Independent Commission on Freedom of Information

Response to a Call for Evidence

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Glossary

Call for Evidence	means the Commission's Call for Evidence dated 9 October 2015
Commission	means the Independent Commission on Freedom of Information
DCA	means the Department of Constitutional Affairs
DPA	means the *Data Protection Act 1998*
EIR	means the *Environmental Information Regulations 2004*
FOIA	means the *Freedom of Information Act 2000*
FOISA	means the *Freedom of Information (Scotland) Act 2002*
HC	means House of Commons
HL	means House of Lords
ICO	means the Information Commissioner

This is the evidence of Philip Antony Coppel, Queen's Counsel, of 2-3 Gray's Inn Square, Gray's Inn, London, WC1R 5AH, in response to the Call for Evidence.

Qualifications and experience

1. I am a self-employed barrister, practising at 2-3 Gray's Inn Square, Gray's Inn, London. I was called to the Bar in November 1994 and was appointed Queen's Counsel in March 2009. Throughout my years at the Bar, I have practised in public law and in commercial law. In my practice I have advised as well as represented numerous clients in relation to FOIA matters. My clients have included numerous public authorities, both in central government and local government. I am familiar with the Parliamentary history leading to the enactment of FOIA, having read all related *Hansard* and evidence before and reports of the Select Committees. I have written the leading practitioner text on FOIA (*Information Rights*, 4th ed, Hart, 2014). For the preparation of the various editions of that text, I have maintained a library of every decision of every court and tribunal in the United Kingdom on or relating to FOIA, FOISA, EIR or DPA. I have read and annotated all of them. I am also familiar with all the guidance on FOIA issued by the ICO and, before it gave up producing it, the DCA. I have also practised in Australia, where I acted principally for federal government agencies in relation to its freedom of information legislation.

2. I have read the Call for Evidence, which is stated to be a request for objective, factual information about the impact or effect of FOIA on the business of government. It is not expressed to be an invitation for views on the questions posed. For that reason I have kept my views on these questions to myself.

Question 1 - deliberative space

3. In over 30 years of acting for governmental authorities in freedom of information matters (both in the UK and Australia) no public authority employee/office-holder has ever told me that in performing his/her work for that public authority he/she has refrained from putting down a thought that that person thought should have been put down. Individuals in that position whom I have encountered have, from time to time, told me that sometimes the knowledge of FOIA has caused them to be more careful about manner in which they express an idea, though never to the detriment of the expression of that idea.

4. I have from time to time been told anecdotes of employees/officer-holders labouring under the sorts of difficulty identified at p 6 of the Call for Evidence. Whenever I have sought to get better details from these individuals, each has been careful to tell me words to the effect that they personally would never compromise their professionalism in the way suggested at p 6. Moreover, none has been able or willing to identify an individual whom they knew would act in the way suggested at p 6. The impression that has been given to me by them is that beyond the need to be careful (as opposed to careless) in the expression of ideas, the sorts of difficulty identified at p 6 have been mantras of conjecture rather than statements of fact.

5. Having professionally reviewed over the course of 30 years innumerable instances of governmental decision-making, I have seen nothing to suggest that that process or the record of that process is now inferior to the way it was in the decades before 1/1/2005. My impression is that there has in this country been a general improvement in the quality of record-keeping and of decision-making since 1/1/2005, albeit an improving trend was also evident before that date.

Question 2 - Cabinet discussion and agreement

6. I have no personal experience of the effect of FOIA on collective Cabinet discussion and agreement.

Question 3 - risk assessments

7. Some of the advice work upon which I have been instructed has involved FOIA requests for "risk assessments" (as that term has been used at pp 11-12 of the Call for Evidence). In my experience, the public authorities concerned have always been able to identify which (if any) class- or prejudice-based exemptions are applicable to all/some of that risk assessment and that those exemptions, even after a consideration of the s 2 public interest balance (where applicable), has afforded the public authority protection where it is needed.

8. No public authority with whom I have worked has expressed the view that a risk assessment (or part of it) that should have enjoyed exemption has been unable to enjoy exemption. Nor until I read pp 11-12 of the Call for Evidence had I encountered the suggestion that risk assessments should enjoy class-exemption. In my extensive research for writing my book, the only instance I had encountered of a public authority suggesting that risk assessments might be adversely affected by FOIA was at para 60 of the 3rd Report and Proceedings of the House of Commons Select Committee on Public Administration (19 May 1998), quoting the ECGD. I had not heard it said before that the existing suite of exemptions was ineffective for affording the ECGD (or any other public authority) the protection it sought. Moroever, my researches showed that even before FOIA came into force, legislation was providing for the orderly release of certain risk assessments (e.g. reg 34 of the Genetically Modified Organisms (Deliberate Release) Regulations 2002).

Question 4 - the Cabinet veto

9. The account at pp 13-14 of the Call for Evidence) confuses the vetoing of the FOIA obligation to disclose particular information with the power of a public authority to disclose particular information even though FOIA does not oblige it to disclose that information. They are conceptually and legally distinct.

10. The FOI Bill (referred to at p 13 of the Call for Evidence) did not have the concept of absolute and qualified exemptions which we see in FOIA. Under the Bill, if information was captured by an exemption then that displaced the requester's entitlement to the information. A public authority was nonetheless required to consider, as a matter of its discretion and having regard to the public interest in allowing access to that information, whether the information should nonetheless be disclosed (cl 14). In its treatment of the public interest in maintaining exemptions and in disclosing information, the Bill was thus fundamentally different from FOIA. Contrary to what is stated at p 13 of the Call for Evidence, the position under the Bill was not the same as under the Canadian *Access to Information Act*, the only Westminster-based legislation there referred to. Under the Canadian Access to Information Act, it is the exemptions themselves that are divided into mandatory and discretionary: the former must be invoked, the latter may be invoked. Under both FOIA and the Bill, invocation of all exemptions is discretionary.

11. The Call for Evidence also misunderstands the position under the US Freedom of Information Act (5 USC 552) of 1966. Under that Act (as under FOIA) all exemptions are discretionary: an agency

(as public authorities are called under that Act) may, but need not, invoke an exemption. Under the US Act, if an exemption is invoked and a federal court finds that that exemption applies, the court does not have any inherent or equitable power to order to disclosure: *Spurlock v FBI* 69 F (3d) 1010 at 1016-1018 (9th Circuit, 1995). That is the same as the position in the UK; or at least as it was until the Supreme Court in *Kennedy v Charity Commission & anor* [2014] UKSC 20 divined that the common law enabled courts in certain circumstances to require public authorities to disclose information.

12. In relation to the reference to the Bill's Parliamentary passage (p 13), the *White Paper* had ruled out any form of veto on the basis that "a government veto would undermine the authority of the ICO and erode public confidence in the Act" (p 30). The evidence received by the House of Commons Select Committee had been to the same effect: *Minutes of Evidence taken before the Select Committee on Public Administration*, 2/12/97, pp 44, 49; *Select Committee on Public Administration, Third Report, Freedom of Information Draft Bill,* vol II, Memoranda of Evidence, 28/7/99, pp 85, 89.

13. The record shows that the original FOI bill provided for ministerial certificates for non-disclosure only where that would be harmful to national security or the information was sourced from a security body: cll 18(2), 19(4). This was stated by the then-Secretary of State for the Home Department to be "the first and most important thing to say about that part of the scheme of the Bill": *Hansard*, HC, vol 347, 4/4/00, col 918.

14. The record of debate and proceedings before Committees shows that within the FOIA scheme, the distinction between a veto and a conclusive certificate had been accurately explained: *Hansard*, HC, vol 347, 5/4/00, col 1060. The difference in their content and practice is minuscule. Whether called a "veto" or a "conclusive certificate" the effect is the same (namely, preclusion of any contradicting merit-based decision) and the availability and standard of review (ie judicial review) is exactly the same. The record shows that this was recognised by the then-Secretary of State for the Home Department, who told the House of Commons that "in practice, it would be an extremely unwise Cabinet Minister who chose to issue an exemption certificate amounting to a veto of a decision made by the commissioner to order disclosure without consulting his or her Cabinet colleagues:" *Hansard*, HC, vol 347, 4/4/00, col 922. Short of reversion to ancient or foreign forms of government, there is no lesser degree of outside supervision of executive decisions.

15. The introduction of the conclusive certificates for Cabinet material and the like (now FOIA s 36(7)) was characterised at the time as one of the major changes effected since the HC second reading speech of the Bill: see HC Research Paper 00/89, pp 9, 16.

16. The record shows that the operation of conclusive certificates was carefully considered and generally understood: *Hansard*, HC, vol 347, 4/4/00, cols 850, 934-935; vol 347, 5/4/00, cols 993, 1003, 1030, 1098-99, 1103-1106; vol 357, 27/11/00, col 740; *Hansard*, HL, vol 612, 20/4/00, cols 838, 848, 854, 865-866, 873; vol 618, 25/10/00, cols 434-435, 438-441, 446; vol 619, 14/11/00, cols 216, 226-227, 231-232, 254-256; vol 619, 22/11/00, cols 843-847. Contrary to what is stated in the Call for Evidence (p 14), there is nothing in the record to support the proposition that the understanding of the veto at the time of the enactment of FOIA was any different from what the Supreme Court declared it to be in *Evans* — quite the opposite (see the references above).

17. The system under s 36(7) is, for all intents and purposes, the same as that which existed in Australia under ss 34-36 of their 1982 Act until 2010 (when conclusive certificates were removed by the *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009*). I have not come across any material from abroad that policy-making took a turn for the worse in Australia after 1983 (or dipped further in 2010), in New Zealand after 1982, or in Canada after 1982, or in the Republic of Ireland after 1997. By all the accounts I have seen, these countries enjoy a Westminster system of government and similar democratic traditions to this country and are well able to function with freedom of information legislation that provides no greater (and sometime less) protection for policy documents than that which is provided by ss 35 and 36 of FOIA.

18. I have not come across any material to suggest that since 1 January 2005 policy-making in relation to environmental matters has become worse than it is in relation to non-environmental matters. That is what I would have expected to be able to find if the conjectures at pp 13-14 of the Call for Evidence had any evidential basis. This is because the scope of ministerial certificates is more limited in relation to environmental information: EIR reg 15. The definition of "environmental information" does not respect departmental demarcations.

19. Nor have I come across any material to suggest that since 1 January 2005 policy-making by Scottish public authorities has been afflicted in the way claimed to have been suffered by Central Government bodies in pp 13-14 of the Call for Evidence. Under FOISA, conclusive certificates are only available for national security: s 31(2). What the evidence does point to is that any resurgence in the culture of governmental secrecy in Westminster will serve to distance it from those whom they govern in Scotland, giving succour to those who would want to exploit the difference with the Scottish regime for other purposes.

Question 5 - the appeal system

20. The Call for Evidence pp 15-16 accurately sets out the appeal system. I have experienced appeals taking several years to work through the system and at considerable cost to all involved (including to the tribunals and courts).

21. In summary, my experience is as follows:
    (1) The internal review process rubber-stamps the original decision and is a waste of time and resources.
    (2) The competing roles assigned to the ICO (to assist the requester by examining the documents and claims for exemption, then to make a decision that becomes the subject of merit review, then to participate in appeals seeking to uphold his own decision) complicates and lengthens the appeal process.
    (3) To date no policy review has contemplated that appeals against the original decision of the public authority should go direct to the First-tier Tribunal, with the ICO being notified of each and able to join and take a position at the outset (whether to support the public authority, the requester or neither, whether in part or in whole).
    (4) The practical effect of an appeal in the Tribunal is to focus attention on those cases that should be fought and those that should not, but this practical effect is diminished under the current appeal structure because by the time that an appeal reaches the Tribunal both parties' positions have become entrenched through the earlier stages.

Question 6 - burdens on public authorities

22. Based on my experience, the Call for Evidence is right in saying that the most frequent users of FOIA are private individuals, businesses and journalists (p 18). Indeed, the only other sort of being that could want to use FOIA are groups of individuals with a shared interest, eg Friends of the Earth.

23. I have observed a wide divergence in the record-keeping systems of the public authorities for whom I have carried out FOIA work. Those that keep poor systems tend to take a long time to find the information that answers the terms of a request — even a simple request — and vice versa.

24. I have noticed an increasing tendency over the years for public authorities which anticipate more than one request for the same information to pre-empt the FOIA request process by posting up the information on their website. Whether such public authorities are encouraged to do this because they are unable to recover for the cost of retrieval I do not know.

25. In any event, the time needed to find the information that is captured by the terms of a request has, by the point at which I have become involved, always been eclipsed by the time that those instructing me have devoted to trying to uphold exemptions, whether good, bad or indifferent.

26. With the benefit of all the years I have been practising in this area, I cannot think of how it would be possible to devise a fee system that actually reflected the "proportionality of the burden" imposed by the request. Some of the requests with which I have been involved have turned out to be in the highest public interest, others less so, and some have proved to have served no perceptible public interest. Often the extend of the public interest served by the request has only emerged over time or in the light of later events. Unless the proportionality of the burden of a FOIA request was made to reflect the wider utility of the request, unfairness would be effected in its name. From my practice it has been apparent that those administering the FOIA regime already find it sufficiently complicated, I have discerned no appetite for the introduction of another evaluative discretion and that those processing requests find comfort in incontrovertible arithmetical systems where possible. To this end, a system that imposed a fixed charge per A4 page of information (or the equivalent of an A4 page of information) answering the terms of a request regardless of whether it was exempt, might encourage requesters to temper the ambit of their requests whilst encouraging efficiency in public authorities in the handling of requests.

Conclusion

27. I thank the Commission for inviting me to give evidence to it.

Philip Coppel QC
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