Ministry of JUSTICE

Memorandum to the Justice Select Committee

Post-Legislative Assessment of the Freedom of Information Act 2000

December 2011

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Post-Legislative Assessment of the Freedom of Information Act 2000

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by the Lord Chancellor and Secretary of State for Justice
by Command of Her Majesty

December 2011

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1. Introduction

1. This Memorandum provides a preliminary assessment of the Freedom of Information Act 2000 (FOIA) and has been prepared by the Ministry of Justice (MoJ) for submission to the Justice Select Committee as part of a process of post-legislative scrutiny. Its publication arises from a commitment given by the Government on 7 January 2011 to conduct a review of the operation of FOIA to determine how far it has achieved its original aims and objectives. This was part of a package of measures relating to Coalition Agreement commitments to increased transparency and to the extension of the scope of FOIA.

2. FOIA received Royal Assent on 30 November 2000, and came into full effect on 1 January 2005. The Act gave the public, for the first time, a statutory right (subject to appropriate limitations) to find out if a public authority held specified information and, if so, to be provided with access to it.

3. FOIA provides two key statutory rights for requesters of information; the right to be told if the information is held or not, and if the information is held, to be given access to it. Those rights are subject to some procedural conditions, related, for example, to the cost to the public authority of complying with the Act, and to specified exemptions which relieve the public authority of their duty to confirm or deny that they hold the information or to provide the information. The Act sets out a complaints and appeals system which requesters can avail of where they are unhappy with the outcome of their request, or where public authorities are unhappy with the outcome of a complaint about their decision. The Act also places a duty of proactive disclosure on public authorities by requiring them to adopt and maintain a publication scheme setting out the information and documents which they routinely release.

4. This Memorandum will revisit the objectives of the original FOI Bill and evaluate whether those objectives have been met, as well as highlighting any specific issues identified since FOIA came into force.

5. Chapter 2 explores the objectives of FOIA at the time of its enactment by reference to the White Paper, Parliamentary debates during the passage of the Bill and external speeches.

6. Chapter 3 details the implementation of FOIA, recounts how it was commenced, describes its enabling provisions and their use and how the Act has been amended. It also discusses the support and guidance available to users and sets out previous evaluations and research.

7. Chapter 4 provides an analysis of the operation of FOIA in practice. This includes an examination of the way in which its scope has been maintained and extended; an overview of some key issues arising in the use of procedural refusals and exemptions; an analysis of request volumes, levels of disclosure and timeliness of responses; the operation of the complaints and appeals process; the role FOIA has played in proactive disclosure of information; the impact of FOIA on public authorities, particularly in relation to cost; and the impact of FOIA on commercially focused public authorities.

8. Chapter 5 evaluates the performance of FOIA against its original objectives of openness and transparency, greater accountability, better decision making and greater public involvement in decision making.

2. Objectives of FOIA

A. Openness and Transparency

9. The first and most emphasised objective of FOIA is "to help open up public authorities and other organisations which carry out public functions" as set out in the White Paper (*Your Right to Know [1997]*).[1] This was accepted as a key objective by the Public Affairs Select Committee in its report in response to the White Paper, describing the White Paper proposals as a 'radical advance in open and accountable Government' (*Public Affairs Select Committee [1998]*).[2]

10. Openness and transparency remained the key objective reiterated during the debates in the Commons and the Lords. Opening the Second reading debate on the Bill in the Commons, the then Home Secretary, Jack Straw stated that the Act "will help to transform the culture of Government from one of secrecy to one of openness."[3] Winding up that debate, the Parliamentary Under Secretary of State at the Home Department, Mike O'Brien, said of Whitehall that "It is unnecessarily secretive. It is secretive by culture, and unnecessary secrecy can be profoundly undemocratic and corrosive… The Government and Whitehall recognise that there is a need to be more open."[4] In the Lords, the then Minister of State at the Cabinet Office, Lord Falconer stated of changing the culture of secrecy in public bodies that "The Government intends that the Bill should act as the catalyst for that culture change."[5]

11. The distinction between reactive and proactive openness and transparency is important. Reactive openness and transparency suggests a system responsive to requests for information, while proactive openness and transparency suggests a system in which information is proactively released without the need for requests. The White Paper addressed this distinction and included both within the objective: "First it will empower people, giving everyone a right of access to the information that they want to see. Secondly, it will place statutory duties on the bodies covered by the Act to make certain information publicly available as a matter of course."[6]

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1 *Your Right to Know: Freedom of Information (1997) [CM 3818].*

2 Third Report of the Public Administration Select Committee; 1997-98; [HC 398-I].

3 Jack Straw MP (7 December 1999).

4 Mike O'Brien MP (7 December 1999).

5 Lord Falconer (17 October 2000).

6 *Ibid.* 1 at p5.

B. Accountability

12. The White Paper specified the purpose of its proposals was "to encourage more open and *accountable* government".[7] The Public Administration Select Committee, in its response to the White Paper considered that one of the purposes of FOI was to "Make it easier for politicians, journalists and members of the public to hold the government to account by making government cover-ups more difficult."[8]

13. In the Commons Second reading debate, Jack Straw, then Home Secretary, gave the Government's view that the FOI Bill "will help to deliver a…more accountable public service".[9] This point was reiterated by Lord Falconer in the Lords. Speaking in 2004, Lord Falconer, by then the Lord Chancellor and Secretary of State for Constitutional Affairs, made clear that the objective of accountability stemmed from the primary objective of openness, saying that "the benefits of open government are clear: transparency, accountability, honesty".[10]

C. Better Decision Making

14. While increased openness and transparency, and enhanced accountability may be seen as primary objectives of FOIA, other objectives stem from these. The White Paper stated that "unnecessary secrecy in Government leads to…defective decision making".[11] The Public Administration Select Committee, in its response to the White Paper, identified a purpose of FOI as to "improve the quality of government decision-making because those drafting policy advice know that they must be able, ultimately, to defend their reasoning before public opinion."[12] Jack Straw in the Commons Second reading debate made clear that an anticipated result of greater openness was that FOIA would "enhance the quality of decision making by the Government."[13] Lord Falconer, speaking in 2004, made clear the Government's view that "It is in our interests as Government to show people how government reaches decisions in their names. Freedom of Information, done properly, will mean better Government."[14]

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7 *Ibid.* at p1.

8 *Ibid* 2.

9 *Ibid.* 3.

10 Lord Falconer (26 November 2004).

11 *Ibid.* 1 at p1.

12 *Ibid.* 2.

13 *Ibid.* 3.

14 *Ibid.* 10.

D. Public Involvement in Decision-Making

15. This final objective relates to an improvement in the relationship between the public and decision-making processes. In particular, the objective encompasses improved trust by the public in decision-making and increased participation by the public in the decision-making process.

16. An aim of FOIA stated by Lord Falconer in 2004 was "to show citizens how government works – and to show them how decisions are taken." In the same speech he set a benchmark for the evaluation of FOIA as "Do the public think we are becoming more secretive, or less? Do they feel government is becoming more transparent, more *trustworthy*?"[15] *Your Right to Know* makes reference to the perception of excessive secrecy as "a corrosive influence in the decline of public confidence in government".[16]

17. In relation to the objective of greater public participation in the decision-making process, Lord Falconer argued in 2004 that "without openness we cannot hope to encourage greater participation in our democratic life".[17] MPs in the Commons debate highlighted increased public participation as an objective, stating that wide access "will assist strong, informed democratic participation in the life of this country…Information is the oxygen of democracy."[18]

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15 Lord Falconer (1 March 2004).

16 *Ibid.* 1 at p1.

17 *Ibid.* 10.

18 Patrick Hall MP (5 April 2000).

3. Implementation of FOI

18. FOIA is UK wide in scope but does not apply to certain bodies in Scotland that are listed in FOIA.[19] In line with the terms of the devolution settlement, requests for information made to these Scottish public authorities are instead covered by the Freedom of Information (Scotland) Act 2002.

19. The Northern Ireland Assembly and the National Assembly for Wales have legislative competence in relation to access to information. This means that any legislative developments related to FOIA need to take account of the enhanced legislative competence that each respective Assembly has acquired.

20. FOIA was commenced in six phases, during the periods specified in section 87 of FOIA and on the dates specified in five commencement orders. All of its provisions have been commenced. A full list of commencement orders and secondary legislation issued under the enabling provisions of FOIA is provided in Annex A.

A. Powers to Make Secondary Legislation

21. FOIA provides sixteen distinct powers to make secondary legislation, details of which are given below. Sections 4(1), 4(5)(a), 4(5)(b), 5(1)(a), 5(1)(b), 7(3)(a), 7(3)(b) 9(3), 10(4), 12(4), 12(5), 13(1), 53(1)(a)(iii), 74(3), 75(1) and 83(2) all confer powers on the Secretary of State to make secondary legislation.

22. All of the powers have been used at least once except for the powers to make secondary legislation given under sections 5(1)(b), 7(3)(b), 53(1)(a)(iii) and 74(3) FOIA. Further information on the use of these powers to date to make orders and regulations is provided in Annex A.

23. The provisions under **section 4** (relating to the addition and removal of public authorities listed in schedule 1) **section 5** (designation of further public authorities) and **section 7** (limitations of scope to information of a particular description) are discussed in more detail at paragraphs 70, 74 and 85 respectively.

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[19] Section 80 of FOIA provides that it may not be extended to include the Scottish Parliament, any part of the Scottish Administration, the Scottish Parliamentary Corporate Body or any Scottish public authority with mixed functions or no reserved functions (within the meaning of the Scotland Act 1998). The effect of this and the provisions of the Scotland Act 1998 is that FOI legislation relating to these bodies is a matter for the Scottish Parliament.

24. **Section 9(3)** provides that fees chargeable in order for the public authority to fulfil its obligations under Section 1(1) are to be determined by regulations made by the Secretary of State.

25. **Section 12(4)** permits the Secretary of State to make regulations prescribing that where two or more requests are made to a public authority by one person or by more than one person who appear to be acting in concert or in pursuance of a campaign, the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.

26. **Section 12(5)** permits the Secretary of State to establish regulations setting the limit to the estimated cost of complying with the request and the manner in which this limit may be estimated. A public authority is no longer obliged to comply with the relevant subsection of section 1(1) if the cost limit of complying with that subsection is estimated to be exceeded. If the estimated costs of complying with the requirement in subsection 1(1)(b) exceed the cost limit designated in the regulations, there is still an obligation to comply with subsection 1(1)(a) unless the estimated costs of complying with that requirement would also exceed the limit.

27. **Section 13(1)** allows public authorities to charge requesters for communicating information which is beyond the cost limit set out under Section 12 and which is not otherwise required by law, in accordance with regulations made by the Secretary of State.

28. Regulations under Sections 9(3), 12(4), 12(5) and 13(1) were issued in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (2004 No. 3244).

29. **Section 10(4)** empowers the Secretary of State to extend the period in which a public authority must respond to a request up to a maximum of sixty working days. This power has been used in three orders to extend the deadline: for schools and academies, to reflect their inability to respond requests during school holidays; for consideration of requests relating to closed transferred public records; and for requests where information may need to be provided from outside the UK; or from the armed forces.

30. **Section 53(1)** permits the Secretary of State, by order, to designate public authorities not already caught within the section who may, through an accountable person in relation to that authority, give the Information Commissioner a certificate stating that the accountable person has, on reasonable grounds, formed the opinion that there was no failure to comply with section 1(1) as the duty to confirm or deny under section 1(1)(a) does not arise, or the duty under section 1(1)(b) does not arise in respect of exempt information.

31. **Section 74(3)** permits the Secretary of State to make regulations as he considers appropriate for implementing the information provisions of the Aarhus convention or implementing any amendment to those provisions made in accordance with the convention. The Environmental Information Regulations (EIR) 2004 gave effect to those provisions. The EIR regime which implements EU Directive 2003/4 on public access to environmental information, runs alongside the FOI regime and is enforced by the Information Commissioner's Office.

32. **Section 75(1)** enables the Secretary of State to, by order, repeal or amend an enactment, made before or at the same time as FOIA, for the purposes of removing or relaxing a prohibition that, by virtue of section 44(1)(a), is capable of preventing disclosure The Freedom of Information (Removal and Relaxation of Statutory Prohibitions on Disclosure of Information) Order 2004/3363 amended eight specified enactments in order to remove or relax the prohibition of disclosure in cases of Freedom of Information that would otherwise have applied, although one has subsequently been revoked. This is the only occasion on which Section 75(1) has been used. In 2005, the then Department for Constitutional Affairs published a review of such provisions.[20] It identified 210 statutory prohibitions which prohibit disclosure under FOIA and made recommendations about amendment, repeal or retention, of each provision. However no further Orders under section 75 have been made and the majority of statutory bars on disclosure remain in place, although many appear little used.

33. **Section 83** provides the definition of the term 'Welsh public authority' which is used throughout the Act. For example, section 7 requires the Secretary of State to consult with the National Assembly for Wales when he makes an order under that section in relation to a 'Welsh public authority'. Section 83(2) specifies that the Secretary of State can, by order, exclude bodies that would otherwise be considered as Welsh public authorities from that definition. The Freedom of Information (Excluded Welsh Authorities) Order 2002 specifies a range of bodies as being excluded authorities for the purposes of section 83(1). These include specified Magistrate Court committees, specified Advisory Committees of General Commissioners of Income Tax, specified Advisory Committees on Justices of the Peace, the Parliamentary Boundary Commission for Wales, Sianel Pedwar Cymru (in certain respects) and the Traffic Commissioner for the Welsh Traffic Area.

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20 *Review of Statutory Prohibitions on Disclosure* (2005) http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/StatutoryBarsReport2005.pdf

B. Amendments to FOIA

Constitutional Reform & Governance Act 2010

Historical Records

34. Under section 63 of FOIA, information contained in an "historical record" (as defined by section 62) cannot be withheld on the basis of the exemptions in sections 28, 30(1), 32, 33, 35, 36 (for the most part), 42 and 43 of FOIA. In the form that FOIA was passed, a record is an historical record once it is 30 years old. The 30 year period is calculated from the year following the year in which the record was created.

35. This 30 year period mirrored the date on which a record that is classed as a public record is required to be transferred to The National Archives or place of deposit for public records under the Public Records Act 1958. Section 45 of the Constitutional Reform and Governance Act 2010 ("the CRAGA") reduces this date so that a public record has to be transferred to The National Archives 20 years from the date of creation instead.

36. To reflect this, section 46 of the CRAGA makes related changes to the original FOIA arrangements. Under FOIA as amended, a record becomes an historical record after 20, rather than 30, years. The new result is that information contained in a record that is 20 years old cannot be withheld under sections 30(1), 32, 33, 35, 36 (for the most part) or 42 of FOIA.

37. However, the new 20 year limit does not apply to information that might be subject to certain exemptions identified in the CRAGA amendments. Instead, information subject to these exemptions can continue to be withheld until the 30 year point. The exemptions are:

    - section 36(2)(a)(ii) (information which would or would be likely to prejudice the work of the Executive Committee of the Northern Ireland Assembly);
    - section 36(2)(c) (prejudice to the effective conduct of public affairs), in so far as disclosure would cause such prejudice in Northern Ireland;
    - section 28 (relations within the UK);and
    - section 43 (commercial interests).

38. Originally, section 37(1)(a) provided a qualified exemption in respect of information which relates to communications with Her Majesty, with other members of the Royal Family or with the Royal Household. CRAGA amended section 37(1)(a) so that it covered information relating to the following categories:

    (a) communications with the Sovereign,

    (aa) communications with the heir to, or the person who is for the time being second in line of succession to, the Throne,

    (ab) communications with a person who has subsequently acceded to the Throne or become heir to, or second in line to, the Throne,

(ac) communications with other members of the Royal Family (other than communications which fall within any of paragraphs (a) to (ab) because they are made or received on behalf of a person falling within any of those paragraphs), and

(ad) communications with the Royal Household (other than communications which fall within any of paragraphs (a) to (ac) because they are made or received on behalf of a person falling within any of those paragraphs).

39. CRAGA makes the exemption absolute where information relates to any of the first three categories (i.e. those contained in section 37(1)(a) to (ab). This includes information which relates to communications made on behalf of a member of the Royal Family mentioned in those categories by another member of the Royal Family or the Royal Household. The exemption remains qualified where another member of the Royal family or of the Royal Household is acting in any other capacity.

40. Information in any record cannot be held under the newly amended exemption (whether the absolute or qualified part) for more than 20 years after the year following the year in which it was created or, if later, for more than 5 years after the death of the relevant member of the Royal family,[21] whichever is later.

41. The amendment included a new Section 80A which limited the effects of the other amendments where the information is held by the Northern Ireland Assembly, a Northern Ireland department or a Northern Ireland public authority. The Protection of Freedoms Bill proposes to repeal that section and bring this information within the scope of the amendments.

42. Only the amendments to section 37(1)(a) and that introducing new Section 80A have been commenced to date.[22] The result is that the reduction of the 30 year transfer period to 20 years has yet to come into force.

Protection of Freedoms Bill 2011

43. The Protection of Freedoms Bill, currently before Parliament, would have the effect of amending FOIA primarily in relation to the rights of requesters in respect of datasets. The changes are intended to promote the proactive release of more datasets and to ensure that when data is

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21 The relevant member will depend on which section 37 category the information relates to. If it relates to communications with a specific member of the Royal family then the relevant date is the date of death of that member. If it relates to communications with the Royal Household the relevant date is the date of the death of the Sovereign at the time that the record in which the information is contained was created.

22 Section 37(1)(a) was brought into force by The Constitutional Reform and Governance Act 2010 (Commencement No. 4 and Saving Provision) Order 2011 (S.I. 2011/46).

released it is in a re-usable format and, where possible, free for re-use. This will in turn promote use and development of the raw data held by public authorities to provide useful products and services.

44. If the Bill is passed, section 11 of FOIA would be amended to make particular provision where a request is made for information that is a dataset, or which forms part of a dataset. Where such information is held by the public authority and the applicant requests that information be communicated in an electronic form, the Bill provides that the public authority must, as far as is reasonably practicable, provide the information to the applicant in an a re-usable format (i.e. an electronic form that is capable of re-use). A dataset for these purposes is raw factual material that has not been adapted or altered in any way (e.g. to form statistics). Where the dataset is subject to copyright the amendment provides that the public authority should seek to provide the dataset under license and may make regulations to charge for the provision of such datasets in response to a request.

45. Section 19 would be amended to provide that publication schemes must include a requirement for the public authority to publish any dataset it holds, which is requested by an applicant, and any updated version of a dataset, unless the authority is satisfied that it is not appropriate for the dataset to be so published. It requires public authorities, where reasonably practicable, to publish any dataset in an electronic form which is capable of re-use. It also requires public authorities to make any relevant copyright work (if the authority is the only owner) available for re-use in accordance with the terms of a specified license. Section 45 would be amended to to insert a new requirement for the code of practice to include provision relating to the disclosure by public authorities of datasets held by them. It sets out the different provisions relating to the re-use and disclosure of datasets that may, in particular, be included in the code of practice under section 45 of FOIA. The Bill also amends section 45(3) of FOIA so as to provide for the possibility of making more than one code of practice under section 45, each of which makes different provision for different public authorities.

46. The purpose of these changes was to increase the proactive disclosure of factual information held by public authorities. The format and copyright changes have been made to enable individuals and companies to re-use data for the purposes for which it was requested, such as for statistical manipulation.

47. The Bill also seeks to clarify the position under Section 6 of FOIA, which only brings companies wholly owned by a single public authority or by the Crown within FOIA's scope. The Bill proposes to amend section 6 of FOIA to bring within the scope of the Act companies wholly owned by more than one public authority.

48. The Bill also proposes certain changes to the role of the Information Commissioner's Office to enhance and ensure its independence. The Bill proposes changes to the tenure of the Information Commissioner,

increased independence to charge for services and reduced need for approval from the Secretary of State for operational decisions. The amendments are described in more detail at paragraph 155.

49. Finally, the Bill proposes to repeal Section 80A inserted in the CRAGA and bring the amendments made to FOIA by that Act into effect in respect of Northern Ireland public authorities.

C. Codes of Practice and Support

50. Section 45(1) requires the Secretary of State (in practice this is the Secretary of State for Justice) to issue a non-binding Code of Practice providing what he considers to be best practice guidance for public authorities when dealing with requests under Part I of FOIA. Public authorities subject to FOIA are not legally bound by FOIA to follow the Code but, under standard public law principles, would be expected to take the Code fully into account when dealing with a FOIA request for information.

51. The Code is, in particular, required to include guidance on providing advice and assistance to requesters, transferring of requests from one authority to another, consulting with individuals to whom the requested information relates or whose interests are likely to be affected, including disclosure clauses in contracts and the procedures for making complaints about how requests have been handled. The Information Commissioner must be consulted before any code is issued or revised, and any code issued or revised must be placed before both Houses of Parliament. The Code of Practice issued under Section 45(1) was placed before Parliament in November 2004.[23]

52. Section 46(1) requires the Lord Chancellor to issue a non-binding Code of Practice (which, again, is not legally binding under FOIA) to "relevant authorities"[24] relating to best practice in keeping, managing and destroying their records. The guidance may also include guidance on the practice for transferring records under the Public Records Act 1958 and the Public Records Act (Northern Ireland) 1923 and practice for reviewing such documents before they are transferred. No specific points of inclusion are required but before issuing or revising any Code the Lord Chancellor is obliged to consult with the Information Commissioner and the relevant Northern Ireland Minister, where necessary. The first Code of

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[23] Secretary of State's Code of Practice on the discharge of public authorities' functions under Part I of the Freedom of Information Act 2000 (November 2004); http://www.justice.gov.uk/guidance/docs/foi-section45-code-of-practice.pdf

[24] These are public authorities subject to FOIA and also other bodies who hold departmental and administrative records that are public records within the meaning of the Public Records Act 1958 and the Public Records Act (Northern Ireland) 1923 (see section 46(7) of FOIA).

Practice was issued in November 2002 and was updated in July 2009 to reflect the importance of guidance relating to digital records.[25]

53. In addition to the statutory Codes of Practice, MoJ issues non-statutory FOIA guidance for central government bodies.[26] This includes procedural guidance for use in responding to FOI requests and guidance on the use of exemptions. The guidance covers all aspects of FOIA's operation and sets out the Government's working assumptions for the handling of specific types of request. To assist departments in their handling of complex and sensitive cases, a central clearing house was established in the then DCA in late 2004. The role of the clearing house is to provide advice on complex, sensitive, or high profile requests for information, to ensure consistency across central government in the handling of these types of request and to work to develop, through litigation, the boundaries of the legislation in accordance with government policy. Central departments are encouraged to refer cases to the clearing house where they meet specified sensitivity criteria listed on MoJ's website. The size of the clearing house has steadily reduced as public authorities became more expert in the implementation of the Act.

54. The Information Commissioner's Office also provides comprehensive guidance on FOIA and the EIRs for all public authorities.[27] The MoJ study carried out by Ipsos Mori[28] with FOI practitioners indicates a broad satisfaction with the range of support and guidance available for public authorities. A small number, however, indicated that some limitations exist with guidance as it is generic and can be difficult to apply to more complex circumstances.

D. Previous Evaluation of FOIA

55. Since the commencement of FOIA, a range of statistics, reviews and research pieces have been published which together provide some indication of how FOIA is operating in practice. This section will provide an overview of that evidence, focusing primarily on Parliamentary and departmental reviews and reports, statistical research on the implementation of FOIA, research into public opinion about FOIA, the experience of FOI practitioners and the experience of information requesters.

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25 Lord Chancellor's Code of Practice on the management of records issued under section 46 of the Freedom of Information Act 2000 (2009) http://www.justice.gov.uk/guidance/docs/foi-section46-code-of-practice.pdf

26 http://www.justice.gov.uk/guidance/freedom-and-rights/freedom-of-information/index.htm

27 http://www.ico.gov.uk/for_organisations/guidance_index/freedom_of_information_and_environmental_information.aspx

28 Annex C.

1. Parliamentary Reports

56. The first Parliamentary report issued after the commencement of FOIA was the report of the Constitutional Affairs Select Committee *Freedom of Information: One Year On*[29] [Seventh Report CASC Session 2005/06; HC 991]. This report recognised that in its first year of operation FOIA had helped bring about "significant and new releases of information and that this information is being used in a constructive and positive way." The Committee noted a number of areas of concern with FOIA and issued twenty-two recommendations.

57. Key recommendations related to measures to reduction of delays in responding to requests and in carrying out internal reviews and public interest tests, to ensuring that the work of the clearing house was more transparent and to strengthen the independence of the ICO. The report also recommended a number of changes to the publication of MoJ-compiled statistics to include statistics relating to timeliness of response and of internal reviews, and relating to the work of the clearing house. The Committee also expressed concern and recommended a plan of action to deal with the issue of long-term preservation of digital records, fearing that difficulties in accessing older records would become a problem for public authorities.

58. The previous Government's response was laid before Parliament in October 2006.[30] In it, the previous Government agreed with a number of the comments and recommendations of the Committee, such as their comments on the importance of timely responses and the importance of additional figures in MoJ quarterly statistics. The previous Government's response disagreed with the Committee's concerns relating to long-term preservation of records and with the view that the ICO should be directly responsible to and funded by Parliament.

59. At the same time as its response to the Committee's report, the previous Government also published research by Frontier Economics commissioned by the DCA on the cost of FOIA along with proposals for amending the cost regime.[31] This issue is discussed in more detail at paragraphs 171–189 in a broader consideration of the resource impact of FOIA. The Constitutional Affairs Select Committee responded to these proposals[32] (Fourth Report of Session 2006/07; HC 415), expressing a view that they proposed changes were unnecessary and had not balanced costs and benefits appropriately.

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29 Seventh Report of the Constitutional Affairs Select Committee Session 2005/06; [HC 991].

30 Government Response to the Constitutional Affairs Select Committee's Report; Freedom of Information: One Year On [CM 6937].

31 Independent Review of the Impact of the Freedom of Information Act; Frontier Economics (October 2006).

32 Fourth Report of the Constitutional Affairs Select Committee 2006-07 [HC 415].

2. FOI Statistics

60. The Ministry of Justice compiles statistics from just over 40 central government departments and bodies, including all Departments of State. The precise number can change from time to time due to "Machinery of Government" changes, but a full list of the monitored bodies at the present time can be found in Annex B. The statistics relate to "non-routine" information requests that the government departments have received. Essentially, this means that the statistics should only count those requests where (a) it was necessary to take a considered view on how to handle the request under the terms of FOIA, and (b) departmental FOI officer(s) were informed of the request and logged it in their case management systems. These statistics measure the number of FOIA and EIR requests received, the timeliness of response, outcomes, the use of exemptions, the number, timeliness and outcome of internal reviews, the number and outcome of complaints to the ICO, the timeliness of public interest tests and the numbers of referrals to the MoJ Clearing House. These statistics are National Statistics and are compiled on a quarterly basis and reports are published on the MoJ website. The statistics have been developed since they first began in 2005, including changes based on Select Committee recommendations, with the addition of information relating to the timeliness of the conduct of public interest tests in 2006. Information relating to the timeliness of the conduct of internal reviews was added in 2007.[33]

61. Corresponding statistics are not compiled for the wider public sector. At local government level, UCL's Constitution Unit has carried out research on request volumes and performance.[34] UCL's research extrapolates statistics from responses provided to annual questionnaires provided to FOI practitioners across local government and are not, therefore, directly comparable to MoJ's central government statistics. Nonetheless, they can provide a useful overview of trends for comparison. These trends are analysed in more detail throughout the Memorandum.

62. In order to assess public perceptions of information rights, from June 2005 until January 2010, MoJ carried out regular tracker surveys of public opinion on information rights issues covering the Data Protection Act 1998 and FOIA.[35] The questions asked about public awareness of rights under FOIA and DPA, their perception of whether public authorities were becoming more open and transparent and their perception of whether public authorities were generally open and trustworthy. The ICO also carries out regular tracker surveys which ask for respondents' views on whether FOIA rights increases knowledge, accountability, transparency,

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33 http://www.justice.gov.uk/publications/statistics-and-data/foi/implementation-editions.htm.

34 http://www.ucl.ac.uk/constitution-unit/research/foi/foi-and-local-government/FOI_Surveys_6_year_Summary_FINAL_Nov2011_edit.pdf.

35 https://www.justice.gov.uk/publications/docs/foi-tracker-survey-wave-14.pdf

confidence and trust as well as measuring general awareness of FOIA rights.[36]

3. Research

63. The experience of FOI practitioners has been subject to some research. For the first three years of FOIA's operation, the ICO produced an annual report detailing the views of FOI practitioners.[37] These reports sought information on their compliance with the Act, the extent to which information was proactively released, the topics of information requests, future changes planned to comply with FOIA, attitudes to FOIA, impact of FOIA and awareness and use of the information available from the ICO. The last of these reports was published in 2008.

64. UCL's Constitution Unit has also published research into the views of FOI practitioners in central government, *Does FOI Work? The Impact of the Freedom of Information Act on Central Government in the UK*[38] and into the use of FOIA in Parliament, *The Sword and the Shield: The Use of FOI by Parliamentarians and the Impact of FOI on Parliament*.[39] UCL had also published research commissioned by the ICO; *Understanding the Formulation and Development of Government Policy in the context of FOI*.[40]

65. This research provided a broader evaluation of the policy-making process in Whitehall and discussed the impact that FOI has had on that, indicating a high level agreement that FOI had changed how and to what extent decisions are recorded in writing in central government. Their research has also included a six year study on FOI volumes in local government[41] and a study into the impact of FOI on Parliament published in 2009.[42] The former, in particular, is referenced further on in the Memorandum and will feed in to a more detailed study on the impact of FOIA on local authorities.

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36 Report on the Findings of the Information Commissioner's Office Annual Track 2010 (November 2010).

37 For summary see: Information Commissioners Office; Freedom of Information: Three Years On (2007).

38 Does FOI Work? The Impact of the Freedom of Information Act on Central Government in the UK; *Hazell, Worthy and Glover* (2009).

39 http://www.ucl.ac.uk/constitution-unit/research/foi/foi-and-parliament/sword-and-the-shield.pdf

40 Understanding the Formulation and Development of Government Policy in the Context of FOI; *Waller, Morris and Simpson* for The Constitution Unit (2009).

41 *Ibid.* 33.

42 *Ibid.* 37.

66. To complement the existing research MoJ has commissioned a small number of interviews with a range of public authorities across the wider public sector to help inform this Memorandum. Respondents were asked about the impact of FOI on their organisations, both positive and negative, and how their organisations implement FOI. The study was carried out by Ipsos Mori in October and November 2011 and its findings are referred to further on in the Memorandum.[43] The report produced by Ipsos Mori for this purpose is at Annex E to the Memorandum.

67. Very little research has been published detailing the views of requesters of information. The tracker surveys mentioned above provide some evidence, however the experience of FOI requesters has not been the subject of a major piece of research. Available evidence suggests that as a proportion of the overall population, the number of people using FOIA is very small.[44] As a result a general survey of the population would prove impractical. A self-selecting survey of FOI users would appear to be the most realistic means of collating that information. However this approach brings attendant problems. UCL's research did include a survey of self-selecting requesters.[45] In addition to the inherent problems of self-selection (i.e. those who choose to participate may often be those with strong views and may not necessarily be representative of the wider body of requesters), the research also had a very low response rate. As such, to date there is limited evidence available on the experience or views of requesters of information under FOIA.

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43 *Ibid.* 27.

44 *Ibid.* 37; The Constitution Unit estimate that 0.2 per thousand of the population made a request under FOIA in 2005 at p65.

45 *Ibid*.

4. Operation of the Act

A. Scope of FOIA

Key Points

- FOIA is extensive in its coverage. The Act applies to over 100,000 public authorities
- The provision of a list of public authorities within the scope of FOIA under Schedule 1 can add clarity for users, over and above that provided by a legislation which includes all bodies with certain characteristics e.g. the Human Rights Act. However the changing nature of public authorities means that the list can be difficult to keep up to date and has to be regularly amended in primary and secondary legislation.
- Adding bodies under section 5(1)(a) can be difficult and time consuming. Nonetheless, the Government is committed to extending FOIA's scope.
- There is increasing focus on how transparency can be assured in bodies who deliver public services or who are in receipt of public funds currently outside the scope of FOIA and the public sector.

Existing Scope of FOIA

68. FOIA applies to more than 100,000 public authorities, from large Government departments to local authorities, schools, hospitals, and individual GPs and dentists.

69. The vast majority of officeholders and bodies are primarily subject to FOIA by virtue of being listed (either individually or as a type of body) in Schedule 1. They may also be subject to FOIA by virtue of their inclusion through an order under section 5, or because they come within the definition of a "publicly owned company" set out in section 6.

Section 4

70. Section 4 of FOIA provides for the Secretary of State to amend the list of public authorities in Schedule 1 by Order by either adding (section 4(1)) or removing bodies (section 4(5)). An officeholder or body may only be added it if meets two conditions. The first is that it is established by statute or under the Royal Prerogative or has been established in any other way by a Minister or government department. The second is that, if a body, it is wholly or partly appointed by the Crown, Ministers or government department or, if an officeholder, is appointed by one of these.

71. Under section 4(4), where an officeholder or body listed in Parts VI or VII of Schedule 1 no longer meets either of these conditions it automatically ceases to be subject to FOIA. Accordingly, entries in Orders made using the section 4(5) are often included to ensure that Schedule 1 does not contain the names of officeholders or bodies that have ceased to meet the conditions in this way. The other instance in which entries can be removed from Schedule 1 using this Order-making power is where a listed body or officeholder no longer exists.

72. Since the enactment of FOIA, Orders under section 4 have been used on seven separate occasions to bring public authorities within the scope of FOIA and five times to remove public authorities from its scope. Across these Orders 163 entries have been added to Schedule 1 and 72 have been removed.

73. Additionally, where a body changes its legal name it may also cease to be subject to FOIA unless steps are taken to include its new legal identity within Schedule 1. Where the original body meets section 4 conditions it may either be necessary to remove the original name through a section 4(5) Order and at the same time add the new name to Schedule 1 through a section 4(1) Order. Alternatively, this adjustment might be made through any other primary or secondary legislation being made which provides for the change in identity. For example, the section 4 Orders which came into force on 1 October 2011 added the Advisory Committee on Clinical Excellence Awards and the NHS Pay Review Body in place of the Advisory Committee on Distinction Awards and The Review Body for Nursing Staff, Midwives, Health Visitors and Professionals Allied to Medicine.[46] As bodies meeting the section 4 criteria are created or cease to exist on a regular basis, Schedule 1 often does not provide an up to date list of bodies subject to FOIA.

Section 5

74. Section 5 of FOIA permits the Secretary of State to bring officeholders or bodies within its scope where they are not already included in Schedule 1 and where they cannot be added to that Schedule using an Order made under Section 4.

75. Once brought within the scope of FOIA through Section 5, officeholders or bodies are not added to Schedule 1 as with those included through Section 4 or primary legislation. The criteria for inclusion in a section 5 Order is that the officeholder or body must "appear to the Secretary of State to exercise functions of a public nature" (Section 5(1)(a)) or be "providing under a contract made with a public authority any service whose provision is a function of that authority" (Section 5(1)(b)).

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[46] See the Freedom of Information Act (Removal of References to Public Authorities) Order 2011 (S.I. 2011/1042).

76. Where section 5(1)(a) is used FOIA will only apply to the officeholder or body when it exercises what appear to be functions of a public nature. To this end the Order must specify the relevant functions. Similarly, an Order under Section 5(1)(b) can only apply FOIA to the services under contract that are being done on behalf of a public authority and the Order must identify them. In addition, the Secretary of State is bound under Section 5(3) to consult with each body considered for inclusion prior to making an order under either section 5(1)(a) or (b).

77. The MoJ ran a public consultation about the potential use of section 5(1)(a) in October 2007[47] and the response was published in July 2009.[48] The provision in Section 5(1)(a) has since been used once, in 2011, to bring the Association of Chief Police Officers, the Universities and Colleges Admissions Service ("UCAS") and the Financial Ombudsman Service within the scope of FOIA from 1 November 2011.[49] UCAS was only brought within scope in respect of its admissions and applications functions. Other functions including commercial ones were not included in the Order. By contrast, all of the functions of the other two bodies were included in the Order. To date, the powers under section 5(1)(b) have not been used to extend the scope of FOIA to contractors.

78. The Ministry of Justice is also currently in consultation with the following officeholders or bodies or types of bodies (over 200 bodies in total) about their inclusion under section 5(1)(a) and will, subject to the outcome of those consultations, bring forward further orders in 2012 as appropriate:

    - Advertising Standards Authority
    - Approved regulators under the Legal Services Act 2007, including the Law Society and Bar Council
    - Awarding bodies (where not already covered)
    - British Standards Institution
    - Carbon Trust
    - Energy Saving Trust
    - Harbour authorities (where not already covered)
    - Independent Complaints Reviewer
    - Independent Schools Inspectorate

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47 *Freedom of Information Act 2000: Designation of additional public authorities. Consultation Paper. CP27/07.* http://www.justice.gov.uk/consultations/docs/cp2707.pdf.

48 *Freedom of Information Act 2000: Designation of additional public authorities. Response to Consultation.CP(R)27/07.* http://www.justice.gov.uk/consultations/docs/consultation-response-_section5.pdf.

49 The Freedom of Information (Designation as Public Authorities) Order 2011 [2011 No.2598].

- Local Government Association
- National Register of Public Service Interpreters
- NHS Confederation
- Quality Assurance Agency
- Schools Inspection Service
- The Bridge School Inspectorate
- The Panel on Takeovers and Mergers
- The Parking and Traffic Appeals Service
- The Trinity House Lighthouse Service
- Traffic Penalty Tribunal.

79. Additionally the Government intends, in 2012, to consult housing associations and the Housing Ombudsman about their possible inclusion in a Section 5 Order.

80. Experience to date in consulting and including bodies under section 5 of FOIA has demonstrated that this is a particularly complex process. Neither Section 5(1)(a) nor FOIA case law to date provide a definition of what a "function of a public nature" is and each function of each body under consideration therefore falls to be assessed on the basis of a number of factors that are not necessarily specific to FOIA, including factors derived from relevant non-FOIA case law[50] In drafting an Order it is necessary to describe each function designated in accordance with section 7, even where all of a body's functions are to be covered. These factors, together with the time required to carry out full consultation with each body considered for inclusion require significant amounts of legal and policy resource.

81. Once a Section 5 Order is in effect, it is also worth noting that the bodies to which it extends FOIA are not automatically subject to the EIRs. Also, any company wholly owned by a designated officeholder or body is not included through Section 6 (clause 101 of the Protection of Freedoms Bill will have no effect on this fact) Furthermore, if a body is covered for only some of its functions, this can lead to a lack of clarity for public authorities and requesters about the information which is and is not subject to FOIA, and could make the ICO's regulatory role more complex.

82. Bodies are also frequently added and removed from Schedule 1 by subsequent amendments in primary legislation where otherwise an order under sections 4 or 5 might have been used – for example Academies were brought within the scope of FOIA in the Academies Bill 2010.

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[50] For example, the decision of the House of Lords in *YL v Birmingham City Council* [2007] UKHL 27 on the definition of a "public authority" for the purposes of section 6 of the Human Rights Act 1998.

Section 6

83. A body may also be subject to FOIA by means of falling within the definition of "publicly owned company" within section 6 of FOIA. Section 6 defines a publicly owned company as a company wholly owned by the Crown, wholly owned by a public authority in Schedule 1 (except a Government Department).

84. Section 6 has been interpreted to mean that FOIA applies to companies which are wholly owned by a single public authority, but not those jointly owned by more than one public authority. In order to clarify the position clause 101 of the Protection of Freedoms Bill currently before Parliament proposes to amend Section 6 to bring companies wholly owned by more than one public authority within the scope of FOIA. FOIA does not list the bodies falling within this definition and users of FOIA can find them difficult to identify.

Section 7

85. Section 7(3) permits the Secretary of State to amend existing entries in Schedule 1 of the Act through adding, removing or amending limitations as to the type of information for which a specified public authority is subject to FOIA. For example. the Freedom of Information (Parliament and National Assembly for Wales) Order 2008[51] limited the scope of coverage of the Act in relation to the House of Commons, House of Lords and the National Assembly of Wales by excluding information relating to residential addresses of members, travel arrangements which are regular in nature or which have not yet taken place and the identity of anyone who delivers or has delivered goods or who provides or has provided services to members at their residences.

86. Similarly, when a new public authority is added by Order under the section 4 procedure above it is possible for it to be added only in respect of certain information that it holds (section 7((2)).

87. Inclusion of a body for only some of its functions can lead to a lack of clarity for users about the type of information subject to FOIA and has resulted in litigation to determine the extent to which FOI applies. For example the BBC derogation has been the subject of significant litigation up to the House of Lords to establish its extent.[52]

Proposals for Change in Scope

88. There have been calls for both the contraction and extension of the scope of FOIA since 2005. The Freedom of Information (Amendment) Bill 2006[53] proposed amendments to exempt communications with Members

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51 [2008] No. 1967.

52 Sugar v BBC [2009] UKHL 9

53 Freedom of Information (Amendment) Bill 2006 introduced by David Maclean MP.

of Parliament from the scope of FOIA. The Bill passed all stages at the House of Commons but fell when it failed to get a sponsor in the House of Lords.

89. More recently a number of attempts have focused on the extension of the scope of FOIA, particularly in relation to the provision of public services under contract.

90. The Freedom of Information (Amendment) Bill 2010[54] proposed the extension of FOIA to contractors and an amendment to the definition of publicly owned companies to include all companies in which public authorities owned a majority share. The Bill did not reach its Second reading. Amendments tabled in 2011 to the Localism Bill at Lords Committee and Lords Report sought to bring information held by local authority contractors about the performance of contracts within the scope of FOIA by making it held "on behalf of" the contracting authority. Other amendments seeking to address this issue, and take account of changes in the way public services are delivered, have been tabled in relation to the Public Bodies and Health and Social Care Bills.

91. While private companies providing public services under contract are not subject to FOIA, information held by contractors may also be brought within the scope of FOIA where it is held "on behalf of" the contracting authority in accordance with section 3(2)(b) of FOIA. The question of whether information is held on behalf of a public authority can be complex.

92. The types of information likely to be brought within scope by this provision include, for example, information owned by a public authority which is entrusted to a contractor for storage or processing, whereas information generated by the contractor itself is less likely to be caught. Public authorities may also include clauses in contracts to require a contractor to provide them with information relevant to a request so that it might be disclosed, but there is no requirement to do so. The Office for Government Commerce has issued guidance on FOIA and contracts, which includes advice on model contract clauses.[55]

93. A significant amount of information about contracts and procurement has been made proactively available under the Government's transparency commitments. For example, new central government tender documents for contracts over £10,000 published on a single website, while local government is asked to publish details of all new contracts and tenders on their websites.

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54 Freedom of Information (Amendment) Bill 2010 introduced by Tom Brake MP.

55 http://83.231.159.113/freedom_of_information_freedom_of_information_act_2000_-_model_contract_clauses.asp

94. The Government also recently undertook a public consultation on Transparency and Open Data.[56] This consultation sought views on a number of FOI issues, and included questions about the range of bodies, beyond those covered by FOIA, to which an open data strategy should apply. The Government is due to publish its response to this consultation in 2012.

B. Vexatious Requests

Key Points

- Public authorities make little use of section 14(1) when dealing with vexatious requests.
- Public authorities have expressed concern that the section is difficult and confusing to use.

95. Section 14 of FOIA provides that the obligation to confirm whether or not information is held or, if it is, to disclose it does not apply where a request is vexatious. Equally the obligations do not apply where the same or very similar request is repeated without there having been a reasonable interval between requests.

96. According to MoJ's monitoring statistics, very few non-routine[57] requests for information in central government are refused under section 14. Of the 161,000 non-routine requests received by monitored bodies during the period 2005 to 2010 which had been answered by the time monitoring statistics were collected, fewer than 400 were refused in full as vexatious (section 14(1)) and a similar number refused in full as repeated under section 14(2).[58] Feedback received from central government departments suggests that the procedure for establishing whether requests are vexatious is particularly difficult to deal with and that it was often less time consuming to respond to a vexatious or repeated requests than to refuse under section 14.

97. This suggestion is supported by the views expressed by FOI practitioners in the MoJ study carried out by Ipsos Mori. A number of stakeholders found it difficult to apply this exemption, noting that although they are

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56 http://www.cabinetoffice.gov.uk/news/how-should-government-become-even-more-open

57 The MoJ's central government FOI statistics referred to throughout this report relate to "non-routine" information requests received by the 40 or so monitored bodies. Essentially, this means that the statistics should only count those requests where (a) it was necessary to take a considered view on how to handle the request under the terms of the Freedom of Information Act, and (b) departmental Freedom of Information officer(s) were informed of the request and logged it in their case management systems.

58 *Ibid.* 32.

perceived to be from "vexatious" individuals, the requests submitted cannot be considered to be vexatious in nature.

98. A further problem identified with applying section 14 is that it may be potentially more costly to refuse a request under section 14, because of the cost of defending the decision at internal review or dealing with a complaint to the ICO, may be greater than in dealing with the request even where it is clearly vexatious.

99. Beyond its application to requests rather than requesters, section 14(1) does not provide any definition of "vexatious" and this may have led to reluctance to use it more widely. The ICO has provided detailed guidance[59] on its use and suggests that a number of factors may render a request vexatious. These include: whether a request could be seen as obsessive; the burden imposed; whether it is designed to be disruptive; whether it harasses or causes distress; or lacks any serious purpose or value. Any number or combination of these factors can, on the circumstances of a particular case, render a request or requests vexatious for the purpose of section 14.

100. ICO decisions demonstrate that it is generally supportive of public authorities' reliance on section 14(1), and the Information Commissioner has encouraged its robust use to deter such requests. However, public authorities' reluctance to use section 14 is sometimes compounded by a fear that the ICO will not back them up. Where the ICO find against public authorities it may be because the individual request has not been found to be vexatious despite an established pattern of behaviour from the requester, or because the burden caused by the request(s) is insufficient. The Tribunal has upheld the use of section 14 on 19 occasions. The ICO has recently appealed against a decision by the First Tier Tribunal[60] overturning its decision to uphold the use of section 14(1). There may, then, remain some uncertainty amongst public authorities as to how or when to engage section 14 and, if they do, whether they will be backed up on complaint or appeal.

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59 http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance_22_vexatious_and_repeated_requests_final.pdf

60 *Dransfield v Information Commissioner* http://www.informationtribunal.gov.uk/DBFiles/Decision/i573/20110920%20Decision%20EA20110079.pdf

C. Exemptions

Key points

- Exemptions are generally thought to provide appropriate protection where necessary by public authorities.
- The number of cases in which exemptions are used as a proportion of all requests refused in full or in part has fallen slightly in central government in the last few years.
- There is little published evidence on the attitude of users of FOIA to the use of exemptions.
- Concern exists within central Government about the ability to protect the space needed for policy formulation and with the level of protection provided by the exemptions in FOIA to information whose release would be damaging to Cabinet Collective responsibility such as Cabinet Committee papers and correspondence. The section 53 executive override or "veto" has been used twice in relation to such material.
- The application of some exemptions is relatively complex, as is the relationship between provisions in FOIA and other information access regimes such as the EIRs and Data Protection Act 1998.

Summary

101. The obligation to disclose or to confirm whether information is held under FOIA is qualified by a number of exemptions set out in Part II of the Act. 23 sections of FOIA can be invoked. In the case of all of them except the exemption under section 21 (information accessible by other means), the right to refuse to disclose information covered by the exemption also includes the right to neither confirm nor deny that the information is held where that confirmation or denial in itself would have the effect of releasing exempt information or undermining the purpose of the exemption.

102. Nine of the exemptions are absolute (in whole or in part) in that they can be invoked without the requirement for the public authority to consider any public interest arguments. The absolute exemptions are listed in section 2(3) of FOIA as section 21 (information accessible by other means), section 23 (information provided by or related to specified security bodies), section 32 (information held as part of a court record), section 34 (information exempt due to parliamentary privilege), section 36 (information prejudicial to the effective conduct of public affairs but only where held by either House of Parliament), section 37(1)(a) – (ab) (information relating to communications with certain members of the Royal Family), section 41 (where disclosure of information would involve an actionable breach of confidence) and section 44 (disclosure prohibited by other enactments, EU obligations or rules on contempt of court). Section 40 (personal data) is also listed as an absolute exemption in cases where someone asks for their own personal data or where

disclosure to a third party would breach one or more of the data protection principles set out in Schedule 1 to the Data Protection Act.

103. The remaining exemptions are qualified in that they can only be deployed where the public authority has conducted a public interest test and has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosure. Effectively this requires the public authority to consider whether the public interest lies in disclosure or non-disclosure. Qualified exemptions fall into two categories: those which are class based, and those which are subject to a prejudice test. Class based exemptions exempt from disclosure, subject to the application of the public interest test, information falling within particular categories without any need to show that disclosure would cause any particular type of harm. These are section 22 (information indented for future publication), section 24 (national security), section 30 (investigations and proceedings), section 35 (formulation and development of government policy), section 37 (communications with the Royal Family and Household, and honours), section 39 (environmental information), section 42 (legal professional privilege), and section 43(1) (trade secrets).

104. Prejudice based qualified exemptions can only apply, subject to the public interest test, where it is first demonstrated that disclosure of information would be likely to be, or would be, prejudicial to the purposes which the exemption is designed to protect. The prejudice based qualified exemptions are section 26 (defence), section 27 (international relations), section 28 (relations within the UK), section 29 (the economy), section 31 (law enforcement), section 33 (audit functions), section 36 (prejudice to the effective conduct of public affairs), section 38 (health and safety), and section 43(2) (commercial interests).

105. FOIA provides that in respect of certain exemptions a certificate may be issued to demonstrate that an exemption applies. A certificate signed by a Minister of the Crown shall be regarded as conclusive evidence that an exemption under section 23 or 24 is required. In relation to the Commons or the Lords, a certificate signed by the Speaker or the Clerk of the Parliaments respectively, shall be conclusive evidence that an exemption under section 34 or 36 is required. It is not necessary for a certificate to have been issued in order to apply any of these exemptions but the provision of a certificate does ensure that the ICO cannot decide that the relevant exemption is not engaged if a complaint is made against the decision.

106. FOIA also provides a means by which a decision notice requiring the release of information made by the ICO or, in the place of the ICO, a court can cease to have effect on certification by an ‘accountable person’. This executive override provision is provided for in section 53 of FOIA and is commonly referred to as the veto. Further information about its use is provided in paragraph 116 below.

107. Further information about each exemption provided by FOIA is contained in Annex C.

Use

108. The use of exemptions (including exceptions under the EIRs) has steadily reduced as a proportion of requests which resulted in information not being disclosed, either in full or in part, in central government. Between 2007 and 2010 in central government (figures for exemption usage could not be provided by all monitored bodies in 2005 and 2006), the proportion of non-routine requests resulting in information not being disclosed, either in full or in part, where one or more exemption was applied, fell slightly, from 82% to 78%. There was a corresponding percentage point increase in the proportion of requests which incurred the cost limit. During these four years, a total of 32,600 requests invoked exemptions.

109. By far the most used commonly used FOIA exemption by central government monitored bodies is that under section 40 (personal information). In total between 2007 and 2010, 41% of requests refused in full or in part where an exemption was used invoked section 40. Of the remaining exemptions, all rank well behind section 40 in terms of use. The next most used exemptions were: section 30 (Investigations and proceedings conducted by public authorities) which was applied to 11% of requests where exemptions were applied, section 41 (information provided in confidence) 8%, section 31 (law enforcement) 8%, section 35 (formulation of government policy) 7%, section 43 (commercial interests) 7% and section 44 (prohibitions on disclosure) 7%.

110. The most rarely invoked FOIA exemptions in central government are Parliamentary privilege, information which would prejudice relations within the UK, and information held for the purposes of audits.

Operational consideration

111. Practitioners have raised few issues about the operation of the majority of exemptions, which suggests that in general they are felt to be adequate in scope and the way in which they operate. More evidence exists about the views of central government departments than other public authorities, and where specific concerns have been raised they are detailed below. There is little research available evidence from FOI users on the use of exemptions. However, where an applicant is dissatisfied with the application of an exemption they have recourse to complaints mechanisms provided for in Part V of FOIA and internal review and appeal rates (detailed at paragraph 149 below) may provide some insight.

Section 35

112. Section 35(1)(a) protects information which relates to the formulation and development of government policy, subject to the public interest test. This exemption can only be used by government departments and is frequently applied to protect the “policy making space”. The need to have a protected space within which policy is formulated and where free and frank discussions can be held and ideas developed without fear of disclosure is viewed as particularly important by government

departments. The importance of the policy formulation space has been reflected in decisions of the First-Tier Tribunal (Information Rights), and in particular in the decision in *Department for Education and Skills v Information Commissioner and Evening Standard "[D]isclosure of policy options, whilst policy is in the process of formulation, is highly unlikely to be in the public interest unless, for example, it would expose wrongdoing within government"*[61]*.* Tribunal decisions also reflect that the arguments for protecting the policy making space will decline once policy is formulated and with the passage of time. However, concern remains within government departments that the possible release of such information FOIA can have a "chilling effect" on the candour of discussions. Evidence relating to the "chilling effect of FOI is discussed further at paragraphs 212–218.

113. Section 35(1)(b) is designed to protect, subject to the public interest test, information which relates to Ministerial communications. This provision only relates to communications between two or more serving ministers, and not a Minister and another person. Communications between Ministers which fall within the scope of section 35(1)(b) include Cabinet and Cabinet Committee papers and correspondence. Protection for such information is also provided by section 36(2)(a) where disclosure would at least be likely to prejudice "the maintenance of the convention of the collective responsibility of Ministers of the Crown", and the balance of the public interest favours non-disclosure. However, given that sections 35 and 36 are mutually exclusive and section 36 cannot apply where section 35 does, Government departments[62] will where necessary rely on section 35(1)(b) to protect Cabinet information and the convention of collective responsibility rather than section 36(2)(a).

114. Cabinet information has been released as a response to FOIA, for example in relation to the Westland affair. That decision to release followed adverse decisions of the courts[63] and the information was over 20 years old at the time of release.

115. The ***Westland*** case is the most recent in which the courts have considered the application of section 35(1)(b). Despite ordering Cabinet material to be disclosed, the First-tier Tribunal observed that, given the convention, Cabinet information is of great sensitivity which extends beyond the particular administration in which it was generated. Accordingly, there is a substantial general interest in maintaining the section 35(1)(b) exemption and disclosure within 30 years will only "very rarely" be ordered in circumstances where disclosure poses no threat to the cohesive working of cabinet Government. By contrast, the Tribunal suggested that there is a significant interest in reading an impartial

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61 EA/2006/0006, 19th February 2007.

62 Public authorities other than Government departments (including Northern Ireland departments) and the Welsh Assembly Government cannot rely on section 35.

63 *Cabinet Office v IC (Westland)* (EA/2010/0031).

account of Cabinet dealings and that will be stronger where the information has particular political or historical significance. Additionally, the passage of time, publication of descriptions of the information through other media (e.g. memoirs of the Ministers involved) and the fact that the matters may be of no lasting significance may weigh in favour of disclosure.

116. As a result of concern that the ICO and First-tier Tribunal had not attached sufficient weight to the importance of protecting the principle of collective responsibility in the relevant cases, the executive override or "veto" provided in section 53 of FOIA has been used on two occasions, firstly in February 2009, in respect of a request for information about cabinet meetings where legal advice relating to the invasion of Iraq was provided by the Attorney General; and secondly in December 2009 in respect of a request for minutes of the Cabinet Committee dealing with devolution in Scotland, Wales and Northern Ireland. To date, these are the only occasions where certificates under section 53 have been issued.

117. Given the concerns of the adequacy of protection being given in practice to such information and a desire to ensure that any use of the veto in this area was made only by reference to the relevant factors, the first published policy on the use of the executive override in cases engaging Cabinet Collective responsibility was published alongside the first use of the veto in February 2009 and an updated version of this policy was published on 11 July 2011.[64] Both policies set out that the executive override should only be employed in exceptional circumstances, and that it should be employed only following a collective Cabinet decision to do so. The 'accountable person' will be, where possible, the Cabinet Minister with policy responsibility for the information requested or, where the decision involves the papers of a previous administration, the Attorney General.

118. The veto only applies to an individual decision notice and does not apply to subsequent requests for the same information. Accordingly, a number of requests have been received for information which has previously been the subject of the veto. For example, a request made in 2010 for the minutes of the Cabinet Sub-Committee on Devolution Scotland, Wales and the Regions (DSWR), which had been vetoed by the previous Government in 2009.

Section 36

119. Subject to the public interest, section 36 protects collective responsibility (section 36(2)(1)), the provision of advice or the exchange of views in a free and frank way (section 36(2)(b)) and information the disclosure of which would or would be likely to "*otherwise prejudice the effective conduct of public affairs*" (section 36(2)(c). It differs from all other exemptions in that it can only be applied where, in the "reasonable

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64 http://www.justice.gov.uk/publications/policy/MoJ/foi-veto-policy.htm

opinion" of a "qualified person", the prejudice would, or would be likely to occur. For Government departments, the "qualified person" is a Minister of the Crown, or in the case of non-ministerial departments, the commissioners of that department or other person in charge. Aside from a small number of instances where the role of "qualified person" is explicitly allocated (through section 36(5)) any person other than a Minister may only act in this capacity for any public authority where authorised to do so by a Minister. Typically, the person in charge of a public authority is authorised as the "qualified person" in such instances.

120. Outside Government departments section 36 provides the only means of protecting the candour of advice and discussion unless there are other reasons why disclosure would be inappropriate given that section 35 cannot be relied upon. In addition, practice has shown that there is a wide range of information held by public authorities for which there is a strong argument against disclosure but where the other 22 exemptions do not apply. For example, many public authorities run staff recruitment and promotion tests and exercises. Requests for the marking criteria for such exercises have been refused under section 36(2)(c) and the decision to do so successfully upheld.

121. In practice section 36 can be more difficult to apply procedurally than other exemptions as it will normally require the submission of written advice to the "qualified person" and evidence that the qualified person holds the necessary opinion. It is also more difficult to defend as on appeal it is necessary not only to prove that the use of the exemption is reasonable in substance but also that the decision of the Qualified Person was reasonably arrived at, i.e. by reference to the relevant evidence.

Section 40

122. Section 40(2) protects personal data[65] where disclosure would either breach one or more of the data protection principles contained in Schedule 1 to the Data Protection Act 1998 (DPA) or section 10 of the DPA which enables a data subject to prevent processing likely to cause damage or distress. As outlined above, Section 40 is the most used FOIA exemption in both central and local government. Anecdotal evidence suggests that some requesters believe that public authorities place an over reliance on the use of section 40 in response to requests and when redacting information.

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[65] The meaning given to personal data in FOIA is the same as in section 1(1) of the DPA i.e. data relating to a living individual which, either on its own or together with other data held by the data controller, identifies that individual.

123. While section 40(2) is usually applied as an absolute exemption,[66] the need to consider whether disclosure would breach the DPA before applying it makes its proper application relatively complex for practitioners, who also need to ensure that their authority does not breach its responsibilities as a data controller and processor. This requires consideration of issues such as the definition of personal data, necessary processing, the legitimate aims of the requester, the identity of the requester, whether the information is sensitive personal data and anonymisation, to name but a few. Prior to FOIA there was very little litigation and therefore case law relating to the DPA. As a result of FOIA requests the volume of DPA case law has extended considerably.

124. Since 2005, there has been a noticeable change in the way in which requests for data about public officials, e.g. in relation to their salaries and expenses, have been handled. In the first years of FOIA such requests may have been refused under section 40 on the basis that release would constitute unfair processing and contrary to the expectations of the data subject. Increasingly the Government has expanded what it is acceptable to release about a public official's public life have been pushed back, with salaries and expenses, certainly of senior officials, Ministers and MPs published on a regular basis.

125. However, the case law remains relatively consistent in recognising that it is open to public authorities to withhold the names of junior officials (in central Government, those below Senior Civil Service level) on the basis that, because of the nature of their role and responsibilities, they have an expectation of privacy. On that basis it would be a breach of the first data protection principle (data should be processed fairly and lawfully) to disclose their identities. That said, this approach must be applied on a case-by-case basis and there may be instances where the disclosure of the identities of junior officials in "outward-facing" roles that identify them more readily to the public with the policy or performance of a government department will not be objectionable.[67]

Environmental Information Regulations

126. Access to environmental information is provided for under the EIRs. Section 39 of FOIA exempts environmental information from its scope, subject to a public interest test. In practice the exemption is little used as

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[66] It is a qualified exemption in two circumstances. The first is where consideration is required to be given to whether disclosure would breach section 10 of the DPA (which enables a data subject to prevent her/his personal data being processed in circumstances where it would cause substantial and unwarranted harm or distress). The second is where the personal data is exempt from the subjects right of access under section 7 of the DPA by virtue of an exemption contained in Part VI to the DPA.

[67] See, for example, the decisions of the First-tier Tribunal in *Roberts v IC and BIS* (EA/2009/0035), *Greenwood v IC & Bolton MBC* (EA/2007/0007), *Dun v IC &_NAO (EA/2010/0060)* for discussion of the relevant principles.

public authorities will automatically consider requests for such information under the EIRs. The EIRs and FOIA differ in a number of ways. All EIR "exceptions" are subject to a public interest test and, unlike FOIA, include, for example, specific provisions to protect intellectual property and draft documents. It is worth nothing that section 39 in practice requires two public interest tests to be carried out; one in deciding to maintain the exemption or not, and one in assessing the application under the EIRs. Both FOIA and the EIRs are regulated by the ICO. The crossover between the two regimes can be confusing for practitioners and requesters, although issues will generally only arise when information is being withheld. The question of whether information is environmental, and therefore subject to the EIRs has been the subject of some litigation, prompted largely by the difference between the two regimes, as information can be perceived to be harder to withhold under the EIRs.

D. Level of Request & Disclosure

Key Points

- The extent to which FOIA is used indicates that it has become a vital tool in information disclosure.
- Between 2005 and 2010, over 220,000 non-routine information requests were made to the central government bodies covered by the MoJ's monitoring statistics (includes requests under EIRs). Research also suggests nearly 700,000 FOI requests were made to local authorities between 2005 and 2010.
- Available evidence indicates that request volumes have increased considerably in recent years.
- The rate of disclosure is more difficult to evaluate. In central government, the proportion of resolvable requests where the information sought was disclosed in full fell between 2005 and 2010. However there were increases in full disclosure in local government.
- There is a perception amongst some public authorities that in addition to an increasing level of requests, the complexity of requests has also increased.

127. Ascertaining a full picture of request volumes and disclosure levels under FOIA is difficult because collated statistics for public authorities outside of central Government are not maintained. In addition to the statistics collated by the MoJ on the operation of FOIA in central government, UCL's Constitution Unit has collated statistics in respect of request and disclosure levels in local government. It is important to recognise, however, that with over 100,000 bodies subject to FOIA, these statistics do not necessarily reflect the trends outside of central and local government, although it is likely that the largest proportion of FOI requests is received within these two sectors.

128. Central government 'monitored' bodies received a total of almost 225,000 FOI and EIR requests in the period 2005 to 2010. Following an initial surge in request volumes in early 2005 following FOIA's implementation, request levels were generally flat until the end of 2007, but since then there has been a steady increase, with 43,900 requests received in 2010 compared to 33,000 in 2007). Final figures for the whole of 2011 will be available early in 2012 but statistics from the first two quarters suggest that request levels have continued to increase in 2011, with more than 23,000 requests received in the first half of the year.[68]

129. UCL figures for local government indicate that a total of 693,650 FOI requests were received from 2005 to 2010. This has involved a dramatic increase in request levels in each year of the Act's operation from just over 60,000 in 2005 to 197,737 in 2010. The increase in request levels may indicate a greater awareness of the range of information which can be obtained under the Act. With over 900,000 requests dealt with since 2005 in local and central government alone, there is no doubt that the Act has become a much-used tool for those seeking information.[69]

130. This trend of increasing numbers of FOI requests is supported by The MoJ study carried out by Ipsos Mori, in which respondents who gave an indication of their number of requests all indicated that volumes of requests were increasing. In some cases, this increase was dramatic, for example, indicating a 25% increase in requests in the past year.

131. Of greater relevance than the level of requests received, the extent of disclosure indicates the extent to which FOIA is useful in releasing information which might otherwise not have been disclosed. In central government, there has been a steady decrease in the proportion of "resolvable" requests[70] where the information sought was disclosed in full, from 66% in 2005 to 57% in 2010. At the same time, the rate of full withholding of information rose from 18% to 25%. As noted above, there has been an increase in the proportion of requests which were refused on the basis of incurring the cost limit. Between 2005 and 2010, over 100,000 non-routine requests to central government have resulted in all the information requested disclosed.[71] The experience of local government is quite different according to UCL's research, with full refusal of requests accounting for, at most, 10.5% of requests (in 2006) and refusal rates falling overall between 2005 to 2010.[72] Although the trends

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68 *Ibid.* 32.

69 *Ibid.* 33.

70 In the MoJ's central government monitoring statistics, "resolvable" requests are those where it would have been possible to give a substantive decision on whether to release the information being sought, so exclude, for example, requests for information that was not held by the body in question.

71 *Ibid.* 32.

72 *Ibid.* 33.

differ, the statistics demonstrate a strong level of disclosure of information resulting from FOIA.

132. While no specific research has been undertaken into the reason for the differing trends between central and local government, a number of explanations may apply. The different methodologies in collation of statistics may be relevant. It is also possible that links between local government and the public are closer and that it has, as a result, a greater culture of openness than central government. The size of some government departments may mean that they are likely to need to use the cost limit to refuse requests where they are broadly drawn. There is also a wider range of exemptions which are likely to apply to central government information rather than that held by local government (such as national security and defence).

133. This theory may in part be supported by the range of disclosure rates across Government departments according to the nature and sensitivity of the information they hold. In 2010, for example, the Home Office and the Foreign and Commonwealth Office both responded to 13% of requests by withholding the information in full under one or more of the exemptions while the comparable figure for the Department of Communities and Local Government was 6%.[73] Some departments, such as MoJ, have a relatively high use of exemptions because of the volume of personal data they hold (e.g. court and prison records). This disparity within central government may be indicative of the extent to which some exemptions, such as those relating to national security and international relations, may properly apply more to information held by some public authorities than to others.

134. Another possible explanation for the fall in disclosure rates in central government might be that as more information is routinely and proactively disclosed, requests are made for more complex and sensitive material.

E. Timeliness of Response

Key Points

- A key indication of how FOIA works is the timeliness of compliance with the Act.
- Compliance against statutory deadlines has been consistently high since the FOIA was first implemented.
- Concern still exists as to the time taken to conduct internal reviews and public interest tests, which are not limited by statutory timeframes.
- Improvements have occurred in the timeliness of internal reviews but the results for public interest tests is more mixed, with many extensions beyond an additional 20 working days.

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[73] Annual Statistics on Implementation in Central Government 2010 p32; available at *Ibid 32.*

135. It is an important element of the success of the Act that requesters should receive a response to their request within the statutory time limits. In this respect, MoJ statistics for central government indicate that compliance with the statutory limits is good, with 86% of requests responded to within 20 working days (or 30 working days for historical records held by the National Archives) in 2010. The rate of response within either the 20 day limit or within a permitted extension (such as for the conduct of a public interest test) was 91% in 2010. Both these figures have remained consistent since the early days of the Act's implementation in 2005.[74]

136. For local authorities the rate of requests answered within the statutory limit was 85% in 2005 and remained at roughly that level until dropping to 79% in 2009 and rising again to 88% in 2010. It is unclear to what extent information not answered within the statutory timeframe was answered within a permitted extension.[75]

137. Some improvement in timeliness of response to requests is supported by the MoJ study. The majority of respondents had experienced problems in meeting the 20 working day response time, but this only occurred occasionally for most. Some indicated that they had moved from a position of poor performance to good performance as knowledge of the Act increased. A number indicated, however, that for particularly complex requests, or in cases where only one staff member can provide a response, meeting the deadline can become more difficult. This is made somewhat worse by the inability for some public authorities to plan the resources needed for dealing with FOIA, particularly those authorities with sporadic FOIA request rates.

138. The time taken for public authorities to conduct a public interest test is not regulated by FOIA other than a requirement that the time taken be 'reasonable in the circumstances' (section 10(3)). MoJ guidance to central government and ICO guidance to all public authorities both express the view that where possible, the public interest test should be conducted within the twenty working day statutory limit, but that where that is not possible, any extension beyond it should not exceed a further twenty working days.[76]

139. Concern about the time taken to conduct public interest tests was raised in Freedom of Information – One Year On.[77] In that report, the Committee recommended that the then Department for Constitutional Affairs include in its guidance a recommendation as to the time taken to conduct public interest tests and that data be published as to the time taken for public interest tests across central government. Those recommendations were followed, and statistics in 2006 showed only 49% of public interest test

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74 *Ibid.* at p21.

75 *Ibid.* 33.

76 *Ibid.* 25.

77 *Ibid*. 28 at p27-28.

extensions (which had been completed by the time the statistics were collected) lasting twenty working days or less. This figure increased to 58% by 2009[78] but fell back to 47% in 2010.[79]

140. A small number of requests can result in exceptionally long delays for the consideration of the public interest test. MoJ central government statistics began more detailed monitoring of the breakdown of public interest test extension durations in excess of 40 working days in 2010. In that year, the statistics showed that in central government, 375 requests resulted in public interest tests which lasted between 40 and 100 working days (22% of completed extensions), with 4% lasting more than 100 working days. Unlike the situation with timeliness in internal reviews set out below, the timeliness in conducting public interest tests has not improved in recent years.[80]

141. The time taken to conduct internal reviews has also been an area of concern in the implementation of FOIA. Similar to extensions to consider the public interest test, no statutory limit exists for the length of time taken to carry out an internal review. MoJ guidance to central government is that more straightforward internal reviews should aim to be completed within twenty working days of receiving the complaint, and that more complex reviews should aim for completion within six weeks.[81] The ICO guidance to all public authorities recommends a twenty working day limit and where this is not possible, no more than 40 working days supported by a clear demonstration why an extension is necessary.[82]

142. Concern about the time taken to conduct internal reviews was raised in Freedom of Information – One Year On,[83] the seventh report of the Constitutional Affairs Committee of session 2005-06. In that report, the Committee recommended that the then Department for Constitutional Affairs include in its guidance a recommendation as to the time taken to conduct internal reviews and that data be published as to the time taken for internal reviews across central government. Those recommendations were followed, and MoJ's monitoring statistics in 2007 showed 37% of internal reviews taking twenty working days or less.[84] This has increased steadily to 58% in 2010. Similarly, the proportion of internal reviews taking sixty working days or more has fallen from 19% to 8% in that period.[85]

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78 Annual Statistics on Implementation in Central Government 2010 p30; available at *Ibid 32.*

79 *Ibid.* 70 at p43.

80 *Ibid.*

81 *Ibid.* 25.

82 *Ibid.*

83 *Ibid.* 26.

84 Annual Statistics on Implementation in Central Government 2007 p26; available at *Ibid 32.*

85 *Ibid.* 70 at p39.

143. The ICO has begun the process of monitoring public authorities which have presided over significant delays in compliance with FOIA. These have included bodies for which more than six delay-related complaints were received in a six month period, where it appeared to the Commissioner that they had exceeded the time for compliance by a significant margin at least once, or where their compliance with statutory timeframes was less than 85%. In 2011, the ICO issued a notice stating that out of 33 bodies monitored for a period of three months, 26 made considerable improvements while seven remained problematic.[86] For those seven bodies, the ICO sought agreements on further improvements or entered into discussions on appropriate regulatory measures.

F. Sanctions, Complaints and Appeals

Key Points

- FOIA ensures that requesters have recourse to a robust complaints and appeals system where they are unhappy with the outcome of their request.
- There is satisfaction amongst public authorities with the complaints and appeals system.
- The way the complaints system works has overcome to a considerable degree the operational difficulties experienced when FOIA was first implemented.
- Statistics on the rate of decisions overturned by the ICO indicate a high level of compliance with the Act by public authorities.

Internal Reviews

144. Part VI of the section 45 Code of Practice issued in 2004 sets out that public authorities should alert requesters that an internal review can be carried out if they are unhappy with the outcome of their request.[87] Internal reviews should be carried out by someone of higher seniority than the decision-maker where practicable and should, in any case, involve a full re-evaluation of the handling of the request. The Code of Practice indicates that any complaint about the outcome of a FOI request, whether or not it specifically requests an internal review, should be treated as an internal review. Internal reviews under FOIA are not subject to a statutory timeframe, although guidance does recommend that they be conducted within 20 working days where possible. This is in contrast to internal reviews under the EIRs for which a statutory timeframe of as soon as possible and no more than forty working days exists. Internal reviews and complaints against FOIA decisions will usually be carried out under the same processes.

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86 Information Commissioners Office; 23 June 2011.

87 *Ibid.* 23.

145. In central government, for requests which were initially received between 2005 and 2010, 7,400 internal reviews had been requested by the time each year's statistics were collected. The represents 4.4% of all requests received in that period.[88] Between 2005 and 2010 in local government according to the research conducted by UCL's Constitution Unit, there were 11,336 internal reviews arising out of 693,650 requests – a rate of 1.6%.[89] These statistics, combined with the fact that there is no cost to the requester of seeking an internal review might be taken to indicate a good degree of satisfaction amongst requesters that their request was dealt with appropriately by the initial decision-maker.

146. The proportion of initial decisions which are upheld in full by internal review has remained consistently high in central government over the first six years of FOIA's operation. Of those internal reviews which had concluded by the time each year's statistics were collected, 76% of internal reviews upheld the original decision in full and 15% upheld it in part. Only 9% of internal reviews resulted in the original decision being overturned.[90] No information is available as to the extent to which internal reviews uphold original decisions in the wider public sector.

Complaints to the ICO

147. Section 50 of FOIA allows for a requester to make a complaint to the ICO about the handling of their request for information. Having investigated a complaint, the ICO may issue a decision notice obliging the public authority to take action specified in the notice where the ICO finds that a public authority has contravened FOIA by failing:

    i) to confirm whether or not it holds requested information,

    ii) to provide the requested information where there is no ground for withholding it;

    iii) to communicate information in a form requested by the requester where it was reasonable to do so in accordance with section 12; or

    iv) to respond to a request within the statutory time limit set out in section 17.

148. Under section 50(2) the right to have a complaint adjudicated on by the ICO applies unless the internal review process has not been exhausted, unless there has been undue delay in bringing the complaint, unless the complaint is vexatious or frivolous or unless the complaint has been subsequently abandoned or withdrawn. As with internal reviews there is no cost to the requester of making a complaint to the ICO.

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88 *Ibid.* 32.

89 *Ibid.* 33.

90 *Ibid.* 32.

149. The MoJ's monitoring statistics for central government include figures on those requests which were appealed to the ICO on the grounds of non-disclosure of information, and where the appeal had been received and notified to the department concerned by the time each year's statistics were collected early the following year. From 2005 to 2010, there were 1,320 complaints were made to the ICO. Of those which had been resolved by the time the statistics were collected, 64% upheld the internal review decision in full and 19% upheld it in part. Only 16% of internal review decisions were overturned in full by the ICO.[91]

150. In addition to issuing decision notices the ICO has a number of other enforcement powers under FOIA. He can issue information notices requiring that he is provided with information required in order to adjudicate on a complaint. Between 23 and 35 Information Notices have been issued per year since 2007. Where the ICO is of the view that a breach of the Act has occurred, an enforcement notice can be issued requiring specified action to be taken. This power tends not to be used frequently in respect of FOIA – in 2010/11, the ICO issued only one enforcement notice to a public authority on the basis of persistent delays in responding to requests.[92]

151. Although not specifically provided for by FOIA, the ICO also issues practice recommendations. These set out the ICO's views on actions necessary to ensure a public authority is conforming with Codes of Practice under section 45 or section 46 which are not binding. In its 2008/09 annual report the ICO noted that its experience of issuing practice recommendations was that they tended to result in significant improvements in the public authority's compliance with the Act.[93]

152. The ICO also has powers of entry and inspection set out in Schedule 3 of FOIA, which have not been used, and has the power to investigate and bring a prosecution for an offence under section 77 of FOIA. This section creates an offence of altering, defacing, blocking, erasing, destroying or concealing any record with the intention of preventing disclosure where a request has been made and disclosure would be required under FOIA or the subject access provision in section 7 of the DPA. An offence under Section 77 is a summary offence subject to a maximum fine of level 5 on the standard scale and can therefore be prosecuted only if proceedings have been initiated in the Magistrates' court within six months of the offence taking place. The ICO has identified this as an area of difficulty. Giving evidence to the Justice Select Committee in September 2011, the Information Commissioner indicated that the delays which may be caused by dealing with a request and carrying out an internal review mean that a

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91 *Ibid.*

92 Information Commissioners Annual Report and Financial Statement 2010/11 at p40.

93 Information Commissioners Annual Report and Financial Statement 2008/09 at p41.

potential breach of Section 77 may not cross his desk until a substantial part of the six months has passed, making it difficult to take the necessary steps to initiate criminal proceedings within the statutory timescale.[94] MoJ is working with the ICO to ascertain and compile evidence on this problem.

153. An area in which concern has been expressed in the past and which has seen considerable improvement in recent years is the caseload of the ICO and delays in the resolution of complaints. The manner in which FOIA was commenced (i.e. coming into effect for all public authorities on the same day) led to initial concerns that the ICO was unable to respond to complaints speedily. The Constitutional Affairs Select Committee noted that during 2005, out of 2385 FOIA complaints, 1060 (44%) were closed and 1325 (55%) remained open, many of which had been open for several months.[95] That situation has now largely changed. The proportion of caseload aged less than 90 days has increased from 45% in 2005/06 to 64% in 2010.[96] The ICO estimated in 2004 that its caseload would peak at 4000-9000 cases in 2009 before stabilising.[97] In fact the caseload was lower than anticipated, peaking at 3,827 in 2010/11, and the case closure rate in 2010/11 was at 99%.[98]

154. Concern was expressed in 2006 by the Constitutional Affairs Select Committee and, in evidence, by the Information Commissioner, as to the relationship between the ICO and the then Department for Constitutional Affairs.[99] In particular the Committee was concerned by the ability of the ICO to reduce delays in resolving complaints with the funding provided by MoJ and recommended that the ICO should report directly to Parliament. The Committee expressed concern that funding restrictions was a cause for the ICO backlog which existed. The previous Government disagreed that there was any lack of independence on the part of the ICO arising from the sponsorship arrangements in place, but noted the Committee's recommendation that it should examine the arrangements. The previous Government also pointed out that an 11% increase in the ICO grant had been agreed along with £300,000 in efficiency savings within the ICO.[100] Since then a number of measures have been introduced to enhance and ensure the independence of the ICO.

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94 Oral Evidence of the Information Commissioner to the Justice Select Committee; 13 September 2011 [HC 1473-i].

95 *Ibid.* 28 at p21.

96 *Ibid.* 89 at p26.

97 *Ibid.* 28 at p21.

98 *Ibid.* 89 at p26.

99 *Ibid.* 28 at p22–23 and p33–34.

100 *Ibid.* 29 at p9 and p14.

155. The Protection of Freedoms Bill, proposes to change the tenure of the Information Commissioner to a single seven year term from the current position of a maximum of three five-year terms. This move will ensure that the Information Commissioner is not dependent on the MoJ for re-appointment and so his independence will be strengthened. The Bill proposes to allow the ICO to charge for certain specified services (such as for multiple hard copies of publications and places at ICO conferences and events) without a requirement of permission from the Secretary of State, and to allow the Secretary of State, by order, to expand the list of services that can be charged for by the ICO without a requirement for permission. The ICO would have to be consulted before any such Order is made. Finally the Bill also proposes to limit the role of the Secretary of State in approving staffing and salary arrangements of the ICO, ensuring instead that those arrangements are made by the ICO with regard to the need for a merit-based selection.

156. In addition to the changes proposed in the Protection of Freedoms Bill, a new Framework Agreement published in September 2011 changed how the MoJ works with the ICO.[101] The framework makes a number of changes, for example by allowing the ICO to retain in-year receipts rather than remitting them to the MoJ and by providing greater flexibility in the amount the ICO can carry over from one financial year to the next and how it draws down grant-in-aid payments.

157. Furthermore, the Government has committed itself to abiding by the recommendation of the Justice Select Committee in the pre-appointment scrutiny when the next Information Commissioner is due to be appointed in 2014.

Appeals to the First-tier Tribunal (Information Rights) and Beyond

158. Section 57 of FOIA provides a right for either a requester or a public authority to appeal against an ICO decision notice to the Information Rights Tribunal which, since 2010, sits as part of the General Regulatory Chamber of the First Tier Tribunal. Up until 17 January 2010 the Information Rights Tribunal was called the Information Tribunal (previously called the Data Protection Tribunal) and was originally set up to hear appeals under the Data Protection Act 1984. The Information Rights Tribunal is now part of the First–tier Tribunal in the General Regulatory Chamber and is referred to as the First–tier Tribunal (Information Rights). Under the changes, most appeals against ICO decisions are heard in the First Tier Tribunal but can be heard by the Upper Tribunal if necessary.

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[101] https://www.justice.gov.uk/publications/corporate-reports/MoJ/ico-MoJ-framework-agreement.htm

159. Prior to the 2010 changes, appeals from Tribunal decisions could be made on a point of law to the High Court. Appeals on a point of law are now heard by the Upper Tribunal. Under the system introduced by the Transfer of Tribunal Functions Order 2010,[102] appeals on a point of law beyond the Upper Tribunal are heard in the Court of Appeal.

160. Out of 2667 decision notices issued by the ICO from 2005 to the issuing of the 2010/11 annual report, 685 have been appealed. For the first four years of FOIA's operation, the breakdown of the source of the appeal has been in the region of 65% originating from the requester and 35% from the public authority. In 2010/11 the breakdown was 84% requester and 16% public authority. The extent to which the ICO's decision notice has been overturned, wholly or partially, has been consistent over the first six years of FOIA's operation – just under 30% of appeals have been either wholly or partially allowed.[103]

161. The complaints and appeals structure was universally viewed as appropriate by respondents to the MoJ study, with a number of respondents feeling that the internal review process gave benefits to the public authority as well as the requester by giving them an opportunity to ensure they applied the Act correctly. Some respondents noted their experience of delays and inconsistency in decisions from the ICO in the past but the general belief was that this has improved considerably recently.

G. Proactive Disclosure and Publication Schemes

Key Points

- There has been an increase in the extent of proactive disclosure of information since the implementation of FOIA
- There appears to be something of a disconnect between proactive disclosure, which has broadly been responded to enthusiastically by public authorities, and the requirement to maintain publication schemes under FOIA which ICO research indicates have relatively high rates of non-compliance.
- The volume of information proactively released in the last 18 months has increased considerably, although this is likely to be attributable to the Government's wider transparency agenda, rather than an increased adherence to publication scheme requirements under FOIA.

162. The extent to which public authorities proactively release information relating to their activities as a result of FOIA is key to assessing whether FOIA has resulted in more transparent government. Section 19 requires that public authorities adopt and maintain a publication scheme which has

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[102] [2010] No. 22.

[103] Annual Reports of the Information Commissioners Office 2005/06 to 2010/11.

been approved by the Information Commissioner. Each publication scheme must specify what sort of information will be proactively released, the manner in which it will be released and whether it will be released free of charge or upon payment.

163. Section 20 provides that the Commissioner can approve model publication schemes which can be adopted by public authorities without the need for separate approval by the Commissioner where they are adopted without modification. From 2009, all authorities are required to adopt the ICO's model publication scheme and a 'guide to information'. While the publication scheme remains the legally enforceable element, the guide to information should be a more specific indication of the sorts of information which will be proactively released to give effect to the model scheme. The development of the model scheme was a collaborative effort between the ICO and public authorities and was designed to give a more consistent focus on what information an authority can and should routinely publish. The Information Commissioner is running a further consultation on publication schemes in light of the wider transparency agenda, launched in September 2011.[104]

164. The requirements for publication schemes were described by Lord Falconer as "the vehicles by which proactive disclosure is required." He went on to say that "the requirement for all public authorities to apply a scheme for publication—in effect to say what, when and how information will be published—is probably the most powerful push to openness in the Bill."[105]

165. There is limited information as to the extent of proactive disclosure by public authorities. ICO research indicated that 97% of public authorities proactively released some information in 2007, but the proportion proactively releasing information under a number of specific headings had decreased considerably since 2005.[106] The ICO in its report suggests that a reason for this decrease may be that as FOIA become more embedded in organisations, there was greater awareness as to what needs to be published to be compliant with the Act.

166. Separate ICO research into the use of publication schemes in central government and in police authorities in 2009 and 2010 found that 25% of central government public authorities[107] and 30% of police authorities

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104 Information Commissioner's Office; Revising publication schemes under sections 19 and 20 of the Freedom of Information Act (September 2011).

105 Lord Falconer (22 November 2000).

106 *Ibid.* 36 at p14.

107 ICO (30 November 2009); http://www.ico.gov.uk/what_we_cover/~/media/documents/library/Freedom_of_Information/Research_and_reports/CENTRAL_GOVERNMENT_SECTOR_MONITORING_REPORT.ashx

were not operating approved publication schemes.[108] This included public authorities who had no publication scheme at all, those who were using an old, unapproved publication scheme or those who were releasing less than the seven categories of information required by the ICO's model publication scheme. A follow-up report[109] indicated that 88% of police authorities who were found to be not operating an approved publication scheme rectified the situation upon being informed of that fact.

167. The MoJ study supports a view that FOIA has resulted in more proactive disclosure of information by public authorities. Respondents indicated that they now proactively release more information than they did prior to FOIA. Respondents were aware of their publication scheme but were often unaware of how frequently it was used. Some respondents did express a concern that the schemes were not used by the wider public. A number indicated that they were in the process of reviewing it.

168. The Government has stressed its commitment to increased openness and transparency and to proactive publication of information by public authorities. The Cabinet Office has been consulting on issues surrounding proactive disclosure of data in its consultation document *Making Open Data Real: A Public Consultation*.[110] The Government has taken a number of steps to enhance proactive disclosure of information and particularly of data relating to the performance of those performing public services, across the public sector as part of its transparency agenda.

169. Information now routinely released includes financial information, contracts and tendering details, performance indicators and pay grades. The Department of Communities and Local Government urged all local authorities to proactively publish any expenditure above £500 and has indicated that, to date, all but one local authority does so.[111] Central Government departments are required to publish spending decisions above £25,000 but a number have opted to publish all expenditure above £500. Central Government contracts and tender documents over £10,000 must now be published, including performance indicators, break clauses and penalty measures. Local authorities are asked to publish details of all new contracts and tenders. The names, grades, job titles and annual pay rates for most civil servants with salaries over £150,000 are now routinely published. Similarly, public service performance indicators, such as crime

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108 ICO (March 2010); http://www.ico.gov.uk/what_we_cover/~/media/documents/library/Freedom_of_Information/Research_and_reports/POLICE_SECTOR_PS_MONITORING_REPORT.ashx

109 ICO (22 July 2010); http://www.ico.gov.uk/upload/documents/library/freedom_of_information/research_and_reports/police_sector_ps_monitoring_follow_up_report.pdf

110 Making Open Data Real: A Public Consultation; Cabinet Office (August 2011).

111 http://communities.gov.uk/localgovernment/transparency/localgovernmentexpenditure/

statistics at a street-by-street level and hospital data on MRSA and C-difficile infection rates, are published. Attempts to increase the level of proactive disclosure are continuing, with the establishment of a requirement to proactively disclose datasets proposed in the Protection of Freedoms Bill. The means of publication is also relevant. The Government is committed to the idea that data should be released in a reusable and machine readable format and on an open license for re-use, including for commercial re-use.

170. There appears to be somewhat of a disconnect between proactive publication of information, which has certainly increased since the enactment of FOIA, and the use of publication schemes, which exist in most cases but appear to be less of a focus of public authorities. This may be demonstrated by the lack of monitoring by public authorities of the use of their publication schemes identified in the MoJ study carried out by Ipsos Mori respondents and the number of public authorities without an approved publication scheme in ICO research. It may be worthy of consideration whether publication schemes remain the best way to encourage proactive disclosure and whether they provide any help to the public in seeking information which is routinely available. It may be the case that the technological advances since the enactment of FOIA might have rendered publication schemes somewhat obsolete as users are more familiar with searching for information and documents using internet search engines than through publication schemes. It is a possibility, then, that the disconnect between proactive disclosure, which has improved considerably under FOIA, and publication schemes, which are maintained somewhat unenthusiastically, may reflect that publication schemes are less important to those seeking information now than when they were first envisaged.

H. Impact of FOIA on Public Authorities

Key Points

- There is evidence to suggest that FOIA has had benefits for public authorities in encouraging more professional communications, more focused record-keeping and adherence to best practice in decision-making. This is discussed in more detail in Chapter 5 at paragraph 212.
- FOIA has also had an impact on resources and the cost to public authorities, with some requests resulting in significant cost.
- The appropriate cost limit is largely viewed as inappropriate by public authorities who feel either that the limit is too high or that the range of activities which can be included in its calculation are not comprehensive enough.
- There is little evidence on the effect of FOIA on commercially focused public authorities which operate in competition to bodies not subject to the Act.

171. For the first time, FOIA placed a statutory obligation on public authorities to provide information to the public, subject to appropriate limitations. The movement in ethos from 'need to know' to 'right to know' was a major evolution in how public authorities interacted with the public and how they worked. This section seeks to establish what practical impact FOIA has had on public authorities.

Resources

172. The most obvious impact on organisations which are subject to FOIA is the cost of compliance. At a time when all public authorities are required to do more with less, this consideration of the financial impact of FOIA on public authorities is pertinent. The resource cost is made up almost entirely of staff time, though legal costs of appeals are also relevant. Staff time can be taken up in locating and extracting the information, considering whether the information is appropriate for disclosure or whether exemptions apply, considering the public interest test, and communicating the decision and, where appropriate, the information it can go on to include time spent conducting internal reviews and dealing with ICO complaints and appeals to the Tribunal and, in some cases, beyond.

173. Section 12 of FOIA enables the Secretary of State to set a cost limit which, if in the estimate of the public authority, would be exceeded by complying with a particular request releases that authority from the requirement to disclose information or to communicate whether information is held. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004[112] made provision for this by setting the limit as £600 for central Government Departments and £450 for all other public authorities. In calculating whether the cost limit would be exceeded by complying with a request, a public authority may, under the regulations, only factor in the costs involved in determining whether it holds the information, locating the information, retrieving the information and extracting the information.

174. The regulations also provide that costs are to be assessed at a rate of £25 per staff hour involved in any of those activities. The figure of £25 was based on the average hourly rates charged by central government departments in response to requests made under the Code of Practice on Access to Government Information, which in turn corresponded with the hourly rate for calculating the costs of responding to Parliamentary Questions. A uniform hourly rate was provided to ensure consistency in calculating the cost of compliance with FOIA across all public authorities, and to ensure that the cost limit was not invoked inappropriately by calculating the cost at senior salary levels. Time taken in reading or considering the information or consulting internally about the request cannot count towards the cost limit. Nor can considering whether an

[112] [2004] No. 3244.

exemption applies, where the public interest lies in relation to a qualified exemption, nor redacting[113] from the information any information that is exempt from disclosure.

175. Section 9 of FOIA permits a public authority to make charges for providing information in a manner laid down by regulations by the Secretary of State. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004[114] allow public authorities to charge for the reproduction and communication of information but not the cost of determining whether it holds the information or the costs of locating, retrieving or extracting the information. The amount that can be charged cannot exceed the actual cost to the public authority of reproducing or communicating the information.

176. In practice, use of the charging mechanism allowed by section 9 is low. UCL research relating to local authorities indicates that a high proportion state that they never charge for information with between 62% and 72% stating that they never charged for information in the period 2005 to 2009. Of the remaining 28% to 38%, the clear majority indicated that they charged in less than 5% of requests. A small minority (peaking at 7% of respondents in 2007) indicated that they charged in 6% of requests or more.[115]

177. In central government, MoJ-compiled statistics indicate that a very small proportion of requests are subject to fees charged. In 2010, 2% of requests were subject to an average fee charged of £56 each. The vast majority of charges – 968 out of 976 – were charged by The National Archives, reflecting the specific nature of information requests to that body. Fees charged by The National Archives fall under the statutory fees regime of the Public Records Act 1958. Only 8 requests in central government were subject to a fee charged by bodies other than The National Archives.[116]

178. Little recent and detailed research is available to provide an accurate indication of the cost of compliance with FOIA. UCL research referred to above also includes research on time taken per request in local Government. As this information is provided in response to annual surveys, the method of calculation may not be consistent. This research indicates a steady reduction in time taken to respond to requests from 16.4 hours in 2005 to 6.4 hours in 2010. Applying the 2004 regulations figure of £25 per staff hour, the research indicates that the cost has fallen

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[113] That redacting information cannot count towards calculation of the costs limit was confirmed by the High Court in *The Chief Constable of South Yorkshire Police v The Information Commissioner* [2011] EWHC 44 (Admin).

[114] *Ibid.*

[115] *Ibid.* 33.

[116] *Ibid.*

from £410 to £160 per request, a 61% reduction.[117] The reasons for the drop in time taken are not clear but may include that FOI practitioners have become more expert and efficient in compliance, that records management has improved since the enactment of the Act or that requesters have become more aware of how to construct effective and clear requests.

179. The only available research into the cost impact of FOIA on the wider public sector dates from the report commissioned by DCA by Frontier Economics in 2006.[118] This report indicated that in central government, the average request required 7.5 hours to deal with and at an actual cost of £34 per hour. The research did not actively measure the cost of dealing with FOI requests outside central government, but assumed that they cost 75% of the average cost in central government to reflect their lower complexity. The report estimated the average cost of FOI at central Government to be £254 per request.

180. The report noted that the time taken to read information, consider exemptions, apply the public interest test and consult with Ministers and senior officials cannot be included in the in the costs that can be considered in applying the cost limit under section 12. The key recommendation of the report was that consideration be given to a range of options that would reduce the burden of complying with FOIA on public authorities.

181. Specifically, the report recommended that consideration be given to including reading, consideration and consultation time within the scope of calculating the cost limit. The report recognised that there would be a need for an agreed methodology for calculating the cost of reading, consideration and consultation in order to achieve consistency. The report also identified problems with the figure of £25 per hour, and calculated £34 per hour for central government and £26 per hour for the wider public sector as a more representative cost. The report estimated that these recommendations would mean an estimated 8% of central government and 6% of local government requests would incur the FOI cost limit, compared to 5% under the current costs regulations at the time the research was conducted. The report further estimated that the change would reduce the costs of delivering FOI by 54% in central government and 48% in the wider public sector through a comparatively small number of expensive requests driven by large volumes of reading material and/or needing extensive consultation or consideration that would be excluded.

182. The report did suggest that consideration be given to charging for internal reviews or for complaints to the ICO, noting that such changes would require primary legislation. The report also suggested that consideration

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117 *Ibid.*

118 *Ibid.* 30 at p1–2.

be given to introducing a targeted fee for commercial, media or repeat requesters.

183. The Constitutional Affairs Committee considered the report and disagreed with its conclusions.[119] In particular, the Committee concluded that sufficient weight was not afforded by the report to the public interests in access to information or to the wider benefits of FOIA and that a change to the appropriate limit regime would require a most rigorous cost-benefit analysis. The Committee was also not satisfied that any change would be transparent and subject to sufficient review. In response the then Government announced that it would not amend the fees regulations.

184. A number of respondents to The MoJ study carried out by Ipsos Mori expressed concern about the cost limit. The most common concern was that reading, redaction and consideration time was not counted towards the appropriate limit. A number indicated that considerable time can be spent reading and redacting information which is easily identified and retrieved. As such, the cost to the organisation can go beyond £450 or £600 but the public authority is unable to refuse the request under section 12. There was also a view expressed that the actual limit itself was too high and that 18 hours or 24 hours was too high a resource cost to expend on a single request under FOIA.

185. A common theme emerging from The MoJ study carried out by Ipsos Mori is that applying FOIA is resource intensive and that there is something of an opportunity cost involved in that each hour spent by a staff member responding to an FOI request was an hour not spent on their 'day job'. A number of respondents felt that although the volume of requests has increased considerably, resources were staying static or declining and the cost to organisations of dealing with FOIA was increasing.

186. There is evidence to suggest that a small minority of FOI requests can be particularly resource intensive. This is supported by The MoJ study carried out by Ipsos Mori where respondents pointed to the growing complexity of requests, where more staff are needed to respond, and resulting difficulties in meeting the 20 day deadline. The Frontier Economics report found that 5% of FOI requests in central government were responsible for 45% of the total cost of FOI.[120]

187. Though a great many FOI requests are routine and are answered with relatively little resource commitment, a small number of highly complex cases illustrate the cost to public authorities of complying with FOI under the current cost limit regime. An example of such a case was a request made to a Government department for prison records relating to Myra Hindley, Harold Shipman, Fred West and Reggie Kray.[121] The request

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119 *Ibid.* 31.

120 *Ibid.* 30 at p2.

121 ICO Decision Notice FS50121803.

was refused initially on the grounds that the information was due for future publication. Upon complaint to the ICO, the cost limit under Section 12 was also employed because of the extent of the information held. The department indicated that the information held which was requested made up at least seventeen metres of horizontal shelf-space plus twenty-one audio cassettes and a small number of other files in different, but identified locations.

188. The ICO decision-notice made clear that the cost-limit could not be employed because the information was all collated in single, easily located files. It found that the time taken to read through the files, to decide if exemptions applied to specific information within and to redact that information to which exemptions did apply could not count towards the cost limit. The request took one official working full time over one year to answer.

189. The research above suggests average costs of between £160 and £254 per FOI request and, with over 900,000 requests dealt with since 2005 in local and central government, the cost to public authorities seems likely to have been in the range of £140m–£230m or about £40m per annum, not counting the 'opportunity' costs caused by FOI diverting staff from their day to day work. As the evidence available suggests that FOI request volumes are rising and given the context of tighter public sector funding, the MoJ has commissioned study across 48 public authorities which will seek to measure the time spent on FOI requests over a specified period. We expect to be able to supply these findings to the Committee in early 2012. Unlike the Frontier Economics research, this study will include active measurement of costs in a range of public authorities outside central government. These findings will provide a picture of the resource impact of FOIA on the public authorities to which it applies.

Commercial Operations

190. Some of the bodies subject to FOIA operate in a commercial environment with competitors who are not subject to the legislation. Examples of such bodies include East Coast Rail, the Royal Mail and Channel 4. A wide range of trading funds also operates to varying degrees in commercial environments where they are dependent on non-exchequer sources of income.

191. Commercial entities argue that the additional burden of compliance with FOIA can hinder their ability to compete in the market place. There is little evidence available of the impact that FOIA has on the commercial or revenue-raising activities of these public authorities. The resource implications discussed at paragraphs 171–189 above may be of relevance to commercial and trading fund public authorities. If the resource burden of FOIA is significant their competitors may operate under reduced costs.

192. In addition to the resource implications of complying with FOIA for public authorities operating in a commercial environment, such public authorities are concerned that they may be required to release potentially commercially damaging information under FOIA. Although Section 43 of FOIA does allow public authorities to withhold information where release would prejudice the commercial interests of any body, including the public authority, the evidence required to be shown of the relevant harm can pose difficulties.

193. In particular, the public authority must be able to demonstrate real likelihood of prejudice. This must include demonstrating likelihood both that the consequences flowing from disclosure are likely to occur and that those consequences would have a prejudicial impact on the public authority's commercial interests. An example of a recent ICO decision notice in relation to Royal Mail illustrates this high burden.[122] A request for information about the rate of undeliverable post by Royal Mail was withheld by Royal Mail. The basis for the decision was that even though undeliverable mail was a common element of any delivery service provider, by providing the figures, Royal Mail would be subject to targeted criticism and negative publicity which its competitors would not be subject to. The decision notice upheld the requesters complaint and noted its expectation that Royal Mail did not just need to demonstrate a possibility of negative coverage, but a likely prospect of that negative coverage occurring. In addition, the ICO noted that an assumption that negative publicity to which a public authority's competitors are not subject, in itself, would be damaging was not sufficient to constitute evidence of prejudice to commercial interests. It needed to demonstrate that that the negative coverage would be likely to damage to its commercial activities.

194. The example above demonstrates that, notwithstanding the protections offered by FOIA, public authorities operating in a commercial environment are likely to be compelled to release information under the Act which their competitors can use against them and which their competitors are not compelled to release. Of course, such bodies will have been included within the scope of FOIA as they are publicly owned companies or because their functions can be deemed to be of a public nature. The question of whether they should be subject to more scrutiny and absorb more burdens that their competitors is a valid one and the balance to be struck between their commercial and public status may be worthy of further consideration.

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[122] FS50318446.

5. Performance Against Objectives

A. Openness and Transparency

195. As the most clear and fundamental objective of FOIA, increased openness and transparency can be examined on two levels. The first is the extent to which public authorities responsively release information. This can be measured in the extent to which FOI requests are received and the extent to which requests result in the disclosure of information. Feeding into this element of the objective is the extent to which requests are dealt with in a timely manner and the extent to which appeals, complaints and sanctions can be employed to enforce the Act. The second level is the extent to which information is proactively released by public authorities, which will be informed by the extent to which the public perceive public authorities to be open, the extent to which they proactively release information and their compliance with the requirements to create and maintain publication schemes.

196. The evidence discussed above at paragraphs 127–134 relating to the extent to which FOIA has been and continues to be used indicates that the Act has become a vital element in opening up Government. This extensive and increasing use of FOIA has resulted in disclosure of significant amounts of information which might otherwise have gone unreleased. The increase in proactive disclosure discussed above at paragraphs 162–170 which has occurred since FOIA was implemented further indicates the role that FOIA has played in opening up public authorities to public scrutiny.

197. A key indicator as to whether FOIA has resulted in increased openness and transparency is whether the public perceive that this is the case. The MoJ has conducted a range of surveys on information rights which include an assessment as to whether people agree that "public authorities are becoming more open about what they do and how they are run" and "public authorities are generally open and trustworthy". These tracker surveys ran from June 2005 to January 2010, with the most recent surveying 1,877 adults in England and Wales.[123]

198. In respect of whether the public agree that public authorities are becoming more open about what they do and how they are run, the proportion of people agreeing has consistently been higher than those disagreeing, with the most recent survey showing 52% of people agreeing (strongly or slightly) and 35% disagreeing (strongly or slightly) and 24% neither agreeing nor disagreeing (including those who responded 'Don't know'). Although the gap narrowed in the period 2006 to 2008, the gap between 'agree' and 'disagree' has always remained at least ten

[123] *Ibid.* 34.

percentage points and widened again in the most recent waves of the survey. This indicates a general perception over the first five years of the Act's operation that public authorities are, at least, moving in the right direction towards greater openness and transparency.

199. In respect of whether the public authorities are generally open and trustworthy, broadly the surveys have found more respondents disagree (either strongly or slightly) than agree with the statement that "public authorities are generally open and trustworthy". However, the numbers of respondents agreeing with this seemed to be on a steadily increasing trend over the lifetime of the survey, and the most recent wave in January 2010 indicated, for the first time, more respondents agreeing (42%) with the statement than disagreeing (33%).

B. Accountability

200. It is argued that information is key to holding public authorities to account for their decisions and actions. Equipped with information about what decisions or actions were taken and the basis for those decisions, individuals and the media can use this information to hold public authorities to account. There is no easy methodology to measure accountability, or whether and if so how FOIA has increased levels of accountability. MoJ's Information Rights Tracker Surveys show a consistently high agreement rate with the statement that "members of the public can hold public authorities to account because they have the right to obtain information about the decisions that the authorities make." Over the life time of the survey, consistently 60% to 70% of respondents agreed, either slightly or strongly, with this statement. Typically about 10% to 15% of respondents disagreed.[124]

201. In order to assess whether FOIA has led to an increase in the accountability of public authorities, or in the perception that public authorities are more accountable, it is necessary to consider the wider context within which public authorities operate and other ways in which they may be brought to account. In addition to more traditional means of accountability such as to Parliament or through judicial review, FOIA was enacted at a time of wider reform of the public sector which altered the more traditional hierarchical means of accountability. The focus on user-focused accountability in public services, whereby public authorities would be accountable to their service users and not just to their department or to Parliament, became more prevalent at the same time as the enactment of FOIA. Examples of this shift in the operation of public services are evident in the 1999 Modernising Government White Paper;[125] Public Service Agreements introduced in 1998 and the focus on

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[124] *Ibid.*

[125] CM 4310 (March 1999).

delivery in public services outlined by the Office of Public Services Reform in Reforming Our Public Services.[126]

202. Similarly, external forces, such as changes in the nature of media, e.g. the internet and 24 hour news, have placed public authorities under ever more scrutiny. FOIA has been instrumental in both shifts in accountability, by empowering service users to obtain the information they need to hold public authorities to account as envisaged and by providing a mechanism through which media can seek to obtain information about the way in which public authorities operate. Although other factors have also fed into the increase in accountability, FOIA has resulted, either directly or indirectly, in the disclosure of significant amounts of information which has enabled the public to hold public authorities to account. This information includes service performance indicators, spending decisions and expenses of politicians or officials.

203. It is worth evaluating, as far as is possible, the question of to whom public authorities should be accountable. The ostensible focus of FOIA is on the individual seeking information with which they can then hold their public authority accountable. In practice, a great deal of FOI requests come not from private individuals but from journalists, commercial requesters and campaign groups. Because FOIA is 'requester blind', detailed statistics are difficult to obtain, but UCL Constitution Unit's study of FOIA in local Government indicates that FOI practitioners have a strong sense of the role of the media in FOI requests, perceiving that roughly similar numbers of requests come from media (33%) as private individuals (37%) and a much stronger perception of media's role in more complex and time consuming requests.[127]

204. The most commonly cited example of FOIA use by the media to hold public authorities to account relates to the release of MPs expenses. Of course, it is noted that the release of this information ultimately came via a leak rather than in response to FOIA requests, however it was the existence of the FOIA requests and the subsequent appeals which precipitated the story. The use of FOIA by the media is demonstrated by the daily examples of media stories which attribute their source as information released in response to a FOI request.

205. Notwithstanding this, it is an area of concern amongst some FOI practitioners that FOI requests are occasionally seen as a substitute for investigative journalism or that some FOI requests from media may not be geared towards the public interest and accountability, but to sourcing news stories of little relevance to accountability of public authorities. This concern has been reflected in the MoJ study carried out by Ipsos Mori which indicated concern at a large number of requests from journalists who were 'fishing' for a story.

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[126] Office of Public Service Reform (March 2001).

[127] *Ibid.* 33.

C. Trust & Participation in Decision-Making

206. Although increasing trust in decision making was suggested as a potential benefit of the legislation, it is arguable whether this was, in fact, a realistic goal. On the one hand, FOIA ensures that the public have far more information than was available previously and the Act provides a mechanism whereby they can trust that they are provided with the relevant information held by a public authority. The very existence of the legislation in this case gives some confidence that public authorities have little to hide behind. They know they can be scrutinised and this of itself tends towards a different relationship between public authorities and the public.

207. On the other hand, FOIA is frequently used to identify deficiencies in decision-making or inefficiencies in spending decisions and news stories based on those outcomes of FOI requests tend to be more prevalent. UCL's research on the impact of FOI on central government indicated a finding that 58% of analysed newspaper articles arising from FOI requests tended to be negative in tone.[128] As such, it is open to debate as to whether FOIA was ever really likely to see increased trust in public authorities or whether, in fact, it would increase trust that public authorities were being open and transparent, but reduce trust in the actual decision-making of public authorities.

208. Nonetheless, ICO research indicates a significant increase in the proportion of people agreeing that 'Being able to access the information held by public authorities increases your confidence in them' and 'Being able to access the information held by public authorities increases your trust in them'. 51% agreed with both statements in 2004, rising consistently to 79% and 75% respectively in 2010.[129]

209. A similar secondary objective of FOIA stemming from increased openness and accountability is that the public would have a better knowledge and understanding of how public authorities operated and how decisions are made. Within the context of increased knowledge of and trust in public authorities, increased public participation in decision-making was identified as an additional objective.

210. In terms of public understanding of decisions, the ICO tracker survey[130] indicates a steady increase in the proportion of people agreeing that "being able to access information held by public authorities increases your knowledge of what they do" from 54% in 2004 to 87% in 2010. As with the issue of trust, this seems to indicate that before the commencement of FOIA, public sentiment was sceptical about its capacity to increase their knowledge but that as they saw it become embedded in public authorities, that perception changed. Other research

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128 *Ibid.* 37 at p221.

129 *Ibid.* 35.

130 *Ibid.* 35.

also indicates moderate increases in knowledge of the political system over the period since FOIA was implemented. When asked about their level of knowledge in 2011 by the Hansard Society, 53%[131] replied with 'a great deal' or 'a fair amount', compared to 42% in 2004.[132] Although it is not attributable specifically to the impact of FOIA it aligns with the research of the ICO in this regard.

211. It is difficult to measure the extent to which FOIA has increased participation in the decision-making process. With a very small proportion of the public making FOI requests, the vast majority of people appear to interact with FOIA through media reporting or use of information by campaigners. UCL research indicates a view amongst FOI officials in central government that those who tend to become involved in decision-making because of an FOI request would have become involved regardless of FOIA.[133] Nonetheless, that research did also note that of the requesters it surveyed, 10% used the information to voice disagreement with a policy decision, 7% passed the information to a campaign and 5% used the information to correspond with their MP. Although the sample in this research is very small, and it is difficult to evaluate how many of those requesters would have been involved in the decision-making process even without FOIA, it is clear that the Act is capable of facilitating increased participation in the political process, though it remains unclear how much that capability has become reality.

D. Quality of Decision-Making

212. An objective set out during the passage of the Act is that increased openness and accountability would lead to improved decision-making and record keeping. The objective of better decision-making and record management is founded on the view that where public authorities know that information contained in their records and that the advice and background to decisions can be requested by the public, those maintaining records and those advising on or making decisions will take more care that their actions and decisions are properly recorded, defensible and supportable. The counter argument, which presented itself in the debates on the FOI Bill, is that, officials knowing that written records advice and background information relating to decisions can be requested will be less likely to create or retain that record in the first place. This is commonly referred to as the "chilling effect", which describes a scenario where officials become more reluctant to provide or record advice, or to explore a wide range of options, for fear of disclosure.

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131 Audit of Political Engagement 8; Hansard Society 2011 at p19.

132 Audit of Political Engagement; Hansard Society 2004 at p21.

133 *Ibid.* 37 at p235.

213. The evidence on the impact of FOIA on decision-making is limited. ICO research indicates that FOI practitioners did not volunteer better quality decision-making as a benefit of FOIA when asked.[134] 'Improved quality of service/Ensures Best practice" was, however, suggested by 8% in the 2007 survey by the ICO. Better record management also emerged as an unprompted benefit of FOIA, though its prevalence in responses to the ICO research fell between 2005 (27% of respondents) and 2007 (14% of respondents).

214. Similarly, UCL's research found little evidence of FOIA leading either to better decision-making or to a chilling effect.[135] That research indicated that many practitioners felt that they did the same job as before FOIA, with no impact on how they make decisions or the advice they provide to Ministers or other officials.

215. Additional UCL research,[136] carried out on behalf of the ICO into the formulation and development of Government policy in the context of FOIA did indicate that amongst respondents, although the general view was that the advice offered and decisions taken remained unchanged in the wake of FOIA, the manner in which information was recorded had changed. Some viewed this change positively by noting that submissions and other written communications became more thorough and focused, while others viewed it more negatively by noting that fewer decisions were being recorded on paper and recorded decisions were becoming less detailed and more anodyne.

216. The response to the MoJ study carried out by Ipsos Mori was mixed. A number of respondents were of the opinion that FOIA had forced them to adopt better record management and that internal communications were more formal and professional. However, a number also indicated a view that some people were recording less information and that internal communications had become less detailed and informative than before FOIA. Although respondents generally did not believe FOIA had revealed any areas of waste or poor practice, many did agree that FOIA had prompted their organisation to ensure best practice is followed in decision-making and that FOIA has made them more accountable for decisions.

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134 *Ibid.* 35 at p29.

135 *Ibid.* 37 at p 164.

136 Ibid. 38.

217. The ICO and the Tribunal have been reluctant to accept generic arguments that disclosure in one case would lead to a wider chilling effect in provision of free and frank advice. While not dismissing the arguments made by public authorities, they have indicated that, where it is difficult to show that disclosure of an individual document will harm the interest that an exemption is designed to protect, very strong arguments for a wider chilling effect need to have been advanced by the public authority seeking to avoid disclosure. Nonetheless, the ICO have stressed the distinction between 'chilling effect' arguments, for which they require very strong arguments to uphold, and the need for space in policy making and collective cabinet responsibility, both of which have been readily accepted by the ICO.

218. There is an important balance to be struck in enhancing transparency while protecting the necessary space in which policy options need to be discussed and decisions taken. The difficulty in appropriately striking that balance remains a concern and is worthy of consideration.

6. Conclusion

219. The Government is committed to greater transparency and openness throughout the public sector. Freedom of Information remains a vital element of the transparency agenda and has been instrumental in the release of a great deal of information which might otherwise have remained closed. It stands with and has been enhanced by more recent measures such as the Government's transparency agenda which has significantly increased the volume of information proactively released and is driving changes to ensure that data is released in a re-usable format and is available for re-use

220. In the eleven years since the passage of the Act and the seven years since its commencement, FOIA has become embedded in the culture of public authorities and its effects on openness and transparency are clear. Use of the Act by the public, by the media and by campaigners has increased considerably over the past seven years. Despite this, some issues remain to be considered relating to the time limits for conducting public interest tests and internal reviews. Nonetheless, public opinion on openness and transparency, and the trustworthiness of public authorities as a result, clearly indicate that FOIA has had significant success in opening up Government.

221. These successes do not come without cost, however. Concern within public authorities at the time taken to process and respond to FOI requests, to conduct public interest tests and consider exemptions, to conduct internal reviews and to deal with complaints and appeals is significant. In particular, the limitations on what activities can count towards the cost limit can leave public authorities with significant costs from dealing with a small number of complex requests. The Government’s commitment to transparency stands alongside its commitment to reduce regulatory burdens. A question worthy of consideration is whether the current FOIA regime strikes the right balance between those two objectives.

222. The extent to which original decisions are either not complained against, or are upheld on complaint, indicate that FOIA is working largely as it should and provides a clear indication that FOIA is, broadly, operating as intended. However some aspects of FOIA’s operation where difficulties arise which may be worthy of further consideration.

223. Initial problems in the complaints and appeals system, where the ICO was overwhelmed with the volume of complaints demanding resolution appear to have largely been resolved. Significant improvements have been made in the average age of caseload dealt with by the ICO and in evidence to the Justice Select Committee in September 2011, the Commissioner indicated that while some issues remained to be resolved, the significant problems experience in the first few years of the Act's operation were, by and large, resolved. Similarly, concerns expressed by the Constitutional Affairs Select Committee in 2006 about the relationship between the ICO and the then DCA have been taken on board and measures have been taken to enhance and protect the independence of the ICO.

224. The Government believes that the expansion of the Act which has taken place and which is planned, and the further reforms planned as part of the transparency agenda, will continue to promote openness, transparency and accountability across the public sector.

Annex A – FOIA Commencement and Secondary Legislation

Commencement

Section 87 of FOIA specifies various provisions of the Act which were to come into force: (i) on the day that the Act was passed; (ii) at the end of a period of two months following the day on which it was passed; and (iii) at the end of a five year period beginning on the day on which the Act was passed or (iv) on such day before the end of that period as the Secretary of State appointed by order. The provisions required to be brought in by Order were commenced within five years of the Act coming into force by the following Orders:

The Freedom of Information Act 2000 (Commencement No.1) 2001 (S.I. 2001/1637) commenced provisions in section 18 and schedules 2, 4 and 6. These provisions came into force on 14 May 2001 and relate to the renaming of and appointments to the Information Tribunal; the appointment and period of office of the Information Commissioner; minor amendments to the Data Protection Act 1998; and provisions enabling the Secretary of State to make rules for regulating the exercise of rights of appeal, under section 57 of FOIA, to the Information Commissioner against a notice served under Part IV of FOIA.

The Freedom of Information Act 2000 (Commencement No. 2) Order 2002 (S.I. 2002/2812) commenced provisions relating to the Lord Chancellor's requirement to issue codes of practice relating to records management and the discharge of public authorities functions under FOIA; various functions of the Information Commissioner including the duty to promote the following of good practice and provisions relating to publication schemes; minor amendments to the Public Records Act 1958 and the Data Protection Act 1998; and obligations on public authorities in relation to publication schemes. These provisions came into force in three stages on 30 November 2002, 28 February 2003 and 30 June 2003.

The Freedom of Information Act 2000 (Commencement No.3) Order 2003 (S.I.2003/2603) commenced the publication scheme provisions under section 19 relating to publication schemes for all remaining public authorities, bar two, on a phased basis on 31 October 2003, 29 February 2004 and 30 June 2004.

The Freedom of Information Act 2000 (Commencement No. 4) Order 2004 (S.I. 2004/1909) commenced provisions on 1 January 2005 which implement aspects of the Aarhus Convention and the Environmental Information Directive (2003/4/EC). These provisions relate to public records; the provision for the recommendation of good practice by the Information Commissioner; enforcement, powers of entry and inspections; and appeal proceedings including those under Schedule 4 to FOIA which have subsequently been repealed by the Transfer of Tribunal Functions Order 2010 (S.I. 2010/22).

The Freedom of Information Act 2000 (Commencement No. 5) Order 2004 (S.I. 2004/3122) commenced the remaining and substantial sections of FOIA on 1 January 2005.

Secondary Legislation made under powers conferred by FOIA:

The Freedom of Information (Additional Public Authorities) Order 2002 (S.I. 2002/2623). The Order came into force on 11 November 2002 and was made by the exercise of powers under sections 4(1) of FOIA. It adds bodies and offices to Parts VI and VII of Schedule 1 to FOIA.

The Freedom of Information (Excluded Welsh Authorities) Order 2002 (S.I. 2002/2832). The Order, which came into force on 30 November 2002 and which was made under the power conferred by section 83(2) of FOIA, lists public authorities designated as excluded for the purposes of section 83(1)(a) of FOIA.

The Freedom of Information (Additional Public Authorities) Order 2003 (S.I. 2003/1882). The Order came into force on 11 August 2003 and made in exercise of the powers conferred by sections 4(1) of FOIA, the Order adds specified bodies to Parts VI and VII of Schedule 1 to FOIA.

The Freedom of Information (Removal of References to Public Authorities) Order 2003 (S.I. 2003/1883). The Order removes specified bodies and offices from Part VI of Schedule 1 to FOIA. The Order was made in exercise of the powers conferred by section 4(5) and came into force on 11 August 2003.

The Freedom of Information (Additional Public Authorities) Order 2004 (S.I. 2004/938). Made under the powers conferred by sections 4(1) of FOIA and came into force on 19 April 2004, the Order adds specified bodies and offices to Parts II, VI and VII of Schedule 1 of FOIA.

The Freedom of Information (Removal of References to Public Authorities) Order 2004 (S.I. 2004/1641). The Order removes bodies and offices which were listed in Parts VI and VII of Schedule 1 to FOIA. The Order was made under powers conferred by section 4(5) of FOIA and came into force on 29 June 2004.

The Freedom of Information (Additional Public Authorities) (Amendment) Order 2004 (S.I. 2004/1870) came into force on 10 August 2004. In exercising powers conferred by section 4(1) of FOIA, the Order amends article 2 of the Freedom of Information (Additional Public Authorities) Order 2004.

The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (S.I. 2004/3244): The Regulations came into force on 1 January 2005. The Regulations set the cost limit under section 12 at £600 for public authorities listed in Part I of Schedule 1 to FOIA (namely government departments, the House of Commons, the House of Lords, the Northern Ireland Assembly, the National Assembly for Wales, the Welsh Assembly Government and the armed forces of the Crown) and at £450 for any other public authorities subject to FOIA. They also provide that the cost

should be calculated using a rate of £25 per person per hour spent on determining whether it holds the information and locating, retrieving and extracting the information. The Regulations give effect to section 12(4) and set out that the calculation of any fee charged under section 9 for providing requested information are limited to the communication of the fact of the information being held and the communication of the information itself. The order also provides that if a charge is to be levied under section 13(1) (provision of information over the cost limit) it can include the costs of determining if it holds the information, locating, retrieving and extracting the information and communicating the information.

The Freedom of Information (Removal and Relaxation of Statutory Prohibitions on Disclosure of Information) Order 2004 (S.I. 2004/3363) came into force on 1 January 2005 and was made by the powers conferred under section 75 of FOIA. The Order has the effect that the following provisions do not prevent disclosure under FOIA: section 154 of the Factories Act 1961; section 59 of the Offices, Shops and Railway Premises Act 1963; subsection (1A) to section 118 of the Medicines Act 1968; paragraph 5 of schedule 11 of the National Health Service Act 1977 (later revoked by the National Health Service (Consequential Provisions) Act 2006); section 28 of the Health and Safety at Work Act 1974; section 49 of the Audit Commission Act 1998; section 20 of the Access to Justice Act 1999; and section 5 of the Biological Standards Act 1975

The Freedom of Information (Time for Compliance with Requests) Regulations 2004 (S.I. 2004/3364). Made under the powers conferred by section 10(4) of FOIA and coming into force on 1 January 2005, the Regulations provide that in the case of maintained schools, the timeframe for complying with section 1(1) of FOIA should not include working days which were not school days up to a limit of 60 working days. The Regulations extended the timeframe for disclosure of information contained in certain transferred public records to thirty days and provided that the timeframe for information which is dependent on provision from outside the UK or from someone involved in an operation of the armed forces should be extended until that information has been provided, subject to a maximum of sixty working days.

The Freedom of Information (Additional Public Authorities) Order 2005 (S.I. 2005/3593). Commencing in part on 7 February 2006 with the remaining provisions coming into force on 1 June 2006, the Order was made under powers conferred by sections 4(1) of FOIA and specifies bodies to be added to parts VI and VII of Schedule 1 to FOIA.

The Freedom of Information (Removal of References to Public Authorities) Order 2005 (S.I. 2005/3594). Coming into force on 7 February 2006 and made under powers conferred by section 4(5) to FOIA, the Order removes specified bodies and offices listed in parts VI and VII of Schedule 1 to FOIA.

The Freedom of Information (Additional Public Authorities) Order 2008 (S.I. 2008/1271). Made under the exercise of powers conferred by section 4(1) of FOIA and came into force on 2 June 2008, the Order specifies additional public authorities to be added to Part VI of Schedule1 to FOIA.

The Freedom of Information (Parliament and National Assembly for Wales) Order 2008 (S.I. 2008/1967). Commencing on 23 July 2008, the Order was made in exercise of powers conferred by section 7(3)(a) of FOIA and amends Schedule 1 to FOIA to limit entries relating to three public authorities namely the House of Commons, the House of Lords and the National Assembly for Wales.

The Freedom of Information (Time for Compliance with Requests) Regulations 2009 (S.I. 2009/1369). The Order, made under the powers conferred by section 10(4) of FOIA, came into force on 26 June 2009 and extends the provisions relating to maintained schools in the 2004 regulations to controlled schools, voluntary schools, grant-maintained integrated schools and pupil referral units in Northern Ireland as these had been omitted from the first order.

The Freedom of Information (Additional Public Authorities) Order 2010 (S.I. 2010/937). The Order, made under the powers conferred under section 4(1) of FOIA, amends various specified entries under Schedule 1 to FOIA and inserts entries into Parts II and VI of that Schedule. The Order partly came into force on 1 October 2010. The remaining provisions will do so on 31 December 2011.

The Freedom of Information (Removal of References to Public Authorities) Order 2010 (S.I. 2010/939). The Order was made by the exercise of powers conferred under section 4(5) of FOIA. It removes references to certain public authorities from Parts VI and VII of Schedule 1 of FOIA and partly came into force on 1 October 2010. The remaining provisions will come into force on 31 December 2011.

The Freedom of Information (Additional Public Authorities) Order 2011 (S.I 2011/1041). The Order came into force on 1 October 2011 and was made under the powers conferred by sections 4(1) of FOIA. The Order specifies additional public authorities for inclusion under parts VI and VII of Schedule 1 to FOIA.

The Freedom of Information (Removal of References to Public Authorities) Order 2011 (S.I. 2011/1042). The Order came into force on 1 October 2011 and was made under the powers conferred by section 4(5) of FOIA. The Order removes references to specified public authorities listed in parts VI and VII of Schedule 1 to FOIA.

The Freedom of Information (Designation of Public Authorities) Order 2011 (S.I. 2011/2598): came into force on 31 October 2011 and was made in exercise of the powers conferred by sections 5(1)(a) of FOIA. The Order specifies persons designated as public authorities under section 5(1)(a) FOIA.

The Freedom of Information (Time for Compliance with Requests) Regulations 2010 (S.I. 2010/2768). Coming into force on 18 November 2010, the Order, which was made by exercising the power conferred by section 10(4) of FOIA, modifies the period within which proprietors of Academies must respond to requests for information under FOIA, following their inclusion within the scope of FOIA in the Academies Act 2010.[137]

[137] Proprietors of Academies were added to Part IV of Schedule 1 of FOIA by paragraph 10 of Schedule 2 of the Academies Act 2010.

Annex B – Central Government Bodies monitored by MoJ as at mid-2011

Attorney General's Office
Cabinet Office
Department for Communities and Local Government
Department for Business, Innovation and Skills
Department for Culture, Media and Sport
Department for Education
Department for Environment, Food and Rural Affairs
Department for International Development
Department for Transport
Department for Work and Pensions
Department of Energy and Climate Change
Department of Health
Export Credits Guarantee Department
Foreign and Commonwealth Office
HM Treasury
Home Office
Ministry of Defence
Ministry of Justice
Northern Ireland Office
Scotland Office
Wales Office
Central Office of Information
Charity Commission
Child Maintenance and Enforcement Commission
Crown Prosecution Service
Debt Management Office
Food Standards Agency
Health and Safety Executive and Commission
HM Land Registry
HM Revenue and Customs

National Archives

National Savings and Investments

Office for National Statistics

Office for Standards in Education (OFSTED)

Office of Fair Trading

Office of Gas and Electricity Markets (OFGEM)

Office of Rail Regulation

Ordnance Survey

Royal Mint

Rural Payments Agency

Serious Fraud Office

Treasury Solicitor's Department

Water Services Regulation Authority (OFWAT)

Annex C – Summary of Exemptions

Section 21 exempts information from disclosure where it is "reasonably accessible" to the applicant. Payment of a fee does not prevent information being reasonably accessible for this purpose. Whether information is "reasonably accessible" is not automatically determined by looking at all information in the public domain. It is necessary to take account of an applicant's individual circumstances and ability to access the information in question.

Section 22 applies, subject to the public interest test, to exempt information from disclosure that is intended for future publication. In order to engage the exemption an intention to publish the information held must exist at the time a request is received, although there is no requirement to either know when that date will be, or to name it. Similarly, there is no time limit by which the intention to publish must result in actual publication. However, for the exemption to apply, it must be "reasonable in all the circumstances" to withhold the information between the time of the request and the date of intended publication.

Section 23 exempts from disclosure any information provided by, or relating to, the security bodies listed in section 23(3). These include the Security Service, the Secret Intelligence Service and GCHQ. The list of bodies relevant to section 23 has been amended by primary legislation since it first came into force.[138] Section 23 is often used in conjunction with section 24 to neither confirm nor deny the existence or otherwise of national security or security body information. A certificate signed by a Minister of the Crown provides "conclusive evidence" of the exemption's proper engagement, although such a certificate may be appealed to the Tribunal. However, it is not necessary to obtain a certificate to rely on the exemption and no certificate has ever been issued.

Section 24 applies, subject to the public interest test, to exempt information from disclosure where non-disclosure is required for the purpose of safeguarding national security. Section 24 is often used in conjunction with section 23 to neither confirm nor deny the existence or otherwise of national security or security body information. A certificate signed by a Minister of the Crown provides "conclusive evidence" of the exemption's proper engagement, although such a certificate may be appealed to the Tribunal. However, it is not necessary to obtain a certificate to rely on the exemption and no certificate has ever been issued.

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[138] Section 23(3) was amended by paragraph 158 of Schedule 4 to the Serious Organised Crime and Police Act 2005 to add the Serious Organised Crime Agency to the list of "security bodies".

Section 26 exempts from disclosure, ,subject to the public interest, information the disclosure of which would or would be likely to prejudice the defence of the British Islands or any colony, or the capability, effectiveness or security of the armed forces of the Crown or any forces co-operating with them.

Section 27 exempts from disclosure, subject to the public interest, information the disclosure of which would, or would be likely to, prejudice relations between the United Kingdom and any other State; relations between the United Kingdom and any international organisation or international court; the interests of the United Kingdom abroad; or the promotion or protection by the United Kingdom of its interests abroad (section 27(1)). Confidential information obtained from another state, an international organisation or an international court is also exempt, subject to the public interest test (section 27(2)).

Section 28 exempts from disclosure, subject to the public interest, information the disclosure of which would, or would be likely to, prejudice relations between two or more administrations in the United Kingdom. The relevant administrations (for this exemption and section 29 below) are the government of the United Kingdom, the Scottish Executive, the Executive Committee of the Northern Ireland Assembly and the Welsh Assembly Government.

Section 29 exempts from disclosure, subject to the public interest, information the disclosure of which would, or would be likely to, prejudice the economic or financial interests of the United Kingdom or of any administration in the United Kingdom.

Section 30 is concerned primarily with information held by public authorities that have functions relating to certain proceedings and investigations. The exemption may be used, subject to the application of the public interest test, to exempt information from disclosure where information has at any time been held for the purpose of specified criminal and other investigations or proceedings (including for the purpose of deciding to bring proceedings) or where information relates to the obtaining of information from confidential sources and was obtained or recorded for specified investigations or proceedings. Section 30 can only be relied on by an authority which itself carries out an investigation or is able to bring proceedings that are specified in the exemption. Section 30 is closely linked to section 31 (law enforcement). The two exemptions cannot apply to the same information.

Section 31 exempts from disclosure, subject to the public interest test, information the disclosure of which would, or would be likely to, *prejudice* a range of law enforcement interests. Commonly cited parts of the exemption are section 31(1)(a), prejudice to the prevention and detection of crime; section 31(1)(b), prejudice to the apprehension and prejudice to prosecution of offenders; and section 31(1)(c), the administration of justice. Sections 31 and 30 are mutually exclusive.

Section 32 exempts from disclosure under FOIA all information held by public authorities by virtue of the fact that it is contained in records placed with or created by a court for the purposes of certain legal proceedings or served by or on the public authority for that purpose. A court in this sense includes a

tribunal or other judicial body and legal proceedings includes inquests and post-mortems. The exemption also extends to documents created by or placed with a person carrying out an inquiry or arbitration. Courts themselves are not subject to FOIA and the disclosure of court records are considered under the court disclosure rules.

Section 33 exempts from disclosure, subject to the public interest, information the disclosure of which would, or would be likely to, prejudice the audit of the accounts of other public authorities, or the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions. Section 33 only applies where a public authority has audit or monitoring functions in relation to another public authority. It does not apply where a public authority has such functions in relation to private sector bodies, nor does it cover internal audit and monitoring.

Section 34 makes information exempt from disclosure where release would infringe parliamentary privilege. A certificate signed by, in relation to the Commons, the Speaker, or in relation to the Lords, the Clerk of the Parliaments, shall be conclusive evidence that an exemption is required to avoid an infringement.

Section 35 exempts from disclosure, subject to the application of the public interest test, information held by a Government department (but no other public authority) and which relates to:

- the formulation and development of Government policy (section 35(1)(a));
- Ministerial communications (section 35(1)(b));
- the provision of, or a request for, Law Officers advice (section 35(1)(c)); or
- the operation of a ministerial private office (section 35(1)(d).

Section 35(1)(a) is broadly drawn and covers, subject to the public interest test, a wide range of information relating to formulation and development of central government policy. However, once a decision about Government policy has been taken, statistical information used in formulating and developing that policy falls outside the scope of this exemption (section 35(2)(a)). At all times regard is to be given to the public interest in the disclosure of factual information used in the decision making process (section 35(4)).

Section 35(1)(b) covers, subject to the public interest test, any record of communications between Ministers (including Northern Ireland Ministers and members of the Welsh Assembly Government). Ministerial communications in this sense includes Cabinet and Cabinet Committee Minutes, letters and emails between ministers, and notes of telephone calls made between them. It does not relate to communications between a Minister and any other person. The “Ministerial veto” provided in section 53 of FOIA has only ever been used in relation to Cabinet Minutes (see paragraph 116 of this memorandum).

Section 35(1)(c) exempts from disclosure, subject to the application of the public interest test, advice and requests for advice from the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland, the Counsel General to the Welsh Assembly Government**,** and the Attorney General for Northern Ireland. This exemption is commonly used to neither confirm nor deny the involvement of the Law Officers, to reflect the longstanding convention that the Government does not reveal whether or not the Law Officers' have advised or been asked to advise on a particular matter.

Section 36 exempts from disclosure, subject to the public interest, information the disclosure of which would, or would be likely to, prejudice the effective conduct of public affairs. The more specific interests that lie under the broader heading "effective conduct of public affairs" are set out in section 36(2)(a) to (c) (described in more detail below). Sections 35 and 36 are mutually exclusive and cannot concurrently be used by a government department (to whom both are available) to protect the same information. Accordingly, section 36 can only be used where section 35 is unavailable.

Before it can be relied on, section 36 requires a determination by a 'qualified person' that in their reasonable opinion disclosure of the requested information would, or would be likely to, prejudice an interest set out in section 36(2). Section 36(5) identifies who is to be regarded as the "qualified person" for various types of public authority listed in that subsection. For most government departments, this means a Minister i.e. a Minister for the department that holds the information. Under the policy adopted by the Government regarding a request for papers of a previous administration, the Attorney General will act as the relevant Minister. Where a specific public authority is not listed in section 36(5), the 'qualified person' will be a Minister of the Crown or, if authorised for the purpose by a Minister, the public authority or one of its officers or employees.

Section 36(1)(a) exempts from disclosure , subject to the public interest, information the disclosure of which would at least be likely to prejudice the maintenance of the convention of the collective responsibility of Ministers of the Crown, the work of the Executive Committee of the Northern Ireland Assembly, or the work of the Cabinet of the Welsh Assembly Government. Given the overlap with sections 35(1)(a) and (b), this exemption is little used by bodies able to rely on those provisions.

Section 36(2)(b) exempts from disclosure, subject to the public interest, information the disclosure of which would at least be likely to prejudice the free and frank provision of advice (section 36(2)(b)(i)) and the free and frank exchange of views for the purpose of deliberation (section 36(2)(b)(ii)).

Section 36(2)(c) exempts from disclosure,, subject to the public interest, information the disclosure of which would at least be likely to otherwise prejudice the effective conduct of public affairs.

A certificate signed by, in relation to the Commons, the Speaker, or in relation to the Lords, the Clerk of the Parliaments, (the relevant Qualified Persons) shall be conclusive evidence that section 36(2)(b) is engaged.

Section 37(1), as amended by the CRAGA, now provides an absolute exemption for information held by English and Welsh public authorities relating to communications with the Sovereign (section 37(1)(a)), the heir to the Throne (section 37(1)(aa)), the second in line to the Throne (section 37(1)(ab)), and communications made on their behalf by other members of the Royal Family or by the Royal Household. Information relating to communications by other members of the Royal Family or the Royal Household for any other purpose is subject to a qualified exemption. Prior to the commencement of these provisions in February 2011 all parts of this exemption were qualified. Clause 102 of the Protection of Freedoms Bill will extend this provision to Northern Ireland public authorities, but until this is commenced information falling within these categories remains subject to a qualified exemption. The Northern Ireland Assembly passed the relevant Legislative Consent Motion in 2011.

Section 37(1)(ac) – (ad) exempts from disclosure, as set out above, subject to the public interest test, information relating to communications with members of the Royal Family, other than the Sovereign, heir to the Throne, and third in line to the Throne, and the Royal Household. Communications made on behalf of the Sovereign, heir to the Throne, and third in line to the Throne are covered by the absolute exemption contained in section 37(1)(ac) and (ab)(see above). All information relating to communications with the Royal Family and Royal Household held by Northern Ireland public authorities remains subject to a qualified exemption until such time as clause 102 of the Protection of Freedoms Bill, which extends the amendment to section 37(1) in the CRAGA to Northern Ireland bodies, is commenced.

Section 37(1)(b) exempts from disclosure , subject to the public interest test, information relating to the conferral by the Crown of any honour or dignity. This is unaffected by the changes made to section 37(1) by the CRAGA.

Section 38 exempts from disclosure, subject to the public interest, information the disclosure of which would, or would be likely to, endanger the physical or mental health, or the safety, of any individual.

Section 39 exempts from disclosure subject to the public interest test, environmental information from disclosure under FOIA that is subject to the regime for disclosure of environmental information established by the EIRs.

Section 40(1) exempts personal data from disclosure where it is requested by the data subject. This is because requests for one's own personal data are considered under the subject access provisions provided by section 7 of the DPA. Subject access requests may be made by the data subject or a person acting on their behalf.

Section 40(2) exempts personal data which is not the requester's personal data from disclosure where one of two conditions is satisfied.

The first condition has two limbs which is met if either limb is present. The first limb is that its release would contravene any of the data protection principles contained in Schedule 1 to the DPA. The second limb is that it would contravene the right of a data subject under section 10 of the DPA to prevent processing that is distressing or harmful. Section 40 provides an absolute exemption where the condition is met on the basis of the first limb. Where the condition is met on the basis of the second limb the exemption is qualified.

The second condition is that the personal data is exempt from the data subject's right of access to personal data by means of any of the exemptions contained in Part IV of the DPA. Where this condition is met the exemption is absolute.

Section 40(2) also provides a fully qualified exemption from the obligation to confirm or deny whether or not personal data is held by the public authority (section 40(5)).

Section 41 exempts information obtained by a public authority from another person from disclosure where release would constitute an actionable breach of confidence. The exemption can only be relied upon where a person could bring a successful legal action as a result of a breach of confidence. Under the common law of confidence the courts have long recognised that a person will not succeed in an action for breach of confidence if there is an overriding public interest in disclosing the information.

Section 42 exempts from disclosure, subject to the public interest test, information which is subject to legal professional privilege. The Information Commissioner, Tribunal and High Court have recognised the substantial inherent public interest in maintaining the confidentiality of legally professionally privileged material. Accordingly it is likely to only be in exceptional circumstances that this will be outweighed by the public interest in disclosure.

Section 43(1) exempts from disclosure, subject to the public interest test, trade secrets and information that, if disclosed, would or would be likely to prejudice commercial interests.

Section 44 exempts information from disclosure where prohibited under any other enactment, where release is incompatible with any Community obligation, or where release would constitute or be punishable as a contempt of court. Section 75 of FOIA provides an Order making power enabling the amendment or repeal of statutory bars on disclosure which predate FOIA receiving Royal Assent. This power was used in 2004[139] to repeal or amend prohibitions on disclosure contained in eight pieces of legislation so that they

[139] The Freedom of Information (Removal and Relaxation of Statutory Prohibitions on Disclosure of Information) Order 2004 (S.I. 2004/3363).

did not prevent disclosure under FOIA. In 2005, the then DCA published a review of other provisions that were capable of preventing disclosure in response to a request under FOIA.[140] It identified 210 statutory prohibitions which prohibit disclosure under FOIA and made recommendations about amendment, repeal or retention, of each provision. However, no further Orders under section 75 have been made and the majority of statutory bars on disclosure remain in place, although many appear little used.

[140] *Review of Statutory Prohibitions on Disclosure* (2005) http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/StatutoryBarsReport2005.pdf

Annex D – Investigative study to inform the FOIA (2000) post legislative review

Evidence Review

Disclaimer

The views expressed are those of the authors and are not necessarily shared by the Ministry of Justice (nor do they represent Government policy).

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Contents

Introduction

Aims of the review

Ipsos MORI was commissioned to undertake an investigative study to inform the post-legislative review of the Freedom of Information Act (2000) (FOIA). The aim of this report is to provide a preliminary assessment of the literature to establish what evidence is currently publicly available – as at October 2011 when this study was carried out – on public authorities' delivery of the Act and evidence gaps in knowledge.

This report is not a comprehensive, in-depth evidence assessment; rather, it is a smaller-scale review of readily accessible published information from a range of sources. The evidence presented here is hoped to be indicative of the information available to the public relating to the Act.

This review looks at publicly available sources on the Act and sets out to answer the following questions:

- What are the request volumes across a range of bodies outside central government subject to the FOIA?
- How much does it cost to deal with Freedom of Information (FOI) requests across a range of bodies?
- What were the start up costs for introducing the FOIA?
- Are any financial benefits attributable to the FOIA? Does this differ across different sectors/bodies?
- What benefits has the FOIA brought? Does this differ across different sectors/bodies? Has it brought increased public confidence?
- How effective is the FOIA at meeting its aims – has it improved levels of trust, accountability, understanding of decision making, public engagement? Does this differ across different sectors/bodies?
- How aware are the public about their rights to access information?
- Who uses the FOIA? Does this differ across different sectors/bodies?
- How does the operation of the UK FOIA compare with other countries?

Ipsos MORI was also commissioned to undertake two other strands of work as part of the study. The second was to gather the views and experiences from a total of 16 government departments and other public authorities on the operation of the FOIA and the findings from this are also published within the Memorandum. The findings from the third strand of work, which is to assess the costs for a range of public authorities in dealing with FOI requests, will be published in early 2012. At the same time, the reports of all three strands of work will be brought together into one coherent analytical assessment.

Approach

The review examines academic papers, official reports and primary research (drawn from internet searches) on the implementation and effects of the FOIA and parallel legislation in other English-speaking countries. Because statutory freedom of information in this country is a recent innovation (the provisions of the Act came into effect in 2005) there has been relatively little research into its effects. Much of the fieldwork in this topic area has been conducted by members of the Constitution Unit at University College London's Department of Political Science. Their research is methodologically robust, encompassing multiple methodologies including quantitative surveys of FOI requesters, officials and stakeholders; interviews with parliamentarians, civil servants and Information Tribunal members; analysis of media coverage; and analysis of Information Tribunal cases. However, we have also included a number of sources from small scale reports, with findings drawn from very small samples of requesters and FOI officials. The robustness of some of these studies is variable and therefore some findings should be seen as indicative rather than representative. Also, wherever the views of FOI officers or civil servants are cited these should be taken as useful insights into the effect of the FOIA, but they are not disinterested or comprehensive observations.

Background

The Act came into force on 1 January 2005. The Act makes provision for the disclosure of information held by public authorities and aims to enable greater transparency, accountability and public engagement. The Act creates a statutory right of access to information held by a public authority. The information requested must be provided (unless the information is exempt from the duty of disclosure) within 20 working days. The Act applies to over 100,000 public authorities. These include central government departments, local authorities, schools, colleges and universities, the health service, the police and a range of other public bodies. The Act requires public authorities to adopt a scheme for the publication of information, including listing the information the authority intends to publish and the manner of publication.

Freedom of Information processes

There are a range of practices and processes employed by public authorities in responding to FOI requests they receive, but typically requests are logged on to a central monitoring system and then passed on to the relevant individual within the organisation. Requests may go through a number of stages including finding the information, considering the organisation's response to the request and ensuring it does not fall under an exemption[141].

[141] http://webarchive.nationalarchives.gov.uk/+/http:/www.dca.gov.uk/foi/reference/foi-independent-review.pdf

Official statistics on the implementation of the FOIA in central government published by the Ministry of Justice (MoJ)[142] show that 54% of "resolvable" requests[143] received by the 40 or so bodies covered by the statistics were granted in full during the quarter April to June 2011. Some 90% of all requests were processed either within the 20 day time limit or with a permitted extension for considering the balance of public interest in whether or not to disclosure the requested information. A total of 2,380 requests were reported as having one or more exemptions listed in Part II of the FOIA applied to them.

In order to ensure consistency across central government departments in dealing with FOI requests, the government has set up a central Clearing House[144], which sits within the MoJ. The function of the Clearing House is to provide advice and assistance to Whitehall Departments when faced with requests which are difficult or have cross-departmental implications.

142 http://www.justice.gov.uk/downloads/publications/statistics-and-data/mojstats/foi-quarterly-stats-apr-june-2011.pdf

143 The MoJ statistics relate to "non-routine" information requests that the central government bodies receive. Essentially, this means that the statistics should only count those requests where (a) it was necessary to take a considered view on how to handle the request under the terms of the Freedom of Information Act, and (b) departmental Freedom of Information officer(s) were informed of the request and logged it in their case management systems. "Resolvable" requests are those where it would have been possible to give a substantive decision on whether to release the information being sought, so exclude, for example, requests for information that was not held by the public authority in question.

144 http://www.justice.gov.uk/guidance/freedom-and-rights/freedom-of-information/foi-clearing-house.htm

Findings

The report starts by looking at the publicly available evidence regarding if and how the FOIA 2000 has met some of its key objectives. It goes on to look at the evidence indicating the numbers of FOI requests received across different parts of the public sector, the characteristics of those who make FOI requests, and the costs to public authorities of dealing with requests. Details of the reference sources cited throughout can be found at the end of the report.

Objectives of the FOIA

The FOIA 2000 was implemented to provide greater transparency and accountability across central government and public bodies. One of the main aims of the Act is to provide the public greater access to information held by public authorities[145].

The UCL Constitution Unit, through a survey of FOI officers across local government, explored the extent to which a number of objectives of the FOIA (defined by UCL from their review of ministerial statements, white papers and parliamentary debates) were being achieved;

Table 1: 2008 Survey of local government FOI officers[146]

	% of FOI officers who agreed that the following objectives were being achieved:
increased openness and transparency	95%
increased accountability	78%
improved decision-making in government	26%
better public understanding of government decision-making	49%
increased participation	25%
increased public trust in government	25%

Of these, *openness* and *accountability* were deemed by UCL to be core objectives of the FOIA, while the other four were considered secondary objectives. It was believed by policy-makers that achievement of the core objectives would lead automatically to improvements on the secondary ones.

[145] Laperdrix, M (2011)

[146] UCL Constitution *Unit* (2010), p. 2.

Progress on core objectives

More than five years on from the introduction of the FOIA, the evidence suggests that central government has indeed become more *open*. The public are able to acquire far more government data than previously, and a tracker survey, commissioned by the Ministry of Justice roughly quarterly from 2005 to 2010, found the majority of the public agreeing that the authorities are becoming more open[147]. The same survey found that over 70% of respondents were aware of their right to access publicly-held information.

Parliament has also become more transparent; whereas it has always published the proceedings of debates and committee hearings, it now makes available details of parliamentarian expenses and 'inner workings' of parliamentary facilities that were not previously released. The latter include, for example, "restaurant tabs of MPs, CO_2 emissions of its buildings, policies relating to pest control in the Palace of Westminster, costs of construction of the Visitors Centre, peers with criminal convictions, 'golden parachute' payments to former MPs, and the use of parliamentary facilities by outside organisations"[148].

A UCL (2010) study suggested that FOI has made slight improvements to local government transparency, although there was variation in the levels of openness between different local authorities. Many factors are relevant in explaining the variation, including the attitudes of senior officials and local politicians, initial experience of FOI requests, and the political balance of power in the council[149]. Where politicians and officials are positive towards the FOI agenda, implementation of the Act has been undertaken with greater vigour. Local authorities whose initial experience of the Act have included a high proportion of commercially-minded requests, or damaging revelations of salaries, have subsequently adopted a more defensive approach to compliance. Those councils with a dominant party can 'absorb' damaging FOI revelations better than those with a slim majority or no overall control, and perhaps for this reason the former tend to be more comfortable with frank disclosure of information.

Concerning the other core objective of the Act – *accountability* – surveys of officials and stakeholders across public authorities found that the FOIA had indeed made central and local government more accountable. The Ministry of Justice's Information Rights Tracker Survey has consistently found a majority of respondents think "public authorities can be held to account because of the right to get information from them"[150]. FOI requests have been used by campaigners, MPs and the media to reveal decision-makers' actions, obliging them to explain themselves where they otherwise would not have. This includes a number of instances widely reported in the media,

147 Ministry of Justice, "Information Rights Tracker Survey – Key Wave 14 results Fieldwork: January 2010". http://www.justice.gov.uk/downloads/publications/statistics-and-data/FOI/info-rights-tracker/foi-tracker-survey-wave-14.pdf

148 Worthy and Bourke (2011), p. 11

149 UCL Constitution Unit (2010)

150 Ministry of Justice, "Information Rights Tracker Survey – Key Wave 14 results Fieldwork: January 2010"

Progress on secondary objectives

The Freedom of Information Act was designed to improve governance in the UK, at all levels from local authorities to parliament. The extent to which FOIA has improved *public understanding of government decision-making*, appears to vary between central and local government requests. A very small proportion of the public requests information, and media coverage of FOI requests is rarely on policy-decision topics (i.e. it is far more likely to cover a topic like expenses, crime statistics and so on). The picture is slightly different in the case of local government – there are proportionally more requests from the general public, and these requesters tend to report that their understanding of government decision-making has been improved by engaging with FOI (though they are still a very small part of the total population)[151].

Waller et al find no evidence that the Act has *improved decision-making* in either local or central government. Most officials agreed that the same issues would have been discussed and the same decisions reached had the FOIA not been in place[152].

There is little evidence to suggest the FOIA has increased *public participation in government*: the number of individuals making requests is insignificant in terms of the UK population. Those who make requests are normally already engaged with government: campaigners, journalists and politicians for instance[153]. There is evidence that charities and non-profit service providers are holding back from using FOI requests out of fear that it will antagonise the public authorities they rely on for funding[154]. A study of 705 third-sector organisations found that although half had made FOI requests, a similar proportion "would be discouraged from making a request because of a fear that it might harm working relations or funding relations or both"[155]. The higher the level of funding an organisation receives from a public authority, the more likely they are to believe that using FOI could harm relations between their organisation and the public authority. The particular source cited here is from Scotland, which has its own Freedom of Information Act, but it is reasonable to assume that similarly applies across the rest of the UK for the FOIA.

There is ambivalent evidence on the impact on *public trust in government*. On the one hand, having greater access to information may have reduced suspicion of government. On the other, revelations of public waste or corruption are likely to erode confidence in the system. An analysis of media articles drawn from FOI requests to central government found that only 3% were likely to have a positive impact on public trust, whereas 58% were likely to have a negative impact[156]. Only 3% of requesters who responded to an online survey reported that their experience of FOI had increased their trust in government. This study found no quantitative analyses about the link between FOI and public trust in local government or parliament, but the Amos, Worthy and Bourke (2010) research points towards a negative effect. This is in some accord with Table 1, which shows that only 25% of local government FOI officers interviewed for a 2008 survey felt the FOIA had increased public trust in

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151 UCL Constitution Unit (2010)

152 Peter Waller, R.M. Morris and Duncan Simpson (2009), "Understanding the Formulation and Development of Government Policy in the context of FOI", chapter 7.

153 Kate Spence (2010) 'Volunteering Information? The use of Freedom of Information laws by the Third Sector in Scotland Survey Findings'

154 Hazell and Worthy (2009), p.8

155 Kate Spence (2010), "Volunteering Information? The use of Freedom of Information laws by the Third Sector in Scotland Survey Findings"

156 Hazell and Worthy (2009)

government. The MP expenses controversy is an example of where information released under FOI has weakened rather than strengthened trust in public institutions.

In short, the evidence suggests that the FOIA has had considerable success in achieving its primary objectives of greater openness and accountability. On the secondary objectives there is far less evidence of progress – it would appear that the FOIA has had only a marginal impact on these goals, and may even have reduced public trust in government. The authors of a UCL report on the impact of the FOIA feel this was always the likely outcome of the Act:

> *"FOI was oversold, by its advocates and by ministers, and labours under the burden of unrealistic objectives. To policy audiences we stress the need to lower expectations of what FOI can deliver; and explain that FOI is unlikely ever to increase trust, because the government's battle with the press over bad FOI stories is one that can never be won"*[157]*.*

Impact of FOIA on the policy process

Both before and since the FOIA came into effect, its opponents have voiced a range of objections concerning its effect on the design and implementation of public policy. The most commonly heard concern is a *'chilling effect'* on policy debate[158]: politicians and officials will record less of the advice and discussion that leads up to a policy decision, to the detriment of proper decision-making. At worst, officials may be deterred from giving advice for fear that if the policy fails they will have their reputation publicly tarnished. However, interviews with civil servants conducted by UCL Constitution Unit in 2009 found no evidence of a 'chilling effect' on central government.[159]. Also, the majority of local authority FOI officers reported there was no chilling effect on their authority[160].

Claims that the FOIA would undermine civil service neutrality or ministerial accountability have likewise proved unfounded, according to the evidence: ministers, not officials, continue to take responsibility for policy decisions despite the availability of policy advice submitted by named officials[161].

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157 *Ibid.* section 7.2.

158 Waller, Morris and Simpson (2009), p.59

159 Hazell and Worthy (2009)

160 UCL Constitution Unit (2010)

161 Hazell and Worthy (2009)

Freedom of Information requests

Request Volumes

The dominant trend across all branches of government and public bodies has been a steady rise in the number of FOI requests received. Comprehensive statistics on FOI requests to central government are published quarterly by the Ministry of Justice, and include both departments of state and a range of 'other monitored bodies', which are national public authorities such as HM Revenue and Customs and the National Archives.

Table 2: FOI requests received across central government[162]

	2005	2006	2007	2008	2009	2010
TOTAL	38,108	33,688	32,978	34,950	40,467	43,796
Departments of State	19,717	17,999	16,903	19,175	23,732	27,294
Other monitored bodies	18,391	15,689	16,075	15,775	16,735	16,502

Though the Houses of Parliament are also covered by the FOIA, they are not included in the Ministry of Justice statistics given above. Separate data, collected for a report by the UCL Constitution Unit, show that requests to parliament have also been increasing:

Table 3: FOI requests received by parliament[163]

	2005	2006	2007	2008	2009
Total requests	259	191	249	421	910

Aggregated FOI request statistics across the whole of local government do not exist; however, the UCL Constitution Unit has produced estimated figures through its surveys of FOI officers.

Table 4 Estimated volume of FOI requests received by local authorities[164]

	2005	2006	2007	2008	2009
Estimated total requests	60,000	72,000	80,000	118,000	165,000

[162] April to June 2011 Statistical Tables, available from "Freedom of Information: Statistics on implementation in central government" page of Ministry of Justice website. http://www.justice.gov.uk/publications/statistics-and-data/foi/implementation.htm

[163] Ben Worthy and Gabrielle Bourke (2011), *The Sword and the Shield: The use of FOI by Parliamentarians and the Impact of FOI on Parliament*, p. 8.

[164] UCL Constitution Unit (2009), *FOI and local government: preliminary findings*, p. 2.

Originators of requests

The UCL Constitution Unit surveyed FOI officials across local authorities and asked them to name the three biggest categories of requesters; again the public, the media and business dominated responses to the virtual exclusion of all other groups. The researchers estimated that journalists originate 32% of FOI requests, the public account for 31% and business for 27%. The raw response data from the survey are given in the table below:

Table 5 – Requesters responsible for the largest volume of requests according to survey of FOI officers across local authorities[165]

	Percentage (%) of officials choosing this group as the source of:		
	The largest volume of requests	The second largest volume of requests	The third largest volume of requests
Public	56	11	15
Business	28	49	21
Journalists	11	33	45

Some local authorities do compile and publish statistics on requests received (however from the searches undertaken it is apparent that most public sector organisations do not keep statistics on FOI requesters by category). The following statistics give a flavour of the overall pattern and it is immediately clear that members of the public, the media and business are the three main groups of requesters, far ahead of the rest.

Table 6: Main groups of FOI requesters for selected Local Authorities 2010

	No. of requests	**Business**	**Public**	**Media**	**Charities**	**Campaign Groups**	**Political (MPs, political parties)**	**Other**
Solihull[166]	*596*	17.6%	43.1%	28.9%	2.7%	4.4%	2.2%	0.1%
Teignbridge[167]	*356*	35.8%	26.3%	27.3%	-	-	5.8%	4.7%
Northern Ireland Executive[168]	*2883*	11%	65%	9.5%		4%	2.5%	8%

[165] Jim Amos, Ben Worthy and Gabrielle Bourke (2010), "FOIA 2000 and local government in 2009: The experience of local authorities in England"

[166] "Freedom of Information Statistics" page, Solihull Metropolitan Borough website. http://www.solihull.gov.uk/democracy/22360.htm

[167] "Freedom of Information Statistics: 1 August – 30 September 2011", Teignbridge District Council website. http://www.teignbridge.gov.uk/index.aspx?articleid=13356

[168] Office of the First Minister and Deputy First Minister, "FOI Annual Report 2010: A Summary of the Sixth Year of the Freedom of Information Act in Northern Ireland" http://www.ofmdfmni.gov.uk/foi_annual_report_2010.pdf

Another example of the types of groups requesting information at a local level is provided, following a BBC analysis, by Norfolk and Norwich University Hospital[169]. The journalist writing the BBC article commented on being unaware of any other public authority providing such a breakdown. He was mindful to note that this should not been seen as representative of other public authorities but provides an example of the types of requesters one authority receives. He also raised the issue that 'individual' may not represent a member of the public but may actually be someone making request on behalf of an organisation.

Table 7: Main groups of FOI requesters for Norfolk and Norwich University Hospitals[170]

	2005	2006	2007	2008	2009	2010	Total	Total %
Individual	50	27	25	56	65	94	**317**	**35**
Media	19	54	32	67	76	58	**306**	**34**
MP/councillor/political party	3	11	15	51	40	6	**126**	**14**
Business	6	12	11	22	23	35	**109**	**12**
Voluntary group/campaign/union	1	0	5	3	8	10	**27**	**3**
Other hospitals/public sector	0	2	0	4	4	5	**15**	**2**
Unknown	2	1	2	0	0	2	**7**	**1**
Total	**81**	**107**	**90**	**203**	**216**	**210**	**907**	**100**

As is evident in all the data examples provided, the media have emerged as significant users of FOI requests. These often take the form of requests for spending or expenses figures which are used for exposé articles. A popular theme last year, especially for the *Daily Mail*, *Daily Telegraph* and *Times*, was printing the salaries of senior local government officials. Local and regional papers have also used the FOIA to produce this kind of article, although they also use it for more localised concerns such as health and safety investigations of individual restaurants[171].

Businesses are also increasing users of FOI requests. These are sometimes used to obtain information for commercial advantage (contacts, tendering information etc.) which many FOI officers feel is 'against the spirit of the act'[172].

Another common approach is to request statistics on public services, the economy or society which can be used to form the basis of general interest pieces. Local authorities have noted that a significant number of requests they face are 'round robins' from national media outlets, i.e. identical requests that are sent to every local authority in the country with the results being aggregated into nationwide statistics. These range in topic from drug use in schools to attacks on bin men[173].

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169 Rosenbaum, M – BBC 'Who makes FOI requests?' 14 January 2011; http://www.bbc.co.uk/blogs/opensecrets/2011/01/who_makes_foi_requests.html

170 Rosenbaum, M – BBC 'Who makes FOI requests?' 14 January 2011; http://www.bbc.co.uk/blogs/opensecrets/2011/01/who_makes_foi_requests.html. Figures compiled from register of FOI requests on NNUH website, http://www.nnuh.nhs.uk/qa.asp?c=FOI

171 UCL Constitution Unit (2010)

172 UCL Constitution Unit (2010)

173 UCL Constitution Unit (2010)

Data is also available on requesters to Strategic Health Authorities (SHA) and Higher Education Institutions (HEI) gathered from surveys of officials. The results confirm that journalists and businesses are major users of FOI requests. Members of the public are more prominent amongst SHA requesters than they are amongst local government ones – this is likely to be because of large numbers of individual lodging requests in order to investigate the medical treatment provided to themselves or their family members. If students and staff are counted as members of the public – which is reasonable, considering that patients, health staff and local government workers would be considered members for the public for compiling the equivalent data – the HEI originator statistics are broadly similar to those for local government.

Table 8: Main groups of FOI requesters for Strategic Health Authorities in 2006[174]

	Companies	Members of the Public	Media
Strategic Health Authorities	19%	60%	10%

Table 9: Main groups of FOI requesters for Higher Education Institutions in 2005[175]

	Companies	Own Students	Media	Own staff	External staff / researchers	Unknown
Higher Education Institutions	9%	15%	22%	6%	8%	21%

The Joint Information Systems Committee (JISC)[176] conducted a survey on management and information legislation in 2009 with 45 higher education institutions in England, Scotland and Wales. The survey found that the 45 institutions received a total of 3,272 FOI requests in 2009, with an average of 273 requests a month. The most frequent type of requester was journalists, who made 764 requests. Commercial organisations made 389 requests, students made 243 requests to the institution they were currently enrolled at and campaigning groups made 186 requests. 89% of all requests took institutions less than 1 day to respond to. 11% of all requests took between one and five days to respond to. Most institutions reported that they logged FOI requests extremely quickly (73%). 40% of institutions reported identifying the information they needed very quickly, 15% found it quickly and 9% took an extremely long time to find it. The average number of staff involved in FOI requests was 1 member of staff in 17% of requests, 2-3 members of staff in 71% of requests and 4-5 members of staff in 12% of requests.

Only 4 out of the 35 institutions published a disclosure log documenting the FOI requests they had received, and the answers or information they had provided in response. When the 39 institutions who did not publish a disclosure log were asked why not; 43% said that it would provide limited value and would not justify the resources required to do so. 28% said they didn't have one because it was not a mandatory requirement and 8% feared it might encourage additional requests.

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[174] Frontier Economics (2006), "Independent Review of the impact of the Freedom of Information Act", §2.6.3

[175] *Ibid*.

[176] JISC infoNet 'Information Legislation and Management Survey, 2009' www.jiscinfonet.ac.uk

40 of the 45 institutions (90%) had an officially designated FOI Officer and/or team. Of the 40 institutions, just over half (51%) had between 0.6-1 full time equivalent (FTE) staff members devoted to dealing with FOI requests. 27% of the 40 institutions had less than one staff member working part-time (0.5 FTE) on FOI requests and 12% had 1.1-1.5 FTE staff time devoted to FOI requests.

Costs of FOI requests

The economic costs of applying the FOIA are almost entirely down to staff time[177]. This includes officials dealing with initial requests, those dealing with reviews and appeals, plus the costs of staffing the Information Commissioner's Office (ICO) and for the Information Tribunal. There are also overheads associated with maintaining the ICO and with the extra staff in departments, public bodies and local authorities.

Frontier Economics' 2006 review of the FOIA found that, after an initial surge following the introduction of the Act had died down, there were 121,000 requests per year made across the public sector, at a cost to the taxpayer of £35.5m[178]. However, there has been considerable growth in the volume of requests, so that in 2009 FOI requests to the local government sector alone were greater in volume and cost than the for the entire public sector in 2006. Research by the UCL Constitution Unit found that local government officials spent an average of 8.9 hours complying with a FOI request[179]. Assuming a cost of £25 per hour, this meant an outlay of £36.7 million for local authorities to comply with 165,000 requests in 2009 (see table 4). The true cost may be higher: the figure of £25 per hour comes from the FOIA itself, in its provision for calculating whether an FOI request will cost above the maximum obligation for the relevant public body. However, the Frontier Economics review found that already in 2006 the true cost of officials' time in central government was nearer £36 per hour[180].

This review found no more recent data on costs for the whole of central government. However, research by the Scottish Government[181] found that they were spending an average of 7 hours 22 minutes on information requests (though a median time of just 3 hours – a small number of very big requests had a disproportionate effect on the average). The study tracked FOI cases over a nine week period in 2009 and found that dealing with 253 cases cost the government an average of £227 per case (this does not include the cost of reviews and appeals). If we take this as a baseline estimate for the cost of processing the 40,467 requests received by the UK central government in 2009, it would give us estimated costs of £9.19m (note that a separate FOI Act operates in Scotland).

A joint survey by JISC, Universities UK and the Standing Conference of Principals found that 2,000 FOI requests were received by Higher Education Institutions in 2005 (the year the FOIA came into force), and cost the sector £240,000 to deal with[182]. This means that universities were spending £120 on each request, a much lower average than local and central government. It is unclear why this is the case.

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177 Frontier Economics (2006), Annexe 1

178 Frontier Economics (2006),

179 Amos, Worthy and Bourke (2010)

180 Frontier Economics (2006), p. 1.

181 Scottish Government (2010), "Freedom of information costing exercise 2009-2010: Final Report"

182 JISC, 16 October 2006. 'Freedom of Information Act a 'significant success' says Govt' http://www.jisc.ac.uk/news/stories/2006/10/news_foi.aspx

The costs of compliance with the FOIA cannot be entirely eliminated, as some have suggested, by more pro-active publication of data by public bodies. Many FOI requests are for data that has not been previously collected or processed and therefore requires the use of officials' time to put together in a presentable format. Although some of these requests can be pre-empted, on other occasions "it is very difficult to anticipate what requesters will want, especially since many are pursuing private interests not shared by others"[183].

A survey of local government officials finds that the time spent processing each FOI request fell from 11.6 hours in 2008 to 8.9 hours in 2009, thanks to pro-active publication, learning by FOI officers and more efficient data collection[184]. This implies that there is still scope for the FOIA to be implemented more cost-effectively, as 8 out of 30 central government bodies[185] and 26 out of 90 police authorities[186] have not adopted the ICO's Model Publication Scheme. This scheme defines a selection of documents and information that eligible bodies must make available to the public via their website.

There is an apparent lack of data which compares the costs of responding to information requests prior to the FOIA being implemented with the current costs incurred as a result of the legislation being in force. Likewise this review found no evidence of the start up costs incurred by the implementation of the FOIA.

Capacity issues

Many of the local authority FOI officers interviewed by UCL's Constitution Unit in 2009 felt they were operating at or above capacity, i.e. they did not have staff time available to handle any increase in the number of requests. They were concerned about the impact of forthcoming cuts to local government budgets[187]. Some suggested local authorities should filter out 'nuisance' requesters or introduce more fees to deal with capacity constraints. Indeed, whereas 72% of local authorities never charged for information in 2008, the figure for 2009 was 65%. However, only 7% of councils charged a fee in more than 5% of cases.

The FOIA requires that all public bodies covered by the Act respond to requests within 20 working days (with the exception of the National Archives, which must respond within 30 working days). An extension to this time limit is permitted if the request falls into certain categories – for example, if the requested information is potentially exempt from the FOIA then the public body is allowed extra time in order to consult on or consider whether the balance of the public interest lies with disclosing or withholding the information. The timeliness of responses can be taken as a crude indicator of whether FOI mechanisms are coping with request volumes. The latest Ministry of Justice statistics for the second quarter of 2011 (Table 10) show that 90% of requests to central government are dealt with in the time dictated by the Act, potentially indicating that these bodies do not face a capacity crisis, although what impact dealing with requests has on officials' 'day jobs' is less clear. In 2010,

183 Hazell and Worthy (2009), p. 8.

184 Amos, Worthy and Bourke (2010), p. 7.

185 Information Commissioner's Office (2009), "Central Government Sector Monitoring Report"

186 Information Commissioner's Office (2010), "Police Sector Monitoring Report"

187 UCL Constitution Unit (2010)

the Northern Ireland Executive met 92% of requests on time[188], and the Welsh Assembly's rate was 74.6%[189].

Table 10: Timeliness of response to information requests to UK and devolved governments, 1st April – 30th June 2011

	All requests received	20-day deadline met	Permitted extension to 20-day deadline	Late response (deadline missed)	*% requests meeting 20-day deadline*	*% requests meeting deadline or permitted extension*
UK central government (Q2 2011)[190]	10,960	9,417	491	1,052	*86%*	*90%*
- Departments of State	7,124	5,886	397	841	*83%*	*88%*
- Other monitored bodies	3,836	3,531	94	211	*92%*	*94%*
Northern Ireland Executive (2010)[191]	2,811	2,517	64	230	*90%*	*92%*
Welsh Assembly (2010)[192]	786	541	45	200	*69%*	*75%*

The review found very little data available in terms of time spent dealing with requests by individual public authorities. However, an FOI request made to the Police Service of Northern Ireland (PSNI) revealed that in 2009, 440 FOI requests were made to that organisation. Between January and March 2010, 215 requests were made, which contained a total of 672 questions. The average length of time taken to respond to FOI requests was 24 days. The longest request took 90 days to respond to, and the shortest took one day.[193]

International Context

The UK is a latecomer to FOI legislation in the English-speaking world. The United States government passed its Freedom of Information Act in 1966. In the Commonwealth, FOI started off with New Zealand's Official Information Act (1982), quickly followed by Australia's Freedom of Information Act (1982) and Canada's Access to Information Act (1983), which place a duty of openness on the respective federal governments (provincial or state governments have separate access legislation). More recently, the Republic of Ireland passed a Freedom of Information Act in 1997.

188 Office of the First Minister and Deputy First Minister, "FOI Annual Report 2010: A Summary of the Sixth Year of the Freedom of Information Act in Northern Ireland" http://www.ofmdfmni.gov.uk/foi_annual_report_2010.pdf

189 Welsh Assembly Government (April 2011), "Report on the implementation of open government legislation and policies during 2010" http://wales.gov.uk/publications/accessinfo/reportsopen/5146965/?lang=en

190 Ministry of Justice website, *op cit.*

191 Office of the First Minister and Deputy First Minister, *op. cit.*

192 Welsh Assembly Government, *op. cit.*

193 Police Service of Northern Ireland (PSNI) Request number: F-2010-00347

All the above countries have experienced complaints by civil servants of a 'chilling effect' as a result of FOI legislation. However, the evidence for this is inconclusive; as it is difficult to isolate the effect of FOI legislation from changes in ministerial practices (increased use of special advisors, 'sofa government' and so on)[194]. As noted previously, evidence found for this review suggested that UK civil servants did not feel that there had been a 'chilling effect' under the FOIA. In Australia, where the FOIA has an exemption for government working documents whose release would be "against the public interest", there have been cases of information being withheld on the grounds that it would inhibit future 'frankness and candour' on the part of civil servants. However, in judicial reviews of such cases, the Administrative Appeals Tribunal has been reluctant to allow the 'frankness and candour' argument to justify a class exemption of all policy deliberation documents. It will consider 'frankness and candour' as just one of a number of factors to weigh up in ruling on the public interest of a particular case, and rulings are often sceptical that any inhibition of frankness will occur as a result of releasing a policy document[195].

The impact of FOI legislation in the English-speaking world has been, as in the UK, most significant in increasing transparency and accountability of government. However, the improved accountability has tended to be of individual parliamentarians rather than government as a whole: "greater scrutiny of ministers' expenses rather than of their management of economic policy"[196].

New Zealand is the only country of those discussed here where parliamentarians make frequent use of FOI requests. An upsurge in FOI use occurred after the country switched to a mixed-member proportionality voting system in 1996. This indicates that a fractionalised parliament – with greater power in the hands of MPs as opposed to the government – has encouraged MPs to request information, both as a way of holding the government to account and in order to uncover scandals about individual parliamentarians. In the UK, no more than 20 out of 650 MPs, and five out of 700-800 peers, are named FOI requesters, according to Worthy and Bourke (2011)[197]. This research claim that this is due to the novelty of the FOIA: MPs are 'creatures of habit' who will take time to adopt new practices. However, the comparative context shows that this is not the case: parliamentarians in other Commonwealth countries with longstanding freedom of information legislation also make few requests. It may be that the time and effort that go into making a FOI request make it seem unattractive to MPs and peers who want information for a debate that same day, as compared to the other avenues available to them (such as written Parliamentary Questions and oral questions to ministers in debates).

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194 Peter Waller, R.M. Morris and Duncan Simpson (2009), "Understanding the Formulation and Development of Government Policy in the context of FOI", ch. 8.

195 Waller, Morris and Simpson (2009), p. 80

196 Worthy and Bourke (2011), p. 19.

197 Worthy and Bourke (2011), p. 20.

Conclusion

The FOI legislation set out to improve transparency and accountability, and evidence to date indicates this has been achieved. There is, however, less evidence that the FOIA has met it's secondary objectives. There has been a steady rise in the number of requests being made to central government and public bodies, with the biggest group of requesters being individuals, media and business. The costs associated in dealing with these requests, in the main, are entirely down to staff time. There is evident variation in organisations meeting the 20 day deadline for providing substantive responses, with central government meeting this deadline in about 90% of cases. Overall the review found that the amount of available evidence on the use and application of the FOI Act is limited, particularly in relation to public bodies at a local level.

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Ipsos MORI

Annex E – Investigative study to inform the FOIA (2000) post legislative review

Qualitative Review

Disclaimer

The views expressed are those of the authors and are not necessarily shared by the Ministry of Justice (nor do they represent Government policy).

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Summary

Summary

Executive summary

Ipsos MORI was commissioned by the Ministry of Justice to undertake an investigative study to inform the post-legislative review of the Freedom of Information Act (FOIA) (2000). In addition to an evidence review and a costing exercise, telephone interviews were carried out with 22 respondents across 16 organisations, including central government departments and a range of public authorities across the wider public sector. The aim of these discussions was to gather views and experiences of the respondents when responding to Freedom of Information (FOI) requests. More specifically, the study aimed to identify benefits from the implementation of the legislation and desirable changes for the future from the practitioner perspective.

Key Findings

FOI requests and processes

Ministry of Justice statistics show that central government departments currently receive a total of about 2000-2500 FOI requests per month, ranging from about 10 to 300 or more per month per department. Volumes have increased by about 5%-15% year-on-year in recent years. When interviewed, respondents from public bodies outside of central government estimated that they received anything from 5 to 130 requests, depending upon the organisation. Request volumes were highest for local authorities (70-130 per month).

Request volumes were deemed to be increasing, with a few estimating year-on-year increases of approximately 20-25% in recent years. There was also a general acknowledgement that requests are becoming more complex and require a greater degree of involvement by staff. The highest number of FOI requests tended to originate from members of the public and from journalists. Requests from journalists and commercial companies are perceived to be a “drain” on resources, with some respondents questioning whether it is fair to devote public resource to providing information for private companies and those “looking for the next news story”.

Information management and publication scheme

There was little consensus on whether the FOIA had explicitly improved the recording, management and processing of information by public authorities. However, there was common agreement that the FOIA had led to information being published more proactively.

Respondents expressed concerns that the implementation of the FOIA may have adversely impacted the behaviour of officials in recording information; that is, the fullness of the information may be being compromised given the increased need for transparency.

All referred to publication schemes being in place and believed that the FOIA had resulted in a more proactive approach to publishing information. However, the extent to which these schemes are accessed by the public was questioned. This was seen to relate to a lack of awareness that certain information was available, coupled with the ease with which a FOI request could be made.

FOI response time and resourcing

The majority believed it was occasionally difficult to meet the 20 day response deadline, e.g. due to the complexity of a request. Yet many stated that this deadline is met the majority of the time and considered it to be an appropriate time limit.

There was clear conflict between the increasing numbers of requests being received versus diminishing resources. Respondents reported that staff reductions stemming from budget cuts have meant that staff time is being diverted from other issues to concentrate on responding to FOI requests.

Exemptions and guidance

All respondents had a good understanding of the FOIA exemptions. There was a general feeling that the exemptions are effective in protecting information that they believe should not be released.

There was common agreement that the cost of locating, retrieving and extracting information does not adequately reflect the total amount of time spent in practice in compiling the response. In particular, redaction time was deemed to be extremely onerous and many respondents believed that there should be greater consideration of this when assessing whether the cost of dealing with a request falls within the appropriate limit.

Clearer guidance was requested on the application of particular exemptions, yet overall, respondents believed that the guidance produced by the Ministry of Justice and the Information Commissioner's Office (ICO) was both clear and comprehensive. Furthermore, all spoke of a good relationship with the ICO. The only criticisms were that there should be greater co-ordination between the two sets of guidance and examples provided; particularly for exemptions.

Benefits of the FOIA

There was common agreement that the FOIA had led to greater transparency and accountability. The volume of information now published is seen to be considerably greater, allowing the public to access to a wider range of public sources.

There were mixed views on the benefits of the FOIA for the wider public. Some believe that the FOIA has increased public confidence, whilst others suggested that it may have prompted more suspicion, with the public believing that not all of the information available is released.

Complaints and appeals process

There was general support for the internal review and appeals process and all believed that such processes further reassure respondents that they are making the right decisions, especially given that most are upheld. The vast majority of respondents spoke highly of the Information Commissioner's Office and could not cite any issues with the appeals process.

Respondents spoke of the frustration of serial or vexatious requesters who, in their view, waste time and money by pushing their request through the internal review process and up to the Information Commissioner. Some believed that such cases should incur a fee.

Suggested amendments

There were a number of suggestions from respondents for potential future amendments that could be made to the FOIA. These included;

- The desire to see the appropriate limit amended in some way, i.e. either a reduction in the overall limit, or for other costs to be included, e.g. reading, consultation and, most importantly, redaction time.

- The introduction of a small fee for placing a request, or for requesting an appeal (which would be repayable if successful). This was directed at serial requesters, as some believed that the introduction of a fee would dissuade these individuals from submitting numerous requests. That said, such respondents did recognise problems with the possible introduction of a fee, e.g. identity checks, processing payments, and whether such fees would impact more upon the general public as opposed to journalists.

- A review of resources in responding to the increasing numbers of requests, particularly in light of budget cuts.

Introduction

Background and Objectives

Ipsos MORI was commissioned to undertake an investigative study to inform the post-legislative review Freedom of Information Act (2000). The aim of this strand of the work was to gather the views and experiences from a total of 16 government departments and other public authorities on the process of responding to FOI requests. Subject areas included the perceived benefits that have arisen from the implementation of the legislation and desirable changes for the future. This report is the output from this strand of work.

Ipsos MORI was also commissioned to undertake two other strands of work as part of the study. The first was an evidence review of publicly available research on the operation of the Freedom of Information Act and the findings from this are also published within the Memorandum. The findings from the third strand of work, which is to assess the costs for a range of public authorities in dealing with FOI requests, will be published in early 2012. At the same time, the reports of all three strands of work will be brought together into one coherent analytical assessment.

Methodology

Overall, a total of 22 respondents were interviewed across 16 organisations, including representatives from central government departments and a range of public authorities across the wider public sector, (including bodies subject to FOI operating in a commercial environment). Respondents tended to be FOI officers or officials with substantial responsibilities for dealing with FOI requests within their respective organisations. Therefore, the views reported may not reflect those of others working for these organisations. A sample of potential interviewees was provided to Ipsos MORI by the Ministry of Justice, although all respondents were provided with assurances regarding confidentiality. All interviews were conducted via telephone by a member of the Ipsos MORI research team between 27th October and 17th November 2011. The discussion guide used for the interviews can be found at Appendix A. The resulting transcripts were then analysed by the project team who classified the data into “thematic frameworks” before drawing out the key findings to be included in the report.

Table 1: Respondents included in the study

Organisation	**Number of respondents interviewed**
Central government departments	4
Local authorities	5
Health organisations	6
Police	3
Commercial organisations	2
Other public authorities	2

Interpretation of the qualitative data

Unlike quantitative surveys, qualitative research is not designed to provide statistically reliable data on what people as a whole are thinking. It is illustrative rather than statistically reliable and therefore does not allow conclusions to be drawn about the *extent* to which something is happening.

Rather, qualitative research offers an insight into the range of views and experiences of those respondents interviewed. It is also intended to shed light on *why* people have particular opinions. A depth interview enables a cross section of people to participate in an informal and interactive discussion. It is important to bear in mind that we are dealing with *perceptions* rather than *facts*, although to participants these perceptions *are* facts.

Verbatim comments from the depth interviews have been included within this report. These should not be interpreted as defining the views of the interviewees as a whole, but have been selected to provide an insight into a particular opinion or experience held by respondents.

FOI requests: volumes, requesters and processes

This chapter sets out to examine the volume of FOI requests received by respondents' organisations, who the requesters are, and the general processes and procedures public authorities have in place for dealing with requests.

Request volumes

Given that robust official statistics are produced by the Ministry of Justice (MoJ) (see Table 2 below), respondents across central government departments were not asked to estimate monthly request volumes. Further analysis of the figures for 1 April – 30 June 2011 revealed that central government departments (Departments of State) received a total of 2000-2500 FOI requests per month, ranging from 10 to 300 or more per month (depending upon the department)[198].

Table 2: FOI requests received across central government[199]

	2005	2006	2007	2008	2009	2010
TOTAL	38,108	33,688	32,978	34,950	40,467	43,796
Departments of State	19,717	17,999	16,903	19,175	23,732	27,294
Other monitored bodies	18,391	15,689	16,075	15,775	16,735	16,502

Respondents from public bodies outside of central government (not covered by the MoJ statistics) were asked to estimate the number of FOI requests they received in an average month. Request volume estimates tended to vary greatly, ranging from between 5 to 130 per month. Closer analysis suggests that local authorities tend to receive a higher number of requests than other public organisations, ranging from around 70-130 per month. As detailed later in this section, many organisations tend to receive a high number of requests from journalists, commercial companies and serial requesters.

> *"I think it's very media driven; if you look at the paper, what's in the media at the weekend. We know that come that week we're going to get requests on it." (Respondent – non-departmental public authority)*

Feedback from some respondents revealed that the volume of requests is increasing, with a few estimating year-on-year increases of around 20-25% in recent years. When asked to explain this apparent increase, respondents could not say for certain but speculated that the public may have become more aware of the FOIA and their rights pertaining to it. Other suggestions for the apparent increase include the idea that general interest levels in FOI have risen and that journalists are more likely to consult solicitors to determine what

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198 April to June 2011 Statistical Tables, available from "Freedom of Information: Statistics on implementation in central government" page of Ministry of Justice website. http://www.justice.gov.uk/publications/statistics-and-data/foi/implementation.htm. Figures are based upon the number of non-routine requests and their status at the time of monitoring.

199 Ibid

information they can request. A few respondents also speculated that individuals now realise just how easy it is to submit an FOI request, citing the website "WhatDoTheyKnow.com":

> *"It's very easy for people to make requests to us, because all you have to do now is use WhatDoTheyKnow.com. At least [before] they'd have to type an email or write a letter to us. Now all they do is put their information in and it sends it directly to us. I don't think that's a bad thing, I just think that it's made it easier and made people lazier. For example, as soon as we refuse a request from WhatDoTheyKnow.com quite often we'll receive a request for an internal review very quickly because all they need to do is push a button to say I want this to go to internal review". (Respondent – non-departmental public authority)*

Originators of FOI requests

A 2009 survey conducted by the University College London (UCL) Constitution Unit[200], suggested that the three biggest categories of FOI requesters were members of the public, journalists and businesses. The research estimated that journalists originate 32% of FOI requests, the public account for 31% and businesses for 27%. Feedback from the interviews tended to support these findings, with respondents most likely to mention the general public and journalists as the most prolific requesters. That said, respondents also cited a number of other groups including students, commercial companies, and voluntary and campaign groups. In addition, respondents from NHS organisations also noted an increase in the number of requests from MPs, citing the proposed NHS reforms as a potential reason for this.

A key theme that emerged throughout a number of the interviews was the volume and complexity of requests submitted by journalists. One respondent from a local authority estimated that as many as 50-60% of their requests originate from journalists and media organisations, whilst another from a non-departmental public authority estimated this percentage to be around 45-50%.

Such requests are perceived by some respondents to be a "drain" on resources. Whilst recognising that journalists play a valuable role in uncovering stories and holding public bodies to account, a number of respondents were unhappy with the sheer volume of requests submitted by both local and national media organisations who may be "fishing" for stories required to sustain 24 hour news coverage. It was well recognised by most that journalists have started to use other email accounts in requesting information as a way of masking the origin of the request.

> *"They'll send in requests from Gmail to disguise [the fact] that they are from the media". (Respondent – non-departmental public authority)*

There was also some frustration among respondents regarding the volume of requests submitted by commercial companies, and a couple questioned whether it is reasonable to devote a large proportion of public sector resource to providing information to private companies and marketers who are likely to sell on the information or use it for commercial gain. A couple of respondents from local authorities also noted the increase in requests for contractual/tendering information from private companies.

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[200] UCL Constitution Unit (October 2010), "FOI and local government: preliminary findings", University College London.

A key theme running through many of the interviews was the suggestion that FOI requests are becoming more complex in nature and involve a greater degree of input from staff. This issue is explored further later in the chapter "FOI response times and resourcing".

Processes and procedures in place for dealing with a FOI request

Due to the wide range of government departments and other public authorities interviewed, there are both differing and comparable examples of the practices and processes employed by each in responding to FOI requests. The section below sets out the typical processes that tend to be followed by a majority of departments/organisations included in the study. However, it is important to note that such processes did not apply to every department/organisation. Although the majority contain staff with central FOI coordination functions, the size and functions of these departments does vary (as does the extent to which the central FOI teams directly answer requests).

Typical FOI processes within a department/organisation

Requests for information can be received in a variety of ways, whether by email, letter, the organisation's website, telephone or even via social media networks such as Facebook and Twitter. Furthermore, such requests can be directed to any individuals within the organisation. The respondents interviewed tend to head up teams or departments that oversee information compliance across the organisation, e.g. FOIA, Data Protection and Environmental Information Regulations etc. These requests are either received directly or filtered through to the respondents and their teams. Requests are logged on a central database/monitoring system, which will generate a request number and allow staff to upload and scan documentation relating to the case. More sophisticated packages may also include additional functions, e.g. alerting the user when the 20 working day limit is approaching. In logging receipt of the request, it is then reviewed to determine whether any initial exemptions are likely to apply, i.e. if the request is likely to exceed the appropriate cost threshold (Section 12).

Some refer to particular processes that have been developed:

> *"A devolved, slightly more sophisticated model, in doing so, downsizing my team to 15, and placing the responsibility for drafting and answering the requests [on] the department where the expertise and information lies. The advantage of this [is that] we are able to get answers out the door more quickly and more accurately. Those who know what they're talking about are the ones answering the requests." (Respondent - central government)*

Assuming that no initial exemptions are flagged up, the respondent (or a member of their team) will allocate the request to individuals in the relevant departments who are best placed to provide the information. In some cases the request will be handed over to the individual, e.g. a departmental FOI officer, who will have full responsibility for taking the request forward and monitoring the deadline. In most cases, a nominated lead official will take on this responsibility, e.g. in assisting the individual in gathering information, discussing the handling of the case, determining exemptions that may apply, assessing any cost implications, redacting information and liaising with legal departments and press offices. Once the information is signed off the nominated member of staff responsible for the request will prepare the response or refusal notice.

Obtaining clearance of the material is likely to be the responsibility of the official gathering the information within the specific department. The role of the official signing off the materials tends to vary, i.e. it could be the team leader of a specific department, the Chief Executive

(e.g. if particular exemptions such as Section 36 apply), individuals within central government departments or ministers.

Key findings

- Ministry of Justice (MoJ) statistics show that central government departments currently receive a total of around 2000-2500 FOI requests per month. This ranges from about 10 to 300 or more per month per department. Volumes have increased by about 5%-15% year-on-year in recent years. When interviewed, respondents from public bodies outside of central government estimated that they received anything from 5 to 130 requests, depending upon the organisation. Request volumes were highest for local authorities (70-130 per month).

- Request volumes were deemed to be increasing, with a few estimating year-on-year increases of approximately 20-25% in recent years. There was also a general acknowledgement that requests are becoming more complex and require a greater degree of involvement by staff.

- The highest number of FOI requests tended to originate from members of the public, and from journalists. Requests from journalists and commercial companies are perceived to be a "drain" on resources with some respondents questioning whether it is fair to devote public resource to providing information for private companies and those "looking for the next news story".

- There were some similarities between the departments/organisations interviewed, in that most contain staff with central FOI coordination functions who will oversee the FOI request process. Such officials are responsible for allocating the request to the relevant individuals and ensuring that the request is answered on time.

Information management and publication schemes

This chapter explores the impact of the FOIA on the recording, management and processing of information. It also examines the use of publication schemes adopted by each organisation.

Information management

Overall there was little consensus among respondents as to whether the FOIA has explicitly led to any amendments in the way information is recorded, managed or processed by public authorities. Some believed that improvements in record management would have occurred if the FOIA had not been introduced, e.g. through improved general practices and adoption of new technology. Furthermore, it has not been an overriding factor in how they manage information. However, others noted that new record management systems have been implemented in preparation for the FOIA, i.e. software that is more user-friendly and is robust enough to maintain and retrieve records for FOIA purposes.

Respondents were more likely to agree that the FOIA has resulted in their department/organisation pro-actively publishing information (whether as a result of FOI requests received in the past or anticipating future requests). One respondent routinely reviews the information being requested and encourages internal departments to proactively publish information as part of their publication scheme. Other respondents spoke of publishing documents automatically, i.e. board papers, expenses, high profile cases, and technical reports that have been written in layman's terms.

In contrast to the benefits cited above, a few respondents expressed concerns relating to the extent to which the FOIA may impact upon officials' behaviour when recording information. For example, one respondent noted that minutes of meetings tend to be pared down, with initials being recorded instead of full names and the content listed more as functional action points as opposed to fulsome descriptions. Furthermore, two respondents noted this practice in relation to other communication, e.g. internal emails and memos, and pondered whether increased transparency may have compromised the fullness of record management in the long-term. That said, a few respondents did assert that the FOIA has resulted in more professional communication and best practice.

> *"You know that whatever you write down may well be published and means that people are much more careful about internal emails, internal documents and internal memos. If you look at board minutes particularly, those taken before the legislation came in were very fulsome. All minutes taken since the legislation came in are not. And it's not just in this organisation that you notice that." (Respondent – commercial organisation)*

Publication schemes

Under Section 19 of the FOIA, all organisations subject to the Act are required to adopt a publication scheme approved by the Information Commissioner. The scheme provides details of information which each organisation publishes or intends to publish.

When questioned, all respondents confirmed that their department/organisation had a publication scheme in place. On the whole, respondents believe that it is a useful tool and the majority confirmed that their department/organisation proactively publishes information. Another benefit cited by one respondent is the clear steer that it gives to organisations in terms of what the Information Commissioner believes should be routinely published. That said, a couple of respondents did note that the scheme can be quite resource intensive, e.g. in keeping things up to date.

One concern expressed by a few of the respondents interviewed centred on a belief that the schemes were not used by the wider public. When asked to suggest reasons why, respondents speculated a low level of awareness and that the ease of submitting FOI requests may be contributing factors. A couple of other respondents also questioned whether the public are more likely to search for reports and information via internet search engines as opposed to accessing publication schemes or disclosure logs.

> *"One of the things I would say about publications schemes is that they are the most unread documents on the planet. You spend a lot of time putting a publication scheme in place and there is an assumption on the part of the Information Commissioner that that's everyone's first port of call. To be brutally honest if I was looking at a public authority website, and if I didn't know a publication scheme existed, I'm not certain I'd look to find one because I wouldn't know what one was. My assumption would be that I'd just bang in the request and see what happens. It's easier". (Respondent – non-departmental public authority)*

When asked, the majority of respondents could not say for certain whether their department/organisation monitored the use of their publication scheme, e.g. the number of times certain information is accessed. In fact, only one respondent could definitely confirm that their scheme was monitored.

> *"I am strongly of a suspicion that it's not used much but I haven't got any hard evidence to back that up because I haven't asked anybody to monitor it". (Respondent – commercial organisation)*

Key findings

- There was little consensus as to whether the FOIA had explicitly improved the recording, management and processing of information by public authorities. However, a commonly held view was that the FOIA had led to information being published more proactively.

- Respondents expressed concern that the implementation of the FOIA may have adversely impacted upon the behaviour of officials in recording information. More specifically, that the fullness of information may be being compromised, given the need for increased transparency.

- All referred to publication schemes being in place and considered that the Act had resulted in a more proactive approach to publishing information. However the extent to which these schemes were well used by the public was questioned. This was seen to relate to a lack of awareness that certain information was available, coupled with the ease at which requests could be made.

FOI response times and resourcing

This chapter sets out to examine the timeframes for dealing with FOI requests, including respondents' opinions on the appropriateness of the statutory deadlines specified in the FOIA. It also explores the issue of staff resourcing in dealing with FOI requests.

Timeframe to respond to FOI requests

The FOIA obliges public authorities to substantively respond to a FOI request within a time frame of 20[201] working days, although certain extensions can be permitted, e.g. to allow for consideration of the balance of the public interest[202]. The latest Ministry of Justice statistics for the second quarter of 2011 show that 90% of requests to central government are dealt with "in time", i.e. within 20 days or with a permitted deadline extension. The review found very little data available in terms of time spent dealing with requests by individual public authorities.

Of those interviewed, the majority have experienced problems in meeting the 20 working day response time. This can be, for instance, a result of the complexity of the request. That said problems only tend to occur "occasionally" for most respondents, with the majority of requests being resolved within the 20 day time frame. In line with MoJ statistics, some respondents also confirmed that response times had improved. Overall, the majority of respondents agreed that the 20 day limit is appropriate.

The problems experienced in meeting the 20 day response limit tend to centre on complex requests (which are increasing in number). These were most commonly defined as those requiring input or clearance from a variety of individuals in different departments or organisations. Other examples include those that contain multiple questions, requests that have national security implications, those that relate to unfamiliar legislation and requests that are likely to involve the disclosure of "sensitive information" (i.e. in preparing the ground for disclosure and altering individuals). Respondents acknowledged that such requests are part of the nature of their business and that they cannot control every part of the process.

> *"There are times when it can be really difficult. The more people it involves the more sets of interests there are, with differing opinions over what they consider to be releasable and what I consider to be releasable". (Respondent – non-departmental public authority)*

A few noted that the increase in complex requests tend to originate from individuals (notably media professionals and serial requesters) who are becoming more "savvy" and have a clearer idea of the information that they can request.

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201 30 working days in the case of the National Archives

202 Any request where a qualified exemption may be applicable is required to go to a Public Interest Test, i.e. consideration as to whether the public will be better served by disclosure or by withholding the information.

Staff resourcing

A key theme that emerged from the interviews was the issue of diminishing resources. This is a key concern for some respondents (most notably in the bodies outside of central government) who questioned whether they would be able to meet targets in the future if the current trend for complex requests continues against diminishing resources.

> *"We face substantial cuts to our resources; both in terms of money, and a consequential reduction in the number of people. It's an additional burden on top of their normal workload and it becomes an increasing burden if you've got less people around to do the work because of the impact of reducing your headcount." (Respondent – central government department)*

Concerns were also expressed over resources being diverted to answering FOI requests, reducing the length of time that officials in other parts of the organisation (outside of the FOI team) could focus on their main duties. A few respondents also noted problems with the sheer volume of requests and issues when individuals are off sick or on annual leave.

Some respondents in central government departments believed that they had taken positive steps to improve procedures, which they felt had increased the percentage of requests answered within the required timeframe. Citing reasons for this increase, a number of factors were noted, including removing redundant clearance steps, implementing "case workers" to deal with FOI requests within departments, better liaison with press officers, more senior buy in (deemed to be crucial) and encouraging business areas to take their responsibilities more seriously.

Key findings

- The majority experienced problems in meeting the 20 working day response deadline, e.g., due to the complexity of the request. Yet many believed that they do meet this deadline the majority of the time and felt it was an appropriate time limit.

- There was clear conflict between the increasing numbers of requests being received versus diminishing resources. Respondents reported that staff reductions (stemming from budget cuts) have meant that staff time is being diverted from other issues to concentrate on responding to FOI requests.

Exemptions and guidance

This chapter examines the various exemptions that can be applied when dealing with FOIA requests and considers the FOI guidance issued to organisations.

FOIA Exemptions

The FOIA sets out a number of exemptions which mean the disclosure of certain information requests is not required. The request for information can be refused if it falls within the FOIA list of exemptions. There are a number of factors which fall under the Act's list of exemptions which would be too detailed to reference here. However the exemptions are divided into two categories, absolute and qualified. Where an absolute exemption applies, a public authority, under the legislation, is not required to provide the information requested. Qualified exemptions require a public authority to consider the public interest in providing the information. If the public authority decides that the public interest in maintaining the exemption outweighs the public interest in disclosure, then the information requested will not be disclosed.

All respondents interviewed had a good understanding of the FOIA exemptions. Many commented that their work lends itself to specific exemptions which are used on a daily basis, meaning that they have no problems in interpreting the exemptions and understanding how to apply them. Most departments/organisations interviewed commonly apply Section 40 (personal information). Some respondents expressed concerns that the application of 'qualified' exemptions can prove to be difficult in some situations, especially given that they can be subject to personal interpretation about whether the balance of publish interest lies in disclosing or withholding the information. Some respondents obtained legal advice in relation to such matters.

If exemptions are applied and information withheld, respondents said that their organisations are careful to provide clear reasoning for their decisions:

> *"We do try and give some background as to why we have said it is unreasonable or that we are applying a certain exemption. We do try and set out the background of our thinking rather than just saying "no"." (Respondent – commercial organisation)*

There was a general feeling that the exemptions are effective in protecting information that they believe should not be released, and that comprehensive checks and balances are in place. Only one respondent expressed some concerns, believing that their own organisational processes are slightly more stringent in relation to identifiable data and disagreed with a decision by the Information Commissioner to release certain information.

Section 12 exemption

Section 12 of the Freedom of Information Act allows public authorities to refuse to answer requests for information if the cost of complying would exceed the 'appropriate limit' prescribed in the Fees Regulations (SI 2004/3244)[203].

The majority of respondents interviewed believe that the FOIA's provisions relating to the cost of answering a request are not appropriate. A clear consensus emerged that the cost of locating, retrieving and extracting information does not adequately reflect the true amount of time spent on some requests. In relation to this, some respondents were keen to stress that reading, consultation, and, most notably, redaction time is likely to require the most resource. Some considered the cost limit was appropriate when the FOIA came into force but the growing complexity of requests has proved to be a significant drain on resources, resulting in the cost limit no longer being realistic. There was some suggestion requesters (in particular private companies) assume that providing information merely involves "the push of a button" and fail to appreciate how burdensome some requests may be.

Respondents recognised that previous reviews have suggested that redaction time should not be taken into account yet stressed that this process can be extremely onerous and time consuming. One respondent cited a request which involved the collation of 200-300 incident reports. Such reports were easily accessible, but the time taken to redact personal information far exceeded the cost limit. Another noted that specialist resource (as opposed to administrative) often has to be utilised to redact information from some technical reports.

> *"The one area where I think there's a possibility for change is the amount of resource that goes into redaction. We don't have too many problems finding information that's been requested but there are sometimes heavy amounts of redaction [required] because there are a large numbers of names, or we have PhD students asking for lots of records at one time. We know that the ICO tribunal have taken the view that redaction costs shouldn't be part of the cost limit, but I think that's something that is worth looking at, because that's the big drain. Often, it's not making a decision to release or not. It's where 70%, 80% of the record is personal information, and 30% could arguably be released. That requires heavy redaction. I think that's the only area that we'd probably want to flag up for consideration". (Respondent – central government)*

Respondents were also keen to emphasise that they will help requesters as much as possible if their requests exceed the cost limit (in accordance with Section 16 of the FOIA, i.e. the duty to provide advice and assistance). For example, they will work with requesters to refine their request to bring it within the appropriate limit or provide information for as many questions as possible, even if the total request exceeded the limit. This was the case for one respondent who noted that they enforce very few section 12 exemptions, confirming that they had applied this exemption 70 times in 3,800 cases (since the FOIA came into force).

Some requested that clearer guidance be produced relating to the costs that can be taken into consideration, given that there was some confusion within their departments as to what work counted towards the appropriate limit. One respondent suggested that the current guidelines can occasionally be subject to personal interpretation.

Perhaps unsurprisingly, a number of respondents emphasised that the cost threshold relating to Section 12 should not be increased. Instead they believe that the cost threshold should be lowered, or other time factors be taken into account.

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[203] FOIA (2000)

> *"In terms of any changes to the legislation, the Act only allows us to refuse a request if it exceeds 24 hours, but we can only take into account the time involved in identifying, locating and extracting the information. In some instances the time to identify the information is very small because you might have to ask for a pile of reports which are all sitting on somebody's desk. Actually working through that information, the reading time, and the time needed to consider whether or not it can be disclosed cannot be included. We have found instances where requests take very significant amounts of time but the charging regime doesn't help us at all. I think a change in those regulations to allow for the inclusion of time for a wider range of activities could be helpful". (Respondent – central government)*

FOIA Guidance

According to respondents, the guidance issued by the Ministry of the Justice (MoJ) and the Information Commissioner's Office (ICO) is very comprehensive and clear. Respondents did not appear to have any problems in interpreting the guidance and have good levels of support, whether this be from legal teams, FOI units or nationwide bodies. One respondent referred to the Central Referral Unit (a division of the Association of Chief Police Officers), which provides assistance in applying guidelines as well as running a two day "decision makers course".

A number of respondents confirmed that they have a good relationship with the ICO and can consult them for guidance. That said slight frustration was expressed with the ICO helpline (a resource that provides advice on the law relating to the FOIA). Some respondents cited instances where they had called for advice on particularly contentious issues, only to find that the representative could not provide any clear, definitive advice or concrete opinions:

> *"They just don't seem to be very approachable. I understand that they have to be separate from us because, at the end of the day, they would deal with any complaints. That still doesn't mean that they couldn't be approachable to advise us, or at least let us have an opinion on something." (Respondent – non-departmental public authority)*

Yet, respondents did appreciate the difficult balancing act that the ICO have to maintain, i.e. to provide guidance but remain independent.

Respondents tended to refer more frequently to the ICO's guidance as opposed to the MoJ's, believing the former to be more up to date. There was some suggestion that it would be more beneficial if the guidance produced by the two organisations could be coordinated, i.e. if there was one set of guidance. Another respondent also pointed out that the guidance produced by the two organisations can sometimes contradict each other. As an example, the respondent noted that the ICO's guidance had naturally supported decisions made by their own Commissioner. However, the respondent believed that when the MoJ felt that the ICO did not reach the correct decision, they were not minded to amend their own guidance. This can make it difficult for practitioners and has been raised at various conferences.

One other suggestion made by a couple of respondents is for the ICO to provide examples, particularly for exemptions. Given that some respondents find it quite difficult to keep up with decision notices this could help ensure best practice:

> *"It could be helpful if the guidance relating to particular exemptions could provide links to some of the most important decisions that the Commissioner and the tribunal have taken in relation to that exemption so that you could read about the hearing and the general approach that should be taken to use an exemption. You could also be referred to some particular cases and examples of what's happened where it's been applied in practice to bring it all together for users." (Respondent – central government)*

Key findings

- All respondents had a good understanding of the FOIA exemptions. There was a general feeling that the exemptions are effective in protecting information that they believe should not be released.

- There was common agreement that the cost of locating, retrieving and extracting information does not accurately reflect the amount of time spent in practice in compiling the response.

- Redaction time particularly was deemed extremely onerous and it was considered that there should be greater consideration of this when deciding whether the cost of dealing with a request is within the limit.

- Clearer guidance was requested on the application of particular exemptions. However, respondents saw the MoJ and ICO guidance being clear and comprehensive and all spoke of a good relationship with the ICO. The only criticisms were that the guidance should be more co-ordinated and examples provided; particularly for exemptions.

Benefits of the FOIA

This chapter explores the perceived benefits of the FOIA for the general public, as perceived by the respondents, and the benefits to the respondents' departments/organisations. It also looks at whether the FOIA has resulted in any instances of public resources being misused or wasted.

Benefits of the FOIA for the general public

Overall, there was common agreement with the principles of the FOIA and support of the legislation in fulfilling its aims of enabling greater transparency and accountability.

In terms of benefits to the public, respondents reported that greater volumes of information are now published on their department/organisation's website, enabling the public to access a wide range of sources. In addition, the FOIA has made organisations consider what information can be published pro-actively, i.e. before a request is received. Disclosing this material allows the public to be more informed on a variety of topics, and may possibly increase levels of engagement:

> *"[The legislation] has enabled people to say what information it is that they want to see and to have that information communicated to them. Hopefully that leads to the relationship between government and citizens [becoming] a more open and fluid one. If that can lead to citizens being better informed and engaging in government debates and discussions more effectively, then yes, that would be a big benefit". (Respondent – central government)*

It is worth noting that a report produced by the UCL Constitution Unit[204] questioned whether the FOIA had actually increased levels of public engagement, providing evidence to show that the number of individuals making requests is insignificant in terms of the UK population. Furthermore, the report argued that those who make requests are normally already engaged with the government, e.g. campaigners.

A further benefit of providing more information to requesters may be a possible increase in public confidence, i.e. that disclosing information to the public demonstrates transparency and shows that a department/organisation has "nothing to hide". In contrast to the previously cited benefit, the UCL report concurred with this argument, citing evidence to show that the public are able to acquire far more central and local government data. Furthermore, a study commissioned by the MoJ[205] found that the majority of the public agreed that authorities were becoming more open.

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[204] UCL Constitution Unit (October 2010), "FOI and local government: preliminary findings", University College London.

[205] Ministry of Justice, "Information Rights Tracker Survey – Key Wave 14 results Fieldwork: January 2010". http://www.justice.gov.uk/downloads/publications/statistics-and-data/FOI/info-rights-tracker/foi-tracker-survey-wave-14.pdf

Benefits of the FOIA to the respondents' department/organisation

In terms of benefits to the department/organisation, some respondents believe that the Act has made individuals much more aware of their obligations and responsibilities to the public, e.g. in recognising that the public have a right to access information, and improving transparency by publishing minutes of meetings and expenses incurred by individuals.

> *"We are slowly getting people to realise that we do have to be more open. I think we both face an uphill struggle with people saying this is the way we've always done it; we've never released that information before. We're hopefully getting to a point where we're going to start publishing information about Chief Executive's expenses online without it having to be made as a request. As far as I know that wouldn't have happened two years ago … it's trying to make people realise that the public are entitled to this information". (Respondent – non-departmental public authority)*

That said, a few respondents did note that it is difficult to separate the benefits derived from the FOIA, specifically from the government's overall transparency agenda, e.g. in publishing board expenses.

A further benefit of the FOIA cited, has been the perceived improvement in standards. For example, individuals are now aware that their written communication such as emails and reports may be subject to public scrutiny, resulting in a more professional and less "cavalier" approach.

Alongside this, respondents felt that the public are able to gain a greater understanding of decision making processes and are better able to hold individuals to account. More generally, it has helped departments/organisations consider the impact their decisions have upon the public, how they spend public money, and has also acted as a "safety net" in making robust decisions regarding expenditure. Here, the MoJ tracker study consistently found that a majority of respondents agreed that "public authorities can be held to account because of the right to get information from them"[206].

When questioned, a notable minority of respondents found it difficult to cite the main benefits of the Act in relation to their organisation, noting that record management and processes would have improved without the introduction of the Act. In addition, some respondents struggled to cite benefits to their organisation given the time and resource taken up by the Act – specifically in dealing with requests from the media, serial requesters and "vexatious individuals". Indeed, a few questioned how many members of the general public actually benefit:

> *"For your average member of the public that's really difficult to say [what the benefits are] because we don't seem to have many requests from the man on the Clapham omnibus". (Respondent – non-departmental public authority)*

> *"The thing that always shocks me is the number of requests from the public and how few it is." (Respondent – non-departmental public authority)*

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[206] Ministry of Justice, "Information Rights Tracker Survey – Key Wave 14 results Fieldwork: January 2010"

Interestingly, contrary to the view of some that public confidence might have increased as a result of the Act, a few respondents felt that the FOIA may have actually increased public suspicion of government departments and public organisations. In citing examples, there was a view that the individual requesting the information sees the application of an exemption as "holding something back". Some respondents speculated that some individual requesters may believe that public authorities possess more information than is actually held and do not believe that they have released all of the information relating to their request.

Misuse of public resources

As part of the interviews, respondents were asked if they could cite any instances where an FOI request had directly exposed any waste or misuse of public resources, e.g. in uncovering poor practice, excessive expense claims, or value for money in procurement. Overall, few respondents could do so. Respondents were keen to stress that expenses and costs were routinely published, and explained that the FOIA has revealed the need for greater transparency. Only one respondent noted the FOIA has revealed evidence of poor planning and misuse of costs when purchasing goods.

Key findings

- There was common agreement that the FOIA had led to greater transparency and accountability. The volumes of information now published are all seen to be considerably greater, allowing the public wider access to public sources.

- There were mixed views on the benefits of the FOIA for the wider public. Some believe that the Act has increased public confidence, whilst others suggested that it may have prompted more suspicion, with the public believing that not all the information available is released.

- Respondents suggested that the Act may have made public bodies more aware of their obligations to the public and improved the standard of information held (i.e. emails/reports).

- Few respondents could cite any instances where public resources might have been wasted or misused, but reaffirmed the benefits of the Act in identifying the need for greater transparency.

Complaints and appeals process

The FOIA introduced a process whereby a requester who is unhappy with how a public authority has dealt with their request can appeal against the decision. The appeals process begins with an internal review conducted by the public authority itself, followed by an appeal to the Information Commissioner if a party remains unhappy. A requester or a public authority can then subsequently appeal to the Information Rights Tribunal if they are dissatisfied with the decision of the Information Commissioner.

Complaints and appeal process

Overall, respondents expressed strong support for the internal review process. They believe it to be an efficient way of dealing with matters as well as saving money, (i.e. as cases are not referred directly to the Information Commissioner). It has also proven to be reassuring for respondents, given that their original responses to FOI requests tend to be upheld in most cases.

Another benefit of the internal review is allowing organisations to have "a second bite of the cherry". The process concentrates the mind in focusing upon how previous exemptions have been applied and allows the organisation to review whether they were unreasonable in the way an exemption was interpreted. A few respondents believed that it was "only fair" to keep the internal process in-house given the sheer number of requests received by some organisations.

> *"For us to have another go, I think that's fair. Say we get in 70 [requests a month], are we getting it right every single time, given how difficult it is to do? So I think that it's really good. And then if the requester isn't happy with that, then they can go to the Information Commissioner, who'll then look at the records". (Respondent – non-departmental public authority)*

One issue that emerged relates to serial or vexatious requesters who will push their case through an internal review and up to the Information Commissioner. A couple of respondents speculated whether the ICO should introduce a fee for requestors to have their cases heard by the Information Commissioner (to be re-paid if they were successful). Respondents speculated that this may act as a deterrent to some individuals and would save time and resource, i.e. when preparing their case.

The vast majority of respondents spoke highly of the Information Commissioner's Office and could not cite any issues with the appeals process. In addition, some respondents mentioned that delays encountered in the past had improved in recent years.

Key findings

- There was general support for the internal review and appeals process, which helps to provide further confidence to respondents, given that most of their decisions are upheld. The vast majority of respondents spoke highly of the Information Commissioner's Office and could not cite any issues with the appeals process.

- Respondents spoke of their frustration with serial or vexatious requesters who, in their view, waste time and money by pushing their request through the internal review process and up to the Information Commissioner. Some respondents believed that such cases should incur a fee, which would be repayable if successful.

Suggested amendments

Suggested amendments to the FOIA

All of the respondents were asked to consider what they felt would be desirable and undesirable potential future changes to the Freedom of Information legislation.

A consistent message from the majority of respondents was a desire to see the appropriate limit reduced, or for other resourcing elements such as redaction, consultation and reading time to be included in some way. Currently the legislation sets the cost limit at £600 for government departments and £450 for all other public authorities, equating to three and a half person days and two and a half person days of work respectively. There was a general view that the current time given to dealing requests is too onerous, with the issue being particularly exaggerated by the recent budget cuts which have taken place.

> *"18 hours is an awful long time to divert people away from their work. We try not to issue fees notices but, or to refuse on the grounds of cost, but FOI is a huge drain on resources that, I'd like to see it lower than 18 hours". (Respondent – non-departmental public authority)*

> *"It's counterintuitive to impose a greater burden on a public body at the same time as you reduce its ability to deal with it". (Respondent – central government)*

It was also felt that more guidance would be useful in meeting the redaction time specified, with realistic estimations and advice given on how this time should be broken down in responding to requests.

Many of those interviewed highlighted the increase in number of requests they were receiving, and within this their frustration at the number of request from serial requesters. There was a view that some of these requests are coming from individuals with the sole purpose of gathering information for what was seen as illegitimate use i.e. a 'good' media story or to irritate organisations. Although the Act contains an exemption to protect against vexatious requests (Section 14), a number of respondents still found it difficult to apply this exemption, noting that although such requests are perceived to be from "vexatious" individuals, the individual requests submitted cannot be considered to be vexatious in nature.

> *"There are certain people who will make requests, arguably for no public benefit at all, simply to irritate the public body concerned. Because it costs them nothing to do it, they can keep doing it and doing it. You can of course refuse to deal with requests when they're coming from an individual who you deem to be vexatious. But actually, the definition of vexatious, certainly from the ICO's standpoint and from our own legal team's stand point is a very, very high bar. Most people who put in these requests are never really at the level of being what you would call vexatious but they are more than irritating." (Respondent – commercial organisation)*

Whilst there was agreement that the public should not have to pay to access public information, it was suggested that a possible means of preventing such spurious and repeat requests would be through the introduction of a nominal fee. It was acknowledged this would require a number of considerations and possible exemptions. All were aware of the impact this would have on low income individuals. Furthermore, other respondents noted that the cost implications of introducing a fee may well outweigh the revenue.

Key findings

There were a number of suggested amendments made, these included;

- The desire to see the appropriate limit reduced;
- For redaction, consultation and reading time to be included in the cost/time incurred in processing requests;
- The introduction of a small fee in placing a request - this was namely directed at serial requesters as many were aware that the introduction of a fee will automatically prevent some individuals from submitting a request, i.e. from members of the public as opposed to journalists;
- A review of resources in responding to increasing numbers of requests, particularly in light of budget cuts.

Appendix A – Respondent discussion guide

Research to inform the Freedom of Information Act post-legislative review

Discussion Guide

Interview time: around 30-45 minutes overall

Discussion Areas	Notes
Initial Introduction	
Good morning/afternoon, my name is [INSERT NAME], and I'm calling from Ipsos MORI, the independent research organisation. We're currently conducting the study on the Freedom of Information Act (2000) on behalf of the Ministry of Justice. I understand XXX from the Ministry of Justice has previously contacted you about this study. INTERVIEWER: CHECK IF RESPONDENT IS STILL WILLING TO TAKE PART, CONFIRM DATES/TIMES ALREADY LISTED OR SCHEDULE NEW APPOINTMENT.	
Introduction	**2 mins**
• Thank respondent for taking part in the research. • Introduce self, Ipsos MORI, an independent research organisation. • Explain that we are conducting research on behalf of the Ministry of Justice. Aim is to provide information on the operation of the Freedom of Information Act, to inform a memorandum to be presented at a departmental Select Committee. • Mention that the interview will take around 30-45 minutes and ask permission to audio record the interview. Explain that this will improve the flow of the interview/reduce note taking and to aid with the analysis/reporting process. • Stress that whilst the Ministry of Justice have provided Ipsos MORI with contacts for interviews, Ipsos MORI will make sure all findings are anonymised, i.e. we will not attribute names to quotations used in reporting, no one will be able to identify them from the research findings. • Explain importance of being able to say what they think, please be as honest as possible etc.	
Background	**2 mins**
• To start, can you tell me your job title, the department you work for and a bit about your role and responsibilities.	

Operation of the FOIA within the respondent's organisation	**20-30 mins**
ONLY ASK IF ORGANISATION IS OUTSIDE CENTRAL GOVERNMENT: Approximately how many Freedom of Information Act requests does your organisation receive per month? • Can you briefly tell me a bit about any processes and procedures your organisation has in place for dealing with Freedom of Information (FOI) requests? • ASK IF NOT ALREADY COVERED: Does you organisation have staff whose role is wholly or partly dedicated to dealing with FOI requests? PROBE AS TO WHETHER THIS RELATES TO ANSWERING THE ACTUAL REQUEST AND/OR DEALING WITH THE ADMINISTRATION, I.E. RECEIVING REQUESTS, ENSURING THAT THEY ARE ANSWERED ON TIME BY THE RIGHT CONTACT, MONITORING PROGRESS, ETC. • ASK IF NOT ALREADY COVERED: Do you have a standard process for clearing request responses within your organisation? • Has the Act led to any amendments to the way in which your organisation records, manages or processes information? PROBE AS TO WHETHER THE ORGANISATION ROUTINELY PUBLISHES CERTAIN INFORMATION (AS A RESULT OF HAVING RECEIVED FOI REQUESTS FOR IT IN THE PAST). ALSO PROBE AS TO WHETHER THE RESPONDENT'S ORGANISATION HAS AMENDED ITS RECORD MANAGEMENT SYSTEMS AS A RESULT OF THE FOI ACT COMING INTO EFFECT • Has the operation of the Act revealed instances within your organisation where public resources may have been wasted or misused? PROBE: ANY EXAMPLES? IF NEED BE, PROBE FOR OTHER EXAMPLES, E.G.: o Unnecessary travel costs o Poor practice or value for money in procurement o Excessive expense claims o Problems with organisational processes • Have these resulted in any changes to your organisation's processes? PROBE: which ones? The Act obliges public authorities to respond to FOI requests within a set time frame of 20 working days. • Can I ask if your organisation/department (INTERVIEWER: ASK ABOUT THE RESPONDENT'S DEPARTMENT IF INTERVIEWING CENTRAL GOVERNMENT RESPONDENTS) has had any problems in meeting this target? IF YES: Can you describe the sorts of problems your organisation regularly encounters? Do these problems result in your organisation missing the target? How often do you encounter these problems? PROBE FOR OTHER EXAMPLES	

• Do you think the Act's provisions as to how quickly a public authority must respond to FOI requests are appropriate? IF NO: what amendments would you make? The Act has a number of 'exemptions' which allow public authorities to refuse some requests for information in certain circumstances. • How well would you say you understand all of the exemptions are, and how to apply them? • How well do you feel the exemptions work in practice? PROBE: Are they effective in protecting information you feel should not be released? Are they simple to use? Section 12 of the Act allows public authorities to refuse to answer a request if the cost of locating, retrieving and extracting the information exceeds a certain threshold. • Do you think that the Act's provisions relating to the cost of answering a request are appropriate? PROBE: Why/why not? IF NO: What amendments would your organisation like to see in future? • Do you think there is adequate guidance on how to operate under the Freedom of Information Act? IF YES: Could you any provide examples of best practice? ALL: Are there any areas that need to be improved? • What changes to the Act, if any, would you like to see made in future? • In your opinion, has the Act directly brought about any benefits to your organisation? IF YES: What kind of benefits? PROBE FOR EXAMPLES OF BEST PRACTICE. ALSO PROBE FOR WIDER BENEFITS TO PUBLIC BODY ITSELF AND THE PUBLIC	
Complaints and appeals process	**5 mins**
The Act introduced a process whereby a requester who is unhappy with how a public authority has dealt with their request for information can appeal a decision. The appeals process begins with an internal review conducted by the public authority itself, followed by an appeal to the Information Commissioner if a party is not happy. A requester or a public authority can then subsequently appeal to the Information Rights Tribunal if they are dissatisfied with the decision of the Information Commissioner. • Do you think the complaints and appeals process is effective? PROBE: Why/Why not?	
Publication schemes	**5 Mins**
The Act requires all public authorities to adopt and maintain a publication scheme. This lists the classes of information the public authority will proactively publish and how it can be obtained. • Does your organisation have a publication scheme?	

• Do you/does someone monitor use of your publication scheme? IF YES: how frequently it is used?	
Additional questions (where time allows)	**5 Mins**
• Excluding any issues that you have already highlighted in previous answers, do you feel that meeting the requirements of the Freedom of Information Act poses any other problems for your organisation or not? IF YES: Which problems? • Can you tell me how the Act works alongside other access legislation, such as the Data Protection Act? PROBE FOR OTHER EXAMPLES, E.G. THE ENVIRONMENTAL INFORMATION REGULATIONS.	
Concluding remarks	**5 Mins**
• Thank participant and explain the next steps of the research/ask if they have any further comments to make/answer any questions.	

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