

# Independent Commission on Freedom of Information: Responses from individual respondents to Call for Evidence

This document combines responses from individuals to the Independent Commission on Freedom of Information's call for evidence.

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**To Note**

The Secretariat to the Commission has excluded a limited number of submissions from this document for reasons because they contain considerable amounts of personal data.

**Amendments to this document**

There have been no amendments to this document since publication.

**Ed Addis**

I write to express the view, which is held by the vast majority of the population, that this act must not be watered down. Many examples of corruption in high places, which would never otherwise have seen the light of day, have been exposed because of the act. It is an essential instrument of democratic supervision, and should be reinforced, not curtailed.

Ed Addis

## **Edward Evans**

This Act has allowed the public (through the press) to see just how grotesquely inefficient much of the public sector really is. If it works don't fix it. What is definitely not needed is an "independent" commission stuffed full of characters to whom outside scrutiny is anathema ...Straw....rendition ...torture? Any move by this lot will involve dilution of the Act's effectiveness. Sack the commission and leave the act alone.

E.D.Evans.

**Edward Meerloo**

Sirs

This email is sent to let you know that I do not consider there should be any watering down of current Fol rules. There should be openness; there certainly should not be less.

It would be indefensible for the government to press ahead with the Investigatory Powers Bill but to curtail Fol laws.

Yours faithfully

Edward Meerloo

## **Elizabeth Bruce**

Please note that any restrictions on the current freedom of information laws will be viewed with suspicion by the public. Without these freedoms, we would never have heard about the Expenses scandal and no doubt that is why restrictions are being considered, but you wont get away with it. Votes will be lost.

Only more freedom should be considered.

E Bruce

**Dr Elizabeth Gould**

**WRITTEN EVIDENCE TO THE INDEPENDENT COMMISSION ON THE FREEDOM OF INFORMATION ACT (FOIA).**

Submitted in a personal capacity by Dr Elizabeth Gould.

**1. PERSONAL INTRODUCTION AND REASON FOR SUBMISSION**

I wish to contribute to the Call for Evidence because:

I believe that the Freedom of Information Act is absolutely fundamental to a healthy, participative democracy.

I am concerned that restrictions to the existing Act will make it even more difficult than it already is for citizens to hold public bodies to account.

I am concerned that the document "Call for Evidence " (1) is itself weighted in favour of public bodies to the disregard of citizens.

I have extensive professional experience of government/NHS policy internal deliberations and appreciate the sensitivities involved.

I have experience as a citizen of making successful FOIA requests to the NHS and to Local Government.

I have experience of being unable to make FOIA requests because the public body has outsourced their information archive to a private company, or because, contrary to expectation, it is not a public body eg Ombudsman Services who act for OfGem.

Underpinned by the above, my reason for this submission to the Commission is the belief that restrictions to the existing Act will make it even more difficult than it already is for citizens to hold public bodies to account. Rather than restricting the Act it should actually be extended to cover a wider range of bodies with public responsibilities.

## 2. SUMMARY

I offer a consideration of Questions 1 and 6 posed in the Call for Evidence which can be summarized as:

2.1 Protection is already in place offering flexibility of the public interest under existing exemptions. Further restrictions would serve to increase distrust and suspicion amongst the public that public bodies had 'something to hide'.

2.2 Rather than viewing FOIA requests as a burden, they should be encouraged as an essential part of a healthy democracy.

## 3. CONSIDERATION OF QUESTION 1

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

Effective protection already exists.

ICO figures indicate that the percentage of cases where government departments have been ordered to disclose information, denying them the protection they claimed, is very small - in 2014 it was 2.75%.

My professional experience suggested that much internal deliberation on policy matters within the government/public body arena is of a highly informal and undocumented nature anyway - to the point that minutes are not taken when they perhaps should have been. As others have observed this 'informality' is part of a wider change in culture and administrative practices, not all for the good.

It was also my experience that very legitimate information on, for example charges for procedures by NHS Trusts, procurement contracts, extra contractual referrals, were not disclosed when openness and transparency suggested they should have been. There was non-disclosure not just to the public but within the government/NHS policy-making arena itself.

This cannot be right.

As citizens we are told 'nothing to hide, nothing to fear'. When a government seeks extreme means to protect information with a serious public interest it simply fuels suspicion and distrust that might well be unfounded. To use a high profile example, all medical reports including post-mortem findings in respect of Dr David Kelly are to be classified information for 70 years, leading to the view 'what's there to hide?'

In summary, existing protections are already in place.

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

This can only be answered on a case-by-case basis.

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

The Information Commissioner has highlighted the protections of the current regime and the flexibility of the public interest under exemptions. These would appear to be fit for purpose.

#### 4. CONSIDERATION OF QUESTION 6

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

Yes. Access to information that is in the public interest is key to a healthy democracy. It is of concern that the language used in this question and the evidence in the supporting narrative suggest a political culture that is seeking to discourage scrutiny.

#### 4.1.1 A critique of the wording of the question

The use of the word “burden” in this question is itself a revealing indication of how the responsibilities of public authorities under the Act are perceived by the authors of the “Call for Evidence”. Synonyms for the word ‘burden’ include ‘punishment’, ‘hindrance’, and ‘anxiety’.

Framing this question by the use of the word ‘burden’ rather than the word ‘responsibility’ suggests partiality in the “Call for Evidence”, partiality that views the issue from the perspective of public bodies.

Using the word ‘burden’ closes down the opportunity of seeing the FOIA as a means of enabling citizens to engage in the workings of their government and its agents. Rather than bemoaning the number of FOIA requests, they should be welcomed as a sign that citizens care about what goes on in their country.

Facilitation of the right to vote is not referred to as a burden although considerable resources are required to ensure that the processes of voting operate efficiently. How much cheaper it would be if we restricted the franchise - or did away with it altogether. No sensible person would suggest such a thing - yet restricting the FOIA because of the resource implications is under consideration by the Independent Commission.

#### 4.1.2 Partiality of the narrative

In the narrative that accompanies this question there are references to written evidence provided during post-legislative scrutiny to the FOI Act in 2012. There were 139 submissions of written and supplementary written evidence to the Justice Committee; within those submissions can be found a range of views on the costs associated with the FOIA. Yet the narrative gives prominence to views expressing concern about costs - notably submissions from Kent County Council and the Foundation Trust Network. The narrative fails to note counterpoint evidence that FOIA costs are, for example “reasonable and on a downward trend” (member of the UCL Constitutional Unit).

The narrative also fails to reflect the difficulties over measuring the costs of fulfilling FOIA requests; the UCL Constitutional Unit has suggested that reliable measurement of the costs of FOIA requests is almost impossible and quotes very different average costs across public bodies.

Even referring to “private individuals” as one of the three main groups of requestors rather than ‘member of the public’ or ‘citizens’ lends an air of something secretive and closed rather than open and entirely legitimate.

In summary – this is a loaded question that starts from the premise of cost control of a fundamental democratic right. What value do we place on our democracy?

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

Controls are already in place.

Public authorities already have the means to refuse FOIA requests.

The Information Commissioner in his response to the Independent Commission (16th November 2015) maintains that public authorities could make better use of the provision for vexatious requests under section 14. This should not be seen as encouragement for public bodies to invoke Section 14 as a means of closing down legitimate requestors. It is not unknown for a public body to obstruct access to information in such a way that the requestor has to repeat/clarify their request whereupon the public body accuses them of vexatiousness and closes the matter down.

I would agree with the Information Commissioner that the introduction of a time based charge as a control mechanism would actually encourage poor document and records management systems and act as a disincentive for improving these systems.

In summary, further control mechanisms should not be necessary.

4.3 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 member of the public I am not in a position to know the requests that impose a “disproportionate burden” on public authorities.

However using a “time spent” basis means that the concept needs to be treated with caution. A GP sees 30 patients in morning surgery. Of those, 29 are dealt with in a straightforward manner. The 30<sup>th</sup> patient presents with complex problems. It would clearly be absurd for the GP to complain that the very sick patient imposed a disproportionate burden in that morning surgery, though this would be factually correct if ‘time spent’ were the only metric being used. It would be ludicrous to complain that sick people impose a disproportionate burden on the NHS generally.

Without qualitative data on the nature of requests invoking “disproportionate burdens”, then we are not to know what that information would have revealed and the outcome of that information release. Those requests might actually be those that have a very high level of public interest.

Introducing further controls to facilitate the refusal of a request on the basis of ‘disproportionate burden’ would seem regressive.

It is possible that “disproportionate burdens” could sometimes be those of a public body’s own making: Failure to supply information that openness and transparency would suggest should already be in the public domain; inability to provide information because of out-dated and inefficient data management systems; delays and obstructions that mean a requestor is obliged to keep returning to the same issue.

Drawing on my own professional experience I was aware of what should have been a legitimate, straightforward FOIA request being impossible to meet on the grounds of ‘disproportionate burden’ because of the complete inadequacy of internal records. This, coupled with paternalistic/patronising concerns that the public could not be trusted to have access to healthcare data for fear of misinterpretation, can create unnecessary, time-consuming work in what should be a straightforward process of information-access.

In summary - without access to qualitative data on requests that impose a “disproportionate burden” then this question cannot be answered. It is reasonable to be concerned that requests labelled in this way are actually those that might be of the greatest public interest.

[1] Independent Commission on Freedom Of Information, Call for Evidence

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/472007/ICFOI\\_call\\_for\\_evidence\\_paper\\_web281015.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/472007/ICFOI_call_for_evidence_paper_web281015.pdf) Accessed at 1449 20/11/2015

**Elizabeth Hopkirk**

Dear commission,

FOI has proved itself a really important tool for serious investigative journalists. Their work has benefited society and shone a light in dark places. We must defend this work. Please do not water down the FOI Act.

Yours faithfully

E Hopkirk

**Elizabeth Miller**

I would like the Act to remain as it is. With a ruling class at all levels of government by nature clubby and secretive, with no written constitution, this country really needs this.

I have no hope that my view will be adopted however many people write in the same vein, and I shall continue to be treated by those in power as an enemy with no right whatsoever to know how decisions that affect me and my country are taken.

Goodbye

EJ Miller

**Emilio Casalicchio**

Dear the commission on Freedom of Information,

I write to encourage you not to restrict in any way the Freedom of Information act.

The benefit of public transparency far outweighs the nominal £9m cost, a chunk of which is covered by the savings in expenses since 2009 anyway.

David Cameron often talks of the need to tackle corruption in the world. The Fol act is a great example the UK can set to other nations as having nothing to hide.

When approaching this issue please consider yourselves to be working in the interest of the taxpayer - by whom you are employed and engaged to represent - rather than the civil service and government.

There is no doubt that the taxpayer would prefer transparency in government rather than some petty savings.

In terms of the "safe space" argument, the act helps guard against ministers and civil servants being negatively influenced by lobbying, and in fact makes policy development a safer space for the general public, for whom policy is made.

Kind regards,

Emilio Casalicchio

**Eve Parker**

Please do not curtail our rights to get information. I strongly believe freedom of information requests have added to our democracy and without them we will be back in the dark. I find it very depressing all the things you are trying to push through without us noticing.

Eve parker

**Frances Kay**

Dear Commission,

Having found out today through social media that there is a consultation that expires at midnight tonight, I would like to urge you not to weaken or dismantle the present arrangements for freedom of information to be available to all serious enquirers, regardless of income.

Our success as a nation is partly due to politicians of the past who have felt so passionately on an issue [such as slavery] that they spoke out against the tide of opinion and convinced others to change their views. That passion for communicating seems nowadays to have passed from government to independent investigators. They are the ones who can hold the government of the day up to scrutiny. This is important in a country where citizens might feel disempowered in other ways, and it is also democratic. To charge more money, or restrict access, is on a par with the disregard currently expressed by the Prime Minister for the European Charter of Human Rights].

I am concerned that this consultation has not been given enough publicity. I wonder if there is any will to keep the status quo.

Yours,

Frances Kay

**Fiona Sykes**

Dear FOI Commission,

I hope I am not too late, but I would like to register my disagreement with the proposals to curtail the FOI regulations. I feel that these regulations have been valuable in bringing a certain amount of transparency to Government (eg expenses, privatisation of CDC etc) which otherwise would not have come to light.

Such transparency is what makes democracy worthwhile (I live in Hong Kong which is struggling towards these ideals, and proposals such as reducing FOI and increasing observation on citizens make me despair about this). We are being told we need to be 'observed' due to terror concerns, and we're not guilty we shouldn't worry - if this is the (weak) argument that the government puts forward then please live by it and be subject to the same rules.

As I understand it, the cost associated is small in comparison to advertising and other superfluous items.

I've always been proud to be from somewhere with a rich tradition in democracy and freedom, but am becoming increasingly concerned that this is being eroded.

Kindest Regards,

Fiona

**G Phillips**

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

16th October 2015

I am pleased to outline below my response, as an individual, to the above consultation document.

Question 1: What protection should there be for information 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?

First Question: I am generally satisfied with the approach taken before the March 2015 Supreme Court decision, but please see my responses to Question 2 (first question) and Question 6 (first and second questions).

Second question - No comment.

Third question - No comment.

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?

First Question: I refer to page 9 of this consultation document, last paragraph. The approach taken in Australia, Canada and the United States is worthy of serious consideration (i.e. exclude Cabinet material entirely from access rights legislation).

Second question - Greater protection.

Third question - In principle, between 20 and 30 years.

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

No comment.

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?

First question - Yes, the statement by the Justice Select Committee in 2012, stated on page 14 of this consultation document, seems appropriate.

Second question - I do not have specialist knowledge about this, but the way that the veto has been used in the past seems reasonable. Would it be possible to amend the Freedom of Information Act 2000 so that the veto could be used in future, as it has in the past?

Third question - Not applicable.

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

No comment.

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?

First and second questions - There are increasing budget pressures on public authorities, due to the crucial need to tackle the national financial deficit and debt. In that context controls to reduce the burden of Fol on public authorities could be helpful.

Third question -Yes.

Fourth question - No comment.

Yours faithfully

G Phillips

## **G Rookes**

as a member of the public i can see NO justifiable reason for any alteration in the working of the freedom of information act.it has enabled any of us who wish to keep our 'masters' accountable to expose wrongdoing. any alteration must be seen as a diminution of accountability and a covert means to cover up questionable behaviour!! to have packed the commission with people who believe we have 'no right to know' (jack straw, michael howard etc) is indicative of the tenor in government that its very working is an assault on their 'right' to keep us in the dark!!!

g. rookes

**Gabriel May**

Dear Sir/Madam,

I have been prompted to send this email after reading the latest edition of Private Eye.

I understand that there is an independent commission seeking views on, if, and how, the FOI rules should be changed.

I am a firm believer that decisions made by our elected representatives, and the civil servants who enact government policy, should be transparent and readily available to all citizens whose taxes and democratic votes ensure the continued employment of the aforementioned individuals.

Now, more than ever, the need for transparency is increasingly pertinent in a morally opaque world. We must be able to hold those in power to account. It is a fundamental tenant of democracy, the cornerstone of free speech, and the foundation of a free and fair society that holds aloft a beacon to the world stating tolerance, enlightened thought, and opportunity free from prejudice.

For these reasons I beg to propose maintaining the Freedom of Information Act in its current form.

Yours Sincerely,

Gabriel May

**Geoff Broughton**

Independent Commission on Freedom of Information

Responding to Fol requests is an absolutely essential requirement of public bodies. This service must not be watered down or nominal charges applied.

I personally find the “payments to suppliers over £500” lists on Local Authorities an invaluable resource. This shows when contracts have been let and the value. This would otherwise have been invisible. This ensures that contracts are properly advertised rather than simply rolled over for convenience of the LA project officer. Also, shows that the contract value of the winning bid which demonstrates that the tenders were fairly evaluated by the LA.

I have often sent Fol requests to LAs, Defra and the Scottish Gov. I wanted to know the basis of their decisions or why nothing has been done. These are not vexatious or time consuming, but does make the departments justify in writing what is happening.

There have been Fol requests that have been forgotten, or in the case of Defra, completely ignored!! I have to chase them.

Best regards

Geoff

**Geoff Hewett**

I am a C1 grade civil servant working for the Air Cadet Organisation within the Ministry of Defence. I write to provide evidence in relation to Question 6 set out below:

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?

Amongst a range of other responsibilities I coordinate the Air Cadet Organisation's response to FOI requests. I am supportive of the principle of open government and freedom of information. However, there is a loophole in the current regulations that allows for questions to be asked anonymously leading to abuse of the Act and a resultant unacceptable burden on public authorities such as the Air Cadet Organisation.

Websites such as [whatdotheyknow.com](http://whatdotheyknow.com) allow any member of the public to ask a public body a FOI question with complete anonymity. For an organisation such as the Air Cadet Organisation this has a significant effect. We have around 15000 volunteers, the vast majority of whom are outstanding people who give their time to support young people. Unfortunately a very small minority join a youth organisation for the wrong reasons. Each year we suspend and dismiss a number of these. They can then invent a name and ask repeated unrelated questions to harass and waste the time of the organisation that they see as having wronged them for throwing them out for their misdemeanours. If we go through the tortuous process to successfully identify them as vexatious, the following day they can invent a new name and ask more questions. This wastes large amounts of our time; time we should be spending organising and delivering positive activities for young people. This is surely not what the Act intended.

You sought evidence; I can not give you evidence because the names used on [whatdotheyknow.com](http://whatdotheyknow.com) are often anonymous but the link below is illustrative.

[https://www.whatdotheyknow.com/request/use\\_of\\_different\\_shoe\\_polish#incoming-728393](https://www.whatdotheyknow.com/request/use_of_different_shoe_polish#incoming-728393)

Regards

Geoff Hewett

**Geoffrey Thomas**

I wish to express my grave concern about the intention to limit the FoI Act. This act has allowed scrutiny of the public sector. Thanks to this act we the tax payers have seen how our money has been wasted by MPs by their abuse of expenses. The Act has allowed us as taxpayers to understand the scale of inappropriate behaviour by the Comptroller and Auditor General in his relationships with tax avoiders. These are simply two examples of how the FoI Act has been used to expose abuse. Government and the public sector is the servant of the people and the people have a right and a duty to hold its behaviour to account. This can only be achieved with freedom of information.

Yours faithfully

Geoffrey Thomas

**George Russell**

To whom it may concern,

UK citizens have a right to know everything that is going on with the government, from who is lobbying to who works in what department. I do not want the freedom of information to be curtailed.

Yours,

George Russell

**Gerard McCormick**

In the grand scheme of things this service is well worth the cost involved. I feel much more involved in democracy for having access to the information gleaned from the Public Services.

The services should not be "watered down" if anything it should be extended.

Kind regards

Gerard McCormick

**Grace Murphy**

Dear Sir/Madam

I feel very strongly that we must be able to hold our Government to account.

MPs are elected to represent the views and interests of the electorate. As such, in order to enable us to have visibility on what they actually do, the FOI is an essential tool to obtain such information.

It would not only be a retrograde step for the FOI to be limited or removed but, in these days of noticeably inappropriate behaviour by MPs and other elected/non-elected public officials, it is a crucial part of our being able to hold them and the processes and procedures under which they operate to account.

Do NOT amend or remove the FOI if you value the people's and journalists ability to monitor Government both local and central!

Yours faithfully

Grace Murphy

**Graeme Monteith**

To our Government.

It is an outrageous suggestion that the Act should be amended to restrict the amount of information that we are entitled to access. We pay for government; you are our servants. We are entitled to know what government is up to. One can only assume that you want to keep misdemeanour and incompetence hidden. So much for transparency! As for a senior minister saying that it "is being used to generate stories" - well blow me down! If there wasn't misdemeanour and incompetence there would be no story.

Graeme Monteith

**Graham Brady MP**

**Freedom of Information Act**

Dear Sir/ Madam,

You have asked for views on the effectiveness of the Freedom of Information Act.

The Act was an important milestone in improving transparency in government but this does not mean that it cannot be improved in order to be more effective. It is essential that any changes should aim to enhance the likelihood of extracting worthwhile information from government.

My experience in using the legislation over the last fifteen years has been that the current Act allows the release of trivial information but all too often allows important information to be withheld or obscured. For example it is possible to discover the amount of money spent on biscuits in various ministerial offices; yet too often important enquiries are frustrated on the grounds of 'disproportionate cost' or 'figures not collected centrally.' Another reason given refers to the confidentiality of advice to ministers. Clearly this is sometimes a reasonable obstacle, but not in all cases. I know that the review will consider whether the operation of the act adequately recognises the need for a 'safe space' for policy development and implementation and frank advice. Whilst it is important that the Act shouldn't limit the freedom of officials to think creatively, the aim of the Act should be to release as much information as possible without having that effect.

Finally, if charges are being considered in order to prevent people from using the act for repeated, trivial purposes, it should be with the clear understanding that public bodies should not refuse to respond to reasonable requests on the grounds of disproportionate cost. In some instances, I wonder whether a reasonable charging regime might make it possible to collate and release more information than at present.

Yours faithfully,

Graham Brady MP

**Graham Herold-Bell**

Ladies and Gentlemen,

I ask that the following is considered when a final review of the benefits of Freedom of Information Act 2000 (FOI 2000) takes place:

I am a 60 year old white heterosexual married male, with four children and I run a small business. My Wife and I are home owners and we like to think that we are Community conscious. I have used the Freedom of Information Act on one occasion and am about to do the same again.

CASE 1

In late 2013 Carmarthenshire County Council (CCC) place a redundant Village School on the open market for auction. Members of the Village made enquiries of the Auctioneer and were informed, two weeks prior to the date of Auction, that sale of the building and land had been withdrawn because the Council had discovered that they did not own the land on which the school stood. Further questions directed to Officers and to the local Councillor led the Village being informed that CCC had been 'lobbied' by a Jersey based property company, the sole Director of which is Sir Edward Dashwood and as a result the building and land had been 'handed back' to Sir Edward.

In March 2014 I lodged a Freedom of Information Act request with CCC and within two weeks CCC discovered:

That the School and Land HAD NOT been handed to Sir Edward Dashwood

That the Council WERE in fact owners of the Building and Land

That the Council had/have LOST the Title Deeds and are therefore unable to sell it.

Without FOI 2000 would the value of this asset still remain, not only with the People of Carmarthenshire but also within the UK?

CASE 2

My Wife and I have recently had an offer to buy accepted on a home, also within the Carmarthenshire County Council (CCC) area. The Vendors have lived in the Village for 30+ years and have owned the home we are buying since 1993.

Sale on the property to others had been agreed in late May 2015 and standard search enquiries were made of CCC by the then purchasers.

My Wife and I are advised that in early August 2015 and in response to the search enquiries, an Officer of CCC arrived at the Vendors home. The Vendor was then informed by the Officer that a Public Footpath led straight through the garden, through the Kitchen (but this would be overlooked) and that the Officer was immediately altering the Local Footpath Plan to reflect this 'discovery'. The Vendors were then told that they could apply to have the footpath re-routed around the perimeter of their garden upon completion of an application form and payment of £1,000.00. As a result of this revelation by the CCC Officer the sale 'fell through' and the Vendor suffered a health issue.

When my Wife and I discovered that the property was for sale once more we visited the Vendor and agreed a price to buy (a similar price to the first agreed sale). The Vendor supplied us with copies of the August 2015 correspondence from CCC and we commenced our own enquiries and investigations.

We purchased Ordnance Survey Maps dated 1888, 1906 and 1956. From these it is clear that the original Public Footpath in question NEVER led through the land. Further enquiries show us that NO application to divert the original footpath has ever been lodged nor granted. In the old maps the Footpath is shown clearly crossing the land adjacent which is now an extensive Farmyard with a Mansion styled Farmhouse. It has been suggested by others, but we have not substantiated such suggestion, that the CCC Officer is a family member of the Landowner who owns the Farmyard and Farmhouse.

We will exchange contracts in the next week or so and at this point I intend to make a FOI 2000 request to discover on what grounds and upon what evidence the CCC Officer felt able to alter the Local Footpath plan on 6th August 2015 and what information is on file with CCC prior to that date of alteration.

Without FOI 2000 I would be less able to challenge this apparent injustice.

I trust that the above makes it clear that FOI 2000 is an invaluable in the 'Small Man' v 'Government' tool box, however I am of the belief that it is not a tool to be abused by so called Investigative Journalists looking for a 'Head Line'.

In conclusion: I am FOR retention of FOI 2000.

Sincerely,

Graham Herold-Bell

**Graham Oliver**

To the Independent Commission on Freedom of Information

Dear Sirs,

I am writing to declare my interest in you considering in a positive way the uses of the Freedom of Information Act. I support the Government's declared policy of encouraging transparency, openness and fairness. In turn, FOI supports this in making it possible, often over time, comparisons to be made about such topics as excessive spending of public money on aborted or ineffective projects, e.g. IT in the NHS and HS2; tax avoidance or evasion on a large scale, especially through tax havens; inappropriate actions through often secret, non-competitive tendering for national and local government services, land and privatisation sales, and so on.

Please endorse the retention of the Freedom of Information Act in full, and recognise that it will serve as an important deterrent to those intent on 'cheating' the system, benefiting from their actions and collusions at the expense of all honest taxpayers. It gives me, through those able to openly research the many and varied topics accessible through FOI, the ability to critically judge public organisations, which will surely lead to a better, more open society the majority of the population appear to want.

Please feel free to contact me if you have queries about my request and please add me to your list for circulating information about the progress of your commission's work.

Yours faithfully,

Graham Oliver

## **Professor Harcup, Professor Jonathan Grun, Mark Hanna & David Holmes**

Submission to the Independent Commission on Freedom of Information:

[foi.commission@justice.gsi.gov.uk](mailto:foi.commission@justice.gsi.gov.uk)

Submitted 4 November 2015 by Professor Jonathan Grun, Tony Harcup, Mark Hanna and David Holmes from the Department of Journalism Studies, University of Sheffield.

The Independent Commission on Freedom of Information has called for evidence on six questions about the use and operation of the Freedom of Information Act 2000, which came into force in 2005. Given the very short timescale announced by the Commission, this submission will focus on just one of those questions – Question Six – as that is the one of which we have most direct experience and expertise as journalists, researchers, teachers and indeed as citizens.

However, we do make the wider point that it is far too soon to be able to draw any firm conclusions about how the FOI Act is working. It is certainly inappropriate to be seeking ways of watering it down rather than extending its scope. When introducing the Bill in parliament, the Home Secretary argued that FOI would: “help to transform the culture of government from one of secrecy to one of openness. It will transform the default setting from ‘this should be kept quiet unless’ to ‘this should be published unless’.” (House of Commons, 7 December 1999, <http://www.publications.parliament.uk/pa/cm199900/cmhansrd/vo991207/debtext/91207-12.htm>.) The Commission ought to have no need to be reminded of the strength of that argument, given that the Home Secretary in question was Jack Straw, one of the Commission’s members. Some organisations have expressed concerns that the former Home Secretary may now believe the FOI Act to have made too much information too free (see letter to the Prime Minister by the Campaign for Freedom of Information and others, 21 September 2015, <https://www.cfoi.org.uk/wp-content/uploads/2015/09/FOI-letter-to-PM.pdf>). We merely observe that it is extremely unrealistic to expect to have transformed a centuries-old culture of “secrecy” to one of “openness” in just 10 years.

Question Six of the Commission’s Call for Evidence asks:

“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 question itself is one-sided in talking only – and repeatedly – of “burdens”. The Commission does not appear to have called for evidence of public “benefits” brought about by use of the Act. Even if the public good is restricted to benefits that can be expressed in monetary terms, how much money might those using FOI have already helped save public authorities by uncovering incompetence and wrongdoing, by encouraging the tightening up of procedures, or by acting as a deterrent to wrongdoing? The amount of money saved is probably incalculable, not least for the reason that the Act has only been operational for such a relatively short period of time. But the fact that the question does not even form part of the Commission’s call for evidence seems to suggest that the starting point is to view use of the Act as a problem requiring a solution.

Similarly, Question Six asks if “controls” are needed. Yet there are already myriad controls in the form of absolute exemptions, qualified exemptions, data protection, time-based cost limits and the ability to refuse certain requests as vexatious. Many people with experience of using the Act would argue that there are too many controls rather than too few. However, this issue does not form part of the Commission’s Call for Evidence.

The Call for Evidence document appears to argue the case for fees to be introduced to reduce the “burden” on public authorities by reducing the number of requests. In support of what would amount to a tax on information the Commission states: “During the passage of the FoI Bill, there was an expectation that a fee would be charged for making a request, but that was not implemented.” If there was such an expectation among certain people in positions of power at the time, there was certainly no such expectation among those who had spent decades arguing for the introduction of freedom of information measures as a public good. Had charges been proposed it would have been a highly controversial move. And had charges actually been introduced they would have reduced the effectiveness of the legislation from the outset.

Since the Act came into force journalism students at the University of Sheffield have been taught how to use it to uncover information in the public interest. They are taught to use it responsibly, not frivolously, and as an additional mechanism for seeking and checking information rather as a substitute for other reporting methods. As a result of their use of the Act they have revealed important information, first as students, then as students on work experience in newsrooms, and subsequently in their careers as journalists. (For some examples and background, see ‘Universities as evangelists of the watchdog role’ by Mark Hanna in *Investigative Journalism*, edited by Hugo de Burgh, Routledge, second edition, 2008.) One of our graduates has gone on to become a freedom of information specialist, establishing the FOI Directory as a public resource (see [www.foi.directory](http://www.foi.directory)). The development of such expertise in using the Act to uncover information in the public interest would have been severely hampered, if not rendered impossible, by the introduction of fees for FOI requests. The same applies to the imposition of charges for

internal reviews, appeals to the Information Commissioner and so on, as this is an integral part of how the Act operates.

Within the journalism industry FOI has been used effectively by journalists working for news organisations that have no budget for investigative journalism. They have been able to use freedom of information to explore important issues and bring them to public attention precisely because there was no fee for making an FOI request. To give just one example, a South Yorkshire journalist at a cash-strapped weekly newspaper with no budget for investigative journalism managed to use FOI requests to a range of relevant authorities over an 18-month period to investigate alleged misuse of public money, eventually winning the Paul Foot Award for her efforts. Without FOI she would not have been able to find the evidence to have put the story into the public domain, and if charges were introduced it would render such careful and evidence-based reporting much less likely in the future. (For details see Chapter Five of *Journalism: Principles and Practice* by Tony Harcup, Sage, third edition, 2015.)

Over the past decade journalists working for organisations large and small, at a national or local level, have used the Act to place hundreds of stories into the public domain, many of which would not have seen the light of day if charges had been introduced. For numerous examples see the following selections:

[www.pressgazette.co.uk/freedom-information](http://www.pressgazette.co.uk/freedom-information)

[www.holdthefrontpage.co.uk/category/foi/](http://www.holdthefrontpage.co.uk/category/foi/)

[www.bbc.co.uk/news/correspondents/martinrosenbaum](http://www.bbc.co.uk/news/correspondents/martinrosenbaum)

[www.foi.directory/category/updates/local-2/](http://www.foi.directory/category/updates/local-2/)

Which of these stories would it have been in the public interest to have stifled at the outset by imposing charges on FOI requests or subsequent reviews and appeals? And which might be regarded as being a misuse of the Act, in the unfortunate phrase used during the current period of consultation by Leader of the House of Commons Chris Grayling, when he said of FOI: “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” (<http://www.publications.parliament.uk/pa/cm201516/cmhansrd/cm151029/debtext/151029-0002.htm>)?

It is true that a few of the largest news organisations may not be dissuaded from using FOI by the introduction of charges. But the reality for most journalists is that a charge will effectively prevent them from accurately reporting many things that it is in the public interest for us to know. That is particularly likely to be the case in the beleaguered local and regional media, meaning that the very news organisations closest to the hearts of local communities will be denied one of their most

valuable means of serving such communities. How could that be argued to be in the public interest?

If journalists working for mainstream news organisations are likely to be inhibited from using FOI by the introduction of charges, it is even more likely that those people producing local and “hyperlocal” news services online will be priced out of making FOI requests. Such sites are often run by interested citizens giving up their time and receiving little or no income, performing a valuable function on behalf of local communities that has been described as “monitorial citizenship”. Key to those sites that produce evidence-based reporting on public matters has been FOI, and it would seem to run counter to the public interest to take this crucial tool away from them after they have had such a brief opportunity to make use of it. (For details of how such sites use FOI to serve the public see ‘Alternative journalism as monitorial citizenship? A case study of a local news blog’ by Tony Harcup, *Digital Journalism*, 2015; and ‘Deliberative manoeuvres in the digital darkness: e-democracy policy in the UK’ by Giles Moss and Stephen Coleman, *British Journal of Politics and International Relations*, 2014.)

Evidence from the Republic of Ireland suggests that the imposition of a fee will put people off using freedom of information legislation, which is one of the reasons that Ireland scrapped its 15-euro charge in 2014. Announcing that move, the Minister for Public Expenditure Brendan Howlin said that removing the charge would “allow our citizens access to information on a level par with best practice across the OECD. After all, information and data are the currencies of the new age.” (See <http://www.rte.ie/news/2014/0701/627761-freedom-of-information/>.) Does the Commission really wish to travel in the opposite direction?

The imposition of a charge will clearly act as a deterrent for many general citizens as well as for many journalists, particularly those working for regional, local and hyperlocal media and in specialist areas as such health and the environment. The users of the Act least likely to be hampered by the imposition of charges are commercial users requesting information for commercial reasons. Would it not be a sad state of affairs if freedom of information only applied to those who could afford to pay?

A similar point applies to any plans to impose charges on reviews and appeals, which are sometimes vital to the process of teasing out what information ought to be released and what might genuinely be confidential. Restricting reviews and appeals to those who can pay is unlikely to deter commercial users – or publicly-funded authorities appealing against an Information Commissioner decision in favour of disclosure – but is going to hit other citizens, including journalists researching stories in the public interest.

Our experiences and observations as practitioners, scholars and teachers of journalism is that the first decade of the FOI Act has resulted in countless revelations in the public interest and that this form of journalism will be greatly diminished by the imposition even of “modest” charges.

There is little or no research into users’ experience of using the Act, and our experience (and that of the ICO) is that some public authorities - including Ministries - are not in all instances complying with the current FOI law in terms of responses and offering “advice and assistance” under section 16 of the Act. So to weaken the law in terms of their obligations to provide information or such advice could well mean that those recalibrated, less onerous obligations are not met either. If the Act’s requirements on public authorities to release information are weakened, there is a risk that all their information management systems will decline in quality. At present the knowledge that a broad range of information is regularly asked for under FOI causes them to publish such material routinely anyway, but if FOI requests become less frequent because of charges levied or because the law is changed to give them less likelihood of success, then public authorities will have less incentive to keep their information management systems of good quality, and less information will be published routinely. Therefore the public would experience a “double whammy” in terms of loss of transparency.

The Government has no electoral mandate to weaken FOI law. In fact, the Conservative manifesto said: “Transparency has also been at the heart of our approach to government.” It did not mention any plan to weaken FOI law (<https://www.cfoi.org.uk/2015/04/foi-manifesto-commitments/>). The manifesto also said that press freedom would be defended. But to introduce charges for FOI requests would mean that many local newspapers, which already face tough economic conditions to survive, would cease to make such requests or make fewer of them.

The public should not be charged for making an FOI request if it does not require more than 18 hours work from a local public authority to find the information. That is the current law. The public already pays in taxes for the collection and storage of such information, in that one way or another it funds all public authorities.

Finally, if complying with the Act is placing a burden on public authorities then one of the most effective ways of reducing such a burden is for them to publish as a matter of routine far more of the information they hold, thereby rendering FOI requests unnecessary in many cases. This ought to be happening if the shift in default setting envisaged during the passage of the original Bill is becoming reality. But the evidence suggests that 10 years is far too short a time for such a shift to have happened fully.

Submission by:

Professor Jonathan Grun (Professional Chair in Journalism);

Tony Harcup (Senior Lecturer);  
Mark Hanna (Senior University Teacher);  
David Holmes (University Teacher).  
Department of Journalism Studies,

**Harry Knight**

Dear Sirs

I understand that there are proposals for changes to be made to the Act, and whilst I am in favour of any changes to increase the amount of information made available I certainly do not wish anything introduced to diminish the current existing levels.

In an age when trust in our government and it's paid officers and administrators is at a very low level, the taxpayers need some mechanism for ensuring that our money is being spent wisely and that persons who use the system for personal gain are rightly identified and dealt with.

Indeed the leadership of the public spending watchdog meant to monitor this was itself exposed for abusing the system.

A few examples of Fol exposure are:

Former Armed Services senior personnel working for procurement suppliers on retirement.

The very low UK tax paid by large companies through the facility of offshore tax havens.

Police attempts to cover up their botched investigations and treatment of whistleblowers.

Treatment of NHS whistleblowers and the true high cost of PFI contracts and IT suppliers.

The volume of UK properties now owned by foreign offshore investors and companies.

The introduction of open hospitality registers The MP's expenses scandal.

I am no radical nor do I have any political agenda, but I feel very strongly that unless we have a means of keeping tabs on the honesty and integrity of our administrators sadly we will only increase the spiral of distrust.

Indeed I believe that this is reflected in the volume of people actually bothering to vote.

Harry Knight

**Hayden Elliot**

Dear Sirs

I am writing to express my concerns that changes may be made in the future to the Freedom of Information Act.

I consider the act to be an invaluable tool to hold authorities to account and urge that it not be amended in any way.

Best Regards

Hayden

**Heather Brooke**

Submission to the Independent Commission on the Freedom of Information Act

Professor Heather Brooke

Tom Felle

Jonathan Hewett

Department of Journalism City University London

12 page document needs inserting. Security properties prevent it being copied?

**Henry Longden**

Dear whoever it may concern,

I would like to express my support for the current Freedom of Information Act in the UK. As a citizen I find it vital part of our democracy for anyone to have access to information held by public bodies. To put any further limit or charge on this information would take it away from being an equal right, to become the right of those who can afford it.

I hope this is clear and helps you in your commission.

Best,

Henry Longden

## **Hilary Macaskill**

To Members of the Commission,

Having studied the survey on the Freedom of Information Act, I must complain about the form that it has taken.

It appears – in common undoubtedly with many surveys – designed to either elicit the answers required or, failing that, to obfuscate so that the respondent is disheartened, confused or likely to abandon the attempt to fill it in.

The respondent is required to know a good deal about the current operations of FOI to be able to answer the questions.

The survey does not help by putting its questions in context.

Five out of the six questions actually comprise two, three or four questions (sometimes in conflict with each other), which impedes straightforward answers.

And some questions are loaded. The last one is strikingly so, in the phraseology used. The 'burden' imposed on public authorities is used four times in the final question. 'Duty' would be a more appropriate word, don't you think?

I resent the use of energy, time and money that has been employed in drawing up these convoluted, weighted and sometimes misleading questions in an attempt to bludgeon through a change to what is a very serviceable act.

The Freedom of Information Act is an institution to be proud of and one that has increased and improved public knowledge on many issues that hugely affect us, some of them crucial (for example, disclosure of the lobbying against a ban on pesticides). It is certainly legitimate to have a discussion about it, but an open one rather than that represented here.

The Government has a long statement about transparency on the gov.uk website. This consultation looks like an example of how to get round that inconvenient commitment.

Yours faithfully,

Hilary Macaskill

**Huw Sherlock**

To whom it may concern,

The introduction of FOI legislation represents a rare and unheralded expansion of access to the democratic process for the ordinary citizen in the UK. It is fundamental to the functioning of a democratic society that the institutions governing everyone's lives are subject to clear, principled and unfettered scrutiny. Before the FOI it was almost impossible for anyone subject to unjust, arbitrary or corrupt treatment to find out why, who or what was behind this. As a nation we are stronger by being able to hold our legislators to account. Without FOI issues such as the unjustified claims made in the name of parliamentary expenses would never have come to light, even with it it took considerable time, effort and persistence in the face of concerted efforts to cover up the truth. Any attempt to water down, circumscribe or introduce charges for the cost of operating FOI must be strenuously resisted.

I look forward to seeing the results of the commissions deliberations. Let's hope it doesn't require an FOI request you find out what was discussed, and who is in favour of hamstringing this invaluable addition to our national life,

regards,

Huw Sherlock

**Ian Brocket**

As a result of being able to access information freely from past Government related activities we are able to expose where the system is being abused and apply corrective action. There must be no restrictive changes which would make it more difficult or expensive to access information as this will enable abuse to flourish and make society weaker and more divided.

The commission must find in favour to continue the good work and consider ways to improve the access to free information.

Regards

Ian Brocket

**Ian Hardiman**

Good evening,

I believe the current foi act is extremely useful and without it I ( and the general public) would not know what expenses our MPs claim. As such any review should not result in the foi powers being watered down.

Regards

Ian Hardiman

**Ian Marley**

I used to work in Local Government and saw the work involved with Freedom of Information requests. Those working in this area were happy with the process and saw its value for the public. Good information management systems and communication reduce the time taken for requests.

The problematic requests came from journalists looking for a cheap stories and businesses who wanted access to information for commercial purposes. These interests do not have to be declared but it is often easy to detect the origin by the nature of the request.

I would support the continuation of the Freedom of Information in its current form.

If Freedom of Information requests are considered a financial burden (this government knows the price of everything and the value of nothing) then they should consider a nominal charge for public requests and a commercial rate for those who will ultimately profit from the information they receive.

Regards

Ian

**Ian Salisbury**

Dear Sirs,

In both my professional practice as a chartered architect and as a private individual I have made extensive use of the provisions of the Freedom of Information Act ("the Act"). As a former member of the Architects Registration Board, which is subject to the provisions of the Act, I have gained an understanding of operation of the Act from the other side of the fence. This email is submitted as evidence to the Commission.

Deliberative space

Protection of the formulation of government policy under the Act is broadly covered by section 35 of the Act. The protection of some kinds of evidence loses protection once a decision has been taken, but all else retains absolute protection. The distinction appears to me to be apposite, but is decided at first instance unavoidably by the information provider and is therefore de facto open to abuse.

Example 1 – s.35(1)

On 12 January 2011 I wrote to the Cabinet Office as follows:

Informing the Public Bodies Bill

I understand from a communication between [the Dept. of Communities and Local Government] and the Architects Registration Board that so as to inform the Public Bodies Bill, last year the CLG made a return to you assessing the Architects Registration Board against three tests and departmental objectives.

Please identify and provide me with a copy of the request for this information that was sent by the Cabinet Office to the CLG.

Please identify and provide me with a copy of the return made in reply by the CLG in respect of the Architects Registration Board.

The Cabinet Office was late in replying. Reminders were sent on 10 February, 2 and 7 March. In the last letter, I asked for the matter to be reviewed. On 29 March an apology for the delay was sent. A response was sent on 4 April, the substantive reply being:

The Coalition Government is committed to increasing the accountability of public bodies, and this involves reducing their number and their cost to the taxpayer. To take this work forward, Cabinet Office and HM Treasury worked closely with departments to look at all public bodies to make decisions about whether the functions they carry out should continue. Where it was decided that a function should continue, we applied three tests in order to assess whether it should continue to be carried out by a public body:

does that body perform a technical function?  
does it need to be politically impartial?  
does it act independently to establish facts?

The Cabinet Office proposed that the Architects Registration Board be retained as a NDPB on the grounds of impartiality. In reply, CLG agreed with this assessment.

This exchange between Cabinet Office and CLG was via ministerial correspondence and as such we will not be releasing the documents as the exemption at section 35 (b) around ministerial communications is engaged.

On 4 April I wrote to say that the exemption relied upon does not entitle the Cabinet Office to absolute exemption, and I asked for reasons why the public interest in maintaining the exemption outweighed the public interest in disclosing the information. The following reply was sent on 4 June:

Firstly I apologise for the delay in responding to you. The Cabinet Office's performance under FOI has not been as it should. We have recently signed an undertaking with the Information Commissioner to improve our performance and are currently implementing a plan to do this over the next few months. A specific reason for the delay is that your original request did not reach the appropriate team within Cabinet Office until your most recent follow up message of March 2011. I therefore agree that, in taking longer than 20 working days to reply to you, the Cabinet Office did not comply with the act.

I have taken a fresh look at the response to your request, and considered whether the Cabinet Office was correct in applying the exemption it did, whether the public interest considerations were correctly identified, and whether the decision was the correct one.

Your original request was:

... [see above] ...

Information was originally withheld under the exemption in section 35(1)(b) of the Act. Under this exemption, information can be withheld if it relates to Ministerial communications. In this case, the information held falling within the scope of your request was contained in correspondence between Ministers from the Cabinet Office and the Department for Communities and Local Government.

I find that the Cabinet Office correctly applied s.35(1)(b) of the Act in withholding this information. The exemption is engaged because the information held is contained in communications between Ministers of the Crown.

Section 35 is subject to the public interest test. Public interest arguments for and against disclosure of the information held should have been included in the response letter to you. In this case, the public interest arguments in favour of disclosure are:

Greater transparency makes government more accountable to the electorate and increases trust

As knowledge of the way government works increases, the public contribution to the policy making process could become more effective and broadly-based

The specific information held relates to policy development that has a significant impact on the lives of citizens and there is a public interest that the deliberations which produce these policies are transparent

The public interests in favour of withholding the information are:

Good government depends on good decision making and this needs to be based on the best advice available and a full consideration of all the options without fear of premature disclosure

Ministers and officials also need to be able to conduct rigorous and candid risk assessments of their policies and programmes including considerations of the pros and cons without there being premature disclosure which might close off better options

Disclosure of interdepartmental consideration and communications between ministers may undermine the collective responsibility of the government

The specific information held would not be in the public interest as disclosure of the discussions between ministers and their advisers would weaken their ability to discuss controversial and sensitive topics freely and frankly and this would have a damaging effect on the quality of their discussions. The candour of all involved would be affected if discussions were routinely made public. The quality of debate underlying government policy making would decline and badly-informed and unsatisfactory decisions would ensue.

After weighing up the competing public interest considerations I have determined that, in all the circumstances of the case: the public interest favours withholding all the information held under s.35(1)(b) of the Act.

By the serial delays, and by the application of the exemption, I was not informed of information that may have given me evidence on which I could lobby parliament as the Bill progressed.

The Bill had been introduced in the House of Lords in October 2010, and came into force a little over a year later. I thought that this was unsatisfactory. I also thought the review was unsatisfactory as it failed to provide any reasoning.

Although it would be wrong to reach a conclusion on the basis of a single application of an s.35(1) exemption, I felt that the framework allowed the Cabinet Office to dodge a perfectly reasonable request for information. I would like the Commission to take this exchange into account so that it may recommend changes which remove temptations from government departments to abuse the process.

Example 2 – s.27(1)

On 11 February 2011 I wrote to the Department for Communities and Local Government. This information was relevant to me because I was engaged in consultation with the European Commission, responding to the Consultation Paper by the DG Internal Market and Services on the Professional Qualifications Directive 2005/36. In my email to the DCLG I said as follows:

I refer to the EU Pilot Project Case 197/08/08/ MARK - DCLG; Market Services - Conformity of the Architects Regulation 2008.

When applying Community Law (Applying Community law [COM(2007) 502

final]), it is the Community's view that the EU Pilot project, which has been operating since April 2008, has had a measure of success. It has the aim of providing quicker and fuller answers to questions, and solutions to problems arising in the application of EU laws – particularly those raised by citizens or businesses – requiring confirmation of the factual or legal position in a Member State with a view to improved communication and cooperation between Commission services and Member State authorities on issues concerning the application of EU law.

This particular Pilot project was one of the first to be instituted and it is disappointing that, unlike many others, it has yet to be concluded.

I would be grateful therefore if you would provide me with the following information.

1. Please provide all the dates when the European Commission has requested information or other action by the United Kingdom under this Pilot project.
2. For each request so made, please state whether the United Kingdom was requested to reply within a given time. (If this is a matter of general application of Pilot procedure, please state it.)
3. For each request so made, please state when it was that the United Kingdom provided its full and substantive reply, providing the information requested or giving assurances concerning future action.
4. In every instance where assurances have been given concerning future action, please outline the nature of the assurance given and describe the intended action and the dates by which such action would be taken. With this information, please do not omit to provide information concerning the public consultation that was promised to take place some time ago, but which has yet to commence.

I was sent a response on 11 March. I was told:

I note that you do not specifically request release of the documents in question, but ask for disclosure of specific information that may be contained within the documents that the Department holds.

I can confirm that I am able to provide you with some of that information that you have requested in response to part 1 of your question. Enclosed with this letter is a table indicating dates on which the Commission and the UK Government have exchanged communication in relation to the relevant Pilot Case Project. We note for clarity that this includes any communications to which the UK was obliged to respond, as we deem this to constitute action as set out in your request.

I wish to advise you however that the information requested under items 2, 3 and 4 of your request cannot be disclosed for the reasons given below.

The content and information of the communications between the Commission and the United Kingdom is being withheld as we consider that it falls under the exemptions in sections 27(1)(b) of the Freedom of Information Act 2000.

Section 27(1)(b) provides that information is exempt information if its disclosure would, or would be likely to, prejudice relations between the UK and any international organisation or international court.

In applying the exemption at section 27 we have had to balance the public interest in withholding the information against the public interest in disclosing the information. In this case, you have requested information that remains relevant to possible future legal proceedings between the European Commission and the Government of the United Kingdom, and on balance we have come to the view that the public interest is not best served by releasing that information at this time.

We acknowledge the general public interest in disclosure of public documents such as these in order to better inform the public about the issues being considered and progress of investigations conducted by the EC. However, there is a very strong countervailing public interest in withholding documents relating to an ongoing investigation since disclosure would, in our and the Commission's view, adversely affect the protection of the public interest and have negative impacts on the conduct of the investigation by the Commission. Both the UK Government and the Commission need 'space' free from the public gaze in which to conduct their discussions and negotiations on how best to resolve their differing positions. We have therefore taken the view that that release of this information could prejudice relations between the UK and the European Commission, an international organisation (section 27(1)(b)).

We note that the Consultation on the proposed amendment to the Architects Act 1997 was launched on 1 March 2011 and we can confirm that it is planned that the subject to the result of consultation the amendment will be made in May of this year.

Being not satisfied by this reply, on 11 March I wrote asking for an internal review, saying:

My complaint is based upon the misapplication of section 27(1)(b) of the Freedom of Information Act 2000. I accept that information is exempt information if its disclosure under this Act would, or be likely to, prejudice relations between the United Kingdom and the European Commission. However, the information that I have asked for does not include any information that is not expressly and explicitly known by both parties to the correspondence.

The disclosure of this information cannot therefore by any ascertainment prejudice relations because there is nothing that could possibly be disclosed by DCLG that is not already known by the EC.

Please review this request and provide the information promptly as the Act requires. Please do not, as appears to be your practice, extend the period for reply to the full extent of the permissible period without good reason.

If there is good reason to delay the production of this information to the full extent of the permissible period, please kindly disclose that reason or reasons to me as part of this request for information.

A reply was given to me on 8 April. It said:

... I have concluded that R... H...’s handling of your request followed due process and that his decision not to disclose some of the information you requested was justifiable and, therefore, correct. His original decision should, therefore, be upheld. My judgement is based on the following considerations:

With regard to the handling of your request, my conclusions are as follows:

R..... advised you, correctly, that the Department holds the information that you referred to, and he catalogued it by date, as you requested;  
He gave you a full description of the (qualified) exemption that was the basis for his refusal to divulge some of the information you requested - in this case, Section 27(1)(b) of the Freedom of Information Act 2000 which states that information is exempt information if its disclosure would, or would be likely to, prejudice relations between the UK and any international organisation or international court;  
He provided you with a full explanation of why he believed that this particular exemption applied to your request;  
In so doing, he referred, and paid due regard, to the requirement that he should consider the public interest in either disclosing, or withholding, the information you requested;  
He explained to you your right to request a review of his actions and decisions, and your right to approach the Information Commissioner;  
He replied to you within the required timeframe - 20 working days.

This leaves the question as to whether R..... H..... was correct to apply the Section 27(1)(b) exemption as his justification for withholding some of the information you requested. On this specific issue, my judgement is as follows:

I accept your point that all of the parties to the negotiations surrounding this matter are fully and equally cognisant of the content of all the relevant correspondence and papers. In the circumstances, however, this argument is immaterial and does not provide sufficient cause or reason to ignore and circumvent the Section 27 exemption.

In my view, the key issue is whether the parties to these communications would be willing to allow their common knowledge to be shared with the world at large. My reading of the documentation in question indicates that is clearly not the case. As R..... H..... pointed out in his reply, both UK Government officials and their international counterparts should be able to rely on the reasonable assumption that they can conduct their business outside the public gaze – especially where that business impinges on possible future legal proceedings between the European Commission and UK Government.

There remains the issue as to whether the public interest in withholding the information in question, for the reasons described above, is trumped by the public interest in disclosure of that information e.g. on the grounds of transparency and accountability.

In my judgement, and in the circumstances under review, participating officials have the right, where judged appropriate, and having applied the public interest test, to keep such inter-administration deliberations and documentation out of the public domain.

By the application of this exemption, I was not informed of information that may have given me evidence on which I could engage in consultation with the European Commission.

I thought that this was unsatisfactory. I also thought that the reasons given for not providing the information were unsatisfactory as it failed to provide any reasoning.

Although, as with my earlier example, it would be wrong to reach a conclusion on the basis of a single application of an exemption, I felt that the framework allowed the DCLG to dodge a perfectly reasonable request for information. I would like the Commission to take this exchange into account so that it may recommend changes which remove temptations from government departments to abuse the process. There was no substantive reason for not providing this information – the reason given was purely technical and it was not satisfactory.

### Example 3 – s.42(1)

On 12 November 2010 I wrote to the Department of Communities and Local Government. The information I was requesting was important because Government had abandoned its stated intention of abolishing the Architects Registration Board, and I wanted to know why. I said as follows:

Concerning the "List of quangos to be abolished, retained, under consideration and merged" published by the Government in October 2010, in connection (only) with the Architects Registration Board that is shown to be retained, please identify and provide copies to me of:

1. The original decision to retain ("the decision") showing all head notes and end notes, face sheets and end sheets, and in particular the identity/(ies) and/or office description(s) of the decision taker(s).
2. All briefing papers / emails etc informing the decision, showing in particular the authorship of each paper / email etc.
3. All internal Government meeting notes and/or minutes relevant to and/or informing the decision identifying those attending.
3. All relevant meeting notes and/or minutes between the Government and / or its officers with the Architects registration Board and/or

its officers (executive, appointed or elected) identifying those attending;

4. Telephone conversation notes between the same identifying the participants;

5. Correspondence whether by mail or email between the same identifying the correspondents;

6. All representations relevant to the decision made to the Government its ministers or its officers by individuals, organisations or by or through Members of Parliament (of both houses).

In respect of the redaction of information, for instance a redaction of the names of private individuals, please justify any such redaction by reference to the relevant statute. In respect of any exemption, please identify the information exempted and the justification for its exemption.

Please note that none of the above request relates to the formulation or development of Government Policy. It is a request for information about a decision and the formulation of that decision.

A substantive reply was sent to me on 10 January 2011. It said:

I wish to advise you however that some of the information cannot be disclosed.

We hold one piece of correspondence from a member of the public enquiring as to whether Government intends to review the role of the Architects Registration Board which we have decided not to release under Section 40 of the Freedom of Information Act – fairness of disclosure of personal information – and section 41 – information provided in confidence, disclosure of which would, or would be likely to lead to an actionable breach of confidence. Whilst there is public interest in releasing correspondence to Ministers, in this instance given the private nature of the correspondence the correspondents request for confidentiality merits it be withheld.

The remainder of the information falling within the terms of your request is exempt from the right of access under the Act by reason of three sections of the Freedom of Information Act 2000.

Section 35            Formulation of Government Policy

Section 35(1)(a) – which provides an exemption for information relating to the formulation and development of Government policy – is a qualified exemption which means that, for information falling within the exemption, we are required to assess whether the public interest is best served by releasing the information or maintaining the exemption.

There is a general public interest in the information held by public authorities being made publicly available. This helps increase accountability and transparency and promotes confidence and trust in the way that government considers policy options and takes decisions. It also helps to provide as full and open account as possible of the government's work in developing policy and in demonstrating that the government's consideration of policy options has been comprehensive and appropriate.

However, there is a strong public interest in Ministers and their officials being afforded the appropriate degree of private thinking space in which to consider and advise on a range of policy options and in which to formulate and take decisions. Without the appropriate degree of thinking space it is likely that concern about the release of information about policy development and formulation would lead to Ministers and officials being less likely to give the necessary degree of thorough consideration to the full range of policy options, particularly where these are less palatable, and in turn this would result in less effective policy making. In this particular case we must judge how exposing the considerations behind policy formulation might adversely affect the UK's on-going policy development, and whether doing so would be in the public interest.

On balance, and in all the circumstances of this particular case, the Department has concluded that the public interest is best served at this time by maintaining the exemptions as described above and in not releasing some of the information you have requested.

Within your request you state that documents relating to a decision which has already been taken should not be considered as falling under this exemption. However, for the reasons given above we do believe that where relevant the exemption does apply to the documents withheld.

#### Section 40 Personal Data

[I considered this part of the reply, which attached to only a small amount of information, as reasonable. I have not therefore reproduced it.]

Section 42      Legal Professional Privilege.

Section 42 – which provides an exemption for information for which a claim to legal professional privilege could be maintained in legal proceedings – is a qualified exemption which means that, for information falling within the exemption, we are required to assess whether the public interest is best served by releasing the information or maintaining the exemption.

There is a strong general public interest in disclosing the legal justification and considerations underpinning the actions of Government.

However, it is also recognised that there is generally a very substantial public interest in maintaining the confidentiality of legally privileged material, and that as such equally weighty factors in favour of release must be present for the public interest to favour disclosure.

On balance, and in all the circumstances of this particular case, the Department has concluded that the public interest is best served at this time by maintaining the exemptions as described above and in not releasing the information in the documents described in the attached table which fall within the scope of your request.

In asking for a review, I said:

My complaint is that the application of the statutory exemptions [in] your reply so as to refuse to disclose information is evidently excessive from the paucity of information provided, and the reasons given in justification are so insufficient that it is not possible to ascertain whether or not they have been properly applied.

The review, when I received it on 4 February, said:

R [REDACTED] H [REDACTED] advised that some of the information that was held by the Department could not be released under section 35(1)(a) (for information relating to the formulation or development of government Policy), section 40(2) (for information that is personal data and where disclosure would breach any of the data protection principles in the Data Protection Act 1998 ["DPA 1998"]) and section 42 (for information to which a claim to legal professional privilege could be maintained in legal proceedings) of the FOI 2000.

On the same day you e-mailed the Department asking for an internal review. You advised that the lack of information provided and the reasons for so doing were insufficient as to ascertain whether they had been properly applied.

Appeals officer's response

Section 35

As R [REDACTED] H [REDACTED] highlighted in his response, section 35(1)(a) provides an exemption for information relating to the formulation or development of government policy. I am satisfied that the information in question, as it related to policy decisions in respect of the Architects Registration Board which, at the time of the creation of the information, had not been taken, fell within the section 35(1)(a) exemption which was, therefore, correctly cited.

Section 35(1)(a) is a qualified exemption which means that for information falling within this exemption the Department is required to assess whether the public interest is best served by releasing the information or maintaining the exemption.

There is a general public interest, embodied by the FOI 2000, in information held by public authorities being made publicly available. This helps promote accountability and transparency and helps ensure that the public is informed and therefore able to engage in an informed way in matters of policy development. In turn this helps build public confidence and trust in the way that government considers policy options and takes decisions.

However, as R [REDACTED] H [REDACTED] highlights, there is a strong public interest in Ministers and their officials being afforded the appropriate degree of private thinking space in which to consider and advise on a range of policy options and in which to formulate and take decisions. Without the appropriate degree of thinking space it is likely that concern about the release of information about policy development and formulation would be likely to lead to Ministers and officials feeling constrained in their ability to give the necessary degree of thorough consideration to the full range of policy options, particularly where these are less palatable, and this would result in less effective policy making.

In this particular case, in addition, the Department was required to consider how exposing the considerations behind policy formulation might have adversely affected the ongoing implementation of the policy decision, and whether doing so would be in the public interest. While the discussions related to this policy decision have concluded, the Department continues in its sponsorship role of the Architects Registration Board in line with Ministers' expectations which will include in the near future undertaking a review of their Framework agreement and ultimately a triennial review of their function and whether they remain as a body fit for purpose. The advice provided last year therefore remains live and relevant to on-going policy work now and in the future. In view of this I conclude that the thinking space in respect of this information remained important at the time of the response to your request and continues to do so.

I am satisfied that the arguments in both respects were considered fully by the Department and that release of the information would have been likely to have the adverse effect mentioned. I therefore consider and conclude, having taking account of all the circumstances of this particular case and with reference to your comment that with the decision having been already made, that the public interest was best served at the time of the response to your request by maintaining the exemption above and in not releasing some of the information you have requested.

Section 40 Personal Data

.....

## Section 42 Legal Professional Privilege

Section 42(1) provides an exemption for information for which a claim to legal professional privilege could be maintained in legal proceedings. Generally, for information to fall within this exemption, it must consist of or relate to communications between a lawyer and client for the predominant purpose of seeking advice or litigation. I am satisfied that the exemption was correctly applied to the relevant information in this case.

Section 42(1) is a qualified exemption which means that, for information falling within the exemption, the Department is required to assess whether the public interest is best served by releasing the information or maintaining the exemption.

The more general arguments why the public interest is served by releasing information held by public authorities I have already referred to. These also apply to this information of course. There is also a public interest served by ensuring that the public is able to be reassured that the decisions made by government are taken, where appropriate, in the light of relevant, appropriate and effective legal advice.

However, there must therefore also be a strong counter argument that government must be able to seek and receive legal advice within the appropriate degree of private space. The principle of confidentiality in the lawyer and client relationship is well established and understood and there is generally a very substantial public interest in maintaining the confidentiality of legally privileged material. As such there must be at least equally weighty factors in favour of the disclosure of such legally privileged information if the public interest is to favour disclosure.

I consider, on balance and taking account of all the circumstances of this particular case, that there were no significantly strong arguments that would have merited the disclosure of the legally privileged information in this case and that the public interest was best served at the time of the response to your request by maintaining the exemption as described above and in not releasing the information.

By the application of these exemptions, I was not informed of information that may have given me evidence on which I could have brought to the members of my profession in the architectural press. I felt the reasons given were unsatisfactory. It was clear from the reply that the departmental concern was that the information, if provided, might inhibited the implementation of policy. This is not a valid exemption. Secondly, I am sufficiently well informed to know, with reasonable confidence, that there were no legal proceedings to which section 42 might have been applied.

Although, as with my earlier examples, it would be wrong to reach a conclusion on the basis of a single application of an exemption, once again I felt that the framework allowed the DCLG to dodge a perfectly reasonable request for information. I would like the Commission to take this exchange into account so that it may recommend changes which remove temptations from government departments to abuse the process. The problem of course is that in cases such as this where malfeasance is suspected, the person who is requesting the information finds that the decision to refuse it is taken by the people who by any description would fail the judicial test of bias. That, I believe, is not satisfactory.

Answer to Question 1.

Although protection of the internal deliberations of public bodies may in some instances be justified, the process of achieving that protection is flawed because it is administered by the very people who might seek to achieve that protection. This is unsatisfactory. I have no objection to the current legislation as it stands, but I the operation of the exemptions should be removed from those who seek to apply them.

Collective responsibility; Question 2

I have no observation to make on this question, being insufficiently informed to do so.

Risk assessment; Question 3

I have no observation to make on this question, being insufficiently informed to do so.

Cabinet veto; Question 4

I have no observation to make on this question, being insufficiently informed to do so.

Enforcement and appeals; Question 5

No provision of the Act should ever be exempt from judicial oversight. The review process is a waste of time and should be abandoned because, even if it is not biased, it appears to be. My

suggestion is that if a requestor is dissatisfied with the information provided then there should be a period of 14 days in which a request is made to the Information Commissioner for an adjudication of the decision. The information provider should be given 14 days in which to respond, and a decision in the adjudication decision should be given 14 days after that. Thereafter, the matter should be dealt with by a tribunal which should consider the complaint de novo. An appeal from the tribunal should be to the High Court.

#### Burden on public authorities; Question 6

The information provided in background to this question does not allow those responding to give an informed view, because the cost of the service of providing information is not related to the turnover of the organisations involved. I suspect that the cost is, relatively, very small.

#### Example 4 – s.12(1)

On 6 January 2015, I asked for some information from Oxford City Council. The information was important to me because I wished to make a representation to a planning committee. The Council replied that retrieving the information that I had asked for would result in at least 25 hours work. On 4 February I wrote further, saying:

I am grateful to you for the estimates of time you have provided. Subsection 12(3) of the FOI Act refers to "the appropriate limit" rather than "the time allowed", a limit that is prescribed by regulation. I understand that this limit for a public authority such as Oxford City Council stands at present at £450. Please provide me with your calculation of "the appropriate limit".

For the present I will accept that you have used this regulated amount for your calculation and I shall accept your estimate of time of 25 hours for the 300 items on the same basis. From your figures I calculate the cost of providing me with the 7.5 hours work in order to complete the task will therefore be £182.43.

Please inform me to whom I should pay this amount and I shall pay it today.

The Council replied on 9 February, too late for the planning committee. It said:

I think that you may have misunderstood Section 12 of the Freedom of Information Act 2000. When the public authority estimates that the appropriate limit would be exceeded (as the Council has in respect of your request), there is no duty on the authority to comply with the request – see Section 12(1).

Answer to Question 6

Although the Local Authority was correct, the Act allows for it to prevaricate. Time limits in dealing with administrative matters should be much reduced. If a requestor offers to pay, then the information should be provided on payment.

I have no objection to the present levels of fee requirements. They should remain as they are.

Yours faithfully

Ian Salisbury

**J Hill**

Review of Freedom of Information Act.

I am writing to you as a member of the general public who is most concerned over proposals to amend Act.

I feel that at present the Act is working well and does not need amending in any way. It enables members of the public and the media in general to discover what public bodies are doing and should changes be made then it would be much harder for public bodies to be held to account. An example of the value of the Act is in the case of large expenses which have been claimed by some Members of Parliament and civil servants, etc.

It is, I believe, thought that perhaps a fee should be paid by those requesting information, but this would be a strong deterrent to users who may not be able to pay this.

Yours faithfully

**J M Hovey**

This Act should not be changed or watered down.

To do so would allow politicians of all shapes and shades to cover up or hide wrong doing.

J M Hovey

**J P Conry**

Sirs - I wish to register my strong objection to any proposed Restrictions or limitations on existing FoI Act provisions.

yrs

J P Conry

**Jac St John**

Dear Sir or Madam:

My name is Jac St John and I am a doctoral candidate at the University of St Andrews, researching in the field of contemporary British history. My primary supervisor is Professor Gerard De Groot. As part of my academic research I have submitted numerous Fol requests to the Home Office (HO), the Foreign and Commonwealth Office (FCO), the Ministry of Defence (MoD), and the Metropolitan Police Service (MPS).

Please consider this email a response to the call for evidence issued by the Independent Commission on Freedom of Information. This submission is primarily concerned with 'question 6' of the Commission's remit, which asks:

'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?'

Though I appreciate the financial burden placed on public authorities in responding to Fol requests, I consider there to be ample evidence that this burden is justified due to the positive effects the release of information has had on transparency and encouraging an informed public debate. Your call for submissions will no doubt have resulted in ample evidence for this argument, but for the construction of my own position, I will include the following limited examples from my own research.

My requests to the MPS resulted in the release of information that encouraged a more informed public debate on the role of undercover police officers by the Special Demonstration Squad (SDS) and the National Public Order Intelligence Unit (NPOIU) (evidence available upon request). This public interested has resulted in an independent inquiry, led by Lord Justice Pitchford, into undercover policing.

I am aware that I am one of a number of people that submitted requests for such information, and herein lies my recommendation for the 'controls needed to reduce the burden of Fol on public authorities'.

In order to prevent the duplication of requests, which no doubt contributes to the financial burden placed on public authorities, I would suggest that each public authority operate a completely comprehensive and searchable disclosure log. As it stands, public authorities do have a platform for this information, but it is insufficient to prevent duplicate requests. For example, the MPS have a comprehensive FOI disclosure log, but it is not searchable. It involves opening individual pages for a summary of the requests of each week. This does not encourage the would-be requester to search for information that might already have been released. In another example, the MoD, FCO and HO has searchable disclosure logs, but their records are far from comprehensive.

I would suggest, therefore, that the 'kinds of requests which impose a disproportionate burden on public authorities' are repeated requests made by poorly informed requesters. I would also add that, in my experience, public authorities keep insufficient records of what information has previously been released (a problem a comprehensive and searchable disclosure log would prevent), meaning public authorities must find and republish records that have, in the past, been released – a 'double handling' which results in an unnecessary financial burden.

My conclusion, therefore, is that if public authorities adopted comprehensive and searchable disclosure logs, this would not only be positive for transparency in and of itself, but it would also ease the financial burden imposed on public authorities by repeated requests.

Please do not hesitate to contact me with questions regarding any aspect of my submission, or for copies of the evidence referenced within (though these documents already exist within the public domain).

Kind regards,

Jac St John

## Jacob Ecclestone

20 November 2015

Personal submission to the Commission on Freedom of Information

Democracy is about people governing themselves – and having the information with which to make decisions on the way they want to be governed. People making decisions on false or incomplete information are more likely to make bad decisions than people who have accurate and detailed information. James Madison, then the President of the United States of America, put the matter clearly in 1822 when he said: " A people who mean to be their own governors must arm themselves with the power which knowledge gives."

It has been said that modern politics was invented in November 1647 in Putney parish church when the General Council of the New Model Army met to try to work out how England was to be governed. The words of Colonel William Rainborough have come down to us over almost 400 years, and they are as true and relevant today as when he declared: " For really I think that the poorest he that is in England hath a life to live, as the greatest he; and therefore truly, sir, I think it's clear that every man that is to live under a government ought first by his own consent to put himself under that government, and I do think that the poorest man in England is not at all bound in a strict sense to that government that he hath not had a voice to put himself under."

Our democracy has widened and deepened over the years, but all government still depends on consent. Freedom of information and the right of people to know what the government and its various agencies are doing is now part of our political culture and part of the compact between people and government. You tamper with it at your peril.

Fifteen years ago, parliament made one of the most important and socially beneficial decisions in my long life – the introduction of a Freedom of Information Act. The underlying purpose of the Act—weak though it is in some respects – was, for the first time, to give ordinary people the right to know more about what was being done in their name; what was being done for them and to them. It was a qualitative step forward in our democracy, although it had been a long time coming.

As long ago as 1968 the Fulton Committee report declared: "We think that the administrative process is surrounded by too much secrecy. The public interest would be better served if there were a greater degree of openness."

The Redcliffe-Maud report on local government said in 1974 that "An essential safeguard for honesty in local government is maximum openness..... this requires much more than observing the letter of the law on admission of the public and press to meetings; rather, the authority must promote a flow of information for the public, encourage a response to it and take account of the response."

In 1977 the third Royal Commission on the Press declared: "The right of access to information which is of legitimate concern to people, parliament and press is too restricted, and this, combined with the general secrecy in which government is conducted, has caused much injustice, some corruption and many mistakes."

"Much injustice, some corruption and many mistakes". The Freedom of Information Act has begun the long process of making it easier to fight injustice, to expose corruption and to reduce if not eliminate the great swarm of mistakes which go hand in hand with secrecy and confidentiality.

Whatever its faults, whether they be the cost of meeting requests for information or embarrassment for politicians, governments, civil servants and the providers of public services—health, education, transport etc. - the Freedom of Information Act has undoubtedly improved the fabric of our democracy; it has played a part in exposing wrongdoing and greed and it has helped to give people greater confidence and trust in the conduct of public affairs.

It seems clear that the present government wants to change the present Act in order to make it more difficult to use; to make it less effective; to extend those areas of public life which fall outside the remit of the present Act; to make it more expensive for people to use the Act, and to place new restrictions on what may be made known under the Act.

But there can be no going back on this fundamental change in the political life of our country—not unless the government wants to be held up to public ridicule and contempt. Since we now all live in a digital world, it is possible to predict with near-certainty that any attempt to dam the flow of information between government and people will lead to more whistleblowing and more illicit downloading of official information. The path chosen by Edward Snowden will become well-trodden if this "review" leads to the Freedom of Information Act being weakened.

Instead of reacting with fear and seeking to water down the Freedom of Information Act for narrow political reasons, the government should recognise and appreciate the benefits it has brought to this country. Our society is made stronger by the Act—just as our political system has been made more open and responsive to public pressure.

Rather than trying to undermine or restrict the way the Act works at present, the government should be looking for ways in which the Act could be improved. For example, I believe that all companies—whether public or private (in the case of charities) should be brought under the terms of the Act if they are receiving public funds. It seems wrong that a commercial, profit-making company should be excluded from the provision of the Act even though that company may be contracting with the government to provide all kinds of public services. "Commercial confidentiality" has become a by-word for deals which would not survive public scrutiny.

Although I have benefitted in countless ways over the last 10 years from the information which the Act has brought into the public domain, I have made personal use of the legislation only once. This is what I experienced:

1. In October 2012 I submitted a complaint to the Certification Officer concerning a "financial irregularity" in the accounts of my trade union – the National Union of Journalists. The irregularity was the improper payment out of union funds of £30,000 to the outgoing general secretary, Mr Jeremy Dear. In a nutshell it was a case of fraud.

2. In June 2013 the Certification Officer wrote to tell me that he would not be appointing an inspector to investigate the financial affairs of the NUJ. Under the Trade Union and Labour Relations Act he was entitled to make such a decision.

3. I asked the Certification Officer to explain his decision, to give me the reasons why he reached his decision that the Rules of the NUJ had not been broken. The CO refused my request – and he also refused to confirm or deny whether he held any of the information I had requested. That seemed to be a throwback to an era before the Freedom of Information Act became law; it was also foolish, because it was clear that no consideration had been given to whether the public interest in refusing to confirm or deny whether the CO held such information outweighed the public interest in confirming or denying that he held the information I sought.

4. I made a formal complaint to the Information Commissioner and, after a long and wearying exchange of arguments, the Certification Officer eventually disgorged more information. Not enough to justify his original decision in my opinion, but more than he wanted to at the outset.

5. My experience of using the Freedom of Information Act to prise information out of the Certification Officer led me to two conclusions:

First, that the entrenched culture of secrecy and disdain for any member of the public impertinent enough to ask for an explanation of an official decision has barely been scratched. The Certification Officer admitted that his office had no previous experience of handling a request under the Freedom of Information Act before I submitted my request. It was clear that the mere suggestion that I might have a right in law to know how and why the Certification Officer had reached a decision was something which he and his staff found both novel and distasteful.

Second, that even the most trivial and innocuous information is protected by thickets of sub-clauses exceptions and prohibitions in the wording of the present Act and that government agencies have almost limitless scope for procrastination and pettifogging argument. I believe, as a consequence of my use of the Act – a case involving fraud against the members of the National Union of Journalists – that the present Act should be strengthened and that the “public interest” should be given far greater weight.

I note that your commission is asked to “consider whether there is an appropriate public interest balance between transparency, accountability and the need for sensitive information to have robust protection....”

I further note that you “may also consider the balance between the need to maintain public access to information, and the burden of the Act on public authorities, and whether change is needed to moderate that while maintaining public access to information.”

It is my view that the Freedom of Information Act should be strengthened, not weakened; that there is already a serious imbalance between transparency and the protection of sensitive information and that it would be in the public interest if there was greater transparency and that the definition of “sensitive information” did not always coincide with the interests of governments and public authorities.

I do not share the government's view that the Freedom of Information Act should be regarded as a “burden” on public authorities. The same sort of twisted argument was used 100 years ago by those who sought to prevent women from having the vote. Democracy is made up of many strands – the franchise, freedom of speech, freedom of the press, accountability, devolved government. None of these would today be described as a “burden”, and nor should freedom of

information. I suspect that you are being asked to regard this “burden” as financial and that you are being invited to recommend that charges should be imposed on those who put in requests under the Freedom of Information Act. That would be wrong morally, because it would mean that access to information would be conditional on wealth, and politically because it would deter requests. Of course, that may be the intention.

The final point of my submission is that you, members of the review panel, have been chosen because the government trusts you to come to the “right” conclusions. You may indeed live up to government expectations and recommend that the Freedom of Information Act should be eviscerated, though whether the government could persuade parliament of the merits of your proposals is another matter altogether.

Yours,

Jacob Ecclestone

**James Bond**

Freedom of Information Act 2000

Dear members of the Independent Commission on Freedom of Information,

I write to you as both a concerned member of the public and, significantly, as an elected local government representative who is reporting to you the views that are being expressed by my constituents.

Earlier this year the government announced the formation of a new Commission on Freedom of Information, claiming it needed to scrutinise:

whether there is an appropriate public interest balance between transparency, accountability and the need for “sensitive information to have robust protection”

whether the operation of the Freedom of Information Act 2000 adequately recognises the need for a safe space for policy development and implementation and “frank advice”

the balance between the need to maintain public access to information and the “burden of the Act” on public authorities

At the time that the review into the above mentioned Act was being announced by the Cabinet Office Parliamentary Secretary Lord Bridges, he is quoted as saying that the government supported the FOI Act, but he goes on to state: “after more than a decade in operation it is time that the process is reviewed, to make sure it’s working effectively.”

I respectfully say to you: to make sure it is working effectively for whom? If your concern is primarily for the government of the day and the multitude of other public bodies, both local and national, that the FOI Act covers then I can understand the government’s motivations for a review and will let you draw your own conclusions for mine, and those of my constituents, regarding our fears and suspicions on the matter.

If, on the other hand, there is real and genuine concern in government and the civil service that the FOI Act may not be working effectively for the population at large, then I beg to ask you why was there no mention in the remit to scrutinise the effectiveness of the Act, for example, by

enhancing the right of access, making provisions to increase the number of organisations subject to the Act and removing unnecessary obstacles to disclosure?

I believe that the formation of a new Commission on Freedom of Information is definitely not in the public interest having studied the government's scrutiny remit on this occasion. I must also respectively draw to your attention the thorough review of the FOI Act in 2012 carried out under the auspices of the House of Commons Justice Committee. The cross party membership of that committee concluded that: "The Freedom of Information Act has been a significant enhancement of our democracy. Overall our witnesses agreed that the Act was working well. The right to access information has improved openness, transparency and accountability."

The review of the FOI Act that was undertaken three years ago was conducted over a period of seven months, considered 140 pieces of evidence and listened to oral evidence from 37 witnesses. By contrast the current review is due to report back to you at the end of this month and is judged to be unsafe by many people representing bodies and organisations who collectively have a wealth of knowledge and experience when it comes to the FOI Act. Opinions recorded to date suggest that the review instigated by the government will not offer up an open minded conclusion leading to allegations that the review announced back in the summer will give you the answers the government and the civil service wish to hear.

In writing to you today I echo the sentiments expressed by the Open Government Network, who in their own correspondence with you said:

We ask the government to publish its reasons for limiting the Commission's remit solely to measures that would restrict the right of access while omitting any consideration of what might be needed to enhance access under the Act.

To ignore the request made by the Open Government Network, and others, would be disappointing to say the least and undermine many people's confidence in the business of government, particularly when in 2011 the Ministry of Justice is quoted as saying: "It is in our interests as Government to show people how government reaches decisions in their names. Freedom of Information, done properly, will mean better government." That statement should have been the catalyst that could have lead this one-sided review to have adopted a real and genuine public interest focus in that it could, if the motivation had existed in the first place, to examine how governance has changed in the Act's ten year existence and to plug gaps in Freedom of Information coverage. For example, services that were once provided by both central and local government are increasingly outsourced to private companies who are not subject to the FOI Act. These service providers then fall outside the remit of the FOI Act and so are not accountable to the public.

As a local councillor in Harrow I have first hand experience of how a private company carrying out a service that was once in-house and under local authority direction and control is no longer accountable and therefore does not have to comply with requests for information or even answer basic questions I may ask in pursuit of a satisfactory resolution to a constituent's problem.

Referring back to the cross party House of Commons Justice Committee 2012 review of the FOI Act it is important that the Government reacquaints itself with the findings relating to the cost of administering freedom of information. The committee, in its most strongly worded conclusion, stated: "Evidence from our witnesses suggests that reducing the cost of freedom of information can be achieved if the way that public authorities deal with requests is well-thought through. This requires leadership and focus by senior members of public organisations. Complaints about the cost of freedom of information will ring hollow when made by public authorities who have failed to invest the time and effort needed to create an efficient freedom of information scheme."

There is also an inexcusable cost in accessing freedom of information which is entirely the responsibility of the public body concerned. In my five and a half years as a councillor I have experienced a general reluctance within my council for officials to release information at the time of asking. This is also the experience of my constituents who suffer the same frustrations when requesting information or attempting to have basic questions answered.

On a day to day basis requests for information sort by councillors is requested in the first instance without using the FOI Act and it is only used, as a last resort, when all other means to garner information and have questions answered have failed. It should concern you that in Harrow there have been 17 Freedom of Information requests made by councillors of all political persuasions to their own local authority during the past four years because the information requested was not forthcoming by more open means. That the elected representatives have to use the FOI Act to extract information from the very authority they are members of is shameful and an appalling indictment on the system of democratic accountability.

The so called "burden of the Act" on central and local government and other public bodies currently governed by the FOI Act should not be interpreted as a 'green light' to introduce basic charges. Nor should a system of charging for FOI requests to be answered be introduced on the premise of having to deal with too many vexatious and 'trivial' requests. The relevance and importance of a freedom of information request will differ from person to person so this kind of judgement is not, in my view, in the public interest as well as being disrespectful to what is deemed important to the questioner.

A few days ago I had the good fortune to be able to put a question to the Right Honourable Greg Hands MP, the Chief Secretary to the Treasury. Mr Hands reiterated the Government line that it supported the FOI Act, adding: "you have nothing to worry about, we're just trying to curb 'abuses', for example, when someone submits a freedom of information request asking for the number of freedom of information requests received!" I disagree with the view of the Chief Secretary to the Treasury and redirect you to the experiences of my fellow councillors and constituents that I have quoted elsewhere in this letter.

The introduction of basic charges for all freedom of information requests and appeals to the Information Commissioner would be a retrograde step. A reduction in administration costs relating to the FOI Act could be achieved if all public bodies were to practice consistency by pursuing a policy of open government with complete transparency rather than trying to cover things up.

I urge you most strongly not to introduce basic charges for the public's right to access information within the remit and scope of the FOI Act which is, in the overwhelming majority of cases, deemed to be in the public interest and for the few instances when disclosure is judged a security risk, the necessary provisions in the Act to withhold sensitive information already exist. The right to know and to hold those in positions of power and influence to account is a fundamental right in a democratic state. There is a very real danger that many people would be excluded from their right to know, and their right to find out, on cost grounds alone.

In conclusion I must draw to your attention the enthusiasm being expressed by a number of public authorities for the introduction of charges for freedom of information requests. Birmingham City Council is reportedly urging a standard charge of £25 per freedom of information request! At the time of writing my own authority, Harrow Council, have yet to tell me if they are in favour of charging for our right to know. It will be ironic if I have to submit yet another request under the FOI Act to find out!

Thank you for receiving my correspondence and along with the Campaign for Freedom of Information and many others I urge the government to respond to the review that was instigated in the summer by doing nothing that will weaken the effectiveness or undermine the authority of the Freedom of Information Act 2000.

Yours sincerely

Cllr James Bond

**James Hallinan**

Dear Sir's,

I wish to express the my views regarding the freedom of information act review. In my opinion the act should not be watered down at all. The FOI act should remain as it is, in order to allow the honest citizens of this country the right to scrutinize those in power and those individual in public or private office to be held to account.

And that the information request should be free of cost to the British Tax payer. that is the government or institution must bear the full cost

Regards

James Hallinan

**James Kemp**

Dear Sir / Madam,

This current government promised the most open government ever restricting the FOI act in any way is an abuse of power and it must not increase the fee for information again this restricts the ability for ordinary people to hold the government to account and stop abuses of power.

information that we the people of the UK already pay for should not be restricted and hidden in more complex ways and for only elite or special people this is again wrong thinking or attempting to hide bad news from the people.

2 important abuses of power have only been discovered via the FOI act the abuse of parliamentary expenses and the numbers of disabled people's deaths who fail the WCA test. Without the act these abuses would be never discovered and the abuse of power would continue. The current act may not be perfect but it works please don't allow any further restriction of information.

James Kemp

**James Sprinz**

Hi,

I am concerned by the attempt to introduce charges for or restrict access to Fol requests. Access to government information is a crucial for holding the government to account. Charging for these requests will surely limit the amount of requests that are made and place unwarranted burdens on those seeking clarity on issues. Holding the government to account is a fundamental part of open and transparent democracy. Attempts to limit this, perhaps inadvertent, should be avoided.

The claim that the media has excessively used the Fol system is odd. The media should be one of the most frequent users of Fol requests as one of its primary responsibilities is shedding light on government activity. The current government shows a worrying tendency to avoid discussion of and reflection on its policies. The lack of ministers prepared to be interviewed on almost anything is the clearest example of this. Considering the current government's behavior it would be hard to view increasing restrictions on Fol as anything other than an attempt reduce government transparency and limit the ability of the public to hold it to account.

Regards,

James

## Jane Clare

I am not happy with the tinkering to the FOI Act that is in the offing since the setting up of the so-called Independent Commission. Some of its members are hardly independent in this matter. I believe the general public knows and cares little about the matter since they are told that all is being taken care of by their government, the authorities and so on. Anyone who attempts to obtain information through the act is frequently blocked for spurious reasons of 'national security', and yet any timewasters are outweighed by those doing serious research or who have the need for accurate knowledge.

I thought I had lived in a democracy for the last 65 plus years. I am not convinced that the current electoral system serves the needs of the whole electorate, nor that, post-Snowden, British citizens can go about their business in the illusion that they are a free people. I believe that this government is the most secretive ever. It has already broken some manifesto promises. It is doing all it can, building on efforts during Coalition, to improve the country's security. This is correct for a national government to do. However, this should not mean that it simultaneously erodes the rights of its citizens to assemble, to protest, to express opinions, to join trade unions, to enjoy the protections in the workplace from arbitrary expulsion without recourse to justice, and to be aware of where to seek help in matters of poverty, discrimination, injustice and so on. We have less and less control over our own lives. Our longstanding and well respected public institutions and services are being put out to private tender for private profit at an alarming rate.

We must continue to see accountability of those in government at all tiers. We must have scrutiny at all times and not just through the ballot box every five years, of those who act with the benefit of taxpayers' money. We need the Freedom of Information Act to continue, and indeed to be strengthened. I would like to see it extended to all private companies who act in the sphere of public service. I am dismayed at the incompetence of such as G4S and other contract holders who seem to be able to secure further contracts no matter how many mistakes they make and how much upset they cause, all to further this government's mantra that private is best.

I pay my taxes and expect those who use them to be accountable. Do not meddle with the FOI.

Jane Clare (Mrs)

**Janet Perks**

To whom it may concern

I wish to register my opinion that the Freedom of Information Act is vital to our democracy and should not be weakened for the convenience of politicians.

Revelations about dishonesty, vested interests, tax avoidance and use of tax havens etc are important matters.

If these activities cannot be prevented, at least the electorate should be allowed to know about them.

Yours sincerely

Janet Perks

**Janet Sage**

Dear Sirs,

I am writing to beg you not to reduce the powers of the Freedom of Information Act. I understand that it is considered that the £9m cost is considered to be a drain on public funding but I would be grateful if you would reduce Central Government's spending on advertising so that this relatively small sum can still be spent.

I understand that it would have been very difficult/ impossible to find out about the MP's expenses scandal or the privatisation of part of the UK's International Development Fund (CDC) or the extent of tax dodging in the UK without the current law. As a tax payer, I feel entitled to know where my money is being spent - or wasted. It's not as if the fact that the public knows these shocking facts seems to make any difference!

Yours faithfully,

Janet Sage

## **Janet Smith**

We need to keep this act. People should be able to find out the information they need. Nobody should be able to keep secrets in our name. Now in this highly volatile world we need to know what our Government is doing (especially since Tony Blair lied to us all). Powerful people should know that they will ALWAYS BE HELD ACCOUNTABLE for decisions they make. I am an ordinary person who feels very strongly about accountability for all of us, nobody should be exempt.

Thank you,

Janet Smith

**Janet Treharne Oakley**

Dear ICoFI

Any decrease on fair information will produce more whistleblowers and hackers. Because it will be seen to be unfair.

Therefore it will provably be counterproductive to try and keep more reasonable information secret by hiring the bar.

Denied (S36) requests regarding Confidential/ Cabinet issues ( S36 etc) should be reviewed on by the ICO - on request.

Cabinet..new request wd be permitted every two years.

Less confidential ...every one year.

Charging requesters fees may cost.

The administration needed to collect fees etc may cost more than the fees collected, since the amounts projected are not high.

The ICO should have the power to issue much higher fines on DPA negligent companies.

The fines should equate to the ICO cost of producing the case against the companies ..plus.

Janet Treharne Oakley

## Jen Personn

### Independent Commission on Freedom of Information Submission

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

A “safe space” in which to develop and discuss policy proposals is necessary. I can demonstrate where it was used well, in a case study of a request I made to NHS England. [1]

The current protection afforded to the internal deliberations of public bodies are sufficient given section 35 and 36 exemptions. I asked in October 2014 for NHS England to publish the care.data planning and decision making for the national NHS patient data extraction programme. This programme has been controversial [2]. It will come at great public expense and to date has been harmful to public and professional trust with no public benefit. [3]

NHS England refused my request based on Section 22. [4] However ten months later the meeting minutes had never been published. In July 2015 the Information Commissioner issued an Information Notice and NHS England published sixty-three minutes and papers in August 2015.

In these released documents section 36 exemption was applied to only a tiny handful of redacted comments. This was sufficient to protect the decisions that NHS England had felt to be most sensitive and yet still enable the release of a year’s worth of minutes.

Transparency does not mean that difficult decisions cannot be debated since only outcomes and decisions are recorded, not every part of every discussion verbatim. The current provision for safe space using these exemptions is effective and in this case would have been no different made immediately after the meeting or one and a half years later. If anything, publication sooner may have resulted in better informed policy and decision making through wider involvement from professionals and civil society. The secrecy in the decision making did not build trust.

When policies such as these are found to have no financial business cost-benefit case I

believe it is strongly in the public interest to have transparency of these facts, to scrutinise the policy governance in the public interest to enable early intervention when seen to be necessary.

In the words of the Information Commissioner:

*“FOIA can rightly challenge and pose awkward questions to public authorities. That is part of democracy. However, checks and balances are needed to ensure that the challenges are proportionate when viewed against all the other vital things a public authority has to do.*

*“The Commissioner believes that the current checks and balances in the legislation are sufficient to achieve this outcome.” [5]*

Given that most public bodies, including NHS England’s Board, routinely publish its minutes this would seem a standard good practice to be expected and I believe routine publication of meeting minutes would have raised trustworthiness of the programme and its oversight and leadership.

The same section 36 exemption could have been applied to the small redactions that were felt necessary balanced against the public interest of open and transparent decision making.

I do not believe more restrictive applications should be made than are currently exempted under sections 35 and 36.

**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?**

The transparency achieved through these Freedom of Information requests will I hope soon transform the culture at the the Department for Education from one of secrecy to one of openness.

As an individual I made 40 requests of schools and 2 from the Department for Education which may now result in benefit for 8 million children and their families, as well as future citizens.

There is the suggestion that a Freedom of Information request would incur a charge to the applicant.

I believe that the benefits of the FOI Act in the public interest outweigh the cost of FOI to public authorities. In this second example [6], I would ask the Commission to consider if I had not been able to make these Freedom of Information requests due to cost, and therefore I was not able to present evidence to the Minister, Department, and the Information Commissioner, would the panel members support the ongoing risk that current practices pose to children and our future citizens?

Individual, identifiable and sensitive pupil data are released to third parties from the National Pupil Database without telling pupils, parents and schools. This Department for Education (DfE) FOI request aimed to obtain understanding of any due diligence and the release process: privacy impact and DfE decision making, with a focus on its accountability.

This was to enable transparency and scrutiny in the public interest, to increase the understanding of how our nation's children's personal data are used by government, commercial third parties, and even identifiable and sensitive data given to members of the press.

Chancellor Mr. Osborne spoke on November 17 about the importance of online data protection:

*"Each of these attacks damages companies, their customers, and the public's trust in our collective ability to keep their data and privacy safe."*

*"Imagine the cumulative impact of repeated catastrophic breaches, eroding that basic faith... needed for our online economy & social life to function."*

Free access to FOI enabled me as a member of the public to ask and take action with government and get information from schools to improve practices in the broad public interest.

If there was a cost to this process I could not afford to ask schools to respond. The cost of a few FOI requests has therefore been low I believe compared with the immeasurable cost of the potential harm to children that current practices create. Had I not been able to afford to access information about the Department for Education's handling of my children's personal and sensitive data, I would not have been able to enter into conversation with Schools Minister Nick Gibb MP and then with the Department for Education with evidence that this issue is widespread enough for investigation to be warranted and engage in the process of improvements which the Department appears to be willing to make.

Schools are managed individually, and as such I requested the answer to the question; whether they were aware of the National Pupil Database and how the Department shared their pupils' data onwardly with third parties. I asked a range of schools in the South and East. From 40 schools to date, not one was able to confirm that they had ever been told by the Department for Education about the onward sharing of pupil personal data to third parties; including press and commercial companies, since legislative changes were made in 2012 to permit this sharing policy.

In order to give a fair picture of more than one county I made requests from a range of types of school - from academy trusts to voluntary controlled schools - 20 primary and 20 secondary. Due to the range of schools in England and Wales [7] this was a small sample.

Building even a small representative picture of pupil data privacy arrangements in the school system therefore required a separate request to each school.

I would not have been able to do this, had there been a charge imposed for each request. This research subsequently led me to write to the Information Commissioner's Office, with my findings.

Were this only to be a process that access costs would mean organisations or press could enter into due to affordability, then the public would only be able to find out what matters or was felt important to those organisations, but not what matters to individuals.

However what matters to one individual might end up making a big difference to many people.

Individuals may be interested in what are seen as minority topics, perhaps related to discrimination according to gender, sexuality, age, disability, class, race or ethnicity. If individuals cannot afford to challenge government policies that matter to them as an individual, we may lose the benefit that they can bring when they go on to champion the

rights of more people in the country as a whole.

Eight million children's records, from children aged 2-19 are stored in the National Pupil Database. I hope that due to the FOI request increased transparency and better practices will help restore their data protections for individuals and also re-establish organisational trust in the Department.

Information can be used to enable or constrain citizenship. In order to achieve universal access to human rights to support *participation*, *transparency* and *accountability*, I appeal that the Commission recognise the need for individuals to tackle vested interests, unjust laws and policies.

Any additional barriers such as cost, only serve to reduce equality and make society less just. There is however an immense intangible value in an engaged public which is hard to measure. People are more likely to be supportive of public servant decision making if they are not excluded from it.

Women for example are underrepresented in Parliament and therefore in public decision making. The average gap within the EU pay is 16 per cent, but pay levels throughout the whole of Europe differ hugely, and in the South East of the UK men earn 25 per cent more than their female counterparts. [8] Women and mothers like me may therefore find it more difficult to participate in public life and to make improvements on behalf of other families and children across the country.

I believe these two case studies show that the Act's intended objectives, on parliamentary introduction, to 'transform the culture of Government from one of secrecy to one of openness'; 'raise confidence in the processes of government, and enhance the quality of decision making by Government'; and to 'secure a balance between the right to information...and the need for any organisation, including Government, to be able to formulate its collective policies in private' are not only necessary but work in practice. If anything, they need strengthened to ensure accessibility.

Any actions to curtail free and equal access to these kinds of information would not be in the public interest and a significant threat to the equality of opportunity offered to the public in making requests. Charging would particularly restrict access to FOI for poorer individuals and communities who are often those already excluded from full public participation in public life.

[1] [https://www.whatdotheyknow.com/request/caredata\\_programme\\_board\\_minutes](https://www.whatdotheyknow.com/request/caredata_programme_board_minutes)

[2] <http://www.theguardian.com/society/2014/dec/12/nhs-patient-care-data-sharing-scheme-delayed-2015-concerns>

[3] <http://www.statslife.org.uk/news/1672-new-rss-research-finds-data-trust-deficit-with-lessons-for-policymakers>

[4] [http://jenpersson.com/wp-content/uploads/2015/11/caredataprogramme\\_FOI.pdf](http://jenpersson.com/wp-content/uploads/2015/11/caredataprogramme_FOI.pdf)

[5] <https://ico.org.uk/media/about-the-ico/consultation-responses/2015/1560175/ico-response-independent-commission-on-freedom-of-information.pdf>

[6] [http://jenpersson.com/wp-content/uploads/2015/11/NPD\\_FOI\\_submissionv3.pdf](http://jenpersson.com/wp-content/uploads/2015/11/NPD_FOI_submissionv3.pdf)

[7]

<http://www.newschoolsnetwork.org/sites/default/files/Comparison%20of%20school%20types.pdf>

[8] <http://www.equalpayportal.co.uk/statistics/>

**Jasper Jolly**

To whom it may concern,

I would like to express my grave concern that the Independent Commission on Freedom of Information may result in the weakening of the invaluable Freedom of Information Act 2000.

As a member of the public with no personal (or, for that matter, business) interest in the functioning of the Act, it seems that barely a week goes by in which important information is not brought into the public domain by activists, journalists, and concerned citizens which would otherwise never have been revealed. In my opinion, FoI requests have provided for a degree of transparency within public bodies that is to be encouraged, and any moves to weaken that transparency would be both inherently undemocratic - removing the ability to challenge the government from ordinary people - and hypocritical - standing at odds with the principles of openness and transparency which our society holds dear.

Of particular concern would be any attempts to charge a fee for requests, which would remove the right of ordinary citizens to find information on matters that concern them, or the possibility of limiting transparency at the top levels of government, where the most wide-reaching policy decisions are made. Both of these measures would harm the governance of the United Kingdom.

Yours faithfully,

Jasper Jolly

**Jim Hardaker**

19 November 2015

Independent Commission on Freedom of Information London

By email: [foi.commission@justice.gsi.gov.uk](mailto:foi.commission@justice.gsi.gov.uk)

Dear Sir

RESPONSE TO CALL FOR EVIDENCE - FREEDOM OF INFORMATION ACT 2000

I wish to respond as a member of the public to your call for evidence into the review of the above.

Most of my own requests for information have been to public organisations other than Government itself, for instance local authorities, the Environment Agency, the BBC and so on. I therefore do not feel that I have sufficient knowledge or opinion to comment on Questions 1-4.

Question 5:

In terms of the enforcement and appeals process, it seems from the figures presented that there is an extremely concerning issue surrounding wasted time for the various tribunals involved.

It could be argued, since the lower tier tribunal overturns some of the Information Commissioner's decisions, and the upper tier tribunal overturns some of the lower tier tribunal's decisions, that a thorough and robust appeals system such as that currently in place is required. However, it could also be argued that whatever decision is reached, there can always be another judicial body willing to consider things in a different light. Any appeals process must have an end point, otherwise the appeals procedure in any given case could go on ad infinitum.

Clearly the Information Commissioner's decision cannot be final – freedom of information, like any legislation, is a point of law and there must be legal redress where an individual or an organisation

feels that the wrong decision has been made. I would suggest however that the lower tier of the tribunal be removed from the appeals process, and appeals escalated instead immediately to the upper tier. If more appeals were heard by upper tier tribunals, then more precedents could be set, and this in the long run may have the effect of reducing the number of future appeals because in those cases the judicial position has already been made clear.

#### Question 6:

The Freedom of Information Act has been of enormous benefit to individuals and organisations alike in encouraging better transparency of the way in which public funds are spent and in holding those organisations responsible to account. Unfortunately, it has also been an enormous burden in those cases when individuals have sought to effectively sabotage the spirit of the Act itself with frivolous and nonsensical requests.

It is quite clear that the public interest behind the Act outweighs the burden. I spent six years as a taxi driver, and although I sometimes received hoax bookings that never made me think twice about whether to answer the phone or not. The rough, in that case as well as this, must be taken with the smooth and those seeking access to information which is in the public interest should not be unfairly penalised for the actions of an irresponsible few. With that said, I can certainly see a case for introducing some kind of

fee-charging system to better dissuade the actions of those few, and to ensure that we all think twice about the information we request and whether it is truly in the public interest. Such a system should moderate, rather than restrict, the use of the Act while at the same time avoiding turning it into a tool only for the rich.

I would suggest that each request be subject to a fee of £10, bringing freedom of information into line with data protection. I would further suggest that an exemption to this fee should exist for any request which—

- is made jointly by way of petition by at least 20 people;
- is made by or on behalf of a journalist working for a print, television or radio outlet; or
- is made by or on behalf of a charitable organisation.

Secondly, I would suggest bringing the public interest test into the request procedure from the beginning. Requiring that each applicant give justification as to why they consider the information to be in the public interest would be an effective means of deterring those requests which are made simply to waste time. It would also save time in those circumstances where authorities

apply a public interest test to determine whether or not to provide information, since that test will have become part of the request process.

Frivolous requests such as the number of drawing pins a council has on its noticeboard, for example, would be unsubmittable because the requester could not possibly argue for the public interest.

Note however that the above should not require an individual to specify their own personal reasons for making the request – for example, a person seeking information about the treatment of mental health need not be required to specify that they do so because they themselves have a mental illness.

The above, I believe, would be far preferable to restricting the public's access to the information available. Thank you for taking the time to read my comments; I look forward to seeing the outcome.

Yours faithfully

Jim Hardaker

## **Jim Pragnell**

Dear Independent Commission,

I emailed brief comments in response to the questions set out in your consultation document on 13 October 2015. I now respond in detail to Question 2. I do so by referring to a request for information that I made to the Ministry of Justice (MoJ) in October 2010 regarding the Constitutional Reform and Governance Act 2010 (CRAG). This Act amended the FOI Act and the responsible Minister was the Rt. Hon. Jack Straw, a member of your Commission.

CRAG was included in the "wash-up" legislation of the last Labour Government and I asked the MoJ to see any Government paper that states who (i.e. which body) proposed the change, discusses the reasons for the change and/or recommended that the change be made. I amended the wording of my request in September 2010 at the suggestion of the MoJ. I am a member of the public (not a journalist) who wanted to know how such an Act suddenly appeared in the wash-up legislation.

The MoJ refused my application. I appealed and it was refused again. I appealed to the Information Commissioner (ICO) and in November 2011 he also refused my request. I then took my case to the First Tier Tribunal who on 20 June 2012 decided in favour of the MoJ. The ICO refused my application mainly because at the time I submitted it in September 2010 he said that the Act was still in its formulation and development stage. He also said that the information I had requested was of a genuinely free and frank nature (which I don't think is relevant in terms of the FOIA). Both the MoJ and the ICO agreed that the formulation and development stage ended on 19 January 2011, when the commencement order for CRAG was issued.

In October 2012, namely at a time when the MoJ had previously said that the formulation and development stage of CRAG had ended, I re-submitted my request for information to the MoJ. I was surprised when the MoJ refused my request and they did so again on appeal. I appealed to the ICO and in February 2014 he also refused my application. The MoJ refused my application because they said that CRAG was subject to post legislative scrutiny, although what was being scrutinised was not CRAG but the FOI Act itself following the issue of a report by the House of Commons Justice Committee.

These are the lessons that I learned from this protracted request for information. Protracted because I did not think the reasons for the refusals were reasonable:

1) That the existing provisions of Section 35 of the FOI Act are robust from the Government's perspective and do not need to be tightened up. In its response to the Justice Committee's report in November 2012 the then Government said that the legal framework of the FOIA through the Section 35 exemption and the availability of the veto "offers sufficient protection for these types of sensitive information (Cabinet records and policy formulation etc)". This comment remains valid today.

2) However, the Section 35 exemption is less robust from the public's perspective. The exemption is class-based and therefore subject to a public interest test, which in my experience are often carried out very perfunctorily. The exemption applies to information if it relates to the formulation or development of government policy among other things. The ICO argued that at the very least "formulation or development" suggests that something is actually happening to policy. So once a decision has been taken on a policy line and it is not under review or analysis then it is no longer in the formulation or development stage. Thereafter policy makers no longer need a "safe space" to consider policy options.

3) In my case the MoJ said that CRAG was subject to post legislative scrutiny although Section 37 of the FOIA was not one of the Sections of the FOIA that was being scrutinised by the Justice Committee and the Government at the time. Nevertheless, the MoJ said that any aspect of the FOIA was open to consideration and despite this weak case ruled not to disclose the information. The ICO did not accept this line and said that the process of formulating and developing CRAG had ended and the policy settled. However, the ICO went on to say that disclosure could have a "chilling effect" on policy making in other related areas, particularly given the sensitive and candid nature of the discussions contained in the withheld information. I query the relevance of this statement given that the Section 35 exemption was no longer in force. Perhaps the proper procedure would have been for the ICO to allow disclosure and let the MoJ decide whether to apply the veto in Section 53 of the FOIA.

4) Based on my experience there is no case for making the exemptions in Sections 35 and 36 absolute. In fact it would appear that the relevant parties are stretching the exemptions beyond what is reasonable. While it is desirable for policy makers to have a "safe space" to develop policy this should end when the policies are decided. Any attempt to extend the exemption by some undefined general process must be resisted and the guidance given by the ICO and MoJ should make this point clearer.

5) Tribunals give less weight to the "chilling effect" arguments than has been argued by Public Authorities. One Tribunal noted that independent research carried out by the Constitution Unit at University College London concluded that there is little evidence of the FOIA leading to a "chilling effect". In my opinion these arguments are more often a case of special pleading by public officials backed up by MPs. and should not be given much weight. Particularly as these arguments can

have a detrimental effect by allowing MPs and officials to carry on acting in private in a way they would not in public. Despite the lack of evidence for the arguments they are regularly used by public officials, even as in my case when policy had been decided. This shows the difficulty the public has in getting information they ought to have and why some FOIA rules need to be loosened not tightened up. The public are often told that "if you have nothing to hide you have nothing to fear". This is an apt message for MPs and officials.

6) Finally you have probably read that your Commission has been picked to give the answers to the consultation that the Government wants to hear. There is no one on the Commission, for example, who is specifically there to argue the public's point of view. When the FOIA was debated in Parliament MPs said it "will assist strong, informed democratic participation in the life of this country ..... information is the oxygen of democracy". I would like the Commission to think on this when it comes to its conclusions and put aside any special pleading by MPs and public officials, who fear having to answer for their actions as a result of the proper release of this oxygen to the public. In recent years what I call the establishment "blob" has been doing its best to undermine any rights the public have to challenge the "blob", whether it is via changes to legal aid, judicial reviews, public protest and now freedom of information. Are you on the side of the "blob" or the public?

Yours faithfully,

Jim Pragnell

**Dr Joe Parker**

Dear Commission,

I have read with alarm that the provisions and spirit of the Freedom of Information Act may be repealed, or watered down, or become subject to arbitrary financial charges, seemingly with the explicit intent of restoring some of the cloak of secrecy surrounding officialdom in this country.

I regard this as a deeply retrograde step. The introduction of the Act is one of the few genuinely useful reforms Blair introduced. It is no surprise to read that powerful, and foolish, men in positions of authority should not want their actions scrutinized. But just as their positions depend on avoiding scrutiny on their mistakes and misdeeds, effective long-term administration of this - or any - country depends upon effective constitutional mechanisms by which corrupt or incompetent individuals and practices can be weeded out.

I strongly resist any moves to amend or repeal any part of the existing FOI provisions as anti-democratic.

Yours,

Dr. Joe Parker

**Joe**

Freedom of Information requests are an essential part of democracy and accountability, and we would be fools to let them go.

**John Bishop**

Dear Sir

I am very concerned that FOI request would be badly affected if you change the rules. I cannot see the cost being a serious factor when the general public needs to know what is carried out in our name and with our money.

John Bishop

## **John Bishop**

Any (further) restrictions on the scope of the Freedom of Information Act should be resisted strongly. If anything the provisions should be extended to stop local or central authorities from claiming administrative burdens or 'commercial confidentiality' in dodgy public/private deals prevent them from complying.

If you want evidence, you don't need to look further than the MPs' expenses scandal and the House of Lords. But try the 'Rotten Boroughs' page in Private Eye. No wonder politicians want the Act scrapped!

Politicians, civil servants and local authority employees need to remember they are public servants - which demands that their acts must be open to public scrutiny.

John Bishop

## **John Bowers**

I believe that the Commission is reviewing the Freedom of Information Act, 2000.

I write to support the principle that public bodies should reveal information on demand, unless there is good reason not to.

I was a planning officer with Snowdonia National Park Authority from 1987 until I retired this year. Before that, I worked in industrial south Wales. The Local Government (Access to Information) Act, 1985, allowed me to give essential information about planning applications to councillors and others without risking the sack. It allows the Planning Inspectorate to demand copies of officer's reports for applications subject to appeal. Objectors can also see reports - three days before the Committee meeting. This has reduced the number of perverse decisions by Planning Committees.

I used the 2000 Act for my MBA dissertation. I responded to requests for information on behalf of my authority - I hope fully and helpfully.

My authority allowed several senior officers to become redundant, rather than retire early. (Redundancy is usually much more generous.) I was concerned at the implications for those left to do the work, and for the authority finances. I asked Governments in Cardiff and London for estimates of costs of public sector redundancies. Both claimed to have no information.

The BBC used the 2000 act for a story on redundancy costs to individual local councils in Wales. Audit Wales then prepared a comprehensive report with information on redundancy numbers and costs at all Welsh local authorities and the Welsh government.

I hope and expect this to lead to evidence - based changes to policy which will reduce the temptation for middle aged officers to take voluntary redundancy rather than retirement.

Without the 2000 act, I do not believe the Audit Commission would have looked at this topic.

My Authority refused a request for the name of a neighbour who reported unauthorized felling of protected trees. We also refused to provide a translation of a document we held in one official

language, but not the preferred official language of the man who asked. In both cases, the Information Commissioner accepted our refusals.

I have used published information on sale prices for houses in Snowdonia for reports on housing costs in the National Park. Lack of such information in the Isle of Man is making it difficult for my family to decide how to price my mother's bungalow.

Please do NOT reduce the scope of the 2000 act.

John Bowers BA (Hons), MRTPI(Retired), MBA

**John Brigden**

Dear Sir

I am writing concerning the current consultation over the future of the Freedom of Information Act.

I am worried that you might consider actually watering down the Act instead of ensuring that there is more accountability. Government, local and central, as well as any Corporate involvement with any such government must be held accountable for their actions in all matters.

The Public despairs over the exposés that have happened since the Act became law, yet, I can't imagine the state of affairs we would be in if in the future we do not have the ability to question everything that is done in our name. There must be clear accountability and the Act in some way goes towards achieving that.

Yours faithfully

John Brigden

**John Doy**

Dear Sir,

I am alarmed at the possibility of changes to FOI that could mean that less information could be subject to it.

In my opinion the FOI act is a crucial piece of legislation that give an opportunity to hold public bodies to account. If anything I feel its scope should be widened to include any organisation that is performing work that is being performed for central government, local government, the NHS or any other part of the state.

Private Eye has given a few examples of cases uncovered under FOI and must be many others where the information has proved essential and not just for exposing of fraud and misbehaviour. The cost that Private Eye has mentioned of £9 million is insignificant compared with the profligacy that is shown under other budgets and could well be trebled to improve openness by government.

Yours faithfully

John Doy, a taxpayer who wants his tax spent wisely and honestly.

**John Filor**

Independent Commission on Freedom of Information 9th Floor  
102 Petty France  
London SW1H 9AJ

Dear Sirs,

Commission Brief and Composition

I have followed the progress of the Commission's membership and activities with increasing concern with particular respect to the following:

The Membership appears to have been drawn from a small, selected pool of retired Politicians with no representatives from the press or active campaigners on the subject to provide coverage of the full spectrum of views which I feel should be considered.

The current FOi Act seems to provide a very useful means of allowing investigative journalists to carry out their work. Numerous topics addressed are a matter of public record.

The existence of a 'safe space' for policy development now seems to override the possibility of such discussions being open for investigation under the Act as Minister/Civil Servant meetings are no longer universally recorded in writing.

On the basis of evidence reported to date, I can see no justification for attempting to moderate public access to information in order to reduce the burden of implementing the Act on Civil Servants and Public Authorities. Consider: cost of FOi Act £9m; Cost of advertising by Central Government £290m.

I now regret not having comment on the matter earlier but am increasingly concerned at attempts to restrict the freedom and ability of the press, mainstream or otherwise, to investigate and put into the public domain matters such as MPs' expenses, offshore ownership of property, inefficient and unnecessary privatisation of defence-related organisations and numerous others.

Without rigorous investigation and discussion such matters risk being kept secret within Government Departments for no better reason than to protect the reputations of politicians and civil servants.

J. W. Filor BSc CEng MICE

## John Geddes

Please don't consider charging for FOI requests.

I am an ordinary member of the public who is reasonably critical of public services. If FOI requests cost even £10 a time, I wouldn't feel that I could divert that money from a tight family budget when the payoff - if I made a request that exposed something shameful - would not be to my family, but to society as a whole.

As it is, I have made five requests over the years - and delivered pretty impressive public value from two of them:

- Exposing £0.3m wasted on an "electronic bus stop" scheme in Derbyshire, which never worked. Matthew Parris praised my exposee in his Times column.
- Obtaining real-life data on fire service response times to allow me to expose the weaknesses in a proposed scheme that was consequently withdrawn

In both of these cases, I had asked politely for the information outside the FOI framework, but had been refused. In one other case, I withdrew my FOI request when the public body suddenly got round to addressing a month-old non-FOI request for the data, the day after I had repeated it within the FOI framework.

As local and regional newspapers retreat from investigative journalism, great swathes of public services face little effective scrutiny. Diligent individuals have an important part in asking awkward questions and exposing inconvenient truths - but asking them to fund such questions is unreasonable.

And crucially, if public bodies know that individuals are unlikely to turn to FOI when a non-FOI request is refused (or simply ignored), then they are going to be less forthcoming in answering non-FOI enquiries. Outside FOI, I recently got my local ambulance service to confirm that their 999 ambulances are using Satnavs set to save mileage even at the expense of slower journeys - something that I have since shared with the CQC (and the BBC). In a pay-for-FOI world, might they not be tempted to decline to provide me with embarrassing information in the expectation that they could keep the lid on it, because only a tiny minority of private citizens will have the wealth/inclination to make a paid-for FOI request?

John Geddes

**John Griffin**

Dear Sirs,

I write in order to complain about the government's plans to limit the scope of the Freedom of Information Act or, even worse, abolish it altogether. To me this is a cynical attack on press freedom and part of a government agenda to limit the supply of information to the press and the public. Indeed, I believe that if the government is allowed to get away with an act of oppression such as this it will have carte blanche to turn the UK into a banana republic.

This government has already attempted to do away with the human rights of the British people by withdrawing from the European Convention and must not be allowed to get away with abolish press freedom.

Yours faithfully

John Griffin

**John Idiens**

May I just let you know that I would regard any reduction in accessibility or any extra hurdles put in the way of access as a highly retrograde step.

If you want to make any changes, make them to the powers of the Information Commissioner's to enforce decisions.

At the moment it seems to me that Govt departments can hide behind one or other exception for as long as it takes to reduce any enquirer to apathy.

There are also some organisations that escape the provisions of the Act, by way of being a quango or somesuch. You will be aware of which escape, but if not, let me know and I will work at it.

Sincerely,

John Idiens MBE

**John O'Donnell**

I register my opposition to any reduction in the ability of the public, including journalists, to obtain information about government activities.

There have been many recent examples of disclosure which has led to improvements in the public realm. Regrettably we cannot rely on openness and honesty from government without FOI.

John O'Donnell LLB

## **J.Shingleton**

The rules regarding Freedom of Information must not be watered down. They have proved very successful in answering questions which the public needed to know the answers to, and have exposed behaviour by public servants which has been far below the standards expected.

Already we have seen certain authorities trying desperately to avoid full and honest answers, allotting unreasonable costs and time frames to questions, which if honestly answered, could have seen a response in less time for little expense from a willing, well organised body.

On some occasions documents have even been redacted or delayed to a ridiculous degree for no apparent good reason other than to conceal pertinent facts.

It is absolutely essential that this commission is clearly seen to have acted in the public interest and not as a tool of politicians who would appreciate a devaluation of the legislation.

J.Shingleton

**John Sinclair**

Can I ask you please not to submit to pressure for anyone to reduce the power and practicality of the present legislation which has proved a very important tool in holding accountable those who hold power over British institutions.

The fact is that use of this legislation has brought a degree of openness to political life that is vital if people are to have their faith in sometimes corrupt relationships and dealings is to be restored.

Thank you.

John Sinclair

**John Slater**

Dear Commission,

Please find attached my evidence submission as per your call for evidence. If you require any further information please let me know.

This email has 3 attachments:

Submission to the Commission.

[UCL Constitution Unit FOIA Research – ESRC End of Award Report Sept 2009.](#)

[UCL – The Cost of Freedom of Information December 2010.](#)

Yours sincerely

John Slater

### **Submission to the Commission**

#### **Introduction**

1. Many opinions have been expressed about the impact of the Freedom of Information Act 2000 (“FOIA”) on local and national government. The majority have come from people within or associated with Government. By its very nature this information will be subject to subtle personal bias either in favour or against the FOIA in its current form. I suggest that the Commission ask whether these opinions should carry a cautionary warning of ‘they would say that wouldn’t they’ before acting on them.
2. Despite Freedom of Information being in place across some 75 countries around the world, it has not been the subject of a great deal of research. The UCL Constitution Unit (“UCL”) carried out comprehensive research on the impact of FOIA on central Government in 2008/9. It published its full research in the following book (the Commission may wish to obtain a copy):

**The Impact of the Freedom of Information Act on Central Government in the UK: Does FOI Work?** (Hazel, Worthy, Glover. September 2010 Palgrave Schol ISBN-13: 978-0230250345 348 pages).

3. As the research was funded by the Economic and Social Research Council (“ESRC”) an exit report (“Exit Report”) was published in September 2009. A copy is attached with this submission.
4. In its Exit Report, UCL explained that it has been perceived that:

*“The main threat to effective government is that FOI might have a ‘chilling effect’, with the fear of disclosure leading to less information being communicated and recorded. This in turn would*

*have damaging effects on the quality of government decision making, as well as the quality of the official record.”*

5. The Exit Report also listed 6 objectives of the FOIA which have been most frequently mentioned in ministerial speeches, white papers and parliamentary debates:
  - *increased openness and transparency*
  - *increased accountability*
  - *improved decision-making in government*
  - *better public understanding of government decision-making*
  - *increased participation*
  - *increased public trust in government*
6. I respectfully suggest that the Commission should consider using this list as a test to gauge the impact of any recommendations made. Should any proposed recommendation adversely impact these objectives I suggest that the Commission should not include it in its final recommendations. After all it is not the remit of the Commission to fundamentally undermine Parliaments original intentions for the FOIA.

#### **Current Protection**

7. It is important to remember the comprehensive protection that the FOIA affords before considering tightening it. Tables 1.1 and 1.2 below list the current exemptions:

**Table 1.1 – Exemptions Subject to PIT**

<b>Subject to Public Interest Test</b>
S.22 Information intended for future publication
S.24 National security.
S.26 Defence.
S.27 (1) & (2) International relations.
S.28 Relations within the United Kingdom.
S.29 The economy.
S.30 Investigations and proceedings conducted by public authorities.
S.31 Law enforcement.
S.33 Audit functions.
S.35 Formulation of government policy.
S.36 Prejudice to effective conduct of public affairs.
S.37 Communications with Her Majesty, etc. and honours.
S.38 Health and safety.
S.39 Environmental information.
S.40 (2) Personal information.
S.42 Legal professional privilege.
S.43 Commercial interests.

**Table 1.2 – Absolute Exemptions**

<b>Absolute Exemptions</b>
S.12 Exemption where cost of compliance exceeds appropriate limit.
S.14 Vexatious or repeated requests.
S.21 Information accessible to applicant by other means.
S.23 Information supplied by, or relating to, bodies dealing with security matters
S.32 Court records, etc.
S.34 Parliamentary privilege.
S.36 (Parliament)
S.40 Personal information.
S.41 Information provided in confidence.
S.44 Prohibitions on disclosure.

**The ‘Cost’ of Disclosure**

8. Those critical of the FOIA make much of the financial cost and disruption to the activities of public authorities (“Authorities”) resulting from requests for information (“RFI”). I suggest that it is important for the Commission to keep to the fore that no implementation of a FOIA can be or is ever intended to be painless for Authorities.
  
9. The Commission should also consider the ‘cost’ and practicality of trying to obtain information from Government Departments without the FOIA. I have previously asked the Department for Work and Pensions (“DWP”) some questions about policy implementation and sought associated information. Sadly the responses to my queries bore little resemblance to the questions asked and none of the information was provided. I responded each time explaining the issues only to be met with the blunt response of:
 

*“We have nothing further to add.”*
  
10. Accepting that the DWP wasn’t going to answer my questions but still feeling frustrated I contacted the ICO to ask if the DWP should have provided the requested information. On

both occasions the ICO informed the DWP to supply the information. I suggest it is clear that without the backdrop of the FOIA, Government Departments automatically return to the 'bad old days' of treating enquiries from the public with disdain.

11. Clearly the correct balance between the benefits of disclosure and the disruption to the Authorities must be maintained. However, I worry that the Commission might tilt that balance too far in favour of the Authorities and return us to the 'bad old days'. Case law specific to the FOIA is still developing. However, it is well established in relation to the Official Secrets Act 1989 ("OSA"). One could consider the OSA as the forerunner of the FOIA both legislatively and in terms of the Government's mindset at the time the FOIA was enacted.

12. Lord Bingham (Lord Chief Justice and strong advocate of the Rule of Law) in the House of Lords case *R v Shayler* [2002] UKHL 11 [2003] AC 247 describes the correct balance between disclosure of information and Government secrecy:

*"Modern democratic government means government of the people by the people for the people. But there can be no government by the people if they are ignorant of the issues to be resolved, the arguments for and against different solutions and the facts underlying those arguments. The business of government is not an activity about which only those professionally engaged are entitled to receive information and express opinions. It is, or should be, a participatory process. But there can be no assurance that government is carried out for the people unless the facts are made known, the issues publicly ventilated. Sometimes, inevitably, those involved in the conduct of government, as in any other walk of life, are guilty of error, incompetence, misbehaviour, dereliction of duty, even dishonesty and malpractice. Those concerned may very strongly wish that the facts relating to such matters are not made public. Publicity may reflect discredit on them or their predecessors. It may embarrass the authorities. It may impede the process of administration. Experience however shows, in this country and elsewhere, that publicity is a powerful disinfectant. Where abuses are exposed, they can be remedied. Even where abuses have already been remedied, the public may be entitled to know that they occurred. The role of the press in exposing abuses and miscarriages of justice has been a potent and honourable one. But the press cannot expose that of which it is denied knowledge."*

13. It is clear that the most senior court in the land accepts that the bar to prevent disclosure of information, in terms of any adverse effects on the Authorities, is a high one. I suggest that the Commission would be failing in its duty to the electorate if it lowered this bar.

14. Tony Blair's comments on Freedom of Information are well known. However, his successor Gordon Brown had a different opinion. In a speech in October 2007 he said:

***"Although FOI can be inconvenient, at times frustrating and indeed embarrassing for governments, freedom of information is the right course, because government belongs to the people, not the politicians."***

15. Prime Minister Brown's comments are entirely compatible with Lord Bingham's judgement and at odds with those highly critical of the FOIA.

16. In respect of the financial costs and staff time, based on personal experience, I suspect that much of this is self inflicted. It is not unusual to see responses from Authorities that are patently wrong in terms of the information provided of the exemption engaged. This leads to the requester having to submit an Internal Review Request (“IRR”) and which in turn results in further work for the Authority.
17. From personal experience with the DWP it has taken up to 5 IRR to obtain the requested information, which I knew existed from references in other DWP documents despite the department claiming otherwise. Such behaviour by the DWP and other Authorities is common. The frustration of dealing with such behaviours now means that after submitting only one IRR I refer the matter immediately to the Information Commissioner. The costs and disruption associated with this lay squarely at the feet of the DWP and other departments with similar poor track records.
18. Another issue that frequently raises its head is the antiquated IT systems being used by Authorities. I have seen numerous RFI that could be satisfied by a simply search of an email system. However, the response from the Authorities concerned is usually that the email system doesn’t have a search facility. I’m sure that similar issues apply to electronic storage systems. The FOIA should not be the fall guy for the impact of inadequate IT systems or information storage strategies. Over time these issues will resolve as better IT is procured by the public sector.
19. The costs associated with Tribunals are grossly inflated by the behaviour of Authorities. For example I have an ongoing RFI (dating back to June 2012) that the DWP appealed having lost at the First-Tier Tribunal (“FTT”). At the original FTT hearing the DWP had 6 people in attendance (one was a witness and 3 were “hangers-on”) compared to the ICO and myself each with 2. At the Upper Tribunal (“UT”) Hearing the DWP had two solicitors, Counsel and 3 “hangers-on”. The matter is being reheard by the FTT and the DWP intends to have similar excessive numbers yet again. To use the DWP own words it intends to have “*at least 4 people attending from London for the Department (Counsel, our witness, our lead lawyer and our lead client)*”. The FTT expressed surprise at the numbers as the DWP had claimed that the matter could be resolved by papers. Once again the ICO will manage with 2 people as will I.
20. I believe that the Commission should also consider the behaviour of Authorities pursuing appeals based on flimsy grounds. I suggest that some Authorities use the complaint/appeal process (ICO to FTT to UT) as a method of delaying disclosure or deterring the requester from pursuing the mater. Some of these appeals deal with what might be politically embarrassing information rather than damaging as protected by the FOIA.
21. In the case mentioned above the DWP won at the UT on a legal technicality. Despite this the Judge remarked:  
  
*“It is possible that, on reflection, the Department may accept that it is not worth at this stage pursuing the case in respect of some or all of the other information. That is just a thought; it is not a matter for me.”*

22. Despite the Judge's comments and having disclosed one of the 4 documents following the UT hearing the DWP is insisting on yet another FTT hearing (despite having cited the same exemptions for all 4 documents).
23. The disclosed document was purely a factual record of the milestones for the DWP Universal Credit Programme ("UCP"). It showed that the DWP originally intended to have completed it by September 2014. Completion dates into 2019 are now being mentioned by the DWP. The House of Commons Public Accounts Committee ("PAC") and Work and Pensions Committee ("W&P") had been trying to get the Secretary of State to tell them his plan and he refused.
24. On the 5<sup>th</sup> September 2013 in response to an emergency question about the UCP the Secretary of State told Parliament:  
  
*"The plan is, and has always been, to deliver this programme within the four-year schedule to 2017".*
25. The milestone plan disclosed in July 2015 suggests that the Secretary of State may have been less than truthful with Parliament as the original plan only ran to September 2014. Had this been disclosed earlier the PAC, W&P and Parliament would have been able to challenge the Secretary of State's claims. Given that the UCP is the most radical redesign of the benefits system this country has ever seen and costs in the £billions, being able to hold the Secretary of State to account is an essential feature of our system of government. This cannot happen if those responsible for supplying the checks and balances are starved of information. As a free and democratic country this must also include the press.
26. I suggest that the Commission needs to be careful not to confuse protecting ministers from the disclosed politically embarrassing information with protecting the process of Government, as they are not the same thing.

#### **Unexpected Consequences of Changes**

27. The Commission should be aware that making changes to the FOIA to make it more difficult for the public to obtain information could have unexpected and undesirable side effects.
28. It is likely to reduce trust in Government even further as people will look at such changes as evidence that the Government has something to hide. Politicians of all sides have expressed concern about the lack of engagement by the public (e.g. low voter turn out, lack of interest in major issues, etc). The FOIA is actually a very cost effective way for the average person to engage with Government at the national and local level to obtain information about specific issues of interest to them.
29. Websites such as [www.WhatDoTheyKnow.com](http://www.WhatDoTheyKnow.com) enable people to interact with others and discuss common or differing issues. This provides a gentle non-party political forum where people often become more interested in local or national politics. The site is also self

moderating such that the very small minority that attempt to abuse the FOIA are educated by moderators and other users. If their misuse continues they are barred from the site.

30. Making access to information more difficult is likely to be seen as sending the message that such interest is undesirable and that people 'should know their place' and let those in Government "get on with it." This would be dangerous and reminiscent of Government in earlier centuries. In fact it would fatally undermine the intent of the FOIA and open government.

#### **Interpretation by Tribunals and the Courts**

31. In this submission the term "Courts" is used to refer to both Tribunals and Courts. The Commission and others have raised concerns about binding decisions by the Courts. The most well know of these is that of the Supreme Court in *Evans* which dealt with the use of the ministerial veto in respect of HRH the Prince of Wales's correspondence with Government ministers.
32. The members of the Commission with a legal background will be familiar with the doctrine of the separation of powers. This dates back to the mid-seventeenth century. Writers of the day such as John Locke and Montesquieu proposed the separation of the legislature, executive and the judicial functions of justice (i.e. independence of the judiciary). Whilst there has been much debate about separation of powers it is now accepted, as Lord Bridge observed in *X Ltd v Morgan-Grampian Ltd* [1991] 1 AC 1, 48, that:

*"In our society the rule of law rests upon twin foundations: the sovereignty of the Queen in Parliament in making the law and the sovereignty of the Queen's courts in interpreting and applying the law."*

33. Therefore, I would urge the Commission not to recommend anything that could be seen to undermine this essential pillar of our constitution. I suggest that to do so would place the Commission and Parliament at odds with the rule of law.

#### **Question 1 – What protection should there be for information relating to the internal deliberations for 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?**

34. This question is disturbing as it appears to suggest that the Commission is considering the extension of the protection afforded to the development of policy to include the day to day activities of Government. I suggest that to do so would be fundamentally flawed and be at odds with the original objectives of the FOIA.
35. In respect of 'internal deliberations' the information concerned could fall within a number of the existing statutory exemptions. The majority of RFI probably fall within the ambit of S.35, S.36 and S.42

#### **S.42 Legal Professional Privilege**

36. The level of protection offered by S.42 quite correctly is very strong. This in turn has been reinforced by legal precedent. I suggest that there is no need to change the protection afforded by this exemption.

### **S.35 Policy Formulation**

37. S.35 already provides wide ranging class based protection, referred to as 'safe space', for Governments engaged in policy formulation. Court judgments have also accepted that some policy formulation can extend beyond the traditional time period and extended the ambit of S.36 accordingly. It is difficult to see how protection for policy formulation could be increased, save for the removal of the public interest test ("PIT")

38. S.35 is a qualified exemption and therefore requires a PIT. It is possible that the Commission will consider removing the PIT. If the Commission can be absolutely certain that there will never be a time where it is in the public interest for information related to policy formulation to be disclosed, then it could recommend this change. However, if there is even the remotest possibility that a future Government could do something so wrong that it should be exposed, then the PIT for S.35 should be retained.

39. The House of Commons Justice Committee's report "Post-legislative scrutiny of the Freedom of Information Act 2000" ("JC Report") published 3<sup>rd</sup> July 2012 deals with safe space in some detail at page 58 (including the Rt Hon Jack Straw's recollection of what he thought Parliament intended when creating S.35). It concluded at paragraph 166:

*"It is evident that numerous decisions of the Commissioner and the Tribunal have recognised the need for a 'safe space'. However, equally evident is the fact that in some cases their decision that information should be disclosed has challenged the extent of that safe space. We accept that for the 'chilling effect' of FOI to be a reality, the mere risk that information might be disclosed could be enough to create unwelcome behavioural change by policy makers. We accept that case law is not sufficiently developed for policy makers to be sure of what space is safe and what is not."*

40. The JC Report remarked on exactly what safe space was intended for:

*"we remind everyone involved in both using and determining that space that the Act was **intended to protect high-level policy discussions.**"* (emphasis is mine)

41. This is further supported by comments made by Lord Falconer of Thoroton (then a Government minister) that whilst any factual and background information used in policy making is subject to the PIT it is given "**a strong steer towards disclosure**" (HL Deb Vol 612, col 827, 20 April 2000).

42. This suggests that should the Commission recommend anything that goes beyond the protection of high level policy formulation it would be inconsistent with Parliament's original intent.

43. The criticism of S.35 PIT decisions by the Courts in some quarters comes perilously close to falling foul of the principle that Parliament makes the law and the Courts interpret and

apply the law. As recognised in the JC Report we are still at the early stages of understanding what 'safe space' actually means and the necessary case law is still evolving. It is accepted that some of those in Government may feel uncomfortable while case law develops. However, that is the way that our legal system works and it has proven itself over centuries.

44. I suggest that the FOIA provides adequate protection in relation to the formulation of Government policy. In respect of what 'safe space' actually means I believe that the Courts rather than politicians are best placed to define this. The UK is changing rapidly and people no longer automatically defer to traditional authority figures. The populous is getting ever more used to having access to information at the click of a mouse button. In light of such changes the nature of 'safe space' will have to evolve to reflect the demands of the electorate and that definition is best left to the Courts. Politicians used to the world as it was 10, 20 or 30 years ago may feel uncomfortable with this but they and the Commission must remember that Politicians work for the people, the people do not work for politicians.

### **S.36 Prejudice to the effective conduct of public affairs**

45. The majority of RFI where S.36 is engaged relate to claims that disclosure would
- inhibit the free and frank provision of advice or exchange of views; or
  - otherwise prejudice the effective conduct of public affairs.
46. This exemption has led to the notion of the "Chilling Effect" ("CE"). The basis of claims for the CE is that disclosure of information will make civil servants temper what they write in documents for fear that they would be disclosed. To date no Government Department has been able to offer proof that the phenomenon is real or describe the mechanism by which it 'works' or is identified. When challenged supporters claim it is far too subtle an effect to see and that we have to trust their word. Those familiar with the tales of Hans Christian Andersen will be familiar with such claims in his short story called "The Emperor's New Clothes".
47. When considering the claims by ministers and civil servants the Commission should remember that a considerable 'inequality of arms' exists between the requesters and the Authorities. Requesters simply do not have access to ministers or civil servants to put up as witnesses to argue a contrary view in respect of the CE.
48. A good example is the Department of Health Transitional Risk Register mentioned by the Commission in its call for evidence. In this case one of the requesters had served as a government minister. The judgement (Department of Health v ICO & Healy, Cecil [2012] 1 INFO LR) covers this issue at paragraphs 66 to 73.
49. Despite giving evidence supporting the Chilling Effect the head of the Civil Service, Lord O'Donnell, admitted that "*it was very difficult to prove one way or the other whether a chilling effect would take place*" (para 69).
50. Para 67 recalled the evidence of a previous Government minister:

*“Mr Healey was the minister responsible for the Office of Government Commerce at the time and said that there was no evidence that a chilling effect developed as a result of the release of the reviews even after he moved to The Treasury.”*

51. At para 70 the Tribunal noted the views of Mr Healey regarding the impact of disclosing Gateway Reviews:

*“Mr Healey expressed the view, that in his experience as a minister, that the quality of submissions on policy had tended to improve since the above disclosures.”*

52. In this one case we have the most senior civil servant claiming that the CE exists but admitting that it was difficult to prove and a previous Government minister claiming that disclosure actually resulted in improvements in submissions to ministers.

53. With such contradictory arguments the Commission should look to other sources. Truly independent evidence does exist in the form of research carried out by UCL. Its Exit Report states:

***“FOI has not caused a ‘chilling effect’ on frank advice and deliberation, or on the quality of government records. The myth persists, but convincing evidence proved hard to find.”***

54. Despite the absence of proof, other than opinions of civil servants (who one might reasonably consider “they would say that wouldn’t they”) and the UCL research, Tribunals remain receptive to claims of a CE by Authorities and refuse disclosure of information as a result.

55. I suggest that there is no compelling evidence to justify any increase in the protection afforded Authorities for information related to internal deliberation. Despite some ten years of disclosures, Authorities have been unable to provide proof that disclosure of information related to internal deliberation resulted in the mythical CE. There is however, research from the highly reputable UCL that:

***“... FOI has not caused a ‘chilling effect’ on frank advice and deliberation, or on the quality of government records.”***

56. To recommend changes on the basis of the unproven opinions of people whose probity can be reasonably challenged on the basis ‘that they would say that, wouldn’t they’ and in the face of independent high quality research, would be unjustifiable.

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

57. I suggest that the only sensible answer to this question is that it depends on the specific circumstances of the case. Considerations such as context, timing and content all contribute to the sensitivity of information and it would be impossible to draft a law to account for this.

58. Many civil servants and ministers will have experienced much of their careers where disclosure of information was via the 20/30 year rule. It is accepted that people do not like change especially when this is forced upon them. This is likely to be the genesis of many of the problems with the FOIA alleged by ministers and civil servants. The Commission should be careful not to let their familiarity of old processes taint the need for much shorter timescales for disclosure in the fast moving world of today.
59. Establishing a fixed arbitrary deadline after which information is no longer considered sensitive would be a blunt instrument and create legal absurdities. For example if a period of 12 months is agreed would it be sensible to refuse a request for information that is 11 months 30 days old?
60. I suggest that such an approach would be unhelpful and, unless the period of protection is set for an unreasonably long period, undermine the protection already in place. The nature of the work undertaken by Authorities is such that some information will cease to be sensitive after 6 months whilst other examples may take 2 years or more.
61. The obvious answer to this question is the current application of the PIT supported by the ICO and the Tribunal System. Despite reservations in some quarters, I suggest that this remains the best solution to this concern.

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

62. Parliament was right to separate the formulation of policy from other deliberative information. However, I do not believe that there is any justification for changing the level of protection offered by S.35 or S.36. Apart from setting an arbitrary time period the only other option would be to create a class based absolute exemption for the respective information. I suggest that this would be a gross over reaction and damage the objectives of the FOIA.
63. Creating an absolute class based exemption would lead to a significant number of appeals as the ICO and Tribunal system determined exactly what information is actually policy formulation or simply internal deliberation. It would also lead to less scrupulous Authorities describing information as being covered by S.35 or S.36 to shelter under the absolute nature of the exemptions.
64. I suggest that the Commission would be opening 'Pandora's Box' if it recommended making S.35 and/or S.36 absolute class based exemptions. As stated previously the best way to resolve such issues is the PIT supported by the ICO and the Tribunal System.

**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?**

65. Collective Cabinet responsibility is an essential part of the system of Government and should be protected. This information should be entitled to greater protection than other

deliberative information. As long as a suitable legal definition can be drafted of what information relates to collective Cabinet discussion and agreement, I think this should be an absolute class based exemption. Any legal definition should offer a restrictive view of what information qualifies to prevent people sheltering unrelated information under it.

66. The Commission may wish to consider a time limitation for such an exemption. I suggest that maximum period of 5 years would be reasonable after which it would be subject to the PIT.

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

67. I suggest that the fundamental basis of this question is fatally flawed. I have 30 years experience in IT development, project and programme management and hold professional and post-graduate qualifications in the field. As such, I find the focus on the assessment of risks (risk registers) perplexing and suggestive of a poor understanding of professional risk management.
68. Risk registers are simply one of a number of basic tools used within programme and project management and possibly in other aspects of Authorities work. There are simply a 'guess' of how likely something might happen in the future and the impact it will have.
69. Issue logs are another 'basic tool' and unlike the risk register deals with problems that have actually occurred. If the concerns expressed by the Commission are truly about sensitivity then surely live ongoing problems that have occurred are far more sensitive than guesses of what might happen in the future.
70. I have run large projects and programmes in both the private and public sectors. Invariably I have been very open with documents such as risk and issues registers. There was only ever a very small amount of sensitive information that was not shared (e.g. related to job losses). Distribution of this information never resulted in problems. In fact on a number of occasions it helped uncover potential problems that had been either overlooked or not known about. It also reassured stakeholders that the project or programme was being run professionally.
71. Witnesses and Authorities have tried to convince the ICO and Tribunals that disclosure of risk assessments will result in harm. The CE is usually one of the 'go to' reasons. To date I have yet to see any explanation of why disclosure of a risk register will cause civil servants to change their behaviour. We should remember that people only change their behaviour in response to positive or negative events. Therefore if raising a risk results in a positive reaction the behaviour continues. Thus, the only reason that people would change their behaviour would be in response to a negative reaction. This suggests the existence of bad and possibly unlawful employment practices (e.g. bullying, retribution etc). Therefore, by recommending that risk assessments are a special case the Commission could be seen to be condoning bad or unlawful employment practices. A final point to remember is that names below Senior civil servant grade aren't disclosed.
72. Witnesses and Authorities have also claimed that the public and the Media will misunderstand the risk assessment information if disclosed. I cannot speak for the media

but given the size of many press offices within Government Departments it is clear that they are more than capable of dealing with a mischievous media story. After all, Authorities deal with leaks where they get little or no warning that the information will be published. Disclosures under the FOIA give the Authority a minimum of 40 working days to prepare for any disclosure.

73. In respect of the public I suggest that such fears are misplaced. All of us are familiar with the concept of risk management. We buy insurance for our homes, our cars and when we go on holiday. No one does this expecting their house to burn down, their car to be stolen or the plane to crash. Even something as simple as parking a car includes basic risk management. Upon entering a car park with plenty of spaces we may spend time looking for the 'best space' so there is more room to open the door or less chance of the car getting scratched. However, if there is only one space available we park in it without hesitation.
74. I suggest that if an Authority includes a risk that a building housing a new IT system might be the target of a terrorist attack, members of the public will not assume that such an attack will take place. The same can be said about problems with IT systems or personnel issues.
75. There will undoubtedly be a limited amount of information in some risk registers that should not be disclosed. This could be for legal reasons (e.g. related to job losses), security reasons or because it relates to policy formulation. I suggest that there are already sufficient exemptions in place to allow this information to be redacted prior to disclosure.
76. I suggest that concerns about disclosing risk assessments (risk registers) are fundamentally flawed. The information they contain is actually no more sensitive than that contained in other documents and there is already sufficient protection afforded by the FOIA.
77. In order to justify making risk assessments a special case the Commission needs to be able to explain why this information is a special case and what actual harm is likely to happen following disclosure. I suggest that other than unfounded fears by people who 'would say that, wouldn't they' the Commission will be unable to do so.

**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?**

78. On the face of it the principle of a ministerial veto appears reasonable. However, this is based on the premise that the executive can be trusted not to abuse it. Sadly I do not believe that this is the case. Given the current behaviour of the executive, and to some degree MPs, it is very likely that the veto would be used to prevent disclosure of politically embarrassing information or unlawful behaviour.
79. A good example of this may be the criticism of the government by the head of the UK statistics authority. Would a Government willingly disclose information that proved it had

been dishonest by publishing grossly misleading statistics? To be blunt, I believe that there is a grave concern that modern politicians can't be trusted.

80. I suggest that the idea of an unfettered executive veto fails the fundamental principles of justice being seen to be done and the role of the judiciary being to interpret the law. In the case of Evans (HRH the Prince of Wales' correspondence) the Courts got it right. It simply isn't reasonable for an Authority to travel through the legal system and then use the veto because they didn't agree with the judgement. Imagine what would happen if this facility existed in other areas of law. I suggest that the current FOIA provides adequate protection.
81. If the Commission recommends changes to the current veto within the FOIA then I suggest it must have a role for the Judiciary. Simply allowing the executive to override or bypass the Courts would damage what little faith the public have in government at present. The route of judicial review would remain open to challenge the process by which the certificate was granted whilst keeping the information safe.
82. I suggest that by definition the requirement to employ a veto must be an exceptional event and involve only the most sensitive of information. Therefore as in other areas of law (e.g. top secret information in criminal trials) it seems reasonable that if the executive wished to employ the veto it would have to apply to a High Court Judge to obtain a certificate stating that its use was reasonable and within the law.

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

83. The current system works very well and I can see no reason for major changes.
84. The process of submitting an IRR to the Authority, should it initially refuse disclosure or simply not respond, is simple and not bureaucratic. However, many Authorities rely on the lack of a statutory deadline to respond to IRR and simply ignore them until the ICO becomes involved. I have personal experience of this happening several times. I suggest that the introduction of a statutory deadline (20 working days would be reasonable) in which to respond to an IRR should be included in the Commissions recommendations.
85. The initial appeal by either party to the ICO is straight forward, makes good use of electronic communication and is well run by the Commissioner. Based on personal experience and feedback from others the ICO gets it right in the vast majority of decisions. Even when the decision has gone against me the ICO decision notice explains the reasons such that I understand how and why that decision was reached. Given that I have only made one appeal against an ICO decision (which I won at the FTT), I believe that this part of the system works very well.
86. I have limited experience of the First-Tier and Upper Tribunal services. However, I cannot praise everyone involved highly enough. Despite being up against solicitors and barristers from the ICO and the Authority I was given appropriate help throughout the process.

**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?**

87. I suggest that the premise of the question may be based on flawed assumptions and appears to be ignoring the considerable protection that the FOIA already affords Authorities. S.12 and S.14 already provides broad protection from the concerns expressed in this question.
88. S.12 already provides an absolute exemption if the Authority estimates that complying with the request or trying to confirm or deny if the information is held would exceed the statutory cost limits. This addresses the risk of undue financial burdens.
89. S.14 provides protection for vexatious or repeated requests. The meaning of vexatious has been established via precedent and is held to be:
- "...manifestly unjustified, inappropriate or improper use of a formal procedure."*
90. The ICO confirms in its S.14 guidance that this definition encompasses requests that are likely to cause a disproportionate or unjust level of disruption, irritation or distress.
91. On the face of it S.12 and S.14 already afford adequate and proportionate protection for the issues raised in this question. Therefore, it may be that the Commission is asking in an indirect way if limitations should be imposed on the number of requests submitted. If this is the case it would naturally lead to consideration of controls or mechanisms such as the introduction of fees.
92. In respect of the overall burden imposed by FOIA on Authorities, unless the Commission is able to understand how much of that burden is self inflicted then it should be cautious about recommending any changes to the current Act. I also question the veracity of claims from Authorities about the burden of the FOIA given my observations of their financial recording of FOIA related activities.
93. It is quite common for people to submit an RFI to an Authority to ask how much it spent on a particular appeal that was reported in the press. It is also very common for Authorities to respond saying that it does hold that information as it is not recorded. People have also asked how much particular authorities spend on dealing with RFI in general. The standard answer from most Authorities is either that it doesn't hold the information or it is so dispersed throughout the organisation that it would cost too much to find and calculate.
94. I suggest that the Commission also needs to consider the disproportionate costs resulting from appeals that Authorities initiate, often on grounds with little merit. The fees alone for 1 solicitor and 1 barrister to complete a simple FTT hearing would conservatively pay for at least 50 RFI charged at the maximum rate allowed.

95. A final issue relates to Authorities that use the Government Legal Services (“GLS”), previously known as the Treasury Solicitors Department, for tribunal appeals. The costs incurred by the GLS are not charged back to the Authority. Such costs will be significant as they cover charges for the Solicitors and Barristers involved in the appeal.
96. I suggest that this places the Commission in a difficult position. If Authorities do have cost information readily to hand then they are not responding to RFI legally. If (as I suspect is really the case) they do not have the cost information readily to hand then claims of an unreasonable burden have to be treated with considerable scepticism.
97. Based on my own experience I suggest that many if not most Authorities are their own worst enemies in respect of costs incurred (this includes staff time). Real examples are:
- Ignoring initial RFI and subsequent IRR until instructed by the ICO to respond.
  - Blatantly responding very late which means having to deal with an IRR as well as the RFI.
  - Engaging exemptions that are obviously not applicable. This often happens following the issue of guidance by the ICO. For example when guidance was issued about vexatious requests, suddenly a significant minority of RFI were claimed to be vexatious. The DWP tried this with 2 of my requests. Despite attempting to resolve this with the DWP I had to refer the matter to the ICO. The DWP claims were dismissed out of hand.
  - Making claims that information is not held when there is proof (e.g. referred to in other Authority information) that it does. I have had a number of experiences where it was only after a high number of IRR (3 and above) explaining why I knew the information existed that it was disclosed. There does seem to be a correlation between the information being potentially being embarrassing and the reluctance to disclose within government departments.
  - Deliberately misunderstanding the RFI. I have seen a number of responses (not all mine) from Authorities that can only have been deliberately misunderstood. This then triggers an IRR and further delays to disclosure.
  - Claims that S.21 applies when the information referred to by the Authority is not what was requested. This then triggers an IRR and more work for both parties.
  - Claims that S.12 (costs) applies when it is obvious that the information is readily available within the appropriate cost limits. For example I asked for the number of risks held in a risk register (held in a computer based repository) and the number of issues held in an issues log (electronic document). It simply isn't credible to suggest that it would take one person more than 24 working hours to find and gather the information requested.

- Costs incurred at the appeal stage inflated by the Authority when it sends 2 solicitors, 1 Barrister and 3 'observers' from the programme to an UT hearing.
- Costs incurred at the appeal stage when the Authority sends 1 Solicitor, 1 Barrister, 1 Witness and '3 hanger-ons' to a FTT hearing outside of London.
- Authorities appealing based on grounds that have no merit.
- An Authority insisting on an oral hearing despite an UT Judge saying:

*"It is possible that, on reflection, the Department may accept that it is not worth at this stage pursuing the case in respect of some or all of the other information. That is just a thought; it is not a matter for me."*

98. Although it is not mentioned specifically by the Commission, there has been mention of the introduction of fees for FOIA by the press. At least one member of the Commission (Rt Hon Jack Straw) has previously expressed support for them:

*"72. Mr Straw's motivation for introducing a charge was to reduce the volume of requests. He told us that a £10 fee "would not stop important requests, but it would act as a check." (Post-legislative scrutiny of the Freedom of Information Act 2000 MoJ 03 July 2012)*

99. I suggest that Mr Straw's reasoning is flawed. The introduction of fees would certainly reduce the volume but would also stop 'important requests'. In respect of departments such as the DWP the majority of requests on the What Do They Know web site are from individuals and small charitable organisations helping those in dire need. I have seen a high number of important disclosures that have helped protect the rights of our sick and disabled citizens. I suggest that virtually all of those requests, including my own, would not have been occurred if a £10 fee existed.

100. The introduction of fees for Tribunal hearings would have unexpected disastrous consequences. Authorities would know that people (and probably the ICO) would be reluctant to take cases to appeal due to the deterrent effect of a fee. This means that Authorities who receive the most RFI, and are also the worst offenders for abusing the FOIA, would simply refuse disclosure knowing that there was little chance of the case ever getting to a Tribunal hearing.

101. Given the disastrous impact that fees have had on employment tribunals it can only be assumed that the same would happen for the FOIA. It could be argued therefore that recommending the introduction of fees could be perceived as a cowardly act by those too frightened to recommend the total abolition of the FOIA.

102. I remind the Commission that one of the justifications for the creation of administrative tribunals was the provision of a speedier and cheaper procedure than that afforded by the ordinary courts. I suggest that the introduction of fees runs contrary to this goal and is not justified on the facts.

103. It is essential that the Commission look at the available independent evidence rather than their own feeling or opinion before making any decisions as to the reasonableness of any burden imposed by the FOIA. A UCL paper published In 2010 (copy attached) stated:

*“The total cost across central government of dealing with FOI requests is £24.4 million per year.”*  
(£35.5m per year if local government is included)

104. This amount needs to be placed into context if its value or burden is to be understood.

105. Current Government spending on PR and Communications is reported to be £289m per year or £4.50 per head of population. IPSA reported that MPs business costs and expenses totalled £105,884m for 2014/15.

106. I suggest that within the context of this spending the public would consider £24.4m extremely good value. It is essential for credibility that should the Commission make any comments on the financial impact of FOIA or recommendations about the introduction of fees it does so within an appropriate financial context.

107. The introduction of fees to any aspect of the FOIA would be very badly received by the public and organisations that use the FOIA. Fees may well deter people from sending inappropriate RFI or reduce numbers. However, as a crude and blunt instrument it will also place FOIA out of the reach of those that are most in need of the information. I also suggest that voters would rightly see fees as a tax on information and knowledge and their right to hold the government of the day to account.

### **Conclusion**

108. Much has been written about the impact of the FOIA by ministers and senior civil servants. Claims are frequently made about the notion of a chilling effect or the disproportionate impact that the FOIA has on public authorities. When asked to point to the harm resulting from the disclosures under the FOIA, those making the claims are unable to do so.

109. However, if one considers other evidence such as independent high quality research and comparison of FOIA costs with other Governments, see attached report “The Cost of Freedom of Information” (December 2010), it quickly becomes apparent that the claims of harm are unsubstantiated. UCL concluded in its Exit Report:

***“Finally, FOI has not caused a ‘chilling effect’ on frank advice and deliberation, or on the quality of government records. The myth persists, but convincing evidence proved hard to find. There was no evidence of any decline in the quality of official advice. Ministers may resort to ‘sofa government’, and there is deterioration in the quality of government records; but there is no evidence to link this to FOI. Sofa government results from ministerial preferences and behaviour. The deterioration in government records results from starving the record keeping function of resources. Given so few***

*specific FOI examples, we concluded the chilling effect to be a myth, albeit a pervasive one. The majority of officials were more fearful of the consequences of not having a record rather than of a record being released. Many pointed to general shifts in the way decisions are made and use of electronic technology as the source of changed records, rather than FOI.” (emphasis is mine)*

110. The Select Committee on Constitutional Affairs said in its 7<sup>th</sup> report of 2005-06 (HC 991, para 13):

***“It is clear that the implementation of the FOI Act has already brought about significant and new releases of information and that information is being used in a constructive and positive way by a range of different individuals and organisations. We have seen many examples of the benefits from the legislation and are impressed with the efforts made by public authorities to meet the demands of the Act. This is a significant success”*** (emphasis is mine)

111. In respect of open government, the open government partnership website includes the following text as the start of its introduction:

***“Prime Minister David Cameron has championed open government in the UK with a pledge to make the government “the most open and transparent in the world”. The minister for the Cabinet Office has described open data as “the new raw material of the 21st century” the value of which lies in “holding governments to account; in driving choice and improvements in public services; and in inspiring innovation and enterprise that spurs social and economic growth.”*** (Emphasis is mine)

112. Clearly there is a discrepancy between research in the field of FOI, previous Parliamentary reports on the implementation of FOIA, a statement made by Prime Minister Gordon Brown, the current Prime Minister championing open government and what senior civil servants and ministers (including ex ministers) are claiming. I am inclined to dismiss the now infamous comments made by Tony Blair as they are not supported by the facts and the existing exemptions more than adequately address the concerns he raised. I do not believe that those expressing concerns are being dishonest but there is another more credible possibility.

113. People with long service, be they ministers or senior civil servants, would have started their careers long before the FOIA came into being. They are used to operating in a culture where the OSA and the 20/30 year rule controlled disclosure of information. The introduction of the FOIA would have represented a huge assault on the culture they were familiar with. In effect a huge change was imposed upon them and I suggest they reacted as most human beings do. People’s typical reaction to change is comparable to a grieving process as they have lost something that they are comfortable and familiar with. Their behaviour typically follows the stages shown in Table 2 below:

**Table 2: Reaction to Change**

Stage	Interpretation
Denial	Denial is a defensive response. It is the conscious or unconscious refusal to accept facts, information or reality relating to the situation.
Anger	When people deal with emotional upset they can get angry with themselves or with other people.
Bargaining	People facing change often seek to negotiate a compromise.
Depression	During periods of change people may feel there is little purpose in their work.
Acceptance	Eventually people pass through the period of depression and begin to accept their loss or change in circumstance.

114. It would not be unreasonable to ask if the claims of harm resulting from disclosure, whilst being genuinely made, are actually symptoms of people reacting to the big change in their work lives that the FOIA is delivering. People in the stages of ‘anger’ or ‘bargaining’ would genuinely believe that the FOIA is bad and hence be looking for reasons to justify how they feel. Such behaviour would explain claims of side effects such as the chilling effect and lobbying for changes to the FOIA (bargaining). It would also explain why independent research has been unable to find evidence to substantiate such claims as they are based on feelings rather than facts and measurable actions.

115. I suggest that the Commission needs to be convinced that any recommendations are evidence derived from objective measurable effects rather than feelings arising out of an understandable resistance to the changes implicit in the FOIA.

116. Voters and non voters alike are now used to information being readily available at the click of a mouse button. The days of deference to traditional authority figures, such a ministers and civil servants, are waning. I suggest that any diminishing of the FOIA would be seen as a retrograde step by those who are out of touch with contemporary society.

117. I genuinely hope that no member of the Commission wishes to be remembered for emasculating the FOIA and taxing the public to gain access to the information it requires in order to hold their elected government to account.

118. I would argue that if the FOIA sits in the back of the minds of ministers and senior civil servants because they may be called to account for their actions then that is a good thing. I end my evidence reminding the Commission of the extract of Lord Bingham’s judgement mentioned earlier in this submission:

*“Modern democratic government means government of the people by the people for the people. But there can be no government by the people if they are ignorant of the issues to be resolved, the arguments for and against different solutions and the facts underlying those arguments. The business of government is not an activity about which only those*

*professionally engaged are entitled to receive information and express opinions. It is, or should be, a participatory process. But there can be no assurance that government is carried out for the people unless the facts are made known, the issues publicly ventilated. Sometimes, inevitably, those involved in the conduct of government, as in any other walk of life, are guilty of error, incompetence, misbehaviour, dereliction of duty, even dishonesty and malpractice. Those concerned may very strongly wish that the facts relating to such matters are not made public. Publicity may reflect discredit on them or their predecessors. It may embarrass the authorities. It may impede the process of administration. Experience however shows, in this country and elsewhere, that publicity is a powerful disinfectant. Where abuses are exposed, they can be remedied. Even where abuses have already been remedied, the public may be entitled to know that they occurred. The role of the press in exposing abuses and miscarriages of justice has been a potent and honourable one. But the press cannot expose that of which it is denied knowledge.”*

John Slater  
12 November 2015

#### **Attachments**

[Impact of FOI on Central Government \(UCL Constitution Unit. September 2009\)](#)  
[The Cost of Freedom of Information \(UCL Constitution Unit. December 2010\)](#)

**John Sprackling**

I was aware of this review but the attached item from the latest Private Eye prompted me to write to you.

Please do not dilute this legislation as it is absolutely essential 'tool in residents' tool box' to obtain information from our local Council.

Poole residents have to resort to the Freedom of Information procedure from time to time to obtain answer their legitimate questions, when some officers and/or some Councillors seem unwilling to provide the answers required.

John Sprackling

**Jon Barclay**

The Chairman,

FOI Commission.

Dear Sir,

I believe that the Freedom of Information Act should not be changed. The Act enables information to the public which can expose activity by Government or Companies which is wasteful or unlawful, or contrary to Government statements or policies. As an example, the privatisation of the UK International Development Fund CDC was a shameful government action that the FOI Act exposed.

Many thanks

Mr Jon Barclay

**Jon Mackenzie**

Dear Lord Burns,

I have read with interest several reports regarding the independent commission on Freedom of Information and I would like to offer a little insight as someone who deals directly with handling these requests on behalf of a Local Authority.

The negative reaction of the press is exactly what one might expect but it is perhaps the press who abuse the current system more than anyone else.

I take the view that Freedom of Information does not mean free information. It means access to information, whether it is free to obtain or there is a charge levied. This is a very important point that the press do not make.

What local councils provide through the Local Government Transparency Code is free information and we could certainly expand upon the current model in our quest to become the most transparent democracy in the world – assuming we're not already. Freedom of Information requests often call for embellishments to this free information, particularly in relation to contracts. Despite being the smallest unitary authority in the UK, the Council of the Isles of Scilly receives as many requests of this nature because we are part of a list that does the rounds across every local authority in the country. These requests are nothing more than sales calls and demand to know information that goes beyond what is on the contracts register. It often takes time and therefore a great deal of money to extract. Why shouldn't we charge a fee? Banks and solicitors charge administration fees for sending letters so why don't local councils?

The press are worse. Here is a request I received recently from a major newspaper publisher:

I am writing to request information under the Freedom of Information Act 2000.

I would like to know the following:

The names and breeds of each fire investigation dog employed by the fire service over the past 10 years (i.e. 2006-05) and, if possible, pictures of the dogs.

The years during which these dogs were active.

The number of times that each of these dogs were used in the field and, of this number, the number of times they found evidence that a fire had been deliberately started.

Pictures of dogs? And their names? I'm sorry but answering such a request is a waste of public money that could be used to build a new school or a hospital.

I believe there is no objective justification to this sort of media request and it is improperly motivated. It is clearly constructed to assist in writing a story for commercial gain but I fail to see how the information sought will be of any value to the requester as an individual or the general public. However, rejecting it could call into question our stance on openness and transparency. If a charge were applied then it is my opinion that the request would not be made but if it were then we would be happy to respond because a fee is involved so either way our stance on openness and transparency would be unaffected.

In short, I believe there is a case to put forward that applying a charge to FOI enhances the credibility of openness and transparency.

What should also be considered is the fact that very few people make FOI requests. I have attached some data to back this up as I did a study of a sample of Unitary Authorities in order to compare our performance against our peers to demonstrate to my colleagues that we could be doing better in our efforts to respond within 20 working days. Taking each request to represent one person, only Cornwall have a volume of requests that could represent more than 1% of the population (you must remove Scilly and City of London from a similar equation owing to our sui generis status). The actual figure is around 0.5%, and much of this consists of media requests and sales pitches. The fact is that sufficient information is generally available through the publication schemes and on request as a standard query. Whatever the press might say, we are doing well as a country when it comes to transparency.

I believe the best thing Councils could do in the interest of openness and transparency is ensure they have a general enquiries website address (you might be surprised how many do not) and a telephone that is answered by a person rather than a machine. As for FOI requests, I reckon £15

as a starting point should cover it. If you really want to know certain information then why would you not be prepared to pay for it? Even companies house charge for public accounts.

As for my sample of FOI data, at £15 a request there would have been an extra £700k available in public funds. Across all authorities in the UK it would run into several million and a simple FOI request by your commission asking each local authority for its FOI volume in 2014 would give you an exact figure to quote. Surely that is in the public interest? It would also save a lot of public money currently being wasted to find pictures of dogs on behalf of fewer than 0.5 percent of the population which is not in the public interest.

I hope my little contribution has been of some use and I look forward to seeing the outcome of your cross-party review.

Best wishes

Jon Mackenzie

**Jon Trounson**

Dear madam/sir

Please do not change the terms of the Act. This is an unpopular government 's chance to reassure the public that they listen and care. Do NOT place it out of the reach of the electorate, making it only accessible to those who have a vested interest in keeping their activities from scrutiny.

Thank you

Jon Trounson

## **Jonathan Bell**

Dear Sirs,

I write further to your call for evidence, in particular question six regarding the burden imposed on public authorities by the FOI Act.

I am a Freedom of Information Act officer working in a Commissioning Support Unit. I work in a small team answering over 4,000 FOIs every year for a number of Clinical Commissioning Groups in the NHS. Please note I am sending this email in an entirely personal capacity.

I am writing to you because I feel strongly that something needs to be done to control the number of requests received by public authorities.

I fully support the principles behind the FOI Act. I believe transparency and accountability have led to better decision making and has saved public money. It is however far too easy to make a request.

In one email a journalist can send a request to all 211 Clinical Commissioning Groups, often just looking for a story. We are allowed to turn down a request if we estimate it will take more than eighteen hours, but with one email, a journalist can create just under 3,800 hours of work in CCGs throughout the country with absolutely no detriment to that journalist. The amount of time answering such requests throughout the country cannot justify the few stories produced of real public interest.

It is also too easy to submit a request for example for a very large document or for a very large number of emails. These can take many hours, if not days, to redact. As you know we are not allowed to take into account the time taken to redact such documents.

Numbers of requests are increasing every year and I believe the FOI Act has lead to an unacceptable burden on staff doing their best to commission NHS services for the public. In the age of austerity this also has financial implications, not least the cost of employing Freedom of Information Act staff.

I consider that a small charge should be made for all requests which will cut down on those requests which are abusing the spirit of the FOI Act. It will mean that public authorities will be able to concentrate on valid, serious requests and will save a great deal of money and time.

I have also experienced confusion by members of the public about the fact that we charge for personal data under the Data Protection Act but not for FOIs. Many members of the public do not understand the difference between the two Acts and we often receive personal data requests under the FOI Act. It is not logical to charge for one and not the other.

I do not consider that it is possible to distinguish between valid requestors and those taking advantage of the Act. Journalists are increasingly not revealing who they are when sending in requests.

Please do not take too much regard of commentators such as the Campaign for Freedom of Information, whom I doubt have little real experience of answering FOIs and of the sometimes overwhelming burden on public authorities.

Yours faithfully,

Jonathan Ball

## Jonathan Collinson

### Bias

The first concern regarding the Independent Commission on Freedom of Information is the appearance of bias. It is generally acknowledged that a perception of bias – regardless as how open-minded a person seeks to be in practice – acts to delegitimise the conclusions that they come to.

In *R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte (No 2)* [1999] UKHL 52, a perception of even the risk of bias on the part of one of the highest judges of the land was sufficient to cast doubt on the integrity of the outcome. As a political body, the Independent Commission is not expected to maintain the same standards as a judicial body. However, the Commission cannot escape from the perception that its members are biased. This is particularly so when some members have apparently predetermined views<sup>1</sup> on the issues which are central to the consultation.

A perception of bias in favour of secrecy is heightened by the holding of official briefings ‘off the record’.<sup>1</sup>

A perception of bias is also found in the background provided by the Call for Evidence. The background to the consultation is said to be that, following *R (Evans) v Attorney General* [2015] UKSC 21, ‘the [Cabinet] veto could no longer be used as the Government had previously understood.’ As the Government had argued against the disclosure of the memos at the heart of the case, and can thus be assumed to be disappointed at the decision, the perception arises that this consultation is aimed at making changes favourable to Government in a particularly charged climate.

### Background to Freedom of Information

Freedom of information is a key mechanism of political and administrative accountability. Accountability is a core precondition for effective democracy and the preservation of the rule of law. Where freedom of information is restricted in any way, accountability and democracy are diminished. Therefore any changes to access to information must be assessed against that background.

Democracy and accountability are premised on personal participation in the democratic and accountability mechanisms of the political system. Therefore, because restrictions on freedom of information diminish accountability and democracy there should be an overriding assumption in favour of free access to information, available to the individual. Any restrictions on freedom of information also need to be assessed against their impact on personal participation.

The following criteria should therefore be used to assess the validity of any proposed restrictions on freedom of information:

Does the restriction address a real and pressing risk to the ability of Government to carry out its functions?

Is the proposed restriction the minimum action required to act on that necessity?

Is the restriction subject to accessible and effective checks-and-balances?

Only if these criteria are met is a restriction on freedom of information legitimate.

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?

The current procedures in the Freedom of Information Act are an adequate balance.

#### Public Interest and the Role of the Commissioner, Tribunal, and Courts

The public interest in disclosure cannot be expressed in absolute terms. As the current guidance recognises there is a sliding scale which balances a number of factors, such as whether a decision to which information has been requested has been taken.

Because the public interest in disclosure is a sliding scale, it can also be responsive to some of the concerns raised in the consultation without recourse to legislative change. For example, the alleged 'chilling effect' on honest advice within government departments can be addressed by recognising that there it is rarely in the public interest to release the name of an individual member of the individual civil service who provides a piece of advice. In contrast, the identity of the person giving advice to ministers may sometimes be in the public interest when that person is a political appointee, and it is more likely than not that the identity of the person giving advice is another minister (a junior minister or from a different department).

The subject of the disclosure is not the best judge of the public interest; they are judges in their own case where their own assessment is inherently biased. In contrast, the Information Commissioner, Tribunal, and courts are independent decision makers who are able to impartially determine the public interest after hearing evidence from both sides.

Where a judicial system of adjudication is active, to make its decisions non-binding offends the rule of law as it places the political body beyond the control of legal accountability.

A distinction ought to be drawn between the public interest and the interest of the Government. They are not always conterminous. Information which is in the public interest to be disclose may sometimes be embarrassing or inconvenient for the Government or individuals in Government. However, that is the nature of political accountability. One cannot restrict democratic participation solely on the basis that a democratically elected representative of the people may be embarrassed by the outcome.

## Veto

The Cabinet veto over the release of information after the ruling of the Information Commissioner remains a 'nuclear option' for the executive to prevent the release of information detrimental where its release is detrimental to the public interest. The fact that the veto has only been invoked on a very few number of occasions is evidence that the current system of checks-and-balances is adequate for the purpose.

Indeed, the fact that Australia abolished ministerial veto in 2009 and that in New Zealand the veto has fallen from use is evidence that the UK's veto is in fact unnecessary and undesirable in a democratic society.

## 'Chilling effect'

It is generally in the public interest for the public to be able to access information about what advice was given to ministers (and within local government) in the course of their decision making. Subject to the caveat above about the relative strength of the public interest to identify individual civil servants, it should be recognised that being able to identify when ministers have acted against the advice that they are given is a core feature of political accountability. If a minister is found to have acted against the advice of their civil servants, that minister should be able to

account to the public, explaining their reasons for ignoring that advice. Good governance is in fact then increased by access to internal discussion rather than decreased.

If ministers and civil servants are seeking to actively evade scrutiny and accountability by frustrating the Freedom of Information Act, this is not a failure of the act but a failure of governance and a moral failing on the part of the individuals involved. The evasion of freedom of information legislation is one of the reasons that the use of a private email server by Hilary Clinton whilst US Secretary of State is politically controversial.

Because of the connection between freedom of information, political accountability and democracy, the frustration of the freedom of information scheme by ministers and civil servants should be seen as an attempt to avoid democratic accountability for their actions. This simply isn't acceptable.

I therefore suggest that the Freedom of Information Act be amended to make it a criminal offence to act or conspire to frustrate the purpose of the Act.

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?

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

The Call for Evidence cites evidence of the withholding of information touching on Cabinet collective responsibility and risk assessment. Although the Call for Evidence is couched in entirely negative language (again reinforcing the perception of bias by the Commission), the cited examples evidence how the current checks-and-balances are working entirely effectively and appropriately.

The Information Commissioners have blocked the release of information under the existing exemptions in the cases cited by the Call for Evidence, after having independently weighed the public interest.

Where the Information Commissioner has differed from the Government in its view of the public interest, the executive veto has been used. The veto was not overturned by the courts and the information has not been released.

In cases when information was released (related to Westland and Rowntrees), the government chose not to exercise its right of appeal to higher courts nor exercised its power of veto. Clearly the Government accepted that the public interest was in favour of release. These instances are neither disproportionate (being few in number and limited in impact) nor damaging to the vital interests of the state.

These are evidence of the system of checks-and-balances written into the Act working effectively, rather than evidence that change ought to be made. The impression given by opening these questions is that the Commission's interest is in restricting the freedom of information out of all proportion to the public interest.

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 stated above, the executive veto is used rarely and thus is evidence of the effectiveness of the existing checks-and-balances inherent in the Act. That Australia has relinquished its executive veto, and New Zealand has not used its executive veto in many years suggests that the application of an executive veto is not required for the effective operation of democratic freedom of information legislation whilst protecting the interests of national security. There is therefore good reason for abolishing the UK's executive veto.

If the executive veto must remain, it must remain susceptible to Judicial Review. As the Commission members must know, the grounds for Judicial Review are not the same as simply disagreeing with the decision to veto. In particular, Wednesbury unreasonableness – So outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it – is a high threshold which has been recognised for over fifty years as an appropriate balance between legal accountability and the functioning of government.

A narrow application of the executive veto is desirable because a wide application of the veto would diminish access to democratic accountability. Although the decision in Evans has narrowed the circumstances in which the veto can operate the reality is that the veto has only been

exercised in a narrow range of circumstances in any event. There is no evidence that the decision in Evans would mean that the decisions to veto in the past (other than the request at the heart of Evans itself) would now be unlawful.

There is no evidence that action to amend the Freedom of Information Act is required to address a real and pressing risk to the ability of Government to carry out its functions. The decision in Evans has not to date produced any evidence of such a risk.

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?

As previously stated, the freedom of information scheme is part of the democratic process because it is a key mechanism of political accountability. The question of fees for Fol requests thus becomes one of 'what price democracy?'

The costs of administering the Fol regime are therefore in proportion to the effect of freedom of information on the accountability of public bodies. Democracy and accountability are expensive; but the price that we agree to bear as taxpayers as part of the social contract.

The question of burdens on certain parts of the body politic (such as local authorities) is a question of resource allocation, not of absolute costs. Therefore local authorities could be financially assisted by central government for the administration of the Fol scheme, rather than local government budgets being diverted from (eg social care).

Adding a fee for Fol requests, reviews or appeals puts a cost on personal participation in the political process. Any fees will thus disproportionately affect the low paid, women and the disabled (the latter two groups being more likely to fall into the first). The effect will be to disempower personal participation; pricing people out of the democratic process.

The message sent out by introducing fees for the Fol process would be that the Government has no interest in (and actively seeks to discourage) personal participation in the democratic political process by the poor, women and the disabled.



**Jonathan Engel**

Corrects that I am a UK citizen, not just a resident.

Dear members of the Independent Commission on Freedom of Information,

As a UK citizen and small business owner, I urge you to retain the Freedom of Information Act 2000 in its current form. Do not water it down, increase the allowable exceptions or introduce charges for supplying vital public records to citizens who have already paid taxes to create and store them.

The FOI Act has been a rare bulwark for the public interest against excessive secrecy and questionable government actions, in a country that lacks both a written constitution and anything resembling a Bill of Rights. A free press cannot provide needed transparency and proper checks on government power without open meetings and unfettered access to key documents detailing action taken in the name of the governed.

In the years since its inception in 2005, the act has allowed citizens and the media acting on their behalf to publicise numerous cases of wrongdoing, from the criminal actions of foreign diplomats to the fraudulent expense claims of many MPs.

The operational costs are minimal compared with overall government spending, or the real and potential savings highlighted by proper disclosures. The principle that freedom has costs is well-established in the UK's defence and security spending – it applies no less to public information.

At a time when our essential freedoms are under attack from fanatics preaching hate, intolerance and repression, you have a high-profile opportunity to defend the rule of law. Please don't let us down.

Best wishes,

Jonathan Engel

**Dr Jonathan Mendel**

Dear Sir/Madam,

I am e-mailing to response the Independent Commission on Freedom of Information's call for evidence. My response focuses only on those questions where my knowledge and experience allows me to make a useful contribution. I should also note that - while I have made use of the FOIA in the course of my academic work - I am responding to this Call in a personal capacity and the below does not represent the views of my employer.

Regarding question 3 I would – without commenting on whether there is a need for protection of discussions of risk in a policy context - strongly argue against any blanket exemption for “candid assessment of risks”. Some discussions of risk in other contexts are clear examples of the type of information that should be publicly accessible. For example, I have recently used FOIA requests to access documents from the research ethics review process. This process does involve the discussion of risk but is also information which should be open to academic and public scrutiny: in order to protect trial participants and improve trial conduct.

Regarding question 6, I would like to draw on my personal experience of academic research to offer some examples of how there can be a significant public interest in maintaining the right to know. I currently have two journal papers under review which draw significantly on FOIA requests. These papers suggest improvements in the treatment of trial participants and in the use of evidence in policy, so could have a substantial positive impact. However, this type of work would be more difficult or impossible without current FOIA provisions, and even relatively small charges for requests would make most of this work either very much slower or altogether impractical. For example, rather than being able to submit requests for quick, unfunded but impactful research projects I would have to spend a prolonged period on funding applications before starting a project in order to cover the costs of FOIA requests. In the case of the papers I mention, if I had had to apply for funding before starting these projects I would estimate that – given the current rate at which funding applications are rejected in my field, and the time taken to complete these applications - there would have been a less than 10% chance of me having been able to carry out the FOIA-using aspects of each paper.

I hope that the above is clear, but would be happy to discuss further - or to offer any necessary clarification - if helpful. It's normally best to contact me via e-mail, but my phone number is

0781 7117569.

All the best,

Dr Jonathan Mendel

**Jonathan Swithinbank**

Dear Sir or Madam,

I would like to lodge my support for the Freedom of Information Act and personally believe it does not go far enough, as the public should be entitled to greater freedom of access to government information. Therefore please do not restrict or reduce restriction of this Act.

Kind regards,

Jonathan

**Joseph Kloska**

Dear Sir/Madam,

I wish to express my support for the Freedom of Information as a crucial aspect of our democracy and contemporary British life and that I do not wish it to be changed or weakened by the proposed government bill. If anything, we need more Freedom of Information, not less, to expose corrupt practices, shed light on matters of crucial public significance and to hold our democratic processes to account.

Many thanks,

Joseph Kloska

**Joshua Harding-Jones**

To whom it may concern,

I am shocked that Chris Grayling MP is looking to place additional restrictions on Freedom of Information (FOI). FOI is essential in a democratic society. The state should be held to account for decisions that are made, and FOI is an essential tool in that process.

Why would the Government be so eager to restrict access to information? Do they not think the public have a right to scrutinise the way in which they govern the country?

If the main concern in placing additional restrictions is to allow the Government to have 'frank' discussions on policy behind closed doors, I would question why those discussions need to be kept secret. A small percentage will be sensitive in terms of national security, fair enough. But if the Government is concerned about all of the other information it wants to restrict, I would question the competency of their processes.

The whole point of being able to access the details of Government processes is that it holds the Government to account and prompts them to improve these processes where they are lacking. If the ability to hold the Government to account in such a way is removed, I fear for the transparency of our democratic political system.

**PLEASE DO NOT PLACE FURTHER RESTRICTIONS ON FREEDOM OF INFORMATION.**

Many thanks,

Joshua Harding-Jones



## **Joyce Wallis**

Although I have limited knowledge or experience of the Freedom of Information Act I have observed how it has served the public good by enabling the exposure of such scandals as MP's expenses, the privatisation of part of the UK's international development fund (CDC), the amount of English and Welsh property owned by offshore companies, the money wasted by New Labour on management consultants and the disastrous NHS IT project. I therefore strongly oppose any attempts to water down the provisions or to change the rules in any way which makes it more difficult for information to be obtained. The complaint by Chris Grayling that the act was being used by the media to 'generate stories' is farcical - that is the very means by which many scandals were exposed and the law changed to amend them.

Joyce Wallis

**Judith Muckley**

Dear Sir/Madam,

I would like to record my objections to any watering down of the above Act which has been an invaluable tool in monitoring the expenses and excesses of officialdom .

Given the widespread distrust and contempt of Parliament and Government, any changes would only increase the public's suspicion of lack of openness and accountability within the Establishment.

Please,please don't let our institutions become tarred even more with the brush of suspicion and mistrust,

regards,

Judith Muckley (Mrs.)

## **Julian Cheyne**

Dear Sir/Madam

I would like to support the continuation of Freedom of Information in its present form or to have it extended.

I am a former resident of the Clays Lane estate which was demolished to make way for the Olympic Games. Without Freedom of Information it would have been impossible to get basic information about the London Olympics.

For example, for many years the Olympic Delivery Authority claimed that the green park inside the Olympic Park was the 'largest new urban park in Europe for 150 years'. This was untrue.

However, this claim was endlessly repeated by the media on the basis that this was what the London Development Agency and the Olympic Delivery Authority told them. They did not do proper research into whether this was the case and the ODA simply went on repeating this lie.

As a result of asking the ODA for information about this the ODA finally admitted that it was only the largest new urban park in Europe after an Olympic Games, an entirely different case.

The London Legacy Development Corporation now freely admits it is not the largest new urban park in Europe for 150 years. In fact there is a larger park in West London at Greenford and Northolt.

Another piece of information gathered by making FoI requests was that there is store of over 7000 tonnes of radioactively contaminated soil inside the Olympic Park and that this was constructed without the knowledge of the ODA planning decisions team. Neither of these pieces of information was garnered by Press investigations, but by ordinary members of the public following matters of interest to them.

As someone who was affected personally by this project it would have been impossible to have discovered facts like these, and many others, about a project which so radically affected a group of people I knew and which made many claims which were simply untrue but are not generally known.

I have just highlighted two issues here. But I have also asked and continue to ask questions about the compensation paid, or not paid, to residents and to landowners and about many other topics.

Authorities do not tell the truth and conceal information. Media are not always good at tracking down these lies and are sometimes complicit in their dissemination in their enthusiastic support of a project, as in the case of the Olympics.

It is vital that ordinary members of the public can ask questions of authorities to challenge lying, cover-ups, injustice and in order to hold authorities to account.

Authorities are not by nature transparent, on the contrary they manipulate information as a matter of course. It is essential both for good government and to encourage democratic participation that information be accessible. For that strong Freedom of Information legislation is essential.

Yours faithfully

Julian Cheyne

**Julian Saunders**

TO:

THE INDEPENDENT COMMISSION ON FREEDOM OF INFORMATION RE: CALL FOR EVIDENCE

BACKGROUND

I run a community news service concerning the political establishment in the Borough of Sandwell, West Midlands. Whilst I have some assistance, I am basically a one-band band writing a hard-hitting blog called [thesandwellskidder.blogspot.com](http://thesandwellskidder.blogspot.com)

Sandwell is a one-party dictatorship. Without wishing to be too party-political, Labour have controlled the Borough for 40 years and currently control 71 of the 72 Council seats. The dictatorship is buoyed-up by a cadre of placemen/women within the Council's paid service.

I have also been following the dealings of another (almost totally publicly-funded) body, Sandwell College, which has "got into bed" with the Council and been involved in a major "bent" deal with them. (Ironically, just as I write this I have just received information about this! Sandwell Council gifted Sandwell College a 25-year rent-free lease of a publicly-owned £70m building without applying for s.123 consent from the Secretary of State for Communities etc. The Council and College have refused to disclose the full, unredacted, lease via FoI on the grounds that it is publicly available elsewhere - in this case via HM Land Registry. The Land Registry have just confirmed that a major lease between two publicly-funded bodies is NOT, in fact, available as it is a "protected deed"! So much for "freedom of information"!)

I rely for most of my information via informants but I am clearly conscious of the laws of libel and the FoI Act is an essential tool for me to be able to investigate and "stand-up" many of my exposes.

As a purely general observation, I have to say that Sandwell is a "law unto itself" and ensures that huge tracts of the Council's business are - unnecessarily - kept secret. Most of this seems to be purely a matter of (bad) habit and a result of the local political leadership's "we know best" attitude whilst some of it appears to be a deliberate attempt to avoid scrutiny and to stifle debate/opposition. Unfortunately, I have also had cause to write to the Office of the Information Commissioner (ICO) where Sandwell have lied in formal FoI replies (something you may wish to

consider as, in my submission, the ICO should be given additional powers to take swift and decisive action where prima facie cases of wrongdoing exist).

Much of the information I have to force out of the Council/College should, in my submission, have never been kept secret in the first place. It is also noteworthy that the Council spends over half a million pounds of taxpayers' money on a "Communications Unit" to "spin" its propaganda whilst actively seeking to withhold the underlying information. Regrettably, some sections of the local media fail to check the actual facts and merely present the public with the distorted "truth".

### Case Study One

In respect of the aforesaid lease between the two publicly-funded bodies, Sandwell Council and Sandwell College, the College had only just moved into its own brand new taxpayer-funded building when the bent deal was cooked-up. Because the College could not raise funds itself the Council borrowed a multi-million pound sum to convert a former arts centre, The Public, into a second £70m+ college building. The parties then gave a multi-million pound contract to Interserve to complete the works without putting the contract out to tender or any other form of competition. The deal was for the College to pay back the conversion costs and interest over 25 years as a "rent-charge" but as far as we can tell (as above, the unredacted lease is still being kept secret) the College is paying no actual rent at all (or merely a peppercorn rent). Unbelievably for a 25-year lease, it is not only rent free but the Council lessor has remained liable for extremely high maintenance costs. Both the College and Council fought tooth and nail to keep all this secret and another local community activist had to appeal to the ICO to get partial and heavily redacted disclosure of the facts. As above, the lease is still being kept secret but the Council's "Communication's Unit" and the political "leader" have consistently and falsely put out the information that the Council is receiving rent and this falsehood has been eagerly printed by the "Express and Star", which purports to be a local "newspaper".

### THE COMMISSION

I appreciate that, by the composition of your Commission, you have been set up with a view to restricting the provisions of the 2000 Act but, in my submission, this is wrong and the FoI provisions should be strengthened and not diminished.

### COMMERCIAL CONFIDENTIALITY

The excuse of “commercial confidentiality” is used by both Sandwell Council and College to withhold information. I fully accept, of course, that this is a provision which should be used in appropriate circumstances eg where there is a proper tendering process under way. But Sandwell Council is claiming to use its “general power of competence” to discuss “deals” with individual persons or companies and then to waive the Council’s “normal procurement rules and procedures” to privately contract with those third parties without any commercial competition or tendering - indeed, drafting contracts stuffed with clauses specifically locking-out all competition and purporting to restrict the application of the FoI provisions.

Leaving aside, here, the question of whether some of these contracts constitute unlawful state aid, it is, in principle, wrong for Sandwell to routinely act in an anti-competitive manner to contract with parties who have been specifically favoured for reasons which they seek to conceal. Where a third party has been specially favoured in this manner, they should not (without, perhaps, specific exemptions in respect of, for example, contracts relating to security issues) have any protection against full disclosure.

Further, the Council seek to argue commercial confidentiality to delay the release of information for so long that affected parties are deprived of their right to seek judicial review of the original decision.

The fact is that where the Council waives proper procurement rules to favour a specific third party there is no real commercial confidentiality as all other commercial bodies have already been “locked-out” of any deal. This is pure secrecy and nothing to do with proper governance of commercial transactions.

Bizarrely, Sandwell Council often go further. They refuse to disclose information where the contract is under way but also after the event. A spurious argument is put forward that major companies (see Interserve is Case Study Two) may suddenly turn their backs on commercial contracts with the publicly-funded Council if their terms and conditions are publicly known. I find this incredible as most good companies face tough competition and are unlikely to turn away from good business.

It is also incumbent on Councils and other publicly-funded to secure “best value”. How is one to determine this if the terms and conditions of secret deals with favoured parties are kept secret?

I submit that, save in exceptional circumstances, all contractual terms should be publicly available as a matter of routine but, particularly, those where normal procurement rules are specifically waived.

## Case Study Two

Again with reference to the bent College deal, Sandwell Council's Leader and Deputy Leader instigated the deal. The Council lied about this (and, indeed, continue to do so in official Council records) but were caught out by the College truthfully answering a Fol request. The Council secretly canvassed Interserve and, as they were anxious to rush the deal through, agreed an "in principle" multi-million pound contract long before any official "appraisal" of the merits of the project and any deal with the College. I am not saying that there was direct corruption here (yet) but clearly this sort of behaviour is a fertile ground for corrupt practices to seed.

The heavily redacted contracts that eventually emerged show that the parties were anxious to keep the whole affair secret despite Sandwell's very expensive "Communication's Unit" spinning that it was a "fantastic" [sic] deal for Sandwell.

This was a multi-million pound bespoke conversion contract for a one-off iconic building and yet every other construction company in the European Union (and, indeed, the world) were locked out of bidding for the work in a blatantly anti-competitive procedure by the political "leadership" of Sandwell Council.

Curiously, at around the same time, Interserve were actually tendering for another multi-million contract with Sandwell to build a new leisure centre (which they won). Is it really sensible to suggest that such companies will not tender for council contracts if their job-specific contracts are exposed?

The fact is that in this particular case, even after appeal to the ICO, the disclosure is partial and redacted and it is not possible for any commercial competitors, lawyers or the public at large to assess whether this secret deal constituted "best value" or not.

## "Spurious Partnerships"

Many councils, not just Sandwell, are outsourcing services but, in many cases, so-called "partnerships" are created which have the result, accidental or otherwise, of thwarting the provisions of the Freedom of Information Act. Ironically, the setting up of a charitable trust to operate the aforesaid Public Arts Centre was one such.

Large sums of money are now being outsourced to “third sector” organisations with very little public scrutiny/accountability. In Sandwell’s case, because of the iron grip of the Labour dictatorship, many of these bodies are stuffed with Labour Councillors or cronies. This is fertile ground for corruption again (though I am specifically NOT making an allegation of corruption (yet) against any Sandwell person or persons).

I submit that where the “partner” organisation is receiving more than just minimal public funds the agreement with it should be publicly available as should documents relating to ongoing performance.

Non-recording and “secret meetings”

Both Sandwell Council and College have been guilty of manufacturing situations to prevent information becoming susceptible to the FOI Act.

Where parties have deliberately failed to keep records they should, in my submission, be obliged to create an official factual “record” of the event or activity.

### CASE STUDY THREE

Despite the provisions that require a council to show that they are securing “best value”, Sandwell Council’s “Communication’s Unit” are not obliged to keep time sheets or other records of their dubious activities. Accordingly, they refused to say how long they spent on writing a blog which the political leader falsely claims to be his own on the simple grounds that they just didn’t bother to keep records. They say that as the Act only applies to disclosure of documents that have been created they are not even obliged to provide an estimate of the considerable amount of time spent at taxpayers’ expense. Thus they have evaded providing the information to the public at large.

### CASE STUDY FOUR

During the negotiations for the bent Public deal - where all other parties in the European Union (and, indeed, the rest of the world) were locked out as Sandwell Council had made a secret decision to only offer a deal to Sandwell College to the exclusion of all others - the College wished to avoid disclosure of information under the Act and so simply agreed to hold a secret and “un-minuted” meeting. Thus it is not even known who attended the meeting (important since, for example, when the Council had a secret meeting in respect of this same matter their “outsourced” lawyers were present and took part in the decision-making

progress. They were then asked to undertake the legal work for which they were then made a Vat-exclusive sum of £43,230.40p!

Thus the publicly-funded College thwarted the Act.

## COSTS OF FOI COMPLIANCE

This is trotted out by council's etc but the vast bulk of the cost could be saved if the information was simply published in the first place as a matter of routine.

Sandwell Council, in particular, have a cottage industry to redact information. Take a look at the agenda of virtually any meeting. Notices are published that huge sections and, in some cases, whole meetings will be held in camera and large parts of the agendas are not publicly accessible.

In my submission, there should be a presumption that all documentation is disclosed routinely unless there are specific legal or commercial reasons why it shouldn't. If there are genuine reasons for redaction, there should be automatic disclosure as the first appropriate opportunity.

Sandwell routinely redact information relating to land sales when one would normally expect that it would be commercially expedient to advertise the fact of the land availability far and wide to secure "best value" (although at least three properties have recently been sold to the sons of Sandwell Councillors). It is difficult to see why Sandwell should withhold such information but then its political "leader" routinely complains about the cost of having to provide the information at a later date!

I do not see why, as with planning files etc, the public cannot be allowed to view files in controlled circumstances and take notes which would save a lot of staff time in searching through them for information.

There have been suggestions in the media that fees should be charged. Again, costs could be avoided if disclosure is made in the first place. But it would become impossible for small community news services like The Skidder to regularly pay for information which should be publicly available in the first place.

Again, in the case of Sandwell Council, its "leader" complains volubly about FOI costs but then spends well over half a million pounds per annum on the "Communication's Unit" - which appears to spend most of its time tweeting about dog excrement.

ICO

The ICO is painfully slow in dealing with matters and, far from cutting resources, it needs help to call recalcitrants to account. As above, there should be a “fast track” process where there is a prima facie case that a reply is incorrect/untruthful.

## SUCCESSFUL OUTCOMES

This is a non-exclusive list of FOI “successes” thanks to the efforts of my small team:

An employee of Sandwell Council provided false information about the purchaser of some Council-owned property. An internal review led to the purchaser being outed as a member of the extended family of a very senior Councillor. In the same matter, the FOI confirmed that another senior Councillor had lied on BBC radio about the affair. This episode is currently part of a police investigation.

As above, a FOI request disclosed that an outsourced firm of solicitors was actively involved in the (purported) decision-making process that led to it securing over £40,000 of work.

That the Deputy Leader of the Council lied to the media concerning the costs of a legal case. In a separate case the scale of the costs was also deliberately misrepresented and finally exposed.

That a funding body was conned into making a grant a very high percentage of which was to go as pay to the partner of the son of two Sandwell Councillors.

That as a quid pro quo for the bent Public deal referred to above, Sandwell College started renting very expensive office space (for Sandwell) from Labour Party Properties Limited.

There are many other examples. There is also a case with the ICO at the moment where Sandwell have refused to answer a request from March relating to them ploughing huge sums of taxpayers money into what is supposed to be a “private” statue project.

I have four major Requests relating to land sales by Sandwell Council currently blocked as they are subject to a police fraud investigation.

This is all important information and I submit that it would be very difficult to have obtained this - legally - but for the current Freedom of Information Act.

JULIAN SAUNDERS

**Justin Walker**

Dear Sir/Madam

I am writing to express concern about potential reform of the FOI Act and the make-up of the commission itself which seems to be rather one sided and thus to belie the avowed commitment to the most transparent government in the world.

Dilution of the Act would be to the short-term benefit of the members of the establishment but would undermine the leading and authoritative position that the United Kingdom has held for centuries. The country's integrity and standing should surely take precedence over the comfort and wealth of a few individuals.

Yours

Justin Walker

**Kamran Rahman**

Dear Sir/Madam

I feel very strongly that FOI and open government is a fundamental part of the checks and balances of a democracy. FOI has been repeatedly demonstrated to be an invaluable tool in holding government to account - without full and proper accountability of government there is no democracy because people don't know what the government is doing and what they are voting for.

The cost of FOI requests should form a part of the cost of democracy, and cannot as a matter of principle fall upon the electorate (other than by way of general taxation, or in the case of very substantial requests).

Asking people to pay for the cost of FOI requests in order that they can check the workings of government is the same as a poll tax asking people to pay to take part in the electoral process.

In the modern digital age government departments should be encouraged to keep full and accurate digital records - this will gradually make FOI requests easier and cheaper to comply with. Also, the culture of keeping full and accurate records should help government, so that the right hand knows what the left is doing.

Overall, a culture of good record keeping and openness is essential for democracy.

As part of the review it is essential that the ability to make FOI requests is extended to private companies that deal with government functions. The current loophole must be closed. If a private company is carrying out functions of the government then that must be on the basis of the same rules of openness and accountability that the government is subject to.

## Karen McCartney

### Expertise & Experience of Respondent

This submission by Dr Karen Mc Cullagh, a Lecturer in IT, Media & Public Law at the University of East Anglia is informed by the experiences of Norfolk Community Law Service (NCLS).

Dr Karen Mc Cullagh's specialist research interest is in the field of information rights which includes Freedom of Information. She has delivered lectures and guest talks on the 'fundamentals' of the Freedom of Information Act (FOIA) 2000, to Information Governance practitioners, University FOI Officers and to Law Students. Her recent research includes a case note on the implications of *Evans v AG* (Prince of Wales correspondence), and a working paper which provides a comparative evaluation of the effectiveness of the Freedom of Information Act 2000 (FOIA) and the Freedom of Information Scotland Act 2002 (FOISA) a decade after their implementation against principles synthesized by the highly respected NGO, ARTICLE 19<sup>1</sup> that have been endorsed by the United Nations as forming the normative foundations of freedom of information laws. She also has experience of making freedom of information requests in the course of her research.

Additionally, the response is informed by the experiences of Norfolk Community Law Service (NCLS), a registered charity that aims to provide access to justice and equality in Norfolk through identifying and meeting unmet legal need and by providing free and independent legal services to try to meet that need.

NCLS has been operating for over thirty years and currently has 12 staff and around 80 volunteers. The current services provided by NCLS include –

- twice weekly free legal advice drop in - employment, family & general
- debt advice for offenders, ex-offenders, young people & vulnerable people
- domestic abuse advice & support
- employment, discrimination & benefits advice for migrant workers
- advice on residency, status & entitlement for EEA nationals
- discrimination advice and representation
- rent arrears mediation for Norwich City Council tenants
- welfare rights appeals and representation
- family support service

NCLS is also the lead agency for the Norfolk Community Advice Network (NCAN), comprising statutory and voluntary providers of social welfare advice as well as private solicitors.

NCLS has experience of making freedom of information requests both in the course of representing their clients and also as part of their annual performance monitoring review process. These experiences inform the response to questions 5 & 6.

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<sup>1</sup> ARTICLE 19, (1999), The Public's Right To Know: Principles on Freedom of Information Legislation, <<http://www.article19.org/data/files/pdfs/standards/righttoknow.pdf>>

## Introductory Comments – Terms of reference

A decade after implementation, the Government has appointed a Commission tasked with evaluating the effectiveness of the Freedom of Information Act (FOIA) 2000. Lord Bridges declared: “We are committed to being the most transparent government in the world”<sup>2</sup> in a statement announcing the review.

The Commission’s call for evidence makes a number of references to legislation from different jurisdictions. This consultation response does not engage in a comparative analysis of the merits of each of these different legislative regimes, rather it draws upon the experience of these jurisdictions where appropriate.

To assess the effectiveness of FOIA in delivering transparency provisions of the Act are compared, where appropriate, against principles developed by the highly respected NGO, ARTICLE 19.<sup>3</sup> These principles serve as an international benchmark, having been endorsed by the United Nations as forming the normative foundations of freedom of information laws.<sup>4</sup> The principles are: Principle 1: Maximum disclosure, Principle 2: Obligation to publish, Principle 3: Promotion of open government, Principle 4: Limited scope of exceptions, Principle 5: Processes to facilitate access, Principle 6: Costs, Principle 7: Open meetings, Principle 8: Disclosure takes precedence, and Principle 9: Protection for whistleblowers.

Although the Commission’s terms of reference do not extend to considering whether the Act has achieved its stated objectives or whether it could be further improved, this response includes recommendations that ought to be taken into account by the Commission to arrive at a balanced and fully-informed view of how FOIA is working in practice, and how it could be improved.

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<sup>2</sup> Cabinet Office, ‘Written statement to Parliament- Freedom of information: new Commission,’ (17<sup>th</sup> July 2015) <https://www.gov.uk/government/speeches/freedom-of-information-new-commission>

<sup>3</sup> ARTICLE 19, (1999), The Public’s Right To Know: Principles on Freedom of Information Legislation, <http://www.article19.org/data/files/pdfs/standards/righttoknow.pdf>

<sup>4</sup> The principles were synthesized from international and regional laws (e.g. UNDHR and ECHR), and judicial pronouncements. They were originally developed in 1999 and updated in 2015. The Principles were endorsed by Mr Abid Hussain, the UN Special Rapporteur on Freedom of Opinion and Expression, in his report to the 2000 session of the United Nations Commission on Human Rights; UN HRC, Report of the Special Rapporteur on access to information, criminal libel and defamation, the police and the criminal justice system, and new technologies, UN Doc.E/CN.4/2000/63 (18<sup>th</sup> January 2000). The principles were referred to by the UN Commission in its 2000 resolution on freedom of expression; UN CHR, 2000/38: Resolution, Right to Freedom of Opinion and Expression, UN Doc.E/CN.4/RES/2000/63, (20<sup>th</sup> April 2000), as well as by Hussain’s successor Frank LaRue in 2013 in his report to the UN General Assembly in 2013 (A/68/362, 4 September 2013).

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?

An inevitable tension exists between the principle of the right to know and any claim by public bodies to 'safe space' for deliberation and formulation of policy. Whilst the need for 'safe space' is generally uncontested, its limits are.

A common claim is that the absence of safe space would have a 'chilling effect' that is: FOIA causes officials to be "less candid" with ministers for fear of advice and correspondence being released to the public.<sup>5</sup> However, such comments are of an anecdotal nature, unsupported by real evidence that civil servants have altered their working practices in response to FOIA.<sup>6</sup> The lack of evidence prompted the Justice Select Committee in its report on its post- legislative scrutiny of the FOI Act in 2012 to state: "We are not able to conclude, with any certainty, that a chilling effect has resulted from the FOI Act.' The Committee found that the 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.<sup>7</sup>

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. It implies that this 'uncertainty' could be avoided by imposing a blanket ban on access to internal deliberations e.g. through an absolute exemption.

However, if access to information on internal deliberations was not subject to a public interest test, then mistakes, corruption and scandals could be kept secret until they lost their 'political currency.' There is a significant public interest 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 interest far outweighs concerns about the challenge of "uncertainty" faced by civil servants.

Principle 4 of the ARTICLE 19 principles states that exceptions should be clearly and narrowly drawn and subject to strict "harm" and "public interest" tests. Sections 35 & 36 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 transparent government, it is vital that information

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<sup>5</sup> Oral Evidence by Sir Jeremy Heywood in response to Q365 at Public Administration and Constitutional Affairs Committee session on EU Referendum Bill: Part One: Purdah and Impartiality, Tuesday July 21, 2015.

<sup>6</sup> House of Commons Justice Committee, Post-legislative scrutiny of the Freedom of Information Act 2000, Minutes of Evidence, HC 96-II  
<<http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/120221.htm> >

<sup>7</sup> House of Commons Justice Committee, Post-legislative scrutiny of the Freedom of Information Act 2000, First Report of Session 2012-13, HC 96-I  
<http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/9609.htm#a46> , para 200

covered by these exemptions continue to be subject to a public interest test, as per the fourth NGO principle, to ensure that policy is made in a robust and evidence-based way, free from undue influence,

The terms of reference indicate concern that protections for internal deliberations available under sections 35 and 36 are not working well.

It is instructive to consider the most recent annual freedom of information statistics for central government as these indicate that the section 35 exemption was used to withhold information for 598 requests whilst the section 36 exemption was used to withhold information for 420 requests. However, the Information Commissioner only upheld complaints in a very small number of cases (10/598 = 1.7% of section 35 cases and 18/420 = 4.3% of section 36 cases). That is, in the majority of cases considered (96.25%), government departments were not ordered to disclose information.<sup>8</sup>

Thus, it appears that a very small number of high profile cases may have distorted perceptions of FOIA within government, particularly at a senior level. The evidence presented in the previous paragraph should be used to dispel these misconceptions.

Recommendation: the Independent Commission should be mindful that FOIA was introduced to increase transparency. Thus, whilst safe spaces are needed for deliberations, that space should not be considered 'secret' on an indefinite basis.

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?

Whilst it is a truism that increasing transparency and accountability through the disclosure of information underpinning government decisions lies at the heart of FOIA it is also trite that the government could not develop policies or operate effectively if it did not have 'safe space' for discussion, debate and disagreement as enshrined in the constitutional conventions of individual and cabinet responsibility.

Politicians were naturally concerned that this 'safe space' would be threatened if FOIA permitted premature or inappropriate disclosure of government information. Accordingly, legislators sought to assuage their concerns by introducing qualified exemptions regarding the formulation of government policy<sup>9</sup> and the disclosure of material that would prejudice the effective conduct of public affairs.<sup>10</sup>

These broadly drafted exemptions have been the subject of much discussion and challenge, and indeed were considered as part of a post-legislative scrutiny of FOIA which reported:

'It is evident that numerous decisions of the Commissioner and the Tribunal have recognised the need for a 'safe space'. However, equally evident is the fact that in

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<sup>8</sup> ICO, Freedom of Information Statistics: Implementation in Central Government 2014 Annual and October – December 2014

<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/423487/foi-statistics-oct-dec-2014-annual.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/423487/foi-statistics-oct-dec-2014-annual.pdf)>

<sup>9</sup> s35 FOIA

<sup>10</sup> s36 FOIA

some cases their decision that information should be disclosed has challenged the extent of that safe space.<sup>11</sup>

The Independent Commission has been tasked with considering: 'whether the operation of the Act adequately recognises the need for a 'safe space' for policy development and implementation and frank advice.' Given the perceived 'uncertainty' regarding the extent of the safe space, the Commission may be minded to recommend to Parliament that these FOIA exemptions be changed from qualified to absolute in nature. The political temptation to call for this change is understandable. Politicians do not like excessive scrutiny of their decisions, particularly when that scrutiny shows them to be flawed and leads to political embarrassment.

However, if the exemptions for policy formulation were made 'absolute,' rather than subject to a public interest test, such information would only become public 20 years later when official papers were released. This delay should be resisted since informed public debate is at the heart of FOIA. If information is not disclosed on a timely basis then neither opposition parties, the media, nor the public will know whether a policy decision was made for objective reasons as opposed to short-term political gain, that is, valuable opportunities for scrutiny, debate and refinement of thinking will be lost. Arguably it would represent a return to the pre-FOIA era in which all government information is secret until it chooses to disclose it, and it will naturally not be minded to disclose it until it has lost its political 'currency.'

An analysis of ICO and Information Tribunal decisions confirms that disclosure is sometimes ordered once a decision has been announced, where exchanges are anodyne, the material is old, or the public interest arguments for openness are overwhelming.

Politicians may find these public disclosure decisions painful but that does not mean that they are inconsistent, incoherent or manifestly unfair – rather they strike an appropriate balance between political and public interests in information disclosure.

Recommendation: Given that the correct balance has already been struck between disclosures and safe space there is no need to reform FOIA to amend ss35-36 so that they become absolute in nature.

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

It is not clear why information relating to risk should be dealt with separately from other information.

Protections do exist for information that involves a candid assessment of risks. It is not possible to specify the time period for which such information remains sensitive since it depends on the sensitivity of the topic and what other related information is already in the public domain.

Accordingly, the Information Commissioner assesses such cases on an individual basis to ensure that appropriate factors are properly weighed and considered. For instance, the Information Commissioner has given weight to the need to protect risk assessments when the public authority may still be considering the implications of the assessment.

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<sup>11</sup> House of Commons Justice Committee, Post-legislative scrutiny of the Freedom of Information Act 2000, First Report of Session 2012-13, HC 96-I, para 279, <<http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/9609.htm>>

Recommendation: Generic arguments safe space, chilling effect, and candid assessments of risk should not provide public authorities with unfettered discretion not to disclose information.

The approach adopted by the Information Commissioner of protecting space for conducting risk assessments and disclosing such information when it is appropriate to do so is correct. There is no need for reform in this area.

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?

Given that the fourth ARTICLE 19 principle recommends narrow, exhaustive limitations, subject to strict “harm” and “public interest” tests, the inclusion of a ministerial power to issue certificates that override decisions or enforcement notices issued by the Commissioner and/or Tribunal in favour of disclosure on public interest grounds in the Act is problematic.

At first glance, it appears that the veto power has been used sparingly by Westminster MPs – only seven vetoes in a ten-year period, in comparison to 48 vetoes in the first four years of existence of the Australian FOI law. However, the ministerial certificate issued in *R (Evans) v HM Attorney General* represents an occasion on which the executive attempted to override a judicial decision in contravention of the traditional doctrine of separation of powers prompting the Lord Chief Justice to describe the veto power as ‘a constitutional aberration.’<sup>12</sup>

It is instructive to consider reactions to the Supreme Court judgment in *R (Evans) v HM Attorney General*.<sup>13</sup> This judgment makes it clear that the Executive cannot issue ministerial certificates vetoing the release of information when a First Tier or Upper Tribunal decision displeases them for politically sensitive reasons. In future, ministers will have to satisfy a higher threshold of a ‘material change of circumstances’ or that the decision was ‘demonstrably flawed in fact or law.’ The Campaign for Freedom of Information welcomed the decision, noting that it had clarified a point of confusion:

‘Parliament never intended the veto to be used against the Tribunal or courts – that possibility was not mentioned at all let alone debated during the Bill’s passage. The veto was seen as available only in relation to the Information Commissioner’s decisions.’<sup>14</sup>

By contrast, the Prime Minister commented: ‘Our FOI laws specifically include the option of a governmental veto, which we exercised in this case for a reason. If the legislation does not make parliament’s intentions for the veto clear enough, then we will need to make it clearer.’<sup>15</sup> How the government intends to clarify parliament’s intentions is not yet known. The implications of two potential reforms are discussed below.

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<sup>12</sup> *Evans, R (on the application of) v HM Attorney General & Anor* [2013] EWHC 1960 (Admin)

<sup>13</sup> [2015] UKSC 21.

<sup>14</sup> Campaign director Maurice Frankel, quoted in a press release:

<https://www.cfoi.org.uk/2015/03/welcome-for-supreme-courts-ruling-on-the-ministerial-veto-in-prince-charles-case/>

<sup>15</sup> K Stacey & J Pickard, ‘Gove plans freedom of information crackdown,’ *Financial Times*, 21<sup>st</sup> June 2015.

Firstly, FOIA could be amended so that a ministerial veto could only be judicially reviewed if a minister acted 'irrationally' in issuing it, a very high threshold test that would preclude most legal challenges.<sup>16</sup>

Secondly, s53 could be revised so that ministers issue certificates at an earlier stage (e.g. after a government department has refused to disclose the information requested), thereby precluding a merits review by the ICO or judiciary. This would mirror the recently abolished Australian practice regarding issuance of ministerial certificates.<sup>17</sup>

Neither of the proposals represents a proportionate response as they would, in effect, give ministers 'the last word' in refusing information requests. Ministers could be tempted to issue vetoes to avoid politically embarrassing disclosures (as exemplified by the issuance of 48 vetoes in Australia the first four years of its operation).<sup>18</sup> This would be an imprudent move since the Australian experience confirms that:

'certificates came to represent everything that was wrong with the Australian FOI system...because the public interest analysis was not transparent. It was quite difficult to determine how many certificates were being issued and whether the reasons were sound.'<sup>19</sup>

Amendment of the veto power in ways outlined above would represent a retrograde step and a real threat to the effectiveness of FOIA since it would reinstate a 'culture of secrecy' in which decisions regarding the release of information are made by a political elite using an informal code of practice à la pre-FOIA 2000 and the important public scrutiny that emerges from external review would be lost.

Recommendation: If the Independent Commission determines that the veto power should be clarified, then it should consider specifying that it is not permissible to exercise the veto before exercising the right of appeal to the FTT. At that stage, to exercise the veto, a minister would be required to demonstrate a 'material change of circumstances' or that the decision was 'demonstrably flawed in fact or law.' This would be a proportionate response that respects the constitutional principle of separation of powers, and meets the fourth ARTICLE 19 principle requirements.

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

Principle 5 of the ARTICLE 19 Principles recommends a three tier appeal process comprising an internal appeal to a designated higher authority within the public authority who can review the original decision; appeal to an independent administrative body; and appeal to the courts. FOIA is not fully compliant with this principle since it has multiple tiers of appeal.

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<sup>16</sup> Ibid

<sup>17</sup> Until 2009, Commonwealth Ministers could, under the Freedom of Information Act 1982 sign certificates that 'conclusively' established that certain documents were exempt, and that included establishing conclusively the public interest test for a qualified exemption. The power was abolished through the enactment of the Freedom of Information (Removal of Conclusive Certificates and other Measures) Act 2009.

<sup>18</sup> Campaign for Freedom of Information (2001), 'The Ministerial Veto Overseas.' <<http://www.cfoi.org.uk/pdf/vetopaper.pdf>>.

<sup>19</sup> J Bannister, 'The Last Word on the Public Interest in FOI: Australia and the United Kingdom Compared', UK Const. L. Blog (12th Jun 2015) <<http://ukconstitutionalallaw.org/>>.

FOIA does not contain a statutory duty of mandatory internal review by a public authority, though in compliance with the code of practice<sup>20</sup> many public authorities do have an internal review procedure. Where one exists, it must be used before a requester can appeal to the ICO for a decision.<sup>21</sup> No time period for completion of internal reviews exists under FOIA<sup>22</sup> so requesters often experience frustrating delays.

Where no internal review exists or it has been exhausted, those refused access to information can complain to the ICO to make a determination.<sup>23</sup> No provision exists under FOIA for the ICO to effect a settlement though complaints are routinely resolved informally by the ICO. Problematically, a backlog of complaints causes delay in ICO determinations (e.g. up to 23 months).

At first glance, amendment of FOIA to include a requirement for a public authority to conduct mandatory internal review of any decision by it not to disclose information requested under a FOI request seems appropriate, in line with the fifth ARTICLE 19 principle. However, the experience of NCLS in relation to other tribunals e.g. the employment tribunal is that the addition of an extra step would lead to a more complex, confusing and time-consuming process. Of particular significance is that local authorities usually have only one person tasked with dealing with FOI requests, so it is likely that the person who took the original decision would be the person required to undertake the review, and thus be highly unlikely to come to a different decision during the review process. Adding an additional layer to the decision making process would increase the staffing and financial resources burden for the public authority, and cause delay and complexity for those seeking to challenge a decision.

Recommendation: the appeal process under FOIA should be reviewed to ensure that it is less time consuming e.g. a requirement for public authorities to respond within 20 working days, and the ICO to complete its reviews within specified time periods so that the appeal processes become more time and cost effective.

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?

#### Burdens v Benefits – an overview

When considered in isolation FOIA compliance costs can appear significant and in times of 'austerity' they might be perceived as an unaffordable burden since they create concentrated costs with dispersed benefits.<sup>24</sup>

Two types of benefits can be identified. Firstly, such requests complement other information duties public authorities are obliged to fulfill such as: providing information about services, responding to complaints, running consultations; investment in FOIA request handling and

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<sup>20</sup> Section 45 code of practice

<sup>21</sup> s 51 FOIA; s50 FOISA

<sup>22</sup> ICO may issue a practice recommendation to the public authority

<sup>23</sup> S50 (2) states that Commissioner can refuse to come to a decision if the applicant has not exhausted all remedies. Commissioner can refuse to investigate a case where there has been undue delay in appealing to him.

<sup>24</sup> A Fung, D Graham, & M Weil, *Full Disclosure: The Perils and Promise of Transparency*, (Cambridge University Press, 2007), 117

records management systems assists with these and other legislative compliance requirements e.g. data protection and equalities opportunities legislation.

Secondly, the perceived burden of responding to FOIA requests should be balanced against both the immediate benefit to the public authority responding to the request in fostering a more open, transparent and responsive culture, and the immeasurable wider public benefit that the right to access information plays in facilitating transparency, accountability, informed and engaged citizenry, and ultimately, trust in the democratic process.

#### International benchmark

The sixth ARTICLE 19 principle states: Individuals should not be deterred from obtaining public information by costs. This principle provides that:

- the cost of gaining access to information held by public bodies should not prevent people from demanding information of public interest, given that the whole rationale behind right to information laws is to promote open access to information.
- experience in a number of countries suggests that access costs are not an effective means of offsetting the costs of a right to information regime.
- Generally the principle should be that the information is provided at no or low cost and limited to the actual cost of reproduction and delivery.
- Costs should be waived or significantly reduced for requests for personal information or for requests in the public interest (which should be presumed where the purpose of the request is connected with publication) and for requests from those with incomes below the national poverty line.
- In some jurisdictions, higher fees are levied on commercial requests as a means of subsidising public interest requests but this is generally not considered to be fully effective.

#### Benefits – NCLS case studies

Norfolk Community Legal Service (NCLS) makes Freedom of Information requests on a sparing basis, only doing so where the information sought is essential either to assist NCLS clients, or monitor its own performance in assisting clients. Below, four cases studies are outlined.

Case study 1: Every year NCLS submits a FOI request to the HM Courts & Tribunal Service (HMCTS) requesting a breakdown of: the number of appeals in the Norfolk area, the number of appeals allowed or refused, the number of Tribunal applicants represented by legally trained advocates, and the number of applicants who represented themselves. The purpose of this annual request is to gather evidence that allows NCLS to assess whether it achieving its goal of the meeting unmet legal need. The statistical information is also made available to NCLS funders, to demonstrate that funding the service represents value for money. Additionally, the information is used to identify emerging trends and patterns. For instance, the Department of Work and Pensions (DWP) introduced reforms to the benefits appeals process requiring claimants to lodge their appeal directly with HMCTS. NCLS and the clients they represented encountered difficulties accessing the relevant forms. This led to a reduction in the number of appeals being lodged. HMCTS release national level statistics on the number of direct lodgements entered. However statistics are not disclosed on a venue basis. A FOI request submitted by NCLS revealed a drop in the number of appeals lodged in the Norfolk area, so NCLS wrote to Her Majesty's Courts and Tribunals Service requesting

assistance in obtaining the appeal forms. This resulted in a box of forms being supplied by HMCTS, allowing NCLS to better assist their clients.

Although HMCTS does respond promptly to the annual FOI request by NCLS, the respective burden of submitting and responding to the annual request could be reduced if HMCTS conducted an analysis of requests it has received to date and proactively published information sought on a regular basis.

Case study 2: NCLS challenged a local authority in the East of England on its implementation of the Housing Benefit Size Criteria Rules. The rules permit a decision to be appealed to a First Tier Tribunal (FTT). The local authority was of the opinion that the decision could not be appealed so it did not include any information on the right to appeal in its decision notice letters.

NCLS was unsure whether its claimants were failing to bring the information on appeal rights to consultations, or, whether as clients claimed, the local authority was not issuing information that such decisions were appealable.

To ascertain this they submitted a FOI request seeking: a copy of the template letter notifying claimants of their right to appeal the decision, the number of decisions made, and the number of template letters notifying claimants of their right to appeal that had been issued.

The FOI request led to confirmation that claimants were not being informed that such decisions were appealable. It confirmed there was a systematic problem.

NCLS discussed the issue with local councillors and two councillors raised the issue in a meeting. This led to the local authority agreeing to issue 3,500 letters informing Housing Benefit claimants of their appeal rights. As a result, NCLS represented 5 claimants who successfully appealed the local authority decision.

Case study 3: The DWP changed eligibility rules for social security benefits so that EEA migrants would only be eligible for social security benefits if they could demonstrate that the 'work' they had done was 'genuine and effective' and not 'marginal or ancillary,' and that the amount earned during the relevant period exceeded a minimum earnings threshold. The term 'genuine and effective' was not clearly defined so NCLS were concerned that different local authorities in the county were not interpreting it uniformly and consistently.

NCLS submitted an FOI request to all local authorities in the county. The response revealed that some local authorities had applied the minimum earnings threshold, other local authorities had not applied this element to any and in 2 cases a local authority applied the minimum earnings threshold test with the effect that two claimants were refused housing benefits.

As a result of the inconsistent application of the test identified through the FOI request, NCLS contacted local authorities asking them to refer clients to them, so that they could guide them on what documents might constitute evidence of genuine and effective work. Two out of the six local authorities approached took up this offer.

Case study 4: The CCM20110 - A8 Migrant Workers: Workers Registration Scheme required A8 country workers to register their employment within one month of starting work for an employer. Failure to register had right of residence implications for the worker, and employers were under penalty of criminal law.

NCLS submitted an FOI request to HMRC ascertain how many employers were prosecuted

under the regulations in an attempt to identify inconsistency in treatment of workers and employers by the public authority. NCLS were representing a client with a case in the First-tier Tribunal regarding a benefits appeal. NCLS wanted to use the information regarding prosecution of employers in that client's tribunal hearing, to show that the regulations were being applied to punish workers and not employers. The Home Office replied to the request and confirmed that there were no prosecutions.

The case was stayed in the First-tier Tribunal was stayed pending an appeal in the Court of Appeal.<sup>25</sup> Neither NCLS nor its clients were required to pay an application or appeal fee. If they were, neither could have afforded the costs.

#### Burden controls –Fees

The Commission has sought evidence on the merits of: introducing a flat fee for requests, charging for staff time, and charging different types of applicants different amounts. All are discussed below.

One rationale for not introducing fees in respect of FOI requests is that the information disclosed in response to a request is released to the public at large, rather than only disclosed to an individual, as is the case in respect of data subject applications under the Data Protection Act 1998. A second rationale is that it would restrict the availability of official information citizens have already paid for through taxation.

The current, fee-free FOI request process represents a significant and essential costs saving for charitable bodies such as NCLS as it does not have a budget for client disbursements. If a request fee were charged then NCLS would have to bear the costs, since their clients do not have the financial resources to do so. Bearing the application cost would place an extra strain on NCLS resources, forcing them to be more selective than they already are regarding FOI applications. Indeed, if fees were charged then FOI requests would become unsustainable.

The deterrent effect of a flat fee in reducing the number of requests is well known. In 2003 the Irish Government introduced a flat request fee of 15 euro. It had a clear deterrent effect, causing the number of requests to drop significantly.<sup>26</sup> A flat rate request fee should also be avoided because it would not meet the public policy objective of enabling public authorities to recover costs. In fact, charging a flat rate fee would create an administrative burden; research by the Constitution Unit found that 62% of authorities they surveyed did not levy a disbursement fee for answering a request because the cost of recouping the fee would be higher than the revenue raised.<sup>27</sup>

At present, no fee is charged for an application to the Information Tribunal.<sup>28</sup> A separate, recently closed, consultation asked for responses on the proposed introduction of fees for all proceedings in the General Regulatory Chamber: specifically £100 to start proceedings with

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<sup>25</sup> The outcome of the CoA case rendered the point moot and we had to withdraw the appeal.

<sup>26</sup> Office of the Information Commissioner, Annual report 2004, p. 5  
<<http://www.oic.gov.ie/en/Publications/AnnualReports/2004/File,519,en.pdf>>

<sup>27</sup> UCL Constitutional Unit (2011). Town Hall transparency? The Impact of the Freedom of Information Act on English Local Government. <<https://www.ucl.ac.uk/constitution-unit/research/foi/foi-and-local-government/town-hall-transparency.pdf>>

<sup>28</sup> NCLS has experience of appealing a decision to the First Tier Tribunal (Information Tribunal). The appeal was stayed pending the outcome of a Court of Appeal decision.

a determination on the papers; and a further fee of £500 for a hearing.<sup>29</sup> If a fee were charged, NCLS could not afford such fees and would lose the ability to challenge public authority decisions at this level. It would adversely affect those on low incomes who would be disproportionately affected by such charges; the experience of NCLS is that any proposed fee remission scheme would prove too lengthy and complex to navigate. Recent experience shows that introducing Tribunal fees does have an impact on the number of claims brought. For example, following the introduction of fees for Employment Tribunal and Employment Appeals Tribunal claims in July 2013, the number of cases brought to those tribunals fell. The Government's own statistics confirm that the number of single claims received in July to September 2014 was 61 per cent fewer than the same period in 2013, and the number of multiple claims also fell.<sup>30</sup> Introducing fees for FOI appeals is likely to have a similarly drastic impact.

Another option would be to charge for more elements of staff time, for instance, staff deliberation or reading time. This would generate a number of problems, not least, how to calculate such costs – reading speed can vary!

The Scottish experience is instructive on the issue of staff costs. Despite the existence of a national civil service, with national rates of pay, differentials in the hourly rate charged have emerged between the two jurisdictions. The hourly rate for staff locating, retrieving or providing information in Scotland is lower - capped at a maximum of £15 per hour compared to a flat rate £25 per hour in the UK. Accordingly, an applicant in Scotland is entitled to 40 hours per request compared to 24 hours per request submitted to a central government department or 18 hours per request submitted to another public body in the UK.

Further, in Decision 055/2013 the Scottish Information Commissioner was not satisfied that a fee of £15 per hour should be charged, finding that the request could be processed by a staff member on a lower pay grade (£9.50 per hour).

The Independent Commission should heed this experience, since 'A common complaint about the lowest transparency [Whitehall] departments is that they often lie to inflate these costs so they can refuse releases.'<sup>31</sup>

Recommendation: A more robust approach to staff costs would assist in ensuring greater efficacy. Any system that charged for staff time should also penalise poor records management practices; otherwise recalcitrant public authorities and government departments could use staff time charges to avoid fulfilling information requests.

The introduction of differential fee rates for different types of users e.g. individuals, charities, business and media organisations is prima facie attractive. An often-heard complaint is that the media make excessive use of the Act. For instance, the Leader of the House of Commons, Chris Grayling, said, of the Freedom of Information Act: "It is, on occasion, misused by those who use it as, effectively, a research tool to generate stories for the media,

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<sup>29</sup> Ministry of Justice, (2015) 'Court and Tribunal Fees - The Government response to consultation on enhanced fees for divorce proceedings, possession claims, and general applications in civil proceedings and Consultation on further fees proposals,' Cm 9124  
<[https://consult.justice.gov.uk/digital-communications/further-fees-proposal-consultation/supporting\\_documents/Government%20response%20to%20consultation%20on%20enhanced%20fees%20and%20consultation%20on%20further%20fees%20proposals%20web.pdf](https://consult.justice.gov.uk/digital-communications/further-fees-proposal-consultation/supporting_documents/Government%20response%20to%20consultation%20on%20enhanced%20fees%20and%20consultation%20on%20further%20fees%20proposals%20web.pdf)>

<sup>30</sup> Tribunal Statistics Quarterly, July to September 2014:  
<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/385759/tribunal-grc-statistics-quarterly-jul-sep-2014.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/385759/tribunal-grc-statistics-quarterly-jul-sep-2014.pdf)>

<sup>31</sup> C Cook, 'Is there trouble ahead for Freedom of Information?' BBC News, (13 May 2015)  
<<http://www.bbc.co.uk/news/uk-politics-32723791>>

and that is not acceptable.”<sup>32</sup>

However, levying higher fees on media companies would be difficult to administer in practice. Furthermore, it potentially overlooks the public interest ‘watchdog’ role played by the media.<sup>33</sup> Local, regional, and national newspapers have published articles illustrating how FOI requests made by their journalists have been used to uncover mismanagement, poor practices, and to prompt councils and service contractors to improve services.<sup>34</sup> A Select Committee report has acknowledged that newspapers face serious funding difficulties. The funding of Investigative journalism is particularly at risk.<sup>35</sup> FOI fees would be a further, potentially unsustainable burden.

In the decade since its implementation, a perennial concern of public authorities and politicians is that public resources are wasted detailing with the burden of vexatious requests. However, the experience of FOI practitioners is that most prima facie ‘wacky’ requests are not in fact vexatious; often they obliquely query public expenditure and are therefore legitimate FOI requests.<sup>36</sup>

Any argument that section 14 should be amended to address the perceived burden of ‘frivolous’ requests is fundamentally misconceived since a public authority can easily dismiss them, a point previously addressed by the Justice Committee in a post-legislative review.<sup>37</sup>

Recent case law: *Dransfield v ICO & Devon County Council*; *Craven v ICO & Department for Energy and Climate Change*<sup>38</sup> confirms that section 14 which allows for refusal of vexatious requests works well when public authorities make use of it.

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<sup>32</sup> Hansard, House of Commons Debate, 29 Oct 2015, Column 522, <<http://www.publications.parliament.uk/pa/cm201516/cmhansrd/cm151029/debtext/151029-0002.htm>>

<sup>33</sup> House of Lords, Select Committee on Communications: The future of investigative journalism 3rd Report of Session 2010–12, HL paper 256. The report acknowledges that newspapers face serious funding difficulties. The funding of Investigative journalism is particularly at risk. FOI request fees would be a further burden.

<sup>34</sup> Editor, ‘11 things we wouldn’t have been able to tell you without the Freedom of Information Act,’ *Eastern Daily Press*, (22 July 2015), <[http://www.edp24.co.uk/news/politics/11\\_things\\_we\\_wouldn\\_t\\_have\\_been\\_able\\_to\\_tell\\_you\\_without\\_the\\_freedom\\_of\\_information\\_act\\_1\\_4163071](http://www.edp24.co.uk/news/politics/11_things_we_wouldn_t_have_been_able_to_tell_you_without_the_freedom_of_information_act_1_4163071)>; K Rodgers, ‘FOI: Our special report about protecting your right to know,’ *Oxford Mail*, (12 November 2015), <[http://www.oxfordmail.co.uk/news/14027067.Freedom\\_of\\_Information\\_\\_What\\_you\\_need\\_to\\_know/?ref=mmssp](http://www.oxfordmail.co.uk/news/14027067.Freedom_of_Information__What_you_need_to_know/?ref=mmssp)>; M Burgess, ‘Freedom of Information Act: 103 stories that prove Chris Grayling wrong,’ *The Guardian* (30 October 2015), <<http://www.theguardian.com/media/2015/oct/30/freedom-of-information-act-chris-grayling-misuse-foi>>

<sup>35</sup> House of Lords, Select Committee on Communications: The future of investigative journalism 3rd Report of Session 2010–12, HL paper 256.

<sup>36</sup> J Baines, ‘Wacky FOI requests – with serious motives?’, (16 August 2014) <<http://informationrightsandwrongs.com/2014/08/16/wacky-foi-requests-with-serious-motives/>>;

T Turner, ‘Here be Dragons,’ (8 August 2014) <<http://2040infolawblog.com/2014/06/08/dragons/>>

<sup>37</sup> House of Commons Justice Committee, Post-legislative scrutiny of the Freedom of Information Act 2000, First Report of Session 2012-13, HC 96-I, para 279

<sup>38</sup> *Dransfield v ICO & Devon County Council*; *Craven v ICO & Department for Energy and Climate Change* [2015] EWCA Civ 454

Guidance issued by the Information Commissioner states that section 14 can be used by public authorities to refuse requests that cause an excessive burden without needing to consider other factors such as the obsessive or repetitive nature of a pattern of requests.<sup>39</sup>

Recommendation: vexatious or frivolous requests do not present a significant burden. The current legislative framework and associated guidance does not need revision.

Recommendation: There is room for improvement regarding the culture and mindset of public authority staff tasked with responding to FOI requests. If a more proactive approach to publication schemes and disclosure logs were adopted then FOI processing costs would reduce.

### Concluding remarks

Whilst the rationale for transparency in terms of access, accountability and public participation is well established under FOIA there is no room for complacency. The experience of other countries is that early support for FOI laws can wane - as political parties suffer embarrassment from disclosures they become more hostile to it. Indeed, Zifcak and Snell<sup>40</sup> have observed that initial optimism tends to be followed with a second stage of pessimism and a third stage of revisionism as politicians succumb to the temptation to restrict the operation of the laws or to starve them of resources. Comments made by Westminster politicians over the years are indicative of a pessimistic view of the Act, and the announcement of a Commission to review it, and a proposal to introduce Tribunal fees, signal a move into the third, revisionist stage. It is to be hoped that the Commission will fruitfully encourage a move toward the final stage of a return to 'fundamentals'.

FOIA is not fully compliant with the Art 19 principles of good practice. The Independent Commission should consider revising it to ensure compliance with these fundamentals. To this end, it should address recommendations that remain outstanding following the 2012 post-legislative scrutiny of FOIA by the Justice Committee as well as the specific recommendations made in this response which are also set out in an appendix..

The Independent Commission should caution against reinvigorating the Westminster culture of secrecy through amendment of FOIA provisions regarding 'safe space for policy development,' or strengthening the power of ministerial veto; lessons should be learnt from the Australian experience that use of a veto heightens mistrust and reduces confidence in government.

As well as amending the FOIA to make it fit for purpose in future decades, consideration needs to be given to the funding arrangements of the Information Commissioner. The ICO has experienced a budget cuts (in excess of 30% since 2011.<sup>41</sup> Ongoing budget reductions in the name of 'austerity measures' could be used as a guise for eroding information rights.

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<sup>39</sup> For example, FS50561528 – FCO – DN issued 25/02/15; FS50539606 – ACPO – DN issued 4/08/2015.

<sup>40</sup> R Snell, "Freedom of Information : The Experience of the Australian States - an Epiphany?" (2001) 29(3) Federal Law Review 343; S Zifcak, 'Freedom of Information and Cabinet Government: Are They Compatible In Every Dissimilar Respect?' (1994) 1 *Australian Journal of Administrative Law*, 208-221.

<sup>41</sup> Information Commissioner's Office, *Information Commissioner's Annual Report and Financial Statements 2011/12: In the Rights space- at the right time*, 4 July 2012, HC 350, p 16

A Government that is truly committed to promoting and protecting information rights will, if necessary, 'ring-fence' budgets for the Office of Information Commissioners so that the efficacy of the Commissioner is not reduced.

I am happy for this response to be published. I am also happy for the Commission to contact me in order to clarify anything herein or for any further information.

### **Appendix: Summary of Recommendations**

Recommendation: the Independent Commission should be mindful that FOIA was introduced to increase transparency. Thus, whilst safe spaces are needed for deliberations, that space should not be considered 'secret' on an indefinite basis.

Recommendation: Generic arguments safe space, chilling effect, and candid assessments of risk should not provide public authorities with unfettered discretion not to disclose information.

The approach adopted by the Information Commissioner of protecting space for conducting risk assessments and disclosing such information when it is appropriate to do so is correct. There is no need for reform in this area.

Recommendation: Given that the correct balance has already been struck between disclosures and safe space there is no need to reform FOIA to amend ss35-36 so that they become absolute in nature.

Recommendation: the appeal process under FOIA should be reviewed to ensure that it is less time consuming e.g. a requirement for public authorities to respond within 20 working days, and the ICO to complete its reviews within specified time periods so that the appeal processes become more time and cost effective.

Recommendation: If the Independent Commission determines that the veto power should be clarified, then it should consider specifying that it is not permissible to exercise the veto before exercising the right of appeal to the FTT. At that stage, to exercise the veto, a minister would be required to demonstrate a 'material change of circumstances' or that the decision was 'demonstrably flawed in fact or law.' This would be a proportionate response that respects the constitutional principle of separation of powers, and meets the fourth ARTICLE 19 principle requirements.

Recommendation: A more robust approach to staff costs would assist in ensuring greater efficacy. Any system that charged for time should also penalise poor records management practices; otherwise recalcitrant public authorities and government departments could use staff time charges to avoid fulfilling information requests.

Recommendation: vexatious or frivolous requests do not present a significant burden. The current legislative framework and associated guidance does not need revision.

Recommendation: There is room for improvement regarding the culture and mindset of public authority staff tasked with responding to FOI requests. If a more proactive approach to publication schemes and disclosure logs were adopted then FOI processing costs would reduce.

**Dr Karen Liebreich**

Dear Sir/Madam,

I understand that the future of the Freedom of Information Act is currently under consideration.

I have used this legislation several times with regard to my local Council, in order to find out about suspected malpractice or incompetence. In several cases my suspicions were proved correct and I was able to request modifications and improvement; in some cases my suspicions were unfounded, but at least my concerns were allayed. By moderate use of the Freedom of Information Act I have been able to improve local government and root out some crooked or foolish behaviour.

It seems to me that a strong Freedom of Information Act is an essential tool for a functioning democracy. Please do not weaken or remove it.

Yours faithfully

Dr Karen Liebreich, MBE

**Karl McCartney MP**

Lord Burns GCB Chairman

Independent Commission on Freedom of Information 9th Floor

102 Petty France London, SW 1H 9AJ

KM/MB            12 November 2015

I am delighted that The Independent Commission on Freedom of Information has been tasked with Reviewing the Freedom of Information Act 2000. It is entirely right that, after more than a decade in operation, the process is reviewed, as I feel very strongly that it is not working as effectively as it should.

There are two main concerns that I would like your Review to recognise and for the Government to address. First is the effect that Fol requests have on schools. Some Headmasters and Headmistresses in my City of Lincoln Constituency have told me that their schools are spending a large amount of time answering Fol requests, as they are legally bound to do, submitted in the main by journalists when 'fishing'. My understanding of the current rules is that if a request is not going to take more than 18 hours of staff time, schools must comply, which is simply ridiculous in the context of a school. Where are schools supposed to find 18 hours of staff time? And all the while this is diverting vital resources away from pupils.

It seems to me that there is a simple and straightforward solution. The Government should indicate to each school what information it should publicise, where it should be publicised and in what format and then the issue of The Freedom of Information Act would not arise.

Secondly, and more generally, I believe it is wrong that people can submit Fol requests to public organisations in total anonymity. If we can see who the request has been submitted to, so we should see who made the request and who is ultimately responsible for the costs incurred by taxpayers for that request. If I were to have the opportunity of tabling a Private Members' Bill and change the law in any way, I would seek to address this anomaly.

I am pleased you are considering whether there is an appropriate public interest balance between transparency and accountability, and for the operation of the Act to adequately recognise the need for a private space for policy development, implementation and frank advice. The correct balance does need to be found. I believe that by recognising and seeking to address both the effects on schools and the anonymity anomaly outlined above, we can begin to strike the right balance.

I hope you find my comments useful and please do pass on my sincere thanks to your colleagues on the Commission for their work on this long overdue Review.

**cc**

Dominic Raab MP. Minister for Freedom of Information and Transparency. Lord Bridges, Parliamentary Secretary. Cabinet Office

**Kate Beattie**

I am concerned that if the FOI act is watered down that stories which should be known to the public will remain secret. This will allow those with few if any scruples or probity to proliferate. This cannot be good for society as a whole.

Kate Beattie

**Kate Moran**

Dear Sir/Madam,

I am very concerned about proposed changes to the FOI laws. FOI is a vital tool in providing accountability for the public and it also helps build trust. Trust between government and the general public is low. Anything which limits or curtails FOI will further reduce trust. I understand there is an overhead in responding to requests but this is a small price to pay for transparency and worth paying considering the cost of lack of trust that limiting FOI will result in.

Yours sincerely,

Kate Moran

**Katerina Porter**

I have only just learnt that there is an inquiry into the working of the Freedom of Information Act.

I believe it is essential for the better health of our democracy and has been a very valuable tool for the transparency that is always being talked about on all sides as being desirable. Possible disadvantages are after all covered by the redaction that is permitted.

Katerina Porter

**Dr Katherine Horton**

Dear Sir/Madam,

The news publication Private Eye drew my attention to the fact that the Freedom of Information Act is currently under review. I am writing to you to express my most urgent support for the continuation and, furthermore, the expansion of the remit of the Freedom of Information Act.

FOI is currently used by countless journalist, researchers, charities, activists and members of the public. It is the only effective means to obtain information from the government and from a plethora of other public organisations. As such, it is the most vital tool for a healthy democracy. With my research expertise in the systems analysis of human systems, I cannot stress enough how important the FOI is for the rule of law in Britain.

As part of my research, I have studied human organisations of different types, varying in size from small businesses to nation states. All of these organisations are regularly impaired or subverted in their normal functioning by simple mistakes or unpleasant aspects of "human nature". No organisation is immune from that, since it is a simple mathematical fact that the probability of (partial) system subversion increases with the number of humans operating the system. (I.e. the more people are involved the more likely it is that someone makes a genuine mistake or does something dishonest at some point.)

I discovered that only those organisations could recover from these regularly occurring errors in their system that had a form of freedom of information incorporated into their statutes. Without such FOI rules, systems succumb to any forms of exploitations by humans that go undiscovered and hence unpunished or uncorrected. FOI is thus a crucial mechanism that ensures the resilience of a system against human error in all its shapes and forms.

To understand the true importance of FOI one has to have studied real-life examples of systems that went spectacularly wrong. In the case of small systems, e.g. a company or a hospital, the resultant damage can be horrific but it is still contained by the size of the system. In the case of a nation state, the absence of an FOI mechanism can result in a gradual and insidious subversion of its democracy. Such a process is truly devastating for the population because, in general, only a bigger system can stop a subverted system from spinning out of control. In plain English: Only external action by another bigger nation state can recover a subverted nation state.

It might well seem outlandish to you to consider that watering-down the current FOI legislation could result in the subversion of Britain's democracy. However, the increase in the probability of subversion at all scales of government is a mathematical fact that every systems analyst can confirm. I would also respectfully submit to you that a quick perusal of Private Eye could give you many examples of e.g. local councils, hospitals, news organisations and government departments that suffer from some kind of subversion or capture. It is thus an undeniable fact that "system malfunctioning" happens everywhere and mechanisms need to be put in place to recover a system from it.

Before the days of FOI, external complaints or internal whistleblowers were the only means through which we could uncover that something had gone wrong in a given system. What exactly had gone wrong, however, often eluded the external investigation when whistleblowers were not privy to the precise financial or contractual information that lay at

the heart of a problem. Furthermore, whistleblowers are a much rarer occurrence than malfunctioning systems.

FOI is thus the most effective means through which external actors, who do not suffer from the psychological and financial pressure put on whistleblowers, can question a system. Moreover, external actors, who can potentially question a system through and FOI request, are also more numerous than internal actors within a system. This is the greatest strength of the FOI mechanism because it gives external expertise access to system-internal information.

I understand that your major issue with FOI, as it currently stands, is the large number of requests that public institutions have to process. I also know from my research that the natural human response, when faced with such a deluge of requests, is to blame the phenomenon itself, rather than investigate where it comes from or admit that it might be a good thing that one should simply adjust to.

I would thus advise the Commission to consider that instead of the large number of requests being a problem, it is instead a natural and NECESSARY aspect of a functioning democracy. The fact that there is such a large number of FOI requests is a result of the fact that there are many more experts or highly qualified interest groups outside a given system than inside. It is through their questioning that obfuscated or subtle problems in an organisation are uncovered.

It is a blessing that there are so many people questioning and double-checking the functioning of our public institutions. There would not be enough civil servants to do it, otherwise, and they would not necessarily have the same level of expertise or focus.

FOI requests are essentially a mechanism for the crowd-sourcing of system problems. We know that such problems arise statistically in all systems. Therefore, it follows that the larger the number of FOI requests the higher the probability that system problems get uncovered and thus resolved.

Thus, I would respectfully submit that the larger the number FOI requests the healthier a democracy, i.e. the more resilient against naturally occurring subversion.

Finally, please also consider this: Civil servants, like all employees, have a tendency to think that the more "work" they get done the better. However in a (partially) subverted system, such "work" can also be counterproductive because it just drives a malfunctioning system even further along. Therefore, if part of such "work" is replaced by processing FOIs through which a malfunctioning can be exposed, then that is a much better thing than the civil servant just ploughing on with his usual "work".

In summary, the Freedom of Information Act has placed Britain in the unique position to make its institutions truly resilient against malfunctioning and subversion of all kinds. Modern systems analysis can show that FOI is essential to achieve this. Therefore, the FOI Act is a crucial element of a democracy of the 21st century. Its expansion has to be applauded.

Yours sincerely,

Dr Katherine Horton

**Katie Hawks**

Dear FOI Commission,

The Private Eye contains disturbing news about the freedom of the Act. FOI is a jolly good thing. Keep it up.

Katie Hawks

**Ken Briscall**

Dear Sir/Madam,

As a member of the public I wish to state that I am happy with the Freedom of Information Act in its current form.

I believe that the workings of government at all levels should be transparent and that any attempt to dilute the current ability of people like myself to access information which informs me of the true nature of government policy and either their success or failure should be resisted.

An example I would give would be my ability to access information regarding cuts to Tax Credits and how these would impact on my local communities.

We should all be able to get information which shows just how governing bodies are performing and how policies affect us.

Yours Faithfully

Ken Briscall

## **Kenneth Marks**

I am disturbed, along with many others, that the above Act is in danger of being weakened to the detriment of the citizens of this country and in favour of those who would wish to keep from us information which they might consider embarrassing or the property of a certain group of privileged persons.

As we are all citizens of the United Kingdom, only that information the revealing of which might be genuinely harmful to our safety should be withheld. No other consideration is defensible.

Kenneth Marks

**Kevin Cahill**

Dear Dame Patricia,

It is my understanding that you have asked for evidence relating to reforms of FOi.

Here is the most compelling case and evidence I can find for improving FOi, making more of Government subject to it, limiting exemptions further and having it taught on the school curriculum.

On the 6th of October 2015 the European Court struck down the 'Safe Harbour' agreement. There was no grace period. There was no grace period because the Court was aware of significant criminal implications at Member State level. The Court was also aware that some of its members had been subject to that criminality. As have each of you. This criminality is the PRISM espionage programme, which has been used to intercept the emails of between 50% and 70% of UK internet users and steal the data of the same percentage of people. Additionally the PRISM programme has been used to intercept the emails and steal the data of as many as 70% of the UI< children who use the Internet. (84% of those aged 3 to 17 use the web according to the LSE) And to steal your data and the data of Parliament. The Parliamentary data is handled by a company, contracted for money to the NSA to intercept Parliaments e mails and steal Parliamentary data. Far from committing a criminal act by publishing the Snowden material, the Guardian disclosed the most extensive criminal act ever perpetrated against the people of the UK, a programme in which the data of persons such as yourself was specifically targeted. The reliability and accuracy of Snowden's evidence about PRISM is a finding of fact by the ECJ. There is no appeal against the judgement.

According to Sir Anthony May QC, in his report to the Prime Minister last year the warrantless interception of e mails is a criminal offence and the theft of data an unlawful breach of HRA 8. When I gave him my evidence he advised I go to the police. That is the advice he would have to give you, since it is a legal duty on everyone, including yourself, to report crime. Have you done this?

The PRISM espionage has impeded the work of our three intelligence services, opened them to attack by misguided privacy advocates and damaged public confidence in their integrity.

I understand that you have never made a FOi request yourself. Further, the deadline is short and you may or may not have attended a meeting in the House of Commons last week, at which no person was identified and no one was quoted. I understand that an anonymous

claim on your behalf is that you are 'independent' and 'open minded', that you will receive and review evidence by Nov 20th and write and produce a report by Dec 17".

Three of you are members of the Privy Council, the ultimate secret body in the state, not subject to FOi. Two of you are former Cabinet Ministers. There is no representative of the public, any civic body or the media on your panel.

The lack of balance, the lack of independence and the need to protect the Government from the consequences of its failure to deal with PRISM, all infer that your panel's recommendations are already made. And that a primary purpose in the exemptions you will recommend will be to try and conceal from the public the PRISM criminality, especially the theft of the children's data. But I hope not.

Kevin Cahill (FRSA, FRGS) FBCS.CITP, FRHistS. Bureau Chief, Global & Western News

## Lawrence Dunhill

Hi there – I would like to make a submission to this consultation:

<https://www.gov.uk/government/consultations/independent-commission-on-freedom-of-information-call-for-evidence>

The FOI Act is a crucial tool for responsible journalists who pursue stories in the public interest. In the NHS, many of the communications/media departments do not provide adequate responses to our enquiries. And it is very rare that a director will agree to talk about an issue, which makes it very difficult to get accurate information.

The response below is a pretty typical example. I have pursued this to no avail, so my only route to the information now, would be to submit an FOI.

Thanks

Lawrence Dunhill

**Subject:** FW: Winter funding

Hi Lawrence

Here is our response.

A spokesperson for Lewisham and Greenwich NHS Trust said:

“We can confirm that the Trust agreed with commissioners an overall contract value of £7million for winter pressures in 2015/16.”

XXXXXX

Hi Press Team,

Could you see if your CEO or finance director have 10 mins to talk through their winter plans with me? I'm happy to treat this as a background conversation and not for quoting, if that's preferred.

If not, please can you answer the questions below. Please answer each one separately to avoid the need for clarification or call backs.

1. How much of the trust's income from commissioners is allocated for winter resilience?
2. What did the trust receive for winter resilience last year?
3. How much did the trust request this year?
4. Is the allocation you've got enough to meet your plan?
5. If not, what will the consequences be?
6. Do you expect to receive any central funding for winter resilience?

My deadline for this is 5pm on Wednesday.

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Thanks  
Lawrence Dunhill

**Les Riley**

To the commission

I wish to register my opposition to any attempt to curtail the Freedom Of Information Act. If we wish to live in a democracy freedom of information and scrutiny of Parliament and its doings is an essential part of it.

Why are there no members of the commission looking into the Act who are in favour of more openness, only those who wish to curtail it?.

Recent events demonstrate all too clearly that all public officials, elected or appointed, must be open to public account.

I recommend Private Eye, "Cry Freedom", issue 1405, "In The Back" section.

Yours

L. Riley

## **Les Smith**

Thank you looking at this

I was on long term bail

Found not guilty

Lost my business coz of the legal fees that I cant get back and lose of earning

Still fighting to see if the babies mine or not and I got to psy They on benefits and go on 7 weeks holiday Work on the side

And im about to lose my flat coz had only 73.10 since feb and had to cash in my pension and now dhss are keeping me waiting

What a country

Les smirh

**Lesley Whybrow**

Hi

I just wanted to say that I feel strongly that the FoI rules should not be watered down - it is vitally important that members of the public and the press can hold Government and local authorities to account in this way and indeed I have done so. If anything I think perhaps the rules should be changed to reduce the excuses that councils use to avoid and/or delay publishing this information.

It is unfortunate that some people abuse the system by putting in FoI requests for what are obviously commercial purposes but I think this is something we have to accept in order to have open and democratic government.

Councils etc could avoid the costs of dealing with FoI requests if they published more info on their websites in the first place.

Kind regards

Lesley Whybrow

**Lex Allison**

Freedom of Information commission.

Dear sirs,

I understand the Freedom of information act is under review.

I would deplore any move to reduce access to information about public bodies.

If anything I would urge you to make it simpler to access knowledge of the workings of all such organisations. Indeed much of the information which has to be pursued through this act should be available on line as a matter of public record. So much is already held in digital form. The public have a clear right to know what they are funding and how this is executed (or not). It is in fact essential for proper, democratic, public involvement in decision making.

This would also remove the cost of search from the authorities, so often used to argue against the act, and place the search efforts in the field of those seeking information.

It is also obvious that public scrutiny can only lessen the possibility of careless, bad or corrupt decision making and even, surely, god forbid, encourage competence and diligence.

As a retired teacher I urged pupils to be involved in understanding the powers that arrange their lives and involve themselves in democratic decision making. Cutting access to information can only inhibit such good citizenship.

Don't reduce the act, strengthen it!

Yours faithfully,

Lex Allison

**Logan Goldie-Scot**

Hi,

I strongly believe that the FOI act is an important tool for the public and journalists and contributes to better governance. I do not believe that this should be restricted, or that charges are attached to requests, since this would reduce transparency.

Although I understand that these requests often take time, it is an important way to increase transparency and the government should embrace this. There are numerous examples of the FOI being used to uncover stories of where the local or national authority was in the wrong, and changes were subsequently made.

The idea that it should not be used for media stories is genuinely worrying as this is a key way of holding governments to account and uncovering problems in the system.

Yours,

Logan

**Rt Hon Lord McNally**

Dear Terry,

I am responding to your letter of 9 October inviting contributions to your work looking in to the practical operation of the Freedom of information Act 2000.

Background

My interest in FOI goes back some forty years to when I served as Political Secretary to the then Prime Minister, the Rt. Hon. James Callaghan. I tried to interest Mr. Callaghan in including an FOI proposal in the 1979 Labour General Election manifesto. I failed. Mr. Callaghan had many great qualities; but his approach to reform of governance was that of a small "c" conservative.

My next serious bite at the cherry came in 1996 when I served on the Labour / Liberal Democrat Commission on the Constitution which greatly influenced commitments to FOI in both the Labour and Liberal Democrat 1997 Election Manifestoes and also influenced the shape and content of the 2000 Westminster FOI Act and the 2002 Scottish Parliament Act. I served on the Lords pre- legislative scrutiny committee of the Westminster Bill.

After the 2010 General Election I became Minister of State at the Ministry of Justice with responsibility for the Freedom of Information Act's observance, the Information Commissioner's Office and the working of the Data Protection Act.

I go into some autobiographical detail because I want your Commission to understand that my evidence and opinions are not lightly given nor lacking in experience of the working of the Act or its origins.

The Culture of Secrecy

To start with its origins, in the 1970s there were many who thought that a culture of secrecy pervaded the working of government at local and national level and that the view that the man in Whitehall still knew best was alive and well. I think one of the great successes of the 2000 Act has been to break down the mystique around policy making and open it up to wider influence and greater discussion. Where the act has failed is in breaking down the culture of secrecy. Every senior Whitehall Mandarin I have known has been resistant to and critical of the Act. That leadership (or lack of it) has much to do with the continuation of that culture of secrecy and has a knock on effect on its cost.

Open Data

I am sure that you will have been given robust evidence about how this Government and the last one has opened up shed loads of data - and that is true. I was an enthusiastic member

of Francis Maude's Committee which oversaw the last Government's Open Data policy.

However the Commission should not be dazzled by statistics about data sets released. Open Data is what the Government wants to tell me. Freedom of Information is what I want to know. The gap between the two is where secret government and the culture of secrecy are alive and well.

Let me also make the point in passing that we have been well served by the Information Commissioner and the ICO. Both have carried out their duties with commendable integrity and independence. Both the ICO and the Tribunal have shown a commendable willingness to protect information when it is in the public interest to do so.

### Chilling Effect

Much is made, particularly by senior mandarins, of the "chilling effect" of the FOIA. All I can say is that in three and a half years in government I saw no such reticence in giving advice. In fact I was impressed at the "democracy" of our civil service in encouraging often quite junior people to argue their case. If by "chilling effect" it means that senior civil servants or special advisers think twice, or even three or four times, before giving advice that is rash or even illegal, then I think that this is one of the benefits of the Act.

### Cost Burdens

The cost burdens are often cited as being a reason for changing the act, particularly for local government. My experience is, as I refer to above, that some of those burdens would be far less if the culture of secrecy was less and government at all levels accelerated release of information. It is also true that although critics are quick to enumerate the costs of implementation, there is less enthusiasm for calculating the cost benefits of the FOIA exposing waste, inefficiency and profligacy.

### Charging

On the question of charging, I hope that the Commission treads with caution and looks carefully at the Irish experience of fee charging. In my experience as minister responsible I found no evidence provided of "industrial usage", irresponsible (as opposed to inconvenient) use by journalists or inability to deal with persistent or vexatious requests.

### Cabinet Government

I have had no first-hand experience of Cabinet; but I am a lifelong believer in the concept of Cabinet Government and collective responsibility. Public confidence in our political institutions is still fragile. I do urge the Commission, in a search for a "safe space" in which Cabinet Government may operate they do not appear to be bringing down the shutters of secrecy just when public trust is at its lowest. The publication of the Chilcot Report next year may well awaken public mistrust of secret government.

## Post Legislative Scrutiny

I make one other point which impinges on the Commission and its work. I have always been the strongest supporter of both pre and post legislative scrutiny. When I became responsible for FOIA in 2010 I actively sought post- legislative scrutiny and gave evidence to the Justice Committee when it carried out its investigation. I just wonder where the integrity of the post- legislative scrutiny process sits if the Executive can then hand- pick its own commission to second guess a committee of Parliament which Parliament has charged with such a review?

I see no evidence that invalidates the judgement of the Justice Committee, when, after its thorough and comprehensive review it said that the freedom of information act is working well and its scope should not be diminished. That chimes with my personal experience both as a minister and since becoming the chairman of an arm's length body (the Youth Justice Board) where I have encouraged open governance whilst on occasion invoking the act to protect information in the public interest. I have found the act robust in that respect at all times.

I am, of course, happy to appear before your Commission should you wish me to expand on any of the above matters. I am sending this submission to you both by e-mail and by post. On the soft copy of this letter is a link to my evidence to the Justice Select Committee on this matter, much of this you may still find relevant.

Yours Sincerely,

Tom McNally.

**Luciana Berger**

Dear Lord Burns

Thank you for your invitation to submit evidence to the Independent Commission on Freedom of Information.

I felt it important to write to you to express how valuable I consider Freedom of Information requests to be, in my role as Shadow Cabinet Minister for Mental Health.

As a member of Her Majesty's Opposition, my duty is to scrutinise the work of the Government and hold Ministers to account for the work that they do. In the area of mental health, the shadow brief I hold, there is an appalling lack of transparency in data, particularly in terms of financial investment.

The Government has discontinued the annual National Survey of Investment in Mental Health Services which provided information on national investment in mental health services and has monitored expenditure for the past twelve years. Without the important measures contained in this survey, it is almost impossible to make an accurate assessment of investment in mental health services.

This is particularly concerning at a time when mental health services are under increasing pressure and the Government has consequently made a series of pledges in relation to increasing investment in mental health. Other than through the Freedom of Information request process, there is no way of determining if the Government is achieving what it said it would.

A case in point is the Government's pledge to ensure investment by Clinical Commissioning Groups in mental health increases this financial year in line with the increase in their overall budgets. NHS England's planning guidance, Forward View into action: planning for 2015-16, set the expectation that clinical commissioning groups' (CCG) spending on mental health services in 2015/16 should increase by at least as much as each CCG's allocation increase to support the ambition of parity of esteem between mental and physical health. <http://www.england.nhs.uk/wp-content/uploads/2014/12/forward-view-plning.pdf>

Ministers have repeatedly stated in parliamentary questions that they would ensure CCG spending on mental health increases in 2015/16.

<http://www.publications.parliament.uk/pa/cm201516/cmhansrd/cm150707/debtext/150707-0001.htm#15070743001282>

<http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-07-07/6043/>

However there is no central record of investment by CCGs in mental health – the Government has never published a breakdown of investment in mental health services by each CCG, despite NHS England having reviewed the spending plans of all CCGs in the Spring. Using the Freedom of Information Act, over summer 2015 I asked each CCG to submit to me the amount of their budget they were allocating to mental health for 2015-16. I

discovered that more than one in three CCG was not meeting the Government's expectation. I consider this exercise to have been of vital importance in enabling me to shine a spotlight on an area of great public concern and to hold the Government to account accordingly.

Yours sincerely

Luciana Berger

