong record in complying with the Freedom of Information law. We respond to over 99% of requests within the 20 day timescale. We receive a negligible number of requests for review of our decisions, and only 3 of our decisions, across over 3000 requests, have been referred to the Information Commissioner (who has upheld our decision in each case).

However, we are concerned by the growing burden that Freedom of Information is creating on Local Authorities. As our response will establish, as resources become increasingly constrained, the growing number of requests – particularly from businesses - makes it increasingly difficult to respond accordingly.

Question 1: What protection should there be for information relating to the internal deliberations of public bodies? For how long after a decision does such information remain sensitive? Should different protections apply to different kinds of information that are currently protected by sections 35 and 36?

South Norfolk Council has invoked the Section 36 exemptions on very few occasions over the last 5 years (5 times). We have found that this exemption has sufficiently allowed us to protect information relating to internal deliberations. For example, the exemption has been used to withhold information relating to the consideration of early-stage Gypsy and Traveller sites. This has allowed both officers and Councillors to feel comfortable to exchange frank advice and enter deliberations relating to controversial issues that would be damaging if released into the public domain at an early stage of development.

In terms of how long after a decision this should last for, we consider that the exemption is relevant for the length of time that the information remains out of the public domain or is no longer relevant/is superseded.

Question 2: What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?

We have no comment as this does not impact upon South Norfolk Council.

Question 3: What protection should there be for information which involves candid assessment of risks? For how long does such information remain sensitive?

In terms of protecting candid assessments of risk, we consider that the public interest would have to be balanced. It is important that the public have confidence that risks are being managed appropriately; however this need has to be balanced against the requirements of the public authority. We would not wish to disclose information that could jeopardise risk mitigation or increase the chance of the risk occurring. We would look to use the exemptions available to us if appropriate, particularly relating to security of IT systems by applying Section 31 etc. We believe this information should be considered sensitive while there remains a change that the risk may crystallise.

Question 4: Should the executive have a veto (subject to judicial review) over the release of information? If so, how should this operate and what safeguards are required? If not, what implications does this have for the rest of the Act, and how could government protect sensitive information from disclosure instead?

We have no comment as this does not impact upon South Norfolk Council.

Question 5: What is the appropriate enforcement and appeal system for freedom of information requests?

We consider that generally the appeal and enforcements systems associated with FOI are adequate.

Question 6: Is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know? Or are controls needed to reduce the burden of FOI on public authorities? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kinds of requests do impose a disproportionate burden?

South Norfolk Council is committed to providing information to the public in a transparent and proactive manner. We strive to make data available on our website and regularly review information that is frequently requested with a view to publishing it online. This not only assists the public, but has also limited the number of officers and departments involved in responding to certain types of requests (eg, information relating to business rate accounts and public health funerals). We now respond to nearly 20% of requests by directing the requester to our website, which is a considerable increase in two years (under 4% of requests were handled in this way in 2013).

It is unfortunate that the publication of data online does not dramatically reduce the number of requests received for this data as requesters tend to use round-robins to all councils via email. If it takes an officer at each authority a day to collate the information to respond, that is the equivalent of employing a full time officer for a year on a national basis; which is potentially placing a burden on the public purse of upwards of £20,000 for just one request.

Despite being proactive and also conforming to the Local Government Transparency Code, we still receive a high volume of requests and last year alone, we saw a 10% increase in requests received compared to the previous year. In the last 5 years, we have recorded a 66% increase in the number of requests. This increase in workload puts considerable pressure on all departments throughout the Council.

In terms of making a judgement on whether this burden is justified under the public interest, this is quite a challenging assessment. When considering the public interest, it is important to bear in mind that this relates to the public generally. It is not focussed on one individual (the requester) or one company. We believe that the majority of requests from individual members of the public do meet the public interest and satisfy the original aim of the legislation. However, the legislation does not allow public authorities to ask why the information is being obtained, therefore at times it is difficult to assess how the public interest is being served, or to provide more meaningful information to the requestor

In addition to requests received from members of the public, we receive a high proportion of requests from organisations. Many of these requests are sent with the aim of improving their own commercial success and profit. Many requests relate to information regarding contacts and procurement, which could be argued satisfies the public interest as releasing the information ensure transparency in the area of the spending of public funds. However, this form of request is increasing and it is becoming difficult to justify that answering numerous requests such as this is in the public interest as it diverts Council resources immensely. Ultimately in these circumstances the taxpayer is subsidising these organisations to carry out their market research and often after providing the information, these very same organisations then try to sell their products and services back to the Council. We are finding that a number of requests from commercial organisations seek to obtain more information relating to contracts than we are required to published under the Transparency Code. We believe that the Transparency Code satisfies the public interest in terms of accounting for the spending of public funds. It is also worth noting that we routinely published information relating to contracts and spending over £250 before this became statutory under the Code.

We are also finding that companies are very open to advising us of the purpose of their request – stating at the beginning of their requests that they are working for clients who are undertaking research in order to sell information obtained under FOI legislation. Some companies are also purposefully vague in how they request information and the Act is certainly used as a tool to obtain answers rather than recorded information. This is extremely demoralising for Officers, and moreover an unfair burden on the public purse.

We do not consider that including additional costs within the 18 hour limit (such as exemption / redaction time) nor reducing the 18 hour limit in such cases would be effective remedies for this situation, as the majority of such requests take less than 10 hours and there are no exemptions; it is their volume that is challenging for authorities.

Generally, we are working in a more efficient way in response to the increasing number of requests. However, this is limited by the legislation itself and the lack of controls regarding information requested for commercial gain rather than in the public interest.

We consider that the following measures may provide some suitable remedy:

- Requiring requestors to state why they wish to request the information; in many cases, this would support organisations to assist the requestor more effectively;
- Allowing authorities to refuse requests where there is no clear reason for the request;
- Allowing authorities to charge for the costs associated with providing information in those cases where the request is from a commercial organisation who is seeking to subsequently sell the information, or utilise it for their own market research.

South Warwickshire NHS Foundation Trust

Q1. What protection should there be for information relating to the internal deliberations of public bodies? For how long after a decision does such information remain sensitive? Should different protections apply to different kinds of information that are currently protected by sections 35 and 36?

R1. Accept that the exemptions in S35 should remain class-based and be qualified by the public interest test. Accept that it protects the integrity of the policy-making process and prevents disclosures which would undermine this process and result in less robust, well considered or effective policies.

Would argue, however, that this extends beyond central government and applies equally to public authorities because it ensures a safe space to consider policy options, affecting local health and social care populations, in private. In this respect, it may be worth considering a less strict exemption to protect the internal deliberations of a public authority; that is, a prejudice-based absolute exemption where information can be withheld if its release would harm one or more specific interests, but there is no requirement to also consider whether the public interest nevertheless requires its release, would be more appropriate. Furthermore, it may be worth considering that a public authority's requirement for Qualified Persons approval should be removed.

Q2. What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?

R2. Would argue for the continuation of the status quo. Sections 35 and 36 allow for the process of collective agreement to be protected and, as qualified exemptions, they are subject to a public interest test and are subject to appeal to the Information Commissioner, tribunal and court. Would argue for material subject to non-disclosure to be protected for 20 years. The sensitivity of this material is not likely to be more 'sensitive' in 20 years' time as opposed to 30 years. It is generally accepted the sensitivity of views and even those expressed frankly under 'collective responsibility' will diminish over time and this should accord with the definition of 'historic records' from 30 to 20 years.

Q3. What protection should there be for information which involves candid assessment of risks? For how long does such information remain sensitive?

R3. Would wish for risk assessments to be developed, following candid assessments of those risks together with consequences and controls to mitigate against them. Such information should remain sensitive until such time as the risk is no longer a risk or the work, to which the risk assessment relates, has been completed. Would suggest that the 'final' Risk Assessment document should be disclosed but would suggest that the draft documents (reflecting the deliberations) be with-held.

Q4. Should the executive have a veto (subject to judicial review) over the release of information? If so, how should this operate and what safeguards are required? If not, what implications does this have for the rest of the Act, and how could government protect sensitive information from disclosure instead?

R4. Would argue in favour of maintaining the status quo in relation to the Cabinet veto. Its introduction was subject to the intention of it being used sparingly; it could be argued this has in fact occurred: 7 occasions in a 10 year period and subject to consultation with Cabinet colleagues. The safeguards of judicial oversight through judicial review would appear to work effectively and should suffice. The veto should only be used in exceptional circumstances and only following a collective decision of the Cabinet. Accept that the further safeguards to disclose in the public interest are provided by Articles 3, 4 and 6 of the Council Directive 2003/4/EC.

Q5. What is the appropriate enforcement and appeal system for freedom of information requests?

R5. Would argue in continuing the principle of the UK Appeal system but reduce the number of layers; such that 'internal reviews should be scrapped and so too an appeal to the First-tier (Information Rights) Tribunal on the basis that the latter is not a superior court of record and its decisions do not create legal precedents. It is suggested that the resultant appeal system would be by referral to the Information Commissioner following the decision of a public authority to withhold. Of note, the Information Commissioner has been shown to successfully resolve matters informally and it is hoped that this would continue, benefiting both requester and public authority. The Information Commissioner's Decision Notices should not become legal precedents. As now, if either the requester or the public authority are dissatisfied with the Information Commissioner's Decision Notice, they could appeal to the Upper Tribunal, (a superior court of record and able to establish legal precedents). As now, from the Upper Tribunal, further appeals on a point of law should continue to be passed to the Court of Appeal and Supreme Court.

Q6. Is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know? Or are controls needed to reduce the burden of FOI on public authorities? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kinds of requests do impose a disproportionate burden?

R6. The burden imposed on public authorities under the Act is not justified by the public interest in the public's right to know where it relates to spurious requests or those from private/commercial businesses, wishing to use the information for their own private benefit. This flagrant misuse of public money for private/commercial enterprise/benefit cannot be justified.

This misuse could be controlled by the introduction of a justification by the requester as to why it is in the public interest for the public authority to disclose the information, if held. So too, all requests should be accompanied by an initial fee, solely to cover the process of searching and retrieving documents. The amount should be set based on research previously undertaken and should be tailored to who is requesting the information. The media and business should always pay more than members of the public. In order to further control this there would need to be some means of ensuring that requests are genuine and are from those requesters who are what they appear to be. For example, public authorities should be allowed the discretion to reject requests from obvious 'characters'.

Furthermore, the provision of S.12 is too restrictive in that it does not allow for time spent redacting to be included and, in relation to a number of requests, this is where the largest amount of time is spent especially where the information required is voluminous e.g. spread-sheets where personal data is mixed in with other non-personal data.

Spend Network

Spend Network is a startup company which uses open public data to build up a picture of what is being spent by over 270 organisations. You can see the results here: <http://www.spendnetwork.com>. In discussions on the future of the Freedom of Information Act (FOIA), open data has been cited as a possible alternative in many of the situations when the FOIA is currently used,⁴⁰ but the only way open data can replace FOI requests in these circumstances is if there is an independently curated dataset that is published to a standard that is properly enforced. Our experiences of using open data and FOI requests highlight where reforms will be needed before open data offers a viable alternative to FOI. This response covers three topics illustrating the important relationship between FOI and open data:

- FOI requests for data that should be open
- The usability and accessibility of open data
- Contracts data.

Improving the standard of open procurement data and ensuring that its publication can be enforced would improve the FOI request process by reducing the volume of FOI requests. The FOIA is invaluable in its current form as a tool to improve access to data that should be open, but loopholes and inconsistencies in ICO judgements limit its scope to enforce open data standards. This document will illustrate how the following steps would reduce the burden of FOI requests by improving the availability and quality of open data, ensuring it complements and is complemented by the FOI process:

- Create a single, aggregated dataset of open spending data and ensure that users can query this data
- Set up a fast-track process for FOI concerns raised to the ICO regarding open data
- Publish all contracts to the Open Contracting Data Standard.⁴¹

We need FOI requests to ensure the publication of open data

Since 2010, governmental authorities have been mandated to publish data on expenditure, so there is a presumption among many in government that procurement data is already open. We work with the spend files that are mandated to be published by local and central Government. Despite this mandate for publication, we frequently have to make FOI requests to public bodies in order to secure this data, and even then we often struggle to access data through these FOI requests. Here are some examples of when FOI has been used to access spending data that should have already been published.

The Cabinet Office has not published any spending data since August 2014.⁴²

- We made a FOI request for the data in March 2015, after having failed to secure any movement through informal requests.
- The data remains unpublished and, in response to our request for an internal review, we've been told that the Cabinet Office's Finance team's intention to publish the data in the future effectively invalidates our request and that we must wait for the data.
- We raised this as a concern with the ICO in August. However, as we had not had a response to the Cabinet Office's internal review despite waiting 20 working days, we were told that we would have to wait another 20 days until our concern could be processed by the ICO. This meant that we had to **wait a full 40 working days** after requesting an internal

⁴⁰ <https://www.gov.uk/government/speeches/freedom-of-information-new-commission>

⁴¹ <http://standard.open-contracting.org>

⁴² <https://www.gov.uk/government/publications/cabinet-office-spend-data>

review before we could raise this as a concern with the ICO.

- As of the 18th of November, our concern is still pending with the ICO.

It took us nearly a year to secure judgement against the Ministry of Justice in a similar case where intent to publish in the future was cited as a reason to not publish in response to an FOI request.

- The ICO found in our favour and clearly stated that intent to publish needs to be well established and that it should not be an open-ended excuse to prevent publication.
- Despite this judgement being in place, it has **no effect on subsequent concerns** and our cases against the Cabinet Office and DCMS are being reviewed again without any reference to the previous finding.
- In the case against the DCMS, the ICO have found in favour of DCMS's right to use the 'intent to publish' defence, despite the previous finding that suggests that this defence is inappropriate in cases of drawn out delays.

In other situations we receive valueless, or error laden data which requires a follow up.

- In these cases, the **FOIA is invaluable**, but again we can often be left frustrated, with publishers making spurious claims about their data and the time it would take to process it.
- For example, we have been told by Southwark Council that they do not gather VAT data on their transactions and/or that it would take more than 18 hours to publish the month that their transactions occurred.

The burden of that making and managing these requests is high. This would be understandable if we were asking for data that isn't required to be published already, but we're requesting data that has been mandated for nearly six years and that has detailed instructions on the standards that publishers should meet. We are continually confounded by a series of excuses and legal contortions that seem focussed on finding a reason to delay publication in the hope that we'll lose patience with the FOIA process and fail to pursue our requests.

These examples demonstrate that open data cannot be seen as a straightforward alternative to FOI even when the publication of the data has been mandated for over five years. In fact, the **FOIA is a necessary tool** for ensuring the publication of data that should be openly available. However, based on our experience, the current way that FOIA is enacted is a **poor mechanism** for enforcing publication schedules that have been mandated by Government. It is quite clear that the **law itself is not at fault**, rather that the way that law is enacted is so ineffective that it has become virtually useless. If open data is truly to be an alternative to FOI requests in the 30%⁴³ of cases that refer to spending, then it must be published to an **enforceable quality standard and timeline**.

Recommendations:

- Create a **fast track FOI** process for data that should be open:
 - Any review of current FOI processes should take account whether the data should be open. If it should, there should be a mechanism to ensure that the data is published quickly to the requisite standard without recourse to a labyrinthine process of appeals. A fast track approach to FOI requests for data that should be open would **streamline the FOI process**.
 - In a fast-track judgement **the ICO should not need to gather evidence** on whether or not the data should be released, nor whether the public body has the data. Instead, the ICO should simply judge whether the public body has met a goal of publishing the data to a reasonable standard and without undue delays.

⁴³ 30% is based on Spend Network's analysis of FOI requests on What Do They Know?

<https://www.whatdotheyknow.com>

- The ICO should be able to find against the publisher instantly, using **precedents**, in cases where the data isn't published or is of such a poor standard to render it useless. This would allow the ICO to focus on new and more challenging problems.
- A new fast-track process would require **no change in the law**, only the application of existing precedents and guidance on what data could be 'fast-tracked' and what could not.
- Publish a **single, aggregated dataset** for open spending data
 - Establishing a single, aggregated dataset on governmental spending would ensure procurement data is **published on time and to the correct standard**. Enforcing open data through this mechanism would significantly reduce the need for FOI requests, thereby **reducing the burden of FOI** on the government and the ICO.

Open data difficult to use in its current form

Unless the data that has been published is genuinely accessible, it is not a replacement for FOI. The current quality of the data is so poor that **finding the answers to simple questions requires sophisticated data collection, aggregation and manipulation**. For example, to find out how much two councils spent with Capita over two years you would need to access 48 files (if available) which might not have reconcilable headers or correctly named suppliers. An FOI request for this information would be rejected on the grounds that this data is already open.

Recommendation

- Enable users to **run queries** on a single, aggregated dataset of open spending data
 - A single, aggregated dataset of all government spending would enable users to access the data and run simple queries like the example above. Making this data more accessible would **reduce the number of FOI requests** while **improving the experience** of people seeking data.

Better open contract data would reduce the FOI burden

Requests made under the FOIA highlight where there is an appetite for public data and, based on our research on What Do They Know?, **over 30% of all FOI requests concern spending or contracts**. However, at the moment only 40% of tenders on Contracts Finder and 30% of tenders on Tenders Electronic Daily, have matching Contracts Awards Notices published 200 days after the original tender was posted.

The large number of FOI requests concerning contracts would indicate that this is fertile ground for open data to reduce the burden of dealing with these requests. Despite this, in prior discussions of the FOIA, its use by businesses to discover contract data has been viewed in a negative light.⁴⁴ However, we believe a greater focus on publishing high quality contract data would be **beneficial for both businesses and the government**. Opening this contract data would be a radical change to the way in which suppliers engage with government, **increasing competition** for public business by encouraging firms to compete with each other to **deliver savings** for the public purse, while also making it easier to spot **fraud and omissions**. It would encourage **innovation**, making it easier for **smaller companies and third sector suppliers** to understand what is required to trade with the public sector.

Therefore, making this information open this will strengthen the government's position as a buyer while reducing the time spent responding to these FOI requests.

⁴⁴ <https://www.cfoi.org.uk/2014/05/move-to-restrict-use-of-foi-by-campaigners-criticised/>

Recommendation

- Publish all contracts to the **Open Contracting Data Standard**⁴⁵
 - The frequent requests for contract data highlight how useful it is to **publish well-structured contracts data openly**. Mandating that all contract data should be published to the Open Contracting Data Standard and ensuring the data is released on time would reduce the number of Freedom of Information requests from businesses significantly.

Conclusions

- **Open data** cannot be used as an alternative to FOI requests if it is not published to an **enforced schedule and consistent quality**. At the moment, we rely on the FOIA to access data that should be open.
- The FOIA is a good tool for securing data that relates to mandated publications, for example if we want to see the original tender documents relating to a contract, it is necessary to use the FOIA.
- The ‘intent to publish’ defence is an open-ended loophole that prevents public bodies from having to comply with requests for the timely release of mandated data and forces data requesters into the arms of the ICO.
- The time taken to go from request to a judgement by the ICO is unnecessarily long, and can often extend to a year. In particular the time allowed between rejecting a claim and conducting an internal review is unnecessarily long at 40 days.
- Public bodies and the ICO implement FOIA inconsistently, with the same cases receiving different judgements. Not only is this unnecessarily frustrating, it is a clear waste of effort.
- Setting up a fast-track process for FOI requests that concern data that should be open would ensure the that open data is enforceable and cut the time taken to process FOI concerns by the ICO.
- Publishing government open data on spending in a single, aggregated dataset would provide a mechanism to ensure the quality and timely publication of this data while making it easier for users to extract useful answers to queries on spending without resorting to FOI.
- Ensuring that buying authorities publish Contracts Award Notices for all completed tenders and that these contracts meet the Open Contracting Data Standard, could significantly improve the quality and accessibility of open contracts data while reducing the number of FOI requests.
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⁴⁵ <http://standard.open-contracting.org>

Southwark Council

Dear Sir or Madam

Independent Commission on Freedom of Information – Call for Evidence

Thank you for this opportunity to provide evidence to the Commission on Freedom of Information, to which I am responding as the senior information risk owner on behalf of Southwark Council.

I have set out my responses to specific questions below, but should like to make the following more general observations first.

Southwark Council clearly supports the provision of recorded information through an enforceable right of access to its residents and relevant stakeholders and aims to operate in a transparent way. It also acknowledges that open data has significantly increased the amount of information relating to the council's business which is now publicly available.

It is concerning however that the FOI regime continues to be used by those attempting to make profit for themselves or their business and by those (both companies and individual students) seeking to pass the burden of research on to public bodies. This creates significant additional administration costs for local authorities, at a time of severe budgetary constraint. These issues are addressed in our formal response below, but overridingly there is a genuine concern that the Act is not being used for the purposes originally envisaged.

Responses to specific consultation questions

Q1 What protection should there be for information relating to the internal deliberations of public bodies? For how long after a decision does such information remain sensitive? Should different protections apply to different kinds of information that are currently protected by sections 35 and 36?

Section 35 is not applicable to local authorities, but they may rely upon section 36 which provides a prejudice-based qualified exemption for information from disclosure so that use of it is subject to the public interest test.

It covers the disclosure of information which would, or would be likely to, inhibit the provision of advice or exchange of views for the purposes of deliberation or which would otherwise, or would be likely otherwise to, prejudice the effective conduct of public affairs.

Examples of its use to date include in relation to internal audit reports and departmental risk registers. Other uses might include the provision of advice by officers to members. It is suggested that such information will often remain sensitive until it has been disposed of or superseded but see also my response to Q3 below.

The current section 36 exemption is prejudice-based which means that it is available where the disclosure would, or would be likely to, harm one or more specific interests. Because it is prejudice-based, it offers less of a safe space for deliberation than might be expected, as the Information Commissioner's Office (ICO) attaches little weight to 'chilling effect' arguments but appears to rely on the counter-argument that the lack of safe space makes for better and more transparent decision making. There are equivalent exceptions (for unfinished documents and for internal communications) under the Environmental Information Regulations (EIR) which differ in that they are class-based. An advantage of class-based exemptions for local authorities is that councils are not required to expend resources in arguing for the protection of discussions or drafts about ideas or events that may never actually come to pass.

It is suggested that the current prejudice-based exemption be replaced with a class-based one in respect of internal deliberations.

Q2 What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?

As this does not relate to councils' information, this has not been considered further.

Q3 What protection should there be for information which involves candid assessment of risks? For how long does such information remain sensitive?

This question is closely tied in with Q1. The consultation document recognises the argument that full risk assessment requires a safe space and that public disclosure would very likely result in a 'sanitised' consideration of risks, with adverse consequences for robust decision-making. Such information will often remain sensitive until it has been superseded but it should be noted that some information may remain sensitive indefinitely, for example, where it is the free and frank discussions that happen on the basis of continuing confidentiality or the audit/risk management process that would be revealed.

Q4 Should the executive have a veto (subject to judicial review) over the release of information? If so, how should this operate and what safeguards are required? If not, what implications does this have for the rest of the Act, and how could government protect sensitive information from disclosure instead?

As this does not relate to councils' information, it has not been considered further.

Q5 What is the appropriate enforcement and appeal system for freedom of information requests?

The consultation paper recognises that the appeals system as set out above can be lengthy and drawn out and 2014/15 statistics suggest that the final result is not changed significantly through appeal.

The role of the ICO and that of the First-tier Tribunal appear to be similar, with both carrying out merit-based reviews and neither creating legal precedents. In cases where the ICO accepts complaints before an applicant has exhausted the internal review procedure, this can create additional work when responding to the ICO and blurs the lines around how councils should best and most efficiently handle the matter. The council's experience of responding to the Information Commissioner is that this is increasingly time-consuming and it is not always clear that the approach required to be taken is proportionate or cost-effective.

It is suggested that a review of the appeals process be undertaken, with a focus on the role and powers of the Information Commissioner and First-tier Tribunal, to consider changes which would make the process more timely, efficient and less costly.

Q6 Is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know? Or are controls needed to reduce the burden of FOI on public authorities? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kinds of requests do impose a disproportionate burden?

As noted above, the legislation included provision for fees to be charged for requests, but the power has not yet been exercised. In the first ten years since the Act was introduced, the number of requests has risen significantly, as well as the number of internal reviews and appeals to the ICO. Total numbers of FOI and EIR requests received by Southwark Council in recent years is as follows: 2012/13 – 1,598; 2013/14 – 1,753; 2014/15 – 1,832; and 2015/16 first six months – 944. The consultation paper notes concerns expressed by public bodies about the cost of FOI, particularly as the sector already faces severe budgetary constraints. However, the introduction of a charge for all requests would need careful consideration to avoid being either administratively burdensome to councils and/or discriminatory to those wishing to make requests.

At present, requests which take more than 18 hours in respect of permitted activities do not need to be responded to, with permitted activities being defined as: determining whether the information is held, retrieving the information, locating the information, and extracting the information. Time taken to consider the information and redact it may not be included in the calculation, notwithstanding the need to comply with data protection requirements. Likewise, time taken to apply the public interest test may not be included.

It should be noted that the FOI Act sets the cost limit at £450 for local authorities and applies a standard charge of £25 per hour – hence the 18 hour time limit. This limit has applied since the commencement of the Act and, clearly, the real cost of activities carried out up to the 18 hour threshold will in most cases exceed £450, particularly where requests require the input of senior officers or significant redaction.

It is suggested that a review both of the current threshold of £450 and also of the activities permitted to be included in estimating the costs of a request be carried out. This would help redress the balance between open and transparent decision making and the burden on public bodies.

Requests received are of very different types. These include those from individual residents or stakeholders, journalists, companies pursuing a business interest, students, councillors and members of parliament. There is a requirement to be 'applicant blind', with all requests being dealt with on a timely basis, and within the statutory period of 20 working days.

Use by the media of the FOI regime is alongside their use of other contacts and means of obtaining information from councils. This can lead to inefficient administration of requests with the potential for duplication of processing.

As the consultation document notes, a significant proportion of requests are received from commercial entities and in many cases the requests appear to be more about market research than about openness and transparency or enhancing the quality of decision making. If such requests were to be removed from the scope of the legislation, this would allow councils to consider them with greater regard to resources.

It is suggested that consideration be given to removing both media/journalists' requests and those received from commercial entities from the FOI regime, to enable public bodies to deal with such requests more efficiently and with a greater regard to available resources.

I hope that this will help in your consideration of the practical operation of the Act and should be very happy to discuss further.

Independent Commission
on Freedom of Information

Yours sincerely,

Duncan Whitfield CPFA
Strategic Director of Finance and Governance
Duncan.whitfield@southwark.gov.uk
cc. **Thelma Stober, Local Government Association**

Stockport Metropolitan Borough Council

What protection should there be for information relating to internal deliberations of public bodies? How long after a decision should such information remain sensitive and should different protections apply to different categories of information than those that are currently protected under Sections 35 and 36 FOIA exemptions?

The following considerations are recommended:

- Any removal of the public interest test from section 35 and section 36 should be clearly defined and limited in nature.
- Section 36(2)(a) should be amended to include the work of devolved administrations at regional and local level (an equivalent amendment to regulation 12(8) the EIRs should also be considered in the light of the tribunal decision in EA/2006/0073 on the scope of 'internal communications' providing a safe space across government departments⁴⁶).
- If the prejudice test and/or public interest test is to be removed from section 36, this should apply to all public authorities, not only central government.
- Devolved administrations at regional level and local authorities should have access to the same safe space protection as government departments in relation to the convention of collective responsibility, frank exchange of advice and views for the purpose of policy formulation and the effective conduct of public affairs.
- If protection for risk assessments is to be increased, this principle should apply to all public authorities and not only central government (e.g. section 36 should be amended to deal with risk assessment in preference to section 35).

What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?

No comment as this question relates primarily to central government.

What protection should there be for information which involves candid assessment of risks? How long does such information remain sensitive?

No comment as this question relates primarily to central government.

Should the executive have a veto (subject to judicial review) over the release of information? If so, how should this operate and what safeguards are required? If not, what implications does this have for the rest of the Act and how could government protect sensitive information from disclosure instead?

No comment as this question relates primarily to central government.

What is the appropriate enforcement and appeal system for FOI requests?

It is recognised that the current system involves:

- Internal review carried out by a different part of the LA to the one that responded to the request
- Appeal to the Information Commissioner's Office
- Appeal to the First Tier Information Rights Tribunal
- Appeal to the Upper Tribunal

The following considerations are recommended:

⁴⁶ Friends of the Earth v Information Commissioner (EA/2006/0073) 20/8/2007 (para 20 & 44-47)
<http://www.informationtribunal.gov.uk/DBFiles/Decision/i76/FOEvECGD.pdf>

- That any change to the enforcement and appeals process must operation in the same way for both FOIA and EIRs as otherwise there will be a two tier process which will cause confusion and additional burden.
- That the processes for FOIA and DPA complaints are more closely aligned.
- The potential for the introduction of fees at each stage of the process is explored. It is known that Government has recently consulted on introducing fees for First Tier Tribunals (£100 fee for an appeal to be issued, and a further £500 fee if an oral hearing takes place) but the outcome of that consultation is not yet known.

Is the burden imposed on public authorities under the Act justified by the public interest in the public’s right to know? Or are controls needed to reduce the burden of FOI on public authorities? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kinds of requests do impose a disproportionate burden?

FOI/EIR statistics – The Council has received increasing numbers of FOI and EIR requests year on year as identified in the following table:

2008	2009	2010	2011	2012	2013	2014	2015 to date
552	802	925	1155	1288	1244	1431	1155

It is widely recognised that the FOIA imposes a significant burden on local authorities. Research also confirms that while authorities are now publishing a wide variety of information and data-sets in response to the Local Government Transparency Code of Practice and also following analysis of commonly requested information under the FOIA, the vast majority of requests are specific in nature and therefore require an individual response.

The following considerations are recommended

- Reducing the time allowed before the cost limit threshold applies (currently this equates to 24 hours for central government and 18 hours for local government calculated on a standard hourly rate of £25); and/or
- Increasing the standard hourly rate of £25 used to calculate the 18 hour threshold as this has remained unchanged since 2005.
- Extending the range of activities that may count towards the calculation of the FOIA cost limit threshold. (There is an argument that this is too restrictive and that the estimated time for consulting senior colleagues, seeking legal advice, applying exemption and the public interest should be included although how this could be achieved without a prescriptive format for objectively measuring the reasonableness of each additional activity to ensure this is capable of independent judgement and scrutiny, is perhaps open to question);
- Changing some ‘qualified’ exemptions to ‘absolute’ to remove the requirement for a prejudice/class public interest test;
 - This could be balanced by extending the scope of the Transparency Code of Practice and FOIA Publication Scheme following active consultation with local government to encourage increased publication of documentation.
- Extending what is deemed to be a vexatious request so as to include requests:
 - where the predominant purpose is to use the legislation to obtain information in order to market services/products back to the public sector;
 - where two or more similar requests are considered to be part of an organised campaign against the authority.

Tax Payers' Alliance

Responses to the questions raised in the Consultation

What protection should there be for information relating to the internal deliberation of public bodies? For how long after a decision does such information remain sensitive? Should different protections apply to different kinds of information that are currently protected by sections 35 or 36?

The first thing to note is that it is people and institutions who need to be protected, not information. Information is exempted from the right to access it, not 'protected'. It is exempted to protect people, institutions or value which might be harmed by its dissemination.

This is an important distinction that will help us avoid the danger of getting confused about the purpose of exemptions and how to adjust their scope. When one accurately describes who or what it is the law should be 'protecting' from the public's right to information, the nature of the discussion is brought into a somewhat sharper focus.

It is understandable that policy makers, civil servants, and local government staff wish to conduct open and honest discussions to reach the best possible decisions. But the Freedom of Information Act puts in place adequate protections so that these discussions can occur through the exemptions in place in sections 35 and 36.

It is important to remember that the Freedom of Information Act was in part introduced to create a culture of openness. That culture has not fully taken hold at every public body and may not do so for some time, as new members of staff replace older generations who are used to other ways of working before the Act was introduced.

Furthermore, our experience demonstrates that different public bodies hold very different views on what is or is not in the public interest.

What protection should there be for information that relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection that that afforded to other internal deliberative information? For how long should such material be protected?

The current arrangements and their gradual shift to earlier disclosure seem to be working, particularly from the evidence provided in the consultation document. For instance, the Information Commissioner considers that the public interest in protecting the convention continues after a decision is made.

It is also important to remember that this protection is only about deliberations, and how to promote free and frank discussion; national security, the economy, health and safety etc. are all covered by other exemptions.

Furthermore, the time limit of publishing 'historic records' is being reduced from 30 years to 20 years so the public expectation of transparency is already being satisfied. It would be satisfied even further if information were proactively published in a shorter timeframe, if appropriate to do. Failures to proactively publish non-sensitive material, under the guise of collective responsibility, will only fuel suggestions that information is blocked for little more than preventing embarrassment.

Finally, society is moving towards greater openness, and expectations of transparency are solidifying. It would be foolish for government to move against this grain, especially when it is already behind. Indeed, we believe that the Government should be seeking to strengthen FOI; for instance, to cover public contracts run by the private sector.

What protection should there be for information that involves candid assessment of risks? For how long should such information remain sensitive?

The TaxPayers' Alliance strongly contests the concept of withholding information on risk assessments. We would also strongly contest the notion that making risk assessments public would make them anodyne.

Risk assessments should be extremely robust. But it seems that exemptions are being sought because politicians wish to proceed with policies or projects that have critical risk assessments. Therefore it seems exemptions are merely being used to protect politicians from evidence-based criticism of their decision.

For projects like HS2, it is extremely important that the public has information on the risks. If any documentation is withheld, it stops a proper, informed debate from occurring. And if a politician wishes to go ahead with a policy or project despite a 'bad' risk assessment then they should have the courage to do so and make the arguments. Or if there is evidence that contradicts the findings of risk assessment, again, the public deserves to be presented with it.

It is not the Act's job to protect politicians and officials from the public finding out about what is being done in their name or with their money, just because it is unpopular. In fact, the point of the Act is the polar opposite.

Should the executive have a veto (subject to a judicial review) over the release of information? If so, how should this operate and what safeguards are required? If not, what implications does this have for the rest of the Act, and how could government protect sensitive information from disclosure?

The first thing to note is that just because information is 'sensitive', that does not provide a sufficient reason for it to be exempt. As with other discussion points in the consultation, this implies that politicians wish to preserve the authority to block information that they believe to be embarrassing or politically damaging. These are absolutely not acceptable reasons to block information that is in the public interest from being released.

If the government wants to "protect sensitive information" then it is incumbent on them to explain why other provisions in the Act are insufficient to do so.

We believe that there should be an executive veto for areas such as national security but certainly not for "sensitive" information. If there is to be an executive veto, we believe that it must come from the relevant Secretary of State, or the Prime Minister. We do not think that ministers should have the authority to veto the release of information. Any decision should also remain subject to a judicial review. It is also worth exploring the idea of giving the ICO sufficient powers to overturn an executive veto.

What is the appropriate enforcement and appeal system for freedom of information requests?

The appeal system seems to be a fair and reasonable way of contesting a decision. However, we would argue that public servants must be public service-minded, and be inclined to publish information rather than seek to 'protect' their organisation or colleagues.

We have examples where it seems that public servants have wilfully misinterpreted our requests for information to be obstructive. All this does is wilfully increase the cost and time of responding to requests. For instance, an FOI request sent to Liverpool City Council last year asking how many employees received remuneration in excess of £100,000 in a financial year ended up with a complaint being made to the ICO. The senior information officer repeatedly provided incorrect responses, claiming that the information was publicly available. Despite pointing out that this was not the case multiple times, via phone and email, a complaint was lodged with the ICO after the failure of an internal review. The ICO contacted the council who subsequently revised their response. The process took three-and-a-half months and required 27 emails. Another request asking for details of trade union

“facility time” sent to a county council was equally absurd, with the employee responsible asking for definitions of simple words such as “paid”.

We would argue that there is too much ignorance of the Act itself in public authorities. For instance, the headmaster of a school in Buckinghamshire initially refused to respond to a request from us until he received written confirmation on official headed notepaper from the Chief Executive that one of our employees was acting in an official capacity as he was not listed as a member of staff on the website. Responders are supposed to be blind to the requester, and provide information where possible to whoever asks for it.

Furthermore, we have too often seen email chains where FOI requests have been passed around a public authority before it has been released. Sometimes very senior members of staff have a better grasp of the details of an issue and they will want to check sensitive things because they will spot inaccuracies that junior staff will miss. But too often this includes the communications department. This only generates suspicion that the public authority is actively seeking to control not only what information they release, but also the way they phrase any release. This may not be in the name of clarity, but in the name of reputational protection or media strategy. This is unacceptable and it should be considered whether requests should be banned from being forwarded/circulated to anybody who is not actively required to provide information in order to meet the request. Once the response has been sent to the requester, it is of course acceptable for the rest of the organisation to be aware of what has been sent – but until then, it is at best ill-advised for communications staff to intervene and influence the response that is sent.

As for enforcement more generally, we believe that public sector staff are either unaware or not fully appreciative of the fact that they are breaking the law when they respond late. For example, a response to a simple request sent to TfL on 17th October 2014 was received on 13th July 2015. The penalties for breaches should be more stringent, with the penalties handed directly to the ICO, which the ICO can use to resource their work. It may also be worth considering making individuals personally responsible for breaches. This would ensure a higher standard of responses and that processes are adhered to (and improved).

Is the burden imposed on public authorities under the Act justified by the public interest in the public’s right to know? Or are controls needed to reduce the burden of FOI on public authorities? If controls are justified, should these be targeted at the kinds of requests that impose a disproportionate burden on public authorities? Which kinds of requests do impose a disproportionate burden?

A mooted method of ‘controls’ is charging for requests. But the prospect of implementing charges is deeply troubling. The Government should stick to the open data principle of free access, and if non-vexatious requests within the limit are proving disproportionately expensive then that is proof that the authority is failing to create systems to automatically disclose the kind of information which is generating requests. If anything, the public authority should be charged for that failure, not requesters.

Furthermore, vexatious and too-costly requests impose a disproportionate burden. But those types of requests already have sufficient exemptions in place. There are no more controls needed to reduce the burden of FOI on public authorities.

As alluded to in the last answer, we have examples of public servants being wilfully unhelpful. North East London NHS Foundation Trust responded to a request simply by saying that “The Trust is not currently able to determine how many employees have earnings in excess of £100,000”. Much of the time, public bodies invite burdens on themselves by not answering requests on time and in sufficient detail. A back-and-forth exchange with a requester costs time and money.

If public bodies believe that the burdens are too big, quite often that is a function of their own inefficiency. A request to Cornwall Council asking how much had been paid to councillors in the last 3 financial years was rejected on cost grounds. The FOI officer stated that gathering the information would take 37 hours.

Overall, we believe that public authorities should publish all of their data, unless it meets current exemptions or the authority believes that nobody wants that data to be published.

Telegraph Media Group (TMG)

Introduction

Telegraph Media Group (TMG) is the publisher of the The Daily Telegraph, The Sunday Telegraph, the The Weekly Telegraph and telegraph.co.uk.

TMG also responded to the call for evidence by the Justice Committee in 2012 during their 'Post-legislative Scrutiny of the Freedom of Information Act (FoIA) 2000' inquiry⁴⁷.

TMG have seen and fully support the submissions of the Media Lawyers Association and that of the News Media Association, of which we are members.

At the outset we want to state that we are uneasy with many of the questions asked in this consultation. Rather than seeking to enhance the FoIA – we believe that the tone of the Call for Evidence, and indeed the Commission's remit, can only be interpreted as seeking to curtail an already deficient regime.

We do not believe that the Commission will best be served by TMG simply responding to the specific questions asked. It is imperative that the context in which the Act operates, and the experiences of our journalists in using it, are properly understood by the Commission.

We also hope to tackle the myths, misinformation and oft-repeated arguments that surround the operation to the FoIA – especially made by those that seek to limit its effectiveness - which will undoubtedly be repeated, yet again, in the various responses to the Commission's call for evidence.

Warm words. Wide of the mark.

Statements and documents from government ministers are littered with grandiose commitments to transparency and openness. For example the Cabinet Office's 'Open Government Partnership UK National Action Plan 2013 to 2015':

"Transparency and open government are ideas whose time has come. People around the world are demanding much greater openness, democracy and accountability from their governments. Citizens are demanding that the state should be their servant, not their master, and that information that governments hold should be open for everyone to see."

....

"Transparency, participation and accountability are not just lofty principles – they affect people's lives on a daily basis." 48

The Commission's mission and tone within the Call for Evidence sit quite at odds with even this statement.

TMG also note that the initial Commission decision was to withhold responses to its own Call for Evidence and keep them secret. We welcome the decision to change this. But that earlier intention is illustrative of the wider problem with the British state in relation to transparency and openness which are discussed later.

Freedom of Information in operation

It is undeniable that the FoIA has gone some way to allow the public to learn more about how public bodies operate and exercise power in their name. This has been achieved by individual requests and those made by campaigning organisations and the media, particularly newspapers.

The results for the public sector and government when stories are published are often unflattering. But embarrassment is no reason for secrecy.

We want to remind the Commission that TMG spent an enormous amount of money and resource defending the very role and purpose of newspapers and journalism in our democratic system throughout the Leveson Inquiry.

⁴⁷ <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/96vw63.htm>

⁴⁸ http://www.opengovpartnership.org/sites/default/files/20131031_ogp_uknationalactionplan.pdf

Journalism and the public's right to know were on trial. That inquiry - the remit defined by politicians - was armed with greater powers than that of the inquiry into the Iraq War. TMG both entered and emerged the Leveson Inquiry quite certain of, and championing the role, newspapers to hold those in power to account.

That inquiry recommended statutory control of newspapers, and the constitutional mess that ensued – of course, created by politicians - has resulted in a legislative infrastructure that has very dangerous consequences for freedom of speech and democracy in the United Kingdom. Restrictions on FoI would be a further blow to press freedom.

This Commission's work must be seen within this context.

We are unequivocal in our belief that the FoIA is currently inadequate: it needs strengthening, enhancing and extending, and certainly not seeing any of its remit curtailed or exemptions extended as this Call for Evidence suggests.

Despite the numerous exposés of waste, ineptitude and bad practice exposed by TMG's titles the reality is that the process of using the FoIA to extract information by our journalists has been described as "tortuous" and "like entering a war of attrition". Actual FoI replies are regularly slow.

'Gaming' (discussed later) whereby public servants deliberately obfuscate the release of information, or seek to frustrate FoI requests, is commonplace.

Accountability

The FoIA can only be considered as a mere hand chisel picking away at the rock of organisational secrecy. Its remit and effectiveness need extending.

Fundamental change in the mind-set of public organisations and public servants is required: the default mind-set of the British state and officialdom remains one of secrecy. As mentioned earlier, the fact this Commission initially sought to keep consultation responses secret is an example of this.

We believe FoI is wrongly considered a menace by many organisations. Reputation management is their starting point, rather than the public's right to know. Some bemoan the "chilling effect" that information might be released; nonetheless the Information Commissioner dismissed it as a "self-fulfilling prophecy"⁴⁹.

We prefer to focus on how the FoIA increases accountability which Lord Howard, when Leader of the Conservative Party, quite rightly championed.

Accountability of public servants is quite proper. It has the result of ensuring value for money for tax-payers and driving efficiencies within organisations. The fear of public servants being uncovered wasting money ought to be welcomed by HM Government - whatever its particular colour.

While the "chilling effect" - which is actually fear or reputational damage or exposure of inefficiency, waste or error –might embarrass individuals or an organisation, the public are owed not only the right to know but deserve better. Indeed, as the Prime Minister once said: "sunlight is the best disinfectant".

The Commission will remember the Telegraph published the details of MPs expenses in 2009, which was a seminal moment in post-war British politics.⁵⁰ It was precisely because the MPs expense system was mired in secrecy that such egregious claims, and indeed, criminality took place.

The refusal of Parliament to publish MPs expenses under the FoIA- despite various rulings and recommendations that it should, intensified the genuine public outrage of when information was published by the Telegraph.

⁴⁹ <http://blogs.lse.ac.uk/mediapolicyproject/2015/10/01/working-effectively-lessons-from-10-years-of-the-freedom-of-information-act/>

⁵⁰ <http://www.telegraph.co.uk/news/newsttopics/mps-expenses/6499657/MPs-expenses-scandal-a-timeline.html>

The Government is proud of its record in the release of more proactive information⁵¹— albeit largely statistical – by public authorities, but this is not equivalent to information extracted from it. There is a fundamental distinction between information any public body has chosen to release and that which it has been required to release by extraction.

The Commission may find the just a few example headlines of how the FoIA has allowed the public to be told about how public authorities operate. It is important to note that not one of these stories emerged due to the release of information proactively:

“Abortions to reduce multiple births on the rise”⁵²

“MPs use children to claim more expenses”⁵³

“NHS pays temporary boss £47,000 a month”⁵⁴

“Locum doctor paid £11k to work a weekend”⁵⁵

“Expenses scandal: Kevin Barron claimed £1,500 a month to rent from colleague”⁵⁶

“Patients stuck in A&E for up to 46 hours”⁵⁷

Costs: greatly exacerbated

There are clearly costs involved for public sector organisations in operating the FoIA. The Commission’s consultation lists the number of FoI requests in a table under the heading “burdens on public authorities”. This tone is, again, disappointing but illuminating.

Similarly, it is now a common practice that many press officers within public sector and government organisations now routinely advise our journalists to submit FoI requests for simple information that were once answered and could be answered immediately. See Annex A.

Similarly, ‘gaming’ further inflates considerable cost to an organisation, again Annex A demonstrates this. Our journalists know it is unlikely they will be successful in obtaining the information quickly. It would be clear what information is being sought, but it is also well known that many public bodies will erect obstacles to prevent the disclosure. Examples of these barriers would include taking significant amounts of time to carry out internal reviews into responses that were themselves delayed; taking months supposedly to carry out public interest tests; and waiting until the end of the 20-day period to advise that responding to the request would exceed the statutory cost limit.

An absurd, but no means rare, example of a FoI request being ‘gamed’ is included in Annex A. A Telegraph journalist sought information from the Department of Health. He was told he would have to narrow his request as it would pertain to a specific Directorate. He then asked for a list of Directorates so that he could focus his request. He was then told this was now being considered as a separate and new FoI request – of course, bringing further delay.

We are aware of one case of ‘gaming’ which has taken over two years. After two years this request is now the subject of an internal review.

⁵¹ Cabinet Office Minister opens up corridors of power, Cabinet Office Press Release, 1 June 2010

⁵² <http://www.telegraph.co.uk/news/health/8981504/Abortions-to-reduce-multiple-births-on-the-rise.html>

⁵³ <http://www.telegraph.co.uk/news/newstoppers/mps-expenses/10161087/MPs-use-children-to-claim-more-expenses.html>

⁵⁴ <http://www.telegraph.co.uk/news/health/news/11674461/NHS-trust-pays-temporary-boss-47000-a-month.html>

⁵⁵ <http://www.telegraph.co.uk/news/health/news/11806235/NHS-locum-doctor-paid-11000-to-work-a-weekend.html>

⁵⁶ <http://www.telegraph.co.uk/news/politics/9621818/Expenses-scandal-Kevin-Barron-claimed-1500-a-month-to-rent-from-colleague.html>

⁵⁷ <http://www.telegraph.co.uk/news/health/news/11561484/Patients-wait-in-AandE-for-up-to-46-hours.html>

If there is a perceived risk of reputation management this is when delay and 'gaming' is at its worst or when we see exemptions cited which do not apply.

Any assessment of perceived costs of complying with FoI must be considered against this backdrop. We would also go further and ask: what cost democracy?

In an attempt to counter this worrying development, we know that some of our journalists have now built relationships with FoI staff within organisations. It is not, however, common. They will often put in an unofficial call before submitting a request to seek guidance on how best to word their formal requests to counter any potential barriers imposed by that organisation. These relationships would have only once existed with press officers.

We are also aware of the practice whereby government ministers and special advisers have offered guidance our journalists to submit specific FoI requests about *their own* department in order to have information brought to light. Political parties themselves have also sought to use FoIA in order to expose wrongdoing.

It is the conclusion of TMG that much of the cost of complying with the Act could be significantly reduced if organisations were to operate within the spirit of the Act, rather than obfuscate and delay from the outset.

We, therefore, have very little sympathy with the argument that FoI is increasingly costly to public sector organisations and as a result of this the legislation needs amending. The experiences of our journalists demonstrate that the costs and number of FoI requests are over-inflated by the tactics of far too many public sector organisations and government departments who are more concerned with reputation management rather than the public's right to know.

Appeals

We are pleased the Commission is considering the appeal mechanisms. This, if properly considered, would be another area where costs of the FoI could be significantly reduced.

TMG urge the Commission to recommend the introduction of statutory time limits on the length of time that a public authority can spend conducting a review of a refusal. This would also have the added effect of ensuring that the process cannot be abused.

Coupled with a requirement for each public authority to publish data on the timeliness of responses to requests, which was also suggested by the Justice Select Committee, would greatly enhance the level of service that the public receive. The financial costs would be negligible but result in massive improvements.

Cabinet Veto

We do not support any strengthening of s53 of the Act. Whilst the Cabinet Veto has only been used on a handful occasions – even when against a decision of the Tribunal - it is entirely proper that any decision is subject to judicial review.

Impediments

The Justice Select Committee stated in their report, and government acknowledged in its response, that there are significant benefits to the taxpayer of the FoI regime:

“The Freedom of Information Act is a significant enhancement of our democracy. It gives the public, the media and other parties a right to access information about the way public institutions in England and Wales are governed, and the way taxpayers' money is spent. Governments and public authorities can promote greater transparency but, without FOI requests, decisions on what to publish will always

lie with those in positions of power. FOI has costs, but it also creates savings which accrue from the disclosure of inappropriate use of public funds or, more importantly, fear of such disclosure⁵⁸

Newspapers and journalists exist to ask questions of those in power on behalf of the public. Any impediment to this, financial or otherwise, would be unacceptable and is an anathema to the principle of “open and transparent” government.

We also believe that imposing fees on those making FOI requests is both unjust and unacceptable. The Government also agreed:

“The Government agrees with the Committee’s assessment that charging for FOI requests would have an adverse impact on transparency and would undermine the objectives of the Act.”⁵⁹

If a fee regime were introduced, examples of stories that would have incurred significant cost for even a large organisation like TMG, include:

*“Revealed: the alarming shortfall of A&E doctors at weekend”*⁶⁰

*“Revealed: more than 500,000 home care visits last less than five minutes”*⁶¹

*“Potholes: huge rise in damage claims but council pay-outs fall amid repair 'backlog’”*⁶²

*“£14m bill for gagging axed public officials”*⁶³

Not for one moment could even the staunchest proponent of the “chilling effects” on public authorities or government, or those seeking to introduce impediments on FOI justify their arguments in the face of such stories.

It has been submitted in evidence to other inquiries that another method to reduce costs without introducing fees would be to limit the number of requests that an organisation can make. This is wrong in principle and would be near impossible to police. Not least because of the principle of requestor blindness, which the Justice Select Committee fully supported the continuation of, as fundamental to the operation of the FOIA⁶⁴

Anything that curtails the work of specialists, academics and journalists or limits the public’s right to know would be highly regressive.

S35 and s36

Restrictions to these sections of the Act are wholly unnecessary and again are an anathema to “open and transparent” government.

Whilst the principle of “deliberative space” is certainly required these provisions are already sufficient to protect it. The Justice Select Committee during their lengthy inquiry concluded that “[this] is why we are cautious about restricting the rights conferred in the Act in the absence of more substantial

⁵⁸ <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/96.pdf> Pg 24

⁵⁹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217298/gov-resp-justice-comm-foi-act.pdf pg11

⁶⁰ <http://www.telegraph.co.uk/news/nhs/11834001/weekend-hospital-consultant-nhs-shortfall.html>

⁶¹ <http://www.telegraph.co.uk/news/health/news/11302534/Revealed-more-than-500000-home-care-visits-last-less-than-five-minutes.html>

⁶² <http://www.telegraph.co.uk/news/uknews/road-and-rail-transport/10685311/Potholes-huge-rise-in-damage-claims-but-council-pay-outs-fall-amid-repair-backlog.html>

⁶³ <http://www.telegraph.co.uk/news/9967901/14m-bill-for-gagging-axed-public-officials.html>

⁶⁴ [Post-legislative scrutiny of the Freedom of Information Act 2000 - Volume I, Justice Select Committee, July 2012, Pg35](#)

evidence.”⁶⁵ Indeed, TMG is not aware of a single example where policy advice to ministers has ever been released before that policy was announced.

In Annex B we demonstrate just one example of the effectiveness by which both government and public authorities already utilise these provisions to protect the “deliberative space” ⁶⁶

Perhaps we can attribute the “self-fulfilling prophecy” of the chilling effect to the anecdotal but growing, and worrying, practice of “archiving” of emails within government. This is best described as deleting emails, some as recent as just six months old, meaning that information could never be available or released under FoI.

Conclusion

The FoIA was a welcome constitutional development, but rather than seeking to limit its effectiveness the Commission and government should now be seeking to enhance it.

Political discourse is littered with platitudes about “openness” and “transparency”. This is far from the reality in Britain and at odds the experiences of our journalists.

We are deeply sceptical of the Commission’s tone of consultation. The time is now right for extension of the remit of the FoIA and we hope the Commission will also be able reach this conclusion.

We oppose any form of fees for making FoI requests, or that any limits on the number from organisations – particularly the media – should be introduced. This fundamental principle is supported by civil rights groups, the media, and the Justice Select Committee.

We also oppose extensions to exemptions on s35 and s36. Any attempt to do so would fatally undermine the effectiveness of an already deficient Act.

We would not be satisfied with the Commission finding that fees should not be introduced but as *quid pro quo* suggesting exemptions (namely s35 and s36) could be further extended. This would be a deeply cynical move.

Similarly, there should not be a strengthening of s53 (Cabinet Veto).

Statutory time limits on appeals, coupled with a requirement to publish statistics on FoI response times, would significantly reduce the costs of the operation of the FoI regime whilst introducing greater transparency.

The costs of complying with the FoIA are significantly exacerbated by practices developed within organisations that are subject to it. Press officers passing simple requests for information as FoI requests; public servants seeking to ‘game’ FoI requests; the pervasive culture of secrecy; and delays in responding need to be considered seriously by the Commission.

**Telegraph Media Group
November 2015**

[65. Post-legislative scrutiny of the Freedom of Information Act 2000 - Volume I, Justice Select Committee, July 2012, Pg 75](#)

⁶⁶ The request was made in relation to this story: *The Minister the mine and the £1300 an-hour payday*, <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/mozambique/11233343/The-minister-the-mine-and-the-1300-an-hour-payday.html> November 2014

Annex A



Department
of Health

22/10/2015

DE00000964710



Thank you for your request of 16th October 2015 under the Freedom of Information Act (2000). Your exact request was:

"Thank you for this response. Could you please provide me with a list of your directorates to help me narrow down my request."

I can confirm that the Department holds information relevant to your request.

However, as the information held by the Department is in the public domain, we will under Section 21 of the FOI Act (information accessible to the applicant by other means) refer you to the published source.

The Department's Organogram can be found on the following website:

<https://www.gov.uk/government/publications/dh-staff-and-salary-data-on-1-april-2014>

If you have any queries about this email, please contact me. Please remember to quote the reference number above in any future communications.

If you are dissatisfied with the handling of your request, you have the right to ask for an internal review. Internal review requests should be submitted within two months of the date of receipt of the response to your original letter and should be addressed to:

Head of the Freedom of Information Team
Department of Health
Room 520
Richmond House
79 Whitehall
London
SW1A 2NS

Email: freedomofinformation@dh.qsi.gov.uk

If you are not content with the outcome of your complaint, you may apply directly to the Information Commissioner (ICO) for a decision. Generally, the ICO cannot make a decision unless you have exhausted the complaints procedure provided by the Department. The ICO can be contacted at:

The Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Yours sincerely,



Freedom of Information Officer
Department of Health

freedomofinformation@dh.qsi.gov.uk

Hi,

Thanks for your email but this is not an FOI request. It is a query for your press office and for which our deadline is this coming Thursday. I would be grateful if you could ensure it is directed to the relevant person.

Many thanks,

~~XXXXXXXXXX~~

On 30 Dec 2013, at 09:20, ~~XXXXXXXXXX~~ wrote:

Dear ~~XXXXXXXXXX~~,

Thank you for your Freedom of Information request, received today in relation to: 'Council Tax Setting'

The request has been logged under Reference FOI 655 and will now be assigned to an officer for a response.

The statutory period for response time for these requests is 20 working days (with some exceptions).

Please quote the above reference in any further correspondence.

~~XXXXXXXXXX~~

Solicitor
Chesterfield Borough Council
foi@chesterfield.gov.uk

~~XXXXXXXXXX~~

From:] ~~XXXXXXXXXX~~
Sent: 26 December 2013 17:32
To: ~~XXXXXXXXXX~~
Subject: Urgent press query

To whom it may concern,

If this email has not in the first instance reached your council's press team, I would be grateful if you could forward it on.

The Telegraph is conducting a survey on council tax plans for the next financial year. Could you please let us have answers to the following questions as soon as possible?

1. Is your council considering raising council tax for the 2014-15 financial year, or has it decided to take up the grant offered by the Government for freezing its tax rate?
2. If plans for an increase are being considered, a) what stage are such plans at? (e.g. backed by the leader and/or cabinet and awaiting approval by the full council), and b) what percentage increase is the council considering? i.e. as a range (1-3%), or a specific figure (2%).
3. On what date do you expect the final decision on this to be made?

4. What is a) the political governance of your council (i.e. Labour, or Labour-led coalition) and b) the political affiliation of the council leader (e.g. Labour)

I would be grateful for your answers by midday on Thursday January 2. You can reach me on ~~XXXXXXXXXX~~

Many thanks,

Annex B



Foreign &
Commonwealth
Office

Foreign and Commonwealth Office
King Charles Street
London SW1A 2AH

Website: <https://www.gov.uk>

[REDACTED]

24 February 2015

[REDACTED]

INTERNAL REVIEW OF FOI REQUEST REF: 1078-14

Thank you for your email of 19 December asking for an internal review of the decision conveyed to you in our letter dated 19 December. In your request for a review, you said:

"Thank you for your response. Could I ask you to look again at this however. My FOI request appears to be broader than that letters you point to from a different request. For example, it includes correspondence between the FCO and the Government of Mozambique, and we know as a matter of public record that Mr Bellingham wrote to Mozambique over the Pathfinder affair. Does the FCO hold any of that correspondence? Equally, are there not letters between Pathfinder's British parties and the FCO?"

I am writing to confirm that I have conducted a full examination of all the material, both released and exempted, of relevance to your request.

Search for information

A search of FCO records was undertaken last year in response to your original request. Following that search it was confirmed to you that the FCO held relevant material. Further to your request for a review, I undertook a further full search of FCO records; I discovered no additional relevant documents. I am therefore content that a reasonable search was carried out in relation to your original request.

Use of exemptions

In this review process, we have applied the exemption in section 21 (information available by other means) of the Act. We considered that we were not required to provide information in response to your request as the information was already reasonably accessible to you. We used that exemption as on 19 December we made some information available on our website in response to an almost identical Freedom of Information Act request.

I am content that that s.21 was applied correctly.

In the spirit of the Act I also reviewed the documents that were considered in response to the earlier request and the use of exemptions applied. I can confirm we interpreted that request in its broadest form and considered all relevant material. In responding to that request, we applied the exemptions in sections 27, 35, 40 and 43. Taking those exemptions in turn:

Section 27 – International relations. Some of the information relevant to the 19 December request was withheld under s.27(1)(a). That section of the FOIA recognizes the need to protect information that would likely be prejudicial to relations between the United Kingdom and other states if it was disclosed. The material reviewed contains confidential exchanges between HMG and the Government of Mozambique. If we were to release such information, the Government of Mozambique may question whether information given in confidence to the UK would be respected and could therefore adversely affect the conduct of the UK's relationship. After careful consideration I am content that s.27(1)(a) was correctly applied.

Section 35 – Formulation of Government Policy. Some information in the 19 December request was withheld under s.35(1)(a). This section recognizes that there is public interest in greater transparency in the decision making process to ensure accountability within public authorities. However, officials need to be able to conduct rigorous and candid risk assessments of their policies and programmes including considerations of pros and cons without there being a risk of premature disclosure which might close off better options and inhibit the free and frank discussion of all policy options. For these reasons I consider that the public interest in maintaining this exemption outweighs the public interest in disclosing the material. I am therefore content that s.35(1)(a) was correctly applied.

Section 40 – Personal Information. Some of the information in the 19 December request was withheld under s.40(2) and (3) as it is personal data relating to third parties, the disclosure of which would contravene one of the data protection principles. In this case, our view is that disclosure would breach the first data protection principle. This states that personal data should be processed fairly and lawfully. It is the fairness aspect of this principle, which, in our view, would be breached by disclosure. In such circumstances, s.40 confers an absolute exemption on disclosure. There is, therefore, no public interest test to apply. I am content that this exemption was correctly applied.

Section 43 – Commercial Interests. Some information in the 19 December request was withheld under s.43(2). When considering this exemption we had to balance the public interest in withholding the information against the public interest in disclosure. We considered that in this case had we disclosed information it would have posed the risk that in the future companies would have been less likely to provide the FCO with commercially sensitive information and would have harmed the interests of those parties to legal proceedings in Mozambique. After careful consideration I am content that s.43(2) was applied correctly.

Your specific queries

As I have stated above in considering the 19 December request referred to we undertook an expansive search and considered all documents of relevance including such correspondence as you refer to in your request for an internal review.

Therefore, after careful consideration of the original handling of the request and on the basis of the findings above, the internal review has upheld the original decision.

Independent Commission
on Freedom of Information

I hope you are satisfied with the process of this review and the outcome. However, if you feel we have applied the exemptions incorrectly or we have not handled your internal review in the right way and you wish to make a complaint, you may then apply directly to the Information Commissioner for a decision. The Information Commissioner can be contacted at:

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF.

Yours sincerely,



Deputy Head
Southern Africa Team



We keep and use information in line with the Data Protection Act 1998. We may release this personal information to other UK government departments and public authorities.

Thanet District Council's

Thanet District Council is pleased to have the opportunity to respond to the call for evidence, and has focused its response on questions 5 and 6 which are the most salient for the council.

Question 5: What is the appropriate enforcement and appeal system for freedom of information requests?

As a small district council, we only have experience of dealing with ICO decisions/enforcement notices and have not yet appealed against an ICO decision. However, as a general observation it seems that the current appeal system has too many layers and should be simplified, thus reducing further the cost of implementing the Act.

Our experience of dealing with the ICO has been generally positive; their investigations are extremely thorough, and the decision notices a useful source of reference when considering how to approach similar requests.

Question 6: Is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know? Or are controls needed to reduce the burden of FoI on public authorities? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kinds of requests do impose a disproportionate burden?

Despite publishing more information as part of our obligations under the Transparency Code, this has not resulted in fewer FoI requests, in fact the opposite has occurred. The public's desire for information appears to be insatiable, with the number of requests continuing to increase year-on-year (see table below). At the same time, financial support from central government to local authorities continues to be reduced year-on-year, putting further strain on staff who are having to answer the requests within the statutory timescale.

2009/10	2010/11	2011/12	2012/13	2013/14	2014/15
389	519	500	614	869	960

These figures can be broken down by requester type to show the proportion of requests for each group:

- Media **14%**
- General public or individuals **51%**
- Business **30%**
- MPs/councillors **5%**
- NGOs, charities, lobby groups **Not recorded as a separate group**

In 2014/15, it cost Thanet District Council approximately **£65,000** in staff time, with an average cost per request of **£67**.

We have also observed that – in the case of commercial companies submitting requests – it appears to be easier for them to submit an FoI than to search our website (even though the information they are asking for in some cases is published, easy to find, and updated monthly). On one occasion, we were curious to find out why the same person at the same company continued to submit the same request every month. We contacted them by phone and they explained that “it's quicker to send an FoI request by email than to search councils' websites”. Therefore the cost is borne by the public sector and yet the private sector is using the information for commercial gain; this does not seem reasonable at a time when councils and other public sector bodies have faced, and continue to face significant cuts.

Given the increasing number of requests that public authorities are dealing with, serious consideration must be given to the introduction of a nominal charge – for example £25 – for processing a request. This would go some way towards covering the costs of processing the request, and would also discourage people from submitting a large number of requests.

Alternatively, a significant reduction in the cost/time limit could sensibly be considered. The current limit of 18 hours/£450 for local authorities may have been reasonable when the legislation was first introduced, the volumes were much lower, and local authorities were in a much healthier financial position. However, the landscape has now changed immeasurably and the legislation must adapt to reflect a much tougher climate. Given that the average cost to process a request is £67/c2.5 hours, the cost/time limit should reflect the actual time taken to deal with requests. The current limit of 18 hours per request is both unrealistic and unaffordable for public authorities, given the volume of requests we are now dealing with.

The issue of burdens is critical in enabling us to process requests in a timely manner, and redacting is a key component of one that must be addressed as part of this review. For requests which involve the use of exemptions, a significant amount of time is typically spent in not only redacting information, but then checking it carefully to make absolutely sure that no personal data, for example, has been inadvertently disclosed. This places an enormous pressure on FoI officers, and it is time that cannot be taken into account when estimating the cost/time limit. Time taken to redact and check is often the single most burdensome part of the entire request, and it is extremely frustrating that this cannot currently be factored into the cost/time calculation.

The issue of vexatiousness is one which merits special consideration, and the two requests below exemplify the ludicrous situation we find ourselves in, 15 years into the legislation. To illustrate the point, the two requests below have been received by Thanet District Council:

- 1 “Please could you provide me with the number of times any edition of any of the ‘Fifty Shades of Grey’ books by EL James has been borrowed from your libraries.”
- 2 “How many female staff you have with the name beginning with the letter A”

Whilst there are exemptions that can be applied to these types of requests, they still have to be processed in accordance with the legislation, and are an unwelcome and unnecessary distraction from the council’s core business. The introduction of a nominal charge would have the effect of filtering out these time-wasting and futile requests.

There is a handful of individuals in our district (and no doubt others across the country) who are placing a significant burden on the council through their frequent use of the Freedom of Information Act. The typical pattern of behaviour is the submission of a request, which invariably results in a request for further information, a request for an internal review and/or an appeal to the ICO. These people typically also submit subject access requests, thus placing a further burden on public authorities, and diverting resources from the delivery of front line services.

Vexatious requests – which in reality are about the person and not the request – have resulted in a hugely disproportionate amount of time taken in servicing the needs (and rights) of the few, at the detriment of the many. In this regard, the current legislation is woefully inadequate, with much tighter controls needed to prevent abuse of the legislation and protect limited public resources.

Tobacco Free Futures

About

Tobacco Free Futures (TFF) is a social enterprise, and our mission is to Make Smoking History for Children. We are leading experts in tackling tobacco and our vision is to change the way children, young people and adults think about tobacco and help future generations to be tobacco free. We support regional and national tobacco control activity at a local level, offering consultancy, training, managed programmes and high quality campaign resources that enable Local Authorities, Directors of Public Health, and any organisation we work with to tackle tobacco issues in their area.

TFF is part of the Smokefree Action Coalition (SFAC) alongside Action on Smoking and Health (ASH) and a number of other partners working in the tobacco control field.

General Considerations about the FOI Act

TFF supports the Freedom of Information Act 2000 (FOIA) as an important tool to support control and adequate regulation of the tobacco industry, which for many years had been engaged in private lobbying of Ministers and officials, with a view to frustrating legislation and public policy designed to reduce tobacco consumption.

TFF does not have a history of making FOIA requests but we are aware that our SFAC partners are active in submitting such requests and are strongly supportive of this activity. In general, we consider that the FOIA helps public health organisations to engage with Government on tobacco policy on more equal terms with the major tobacco manufacturers and the “front groups” they fund, which have vastly greater financial resources than organisations working on tobacco control. We would therefore strongly oppose any changes to the FOIA which would weaken its provisions and make it more difficult for public health organisations to monitor and report on tobacco industry lobbying activity.

The United Kingdom is a Party to the World Health Organisation Framework Convention on Tobacco Control (FCTC), the world’s first public health treaty.⁶⁷ Article 5.3 of the FCTC states that: “in setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law”.

Guidelines on the application of Article 5.3 were approved by the FCTC Conference of the Parties at its third session in November 2008.⁶⁸

- These require Parties to the FCTC not to:
- Treat tobacco corporations as “stakeholders” in public health policy.
- Invest in the tobacco industry.
- Partner with tobacco corporations to promote public health or other purposes.

Accept the tobacco industry’s ‘corporate social responsibility’ schemes. There are a number of prohibited actions under the Guidelines, including:

- Partnerships, and non-binding or non-enforceable agreements between tobacco industry and governments.
- Voluntary contributions by tobacco industry to governments.
- Tobacco industry-drafted legislation or policy, or voluntary codes as substitutes for legally enforceable measures.
- Tobacco industry representation on government tobacco control bodies or FCTC delegations.

There are also transparency measures established under the Guidelines, including:

- Transparency of government interactions with the tobacco industry, through public hearings, public notice of interactions, and disclosure of records.
- Disclosure of tobacco industry activities, including: production, manufacture, market share, revenues, marketing expenditures, and philanthropy

⁶⁷ [Framework Convention on Tobacco Control](#): English text, World Health Organisation

⁶⁸ [Guidelines on Article 5.3 of the FCTC](#): English text, World Health Organisation

- Disclosure or registration of tobacco industry affiliated entities, including lobbyists.
- Disclosure of current or previous work with tobacco industry by applicants for government positions related to health policy, and of plans to work for tobacco industry by former public health officials.

The FOIA provides an essential mechanism to ensure that the UK Government is meeting its obligations under Article 5.3. It enables SFAC members and other organisations to request and receive information from Government which establishes its conformity or otherwise with Article 5.3 and the accompanying guidelines.

Tobacco control work proceeds on the principle that any intervention, including proposed legislation and other Government policies and initiatives, must be evidence based. Tobacco control organisations do not propose new policies without first establishing their predictable positive effects, based on robust evidence. The FOIA provides our SFAC partners with an essential mechanism for ensuring that Government consideration of and decisions about tobacco control policy is also evidence based, and not unduly influenced by industry lobbying. It can and should be used to ensure that the information on which Governments rely for their decisions on tobacco control policy is both accurate and appropriate.

TFF is therefore strongly opposed to any amendments to the FOIA which would provide a means for Governments and public bodies to refuse to disclose relevant information relating to tobacco control policy formation and its practical implementation. In the event that such amendments were placed before Parliament we would be obliged to inform parliamentarians of the possible negative implications for our work.

It should be noted that the FOIA is also used by the tobacco industry and its paid lobbyists and researchers, generally to try to disrupt policy formation and other initiatives relating to tobacco control, as well as to support legal challenges, including the current industry case against the UK Government over standardised packaging. Numerous public bodies in the health sector have received FOIA requests of this kind. TFF previously operated within the NHS prior to spinning out under the 'Right to Provide' policy, and itself received a number of FOIA requests from the tobacco industry / partners during that time. However, the FOIA is a tool of transparency which supports free democratic accountability and debate and it can be used by any individual or organisation. We regard the tobacco industry's use of FOIA requests as a price well worth paying in order to ensure that appropriate information is placed in the public domain.

As SFAC members, TFF has drawn upon the Action on Smoking and Health consultation response in its own responses below.

Question 1: What protection should there be for information relating to the internal deliberations of public bodies? For how long after a decision does such information remain sensitive? Should different protections apply to different kinds of information that are currently protected by sections 35 and 36?

Question 2: What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?

Taken together, these questions imply that the Commission may make proposals intended to provide wider exemptions from the FOIA for information related to policy formation and implementation. In particular "information which relates to the process of collective Cabinet discussion and agreement" suggests that a wide range of Cabinet papers and supporting information could be kept confidential, regardless of whether there is a public interest in their disclosure. We note with alarm that a member of the Commission has already stated his view that there should be "a class exemption, full stop, that exempts information if it relates to the formulation of development of Government policy". This could allow exemption for information in at least the following categories:

- Research reports
- Opinion polls

- Statistics
- Scientific and technical information
- Contacts with lobbyists, including those from the tobacco industry and its surrogates, and
- Consultation responses.

TFF would regard such a wide exemption as retrograde and unjustified.

Question 3: What protection should there be for information which involves candid assessment of risks? For how long does such information remain sensitive?

This question appears to cover cases such as the refusal of the Government to disclose NHS Strategic and Transitional Risk Registers during the passage of the Health and Social Care Act 2008. Following FOI requests, the Information Commissioner recommended release of both registers. The Department of Health appealed to the First-tier Tribunal, which recommended the release of the Transitional but not the Strategic Register. On 8 May 2012, the Secretary of State for Health issued a certificate blocking release of the Transitional Register.

Risk registers of this kind are likely to contain observations about risk that may be open to misrepresentation – an accurate assessment of risk must include both the nature of the risk and the likelihood of the relevant events occurring. However, this problem is best mitigated by appropriate drafting of register entries and by the Government or public body framing publication in an appropriate way. Keeping assessments of risk confidential generally does not help in the passage of good legislation. The Health and Social Care Act might have been substantially improved if the registers had been published to inform Parliamentary debate, and it is hard to avoid the conclusion that the veto on publication had more to do with avoiding political embarrassment than with protecting properly confidential information.

In the case of the NHS risk registers, the existing legislation produced a result that was arguably too restrictive; it certainly does not provide grounds for restricting the publication of such information even further.

Question 4: Should the executive have a veto (subject to judicial review) over the release of information? If so, how should this operate and what safeguards are required? If not, what implications does this have for the rest of the Act, and how could government protect sensitive information from disclosure instead?

TFF does not believe that reinforcing a right of veto for the executive would be an improvement on the present legislation. The courts, from the First-tier Tribunal up to the Supreme Court, should have oversight when a veto is applied. Good grounds for a veto do not include the protection of the executive – or the Crown – from public embarrassment. The right of veto by Ministers, which already exists in the FOIA, should be applied only in extremely restricted circumstances. Ministers should not be able to overturn a court decision simply because they disagree with the court's decision, and have a different view on what constitutes the public interest.

We therefore consider the claim in the consultation document that the judgement of the Supreme Court in *R (on the application of Evans) and another (Respondents) v Attorney General (Appellant)* “raised serious questions about the constitutional implications of the veto, the rule of law, and the will of Parliament” to be grossly overstated.

Question 5: What is the appropriate enforcement and appeal system for freedom of information requests?

TFF considers the current enforcement and appeal system to be satisfactory.

Question 6: Is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know? Or are controls needed to reduce the burden of FOI on public authorities? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kinds of requests do impose a disproportionate burden?

It is true that the FOIA places an administrative burden on public authorities. However, we consider this to be more than compensated for by the better development and implementation of public policy that follows the introduction of a more transparent system of decision-making. We do not consider that a total number of requests to central Government bodies of around 45,000 to 50,000 a year is excessive. We also note from the IPSOS-Mori research for the Ministry of Justice referenced in the call for evidence that the total cost to central Government bodies of processing such requests was around £8.5 million in 2012, which represented about 0.0015% of total central Government spending in that year.⁶⁹ Again, we consider this far from excessive in view of the great gains in transparency and accountability secured by the FOIA.

We would therefore strongly oppose any proposal to impose fees or charges on FOIA applications. This would simply privilege large and well-funded organisations using the FOIA at the expense of small organisations and individuals. In the case of tobacco control, such charges would benefit the tobacco industry at the expense of organisations and individuals working on public health. We would also oppose making it easier for public bodies to refuse FOIA requests on cost grounds.

⁶⁹ [UK public spending 2012](#)

Transparency International UK

Transparency International UK (TI-UK) recognises the need for a balance between public access to information and the need for government to work effectively. However, we are strongly concerned about both the potential changes that might be implemented after this review, and indeed about the independence and impartiality of the Commission itself.

Freedom of Information (FOI) is a principle enshrined in the United Nations Convention Against Corruption (UNCAC), to which the UK is a signatory; yet the proposed reforms would reduce accountability and increase corruption risk in the UK.

Other checks and balances to mitigate corruption risks have already been eroded recently in the UK – for example the abolition of the Audit Commission – which places renewed emphasis on the importance of the Freedom of Information Act (FOIA) as part of our national defences against corruption.

The UK Government is in danger of implementing changes that both increase corruption risk in the UK and send a message to the rest of the world that it is acceptable to reduce rights to access information.

By contrast, we believe the UK Government should be aiming to strengthen the UK's FOI regime, notably by applying the FOIA to the private sector when it is delivering public services.

Rights to information

The right to access information held by the state, public officers and providers of state services is an essential part of a functioning democracy. It provides citizen-led checks and balances on concentrations of power, without which corruption would be allowed to thrive; allows citizens to make informed judgements about the efficacy of governments and elected representatives; and helps hold institutions and officials to account for their actions.

In the UK, the FOIA has helped to:

- Identify and deter corruption: our research has shown that the FOIA has played a central role in identifying corrupt activities, especially lobbying abuses.⁷⁰
- Hold public officials and institutions to account: for example, it helped citizens know about how the Parliamentary expenses system was being abused by MPs⁷¹, how hospitals have responded to alerts about patients' safety⁷² and how public money was misspent by a Council on a luxury car for its Chief Executive.⁷³
- Inform public debate about issues of national importance: for example, it has been used to challenge government claims about working practices in the NHS.⁷⁴
- Complement other forms of information access: for example, organisations like Spend Network⁷⁵ rely on FOI requests to help improve open data that can help save public money, and Transport For London has used FOI requests to inform what data it releases proactively.⁷⁶

TI's experience globally is that access to information laws are a key tool in the fight against corruption. We have seen how it has been used to by communities in Guatemala⁷⁷, Kosovo⁷⁸, Brazil⁷⁹ and the Czech Republic⁸⁰ to help identify abuses of entrusted power and hold officials to account. It is so

⁷⁰ Transparency International UK, How open data can help tackle corruption (June 2015)

<http://www.transparency.org.uk/publications/15-publications/1287-how-open-data-can-help-tackle-corruption-policy-paper>

⁷¹ <http://www.telegraph.co.uk/news/newstoppers/mps-expenses/6499657/MPs-expenses-scandal-a-timeline.html> [accessed on 16 November 2015]

⁷² Action Against Medical Accidents, Patient safety alerts: Implementation; monitoring; and regulation in England (February 2014) http://www.avma.org.uk/wp-content/uploads/2015/05/Feb_2014-PSA-Report.pdf

⁷³ <http://www.bbc.co.uk/news/uk-wales-south-west-wales-30895274> [accessed 17 November 2015]

⁷⁴ <http://www.independent.co.uk/life-style/health-and-families/health-news/less-than-one-per-cent-of-nhs-consultants-use-control-loophole-to-opt-out-of-weekend-work-10436080.html> [accessed 16 November 2015]

⁷⁵ <http://www.spendnetwork.com/license/> [accessed 16 November 2015]

⁷⁶ <https://tfl.gov.uk/info-for/media/press-releases/2013/october/tfl-introduces-further-transparency-and-accountability-by-publishing-more-data-and-information> [accessed 16 November 2015]

⁷⁷ http://www.transparency.org/news/story/ghost_politics [accessed 16 November 2015]

⁷⁸ http://www.transparency.org/news/story/drug_deal [accessed 16 November 2015]

⁷⁹ http://www.transparency.org/news/story/secret_diaries [accessed 16 November 2015]

⁸⁰ http://www.transparency.org/news/story/the_road_to_safety [accessed 16 November 2015]

fundamental to ensuring accountability that the UN has enshrined the right to access information in Article 13 of the UNCAC.⁸¹

The public already think that corruption is on the increase and that public officials cannot be trusted to work for the public good.⁸² Watering-down citizens' right to information will only further exacerbate these trends and raise significant doubts about the UK Government's commitment to open governance. Furthermore, if the UK takes steps to weaken the FOIA it will undermine the Prime Minister's credibility in taking a global lead on corruption. This will aid the corrupt globally by sending out the message that it is acceptable to weaken information rights in the rest of the world, including Commonwealth States who often model their legislation on that of the UK.

The Freedom of Information Act

Overall the current Act is working well, but there is also room for improvement

There is speculation but no evidence to suggest that the FOIA is unduly inhibiting the 'safe space' where Ministers and officials can talk candidly about government policy, and we see no argument to amending the scope of the Act's exemptions to make it narrower than is currently the case.

However, we do think that there could be improvements to the scope of FOIA and how it operates in practice. Since the FOIA came into effect in 2005, there has been a significant change in the way public services are delivered. Latest figures suggest that around half of the UK Government's spending on goods and services is on contracts with private providers.⁸³ This is equal to around £93.5 billion in taxpayers' money.

Much of the information held by these companies about how they deliver public services is not covered by the FOIA and only around one in three of public contracts have some form of FOI clause in them.⁸⁴ This means there is a significant accountability gap, with citizens unable to scrutinise how essential public services are being delivered. This has the potential to put both public money and citizen's lives at risk.

In addition, we have found that UK Government departments are not always making accurate judgements about what should be released and citizens are having to wait too long to be able to access information held by public bodies. Our recent research found that between 2010 to 2013 at least 52 per cent of appeals to the Information Commissioner's Office (ICO) were either upheld or partially upheld. This suggests that a significant proportion of internal reviews are being misjudged by departments and officials are being overly cautious about releasing information. Worryingly, only a fraction of requestors appeal internal review decisions, which means that public bodies applying the FOIA incorrectly are rarely challenged or held to account.

In addition, we found that it can typically take up to five months between a complaint being made to the ICO and the ICO issuing a Decision Notice.⁸⁵ This is without including the time between the submission of the initial request and the internal review process. Taking this into account and the time public bodies have to comply with a Decision Notice, requestors could have to wait 44 weeks before they receive the information they have requested.⁸⁶ This is far too long.

Exemptions should be subject to a public interest test overseen by the courts

TI-UK recognises there needs to be a balance between public access to information and the need for government to work effectively, and we acknowledge this can be difficult to judge. However, in the spirit of open government, where there is uncertainty we would encourage public bodies to err on the side of disclosure. Where there are significant concerns with disclosing information, the principle for determining this balance should be a public interest test and the arbiter of this should be the courts.

⁸¹ https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf [accessed 16 November 2015]

⁸² http://www.transparency.org/gcb2013/country/?country=united_kingdom [accessed on 16 November 2015]

⁸³ Public Accounts Committee, *Contracting out public services to the private sector*, HC 777 (March 2014) p.3 <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpubacc/777/777.pdf>

⁸⁴ Public Accounts Committee, *Contracting out public services to the private sector*, p.5

⁸⁵ Transparency International, *How open is the UK Government? UK open governance scorecard results* (March 2015) p.12 <http://www.transparency.org.uk/our-work/publications/15-publications/1239-how-open-is-the-uk-government>

⁸⁶ Transparency International, *How open is the UK Government?* p.12

It is essential that an independent judiciary is responsible for making this decision in order to ensure that there are sufficient checks and balances on executive power. To leave this decision solely in the hands of the UK Government would be to allow the executive to be both judge and jury over what information is and is not released into the public domain. Considering the partiality of government, this would result in a dangerous concentration of power with an attendant and heightened risk of its abuse.

We would be significantly concerned if there were any amendments to the FOIA that would allow the Ministerial veto to override judicial rulings.

Where there are absolute exemptions under the FOIA, this information should be released as soon as reasonably practicable. We welcome the changes by the Constitutional Reform and Governance Act 2010 that have paved the way for a transition to a new “20 year rule” regarding the release of sensitive public documents. However, we do not think these changes justify restricting the FOIA.

There should be no charge for appealing against the decisions of public bodies

As mentioned above, public bodies have proved worryingly unsatisfactory at making accurate judgements as to whether information should be put into the public domain. And there are already relatively small numbers of people who seek to appeal decisions that do not favour disclosure. It is therefore with great concern that we view the UK Government’s plans to introduce fees for citizens appealing internal review decisions by public bodies.

Evidence from elsewhere, such as Ireland, has shown that introducing fees can lead to a significant reduction in the number of FOI requests and appeals against decisions by public bodies.⁸⁷ This may seem like a benefit for public administration – removing ‘sand’ from the machine of government – however it makes them less accountable for their actions, which in turn can lead to greater inefficiencies, increased corruption risks and heightened threats to public wellbeing. For example, it would be harder for researchers to access information that could inform healthcare studies.⁸⁸ It would also make it more difficult for organisations like Spend Network to collect data on public expenditure that can help bring efficiencies to the public procurement process, potentially saving public bodies and companies millions of pounds a year.

We would be significantly concerned if the UK Government were to introduce fees for any part of the FOIA process.

The Commission on Freedom of Information

As well as the concerns expressed above, we also have some serious misgivings about the reasons for this review, its scope, and the composition and conduct of the Commission so far.

There does not seem to be a justified reason for this review

We were perplexed when the UK Government announced it was establishing the Commission and the grounds it gave for doing so. As the Commission has already recognised, the Justice Select Committee undertook post- legislative scrutiny of the FOIA back in 2012. The Committee clearly stated in its conclusions that it was “not able to conclude, with any certainty, that a chilling effect has resulted from the FOI Act”.⁸⁹

As noted in the Supreme Court’s ruling in the case, it is also a long-standing principle of the rule of law that the judiciary is the final arbiter in decisions relating to its application.⁹⁰ In the absence of

⁸⁷ Office of the Information Commissioner, *Freedom of Information: The first decade* (May 2008) p.15 <http://www.oic.gov.ie/en/Publications/Special-Reports/10th-Anniversary-Publication-Freedom-of-Information-The-First-Decade-/Freedom-of-Information-The-First-Decade.pdf>

⁸⁸ Alexander J Fowler, Riaz A Agha, Christian F Camm and Peter Littlejohns, *The UK Freedom of Information Act (2000) in healthcare research: a systematic review* (November 2013) <http://bmjopen.bmj.com/content/3/11/e002967.full>

⁸⁹ Justice Select Committee, *Post-legislative scrutiny of the Freedom of Information Act 2000*, HC 96-I (July 2012) p.75 <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/96.pdf>

⁹⁰ R (Evans) v Attorney General [2015] UKSC 21 paragraph 52 p.18 https://www.supremecourt.uk/decided-cases/docs/UKSC_2014_0137_Judgment.pdf

any clear and explicit provision in the FOIA that states there should be an exception to this, this founding principle still stands.

Considering Ministers should have received full briefings and legal advice on the scope of these provisions before they were laid before Parliament, and they would have undoubtedly have received advice when applying the veto in practice, it is perplexing that there should now be any doubt about the scope of their application.

We were also disappointed that the UK Government implicitly used the increased publication of public sector open data as a justification for reviewing the scope of the FOIA. As the UK Government is partner in the Open Government Partnership (OGP), Ministers should be aware that open data and FOI are not mutually exclusive measures – they are complementary tools that empower citizens, ensure efficiencies in the public sector, hold public institutions and officials to account and promote enterprise. Using this language was ill-informed and therefore ill-advised. In addition, establishing the Commission outside of the OGP process and without prior consultation or engagement with civil society does not instil confidence in the UK Government's commitment to open governance. We hope that this unfortunate turn of events does not indicate how the UK Government intends to engage with civil society in the future.

We are disappointed with the scope of the review

Considering the UK Government is willing to spend public money on reviewing the scope of the FOIA, it is disappointing that it did not decide to use those funds to see how it could be reformed to better serve the public good. The scope of the review is extremely narrow and seems solely concerned with building the case for widening the scope of the exemptions under the FOIA to reduce the amount of information made public. This is a missed opportunity to build on the foundations of the Justice Select Committee's recent review of the Act and explore how it can be improved how it works in practice for members of the public.

One of these improvements is to make use of existing provisions within the FOIA to extend it to cover private companies providing public services. Important information held by these organisations is not covered by the FOIA, whilst they account for an increasing amount of taxpayer spending. This growing gap in information rights needs to be filled.

We think the FOIA should be extended to include private contractors providing public services.

We do not have confidence in the impartiality or independence of the Commission

We note that some members of the Commission have publicly expressed a desire to water down the FOIA⁹¹, claimed that it has had a chilling effect on government, or been criticised because of information brought to light by FOI requests.⁹² This raises serious questions about their ability to engage in impartial deliberations about the workings of the Act. We are also alarmed by the way in which the Commission has conducted itself so far.

Providing anonymous briefings to journalists⁹³ and considering anonymising evidence⁹⁴ does not instil confidence in its commitment to, or recognition of the need for, openness and transparency. In addition, the timelines provided for the review – which have already been extended to allow civil society to express its views – are prohibitively tight and unlikely to provide the necessary consultation and discussion necessary to provide a balanced and informed review of the Act. In its post-legislative review of the FOIA, the Justice Select Committee noted that it was “cautious about restricting the rights conferred in the Act in the absence of more substantial evidence [that there were insufficient provisions to ensure a safe space for policy development]”.⁹⁵ Considering the relatively small time that has passed since this inquiry – which took 140 pieces of written

⁹¹ <http://www.telegraph.co.uk/news/politics/9210126/Jack-Straw-calls-for-FOI-act-to-be-rewritten.html> [accessed 17 November 2015]

⁹² <http://www.theguardian.com/politics/2015/oct/09/freedom-of-information-commission-not-very-free-with-its-information> [accessed 17 November 2015]

⁹³ <http://www.independent.co.uk/news/uk/politics/foi-commission-reviewing-what-public-has-right-to-know-bans-journalists-from-fully-reporting-its-a6687896.html> [accessed on 19 November 2015]

⁹⁴ <http://www.pressgazette.co.uk/government-freedom-information-commission-condemned-over-plan-keep-secret-names-those-providing> [accessed 19 November 2015]

⁹⁵ Justice Select Committee, *Post-legislative scrutiny of the Freedom of Information Act 2000* p.75

evidence and oral evidence from 37 witnesses during 7 evidence sessions – and the challenging timetable the Commission has been set, we would be extremely surprised if any new “substantial evidence” is going to be found and properly assessed.

This is a disturbing picture, at odds with the Government's stated intent to be among the most open in the world, and its commitment to tackle corruption. We have no confidence in the Commission's impartiality or independence.

We have outlined our response to the Commission below for the public record.

Question 1: What protection should there be for information relating to the internal deliberations of public bodies? For how long after a decision does such information remain sensitive? Should different protections apply to different kinds of information that are currently protected by sections 35 and 36?

As the Commission is aware, the Justice Select Committee made it clear that there are sufficient protections or ‘safe space’ for deliberations within public bodies. Although this was before the Supreme Court's recent ruling, we do not think this judgement had a material impact on the workings of the Act.

We have not seen any evidence to suggest that the public interest tests under Sections 35 and 36 are not working in practice. To move information covered by these provisions from qualified exemptions to absolute exemptions would fundamentally undermine the purpose of the Act and disempower citizens.

Question 2: What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?

We consider that the current provisions in the FOIA provide sufficient protection for information that relates to the process of collective Cabinet discussion and agreement. Therefore, we do not think that it should be amended to afford it greater protection than there is for other internal deliberative information.

As noted by the ICO in its evidence to the Justice Select Committee, both it and the Information Tribunal are supportive of the need to protect safe space for policy discussion within government. In its evidence to the Justice Select Committee, the ICO observed that “Cabinet minutes are not routinely outed”.⁹⁶ In addition, the UK Government has also only used the Ministerial veto four times in relation to the requests to release information relating to Cabinet discussion and agreement, all of which have been applied without being overturned by a subsequent judgement by the Supreme Court. Therefore, we cannot see what harm is intended to be solved by amending the FOIA.

Question 3: What protection should there be for information which involves candid assessment of risks? For how long does such information remain sensitive?

As a minimum, the disclosure of risk assessments should be subject to the public interest test. However, there is also an argument for proactively publishing these documents as part of the UK's commitment to open government. This would allow citizens to assess how public bodies are implementing major policies and projects that potentially have a significant impact on their well-being and the public purse. This sentiment was reflected in the Information Tribunal's judgment on the request to release the UK Government's transition risk register for its healthcare reforms.⁹⁷

⁹⁶ Justice Select Committee, *Post-legislative scrutiny of the Freedom of Information Act 2000* p.61

⁹⁷ ICO, *Ministerial veto on disclosure of the Department of Health's Transition Risk Register: Information Commissioner's Report to Parliament*, HC 77 (May 2012) paragraph 5.7 <https://ico.org.uk/media/about-the-ico/documents/1042385/ico-report-to-parliament-doh-transition-risk-register-hc77.pdf>

Question 4: Should the executive have a veto (subject to judicial review) over the release of information? If so, how should this operate and what safeguards are required? If not, what implications does this have for the rest of the Act, and how could government protect sensitive information from disclosure instead?

As mentioned above, it is a long-standing principle of the rule of law that decisions of courts are binding and that the actions and decisions of the executive are reviewable by courts at the initiation of a citizen. Therefore, there would have to be a significant and irresistible justification to introduce contrary provisions into the FOIA, which would then need to be debated and considered by Parliament. We do not think this case has been made and we agree with Parliament's original intent that the veto should only be applied narrowly and rarely to decisions by the ICO.

We think that the current rules regarding the Ministerial veto have been working effectively and do not need changing. The UK Government has used the veto on seven occasions and only on one of these occasions has this not led to the suppression of information. If these provisions were ineffectual in the government's eyes you would expect to have seen information being released in the majority of these cases. However, this has obviously not happened.

In addition, we do not think it is a legitimate reason to change the FOIA merely because a court has decided to take a different opinion from the UK Government. Instead of looking to try and overrule the judgements of courts, or legislate to side-line them, the UK Government should focus on putting forward the most convincing case possible as to why it is not in the public interest to disclose certain pieces of information on a case-by-case basis.

Question 5: What is the appropriate enforcement and appeal system for freedom of information requests?

We are generally content with the framework for enforcing the FOIA. However, as mentioned above, we are concerned with how it is being interpreted by public bodies in practice and how long it can take for citizens to receive the information they have requested. We are also very concerned about the UK Government's proposals to introduce fees for FOI appeals to the First Tier Tribunal.

As mentioned above, fees adversely affect the number of requests for information and appeals against judgements by public bodies. At the same time, public bodies are not always making accurate judgements as to when information should be released under the FOIA and there are already a worryingly low proportion of requestors appealing internal review decisions. This leads to the irresistible conclusion that any move to introduce fees for any stage of the process would be a conscious decision to deliberately suppress the amount of information being released into the public domain.

Furthermore, considering FOIA requests are usually made with the public interest in mind, it seems particularly perverse that the UK Government is considering introducing measures that would significantly inhibit this being pursued.

Question 6: Is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know? Or are controls needed to reduce the burden of FOI on public authorities? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kinds of requests do impose a disproportionate burden?

We do not think that the burdens imposed on public authorities outweigh the significant benefits the Act has brought. As noted in the Justice Select Committees report, "the additional burdens [of the FOIA] are outweighed by the benefits"⁹⁸ and the Act remains "a significant enhancement of our democracy".⁹⁹

We note that UK Government departments spent £289 million on advertising alone during 2014 to 2015¹⁰⁰ whilst the latest available figures show it only spends around £9 million on responding to FOI.¹⁰¹ That means central government spending on responding to citizen requests for information is only around 3 per cent of the amount these bodies incur on publicity. Other estimates have put the relative costs of FOI even lower.¹⁰² Considering this, the Act is providing exceptional value for money.

We also note that there are already sufficient controls to reduce the burden on public bodies subject to the FOIA. Firstly, they can reject the request under Section 14 if it is vexatious or a repeat demand. Secondly, they can turn down a request if the estimated cost of responding exceeds £600 for central government departments or £450 for other public bodies. And thirdly, there is a significant list of exemptions – both qualified and absolute – that allow public bodies to refuse to respond in certain circumstances. There is also an increasing amount of research into how the proactive publication of open data could help reduce the number of FOI requests, and public authorities are already analysing FOI requests to see how they could provide information more proactively as open data.

We recognise that other countries charge citizens for information requests. However, as mentioned above, fees can be severely damaging to those undertaking research in the public interest. In addition, if the UK wishes to lead the way on open governance and the anti-corruption agenda, it should not follow these countries by seeking to impose undue restrictions on FOI requests.

Annex – About us

Transparency International UK (www.transparency.org.uk), the UK national chapter of TI, fights corruption by promoting change in values and attitudes at home and abroad, through programmes that draw on the UK's unique position as a world political and business centre with close links to developing countries.

TI-UK:

- A. raises awareness about corruption;
- B. advocates legal and regulatory reform at national and international levels;
- C. designs practical tools for institutions, individuals and companies wishing to combat corruption; and
- D. acts as a leading centre of anti-corruption expertise in the UK.

TI-UK's vision is for a world in which corruption is greatly reduced and the UK has zero tolerance for corruption both at home and abroad.

⁹⁸ Justice Select Committee, *Post-legislative scrutiny of the Freedom of Information Act 2000* p.3

⁹⁹ Justice Select Committee, *Post-legislative scrutiny of the Freedom of Information Act 2000* p.24

¹⁰⁰ <http://www.theguardian.com/media/2014/may/14/governemnet-ad-spend-deficit-scottish-referendum-afghanistan>

[accessed 17 November 2015]

¹⁰¹ Ministry of Justice, *Strand 3 – Investigative study to inform the FOIA (2000) post-legislative review: Costing Exercise* (March 2012) p.30

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217390/investigative-study-informing-foia.pdf

¹⁰² <http://www.foiman.com/archives/2072> [accessed 17 November 2015]

www.transparency.org.uk

The Open Government Network (OGN)

The Open Government Network (OGN) is a coalition of organisations and individuals committed to making government work better for people through transparency, participation, and accountability.¹⁰³

This evidence was prepared by the OGN, and has been endorsed by a diverse group of over 100 civil society organisations, ranging from national NGOs, to local community groups, and open government campaigners, to health, environment and transport charities. A full list of the signatories can be found at the end of this submission.

The OGN was established in 2011 in response to the Government joining the Open Government Partnership (OGP) - an international initiative spanning 69 countries, which was established to 'provide a platform for domestic reformers committed to making their governments more open, accountable, and responsive to citizens'.¹⁰⁴

The Open Government Partnership plays an important global role in setting clear ambitions for governments to 'race to the top' in areas of transparency, civic participation, public integrity and the use of new technologies for openness and accountability.¹⁰⁵

We regard the Freedom of Information Act as a fundamental pillar of the UK's openness arrangements and consider that any proposals to limit the scope and function of the FOI Act would be incompatible with the Government's wish to be "the most open and transparent government in the world".¹⁰⁶

As a founding, and steering committee, member of the OGP, the UK is looked to for leadership on open government. Any weakening of the FOI Act in the UK would run contrary to the spirit and purpose of the OGP, undermining the leading role of the UK, and would offer reassurance to closed and corrupt governments around the world. Such a move would seriously undermine international efforts to bring about open government.

The OGN includes organisations working to promote open government in a wide range of settings (e.g. local democracy, science policy, international development and the extractives industries), and through a wide range of open government mechanisms (e.g. civic participation, open policymaking and open data). Across the OGN, the Freedom of Information Act is seen as foundational: providing an important legal backstop to work on proactive transparency and openness, and acting to regulate the balance of rights and responsibilities between citizens and government. The nature of devolution means that any changes to the FOI Act will also impact on the transparency of reserved public sector functions in the devolved nations. Our members and partners across Northern Ireland, Scotland and Wales are therefore concerned about the implications this review could have for their right to information.

We are deeply concerned by arguments that play proactive and reactive transparency approaches off against one another, for example by suggesting that open data renders

¹⁰³ <http://www.opengovernment.org.uk/>

¹⁰⁴ <http://www.opengovpartnership.org/>

¹⁰⁵ <http://www.opengovpartnership.org/about/open-government-declaration>

¹⁰⁶ <http://www.opengovernment.org.uk/resource/uk-action-plan-2013-15/>

FOI redundant.¹⁰⁷ The welcome push towards open government data should not be used as a cover to restrict access to information. Both mechanisms are necessary in tandem to ensure the transparency and accountability of government. Indeed, FOI can be critical to establishing the provenance and credibility of open data, since it lets us understand the scope and processes that created the data set - and that nothing has been massaged or excluded.

The decision of what information is in the public interest to disclose should not be left to government alone. Transparency is sometimes uncomfortable for governments, but in many ways that is precisely the point; only through ensuring citizens, civil society, media and the private sector are empowered to demand information from government can we ensure that we are being governed effectively and appropriately. Any discomfort felt by decision makers is far outweighed by this public interest.

We are concerned at the remit of the inquiry being undertaken by the Freedom of Information Commission. Its terms of reference and the framing of the Commission's questions indicate that it is solely focused on the case for restricting the FOI Act. The questions direct discussion towards the issues of alleged damage and costs, rather than an open-minded cost-benefit analysis. Indeed, it has been shown that Freedom of Information requests can save Government money, by exposing bad deals for the taxpayer.¹⁰⁸ We are disappointed that the opportunity to examine where the Act is working well and where an extension to the scope would better support the transparency and accountability of key government functions, for example contracted out public services,¹⁰⁹ was not taken.

Only three years ago the Justice Select Committee, in its post legislative scrutiny of the Act, reported that FOI had proved "a significant enhancement of our democracy" and that the Act "was working well". The committee concluded that: "We do not believe that there has been any general harmful effect at all on the ability to conduct business in the public service, and in our view the additional burdens are outweighed by the benefits."¹¹⁰

We therefore consider there to be no need to revisit questions regarding the alleged damage or the costs of FOI. In fact, we believe the time is right to examine how the scope of the FOI Act could be widened, in order to strengthen the public's democratic right to access information and achieve more transparent and accountable government.

Commission questions

Question 1: What protection should there be for information relating to the internal deliberations of public bodies? For how long after a decision does such information remain sensitive? Should different protections apply to different kinds of information that are currently protected by sections 35 and 36?

¹⁰⁷ <https://www.gov.uk/government/speeches/francis-maude-speech-on-open-data-and-transparency>

¹⁰⁸ <http://www.foi.directory/foi-in-the-media/>

¹⁰⁹ <http://www.opengovernment.org.uk/engage/open-government-manifesto/#section-7>

¹¹⁰ <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/9602.htm>

We accept the need for public officials to have a “safe space” in which to develop and discuss policy proposals, but consider the current protection afforded to the internal deliberations of public bodies to be sufficient and, importantly, we do not consider it to be in the interests of the public or good government for policy deliberations to have absolute exemption from FOI.

The call for evidence suggests that the public interest test creates “uncertainty” about what information may be judged suitable for release, leading to less frank recording of views and exchanges. However, we disagree that this uncertainty is grounds for restricting access to information for three reasons:

Firstly, the balance of public interest has very often been judged to favour withholding information. For example, the Information Commissioner’s Office (ICO) upheld the decision to not release documents declassified for the purposes of the Chilcot Inquiry prematurely – on the grounds that FOI should not pre-empt the process or outcome of that inquiry by piecemeal disclosures.¹¹¹

The ICO also refused disclosure of the minutes of the Cabinet meeting in 2003 when the opportunity to bid to host the 2012 Olympic Games was discussed, on the basis that there was no significant public interest in who said precisely what, and that the principle of collective cabinet responsibility should be upheld. Sometimes issues are considered to be of significant public interest and the balance tips in favour of disclosure. Such cases have included requests for information held about the Hillsborough disaster, the takeover of Rowntrees, and the minutes of Cabinet meetings immediately prior to the declaration of war with Iraq in 2003.

Different factors were at play in each of those cases, but they were not matters of the routine business of government and each had far-reaching significance.¹¹²

Secondly, there is little hard evidence to suggest that the ability to disclose internal discussions has resulted in a “less frank recording of views”. A study conducted in 2009 by The Constitution Unit at UCL found that although there were significant concerns from Ministers and Officials about the impact of FOI on the way government conducted business, there was no ‘no evidence that FOI was having any adverse impact on the substance of decisions being made by government. Both Ministers and civil servants thought that the same issues would continue to be considered and the same decisions reached’.¹¹³

Similarly, the Justice Committee in 2012 ‘was not able to conclude, with any certainty, that a chilling effect has resulted from the FOI Act’ and also felt the protections for policy were sufficient and was ‘cautious about restricting the rights conferred in the Act in the absence of more substantial evidence’. The committee argued against change but cautioned care.¹¹⁴

Thirdly, if there is a blanket ban on access to information on a public authority’s internal deliberations and they are not subject to a public interest test, then critical mistakes,

¹¹¹ <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2015/10/working-effectively-lessons-from-10-years-of-the-freedom-of-information-act/>

¹¹² <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2015/10/working-effectively-lessons-from-10-years-of-the-freedom-of-information-act/>

¹¹³ Waller, Morris, Simpson and Hazell (2009) *Understanding the Formulation and Development of Government Policy in the context of FOI*. London: UCL [https://www.ucl.ac.uk/constitution-unit/research/consultancy/ICO - FOI and Policy.pdf](https://www.ucl.ac.uk/constitution-unit/research/consultancy/ICO_-_FOI_and_Policy.pdf)

¹¹⁴ <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/9602.htm>

corruption and scandals could be kept secret for decades. There is significant value to the public and good government in it being possible for information to come to light that reveals, for example, where wrongdoing took place, evidence or advice was overlooked, or problems were not addressed or ignored. The public's interest far outweighs concerns about the "uncertainty" of officials, which presents at least as strong a case for strengthening FOI, as weakening it.

Sections 35 & 36 of the existing FOI Act provide for broad exemptions, covering the formulation and development of government policy, including advice to ministers and communications between ministers. In the interests of good policymaking and government, it is vital that the inputs covered by these exemptions continue to be subject to a public interest test. For example, to ensure that policy is made in a robust and evidence-based way, free from undue influence, it is important for the public to be able to find out such things as the research used in the development of policy, consultation responses and contact with lobbyists. It is our opinion that these should be routinely and proactively disclosed.¹¹⁵

Question 2: What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?

We consider the current system to be adequate protection for information relating to the process of collective Cabinet discussion and agreement. As discussed, the Commissioner and Tribunal already give substantial weight to the need to protect ongoing government discussions through the public interest test. Even where disclosures are made, the minutes of Cabinet meetings do not attribute comments to particular members of Cabinet,¹¹⁶ preserving the principle of collective discussion and agreement.

All the evidence suggests that the Act is functioning as intended. UK governments since 2005 have only used their veto seven times and only four times in relation to Cabinet discussions: twice vetoing the release of Cabinet minutes on the Iraq War and twice vetoing minutes of the Cabinet subcommittee on Devolution to Scotland, Wales and the Regions dating from 1997. The fact that instances of the use of the veto are so few makes it difficult to argue that the privacy and protection of collective Cabinet discussions are under threat - especially when compared with the 48 instances the Australian government exercised its veto in the first five years of its own FOI Act.

A 2010 study found there to be very few requests for Cabinet documents and that leaks are a far more important cause of Cabinet discussion disclosure.¹¹⁷ The same study found a few examples of a "chilling effect" but no systematic behaviour changes around advice or space. Indeed they found that many officials were more concerned about the dangers of not having a record if the courts demanded it.

¹¹⁵ <http://www.opengovmanifesto.org.uk/>

¹¹⁶ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/61207/Guide_20to_20Minute_20Taking.pdf

¹¹⁷ Hazell, Robert, Worthy, Ben and Glover, Mark (2010) *Does FOI Work? The Impact of the Freedom of Information Act 2000 on British Central Government*. London: Palgrave Macmillan

Question 3: What protection should there be for information which involves candid assessment of risks? For how long does such information remain sensitive?

A blanket exemption for risk assessments is unlikely to increase candour in such documents. Risk assessments, like impact assessments, should include the risks of all potential avenues of action, including no action at all. As such, the risk assessment should be balanced. Specific consideration should be given to which areas of the risk assessment template should routinely be published, and which should have a higher bar to publication. The public acknowledgement of the existence of certain risks will enhance the public debate about major projects and their implementation. It is when risks can be silently ignored that the consequences are dramatic, often then requiring the complete publication of a flawed risk register when it is too late to prevent the overlooked problems.

Question 4: Should the executive have a veto (subject to judicial review) over the release of information? If so, how should this operate and what safeguards are required? If not, what implications does this have for the rest of the Act, and how could government protect sensitive information from disclosure instead?

We are content for the ministerial veto to be applied narrowly and rarely, as originally intended by Parliament, though we see no particular need for it. As reasserted by the Supreme Court, Parliament only ever intended the veto to be used in response to the decisions of the Information Commissioner. In the passing of the FOI Act, the possibility of the veto being used against the tribunal or courts was never debated nor mentioned.

As ruled by the Supreme Court, it is not reasonable for a government minister to be able to override a judicial decision.¹¹⁸ Quite apart from the constitutional implication if this were changed, the executive is clearly not an impartial arbiter of whether it is in the public interest for a piece of information to be disclosed. It is therefore right that a suitable third party (i.e. the tribunal or courts) applies a public interest test to disclosure.

Rather than relying on a veto, Ministers should be prepared to make well reasoned and evidenced cases for non-disclosure, which stand up to scrutiny in court. If the executive is unable to do this, it is right that the information in question be disclosed.

Question 5: What is the appropriate enforcement and appeal system for freedom of information requests?

The Government has just published proposals to introduce new Tribunal fees, including those for appeals to the First-tier Tribunal against the Information Commissioner's FOI decisions. We believe that this is an inappropriate appeal system for FOI requests.

Unlike other tribunal proceedings, which typically involve the appellant's private rights, FOI appeals generally seek to promote the public interest by making information publicly available. The introduction of fees for appeals to the Employment Tribunal has severely cut the number of unfair dismissal claims. It seems highly likely that introducing fees for FOI appeals will

¹¹⁸ https://www.supremecourt.uk/decided-cases/docs/UKSC_2014_0137_Judgment.pdf

have a similarly drastic impact, affecting the provision of information to the public as a whole.

Question 6: Is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know? Or are controls needed to reduce the burden of FOI on public authorities? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kinds of requests do impose a disproportionate burden?

We believe that the quantifiable and unquantifiable benefits of the FOI Act justify the cost of FOI to public authorities. In the words of the Justice Select Committee, “the additional burdens are outweighed by the benefits” and FOI has indeed proved “a significant enhancement of our democracy”.¹¹⁹

Measuring the cost to public authorities of responding to FOI requests is difficult, not least because each request will vary in cost depending on a range of factors, including how easily accessible the information is, and time spent on consultation with ministers and senior officials. Estimates for an individual request range from £19 - £350.¹²⁰

A statutory price cap, set at £600 for government departments, and £450 for other public bodies, already limits the financial cost of FOI to public authorities. Price caps are crude measures of cost however, not taking into account the public interest of disclosure. They therefore risk being used as an excuse for non-disclosure by public authorities of information of high value to the public, particularly if extended to intangible costs (e.g. “thinking time”).

It should also be acknowledged that public authorities, through poor recording keeping, undue secrecy and poor implementation of the Act, significantly increase the cost of FOI to themselves and requestors. Increasing proactive transparency, improving government systems and processes, and tackling the culture of secrecy that pervades many public authorities would therefore be a better focus of attention.

The cost of FOI is put into perspective when considered alongside other government expenditure. For example, recently it was revealed that the cost of FOI to central government is less than 2% of the cost of its external communications activities.¹²¹ There is undoubtedly a significant public interest in FOI filling the gaps of, and providing a counterweight to, government communications. That it does this at 1/50 of the cost is remarkable.

Any consideration of the cost of the FOI Act must also take into account its vast benefits. These range from the incalculable benefits of an informed and engaged citizenry, through cases of corruption and malpractice being uncovered, to tangible cost savings to the public purse. Numerous case studies demonstrate that FOI has been pivotal in exposing information it was in the public's interest to know things.¹²² Only in the last year, FOI has revealed among a host of other:

¹¹⁹ <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/9602.htm>

¹²⁰ <http://www.democraticaudit.com/?p=14767>

¹²¹ <http://www.foiman.com/archives/2072>

¹²² <http://www.foi.directory/foi-in-the-media/>

- a) GP practices are being offered financial incentives not to refer patients to hospitals, with first appointments for cancer included in the target referrals to cut.¹²³
- b) More than a third of people with degenerative health conditions were being judged fit for work by the DWP and having their benefits cut.¹²⁴
- c) More than 500,000 home care visits last less than five minutes.¹²⁵
- d) Councils spent £750,000 on booking celebrities for events.¹²⁶
- e) The extent of British Petroleum's close ties with and influence over the UK government¹²⁷, and the secret group set up by UK Ministers to enable the United Arab Emirates privileged access to investment opportunities.¹²⁸
- f) GPs have awarded at least £2.4bn of taxpayers' money to organisations that their members own or work for.¹²⁹

We consider any attempt to impose “controls” on FOI, such as charges for submitting FOI requests, to be a significant threat to the openness and transparency of the UK. A charge would act as a heavy deterrent to legitimate FOI requests, rather than a way to fund the cost of responding. This was certainly the case when a €15 application fee was introduced under Ireland’s Freedom of Information Act in 2003. The decline in usage of the Act was immediate and dramatic: between the first quarter of 2003 and the first quarter of 2004 the total number of requests fell by over 50%. In addition, requests for non- personal information had fallen by 75% over the same period while requests for a mixture of personal and non-personal had fallen by 20%.¹³⁰ Ireland’s Freedom of Information Commissioner criticised the charge and the fee was eventually dropped, though there remains a cost for appealing against decisions. Charging would likely particularly restrict access to FOI for poorer individuals and communities, further exacerbating inequalities of access to government transparency and accountability.

There are also many legitimate reasons why multiple requests for information may be needed. For example, the UK’s health and social care system is highly fragmented and much of the data is not routinely aggregated. Building a national picture of the health and social care system therefore requires a separate request to each authority. Likewise, journalists investigating an issue in depth will not access all the information they need from just one FOI request. For example, the recent analysis of senior executive pay in the public sector by the Daily Mail and

¹²³ <http://www.theguardian.com/society/2015/oct/01/gp-practices-offered-rewards-for-not-referring-patients-to-hospitals>

¹²⁴ <http://www.independent.co.uk/news/uk/politics/thousands-with-degenerative-conditions-classified-as-fit-to-work-in-future-despite-no-possibility-of-9811910.html>

¹²⁵ <http://www.telegraph.co.uk/news/health/news/11302534/Revealed-more-than-500000-home-care-visits-last-less-than-five-minutes.html>

¹²⁶ <http://www.dailymail.co.uk/news/article-3088842/Struggling-councils-spent-750-000-taxpayers-cash-booking-C-list-celebrities-events-cut-public-services.html#ixzz3q0D0SF15>

¹²⁷ <http://www.theguardian.com/environment/2015/may/20/revealed-bps-close-ties-with-the-uk-government>

¹²⁸ <http://www.theguardian.com/politics/2015/nov/09/uk-secret-group-of-top-officials-enable-uae-investment-united-arab-emirates>

¹²⁹ <http://www.thetimes.co.uk/tto/health/news/article4610741.ece>

¹³⁰ <http://www.oic.gov.ie/en/Publications/Special-Reports/Investigations-Compliance/Review-of-the-Operation-of-FOI2003/Up-front-Fees.html>

Taxpayers' Alliance required over 6,000 FoI submissions and would not be feasible with charging.¹³¹ This research found that nearly 3,500 employees of local councils were paid more than £100,000 in 2013/14, and subsequently led the Chancellor, George Osborne, to write to councils outlining tougher pay guidelines. This opportunity to identify and reduce costs would have been missed with charging present.¹³²

¹³¹ <http://www.dailymail.co.uk/news/article-3309596/The-shocking-scale-fat-cat-pay-public-sector-exposed-today-major-Daily-Mail-investigation.html>

¹³² <http://www.ft.com/cms/s/0/a945bc68-8e03-11e5-94a4-639039952d45.html#axzz3rwFT8Z3j>

UK Sport

Introduction

With a very clear national and international focus and a remit at the top end of Britain's sporting pathway, UK Sport provides strategic investment to enable Great Britain's Olympic and Paralympic sports and athletes to achieve their full medal winning potential at the Olympic and Paralympic Games.

As well as benefitting from Exchequer funding, UK Sport will distribute £350m of National Lottery Good Cause revenue over the course of 4 years to at least 46 Olympic and Paralympic Summer and Winter sports (2013-2017) to deliver sustained medal success at the Rio Games in 2016 and in PyeongChang in 2018.

UK Sport leads the UK's major events programme. Funded by £27million of National Lottery money for the period 2013-19, UK Sport helps attract and stage some of the most important international sporting events in the world. Indeed the current #EveryRoadtoRio campaign will bear witness to over 30 World and European events being staged in this country between March 2015 and the Olympic and Paralympic Games in Rio taking place next Summer in 2016.

UK Sport is an arm's length body of sponsored by the Department for Culture Media and Sport. Whilst we receive an average of 50 Freedom of Information requests in a 12 month period, the organisation has a streamlined staff to ensure that as much financial resource as possible is put in to the UK high performance sporting system.

Summary

UK Sport supports the public 'right to know' information about the work that we undertake as an arm's length body of the Government. There should be a default of a right to know in the work that we do with the exception of the following:

- a) Work that would inhibit UK Sport competitive advantage over the rest of the world's sporting systems if it were to be made public. The Commission should look at expanding the role of derogation in such instances.
- b) Many requests under the Act are sales calls by another name. The burden of responding to this type of request detracts from the organisation's ability to do its job effectively. Organisations should proactively publish this information online where it does not conflict with commercial sensitivities.

Deliberative space

Question 1: What protection should there be for information relating to the internal deliberations of public bodies? For how long after a decision does such information remain sensitive? Should different protections apply to different kinds of information that are currently protected by sections 35 and 36?

UK Sport is wholly supportive of any measure the commission may seek to take which gives officials greater freedom to deliberate within documents such as emails, draft correspondence and the like. UK Sport operates in an environment which not only includes the commercial sensitivities of a standard business and its relevant contracts but also in a highly competitive global sporting environment.

Having won a record 65 medals at the London 2012 Olympic Games and 120 medals at the Paralympic Games, the UK sporting system which helped to engineer this success from the base of just a single gold medal in Atlanta 1996 has become a model to be copied across the globe. The prestige of Olympic and Paralympic success and the role that undoubtedly plays in Britain's global

soft power means that the system is something which needs a high degree of protection. Given that Freedom of Information requests can be made from any jurisdiction the legislation is something that UK Sport needs to be constantly mindful of in its deliberations.

The consultation document references the derogation carved out for the Bank of England and BBC for economic policy and journalistic reasons respectively. Given that UK Sport operates in a highly sensitive and internationally competitive environment, UK Sport believes that the commission should consider recommending expanding derogation exemptions to organisations that operate in competitive and highly sensitive international arenas to allow them to operate with greater freedom and deliver increased success for the country on the world stage. Such a measure would not impact on the ability of the public to access information relevant to the running of the organisation but would protect sensitive discussions which if they became public via Freedom of Information could provide international competitors with a significant advantage.

Enforcement and appeals

Question 5: What is the appropriate enforcement and appeal system for freedom of information requests?

UK Sport is supportive of the current system of enforcement and appeals. In particular the initial opportunity for internal review which helps to ensure that most enquiries can be resolved before any need to involve the Information Commissioners Office.

Such a multi-layered approach keeps costs down at the initial stage. Without it, the level of appeals would put huge pressure on the Information Commissioner's Office and could result in a large increase in costs at that end of the process or could result in long appeal lead times.

UK Sport believes it is vital to retain this initial internal stage of review so that requests can be resolved as soon as possible if the requester feels that they need to make recourse to an appeals process.

The system whereby a complainant refers the Information Commissioner's decision to appeal to the Information Tribunal could be improved in a way that keeps legal costs down both for the Information Commissioners Office and the public body involved. It is not in the public interest for both organisations to incur separate external legal fees and costs for one respondent to adopt the other's position. A direction from the Information Tribunal on a lead respondent and then the provision of written questions to the second respondent to answer could keep costs down and avoid unnecessary duplication.

Another solution could be for decisions of the Information Tribunal could be made on the papers and without a hearing if this was option provided for in the rules and the parties agreed.

UK Statistics Authority

From UK Statistics Authority (UKSA) perspective, it would be beneficial to have parity with FOIA Scotland, where personal census information can be withheld under absolute exemption. S.38(1)(c) of FOIA Scotland exempts the disclosure of personal census information. At present, when FOI requests for personal census information are made to UKSA, a number of arguments are applied to withhold the information. Specifically we use the s.44(1)(a) prohibitions on disclosure exemption where we rely on s.39 and s.40 of the Statistics and Registration Act 2007 (SRSA) to withhold information. The argument for withholding the information has always been upheld by UKSA as well as the Information Commissioner's Office (ICO). Please see the following ICO Decision Notices' FS50213881, FS50164048, FS50368663 for relevant detail. The UKSA position has also been upheld by the Information Tribunal each time it has been tested there. Please see Information Tribunal Appeal Cases EA/2007/0112, EA/2011/0241 for relevant detail. It would be beneficial to have an absolute exemption for census information within FOIA. This would simplify the process for responding to census requests, particularly in and around the next census in 2021 when we will receive a large number of similar requests. We can also be more certain when making a pledge to the public about how their information will remain closed. This should have a positive effect on response rates. With an amendment of the act, we would also envisage a decrease in the number of census requests that we receive through FOI. The introduction of a new exemption would solve the issue of digitisation that we will soon be facing. Due to current legal arrangements, if we let The National Archives have access to the 1921 Census records before 2022 for digitisation, then this ceases to be covered by the s.44 FOI exemption. Therefore, it is unlikely that the records would be ready for release to the public on 1st January 2022.

It would be beneficial for there to be an exemption for draft statistics. Principles and protocols within the UK Statistics Authority Code of Practice for Official Statistics provide evidence for why this exemption would be valuable. 'Principle 4: Sound methods and assured quality' of the statutory Code of Practice, issued under s.10 of the Statistics and Registration Service Act 2007 states:

Ensure that official statistics are produced to a level of quality that meets users' needs, and that users are informed about the quality of statistical outputs, including estimates of the main sources of bias and other errors...

'Protocol 2: Release practices' states:

Statistical reports should be released in to the public domain in an orderly manner that promotes public confidence and gives equal access to all...

At present, if statistics are in the production stage prior to formal release, we invariably rely on the s.22 information intended for future publication exemption. This is a qualified exemption; therefore, there is an increased chance of a challenge over its appropriate use. From a UKSA perspective, it is extremely important that statistics are presented and disseminated to the highest quality. Statistics at the draft stage of production, where quality assurance processes have not been completed, could cause confusion if released in their draft format. The statistics would also be open to misuse. This could cause severe reputational damage to UKSA. More widely, the premature release of statistics could also detrimentally influence public policy. The inclusion of a new exemption would resolve legislative issues between the use of FOIA and SRSA. As the lead in statistical production, it is important that where possible, legislation works in harmony in respect to statistical outputs.

Section 35 - Protection should automatically apply where the internal deliberations in the formulation of government policy relate to an ongoing issue. This allows for a safe space within public authorities for decisions to be made without public recrimination throughout the process. From a practical perspective, ongoing deliberations on the formulation of government policy could be an absolute exemption; where the policy has been finalised, a qualified exemption could

remain. Generally speaking however, UKSA does not have many issues with the implementation of either s.35 or s.36.

Controls needed to reduce the burden of FOI – UKSA receive numerous requests from businesses, requesting procurement information to assist them in soliciting work on behalf of UKSA. The requests are usually of a similar nature and ask for details of contracts in relation to IT, facilities, waste management etc. These requests are not within the spirit of the act and undermine the contract tendering process. These requests can provide an unfair commercial advantage to the requester. We receive a number of these requests per month and they put a particular burden on the service and technology teams. The requests are often sent to numerous government departments at the same time and are often repeated from the same requester a number of times per year. One control could be that when a FOI request is received that has been cc'd in to numerous other public bodies, an estimate should be made as to the time it would take to produce a response. This estimate could then be multiplied by the number of public authorities. If the time is over the limit stated within the act, s.13 should be used to refuse to comply with the request. An alternative could be that one department takes the lead on answering round robin FOIs – but charges a large aggregated amount for this “service”.

UNISON

Introduction

This evidence is submitted by UNISON, which forms one of the largest trade unions in the UK, representing in excess of 1.3 million members working across the public services. Our members are employed directly by public sector organisations, by private contractors and community/voluntary organisations engaged in providing public services, and by utility companies.

UNISON represents workers in local government, the health service, social care, schools universities, further education and sixth form colleges, police and probation services, water and energy companies, environment agencies and transport.

General comments

Since the Freedom of Information Act came into force in 2005, UNISON has found the legislation an extremely valuable tool in obtaining information that we believe has assisted work to improve the standards of public services. The existing legislation already includes an array of exemptions that allow certain types of information to be withheld under certain circumstances and we believe that insufficient justifications have been put forward to extend this range of exemptions.

To expand on this position and provide concrete examples of the extremely damaging impact of proposed changes to Freedom of Information legislation on the standards of public services, we set out below our responses to the questions posed by the commission as part of its consultation that impact most strongly on UNISON's use of the legislation.

We then go on to outline how Freedom of Information could be extended to improve the standards of public service and in particular how greater transparency in the field of outsourcing practices is needed to ensure that taxpayers get a better deal for their money and public service contractors are subject to proper democratic accountability.

Responses to specific questions

Question 1: What protection should there be for information relating to the internal deliberations of public bodies? For how long after a decision does such information remain sensitive? Should different protections apply to different kinds of information that are currently protected by sections 35 and 36?

Sections 35 and 36 of the Freedom of Information Act already provide exemptions to material relating to the internal deliberations of public bodies and this material can only be released where it is judged to serve the public interest. Therefore, proposed further restrictions would inevitably mean that information serving the public interest would be withheld.

UNISON is unconvinced that public figures should have their views or any evidence submitted to support public decisions, hidden from public view, simply because they would be uncomfortable with being seen to advance those views or having evidence scrutinised by the public.

Disclosure of evidence based, recorded and accountable information on decision making can serve a vital role in allowing the public to come to an opinion about the validity of decisions and to challenge an erroneous basis for a decision. FoI enables the public to scrutinise and hold accountable public officers on the validity, selection and range of sources of evidence that public figures use to make public decisions. It also ensures that they leave an audit trail or decision-making footprint to enable monitoring and review of key changes in policies or projects.

By way of example, during 2015 UNISON has made Freedom of Information requests to universities regarding the decision making processes through which consultants have advised on “restructuring reviews” that have frequently entailed staff redundancies. The experience of negotiators for UNISON members in higher education is that only Freedom of Information requests have been able to extract material on this subject with sufficient speed to allow any challenge to decisions as they unfold and change the major ramifications of those decisions for staff and students.

Question 5: What is the appropriate enforcement and appeal system for freedom of information requests?

UNISON believes that the Information Commissioner has a crucial part to play in acting as an independent arbiter in the operation of Freedom of Information legislation. We would not support any weakening of its role without rigorous alternative appeal procedures being put in place.

Question 6: Is the burden imposed on public authorities under the Act justified by the public interest in the public’s right to know? Or are controls needed to reduce the burden of Fol on public authorities? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kinds of requests do impose a disproportionate burden?

The Freedom of Information Act already allows exemptions for disclosure of information if the estimated cost of meeting the request exceeds £450 for UK authorities or £600 for UK government departments. It also allows exemption for any requests that can be regarded as “vexatious.”

UNISON regards these exemptions as adequate for protecting authorities against excessive burden.

Although the introduction of a small fee may act as a minimal deterrent to requests going to a single authority, they would act as a major barrier, involving prohibitive expense, to requests going to a large number of authorities to gain a comprehensive UK, regional or sector wide picture of a particular issue.

This is illustrated by the following examples:

- UNISON conducted a Freedom of Information survey over the summer of 2015 that went to every local authority, NHS trust, police force, university and further education college in the UK. This was a very short survey of just seven questions, mostly requiring a simple Yes, No or Don’t Know response, which sought to obtain a comprehensive picture of Living Wage payment across the public sector.

The survey gained 910 responses. Therefore, if a fee was set at £10 per request, this survey would have cost in excess of £9,000. In such circumstances, it is clear that many Freedom of Information surveys would not be pursued because of excessive cost, denying the assembly of information that goes beyond a single or small group of authorities to provide a broad overview of key public service issues.

- UNISON collects data from local authorities in England, Scotland and Wales on key home care issues that have a major public interest benefit in exposing exploitative employment practices and providing pressure to drive up the standards of care received by the elderly and adults facing physical and mental health issues. UNISON regularly utilises Freedom of Information requests to establish which home care providers are employed by local authorities and this information is passed on to the government’s HMRC department, which

has previously utilised the data as part its enforcement programme for seeking to ensure that the national minimum wage is paid in the social care sector. Similarly, UNISON utilises Freedom of Information requests to uncover where 15 minute home care visits are still permitted by local authorities, despite government advice that 15 minute limits have an unacceptable impact on the quality of care. Finally, Freedom of Information requests also establish a Britain wide picture of where home care providers fail to pay care workers for travel time, despite rulings that travel between visits should be paid. All these requests involve a set of straightforward questions that rarely extend beyond four points for the employer to answer. However, every request goes to over 200 authorities and therefore, a £10 cost would entail a charge of over £2,000.

- As a union that represents police staff, UNISON utilises Freedom of Information requests regularly to obtain data from police forces. In a typical year, we estimate that imposition of a £10 charge for each Freedom of Information request would cost us approximately £2,500. The information gained from these requests feeds into discussions with employers about motivation and adequacy of staffing levels, which have a crucial impact on the standards of police services provided to the public. FOI was utilised to uncover information unavailable anywhere else on the use of volunteers in public services, which was taken up the College of Policing and generated a wide-ranging public debate about the appropriate use of such staff in the delivery of police services.
- In local government, UNISON's use of FOI requests is frequently a response by the union to the failure of local authorities to systematically collect and publish data on equality issues. Although the Public Sector Equality Duty places a legal requirement on public authorities to eliminate discrimination, harassment and victimisation, advance equality of opportunity and foster good relations, it does not specify any standard format for the collection of data that demonstrates progress in these areas. In the absence of such a requirement, FOIs are an indispensable tool for UNISON

and serve the wider public interest in advancing equality across the protected characteristics defined by the Equality Act, which include age, gender, race, disability, sexual orientation. UNISON usually conducts two FOIs across all local authorities every year and therefore the imposition of a £10 charge for each request would lead to annual costs of approximately £8,000.

Most of the information gathered in these examples could not be obtained in such a comprehensive and consistent format, within a reasonable timeframe, through any other route than Freedom of Information. Though the Trade Union and Labour Relation (Consolidation) Act 1992 gives unions the right to obtain information for collective bargaining purposes where they are recognised by the employer, use of this route to obtain a comprehensive and consistent picture of a broad issue across a multitude of employers would represent an impossibly bureaucratic task.

Further comments

This consultation by the Independent Commission on Freedom of Information is focused principally on imposing additional restrictions on access to information. However, we would like to see emphasis given to exploring opportunities for opening up greater access to information.

A key point in this regard is that it is astonishing that decisions to outsource services are made in secret, especially when most of the public have positively affirmed that they want services to be run for people not profit.¹³³

UNISON's response to the UK transposition of the Public Procurement Directive 2014 set out the need to strengthen rather than weaken FoI in the Public Contracts Regulations 2015

UNISON believes that the recommendations set out in the Public Accounts Select Committee report on contracting out public services to the private sector highlighted some key areas for improvement¹³⁴.

The report highlighted that more scrutiny and transparency was needed in outsourcing practices to ensure taxpayers got a better deal for their money and could hold both private contractors and public authorities to account on poor quality services and cases of fraud.

UNISON would like to see these select committee recommendations incorporated into public service contract practices and reporting mechanisms. UNISON believes that if these were implemented there would be less need to require FoI requests from stakeholders delivering public services because the information would already be public as part of best procurement practice.

If the following procurement recommendations were implemented through stronger procurement regulations then FoI transactional costs would be already factored into procurement and commissioning practices:

- Contractors must have effective governance and internal controls over all aspects of their operations;
- Terms of contracts must properly protect both the taxpayers' interest and the service users' legitimate expectations;
- FoI should be extended to private contractors and sub contractors with more transparency and the removal of „commercial confidentiality“;
- Periodically review and update the performance regime of major contracts to ensure that they reward or penalise performance as appropriate;
- Contracting authorities should look at the scope for more ways to share the savings from efficiency gains with contractors;
- Penalties imposed on contractors who fail to deliver must reflect the full cost to the taxpayer;
- Contractors should make full use of their ability to take into account past performance on similar contracts when re-tendering or contracting for new services. Assessment of contractors' performance should also cover their corporate social responsibility policies and their record on corporate taxation.

UNISON would also like to see mandatory exclusions and the rejection of bids by economic operators include the following factors:

¹³³

https://www.ipsosmori.com/DownloadPublication/1345_sri_what_do_people_want_need_and_expect_from_public_services_11_0310.pdf

¹³⁴ <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpubacc/777/777.pdf>

- breaches of employment law including blacklisting;
- non payment of employment tribunals;
- health and safety breaches;
- breaches of environmental and tax obligations;

UNISON believes that to create and enforce a strong ethical and fair procurement regime it is imperative that, alongside exclusions, there must also be a strengthening of the democratic accountability of public service contractors through greater transparency.

- The Freedom of Information Act should be applied to all providers of public services. The same transparency requirements should be applied to all providers of public services, within the public, voluntary and private sector, including details on supply chains, company ownership and governance structures, employment, remuneration and tax policies and practices.

As a specific example of this point, we would like to see the Westminster government following the lead of the Scottish government in relation to housing associations. Following the recommendation of Scotland's Information Commissioner, the Scotland government is now consulting on making the housing association sector subject to Freedom of Information legislation.

- The public should have the „right to recall“ contracted out services due to poor quality or performance that is not in the public interest
- There should also be a requirement to publish audited and verified statements on contractors' operational and financial performance, with access to relevant information, systems and personnel for the NAO, internal public sector auditors and their external auditors
- Public sector authorities commissioning services should not be able to stop the publication of contracts or joint venture details except in cases of national security
- The ownership of all companies, including those with offshore or trust ownership, which provide services under contract to the public sector should be available on public record
- Public sector authorities should disclose details of relationships between providers and decision makers/influencers in public bodies commissioning and procuring services or with influence over the commissioning and procurement process
- Require bidders to demonstrate their contribution to employment and sub-contracting opportunities for the local community and economy and incorporate within award criteria
- Where services are outsourced, standardised accounting procedures and practices for „open book“ accounting should be enforced including an annual independent audit on all public service contracts
- Regular reports on the full costs of procurement should be published, including contingency costs required to cover unforeseen circumstances, use of external advisors and the contract management / monitoring costs for individual contracts

- A robust and consistent framework must be developed which is capable of measuring service quality from the experience of users, not simply performance measure against targets
- Provide a mechanism for contracting authorities to identify and publish what procurement measures will be taken to address inequalities within their area, with particular reference to labour market disadvantage and ensuring public sector equality duties are properly communicated and assessed as part of the procurement and contract management process.

UNISON is currently successfully campaigning for councils around the country to get behind some basic principles for our public services: transparency (making contracts, data and decisions about outsourcing available), accountability (consulting the public and giving them a right to recall bad providers) and people before profit (promoting public ownership, the in-house option and social value). This is backed up by recent research of public opinion.¹³⁵

The picture emerging is of best practice examples that show public authorities producing procurement strategies which embrace more not less FoI on a voluntary basis.¹³⁶

Therefore public authorities do see the need for more transparency as there is actually more of a shift to strengthen their procurement strategies to improve FoI access not weaken it.

UNISON will be encouraging this more in 2016 as part of a wider procurement campaign to include trade unions in the commissioning process.

We would like to see the commission therefore recommend more robust and transparent procurement and commissioning practices in the public realm with the inclusive participation of trade unions and service users as good practice and a cost reducing means of providing and expanding public information.

¹³⁵ <http://weownit.org.uk/sites/default/files/downloads/Better-In-Public-Hands-Why-We-Need-A-Public-Service-Users-Bill.pdf>

¹³⁶

<http://moderngov.southwarksites.com/documents/s55593/Report%20Response%20to%20Recommendations%20on%20Commissioning%20and%20Procurement%20at%20Southwark%20Council%20Overview%20.pdf>

University Hospitals Bristol NHS Foundation Trust

Question 5. Is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know?

RESPONSE: University Hospitals Bristol NHS Foundation Trust fully supports the principles of openness and transparency, and promotes best practice in respect of communicating information between the Trust, governors and members, and the wider community, in order to enhance patient experience and drive quality improvement.

Given the overwhelming and increasing number of requests in the sector and the time taken to respond to such requests, in light of the financial pressures being faced by NHS providers, UH Bristol considers it would be sensible to re-focus FOIA activity more clearly, by redefining and providing further clarity on the definition of 'matters of the public interest' and to streamline the process for responding to legitimate requests, and addressing the significant challenges facing the sector with regard to requests for commercial purposes.

If yes to the above, what would you deem to be justifiable, and what criteria would you apply to ensure consistency?

As is but with an exemption in relation to requests for commercial purposes. Two questions need to be assessed for the NHS context, 1) will this provide a potential patient benefit?; and 2) Is this a topic that is important to address for the public interest (rather than for the business purposes of a private company).

Are controls needed to reduce the burden of FOI on public authorities?

This could be rectified by addressing the issue of requests for commercial purposes and allowing public sector organisations to apply an appropriate exemption, given the vast majority of requests fall under this provision. Inappropriate FOI requests cost the health sector a large sum of money and detract from patient care.

If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities?

See 3 above.

Which kinds of requests do impose a disproportionate burden?

The Freedom of Information Act (FOIA) provisions are used for commercial purposes rather than for scrutiny of issues in the public interest, for example:

- Competitors determining whether to bid for services;
- Alternative suppliers seeking to win business and requesting commercial information in respect of third parties;
- Companies compiling databases of contact information for selling on

Other comments

There are concerns that the number of requests growing rapidly to the point of being overwhelming and the level of resource that was necessary to give over to these requests, including administrative time, but also front-line clinical time. Incorrect and misleading conclusions can often be drawn from FOI requests which had a negative reputational impact on the NHS, particularly involving requests from the media.

Unite

This note is submitted by Unite the Union. Unite is the UK's largest trade union with over 1.4 million members across all sectors of the economy including construction, manufacturing, financial services, transport, food and agriculture, energy and utilities, information technology, health, local government and the not for profit sectors.

Unite is one of the 140 signatories to a letter to the Prime Minister expressing 'serious concern' at the Government's approach to the Freedom of Information (FOI) Act and agree with many of the points raised by the Campaign for Freedom of Information.¹³⁷

The MP's expenses scandal — one of the biggest stories to break in the past decade — may have been kept a secret, had it not been for the Freedom of Information Act.

Freedom of Information (Fol) requests are the beating heart of a transparent democracy, helping campaigners, journalists and average citizens hold power to account.

Fol requests have been also used in revealing disability benefit death statistics, as well as revealing that the Department of Work and Pensions had used fake benefits claimants in their leaflets about sanctions — two stories Unite has covered.

The letter to the Prime Minister expressed concern about proposals to weaken the public's access to information, including replacing currently free appeals with £100 fees for first-tier tribunals against Fol decisions made by the information commissioner. Under the same proposals, an oral hearing would cost £500 extra.

Other proposals include changing cost limits (an Fol request may be rejected if it is too costly to carry out) and including the time officials spend "thinking about" a request as part of determining the total cost.

Freedom of Information requests are important to Unite's work. For example, we have done some important research on how the privatisation of ambulance services has affected the overall service using Fol requests for all Trusts and getting information about the number of accidents.

We also used Fol requests in a report that showed that pharmacy schools had been lowering their standards, which may eventually have the adverse effect of creating a glut of newly-qualified pharmacists not able to find jobs, while also lowering professional standards. We requested information from each pharmacy school about the percentage of students they'd taken on through clearing and the average pass rate in their qualifying exams. It showed that some schools were failing their students. A similar project was done with Veterinary colleges.

We have also requested information about local authorities' HR costs after the reduction or removal of facility time for union reps. As well as this, we and our partners have used it to track cuts to frontline services in local government such as youth services, women's aid, and legal and advice services.

Fol requests were also important in revealing flaws in healthcare regulation.

Unite is now campaigning for Freedom of Information requests to be allowed for all entities providing public services.

We can see the Freedom of Information Commission in a deeper context when taken together with, for example, the Lobbying Act and the Trade Union Bill. It appears that the government is attacking the very public it is supposed to serve through its austerity and privatisation agenda, and then moving to silence any criticism of this agenda.

¹³⁷ <https://www.cfoi.org.uk/wp-content/uploads/2015/09/FOI-letter-to-PM.pdf>

Independent Commission
on Freedom of Information

The fact of the matter is that individual public institutions often want to be held to account and to be able to improve their services. Fol requests help them to do that. We fear it is only this government which is seeking lesser transparency.

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Universities UK

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About us

Universities UK is the representative organisation for the UK's universities. Founded in 1918, its mission is to be the voice for universities in the UK, providing high quality leadership and support to its members to promote a successful and diverse higher education sector. With 132 members and offices in London, Cardiff (Universities Wales) and Edinburgh (Universities Scotland), it promotes the strength and success of UK universities nationally and internationally.

Summary

Our member institutions recognise and strongly support the need for openness and transparency. They are working proactively to support this across all of their activities.

UK universities are playing a leading role in the development of open access to research findings, and in initiatives that increase the quality of information available to both prospective and current students. Further, they are committed to publication schemes, such as the one devised by the Information Commissioner. These publication schemes make information routinely available to the public via institutional websites, and so do not require formal written requests.

However we believe there are reasonable steps that could be taken in relation to the operation of the Act to reduce the burden and ensure that institutions are operating in a fair environment. In particular competition can only be fair and effective if all institutions are operating on a level playing field, subject to the same regulations.

In this context we welcome the Government's commitment, in the Green Paper Fulfilling our Potential: Teaching Excellence, Social Mobility and Student Choice, to the principle that all higher education providers are made subject to the same requirements and proposals to review of the coverage of the Act.

Question 1: What protection should there be for information relating to the internal deliberations of public bodies? For how long after a decision does such information remain sensitive? Should different protections apply to different kinds of information that are currently protected by sections 35 and 36?

For the purposes of the Freedom of Information Act, higher education institutions (HEI) are defined as 'public authorities.' Only section 36 is applicable to non-governmental public authorities subject to FOIA, so this response is made in that context.

Higher education institutions are mostly charities and autonomous bodies that operate in a highly competitive international environment. Funding to the sector has changed significantly since the Act was introduced, with a much greater proportion of teaching funding now coming to the sector on a competitive basis via tuition fees, supported by a government backed loan, that are not treated as public funding.

Universities are now operating in a competitive market with alternative providers that are not treated as public bodies, and so are not considered to be within the scope of the Act. The government has also signalled its intention to encourage more alternative providers to enter the market. It is important that institutions are operating subject to consistent information requirements.

Decisions taken by universities continue to be sensitive after they have been taken. In addition the public's interest in the public right to know may influence the decision making process. This includes the behaviour of decision makers, in terms of the nature of the decision, the manner in which it is taken, and the manner in which deliberation is recorded. Knowledge of this process may be used to influence future decision making of the institution and relevant individuals.

Uncertainty over the determination of the public interest test has also very likely led to changes in practice in terms of the recording of decisions. For example minutes will tend to record decisions only rather than discussion, and information that is in discussion papers is not reproduced in minutes, which makes them less useful to anyone reading them without access to the papers or to the discussion.

The use of Section 36 requires the head of institution to give an opinion in support of the use of the exemption. We suggest that the need to consider the public interest test is removed from the internal review process, and that the legislation should be amended to reflect the position originally intended, i.e. that the Information Commissioner should be able to express a view on the exercise of the public interest discretion, but not to order it, with requestors being able to seek judicial review of an institution's decision.

Question 2: What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?

We do not wish to comment on this issue.

Question 3: What protection should there be for information which involves candid assessment of risks? For how long does such information remain sensitive?

The focus of the call for evidence is on Section 35, which applies only to Government policy. Similar issues arise in respect of other bodies and the use of risk registers, which is recommended good practice, so any changes to Section 35 should be matched by changes to Section 36.

Question 4: Should the executive have a veto (subject to judicial review) over the release of information? If so, how should this operate and what safeguards are required? If not, what implications does this have for the rest of the Act, and how could government protect sensitive information from disclosure instead?

We do not wish to comment on this issue.

Question 5: What is the appropriate enforcement and appeal system for freedom of information requests?

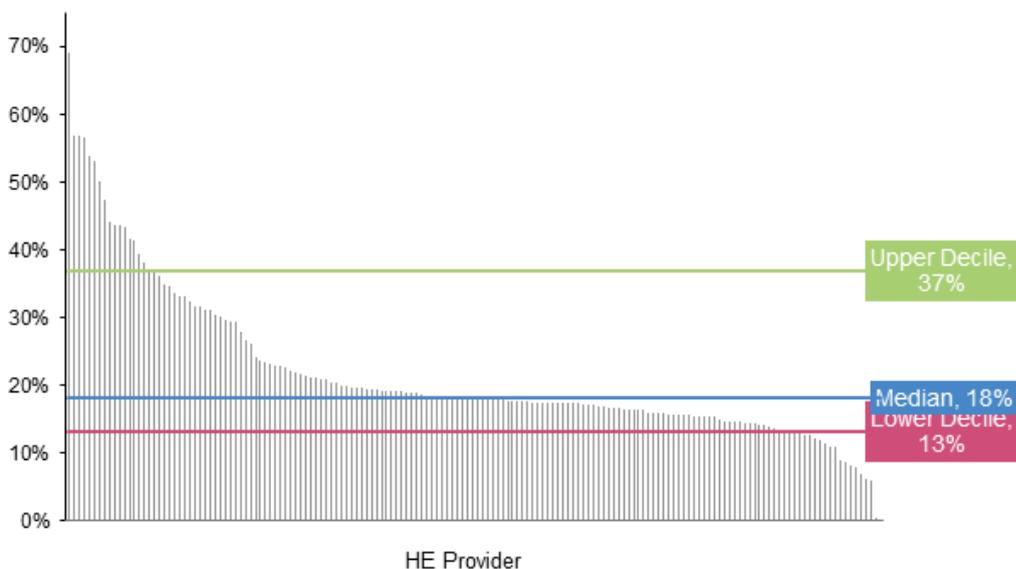
The ICO sometimes appears reluctant to exercise its powers under section 50(2) of FOIA to reject complaints as unreasonably delayed and/or vexatious. In addition, it could explore more nuanced approaches to casework instead of issuing formulaic letters and imposing arbitrary (and often unreasonable, especially given its own delays in progressing cases) deadlines. The multiple potential layers of Tribunal and court appeal are excessive and the Upper Tribunal could be reformulated as the last possible appellate body.

Question 6: Is the burden imposed on public authorities under the Act justified by the public interest in the public’s right to know? Or are controls needed to reduce the burden of FoI on public authorities? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kinds of requests do impose a disproportionate burden?

We recognise that there is a continuing public investment in higher education institutions that requires appropriate levels of transparency and accountability. However we are concerned that the burden imposed on universities under the Act is increasingly disproportionate to the public interest in the public’s need to know. Evidence from individual institutions points to an increasing complexity of requests and substantial costs in complying, with the main increases in areas where all costs cannot be claimed.

The amount of public funds received by institutions continues to vary greatly between institutions based on their size, the volume of research, the volume of high cost subjects that receive direct grant and between the devolved nations. This variation is highlighted in the following chart that illustrates the percentage ratio of total funding body grants to total income by institution 2013 – 14. For institutions in England this proportion will be substantially reduced as the new fees based teaching funding system flows through subsequent cohorts.

25. Percentage ratio of total funding body grants to total income by HE provider 2013/14



Source: HESA Finance Record 2013/14

The burden on the sector has continued to grow. The average monthly number of FoI requests received by UK universities has risen by 19% since 2013, and by almost seven times over the last decade. The average monthly number of requests received per institution has risen from 2.8 per institution in 2005 to 18.2 in 2014. In 2013, the core average administrative cost of handling a request within an HE institution was £144.93. The government's own estimate is that the cost of compliance is approximately £10million per year.¹³⁸

The cost of activities that can be included when calculating cost, such as information retrieval, has gone down over the period. This is principally due to the development of digital infrastructure over the period. However, the cost activity that cannot be included, such as redaction, has gone up. This has driven up overall costs. There is therefore a strong case to extend the range of costs that can be taken into account into consideration in the response to a request.

In order to reduce the burden on higher education institutions to an appropriate level the following measures should be considered in relation to the appropriate limit:

- (i) the appropriate limit should be reduced;
- (ii) it should be extended to include the time reasonably required to consider the application of exemptions and in particular to redact information for release;
- (iii) should be amended so that aggregation can take place of unrelated requests from the same individual or one or more individuals in pursuance of a campaign.

Estimates of costs are also likely to be significantly higher if the time of senior staff and legal costs are fully taken into account. The use of Section 36 requires the head of institution to give an opinion in support of the use of the exemption. We suggest that the need to consider the public interest test is removed from the internal review process.

Further information on the impact of the Act can be found in the latest information legislation and management survey here: <https://jisc.ac.uk/reports/information-legislation-and-management-survey-2014>.

We believe that it is right to consider how the FOIA interacts with proposals for reforms of regulation in the sector to ensure that an effective balance can be struck between the public's right to know and burden on institutions. Higher education providers are subject to a range of public information requirements, including mandated sector data provision, requirements of professional and statutory and regulatory bodies and the consumer rights laws, which includes requirements for provision of accurate material information to students and fair terms and conditions.

In light of this we welcome the government's commitment to review how best to ensure a level playing field for all providers whilst protecting the interests of students and the general public. This should include mechanisms that would allow appropriate exemptions for universities from the act whilst making appropriate information available.

¹³⁸ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/474227/BIS-15-623-fulfilling-our-potential-teaching-excellence-social-mobility-and-student-choice.pdf

Warwickshire Police and West Mercia Police force Alliance.

Question 1: What protection should there be for information relating to the internal deliberations of public bodies? For how long after a decision does such information remain sensitive? Should different protections apply to different kinds of information that are currently protected by sections 35 and 36?

Question 2: What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?

Q1 and Q2: Section 35 and 36 are not routinely used by the Police but recommendation would be that a Class-based, Qualified (Sec 35) and Prejudice-based, Qualified (Sec 36) are the most appropriate exemption type for this category of information. Recommendation would be that the addition of another Class-based, Absolute exemption should be considered for internal deliberations whilst they are live and pre-decisional.

Question 3: What protection should there be for information which involves candid assessment of risks? For how long does such information remain sensitive?

Q3: Information should be protected by a Class-based, Qualified exemption. Thoughts are that a time cannot be specified that the information remains sensitive – this will depend on the subject matter.

Question 4: Should the executive have a veto (subject to judicial review) over the release of information? If so, how should this operate and what safeguards are required? If not, what implications does this have for the rest of the Act, and how could government protect sensitive information from disclosure instead?

Q4: Recommendation is in favour of the executive having a veto, as currently operates.

Question 5: What is the appropriate enforcement and appeal system for freedom of information requests?

Believe that the current appeal system is fit for purpose, however the Public Authority's decision to withhold should be equal focus to that of the Information Commissioner's decision for any upward appeal to a First Tier Tribunal and Upper Tribunal. Also the Upper Tribunal should issue the decision in favour of one of the appellants, and not refer back to the First Tier Tribunal to re-fresh their decision as this creates more delay.

We wonder whether streamlining the process is a possibility, taking out the second tier for example? As highlighted in the paper it would be useful to ensure that, where an appeal is made by an authority in relation to ICO decision, the applicant is consulted to ensure that the information is, in fact, still required to ensure that costs are not being incurred unnecessarily.

Question 6: Is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know? Or are controls needed to reduce the burden of FoI on public authorities? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kinds of requests do impose a disproportionate burden?

Q6: Further controls are needed to reduce the burden of FOIs on public authorities. Thoughts are that the time/fees limit should be reduced from 18 hours to the equivalent of one working day per request.

A nominal fee, should be introduced for requests and a minimal nominal time should be introduced and included in the time calculation per page of information to be reviewed.

The paper states:

The Foundation Trust Network (now NHS Providers) also submitted evidence during post-legislative scrutiny. It highlighted concern that:

“...the Freedom of Information Act (FOIA) provisions were being used for commercial purposes rather than for scrutiny of issues in the public interest...there were also concerns raised about...the number of requests growing rapidly to the point of being overwhelming...the level of resource that was necessary to give over to these requests, including administrative time, but also front-line clinical time”

We get a considerable amount of requests for both forces that fall into this category - the one that springs to mind that is current is the request in relation to whether we have purchased ice cleats and the number of accidents due to employees slipping in icy/snowy conditions. This came in from a company who supply ice cleats. We also have the endless ICT requests which come in from companies and also the procurement ones. When the spirit of the act is to provide openness and transparency in relation to issues in the public interest these commercial fishing exercises do place an unnecessary burden on resources. The same is true in relation to the media obtaining information for stories; we are finding that these requests are increasing, for example, last quarter Warwickshire received 229 requests, 88 of which were from media. In the current quarter we have so far received 100 requests and 47 of these are from media.

As it stands an applicant pays absolutely nothing unless they choose to pay for work taking more than 18 hours (or disbursements). We have never known an applicant who has been issued with a Section 12 notice to go on to pay for the information requested and the burden is placed wholly on the authority to provide information that would not exceed that limit. Although the point of the act is to allow access to information it has to be kept in mind that the cost of searching in relation to requests is not coming out of the authority's purse but the public purse. It is therefore questionable as to whether answering requests for businesses for example is in fact in the public interest.

We feel that there is not only justification in relation to having some sort of fees structure introduced but also that it is necessary given the above. The introduction of a nominal fee like the £10 Subject Access Fee could be utilised which would act to deter those requests with no real purpose but which place such a burden on resources.

It is interesting looking at how the fees structure works in other countries but it is difficult to see how these would work smoothly in practice, for instance how do you know that a search will take, for example, 5 hours unless it is done (sometimes this could be estimated with a dip sample as it is for Sec 12 but this is not always possible). The applicant would then be sent an invoice for £XXX and they may pay, or on the other hand could decide they don't want the information enough to pay, granted the applicant would not get the information but the burden of that search and the resulting cost has already been placed on the authority regardless. This is inevitable with anything other than charging an upfront fee before any searches are conducted.

Some form of charging should be introduced.

Waverley Borough Council

Independent Commission on Freedom of Information

By email to: foi.commission@justice.gsi.gov.uk

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DX 58303 Godalming 1 Your ref:
Our ref: DJBMAN-049
Date: 19 November 2015

Dear Sirs

Independent Commission on Freedom of Information Call for Evidence

I have been asked to submit on behalf of Waverley Borough Council the following response to the Commission's Call for Evidence. Waverley Borough Council continues to meet its obligations under Freedom of Information, Environmental Information and Data Protection legislation.

It is understood that the legislation was originally put in place for the purposes of promoting a culture of openness and transparency and raising confidence in the processes of governance, and enhancing the quality of decision making.

The Council agrees that a balance must be struck between public access to information and the burden placed on public authorities by freedom of information legislation. The legislation currently provides for some limits and safeguards to public authorities, such as those which are outside scope, costly or vexatious, but in the Council's view there is more that can be done to ensure that the balance referred to above is fair and reasonable.

Questions 1-4

These four questions are focused more on Central Government concerns and less on local authority considerations. The Council therefore has no response to make in respect of questions 1 to 4.

Question 5: What is the appropriate enforcement and appeal system for freedom of information requests?

In relation to the enforcement/appeal process, the internal review can be a useful exercise and valuable opportunity to review, rectify, and scrutinise the decision making process and provision of information.

It is clear that some applicants do not understand the purpose of the internal review process, and that they seek internal reviews as an apparent remedy or other opportunity to raise grievances where they disagree with Council actions or decisions, rather than in relation to the provision of information or not. The Council has formal procedures in place in relation to dealing with complaints, and those are more appropriately considered within that separate forum.

A small number of information requests that have been internally reviewed by Council officers have subsequently been referred to the ICO by applicants. Of these, the vast majority have resulted in positive decisions from the ICO in favour of the Council's original decisions. The Council therefore takes the view that the ICO is providing the correct level of oversight, and that it strikes the correct balance when reaching its decisions.

Question 6: Is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know? Or are controls needed to reduce the burden of Fol on public authorities? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kinds of requests do impose a disproportionate burden?

It is understood from research set out in the call for evidence that requests are made mostly by private individuals (60%), the next group being commercial applicants (20%) followed by journalists and others (10% each respectively). Whilst the Council does not log the categories as part of its processing of information requests, recent experience suggests that the number of commercial applicants and journalists are greater than the figures would suggest. It is right that sometimes requests for information are made which include numerous questions (for example up to twenty) and sometimes on varying different themes. Other journalists lodge numerous requests on multiple themes, sometimes several during the course of a business working day.

There are also a significant and expanding number of requests from individuals for the purposes of conducting research, which perhaps formerly would have been processed during the normal course of Council business.

Some members of the public have sent requests for the same multiple information following postings on social media sites, believed to be for the purposes of raising awareness, or lobbying. In addition, complainants that have been treated as vexatious under the Council's complaints process have made repeated, overlapping, requests to the Council for information under freedom of information legislation in an attempt to circumvent the fact that they have exhausted the Council's complaints processes, as well as those of the Local Government Ombudsman.

We have considered the figures and research set out in the call for evidence regarding average costs per request, but regret that we do not categorise or process requests in this way.

A number of requests take a disproportionate time to consider and process, especially

where the request is wide ranging, or lengthy, as set out above, but yet this still falls within the safeguard cost limit, which for local authorities is a high bar to reach.

The current limit on local authorities of £450/18 hours for us to determine if the information is held, located, retrieved, and for this to be extracted can sometimes be significant in terms of resources and time allocations. This applies especially where the questions are multiple and not necessarily thematic. Notably, the time limitation does not take any account of consideration of the material and redaction when finally collated, which in itself can be a very onerous, time-consuming yet important task, in order to meet data protection obligations.

It is rare for the Council to reject requests on the basis of the time I costs limit and we believe strongly that the threshold set for local authorities, which is currently set at 18 hours, should be lowered. Greater controls are needed by local authorities to assist in reducing the impact of those requests that take a disproportionate percentage of Council officer time.

In respect of the time taken for response, it is difficult to provide meaningful comment, given the variation in requests. Some requests are straightforward and easy to process whereas others are often complex or involve drawing information and marshalling this from a number of sources, which can be more involved and time consuming.

Technology has also had an impact upon the number and variety of requests. It is clear that the majority of applicants submit requests online either by online form, available from our website or by

email. There are also a number of websites set up which assist applicants to monitor and process their requests. In comparison, very few requests are now made by letter, or initially by telephone and sometimes often addressed to a particular Council service, and not necessarily being considered by the applicant as a request.

By its very nature email correspondence enables individual applicants (of whatever category) to send multiple correspondence/requests readily and easily and without significant cost to the applicant. Sometimes, the requests for information are unclear and on occasions, ill thought out. This may in part be due to uncertainty about whether and how the information is held, which is understandable. Where this is the case, significant time is spent clarifying the requests, which can be to the benefit of the applicant and to the information provider, to ensure that the information collated is of interest, as well as allocation of time and resources for the authority concerned.

It is also clear with developments in technology, including mobile technology, that enquiries can be made wherever and whenever by the applicant. In the past, and prior to these developments in technology, information would have been more usually elicited by formal correspondence. It seems that previously the small but perhaps important burden in terms of cost (a stamp, time) upon the applicant resulted in more focused and relevant requests for information. However, clearly the improvements to technology are also of benefit to the Council and how it conducts and manages these requests and also is an important feature in terms of access to the information.

Electronic records kept support this assertion, that the number of requests is growing more generally, and that overall there has been an increase in the number of requests.

However, in so far as local authorities are concerned, and over time, resources allocated have not risen accordingly. This appears to create additional burden and pressure on local authorities already under significant budgetary pressures. In meeting the obligations under the legislation, it is a realistic concern that resources are being diverted from the provision of (arguably other more important) services, by the administrative burden in order to meet requirements of the legislation.

Generally at Waverley, the requests are broken down across the various services as set out in the chart below. The information provides relates to the availability of data on our current recording system.

1/2/13-31/3/13		1/4/13 -	1/4/14 -	1/4/15 -
Environmental	5	26	100	58
Community Services	14	90	29	16
Customer office and IT	12	49	64	36
Elections /Special	1	83	3	1
Employee/business	11	63	24	5
Finance	17	145	144	74
Housing	7	73	110	59
Planning	8	61	104	49
Policy and governance	7	54	67	19
Monitoring and returning	0	3	15	3
Several/outside scope	0	0	9	9
Strategic HR	0	0	11	8
Outside scope	0	0	0	
Total	82	647	680	338

As you will note in the chart above, many of the requests relate to financial matters, which could be interpreted as meeting the aspirations of the legislation, demonstrating openness and transparency. However, the reality of the requests is that they relate in the main to business rates enquiries by individuals and those representing companies, presumably for commercial purposes.

Independent Commission
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There are also a large number of housing enquiries, and requests to obtain copies of pre-planning application requests/advice, which form many of the planning related requests. Ordinarily a member of the public would submit information and set fee of £ 150 for this service. However, recently, a number of local professionals have sought to obtain this information by reference to particular sites without cost, by application under freedom of information/environmental information legislation. There have been other requests made by applicants who have collated the information/documents provided, for entrepreneurial purposes, to provide to others upon payments of fees. Whilst this is not objected to in principle, arguably, this is not within the spirit of the legislation.

Whilst the purpose to which the information is used does not form part of the limits/safeguarding of the scheme and would be difficult to monitor, it is clear that much of the information is being sought for the purposes of businesses and financial gain, rather than in order to meet the principles of openness and transparency.

This consultation response is submitted on behalf of Waverley Borough Council, and I should be grateful for an acknowledgement of the Council's submission, and the Council looks forward to reading the Commission's conclusions.

Welsh Government

1. Please find below a response prepared by Welsh Government officials to the consultation by The Independent Commission on Freedom of Information. The comments are intended to cover all of the issues set out in the consultation questions that the Welsh Government wishes to address. Please note that the comments are provided within the context of access to information being a devolved matter. The Government of Wales Act 2006 allows the National Assembly for Wales to legislate on access to information matters in relation to Welsh public authorities which are currently subject to the Freedom of Information Act 2000 (FOIA) as it applies to the law of England and Wales.
2. The Welsh Government is committed to openness and transparency in its daily business. The minutes and papers of Cabinet Meetings are routinely published online, as well as decision reports outlining decisions made by Welsh Government Ministers. In the field of access to information, a public disclosure log is also maintained and the responses to the vast majority of information requests are published. In 2014, the Welsh Government withheld information in full in only 17% of requests and the compliance rate regarding the responses to requests for information within the statutory response time was 91%. In November 2014, the Welsh Government published an online guidance document ("A Practical Guide To Help You Request Information From The Welsh Government") in order to help requestor's focus their requests so as to enable them to get the information they are seeking promptly.
3. One of the issues faced by public authorities under the Act is the burden of compliance with individual requests. For instance, when considering refusing a request under section 12(1) of FOIA – where the cost of compliance exceeds the appropriate limit. Under Regulation 4(3) of The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004, the appropriate limit is set at £600 for the Welsh Government which equates to a period of 24 hours being spent at a rate of £25 per person per hour. The Regulations provide that a public authority can take into account only the costs it reasonably expects to incur in carrying out the following permitted activities in complying with the request:
 - determining whether the information is held;
 - locating the information, or a document containing it;
 - retrieving the information, or a document containing it; and
 - extracting the information from a document containing it.
4. However, there are instances where a request captures a significant volume of information that is relatively straightforward to locate and retrieve, but which contains large amounts of information that needs to be checked and/or properly redacted before release (for example, where it amounts to personal data, commercial information of third parties etc.). This is not an optional activity, yet the – often considerable - time and resource it takes cannot be taken into account when calculating the 'appropriate limit'. Consequently, it is often not possible to rely on the appropriate limit exemption, even though the time that it would take responding to the request could involve a public authority taking considerably longer than 24 hours to deal with a request.
5. Some requests lack focus and clarity and could potentially be 'fishing' for information with no real idea of what the request might provide. Whilst certain of these requests may be dealt with under the appropriate limit, or by arguing that the request does not clearly identify the information being sought and so is invalid, there are requests where neither of these approaches are clearly appropriate, which can result in a great deal of time and effort may be expended in responding to a request that ultimately turns up no information of use to the requester. Unfocussed requests have the potential to generate further follow up requests and generate a cumulative burden.

6. The 'vexatious' provision under section 14(1) of FOIA is relevant in this context, but difficult to engage in practice, in that a reasonable assessment of its applicability is based on a myriad of overlapping criteria that in some cases are context specific in terms of the request being considered whilst in others present a wider range of considerations based on previous correspondence. This is further complicated as the appeals process can then take into account the specific circumstances or motive of the requester in making the request to overturn a public authority's arguments that their request is vexatious. As this process involves significant time and resources, the lack of certainty around the application of the provision engenders a feeling of reluctance to engage it that does not apply to most of the other provisions of FOIA.
7. A public authority is obliged to have a complaints process in place for requests for information made under FOIA. Currently the 'test' (set out in the Secretary of State for Constitutional Affairs' Code of Practice on the discharge of public authorities' functions under Part I of FOIA) that "Any written reply from the applicant (including one transmitted by electronic means) expressing dissatisfaction" sets a very low threshold.
8. As guidance from the Information Commissioner's Office states that a public authority should only have a single stage review process, the Welsh Government has, on occasion, been obliged to initiate our formal complaints process in relation to a request response that simply says 'please review' rather than providing any grounds for the complaint. This can be time consuming and burdensome, particularly in those instances where the review finds no fault with the original response.
9. In terms of the protection that there should be for information relating to the internal deliberations of public bodies, including the preparation of draft documents, public authorities should have the necessary space to think and deliberate in private, including the ability to set out free and frank options in draft documents for internal use. A fear that such recorded deliberations and drafts may routinely be made public could potentially impact on the willingness of officials to contribute and debate uninhibited and robust advice.

Independent Commission
on Freedom of Information

West Felton Parish Councillors

To The FoIA Commission

C.c: West Felton Parish Councillors

REQUEST FOR BETTER FoIA CONTROLS TO REDUCE THE BURDEN OF VEXATIOUS DEMANDS UPON SMALL RURAL PARISH COUNCILS

Dear Commissioners,

I have only just picked up this item today from a news report from the Society of Local Council Clerks and since your deadline for evidence is midnight tonight I have not yet had time to put this matter to a meeting of West Felton Parish Council (WFPC) - although I have copied this email to all its members.

However, having been the Clerk to WFPC for five years now I am well aware of the general feeling within this Parish Council - and many other small Parish Councils in Shropshire - that the present FoIA controls to prevent serial frivolous and vexatious complaints are inadequate when a Parish Council is virtually under siege from a determined vexatious complainant.

Indeed the crux of the matter is that the FoIA does NOT yet acknowledge the existence of "vexatious complainants" - only vexatious complaints - but I can assure you that in every normal sense of the word "vexatious complainants" most certainly do exist.

I realise it will be extremely difficult for the FoIA to define a "vexatious complainant" and even harder to legislate to control such people without damaging their democratic rights as electors and citizens - but this problem of "FoIA witch-hunters" preying on Parish Clerks and Councillors is a serious threat to local government which urgently needs addressing.

I have not got time to outline the specific circumstances of West Felton Parish Council's experiences over the past thirteen years but the attached files are now regarded by the ICO as being in the public domain and I think they are self explanatory.

You will see from the files that the ICO has always done its best to assist WFPC and we are now in a much better position than we were thirteen years ago when this problem first began - but our problem is not unique or even unusual - and we know that several other parishes in Shropshire are still struggling with this type of problem.

In these circumstances I cannot yet speak for WFPC itself until we have had a meeting - but speaking for myself personally I would be pleased to assist the commission with any further information or clarification which might be helpful to you - including attending and speaking to any hearings that might be held on this topic.

I look forward to hearing from you.

Sincerely, ~ Ian A. Hutchinson Fri 20 Nov 2015

West Lancashire Borough Council

Dear Sirs,

I write in relation to the above matter following a Call for Evidence dated 9 October 2015 made by The Independent Commission on Freedom of Information ('Commission') in order to provide information on behalf of West Lancashire Borough Council ('Council').

I note that Parliament's intended objectives of the Freedom of Information Act ('Act') included transforming Government culture from secrecy to openness, promoting confidence in and increasing the quality of decision making by Government, and securing a balance between the public right to information and the Government's ability to formulate policy in private. It would appear that the abuse of the Act by private businesses for commercial gain and the burden and potential disruption to public authorities was not envisaged at the introduction of the Act. If it was envisaged then the extent of such abuse and the volume of requests were not properly accounted for.

In relation to question six contained within the Commission's Call for Evidence, the Council would urge the Commission to ensure that the burden of the Act on local authorities forms a major part of their considerations and provides relevant evidence below in support of that request.

Introduction

The Council is a local authority with a voting population of c. 83,000. Indeed, figures as at 21 September 2015 place the Council as the 235th of 351 local authorities in England in terms of voting population (see <https://www.lgbce.org.uk/records-and-resources/local-authorities-in-england>).

The Council has c. 500 employees, 19 of which are designated to deal with requests under the Act ('FOIRs') in addition to their usual daily tasks. This Council does not have funding to appoint an officer whose role is solely to deal with FOIRs.

The Issues

FOIRs impact on the Council in many ways. I have set out below a number of issues which impose a burden on local authority resources as a direct result of the Act:

Volume of FOIRs

The table below demonstrates the number of FOIRs received by this Council for the previous five years:

YEAR	NUMBER OF FOIRs
2011	446
2012	447
2013	558
2014	739
2015 (to date)	570

It is clear from the table that the number of FOIRs received has increased year on year, from 446 requests in 2011 to 739 in 2014.

Of course, the Council's resources to deal with the increase in FOIRs requests have not increased and there is concern that the pressure the Act puts on the Council is diverting valuable resources away from the provision of more important council services, such as housing, environmental health and street scene.

Reason for FOIRs

Whilst the Council has no power to ask why an FOIR is being made, regularly it would appear from the status of the person making the FOIR, that there is an underlying reason for obtaining the information

other than pursuing the public interest.. Accordingly, the table below demonstrates the percentage of requests received from certain groups in 2014:

GROUP	NUMBER	PERCENTAGE*
Business/Commercial	413	56%
Media	172	23%
Individuals	79	11%
Lobby Organisations/Politicians	75	10%

*This figure is estimated as it is not always possible to identify from which group the FOIRs have been made because the requester does not need to identify themselves.

On the basis of the table above, it appears that only a small percentage of the requests actually come in from individuals which suggests that the Act is not being used by local residents relating to local issues. Indeed, the largest proportion of the FOIRs received are from businesses, followed by the media.

In addition, around 15% of the FOIRs the Council receives from businesses are from Commercial Rating Agencies who request various information at regular intervals regarding business rates. This type of request is increasing yearly and to provide this information can take a considerable amount of the Council's time, which cannot be recharged to the rating companies. The Council does not publish this kind of information on its website because the information is not static and the timescale for requests varies.

The Council regularly receives requests for information relating to its ICT services, software, hardware and telephony from companies that also provide such services. These requests can be timely and complex to answer.

The Council suggests that it is likely the businesses who make up the majority of the FOIRs received are seeking to gain a commercial advantage from the information provided at no cost to themselves. In addition, and as stated above, in order to respond to the FOIRs the Council must divert resources from its usual business and, in many instances due to the statutory time limit for responding, the FOIRs take priority over other service provision.

Overall, it appears that the Act is not being used to improve transparency in the public interest as it was originally intended but rather for commercial purposes. There is currently no provision within the Act to prevent this use or to resolve the issue for local authorities. Given the rollout of the transparency agenda, and the specific information provided there, it is frustrating to have to answer FOIRs with similar (but not the same) information.

Unnecessary/Vexatious Requests

The Council also receives a large number of FOIRs at regular intervals in respect of Public Health Funerals. Although this information is published on the Council's Publication Scheme, the Council still has to formally respond to the FOIRs to direct the requestor to the information which is already in the public domain. It appears that none of the requesters have updated their mailing lists which is creating a further unnecessary burden on the Council.

In addition, around 6% of the FOIRs received by the Council are 'round robins' requesting information that is not held by this Council but rather relates to a County Council function. Again, many of the requesters do not update their mailing lists despite having been informed of the position. This continues to create an unnecessary burden on the Council as the Act requires it to formally respond and assist the requestor by directing them to the correct source of the information.

In addition to the issues raised above which relate to the initial requests for information, the Council asks the Commission to also take into account the additional work which flows from further requests for clarification or supplementary information, internal reviews where requests for information have been refused and, in some cases, complaints to the ICO.

Independent Commission
on Freedom of Information

It is necessary to consider FOIRs in the broader context of information governance as local authorities must also respond to requests for information under the Environmental Information Regulations and (subject access requests) under the Data Protection Act. The overall burden of providing information to the public creates a heavy burden on the Council's resources.

In light of the evidence provided above, the Council is of the view that the Act is not always being used as it was intended and in many cases is being used for commercial gain rather than in the public interest. The burden imposed on the Council's resources outweighs the public interest in many instances. It is clear from the Council's evidence that controls are required to reduce the burden of the Act on public authorities and that such controls would be rightly aimed at business and media requests. Whilst the Council is fully supportive of the public's right to information, it is suggested that the right should be tailored, e.g. to allow those with local links to obtain information of local interest regarding local issues.

I trust this assists, but please do not hesitate to contact me should further clarification or information be required.

Kind regards,

Rebecca

Rebecca Chadwick
Assistant Solicitor
West Lancashire Borough Council

www.westlancs.gov.uk

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West Somerset Council & Taunton Deane Borough Council

Dear Sir/Madam

Independent Commission on Freedom of Information: call for evidence

We welcome the opportunity to participate in the review of FOI, and see it as an opportunity to reflect on the Act's original purpose, how the Act is being used today and the new circumstances in which the public sector is now operating.

Our response centres on question 6.

Question 6: Is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know? Or are controls needed to reduce the burden of FOI on public authorities? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kinds of requests do impose a disproportionate burden?

The original purpose of the Act was to give the public greater access to information about the workings of government and public bodies, to make public bodies accountable to the public and enable transparency in the operation of public bodies. These are laudable aims, each of which we fully support.

However, we have seen in recent years a noticeable drift away from requests which have a clear public interest, towards a greater proportion of requests of personal interest of the requester.

FOI is being used increasingly for commercial purposes rather than for scrutiny of issues in the public interest. Certain businesses have been seemingly using FOI as a back door to avoiding charges or for their own marketing /promotional purposes; using Council staff as an unpaid administrative/research resource. This latter example creates a double drain on resources since following provision of requested information the authority is invariably cold-called for all manner of goods and services, taking up additional officer time.

Similarly, students are using FOI to involve Council officers as an unpaid resource to help with their coursework.

We would suggest that these purposes have little to do with the original central FOI principles of accountability and scrutiny.

The rise in the number of 'round robin' FOI requests is also an unwelcome trend. Whilst these bulk requests can have a place, when they are properly targeted, all too often they are lazily sent to a distribution list without even a rudimentary attempt having been made by the requester to ensure the body to whom they have sent the request has any responsibility for the subject matter of the request (e.g. 'round robins' going to all councils requesting social care or education information regardless of the fact these are not matters administered at a second tier level). Similarly there is often no apparent evidence of the requester having made even the most basic attempt at obtaining the information required from Council websites prior to submitting an FOI request.

Going forward, we feel the current volume and complexity of FOI requests is unsustainable. There has been a huge shift in the financial landscape in which local authorities are operating since the FOIA was introduced and we now have the 'perfect storm' of large numbers of requests at a time of significantly reduced financial and staffing resources.

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on Freedom of Information

If we assume the figures from the March 2012 study by the Ministry of Justice, that an average request made to 'other public authorities' costs an average of £164 in staff time, last year alone FOI requests to this Council have cost in the order of £115k in staff time on this basis.

We believe the majority of FOI request which we receive are made by people and organisations with no connection to the Borough and are therefore being subsidised by the local Council Tax and Business Rate payer. Residents might ask whether it was right that the Council Tax of a hardworking family in this district is being used to gather information for a national multi-million pound IT company, for example, at a time when frontline services for local people are under strain.

We would suggest the time is now right to consider the introduction of a modest charge for FOI requests in order to redress the balance between transparency and the burden of the Act on public authorities more generally. We believe this would discourage frivolous requests, ensure bulk requests were properly targeted and would ensure all requesters (not just the local taxpayer) were making a contribution toward the administrative costs of providing the information sought.

It is noted that several countries already charge a fee for FOI requests and is further noted that in Ireland the introduction of a €15 application fee resulted in the number of requests falling by 75 per cent. This would free up a significant amount of resource which could be directed toward front line services most valued by our local communities whilst still preserving a route through which to hold the Council to account.

The principle of making a charge for information is already well established within the DPA in relation to Subject Access Requests.

In addition to introducing an application fee we would also for two other changes to be considered.

Firstly, reduce the Appropriate Limit from £450 per request to £200 for second tier authorities in recognition of the reduced financial and human resources available by comparison to Unitary and County Councils.

Secondly, allow the inclusion of the time taken to read, redact and consider the information within the calculation of the Appropriate Limit. This is often the most time-consuming element of handling a FOI request and currently cannot be taken into account but is a vital part of the process given the legal obligation placed upon us to protect personal information.

We thank you for your consideration of this submission and look forward with interest to reading your findings.

Yours faithfully

PENNY JAMES CHIEF EXECUTIVE Tel: 01823 365421
Email: p.james@westsomerset.gov.uk

West Midlands Information Management Group- Joint Response

Question 1: What protection should there be for information relating to the internal deliberations of public bodies? For how long after a decision does such information remain sensitive? Should different protections apply to different kinds of information that are currently protected by sections 35 and 36?

We consider that a less strict exemption to protect internal deliberations, a prejudice-based absolute exemption, where information can be withheld if its release would harm one or more specific interests, but there is no requirement to also consider whether the public interest nevertheless requires its release, would be more appropriate. Also consider that requirement Qualified Persons approval should be removed.

(Walsall City Council).

s35 is not applicable as we are a Local Authority.

s36. The exemption was last used in 2014, and for partial exemption. We consider the current arrangements to be satisfactory. *(Warwickshire County Council)*

Protection for information relating to internal deliberations should be simplified and easier to apply. It is of great importance that all options, even unfavourable ones, are considered and debated without concern that comments might later be disclosed. This is in respect of not only debates between Local Authority councillors but also officers in the provision of advice. Whilst matters are still being deliberated there should be an absolute exemption to enable this free and frank exchange.

After the decision has been made it will be dependent on the matter debated as to how long this information remains sensitive and a qualified exemption should be applied at this time. The quality of records of such deliberations may be affected by concerns of later disclosure and an absolute exemption would provide confidence that disclosure will not take place and that frank debate can take place and be recorded.

The Council is receiving an increasing number of requests for information relating to internal discussions regarding controversial decisions particularly in relation to where savings are to be made to meet budget cuts. The requirement for "a qualified person" to determine whether s.36 applies to information and the limitations on who can be "a qualified person" is placing an increased burden on authorities. The requirement for "a qualified person" should be removed. Any challenges to the application of s.36 can be dealt with by the internal review/reference to the ICO process. In the alternative, the definition of "qualified person" should be extended so that the burden can be shared.

It should also be noted that there is a large regulatory and statutory framework in place in respect of Local Authorities which ensures that they are transparent and open. Local Authorities already publish key information around decisions as a matter of course in light of this, however it is at clearly defined time e.g. publication of reports and background information, key decisions, publications in accordance with the Transparency Code. *(Coventry City Council)*

We support the current section 36 approach. We support the requirement that the Qualified Person should make these decisions. We believe that the time limit to hold sensitive information after a decision has been made, needs to be determined on a case by case basis and this depends on the type of information being requested, and the impact of the release of the information on the Council. We find the application of this exemption very effective and we only seek to apply this exemption on a very irregular basis, when it is necessary and appropriate. *(Stoke-on-Trent City Council)*

I think current exemptions are ok for this in general

Depends on the decision as to how sensitive it would be after a period of time. *(Telford and Wrekin Council)*

Question 2: What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?

For a Local Authority, existing legislation covers Committee release and exemption for withheld information.

(Warwickshire County Council)

The principle of collectively responsibility is also of great importance to Local Authorities. Members should be able to express their personal views or voice another option that could be considered without concern that this will later be disclosed. They should be able to, at a later date, promote or defend the decision of the Council as a collective. This should be afforded greater/or the same protection as other internal deliberations. The sensitivity of any matter will change on a case by case basis and will be dependent on the matter at hand. So the length of protection after the decision has been made should be flexible to enable considerations in respect of this. *(Coventry City Council)*

We believe that the section 36 exemption does allow specific information to be withheld where this can be argued robustly in accordance with the legislation, for example Cabinet Agenda Planning Session information. However the exemption must not be relied upon on a blanket basis, but on consideration of the individual merit of each piece of information. This is reflective of the approach adopted for every FOI exemption contained within the Act. All the exemptions should be applied in a consistent manner.

(Stoke-on-Trent City Council)

Should be same protection as that afforded to other officer internal deliberations. As above for period of time.

(Telford and Wrekin Council)

Question 3: What protection should there be for information which involves candid assessment of risks? For how long does such information remain sensitive?

We do publish high level risk registers and would could use s36 exemption where we thought release would expose the authority to undue risk and may prejudice the effective conduct of public affairs. s24, s31, s38 may be applied instead where publication of the assessment of a risk may affect staff or the public. *(Warwickshire County Council)*

Risk assessments by their very nature contain information that may be controversial, however is required to provide a full and frank assessment of the matter at hand. Publication of risk assessments may increase the risk of challenge to local authorities or increase the likelihood/impact of risks occurring. The quality of these assessments may be affected if information is not included out of concern that this might later be disclosed. This again is dependent on what the assessments relate to but there should be greater protection for documents of this nature. The duration of the protection afforded will be dependent on the sensitivity of the decision being taken and should be considered on a case by case basis. *(Coventry City Council)*

Current protection suffices. As above for period of time. *(Telford and Wrekin Council)*

Question 4: Should the executive have a veto (subject to judicial review) over the release of information? If so, how should this operate and what safeguards are required? If not, what implications does this have for the rest of the Act, and how could government protect sensitive information from disclosure instead?

Current arrangements allow for Monitoring Officer approval on s36 exemptions. Information with a security classification of Official-Sensitive would not be released to the public in general. There is no overall precise measurement of when information should be classified as such. Aside from personal and commercial exemptions, we have to rely on s.36 in extreme cases and approval by the Monitoring Officer. Usually s31 and/or s38 are used (e.g. request for IT network/systems and risk for cyber crime). There appears to be a reluctance to use the national security s24 in LAs, guidance could be improved. (*Warwickshire County Council*)

This question is of more relevance to central rather than local government. (*Coventry City Council*)

We recognise that this question is more relevant to Central Government. However we believe that it is not appropriate for Central or Local Government to be able to 'veto' the release of particular information without an exemption being appropriately applied. We believe that this is counter to the spirit of openness and transparency of the Act. (*Stoke-on-Trent City Council*)

No. There should be other measures in place to protect sensitive information, e.g. more exemptions, widening of current exemption scope and/or making some qualified exemptions absolute. (*Telford and Wrekin Council*)

Question 5: What is the appropriate enforcement and appeal system for freedom of information requests?

The current UK appeal system is lengthy and does not always provide an effective system for requestors whose requests are often more relevant at a particular period in time. An effective appeal system will require at least one level of independence within the authority and another level external level which can seek to balance transparency and the protection of sensitive material. The ICO is well placed to provide this external level of appeal with appropriate understanding and commitment to the balancing act required. Having only 1 further level of appeal or veto with the courts or information tribunal would therefore be considered to be adequate rather than the additional 3 / 4 we currently have. (*Walsall City Council*)

Current arrangements are satisfactory. (*Warwickshire County Council*)

It is suggested that the enforcement process for freedom of information requests should mirror that of the Local Government Ombudsman.

Dealing with requests for reviews and complaints to the ICO places an additional burden on Local Authorities, at a time when resources are decreasing.

The ICO does not always appreciate the impact on an authority that a direction to disclose information may have. Currently, the only way to challenge this is to the First Tier Tribunal, which is time consuming and costly.

If the current mechanism is to be maintained, greater consideration needs to be given to the cost to Local Authorities' in administering the FOI regime. (*Coventry City Council*)

We support the current enforcement and appeals system. We believe the process gives public

authorities the opportunity to review any decisions taken so far and provide their opinions and evidence relating to the impact any release would have upon on them. *(Stoke-on-Trent City Council)*

Public bodies should have a mandatory internal appeal process that must be gone through before a referral can be made to the ICO (this is currently a similar requirement for complaints made to the LGO).

In respect to enforcement I think the ICO are currently too heavy handed in taking on referrals. If it can be proven that the public body went through a satisfactory process then, unless in exceptional circumstances, no ICO enforcement should be followed.
(Telford and Wrekin Council)

Question 6: Is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know? Or are controls needed to reduce the burden of FoI on public authorities? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kinds of requests do impose a disproportionate burden?

The burden on public authorities is heavy and continues to grow with increasing numbers coming from business and the media rather than the general public. Further controls are needed to reduce the burden and seek to ensure that limited resources are able to applied to support the original spirit and purpose of the Act. Controls should be targeted to the size of requests and requests that are made for business / commercial use and often a range of questions posed simply on a fishing expedition looking for a story. *(Walsall City Council)*

The provision of S.12 is too restrictive in that it does not allow for time spent redacting to be included this were the largest time is spent in a number of cases where the information required is voluminous e.g. spreadsheets where personal data is mixed in with other no personal data. Also the provision which allows requests to be aggregated is difficult to apply where requestors can disguise the sender of the request. *(Walsall City Council)*

The burden is excessive where requestors ask a large number of complex questions. Making the justification to refuse on the grounds that it exceeds the limit, takes up too much time. An exemption similar to Exception 12 (4)(b) under EIR should be included. On the basis of £300 to respond to an average FOI the estimated cost in 2015/16 will be £360,000.

The majority of our requests are from the public but although commercial and media represent only 27% of requests, they are using public money for commercial gain and are disproportionate effort. A recent example that circulated to LAs is attached. Many of the questions in these sort of requests are not asking for information but an explanation or opinion. *(Warwickshire County Council)*

The burden placed on authorities under the Act has increased significantly since enactment and at this time of budgetary cuts the impact outweighs the public interest in the disclosure of the information. There are an increasing number of requests from journalists who submit generic FOIs to all local authorities. There has also been an increase in requests from Commercial organisations requesting information in order to seek a commercial advantage over competitors. The increase of requests for information about the decision making process, prior to a decision having been taken, detracts from the decision making process itself. Local Authorities have to bear the cost of dealing with these requests at a time whilst at the same time having to take decisions about cutting services to vulnerable people.

Local Authorities are already subject to rigorous regulatory and statutory framework in respect of disclosure of information around decisions being taken. This is disclosed at a defined time that will not

impact upon the frank exchange of views.

It is noted that within the Act it was legislated for regulations to impose fees for such requests. Fees should be implemented to cover the cost of dealing with FOI Requests. This will decrease the financial burden placed on authorities but also ensure that the number of vexatious/malicious requests decreases.

Consideration should also be given to enabling authorities to consider motive of a request so that requests for information, which would ordinarily be required as part of disclosure in Court proceedings should be disclosed as part of such proceedings rather than in response to an FOI.

(Coventry City Council)

We believe that the current section 12 regulations are adequate. However we acknowledge the burden placed on public authorities by requesters other than the general public. Any extra measures placed on public authorities would need to ensure that they are not contrary to the spirit of the Act and do not place even more burdens on the authorities themselves. We do have concerns that a charging system will put an increased burden on local authorities and will discourage individual members of the public in making requests.

(Stoke-on-Trent City Council)

The current burden on public authorities is not justified by the public interest in the public's right to know.

Government measures on openness of local government is already underpinned with such requirements as the Transparency Code.

We estimate we spend over £300,000 on responding to requests – this more would be better spent on front line services.

Much of FOI is misused. The vast majority of requests come from the media or private companies who then profit from the time taken by public sector officers.

The burden would be reduced if:

1. A payment was required when an FOI is submitted
2. Exemptions such as the cost exemption are amended to either reduce the 18 hours or to allow elements of the FOI process to be included, e.g. redaction. We recently had a request for a copy of correspondence between the council and another body and this took the IG team nearly a week to redact.
3. FOI were ring fenced by area, e.g. you could only make an FOI request if you lived in the boundary area of the local authority.

(Telford and Wrekin Council)

Examples of complex requests

Received August 2015

I am writing to you to request information about the cybersecurity practices across your corporate network, and other networks that you may use. This request is applicable under the Freedom of Information Act 2000.

While the information I am requesting may seem to be very broad, it should all be locatable within a small area and thus quite definitely fall within the time/cost limit for a request under the FOIA. If, however, there are particular circumstances which does not make this possible, if you please I would like you excise the particular request and provide all information to me which does fall within the

time/cost limit.

Under Section 16 of the Act, may you please be explicit in informing me of what would fall outside of the limits and provide guidance on how to ensure I am within it in a future request.

If you please, I would initially like you to establish contextualising information about the corporate network(s) that you use.

1a. May you confirm who deployed these networks and their names (i.e. in the instance of Sunderland City Council's corporate network, it has been reported that the network was deployed by BT: <http://www.telecompaper.com/news/bt-delivers-corporate-network-for-sunderland-city-council--819112>)

1b. May you provide me with copies of the tender award documents (these may be 1b.1 - the invitation to tender, and 1b.2 - the final contract, and 1b.3 etcetera, wherein they display an evaluation of the tender process) relating to the deployment of your corporate network.

1c. I would like to be able to contextualise the successful bid by understanding how many bids you received and how they were evaluated. If you may, I would like you to provide this as a table in a spreadsheet format, the rows of which would list those tendering and the columns of which would list the evaluation criteria. If such a document does not exist, please provide me with a facsimile which might only include the financial range of the bids, in a spreadsheet format.

This information is of obvious value in understanding the deployment of your corporate network which is necessary information to complement the following questions regarding your security practices.

2a. I would like to know what anti-virus and anti-malware solutions you use, this information would be the names of the solutions, the locations at which they are installed, and the names of the companies who have provided them.

2b. May you provide me with copies of the tender award documents for these solutions, as per 1b. Here I would like to understand the procurement process for these solutions and the degrees to which they are expected to provide security. I ask for these as I am aware the solutions may be purchased alone, while also an AV solution is often provided as part of a Microsoft Enterprise Agreement, for instance.

2c. May you confirm the date these solutions have been running for.

2d. May you confirm the number and type of machines across which these solutions are installed.

2e. May you inform of whether there is an employee responsible for maintaining these solutions, and whether this employee does so exclusively. If you may also explain to me their title and pay range in pounds sterling.

I am also interested in the threats that you are facing.

3a. May you inform me of the number of malware alerts that your AV solutions detected in the past twelve months.

3b. Most solutions will provide alerts when it comes to malware detections, may you inform me of the number of alerts your solutions have provided, by solution.

These alerts should be held on a database which provides a high degree of granularity in recording the causes of the alerts.

3b.2 May you provide me with a copy of this granular information - preferably in spreadsheet format - for the period covering the last twelve months, or shorter if not applicable.

number of infections

3c. I also wish to receive information about the number of infections that have occurred in the last twelve months, and in what areas, and on what machines these occurred.

3d. I would like to know at what account level these infections occurred.

3e. I would like to know how many instances were there in which these infections were not contained, but spread to another part of the network.

3f. I would like to know what the entry-point of these infections was, in each case.

3g. I would like a list of the number and type of unauthorised accesses within your networks.

3h. I would like to know how many of these were classified as personal data incidents, and how many were reported to the Information Commissioner's Office.

Finally, I would like to ask about your security maintenance policies.

4a. If one exists, may you explain your password policy and its enforcement.

4b. If one exists, may you explain your log-on policy and its enforcement.

4c. If one exists, may you explain your email policy and its enforcement.

4d. If one exists, may you explain your device policy (i.e. nothing from home) and its enforcement.

4e. May you clarify whether you store and or process bank card data?

4f. May you clarify whether you are PCI compliant?

Woodland Trust

1.0 EXECUTIVE SUMMARY

- This document is the Woodland Trust's submission to the call for evidence by the Independent Commission on Freedom of Information, set up by the Minister for Justice to review the Freedom of Information Act (2000). The Woodland Trust (the Trust) welcomes the opportunity to input into this important process. In our experience thus far of using the Freedom of Information Act, we have found it to be a useful tool - not just in practical application but in the additional openness it fosters for general questions to government agencies.
- In addition to this submission, the Trust also supports the submission made to the Commission by the Campaign for Freedom of Information and is a signatory on the joint submission made through the UK Open Government Civil Society Network.

2.0 THE WOODLAND TRUST

- The Woodland Trust is the UK's leading woodland conservation charity. As the champion for the UK's woods and trees, we have three aims: to protect native woods, trees and their wildlife for the future; to enable the creation of more native woods and places rich in trees; and to inspire everyone to enjoy and value woods and trees. We manage over 1,200 sites and have over 500,000 members and supporters across the United Kingdom.
- The Trust works to defend ancient woodland and ancient and veteran trees, and challenges unnecessary and inappropriate development which may negatively affect these irreplaceable and vulnerable habitats through the planning system. The Trust also undertakes lobbying and campaigning activity to effect positive changes in policy and decision-making on behalf of woods and trees, at a local and central government level. In addition, the Trust works with many communities to help them safeguard, and enhance, woodland and treed areas in their neighbourhoods.

Our interest in FOI

2.4 The Woodland Trust's main interest in Freedom of Information therefore lies in the accessibility of information regarding policy-making and planning decisions that affect woodland and trees, in particular ancient woodland and ancient and veteran trees. We value the existence of the Act and have used FOI to request information from government agencies and local planning authorities occasionally, in order to help our work. Our preference is to request required information from the appropriate body directly before turning to FOI; we have found that some Government bodies respond positively to this approach but not all.

2.5 For example, we have asked many questions of Highways England (HE) officials regarding the translocation of woodlands as part of the A21 (Kent) widening scheme. Our experience with HE has been positive, which has been most helpful especially considering the

questions are regarding problems and possible failings of the works and given HE is aware of our opposition to the project.

2.6 Our conclusion is that open government and the obligations on agencies to treat questions from the public akin to FOI requests has certainly produced a more open overall approach.

3.0 Specific examples of FOI requests

1.1 HS1 Ltd

Request: details of the monitoring and results of translocation of woodlands undertaken as part of the scheme. Requested to inform our thinking around the issues, and discussions with HS2 Ltd about next phases of High Speed Rail. **Result:** the requests for information from HS1 Ltd were refused (on the grounds that it has since become a private company) we sent the same FOI requests to the Department of Transport (DfT) and to Defra. Defra didn't respond, DfT pointed us back to HS1 Ltd. After bringing in legal support, HS1 Ltd became more open and provided us with much of the detail we requested.

1.2 Natural England

Request: every piece of correspondence with HS2 Ltd regarding translocation. Requested because HS2 Ltd maintained publicly - which we suspected was not correct - that Natural England supported their proposed approach. **Result:** Natural England provided everything we asked for although they requested extra time to do it – unsurprising given the amount of info they had to send and the fact that they had to redact all the personal information in it.

1.3 HS1 Ltd

Request: further clarification of information previously received. Requested to clarify details. **Result:** HS1 Ltd responded quickly and supplied all the information requested, a stark change from our previous experience when HS1 Ltd refused to comply on the grounds that they had since ceased to be a public body – we do not know why they changed their minds.

Further views

In addition to this submission of evidence, the Trust also wishes to acknowledge its support for the submission made by the Campaign for Freedom of Information. The Trust is also a signatory along with a broad coalition of organisations to the joint submission made through the UK Open Government Civil Society Network. We support the views expressed in these submissions, in particular:

- It is not in the interests of the public or good government for policy deliberations to have absolute exemption from FOI.
Decisions on whether information on the development of policy should be disclosed should continue to be made according to a public interest test.
- The ministerial veto should not be extended to allow the executive to overrule decisions by the courts.

Ministers should be prepared to make well reasoned and evidenced cases for non-disclosure, which stand up to scrutiny in court. If the executive is unable to do this, it is right that the information in question be disclosed.

- A blanket exemption for risk assessments is unlikely to increase candour in such documents. The public acknowledgement of the existence of certain risks will enhance the public debate about major projects and their implementation. It is when risks can be silently ignored that the consequences are dramatic.
- The benefits of the FOI Act justify its cost to public authorities. The costs of FOI are minor in comparison to other comparable government expenditure (e.g. government communications) and there are numerous case studies that demonstrate that FOI has been pivotal in exposing information it was in the public's interest to know.
- Charges for making FOI requests would be a significant threat to the openness and transparency of the UK, acting as a deterrent – especially for smaller organisations and community groups - to legitimate FOI requests, and would play a major role in preventing investigations across multiple organisations.