Independent Commission on Freedom of Information: Responses from organisations to Call for Evidence: D – L

Contents

Updates to the document

This document was updated on 14 December 2015 to include a response submitted by Guardian News & Media (at page 16).

This document was updated on 11 January 2015 to amend the title of the response submitted by Independent Parliamentary Standards Authority (IPSA) (at page 63).

Devon County Council

The following submission is made on behalf of Devon County Council, in response to the above call for evidence. Please see the Council's response to each question below;

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

Current provisions within Section 36(2) of the Freedom of Information Act provide an avenue for public bodies to withhold information on the grounds that disclosure would inhibit the free and frank exchange of views for the purposes of deliberation so long as the public interest favours withholding the requested information. Such provision allows the creation of a "free thinking space" within which decisions can be debated openly and freely to the benefit of national and local government policy formulation.

It would be impractical to apply a broad brush approach to the withholding of particular types of information as decisions on the disclosure or withholding such information should be taken having regard to the relevant public interest factors prevalent at the time of disclosure in each case.

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?

The Act recognises that decisions on disclosure should be taken on a case by case basis having regard to the factors relevant in each individual case at the time. Applying a broad approach to disclosure for specific categories of information, whilst easy to apply, would be unfair and may negatively affect public confidence in local and national government decision making.

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

See answer to question 2.

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?

The current arrangements outlined in Section 53 of the Act provide sufficient protection at this present time. However the application of the ministerial veto should be the subject of a parliamentary vote.

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

More powers should be devolved to the Information Commissioner's Office, to enable statutory auditing of public authorities who consistently fail to comply with the requirements of the Act. The power to fine public authorities should also be considered as a meaningful driver to improve compliance.

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

The principles of the Act are justified, i.e. the authorities should be accountable to the public. However, current usage of the Act is placing a disproportionate burden on authorities from the sheer number of requests and slight variations on the same subject that require a separate response. To help address this concern, provision should be made within the act, to allow for the aggregation of requests received from individuals across a wider timeframe than is currently allowable. Consideration should also be given to allowing aggregation of requests which are not directly linked but from the same person.

It is clear that there is a requirement for a common sense approach to requests made under the Act. It is important that the public are able to request data to allow issues to be brought to light and for policy to be challenged since this can often bring about change for the better for the taxpaying public and often for the local authority too. However consideration should be given to providing for charges for "commercial" purposes. Such request may include requests made by media researchers, journalists or media outlets and are bulk sent to public organisations, for the purpose of creating a news story (even if in the public interest), supplementing information, etc.

East Malling and Lakfield Parish Council

I have been asked to write to convey the Parish Council's support for the Freedom of Information Act continuing to apply in its present scope.

The Parish Council feels the Act does strengthen the local democratic system and would regret any weakening of its provisions.

Just recently the Parish has proposed use of the Act to obtain details of proposals put forward by Kent County Council to suggest a library in this Parish and a local Children's Centre/Community Hall should be allocated on the local plan for housing. The Borough Council were claiming this was "confidential"

By referring to the Act the information which ought to be in the public domain was obtained.

The Act is also useful in obtaining information within a set time rather than waiting indefinitely for it to be provided as previously happened. Previously requests for information could be passed back and forth between departments. Now KCC, for example, has a specified officer dealing with requests and she makes sure departments provide the information.

The Parish Council feels it would be wrong if the Act was watered down to prevent "embarrassing" information coming to light such as MP's expense claims or as again happened in Kent disclosure of the cost of Councillors foreign trips.

We are aware some say the Act allows frivolous requests but there are provisions to reject such requests, or if they are disproportionate.

The Parish Council consider the Act should continue unchanged.

Mrs Val Severn

East Northamptonshire Council

East Northamptonshire Council is committed to the Freedom of Information Act and the purpose for which it was intended. However, over the past few years we have experienced the issues highlighted below, which we would ask the Commission to consider under Question 6 of the Call for Evidence document.

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

Answer: No.

Or are controls needed to reduce the burden of FoI on public authorities? *Answer:* Yes.

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

Which kinds of requests do impose a disproportionate burden? *Answer:* We believe that any request that is not genuinely in the public's interest imposes an unnecessary burden. We set out below examples of the sort of requests that we believe fall into that category.

Background information - FOI Statistics

East Northamptonshire FOI Counts	
2011/12	442
2012/13	591
2013/14	524
2014/15	538
YTD 2015/16 (Apr – Sept)	219

We have carried out an analysis of the type of requester in 2014/15. These figures show those requesters who can be identified without a doubt. The 'other' group includes requesters who cannot be identified as being from a specific group with 100% certainty. They may be businesses or members of the public; we often suspect requesters are writing on behalf of a company (by the type of questions being asked), but a personal email is often used.

ENC Requester Type 2014/15	
Media	59
Business	150
Charities & Non-profit organisations	23
General public	16
MPs and their staff	12
Other (including unidentified)	278
Total	538

We have recorded the amount of officer time taken for the processing of each of these FOIs, and the average time taken is 1 hour and 13 minutes. The total amount of time taken to process FOIs was recorded as 655 hours, which amounts to over 90 days or 18 weeks of officer time. We estimate the cost to be over £16,000. While this does not seem to be a huge amount, for a council with only 176 FTE, there is a significant impact.

Issues Causing Concern at East Northamptonshire:

Frivolous Requests
Example: The number of staff whose name starts with 'A'.

This is clearly a ridiculous request with no public interest. However, the onus on the public authority to provide a detailed response when refusing to release data is such that

- Staff time is wasted
- The value and purpose of the FOIA is degraded in the eyes of staff

Suggestion:

Public bodies should have the right to refuse to respond to such requests without the requesters having a right to a review or to complain to the ICO.

Requests for Commercial Information
Various departments within the council, in particular the ICT department, are regularly bombarded with requests for details on software and contract costs, end dates, review dates and technical details, which are blatant attempts to obtain information in order to contact the council for commercial gain.
While it could be argued that there is a public interest behind a request for information on a public body's contracts and purchasing methods (we do publish our Contracts Register as required by the Local Government Transparency code), it is obvious that this is not the reason behind these requests.
The FOIA concept of a request being applicant blind is understandable, but that should not extend to our being blind to the purpose of the request.
Suggestion:

We would advocate that a change be made to require requesters to specify/define what the public interest is, as part of their original request. We believe that such a requirement would in itself reduce significantly the number of frivolous or commercially-driven requests that we receive.
Alternatively, consideration should be given to imposing a charge for FOI requests that have no public interest value. That might put off those companies who use public bodies to do their market research for them via blanket FOI requests or who use the FOIA to obtain sales leads.

Distortion of information by press

We fully support the right of the media to use investigative journalism to pursue stories that are in the public interest (e.g. MPs' expenses). However, in our experience, FOI requests from the media are often 'fishing expeditions, designed to find a negative story to write an article about rather than a genuine investigation into a specific suspected failing by a particular organisation.
Such requests are often not very carefully worded. Each authority will respond as best it can and the journalist (or, often, an inexperienced researcher) interprets the response, makes various assumptions or extrapolations and arrives at a completely spurious conclusion, which then becomes the focus for a negative newspaper article..
This does not encourage public bodies, in general, to be open and transparent.

Suggestion:

We believe that it should be a requirement for media organisations that have collected information under the FOIA to be required to consult any public body that it proposes to 'name and shame' to ensure that its facts and the conclusions that it has drawn from them are accurate.

Aggressive requests

Representatives of some organisations are becoming more aggressive in their requests: “If you refuse I will take my request to the ICO. If you say it will take more than 18 hours I will split the request into smaller ones. I will appeal….’

This just gives the message that, even if the public body has a legitimate reason under the FOIA not to comply with the requesters’ demand in its entirety, there will be more work in carrying out a review and possibly having to deal with an investigation by the ICO.

Suggestion:

The requirement for a requester to specify the public interest in their original request should reduce the level of these aggressive requests. However, where they persist and appeals are made to the ICO, we believe that there should be some financial incentive / penalty associated with that process. We would be quite willing to pay costs where the ICO has concluded that we have unreasonably withheld information, because we are confident that we comply with the legislation. We believe that, were requesters who lost their appeal to the ICO required to reimburse the public body the costs of their appeal, that would deter much of the unacceptable behaviour we currently experience.

Method of Communication

Section 11 of the Act states that the requester can specify the means by which communication shall be made and that “the public authority shall so far as is reasonably practicable give effect to that preference”. However, requesters are using this to become more and more demanding. We are now being asked to complete online surveys to provide the data, i.e. typing the data into an online form. We are being asked to provide spreadsheets with columns in particular orders and formats. This is effectively expecting the public body to do the requesters’ data analysis for them.

The public body does have a right to assess the required method of communication as impractical, but a review and a possible ICO investigation is the result from this type of demanding requester. This again puts an extra burden to the council.

Suggestion:

Some proper definition of ‘practicable’ and ‘acceptable’ must be made, or limits set. If the information provided in response to an FOI request received electronically is in machine readable form, that should be enough. If the data is in a clearly understandable table if requested in paper form, that should be sufficient.

Yours sincerely

David Oliver
Chief Executive

East Suffolk Councils

The Independent Commission on Freedom of Information has published a call for evidence on the Freedom of Information Act 2000 (FOIA).

The call for evidence is focussing on

1) the balance struck by FOIA between transparency of public bodies' activities and protection for sensitive information.
2) protections for public bodies' internal deliberations (including those of the Cabinet)
3) the operation of the executive veto,
4) the enforcement and appeal system and
5) whether controls are needed to reduce the burden of FOIA on public authorities.

With reference to the points above, and using the same numbering, East Suffolk's comments are as follows;-

1) it is often difficult for local councils to balance the need to protect sensitive information, against the need to be transparent, particularly where the information is commercial in nature, and relates to third parties with whom the councils might have a contractual relationship. Where the East Suffolk councils have purchased land for regeneration purposes, and the purchases have been controversial, locally, FOI/EIR requests follow, inevitably, from those who might oppose the purchases for a variety of reasons. Exemptions under ss42/43 FOI have been applied to protect commercial information, and the public interest test applied, in two similar cases, but when the requestors appealed to the ICO, two different outcomes resulted, creating uncertainty as to the strength of these exemptions. Clear, consistent application and interpretation of the exemptions would be helpful.
   It is often the case, too, that s36 FOI can be relied upon to provide a safe place for Monitoring Officers, or lawyers, for example, to advise their Members on sensitive issues, yet there is no similar provision under EIR, when the subject matter of a request relates to land, or environmental issues, and legal advice has been given. A similar provision to s36 would be useful under the EIR regulations.

2) See point 1) above

3) Not applicable

4) See point 1) above

5) The East Suffolk Councils have purchased and implemented a new FOI management system. The costs of this, of course, cannot be taken into account in responding to FOI/EIR requests, but since having the new system, since June 2015, we have been able to more accurately record the amount of time spent on FOI & EIR requests. The average officer time per month spent on responding to FOI/EIR requests (figures taken from June - Sept 2015) is 202.5 hours. However, we ONLY record the time spent in accordance with the ICO guidance on how to estimate the amount of time spent complying with a request:

6) *Regulation 4(3) of the Fees Regulations states that a public authority can only take into account the costs it reasonably expects to incur in carrying out the following permitted activities in complying with the request:*

- *determining whether the information is held;*
- *locating the information, or a document containing it;*
- *retrieving the information, or a document containing it; and*
- *extracting the information from a document containing it.*

However, this does not in any way reflect the real time spent on responding to FOI requests.

Substantial additional time is usually required in terms of:

- administration of requests - logging request, identifying suitable recipients to respond, checking responses, closing requests (even a standard S21 response where we know that the data is already published on our website takes between 5 and 10 minutes in admin time for an experienced officer)

- once data is extracted, ensuring it is in a format suitable for release/ publication

- redaction - dependent on the nature of the request, this can be a significant amount of time (e.g. where the requester asks for copies of correspondence, there may be a lot of personal data)

- where a part or full exception/ exemption is engaged, ensuring that this is explained fully, including consideration of the Public Interest Test where applicable.

Considerable costs are also incurred, indirectly, via, for example:

- Implementation of a new FOI system
- External training
- internal training and coaching sessions (ongoing) to ensure that service teams gain expertise in responding to requests and creating robust refusals where appropriate
- Informal advice and assistance from Data Protection, Audit and Legal teams.

To this extent, therefore, we are of the view that Regulation 4(3) of the Fees Regulations ought to be reviewed, with a view to widening what a council may charge for, in order to reduce the costs burden on local councils.

Even were the “real” time of responding to a request included, we are also of the view that the current Appropriate Limit of £450 (equivalent to 18 hours) is excessive and incurs a disproportionate cost and disruption to public service in responding to complex or wide-ranging requests.

We believe that the Appropriate Limit ought to be reduced.

Hilary Slater

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Equality and Diversity Forum (EDF)

Introduction

The Equality and Diversity Forum (EDF) is a network of national organisations committed to equal opportunities, social justice, good community relations, respect for human rights and an end to discrimination based on age, disability, gender and gender identity, race, religion or belief, and sexual orientation[1]. Further information about our work is available at www.edf.org.uk.

Our members represent some of the most disadvantaged groups throughout the UK and so we will comment on how the proposed changes may well affect them.

We regard the Freedom of Information Act 2000 (FOI Act) as a vital mechanism of accountability which has transformed the public's rights to information and substantially improved the scrutiny of the operation of public authorities. We oppose any suggestion that it should be weakened.

We note that the FOI Act was the subject of comprehensive post-legislative scrutiny by the Justice Committee in 2012 which found that the Act had been 'a significant enhancement of our democracy' and concluded 'We do not believe there has been any general harmful effect at all on the ability to conduct business in the public service, and in our view the additional burdens are outweighed by the benefits'. We therefore question the need for any further review now.[2]

A number of our members have given us examples of times when they have found FOI requests invaluable in their work.

The End Violence against Women (EVAW) Coalition have worked closely with journalists who have used it to investigate violence against women and girls. An important example where the use of FOI requests has resulted in a beneficial outcome was that of a Press Association reporter who did a number of long term FOI requests to all police forces asking them to disclose reporting of 'revenge pornography' incidents. He was doing this well before 'revenge porn' was criminalised. The requests produced significant figures, got a lot of media attention as it clearly showed that there were a large number of reported incidents of this abusive behaviour before law makers and politicians were aware of the problem. These FOI requests exposed this as a problem and significantly contributed to the pressure on the Government to criminalise it, which it has now done.

The Children's Rights Alliance (England) (CRAE) submitted an FOI request to the Metropolitan Police to find out how many times Tasers had been used on children across London between 2008 and 2012. CRAE had been unable to uncover this data through other routes as such data was not routinely published at the time. The results of this FOI request showed that the use of Taser on children increased nearly six-fold between 2008 and 2012. In total police used Tasers on children in London 131 times in this period. Between 2008 and 2012 Tasers were used on children in all but nine boroughs, but far more frequently in some boroughs that others. The data showed that in four boroughs children were tasered 51 times, accounting for 40% of the total. 70% of the occasions on which police used Tasers on children occurred in just a quarter of London boroughs.

The figures uncovered by this FOI request have had a significant impact. It has led to CRAE adopting a programme of work on Taser use on children. As a result they have briefed the London Assembly members on Taser use; assisted with specific police training and guidance on the use of Taser on children with the College of Policing; secured a commitment from the police watchdog to look at how often children complain about treatment and examine how to monitor use; as well as interest and commitment on reviewing Taser use on children from the Scientific Advisory Committee on the medical implications of less-lethal weapons. [3]

[1] A list of EDF members is attached as annex 1
[2] http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/9602.htm
[3] The Children's Rights Alliance (England) will be also responding to this consultation. Further details will be available there.

The Gypsy and Traveller organisation Friends, Families and Travellers asked the Department for Communities and Local Government (DCLG) the dates of the meetings of the Ministerial Working Group on tackling inequalities experienced by Gypsies and Travellers. This was a working group set up in response to the European Union request that the UK, as with all other Member States, produce a Roma Integration Policy. The Government elected to set up the working group as an alternative, this produced a progress report in 2012[4] which made a number of commitments and said that they 'intend to produce another report once we have had an opportunity to assess progress in delivering against these commitments.' However, no further report seemed to be being prepared. Several FOI requests from Friends, Families and Travellers were declined on the basis that to provide information of this kind would have a chilling effect on Ministers' ability to develop policy free of public scrutiny. Two failed attempts to get the information were followed by a complaint to the Information Commissioner. The Commissioner directed DCLG to supply an answer. The answer was that the Ministerial Working Group was not actually having any meetings and no policy was being developed on Gypsy and Traveller integration although discussions with Gypsy and Traveller Groups were continuing through the DCLG Gypsy and Traveller Liaison Committee meetings.

Response to specific questions 1-6

We support the responses to the specific questions posed by the Commission that is being put in by the UK Open Government Civil Society Network (http://www.opengovernment.org.uk/resource/ogn-briefing-evidence-to-the-foi-commission/) and would adopt their detailed response here as part of our response.

[4] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/6287/2124046.pdf

Equality and Diversity Forum

Annex 1: Equality and Diversity Forum Members

Action on Hearing Loss
Age UK
British Humanist Association
British Institute of Human Rights
Children's Rights Alliance for England (CRAE)
Citizens Advice
Disability Rights UK
Discrimination Law Association
End Violence Against Women Coalition
Equality Challenge Unit
EREN – The English Regions Equality and Human Rights Network
Fawcett Society
Friends, Families and Travellers
Gender Identity Research and Education Society (GIRES)
Law Centres Network
Mind
National AIDS Trust
National Alliance of Women's Organisations (NAWO)
Press for Change
Race on the Agenda (ROTA)
RNIB
Runnymede Trust
Scope
Stonewall
Trades Union Congress (TUC)
UKREN (UK Race in Europe Network)
UNISON
Women's Budget Group
Women's Resource Centre

Other signatories
Inclusion London
Young Women's Trust
London Voluntary Service Council

Fish Legal

Fish Legal is surprised at the constitution of the Commission, noting that several senior politicians on it either have publicly criticised the Freedom of Information legislation or found themselves facing criticism over issues that have only come to light by virtue of this legislation. This, together with the relatively low-key approach to public consultation within this review will be bound to leave an impression that this commission has a pre-set agenda here.

Fish Legal notes that the Commission is only considering Freedom of Information (FOI), which is domestic in origin and not the Environmental Information Regulations (EIR), which are EU based. Fish Legal is concerned that there will be divergence between these two access regimes, which will leave the public in some confusion and possibly disgruntled that information of a similar nature under EIR is subject to different rules under FOI.

Fish Legal is a unique membership association which uses the law to protect fish stocks and maintain the rights of its members. The majority of Fish Legal's access to information work involves E I R. Having said that, we do use and value FOI and would comment as follows:

Question 1

Fish Legal recognises the disparity between the EIR and FOI on the question of internal deliberations / internal communications, where an exception exists under EIR and no equivalent exception applies under FOI.

Fish Legal considers that the case law that has developed in relation to Section 36 offers adequate safeguards in respect of the use of this exemption. In short certification is reserved for significant, weighty, concerns and not the everyday exchanges, the disclosure of which could give rise to embarrassment or inconvenience to public bodies rather than significant harm. In respect of Section 35, Fish Legal considers the current legislative provision within Section 35 to be adequate protection particularly given the potential distinction between the making of any given policy decision and any background information that may have informed those decisions. However, limiting background information to "Statistical Information" is, in our view, far too narrow; it should include all objective factual information.

Question 2

No comments.

Question 3

Fish Legal considers that if the existing legislation is to be modified to create a separate exemption in respect of risk assessment, this exemption should include a statement as to the date at which the exemption would no longer apply or a date at which it would be re-assessed. Thus the application of the exemption itself or the determination date could be subject of a Section 50 referral to the Information Commissioner in the event that a requestor is dissatisfied. Fish Legal believes that the underlying factual information upon which the risk assessment is made should not be exempt however.

Question 4

Fish Legal considers that the current position of ministerial veto is unsustainable in particular in the light of R (on the application of Evans) v Attorney General [2015] UK SC 21. The use of judicial review as the only means of challenge to the veto is unfair and prejudicial to those seeking the information, given that requests may be time critical and the JR process is not always geared to expedition and is costly and complex for the majority of people.

A safer route would be to restrict the use of veto only to instances where fresh material or circumstances come to the attention of the Minister after the disputed determination of disclosure has been made by the regulator or the courts.

Question 5

As a member of the public having utilised both the services of the ICO and the Tribunal service, Fish Legal holds the view that the existing enforcement and appeal system for FOI requests is robust enough and sufficient. The only comment Fish Legal would make is that the Information Commissioner needs to be assured of adequate funding to cater for enforcement and appellate functions. Fish Legal's experience is that on occasion ICO responses are clearly reflective of poor staffing levels. Fish Legal notes and approves of the, generally, costs neutral approach of the Tribunal system which usually protects individuals from adverse costs.

Question 6

Fish Legal's view is that the public right to know is now firmly entrenched as a constitutional right over the last ten years. Transparency is a key modern democratic principle and there is a strong public interest in furthering it.

Fish Legal considers that the imposition of charges is not the appropriate means of introducing controls as inevitably charges have to be modest and in most cases the work generated in billing, collecting and paying in such charges will not be economically viable and will add to the overall burden of FOI on public authorities. Any imposition of an 'affordability' barrier to some militates against the democratic purpose of FOI.

Marketing-based enquiries, or the collection of information to ultimately be codified or reformatted and sold on as a product is disproportionately burdensome to public authorities. This is arguably not what FOI was set up to provide, however it is difficult to address this issue without changing the fundamental principles of FOI that it is both applicant blind and purpose blind.

On many occasions, Fish Legal has used the access to information legislation to effectively compel a public authority to carry out actions it has hitherto been reluctant to do (or to expose unfair, controversial or unlawful behaviour, thereby potentially correcting it).This remains one of the most powerful and beneficial rights of the public and should be preserved, free of cost.

If the FOIA were modified to require a stated purpose for a request before it was processed there could be the following prejudices that would arise:-

a) Clear potential for response and disclosure from the public authority to vary accordingly, as part of a subjective evaluation of the request. Allowing such potential for inconsistency is not desirable.

b) Difficulty in policing uses of information when this is at variance with stated purpose.

c) Requestor may have several purposes in mind at the time of making the request, and ultimate purpose may be dependent on the nature and quality of the information disclosed.

One possible solution could be the revision of the current rules on aggregation of requests and aggregation of costs to include consideration of a period of four or five months as opposed to the current aggregation period of three months as a means of control. However, a fair balance must be struck. The Commission should ask itself whether a valid and worthy requestor be prejudiced in finding out something in the public good, just because it is necessary to request a large amount of information to get to the issue.

I hope our response to you has been useful and that it helps the Commission arrive at conclusions that are fair and reasonable to a general public who now view freedom of information as a national institution.

Yours sincerely,

Geoff Hardy
Solicitor

Flintshire County Council

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

For Public Authorities outside of central government only s36 may be applied to internal information which may prejudice “free & frank” advice or discussions. It is noted that only one identified “qualified” officer may apply this exemption. In the case of Wales this is the Monitoring Officer of an Authority. It is felt that this limitation is unnecessarily onerous and may cause unnecessary delay I providing a response, as this process does not take into account absences from the Authority. This also leads to the anomaly where the Monitoring Officer may be responsible for reviewing their own decision.

The Environmental Information Regulations provide an exception s12[4](e) where internal communications may be withheld this exception maybe applied by any officer deemed competent to respond to a request. It is felt that a similar exemption with a lower bar would be appropriate to internal information particularly as such decision would be subject to a review by a more senior officer.

Question 2: What protection should there be for information which relates to the process of collective Cabinet discussion a**nd 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?**

Where cabinet information is subject to an exemption it is considered that a standard 20 years closure period is ample

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

A new exemption discussed under question 1 would have an effect on this, however it is noted that a number of existing exemptions may be applied in certain circumstances e.g. s36. S38 etc. It is considered that releasing risk assessments in some circumstance may lead to an unnecessarily high perception of risk. Particularly where used selectively or without background information. It is considered that there may be a varying degree of sensitivity which should be considered on a case by case basis.

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?

It is considered that the current review process provides sufficient safeguards

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

The Council is conscious that the intention on implementation was to provide a simple means of review of decisions not to release information. This is part is fulfilled by the current stages of internal review followed by a review by the Information Commissioner. It is considered that these stages are efficient and easy accessible by members of the public. It is easy for the ICO to engage with organisations and members of the public often being able to facilitate informal resolutions.

Unfortunately reviews to the first tier and upper tier tribunals have become extremely complex and costly for both the requestor and authorities. This may lead to complex important issues not being submitted or defended. The fact that First Tier Tribunal Decision are not binding on the Information Commissioner adds further complexity.

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?

Flintshire County Council supports the principle of openness & transparency which it considers has been enhanced by the implementation of FOI and EIR. Flintshire is a comparatively small Local Authority with a revenue budget circa £250million. Since the commencement of Freedom of Information Flintshire County Council has handled over 11,000 Freedom of Information Requests at an average of 3 hours per request costing [using ICO rate of £25 per hour] in excess of £800,000. The cost this financial year to date is already approaching £100,000 these figures do not include redaction costs and resources, time considering exemptions, or time considering internal reviews.

The past year has seen an increase in what may be termed "spam requests" speculative requests from commercial companies seeking marketing information from multiple authorities requesting information in specific formats. Some of these expect authorities to spend time completing specific documents or web pages. These are beginning to impose an increasing and significant burden. It is not felt that this type of request provides any benefit to the principle of openness & transparency. It is considered that the current increasing burden imposed on Authorities during a time of increasing austerity is not sustainable. It is considered that reducing the appropriate limit reducing and including time deliberation time in the limit would reduce the burden on public authorities. However it is also recognised that quantifying deliberation or reading time may be problematic. Our research suggests that reducing the standard local authority limit to 10 hours or less would not affect the majority of what may be termed "transparency" or "public interest" requests.

During a time when authorities are looking to streamline work and reduce burdens it is considered reasonable that an authority should be able to recoup all reasonable costs including time and resource on requests which are made solely by an organisation, or individual, clearly intended to seek profit or market advantage. Indeed it could be argued that providing such information without recouping all cost involved may be providing an unfair economic advantage to the requestor.

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FOI Man

Introduction

This document is my formal response to the Call for Evidence launched by the Freedom of Information Commission in October 2015.

Currently I work as a freelance trainer in data protection, freedom of information, records management and related issues. Until the end of 2013 I was employed in the public sector as an FOI practitioner and records manager in organisations including the two Houses of the UK Parliament, the Greater London Authority, the NHS, and SOAS, a college of the University of London. I am the creator of the FOIMan blog (www.foiman.com) and Twitter feed (@foimanuk). My qualifications in this area include an LLM in Information Rights, Law and Practice and a Masters in Archives Administration. I have written about FOI for a number of publications including the Freedom of Information Journal and Times Higher Education magazine.

I previously responded to the Justice Select Committee's post-legislative scrutiny in 2012 and that response, much of which remains relevant to the current inquiry, can be found online at http://www.scribd.com/doc/82767805/Written-Evidence-From-Paul-Gibbons .

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?

At present, the FOI Act contains several exemptions that protect internal deliberations. In particular, section 35 protects the formulation and development of government policy, and section 36 provides further protection for Cabinet discussion, free and frank exchange of views expressed by officials not captured by section 35 (including internal deliberations of public bodies outside central government). It is my view that these exemptions provide sufficient protection for internal deliberations. As illustration, the chart below shows the number of times section 35 was utilised by the Cabinet Office, a prominent government department, the number of times its use was appealed, and the number of times that the Information Commissioner upheld, partly upheld, or overturned the Cabinet Office's decision within a 5 year period.

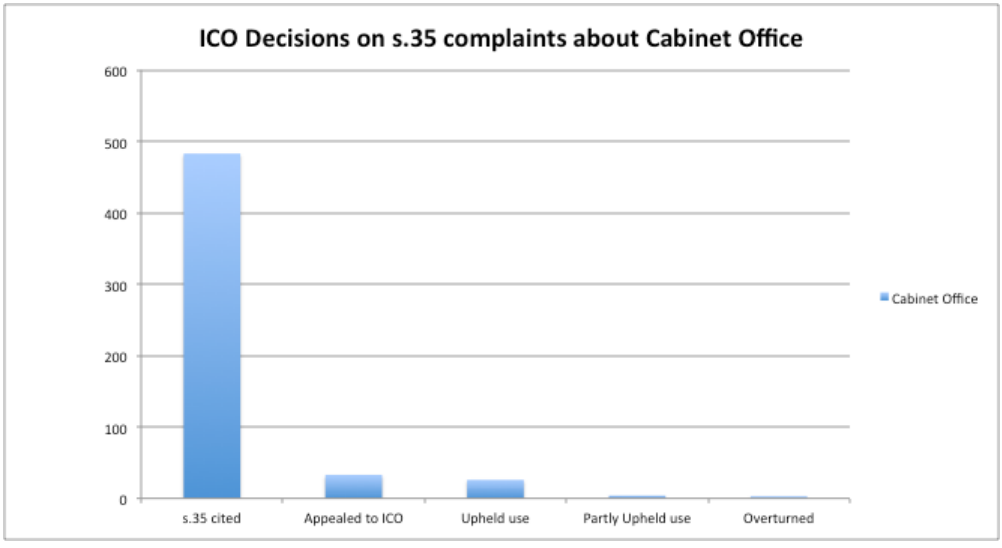

Chart 1: s.35 use by Cabinet Office 2010-2015[5]

[5] Source: Government FOI Statistics, published quarterly by the Ministry of Justice (https://www.gov.uk/government/collections/government-foi-statistics); Information Commissioner's decision notices database (http://search.ico.org.uk/ico/search/decisionnotice). Both accessed July 2015.

The Cabinet Office was the department that used this exemption the most during the five-year period from May 2010 to May 2015. This chart shows that in practice, the use of the section 35 exemption went unchallenged in 93% of cases. Even in cases appealed to the Information Commissioner, the exemption was upheld the vast majority of the time. Only three uses of section 35 by this department were completely reversed by the Information Commissioner's Office (ICO) during these five years. These three cases were: the number of times the "Reducing Regulation Committee" has met (a case which is still being contended, so information has yet to be disclosed), the minutes of the Cabinet Meetings relating to the 2003 invasion of Iraq, and Cabinet information relating to the takeover of Rowntree's in 1988 (papers which in any case are likely to be disclosed soon under the transition to a 20 year rule). There were specific reasons for the ICO decisions in these cases. In a small number of cases disclosure was subsequently ordered by a Tribunal, but nonetheless it is rare that this exemption has been overturned.

What I think this data shows is that whilst there may be a perception in government that internal deliberations cannot be protected by section 35, it is just that – a perception. In practice, the ICO and the Tribunals generally recognise the need to protect such deliberations where such protection is needed.

One simple way to strengthen the protection offered by sections 35 and 36 would be to make the exemptions absolute, in full or in part. In the examples mentioned, the exemption was overturned because the ICO took the view that whilst the exemption was applied correctly, there was a public interest in disclosing the information concerned. I believe, however, that removing the public interest test would be a significant backward step for FOI and open government more generally.

The public interest test signals that government recognises the importance of taking a broader view when considering requests for access to information. By allowing an independent arbiter to consider whether government has correctly considered this, it similarly signals that such decisions will not simply be made for the convenience of government or public officials. Removing the public interest test would send out a message that the convenience of officials and Ministers is more important than recognising the importance of public involvement in policy-making. The public interest test also allows transparency to evolve in a way that takes account of ongoing developments.

I would point the Commission to the evidence provided by the Information Commissioner which expands further on the argument that I have provided here, including the provision of statistics in relation to section 36[6].

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?

My view is that there is already sufficient protection for this. I refer the Commission to the evidence submitted by the Information Commissioner in respect of this point[7].

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

I agree with the Information Commissioner, who has submitted evidence on this point[8].

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

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[6] *Response of the Information Commissioner*, 16 November 2015 (https://ico.org.uk/media/about-the-ico/consultation-responses/2015/1560175/ico-response-independent-commission-on-freedom- of-information.pdf)
[7] *ibid*.
[8] *ibid*.

have for the rest of the Act, and how could government protect sensitive information from disclosure instead?

My personal view is that the appropriate way to decide whether information has been properly withheld is through a fair and transparent appeal process. A Ministerial veto does not provide for this, seeking to override independent review mechanisms.

That said, when the Act was passed in 2000, I recognise that Parliament expressed the will that it should be possible for Ministers to veto disclosures. Given this, I was surprised by the decision taken by the Supreme Court earlier this year in relation to the FOI Act (though I was less surprised by their decision in relation to the Environmental Information Regulations (EIR))[9].

From a pragmatic point of view, whilst in principle I am not in favour of the Ministerial veto, its occasional use has significantly less impact on transparency than would making certain exemptions absolute, whilst providing government with a backstop in cases that cause it most concern. The retention (and if necessary, clarification) of a ministerial veto for exceptional cases seems a proportionate price to preserve a strong FOI Act more broadly.

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

It seems to me that the existing system of enforcement and appeals is largely fit for purpose. I would be extremely concerned at any proposal to limit the ability of the Information Commissioner or the courts to issue binding decisions on public authorities.

Overall the Act works well at present and has led to increased transparency and accountability across the public sector. This would not have happened without there being a "stick". Even now some public authorities resist disclosure of information that ought to be in the public domain. Heels are dragged, and as is evident from the Information Commissioner's evidence, there is still a significant problem with timeliness of responses. Without enforcement powers, the Information Commissioner would not be taken seriously. Progress in opening up the public sector would be slowed and in all likelihood reversed.

As someone who has been involved in the process of handling and answering FOI requests, I am aware that on occasion public employees resist disclosure of information even where it would be appropriate to release it, and no exemption can legitimately be relied upon. Most FOI Officers are relatively junior in their organisations and are thus not well placed to stand up to resistance. Their only way to promote good practice is to point to the powers of the Information Commissioner. Without the existence of an independent regulator able to reverse incorrect decisions, these public officials will struggle to fulfil their role effectively and poor practice will proliferate.

It ought to be remembered that environmental information is subject to the EIRs. These regulations implement a European Directive which require an independent review process to be in place. If the Information Commissioner's powers were diminished in relation to FOI, there would be a divergence in the operation of these pieces of legislation which are so closely related.

There is another reason why I believe it would be short-sighted to remove the existing enforcement and appeal process, at least without putting something equally or more effective in its place. There has been a right of access to information for ten years. The public is used to being able to request information from public bodies. Whatever changes the Commission proposes, or that the government chooses to make, people will continue to make requests. Even now, on many occasions applicants are not satisfied with the response that they receive. The availability of an independent regulator to whom they can complain provides a safety valve. Without it, discontented requesters will merely continue to bombard public authorities with correspondence. Even if such correspondence is not answered, it will take up staff time. Trust will continue to be eroded, public authorities will spend money on repeating

[9] *R (on the application of Evans) and another v Attorney General,* [2015] UKSC 21

themselves, and there will be noone to act as arbiter. A strong and effective enforcement and appeal process is a benefit to government and public authorities as much as it is to those utilising the Act.

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

FOI has a cost. This is indisputable. However, this can be said of most activities in government. I recently carried out research into the cost of public relations activities more broadly across central government[10]. A FOI request was sent to 20 central government departments asking them how much was spent on external relations, press offices and marketing activities in 2014/15. Only 16 departments have provided information, but the total that those 16 departments spent on public relations activities was £157 million in that period, according to their own figures. It is difficult to agree upon a formula to estimate the cost of FOI, but if we take the cost indicated by a Ministry of Justice commissioned report in 2012 (£184)[11] and multiply this by the total number of requests received by government departments in 2014 as cited in the Ministry of Justice's annual statistics for FOI[12], we get a figure of £5.7 million. Compared to the £157 million spent on other communications in a 12 month period, FOI seems relatively inexpensive.

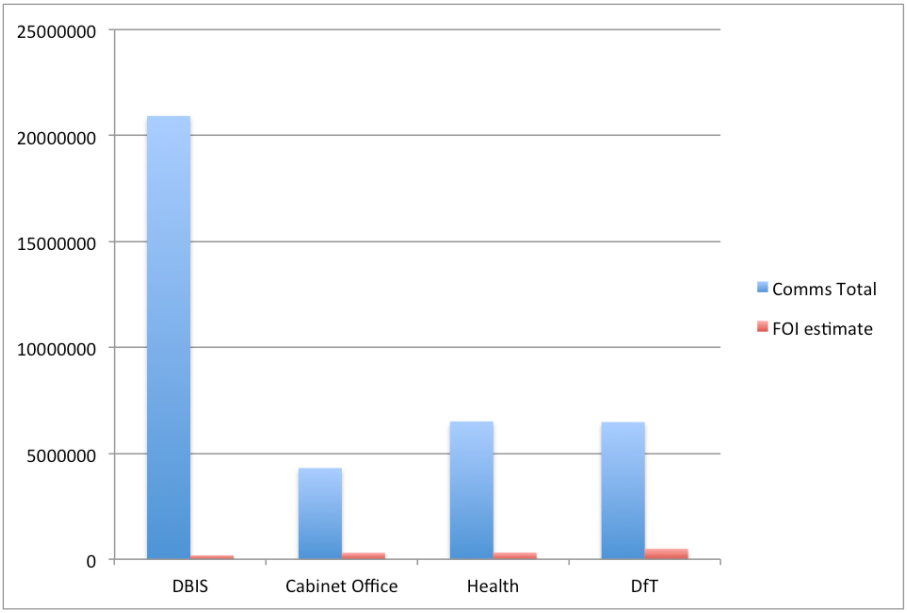

Chart 2: expenditure on public relations v expenditure on FOI in a sample of government departments

It is essential to see FOI in this context. As suggested earlier in this response, it is likely that people will continue to ask questions of public authorities whatever changes are made to their legal rights. It is surely important that public authorities engage with those funding them beyond merely publishing

[10] Full details and copies of the responses received can be found at http://www.foiman.com/archives/2097
[11] *Strand 3 – Investigative study to inform the FOIA (2000) post-legislative review: Costing Exercise*, Ipsos Mori for Ministry of Justice, March 2012 (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217390/investigative-study-informing-foia.pdf)
[12] Freedom of Information Statistics: Implementation in Central Government 2014 Annual and October - December 2014, Ministry of Justice Statistics bulletin, 23 April 2015, p.24 (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/423487/foi-statistics-oct-dec-2014-annual.pdf)

information that they deem of interest. FOI provides a legal framework through which individuals can make their enquiries – and sets out the circumstances when it will be appropriate to refuse requests. Importantly, it is a framework that has achieved some degree of public recognition and trust. Dismantling it may result in unexpected consequences including continuing and perhaps even increased public expenditure.

Another point worth making in relation to the burden of FOI is that there is some evidence that the volume of requests is starting to decline. Government statistics have shown a gentle reduction over the last couple of years, and certainly I have heard anecdotal evidence that this may be a common trend in other parts of the public sector. It is too early to be certain, but it may be that the high-water mark of UK FOI has been passed[13].

Having seen how public authorities work and how they handle FOI requests, it seems to me that the cost of FOI could be reduced by improvements made to their administration. Despite claims that FOI would lead to improved records management, my own experience suggests that these improvements have been limited. Inadequate provision for record keeping impacts not just on the ability of public bodies to respond to FOI requests in a timely manner, but also on the efficiency of those bodies more broadly. Time is wasted by officials resisting disclosure of information even when given clear advice that there are no grounds for withholding it. Bureaucratic handling of requests increases their cost. In response to my recent FOI requests, several departments provided more information than had been asked for and wrote letters which were then scanned and attached to the email sent in response. Time could have been saved by merely responding within the body of the email. Byzantine approval processes delay responses, taking up the expensive time of senior public officials often unnecessarily.

One of the options explored in the Commission's Call for Evidence is the possibility of introducing a charge for FOI requests. I am very much against this, as it is a very crude tool for managing the volume of requests. Arguably, the most useful research carried out using FOI is that which compares spending or decision making by a number of public authorities. My own research described above relied upon this. For most people and organisations, even a relatively small fee of £10 would make this kind of research impossible. To take my own example, it would have cost £200 up front to carry out this research. For those scrutinising whole sectors, for example higher education or local government, the cost could well be as much as thousands. It would prevent important research from being carried out, in many cases resulting in damaging and expensive inconsistencies going uncovered. Examples include media revelations that significant numbers of home care visits last less than 5 minutes which led to Ministers taking action[14]; revelations that children with mental health problems can wait for over three years to be assessed[15]; and that reports of child sexual abuse have risen significantly over the last 4 years[16].

Furthermore, such an approach would limit access to information to those who can afford it. The low paid, the elderly, the unemployed, and other groups with limited incomes would be disproportionately affected by such a change.

An exclusive focus on the burden of FOI would be unfortunate, as it ignores the significant benefits that FOI has brought, including savings to the public purse. I mentioned above the cost of public relations to central government. In response to my request, the Foreign & Commonwealth Office pointed out that some of the expenditure they reported was on activities such as promotion of UK

[13] Source: Government FOI Statistics, published quarterly by the Ministry of Justice (https://www.gov.uk/government/collections/government-foi-statistics)
[14] Revealed: More than 500,000 care home visits last less than five minutes, *Daily Telegraph*, 15 February 2015 (http://www.telegraph.co.uk/news/health/news/11302534/Revealed-more- than-500000-home-care-visits-last-less-than-five-minutes.html - accessed 18 November 2015)
[15] Children with mental health problems can wait over 3 years to be assessed, t*he Independent*, 30 March 2015 (http://www.independent.co.uk/life- style/health-and-families/health-news/children-with-mental-health-problems- can-wait-for-more-than-three-years-to-be-assessed-10142500.html - accessed 18 November 2015)
[16] Reported child sexual abuse has risen 60% in last 4 years, figures show, *The Guardian*, 9 April 2015 (http://www.theguardian.com/society/2015/apr/09/reported-child-sexual- abuse-has-risen-60-in-last-four-years-figures-show - accessed 18 November 2015)

business abroad. Just as this expenditure may result in significant returns for the UK economy, FOI can lead to savings to public expenditure. Officials may be less inclined to make expensive decisions if they are aware that the public will find out about them. The Campaign for FOI has uncovered several examples of this over the last 10 years and will no doubt highlight these in its evidence. One example from my own experience involved a request for the expenses of the Chief Executive of my own employer at the time. As a result of the request, it was established that £9,000 had not been claimed back from an overseas institution, which was immediately rectified. The resulting saving of £9,000 may not have been a huge figure in the context of the overall budget, but was nonetheless significant recompense for an average expenditure of approximately £184 per FOI request. Beyond these kind of anecdotal examples, the savings that FOI has facilitated are difficult, if not impossible, to quantify. They are likely nonetheless to be significant, and possibly greater than the cost of FOI itself to the public purse.

Bearing the above in mind, I consider that the existing mechanisms for managing the burden of FOI are sufficient. Section 12 and the existing fees regulations can be used in most circumstances to refuse the more expensive and unfocussed requests. Where this is not available, recent case law has made clear that the exemption for vexatious requests at section 14 of the Act can be used to refuse overly burdensome enquiries. The Information Commissioner has provided some further detail on these provisions and recent case law relating to them in his evidence and I would encourage the Commission to consider these carefully.

Summary
In summary, my response to the Commission's Call for Evidence is as follows:

- The existing provisions within the Act provide sufficient protection for internal deliberations. Such protection should not be absolute but, as at present, balanced against the benefits that transparency and accountability bring.

- There is sufficient protection for Cabinet discussion and agreement in the Act at present. I am not persuaded of the need for more protection in this area.

- The exemptions in the legislation provide for protection of risk assessments where such protection is necessary and appropriate. Again, I do not believe that this kind of information requires more specific or increased protection.

- In principle I am not supportive of the concept of a ministerial veto. However, its sparing use, subject to judicial review, causes limited damage to transparency more broadly. As a backstop, its existence causes less damage than would an increase in the number of absolute exemptions.

- In order to be effective, it is important that there is a "stick" to encourage public authorities to comply with FOI. In my view the current Act, through the powers of the Information Commissioner and the appeal process, largely provides this. If anything, the Commissioner requires more powers in order to ensure that compliance continues to improve.

- The burden of FOI is often exaggerated and ought to be considered in relation to other expenditure by public authorities and their overall communication strategy. Existing mechanisms, focused on placing a limit on the cost of FOI requests to public authorities, are a far better way to manage any burden than the crude method of charging individuals to make requests. Finally, it is important to recognise the benefits that FOI has brought, including the saving of public money. These are much more difficult to quantify but are nonetheless significant.

Independent Commission
on Freedom of Information

Gateshead Health NHS Foundation Trust

Dear Sir/Madam

Please find below Gateshead Health NHS Foundation Trust's response to question 6 of your Call for Evidence consultation document.

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

Disproportionate burden on public authorities

Gateshead Health NHS Foundation Trust (the Trust) recognises the importance of the right of access to public sector information and the principles of transparency and accountability of public bodies. However, in our view the balance between the public right of access to public sector information and the public interest in ensuring that there is no unwarranted interference with public bodies' ability to plan and effectively use their resources to discharge their core functions currently leans too heavily towards the former. Therefore, we welcome this consultation and support the idea of introducing controls in order to improve that balance.

Like other NHS organisations, we are operating in a very difficult financial landscape resulting from an unprecedented increase in demand for our healthcare services combined with rising costs of providing care and flat funding. To be able to continue to provide outstanding healthcare to all our patients, sustainable both clinically and financially, we must make best use of our resources. The FOI regime in its current form is at odds with this objective.

The main problem areas can be summarised under the following headings:

1. Constantly growing number of requests
2. Disproportionately high cost limit
3. Exclusion of necessary work from the cost limit
4. Insufficient controls to prevent abuse
5. Balance between the interests of the patients or tax payers and private interests

1. Constantly growing number of requests

The number of FOI requests the Trust receives increases year on year as shown in the table below.

	Number of requests
2012/13	271
2013/14	430
2014/15	554
2015/16 quarter 1 & 2	295

Requests contain anything from one to about 40 questions of differing complexity. Whilst some requests can be addressed by the Trust's Information team by interrogating our electronic data systems, a vast majority of requests require cross departmental input of staff of various seniority and searches of multiple systems or records.

Although pro-active publication can help to a degree, and the Trust is currently reviewing its publication scheme with a view of publishing more information, usually there is some change from one request to another which makes re-use of previously released information impossible.

Consequently, responding to FOI requests has become a regular task of many staff members, both in non-clinical as well as clinical departments, demanding a growing share of their time to the detriment of their core responsibilities.

2. Disproportionately high cost limit

We strongly believe that the existing statutory cost limit (i.e. £450 or 18 hours per request for the wider public sector bodies) is too high. It is blatantly disproportionate to require staff on a regular basis to put aside the performance of their core duties (which in the Trust's case are related to the provision of healthcare services) and spend up to 18 hours on responding to each FOI request.

We have experienced situations where a single clinical member of staff had to spend in excess of a full working day on responding to a request, which placed undue pressure on their clinical priorities and resulted in their distress.

3. Exclusion of necessary work from the cost limit

Under the current FOI regime only the time spent on determining whether information is held, and locating, retrieving and extracting information counts towards the statutory cost limit. We are obliged to observe and protect various rights and interests (e.g. patient confidentiality, supplier commercial interests, public interests in maintaining statutory exemptions), yet the time required to consider whether disclosure would breach our obligations is not recognised within the cost limit.

The law on FOI exemptions is very complex. Every decision must be based on its own merits with reference to specific circumstances and take into consideration several factual, legal and public interests factors which are often difficult to ascertain and judge. Every ICO decision notice on the use of exemptions is evidence of just how complicated these considerations are and how detailed justification of reliance on an exemption must be. Further evidence of the complexity of such considerations are the different ways in which NHS trusts interpret and apply the statutory exemptions in relation to identical requests. It is this work that often takes much longer than retrieving the information itself.

4. Insufficient controls to prevent abuse

There are no effective measures for ensuring that the right of access serves to address a genuine need for information. Section 14(1) allows public bodies to refuse to comply with vexatious requests but there are requests which although are not manifestly unreasonable, do not appear to serve any serious purpose.

Section 14(2) allows a public body to refuse to comply with a request which is substantially similar to a previous request from the same applicant, while section 12 can be relied on to aggregate the costs of complying with separate requests from the same applicant or organisation related to the same topic. However, these limitations can be easily circumvented by the use of different names and different private email addresses.

5. Balance between the interests of the patients or tax payers and private interests

There is a general public interest in the transparency and accountability of public sector bodies, and information released under the Freedom of Information Act is deemed to be disclosed to the world at large. However, very often (if not usually) FOI requests serve private rather than public interests (including on occasions the commercial interests of non-UK and non-EU companies).

Public interests only ever come to play when the requested information falls under one of the statutory exemptions. They are not taken into account when non-exempt information is requested even where it is apparent that there is no wider public interest in spending £450 on complying with a particular request.

Number and % of requests by type of requester								
	Not disclosed*		Commercial		Media		Other**	
2014/15	189	34%	137	25%	120	22%	107	19%
2015/16 quarter 1 and 2	119	40%	80	27%	59	20%	37	13%

Notes to the table:
* "Not disclosed" represents requests from private individuals as well as individuals who seek information in their professional capacity but prefer not to disclose it.
** "Other" includes public health sector, academic, voluntary sector, politicians and government bodies.

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***Out of the total of 295 requests received between April and September 2015, 94 were staff related, including 43 about agency/locum staff many of them submitted by recruitment agencies. About 55 requests were in regards to contracts (mainly ICT).

We recognise that there is a public interest in allowing individuals and organisations to benefit from access to public sector information in pursuance of their private interests but in our view disproportionate public resource is currently afforded to meet that interest.

Suggestions

We would suggest that a combination of the measures listed below may help to remove the existing disproportionate burden on public authorities while preserving the principle of requester and motif blind FOI regime:

- appropriate cost limit reduced to 2 hours per request; or
- statutory hourly charges for work required in excess of 2 hours; and
- inclusion of the time spent on the consideration of exemptions in the statutory cost limit; and
- simplification of the law on exemptions.

Should you have any questions, do not hesitate to contact us at foi.enquiries@ghnt.nhs.uk or the contact details in my signature below.

Yours faithfully

Anna Wereszczynska
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General Medical Council

About the General Medical Council

We are an independent organisation that helps to protect patients and improve medical education and practice across the UK.

- We decide which doctors are qualified to work here and we oversee UK medical education and training.
- We set the standards that doctors need to follow, and make sure that they continue to meet these standards throughout their careers.
- We take action when we believe a doctor may be putting the safety of patients, or the public's confidence in doctors, at risk.

Every patient should receive a high standard of care. Our role is to help achieve that by working closely with doctors, their employers and patients, to make sure that the trust patients have in their doctors is fully justified.

Our responses to the questions raised in the Call for Evidence

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 exemption in section 35 (formulation of government policy) is not one which the GMC can rely on and we have no particular view on this.

We feel that the exemption provided for by section 36 (prejudice to the effective conduct of public affairs) could be improved upon. We find the application of this exemption to be quite cumbersome as there are three aspects to it: the question of prejudice, the public interest test and the opinion of a qualified person. In practice the qualified person is usually designated as the most senior person within the organisation and obtaining their opinion can delay a response to a request. We would question the value of obtaining the view of the qualified person on this particular exemption as opposed to any others.

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?

The GMC does not have a view on this.

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

We think that there should be a specific exemption which covers the candid assessment of risks. Currently we feel that there is a greater likelihood that risk assessments may be written in a diluted form in anticipation of public disclosure. Risk assessments are an important part of the work of any organisation and any potential for them to be subjected to a chilling effect is likely to be harmful to that organisation. In our view the information remains sensitive whilst the risk remains 'live' and as such any exemption should cover disclosure for that period of time.

We feel that the Department of Health case concerning its risk registers is illustrative of the need for greater protection. In that case the question of the public interest was described as finely balanced and it is surprising that the matter could only be concluded after tribunal proceedings and the exercise of the

ministerial veto. We feel that it is in the public interest that there be greater certainty surrounding the possible disclosure of risk assessments.

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

We not have a view on this.

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

We feel that there are too many tiers to the existing system. The recent Prince of Wales correspondence case is one of several which illustrate that it can be a great many years before issues are finally definitively determined upon. We do not feel that an effective freedom of information regime should have such delay and uncertainty built within it and that a more streamlined model could be devised.

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?

Some requests can most certainly impose a disproportionate burden on public authorities. A lot of the burden may arise from the need to undertake redaction. We therefore feel that some new controls are necessary in this area.

We do not feel that the appropriate limit provided for by section 12 of the Act and the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 currently provides an effective way of dealing with this.

The recent case of *McInerney v Information Commissioner and the Department for Education* [2015] UKUT 0047 (AAC) illustrates the complexity of the interaction of the Act's provisions and their unsatisfactory application to the issue of redaction costs.

We feel that an effective stand-alone redaction costs exemption could be formulated.

Greenpeace UK

About Greenpeace:

Greenpeace defends the natural world and promotes peace by investigating, documenting, exposing and confronting environmental abuse, and championing environmentally responsible solutions. Using creative actions and people power to hold organisations to account, we act to intervene at points of leverage and apply pressure for change.

Greenpeace is a non-party political organisation. The issues we campaign on are sometimes 'political' but not party political. We advocate and lobby for a change in policies that harm our environment. Our independence is a core part of who we are. In that context we do not take money from any government or corporation. Most of our funding is from small, individual donations. This enables us to freely tackle power and not just the problem.

Greenpeace's view on the importance of the Freedom of Information Act 2000 ('the Act')

Greenpeace notes that the Commission's interpretation of its terms of reference are that it has not been asked to consider more general questions about the Act, such as whether it has generally achieved its stated objectives, or which types of bodies should be covered by it. However, in order to fully and fairly assess whether the Act allows for an appropriate balance between transparency, accountability, and the need for sensitive information to have robust protection – and whether the Act is overly burdensome on public authorities – we believe that a wider evaluation of what the Act has achieved to date is essential. Without this assessment of success versus burden, it is difficult to see how any meaningful conclusions can be drawn about the merits of curtailing access to information allowed for by the Act, or about whether the Act is overly burdensome for officials. If the Act leads to better decision making or the exposure of undue influence the imposition of charges will seem – and is – absurdly petty.

Due weight should therefore be given to the Justice Select Committee post-legislative scrutiny of the Act in 2012. This, as the Commission's Call for Evidence document states, highlighted how the Act had 'contributed to a culture of greater openness across public authorities, particularly at central Government level' and that it 'is a significant enhancement to our democracy… it gives the public, the media and other parties a right to access information about the way public institutions… are governed'.

Furthermore, Greenpeace believes that the Act has played a crucial role in furthering its stated objectives 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'. Whilst Greenpeace therefore accepts the need for governmental 'safe space,' we consider that the existing provisions of the Act provide more than adequate protection – and a narrowing of the Act's scope, as suggested in the Commission's consultation document and by other members of the Government, would fundamentally undermine our democracy, and the accountability of public sector organizations in this country.

The Freedom of Information Act is of crucial importance because of the accountability it creates, for the greater understanding it provides – not all of it flattering – on the processes and views of those who rule us, and to put some brake on deals being done behind closed doors. In other words it provides some protection against corruption.

How Greenpeace makes use of the Act

Greenpeace has used the Act to feed into our investigative and campaign work, activities which form an essential part of the democratic process around environmental issues in this country. For example the impacts of fracking on local people that were acknowledged internally but not publicly by DEFRA[17], and access to senior officials for certain industry players[18] has been uncovered. Were these revelations

[17] http://energydesk.greenpeace.org/2015/07/01/energy-files-defra-report-reveals-extent-of-impacts-on-people-living-near-fracking-wells/
[18] http://www.greenpeace.org.uk/newsdesk/energy/investigations/foi-cabinet-secretary-hosted-dinner-fracking-firms

uncomfortable for parts of Government? Of course they were – but information about how decisions were being made was brought into the public domain and democratic accountability was improved because of it. That said, not all FoI requests Greenpeace has engaged in should be seen as simply making ministers and officials lives difficult. Our FoI requests have uncovered, for example, legitimate civil service frustration with personal attacks from climate sceptics[19] which it would have been politically difficult for Government to reveal themselves.

Specific responses to questions in the Call for Evidence

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?

Whilst Greenpeace accepts the need for governmental 'safe space' we consider that sections 35 and 36 offer more than adequate protection. Firstly, sections 35 and 36 of the existing Act provide for very broad exemptions, covering anything that 'relates to' the formulation and development of government policy, including advice to ministers and communications between ministers. Secondly, it is the Information Commissioner's well established position[20] that it is clearly in the public interest for government to be capable of making policy effectively and that this is specifically relevant where a live policy is disclosed. In Greenpeace's experience, the balance of public interest has very often been judged to favour withholding information. Recent examples of information being withheld from Greenpeace included information between the Foreign Office and a number of oil companies, including BP and Shell, discussing the situation in Russia and Ukraine[21]. Whilst the ICO acknowledged the public interest in disclosure it stated that: "The sanctions policy and the commercial issues arising from it were highly sensitive at the time of the request and remain so at the present time. Given the current instability and uncertainty in the Ukraine/Russia region, the majority of the withheld information is unlikely to lessen in sensitivity for some appreciable time."[22]

Again, whilst Greenpeace acknowledges the reasoning behind *live* information being withheld when regarding sensitive issues, *it is also equally important that this information is always subject to a public interest test,* regardless of the of the surrounding sensitivity, so that in future the information may be disclosed. The absence of a public interest test from some or all internal discussion would lead to material being kept secret, even if it revealed that critical mistakes had been made, inconvenient evidence had been ignored or poor decisions had been taken to satisfy commercial or other vested interests. This undermines democratic accountability and public interest.

One such example of the more than adequate protection currently afforded comes from our application for access to documents relating to the proposed Hinkley Point power station[23]. This has been described by the Financial Times 'biggest and most controversial infrastructure project in Europe', yet modelling underpinning government claims justifying the project (claims which are disputed by independent analysts) over cost savings and benefits have been withheld. If information of this level of innocuousness, on a project this significant and controversial, can be withheld, then the idea that adequate protection is not being afforded to 'safe space' seems absurd.

[19] http://energydesk.greenpeace.org/2015/08/05/energy-files-documents-uk-govt-frustration-with-attack-by-climate-sceptics/
[20] The Department for Education and Skills v The Information Commissioner and the Evening Standard (EA/2006/0006)
[21] http://energydesk.greenpeace.org/2014/11/20/energy-files-shell-telling-everybody-redacted- ukraine-gas-crisis/
[22] ICO Complaint Ref: FS50575347 Informal Decision Notice 23/09/2015
[23] http://energydesk.greenpeace.org/2015/08/20/analysis-do-the-uk-governments-sums-on-hinkley-and-climate-change-add-up-any-more/

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 reasonable to expect that assessment of risk is public unless the disclosure of that risk would impact the risk level or cause blight e.g. uncertainty over property values

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?

Given the vital benefits of the Act in promoting transparency, democracy and accountability of public bodies, Greenpeace believes that the burden imposed on public authorities under the Act is justified. Furthermore, we believe that the Act already provides sufficient controls to reduce the burden on public authorities, through allowing 'vexatious' requests to be refused. The Court of Appeal recently upheld a ruling, which held that a request that is disproportionately burdensome to answer can be refused as vexatious, particularly if the information is not of value to the requester or the public.

Greenpeace is a non-party political organisation. Our independence is a core part of who we are. In that context we do not take money from any government or corporation. Most of our funding is from small, individual donations. Introducing fees for individual requests would therefore severely limit the ability of individuals and organisations, including Greenpeace, to investigate and publish information that is in the public interest. Greenpeace's latest investigation, which involved scores of freedom of information requests, found three quarters of all the funds given to Universities, were given by just two companies: Shell and BP[24]. Because there is no routinely aggregated source of this information, the information can only be made public via sending FOIs to individual Universities.

Introducing fees would likely be particularly damaging for individuals on low incomes, people interested in surveying the practice of authorities in their local area, and for organisations such as Greenpeace attempting to address problems that require them to make multiple requests. This would reduce the scrutiny of public authorities, and make it easier for them to conceal inconvenient information.

Introducing fees would also curb in depth investigative work carried out by Greenpeace and other campaigning organisations. Due to the structure of UK Government, an issue such as the recent Volkswagen Emissions scandal may need a number of FOI's to different departments in order to receive information on the topic. Information on huge public interest stories such as this need to have the opportunity to be thoroughly investigated. The carrying out of these investigations and the pursuit of information under a fee based system would be severely impacted. It should be noted that the revelations uncovered by these FoIs in relation to the process of approval for vehicles[25] have contributed to the Commons transport committee deciding to undertake an inquiry[26] into the vehicle certification process.

Further comments:

The 'cost limit'

In Greenpeace's experience of the Act, we have found that the cost limit can be reached surprisingly easily, particularly where information is held at several different locations, in unindexed files, or when there is no central document storage system, which seems to be the case in a number of Government departments. The exemption can also often be more strictly enforced across different public bodies with little explanation of how the limit came to be reached.

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[24] http://energydesk.greenpeace.org/2015/10/23/data-top-universities-take-134m-from-fossil-fuel-giants-despite-divestment-drive/
[25] http://energydesk.greenpeace.org/2015/10/12/dieselgate-scandal-government-regulator-receives-over-80-million-from-auto-industry-in-past-10-years/
[26] http://www.parliament.uk/business/committees/committees-a-z/commons-select/transport-committee/news-parliament-2015/vehicle-type-aproval-tor-15-16/

Greenpeace also considers the Commission's suggestion to include the costs of deciding whether to release information, or redacting exempt information, in determining whether the cost limit has been reached, particularly damaging. This would make it possible to refuse requests because of the amount of redactions, that heavily redacted documents would not even be considered to be released. This change would prejudice asking for information on topics likely to be considered exempt, such as communications with third parties, or commercial information. Greenpeace believes, that the information most likely to be exempt is also the most valuable and most likely to hold the government to account. For example the recent 'Draft Shale Gas Rural Economy Impacts paper.' This originally contained 63 redactions within 13 pages[27], and was later released in full after a decision by the ICO. This paper may well have been dismissed as exceeding the cost limit, under the new rules the Commission is considering.

Furthermore, under these proposals, we understand that the public interest in disclosure cannot be taken into account in deciding whether the cost limit has been reached. So the proposed changes would make it easier for authorities to refuse requests – irrespective of the value of the information to the public.

Tribunal fees

Greenpeace understands that the Ministry of Justice has proposed that there should be a £100 charge for appealing to the First-tier Tribunal against an Information Commissioner decision. An oral hearing would cost an additional £500. Appeals are currently free. The Tribunal stage is only seen by Greenpeace as a last resort when we truly believe that the information should be in the public domain and that the information is being withheld incorrectly. Greenpeace has a strong record in tribunal, with two recent cases ruling in our favour: Defra's redacting of the 'Draft Shale Gas Rural Economy Impacts paper[28]' and communications between the Department for Energy and Climate Change, the Department for Business, Innovation and Skills and the Treasury "in relation to proposals for the introduction of new emissions performance standards for fossil fuel power stations."[29] Charging for Tribunal appearances would lead to a collapse in the number of legitimate appeals being made by requesters – yet authorities will have no difficulty in challenging decisions they don't like.

[27]http://www.dailymail.co.uk/news/article-2722407/The-fracking-cover-Defra-censors-key-report-63-times-13-pages-described-comical-campaigners.html
[28] https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1431897/fer_0562043.pdf
[29] http://www.osscsc.gov.uk/judgmentfiles/j4674/GIA%205619%202014-00.doc

Guardian News & Media

About Guardian News & Media

Guardian News & Media (GNM) is the publisher of theguardian.com and the Guardian and Observer newspapers. As well as being the UK's largest quality news brand, the Guardian and the Observer have pioneered a highly distinctive, open approach to publishing on the web and has sought global audience growth as a critical priority. It is owned by Guardian Media Group (GMG), one of the UK's leading commercial media organisations and a British-owned, independent, news media business.

In 2014, the Guardian was named newspaper and website of the year at the Society of Editors UK Press Awards and is the most trusted news source in the UK (Ofcom digital media report, 2014). In May 2015 it won Website of the Year, Editorial Campaign of the Year, App of the Year and Product Team of the Year at the British Media Awards. Its journalistic excellence was also recognised when it became the first news organisation of non-US origin to receive the Pulitzer Prize for its investigation into NSA surveillance. The Guardian is also known for its globally acclaimed investigation into phone hacking, the launch of its groundbreaking digital-first strategy in 2011 and its trailblazing partnership with WikiLeaks in 2010.

Rapid technological change and the financial challenges facing the newspaper sector more broadly triggered GNM to drive a significant evolution in its business strategy. In 2011 GNM revealed plans to become a digital first news organisation, placing a distinctive, open approach to digital journalism at the heart of its strategy at a time when many other news brands were putting up digital paywalls and charging premiums for their online content. theguardian.com since has grown to become one of the world's largest quality English-language newspaper websites in the world[30], consistently attracting an audience of over 130m monthly uniques.[31]

Introduction

GNM is pleased to respond to this call for evidence on the Freedom of Information (FoI) regime.

News media organisations such as GNM have a keen interest in ensuring that the FoI regime works in the public interest. Access to information is an important element of the right to freedom of information under Article 10 ECHR and news gathering has also been recognised in common law as an essential part of the free flow of information and ideas in a democracy[32]. For many years GNM has been a champion of greater openness and transparency of governmental and public bodies, and its coverage in support of the principles of free information spans decades.[33] The Guardian launched its "Open Up" campaign in 1999 to hold the Labour Party to its promise that it would abolish the culture of secrecy in public life, and introduce an effective freedom of information law.[34]

[30] Source: comScore, desktop (August 2015)

[31] Source: Digital ABC (September 2015)

[32] R ex parte Simms & O'Brien 1999

[33] See http://www.theguardian.com/politics/freedomofinformation

[34] http://www.theguardian.com/politics/1999/sep/20/freedomofinformation.uk1

The Freedom of Information Act 2000 (the "Act") has been a powerful tool for uncovering wrongdoing, inefficiency, and incompetence as well as for revealing the challenges that public authorities face. The Act is of central importance to those who value transparency in the exercise of democratic power and who wish for scrutiny of bodies that spend public money. Open and transparent government is not the same as accountable government. Accountability of government, of ministers and of civil servants, who lest we forget, act on behalf of the British people, is what the Act has enabled in a fundamental way. The Act has quickly become a cornerstone of press freedom, operating in the interests of British people.

As former Prime Minister Gordon Brown said in a speech in 2007,

> *"Freedom of Information (FoI) can be inconvenient, at times frustrating and indeed embarrassing for governments.*
>
> *But Freedom of Information is the right course because government belongs to the people, not the politicians."*[35]

The stories and campaigns that have been illuminated by FoI requests include scrutiny of Central Government policy decisions that are, at times, matters of life and death:

- **The Mid Staffs hospital scandal.** Investigations revealed that the Government ignored 81 requests for a public inquiry into Mid Staffordshire NHS Trust in the two years after it was first warned of poor NHS care. Up to 2,800 deaths occurred at Mid Staffordshire hospital even after alarm bells had been sounded. Department of Health documents, only made public in 2010 as a result of a freedom of information request by Policy Exchange, were key to exposing the scandal.[36]
- **British involvement in Syrian action**. An FoI request revealed that UK service personnel had acted under the auspices of US and other nations within coalition, marking a significant expansion of the UK's role in the campaign against Islamic State.[37]

In some cases FoI investigations have revealed shocking inefficiency and financial wastage of taxpayer funds (a point to be borne in mind when considering the financial benefits and burdens of the current system - see GNM's response to Question 6 for further detail):

- The Daily Telegraph used FoI requests to show that more than 900 PFI schemes have been completed with a total capital value of £56bn – yet due to accumulated interest, the amount the taxpayer would have to repay at the time of reporting, was £229bn. In the case of the Princess Royal University Hospital in Bromley in Kent, it cost the contractor £118m to build, but the final bill for the taxpayer will be £1.2 bn.[38]

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[35] http://news.bbc.co.uk/1/hi/uk_politics/7062237.stm

[36] http://www.telegraph.co.uk/news/uknews/9875660/Mid-Staffs-Labour-Government-ignored- MP-requests-for-public-inquiry-into-deaths.html

[37] (July 2015) http://www.theguardian.com/uk-news/2015/jul/17/british-pilots-took-part-in-anti -isis-bombing-campaign-in-syria?CMP=share_btn_tw

[38] http://www.telegraph.co.uk/comment/telegraph-view/8279753/Gordon-Browns-poisoned-PFI-legacy.html

- In local government, expenditure revealed through FoI requests include:
    - a Pembrokeshire County Council chief executive's £2,167.46 a month lease for his usage of a Porsche.[39]
    - The Kent Messenger obtained documents showing the wastage of £300,000 of taxpayers money by Kent County Council against the advice of its own advisers when it supported plans for weekly flights from Manston airport in east Kent to Virginia, USA.[40]
- Bonuses at taxpayer-funded non-departmental government body, the Nuclear Decommissioning Authority (NDA), rose by almost a third in 2010, despite the NDA facing a budget shortfall of £4 billion by 2015. Staff were awarded £5m, compared with just under £3.8m the previous year.[41]

FoI requests have also revealed the full financial implications of some policies:

- Landlords enjoyed a record £14bn of tax breaks in 2013, according to figures revealing the expansion of the UK's buy-to-let market in the aftermath of the financial crisis. Some £6.3bn was declared against the cost of mortgage interest alone in the 2012-13 financial year.[42]

In other cases the Act has shone a light on impropriety and illegality within the political system:

- **Westminster child abuse**. The Daily Mail used FoI to show, among other points, that Margaret Thatcher was made aware of allegations involving Liberal MP Cyril Smith before he was knighted.[43]
- **MPs expenses.** The expenses scandal began following FoI requests which prompted attempts by politicians to restrict the FoI regime. The leaked info that the Telegraph published included the addresses and revealed the wrongdoing.[44]

Many journalistic investigations using FoI requests have raised important public interest issues later picked up by government. An example is an FoI request to all Russell group universities regarding their policies around sexual assault and rape. The Guardian published two front page stories on the issue and the follow-up led to the business secretary Sajid Javid announcing that he had ordered vice-chancellors to look into sexual assault and sexist 'lad culture' on campus and best practice to deal with it. [45]

Some further examples of FoI stories are set out in the Annex attached.

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[39] http://www.westerntelegraph.co.uk/news/11751907.__9_000_to_settle_former_Pembrokeshire_County_Council_chief_executive_s_Porsche_lease/

[40] http://www.pressgazette.co.uk/node/37443

[41] http://www.theguardian.com/business/2010/jul/16/nuclear-energy-quango-bonuses

[42] http://www.theguardian.com/politics/2015/may/26/landlords-14bn-tax-breaks-buy-to-let-expansion - mortgage-interest

[43] http://www.dailymail.co.uk/wires/pa/article-2984652/No-Smith-cover-Cabinet-Office. html#ixzz3h6GY6Dps

[44] https://en.wikipedia.org/wiki/United_Kingdom_parliamentary_expenses_scandal#Pre-publication_controversies

[45] http://www.theguardian.com/education/2015/may/24/top-universities-fail-record-sexual-violence-against-students-russell-group; http://www.theguardian.com/education/2015/jul/26/student-rape-sexual-violence-universities-guidelines-nus

Strengthening the Act

The Act has been subject to repeated attacks from politicians since its introduction, as information brought to light by the Act often has posed difficult questions for politicians. On numerous occasions, attempts have been made to reduce the situations in which FoI requests might be made. For example, changes to fees were proposed in 2006[46] and a clampdown on so called 'industrial users' was considered in 2013.[47] After careful scrutiny each investigation has concluded that the Act should not become more restrictive. Only the change to provide an absolute exemption for the heir has been successful. [48]

The Commission's terms of reference are skewed in favour of restricting access to freedom of information. While the commission asserts that it is 'entirely impartial and objective', it has prejudged what are the main concerns and crucially will not consider "whether it [the Act] has generally achieved its stated objectives". The narrow focus on the veto and sections 35 and 36 implies that there is already a problem in protecting government's ability to discuss freely and frankly. We do not accept this, and no evidence is provided to indicate that there is a problem.

The Commission suggests the following proposed changes may be required:

- imposing charges for requests;
- making it easier to refuse requests on cost grounds;
- making it more difficult to obtain public authorities' internal discussions, or excluding some from access altogether;
- strengthening ministers' powers to veto disclosures;
- changing the way that the Act is enforced.

GNM believes that these suggestions for reform must be rejected in their entirety. Greater access to information about the workings of government has resulted in better policy making, improvement of standards and codes of conduct, better enforcement of rules and an improvement in the lives of citizens.

Indeed the example of MP's expenses, referred to above, illustrates the need to strengthen the FoI regime rather than weaken it. If MPs had been able to respond to FoI requests with redacted data (i.e. without their addresses) the 'flipping' of second homes would never have been exposed. The way the House of Commons resisted complying with its obligations under FoI is illustrative of the lengths government may go to in order to avoid the disclosure of potentially embarrassing information[49].

In its 2012 submission to the Justice Committee[50] GNM argued that powers were not strong enough, citing experience of some organisations obfuscating and providing inadequate responses to FoI requests. Feedback from editorial colleagues suggests that some journalists are confronted with unreasonable delays in processing their FoI requests, and express concern about the lack of any real sanction for delay or misinformation about FoI requests.

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47 http://www.bbc.co.uk/news/uk-politics-21187250

48 https://www.indexoncensorship.org/2011/03/royalty-free-freedom-of-information/

49 http://www.telegraph.co.uk/news/newstopics/mps-expenses/5335266/MPs-expenses-the-timeline.html

50 http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/96vw97.htm

Some authorities have played a positive role in advising and assisting journalists, for example, helping them to narrow their requests to avoid exceeding the costs limit in s12 of FoI. Other authorities have resisted offering guidance or help—for example, refusing to provide a schedule of material until the first day of an appeal to the Tribunal. Some public bodies have resisted day to day journalistic enquiries from journalists, treating them instead as FoI requests, providing the opportunity for public authorities to kick journalistic enquiries "into the long grass".

Given the direction of travel in terms of the delivery of public services by private enterprise, NGOs and other bodies, there is a strong argument for broadening FoI legislation to take account of this new form of Government service delivery. This might be done explicitly in legislation or through ensuring FoI obligations are clearly stated in public contracts. This is an argument made by those across the political spectrum, including many on the right, who argue that the principles of transparency and scrutiny of public finances are no less important when the public purse is being spent on the private sector (for example, in relation to the recent closure of Kids Company).[51]

The 2012 Justice Committee report on post legislative review of the Act said that:

> *"The right to access information must not be undermined by the increased use of private providers in delivering public services… In a rapidly changing commissioning landscape this has the potential fundamentally to undermine the Act. We remind all concerned that the right to access information is crucial to ensuring accountability and transparency for the spending of taxpayers' money, and that contracts for private or voluntary sector provision of public services should always contain clear and enforceable obligations which enable the commissioning authority to meet FoI requirements.[52]*

International experience

As a global business with offices in the US and Australia, GNM journalists have experience of different international freedom of information regimes.

Australia's Commonwealth Freedom of Information Act began operating in 1982, and the all six states and two territories of the federation adopted similar laws in the years following. Our journalists tell us that "*Given its foundations in democratic principle, FoI is cheap at the price. The costs properly attributable to FoI are less than the amount of public money spent by the Executive on various forms of media management, public relations and promotional activities*".

Several reviews of the Australian act have reported that it has produced benefits.[53] They include: better records management; improved internal communications and decision-making; avoidance or earlier

[51] http://www.conservativehome.com/thetorydiary/2015/08/kids-company-shows-why-freedom-of-information-should-apply-to-anyone-taking-taxpayers-money.html

[52] http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/9613.htm

[53] For example, Report of the Australian Senate Standing Committee on Legal and Constitutional Affairs on the Operation and Administration of the Freedom of Information Legislation (Canberra, 1987), chapter 2.

detection of some mistakes; productive changes in personnel practices; better links among agencies and by agencies with the public; improved accountability; and better public understanding of aspects of government administration, a feature described by a commentator as 'letting the public in on the take-offs as well as the crash landings'.

In 2009 the Freedom of Information (Removal of Conclusive Certificates and other measures) 2009 removed the power for ministers to issue conclusive certificates that allowed an executive override (similar to our s53 veto). There has been no attempt to bring back this veto power, and no suggestion that its absence has deprived government of 'safe space' for deliberation, or undermined policy making.

The Commission and independence

GNM is concerned about the composition of this commission, specifically the pre-determined views of many of the key participants of the Commission. Jack Straw, was the first Minister to use the ministerial veto to block publication of the Cabinet papers on the Iraq war – a move described by Timothy Pitt-Payne QC, representing the Information Commissioner, as "a serious incursion" on FoI powers.[54]

GNM supported the thrust of a joint letter, signed by 140 campaigners, journalists and supporters[55], which states that,

> *"An independent Commission is expected to reach its views based on the evidence presented to it rather than the pre-existing views of its members. Indeed, in appointing members to such a body we would expect the government to expressly avoid those who appear to have already reached and expressed firm views. It has done the opposite. The government does not appear to intend the Commission to carry out an independent and open minded inquiry. Such a review cannot provide a proper basis for significant changes to the FoI Act."*

It is deeply concerning that the Commission's call for evidence makes scant reference to the importance of transparency and instead considers a range of measures that would restrict the use of the FoI regime.

Arguments around open government

Successive governments have made important and substantial steps towards releasing information about the delivery of public services through initiatives such as data.gov.uk, the crime map and the upcoming register of beneficial ownership[56]. This trend has been further entrenched through changes introduced by European Directive 2013/37/EU, under which public sector organisations are now under a mandatory obligation to allow the re-use of most public sector information.

[54] http://www.bbc.co.uk/news/uk-politics-18017196

[55] https://www.cfoi.org.uk/2015/09/140-press-and-campaign-bodies-urge-pm-not-to-weaken-foi-act/

[56] https://www.gov.uk/government/news/public-register-to-boost-company-transparency

Important though these developments are, they are not equivalent to a properly functioning FoI regime. On 17 July 2015, Lord Bridges of Headley announced the Independent Commission on Freedom of Information. Lord Bridges said that,

> "*We are committed to being the most transparent government in the world. To deliver that goal we are opening up government to citizens by making it easier to access information and increase the volume available, with a record 20,000 datasets now on data.gov.uk, while protecting a private space for frank advice. We are strengthening accountability and making public services work better for people.*"

Former Cabinet Office Secretary The Rt Hon Lord Maude of Horsham stated in December 2014, in a speech on open data and transparency that:

> "*My aim if I'm honest with you is to make Freedom of Information redundant. My view is that we should be proactively making public everything that is appropriate. You should make redundant the need for people to ask for access to information.*"[57]

GNM finds this mindset deeply troubling. The opening up of data sets by government is not comparable to the types of information that FoI reveals. They are two completely different accountability tools, serving different objectives and outcomes.

Open government is a timely and necessary initiative through which government pushes information into the public domain. FoI powers increase the accountability of government - they pull data and information from behind the wall of bureaucracy, ensuring that the inner workings of government match its outward communication. Journalists play a crucial role in investigating government and other public authorities. Their role as "the eyes and ears of the public" has been recognised by the court, e.g. in Mccartan Turkington Breen v Times Newspapers Ltd House of Lords 2 Nov 2000, amongst others.

Most of the stories GNM highlights above and in the annexed document would not have been revealed through the devices of open government such as data.gov.uk for a variety of reasons. For example the information might not be kept in a form that is possible to release in a regular way, or its public interest value might not be understood by those who hold it. Or the relevant department may have been reluctant to initiate disclosure of potentially embarrassing information.

While it is encouraging that government is proactively releasing data sets and other information, the FoI regime allows journalists and others to seek out information that government bodies may be reluctant to see the light of day, but that should be disclosed in the interests of transparency and accountability.

Consultation questions

[57] https://www.gov.uk/government/speeches/francis-maude-speech-on-open-data-and-transparency

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?

This issue has been considered at length in 2012 by the Justice Select Committee in the report referred to above. The Justice Select Committee heard evidence from many sources, including Jack Straw, and took account of independent research by the UCL Constitution Unit.[58] It concluded that s35 of the Act together with the ministerial veto provided sufficient 'safe space' to government. It found that there was no hard evidence that the FoI regime has had a chilling effect, and that it could not recommend reducing the openness of the Act.

In setting out what factors it considers may inhibit 'safe space', the Commission repeatedly suggests that organisations find it "difficult to have frank, internal deliberations if those internal deliberations are to be *quickly* made public" [italics inserted]. It also suggests that those putting forward an alternative view during deliberations may be put in a difficult position if they later have to defend a collective decision. In addition, it quotes the Justice Select Committee report in 2012 in which reference is made to case law not being sufficiently developed "to be sure of what space is safe and what is not".

In fact, the FoI Act, ICO guidance and FoI case law recognise and protect the government's need for safe space and the protection of sensitive information. The timing of an FoI request for such information is acknowledged as an important factor: "[The] public interest [in maintaining the exemption] is strongest at the early stages of policy formulation and development. The weight of the interest will diminish over time as policy becomes more certain and a decision as to policy is made public." *DBERR v ICO and Friends of the Earth* [EA/2007/0072 20 April 2008]. The need for a 'safe space' soon after a decision is made, in order to properly promote, explain and defend its key points, is also recognised in the ICO guidance.

The Information Commissioner's guidance states that the purpose of s35 is to protect good government. The Commissioner says "it reflects and protects some longstanding constitutional conventions of government, and preserves a safe space to consider policy options in private". It is not an absolute exemption; there is no inherent or automatic public interest in withholding information just because it falls within s35, and a public interest test must be applied to decide whether or not the information should be disclosed. An example of the operation of this public interest test is seen in the MP's expenses case.[59]

Section 35 already distinguishes between different types of government information and the public different test is applied differently to reflect the degree of protection required. [60] Many of the principles are applied in *DfEs v ICO and Evening Standard* EA/2006/0006 - see the factors set out in [75] - [85]. In the *Evening Standard* case the Tribunal's comments: "*We do not imply.. that any public interest in*

[58] http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/9603.htm
[59] In House of Commons v Information Commissioner and Leapman, Brooke, and Thomas (EA/2007/0060, 26 February 2008) the Information Tribunal at paragraph 49 found "as a fact" that there was "a long-standing lack of public confidence in the system of MPs' allowances" and "the extent of information published is not sufficient to enable the public to know how the money is spent". This clear evidence of public concern gave a plausible basis for the suspicion which created an additional public interest in disclosure.
[60] for example the ICO states that there is always a strong public interest in protecting legal advice from the Law Officers and decisions about whether to request this advice.

maintaining the exemption disappears the moment that a minister rises to his or her feet in the House. We repeat - each case must be decided in the light of all the circumstances. '[75 (v)]

Section 36 provides an exemption to public authorities if disclosure would be likely to prejudice collective responsibility; inhibit the free and frank provision of advice or exchange of views; or otherwise prejudice the effective conduct of public affairs. The Act allows for a nuanced approach - see for example the judgment in Guardian Newspapers Ltd and *Heather Brooke and ICO and BBC* EA/2006/0011 and EA 2006/0013.

Government departments frequently rely on the protection provided by s35 FoI Act to resist disclosure, often successfully. There is little evidence that s35 is failing to protect sensitive information, or any harm or prejudice that has resulted from any disclosure. Indeed, we are not aware of any instances of FoI requests resulting in the release of policy-related information prior to its official announcement and we note that the Commission does not refer to any in its call for evidence.

On the contrary, it is often used to control, and potentially 'spin' the release of controversial information. Recently the UK Statistics Authority criticised the Government for releasing questionable figures that purported to show how many EU migrants claim benefits. The Authority castigated government for avoiding scrutiny by refusing to release the underlying data and calculations on which the figures were based. [61] A Guardian journalist has been seeking this underlying source data, using FoI since August, without success, and the refusal is based on s35 exemption (the case is currently with the Information Commissioner). The journalistic use of FoI to obtain information about how few councils were doing the 'troubled families programme', contrary to the Prime Minister's claims of 'total success' of the first phase of the programme, is another example of using FoI to examine government claims. [62] Some journalists fear that government bodies often refuse FoI requests for tactical reasons, to delay the release of data and in the meantime gain publicity from the launch of figures that are not open to public scrutiny.

In October 2015 the Information Commissioner, in a speech to the LSE said that *"despite the weight of the evidence, senior Whitehall figures criticise the operation of FoI and warn of its icy blast. In response, I observe that if mandarins keep talking about a chilling effect, theirs is a self-fulfilling prophecy."*

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?

See response to Question 1.

61 http://www.independent.co.uk/news/uk/politics/official-statistics-watchdog-slams-release-of-eu-migrant-benefits-figures-cited-by-david-cameron-a6730451.html
62 http://www.theguardian.com/society/2015/nov/11/troubled-family-programme-government-success-council-figures

Further, as the Commission notes, there are protections within s35 and s36 that mean that information which relates to the process of collective Cabinet discussion and agreement is only disclosable when it is in the public interest. For example we note that ICO guidance on Section 35(1)(b) says that "there will be significant public interest in protecting collective responsibility if the information reveals the views of an individual minister on a government decision." These provisions have prevented the disclosure of information on several occasions, when that material has not been demonstrated to be in the public interest.

We see no reason why material that is shown to be in the public interest should not be disclosed, given the checks and balances within the Act. The Information Commissioner and Tribunal will attach weight to the fact that the relevant information relates to collective Cabinet discussion, when considering the public interest.

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

As set out in response to the questions above , the Act already contains robust safeguards for sensitive information, and the case law shows that the ICO and Tribunals are cautious in releasing information where ss35 and 36 are engaged. GNM sees no reason why risk assessments should be treated differently to other information.

In relation to this and earlier questions, we are not aware of any empirical evidence of a 'chilling effect'. Independent research conducted by the UCL Constitutional Unit[63] reaches the conclusion that there is no inhibiting effect on the formulation of government policy and that "the adverse impact of FoI seems negligible to marginal."

Over the years, a number of risk registers have been disclosed, for example one relating to the third runway at Heathrow in 2008, and registers released by public authorities such as NICE and CQC. The First Tier Tribunal in *Dept of Health v ICO and others* [EA/2011/0286 & 0287] considered all of the factors and concluded that there was "no actual evidence of such a [chilling] effect" [66].

Recently the HS2 report was disclosed, despite the government's use of its veto powers under s53 of the Act. It revealed that officials had serious concerns about costs - not surprising as the publicly available information shows cause for concern.[64]

As Maurice Frankel, director of the freedom of information campaign has pointed out, once the information commissioner and / or tribunal have ordered disclosure, often the material disclosed is anodyne, or the material is old, or the case for openness is overwhelming. If the "*balancing test is*

63 "The impact of the Freedom of Information Act on Central Government in the UK: Does FoI Work?", Robert Hazell and others, 2010

64 http://www.theguardian.com/uk-news/2015/jun/26/damning-hs2-report-reveals-serious-cost-concernshttp://www.telegraph.co.uk/news/uknews/hs2/11830477/Revealed-HS2-abysmal-value-for-money-at-10-times-the-cost-of-European-countries.html

removed, mistakes, bad decisions and policy failures caused by deliberately ignoring the evidence, will be concealed' says Frankel. [65]

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?

The setting up of the current Commission can be seen as a response to the Supreme Court ruling in the Guardian's case of R (Evans) v Attorney General, that the government's use of the s53 certificate (or veto) was unlawful.[66] It is suggested that since the Supreme Court ruled in this case, the circumstances in which the veto can be used are less clear.

In *Evans* the Supreme Court confirmed that the s53 veto – which according to government policy should rarely be used in any event[67] - must be issued on 'reasonable grounds' and that means more than mere disagreement with the court or tribunal. This interpretation must be right in order to comply with the rule of law, and therefore little has changed since the Justice Select Committee scrutinised the operation of the Act and scrutinised whether it deprived government of a "safe space" for formulation of policy and discussion of frank advice.

The Supreme Court judgment does not rule out the use of a s53 certificate entirely, only that a minister cannot use the veto to override a judicial decision simply on the grounds that, having considered the issue based on the same facts and arguments as the court or tribunal, he reaches a different view. The veto can only be lawfully used to overturn the decision of a tribunal in exceptional cases as set out in the Evans decision, where there is new evidence or a manifest error of law. (It can never be used to veto access to environmental information as this would amount to a breach of the Aarhus Convention and directly applicable European law [*Article 6 of Directive 2003/4/EC*].)

The Supreme Court was not required to decide whether a s53 veto could be used against a decision of the Information Commissioner, in circumstances where the Minister simply took a different view on the public interest test. However it was suggested by Lord Mance (obiter) that in an appropriately strong case, a clear, well-reasoned disagreement about the public interest might be lawful when used against the Commissioner's decision.

While it is always open to Parliament, to legislate in a way that is repugnant to the rule of law, and it may seek to do so in connection with s53 of the Act, to do so would be highly controversial and a blow to the rights of citizens to access an independent judicial body, in order to achieve a binding and lawful judgment.

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65 http://www.theguardian.com/news/defence-and-security-blog/2015/jul/22/uk-faces-more-secret-government-with-clampdown-on-information

66 [2015] UKSC 21 http://www.civilserviceworld.com/articles/news/downing-street-strong-case-revisiting-foi-law

67 https://www.gov.uk/government/.../statement-hmg-policy-veto.pdf

As a final note, the disclosure of Prince Charles' advocacy correspondence showed that he was aware of the freedom of information regime while corresponding with Ministers, and there is no evidence that the disclosure has resulted in the harm suggested.

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

The current FoI regime properly provides access to independent scrutiny and a judicial appeal process in order to ensure proper compliance with the Act. A major problem with the enforcement and appeal process is the considerable delay and extensive costs involved (the *Evans* case took over 10 years for the initial request to reach a resolution).

A key concern raised by journalists is the considerable delay in the processing of FoI requests. Public authorities regularly exceed the 20 working day time limit in responding to a complaint. While the Act provides the Commissioner with significant enforcement powers in some respects, there is no real penalty for public authorities who fail to meet time limits, who delay internal reviews and require unreasonable extensions of time. A statutory time limit for the internal review process might speed up the process, if it is accompanied by an appropriate penalty.

The Commission's statistics show that few decisions are overturned at the internal review stage. This reflects the experience of many GNM journalists who feel that the internal review is often a waste of time. One option is to dispense with the internal review procedure and thus to require public authorities to ensure that they have a sound basis for refusing to supply information before rejecting a request.

The amount of time and resources expended on internal review and appeals could be avoided by early, positive advice and assistance to requesters.

While it is often cost efficient and effective to deal with appeals in writing, there is value in having an appeal system which takes oral evidence and hears argument in appropriate cases. In many cases, the Tribunal itself uses its case management powers to require the parties to attend a hearing rather than deal with the matter on the papers.

GNM is concerned about the Department of Justice's proposal to introduce fees for appeals against the Information Commissioner's decisions.[68] Experience from the introduction of fees for employment tribunal appeals shows that it has reduced the number of employment tribunals sharply, and we would expect to see this happen in the sphere of FoIs. If the policy aim is a blanket reduction in the use of FoI, by this measure the introduction of fees might achieve that aim, but would inhibit the free flow of information so essential to a democracy.

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

68 https://consult.justice.gov.uk/digital-communications/further-fees-proposal-consultation/supporting_documents/Government%20response%20to%20consultation%20on%20enhanced%20f ees%20and%20consultation%20on%20further%20fees%20proposals%20web.pdf

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

It is difficult to assess FoI costs accurately, given that there is no real 'baseline'. The fact is that, before the Act came into force, central government and public authorities were still under an obligation to provide information to enquirers and to deal with questions put to them by journalists and others. There were obligations under Ministerial Code on Access to Information, which was subject to judicial review. We do not have accurate figures about requests for information prior to the Act coming into force, or the resulting litigation.

The statistics should be treated with caution, as it is not clear how an FoI request is defined for these purposes, and how consistently the definition is applied across the range of public authorities. Under the Act, an enquiry in writing with contact details, is all that is required to constitute an FoI request. We have already noted that many press inquiries are often treated as FoI requests (resulting in considerable delay in getting a response). Without knowing more, it is impossible to assess the accuracy of the data provided for the purported increase in FoI requests from journalists.

In any event, there are costs to any system of accountability, and the key question is whether that accountability acts in the public benefit. The nature of the public benefit derived from requests under the Act can at times be difficult to measure, although the Commission points to differing metrics which come to significantly different conclusions.

But there are also huge financial benefits. The value of FoI does not simply concern the public's right to know but also the public's right to fiscal efficiency, demonstrated by a range of stories above that have resulted in significant savings by public authorities. In short, under any reasonable measure, FoI has revealed much more public authority wastage than the cost of administering the system.

Press Gazette puts the issue into perspective,

> "*Government departments spend less than £6m a year answering FoI questions. This figure is "very good value for money considering the level of scrutiny and accountability it generates", according to Maurice Frankel, director of the Campaign for Freedom of Information. It represents around 0.001 per cent of the £577.4bn the central Government is due to spend in the 2015 fiscal year (figure from UKpublicspending.co.uk). And it is less than 2 per cent of the estimated £289m the Government Communication Service said it would spend on external communications activities in 2014/15. This figure was set out in the Government Communications Plan 2014/15, published by the GCS and signed off by 16 directors of communications across central Government departments.*"[69]

In 2012, the Justice Committee addressed the issue of potential changes to the costs and fees elements of the FoI regime. The Committee was firmly against changes, saying that rather than being costly, it often makes savings:

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69 http://www.pressgazette.co.uk/cost-central-government-complying-foi-50-times-less-external-comms-budget

> *"without FoI requests, decisions on what to publish will always lie with those in positions of power. FoI has costs, but it also creates savings which accrue from the disclosure of inappropriate use of public funds or, more importantly, fear of such disclosure."*

On the question of making commercial entities pay for requests, the Committee said that *"developing a way to charge requesters who commercially benefit from the information they receive from public authorities is difficult, if not impossible."* The Committee recognised an economic argument in favour of the freedom of information regime being significantly or wholly self-funding, but was concerned that "*fees at a level high enough to recoup costs would deter requests with a strong public interest and would defeat the purposes of the Act, while fees introduced for commercial and media organisations could be circumvented."*

GNM's submission to that inquiry noted that very few public bodies make use of the existing provisions re. charges, for example by using their discretion to charge for the cost of copying and supplying documents (disbursements).[70]

A proper analysis of costs must take into account the costs incurred in withholding information. As Guardian journalist Richard Norton-Taylor wrote, *"Official secrecy is expensive; openness much cheaper. Excessive secrecy is even more costly, in more ways than one. The FoI Act has revealed much about government that would otherwise be covered up, including letters written to ministers by the Prince of Wales and, most recently the disclosure that British pilots have been engaged in strike missions in US or Canadian aircraft over Syria."* [71]

It is also instructive to compare the cost-effectiveness of FoI requests with that of Parliamentary Questions. Data published by the House of Commons authorities and the Cabinet Office suggests that on average, Parliamentarians ask more oral and written questions in a given year than FoI requests are placed with Government. In 2010-2012 session, there were 95348 written questions (not including oral questions).[72] This is compared with the figures, set out in Annex A of the consultation, which state that in 2014-2015 there were 46,806 FoI requests to central government - a similar number.

The average costs incurred by the Government when answering Parliamentary Questions have been estimated to be £164 for a written answer and £450 for an oral answer. [73] The most recent Government estimate for FoI costs is from the Ministry of Justice[74] which estimates that each request costs an average of £184 for a Central Government Department - a comparable cost to a written answer, and far less than an oral answer.

The FoI regime is an effective regime that garners the support of citizens, media and campaigning organisations to hold power to account. Its costs are comparable to - on some measures less than - the cost of Parliamentary Questions which has been subject to criticism both in procedural terms and as

70 http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/96vw97.htm
71http://www.theguardian.com/news/defence-and-security-blog/2015/jul/22/uk-faces-more-secret-government-with-clampdown-on-information
72 http://www.publications.parliament.uk/pa/cm201314/cmselect/cmproced/1095/109506.htm
73 HCDeb 5 Feb 2007 c572
74 As set out in the Call for Evidence at p18

Ministers give "evasive and unhelpful replies".[75] GNM would therefore suggest that the FoI regime represents better value for money and a more effective oversight regime.

GNM emphasises, that the activity - and costs - involved with individuals within central and local government having a public duty to respond to enquiries from the media, campaigners and the public did not begin on the day the FoI Act was passed. They have alway responded to at least some of the enquiries from the press, researchers, campaigners and ordinary citizens. Yet we have no idea of the costs that were incurred as a result.

We should learn, too, from the Australian experience. The most substantial amendments to Australia's FoI regime occurred through the Freedom of Information Amendment (Reform) Bill 2010, whereby application fees for requests, previously $30, were abolished entirely. The FoI fees and charges regime was reviewed in 2012 by a senior public servant, Dr Allan Hawke. Dr Hawke did not recommend that application fees be reinstated in Australia, although he did suggest modernising the processing charges regime. [76]

GNM objects to the proposal that the calculation of fees should be extended to include more activities such as time spent handling requests, reading and redacting the information prior to release. It would have the unintended consequence of benefitting those organisations with poor information management systems, effectively rewarding delay and would be open to manipulation, providing a means to discourage requesters. As with other of these proposals, we are concerned that the kind of changes to FoI that the Commission is considering would ultimately have a chilling effect.

It is disappointing that another call for scrutiny of the FoI Act is presenting access to information as a problem rather than as a benefit to society, and focusing on potential restrictions rather than making information more easily accessible. The annexed list of links to a selection of articles published as a result of FoI requests illustrates how freedom of information is a vital part of the proper functioning of a democracy.

Guardian News & Media

November 2015

[75] Third Report from the Procedure Committee Session 2012 on Parliamentary Questions (HC 622)

[76] Review of the Freedom of information Act 1982 and Australian Information Commissioner Act 2010, Dr Allan Hawke, 2012.

Annex: Sample of articles based on FoI disclosures

Government steps up efforts to prevent young Muslims becoming jihadis

- February 2015
- The geographic expansion of the Home Office's Prevent Strategy, as the counter-extremism strategy spread to more areas amid growing concerns over young men fighting abroad
- http://www.theguardian.com/politics/2015/feb/13/prevent-counter-terrorism-support

Dozens of arms firm employees on MoD secondments

- February 2015
- Information acquired by the Guardian sparks fresh concerns about the cosy relationships between the public and private sector

http://www.theguardian.com/uk-news/2015/feb/16/dozens-of-arms-firm-employees-on-mod-secondments

UK troops recruited to help arms sales

- April 2015
- Records released by UK Trade and Investment show that armed forces personnel have hosted delegations from Qatar and Egypt, among others, over the past year

http://www.theguardian.com/world/2015/apr/26/uk-troops-recruited-to-help-arms-sales

UK police see spike in drone incidents

- October 2015
- Official figures show rise in cases, with incidents including drones being used for sexual offences and ferrying drugs into prisons

http://www.theguardian.com/technology/2015/oct/11/drone-incidents-reported-to-uk-police-on-the-rise

MoD study sets out how to sell wars to the public

- September 2013
- An MOD discussion paper on how to assuage "casualty averse" public opinion in relation to warfare
- http://www.theguardian.com/uk-news/2013/sep/26/mod-study-sell-wars-public

Riots may be controlled with chemicals

- April 2012
- Police look at firing chemical irritants at rioters in search for 'less lethal' weapons, such as plastic bullets, to deal with civil disorder
- http://www.theguardian.com/uk/2012/apr/09/riot-control-chemicals-plastic-bullets

No racial discrimination complaints against Met police upheld

- October 2015
- Force faced more than 240 complaints over 12-month period but found no case to answer as black police chief says Met is not learning from previous lessons
- http://www.theguardian.com/uk-news/2015/oct/12/no-racial-discrimination-complaints-upheld-met-police

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Nick Griffin's vision for BNP-led Britain shown in 1990s police interviews

- May 2014
- Papers relating to 1998 prosecution on race hate charges show how Griffin wanted Britain to be overwhelmingly white nation
- http://www.theguardian.com/politics/2014/may/06/nick-griffin-vision-bnp-britain-1990s-police-interviews

Home Office stripping more dual-nationality Britons of citizenship

- August 2011
- Home Office refuses to explain why use of law introduced following London bombings has increased
- http://www.theguardian.com/uk/2011/aug/15/home-office-law-dual-citizenship

Police failing to sack drink-drive officers

- April 2008
- Police officers were avoiding dismissal after being convicted of drink-driving, despite Home Office guidelines to the contrary.
- http://www.theguardian.com/politics/2008/apr/21/police.ukcrime

Student sexual violence: 'leaving each university to deal with it isn't working'

- July 2015
- Victims of rape and sexual assault say they are not being taken seriously by elite universities, with devastating results, an FoI investigation revealed
    - http://www.theguardian.com/education/2015/jul/26/student-rape-sexual-violence-universities-guidelines-nus

Buy to let industry's tax reliefs

- May 2015
- FoI to HMRC for data on the tax reliefs given to landlords. After publication the largest part of the relief was reduced in the Budget and the Labour party has since made tightening the reliefs central to their housing policy.
- http://www.theguardian.com/politics/2015/may/26/landlords-14bn-tax-breaks-buy-to-let-expansion-mortgage-interest

Private healthcare lobbying organisation held undisclosed position on health enquiry advisory board

- July 2015
- FoI to the Department of Health for correspondence with the lobbying group, revealing that Care UK boss was secretly representing the NHS Partners Network on the panel of the Dalton Review.
- http://www.theguardian.com/society/2015/jul/05/private-health-lobbyist-nhs-privatisation-dalton-review

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By HoldtheFrontPage.co.uk

HoldtheFrontPage.co.uk is a news website which covers news about UK journalism with a particular focus on the regional press. We view highlighting the good work done by UK regional newspapers and their staff as a key part of our role.

Further to your call for evidence on aspects of the Freedom of Information Act covered by your review, I am submitting as evidence our online archive of Freedom of Information stories from UK regional newspapers published over recent years. This can be found here: http://www.holdthefrontpage.co.uk/category/news/foi/

We believe our archive of 204 stories dating back to 2007 demonstrates the valuable role that the Freedom of Information Act has played in enabling regional newspapers to highlight issues of major public concern in their areas.

We also believe it shows that, far from the Act being used frivolously or vexatiously by regional press journalists, the great majority of stories that have been generated as a result of the Freedom of Information legislation have been in the public interest.

Examples include the following:

- Sheffield Star reveals "entrenched sexual exploitation problem" following Freedom of Information request: http://www.holdthefrontpage.co.uk/2015/news/regional-daily-reveals-reports-on-child-sex-crimes-after-foi-request/

- Ipswich Star reveals "alarming" obesity levels among town's hospital patients: http://www.holdthefrontpage.co.uk/2013/news/papers-foi-request-reveals-rising-obesity/

- Surrey Comet reveals numbers of children under 14 treated alcohol and drug misuse at Surrey Hospital: http://www.holdthefrontpage.co.uk/2011/news/weeklys-shock-findings-about-children-and-drugs/

- Sunderland Echo reveals that council workers' pension funds invested in tobacco firms and manufacturers of cluster bombs: http://www.holdthefrontpage.co.uk/2011/news/trainee-reporter-makes-bombshell-discovery/

- Brighton Argus reveals investigation into three hospital workers over the suspicious death of a patient: http://www.holdthefrontpage.co.uk/2011/news/newspapers-foi-request-uncovered-hospital-death-probe/

- Bucks Free Press reveals £1.2m proceeds from speed camera sites: http://www.holdthefrontpage.co.uk/2007/news/controversial-speed-cam-stats-handed-over-after-two-year-free-press-fight/

We believe these and other stories in our archive show why the Freedom of Information Act already strikes a good balance between the public's right to know and the need for sensitive information to be protected, and does not require further amendment.

We also believe it demonstrates the manifest absurdity of the recent comments by the Leader of the House of Commons, who said that journalists using the Freedom of Information Act to "create stories" amounted to a "misuse" of the legislation.

On the contrary, the Freedom of Information Act has become an essential tool for journalists in ensuring public authorities in their local areas are accountable to the people they serve, and it is important that they are able to continue to do this valuable work without the introduction of further exemptions.

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At a time when the local press industry is facing unprecedented commercial pressures, it is also imperative that local and regional newspapers are able to do this without the imposition of burdensome charges.

Paul Linford,
Publisher, HoldtheFrontPage.co.uk,
17 November 2015.

Hampshire County Council

Introduction

As the Commission considers this response, Hampshire County Council will have received its 10,000th FOI/EIR request. This represents well over 100,000 individual questions that we have responded to since the Freedom of Information Act came into force some 10 years ago.

Hampshire County Council is strongly supportive of the "right to know" provided by the FOI Act and EIR.

It is clear that the 10 years of the FOI Act have influenced the amount of information about public authorities that is now routinely available. The amount of information and data that is regularly published by public authorities has increased (e.g. through the Local Government Transparency Code) and this is a fundamentally different position than a decade ago.

We would ask the Commission to consider the operation of the existing information request legislation within the context of this changed environment and look to future-proof it to reflect the increasingly complex delivery models being developed across public services.

Response to questions:

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

Local authorities are provided with the "weakest" form of protection (as described in the consultation) under s36, which includes no veto and is prejudice based. It is most often used to protect information to which no other exemption applies and where the information would clearly cause undue disruption if it were disclosed. Usually this is in connection with the need for a limited period of safe space in which to make a decision. However, some information which requires a safe space will be sensitive for a longer period of time. The ICO decisions tend to favour arguments where it can be shown only a limited safe space is required. Knowledge of this, or the uncertainty this creates, can in turn create a less candid approach towards considering and recording matters of sensitivity. This is to the detriment of good governance. We would welcome a strengthening of the safe space environment, possibly in line with either the Danish or French models.

The need for the "safe space" in which current or future policy advice can be given by officials is especially important in the context of the changing nature of public service delivery, with increasing public services being delivered by multiple organisations through shared services agreements and partnership arrangements. These often involve sensitive negotiations across multiple bodies. It will become increasingly important that important decisions about the provision of public services among a number of public authorities can be undertaken outside the glare of publicity. In addition, we would ask the Commission to consider the importance of this within the context of English Devolution, to ensure that there is parity between those areas of the country where particular responsibilities may remain in the hands of central government and those areas where the same service areas may be devolved to a more local level. It is important that any changes to section 35 and 36 provisions do not lead to a post code lottery, where information may be releasable in some areas but not in others.

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?

No comments.

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

We agree with the comments within the Call for Evidence document regarding the chilling effect that results from concerns that risk assessments or other advice on potential risks may be released under the FOIA. We have noted that the ICO in its considerations has tended not to accept this argument. However, we are aware of instances where officers have considered softening levels of risk or articulated risks in less than candid ways following such concerns. Risk assessment advice needs to be frank and honest in order for it to be of greatest benefit. Within the environment of the need to make best use of scarce public resources, any weakening of the arrangements for managing risk and uncertainty is not to the greater public good. Here, a prejudiced-based absolute exemption would not necessarily be inappropriate.

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

We would point to our comments on 1 above regarding the need to ensure that any changes take the effects of English Devolution into consideration to ensure that there is not a disparity between those areas where Policy may remain in the scope of national government and those where responsibility is devolved to a more local level.

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

The lengthy appeals process is thorough but the time it takes does no favours to complainants where information loses its value over time.

The process for adding interested parties to Tribunal cases can cause confusion and requires authorities to apply to the First Tier Tribunal simply to obtain a copy of the complainant's grounds of appeal in order to assess whether it would be relevant for them to ask to be added as an interested party. We would welcome a more streamlined approach.

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?

There is a cost to a public authority in providing the infrastructure in which to respond to information requests within the legal framework that the FOIA and EIR imposes; e.g. staff, systems and training have to be provided to record, collate and respond formally to such requests, along with occasional access to specialist legal advice.

We have seen increasing numbers and complexity of requests, whilst having to reduce the resources available to respond to them. We have managed this through more efficient processes, and publishing more information routinely (e.g. senior staff salaries and spend data).

We would find the ability to charge a nominal sum for each information request helpful in encouraging parties to look at the significant information we already publish before submitting a request, and to discourage those companies that send in multiple requests for commercial information. Our experience with the charging regime associated with Subject Access Requests indicates that this does not act as a disincentive to members of the public with genuine concerns.

In terms of those areas that we feel impose a disproportionate burden:

1. Requests made for commercial purposes add a significant burden. They are significant and increasing in volume and often seek large quantities of information such as tender submissions from all bidders in a tender exercise. The public interest in disclosure is often limited and serves only to inform commercial organisations of ways in which they might improve their own bids for future work. Public authorities are legally obliged to redact personal information from documents before disclosure, but cannot take this burden into account when assessing how long it takes to locate, retrieve and extract for the purposes of s12 FOIA.
2. Information which is clearly commercially sensitive such as pricing schedules may be exempt, but because there is a presumption in favour of disclosure, all non exempt information must still be disclosed (this is enforced by the ICO). Frequently, this is not the information that will be of real interest to the applicant, but significant amounts of time can be spent redacting information that is exempt under s43 or s40(2)FOIA. Sometimes, redaction time will be considerable, but the time taken to locate will be small because information is held electronically and in a well ordered electronic filing system.
3. Further burden is created by having to obtain evidence from external suppliers/providers of goods and services that they consider disclosure will be prejudicial to them before being able to disclose their information. This burden is increasing as the amount of outsourced work increases. For example, requests have been received in relation to all suppliers on a framework where the framework included 70 – 80 suppliers. It is not often possible to rely on what has been highlighted as sensitive in the contract – suppliers are asked to do so, but many do not. Again, information may be held electronically and it will not fall under s12, even though the time actually spent may considerably exceed 18 hours.

We would welcome the introduction of a fee structure that was simpler and more efficient to administrate than the current limited arrangements, and that better reflected the actual costs of retrieving, collating and responding to requests. We do not believe that providing the option to charge would act as a disincentive to members of the public with genuine concerns or weaken the overall right to know principle.

The Howard League for Penal Reform

The Howard League for Penal Reform (hereafter the Howard League) welcomes the opportunity to submit evidence to the Independent Commission on Freedom of Information. Our evidence will be based on experience of employing Freedom of Information (FOi) legislation in the field of crime and justice.

About the Howard League

The Howard League is the oldest penal reform charity in the world. We conduct research, campaign and, through our legal team, represent children and young adults in custody. We work towards less crime, safer communities and fewer people in prison. For more information about the Howard League please visit www.howardleague.org

Key points

- FOI is of the utmost importance in regard to the criminal justice system, where the state exercises its strongest powers.
- Extending FOI legislation to private and voluntary organisations delivering public services would enhance transparency and reduce the burden on public bodies.
- Reforms prompted by the release of information via FOI have saved vast amounts of public money, far outweighing the administrative costs of fulfilling FOI obligations.
- FOI requests should not be made subject to a charge. This is unnecessary and would unfairly restrict access to information about government and public services to those with financial means.
- Current restrictions and exemptions to FOI ensure a private space for ministers to seek policy advice and develop ideas.

Freedom of information legislation is an important tool in achieving openness, transparency and holding public bodies to account. It is an essential mechanism in the area of crime and justice, where the balance of power between the state and the individual is at its least equal. Individuals are at their most vulnerable and powerless when in police or prison custody. This should be borne in mind when considering restricting or weakening the application of FOI legislation in any way.

Rather than being curtailed, it is crucial that FOI legislation is extended to private and voluntary organisations delivering public services. As the state continues to withdraw from providing services directly and increasing sums of public money are spent on outsourced services extension of FOI becomes an ever more critical issue. For example, in the last year 70 per cent of probation services have been outsourced to the private sector. This policy change has drastically reduced the amount of publicly available information about this crucial service. Extension would not significantly improve transparency, reduce corruption and fraud and reduce the burden on public bodies.

For example, in 2013 G4S and Serco, the companies which held contracts for electronic monitoring of people involved in the justice system, were found to have defrauded the government of approximately £180 million over a period of eight years. Had FOi applied to the electronic monitoring contracts it is likely that this fraudulent activity would have been prevented or discovered much earlier. Similarly, the recent scandal concerning the charity Kids Company could have been avoided if those delivering government contracts or receiving large publicly funded grants were subject to FOi.

The exemption of private and voluntary organisations from Freedom of Information legislation places additional burdens on public bodies. In an attempt to ascertain information about public services provided by exempt organisations, interested parties will often submit FOi requests to the public organisations that commission or come in to contact with the private or voluntary organisations. For example, recently there has been concern about the quality of healthcare in private prisons and the number of ambulance call outs. As the companies running private prisons are not subject to FOi legislation, requests are sent to each ambulance service. Extending FOi legislation would enable a much fairer distribution of the administrative burden FOi requests and responses involve.

Independent Commission
on Freedom of Information

The Howard League recognises that government departments and public bodies can find FOi obligations burdensome. However, the charity maintains that the current limits of the amount of time and money which can be spent on FOi responses are adequate and proportionate. In addition, little account is taken of the savings achieved due to reforms made following information revealed via FOi, which in many cases are substantial. The Howard League's work on child arrests is one example of many.

Child Arrests in England and Wales

Since 2008 the Howard League has been collecting, through Freedom of Information requests, data on the number of children arrested by each police force in England and Wales. Every year the Howard League publishes the latest child arrest figures as well as work with police forces to reduce the number of children they arrest. Between 2010 and 2015 the number of child arrests has fallen by 56 per cent from 245,736 to 112,037 a year.

The data obtained through FOI allowed child arrests figures to be presented in a clear and comparable way for the first time. The public interest in these figures as well as pressure and support from the Howard League enabled police forces to focus on the issue and take action to change their practices. As well as improving the lives of hundreds of thousands of children and their families, this FOI based research has helped to save millions of pounds in policing, courts, and prison and probation costs.

Access to information about public services should not rest on ability to pay. The Howard League would strongly resist any attempts to make FOI requests subject to a fee. As a point of principle information about government and public services should not be available only to those with means. Further, the cost savings generated by information following FOI requests outlined above mean that charging for information is unnecessary.

We understand concerns that civil servants should be able to provide full and frank advice but in our experience the current legislation provides ample space for ministers and civil servants to debate and develop policy. When the Howard League has employed FOI legislation and touched on areas which might conceivably encompass official advice, the many exemptions applicable to FOI are used frequently and information regarding policy development is rarely divulged.

Yours sincerely,

Frances Crook

The Information Commissioner

Introduction

1. As the independent authority responsible for overseeing compliance with the Freedom of Information Act 2000 (FOIA), the Information Commissioner ('the Commissioner') welcomes the opportunity to respond to this call for evidence. The Commissioner and the Information Commissioner's Office (ICO) have been responsible for enforcing compliance with FOIA since 2005 and this response draws extensively on that experience. The Commissioner seeks to provide an expert, objective view on the questions posed in the call for evidence.

2. The Commissioner has sought to address the six questions posed by the Independent Commission. He would also like to draw the Commission's attention to previous submissions he has made in relation to reviews of FOIA or possible reforms:

    - Evidence to the Justice Select Committee's post legislative scrutiny of FOIA (2012)[77].
    - Response to the Ministry of Justice consultation on draft FOI and DP appropriate limit and fees regulations (2007)[78].
    - Speech by the Information Commissioner at the London School of Economics (2015).[79]
    - Response to the Ministry of Justice consultation on Tribunal fees (2015)[80].

3. In his evidence to the Justice Select Committee the Commissioner gave this overall assessment of FOIA in operation:

    > *2.4 The Commissioner does not consider that significant changes to the core principles of the legislation are needed. Those core principles mark out the UK FOIA as a good model for public access to information, with a largely free and universal right of access subject to legitimate exemptions, many of which are qualified by a public interest test. Enforcement mechanisms are strong, with an independent commissioner with order-making powers, subject to a right of appeal to the Tribunal.*

4. The Commission's terms of reference do not extend to other areas where the FOIA regime might be improved. In an appendix to the conclusion of this submission the Commissioner draws attention to some outstanding recommendations from the post-legislative scrutiny which ought also to be taken into account in arriving at a balanced view of how FOIA is working practice.

International benchmarks

5. The Independent Commission's call for evidence makes a number of references to legislation from different jurisdictions. The Commissioner has not sought here to analyse these different regimes, as it is difficult to assess how such regimes operate in practice and in the wider context of different constitutional traditions. If these international comparisons are to be used, however, there also needs to be an assessment of how effective they are in delivering transparency.

6. There have been many studies seeking to compare and rank different countries' access to information legislation. Comparison is a difficult task. However, work by international bodies can

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[77] http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/96we12.htm

[78] http://webarchive.nationalarchives.gov.uk/20070108130935/http://ico.gov.uk/upload/documents/library/corporate/detailed_specialist_guides/response_to_consultation_on_foi_dp_fees_regs_feb_07_v.pdf

[79] https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2015/10/working-effectively-lessons-from-10-years-of-the-freedom-of-information-act/

[80] https://ico.org.uk/about-the-ico/consultations/ministry-of-justices-consultation-on-further-fee-proposals/

illustrate emerging benchmarks for effective FOIA regimes. For example, a UNESCO study[81] states that 'exceptions should be clearly and narrowly drawn and subject to strict harm and public interest tests.'

7. It is also important to recognise the role that the Environmental Information Regulations 2004 (EIR) play in facilitating access to information in the UK. The EIR are based on Directive 2003/4/EC on public access to environmental information, and the Directive implements the international Aarhus Convention[82]. These instruments serve as useful indicative standards for access to information internationally. Whilst there are some differences between EIR and FOIA, they are broadly comparable and provide an effective overall system for access to information for England, Wales and Northern Ireland, and for reserved bodies in Scotland. The impact of any significant divergence between the regimes should be carefully considered.

8. As an international benchmark the Commissioner also highlights the relevance of the Council of Europe Convention on Access to Official Documents[83], adopted in 2008. Relevant extracts:

> *Article 3 – Possible limitations to access to official documents*
>
> *1. Each Party may limit the right of access to official documents. Limitations shall be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:*
>
> *…*
> *k. the deliberations within or between public authorities concerning the examination of a matter*
>
> *2. Access to information contained in an official document may be refused if its disclosure would or would be likely to harm any of the interests mentioned in paragraph 1, unless there is an overriding public interest in disclosure.*
>
> *Article 7 – Charges for access to official documents*
>
> *1. Inspection of official documents on the premises of a public authority shall be free of charge. This does not prevent Parties from laying down charges for services in this respect provided by archives and museums.*
>
> *2. A fee may be charged to the applicant for a copy of the official document, which should be reasonable and not exceed the actual costs of reproduction and delivery of the document. Tariffs of charges shall be published.*
>
> *Article 8 – Review procedure*
>
> *1. An applicant whose request for an official document has been denied, expressly or implied, whether in part or in full, shall have access to a review procedure before a court or another independent and impartial body established by law.*
>
> *2. An applicant shall always have access to an expeditious and inexpensive review procedure, involving either reconsideration by a public authority or review in accordance with paragraph 1.*

[81] Freedom of Information: A Comparative Legal Survey. UNESCO.
http://portal.unesco.org/ci/en/file_download.php/fa422efc11c9f9b15f9374a5eac31c7efreedom_info_laws.pdf
[82] UN/ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf
[83] Council of Europe Convention on Access to Official Documents. https://wcd.coe.int/ViewDoc.jsp?id=1377737 (the Commissioner acknowledges that the UK is not yet a signatory)

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?

9. The Commissioner seeks to show that effective protections for internal deliberations are already available under sections 35 and 36. He has published updated guidance on both exemptions - learning from case law and his understanding of how public authorities work. In 2013 new guidance was issued on section 35[84], to clarify the Commissioner's approach to concepts such as 'safe space' and 'chilling effect' when considering the public interest test. In 2011 the Commissioner published revised guidance on section 36, clarifying his approach to considering the qualified person's opinion[85] and the public interest test.

10. Protection of the private space needed for internal deliberation is an important public interest and will support the effectiveness of policy making and delivery of public services. The Commissioner proposes that there is a distinction between a need for a private space, depending on the circumstances, and a desire for secrecy across a broad area of public sector activity. It was the latter tendency that FOIA was intended to correct.

11. Data from the Commissioner's decision notices on sections 35 and 36 illustrates the level of protection accorded to policy making process and collective decision making. In the following tables, Not Upheld refers to the complaint to the Commissioner; in other words, the public authority had applied the exemption correctly.

Information Commissioner decisions on section 35 for central government 2005-2015

	Not Upheld	Partly Upheld	Upheld	Total
2006		1	5	6
2007		1	5	6
2008	8	3	7	18
2009	7	4	9	20
2010	10	1	7	18
2011	12	3	8	23
2012	23	3	9	35
2013	18	1	7	26
2014	21	1	9	31
2015	24	2	3	29
Grand Total	**123**	**20**	**69**	**212**

[84] Information Commissioner. Section 35 guidance. https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf
[85] Information Commissioner. Section 36 guidance. https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf

Information Commissioner decisions on section 36 for central government 2005-2015

	Not Upheld	Partly Upheld	Upheld	Total
2006	3		1	4
2007	4	1		5
2008	4	4	8	16
2009	5	4	5	14
2010	9	1	1	11
2011	5	4		9
2012	17	3	7	27
2013	23	3	16	42
2014	16	1	17	34
2015	9	2	2	13
Grand Total	**95**	**23**	**57**	**175**

12. The statistics for section 35 illustrate that, at the current time, and certainly over the last 5 years, a significant percentage of the Information Commissioner's decisions have fallen in favour of protecting policy making processes and deliberative space. In 2015 the figure is 83% for section 35 cases, 69% in 2014.

13. There are a number of factors that may explain why the statistics illustrate a trend from 'upheld' complaints (2005-10) to 'not upheld' complaints on sections 35 and 36 (2011-2015):

- The Commissioner issued new guidance that clarified his approach to sections 35 and 36;
- Cases considered by the Commissioner in the earlier period of FOIA covered a range of historical subjects, as there was a pent-up demand before FOIA came in;
- By the second half of the decade the Commissioner and Departments were gaining a better understanding of the law and how the exemptions should be applied.

14. The annual freedom of information statistics for central government for 2014 illustrate that the section 35 exemption was used to withhold information for 598 requests and for section 36 it was 420 requests[86]. It is relevant to look at these figures in the context of the number of decisions where the Commissioner has upheld complaints. This reveals that the percentage of cases where government departments have been ordered to disclose information, denying the protection claimed, is very small:

[86] 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

Section 35
10/598 = 1.7%

Section 36
18/420 = 4.3%

Overall
28/1018 = 2.75%

15. Given these figures, we are concerned that a very small number of high profile cases may be having a disproportionate effect on perceptions of FOIA within government, particularly at a senior level. The Commissioner's experience is that government concerns tend to be focused on the effect of 'routine disclosure'. However, these figures would suggest that disclosure is in fact far from routine; the reality is that only a very small proportion (less than 3%) of requests for this type of information results in an order to disclose any part of it.

16. There is limited evidence from research to suggest that disclosures made under FOI have a significantly detrimental impact on the candour of advice, the quality of policy outputs or quality of record keeping. 2009 research conducted by the Constitution Unit at University College London made the following finding:

> *"Overall, however, none of the officials we interviewed thought that FOI was having or would have a significant impact on the nature of the decisions that the government was seeking to make (ie no actual decision would be different because of FOI concerns). And while, it might well lead to less being recorded in future, it was only one of a number of factors which were having a similar effect, including the greater informality of the relationship with Ministers and third parties, concerns about legal challenge; and resource pressures which were leading to less material being properly filed. In that sense, FOI was part of a general trend towards fewer written records rather than the dominant factor behind the trend. That said, the trend as a whole was not to be welcomed."*[87]

17. The Commissioner has not noted any impact of FOI on record keeping in the Information Management Assessments published by the National Archives[88].

18. A fear of routine FOI disclosure does, however, appear to exist amongst some civil servants and ministers. The Commissioner would observe that this is often driven by a misunderstanding of how FOIA is operating in practice. He acknowledges that the existence of a public interest test for sections 35 and 36 creates some uncertainty around whether policy information will be protected. However, there are many other factors that create the same uncertainty, including leaks, disclosure via legal processes such as judicial review, and public inquiries.

19. The Commissioner has found that considerations of sensitivity will generally start to decrease as soon as a policy decision has been taken, but his casework experience suggests that there is no fixed time limit. How long information remains sensitive will depend on its specific content, the nature of the particular decision-making process, and the wider context (eg the effect on other live deliberations). It can be many years or a number of months, depending on the context.

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[87] Paragraph 7.23 Understanding the Formulation and Development of Government Policy in the context of FOI Prepared for the Information Commissioner's Office by The Constitution Unit, UCL (2009). https://ico.org.uk/media/about-the-ico/documents/1042359/ucl-report-government-policy-in-the-context-of-foi.pdf

[88] The National Archives. IMA reports and resources. http://www.nationalarchives.gov.uk/information-management/manage-information/ima/ima-reports-action-plans/

20. The Commission's call for evidence quotes the Commissioner's section 35 guidance on safe space: 'once the government has made a decision, a safe space for deliberation will no longer be required and this argument will carry little weight.' However it is important to be clear that this only explains the Commissioner's view on a safe space for deliberation (ie in order to reach the decision in question). The term 'safe space' is used in this specific sense, not to describe a broader sensitivity or need for discretion. It should not be taken to mean that the Commissioner automatically assumes that information can no longer be sensitive as soon as a decision is taken.

21. The following Decision Notices (DNs), showing the Commissioner accepting that the exemption was correctly applied, are examples of the Commissioner giving weight to 'chilling effect' arguments even when the need for a specific safe space has passed:

- FS50361967 – HM Treasury – DN issued 7/06/11. Request sought access to plans drawn up by HMT in 2008 or 2009 to acquire toxic/bad assets from UK financial institutions. The Commissioner found that that section 35 was engaged and there was a very significant public interest in avoiding the chilling effect described by the Treasury.

- FS50490676 – Cabinet Office – DN issued 25/11/13. Request sought correspondence regarding a funding grant given by the Department for Education to the charity Booktrust. The Commissioner found that the information was correctly withheld under section 36. Even though the decision had been made he gave weight to the frank nature of the information and proximity of the decision to the request.

- FS50509494 – Ministry of Justice – DN issued 18/02/2014. Request sought access to advice to Ministers and papers of Ministerial meetings relating to the amendments to section 37 of FOIA. Information was correctly withheld under section 35. The Commissioner accepted that the sensitivity of the information would not reduce quickly over time and the impact on the candour of external contributions to policy making.

22. There are often other relevant arguments as to ongoing sensitivity. In particular the Commissioner's section 35 guidance accepts that the following arguments may be relevant:

- if disclosure would directly harm the effectiveness of the policy itself (eg if disclosure of identified risks would make those risks more likely to materialise) – paragraph 80;

- a safe space to reconsider options if debate is reactivated – paragraph 84;

- a safe space to present, explain and defend a decision (for a short time) – paragraph 87;

- a safe space for any related/similar ongoing debates – paragraph 89;

- generic chilling effect arguments (albeit of limited weight) – paragraph 201;

- specific chilling effect on other specified policy debates – paragraph 203;

- collective responsibility and the united front – paragraph 209.

23. Paragraph 89 of the guidance is a clearer statement of the Commissioner's general position on sensitivity over time:

'Even if the policy in question is finalised, a department might argue that disclosure would affect other policy debates. The weight of these arguments will depend on the circumstances. A department might still need a safe space for other ongoing policy debates if they are so similar or related that disclosure of one is likely to interfere with the other. Chilling effect

arguments may also carry more weight if a department can point to a specific policy debate and explain why it is particularly likely to be affected. However, generic chilling effect arguments about unspecified future policy debates are unlikely to be convincing, especially if the information in question is not particularly recent.'

24. The following summaries of decisions of the Commissioner illustrate for how long deliberative information can remain sensitive and the interaction with the public interest test:

- FS50493161 (DCMS, 18 September 2013) – Eight years after first policy decision but only shortly after delivery complete, DN orders disclosure. Request was for 2002 Olympic Bid Report. Previous DN on same information in 2009 found report still sensitive four years after decision to bid for Olympics, because of ongoing impact on delivery of Olympics (FS50182402). However, this DN finds that once Olympics concluded, information should be released. Key factors were the age of the information (10 years old), the fact that delivery was now complete, and the ongoing public interest in disclosure. Although legacy issues still live, no convincing case as to why the content of this information would impact on that (albeit related) process.

- FS50526255 (HM Treasury, 16 October 2014) – Five years after decision, information remains sensitive and DN upholds refusal under s35(1)(a). Request was for information about the sale of Bradford & Bingley in 2008. Advice to Prime Minister and Chancellor prior to the share sale withheld under s35, and remained sensitive even five years after the decision was made. DN accepts ongoing chilling effect on similar discussions in future given ongoing market sensitivity.

- FS50580887 (DfE, 27 October 2015) – Two years after decision; information remains sensitive and DN upholds refusal under s35(1)(a). Request was for drafts of national curriculum for history and any other documents shedding light on the policy process. Previous request made when issue was live was refused and the Commissioner upheld refusal at that time (FS50491842). New request submitted two years on, claiming that no longer sensitive due to passage of time. DN finds policy process complete but accepts ongoing chilling effect arguments due to specific nature of policy process in question and particular effect on external expert contributions.

- FS50446594 (DCLG, 10 December 2012) – process still live, DN upholds refusal – but during ICO investigation policy process completed and DCLG voluntarily discloses. Request was for information submitted to DCLG during drafting of National Planning Policy Framework. At time of request, NPPF still in draft, DN accepts need for safe space and upholds refusal. However, during course of investigation final NPPF was published and DCLG voluntarily discloses, as safe space no longer required.

25. In conclusion, the Commissioner would seek to highlight the protections afforded by the current regime, including the flexibility of the public interest under the exemptions. Some information is likely to be accorded greater protection under this approach, but it will be context dependent – on the content of the information and the timing of the request. The Commissioner has not sought to define specific categories of information that should be added to the exemptions.

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?

26. The Commissioner has always accepted, in both his guidance and decisions, that the constitutional convention of collective responsibility must be accorded due weight when considering the public interest test under sections 35 and 36 (though the vast majority of cases fall under section 35). The process of collective Cabinet discussion and agreement is clearly deserving of significant protection. Maintaining the doctrine of collective responsibility will always carry significant public interest, even after a decision is taken. This may be reduced to some extent due to significant passage of time, if relevant individuals are no longer politically active, and/or confidentiality has already been undermined due to published memoirs or other public statements.

27. The Commissioner would argue that significant protection is provided by the Act. In the vast majority of decision notices concerning material engaging the doctrine of collective responsibility, the Commissioner has agreed that the information could be withheld:

Outcome of decisions on collective responsibility arguments

2005-2015	Total 51	
Not upheld	33	65%
Partly upheld	4	8%
Upheld	14	28%

2012-2015:	Total 15	
Not upheld	13	87%
Partly upheld	0	0%
Upheld	2	13%

(Complaint not upheld = the Commissioner found that the public authority applied the exemption correctly in relation to collective responsibility arguments)

28. There are also a significant number of examples of Decision Notices where the protection accorded to collective responsibility has extended beyond cabinet minutes and sub-committee minutes. For example:

- FS50215878 – Cabinet Office – DN issued 21/06/2010. Information withheld consisted of letter from Secretary of State for Health to Deputy PM & minute from PM to his Political Secretary concerning the Michael Stone case during the period 1997-2001. Request submitted 2008. DN finds that policy-making not live and nearly ten years has passed between since creation of information and request. But DN gives weight to the public interest in protecting collective responsibility given informal and unguarded nature of correspondence.

- FS50530945 – Cabinet Office – DN issued 2/12/14. Request sought copy of the 'Precedent Book' which contained working guidance on precedents for the operation of the Cabinet. DN finds

that principle of collective responsibility would be undermined if disclosed as it would interfere with the flexibility by which Ministers can make decisions.

- FS50579032 – Department for Transport – DN issued 25/08/15. Request sought letter between PM and Secretary of State for DfT dating from 1989. DN recognised that the passage of time and fact that the individuals in question are no longer active in politics reduces the public interest in withholding the information but still found that given the importance of the principle of collective responsibility the information should be withheld.

29. The Commissioner recognises the small number of cases where he has ruled that the public interest has overridden the principle of collective Cabinet responsibility, most notably in the case involving the 2003 Cabinet minutes related to the decision to go to war with Iraq. [89] Such cases have been exceptional and demonstrate the importance of the public interest test. The veto was exercised to overrule the Commissioner's decision in the Iraq case. In the only other cases where the Commissioner ordered disclosure due to overriding public interest, the passage of time was also significant (at least six years, and in one case as much as 20 years).[90]

30. In the few remaining cases where the Commissioner has ordered disclosure, the key factor was either a very significant passage of time (between 19 and 22 years)[91], or the very high level or otherwise anodyne nature of the information, which did not reveal the actual content of a relevant discussion.[92]

31. The flexibility of the public interest test is an important component of FOIA and the Commissioner believes that, overall, the evidence illustrates that this flexible concept can provide the right protection and respect for this constitutional convention, whilst acknowledging that the convention is not absolute.

32. The Commissioner welcomed the introduction of the 20-year rule (down from the previous 30 years), that meant that section 35 and 36 exemptions could not be claimed at all after 20 years. However, the Commissioner believes it is a much harder task to assess how long absolute protection should last. The current regime provides important flexibility, which can provide protection for significant periods of time if the context demands it, and also better serves the public interest in disclosure.

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

33. From the Commissioner's experience information involving candid assessment of risks can be contained in a wide range of documents. Risk assessment tools will be used by organisations in a range of contexts – for assessing general organisational risks to risks for specific projects or policy development. The impact of disclosing candid risk assessments can vary depending on the sensitivity of the topic and what is already in the public domain. The Commissioner observes that it would be a difficult area to define in legislation without creating a very broad category.

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[89] Decision notices FS50165372 (19 February 2008) and FS50417514 (4 July 2012)
[90] Decision notices FS50195059 (7 September 2009) on NHS contracts; FS50161574 (21 December 2009) on the miners' strike; and FS50100665 (23 June 2009), FS50347714 (12 September 2011) and FS50362603 (13 September 2011) on devolution
[91] See decision notices FS50085945 (22 May 2007), FS50142678 (17 March 2008), FS50088735 (22 December 2009), and FS50362049 (3 October 2011)
[92] See decision notices FS50074589 (4 January 2006), FS50076355 (4 April 2007), FS50370783 (28 July 2011), FS50413379 (15 May 2012), FS50474524 (13 May 2013), FS50493496 (29 July 2014), and FS50534298 (21 August 2014).

34. It is undisputed that public authorities must use risk assessment tools and record each stage of the process. The Commissioner also accepts that risk assessment processes may require protection from significant harms under an exemption in FOIA.

35. Information from risk registers can often engage a range of exemptions, depending on the content of the information, not just sections 35 and 36. Risks related to defence and national security may be protected by the exemptions under sections 23 (Security bodies), 24 (national security), 26 (defence) or 27 (international relations). Risk registers for projects with the private sector may sometimes contain information that can be protected under section 43 (commercial interests).

36. The Commissioner has generally accepted that the concepts of safe space and chilling effect can be relevant to the disclosure of information that records risks. However, the Commissioner has proceeded on a case-by-case basis. On some cases the Commissioner has not been persuaded that public officials would be inhibited when recording risks and assessing projects as part of formal risk-management processes. The timing of the FOIA requests has often been important and the Commissioner has given weight to the need to protect risk assessments when the public authority may still be considering the implications of the assessment. The Commissioner has also been persuaded that disclosure of detailed technical risks can be damaging. Arguments have always been more persuasive when they have been focused on specific impacts; the Commissioner has been more sceptical when public authorities have only advanced generic arguments about safe space and chilling effect, without explaining how these would operate in the particular case.

37. The Commissioner has also sometimes accorded significant weight to the arguments for disclosure to enable the public to see risk registers or project reviews as indicators of progress on significant projects, in addition to information already in the public domain.

38. Government policy on publishing information related to risk has changed over time. Previously, FOI requests for 'red, amber, green' (RAG) status of gateway reviews were refused. However the Major Projects Authority now publishes RAG status in a regular report summarising key indicators from project assessment reviews (PAR), the replacement for gateway reviews[93].

39. Some public authorities do publish risk registers, often in some detail. See, for example, the Care and Support Reform Programme Board risk register for 2014[94]. The Health and Social Care Information Centre has disclosed its Corporate Risk Register under FOIA[95].

40. The most well-known decisions where the Commissioner has ordered disclosure of risk-based information are referenced in the call for evidence – NHS risk registers, universal credit and HS2. These decisions were based on the circumstances of each case, including the timing of the request and the weight of public interest in disclosure.

41. The Commissioner would also highlight the following summaries of Decision Notices as examples of where he has agreed that risk information can be withheld:

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[93] Major Projects Authority. Annual report 2014.
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/388467/MPA_Annual_Report_UPDATE_Dec_12__1_.pdf

[94] Care and Support Reform Programme Board risk register
http://www.local.gov.uk/documents/10180/5911073/140324+060105+Risk+Register+-+FINAL.pdf/c85626d7-003f-4316-91bb-2b82afa7be41

[95] Health and Social Care Information Centre Corporate Risk Register https://medconfidential.org/wp-content/uploads/hscic/HSCIC_Board_Papers_-_05_February_2014/3b%20(i)%20Corporate%20Risk%20and%20Issues%20Register.pdf

- FS50274036 - DECC - Carbon capture and storage project risk register – DN issued 18 August 2010. Sections 43 and 36 claimed. Commissioner agreed that section 43 could be applied to all the information.

- FS50497586 - Department for Work and Pensions – universal credit Risk Register. This was a later request for the risk register. The DWP noted that the content of the register had changed since the previous request. The Commissioner ruled that the weight of the safe space and chilling effect arguments had lessened since the previous request as the relevant secondary legislation had been passed and the project was moving on, but they still carried strong weight because the project was being 'reset'. The DWP argued that there was a need for 'imaginative pessimism' in identifying all possible risks, and the Commissioner noted that there was a large amount of frank and candid consideration of risks, and this could be prejudiced in future if the information were disclosed now. This outweighed the very strong public interest in disclosure.

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?

42. The Commissioner is mindful of the significant constitutional issues raised by the Supreme Court judgment in the Prince Charles' correspondence case. He recognises that this is ultimately a matter for Parliament to decide. He does, however, offer the following observations.

43. The veto has been used sparingly over the last 10 years, seven times in all. The Commissioner has on occasion expressed concern about its use in particular cases, questioning whether they were indeed exceptional; but overall the effect on the ability of FOIA to deliver transparency has been limited. The only time the Commissioner has sought to challenge the use of the veto via judicial review has been in the HS2 case under EIR, which was a broader matter of principle in relation to the EIR[96]. In the context of a public interest test applying to a wide range of exemptions, such as sections 35 and 36, the existence of an executive override, to be used in exceptional cases, can be regarded as a proportionate and reasonable provision.

44. If concerns continue about the impact of FOIA on deliberative space and collective responsibility, providing for the possibility of a veto of the Commissioner's decisions, in exceptional cases, is a more proportionate response to the concerns, compared to converting sections 35 and 36 into absolute exemptions. This would not exclude the possibility of any use of the veto being judicially reviewed.

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

45. The Commissioner sees no clear evidence for changing the overall structure and principles behind the enforcement and appeal system under FOIA. International benchmarks for Freedom of Information will generally have an independent body and onward appeal to the Courts as core components. FOI systems are most effective when the independent body has binding enforcement powers.

46. If a public authority does not comply with a FOIA decision notice, enforcement notice or information notice, the Commissioner can instigate proceedings for contempt of court. This backstop ensures that the Commissioner's decisions and investigations are effective. Notwithstanding the

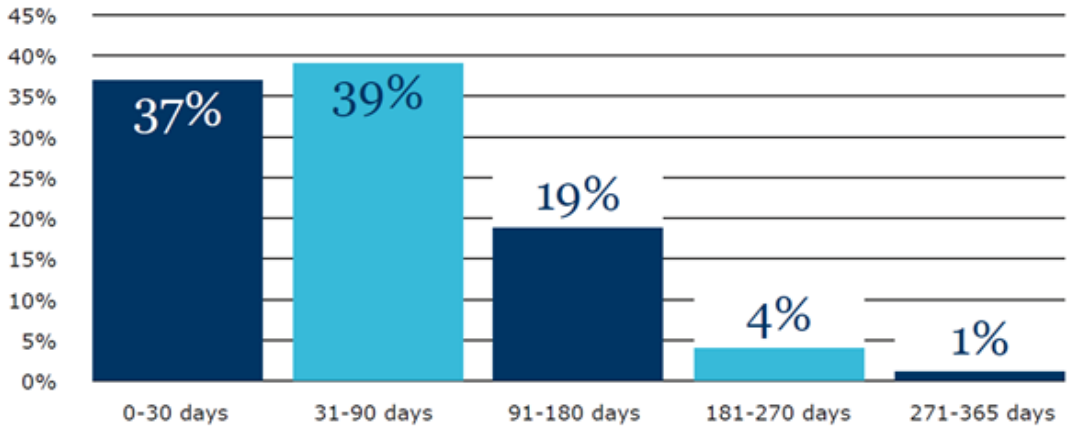
[96] The argument here was that the Directive itself contained no provision for a Ministerial veto and, for this reason, by including a veto in the EIR, the Directive had been incorrectly transposed.

observations on the veto made at paras 43-5 above, the Commissioner would be concerned if any fragmentation was made to his power to order disclosure in a binding decision.

47. It remains a challenge for the Commissioner to tackle issues such as delays by public authorities in meeting the 20 working day limit, delays to internal review, and unreasonable extensions of time to consider the public interest test. The Commissioner highlighted the issue of timeliness in his evidence to the Justice Select Committee[97]. The Commissioner will continue to need the full range of his powers to tackle these issues and FOIA may need to be strengthened in this respect.

48. In terms of the performance of his office, the Commissioner can point to clear evidence as to how the ICO effectively resolves complaints. Concerns were expressed in earlier years regarding delays in complaint handling. Significant improvement has been achieved over the last five years. Recent annual reports illustrate the ICO's performance[98]. The latest data from the 2015 illustrates that over 90% of FOI complaints are resolved within six months.

49. Distribution of FOIA caseload as at March 2015



50. Customer Research commissioned by the ICO in 2012 showed 72% of FOI complainants fairly or very satisfied with our complaint handling. 37% of those who didn't get what they wanted nevertheless said they accepted the ICO's explanation[99].

51. The call for evidence highlights the multiple layers of the appeals system and its uniqueness compared to other systems around the world. The Commissioner recognises the benefits and drawbacks of this system as highlighted in the call for evidence.

52. The Commissioner recently responded to the Ministry of Justice's Consultation on Further Fees Proposals (September 2015). He responded to questions about fees for appeals made to the General Regulatory Chamber of the First-tier Tribunal and whether there should be an exemption from fees[100].

53. The response highlighted the public interest served by appeals to the First-tier Tribunal and how fees could impact on the process. The Commissioner also questioned whether fees would achieve the aims sought from reform. The response raised a number of questions about how fees may

[97] See sections 11 and 12 of the evidence.
[98] ICO annual reports https://ico.org.uk/about-the-ico/our-information/annual-reports/
[99] https://ico.org.uk/media/about-the-ico/consultation-responses/1432482/complaint-handling-wave-1-research-report-september-2012.pdf
[100] https://ico.org.uk/about-the-ico/consultations/ministry-of-justices-consultation-on-further-fee-proposals/

operate in practice and some possible unforeseen impacts. The Commissioner's response recognised that levying fees for appeals to the Upper Tribunal would be reasonable.

54. Provided the core principles of the FOIA system continue to be respected, the Commissioner accepts that proportionate reform of the Tribunal and Court appeal system for FOIA could be beneficial and make the process more efficient. For example, the Commissioner notes that in Scotland, where the Freedom of Information (Scotland) Act (FOISA) applies to public authorities exercising devolved functions, appeals against decisions of the Scottish Information Commissioner are available only on matters of law and by application to the courts.

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?

55. The Commissioner recognises that this is a reasonable question to raise. The public sector as a whole still faces a significant challenge to use financial resources effectively and pressure on public spending will remain for many years.

56. There has been considerable debate about the balance between burdens and benefits over the last 10 years. It is a difficult question to resolve by reference to quantitative data alone. The Commissioner acknowledges the studies that have been completed on compliance costs, as referenced in the Commission's call for evidence. These studies have been subject to scrutiny in terms of method and what can be counted as 'FOIA cost'. It can be difficult to approach an assessment of burden objectively. FOIA compliance costs can appear to be significant when considered in isolation; it is instructive to consider FOIA in the context of other activities that relate to a public interest in information – e.g. running consultations, providing information about services, responding to complaints. Public interest in information and requests for information in the course of business will always exist, with or without FOIA. What FOIA adds is the basis of the right to request information and the right to complain.

57. The investments that can support FOI compliance must be seen in a broader context; investment in request handling systems should go hand in hand with investment in customer services. Records management underpinning FOIA will assist with other legislative compliance e.g. data protection, equalities legislation.

58. The Commissioner has consistently maintained that public authorities could make better use of the provision for vexatious requests under section 14. More confident application of the provision would prevent significant abuse of FOIA rights and excessive burdens from particular requests. He has pointed out that most public authorities successfully apply the provision. Since the Commissioner's new guidance on section 14 was issued in 2013, he has accepted that section 14 was engaged in 84% of cases; for central government departments he agreed that section 14 was engaged in 78% of cases.

59. Case law on section 14 of FOIA has developed considerably over the last 10 years. The test for applying the provision has become more flexible. That is not to say that the public authorities should lightly move to reject requests using section 14; there are some significant thresholds to be met, but public authorities are often over-cautious in using the provision. Guidance on section 14 has evolved considerably since 2005. Initially the Commissioner's guidance focused on a multi-part test that had to be satisfied; this has now evolved to a more flexible test. If the request is 'likely to

cause a disproportionate or unjustified level of disruption, irritation or distress then this will be a strong indicator that it is vexatious'[101]. This has recently been supported by the Court of Appeal in the case of Dransfield and Craven.

60. New guidance on section 14 was launched by the Commissioner in 2013. It recognised that section 14 could be used for requests that caused an excessive burden, without needing to look at other factors that were previously considered, such as the obsessive or repetitive nature of a pattern of requests. There are now a number of decisions by the Commissioner that have accepted the use of section 14 for burden alone. For example:

- FS50561528 – FCO – DN issued 25/02/15. Request sought information submitted by FCO to Detainee Inquiry (Gibson Inquiry). The information in scope extended to approximately 9750 pages of information to which various exemptions would have had to be applied. FCO estimated that complying would have taken at least 130 hours work.

- FS50539606 – ACPO – DN issued 4/08/2015. Request sought copies of Taser Deployment forms sent to ACPO by police forces. ACPO estimated that it would take approximately 1.5 weeks to redact all sensitive data from forms before they could be disclosed. In addition, further work would be needed to liaise with various forces that submitted the forms to ensure that disclosure of a redacted form would not harm ongoing investigations/prosecutions.

61. The Commissioner would be open to strengthening the guidance on section 14 by putting it on a statutory basis in a special code of practice issued under section 45. This could reduce any uncertainty that public authorities may feel about the current approach and the risk of the Commissioner's guidance being overturned by the courts.

62. The Commissioner recognises that the current FOIA fees regime provides only limited opportunities for authorities to charge for requests (e.g. only for disbursements). The guiding principle in considering any option to change the charging regime should be what the change is seeking to achieve and whether it will be proportionate to the important rights that FOIA gives to the public. The purpose of any proposed change must be explicit (ie deterrence or cost recovery).

63. The Commissioner notes that complex or potentially subjective charging and cost mechanisms, for example differentiating between types of request or requester, are more likely to increase the number of internal reviews for public authorities and complaints to the Commissioner.

64. The impact of a flat fee in reducing the number of requests is well documented, evidenced from the charges imposed in the Republic of Ireland. The Commissioner is concerned that a flat fee would be a disproportionate measure because of its deterrent effect on a wide range of requests and requesters. It is worth noting that a flat fee of £10 (the same as for a subject access request under the Data Protection Act) would not enable public authorities to recover costs. It should also be recognised that charging a fee in itself creates an administrative burden, which is one reason why public authorities do not usually do it; the Constitution Unit found in 2010 that 62% of authorities they surveyed never quoted a fee for answering a request[102].

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[101] Information Commissioner. Guidance on dealing with vexatious requests. https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf

[102] Town Hall transparency? The Impact of the Freedom of Information Act on English Local Government. UCL Constitutional Unit (2011). https://www.ucl.ac.uk/constitution-unit/research/foi/foi-and-local-government/town-hall-transparency.pdf

65. Another option would be to charge for staff time. This could create a perverse incentive. The burden of dealing with FOI requests (ie the time spent on this) is greater if a public authority has poor document and records management systems, FOI procedures that are inefficient or not properly followed, ad hoc FOI decision-making processes, a low staff awareness of FOI obligations and a reluctance to make information available proactively. To introduce a time-based charge for handling requests reduces the incentive to improve bad practices; it makes the requester pay for the public authority's shortcomings. Any system that charged for time would need to ensure that good records management was incentivised and bad practices penalised.

66. It is important to consider the practical difficulties of changing the current system for calculating costs under section 12 of FOIA. The Commissioner has previously set out concerns about moving to a system of including deliberation or reading time. He still holds to the view set out in the response to the 2007 consultation run by the Ministry of Justice on amending the fees regulations. The key points of his response were:

- there are grave doubts about the extent to which the aggregation of non-similar requests would be workable in practice, particularly if determined applicants took steps to circumvent the new provisions;
- the proposed concepts of time for reading, consultation, and consideration, will present very real difficulties for challenge and adjudication;
- the proposals will introduce new layers of procedural and bureaucratic complexity. There was likely to be a substantial increase in requests for internal review and appeals to the Commissioner, with a substantial increase in costs in relation to these activities;
- there would be a surge of difficult procedural complaints to the Commissioner.

67. If a change to the cost regime of FOIA is deemed necessary the Commissioner would support the conclusions of the Justice Select Committee: that reducing the appropriate limit in the fees regulations would be the most proportionate step to reduce the impact of FOIA on public authorities. The limit in the regulations was based on the threshold for Parliamentary questions, and the Commissioner accepts that it could be reasonable to review and research a new basis for the limit.

68. Lastly the Commissioner turns to the issue of benefits. FOIA rights are crucial rights for the public in today's information age. There are clear benefits evidenced each week, as examples emerge about a wide range of public interest issues that have led to further public debate.

69. The benefits of FOIA are wide-ranging but can be difficult to quantify. Whilst research can look at the impact of the specific requests and how they have informed the public, it is much harder to assess the wider benefits. The value of FOIA also comes from the more general spotlight it shines on the public sector, which helps to drive an open and responsive culture. There is more to be done to get public authorities to see the benefits of linking FOI to developing a more open culture within their organisations and also to enhancing customer service. This culture change will only come with the backstop of a strong FOIA and associated enforcement regime.

70. FOIA has secured lasting benefits when individual requests, often fiercely resisted initially, have been translated into broader transparency initiatives. For example:

- MOT test data is now regularly published following an FOI request;

- Nationwide data on landlords who have been convicted of offences under the Housing Act 2004 is now available;

- The move towards standard publication of food hygiene ratings was driven by FOIA requests for restaurant inspections held by local councils;

- More information is now published about the process of applying to open free schools.

All of these examples were initially to be withheld under FOIA exemptions, but were released following Commissioner or Tribunal decisions.

71. The media plays an important role in FOIA as a user. Less than one in a thousand members of the public makes an FOIA request, so the media is the main route via which the public receives information disclosed via FOIA. To take a snapshot, in one week alone (w/c 2 November 2015) the following stories were reported in the media as based on FOI:

- An investigation by BBC Radio 5 Live into the number of outstanding child abuse cases, picked up by The Sun, Daily Mail and Daily Star (8/11);
- Town councillors claiming £1bn in allowances and expenses over five years (Sun 8/11);
- Police and Crime Commissioners redeploying senior officers to support them in administrative roles (Mail on Sunday 8/11);
- 26 'terror' prisoners being held in medium security Category B jails (Sunday Star 8/11);
- Action to be taken to stop primary schools 'cheating' at KS1 exams (Times 7/11);
- House of Lords reviewing its IT register after the Press Association exposed 'chaotic' record keeping (Mailonline 6/11);
- The number of children seeking advice about gender identity has risen by 100 per cent (Guardian 5/11);
- HMRC has £2.6 million in unpaid bills including invoices from small businesses and charities (Daily Mail 4/11);
- The Sunday Times (8/11) told the stories of several police widows, who were no longer entitled to their husbands' pensions because they had remarried. The stories were backed up with information obtained through FOI about the number of spouses who lost pension rights in that way;
- The Sun (8/11) ran a piece about the number of mother and baby deaths in UK hospitals by speaking to families who had lost loved ones. The article was backed up with FOI information about the number of maternity units that had been temporarily closed.
- The Daily Mail covered an investigation by the Forum of Private Businesses that looked at 300 FOI responses to conclude that English councils are paying suppliers promptly (7/11).
- Most of the media covered a report by the Children's Society that drew on statistics obtained through FOI that some 45,000 teens were not reporting sex attacks (4/11).
- Plaid Cymru discovered, through FOI, that there are 1,240 full-time equivalent nursing vacancies across Wales' seven health boards (ITV, 2/11).

72. Evidence from local government indicates that the public are consistently the largest category of user making FOIA requests[103]. As just one example it is relevant to look at the different requests made by members of the public for information about school playing fields[104].

[103] Town Hall transparency? The Impact of the Freedom of Information Act on English Local Government. UCL Constitutional Unit (2011). https://www.ucl.ac.uk/constitution-unit/research/foi/foi-and-local-government/town-hall-transparency.pdf
[104] Search results on "school playing fields" from FOIA request website "What do they know": https://www.whatdotheyknow.com/search/school%20playing%20fields/all

73. FOIA supports both the push and pull of information. Publication schemes under FOIA require public authorities to have information that they regularly publish, as an ongoing commitment to transparency. Increasingly, this information will be published as open data. The right to request information under FOIA enables members of the public to pull information from public authorities – the information they want to see, not the information the public authority thinks they should have. Both the push and pull are vital for true transparency.

74. 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.

Appendix – outstanding areas of FOIA reform

Finally, the Commissioner wishes to draw the Commission's attention to a number of matters that remain outstanding following the 2012 post-legislative scrutiny of FOIA by the Justice Committee. These were important recommendations to enable FOIA to operate effectively:

Destroying records-enforcement of section 77

20. The summary only nature of the section 77 offence means that no one has been prosecuted for destroying or altering disclosable data, despite the Information Commissioner's Office seeing evidence that such an offence has occurred. We recommend that section 77 be made an either way offence which will remove the limitation period from charging….We believe these amendments to the Act will send a clear message to public bodies and individuals contemplating criminal action.(Paragraph 121)

Private companies and public funding

36. The right to access information must not be undermined by the increased use of private providers in delivering public services. The evidence we have received suggests that the use of contractual terms to protect the right to access information is currently working relatively well. We note the indication that some public bodies may be reluctant to take action if a private provider compliant with all other contractual terms fails to honour its obligations in this area. In a rapidly changing commissioning landscape this has the potential fundamentally to undermine the Act. We remind all concerned that the right to access information is crucial to ensuring accountability and transparency for the spending of taxpayers' money, and that contracts for private or voluntary sector provision of public services should always contain clear and enforceable obligations which enable the commissioning authority to meet FOI requirements. (Paragraph 239)

37. We believe that contracts provide a more practical basis for applying FOI to outsourced services than partial designation of commercial companies under section 5 of the Act, although it may be necessary to use designation powers if contract provisions are not put in place and enforced. We recommend that the Information Commissioner monitors complaints and applications for guidance in this area to him from public authorities. (Paragraph 240)

Internal reviews

16. It is not acceptable that public authorities are able to kick requests into the long grass by holding interminable internal reviews. Such reviews should not generally require information to be sought from third parties, and so we see no reason why there should not be a statutory time limit—20 days would seem reasonable—in which they must take place. An extension could be acceptable where there is a need to consult a third party. (Paragraph 103)

Other remedies for non-compliance with time limits

17. We recommend that all public bodies subject to the Act should be required to publish data on the timeliness of their response to freedom of information requests. This should include data on extensions and time taken for internal reviews. This will not only inform the wider public of the authority's compliance with its duties under the Act but will allow the Information Commissioner to monitor those organisations with the lowest rate of compliance. (Paragraph 109)

18. We recommend the 20 day extension be put into statute. A further extension should only be permitted when a third party external to the organisation responding to the request has to be consulted. (Paragraph 111)

19. We recommend that a time limit for internal reviews should be put into statute. The time limit should be 20 days, as at present under the Code of Practice, with a permitted extension of an additional 20 days for exceptionally complex or voluminous requests. (Paragraph 112)

75. On the subject of outsourcing and FOI the Commissioner would also highlight the report he published in March 2015 – a roadmap for improving transparency of outsourcing[105]. This highlighted the need to consider a number of policy options, including designation under FOIA, to address the transparency gap emerging.

[105] Information Commissioner: Transparency in outsourcing: a roadmap.
https://ico.org.uk/media/1043531/transparency-in-outsourcing-roadmap.pdf

Inclusion London

1. Introduction

1.1 Inclusion London

Inclusion London is a London-wide user-led organisation which promotes equality for London's Deaf and Disabled people and provides capacity-building support for Deaf and Disabled people's organisations in London.

1.2 Disabled People

There are**:**

- Approximately 12.2 million Disabled adults and children in the UK[106]
- Approximately 1.4 million Disabled people living in London[107]
- Just under 1.3 million Disabled people aged 16 to 64 years are resident in the London[108].

Inclusion London welcomes the opportunity to give evidence to the Independent Commission on Freedom of Information on aspects of the Freedom of Information Act 2000.

2. Inclusion London's evidence

2.1 It is vital in a democratic society that public bodies should be accountable, the use of Freedom of Information Act plays a vital role in this and we oppose any move to weaken the Act. We agree with the Justice Select Committee, Post-legislative scrutiny report, which found that:
'The Freedom of Information Act has been a significant enhancement of our democracy.'[109]

*2.2 '*The Committee also said, *'It should be emphasised that the right to access public sector information is an important constitutional right, a fact that can get lost in complaints about the operation of the freedom of information regime.'*[110]

2.3 Other findings of the Committee included:
'The right to access information has improved openness, transparency and accountability.'[111]
The Committee also said, *'We do not believe that there has been any general harmful effect at all on the ability to conduct business in the public service, and in our view the additional burdens are outweighed by the benefits.'*[112]

2.5 The Freedom of Information Act 2000 came into force in 2005 and the Justice Select Committee published the findings of their post-legislative scrutiny in July 2012. It seems unnecessary to form an Independent Commission to review the FOI Act just three years later. Also it would be entirely inappropriate for the Commission's Committee to ignore the findings of Justice Committee or turn over Justice Committee's recommendations.

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[106] Family Resources survey United Kingdom 2012/13: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/325491/family-resources-survey-statistics-2012-2013.pdf
[107] See All in it together? Report at: https://www.inclusionlondon.org.uk/disability-in-london/deaf-and-disability-equality-facts/deaf-and-disability-equality-facts/
[108] http://www.london.gov.uk/sites/default/files/assessment_gla_deaf_disabled_equality_2013.pdf
[109] http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/9603.htm
[110] http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/9603.htm
[111] http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/9603.htm
[112] http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/9603.htm

2.6 **Narrowness of questions**
Many of the questions (4 out of the 6) in the consultation are about measures that seem to seek to increase the 'protection' of public bodies, while there are no questions on measures that would strengthen the requirements on public bodies and only one that supports the enforcement of FOIs (question 5). We are very concerned at the unequal weight given to questions focused on protections. The last question raises the subject on the 'burden' on public bodies again, while both the burdens and cost of the requests have already been sufficiently addressed by the Justice Committee.

2.7 For Deaf and Disabled people it is crucial that public bodies are open and transparent regarding information that has been used to determine decisions or had a bearing on the creation of government policies. Therefore, Inclusion London opposes any weakening of the Freedom of Information Act, and opposes any additional 'protections' for public bodies as we believe that sufficient 'protections' are already currently in place.

2.9 There have been a number of policies and practices arising from government, which are having a huge impact on the lives of Deaf and Disabled people, for instance the Work Capability Assessment, the benefit sanctions used to enforce the 'Claimant Commitment' on those receiving Jobseeker's Allowance or Employment Support Allowance and the closure of the Independent Living Fund, to name a few.

2.10 **Policy development**
While there may need to be *a "safe space" for policy development and implementation and frank advice,* Deaf and Disabled people should not be left in the dark about the information and evidence used to inform policy making. Transparency is needed to see if evidence is robust or not and to see what information influenced the thinking behind the policy. This is particularly important when policies have ongoing impact on Disabled people's lives for many years. It is appropriate there is a legal right to obtain this information through the FOI Act, if the information is not already in the public domain.

2.11 The balance of power between the state and the individual or group of individuals such as Deaf and Disabled people is already heavily in favour of public bodies. It would be lamentable if this balance of power is weakened further through any change to the FOI Act. What can be experienced as 'vexatious' actions by public bodies is not always time wasting, it can be concerted efforts by civil society trying to obtain information in the public interest. It is vital that this constitutional right is not eroded and furthermore could save public money through avoiding legal action when members of civil society consider there has been a legislative breach but dependent on obtaining otherwise undisclosed information.

2.12 **Impact of policies**
Transparency regarding the impact of government policies on Deaf and Disabled people and other members of general public when they come into force is also important. We give two examples below, where FOI request responses have played an important role in revealing the impact of government's policies on Disabled people. The first involves the impact of the closure of the Independent Living fund in June 2015 and the second involves deaths of those claiming benefits.

2.13 **The Independent Living Fund**
The Independent Living Fund, (ILF) which provided funding for those with high support needs closed in June 2015. Responsibilities for funding former ILF users care and support has been passed to Local Authorities.

2.14 Following the announcement that the ILF was due to close, existing ILF recipients were extremely concerned that their levels of care and support would be drastically cut. Government countered these concerns for instance, Justin Tomlinson, Minister for disabled people, wrote in the Guardian that**,** '*Responsibility for providing this support is, in fact, being transferred to local authorities. Far from being*

taken away, it will be administered in a way better able to take account of variations in local circumstances and services'.[113]
In an interview, the Chancellor, George Osborne said he was not cutting the funding for care and support following the closure the Independent Living Fund funding would just be transferred to local authorities.[114]

2.15 However, the funding was not ring-fenced and while the government maintains they are monitoring the impact of the closure they also say it is too early for them to have evaluated any outcomes. Figures obtained through Freedom of Information (FOI) requests by Disabled People's organisations have revealed that cuts have already occurred in some areas. In some areas these cuts have been dramatic, for example in one London borough we have found that more than a quarter of former ILF users have had their social care packages cut by at least half since the ILF closed: 53 of the 60 former ILF users have had their packages reduced, 16 have seen cuts of more than 50%; seven have seen cuts between 41% and 50% and 11 between 21% and 40%, just seven people have seen their care packages increased.

2.16 Following the closure of the ILF, Deaf and Disabled people are currently caught between local and national government. FOI responses have revealed what is actually happening on the ground. We have now passed this information on to government to inform decisions regarding the forthcoming Spending Review.

2.17 **Deaths of those on benefits**
Deaf and Disabled people and their organisations have been raising concerns for some time about Disabled people been inappropriately found 'fit for work' by the Work Capability Assessments and also possible links between the loss of benefits and the deaths of people Disabled people.

2.18 Robust proof of the link between loss of benefits and a person's death is difficult to obtain, unless it is highlighted in a coroner's report,[115] or there is a suicide note that clearly states this is the case.[116]

2.19 However, the numbers of people on benefits such as Employment and Support Allowance, Incapacity Benefit or Severe Disablement Allowance that have died can be recorded and also data whether the person has been sanctioned/benefits suspended can also collected – it is these statistics should be in the public domain.

2.20 Disabled people have struggled to obtain figures on deaths of those people claiming benefits - the DWP refused a Freedom of Information request by Mike Sivier[117] on the grounds that the information would be published in the future (a section 22 exemption). However, the Information Commissioner found that officials had been wrong to refuse Mike Sivier's FOI request[118] and the mortality statistics were published.[119]

2.21 The mortality statistics for people who died after claiming Employment and Support Allowance, Incapacity Benefit or Severe Disablement Allowance reveal the important information that should be in the public domain, as the statistic showed:

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[113] http://www.theguardian.com/society/2015/jun/11/impact-of-changes-to-disability-benefits
[114] https://www.youtube.com/watch?v=ucBoLsx6bMo
[115] a prevention of future deaths (PFD) report,
[116] http://www.bbc.co.uk/news/uk-england-birmingham-22500009
[117] http://voxpoliticalonline.com/2015/05/01/victory-for-vox-political-dwp-ordered-to-give-details-of-benefit-related-deaths/
[118] https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1424160/fs_50557638.pdf
[119] https://www.gov.uk/government/statistics/mortality-statistics-esa-ib-and-sda-claimants
https://www.gov.uk/government/statistics/mortality-statistics-out-of-work-benefit-claimants-march-2003-to-february-2014

- Of the two million people who had gone through a work capability assessment and had received an ESA decision between 1 May 2010 and 28 Feb 2013, nearly 41,000 had died within a year of that decision.
- Between December 2011 and February 2014, 81,140 people died while claiming ESA or incapacity benefit (IB).
- 2,650 ESA and IB claimants died soon after being found "fit for work" as a result of an assessment.
- Another 7,200 died after being placed in the ESA work-related activity group (WRAG), for claimants the government had decided were well enough to move back towards work.[120]

2.22 In February 2015 a FOI response revealed that the DWP had conducted 49 peer reviews, which had been '*conducted in circumstances where the claimant had died'*, 33 out of the 49 cases, *'contained recommendations for consideration at either national or local level'*. [121] Another FOI response in May 2015 found *'In 10 out of the 49 reviews, the person concerned had sanctions recorded at some point in their claim'*.[122]

2.23 It extremely important that the government is thoroughly transparent on 'claimant deaths'. FOI requests have been a crucial in obtaining information and one of the tools to bring about change policies and procedures; it would be of great concern if the rights to FOI requests are eroded in any way.

2.24 **Response to Questions 1-6**
We support UK Open Government Civil Society Network (http://www.opengovernment.org.uk/) and adopt response here as part of our response. The response is available at:
https://docs.google.com/a/involve.org.uk/document/d/1sMu6s2GZimQ6JT3_TblQGEDLTo76FMCr4I68dQ0JdgU/edit?usp=sharing

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SMS: 0771 839 4687
www.inclusionlondon.org.uk
Registered Charity number 1157376
Company registration number: 6729420

[120] http://www.disabilitynewsservice.com/long-awaited-deaths-stats-do-not-tell-the-whole-story/
https://www.gov.uk/government/statistics/mortality-statistics-esa-ib-and-sda-claimants
[121]https://www.whatdotheyknow.com/request/246714/response/620075/attach/3/Reply%2018%20Harris.pdf
[122] https://www.whatdotheyknow.com/request/252562/response/650114/attach/2/VTR501%20Bellows.pdf

Independent Parliamentary Standards Authority (IPSA)

Submission by the Independent Parliamentary Standards Authority, November 2015

Introduction

The Independent Parliamentary Standards Authority (IPSA) is the public authority responsible for independently administering, regulating and paying the salaries, business costs and expenses of MPs and their staff.

Established by the Parliamentary Standards Act 2009, as amended by the Constitutional Reform and Governance Act 2010 in the wake of the MPs' expenses scandal, we are independent of Parliament, Government and political parties.

The MPs' expenses scandal was itself largely uncovered by requests submitted under the Freedom of Information Act (FOIA), and IPSA's creation can therefore be seen as a child of Freedom of Information. From the outset, our approach has been above all, committed to transparency; in addition to being subject to the FOIA, anyone can visit our website and see full details of every penny their MP has claimed for and what they have received and are paid.

Our approach to transparency

We have a statutory duty to have regard to the principle that IPSA should act transparently. The Constitutional Reform and Governance Act 2010 states that:

> '*In carrying out its functions the IPSA must have regard to the principle that it should act in a way which is efficient, cost-effective and transparent'* and
> '*In carrying out its functions the IPSA must have regard to the principle that members of the House of Commons should be supported in efficiently, cost-effectively and transparently carrying out their Parliamentary functions*.'

Details of all claims submitted by MPs under the *MPs' Scheme of Business Costs and Expenses* ('the Scheme') during a two month period are subsequently published every two months on our publication website, after they have been processed and validated by IPSA's staff. At the end of each financial year, further details on MP's arrangements are published, including (and not limited to):

- details of staff employed during the year;
- the names of any accommodation and office landlords from whom premises are rented under the Scheme; and
- applications for contingency funding received during the year.

Since we were established in 2010, we have worked on the principle that members of the public should be able to see where and how their money is being spent and to hold to account those responsible for that expenditure. The active publication of claims, and the provision of further information under the terms of the FOIA are valuable methods of achieving this.

Further, as a regulator, transparency is an important tool of regulation in itself. That details of all claims made under the Scheme are published and can be viewed by anyone online provides an effective method of self-regulation by each MP before claims are even submitted to us for validation.

IPSA and Freedom of Information

Since being established in May 2010, we have received (and responded to) just over 1,000 requests made under the FOIA. Whilst this may be considered low for central government departments, we are a small body outside central government with a budget of around £6m and around 50 staff. A breakdown of requests received each financial year can be found in the table below.

Financial year	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16 (to date)
Number of requests received	10	161	97	184	246	164	162

We take our responsibilities under the FOIA seriously and have met targets for responding to requests within the statutory time limit for the last 32 months.

Around a quarter of requests we receive relate to our own operations; the vast majority of requests relate to information held relating to MPs' business costs and expenses.

Around 60% of requests come from members of the public, 30% from journalists and 10% from MPs or their staff, with the remaining requests from local councillors, prospective parliamentary candidates and political campaigners.

Over the last five years, 55% of requests have resulted in information being disclosed in full or in part and 12% of requests related to information already available in the public domain. Just 13% of requests resulted in information being withheld in full, with the remaining 20% of requests relating to information not held by IPSA.

The most commonly used reason for non-disclosure is the exemption in Section 21 (in roughly 20% of all requests), relating to instances when information requested is already publicly available at the time the request is made. This is largely due to the amount of information we already publish on MPs' claims which can be referred to in responses. On this same basis, Section 22 is also often used, referring requestors to details of claims which will be published at a future date according to our stated publication schedule.

Further statistics on our engagement with the FOIA can be found at Annex A.

IPSA's position regarding the Commission's questions

In addressing the Commission's questions posed as part of its call for evidence, we have answered below the questions most relevant to our work, and our experience of the FOIA over the five years of our operation.

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

As IPSA is not a government department, we are not able to apply the exemption at section 35 of the FOIA; our protection for information relating to our internal deliberations is primarily that in section 36. As noted in Table , our engagement of the exemption at section 36 of the FOIA is fairly limited, having been applied in just 3% of all requests responded to. IPSA's Qualified Person is the member of IPSA's Board who has previously held high judicial office, currently Sir Neil Butterfield QC, who considers the applicability of the exemption to the information requested, and subsequently whether the public interest outweighs that applicability.

In our comparatively limited experience of having to apply the exemption, we have not felt that there was any shortfall in the scope of the exemption that was adversely affecting the way internal deliberations were being conducted.

The majority of instances in which the exemption is considered and applied relate to requests for copies of correspondence between IPSA and MPs, where disclosure would create a 'chilling effect' that would significantly undermine our ability to carry out our duties. The Information Commissioner's Office (ICO) have twice considered our engagement of the exemption on this basis and in both instances adjudicated that we had engaged the exemption correctly and our decision was upheld.
We have a positive approach to the active publication of documents relating to internal deliberations, and regularly publish minutes of Board meetings, responses to public consultations and corporate plans. We are currently in the process of reviewing what more we can publish.

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

On the whole, we believe the current system of enforcement and appeal works effectively, although perhaps not as efficiently as could be hoped – for both public authorities and requestors.
The current process of appeal for a requestor, as made clear in the Code of Practice, requires the public authority to conduct an 'internal review' of the original request. Indeed the ICO will not consider any complaint where the public authority's review procedure has not been exhausted. This process is often stressed as an opportunity for the public authority to consider the request afresh. As a small organisation, it can sometimes be difficult to identify officials who were not involved in the original decision, and who are sufficiently versed in the FOIA to be able to conduct a thorough and effective review.

This issue is further compounded by the lack of guidance provided to public authorities on the procedure for the internal review, including what the correct course of action should be where the internal reviewer and the public authority have different views on the correct response.
IPSA's experience with the extended appeals process is limited to one occasion, concerning the publication of images of receipts and invoices. We responded to a request for receipts with an extracted transcript of the receipt, which was overturned by an ICO decision notice. Our subsequent appeal provisionally addressed whether we had disclosed all the information we were required to, but took on a much wider question regarding the fundamental definition of information with an impact on all public authorities.

Although to be expected in part, the process took over three years (from the date of the request to the decision of the Court of Appeal). This meant it was an expensive, lengthy and drawn out process. Following this process, we would question whether the separation of the first and upper-tier tribunals, and the extension this adds to the process, sufficiently provides the intended oversight in a beneficial way.

Further, we would contend that tribunals specialising in information law could better serve requestors and public authorities than a tribunal within the General Regulatory Chamber, which can deal with cases as far-ranging as copyright licensing, microchipping dogs, estate agents and freedom of information.

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

As noted earlier, IPSA was established following the MPs' expenses scandal, itself uncovered through FOI. As such, there remains a comparatively high level of public interest in IPSA's work and the 'burden' imposed by the FOIA is, on the whole, a justifiable price to pay for openness, transparency and public confidence.

We do not believe there is an overwhelming benefit to introducing fees for making requests, which are likely to be regressive and reduce the universality of the existing rights of access – limiting the use of the FOIA to large organisations ready to incur such costs. We do not currently charge individuals for subject access requests made under the Data Protection Act, and tend towards the view that the administration costs incurred in requesting and processing such fees would outweigh the value.
As with most public authorities, we receive the occasional frivolous or potentially vexatious request, but we do not view these as so burdensome as to justify further controls. Similarly, we receive a large proportion of requests from a very small number of individuals, but the majority of these requests are the result of genuine public interest and constitute legitimate requests under the FOIA; existing regulations allow us to respond effectively to the very small minority of those that are not.

For a small organisation of around 50 people, we are able effectively to process and respond to the 170 requests we receive, on average, each year within the statutory time limit, and have consistently met deadlines for responding to requests for the last 32 months. As noted earlier, we are, in part, assisted by the large volume of information we actively publish under our publication scheme and are able to refer to in responses. In only a very small number of instances has the day-to-day work of IPSA staff been affected as a result of an FOI request, and following these instances we were able to review our handling of the request to ensure that future requests would not impose such a burden.

The current cost limit provides that public authorities need not comply with a request where the cost of determining, locating, retrieving and extracting information exceeds the appropriate limit. Our view tends towards the position that this limit provides an appropriate balance between the rights of requestors and any burden imposed on public authorities. If any extension to the cost limit were to be made, we would limit it to activities public authorities are required by legislation to carry out.

By way of illustration, following the recent Court of Appeal decision requiring us to disclose images of receipts and invoices submitted by MPs (rather than extractions of the information contained within the receipts), we now run the risk of incurring significant costs entailed in the process of protecting personal, sensitive or financial information contained within those documents (such as personal signatures, bank account details and home addresses), when making them public.

However, the costs incurred protecting this information cannot currently be included within the aforementioned calculations (as they do not constitute the determination, location, retrieving or extraction of information), despite the fact we are required by law to protect such information. As such, we would welcome consideration of the inclusion of the costs of redaction, where required by legislation such as the Data Protection Act, into the activities that can be taken into account when estimating the total cost of a request.

Similarly, the most burdensome requests we receive are those relating to large numbers of third-parties (primarily MPs) who, in the interests of fairness, we inform prior to disclosure. Although the decision as to the ultimate disclosure rests with us, third-parties will often make representations as to the amount, nature or accuracy of the information being disclosed, all of which require individual consideration. As such consultations are considered best practice when processing the data of third-parties under the Data Protection Act, we would invite consideration as to whether the time conducting such consultations could be included within the wider cost estimation.

Annex A
IPSA's Freedom of Information Statistics

Table 1. Requests received by financial year

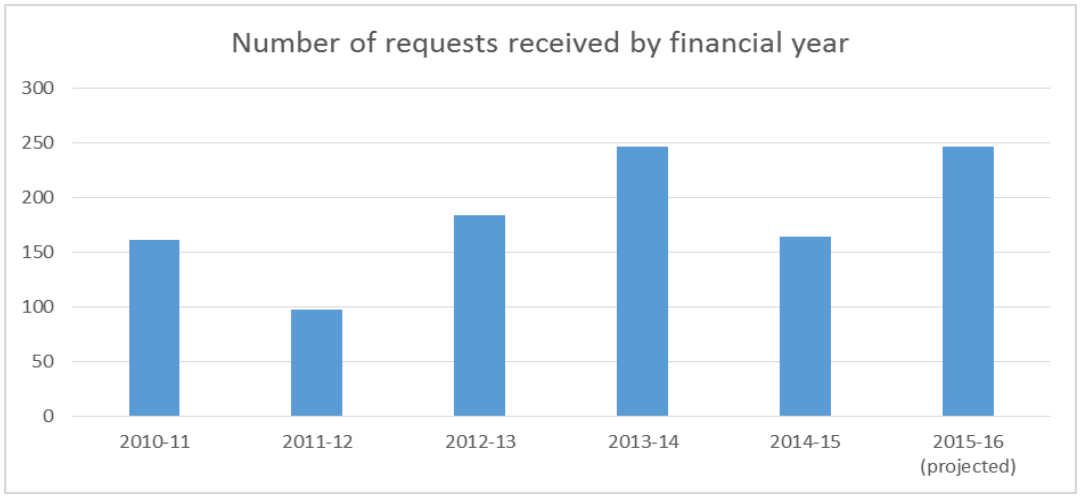
Number of requests received by financial year
300
250
200
150
100
50
0
2010-11
2011-12
2012-13
2013-14
2014-15
2015-16
(projected)

Table 2. Information requested by financial year

Request Category	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	Grand Total
ACCOMMODATION	5	8	31	16	8	6	74
CONNECTED PARTIES	1	2	4	3	4	6	20
CONTINGENCY FUNDING	1		1	3	1		6
COPIES OF RECEIPTS/INVOICES	8	3		17	7	45	80
CORRESPONDENCE	4	1	3	5	6	6	25
DEBT				1	7	6	14
GENERAL EXPENSES ENQUIRY	25	19	46	66	52	21	230
IPSA	83	25	26	58	22	18	239
MORTGAGE INTEREST	1		2	3	2		8
MPs' PAY AND PENSIONS	9	7	19	21	10	19	85
NOT IPSA'S REMIT	3	8	4	5	9	5	34
OFFICE COSTS	1	2	4	5	3	6	21
POLICY & SCHEME	2		1	4	2	2	11
RECALL		2		5	2		9
STAFFING	15	16	19	22	22	18	112
TRAVEL	2	4	6	2	4	4	22
UNDEROCCUPANCY PENALTY			17	9	1		27
WINDING UP	1		1	1	2	1	6

Table 3. Most commonly applied exemptions by financial year

Financial year	Cost limit	Section 21	Section 22	Section 31	Section 36	Section 40
2010-11	9	15	31	7	16	30
2011-12	5	17	11	6	2	18
2012-13	26	33	20	0	3	18
2013-14	20	59	35	12	6	29
2014-15	8	46	12	5	4	21
2015-16	19	35	12	14	4	27
Grand Total	87	206	124	44	35	146

Table 4. Disclosure of information by financial year

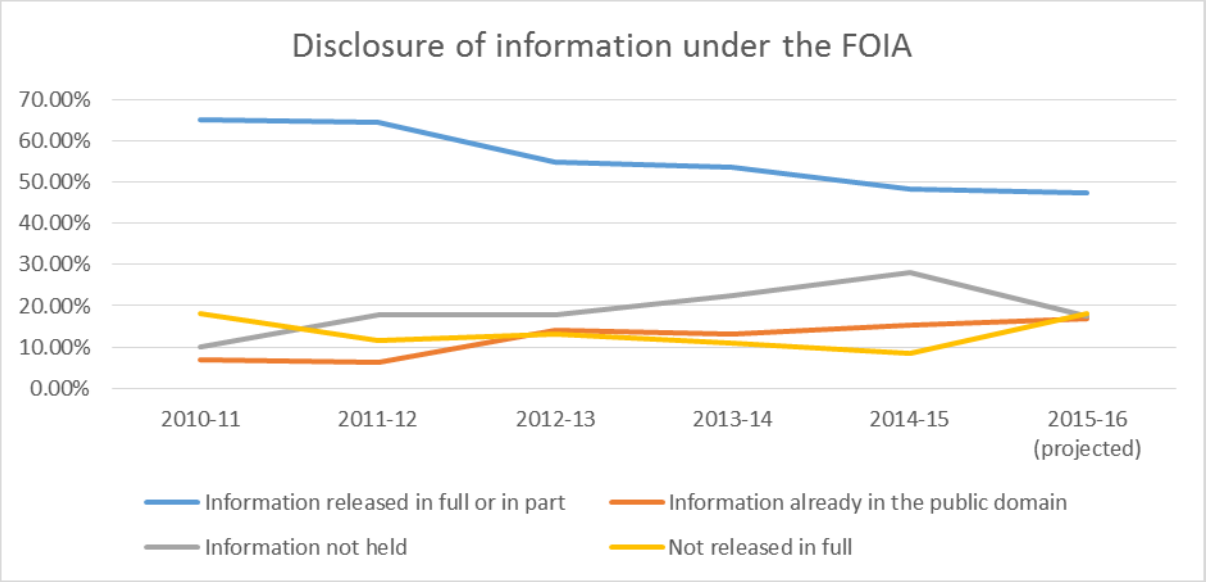

Table 5. Average response times to FOI requests by financial year

Financial year	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16
Average response time (working days)	21	14	16	12	12	13

Table 6. Requestors by financial year

Requestor	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	Grand Total
Councillor		1	1	1	1	1	5
Journalist	14	14	97	90	46	48	310
Member of the public	107	61	76	129	111	108	599
MEP	1						1
MP	32	5	5	7	3	5	57
MP Staff	1	11	1	2		1	16
MSP and their staff			1		1		2
Overseas			1	2			3
Political campaigner	6	5	2	15	2	1	31
Grand Total	**161**	**97**	**184**	**246**	**164**	**164**	**1024**

Independent Commission
on Freedom of Information

Information & Records Management Society (IRMS)

The Independent Commission on Freedom of Information's terms of reference require it to consider the implications for the Freedom of Information Act 2000 of the uncertainty around the Cabinet veto and the practical operation of the Act as it has developed over the last 10 years in respect of the deliberative space afforded to public authorities.
On the 9th October 2015 the Commission issued a call for evidence focusing on 6 main areas and posing 6 key questions.

The Information & Records Management Society (IRMS) is the foremost professional association for all information professionals, regardless of their professional or organisational status or qualifications. Formed in 1983 and with a clear commitment to inclusivity across the profession, IRMS now has over 100 members in the UK and territories world-wide and in all sectors of the business world - both public and private.

Our mission is to provide leadership in records and information management with the aims of:

- Championing the status of information and records management through representation, external liaison & promotion
- Supporting professional development through sharing knowledge and expertise;
- Promoting all aspects of good information and records management practice.

To do this, the Society supports and promotes activity across the profession- everything from Group Events to a podcast programme and publishing a professional 'journal' 6 times a year- as well as being active in advocacy for the profession and engaging in mutually-beneficial collaborations with other organisations for the benefit of both our membership and the wider profession.

The IRMS, after consulting with its membership, submits the following responses to the consultation for consideration by the commission.

Meic Pierce Owen *AMIRMS, FIIM*
Chair, IRMS

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?

There is support for the idea that there should be a degree of protection relating to information on internal deliberations within public bodies. It would appear that under the current legislative framework there are instances where requests for such information are being used for political purposes to disrupt normal public authority proceedings.

We are aware of instances where the presence of FoI has had a chilling effect and although s.36 offers some protection, it is open to wide interpretation as to when it is appropriate to rely upon this exemption, particularly given its public interest test, and requires the additional hurdle of a qualified person's involvement.

It is difficult to rely on FoI case law and ICO guidance as every project, consultation or planning application is different to apply either the standard guidance or the equally specific case law.
One member has commented that all public bodies have accountability to at least one supervisory body and therefore has suggested that s36 be made a prejudice based absolute exemption with the ICO having the power to recommend disclosure only. Alternatively public authorities could be required to provide a summary of the deliberative process rather than all information relating to it with the ICO having the authority to determine if the summary is fair and comprehensive and if that is not the case, to issue an alternative summary.

There is some merit in exploring a similar exemption to that in regulation 12(4)(e) in the Environmental Information Regulations 2004 for requests involving the disclosure of internal communications. Aligning the 2 would make compliance with both more manageable and put them both on the 'same page' with regards to the need for transparency in internal public authority deliberations.

It is also recommended that there is no particular period time after which the confidentiality of internal deliberation information expires. Once the matter has been resolved or closed then the public interest test should be applied and publication should depend on the level of prejudice that could arise from disclosure.

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?

Although there is a strong case for having a space within cabinet discussions where free and frank deliberations can occur that have a degree of protection from a qualified exemption and public interest test (before the matter is resolved), there is an equally strong case in transparency for at least some matters discussed at cabinet and so a process for disclosure should exist which no prejudice test but a public interest test.

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

There is a strong need in any enterprise for there to be in place a robust process to review any and all threats, opportunities and risks. There should therefore be a safe space where such discussions can occur and where accurate records taken of those discussion and the relevant outcomes with an assurance that such documentation is not to be disclosed. If such a space does not exist there is always the risk of either full and frank discussions not taking place, or of thorough records not being maintained.

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?

There are arguments for and against such a veto. For a veto to be required it implies that the existing exemptions have not worked for this type of information so it would need to be released unless a veto is applied.

We recommend therefore that instead of the executive retaining a wide ranging veto, a comprehensive review of the current range of exemptions be undertaken to ensure that they encompass (so far as possible) all types of sensitive information that should not (for whatever reason) by released immediately into the public domain.

If a veto is to remain, they should be used as an absolute last resort. Use of a veto gives the impression that either the exemptions are not comprehensive and therefore that the Act does not work or give the impression that the government has "something to hide".
If a judicial review exists then the power of veto can be held to account and so is not, therefore, necessarily final.

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

We recognise the importance of there being an appropriate method of seeking redress should an enquirer believe that their request has not been handled correctly.

The current escalating enforcement system works well and the work the ICO has undertaken in promotion, provision of guidance etc. is highly valued. However, engaging with the ICO and tribunals can require a great deal of resource. Given the hierarchy of the system, we would suggest that the lowest level (ICO) take a lighter touch.

It is suggested that a charge (say £100) for appeals to the First Tier Tribunal is introduced.

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

It is recognised that the Freedom of Information Act 2000 serves an important function in respect of promoting the transparency and accountability of public bodies. It continues to reshape how government operates and brings the public in more and more into how public authorities operate (which can only be a good thing). Section 46 of the FoIA (the Records Management Code) has helped improve government record keeping immensely and is very much seen as a positive step in effective records management within public authorities above and beyond its role in Freedom of Information.

All public authorities in one way or another are under budget constraints in the current climate of cuts to funding. In a fight for a highly restricted budget the core services of public authorities always take priority over a compliance function such as FoI.

This is especially relevant when a large number of authorities report that of the requests they receive there are too many fishing requests. These are requests, be they from commercial organisations or journalists, whose primary objective is to provide information on the off chance that it is 'interesting' Commercial organisations request information in relation to their own commercial benefit without any increase in the public's "right to know".

Occasionally journalistic requests may end up with an interesting bit of information which the public should know but these occasions tend to be few and far between and it can be argued that, especially by public authorities other than parliament and central government, the resources put in to responding to these requests cannot be justified with the end result. It has been suggested that a charge be introduced, possibly only applicable to commercial organisations but we are unsure how this would work. Small fees

are time consuming and expensive to process and may in fact be a cost rather than an income but they would put off the more frivolous of requesters. An alternative would be to create a hosted, national FoI request and publication system (akin to whatdotheyknow.com)

The fees regulations should be amended to make it easier to refuse requests for information on costs grounds. Consideration should be given to reducing the amount of time an authority needs to take in searching for, and compiling information and additional factors should be taken into account such as the time taken to consider exemptions and to redact information.

The structure of the Act shows its age: developed in an analogue world where the internet was in its infancy. The publication scheme is unwieldly and clumsy, as is the more recent datasets obligation. A smarter, more flexible approach to proactive publication would reduce the burden on public authorities.

It is suggested that very small public authorities (such as individual medical practitioners etc.) could be subject to revised proactive publication requirements but not the obligation to respond to requests. Finally we would like to add that one of the, perhaps unforeseen benefits of the FoIA is that it has created opportunities for the authority to help with its ever shrinking budgets and resources.

The Institute for Government

The Cabinet Office has recently established a Commission on Freedom of Information (FoI) to review aspects of the Freedom of Information Act. Gavin Freeguard outlines the Institute for Government's view.

Parliament and the political process

Transparency and openness are important for effective government, which the Freedom of Information Act (FOIA) plays a part in supporting. The Government recently established an independent commission to review the Act. The Commission's call for evidence expresses particular concern about changes in the legal interpretation of the ministerial veto – which allows the Cabinet to block the release of information – and its effect on a 'safe space' for policy development. But the Government's concern over the ministerial veto – a device used only seven times since 2005 – should not be allowed to bring the shutters down completely around a 'safe space' for policy making and implementation.

The background

In 1999, then-Home Secretary Jack Straw told the House of Commons, 'Unnecessary secrecy in Government and our public services has long been held to undermine good governance and public administration'. It was hoped the resulting Freedom of Information Act (2000) would 'transform the culture of government from one of secrecy to one of openness'; in doing so, 'it should raise public confidence in the processes of government, and enhance the quality of decision making by the Government'. The white paper that preceded the Act – Your Right to Know – began by saying that 'Unnecessary secrecy in government leads to arrogance in governance and defective decision-making'.
A more sceptical Straw is now one of the members of the Commission on FoI, established by the Cabinet Office to review the operation of the Act. The Commission – now taking evidence and planning to publish a final report in December – has prompted letters of concern from the Open Government Network and 140 press and civil society groups.

One of the main issues the Commission will examine as part of its review is the protection of government decision-making, and whether 'the Act adequately recognises the need for a "safe space" for policy development and implementation and frank advice'. Safe spaces are important, and ministers clearly benefit from being able to 'think the unthinkable'. But this argument can be overdone: for example, opening the policymaking process to others, has many advantages (as the Institute for Government has demonstrated).

The problem?

Is there a problem protecting such 'safe spaces'? Section 35 of the Act already provides an exemption for formulation of government policy, and Section 36 for 'Prejudice to effective conduct of public affairs', particularly collective responsibility. In the second quarter of 2015, these were the ninth and eleventh most-used exemptions by government departments in response to FOI requests. Cabinet members can also exercise a ministerial veto. The Commission's call for evidence notes government concern at a changed legal interpretation of the veto. But the veto has only been used seven times since 2005.
If the Government does want to strengthen its protection of 'safe space', it will need to present convincing evidence that preserving the status quo is damaging. The Justice Select Committee examined this issue in 2012, finding it was difficult to assess whether the Act had had the alleged 'chilling effect' on government policy. Some in policymaking had suggested it was a problem, but research by the Constitution Unit found only a 'marginal effect'.

Given the value of 'increased openness' brought about by the Act, the Justice Select Committee concluded it was 'cautious about restricting the rights conferred in the Act in the absence of more substantial evidence' – in other words, it would need compelling evidence to recommend changes and there was none. In its response, the Coalition Government agreed: it felt 'that the legal framework of the FOIA, through both the exemptions and the availability of the veto, offers sufficient protection' for Cabinet records and safe space.

The way forward

Technological advance and concerted Government efforts mean that the UK Government is more open than ever. Ministers rightly point to the UK's high international standing on open data and its position at the top of international indices, as we reported earlier. But it would be wrong to assume open data can replace FoI. The two may be complementary (witness TfL's analysis of FoI requests to work out what open data to publish) but they are different: open data is proactively published at government's behest, FOI disclosures are reactively in response to requests. The latter is particularly important, given the lack of any statutory right to data or legal underpinning of the open data regime.

If the Commission ends up recommending restrictions to the Act, it will need to present compelling evidence that 'safe spaces' are being threatened to the extent that effective government is imperilled. Its recommendations will need to be clearly proportionate to those threats, taking into account the opposing evidence that excessive secrecy itself undermines effective government.

If the Government ends up accepting any recommendations to restrict the Act, its actions need to be placed within a much wider discussion about openness and transparency. As it stands, the Commission has such a narrow remit that, as Ben Worthy points out, it 'tilts all discussion naturally towards the two issues of damage and costs, rather than any more equal cost-benefit analysis'.

There is no consideration, for example, of whether to extend the Act to private providers of public services. The Institute for Government has drafted a standard contract clause to get some key data released, and we believe there is a legitimate debate to be had about private providers being subject to the same FoI rules as public ones (which may be happening). While the Commission is unfortunately constrained by its remit, any Government response is not.

'The climate of public opinion has changed: people expect much greater openness and accountability from government than they used to.' Those words resonate more now than they did when first published as part of Your Right to Know in 1998. We are still in the relatively early stages of assessing how best to govern in a more open age. As with the digital revolution, this could fundamentally alter the relationship between government and governed, and how government operates. The public and civil society have already become used to greater openness; they are unlikely to tolerate the diffusion of the 'disinfecting sunlight' already shining on government.

ITN

ITN welcomes the Independent Commission on Freedom of Information's call for evidence on this important and relatively new democratic right. ITN is the UK's biggest independent producer of commercial broadcast news. We believe we are unique worldwide as a company that provides fully-formed and distinct news programming for all three Public Service Broadcasters – ITV, Channel 4 and Channel 5. ITN also makes investigative programming through our ITN Productions unit. As an organisation, through our news and current affairs output, ITN has on many occasions reported important stories that have had significant public, institutional and even legislative impact. Below we have detailed specific examples of some recent investigations that would not have been uncovered without Freedom of Information (FOI).

Summary

Since the Freedom of Information Act was implemented in 2005, FOI has become an integral part of journalistic practice in the UK as a means of accessing information that would be otherwise unavailable. On many occasions information which is in the public interest has been brought to light through the use of FOI which has resulted in organisational and even legislative change.

There is widespread concern amongst the media that the Commission is the precursor to a move by the Government to weaken FOI by adding new restrictions on the release of information, strengthening the ministerial veto and adding new fees. As such, ITN is a signatory to the Media Lawyer Association's (MLA) response to this call for evidence and we echo the legal arguments made by the MLA and refer the Commission to that response.
However, it was felt important to submit evidence specific to ITN in order to demonstrate the impact that FOI has had on our ability to produce high quality journalism in the public interest. The following submission therefore focuses upon ITN's direct experience with FOI and details our position related to any proposed changes which could make it more difficult for journalists to access information that should be publicly available.

It is extremely concerning to hear the Leader of the House of Commons Chris Grayling describe the utilisation of the Freedom of Information Act by media as a "misuse" of this legislation. Mr Grayling has said it should be used for "those who want to understand why and how government is taking decisions" and indicated that journalists who use this law to "generate stories" are somehow subverting the Act's original intention.

However, ITN would argue strongly that FOI is one of the most effective tools to hold government and other public sector organisations to account. Media plays a fundamental role in our democratic process to bring wrong-doing, mismanagement and even chronic inefficiencies to light. Restricting media ability to access information would be a direct infringement of this democratic process.

There is no doubt that in many cases information can only be found through FOI requests. Making these requests to, for example, hundreds of councils or NHS trusts is extremely time-consuming for journalists. Investigations must be extremely focused in order to generate meaningful data that can illuminate an issue which was previously impenetrable.

ITN understands that the government is concerned about the cost and time spent responding to FOI requests. However, we would argue that the benefit to the public interest of bringing important issues to light strongly outweighs other costs. Levying a charge for individual FOI requests would render them untenable for media organisations, for both logistical reasons and because they operate on lean budgets, as it is necessary to often make hundreds of requests for just one investigation in order to get a comprehensive picture.

The Commission specifically asks whether the burden imposed on public authorities under the Act is justified by the public interest in the public's right to know. It is our contention that the current FOI Act should not be changed to restrict the flow of information to the general public. There are already absolute and qualified exemptions by which institutions can claim that information should not be passed on. There is also already a cost limit as to what can be asked for, measured in how much time it takes to search for, find, and retrieve information. Making it more difficult to access information could lead to the unintended

consequences of a chilling effect on journalism – preventing the public from being made aware of issues that are in the public interest and stifling the democratic process. There are, in fact, areas where the reach of the FOI Act could be expanded as set out in the MLA submission already referred to. For example, this could include private companies with a public service remit.

ITN EXAMPLES OF FOI INVESTIGATIONS GENERATING PUBLIC INTEREST JOURNALISM

CHANNEL 4 NEWS:

Channel 4 News has revealed a number of public interest stories through the Freedom of Information (FOI) Act, and routinely uses FOI to obtain material to support investigations.
Ben de Pear, Editor, Channel 4 News:

"FOI has brought a revolution in transparency giving us all access to the data and decisions that govern our lives and is a crucial mechanism which helps to hold power to account in an open society. At Channel 4 News we've used it to expose the issues faced by some of the most vulnerable and voiceless - not least revealing more than 6,000 children from every corner of Britain at risk of sexual exploitation, and more than 13,000 children, including babies have disappeared from children's homes.

"It's revealed critical ambulance shortages, A&Es in meltdown, and transplants from high-risk donors the bedrock of important stories we have featured on our programme - and information that literally could mean life or death. The best of journalism shines a torch in dark corners; FOI is a floodlight and long may it shine bright."

Children at risk of sexual exploitation

In October 2014, Channel 4 News used FOI to reveal for the first time the full scale of child sexual exploitation (CSE) in Britain. Figures, obtained from councils under FOI showed more than 6,000 children were recorded as at risk of CSE. This was the first time a national figure had been compiled, and showed that the issue affected almost every area of the country.
The data obtained also revealed that the number of children referred to by councils as at risk of CSE in the first six months of 2013 was similar to the numbers referred
during the full previous year. This demonstrated the growing problems faced by authorities in protecting children from abuse.

The issue was demonstrably in the public interest. Our research followed a number of scandals in which children in care were targeted by paedophile gangs. Much of the national debate was confined to the handful of towns where the issue had received prominence, and no national figures were available. The data we obtained under FOI gave a full picture of a serious issue for the first time.

Channel 4 News' figures were covered by other national media outlets, and have been cited in a number of debates, and by charities and campaign groups as evidence of the importance of greater steps to protect children from abuse. We were also contacted directly by a number of care professionals asking if they could access and share our data in their work.

The process of putting in FOI request to more than 150 top-tier councils is always difficult. Many councils now ask for individual web forms to be completed, preventing you from bulk sending requests. Some now refuse to accept FOI requests unless they are addressed solely to that one council, rather than bulk send lists. It's important to be able to build up national pictures, especially in the absence of figures from a national body. Any introduction of a charge per FOI request, even a small charge, would make important national surveys like this using FOI unfeasible.

Thousands of Looked After Children go missing from children's homes

Last year we revealed that children went missing from care on 24,320 separate occasions in just two years. That included babies and toddlers going missing from children's homes for more than a week. This was a public interest investigation that shone a light on an issue that is vastly under-reported by most media, and was only possible through using the Freedom of Information Act.

Cases of child sexual exploitation in Rotherham dominated the headlines in 2014. Many of the victims were Looked After Children in council care, who were routinely going missing. No data existed on episodes of children going missing from care homes. We sent FOI requests to every top-tier council in the UK asking on how many separate occasions children had gone missing from care, how long they had gone missing for, and what ages the children were, between January 2012 and December 2013.

The scale of the problem was staggering. There were 992 cases of children absent for at least five days, 34 missing for at least six months, and eight for more than a year. While the vast majority were teenagers, those who disappeared included six toddlers and dozens of children aged four to nine.

Children's homes are not given a lot of focus in the mainstream media. The experts we have spoken to throughout our investigations all claim that the lack of focus is because children in care are voiceless. They are among the most vulnerable people in society, and the people looking out for them - social workers - are under-resourced. We have been told by many in the profession since our story that it highlighted issues they have been trying to expose for some time. We were able to do it relatively simply but only through FOI.

This investigation would not have been possible if fees were introduced for FOI. Not because of the cost, but because of the logistical process of going through a secure payment site more than 150 times would take too much time.

NHS winter care crisis

In July, C4 News used FOI to reveal the scale of problems that led to a crisis in NHS care over the winter of 2014/15, and its knock-on-effects. We obtained data showing ambulance delays of over an hour waiting to off-load patients at accident and emergency departments, known as 'black breaches'. The information we obtained showed how over-stretched hospitals were unable to admit patients, forcing ambulance crews to wait with them outside.
This ties up ambulances and prevents them from reaching further emergency 999 calls, putting patients at risk. Under FOI, we also obtained copies of emails and letters between ambulance trusts and hospitals, revealing ambulance bosses had warned that patients' lives were being put at risk. In addition, another C4 News FOI request found over-stretched ambulance trusts had been forced to use taxis to ferry patients to hospital, even in emergency cases.

The material obtained under FOI formed the basis for a series of packages looking at the state of the NHS and ambulance services. The packages provided national figures showing the scale of the problems faced by ambulance trusts as the NHS struggled with increasing patient numbers and seasonal demand.

Ongoing use of FOI

In many situations, using FOI has become more difficult. Delays by public authorities in responding to FOI request are common, with repeated requests for time extensions. Many authorities routinely use exemptions for information, forcing us to appeal, and prolonging the process by months. It has become a lengthy and time-consuming process, but remains one of the only ways to obtain important information.

ITV NEWS:

Geoff Hill, Editor of ITV News:

"The Freedom of Information Act is an invaluable resource which enables us to investigate, to scrutinise and to hold authorities to account. The intention is not to generate headlines, but to inform and bring truth to the British public about the biggest issues affecting their lives, from healthcare and education to criminal justice.

"In recent months ITV News used FOI to investigate the mismanagement of child exploitation cases by police forces and to examine how an increasing number of self-harming primary school children were arriving at A&E because results revealed that crisis care lines were not being manned 24/7, despite it being mandatory.

“It’s crucial that journalists can continue to use FOI in this way, without unnecessary restriction, so we can continue do the job our audience expects. Far from being curbed, there is an argument that FOI should be extended to cover the areas of Government activity currently contracted to the private sector, where journalists often come up against a brick wall.”

Mental health 24-hour phone lines (May 2015)

In May, ITV News sent out FOI requests to all mental health trusts in England. We wanted to use our FOIs to collect data on the staffing levels of mental health crisis support services. We were hearing anecdotally that 24 hour support lines were not
being adequately staffed and were failing to provide crucial support to mental health patients in a crisis but we needed the evidence to back it up.

Our results revealed around a third of the crisis care lines were not being manned 24 hours a day despite it being mandatory and that people who rely on this service in a crisis were failing to get the vital help they needed.

These support services are supposed to be a direct line to patients who are feeling suicidal and desperate and our data revealed many areas have only an answer phone service during certain times because they don't have enough staff or resources to run them full time.

Our figures also revealed that because of the failure to provide a full service, many patients were forced to go to their local A&E, putting further pressure on the emergency departments. Patients who needed urgent help were also being put at risk because they were falling through the system and not getting the right type of care they needed from trained staff.

The charity Mind praised our work and said our figures highlighted a serious problem within the service and showed the system was seriously failing patients who were receiving inadequate care.

The Chief Executive of Mind, Paul Farmer, warned that patients' lives were being put at risk and many services weren't fit for purpose. We will repeat the FOI in approximately six months to assess if there have been any changes/improvements.

London Tube Driver Sickness (September 2015):

In September, ITV News London did an FOI on London tube driver sickness and the number of days a year taken off by drivers. The health and wellbeing of staff is a major issue that the unions are highlighting in their ongoing dispute with TFL ahead of the night tube starting. It has now been delayed beyond its launch and there is a threat of future industrial action. The figures allowed us to compare the sickness rate for tube drivers to the London average. It revealed that they take four times the number of days off - on average 14 days a year, compared to 3.5 days for other workers in the Capital. The figures also showed that drivers report in sick on average more than a thousand times a week. This prompted calls for driverless trains in the future as well as unions claiming their members had strict guidelines for working while on medication. The figures were also widely picked up by other media.

The Diversity Deficit (December 2014)

The ITV Tonight programme held the civil service to account on their record on diversity among their staff. By asking about levels of diversity among senior civil servants, we were able to challenge the government on their record in this important area. We found that nearly a quarter have no ethnic minority staff at senior levels, just five departments reflect
the ethnic diversity of our population and nearly a third of departments did not hold ethnic diversity information on their senior staff. This was happening at a time when the government was challenging the private sector to do better at representing the diversity of our country. The programme used the information from our request to challenge civil service diversity champion Richard Heaton who acknowledged the services failure to convert junior staff from minority backgrounds into staff at the top echelons of the civil service. This showed how important FOIs can be in holding government to account.

5 NEWS:

5 News prides itself on unique investigations that tackle issues that directly impact upon viewers. FOI has provided a means of unearthing significant stories that speak to the audience. In December last year 5 News did a special NHS investigation week which used FOI to raise the following issues.

Cristina Nicolotti Squires, Editor, 5 News:

“Freedom of Information requests are an important tool that we use to reveal the truth of what is going on in the public organisations that our viewers, through their taxes, fund. Through their judicious use we have uncovered the true extent of "bed blocking" in NHS hospitals that is caused by cuts in social care budgets and the cost to hospitals of too many people arriving at ANE because they can't get a doctor’s appointment. The government professes to want to put more focus on mental health but FOI results reported on 5 News showed that almost half of the healthcare commissioning groups that responded to us have frozen or cut their mental health funding.

“FOIs are a hugely important way that news organisations, especially those on small budgets, can shine a light on those bodies that are not particularly open about their processes and their results. Any changes or restrictions on them would restrict the ability of the press to do its job - which is to challenge the power of the establishment.”

NHS crisis (December 2014 and ongoing)

In December last year 5 News featured a special NHS investigation week which used FOI requests to reveal the extent of the crisis hitting the health service. Although our reports focused on the imminent winter pressures, our FOI requests allowed us to show how the NHS was already facing unprecedented challenges.

A request on bed-blocking revealed the return of a phenomenon which many people believed to be part of the past. In one case, the data showed a patient who had spent an entire year from September 2013 until the following September due to delays in their ‘transfer of care’. Their example, although extreme, was part of a picture which highlighted the gap between health and social care and the financial impact of cuts to local government services on the NHS.

Although NHS funding had been protected by the coalition government, we felt the financial pressures on the NHS would be an important story in the run-up to the election. An FOI allowed us to see the impact of increasing patient demand. We found that NHS hospitals have lost hundreds of millions of pounds because their A&E departments are getting busier. Under what is known as the medical emergency tariff, hospitals are penalised for every A&E admission above their 2008 level. Our FOI requests revealed that, since 2010, the medical emergency tariff has led to a loss of revenue of £641 million across the 80 Acute NHS Trusts who responded. The calls for proper funding were heeded by politicians, as all the main parties pledged to increase NHS spending.

Following the Mid Staffs scandal, recommendations were made about minimum safe staffing levels. In another of our reports, a Freedom of Information request showed dozens of complaints are made every day about staffing levels in the NHS. Across the 68 Acute NHS trusts that responded, an average of 33 complaints were made per day between April and September 2014. One trust, the Hinchingbrooke Heath Care Trust, received more than 1000 staffing related complaints in this period.

Child & Young Adult Mental Health Services (July 2015):

Mental health provision has been a major line of investigation for 5 News in 2015. As part of an FOI request, we revealed that almost half of healthcare commissioning groups have frozen or slashed their children’s mental health service budgets. This is happening despite NHS England guidance to the Clinical Commissioning Groups (CCGs) instructing an increase in mental health spending and a series of high profile campaigns to improve the funding for services. Of the CCGs who responded to a 5 News Freedom of Information request, 46% said they have cut or frozen their projected budget for Child and Adolescent Mental Health Services (CAMHS) for this financial year.

As a result of this FOI we were contacted by a number of viewers who had experienced real difficulties in obtaining appropriate treatment in a timely fashion. We were able to feature their stories to highlight the human cost when money is cut from services. This in turn led to another investigation into the distances young people were being forced to travel for treatment and also the families who were traveling many miles to visit teenagers who were being treated as inpatients.

Ambulance Staff Stress (March 2015):

In March – we looked at another aspect of the increase in demand on the NHS – stress. An FOI request allowed us to show how the ambulance service in England was under pressure. The data revealed a major rise in the number of days taken off work by frontline staff, paramedics and ambulance technicians took 40 per cent more days off for stress-related illnesses in 2014 than in the previous year. But we also saw how there'd been an increase in the total number of people taking sick leave which had gone up by more than a quarter. The College of Paramedics said the figures were a warning of a real danger to frontline ambulance service and that there was no solution in sight.

We will return to this story, and more FOIs will allow us to compare progress over this time. With a tough winter ahead, limits on spending and more demand than ever, updating the data from these FOIs will help us to pinpoint what's improving and what isn't across the health service.

ITN PRODUCTIONS:

ITN Productions has a contract to produce a number of Dispatches programmes for Channel 4 every year, as well as producing current affairs programming for a variety of national and international channels.

Chris Shaw, Editorial Director, ITN Productions:

"The Freedom of Information Act is the crucial safeguard of public service accountability – without it journalists would have no real leverage to secure vital information of public interest.
"As for the so called "misuse" of FOI requests, there are already rules in place to prevent unjustifiable 'nuisance' inquiries. I fear any undue tightening of these rules can only harm this vital freedom to know what our public servants and public institution are doing with our money."

Dispatches 'Amanda Holden: Exposing Hospital Heartache'

The team behind this Channel 4 Dispatches investigation spent months forensically working through a mass of data accessed via Freedom of Information Requests. This painstaking work led to the explosive revelations that the remains of thousands
"clinical waste" and others burned in "waste-to-energy" power plants used to heat hospitals.

One mother, who features in the programme, was left devastated when she suffered a miscarriage and was later told her baby would be "*incinerated with the rest of the day's waste….that was really difficult to hear because to me it wasn't waste, it was my baby*."
The scale of this story was significant, in total Dispatches found 27 hospital trusts disposed of foetal material under 24 weeks gestation from miscarriages. The investigation made national headlines but, more importantly, the findings had real impact prompting a question in the House of Lords and forcing the government to act before the programme was even broadcast. Department for Health minister for maternity, midwifery and nursing, Dr Dan Poulter told Dispatches: *"It is completely unacceptable for human tissue and human remains to be considered in any way waste".* Following this, Dr Poulter instructed all NHS trusts to stop the incineration of foetal remains. The human tissue authority also revised their codes and guidance on this issue, as a result of this film, making it clear this practice was not permitted. Another related FOI asking for details of stored foetal remains led to Walsall Hospital finding they had mistakenly stored 86 foetuses for up to three years, a fact that would not have been discovered without FOI.

The evidence gathered through FOI was handed to the Department of Health to help with policy decisions. It is now stored in the House of Commons Library (Deposit Reference DEP2014-0569), and can be found here: http://data.parliament.uk/DepositedPapers/Files/DEP2014-0569/PQ194504_-_Library_Doc_-_Report.pdf. This information was only available through FOI. If a fee was introduced, it

would logistically not have been possible to administer the process of going through all the secure payment sites for every NHS Trust. Thus, without FOI in its current state, this practice would still be going on.

CONCLUSION:

Two arguments put forward by those looking to restrict FOI use are that it is used without merit, and that it is expensive.

Firstly, ITN and many other media organisations can point to many public interest stories that were only revealed thanks to FOI (not least MPs' expenses). Examples of these have already been detailed in this submission. The importance of bringing these stories into the public domain should not be underplayed or dismissed.

Secondly, the Government's own figures show FOI is not a large financial burden, and in many cases much lower than the amount of money spent upon on PR and publicity officers. A Press Gazette investigation found that total yearly FOI spend is less than £6m. It represents around 0.001 per cent of the £577.4bn the central Government is due to spend in the 2015 fiscal year (figure from UKpublicspending.co.uk).
http://www.pressgazette.co.uk/cost-central-government-complying-foi-50-times-less-external-comms-budget

When considering the cost posed by FOI requests it should be remembered that FOI deters wasteful spending. In many cases it is key to demonstrating unjustified spending and discouraging authorities from repeating that kind of expenditure.
We support the Justice Select Committee's conclusion during its post-legislative scrutiny exercise of the Act in 2012 which found that FOI had 'contributed to a
culture of greater openness across public authorities, particularly at central Government level' and that it 'is a significant enhancement to our democracy… it gives the public, the media and other parties a right to access information about the way public institutions… are governed'.

The UK media operates within and as part of the democratic process and it is vital that it is allowed to continue to play its role without being hampered by overly strict legislation which aims only at reducing transparency and public openness. The FOI Act was a step forward in the openness and transparency of government in the UK. To rescind or restrict this legislation now would be a retrograde step away from the principles of democracy.
(ends)

About ITN:
ITN is the UK's biggest independent producer of commercial broadcast news. We believe we are unique worldwide as a company that provides fully-formed and distinct news programming for three separate Public Service Broadcasters – ITV, Channel 4 and Channel 5.

Our high-quality journalism has won a string of accolades from national and international industry bodies. In the last year alone our programmes have triumphed at the International Emmys, Baftas, Peabody, Grierson and Amnesty Awards, not to mention a landslide eight Royal Television Society awards in February 2015.

ITN believes high quality, independent provision from multiple sources is essential to a pluralistic news environment in delivering choice and alternative viewpoints that form part of our democratic process, and this should be protected at all costs.

ITN has diversified its business and broadened the range of our activities into profit-generating commercial enterprises alongside our core news contracts.

ITN Productions is the creative and commercial arm of ITN and is one of the cornerstones of the business. In addition to broadcast programming we make television commercials, branded content,

corporate filmmaking, digital and broadcast sports production. Our broadcast output ranges from current affairs programmes, factual entertainment and popular factual programmes to fast-turnaround factual.

ITN's footage licensing division ITN Source licenses archive content to a global customer base. ITN Source represents archive footage collections from ITN, Reuters, ITV Studios, Fox Movietone and many others. Our on-the-day syndication business provides news footage to TV channels around the world.

Independent Commission
on Freedom of Information

John Dwyer, Police and Crime Commissioner for Cheshire

Dear Sir/Madam

INDEPENDENT COMMISSION ON FREEDOM OF INFORMATION: CALL FOR EVIDENCE

Thank you for the opportunity to contribute to the Independent Commission's call for evidence on the review of the Freedom of Information Act 2000. I welcome the establishment of the review following ten years of the Act's operation and my comments are set out below.

Deliberative Space

Whilst I fully accept the need for openness and transparency in the public sector, as elected representatives with executive powers it is important that Police and Crime Commissioners, like Government Ministers, have a protected deliberative space in which to have open and frank dialogue when formulating policy.

To ensure the highest standards of good governance within policing, it is crucial that officials are able to provide Police and Crime Commissioners with full and frank advice about the impact and risks associated with proposed policies and decisions. This advice should be provided without fear that it will have to be disclosed if a freedom of information request is made.

I would welcome the strengthening of the exemption regarding the effective conduct of public affairs and would support this being amended to a prejudice based absolute exemption. I would also support restricting the power of the appellate body to making a recommendation regarding the disclosure of advice to elected officials, rather than being able to impose a binding decision.

I accept that once a decision has been taken the public interest in protecting the deliberative space reduces and documents containing advice may no longer be protected. However, the length of time this information remains sensitive should not be subject to a arbitrary time limit. The information must be considered on a case by case basis with public authorities required to provide an explanation of why the information is being withheld, provided this in itself does not require the disclosure of exempt information.

Risk Assessments

Similarly, I consider that the disclosure of risk assessments and registers under Freedom of Information should be avoided or, as the Government has argued, they will be drafted as public documents and become anodyne with limited value in the strategic management of organisations.

Enforcement and Appeals

Whilst my office has little direct experience of the appeals system, I consider the current multi-layered appeals system is unnecessarily lengthy, bureaucratic and costly. In a time of reducing public sector expenditure the appeals system is in need of review. I would support further exploration of the models operating in other countries to bring forward proposals for a streamlined appeals system.

Burden on Public Authorities

The burden placed on public authorities by the Freedom of Information Act is substantial and in my view excusive, and its impact must not be under-estimated. The number of requests received in my Office and by Cheshire Constabulary continues to increase year on year, whilst the police budget has been reduced over this period.

Responding to FOI requests is not simply a back office function; it often requires input from frontline officers who are required to provide information or advice in relation to a request. This diverts resources

away from policing services that keep our communities safe from harm. The use of the Act by the press has increased significantly and, in many cases, the press would be better contacting the organisation's communications department to gain a better insight into the issue they are interested in.

I would welcome changes to the existing legislation to permit the time taken to read, redact and consider the information relating to a request to count towards the fee limit. This would provide a more accurate reflection of the overall time spent by a pubic authority in dealing with a request.

To help prevent the Act being misused, I consider that further guidance should be issued outlining the circumstances in which it may be appropriate for public authorities to utilise Section 14 of the Act regarding vexatious requests.

The introduction of a fee for making information requests should also be given further consideration. In my view, a system which requires a set national fee to be paid at the time a request is submitted would provide the simplest and fairest mechanism. Careful consideration to the level of fee would be required to ensure it does not prevent legitimate requests being made, but acts as a deterrent to those considering misusing the Act.

Yours sincerely

John Dwyer
Police & Crime Commissioner

Johnston Press

Introduction: Johnston Press

Johnston Press is one of the largest regional publishing groups in the UK.
Our portfolio encompasses 13 daily, 154 weekly paid-for and 37 weekly free newspapers, a number of glossy monthly lifestyle magazines, smaller specialist local publications, 215 local, e-commerce and mobile websites, and 31 tablet and Smartphone apps.

Our brands have a long history of serving local communities including some of the oldest and longest established newspaper titles in existence.

The Belfast News Letter, our daily title in Northern Ireland is the oldest English language general daily newspaper still in publication in the world, having first been printed in 1737. The Rutland and Stamford Mercury is Britain's oldest continuously published newspaper title - since 1712.

Johnston Press titles serve local audiences from Stornoway to Sussex, covering every aspect of local life in the UK, bringing a trusted and professional voice to newsgathering on issues at the heart of our communities.

The Freedom of Information Act and Johnston Press

Since its introduction in 2005, the Freedom of Information Act has become a critical tool used by local reporters across the Johnston Press group. Our newspapers are non-partisan and objective.

Their role is to report, investigate, entertain and inform readers on issues which matter to them – often stories and features which are not covered by any other media.

Requests made under the Freedom of Information Act have become commonplace in the daily work of Johnston Press local reporters in their dealings with local authorities and central government.
These requests are made to seek information, shed light on hidden issues, expose inconsistencies and to provoke debate.

The Act has led to the strengthening of the local press's role in calling authorities and politicians to account – and by giving the public access to the information in our stories, it has strengthened the democratic process.
It would be impossible to list all of the stories written in Johnston Press as a result of the FOI Act since 2005, or even just in 2015. The appendix to this document shows a selection of stories covered by just some of our titles.

This selection is intended to give the Commission an understanding of the breadth of subject matter covered by the group and stories uncovered by FOI requests.

If the Act were not in place, many of these stories would have required huge resources and many months of time to reveal.

Many would simply have never been written at all. Here are some examples:

- The Yorkshire Post learned, through an FOI request, that police officers suspended on full pay for more than a year had been paid more than £20million across the UK. The spending in West Yorkshire was at the highest level, prompting serious debate over how long it takes to investigate misconduct allegations.
- The paper also used an FOI request to inform readers how senior fire officers were paid tens of thousands of pounds for working during a strike – information that was not made publicly available.

- In Edinburgh, the Evening News used FOI requests while reporting on the long- running tram scandal, to reveal the identity of a mediator called in to sort out routes.
- The Scarborough Evening New showed how police were not making public details of more than 130 crimes a week – including serious matters such as rape and kidnap - information which was only giving a public airing due to an FOI request.

- The Sheffield Star showed how one person a week is injured in gun-related incidents in South Yorkshire in a shocking report which came to light because of FOI requests by Star reporters.

- The Derry Journal highlighted inadequacies in Northern Ireland's health services by revealing the numbers of young children with complex mental health needs who had to be relocated outside of the province.

Much has made recently about flippant or puerile uses of the Act.
We see this argument as a distraction - all of the stories mentioned above and those outlined in the appendix are by any definition part of the public interest.
They were created by reporters who have a very close relationship with their communities and avidly read by audiences who have established trusted relation- ships with our products.

We have also witnessed changes in behaviour by local authorities since the introduction of the act.
There is a greater understanding of the responsibility to provide detailed answers by the gatekeepers of public information, the press officers and marketing assistants of local authorities because of the existence of the act and the likely recourse to make requests by reporters. There has been a noticeable change in behaviour by press officers for local authorities and the police - liaising with and guiding the local press through the questioning process to reach clearer outcomes.
Indeed some information is now regularly published without request – such as the annual Food Hygiene Standards ratings compiled and released by councils.

Changes to the Freedom of Information Act: Our concerns

Deliberative Space

We are concerned at the Commission's intention to explore restrictions on the openness of information relating to the internal deliberations of public bodies. Whilst clearly some matters are confidential, we are concerned this will have a detrimental effect on our ability to report on the background to public decisions, particularly if the public interest is seen to be outweighed by the 'chilling effect' on internal debate.

Charges

We feel the introduction of FOI request charges would directly inhibit the scrutiny of public authorities by the local press.

Many investigations published by our newspapers do not come about after a single request, but after a series of requests.

Charges would pose a considerable burden on local papers and websites given the volume of requests made annually and our constant need to be conscious of costs. The pressure on costs and resources is particularly acute for the local news media industry at this time.

This pressure has been recognised by the Department of Culture and the Chancellor of the Exchequer, who are exploring ways of supporting the local press in their role of enabling democratic debate.

We feel this reduction of investigation would enable public authorities to conceal information and hide mistakes, which would have a detrimental effect on our readers. This would go against the clearly stated intentions of the government to preserve democratic scrutiny.

Cost limits
The Commission's consultation document describes the need to avoid a 'disproportionate burden' on authorities in responding to FOI requests.

There are already reasonable upper limits on the cost of finding requested information and the recent decision by the Appeal Court on the refusal of 'vexatious' requests addressed the issue of public interest.

We are concerned the introduction of further cost limits and restrictions will enable authorities to refuse requests more easily purely on the basis of cost – regardless of how important the information is to the public.

Tribunal fees
Plans to introduce a charge to appeal to the first-tier tribunal against an Information Commissioner decision and the introduction of a charge for an oral hearing also concern us.
This cost, like the potential request cost, will we believe, lead to less challenge of the Commissioner's decisions and have a detrimental effect to availability of information.

Strengthening the act

We are concerned the case for strengthening the Freedom of Information Act has not been set out as part of the Commission's remit.
There are numerous issues concerning enforcement of the Act, time limits for responses, the extension of the public interest test and allowing requesters actual copies of documents (rather than just the information in them).

These have been publicly debated on many occasions in the ten years since the FOI Act became effective.

However the Commission has not been given this scope under the terms of reference provided by the Cabinet Office and we feel this should form part of any future review of the effectiveness and remit of the Act.

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Kent County Council

1. Deliberative space

1.1 Kent County Council fully supports the following statement.

"The value of internal, deliberative space is that it allows for an honest appraisal of the full range of options, with proper consideration of risks. It provides a free space in which it is possible to think imaginatively without fear that comments or suggestions will be taken out of context or treated as concrete decisions. Participants can query and challenge all of the options before reaching a rational decision in an open and constructive way. If the details of that deliberation become public quickly it may make participants more cautious about challenges or expressing alternative views. It may also put those who have suggested an alternative view in a difficult position at the point at which they are defending the organisation's collective decision."

1.2 However, since 2005, Kent County Council has only relied on section 36 to withhold information on 42 occasions, mainly because the existing prejudice based qualified exemption is difficult to apply. Given that we have received 15495 requests to date, this is a very small percentage (0.3%).

1.3 Our opinion is that section 36 should be easier to invoke; for example the exemption does not necessarily require the authority of the qualified person, but by the same token, should not be an absolute exemption which could encourage overuse and exploitation

1.4 There should be more "plain English" guidance on the interpretation and application of section 36, perhaps with more examples of how this exemption can be used fairly and effectively without compromising public accountability.

1.5 Kent County Council publishes all decisions on its website together with background papers and reports http://www.kent.gov.uk/about-the-council/how-the-council-works/committees-and-meetings so with regard to the length of time that the information remains sensitive after section 36 has been invoked, in theory, the withheld deliberations and discussions could be released as soon as the action that they relate to has been ratified. This assumes of course that due process has been followed, all options have been well considered and there is sound rationale to justify what was discarded and why, and what was agreed and why.

1.6 However, we recognise that some decisions although well thought through and appropriate, may be unpopular. As a local authority, we cannot ignore the political agenda and we are conscious that elected members may not want to be associated with an unpopular decision that they may be publically obliged to support until after the next election. This will adversely affect how quickly "working papers" and "blue sky thinking" can be published after the event and therefore, we consider timeframes for release of previously withheld information should remain on a case by case basis.

2. Collective responsibility

2.1 Kent County Council has no particular opinion as the formulation of government policy is outside of the local authority's remit and therefore section 35 is not an exemption that we could or have relied on to withhold information.

3. Risk Assessments

3.1 There is a strong positive argument for publishing a strategic/corporate risk register that allows the public to see what the main areas of risk identified by the Local Authority are, who is accountable and how the risks are being tackled. Kent County Council's Corporate and Directorate Risk Registers are

reported to Governance & Audit Committee and are publically available documents. https://democracy.kent.gov.uk/ieListMeetings.aspx?CId=144&Year=0

3.2 However, we do share the concerns that were outlined by the previous coalition government that argues for safe space to prepare frank risk registers as if not, risk registers across the organisation could become carefully worded to avoid controversy on disclosure.

3.3 We are also concerned that the implications could be more severe; it could mean that people do not feel confident enough to put risks they have identified onto the registers, or that risk registers themselves are not compiled in the first place for fear of repercussions. This could lead to potential "nasty surprises" and poor decision-making if people choose to keep risks "in their heads".

3.4 We would support a new absolute exemption or an addition to an existing exemption (perhaps section 31) that allows the council to withhold information where the release could compromise the security of the council's networks, systems, property and assets and/or relates to or would have a detrimental effect on counter fraud measures.

3.5 This information should remain sensitive all the while the risk exists.

4. The Cabinet veto

4.1 Kent County Council has no particular opinion as this would not be applicable to a local authority.

5. Enforcement and appeals

5.1 Since 2005, 491 responses to the 15495 requests received (3%) have been challenged by the applicants and have gone through our internal review process. Of these, 69 (0.4%) have been escalated to the Information Commissioner and 2 (0.01%) have gone to the First Tier Tribunal. Please see our published statistics. http://www.kent.gov.uk/about-the-council/information-and-data/access-to-information

5.2 We consider that the current process is lengthy, especially if followed from internal review right through to the Upper Tribunal and the disputed information may have changed substantially or no longer be relevant by the time the final decision is reached. Therefore, as only the most determined follow this route, we believe that the application of a fee by either the Information Commissioner and/or the First Tier Tribunal is not likely to deter them.

5.3 In our experience, challenges to the application of exemptions (as opposed to other non-compliance issues) are rarely reversed by the internal review process which leads us to question its effectiveness. So depending on the nature of the complaint, perhaps local authority time could be saved by steering applicants directly to the Information Commissioner?

5.4 With regard to the enforcement of the Act, perhaps the Information Commissioner should have greater powers for non-compliance. Perhaps the introduction of a system of fines, akin to those that can be deployed for Data Protection breaches, should be introduced?

6. Addressing burdens

6.1 Kent County Council would like to reiterate and update many of the comments made in its response to the post-legislative review to the Ministry of Justice in April 2012, which are still relevant and topical today.

6.2 Since 2005, Kent County Council has become more proactive at publishing information, not only because changes to legislation have required this, but also at its own volition. However, despite publishing more information, the number of requests for information falling under the scope of FOIA (and

Environmental Information Regulations 2004) has increased dramatically year-on-year, from 504 requests in 2005 to 2360 in 2014. The average officer time to deal with each request is just over 3 hours at a cost of £77 per request. These costs and statistics do not include follow-on queries, time to deal with complaints and reviews, or the combined salaries of the central team.

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

6.4 The increase in requests, despite making more information readily accessible, leads us to three conclusions:

1. People are more aware of their rights

2. We are not publishing the “right” information (i.e. what people want to see)

3. People find it easier to make an FOIA request than conduct research themselves

6.5 A good example of this is the mandatory publishing of transactions in excess of £250. Due to the constraints of KCC’s financial database, which was not designed for this purpose (it would cost the council £millions to replace or update it), it costs approximately £120 a month plus dozens of hours of officer time to redact and prepare data for publication. In the last 12 months, there have only been 535 unique visits to this webpage, so it is questionable whether publishing this information is actually value for money as there clearly isn’t the demand that the Department for Communities and Local Government anticipated.

6.6 We recognise the benefits of the Act which has forced public authorities to become more transparent and to accept a much higher degree of public scrutiny. Within KCC, there is a greater awareness of the need for openness and accountability and an acceptance that no longer can business be conducted “behind closed doors”. The exposure of MPs' expenses is a good example of the strength of the Act

6.7 The Act has also obliged public authorities to pay greater attention to their procedures and processes, for example how records are managed, website design, etc., promoting good business practice.

6.8 However, the Act is open to abuse in that commercial companies use it to glean information free of charge at the taxpayers’ expense, which they will then use for their own profit, for example obtaining contractual information about competitors to circumvent a fair procurement process.

6.9 Journalists and the Media also use the Act as a “fishing expedition” for potential stories, in effect utilising valuable council resources to do their research for them. Disappointingly, the information provided to the Media is then often misrepresented or taken out of context to “sensationalise” and sell news.

6.10 The Act has become an additional weapon in the arsenal of the vexatious and repeat complainers who having exhausted the complaints process, then use FOIA as an alternative route of communications into the authority.

6.11 The Act does not distinguish between the genuine requests and those that seemingly have no value, but cannot be classed as vexatious. See example
https://www.whatdotheyknow.com/request/paranormal_activity_zombie_invas_4#outgoing-381647

6.12 Listed below are some changes to the Act that, that we believe if implemented, might circumvent some of the difficulties that public bodies experience in trying to achieve compliance with the Act.

6.13 The Act should be more prescriptive about cost and time limits. The MoJ should review what can be included in the time limit when assessing whether complying with the request would exceed the appropriate limit or not.

6.14 Reading information to deliberate exemptions and redacting exempt information should be included within the appropriate limit (currently £450/18 hours)

6.15 The appropriate limit should be reduced to the equivalent of a working day, for example £200/8 hours. It is not reasonable to expect that limited council resource be diverted away from front line services for longer than this.

6.16 There should be some way of distinguishing between applicants who will profit from information collated at local authorities' expense (commercial companies) and non-commercial requests.

6.17 The introduction of a fee (rather like subject access requests under section 7 of the Data Protection Act 1998) may deter frivolous requests or the "round robin" requests from commercial companies, journalists and the media, although this could be easily circumvented, unless applied across the board. However, we recognise that unless the fee is applied to everyone, it would go against the spirit of the Act which is "applicant blind". We are also aware that unless the fee is in excess of £30, the cost of processing it may be more than the revenue generated.

6.18 There should also be a mechanism or test to identify and reject trivial, time wasting requests, such as "What varieties/types of biscuits were bought by KCC between April 2010 - April 2011?" Perhaps the Act should include guidance to applicants on things to consider before submitting a request? If the information requested is to a degree of detail that they would not hold themselves on a household level?

6.19 The exemption for vexatious requests - section 14(1) - could be expanded to include the applicant, depending on their history of communications with the authority, and/or be extended to include the format of the request which should be focussed and structured solely on the information required rather than any underlying issues behind it.

6.20 As a counter-measure to these proposed restrictions, the Act could be more prescriptive about information that *should* be published by stipulating specific information that *must* be included in a publication scheme (or its replacement subject to the publication scheme review). This will make a certain level of transparency, such as that outlined in The Local Government Transparency Code 2015, a statutory requirement and there can be no argument about what is expected of public authorities.

6.21 If the Act is tightened and sharpened and less ambiguous, then this would also add to the argument that the Information Commissioner should have greater enforcement powers as suggested in 5.4.

7. Summary

7.1 We would like to state that no matter how much information is published; open data is no substitute for Freedom of Information legislation. Ultimately, open data is to a large extent, chosen for publication and so can be a vehicle for Government to show only what they want seen by the public and not what the public wants to see. This is what makes FOIA so valuable. Whatever changes are made to the Act, they should not curb the right of individuals to ask questions and expect answers.

King's College Hospital NHS Foundation Trust (King's)

This submission addresses the questions raised under 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?"

Background

Number of requests received

Year	Total requests	% Increase in requests	Dedicated FoI staff (WTE)	% increase in resource
2005/06	28		0.3	
2014/15	654	2236%	1.6	433%

The number of requests received by King's College Hospital NHS Foundation Trust (King's) has increased year on year from 2005/06 and then stabilised in 2014/15. The number of requests has remained at a similar level this financial year (2015/16).

Categories of applicant

- Commercial / business c. 30%
- Journalists/media c. 30%
- Not clear c. 20%
- Citizens – less than 20%

Included in the Not clear and Citizens categories are:

- Academic researchers
- Lawyers
- Students seeking material for projects, Masters and doctorate theses
- Political campaigners
- MPs

Types of request

Requests vary from a straightforward request for a copy of a policy or procedure to long lists of questions about multiple topics. Requests are frequently incoherent making comparative analysis possibly risky, meaningless or misleading. Questions can be:

- Very broad or excessively detailed
- Insufficiently explicit
- Lacking clarity in purpose due to an evident lack of understanding of the subject matter
- Loosely structured thereby potentially eliciting nonsense information
- The information sought is open to interpretation by the responding organisation when it is requested in the absence of any context

All of the above require staff time and resource to obtain clarification and ensure that information provided addresses the request and is in context.

Annual costs

- Dedicated FoI resource is 0.8 w.t.e. administrator, 0.6 w.t.e. manager plus ≤ 0.2 w.t.e. senior manager; total circa £80k
- Requests are frequently multi-faceted requiring input from teams across the organisation.

- Expenditure on legal advice on issues of interpretation of the FoI Act
- Estimated average cost per response c. £400-£500
- Estimated total cost in 2014/15 c. £300,000

Current financial environment

Financial pressure in the public sector has increased as the government looks for savings and improved efficiency. The primary focus at King's is to deliver high quality safe patient care. As a result of budgetary constraint, staffing levels at the trust provide little or no capacity or elasticity to deal with unanticipated and irregular additional work, such as FoI requests, on top of the normal business of the service or department.

Response

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

At King's FoI requests are received and co-ordinated by a small central team. Some requested information is easily accessible and readily available such as policy and procedure, but many requests are more complicated and require information provided by teams and departments (often multiple departments) across the trust. Inevitably, in the current financial environment, there is a risk that resource may be diverted from the provision of patient care or the support of that provision, in order to respond to FoI requests.

It is not always clear how the public interest in the public's right to know is served.

"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?"

At a time of considerable financial constraint in the public sector generally, and in the NHS in particular, it is our view that there should be a measure of control to limit the burden of FoI on public authorities (financial and otherwise). That burden may arise in a number of different ways some of which are explained below.

Commercial / business requests

King's deals with frequent lengthy and detailed requests from companies or businesses apparently seeking to gain commercial information and advantage outwith the procurement process, including for example:

- Type and number of specific equipment in use
- Contract specifications
- Contract end dates
- The names of competitor companies invited to tender
- Financial information
- Agency rates and expenditure - requests from commercial staffing agencies

Information and Communication Technology related requests are particularly notable in this category. These requests are time consuming to deal with.

Round robins

The trust receives a significant number of "round robin" requests which are sent to numerous trusts and NHS bodies nationally. These "round robin" requests often turn out to be "fishing expeditions". Whilst the cost to each individual organisation might not be high, the combined cost of such requests to the NHS is likely to be material.

Research related requests

These may be highly specialist or very wide in their application. Where generic data is requested, these are straightforward to deal with, but often specialist information is only available from particular clinical teams whose time is at a premium.

Complainants

The FoI team deal with a small number of exceptionally difficult, time-consuming and complicated FoI requests each year that take up a significantly disproportionate amount of time and resource. These requests have often been made by people who have initially followed the complaints route. Once that process has been exhausted, including intervention by the Ombudsman, and the complaint not upheld, the complainants turn to FoI.

Requests for the same or similar information but differing timescales or breakdown

Information relating to certain “hot” topics may be requested within a short period of time by a number of different applicants, but they will all want the information for differing periods or cut in different ways. Providing this information can be very resource intensive.

Suggested controls

- Reduce the appropriate limit of 18 hours by at least 50%. This currently amounts to nearly three days of work, places an unreasonable burden on staff and arguably diverts resource from patient care.
- Include costs of redaction of personal or other information, which is an unavoidable cost, in the calculation of the appropriate limit.
- Levy a flat fee for all requests taking less time than the appropriate limit, with an additional hourly charge applying thereafter.
- Disallow under the FoI Act commercial and business requests. On the basis that there is well defined process for procurement in the NHS (and the wider public sector) that is intended to be fair and deliver value for money, it is our view that requests of this sort should made by companies and businesses directly to the Procurement team as business enquiries and not as FoI requests.
- Research related requests; applicants should be required provide evidence of project approval so that validity can be established in advance of information being identified and released
- Use of pseudonyms (whereby applicants attempt to avoid aggregation of their requests) should attract a suitable and immediate fine
- Requests for data should be limited to/satisfied by periods covering discreet financial years or reporting periods and classifications the public authority normally reports on.
- Enable application of the “vexatious” exemption in cases where an alternative route to resolution of the underlying issue has been completed already.
- Other than very senior staff and those with outward facing roles, individual staff contact details should be explicitly exempt from disclosure under FoI. We frequently receive requests for contact details, often obviously to try to sell products to staff; an inappropriate use of staff time and resource. Note department and service contact details are already published on the trust’s website.

Conclusion

As a result of our experience of FoI over the last ten years, it is our view that some controls should be applied to limit the demand on public sector organisations of the FoI Act. Should it be deemed helpful, we would be pleased to provide specific request examples to support the commentary above.

Yours sincerely
Fiona Nicholls
FoI Lead fiona.nicholls@nhs.net

Knowsley Metropolitan Borough Council

Independent Commission on Freedom of Information - Call for Evidence

Response to the Call for Evidence from Knowsley Metropolitan Borough Council – 20 November 2016

Preamble

This response is provided by Knowsley Metropolitan Borough Council in response to the Independent Commission on Freedom of Information's call for evidence dated 9 October 2015.

I am submitting this response on behalf of the Council in my capacity as the Council's Monitoring Officer, appointed under section 5 of the Local Government and Housing Act 1989, and also in my capacity as the 'qualified officer' for the purposes of section 36 of the Freedom of Information Act 2000 (the Act).

The Council welcomes the opportunity to contribute to the work of the Commission and believes that the review is timely given the need to balance diminishing local authority resources against the rights of citizens to information on public authority activity and decision making.

The Council is fully committed to the Open Government and Transparency agenda and already complies fully with its obligations to publish information required pursuant to statutory guidance. It also publishes additional information on its website which it believes is of interest and significance to its residents. As with other local authorities the volume of information that is now being published is increasing year on year.

The Council seeks to positively meet its obligations under the Act but believes that a fundamental review of the practical operation of the Act and possible amendments to the Act could reduce the significant operational and financial burden on local authorities and other public bodies in dealing with certain types of request and/or requestors. We have set out some of the challenges faced by local authorities in particular and possible solutions in this response for consideration by the Commission.

The Council's response to each of the 6 questions specifically posed by the Commission is set out below.

If there is any further information that the Council can provide to assist the Commission with their deliberations and considerations then please do not hesitate to let me know.

Yvonne Ledgerton

Assistant Executive Director (Governance) and Monitoring Officer

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?

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

- There should be full protection for information relating to 'internal deliberations'. Public bodies, including local authorities, routinely have difficult situations to consider and discuss. This has been exacerbated by the reduction in local government funding meaning that difficult and sometimes controversial savings will be considered and discussed and decisions made. Members of the public having access to this type of information in isolation and out of context will potentially make those discussions and decisions even more difficult if it is known that this information may at some point be disclosed to the public. Members of the public have elected representatives to act on their behalf who should provide internal scrutiny on the decision making process.

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

- There should be full protection for information relating to 'internal deliberations' for as long as the local authority considers it appropriate. If this information was held it would be for the local authority to determine whether or not it should be released. There can be no firm time limit after which information could be deemed to no longer be sensitive. Sensitivity is related to the subject of the information itself and not when that information was created.
- If a time limit was imposed for categories of information it is highly likely that a local authority would introduce procedures to review information that could become highly political or controversial in the future. This procedure is likely to include guidelines for certain information to be destroyed as there would be no longer any reason for it to be held. There being no time limit after which the information must be released would allow local authorities to retain information of interest without it becoming subject to disclosure.

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

- Section 35 relates to the formulation of government policy so is not relevant to a local authority.

Section 36 relates to the disclosure of information which would, or would be likely to, prejudice or inhibit effective conduct of public affairs. The strength of section 36 lays in the requirement that a Minister of the Crown must authorize a local authority official of sufficient standing to carry out the role of "qualified officer". Having done so any decision to engage the section 36 exemption must be his/her "reasonable opinion" which decision may be challenged by judicial review. This exemption is also subject to the 'public interest test' under the Act. This very much places the responsibility on the qualified officer to make decisions which are by their very nature reasonable, balanced and transparent. For a local authority the qualified officer is the Monitoring Officer which is a statutory post whose functions and responsibilities are set out in section 5 of the Local Government and Housing Act 1989.

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?

What protection should there be for information which relates to the process of collective Cabinet discussion and agreement?

- This issue is not relevant to local government.

Is this information entitled to the same or greater protection than that afforded to other internal deliberative information?

- This issue is not relevant to local government

For how long should such material be protected?
This issue is not relevant to local government.

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

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

- There should be full protection for information relating to 'candid assessment of risks' for the same reason set out in Answer 1 relating to 'internal deliberations'.

For how long does such information remain sensitive?
There should be no time limit after which the information relating to 'candid assessment of risks' would no longer be consider sensitive for the same reason set out in Answer 1 relating to 'internal deliberations'.

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?

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

- Not necessarily as any veto would to be subject to judicial review. If a local authority were permitted to use the exemption in section 36 in a positive and balanced way then there would be less of a need for a formal 'veto' as the use of this exemption is already subject to judicial review. This exemption is also subject to the public interest test under the Act.

If so, how should this operate and what safeguards are required?

- If a veto was available it should be restricted to serious and important issues the disclosure of information relating to which could do significant harm to the local authority's reputation.
- Exercise of the veto should take place at a Cabinet meeting at which the report relating to the issue would be exempt from publication under the terms of Schedule 12A to the Local Government Act 1972.

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

- If a veto was not available there should be greater reliance on the use of the exemption available in section 36.

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

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

- The current system seems adequate in that a request is received and responded to and where the local authority decides not to disclose the information then the relevant exemptions are referred to in that response.
- The requestor can either accept the response or request a further review which will be carried out by a senior officer who was not part of the local authority's original decision. This officer will either confirm the original decision or request disclosure of the information requested (either in whole or part).
- If the requestor remains unsatisfied with the decision they can then refer the matter to the ICO who can contact the local authority to request the reasons for the local authority's decision.
- The ICO should only be able to issue a Decision Notice in the circumstances that the local authority's decision was manifestly in error or was manifestly unreasonable in the circumstances. Local authorities often feel that the ICO regularly imposes an outcome on a local authority which it considers appropriate without giving sufficient regard to the local authority's previous decision. Currently if the ICO does not agree with the local authority it issues a Decision Notice which the local authority must comply with subject to the right of the local authority to appeal that decision to the First Tier Tribunal.
- The ICO's role in the enforcement process should change to monitor and seek to improve the decision making process of local authorities rather than make decisions on its behalf or impose decisions it considers more appropriate.
- Any referral to the First Tier Tribunal should be on a similar basis as would apply to judicial review proceedings.

The use of Improvement Notices by the ICO against public authorities who are deemed not to be responding in accordance with the Act should be restricted to circumstances where the public authority has been given sufficient and reasonable time to improve its performance and has failed to do so.

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

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

- To support transparency in decision making it is right that the public has access to certain information that is held by a local authority. A local authority holds a lot of information that it already shares with the members of the public in order to keep them informed of its decisions. The Local Government Act 1972 and other local government legislation already places a significant and increasing burden on a local authority in providing access to meetings and increasing transparency in the decision making process.
- Requests for disclosure of information arise from a number of key sources. The numbers have increased in recent years and there has been an increase in the use of requests by particular lobby groups, campaign websites, business and commerce e.g. local companies and personal search companies.
- In some cases it is perceived by local authorities that a request lacks any particular focus and is designed merely to engage the local authority in open dialogue to be posted on a public forum website when, despite the local authority's best intention to provide assistance, the recipient has no real interest in what the local authority has to say and the posting merely repeats the complaint the requestor has already made. From a local authority's perspective this merely wastes valuable and reducing resources which could be used more beneficially elsewhere.
- The Government has already published the Local Government Transparency Code, which is statutory guidance, regarding openness and transparency in local government which is a significant burden already on local authorities. While local authorities may have some concerns about the breadth of the information required to be disclosed, complying with the Code does however have the benefit of the disclosure of that information being legitimized and endorsed by Central Government as being important information which it believes the public should have. Central Government should therefore consider extending the list of information which should be published where it considers that this information should be provided to the public.
- In addition to the Local Government Transparency Code a local authority also has to comply with the Information Commissioner's Model Publication Scheme for Local Authorities in accordance with the Act. This again requires publication of a wide range of information and documents by the local authority, some of which is similar to the information required to be published by the Local Government Transparency Code.
- In contrast requests made under the Act tend to be either localised in that it relates to a particular issue of a local resident or business or part of a wider and more national campaign relating to a matter of general interest to the public. In respect of the former the requestor is likely to continue to pursue the information as it impacts on them directly. In the latter the requestor is more likely to accept the information that is provided in respect of other responses they receive and extrapolate that information to obtain a national profile or trend and therefore is less interested in any particular response and is less likely to follow up the request if not received within the appropriate time limits.
- From a local authority's perspective, the standard for treating a request as vexatious appears to be too high. It is common for individuals who are aggrieved with a decision of the local authority to then seek to disrupt the local authority by submitting numerous requests which may at face value appear legitimate and which may or may not relate to the original decision but which do not change the outcome of that decision and which serve no purpose other than to create additional work for the local authority in responding and therefore represents a drain on the local authority's limited resources.
- There is therefore a disproportionate amount of work involved in dealing with a request of a particular type and the benefit for the public to be derived from it. In many instances it is not a public interest that is being triggered but rather a request for public information to satisfy an individual interest. Central Government should there consider whether requests should continue

to be 'motive blind' or whether only requests which have a legitimate and stated motive should be responded to.

- There is confusion in that there are two separate regimes for the disclosure of information. The Act (to which this call for evidence applies) is one regime and that under the Environmental Information Regulations 2004 (EIR) is another. The EIR applies to requests relating to 'environmental information' as defined in the EIR (which itself has been transposed from the EU Directive). The definition is so wide that matters which are routinely treated as requests under the Act are properly matters which should be treated as requests under the EIR. This creates difficulties in that the two regimes operate different procedures for the application of exemptions and charging. The Act operates a system whereby certain exemptions are 'absolute' i.e. not subject to the 'public interest test' whereas under the EIR all exemptions are subject to the 'public interest test'. Certain decisions of the FTT therefore look to apply the circumstances of a case and the respective exemptions from both perspectives. To provide consistency between the two regimes consideration should be given as to whether the two regimes can be consolidated in a single piece of legislation with a similar exemption regime.
- In terms of charging the Act only allows public authorities to charge where the time to deal with the request exceeds 18 hours in total. The EIR operates a different charging mechanism based on information being free to inspect, and, if supplied in another format i.e. electronically, for the local authority to make a 'reasonable' charge for that supply. This includes charging for the time spent by officers in responding to the EIR request and supplying the information. To provide consistency between the two regimes consideration should be given as to whether the two regimes can be consolidated in a single piece of legislation with a similar charging regime. This would enable a 'reasonable' charge to be applied for requests and discourage 'vexatious' or 'fishing' requests. The Council estimates that it currently costs in the region of £240k per annum to deal with Freedom of Information Requests which roughly equates to an average cost of approximately £234 per request. A more equitable arrangement would be for the Council to be able to charge for the supply of information to certain categories of requestor along similar lines to that set out in the EIR.

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

- Yes. It is suggested that controls in the following areas are required:-
  - The motive for the request under the Act should be set out in the request.
  - Better controls on obtaining the identity of the requestor – the local authority's view is that full name and address should be supplied with all requests whether online or written.
  - Public authorities to determine when a requestor is 'vexatious' which is not subject to further challenge except through the FTT.
  - Greater time in which to respond to a request e.g. 30 working days.
  - The ability for public authorities to apply a 'reasonable' charge for dealing with the FOI request, similar to that applicable under the EIR.
  - Less intervention by the ICO in local authorities' decisions. The ICO's role to be limited to monitoring the performance of local authorities but with more limited power to issue Decision Notices only where a public body's decision is manifestly in error or is unreasonable in the circumstances.
  - Greater scope for public authorities to use the exemption set out in section 36 of the Act without further challenge by the ICO.
  - Appeals to the FTT to be on similar basis to that in judicial review proceedings.

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

- Yes.

Which kinds of requests do impose a disproportionate burden?

- Those from pressure/lobby groups and campaign websites where the purpose of the request is

often only to engage the public authority in public dialogue and not to seek and possibly resolve a particular issue.

- Requests from requestors who make frequent and persistent requests for information relating to a local issue in which they have a specific interest and where the local authority has already provided a substantial and considered response(s) but which still fails to satisfy the requestor.

- Requests from the Media where the purpose is only to obtain information which is to be incorporated into an article or programme which is intended to have national public interest or is part of a national campaign.

- Requests from former employees where the purpose of the request is to obtain information relating to their employment which is intended to be used to harm the public authority's reputation.

Requests from organisations for confidential financial information supplied to the local authority from rival commercial organisations during a procurement exercise in order to try and improve their own practices and procedures and gain a competitive advantage during future procurement exercises.

The Land Registry

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?

There is a fundamental need for information relating to internal deliberations to be protected and that protection should extend to all draft documents and communications.

The length of time during which information remains sensitive cannot be prescribed and depends on the context; each case has to be considered on its own merits. It may be possible to draw a distinction between legislative decisions and administrative decisions. If a policy decision results in legislation there is likely to be a good deal of deliberation during the time leading up to implementation of the legislation that might well require protection. Timescales may well differ in relation to purely administrative decisions.

It is not considered that there is necessarily a need for different protections to apply to different kinds of information currently protected by sections 35 and 36; being too prescriptive can bring its own difficulties.

With regard to section 36, the requirement for the public authority's "qualified person" to provide his or her reasonable opinion that the exemption is engaged can be burdensome. If there was greater freedom to obtain the opinion of, say, a senior manager as opposed to that of a prescribed "qualified person" this might lessen the burden.

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

We do not have a view on this as we have no direct experience of the way in which collective Cabinet discussions/agreements operate. It is, however, acknowledged that there may be areas of particular sensitivity that may require greater protection. The length of time during which the material should be protected will no doubt depend on the context and will need to considered on a case by case basis.

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

This very much depends on the nature of the risk(s). Wherever there is a real potential for such information to be used to undermine the subject area of the risk the information should be protected. The information should be protected for as long as the analysis remains relevant to the risk. A candid assessment of risks might be required in relation to a range of matters, for example, risks arising from the threat of targeted industrial action and other HR related issues to cyber security issues.

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?

It is considered that use of the veto should not be expanded as this would undermine the Act, however, experience shows that FOI raises pertinent issues and it may be that consideration could be given to introducing additional exemptions aligned to "problem areas".

Any proposal to remove the veto may require a review of the operation of sections 35 and 36 and consideration would need to be given to any possible impact on the Environmental Information Regulations regime.

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

It is considered that current arrangements work relatively well, although the process in terms of both complaints to the ICO and judicial proceedings, can be slow

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?

Generally speaking, it is considered that the public interest in the right to know outweighs the resulting burden imposed on Land Registry in complying with the Act (although it is recognised that some public authorities receive a far greater number of requests than others resulting in a more significant burden in terms of compliance).

While the Act operates, on the whole, as a useful check and balance, there are, however, instances where the burden is significant and disproportionate to the request being made. Additional controls might be useful to counter these difficulties.

For example, requests for all correspondence/information relating to a particular subject matter can be extremely time consuming, particularly for large organisations and especially given the wide and prolific use of email as a means of communication.

It is also not uncommon to be faced with multiple and repeat requests from the same requester relating to a particular subject matter but framed in slightly different terms.

It would be useful to have a clearer/more focused definition of what is meant by repeat and vexatious requests. Better controls around repeat/vexatious requests would be welcomed.

In Land Registry's experience the FOI process is sometimes used by dissatisfied customers as a route to keeping longstanding complaints open where the complaint/challenge relates to matters of a technical nature. This is not considered to be an appropriate use of the Act.

There also seems to be an increase in the number of "round robin" requests sent to multiple public bodies.

The purpose of the Act was to make public bodies accountable for their decisions and to increase transparency, however, it seems that the FOI regime is being used more and more by parties such as lobbyists, journalists and commercial organisations for purposes not envisaged by the Act. This places a significant burden on public bodies and difficulties can arise in trying to reconcile the FOI regime with business as usual activities and, in the case of Land Registry, its release of particular datasets (which may be under licence). Since the introduction of the Act there has been a strategic drive from Government to increase the publication of national datasets and the transparency and "open data" agenda needs to be balanced against the FOI regime. The ability to "mash" data from various sources (including that obtained through the FOI process) is also a consideration.

A lowering of the section 12 costs threshold might act as a useful control and help reduce the burden on public authorities. It is also considered that a widening of the types of activity that can be taken into account when calculating costs for the purpose of section 12 would help to reduce the burden of dealing with certain requests. The actual costs incurred in dealing with certain requests can exceed the appropriate limit, however, certain activities may not be taken into account, for example, reviewing and redacting information and the consideration of exemptions. These activities can take a significant amount of time.

The ability to aggregate the costs of dealing with repeat requests from a requester (regardless of the subject matter) might also assist in reducing the burden.

While targeting controls at certain types of request would be useful it is acknowledged that there may be practical issues in doing so.

Any proposal to introduce controls would need to take into account any impact on the Environmental Information Regulations regime.

Independent Commission
on Freedom of Information

Leeds Hospital Alert

This evidence is submitted in response to the Commission's Call for Evidence and relates specifically to Question 6 in the Call for Evidence, concerning the importance of the public interest in the public's right to know.

Leeds Hospital Alert
Leeds Hospital Alert is an independent group of Leeds people who monitor the work of public health and social care authorities in the city. The group consists entirely of volunteers who give up their time to work on local health and social care issues. Any expenses incurred are funded by members' subscriptions. Leeds Hospital Alert has published a number of studies of health and social care issues in the city and maintains strong links with the city's MPs, councillors, and public authorities.

Evidence Submitted

Leeds Hospital Alert believes that the benefits of the public interest in the public's right to know fully justify any burden on public authorities that results.

Leeds Hospital Alert has used the Freedom of Information Act over a number of years to obtain information from public authorities specifically in relation to two service areas: mental health and home care. Leeds Hospital Alert has published a number of reports and a national journal article which have made the information obtained widely available.

The issues on which information was obtained were the placement of Leeds mental health acute service patients in hospitals across the country, and the commissioning and delivery of home care services in the city.
The benefits of the use of the Freedom of Information Act in this way have been considerable:

- Information has been put into the public domain concerning the use of public funds. In the case of the mental health service, for example, the cost of placing Leeds patients in hospitals across the country was published. This information was not previously made available. It was obviously important for Leeds people to know how public money is used in this way.
- Information about the care of vulnerable adults by public authorities has been made publicly available. Again in the case of the mental health service, the spread of placements outside Leeds and the lack of beds for patients in Leeds itself were made public; information which was not publicly available previously.
- In the absence of national statistics on one of the issues concerned, the placement of acute patients away from their home area, the information obtained has been used nationally to throw light on an issue which affects many mental health services across the country. This information was published in the journal Mental Health Today (May / June 2012).
- Most importantly, there is evidence that the publication of the information obtained has had a beneficial effect on the services concerned. This was so in the case of the mental health service: following the first publication of information by Leeds Hospital Alert, the Trust responsible for mental health services in Leeds took action to reduce the number of acute patients sent out of Leeds for treatment. After five years in which the number of patients sent outside Leeds rose steadily each year (from 23 to 403), the number fell to 196 in the last year studied. With the commissioning of the home care service, action again followed publication of information by Leeds Hospital Alert. Leeds City Council implemented the key recommendation arising from the report, which was that the City Council should commit to the national Ethical Care Charter.

This evidence shows how important the Freedom of Information Act has been to a small volunteer group working to make information on key public services available both locally and nationally. It is clear that the public interest here far outweighs any burden to the public authorities concerned. Indeed, there is a strong case for arguing that the public bodies concerned should have routinely published this information

as a matter of course as part of their public responsibility, so that the concept of burden does not apply here at all.

Unlike other users of the Act, a small volunteer group such as Leeds Hospital Alert could not pay fees for obtaining information through the Act.

Leeds Hospital Alert hopes that the Independent Commission will appreciate the benefits that the work of small local groups using the Act can have in increasing transparency and accountability for services provided by public authorities, and will ensure that these benefits are protected and enhanced in the future.

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11 November 2015

Leigh Day

We at Leigh Day strongly oppose any proposal that would limit the scope and function of the Freedom of Information Act.

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

It is clear that there needs to be a so called “safe space” for public officials to consider potential policies, but we do not see that this is currently hindered in any way by the FOI in its present format. In our view the current protection of public bodies is adequate.

We do not believe in restricting the access to information. We give examples below:

Firstly, judges have often (despite the public interest being considered) made decisions in favour of withholding information. A good example of this was when the Information Commissioner’s Office (ICO) upheld the decision to not release documents declassified for the purposes of the Chilcot Inquiry prematurely – this was decided on the basis that FOI should not pre-empt the process or outcome of that inquiry by staggered disclosure.

Please note that The Justice Committee in 2012 ‘was not able to conclude, with any certainty, that a chilling effect has resulted from the FOI Act’ and also felt the protections for policy were sufficient and was ‘cautious about restricting the rights conferred in the Act in the absence of more substantial evidence’. The committee argued against change.

In our view it is absolutely essential that there should not be a blanket ban on access to information on a public authority’s internal deliberations, in doing so there are real concerns about corruption, mistakes and scandals being kept secret for many years. The public must be able to scrutinise the government and public bodies, it is of fundamental importance.

We at this firm have used the Freedom of Information Act to obtain important information from public bodies which are of great public interest.

For example, we recently made various FOI requests to the Health and Safety Executive to obtain further information about allegedly defective gas appliances that had been linked to a number of deaths across the UK and Ireland caused by carbon monoxide poisoning. Our clients were able to use this fresh evidence as part of their application to the High Court to re-open an Inquest into the tragic deaths of their sons thought to be linked to one of the affected gas cookers. At the hearing before Justice Ouseley and Mr Peter Thornton QC (the Chief Coroner), the Court ordered that this course of action was both necessary and desirable in the interests of justice.

In December 2014 we made an FOI request to a public authority in order to obtain information for a case we are bringing on behalf of victims of human trafficking. Our clients are seeking compensation for abuse and mistreatment which it is alleged that they suffered whilst in the employ of a British company.

The information we obtained in response to the FOI request was extremely helpful in formulating our case. It showed that our clients’ previous employer had committed similar violations to those alleged by our clients on an earlier occasion and that the public authority had compiled extensive contemporaneous evidence which supported our clients’ case.

In addition, in preparing the FOI request, we realised that our clients had a prima facie case against the public authority itself both in negligence and under the Human Rights Act, which position was confirmed upon receipt of the materials requested under FOI.

We have many such examples of how the Freedom of Information Act has played a very important role in obtaining essential information about a public body which has been of public interest.

Additionally, we believe the current 'qualified exemption' should remain in place i.e. even if an exemption is engaged; the public body can only withhold information if the public interest in maintaining the exemption outweighs the public interest in disclosure.

Information should only remain sensitive for as long as is necessary to protect public interest.

The same protections should apply to information currently protected by ss.35 and 36 that it is essential that any information covered by exemptions should be subject to a public interest test.

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

We believe there is more than adequate protection under the current system to protect information relating to the process of collective Cabinet discussion and agreements.

Please note that UK governments since 2005 have only used their veto seven times and only four times in relation to Cabinet discussions: twice vetoing the release of Cabinet minutes on the Iraq War and twice vetoing minutes of the Cabinet subcommittee on Devolution to Scotland, Wales and the Regions dating from 1997. Therefore the use of the veto has been few and far between and would infer that in fact leaks were the more significant cause of Cabinet discussions/meeting disclosure.

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

We do not think that there should be a blanket exemption for risk assessments as we think it is unlikely to increase candour in such documents.

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

We accept in very rare circumstances there may be a need for this to be applied, but as a general view we believe there is no need for it. It should be the role of the Information Commissioner and/or judiciary to determine whether the release of information is permitted in accordance with the public interest test. Members of government should not be able to overrule decisions made by the Information Commissioner.

As ruled by the Supreme Court, it is not reasonable for a government minister to be able to override a judicial decision. The executive is not an impartial arbiter of whether information is in the public interest.

Ministers should be prepared to make well- informed arguments for non-disclosure, which stand up and can be backed by evidence in court. If the executive cannot provide convincing evidence that the information should not be disclosed then the information should be disclosed.

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

We strongly oppose the Government proposals to introduce new Tribunal fees, including those for appeals to the First-tier Tribunal against the Information Commissioner's FOI decisions. We believe it is

highly likely that introducing fees for FOI appeals will have a similar effect to the rise in the issue fees in civil claims, prohibiting the access of information to the public.

Question 6: Is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know? Or are controls needed to reduce the burden of Foil 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?

Current controls on cost are justified.

In the words of the Justice Select Committee, "the additional burdens are outweighed by the benefits" and FOI has indeed proved "a significant enhancement of our democracy".

In addition there are statutory caps, although we think the current price caps are used as an excuse for non-disclosure by public authorities of information of high importance to the public.

Often public authorities, through inefficient record keeping, and poor implementation of the Act, significantly increase the cost of FOI to the public authorities and the people requesting the information.

We believe that putting "controls" on FOI, and charges on FOI requests, represents a very serious and real threat to the openness and transparency of the freedom of information in this country.

The Liberal Democrats

In 2012 the Justice Select Committee conducted a thorough post-legislative review of the Freedom of Information Act (2000), specifically looking at its effectiveness and whether or not it was operating in the way it was intended to. This report remains highly relevant today and the Liberal Democrats view this current review by the Commission as unnecessary. This is particularly true given the narrow scope drawn by the Commission on Freedom of Information as set out in the Call for Evidence document.

The 'Call for Evidence' document states that: the terms of reference for the Commission were set out by the Cabinet Office; and it appears that the Commission has used this as a shield to set a very narrow scope. However, in response to written parliamentary questions Matthew Hancock, Minister for the Cabinet Office, has explicitly stated that "it is for the independent Commission on Freedom of Information to determine the scope of its review in accordance with its Terms of Reference." We therefore see no reason why the Commission has chosen not to take a wider view of the Terms of Reference to ensure that this consultation draws in a plurality of opinion and evidence and allows for a fundamental review into FOI. The parameters by which the Commission has chosen to confine itself, mean that it will only ever result in a tinkering at the edges – this hardly justifies the cost and time involved.

In our opinion the Call for Evidence misses a crucial opportunity to discuss which types of bodies should be covered by the Freedom of Information Act (the 'Act') and whether it has achieved its stated objectives. It is our belief that it is these questions that go to the heart of the Act itself and should form the source of any reforms. In our own Party's constitution we recognise the valuable role that freedom of information (FOI) has in strengthening the democratic process. It is an essential safeguard to a free, fair and open society which we, as Liberal Democrats, strive for and any dilution or restriction of it can only be seen as a watering-down of democracy itself.

The Liberal Democrats have long-called for private contractors performing public work to be brought within the FOI regime. In Coalition, the then Justice Minister, Simon Hughes, brought Network Rail under the FOI umbrella, but much more needs to be done. Applying FOI to outsourced public services would provide an efficient and effective way to ensure parity across the board. It should be the clear responsibility of the commissioning body to include in the contract an obligation to make available all the information necessary to comply with an FOI request, to the extent that would have been required if the function were still being carried out in the public sector. This was a suggestion endorsed by the Justice Select Committee, led by Alan Beith, in 2012. The commissioning body should be under a duty to enforce this obligation. Outsourcing should not be a way of bypassing freedom of information.

Although this issue is not explicitly part of the Commission's remit, it is impossible to discuss FOI in the health service or local government, for example, without taking account of the extent of outsourcing and privatisation. It would not be defensible for information which was subject to FOI in one local authority to be exempted in another because of differences in the extent of outsourcing.

Accountability, transparency and trust in the system stems from the fact that the general public can see and understand how decisions are reached at all levels of government - from local council decisions to those made in the Cabinet. FOI is not only about high-profile, attention-grabbing requests: at its root, it is about the right of an individual to find out about the decisions that affect their day-to-day life.

The Veto

We understand that there is a need for a 'safe space' to develop policy in. However, it is only in the rarest occasions that recorded discussions should not be liable to be released under the Act. But, we agree with the Justice Select Committee who in their post-legislative scrutiny of the FOIA in 2012 noted that: "we do not believe that there has been any general harmful effect at all on the ability to conduct business in the public service." Consequently, there is no basis for the assertion that FOI creates a 'chilling effect'. The current Government's line of argument that the FOIA needs to be reformed in order to protect civil servants and their ability and confidence to give frank advice, is in our view meritless.

In 2009 the Liberal Democrats said that a "Government's decision to invoke the ministerial veto is self-serving and wrong." We went on to explain why - that this effectively allowed ministers to be judge and

jury in their own cause. The UK Supreme Court's ruling vindicates this position and clears the way now for other FOI requests that had been turned down following a ministerial veto, to be re-submitted.

Furthermore, a veto also undermines the authority of the Information Commissioner whose job is to provide oversight of the implementation of the Act. In fact, the Judge of the Supreme Court in his judgment in the case of the 'Black Spider' letters stated that:

"…it appears to me that there is a very strong case for saying that the accountable person cannot justify issuing a section 53 certificate simply on the ground that, having considered the issue with the benefit of the same facts and arguments as the Upper Tribunal, he has reached a different conclusion from that of the Upper Tribunal on a section 57 appeal."

The judgment went on to reassert the view of the Lord Chief Justice in the High Court decision in the same case that the veto itself is a "constitutional aberration" putting the executive above the courts.

Taking this all into consideration we are clear that whilst there is an argument for information related to sensitive internal deliberations of public bodies to be released after a time lag, there should be no absolute power of veto.

The Burden of FOI

The Act as it currently stands allows exemptions from compliance when the request is "vexatious" (or under Environmental Information Regulations - "manifestly unreasonable"). We believe that these exemptions should continue - the clear guidance on the interpretation and use of these provisions set out by the ICO provide clear boundaries and ensure the Act is not abused. In fact the Information Commissioner in a recent speech (Working Effectively: Lessons from 10 years of the FOIA, 1st Oct 2015) remarked that he was surprised that "more public authorities do not use these provisions more often, but instead complain about having to deal with requests that could validly be described as vexatious." It seems evident therefore that it is not a change in legislation that is necessary, but better training for those dealing directly with FOI requests in order to ensure that they are confident in what the rules are and how to apply them.

In its choice of statistics and exploration of other legislatures, the Call for Evidence document appears to be lobbying for fees for FOI. It rightly states that Section 12 of the Act provides that a public authority is not obliged to comply with the duty to publish information if the cost of compliance exceeds the appropriate limit. We believe that there is a balance to be struck and that it is correctly balanced in its current state.

What the Call for Evidence fails to do is to assess the cost to the public purse saved as a result of the Act. Evidence taken by the Justice Select Committee in 2012 demonstrated that in some cases a FOI request can result in savings to the public purse by exposure of inefficiencies or poor practice. It is not necessary to repeat the case studies here and we are certain that other submissions will set out their own experiences with case studies demonstrating where FOI requests have been instrumental in bringing down public authority costs. These savings should not be forgotten in considering the value of FOI. Further, it is reasonable to assume that the FOI also acts as a deterrent to those who might otherwise feel that they could read the rules and guidelines widely in places or cut corners. In Coalition, we extended FOI to 100 new organisations and our Manifesto in 2015 called for the FOIA to be extended to cover private companies conducting public work; with a great deal of public authority work now being contracted and sub-contracted out, this is a sensible step to ensuring that the spirit of the FOIA is upheld.

FOI should not be seen as a silo, but as a tool to communicate work done by public authorities to the general public. If taken in this context the FOI regime is relatively cheap. An FOI request asked all central government departments: 'how much did they spend on communications in 2014/15' (taken to include press office functions, external communication and marketing). Even though responses have not yet been received from all central government departments, the figure already disclosed amounts to £150.7 million in that one financial year (http://www.foiman.com/archives/2072). The cost of FOI in 2014 by comparison, using the Government's own figures was estimated at £5.7million. Given that FOI has a statutory basis and is one of the primary tools allowing the general public and journalists to hold the Government to account, it is clear that FOI provides value for money.

We are strongly opposed to the introduction of fees. As the Commissioner elegantly put it, the imposition of fees would be "a tax on the exercise of a democratic right." This is clearly a dangerous road to go down. In Ireland the introduction of a 15 euro fee following a change in the law in 2003, saw the number of FOI requests drop by almost a half and led to criticism from the country's Freedom of Information Commissioner. The decision to impose fees was finally reversed in 2014.

The Liberal Democrats firmly believe that open government leads to better government. We believe that pro-active publication of public authority work should sit alongside the FOI regime. The political director of the Taxpayers Alliance has previously said that "if authorities are truly concerned about keeping FOI-related cost down, then they can simply make public spending more transparent so that a lot of the information is freely available without having to file FoI requests. A number of American states already do this, so it is no novel idea." The United Kingdom has been a leader in the creation and building of the Open Government Partnership which advocates for more transparency and a commitment to open government. The Partnership alone would be hugely affected if the Government were to decide to take retrograde steps in this field. It would affect our international credibility on the world stage not just on the desire for open government but also on the associated issues of democratic reform and the fight against corruption.

Conclusions

- The parameters the Commission has chosen to confine itself to means that it will only ever result in a tinkering at the edges which hardly justifies the cost and time involved.
- The Call for Evidence misses a crucial opportunity to discuss which types of bodies should be covered by the Freedom of Information Act for example whether the scope of the Act should be extended to cover private contractors doing public work – something we strongly support.
- The veto itself is a "constitutional aberration" putting the executive above the courts and there should be no absolute power to veto FOI requests.
- Better training should be given to those dealing directly with FOI requests to ensure that they are confident in what the rules are and how to apply them, this would ensure less time is wasted with vexatious requests.
- We are strongly opposed to the introduction of fees – this would essentially amount to a “tax on the exercise of a democratic right” as asserted by the Information Commissioner.
- Open government leads to better government and believe that pro-active publication of public authority work should sit alongside the FOI regime.

Liberty

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.
Liberty's policy papers are available at
http://www.liberty-human-rights.org.uk/policy/

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In July 2012, the House of Commons Justice Committee released its report on the post-legislative scrutiny of the Freedom of Information Act 2000 (FOIA).[123] Liberty gave evidence to the Committee, urging that the transparency created by the Act not be diminished by further legislative change[124].

The FOIA remains a vital tool in vindicating human rights. Our submission to the Justice Committee identified important legal cases in which requests under the Act had been made. Requests under the Act have revealed, for example, critical evidence relating to the use of stop and search powers, detention without suspicion at the UK's borders, and the powers given to police under the 'Prevent' program. The information obtained suggested that the powers are used in ways that breach human rights and discrimination law, supporting Liberty's case work for individual victims and providing transparency for the public in general.

Liberty continues to make use of the Act in our work. For example, following the death of Jimmy Mubenga during his attempted removal from the UK by staff of the private contractor, G4S, Liberty

[123] Justice Committee Report: Post legislative scrutiny of the Freedom of Information Act, July 2012, accessible here: http://www.parliament.uk/business/committees/committees-a-z/commons- select/justice-committee/news/foi-report/.
[124] Liberty's submission to the Justice Select Committee's Inquiry: Post legislative scrutiny of the Freedom of Information Act, February 2012,

made a number of requests under the Act to the Home Office as to their policy in this area. The requests revealed that the Home Office operates a system of formal sanctions against the private contractors who are hired to enforce removals, which can be applied when there is a perceived failure to meet a performance standard. A failure to meet a performance standard can include a failure to provide an escorting service (i.e. a successful take-off and removal from the UK). This appeared to us to build in to the process a financial incentive to ensure that removal take place at all costs, even when it might no longer be safe to remove, such as where detainee is panicking and/or resisting physically. Non-removal would therefore appear to result in a formal sanction. The Home Office claimed that "simple" failure to remove would not necessarily lead to a formal sanction but refused to issue more specific details of the performance standards imposed. It claimed that doing would "identify any areas of performance to which an individual service provider has failed to deliver the required contractual standard and the costs associated with each deduction" and prejudice the commercial interests of the Home Office and its private contractors.

It is Liberty's view that the questions posed by the Commission's Terms of Reference have been fully answered by the findings of the Justice Committee in 2012. As the Chairman, Sir Alan Beith MP, stated, the Act "has been a success and we do not wish to diminish its intended scope, or its effectiveness". Instead, they simply "need to be more widely understood within the public service."

The Committee considered the Act's effectiveness, its strengths and weaknesses, and whether it is operating in the manner intended. In so doing, it took oral evidence from 37 witnesses, over 7 evidence sessions, and 140 pieces of written evidence[125]. This plainly included substantial evidence as to the questions asked by the Commission in its terms of reference. Questions of protection for internal deliberations of public bodies and the Cabinet, disclosure of risk assessments, the exercise of the veto, the enforcement and appeal system, and the burden imposed were satisfactorily covered by the evidence heard and fully evaluated by the Committee in its report. It summarised its chief conclusions as follows:

- "The Freedom of Information Act has been a significant enhancement of our democracy. Overall our witnesses agreed the Act was working well."
- "We do not believe that there has been any general harmful effect at all on the ability to conduct business in the public service, and in our view the additional burdens are outweighed by the benefits."
- "…the cost to public authorities must be weighed against the greater accountability the right to access information brings. In addition, there is evidence of both direct cost savings, where a freedom of information request has revealed erroneous public spending, and an indirect impact whereby public authorities know that they will be exposed to scrutiny as a result of the Act and use resources accordingly."
- "We acknowledge the irritation experienced by public authorities which receive

[125] JC report, p. 5.

frivolous or trivial requests but, since these can normally be dealt with quickly at minimal cost, we do not recommend any change in the law in this area."

- "We believe that civil servants and others in public authorities should be aware of the significance of [sections 35, 36, and the Ministerial veto] and the protection they afford."[126]

Nothing has changed since the publication of the Committee's report which should materially alter or undermine its findings. As identified by the Commission's Call for Evidence, the Committee did not have before it the Supreme Court's judgment in *R (Evans) v Attorney General*.[127][128] However, for reasons we set out below, this represents an insufficient change in the policy and legal landscape to justify an additional inquiry into the operation of the Act.

The Supreme Court's judgment provides significant clarification as to the use of the veto which, in any event, has been used extremely rarely. In any event, the promulgation of the judgment concerns only the deployment of the veto. Whilst its decision as to the scope of the veto plainly did not take place in a legal and political vacuum, it is clear that questions relating to the Act's appeals and enforcement regime, and the financial burdens imposed by the volume of requests made, are wholly unrelated to the issues raised by the Supreme Court.

The Commission

Civil Society has raised serious concerns as to the impartiality and neutrality of the Commission. One member, Lord Howard, has been the subject of requests under the Act as to his expenses claims during his time as a Member of Parliament[129]. He was also the subject of a number of requests relating to events whilst he was Secretary of State for the Home Department, such as the 1995 sacking of the Governor of Parkhurst Prison after high-profile prisoner escapes, in which the former Minister faced considerable public scrutiny[130].

The Commission also includes Jack Straw, a former government Minister at the centre of a number of high-profile requests under the Act in respect of which he exercised his power of ministerial veto, including a refusal to disclose Cabinet minutes relating to the legal advice given prior to the prosecution the war in Iraq, along with Cabinet minutes relating to the Devolution Sub-Committee.[131] It is especially significant that the Iraq war veto related to Mr Straw's time as

[126] JC report, pp. 3-4.
[127] [2015] UKSC 21.
[128] Independent Commission on Freedom of Information, 9 October 2015, accessible here: https://www.gov.uk/government/consultations/independent-commission-on-freedom-of-information- call-for-evidence.
[129] *The Telegraph*, 'MPs' expenses: Michael Howard's £17,000 claims for gardening', 1 June 2009, accessible here: http://www.telegraph.co.uk/news/newstopics/mps-expenses/5418996/MPs- expenses-Michael-Howards-17000-claims-for-gardening.html.
[130] *The Times*, 'Tories cry foul on Howard secrecy files', 26 June 2005, accessible here: http://www.thesundaytimes.co.uk/sto/news/uk_news/article138955.ece.
[131] See, for example, *BBC News*, 'Straw vetoes Iraq minutes release', 25 February 2009, accessible here: http://news.bbc.co.uk/1/hi/uk_politics/7907991.stm.

Foreign Secretary, prompting queries as to precisely what was withheld[132].

In addition, Mr Straw has multiply commented on record that the Act's scope and depth should be curtailed. During his evidence to the Justice Committee, Mr Straw was asked by a member of the Committee as to whether the comments made Tony Blair in his autobiography indicated that they had "parted company" as to the Act's intended effects. These included claims by Mr Blair that the Act is "utterly undermining of sensible government" and that he "quake[s] at the imbecility of it"[133]. Mr Straw stated, "We did not part company on it. Anyway, it was his idea; it has to be. I have an alibi." Asked by the Committee as to whether he would have "killed" the legislation "at birth", had he been able, Mr Straw responded, "I do not know the answer."[134] More of his comments to the Committee are included in an Annex to this evidence.

Mr Straw has also made comments which display serious misconceptions as to the law relating to requests under the Act and its operation. For instance, he stated in evidence before the Justice Committee, that exemptions to disclosure under section 35 "can only apply while policy was in the process of development but not at any time thereafter", something which, in his view, is "crazy and not remotely what was intended".[135] There is nothing in the Act that precludes the application of the exemption to material after the completion of the policy development process, provided it falls within the kinds of information listed in section 35(1), such as information relating to the development of public policy. As the leading Tribunal case on this issue stated, the reasons for refusing disclosure will be far higher where the request is made during the development of the policy.[136] Whether the request is made at such a time is a matter of fact to be determined, naturally affecting the balance of interests for and against disclosure. As it stated, "We do not imply by that that any public interest in maintaining the exemption disappears the moment that a minister rises to his or her feet in the House. We repeat – each case must be decided in light of all the circumstances."[137]

Concerns have also been raised as to the lack of transparency in the Commission's own activities. During its first official briefing, journalists were reportedly requested not to disclose the identities of attendees nor attribute what was said.[138] In addition, the original version of Commission's consultation document proposed that evidence would be quoted anonymously.[139]17 The Committee Chair' replied to queries from campaigners by removing the relevant passage, and providing for the quotation of

[132] See, for example, *The Guardian*, 'Straw vetoes publication of cabinet Iraq war minutes', 24 February 2009, accessible here: http://www.theguardian.com/politics/2009/feb/24/iraq-freedom-of- information.
[133] Blair, A., *A Journey*, Hutchinson, 2010.
[134] Q339, JC report.
[135] Q343, JC report.
[136] *The Department for Education and Skills v Information Commissioner and The Evening Standard* EA/2006/0006, accessible here: http://www.informationtribunal.gov.uk/DBFiles/Decision/i70/DFES.pdf.
[137] See *DFES* decision, paragraph 75(iv) and (v).
[138] *The Guardian*, 'Freedom of information commission not very free with its information', 9 October 2015, accessible here: http://www.theguardian.com/politics/2015/oct/09/freedom-of-information- commission-not-very-free-with-its-information.
[139] See the letter of The Campaign for Freedom of Information to Lord Burn, Committee Chair, 27 October 2015, accessible here: https://www.cfoi.org.uk/wp-content/uploads/2015/10/Lord-Burns- letter.pdf.

anonymous evidence where "it is appropriate in the circumstances to grant it."[140]

The use of anonymous evidence is in itself an extraordinary recourse for any committee to take. It is justifiable only in limited circumstances: for example in 2013 the Home Affairs Select Committee rightly took evidence in private from three women who were tricked into long term relationships by undercover police, in order to protect their anonymity.[141] No basis has been suggested for the Commission to make provision for anonymous evidence on the basis of the likely material to be received. Even less clear is why such provision was made *in the abstract*. Such an approach is all the more extraordinary for a Committee tasked with the assessment of government transparency, accountability, and public access to information.

[140] See the letter of Lord Burns to The Campaign for Freedom of Information, 27 October 2015, accessible here: https://www.cfoi.org.uk/wp-content/uploads/2015/10/Burns-reply.pdf.

[141] Undercover Policing: Interim Report, Home Affairs Select Committee, 26th February 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?

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?

It is Liberty's view that there is no basis for increasing protections already available to public bodies and Ministers provided by sections 35 and 36 and the power of veto under section 53.

Section 35 already exempts all information held by a Government department relating to the formulation of Government policy, ministerial communications, advice by Law Officers, or the operations of any Ministerial private office. This potentially excludes a vast amount of information of use not only to members of the public but also to Parliamentarians making determinations about proposed legislation. Moreover, the 'prejudice' test of section 36 remains easy to meet for those seeking to withhold information. Liberty has previously recommended that a stronger, 'substantial harm' test should be imposed.[142]

The Commission's Call for Evidence quotes the words of the Justice Committee on the need for the provision of "full, frank advice", the ability to "discuss and test proposed policies in a comprehensive and honest way", and the "accurate and sufficiently full" recording of their discussions and decisions.[143] However, the document does not quote the conclusions of the Committee on this very issue.

In particular, the Committee was "unable to conclude, with any certainty, that a chilling effect has resulted from the FOI Act". In light of the clear public policy and democratic objectives of the Act, and the continued availability of the Ministerial veto, the Committee concluded that no significant change to the system could be recommended.[144]

In so concluding it took into account anecdotal Ministerial concerns as to an alleged 'chilling effect' of the Act on the objectives identified above. However, the Committee took seriously the findings of UCL's Constitution Unit – which it called "the most important research-based source of evidence on FOI"[145] – that any such effect has been "negligible to marginal."[146]

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[142] See Liberty's Committee stage briefing on the Protection of Freedoms Bill in the House of Lords (January 2012), accessible here: https://www.liberty-human- rights.org.uk/sites/default/files/liberty-s-committee-stage-briefing-supplementary-prot-of-freedoms-bill- hol-j.pdf.
[143] Independent Commission on Freedom of Information, Call for Evidence, p. 6, citing JC report, p. 54.
[144] JC report, p. 75.
[145] JC report, p. 69.
[146] Hazell, R., Worthy, B., and Glover, M., *The impact of the Freedom of Information Act on Central Government in the UK, Does FOI Work?*, London, 2010.

Nothing in the policy landscape has changed to justify departure from the findings of the Justice Committee on this issue. UCL's Constitution Unit found that, whilst there had been some altered behaviour of officials in certain high profile-cases, "there has been no negative impact of FOI on the quality of advice", *no impact on the way departments work together, and whilst there was some nervousness at the outset those interviewed by the Unit seemed untroubled.*[147]
As the Committee found, the Commissioner and Tribunal have repeatedly upheld the need for a 'safe space' whilst naturally testing its boundaries.[148] In Liberty's view it is the vital constitutional role of the independent court system to determine the meaning of legislation. Where the extent of Ministerial 'safe space' remains not fully clear, it is for the courts to decide by sections 35 and 36 of the Act.
Instead, the Committee found that greater Ministerial direction and leadership is needed as to the safeguards under the Act. Officials should "state explicitly that the Act already provides a safe space, and that the Government is prepared to use the ministerial veto to protect that space if necessary."[149]

The Justice Committee's clear finding was that "the Act has contributed to a culture of greater openness across public authorities, *particularly at central Government level which was previously highly secretive*" (emphasis added).[150] The Justice Committee recognised that refusals to fulfil requests under the Act may simply protect "politically embarrassing" information leading merely to "bad publicity" to the body concerned.[151]

Suspicion will be inevitably deepened where Government Ministers are seen to be employing exceptions under the Act to hide mere embarrassment, rather than protecting anything approaching 'internal deliberative space'. The Act has revealed a wide range of very serious cases of government and Parliamentary wrongdoing, such as the MPs' expenses scandal,[152] allegations as to Sir Cyril Smith's pressuring of police to avoid investigating claims against him of child sexual abuse,[153] over a thousand care-home residents dying as a result of neglect,[154] the summary incineration of over 15,000 aborted foetuses,[155] and the use of police tasers on more than 400 children in 2013.[156]
Providing additional exceptions to the release of information under the Act will deepen worries as to the unaccountability of government which the Act was designed to address. It is likely that imposing further carve-outs to the requirements of the Act for Ministers will increase public mistrust of Government and undermine Government's stated objectives to be truly responsible and responsive to those governed.

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[147] *The impact of the Freedom of Information Act on Central Government in the UK, Does FOI Work?*.
[148] JC report, p. 63
[149] JC report, p. 74.
[150] JC report, p. 11.
[151] JC report, p. 54.
[152] See, for example, *The Independent*, 'MPs' expenses scandal: the timeline', 23 October 2011, accessible here: http://www.independent.co.uk/news/uk/politics/mps-expenses-scandal-the-timeline- 1888349.html.
[153] *Manchester Evening News*, 'Revealed: Sir Cyril Smith's "bullying" of sex abuse probe police', 14 March 2013, accessible here: http://www.manchestereveningnews.co.uk/news/greater-manchester- news/revealed-sir-cyril-smiths-bullying-1744842.
[154] *The Telegraph*, 'More than a thousand care home residents die thirsty', 1 December 2013, accessible here: http://www.telegraph.co.uk/news/health/news/10487305/More-than-a-thousand-care- home-residents-die-thirsty.html.
[155] *The Telegraph*, 'Aborted babies incinerated to heat UK hospitals', 24 March 2014, accessible here: http://www.telegraph.co.uk/news/health/news/10717566/Aborted-babies-incinerated-to-heat-UK- hospitals.html.
[156] *BBC News*, 'Tasers drawn on 400 children in 2013', 25 February 2015, accessible here: http://www.bbc.co.uk/news/uk-31608320.

This is particularly important in light of public worries over other avenues of Executive accountability for matters of major public interest. The longstanding delay over the release of the report of the Chilcot Inquiry on the Iraq War is a case in point.[157]

The same is true of what appears to be frivolous reliance on exemptions from disclosure, such as that in evidence before the Upper Tribunal *The Cabinet Office v The Information Commissioner*.[158] The requestor sought information as to the number of times the Reducing Regulation Committee had met since its establishment over a two-year period. This was opposed by the Cabinet Office by way of section 35(1)(a) and (b), claiming that disclosure of the information would generate the "pollutant" of "exposing the committee (and the Cabinet/Committee structure) to external accountability".

Taking into account the need for a "safe space" in which deliberation and decision- making can take place, the Information Commissioner and the First-tier Tribunal had ordered disclosure. The Upper Tribunal unanimously refused the Cabinet Office's appeal. In addition to heavily criticising the Cabinet Office's witnesses and the testimony they offered, the Tribunal accepted the Information Commissioner's finding that the likelihood of disclosure causing the damage claimed was "very remote", it instead providing public information which supplemented that already available forming its proper context.

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

As to the publication of risk registers, it is Liberty's view that there is no case for the introduction of additional safeguards. As the Justice Committee found, there is insufficient evidence to suggest that any change needs to be made. There remain sufficient safeguards in the Act against the publication of risk assessment where they cause prejudice and the Ministerial veto remains as a final block on their release.

Moreover, the evidence, as it stands, points in the opposite direction. For example, the Information Commissioner, in his report on the use of the veto by Andrew Lansley to suppress the NHS transitional risk register, disagreed with the Government's finding that disclosure would affect the "frankness and candour" of future risk registers, finding no evidence of a chilling effect resulting from publication.[159] He also found that insufficient reasons had been provided for thinking that the circumstances were sufficiently exceptional to justify the veto, nor was the certificate sufficiently reasoned.

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[157] *The Guardian*, 'Chilcot report delays blamed on "vested interests"', 29 August 2015, accessible here: http://www.theguardian.com/uk-news/2015/aug/29/chilcot-iraq-war-report-delays-vested- interests.

[158] EA/2013/0119 (remitted), accessible here: http://www.informationtribunal.gov.uk/DBFiles/Decision/i1666/EA-2013-0119_12-11-2015.pdf.

[159] See Information Commissioner's Report to Parliament, Freedom of Information Act 2000: Ministerial veto on disclosure of the Department of Health's Transition Risk Register, HC 77, Session 2012–13, paragraphs 7.5–7.9, and 7.15-7.19, accessible here: https://ico.org.uk/media/about-the- ico/documents/1042385/ico-report-to-parliament-doh-transition-risk-register-hc77.pdf.

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

In *Evans*, the Guardian journalist Rob Evans made a request under the Act for the disclosure of communications passing between the Prince of Wales and various Ministers. Their departments refused disclosure, arguing that the communications were exempt from disclosure under sections 37 (as in force at the time)[160], 40, and 41[161] of the Act, and their refusals were upheld by the Information Commissioner (although he later resiled from his decision). The Upper Tribunal ruled, in a judgment described by the Court of Appeal as "a most impressive piece of work", that certain communications must be disclosed. None of the departments sought to appeal the decision. Instead, the Attorney General vetoed the Tribunal's decision by issuing a certificate by way of section 53.[162]
Mr Evans challenged this on the basis of both constitutional principle and European Union Directive 2003/4/EC,[163] which requires access to environmental information. The Court of Appeal found that the veto had been unlawfully made,[164] and the Supreme Court agreed. As the majority found, the Attorney General's veto did not meet the section 53 test: in the circumstances, his decision merely disagreed with the carefully-reached findings of the Tribunal, failing to demonstrate the requisite justification for departing from them. As to EU law, Article 6 of the Directive requires decisions of judicial bodies as to the provision of environmental information to be final and binding and therefore was found to provide "no room" for a blanket veto by a member of the executive.[165]

Liberty does not believe that the Supreme Court's decision justifies a reassessment of the Act's safeguards against disclosure, particularly those provided by sections 35 and 36. Rather, its judgment significantly clarifies and crystallises the position since the Act's inception.

The Government's own guidance on the use of the veto states that it "should only be used in exceptional circumstances and only following a collective decision of the Cabinet."[166]Moreover, it provides that the Government "will not routinely use the power under section 53 simply because it considers the public interest in withholding the information outweighs that in disclosure."

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[160] This provided for a qualified exemption for any information relating to communications with Her Majesty, with other members of the Royal Family or with the Royal Household, or the conferring by the Crown of any honour or dignity. Sections 1 and 37 have subsequently been amended to provide for an absolute exemption (it formerly being qualified) for any information relating to communications with the Sovereign, his or her heirs, all other members of the Royal Family or Household, or the conferring by the Crown of any honour or dignity.
[161]

[162] This provides for the Attorney General and others (as designated 'accountable persons') to override a decision or enforcement notice by service of a certificate no later than 12 days after the receipt of the notice stating that he or she has "on reasonable grounds formed the opinion that, in respect of the request or requests concerned, there was no failure" to fulfil the disclosure duties under the Act.
[163] Accessible here: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF.
[164] See [2014] EWCA Civ 254.
[165] *Evans*, paragraph 103.
[166] See Statement of HMG policy: Use of the executive override under the Freedom of Information Act 2000 as it relates to information falling within the scope of Section 35(1), undated, accessible here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/276160/statement- hmg-policy-veto.pdf/.

As a result, the veto has been used extremely sparingly. As recounted by the Justice Committee, it had been used on only 6 occasions other than *Evans*:

> "…in February 2009, when Jack Straw, as Lord Chancellor, vetoed the disclosure of Cabinet minutes and records relating to meetings held in March 2003, concerning the Attorney-General's legal advice about military action against Iraq; in December 2009, when Jack Straw vetoed disclosure of minutes of the Cabinet Sub-Committee on Devolution, Scotland, Wales and the Regions; in February 2012, when the Attorney General, Dominic Grieve, vetoed the disclosure of minutes of the same Sub-Committee; and in May 2012, when the Health Secretary, Andrew Lansley, vetoed disclosure of the NHS transitional risk register."[167]

A further veto was issued in July 2012 blocking the release of cabinet minutes relating to military action in Iraq, and another was issued in January 2014 in respect of documents relating to the planned HS2 rail line.[168]

As Jack Straw stated during the passage of the Act,

> "I do not believe that there will be many occasions when a Cabinet Minister – with or without the backing of his colleagues – will have to explain to the House or publicly, as necessary, why he decided to require information to be held back which the commissioner said should be made available."[169]

It is of note that in his reports on both uses of the veto in 2009 in respect of the Iraq war and devolution minutes, the Information Commissioner doubted the rationale provided by the Government, stating that disclosure of the Cabinet minutes in question would not be likely to significantly undermine the convention of collective Cabinet responsibility.[170][171] He also found that the maintenance of the convention only justified the refusal to disclose only part of what was covered by 2012 devolution minutes.[172]

It was therefore clear before the litigation in *Evans* that the exercise of the Ministerial veto would have

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[167] JC report, p. 63.
[168] See House of Commons Liberty, FoI and Ministerial vetoes, 19 March 2014, accessible here: http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN05007.
[169] Hansard, 4 April 2000, columns 918-23.
[170] See Information Commissioner's Report to Parliament, Freedom of Information Act 2000: ministerial veto on disclosure of Cabinet minutes concerning military action against Iraq, HC 622, Session 2008–-09, paragraph 4.4, accessible here: https://ico.org.uk/media/about-the- ico/documents/1042382/ico-report-on-iraq-minutes-ministerial-veto.pdf.
[171] See Information Commissioner's report to Parliament, Freedom of Information Act 2000: ministerial veto on disclosure of the minutes of the Cabinet Sub-Committee on Devolution for Scotland, Wales and the Regions, HC 218, Session 2009–10, paragraph 4.7, accessible here https://ico.org.uk/media/about-the-ico/documents/1042387/ic-report-to-parliament-hc21.pdf.
[172] See Information Commissioner's report to Parliament, Freedom of Information Act 2000: the Attorney General's veto on disclosure of the minutes of the Cabinet Sub-Committee on Devolution for Scotland, Wales and the Regions, HC 1860, Session 2010–12, paragraphs 4.10–4.12, accessible here: https://ico.org.uk/media/about-the-ico/documents/1042383/ico-report-attorney-general-veto- cabinet-sub-committee-minutes-devolution.pdf.

to be exercised compatibly with both constitutional principle and EU law. The Justice Committee itself heard evidence on the relationship between EU law, including the Environmental Directive and its likely adverse impact on blanket exemptions to disclosure under the Act, such as that relating to the BBC.[173] It also heard evidence as to the impact of the Aarhus Convention, which the Directive implements, the two having been in effect for over a decade prior to the Supreme Court's judgment.[174][175]

The Supreme Court also relied on cases decided prior to the passage of the Act of which Parliament could be presumed to be aware as it made provision for the Ministerial veto.[176] They held that executive decisions to override judicial and even quasi-judicial bodies could be quashed where the government had failed to demonstrate sufficient justification for doing so, including where a Minister had a statutory veto power, or its equivalent, as in *Evans*.

The issues of constitutional principle were also clear and compelling. As Lord Neuberger stated,

> "…it is a basic principle that a decision of a court is binding as between the parties, and cannot be ignored or set aside by anyone, including (indeed it may fairly be said, least of all) the executive. Secondly, it is also fundamental to the rule of law that decisions and actions of the executive are, subject to necessary well established exceptions (such as declarations of war), and jealously scrutinised statutory exceptions, reviewable by the court at the suit of an interested citizen. Section 53, as interpreted by the Attorney General's argument in this case, flouts the first principle and stands the second principle on its head. It involves saying that a final decision of a court can be set aside by a member of the executive (normally the minister in charge of the very department against whom the decision has been given) because he does not agree with it."[177]

He described these principles as "scarcely a recent development" and called the Government's suggestions to the contrary "remarkable".[178] He also relied on the longstanding principle that Parliament cannot legislate to abrogate fundamental rights and the rule of law in the absence of clear statutory language, something plainly absent in the case of section 53.[179]

Most fundamentally, nothing in *Evans* removes the power of veto. In essence, it remains a power to override the decision of a court in circumstances far wider than available appeal rights. Plainly, the veto remains available, for example, where the Tribunal's decision is manifestly wrong, or the Attorney

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[173] Ev w180, JC report
[174] The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 25 June 1998, commonly known as the Aarhus Convention accessible here: http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf.
[175] Ev w3-6 and w180, JC report, volume II.
176 Evans, paragraphs 60-65 and 88.
[177] *Evans*, paragraph 52.
[178] *Evans*, paragraphs 53-55.
[179] *Evans*, paragraphs 56-58.

General seeks to rely on evidence – such as risk assessments – relevant to the original decision but arising after any appeal. This could include evidence not considered or even excluded by the Tribunal or higher courts. The veto's power to challenge a judicial decision is far wider than that available by way of appeal to a higher court, which is only permitted in respect of points of law.

The extent to which the Attorney General or others may veto the decision of a Tribunal will depend on the facts of the case, including the specific decision made and the manner in which it was reached.[180] Lord Mance took this to include cases of disagreement between the Attorney General and the Tribunal as to "the relative weight to be attributed to competing interests", or where the accountable person provides the "clearest possible justification" for departing from the court's decision.[181] Overall, the particular facts of *Evans* were decisive: the Attorney General took a decision in disagreement with the Tribunal without doing what was necessary to make the clearest possible justification for the use of the veto. Mere redetermination or re-evaluation, as against a carefully-considered judicial decision, whose reasoning the certificate did not adequately or at all address, was insufficient to meet the section 53 test.[182]
Evans was a case in which the Government's reasons for issuing the certificate were widely questioned in public, were found wholly inadequate by the Supreme Court, and at their highest amount to a disagreement with the findings of a carefully reasoned judicial body.

In light of this, and the fact that the use of the veto remains rare, Liberty does not expect that the Supreme Court's judgment will have a significant effect on the Government's powers under section 53 in future. There is no justification for further changes to render the making of a veto easier. Nothing has displaced the Committee's finding that the Ministerial veto is "a necessary backstop to protect highly sensitive material."[183]

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

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

It is Liberty's view that nothing has arisen since the publication of the Justice Committee's report which justifies further inquiry into the operation of the Act, quite apart from the issues of sections 35, 36, and the Ministerial veto and in particular in relation to its appeals and enforcement system and the financial cost it imposes. It is Liberty's view that the costs of the Act are amply justified by its clear benefits to transparency, accountability, and democracy. However, the evidence points to two important facts.

[180] *Evans*, paragraphs 66-69.
[181] *Evans*, paragraphs 130 and 145.
[182] See also *Evans*, paragraphs 137-145.
[183] JC report, p. 68.

First, the direct costs it imposes are not significant. Secondly, its direct costs are likely more than offset by the savings made in funds recouped after revelations of government inefficiency or financial and other malpractice.

The Constitution Unit of University College London has estimated that the cost to government of fulfilling its obligations under the Act was around £31.6 million in 2010.[184] It is clear that these costs are steadily decreasing. UCL's research has demonstrated that both cost and the number of hours are decreasing: costs down from £36.6 million in 2009 and the average hours per request have been cut by almost two thirds since 2007. Savings are made, it would appear, as public authorities become more experienced in fielding inquiries from the public and develop systems and practices to deal with them efficiently and effectively.

The evidence cited by the Commission in its Call for Evidence provides further support. Even on the assumption that the number of initial requests significantly increases costs – which is highly debatable in light of UCL's research – numbers of initial requests, internal review requests, and ICO appeals are down since 2013. As the Justice Committee heard, these costs will continue to decrease with "positive leadership combined with good systems, staff and organisation".[185] As the Committee found,

> "Complaints about the cost of freedom of information will ring hollow when made by public authorities which have failed to invest the time and effort needed to create an efficient freedom of information scheme."[186]

It is also important to contextualise the costs of maintaining a transparent and accountable government within its budget as a whole. For example, a recent request under the Act revealed the cost to government of its press, communications, and marketing activities over the course of the year 2014/15.[187]The burden imposed was found to total £150.7 million, almost five times more expensive than that of meeting its obligations to the public under the Act.

The Justice Committee heard evidence as to the savings made by revelations ranging from systemic inefficiencies to serious mismanagement of public funds. The Act generates savings accruing "from the disclosure of inappropriate use of funds or, more importantly, fear of such disclosure."[188] The cost savings to be made by public scrutiny of inefficiencies or inflation of public sector remuneration, including further expenses irregularities by public officials of serious concern.[189]

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[184] Constitution Unit, UCL, 'The Cost of Freedom of Information', December 2010, accessible here: https://www.ucl.ac.uk/constitution-unit/research/foi/countries/cost-of-foi.pdf.
[185] Ev 169, JC report.
[186] JC report, p. 38.
[187] *Foiman*, 'FOI costs, sure – but nowhere near as much as PR', 9 October 2015, accessible here: http://www.foiman.com/archives/2072.
[188] JC report, p. 24.
[189] See, for example, *The Daily Mail*, 'EXCLUSIVE: How much do bosses at YOUR council earn?', 8 November 2015, accessible here: http://www.dailymail.co.uk/news/article-3309596/The-shocking- scale-fat-cat-pay-public-sector-exposed-today-major-Daily-Mail-investigation.html.

The Justice Committee also heard evidence on a number of methods by which the burden on public authorities could be reduced, including the creation of publication schemes and disclosure logs. As it found, this would enable them to answer requests more proactively and efficiently, in parallel to the traditional means by which it meets its obligations under the Act.[190]

There are real dangers to introducing fees for requests under the Act. The experience of Ireland serves as an instructive example. After introducing fees of 10 euros per request, 25 euros for an internal review, and 50 euros for an appeal in 2003, the number of requests made dropped by around 50%. The Irish Information Commissioner found that fees were "a major obstacle" to freedom of information.[191] The Justice Committee concluded that it would be impossible to devise a fee sufficiently high to recoup the costs of the Act whilst not also inappropriately quashing requests under it.[192]

International cost comparisons are highly instructive. In fulfilling each request under the Act, on average, the UK was found at the Act's inception to spend around the same as the US, approximately half as much as Canada, more than half as much as Australia, and over £100 less than Ireland. This was despite each of the comparator countries having operated their freedom of information regimes for significantly longer and, in the case of Ireland, after supposedly cost-saving measures.[193] Moreover, in light of the above, the cost of fulfilling individual requests by UK authorities is likely to have substantially decreased since the Act's beginnings.

As to alleged vexatious requests, the Act already has substantial safeguards. Section 14 which permits public authorities to ignore them, and the Commissioner has provided guidance to assist public authorities in dealing such cases.[194]

As to alleged frivolous requests, it is common sense that, where they are not serial and therefore vexatious, they can be dealt with quickly and summarily. Where they are serial and vexatious, they can be safely ignored under section 14. As a Ministry of Justice representative stated to the Justice Committee, the issue of frivolous requests "is pretty minor in the grand scheme of things."[195] As Committee itself found, such requests "are a very small problem" which "can usually be dealt with relatively easily, making it hard to justify a change in the law."

The Act performs a clear money-saving role, alongside what the Justice Committee described as the "incalculable" benefits "such as greater openness and accountability as well as a better informed citizenry".

Sam Hawke

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[190] JC report, pp.15-6.
[191] See *BBC News*, 'Ireland reviews FOI fee which cut request level in half', 31 May 2012, accessible here: http://www.bbc.co.uk/news/uk-politics-18282530.
[192] JC report, p. 36.
[193] 'The Cost of Freedom of Information''
[194] ICO, Dealing with vexatious requests, undated, accessible here: https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf.
[195] Q463, JC report.

ANNEX – Jack Straw's comments to the Justice Committee

In giving evidence to the Justice Committee during its post-legislative scrutiny of the Freedom of Information Act, Mr Straw made the following comments:

- "[T]he view I take is that it is not a particularly well-constructed Act intellectually or jurisprudentially."[196]
- "FOI was not thought about with any seriousness."[197]
- "There are plenty of things that I would do differently if I were the Minister in charge of this Bill now, one of which is not to have allowed the Act to run retrospectively."[198]
- "If you seek to undermine collective responsibility, which is essentially what the tribunal and the enthusiasts for FOI have been doing, then you will start to undermine Government. Far from discouraging leaking and poor record keeping, you will encourage it. I deplore it anyway, but you will get more of it."[199]
- "On freedom of information more than almost any other area of public policy, it is almost impossible to have a proper balanced conversation with the press, because, regardless of their political persuasions, they have one interest and the Government have another. You can get individual journalists to accept that there needs to be better balance, but they are interested in stories."[200]
- "[I]n my view there is a very significant problem with sections 35 and 36. That is solvable, but there has to be a will to solve it."[201]
- "[I]n my view section 36 is too loose in its wording".[202]
- "My view is that we need a class exemption, full stop, that exempts information if it relates to the formulation or development of Government policy, ministerial communications and so on. However, we also need a class exemption in respect of matters covering section 36—the maintenance of conventional collective responsibility of the Crown and the provision of free and frank advice."[203]
- Sections 35 and 36 have "led to a reluctance to commit the process of decisions to records, so in one sense it has made it more difficult to secure accountability rather than less."[204] They are "unsatisfactory" and produce "consequences that tend towards less openness rather than more."[205]
- "There has to be a space in which decision makers can think thoughts without the risk of disclosure, and not only of disclosure at the time, but of disclosure afterwards. Let me say this: I am very struck that this right to protect private space for decision making is one that many in the media, including the BBC, seek to deny Government, but are

[196] Q342, JC report.
[197] Q334, JC report.
[198] Q332, JC report
[199] Q345, JC report.
[200] Q347, JC report
[201] Q344, JC report.
[202] Q342, JC report.
[203] Q343, JC report.
[204] Q327, JC report.
[205] Q329 JC report.

very jealous about guarding for themselves, as witness the recent BBC case before the Supreme Court."[206]

- "We sort of believed that in section 35 we were establishing a class exemption, but that has not turned out to be the case because of the way it has been interpreted by the courts."[207]
- "I happen to think that the legal advice of an Attorney-General, like any other legal advice, should be the subject of legal professional privilege."[208]
- "I do not think [private secretaries' notebooks] should [be disclosed] at all. I am absolutely clear about that."[209]
- "The drafting of section 12 on cost limits is poor, and it does not include the actual costs. That needs to be changed. There is provision in the Act for charging a small fee for applications, and, although I fully intended to have a fee, I was surprised when, subsequent to my period, it was dropped."[210]
- "The costs are huge".[211]

"My intention was to use section 13, I think it is, but I am speaking from memory, to charge a small charge parallel to that for data protection requests.

It would be about £10. It would not stop important requests, but it would act as a check. I would also tighten up very significantly section 12, which, referring to an earlier answer, relates to the excessive costs provision. As the MOJ memorandum says, it is too narrowly constrained."[212]

- "The real curiosity is that the identity of the requester is kept from Ministers. For the life of me, I do not understand that, and that needs to be changed too."[213]
- [In respect of the early proposals leading to the Act] "[m]y contribution was to ensure that there was a substantial carve-out for Home Office matters…I got protection for the Home Office. There was a huge carve-out, and the rest was all open."[214]

[206] Q331, JC report
[207] Q343, JC report.
[208] Q353, JC report.
[209] Q331, JC report
[210] Q355, JC report
[211] Q360, JC report.
[212] Q363, JC report
[213] Q358, JC report.
[214] Q334, JC report.

Independent Commission
on Freedom of Information

Liverpool City Council

Rt. Hon. Lord Burns
Chair – Commission on Freedom of Information Cabinet Office
9th Floor
102 Petty France London
SW1H 9AJ

Evidence Submission on review of Freedom of Information Legislation

I write further to my letter of 12 October and with regard to the Call for Evidence document issued by the Commission on Freedom of Information on 9 October, enclosing for the attention of the Commission the formal evidence submission of Liverpool City Council.

I would appreciate it if you would acknowledge receipt of this submission and would again take the opportunity to affirm our willingness to continue to engage constructively with the Commission during the course of its review.

I look forward to hearing from you in due course. Yours

sincerely

Ged Fitzgerald

Chief Executive

Response

These matters all have a starting point and undergo a number of iterations before coming forward as formal options. It is essential that this process should not be undermined by requests being made for copies of any emails or communications which formed part of the iterative process of decision making. Ultimately the governance framework ensures any decisions taken are informed and legal. This is a cornerstone of any effective public authority – from Central Government to local authorities – and it is essential that this ability to develop policy, proposals and explore options is maintained otherwise it would impair the quality and ability of public authorities to make informed decisions.

The application of this Exemption requires a person qualified under the Act to give their reasonable opinion, and guidance has been issued by the ICO as to the acceptable format of this. It is clear from the consultation document as well as practical experience that there is a need for such Exemption otherwise the quality of both record-keeping and decision-making by public authorities would be impaired.

Current guidance issued by the ICO ("the evidence required by the ICO would be to assess the quality of the Qualified Persons reasoning process and assist in their determination as to whether a substantive opinion could be considered reasonable…") would appear to indicate that once the Qualified Person has reached and recorded their reasonable opinion then the ICO may only require the production of such a record but may not compel the disclosure of the information to which the Reasonable Opinion relates. The key issue is that the Qualified Person's opinion and record of reasoning which includes the public interest test is recorded. The ICO have produced a template for this purpose.

The Information Commissioners Guidance also indicates that the potential prejudice claimed arising from any such disclosures must be at least or exceed a 50% chance of occurring.

How long after should that remain sensitive?

An additional key aspect of the decision-making process of public authorities is the duration of how long information which falls under the Exemption may be withheld from disclosure on the basis of the opinion of the Qualified Person. Information relating to 'internal deliberations' should remain capable of being withheld from disclosure for as long as the public authority considers necessary. Whether the information held continued to be subject to non-disclosure would of necessity be a matter for the relevant public authority to determine. It would be inappropriate to set any form of definitive time limit after which information could be deemed to no longer be sensitive if published. The sensitivity of any specific piece of information directly relates to the subject of the information itself as opposed to the date when this was created. There should be no limitation as to the period which a Qualified Person may determine that such information should not be disclosed if the subject of a formal request.

The City Council would also consider that opinions issued by Qualified Persons should not be subject to overturn if reached on a reasonable basis and in a manner consistent with ICO guidance and using their standard template. An alternative and more appropriate mechanism would be for any such opinions to be published on the website of the respective public authority and referenced accordingly within the publication scheme of that public authority. This would satisfy the accessibility and transparency requirements for such declarations and for the purposes of Liverpool City Council it is the Monitoring Officer.

An anomaly which the City Council would bring to the attention of the Commission is that of how the Environmental Information Regulations 2004 (EIR) allow an exception (as opposed to the term 'exemption as used under FOIA) for internal communications under Regulation 12(4) (d) and yet no parallel exemption is extant under FOIA.

Recommendations from Liverpool City Council –

(i) Qualified Person Opinion & Publication – that the Section 36 Exemption be revised to state that the reasonable opinion of the Qualified Person, once drafted and recorded on the relevant ICO template and published to the website of the public authority and referenced within the Publication Scheme, that this may not then be the subject of further review by the ICO.

Questions 2 – this question relates purely to matters within the legislation which are applicable only to Central Government and as such no response is proposed to be made.

Questions 3 & 4 see response to question 6 below.

Question 5 – What is the appropriate enforcement and appeal system for Freedom of Information Requests? What is the appropriate enforcement and appeal system for Freedom of Information Requests?

Appeals & Internal Review

Current legislation includes provision whereby public authorities must provide an internal review process whereby requestors may ask the Public Authority to review the original decision of the Public Authority on their specific request.

The burden placed on public authorities in preparing responses to initial requests is further exacerbated by the requirement to undertake an Internal Review to assess the validity of its response, when in the first instance such responses are issued following careful consideration of information held in the context of FOIA legislation. In terms of the figures set out in this response below, in 2014 of 2,139 requests a total of 49 requestors sought an Internal Review. Of these, only 5 appeals were the subject of Decision Notices

from the ICO with only 1 of which requiring any form of action from the City Council – approximately 0.00047% of all requests processed by the City Council.

It is our position that our approach to an FOI request is robust and thorough from the outset, and that the legislation is applied by trained experienced staff so that an Internal Review is unlikely to reach a different conclusion as evidenced by these statistics.

Essentially public authorities are being asked to repeat an assessment when undertaking an Internal Review and to undertake work twice when conducting reviews, which is inefficient and places an excessive burden on local authorities.

ICO Review

We would draw attention to the process which the ICO then undertakes when seeking information from public authorities in such instances when informing their own decision-making. Frequently the level of information sought by the ICO goes beyond that of verifying the information held or application of the exemption concerned and indeed the subject matter of the original request. This process can be both resource intensive and give additional uncertainty in those circumstances where the ICO seeks information or reasoning beyond that which could reasonably be expected on a specific case. We would seek greater clarity as to the remit of the ICO in such circumstances and of the extent to which they may undertake a review.

Decision Notices

Additionally, in concluding reviews, the ICO will then issue a Notice (Decision or Enforcement Notice) setting out their decision on the request concerned. We would suggest that this process be reviewed and aligned more closely to that used by the Local Government Ombudsman whereby any Notices proposed to be issued should firstly be sent to the public authority concerned for response. This would provide a fair and reasonable opportunity for public authorities and the ICO to address any clear factual inaccuracies, assist in maximising the value of any recommendations contained within the final Notice issued and possibly prevent a costly First Tier Tribunal being convened. The timescale for responses by the Public Authority to any Decision Notice to be 10 working days. The inclusion of unsubstantiated and factually inaccurate statements within ICO Notices, issued without opportunity to the public authority of correction or rebuttal, is inappropriate and requires addressing.

Applications to First Tier Tribunal (Information Rights)

The final opportunity for requestors – if unsatisfied with the outcome of a review undertaken by the ICO – is to submit an Appeal to the First Tier Tribunal. There is no threshold to be met before such applications are made and, in seeking to respond, public authorities are required to expend significant resources in responding. Only on the most fundamental principles of information law should this facility be available or otherwise a cost mechanism for such applications should be introduced in the same manner adopted for applications for Judicial Review.

Recommendations from Liverpool City Council –

(ii) Internal Review – that this mechanism be withdrawn on the basis that this offers no practical benefit for requestors and merely requires the duplication of effort by public authorities.

(iii) ICO drafting of Decision Notices – a requirement be introduced whereby the ICO in drafting a Decision Notice and prior to publication, be required to formally consult the subject public authority and allowing not less than ten working days for issues to be raised by the public authority. Such issues if not accepted by the ICO must be recorded as having been raised by the public authority.

(iv) Applications to First Tier Tribunal (Information Rights) – a threshold or application fee be introduced for applications to the First Tier Tribunal, in a similar manner to that used for applications for Judicial Review.

Question 6 – Burden imposed under the Act and whether justified by the public interest in the public's right to know

Public authorities are subject to detailed requirements set out in the Local Government Acts to date requiring the publication of information and prescribing how this is to be made available to the public. In addition, the introduction of the Local Government Transparency Code as statutory guidance introduced additional publication requirements on public authorities regarding openness and transparency in local government, which represents additional obligations beyond that already seen. Combined these elements demonstrate the breadth of requirements already inherent on public authorities to make information publicly available.

The Freedom of Information Act (FOIA) (and parallel Environmental Information Regulations 2004) place additional substantial burdens on public authorities. In terms of the resources public authorities are required to commit to dealing with Freedom of Information requests, there are a number of key points to be made.

Burden on Public Authorities

Under Section 16 FOIA and Section 45 Code of Practice, all public authorities are already under an obligation to give advice and assistance to requestors both in terms of framing requests as well as giving advice to bring such requests within the cost ceiling as laid down within the legislation. The current ceiling set out in the legislation is 18 hours, which is high in terms of resource and cost implications.

Firstly, by way of example of the experience of Liverpool City Council, the number of requests received in 2010 (1,217 requests) to the number of requests received in 2014 (2,139) shows an increase of 922 or in percentages of approximately 76%, and an increase in costs of approximately £150K per annum. This increase can be set against a context whereby the City Council has seen the funding it receives from Central Government reduced by 58% during the same period, placing substantial pressures on the viability of the delivery of essential services for its residents.

In real terms and using the figure for the average costs incurred in responding to an FOI request as set out in the Consultation Document issued by the Independent Commission, of £164 per request, the cost of responding to FOI requests based solely on this is £350K per annum to Liverpool City Council alone.

This does not take into account more complex, technical and detailed requests which have to be dealt with and which cost substantially more. The Council's response rate within 20 working days was 88% in 2014.

The City Council would draw to the Commission's attention the fact that that the average cost per request it has included within its consultation document is based on calculations undertaken in 2008. It is highly probable that a similar calculation conducted today would reach a substantially higher 'cost per request' figure.

Table 1. Number of request received by Liverpool City Council in 2010 and 2014 and associated costs

2010 Month Received	Total	2014 Month Received	Total
Jan-10	92	Jan-14	226
Feb-10	62	Feb-14	215
Mar-10	82	Mar-14	177

Apr-10	97	Apr-14	189
May-10	104	May-14	161
Jun-10	109	Jun-14	151
Jul-10	116	Jul-14	143
Aug-10	106	Aug-14	187
Sep-10	126	Sep-14	171
Oct-10	105	Oct-14	180
Nov-10	140	Nov-14	193
Dec-10	78	Dec-14	146
	1217		**2139**
£164 per request	**£199,588**	**£164 per request**	**£350,796**

Vexatious Requests

The City Council welcomes the revised ICO guidance. However there needs to be additional clear guidance within that around the real public interest rather than the private interests of unelected individuals or concerted campaigns which are a drain on public resources. This type of requestor continues to rise in terms of complexity and their impact on available resources.

Based on the experience of Liverpool City Council and using the average cost idicated above, a small number of “frequent requesters” are costing a disproportionate amount of time and resources responding to their requests, of up to £7,000 per individual. This needs to be reflected and addressed within a substantive manner within any Guidance issued by the ICO.

There are also resource implications even associated with dealing with frivolous requests such as “what is the total number of red pens bought by the Council in the past year”. Even though this is classed as vexatious a formal response to that effect is still required to be issued, effectively occupying valuable resources.

Charging

A further burden associated with FOIA is that of the limited charging mechanisms available under the legislation, specifically, under FOIA public authorities may only charge where the time to deal with the request exceeds 18 hours in total.

The current 18 hours threshold (Section 12) is itself a significant demand on Council resources in that a request can take up to anything just below that timescale and no charge can be made. This in effect is up to and two and half days work . This threshold should be reviewed in the light of some of the research undertaken to date i.e. the average time taken to respond to an FOI request by public authorities of 6 hours and 10 minutes with a lower threshold being established.

In terms of the current charging regime associated with Freedom of Information legislation, again the experience of Liverpool City Council in responding to requests is that the art of redacting specific documents can be very time consuming and should be included within the costs permitted when determining whether complying with a request may exceed 18 hours.

In terms of charging the approach set out in the Environmental Impact Regulations 2004 (EIR) assumes information will be available to inspect ‘for free’ but if information is asked to be supplied in a different format a ‘reasonable’ charge may be made for that supply. Specifically, this charge may extend to the time spent by Officers in responding to the EIR request and supplying the information. This differs to the approach adopted in FOIA and should be made consistent.

The City Council would also draw attention to the difficulties caused by the two disclosure regimes operable in the form of the Freedom of Information Act (FOI) and the Environmental Information Regulations 2004 (EIR). There is considerable overlap between requests which may be received under FOI but which, by virtue of the wide definition under EIR should be considered under that regime. The City Council would seek to encourage greater consistency between both regimes, through either a single consolidating Act or through amendments to both existing regimes to provide for a single common charging mechanism and consistency of the requirements for exemptions and exceptions.

Technical Issues

An additional technical issue which we would seek to highlight is that of an

Exemption (Section 21 absolute, class based) which is applied in those instances where information is either already in the public domain or accessible by alternative means. The legislation still requires this to be issued with a supporting Section 17 Refusal Notice. The City Council considers that the application of this Exemption should not require the issue of a Refusal Notice as no information is being withheld given it is either already in the public domain or accessible by other means to which the requestor is then directed. The use of a Refusal Notice in such instances can give rise to an Internal Review which of its nature would only generate additional unnecessary burdens for public authorities.

Recommendations from Liverpool City Council –

(v) 18 Hour Rule – that a review of the 18 hour limit beyond which charging or refusal is permitted be undertaken and consideration given to reducing this threshold to either 6 or 7 hours.

(vi) Charging/Reasonable recovery of costs – public authorities be given greater opportunity to levy charges for compliance with requests to ensure the recovery of reasonable costs associated with fulfilling requests which would include the time taken to redact any documents. To align the charging policies for EIR and FOI.

(vii) Vexatious Requests –that Guidance issued by the ICO in relation to dealing with Vexatious requests be further reviewed and strengthened in respect of frequent and persistent requesters

(viii) FOIA and EIR Alignment of Regimes – that a concurrent review be undertaken of the FOIA and EIR to ensure greater alignment of both pieces of legislation or one consolidating Act.

(ix) Refusal Notices – the requirements for issue of Refusal Notices be reviewed to remove requirements to issue these in such instances where a Section 21 (information in public domain or reasonably accessible by other means) Exemption is applicable.

Local Government Association

Purpose

We welcome the opportunity to respond to the call for evidence from the Independent Commission on Freedom of Information, issued on 9 October 2015[215]. We have sought views from local authorities to inform our response.

About the LGA

The Local Government Association (LGA) is the national voice of local government. We work with councils to support, promote and improve local government.

We are a politically-led, cross party organisation, which works on behalf of local authorities to ensure local government has a strong, credible voice with national government. We aim to influence and set the political agenda on the issues that matter to councils so they are able to deliver local solutions to national problems.

The LGA covers every part of England and Wales, supporting local government as the most efficient and accountable part of the public sector.

General comments

Local government is already one of the most transparent parts of the public sector, publishing information to inform citizens, communities and business about local authority democracy, accountability and finances, services and performance, and activities. Local authorities publish their data based on statutory requirements and local needs and demands, which are determined by local intelligence, the Local Government Transparency Code and Freedom of Information or Environmental Information requests.

The Local Government Association and its member councils are committed to the principles of openness and transparency, recognising the importance of the public's right of access to recorded information relating to council's business including policy and decision making processes, to enable them to understand the rationale for decisions that will impact them directly or indirectly including the use of public funds.

Local Authorities recognise that the Freedom of Information Act 2000 and its amendments serve an important function in respect of promoting the transparency and accountability of public bodies. Since the introduction in 2005 of the Freedom of Information Act, there has been a significant increase in the amount information published through the Local Government Transparency Code and the openness agenda. At the same time Revenue Support Grant funding has reduced by some 40%.

Local Authorities are concerned however about the increasing misuse of the Act by those seeking to make a profit for their business and those passing on the burden of their research on councils or making frivolous requests. The consideration of exemptions can be time consuming and complex. This creates significant additional administration costs for local authorities, at a time of reduced resources and severe budgetary constraints.

Summary of responses

[215] Call for evidence on FOI https://www.gov.uk/government/consultations/independent-commission-on- freedom-of-information-call-for-evidence

There is a need for change to the legislation whilst protecting the right to reasonable access to information by citizens, so as to:

a) Provide protection of sensitive information by making Section 36 a class- based exemption similar to Section 35 (which means there is no need to show any harm in order to engage the exemption) and remove the requirement for a determination of the application by a "qualified person".
b) Preserve a safe space for public bodies to consider policy options in private, comparable to that currently afforded to central government (i.e. extension of Section 35 to public bodies)
c) Require applicants to set out the public interest in requesting the information, with the provision that an authority is not obliged to respond if this information is not clearly set out, with the aim of eliminating the number of frivolous, commercially or research driven requests.
d) Amend Section 11 (1) (a) when considering the means of communicating the requests to the applicant by deleting the following …."or in another form acceptable to the applicant."
e) In relation to the Fees Regulations 2004:
    - Include within the activities that can be taken into account when estimating the cost of compliance under regulation 7, redacting information to be excluded from disclosure such as personal data and sensitive commercial information.
    - Amend the current provision in section 12 (4) to enablee authorities to aggregate requests from the same or different persons made at the same or different times under the 'appropriate limit' to eliminate splitting requests.
    - Reduce the "appropriate limit to eight hours (equivalent to 1 day) from 18 hours beyond which the applicant should be required to pay.
    - Increase the hourly rate, which has not been amended for 10 years, to bring it in line with current costs.

Detailed responses

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 LGA is of the opinion that the legislation should provide more protection for information relating to internal deliberations of public bodies.
We therefore recommend ~~to~~:

- The provision of robust protection of sensitive information by making Section 36 a class-based exemption similar to Section 35 (which means there is no need to show any harm in order to engage the exemption) and remove the requirement for a determination of its application by a "qualified person".
- The preservation of a safe space for public bodies to consider policy options in private, comparable to that currently afforded to government, by extension of section 35 to public bodies with appropriate amendments

Amendments to Section 36 Exemption

Section 36 provides an exemption to the disclosure of information which inhibits the provision of advice or exchange of views for the purposes of deliberation or prejudice the effective conduct of public affairs. It provides a prejudice-based qualified exemption from disclosure and use of the exemption is subject to the public interest test.

There is a danger that disclosure of discussions could inhibit free and frank conversations, and that the loss of frankness and candor could damage the quality of advice and deliberation and lead to poorer decision making. Because it is a prejudice-based exemption (need to show harm) it offers less of a safe space for deliberation than might be expected. The Information Commissioner's Office (ICO) attaches little weight to 'chilling effect' arguments, but appears to rely on the counter-argument that the lack of a safe space makes for better and more transparent decision making.

There are other equivalent exceptions for protecting unfinished documents and internal communications from disclosure under the Environmental Information Regulations (EIR) which differ in that they are class-based. An advantage of class-based exemptions for local authorities is that they are not required to invest resources in arguing for the protection of discussions or drafts about ideas or events that may never actually be realised because there is no need to consider the sensitivity of the information or show any harm. The information simply has to fall within the class described to be exempt. Classes are broad and will catch a wide range of information. It is suggested by some Councils that the current prejudiced-based exemption is replaced with a class –based one in respect of internal deliberations.[2]

In addition, the use of section 36 requires the authority's 'qualified person' to give their 'reasonable opinion' that disclosure would or would be likely to cause the types of prejudice or inhibition listed above. All other exemptions are determined by FOI practitioners. There is no clear rational for this differential treatment. It is therefore suggested by some Councils that the qualified person requirement should be removed and instead allow FOI practitioners to make the decisions as they do with all other exemptions under the legislation[3]. The current appeals process (i.e. ICO, Tribunals and Court) would apply if a requestor is unhappy with a Councils initial and final decision.

Extending Section 35 exemptions to Authorities

The activities of local government are complex and elected members have individual as well as collective responsibilities. Like government, council members need a safe space in which to consider policy options in confidence without fear of disclosure. Whilst councils can rely on section 36 (prejudice to the effective conduct of public affairs) this does not offer the same protection as it is not a class–based exemption.

We therefore recommend that Section 35 class-based exemption is extended to any public body, thus affording councils similar protection to government. Extending the exemption protects the integrity of the policymaking process and prevents disclosure which could undermine the process and result in less robust or well-considered policy-making.

The continued application of the public interest test to both these provisions will ensure that information is not withheld unnecessarily from citizens.

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

There should not be a defined period for the expiration of protection afforded to sensitive information. The sensitivity of information may or may not diminish over time. The length of time such information should remain sensitive and therefore protected should be based upon an assessment of the type of information, its content and sensitivity and the effect its release would have in all circumstances. The ICO's approach is that that the safe space does not continue forever. Once a policy has been formulated, decided upon and announced, usually the safe space starts to diminish. However, certain types of information, taking into account the likely damage that disclosure may cause, may justify continued protection subject to the assessment of the effect of release. Each case should be determined on its merits, thus when such information is requested public bodies should be required to explain why the information is still sensitive and should not be disclosed.

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?

This protection does not apply to local authorities. It is however important to have appropriate provisions which strike the right balance between transparency, accountability and the need for robust protection in respect of collective cabinet discussion and agreement. As there is such a strong public interest in the protection of the convention of collective cabinet responsibility, it is arguable that it should have the same level of protection as is provided for deliberative space and be subject to absolute exemption.

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

The consultation document recognise the argument that full risk assessment requires a safe space and that public disclosure could result in a 'sanitised' consideration of risks, with adverse consequences for robust decision-making. Such information will often remain sensitive until it has been superseded. However, some information may remain sensitive indefinitely, for example, free and frank discussions conducted on the basis of continuing confidentiality or the audit/risk management process that could be revealed.
Public bodies should be able to exempt any information pertaining to the candid assessment of risks where these are a corollary of the formulation of development of Government (local/central) policy. However, the use of Section 35 should be amended as per our response to Question 1 above. This would ensure that risks that do not form an obstacle to the formulation or development of government policy are made public for citizens, unless the public interest was in favour of withholding the information. We recommend that each risk assessment should be judged on its merits, and information regarding risk assessments should remain sensitive for so long as the risk is ongoing, and the public interest in withholding such information is greater in than in disclosing it.

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?

This power does not currently apply to councils.

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

In line with the principles of openness and transparency we believe it is appropriate that councils have an opportunity to look again at a request and review its decision subject to an external review by the Information Commissioner. However, the current external review processes are cumbersome, lengthy and costly.

Councils' view is that their two stage internal process is correct but that the subsequent process via the ICO and onwards does not favour the "common" requester nor does it support public bodies. The current system, once the appeal to the ICO has been exhausted, requires both parties to seek legal representation at significant cost, while legal FOI subject matter experts are few in number. We recommend consolidation of the process, use of independent "lay" experts and ensuring that all complaints are dealt with within six months.

Similarly, whilst we accept that the number of appeals made to the ICO will always be volatile we are not convinced that the ICO appreciates the significant impact appeals have on councils' workloads,

especially in the context where the number and complexity of requests continue to grow. Whilst we agree that the process has to include timescales, some authorities believe these have to be indicative and local authorities afforded greater flexibility, especially when a request/appeal relates to very complicated and/or commercially sensitive issues, or when multiple appeals are lodged in respective of multiple requests.

It would also be helpful if the ICO could engage in a dialogue with local authorities prior to publication to come to a more consultative outcome. Currently, the ICO can issue an information or decision notice without first advising/consulting with the local authority. In our experience inaccuracies and/or misunderstandings in the wording of a notice can give rise to reputational issues. We believe that the consistency and quality of the reviews undertaken by the ICO can be variable and that the way in which reviews are conducted, and consequently the conclusions reached, can be influenced by the approach adopted by the caseworker. In our experience when a more flexible, consultative, broader minded approach is adopted we tend to achieve better outcomes for all involved.

We therefore recommend that the ICO should enter into dialogue with local authorities (e.g. to share the proposed wording ahead of publication) before publishing any notice, in the same way as the Parliamentary and Health Ombudsmen do.

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?

Local authorities are committed to the Freedom of Information Act and make information routinely available, based on need and in accordance with the Local Government Transparency Code. Increasingly, information is made available as open data via the internet, which should reduce the burden on authorities.

However, feedback from councils suggests that requests have increased by 39 per cent over the three years from 2011/12 to 2014/15, at a time when funding to local government has reduced substantially. Local authorities received an average of 934 requests in 2014/15 (ranging from 488 in a rural district to 1662 in a London Borough). Of these, almost half were from media, business and non-government organisations, although generic e-mail accounts make it increasingly difficult to determine the origin of the requestor. At the same time requests from commercial organisations are becoming increasingly complex.

Case study – Broadland District Council
A survey undertaken by Broadland District Council indicates that, on average, a FoI request takes the council an hour to process. Assuming a cost of £25 per hour, they estimated the total cost of FoI requests was around £25,000 in 2014 – roughly equivalent to the total council tax revenue of a small market town.

Local authorities are overwhelmingly in favour of introducing some controls to reduce the burden of FoI on public authorities, targeting requests which impose a disproportionate burden. Particular areas of concern include:

- Increase in specific and complex requests from companies with a commercial interest
- Requests from journalists and researchers for a specific research or media purpose, often provided as a round robin request to fish for news stories
- Requests for information in a specific format

- Frivolous, vexatious and threatening requests
- Splitting requests to stay below the threshold of appropriate fee limits
- The time spent on redacting personal and sensitive information from complex contracts and other documents which fall outside of the time to account towards fee limits.

Commercial interest requests

Many requests from companies are made in their commercial interest rather than public interest and can take up considerable time. Local authorities provide contract information on a contract register in line with the Local Government Transparency Code which should meet the general requirements of accountability and transparency. Requests from commercial organisations account for nearly a quarter of all FOI requests.

Research and Round Robin requests

Local authorities receive an increasing number of requests for research purposes, predominantly from journalists, students or businesses, often for information that is already published on council websites or falls outside the function of the authority. Requestors are effectively using the FOI route as a short cut to undertaking proper research. As every request has to be llogged and responded to, this places an additional burden on authorities.

Round Robin requests are frequently sent to a number of authorities. Answering them can involve substantial cost to the sector. For example, a request submitted to 200 authorities that takes each authority 15 hours to complete, at £25 per hour, costs the taxpayer £75,000.

Requests to be provided in specific formats

Under section 11 of the Act, authorities are required to provide information in a format acceptable to the requester. There is evidence that this is misused by some commercial organisations, journalists and researchers who demand the information in specific formats such as online survey forms or excel spreadsheets, effectively ensuring that councils produce their research findings for them in final form. To address this we recommend that Section 11 (1) (a) should be amended to delete the following ….”or in another form acceptable to the applicant.”

Frivolous and vexatious requests

The right to know has been misused by requestors and persistent complainers who often waste councils' time with frivolous requests not geared towards a public interest. One FOI officer points to a requester who on more than one occasion said: "I do this because I can - not because I need to or want to!”. Examples of frivolous requests include:

- The number of staff whose name starts with ‘A’.
- List of employees together with their home postcodes.

These requests place an increasing burden on limited and shrinking public resources. The LGA recommends that applicants are required to set out the public interest in disclosing the information, with the provision that an authority is not obliged to respond if this information is not clearly set out.

Splitting requests

Local authorities report that, if the answer to a complex enquiry is likely to exceed the fee limit, some applicants split them into multiple requests to avoid paying the fee. As the requests are not made at the same time, and are worded slightly differently, section 12 (exemptions where cost of compliance

exceeds appropriate limit) and 14 (vexatious and repeat requests) of the Act will not apply. Where authorities have attempted to apply them they have been subject to complaints to the ICO. Broadening the definition of appropriate limits could prevent those tactics. In addition to the current provision enabling authorities to aggregate the requests, the LGA recommends that the “appropriate limit” is reduced to eight hours (equivalent to 1 day) beyond which the applicant should be required to pay.

The cost of redaction

The cost of redacting large documents to avoid releasing personal or sensitive information cannot currently be included in assessing the fee limit. This applies in particular to requests made for voluminous contracts with service providers.

Although provision of part of the information is denied under Section 43, councils are required to disclose all information in a contract that does not prejudice commercial interests. In one case study council officers spent in excess of 18 hours identifying and redacting commercially sensitive information in a contract of several thousand pages. Disclosure of the information could not be denied under Section 12 of the Act, as the time taken could not be taken into account in the calculation. Hence, we recommend that the cost of redaction is included in the “appropriate limit” for fees.

Recommendations

The LGA supports the overwhelming view of llocal authorities in favour of reducing the burden of FOI through stricter controls and/or reducing the fee limit in order to focus resources on disclosure of information on grounds of genuine public interest, rather than on commercial or research interest or on handling frivolous or vexatious requests.

In order to reduce the burden on local authorities we recommend the following controls.

- Require applicants to set out the public interest in requesting the information with the provision that an authority is not obliged to respond if this information is not clearly set out, with the aim to eliminate the number of frivolous, commercially or research driven requests.

- Amend Section 11 (1) (a) when considering the means of communicating the requests to the applicant by deleting the following "…. **or in another form acceptable to the applicant.”**

- In relation to the Freedom of Information (Appropriate Limit and Fees) Regulations 2004:
    - Include within the activities that can be taken into account when estimating the cost of compliance under regulation 7, redacting information to be excluded from disclosure such as personal data and sensitive commercial information.
    - Amend the current provision in section 12 (4) to enablee authorities to aggregate requests from the same or different persons made at the same or different times under the ‘appropriate limit’ to eliminate splitting requests.
    - Reduce the “appropriate limit to eight hours (equivalent to 1 day) from 18 hours beyond which the applicant should be required to pay
    - Increase the hourly rate, (currently £25.00) which has not been amended for 10 years, to bring it in line with current costs.

Appendix: Examples of commercial interest requests

Request sent to East Riding of Yorkshire Council.

Dear Sir or Madam,

Please can you provide me the following information under the Freedom of Information Act 2000:-
List of all computer software used by the Council associated with:

- Asbestos Management
- Health and Safety
- Issuing Work Permits
- Risk Assessment Annual and monthly spend on the above software List of all external consultancies engaged by the Council associated with:
- Health and Safety
- CDM Coordination
- Risk Assessments
- Annual spend on external consultancy services for the above areas

Request sent to Warwickshire County Council:
I am writing to you to request information about the cybersecurity practices across your corporate network, and other networks that you may use. This request is applicable under the Freedom of Information Act 2000.

While the information I am requesting may seem to be very broad, it should all be locatable within a small area and thus quite definitely fall within the time/cost limit for a request under the FOIA. If, however, there are particular circumstances which does not make this possible, if you please I would like you excise the particular request and provide all information to me which does fall within the time/cost limit.

Under Section 16 of the Act, may you please be explicit in informing me of what would fall outside of the limits and provide guidance on how to ensure I am within it in a future request. If you please, I would initially like you to establish contextualising information about the corporate network(s) that you use.

1a. May you confirm who deployed these networks and their names (i.e. in the instance of Sunderland City Council's corporate network, it has been reported that the network was deployed by BT: http://www.telecompaper.com/news/bt-delivers-corporate-network-for- sunderland-city-council--819112)

1b. May you provide me with copies of the tender award documents (these may be 1b.1 - the invitation to tender, and 1b.2 -“the final contract, and 1b.3 etcetera, wherein they display an evaluation of the tender process) relating to the deployment of your corporate network. 1c. I would like to be able to contextualise the successful bid by understanding how many bids you received and how they were evaluated. If you may, I would like you to provide this as a table in a spreadsheet format, the rows of which would list those tendering and the columns of which would list the evaluation criteria. If such a document does not exist, please provide me with a facsimile which might only include the financial range of the bids, in a spreadsheet format.

This information is of obvious value in understanding the deployment of your corporate network which is necessary information to complement the following questions regarding your security practices.

2a. I would like to know what anti-virus and anti-malware solutions you use, this information would be the names of the solutions, the locations at which they are installed, and the names of the companies who have provided them.

2b. May you provide me with copies of the tender award documents for these solutions, as per 1b. Here I would like to understand the procurement process for these solutions and the degrees to which they are expected to provide security. I ask for these as I am aware the solutions may be purchased alone, while also an AV solution is often provided as part of a Microsoft Enterprise Agreement, for instance.

2c. May you confirm the date these solutions have been running for.

2d. May you confirm the number and type of machines across which these solutions are installed.

2e. May you inform of whether there is an employee responsible for maintaining these solutions, and whether this employee does so exclusively. If you may also explain to me their title and pay range in pounds sterling.

I am also interested in the threats that you are facing.

3a. May you inform me of the number of malware alerts that your AV solutions detected in the past twelve months.

3b. Most solutions will provide alerts when it comes to malware detections, may you inform me of the number of alerts your solutions have provided, by solution.

These alerts should be held on a database which provides a high degree of granularity in recording the causes of the alerts.

3b.2 May you provide me with a copy of this granular information -“preferably in spreadsheet format - for the period covering the last twelve months, or shorter if not applicable.

number of infections

3c. I also wish to receive information about the number of infections that have occurred in the last twelve months, and in what areas, and on what machines these occurred.

3d. I would like to know at what account level these infections occurred.

3e. I would like to know how many instances were there in which these infections were not contained, but spread to another part of the network.

3f. I would like to know what the entry-point of these infections was, in each case.

3g. I would like a list of the number and type of unauthorised accesses within your networks. 3h. I would like to know how many of these were classified as personal data incidents, and how many were reported to the Information Commissioner's Office.

Finally, I would like to ask about your security maintenance policies.

4a. If one exists, may you explain your password policy and its enforcement. 4b. If one exists, may you explain your log-on policy and its enforcement.

4c. If one exists, may you explain your email policy and its enforcement.

4d. If one exists, may you explain your device policy (i.e. nothing from home) and its enforcement.

4e. May you clarify whether you store and or process bank card data? 4f. May you clarify whether you are PCI compliant?

For more information please contact

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London Borough of Richmond Upon Thames

We provide our response to each of the consultation questions below, followed by a summary of our key points.

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 Council can only comment on the application of section 36 as section 35 relates to the formulation of government policy and is not applicable to local government.

Section 36 provides an exemption for information if the disclosure would or would be likely to

- Inhibit the free and frank provision of advice, or
- Inhibit the free and frank exchange of views for the purposes of deliberation, or
- Would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs

Therefore S36 as currently framed offers a level of protection for information relating to the internal deliberations of public bodies. The section 36 exemption can only be applied by the qualified person (in Richmond's case the qualified person is the Monitoring Officer). Because it is not an absolute exemption and is subject to public interest considerations it is often perceived that the burden of proof authorities must meet in order to rely on it is set too high.

However recent case law does suggest that perhaps there is a misconception about the burden of proof required to rely on the exemption. For instance in a decision notice issued in December 2014 the Information Commissioner's Office (ICO) in supporting Hampshire County Council's reliance on section 36 asserted in respect of early disclosure of internal deliberations:

"*it is not unreasonable to conclude that information would be less descriptive and couched in a more cautious manner. This would then be likely to have a harmful effect on the deliberation process….*

The ICO's guidance on section 36 states that "safe space" argument can apply if premature disclosure would lead to public or media involvement which would hinder free and frank discussion BUT that this was strongest when the issue was **live**. "Safe space" would no longer be required once the decision had been made, although in some cases "*there might still be a need for a safe space in order to properly promote, explain and defend its key points without getting unduly side-tracked*. The ICO's view is this should only be considered relevant for a short period after the decision.

Therefore currently timing is a big factor in using this exemption. It is difficult to answer the question: for how long after a decision does such information remain sensitive given that some decisions will be relatively straightforward and based on quantitative evidence; therefore disclosure shortly after the decision is taken will not be an issue. Some decisions will be based on difficult discussion and contentious issues and may require a long period of time to lose their sensitivity even after the decision has been taken.

To give an arbitrary period of time for the disclosure of **all** information relating to internal deliberations may have an adverse effect and lead to inhibition of officers during those discussions. Such requests should be assessed on a case by case basis.

In terms of whether different protections should apply to different kinds of information that is currently protected by section 36 one consideration would be to introduce an absolute exemption in respect of

internal deliberations relating to **live** issues. This would provide more clarity and give public authorities more confidence to apply the exemption to this class of information.

An absolute exemption would mean that as long as the information fell within the category described it is automatically exempt from disclosure without requiring the need to justify on public interest grounds.

We believe that the public interest considerations should still apply to requests for internal deliberations when the decision has already been taken.

Richmond Council has not felt the need to rely on the section 36 exemption in many cases. However in the few cases it has been used and subsequently challenged our decision has been upheld.

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

We understand this relates to central government Cabinet discussion and agreement. If so we can only comment from a local government perspective and would re-iterate our views for Q1.

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

We believe in order for risk registers to be effective there needs to be a safe space where officers can identify risks and the management of them in a full and frank manner. The purpose of a risk register is to ensure that risks are fully identified, assessed and managed in order to mitigate the risk. Some risks will be sensitive and may not be recorded in full or indeed at all if there is a possibility that the register will be disclosed in full.

The non-identification of risks on appropriate risk registers would prejudice the effective conduct of the Council's business. Therefore the section 36 exemption would be applicable as well as other exemptions in relevant cases such as section 40 (personal data exemption), 41 (confidential information exemption) & 43 (commercial interests exemption). These exemptions already exist and have been used in order to refuse to disclose risk registers.

Case law shows that in order to apply the section 36 exemption to risk registers public authorities need to demonstrate that it is candid assessment of risks which is refused and not anodyne information which may be contained within the register.

Some authorities already publish very high level risk registers to demonstrate openness and transparency as well as effective working practices with no prejudice or harm as a direct result. Richmond Council, for example, publishes its Corporate Risk Register in Audit Committee papers http://cabnet.richmond.gov.uk/documents/s57321/Corporate%20Risk%20Register%20-%20June%202015%20Update.pdf .Therefore it would be overzealous to blanket refuse this entire category of information.

However careful consideration does need to be taken in respect of the disclosure of risk registers which are likely to reveal sensitive information, for example those related to live change, development or procurement programmes.

The exemptions currently in place referred to above (with the addition of an absolute exemption for live issues as we have proposed) are adequate to protect contentious risk registers. The fact that the section

36 exemption requires a qualified person's opinion should reduce the amount of time anodyne information is refused.

In terms of how long some registers should remain sensitive, again this should be assessed on a case by case basis without an arbitrary set period.

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

We believe an Executive veto would seriously undermine the effective operation of the Freedom of Information legislation which currently uses an independent regulator (ICO), Information Tribunal and the appeal courts for its appeal process. There would also appear to be a clear conflict of interest if the Executive Veto could be exercised.

It would be totally at odds with the aims and objective of the FOI legislation which is to hold public services to account by way of transparency if the government was able to veto the release of information ordered by a court of law. It would also have some effect in reducing trust in the appeals process for FOI requests.

If the Executive are deeply concerned about the disclosure of certain categories of information it would be better to introduce an absolute exemption to apply to that category instead of invoking an Executive veto.

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

Currently the enforcement process does work well in that the ICO can order compliance by way of a formal Decision Notice or Information Notice and if not complied with action can be pursued through the courts. Most of the enforcement costs therefore sit with the ICO. We feel this works well in practice.

In terms of the appeal system an applicant must currently appeal initially to the public authority that issued the response, then complain to the ICO if dissatisfied, then to the Lower Information (or Upper Tribunal in complex cases) Tribunal if either party are unhappy with the ICO Decision Notice. Either party can then only appeal a Tribunal decision on a point of law. This limits to some extent the scope of the appeal after the Tribunal stage.

Although it can be very costly for the parties involved other than the complainant (who can lodge an appeal free of charge) evidence from the ICO suggests only a small number of applicants actually complain following the response received from the public authority.

There is some merit in introducing a fee for appeals following the Tribunal stage. Given that a Tribunal decision can only be appealed on a point of law, introducing a fee would also concentrate the minds of appellants, some of whom can become obsessed with the minutiae of the case which is often not in the public interest.

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

The Council supports the aims and objectives of Freedom of Information and believe it is important to have legislation that allows members of the public to hold public services to account. However we do believe a balance must be struck in achieving these aims. Given the continued constraints on public

sector finances and reduced central government funding it is important to acknowledge that transparency comes with a cost and that compliance with the FOIA consumes resources and management effort which could otherwise be used for the delivery of frontline services.

It is of concern to us that, all too often, central government imposes upon us obligations which have financial consequences without adequately compensating Councils for the cost. At a time when local government finances have been reduced by an unparalleled amount and now are facing a further 30% reduction we believe that no longer should local Councils be required to bear the full cost of most FOI enquiries. It is clear the burden & the cost of complying with the FOI legislation far outstrips any government expectation when the Act came into force.

Below are the FOI figures for Richmond Council since the introduction of the legislation.

Year	**2005**	**2006**	**2007**	**2008**	**2009**	**2010**
Number of FOIs	222	273	337	492	706	720
% complied with within 20 working days	92%	96%	97%	96%	97%	96%

Year	**2011**	**2012**	**2013**	**2014**
Number of FOIs	1,029	1,094	1,451	1,505
% complied with within 20 working days	95%	95%	96%	96%

The Council has taken a proactive approach to publishing information that is repeatedly requested under FOI and also publishes responses to requests in a disclosure log https://www.richmond.gov.uk/foi_log . There are early indications that this has resulted in a small decrease in FOI requests received, although further monitoring is required to be certain of this.
Although there are some controls in place to reduce the burden of FOI requests on public authorities we believe these controls can be tightened up and strengthened without weakening the FOI legislation or detracting from its aims. For example:

- Currently the appropriate limit which is the amount of time the Council must spend locating information relevant to a request is set at 18 hours or £450. We believe this limit should be reduced to 10 hours. Given the significant reduction in government funding many public services are faced with we believe a significant reduction in the cost limit & time expected to locate information would go some way to reducing the current burden;
- Currently public authorities cannot take into account redaction time when calculating the 18 hour appropriate limit set. Only the time taken to search and collate the requested information can be taken into account. Our experience is that in nearly 50% of cases it is redacting sensitive information from the material that is going to be disclosed that takes the longest time, not looking for the information, and redaction in some cases can take many, many hours. Including redaction within the time limit would significantly reduce the burden on public authorities;

- Currently there is an exemption for vexatious or repeated requests (section 14). Although this exemption can be used to ward off some frivolous requests we believe it could be tightened up so that it is explicitly clear; the exemption could be titled ‘Frivolous, Vexatious & Repeated Requests’. This way it would be clear that public authorities could refuse silly requests (such as the actual requests set out below) and much time and effort saved

- Although we believe it will be difficult to administer in practice we do feel there need to be some measures to address the number of requests made by journalists and companies in lieu of undertaking their own research, on a fishing exercise or trying to gain a commercial advantage. In essence local Council Taxpayers are funding journalists and private companies to do their jobs. The Council monitors the origin of FOI requests and we have found that 50% of all requests are from journalists or companies – the figure is likely to be higher as some requesters who appear to be private individuals may actually be acting professionally. Whilst we do not think refusing certain applicants access to information is the right way forward, we do believe that this needs to be addressed
- If information is published there should be no additional requirement to tailor make it to meet nuanced requests. For example, if the Council publishes information annually, it should not be required to provide updated information every month. Where information is published on the topic requested public authorities should not need to do additional work to tailor the information to the specific question. It is disproportionate to then provide the information for specific dates requested under FOI. Although the S.21 exemption applies to information reasonably accessible by other means, this will not necessarily incorporate requests that ask for very specific information where the headline information has been published. At the moment there is no exemption for proportionality i.e. the additional insight the information would provide on the topic taking into account the information already available vs the cost or time to comply (even if it does not meet the S.12 appropriate limit).

In terms of requests that pose a disproportionate burden some example requests are:

- http://www.richmond.gov.uk/17006_1.pdf request asked for amount spent on alcohol and Christmas parties. The Council does not have a dedicated finance code called Christmas party or alcohol. However a great deal of effort was spent trying to ascertain what could be provided. Often officers try to be helpful in providing information from memory but this does not always represent the accurate picture and it became clear that there was no way of providing a definitive answer. The request was refused on cost grounds after a great deal of time was spent ascertaining what could be provided.
- http://www.richmond.gov.uk/home/council/open_richmond/freedom_of_information/foi_log/foi_case_details.htm?id=16176 request related to a contract for cashless parking (Ringo) provider. Although the contract was easy to locate the amount of time spent consulting with the 3rd party provider and the redaction time could not be taken into account when considering the cost limit.

There are some arguments against the introduction of a nominal fee for all FOI requests;

- Other controls can be introduced which can reduce the burden on public authorities without the introduction of a nominal fee. Who will foot the bill in respect of the administrative burden any nominal fee would bring?

However, the introduction of a nominal fee would go a long way towards offsetting the cost to public bodies of implementing the Act and it would deter more frivolous requests. It could be supplemented by full cost recovery for more complex cases.
We would **firmly** support a nominal fee for **all** requests, with full cost recovery in more complex cases we also understand the risks associated with such a move.
If the Government were not minded to go down this route we would support the introduction of the Australian model whereby there is no charge for the first five hours spent deciding whether to grant or refuse a request, including examining documents, consulting with other parties, making deletions or notifying any interim or final decision on the request, but after the first five hours the cost is £25 per hour. This would go some way to reduce the current burden without weakening the legislation.

In summary;

- **Decisions about how long information remains sensitive once issues are no longer live should be taken on a case by case basis and not be subject to a single time limit.**

- **Consideration should be given to introducing an absolute exemption in respect of internal deliberations relating to live issues.**
- **The two points above should also be applied to requests for disclosure of risk registers.**
- **We do not consider that the Executive should have a veto (subject to judicial review) over the release of information. If the Executive are deeply concerned about the disclosure of certain categories of information it would be better to introduce an absolute exemption to apply to that category instead of invoking an Executive veto.**
- **We feel the current enforcement system works well in practice.**
- **The appeals system also works well and only a very small number of cases reach the Tribunal stage. There may be some merit in introducing a fee for these.**
- **Given the significant reduction in government funding many public services are faced with we believe a significant reduction in the cost limit & time allowed to locate information in requests would reduce the burden on local authorities and other bodies. We suggest reducing the time limit from 18 hours to 10 hours.**
- **Authorities should be allowed to take the time required to redact information into account when calculating the time limit.**
- **The exemption for vexatious or repeated requests should be extended to explicitly include frivolous requests.**
- **Consideration needs to be given to limiting the ability of journalists and companies to make 'fishing' requests.**
- **If information is published there should be no additional requirement to tailor make it to meet nuanced requests.**
- **Whilst we fully support open and transparent public decision making we do believe that a nominal fee should be introduced for all FOI requests for the detailed reasons set out above.**

London Fire Brigade

Dear Lord Burns

Independent Commission on Freedom of Information: Call for Evidence

Thank you for the opportunity to provide evidence to the Commission. This response is on behalf of the London Fire Brigade (LFB) which is run by the London Fire and Emergency Planning Authority.

I write as the Brigade's Head of Information Management with the lead responsibility for freedom of information, transparency and data protection.
We would like to provide evidence in regard to question 6 as this is the area of the Commission's review where we have most experience.

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

The Brigade fully supports the goals of the Freedom of Information Act (FOIA) and those of the transparency agenda in enabling public authorities to be scrutinised and held to account by the public. Since the introduction of FOIA there have been some good examples of where public services or policy has been changed, for the better, as a result of information made accessible under FOIA.

We find however, as has been identified by other research, that the FOIA legislation designed to benefit the many is, on occasions, abused by single individuals trying to further a personal and limited agenda. These FOIA request can take significant amounts of time and it is not always clear whether the information disclosed is indeed of any real benefit to the requestor.

I have thought often about how such abuses of public time and money could be mitigated through changes to the FOIA legislation but – and without wishing to prejudice the thoughts of the Commission
– I would think it hard to target such a small group of people through a legislative change. However, I do believe that there are areas of information, or types of requests, that could have their scope legitimately limited (either by tightening the legislation or by further guidance from the Information Commissioner) without diminishing the principles of FOIA. I have set out these thoughts under broad headings below.

Transparency

The local government transparency code 2015 is an important tool in providing publically accessible data about a local authorities activities. By meeting the mandatory requirements of this code, and going further, the public now have access to detailed levels of information and data – sometimes down to individual records – on broad topics of service delivery, spend and employment. For example, every month, the LFB release details about all the emergency incidents attended and the fire engines attending those incidents with times of arrival. Data is available on the London Datastore for all emergency incidents from January 2009.

However, meeting the requirements of the code does not lead to a reduction in FOIA requests and therefore, potentially, creates a duplication of work. FOIA understandably has a requirement to help

people find the information they are looking for and assist in making that information accessible. That requirement can however be interpreted as a need to fulfil every bespoke request. We would like to see a provision within FOIA (or within guidance) whereby an authority can decline a request when there is information already available that is '*similar enough*' to the request.
For example, the transparency code has clear requirements about the publication of information about purchasing, contracts and spend. Yet we still receive a number of requests – typically from companies posing as individuals – for detailed contract information. If government are happy that the local government transparency code represents best practice in information disclosure, then an authority should be able to claim an exemption from FOIA requests that seek similar, albeit subtly different, information.

Such an exemption could also be considered in regards to information available on an authority's disclosure log. Where we receive requests for similar information, but with slightly different parameters, the requirement to be helpful restricts our ability to point people to data that is similar. We therefore lose much of the benefit of maintaining a disclosure log. A exemption (either in legislation or clearer guidance) would then enables an authority to reject a request on the basis that similar information has already been made available would help. This would elevate some burden in reproducing bespoke data for every individual. If such an exemption was available then making it qualified (ie requiring a public interest test) would enable a fair consideration of each individual request.

The appropriate limit

Section 12 of FOIA allows a public authority to refuse to deal with a request where it estimates that it would exceed the appropriate limit to either comply with the request in its entirety or to confirm or deny whether the requested information is held. This exemption provides a fair balance between the rights of access and the burden to an authority in complying. The fees regulations sets out clear parameters about what actions an authority can take into account for the costs it reasonably expects to incur.

We would however like to see the fees regulation amended so that the costs for time for reading, consultation, and consideration of a request can be taken into account.

I am aware that the Information Commissioner's view is that this is unnecessary and that public authorities should make wider use of the vexatious request exemption. Whilst this is undoubtedly true, there is a genuine perception issue of labelling people as vexatious – for just requesting too much information – and also denying the request in this way prevents access to the information, where as it could be made available for a fee if the regulations were to allow it.

Fees for requests

In principle we are opposed to the idea of a fees structure being applied to FOIA. Whilst a charging regime would undoubtedly reduce the number and scope of requests being made such a regime would disadvantage poorer members of the community; those who often have to recourse to FOIA as a way to understand and settle legitimate complaints.
We would however welcome an 'access fee'; a token amount that would represent a commitment to the need for the information from the requestor. We would see this as being similar, if not the same, as the fee for subject access request in data protection law (e.g. £10).

We do see it as necessary to maintain the 'applicant blind' and 'without cause' ethos of FOIA. Whilst it would be nice if an authority had a power to decide the virtue of requests (and only using its resources where there is a greater public good) it is hard to see how the authority would be best place to decide that. Nevertheless, we do see requests where there is very little outlay on behalf of the requester (a two line email requesting information that takes us four or five hours to comply with) with no evidence that the information is ever used, or indeed read!

Examples of this would be requests from students who put out a number of fishing requests to find areas of interest for their dissertations. Enabling authorities to apply a small access fee may be sufficient enough to deter frivolous enquires but without adversely affecting genuine requests. As is the case with the data protection act subject access fee, we would see applying the fee as being at the discretion of the authority.

I hope you find these views useful in your considerations and if I can be of further assistance, please let me know.

Yours sincerely
David Wyatt
Head of Information Management

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