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Response to

Making Open Data Real: A Public Consultation

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1. Datasets and contracting-out

We welcome the Open Data programme and the fact that it will apply both to public authorities and to public service providers which are not currently subject to the Freedom of Information (FOI) Act, including those "who have been funded, commissioned or established by statute to provide a service."[1]

Of the bodies not currently subject to FOI, the most substantial element are private sector contractors. Their significance will increase as a result of legislation now going through Parliament. Although some information about their performance may be available from the public authority responsible for the contract, the increased reliance on contracting out will substantially weaken the public's rights under the FOI Act. It will also undermine the Open Data proposals.

The publication of datasets will not, in itself, be enough to bring about the improvements to accountability, service quality, efficiency, choice and citizen empowerment referred to in the consultation document. Comparisons based on datasets will highlight differences between providers. But this will not reveal the causes of poor performance or provide insight into whether bodies are attempting to address the problems or ignoring them. That requires the broader right to information which the FOI Act provides.

The Localism Bill currently before Parliament exposes virtually all local authority functions to a procedure which may lead to competitive tender and contracting out. The Health and Social Care Bill will lead to NHS functions increasingly being carried out by private providers. We note that the government recently rejected an amendment to the Localism Bill which would have provided that information about the performance of contracts worth more than £1 million would be deemed to be held by the contractor on behalf of the authority and thus be subject to the FOI Act.

The consultation document proposes that the Open Data requirements should apply to non-public authorities providing public services. Although welcome, this should probably not be seen as an *extension* of the public's rights. It may *partly preserve* some of the rights that would have existed had the services continued to

[1] Paragraph 4.8

be provided by public bodies. We believe the emphasis should be on what can be done to more fully preserve these rights.

In the context of the NHS reforms, the government has suggested that FOI rights can be protected contractually. The suggestion is that private providers will be required by their contract to supply to the authority any information which it requires to answer FOI requests which it receives about the services.

The FOI Act provides that any information which a body holds "on behalf of" a public authority is deemed to be held by the authority itself for the purposes of an FOI request.[2] The difficulty is how to distinguish between the information which a contractor holds for its own purposes and that which it holds on the authority's behalf. The Information Commissioner has ruled that this depends on the contract itself. Where the contract requires the authority to keep particular records and make them available to the authority, the information will be held on behalf of the authority – and be subject to the FOI Act.[3] Where the contract does not require this, the information is likely to be considered to be held for the *contractor's* purposes and to be outside the Act's scope.[4]

The government has proposed that contracts with private providers of NHS services should include a contractual disclosure requirement. Such a requirement is already found in the present NHS standard contract. It provide only a limited right of access, to information which the contract itself requires the provider to hold or to supply to NHS bodies.

It would not, for example, permit access to minutes of meetings which the provider holds to discuss risks to the health of NHS patients or correspondence with third parties about such matters. Even fundamental matters such as the arrangements for cleaning premises at which NHS patients are treated appear to be outside the

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[2] Freedom of Information Act, section 3(2)(b)

[3] For example, in discussing a request to the Cabinet Office for information held by the bodies which certify which authorities meet the standards required for a Customer Service Excellence Mark, the Commissioner noted: "*In the Commissioner's view, information would be held on behalf of the Cabinet Office if the Certification Bodies were contractually obliged to gather that information to provide to the Cabinet Office and held the information primarily for the Cabinet Office's purposes rather than their own."* Decision Notice FS50264382, 29 July 2010.

[4] A request for information about the use of Argos points as an incentive to traffic wardens in Islington was refused because the wardens were employed by National Car Parks Ltd under a contract with the London Borough of Islington. The contract imposed no requirement on NCP to provide the authority with information about the incentive scheme. The Information Commissioner ruled that the information was held only for NCP's own purposes and was not disclosable underthe FOI Act. Decision Notice FS50162002, 9 June 2009.

scope of the contractual disclosure provision. We have elsewhere set out our concerns about these provisions.[5]

The NHS standard contract also requires private providers to comply with existing NHS dataset requirements.[6] Additional requirements may arise under the Open Data programme. However, the public will not be able to use the FOI Act to seek further information about these figures. Their rights in relation to NHS services provided by private contractors will be substantially weaker, in relation to both FOI and Open Data, than would be the case when services are provided directly by NHS bodies.

This loss of public rights will not be solely attributable to the terms of any contractual disclosure provision. Key elements of the FOI Act cannot be indirectly applied to contractors. For example:

- The Information Commissioner's powers do not apply to contractors. He cannot investigate a contractor's claim that it does not hold the information needed to answer an FOI request. His power to serve Information Notices, requiring public authorities to supply him with information required for an investigation do not extend to contractors. Nor can he serve a practice recommendation, a decision notice or an enforcement notice on a contractor which is failing to comply with good practice, failing to comply with its contractual obligations or deliberately obstructing FOI requests.

- Once a contract has expired, any contractual disclosure requirement may lapse, removing the right to information about past events. Even if the contract stipulates that it survives, it could only be enforced by a civil action for breach of contract against the contractor. The prospect of such action being taken for failing to assist in replying to an FOI request is highly implausible.

- The offence which applies to a public authority which deliberately destroys, alters or conceals a requested record in order to prevent its disclosure does not apply to a contractor which does this to prevent the authority disclosing it in response an FOI request.[7]

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[5] See the Campaign's letter of 6 September 2011 to the Secretary of State for Health. www.cfoi.org.uk/pdf/Lansleyletter.pdf

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[7] Freedom of Information Act 2000, section 77

The consultation document asks (page 24) whether the Information Commissioner's powers are sufficient to enforce the Open Data proposals. Insofar as the proposals apply to bodies not subject to the FOI Act, it is clear that they are not.

Strengthening rights

Where a contractor provides a service which it is the authority's function to provide, the FOI Act envisages that the contractor could made subject to the Act in its own right.[8] We think contractors providing public services should be brought under the Act in this way to ensure that they are subject to the same FOI and Open Data obligations as the public authorities whose functions they have assumed.

Failing this:

- The contractual duty on public service contractors to provide information to the authority to assist in answering FOI requests should be drafted in broad and explicit terms. We have proposed that such a broad duty should apply to private providers under their contracts with NHS commissioning bodies.[9]

- The Information Commissioner's powers of investigation and enforcement should be extended to public service contractors so that they can be brought to bear on any failure by the contractor (a) to assist an authority in answering an FOI request or (b) to comply with any Open Data obligation.

- The offence of deliberately destroying, altering or concealing a requested record to prevent its disclosure should be extended to public service contractors and apply both to material requested under the FOI and Data Protection Acts

[8] Freedom of Information Act 2000, section 5(1)(b)

[9] The proposal has been incorporated into an amendment to the Health & Social Care Bill tabled by Lord Lucas, which would require a service provider to supply to the commissioning body "such information as the commissioning body may specify for the purpose of responding to a request for information made to the commissioning body relating to -

(i) the performance of the contract

(ii) the ability of the service provider to comply with the terms of the contract (including its record in providing services similar to those provided under the contract), or

(iii) any other information relating to the service provider's facilities, premises, equipment, staff, policies, procedures, performance, deliberations, communications, decisions or actions relating to matters which may affect the physical or mental health or welfare of persons for whom it may have responsibility under the contract or the prevention, diagnosis or treatment of illness of those persons."

and to that containing information whose publication is required under the Open Data requirements.

2. Definition of "dataset'

We have previously expressed serious reservations about the definition of "dataset" which is to be inserted into section 11 of the Freedom of Information Act by the Protection of Freedoms Bill.[10] This presently reads:

> "(5) In this Act "dataset" means information comprising a collection of information held in electronic form where all or most of the information in the collection—
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> (a) has been obtained or recorded for the purpose of providing a public authority with information in connection with the provision of a service by the authority or the carrying out of any other function of the authority,
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> (b) is factual information which—
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> (i) is not the product of analysis or interpretation other than calculation, and
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> (ii) is not an official statistic (within the meaning given by section 6(1) of the Statistics and Registration Service Act 2007), and
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> (c) remains presented in a way that (except for the purpose of forming part of the collection) has not been organised, adapted or otherwise materially altered since it was obtained or recorded."

We have a number of specific concerns about this definition.

First, paragraph (c) of the definition provides that a dataset ceases to be a dataset if its presentation changes. It appears that if, for example, a column in a spreadsheet is divided into two columns, in order to provide more detail about a matter (eg to separately show how particular statistics affect men and women) the material apparently ceases to be a dataset. The requirements to release it in a reusable form, and the removal of copyright restrictions, would no longer apply; nor

[10] See the Campaign's submission to the Protection of Freedoms Bill committee of 4.4.11, at www.cfoi.org.uk/pdf/pofbillcttee040411.pdf

would there be any obligation to release updated versions under the authority's publication scheme.[11]

We cannot understand the purpose of a provision removes the public's dataset rights merely because the authority changes the dataset's presentation to make it more useful. This will happen as a result of the normal evolutionary changes that apply to datasets. Worse, an authority would be able to deliberately make a presentational change solely to circumvent the dataset requirements.

Second, it is not clear what legitimate purpose is served by excluding from the definition any collection of information which involves "analysis or interpretation" as provided by paragraph b(i) of the definition. If a public authority produces a dataset in this way for its own purposes, and it is not exempt from disclosure under the FOI Act,[12] why should the public have less rights in relation to it? The definitions of "dataset" and "Open Data" in section 1 of the consultation document do not appear to be limited in this way. The limitation also appears to be inconsistent with the objectives of the programme, which include the "collection and publication of the *most useful* data" (emphasis added) and making "the internal workings of government and the public sector more open".[13]

If the purpose of this exclusion is to exempt material to which value has been added to allow an authority to exploit it commercially, the exclusion should be defined in those terms.

Third, we believe the unnecessary restrictions on the use of information are not restricted to datasets but apply to other information released under the FOI Act. The reuse problems addressed by the Protection of Freedoms Bill and the Open Data programme in relation to datasets are merely a subset of a wider problem, which is not being fully addressed.

Information released under FOI are often accompanied by unnecessary and sometimes intimidating warnings against the reuse of the information. We are frequently contacted by FOI requesters worried that they will be sued if they publish the responses to their FOI requests on their websites.

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[11] These requirements would apply to datasets held by public authorities as a result of amendments to the FOI Act being introduced under the Protection of Freedoms Bill.

[12] For example a set of projections showing the effects of various policy options might be exempt under the section 35(1) exemption for the formulation or development of government policy, subject to the Act's public interest test.

[13] Consultation document, paragraph 3.3

The same copyright/reuse restrictions generally apply in relation to both datasets and other information. Under the new amendments authorities will have to drop the restrictions for datasets but may continue to apply them to other releases – an unhelpful distinction.

The unnecessary nature of these restrictions can be seen from a number of typical examples. All FOI disclosures made by *Portsmouth Hospitals NHS Trust* are accompanied by this statement:

> **Re-use of Public Sector Information Regulations 2005**
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> The supply of information under Freedom of Information is intended to be for personal use only and does not automatically give the recipient the right to commercially re-use it, for example, the right to publish it or make it available to a wider audience [SI 2005 No: 1515 4(1)]. Therefore, if this information is not for your personal use only you must apply in writing to this Trust. A licence may be issued as the information is under copyright and the issue of a licence may constitute a charge depending upon the information released and proposed re-use.
>
> We do not permit the re-use of any staff personal information.
>
> Failure to comply with the Regulations may result in legal proceedings being taken against you.

The suggestion that the supply of information under the FOI Act "is intended to be for personal use only" is not correct. Furthermore the threat of legal proceedings is intimidating and disproportionate.

This reuse statement has accompanied disclosures about: the number of whistleblowing cases in the trust and their outcomes;[14] the number of admissions to the hospitals for pressure ulcers and the number of those involving patients from care homes;[15] the number and cost of funerals provided by the trust, where no relative willing to pay could be found; [16] the number of patients receiving chemotherapy[17] and the Maternity Unit's policy for dealing with pregnancies where a risk of child abuse is suspected.[18]

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[14] www.whatdotheyknow.com/request/54547/response/140233/attach/html/3/10%2011%20163%20Response.doc.html

[15] www.whatdotheyknow.com/request/46338/response/117194/attach/html/3/10%2011%20110%20Response.doc.html

[16] www.whatdotheyknow.com/request/public_healthwelfare_funerals_68#incoming-88545

[17] http://www.whatdotheyknow.com/request/chemotherapy_85#incoming-18787

[18] Response to a request by the Association for the Improvement of Maternity Services

West Midlands Police have released information about police officers disciplined for misconduct together with a statement requiring its written permission before "any part" of the released information could be reproduced.[19] No permitted uses were mentioned. The same statement accompanied the release of information about the number of motoring offences and the way in which the forms used to record them were dealt with,[20] the numbers of tasers and officers authorised to use them,[21] the arrangements for and costs of storing recovered stolen vehicles[22] and the Chief Constable's correct title.[23]

A request to *the London Borough of Tower Hamlets* asked why a fence had been erected on a particular street forcing pedestrians to walk on the road. The council explained that it had been done to keep pedestrians away from building works, but accepted that it created an obstruction, "wasn't a good idea" and had now been removed. The response was accompanied by a copyright notice warning that "publishing the information or issuing copies to the public will require the permission of the copyright holder".[24]

In August 2011 *the Foreign and Commonwealth Office* released a number of FCO emails written by British diplomats about key votes in the Canadian Parliament and the 2011 Canadian elections to a Canadian journalist. It was accompanied by a copyright statement which permitted its reuse "for non-commercial research, private study or internal circulation within your organisation" but required the journalist to apply for a license if he wished to use it for "any other" purpose.[25] This would apparently have prevented the journalist publishing the material in an article. No mention was made of the fact that journalists are by statute entitled to reproduce reasonable extracts of copyright material for the purpose of news reporting.[26]

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[19] www.whatdotheyknow.com/request/64609/response/164611/attach/3/4446%20ans%2001.pdf (4.4.11)
[20] whatdotheyknow.com/request/86105/response/218096/attach/html/3/5099%20ans%2001.pdf.html (13.10.11)
[21] www.whatdotheyknow.com/request/69484/response/177652/attach/html/3/4598%20ans%2001.pdf.html (26.5.11)
[22] www.whatdotheyknow.com/request/66504/response/185018/attach/html/3/4497%20ans%2001.pdf.html (17.6.11)
[23] www.whatdotheyknow.com/request/title_and_description_of_chief_c#incoming-207566 (6.9.11)
[24] www.whatdotheyknow.com/request/why_has_a_fence_been_built_acros (27.5.11)
[25] Letter to Stanley Tromp, 24.8.11
[26] Section 30, Copyright, Designs and Patents Act 1988

3. Access to personal files

The consultation refers to the right of individuals to control their own service user records (paragraph 5.1) as an element of the Open Data programme (while recognising that such records would be open only in relation to the individuals concerned).

Individuals' subject access rights to their own records, under the Data Protection Act, now lag substantially behind the rights to other information under the FOI Act. [27]If access to personal records falls within the scope of the Open Data programme, we hope the opportunity will be taken to improve these rights. In particular:

- Individuals are not entitled to be told when information has been withheld from them under an exemption. FOI requesters are entitled to be informed of this

- Exemptions under the DP Act are not subject to a public interest test, as is the case for most FOI exemptions

- Bodies withholding information in response to a subject access request are not required to inform individuals of their rights of appeal against such decisions. Public authorities have to notify FOI requesters of their appeal rights when withholding information

- Most complaints to the Information Commissioner about subject access are dealt with by not by a full investigation (as is the case with FOI complaints) but by a less thorough "assessment" of whether it is "likely or unlikely" that the data controller has complied with its obligations. These assessments are not legally binding.

- FOI requesters can appeal to the First Tier Tribunal (Information Rights) against a decision of the Information Commissioner. Individuals seeking their own records have no access to the Tribunal but must apply to the court to enforce their rights, where they are liable to pay the data controller's costs if they are unsuccessful. By contrast, at the Tribunal each side normally pays its own costs.

[27] See the Campaign's submission to the Ministry of Justice on this topic at www.cfoi.org.uk/pdf/DPAresponses.pdf

4. Releasing data "as is"

We welcome the proposal in paragraph 6.11 that the emphasis should be on releasing data "as is" rather than delaying disclosure until the quality of data can be applied.

5. Time limits

We strongly support the suggestion in paragraph 8.6(6), that the time limits for internal review under the FOI Act should be subject to a statutory maximum. As the consultation document observes, a statutory 40 working day time limit applies under the Environmental Information Regulations. A statutory limit for internal review is also found in the Scottish FOI Act.

The unspecified extension to the time limit for responding to requests where an exemption involving the FOI Act's public interest test should also be subject to a statutory time limit. The MOJ's 2010 report on the operation of the FOI Act reveals that in 71 cases, the 20 working day period was extended by more than a 100 additional days (the actual length of the extensions are not monitored once 100 days is exceeded).[28]

Under the Scottish FOI Act, no extension of any kind is permitted for considering the public interest test, which must be completed within the standard 20 working day limit for responses. That should also be the position in the UK.

6. Inventories

We welcome the proposal that steps should be taken to help potential users identify what information public bodies hold by means of "data inventories" (paragraph 8.15). A provision to this effect could be required under authorities' publication schemes.

[28] http://www.justice.gov.uk/downloads/publications/statistics-and-data/mojstats/2010%20Annual%20and%20Q4%20FOI%20bulletin%20vfinal.pdf (Table 15)

7. Internal workings of public authorities

We agree that public authorities should publish more information about their internal workings and the data underpinning advice and decisions (paragraphs 8.16-8.17)

The FOI Act seeks to require this by providing that, when considering the public interest test in relation to the exemption for the formulation or development of government policy, departments should have regard *"to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision- taking"* .[29]

The First Tier Tribunal has been critical of the failure to properly apply this provision in some cases.[30] We think this requirement should be given greater weight, and that an equivalent provision should be inserted into section 36 of the FOI Act, which contains the corresponding exemptions for bodies other than government departments.

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[29] Freedom of Information Act, section 35(4)
[30] Case EA/2010/0080 and 0081, Robin Makin & Information Commissioner, paragraphs60-63 and 69.