Independent Commission on Freedom of Information: Responses from organisations to Call for Evidence: A – C

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Updates to this document

This document was updated on 11 January 2016 to include a response from the Campaign Against Censorship at page 122.

Access Info Europe

This document sets out question-by-question, Access Info Europe's submission to the Independent Commission on Freedom of Information's call for evidence on aspects of the UK Freedom of Information Act 2000.

Access Info Europe is a human rights organisation dedicated to promoting and protecting the right of access to information in Europe as a tool for defending civil liberties and human rights, for facilitating public participation in decision making, and for holding governments accountable.

Our expertise on international standards has fed into the development of our Global RTI Rating (www.rti-rating.org), which is regularly referenced by civil society, national governments and inter-governmental organisations.

Access Info Europe has based its submission on the existing international standards for the right of access to information, a right which has been confirmed as a fundamental human right by, inter alia, the European Court of Human Rights, the Inter-American Court of Human Rights, and the UN Human Rights Committee.

It is worth noting that UK legislation is often the basis of, and can significantly influence, legal developments in other countries - particularly those with *common law* systems. The UK in this respect often sets a precedent that other countries follow and copy. A restriction to the right of access to information held by public bodies in the UK would therefore be likely to have a significantly negative effect on the content and scope of transparency laws in other jurisdictions.

Access Info Europe also notes that, in terms of international leadership on transparency, the UK government is a founding member of the Open Government Partnership and that Prime Minister David Cameron has publicly pledged to make the UK the "*most transparent government in the world*." An essential pillar of achieving this goal is to ensure that the UK Freedom of Information Act is one of the strongest in the world, setting a high standard that others can follow.

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

It is appropriate to have an exception which protects decision making and this is supported by international standards. The Council of Europe Convention on Access to Official Documents, still not yet ratified by the United Kingdom, recognises that the protection of "*deliberations within or between public authorities concerning the examination of a matter*" is a legitimate limitation to the right of access to information. The Convention however, states that this is not an absolute exception - it is only applicable when the protected interest may be harmed by its publication, unless there is an overriding public interest in disclosure.

The transparency rules of the European Union (Regulation 1049/2001) also require a harm test and public interest test when considering the application of an exception to protest the decision-making process (Article 4.3 "*if disclosure of the document would seriously undermine the institution's decision-making process*").

Absolute or blanket (class) exceptions to access such information on internal deliberations are never acceptable in any access to information legal framework. The European Court of Justice has stated, in a case that referred specifically to the decision-making exception, that "*it should be noted that, according to settled case-law, although, in order to justify refusing access to a document, it is not sufficient, in principle, for the document to fall within an activity or an interest referred to in Article 4 of Regulation No 1049/2001, as the institution concerned must also explain how access to that document could specifically and actually undermine the interest protected by an exception*."

Hence, Access Info Europe takes that stance that in the UK all and any information relating to the internal deliberations of public bodies should fall under the scope of the access to information law, and

information may only be refused to a requester where there is a demonstrable harm in releasing the information in that particular case, and there is no overriding public interest in the public obtaining the information.

Where information is withheld, it should be released when the reason for applying the exception cases to apply. This may be caused by changes in circumstances (such as a stronger public interest due to ongoing public debate) or with the passage of time, which results in the release of the information no longer posing a harm to the protected interest. As a result, the application of exceptions should be periodically reviewed by public bodies so as to ensure that once an exception lapses the information will be made public. The EU's access to documents rules require that "*The exceptions … shall only apply for the period during which protection is justified on the basis of the content of the document*."

Wherever possible, requesters should be notified when an exception might cease to apply. There should be no artificial time limits on keeping information secret, although it is acceptable under the Council of Europe Convention on Access to Official Documents to establish absolute maximum limits.

To further support this point, Access Info notes that the UK Information Commissioner has stated that damage to the protected interest is significantly reduced as time passes, and particularly once the decision has been made. International standards are robust on this as well, with the Council of Europe making clear that, "T*he outcome of the "harm-test" is closely connected with the lapse of time. For some limitations, certain events inevitably lead to the cessation of that limitation. In other instances, the passage of time may reduce the damage of release of the information*."

It is also important to clarify a reference in the Call to Evidence regarding Spain. It is not the case that information is absolutely exempt where its disclosure would undermine the confidentiality or secrecy of decision-making. Rather, there is a protection for the ***necessary*** confidentiality/secrecy of decision making, something which is balanced by both harm and public interest tests.

In many other countries, the principle of a harm test rather than a blanket exception is clearly established in law or even in the Constitution. In Poland, for example, the harm test is enshrined in the Constitution (Article 31.3) whereby public authorities must measure the proportionality of protecting the interest against the harm it would cause by releasing the information requested, as well as consider the public interest in disclosure.

It is also worth mentioning European Union case law on decision-making transparency. During a 2013 case which was won by Access Info Europe, The Opinion of the Advocate General stated that, "*In a representative democracy, it must be possible for citizens to find out about the decision-making procedure, since if this were not so, citizens would be unable to hold their representatives politically accountable, as they must be by virtue of their electoral mandate."*

"Inconvenient though transparency may be, when carrying out legislative as well as non-legislative functions, it must be said that it has never been claimed that democracy made legislation 'easier', if easy is taken to mean 'hidden from public scrutiny'," the Advocate General added.

The European Court of Justice in this case found *"If citizens are to be able to exercise their democratic rights, they must be in a position to follow in detail the decision-making process"* and that they should *"have access to all relevant information."*

Question 2: What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?

As stated previously in answer to question 1, absolute or blanket (class) exceptions, for example to access information on Cabinet discussions and agreements, are never acceptable in any access to information legal framework.

Consistent with international standards, Access Info Europe considers that any limitation on accessing information about Cabinet discussions, may be applicable only where there is a demonstrable harm in releasing the information in that particular case and it is not outweighed by the public interest test.

The Information Commissioner and Tribunal already give significant weight to the need to protect ongoing government discussions. Even in those cases where disclosures are made, the principle of collective decision making is preserved as the minutes of Cabinet meetings do not attribute comments to particular members of Cabinet.

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

Access Info Europe does not believe that here should be special protection for risk assessments and certainly not an automatic blanket exception, something which is not permitted by international standards and which is adequately covered by the decision making exception as defined above and (potentially) other exceptions where relevant.

Risk assessments should only be denied when it can be demonstrated that there is a probable harm to the decision-making process, and that such harm is not outweighed by the public interest in obtaining this information.

In many instances, there will be a public interest in providing access. It is important that the public is able to ensure that all risks have been identified and that there is no risk missing. It is also essential to know that the risks have been adequately evaluated and that the degree of each risk is correctly assessed.

Publicity of risk assessments also ensures that policy decisions are based on the evaluation of the wider public interests and not on purely political risks to proceeding or not with policy options.

In many cases, members of the public, including academics, professional experts, civil society organisations and others, may be aware of and able to contribute to or comment on the way in which risks are assessed. This knowledge may be essential to ensuring that decisions are based taking all the facts into account.

Publication of risk assessments may generate public debate, but this is something that policy makers have to work with. Indeed, such public debate may lead to a greater public understanding of the context in which decisions are taken and of what has happened should the potential risks eventually become reality.

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

Access Info Europe takes the stance that the ministerial veto is unacceptable and should be abolished.

When it comes to decisions by the Information Commissioner, which is how the UK FOI Act originally intended the veto to be used according to Supreme Court decisions, public bodies have the alternative to the veto which is to appeal an Information Commissioner decision to the Information Tribunal and then to the courts.

The possibility of a veto over decisions of the courts is of particular concern. In any healthy democracy the decisions of judicial bodies should be final and binding. A ministerial veto over such decisions would raise serious problems about the rule of law. If such a veto were to be proposed by a less democratic state than the UK, it would undoubtedly meet with international criticism. The fact that the UK is a developed democracy does not permit it to push against established human rights principles.

When it comes to the right of access to information – which is a right as recognised by international human rights instances – this consideration also applies. Indeed, here there is a particular concern that the motives for invoking the veto could be purely political or 'face-saving'.

Access Info notes that comparative law in the realm of access to information does not support the existence of a ministerial veto, nor do international standards on the right of access to information.

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

Access Info Europe believes that UK's current system is functioning well and should not be tampered with as it ensures an effective administrative appeal process, the existence of an independent body charged with defending the right, and a proper level of judicial scrutiny.

Given that access to information is a fundamental human right is it essential that there be recourse to a body which can, rapidly and at low or no cost, evaluate violations of this right.

To this end, the Council of Europe Convention on Access to Official Documents specifically refers that, "*An applicant shall always have access to an expeditious and inexpensive review procedure*."

Access Info Europe notes that many of the new access to information laws have an oversight body such as an Information Commissioner or Information Commission whose decisions are mandatory. Examples include countries in Europe such as Croatia, Slovenia, and Serbia, and globlly Brazil, India, Indonesia, and Mexico, and a number of others.

The fact that more European countries, such as the Nordic countries, do not have binding decisions but rather recommendations by the Ombudsman or Commission is also due to the fact that they have much longer traditions of a legal regime for freedom of information than the UK, and that the decisions of the Ombudsman are normally followed, something which is also true of the recommendations of the European Ombudsman. In countries with new access to information regimes, there is a measurable difference in compliance with the right where there is a binding oversight body.

In all countries with access to information laws, requesters have the right to appeal to the courts when information is denied as for other violations of the right. The UK has the Information Tribunal, which has the huge benefit of being a specialised body, something that ensures that both requesters and public bodies receive a fair hearing and that all the arguments are given due consideration. As such it is a model that Access Info and other civil society organisations actively promote globally as a model to be followed.

The data from the call for evidence demonstrates a reasonable use of the appeals procedures, with relatively few requests needing to be appealed. Access Info Europe notes that statistics from the Call for Evidence also demonstrate that only 5.2 % of request result in internal reviews. This is similar to other jurisdictions such as the EU, where the EU Commission in its latest report stated that 4.8% of all the requests made led to an internal review. This number drops as the appeals move up through the appeals system, with the data from the Call for Evidence also showing that the system can effectively filter out decisions that should not be appealed (around 70% of such appeals at the first stage and Upper Tribunal stage are withdrawn, dismissed or refused from the outset).

In terms of the cost of processing appeals, it is consistent with access to information being a fundamental right that this not be something that requesters have to pay for. Furthermore, given the right to appeal to a judicial body, the cost of operating that judicial body has to be assumed by the government. Given the importance of the right of access to information in a democratic society, not just as a right in and of itself, but as a right that permits full exercise of freedom of expression as well as public participation in government, and also accountability of government activities, there is a huge public interest in ensuring that barriers of access to the appeals system are as low as possible. Permitting requesters to move up the appeals system without a lawyer and free of charge is consistent with the government's obligations to uphold this right and also sets a positive standard globally.

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

It is of concern to Access Info that the question of the burden of the right of access to information arises repeatedly in the UK. This question points to the fact that it has still not been fully internalised within government that this is a right of members of the public, consistent with 21st Century democratic values, and that it should be a priority to ensure that the infrastructure is in place in order to make it easy for public authorities to process and respond to requests.

There are various ways in which the burdens and costs of FOI laws can be reduced. They include ensuring good information management so that information is easy to find and deliver.

Access Info notes that in the Call for Evidence there is evidence of a levelling off of the quantity of requests year on year. Such stability enables government to plan ahead to make sure that enough resources are provided to deal with the numbers. There is no need to assume that requests will continue to rise and hence that the burden will increase. Indeed, the push towards proactive publication and open data should decrease the number of requests, without in any way invalidating the need for the FOI Act.

Hence, in order to help reduce times and the cost of accessing information in order to publish it for requesters, there should be investments and improvements made in the way information is stored by public bodies. The information should be stored effectively and in a manner than enables the searching of it quickly and easily. Good information management in reducing burdens and requesters should never be penalised for failures to manage information well by a public body.

As an example of the way in which the UK system is currently limiting transparency comes from Access Info's work on accessing information about respect for human rights. In a pan-European survey, we were given information by 9 European law and order authorities (including Northern Ireland) on the amounts of equipment and number of times used by the police in protest situations. Our requests to four English police forces however, led to refusals by the Metropolitan, Greater Manchester, and West Yorkshire police due to an alleged excessive cost of compiling the information. Only West Yorkshire Police estimated the actual amount of time needed, with other forces telling us it would simply take more than 18 hours of work, worth £450 at £25 an hour (the national threshold according to the three police forces). The Thames Valley Police provided some of the information requested. This leads Access Info to reaffirm the need to place the burden of finding information on public bodies - it is not acceptable to place the burden on requesters to narrow the scope of their request to compensate for inefficient searching of files by some public bodies when others are perfectly able to provide the information.

In order to further reduce the burden, the UK government could also embark on an even more ambitious proactive publication strategy, in specific areas of government activity that are the regular focus of requests such as decision making. In the case of Poland for example, documents and communications between the government and third parties are published online, as part of a live legislative footprint. A similar process in UK institutions could help to reduce the burden of answering such requests for example.

Access Info adds that the fact the local authorities have had their budgets reduced does not mean that they have any less requirement to need to answer access to information requests. The reduced budgets of local authorities should not be allowed to affect the exercise of a fundamental right like the right of access to information, as recognised by the European Court of Human Rights, the UN Human Rights Council, and other International Courts and Bodies worldwide.

Furthermore, and as recognised by international standards, and already covered by the current legislation on access to information held by UK public bodies, the only kinds of requests that can be declined are those that are vexatious in nature, although this must be narrowly interpreted. Hence if a particular request is genuinely unduly burdensome, it can be refused.

Focus on the Benefits

There could also be more effort made to evaluate the benefits of the FOIA in a number of ways. These include by exposing areas of government activity where there can be efficiency and cost saving and reduction in wastage. There is also the societal benefit of better policy making, with greater citizen participation.

The UK is a leading member of the Open Government Partnership and through this alliance has been promoting the benefits of opening up government information. These benefits range from stimulating entrepreneurship to saving lives (the example of data about medical mortality rates). Such benefits do not only flow from open data but also from information made available under access to information requests.

Fees

International standards on access to information are clear when it comes to the costs of access to information requests – they should be free to make and come at no cost to the requester, other than for the production of physical copies. Any other cost that is placed upon requesters when making requests is equal to charging them for something which they have already paid for as taxpayers. This double-taxation is not acceptable and is not in line with the vast majority of international practice. The following is a list of countries that do not charge fees for making access to information/FOI requests:

Albania, Angola, Antigua, Argentina, Armenia, Australia, Austria, Azerbaijan, Bangladesh, Belgium, Belize, Bosnia and Herzegovina Brazil, Bulgaria, Chile, Colombia, Cook Islands, Croatia, Czech Republic, Denmark, Dominican Republic, Ecuador, El Salvador, Estonia, Ethiopia, Finland, France, Georgia, Germany, Greece, Guatemala, Guinea, Guyana, Honduras, Hungary, Iceland, Indonesia, Ireland, Italy, Jamaica, Jordan, Kosovo, Kyrgyzstan, Latvia, Liberia, Liechtenstein, Lithuania, Macedonia, Mexico, Moldova, Mongolia, Montenegro, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Panama, Peru, Poland, Portugal, Romania, Russia, Rwanda, Serbia, Slovakia, Slovenia, South Korea, Sweden, Switzerland, Thailand, Trinidad, Tunisia, Turkey, Ukraine, United Kingdom, United States of America, Uruguay, Yemen.

The following is a list of countries that DO charge fees for making access to information/FOI requests

Canada (One off request fee is Canadian $5 which is about £2.47), China, India (a very low rate that can be waived for impecunious requesters), Israel, Japan, Malta (often not applied in practice as is optional for public bodies), Nepal, Pakistan, Saint Vincent and the Grenadines, South Africa, Taiwan, Tajikistan, Uganda, Uzbekistan, Zimbabwe

As demonstrated, the vast majority of countries and the common practice internationally is to not charge fees to make access to documents requests. It was in recognition of this that Ireland recently dropped charges for FOI requests. The UK should not buck this trend and introduce any fees for making requests, but rather should assess ways in which information can become public even more rapidly and cheaply, through good information management and increased proactive publication.

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Action against Medical Accidents (AvMA)

Introduction

Action against Medical Accidents (AvMA) is the UK charity for patient safety and justice specialising in advice and support for patients and their families affected by medical accidents. Since its inception AvMA has provided advice and support to over 100,000 people affected by medical accidents. Our services to patients include a helpline, a casework service and representation at inquests. A key concern for patients who have been harmed is ensuring that lessons are learnt so that action can be taken to prevent a repetition of what happened to them. AvMA's work with patients and their families directly informs our policy and campaigning work.

The evidence would suggest that the review being undertaken by the Independent Commission on Freedom of Information is ill-founded. Notwithstanding this is referred to as an 'independent review', it is apparent from the document, that the focus of the review is on restricting access with no reference being made to how access might be improved or greater transparency achieved. We believe that the Freedom of Information Act as it currently operates provides more than adequate protection for public bodies and that any move to restrict access would be a retrograde step and go against the basic tenets of the Act as set out in: 'Your right to know: the Governments proposals for a Freedom of Information Act.' [1] [1997]:

> *'Unnecessary secrecy in government leads to arrogance in governance and defective decision-making. The perception of excessive secrecy has become a corrosive influence in the decline of public confidence in government. Moreover, the climate of public opinion has changed; people expect much greater openness and accountability from government that they used to.'*

The Commission appears to ignore the body of evidence presented as part of the detailed post-legislative review of the Freedom of Information Act 2000 undertaken by the Justice Committee in 2012. The Justice Committee weighed up all the evidence but concluded there were no grounds for restricting FOI rights and if anything recommended enhancing rights under the Act.

The Justice Committee explored in some detail the potential burdens placed on authorities but on balance, the Committee confirmed that the benefits of openness and transparency outweighed the potential costs and that authorities themselves could relieve that burden to a greater or lesser extent by improving their processes for releasing information and by pro-actively making more data publicly available. The Justice Committee came to the view that more could be done to achieve greater openness. Therefore any suggestion as implied by the current review to restrict access goes against the findings of the Justice Committee and their detailed enquiry and would risk a significant diminution of accountability:

> ***'Openness***
> *1. We agree with the Ministry of Justice that the Act has contributed to a culture of greater openness across public authorities, particularly at central Government level which was previously highly secretive. We welcome the efforts made by many public officials not only to implement the Act but to work with the spirit of FOI to achieve greater openness. Our evidence shows that the strength of the new culture of openness is, however, variable and depends on both the type of organisation and the approach to freedom of information of the individual public authority.*
> ***Transparency***
> *2. While proactive transparency clearly has the potential to reduce the burden of responding to information requests on hard-pressed public authorities, the proactive publication of data cannot substitute for a right to access data because it is impossible for public bodies to anticipate the information that will be required. Nevertheless, proactive*

[1] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/272048/3818.pdf

> *publication is important in achieving the primary objectives of the Act of openness and transparency.'*
>
> Recommendations of the Justice Committee review in 2012

As indicated above, the Review Commission has limited their public consultation to very narrowly defined questions which are focused on public bodies and where additional restrictions might be beneficial to those bodies to relieve them of the perceived burden of freedom of information (FOI) requests.

What is also of concern is that the questions fail to specifically address some key matters included within the body of the consultation document but which would have a very damaging and limiting effect on the ability to seek disclosure under the FOI Act.

In particular, question 6 deals the burden placed on public authorities. It is of some concern that there is no explicit reference within the questions to the introduction of fees but an exploration of fees is dealt with in some detail within the body of the document.

If the introduction of fees is under consideration, given the 'chilling effect' this is likely to have on the ability of individuals and organisations to make FOI requests as evidenced by the impact of the introduction of fees in Ireland [2], this should have been explicitly and openly addressed within the consultation questions.

Freedom of Information requests undertaken by AvMA

As part of AvMA's patient safety work, AvMA has undertaken research where FOI requests have been fundamental to the investigation. Making FOI requests is not something that we do lightly but can be an essential tool for identifying issues which may directly impact on patients and their families and the quality of the care they receive.

It is AvMA's experience that when we have made FOI requests, it is not uncommon for the public authority to fail to provide the information requested. The reasons given are either that the information is not held in the form requested or that it would be too costly to retrieve. So even in the absence of specific exemptions, public authorities are already able to exercise what is in effect a veto.

Patient Safety Alerts

An example of a key piece of research undertaken by AvMA using FOI requests was in relation to Patient Safety Alerts.

Patient safety alerts were introduced by the NHS to rapidly alert healthcare organisations to risks that had been identified to patient safety and to provide guidance on preventing future incidents that may lead to harm or death. These incidents are identified through the NHS's reporting system for patient safety incidents. The patient safety reports are analysed with the aim of identifying risk areas and common themes that can then be disseminated back to healthcare providers in the form of Patient Safety Alerts. The Patient Safety Alerts provide both warnings as well as potential solutions to prevent serious harm. The Alerts are only sent to NHS trusts for whom they are relevant (for example mental health or learning disability trusts would be excluded if the alert was not relevant to them). Examples of alerts include misplacing of naso-gastric tubes, problems with high-risk drugs, and operating on the wrong patient or wrong part of the body.

In 2010, AvMA became increasingly concerned at the absence of an effective system for monitoring compliance with the Patient Safety Alerts despite the fact that the alerts involved critical risks to patient safety which often warranted an immediate change in practice. All alerts were issued with a deadline for compliance. Although NHS trusts were required to notify the Central Alert System when they had completed the actions in the relevant patient safety alert, the system was based on self-declaration and there was no evidence of pro-active follow up in the event a Trust failed to report back.

[2] http://www.oic.gov.ie/en/News/Speeches-Articles/2014-/has-the-FOI-regime-achieved-expectations.html

AvMA therefore made a FOI request to the Central Alert System administered by the Department of Health. AvMA's analysis of the data identified 2,124 instances of non-compliance. This led to a campaign by AvMA to ensure compliance was more effectively enforced. This included FOI requests to the Care Quality Commission to determine what action had been taken with respect to individual Trusts who had been identified as failing to comply with the Patient Safety Alerts. In a subsequent report produced by AvMA in 2011, the numbers of instances of non-compliance had dropped to 455 and in 2014, to 141. Although there has been a significant reduction in instances of non-compliance, every alert not complied with represents a serious potential risk to patients. AvMA will continue to monitor the situation but it is very conceivable that without the research undertaken by AvMA using FOI requests, this issue would not have come to light or been addressed, leaving patients exposed to avoidable risk of serious harm or death.

Consultation questions

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

AvMA believes that the protections afforded under the present Freedom of Information Act are sufficient. Any curtailment or infringement of rights under the current Act would be a retrograde step and would have the effect of making public bodies far less accountable. The following is a quote from the Justice Select Committee report of 2012:

> *'During the Second Reading of the Freedom of Information Bill in December 1999, Jack Straw MP, told the House that the Government anticipated a widespread culture change as a result of the new statutory right to access information:*
> *Unnecessary secrecy in Government and our public services has long been held to undermine good governance and public administration [...] the Bill will [...] help to transform the culture of Government from one of secrecy to one of openness. It will transform the default setting from "this should be kept quiet unless" to "this should be published unless". By doing so, it should raise public confidence in the processes of government, and enhance the quality of decision making by the Government.' [3]*

As set out above, it is AvMA's experience that public bodies already exercise considerable latitude with respect to the requests that they refuse to comply with. If anything, this highlights the need to strengthen rights to disclosure under the Act to ensure greater compliance by public bodies.

Access to internal deliberations and the information on which decisions are based, is essential to good governance and transparency. Public bodies should be moving to a position where such information is openly available. As it stands, the public interest test should not be perceived as a threat to public bodies. The fact that information is ordered to be disclosed on the basis of 'public interest' speaks for itself – that it is in the public interest. To remove the public interest test, would significantly reduce accountability and the opportunity to learn from mistakes in decision making and policy.

Question 2: What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?

As above (Q1), we believe that the protections afforded under the present Act are sufficient. As set out in the Justice Committee Review of 2012:

> *We are not able to conclude, with any certainty, that a chilling effect has resulted from the FOI Act. On the one hand, the Constitution Unit's research—the most in-depth available—suggests it has only a marginal effect. On the other hand, a range of distinguished participants who are, or who have been recently, at the heart of the policy-making process attest that it is a problem. We see no reason why former senior ministers and officials in particular would flag this up as a concern if they did not genuinely believe it to be so, and we think their views are of value. However, so too of value is the increased openness introduced by the Act and, especially, the power of individuals to exercise their right to information proactively, rather than having public authorities decide what they will disclose, when and to whom, even when acting with the best intentions. Equally, there are other reasons why some officials and politicians may be increasingly reluctant to create paper records, not least the increasing possibility that some form of public inquiry may lead to the subsequent publication of minutes and records. That is why we are cautious about restricting the rights conferred in the Act in the absence of more substantial evidence. (Paragraph 200)*
> *Given the uncertainty of the evidence we do not recommend any major diminution of the openness created by the Freedom of Information Act, but, given the clear intention of Parliament*

[3] http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/9605.htm

> *in passing the legislation that it should allow a "safe space" for policy formation and Cabinet discussion, we remind everyone involved in both using and determining that space that the Act was intended to protect high-level policy discussions. We also recognise that the realities of Government mean that the ministerial veto will have to be used from time to time to protect that space. (Paragraph 201)*

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

As above, we believe the present protections under the Act are sufficient and should not be extended. If lessons are to be learnt where poor decisions have been taken which have gone against the public interest, the process by which those decisions have been arrived at should be open to scrutiny at the earliest stage possible. Failure to carry out an effective risk assessment will often underpin poor policy decisions and the presumption should therefore be on releasing not withholding this information.

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

The Supreme Court decision to overrule a recent veto is an important check on the misuse of the ministerial veto. Such decisions should rest with the tribunals and courts and not be put in the hands of those with a vested interest in withholding information. There are sufficient protections already in place and we would argue against any extension to the current powers of veto.

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

The current appeals system appears to be generally weighted in favour of public bodies. The outcome of appeals would suggest that the current arrangements provide more than adequate protection.

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

AvMA believes that the burden is justified in the interests of open government and could in fact be greatly reduced if public bodies were to:

Operate with greater transparency and make more data publicly available
Make better use of the more sophisticated electronic data storage systems that are now readily available, making it far easier to organise and store data in a format that would make FOI requests much easier to comply with. This would also assist the organisation in its own operation but does require authorities to develop a more systematic approach to data storage;
Have more streamlined process for dealing with FOI requests.

Fees
Whilst not specifically addressed within the consultation question, it is evident from the text of the document that consideration is being given to the introduction of fees. AvMA believes that even a modest fee would have a very significant impact on the ability of individuals and organisations to make FOI requests and in so doing, undermine the very purpose of the Act. As set out in the Justice Committee recommendations in 2012:

'Costs and fees

7. The Freedom of Information Act is a significant enhancement of our democracy. It gives the public, the media and other parties a right to access information about the way public institutions in England and Wales are governed, and the way taxpayers' money is spent. Governments and public authorities can promote greater transparency but, without FOI requests, decisions on what to publish will always lie with those in positions of power. FOI has costs, but it also creates savings which accrue from the disclosure of inappropriate use of public funds or, more importantly, fear of such disclosure. (Paragraph 53)'

12. While we recognise that there is an economic argument in favour of the freedom of information regime being significantly or wholly self-funding, fees at a level high enough to recoup costs would deter requests with a strong public interest and would defeat the purposes of the Act, while fees introduced for commercial and media organisations could be circumvented. (Paragraph 85)'

AvMA would oppose the introduction of fees for FOI requests on the basis that this would directly undermine the purpose of the Act and will impose unacceptable financial burdens on charities such as AvMA, using FOI applications in the public interest.

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Appendix 1

Post-legislative scrutiny of the Freedom of Information Act 2000[4] **- Justice Committee Report – Conclusions and Recommendations** (Published 3rd July 2012)

Conclusions and Recommendations

Openness

We agree with the Ministry of Justice that the Act has contributed to a culture of greater openness across public authorities, particularly at central Government level which was previously highly secretive. We welcome the efforts made by many public officials not only to implement the Act but to work with the spirit of FOI to achieve greater openness. Our evidence shows that the strength of the new culture of openness is, however, variable and depends on both the type of organisation and the approach to freedom of information of the individual public authority.
(Paragraph 17)

Transparency

While proactive transparency clearly has the potential to reduce the burden of responding to information requests on hard-pressed public authorities, the proactive publication of data cannot substitute for a right to access data because it is impossible for public bodies to anticipate the information that will be required. Nevertheless, proactive publication is important in achieving the primary objectives of the Act of openness and transparency. (Paragraph 31)

Government must ensure that the freedom of information regime and the transparency agenda work together to ensure best value for money. Individual initiatives in different departments must be examined before implementation in the light of existing policy to see whether they constitute the most effective approach. Equally, existing initiatives should also be assessed after a period of time to ensure they both offer value for money and have not produced unintended consequences. (Paragraph 32)

Increasing public confidence in public authorities

Our evidence on the impact of the Act on trust generally agreed with the findings of the Memorandum. Whether the Act will contribute to an increase in public confidence in the Government, Parliament and other bodies is primarily dependent on the type of information which is published following a request. The majority of people will receive information published under the Act through the media. Evidence of irregularities, deficiencies and errors is always likely to prove more newsworthy than evidence that everything is being done by the book and the public authority is operating well. In these circumstances, the expectation of a substantial increase in public trust following the introduction of the Act was always going to prove unrealistic. (Paragraph 37)

Greater release of data is invariably going to lead to greater criticism of public bodies and individuals, which may sometimes be unfair or partial. In our view, however this, while regrettable, is a price well worth paying for the benefits greater openness brings to our democracy. (Paragraph 38)

Improving public participation in decision making

Having received limited evidence on the impact of the Act on increased public participation in decision making, we would not seek to disagree with the findings of the Constitution Unit that this objective has not been achieved, at least in central Government. We welcome, however, the suggestion that, while the Act may not have had a direct impact on increasing public participation in decisions made in the NHS it has assisted in a move towards a culture of greater public involvement.
(Paragraph 43)

Costs and fees

The Freedom of Information Act is a significant enhancement of our democracy. It gives the public, the media and other parties a right to access information about the way public institutions in England and Wales are governed, and the way taxpayers' money is spent. Governments and public authorities can

[4] http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/9602.htm

promote greater transparency but, without FOI requests, decisions on what to publish will always lie with those in positions of power. FOI has costs, but it also creates savings which accrue from the disclosure of inappropriate use of public funds or, more importantly, fear of such disclosure. (Paragraph 53)

Developing a methodology whereby subjective activities such as reading and consideration time could be included in the 18 hour time limit does not seem to us to be a feasible proposition. Such activities are overly dependent on the individual FOI officer's abilities, introducing an element of inconsistency into the process that undermines the fundamental objective of the Act, that everyone has an equal right to access information. (Paragraph 60)

We recognise, however, that complying with its duties under the Act can be a significant cost to a public body. A standard marginal decrease in the 18 hour limit may be justifiable to alleviate the pressure on hard-pressed authorities, particularly in the context of increasing numbers of requests. We would suggest something in the region of two hours, taking the limit to 16 hours rather than 18, but anticipate the Government would want to carry out further work on how this would affect the number of requests rejected under section 12, and the corresponding weakening of the right to access information. (Paragraph 61)

The Act operates on the basis of requester blindness. As a result developing a way to charge requesters who commercially benefit from the information they receive from public authorities is difficult, if not impossible. Any requirement that requestors identify themselves could easily be circumvented by requestors using the name of a friend, family member or other person. Attempts to police such a system, either by public authorities or the Information Commissioner, would be expensive and likely to have a limited effect. (Paragraph 81)

It must also be recognised that the focus of the Act is whether the disclosure of information is justified, not who is asking for that information. If the statutory scheme deems it right that data should be released then it is irrelevant who is asking for publication; release of such information is to all, not just the individual requestor. Nevertheless it can be argued that someone seeking to exercise freedom of information rights should be willing for the fact they have requested such information to be in the public domain; we therefore recommend that where the information released from FOI requests is published in a disclosure log, the name of the requestor should be published alongside it. (Paragraph 82)

While we recognise that there is an economic argument in favour of the freedom of information regime being significantly or wholly self-funding, fees at a level high enough to recoup costs would deter requests with a strong public interest and would defeat the purposes of the Act, while fees introduced for commercial and media organisations could be circumvented. (Paragraph 85)

Any future reconsideration of the economic argument for charging would need significantly better data on the number of requests made under the Act and the costs incurred in responding to them. (Paragraph 86)

Lessons to be learn from local government

Evidence from our witnesses suggests that reducing the cost of freedom of information can be achieved if the way public authorities deal with requests is well-thought through. This requires leadership and focus by senior members of public organisations. Complaints about the cost of freedom of information will ring hollow when made by public authorities which have failed to invest the time and effort needed to create an efficient freedom of information scheme. (Paragraph 90)

Compliance with time limits

We were pleased to hear relatively few complaints about compliance with the 20 day response time. We believe that the 20 day response time is reasonable and should be maintained. (Paragraph 94)

Internal reviews

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

Other remedies for non-compliance with time limits

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

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

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

Destroying records-enforcement of section 77

The summary only nature of the section 77 offence means that no one has been prosecuted for destroying or altering disclosable data, despite the Information Commissioner's Office seeing evidence that such an offence has occurred. We recommend that section 77 be made an either way offence which will remove the limitation period from charging. We also recommend that, where such a charge is heard in the Crown Court, a higher fine than the current £5000 be available to the court. We believe these amendments to the Act will send a clear message to public bodies and individuals contemplating criminal action.(Paragraph 121)

Frivolous requests

It is apparent from witnesses that frivolous requests are a very small problem, but can be frustrating. There is a case for adding frivolous requests to the existing category of vexatious requests which can be refused, but such requests can usually be dealt with relatively easily, making it hard to justify a change in the law. (Paragraph 135)

The attitude of requestors

We believe it would be helpful for public authorities to indicate in a response letter how much responding to the request has cost, in approximate terms. We recommend the Information Commissioner consider the easiest way for authorities to arrive at such a figure. We think this unlikely to deter genuine inquiries but it will at least highlight to irresponsible users of the Act the impact of their actions. (Paragraph 138)

The safe space, exemptions and the ministerial veto

Freedom of Information brings many benefits, but it also entails risks. The ability for officials to provide frank advice to Ministers, the opportunity for Ministers and officials to discuss policy honestly and comprehensively, the requirement for full and accurate records to be kept and the convention of collective Cabinet responsibility, at the heart of our system of Government, might all be threatened if an FOI regime allowed premature or inappropriate disclosure of information. One of the difficulties we have faced in this inquiry is assessing how real those threats are given the safeguards provided under the current FOI legislation and what, if any, amendments are required to ensure the existence of a 'safe space' for policy making.
(Paragraph 154)

It is evident that numerous decisions of the Commissioner and the Tribunal have recognised the need for a 'safe space'. However, equally evident is the fact that in some cases their decision that information should be disclosed has challenged the extent of that safe space. We accept that for the 'chilling effect' of FOI to be a reality, the mere risk that information might be disclosed could be enough to create unwelcome behavioural change by policy makers. We accept that case law is not sufficiently developed for policy makers to be sure of what space is safe and what is not. (Paragraph 166)

While we believe the power to exercise the ministerial veto is a necessary backstop to protect highly sensitive material, the use of the word exceptional when applying section 53 is confusing in this context. If the veto is to be used to maintain protection for cabinet discussions or other high-level

policy discussions rather than to deal with genuinely exceptional circumstances then it would be better for the Statement of Policy on the use of the ministerial veto to be revised to provide clarity for all concerned. We have considered other solutions to this problem but, given that the Act has provided one of the most open regimes in the world for access to information at the top of Government, we believe that the veto is an appropriate mechanism, where necessary, to protect policy development at the highest levels. (Paragraph 179)

The Constitution Unit's research on FOI is the first major piece of research of its kind and is a valuable contribution to the debate around FOI. In its consideration of the chilling effect, the Unit broadly concluded that the effect of FOI appeared negligible to marginal. We note this finding and have taken it into account in our deliberations. However, we have also been cognisant of two related points: while respecting the overall conclusions, we note that the research did feature a number of interviews with participants which suggested behaviour had changed, at least in part because of FOI; secondly, as the Unit itself notes, if the chilling effect does exist it would, by its nature, be very difficult to find hard, objective evidence of it. That is why, on this subject, it is necessary at least to consider anecdotes and impressions, albeit they might lack the academic rigour on which we would ideally like to base conclusions. (Paragraph 190)

If the most senior officials in Government are concerned about the effect of the Act on the ability to provide frank advice they should state explicitly that the Act already provides a safe space, and that the Government is prepared to use the ministerial veto to protect that space if necessary. (Paragraph 198)

Since the passing of the Act other ways in which minutes and records are likely to be made public have developed which are likely to lead to greater publicity for the information disclosed than if it had been published under the right to access information. (Paragraph 199)

We are not able to conclude, with any certainty, that a chilling effect has resulted from the FOI Act. On the one hand, the Constitution Unit's research—the most in-depth available—suggests it has only a marginal effect. On the other hand, a range of distinguished participants who are, or who have been recently, at the heart of the policy-making process attest that it is a problem. We see no reason why former senior ministers and officials in particular would flag this up as a concern if they did not genuinely believe it to be so, and we think their views are of value. However, so too of value is the increased openness introduced by the Act and, especially, the power of individuals to exercise their right to information proactively, rather than having public authorities decide what they will disclose, when and to whom, even when acting with the best intentions. Equally, there are other reasons why some officials and politicians may be increasingly reluctant to create paper records, not least the increasing possibility that some form of public inquiry may lead to the subsequent publication of minutes and records. That is why we are cautious about restricting the rights conferred in the Act in the absence of more substantial evidence. (Paragraph 200)

Given the uncertainty of the evidence we do not recommend any major diminution of the openness created by the Freedom of Information Act, but, given the clear intention of Parliament in passing the legislation that it should allow a "safe space" for policy formation and Cabinet discussion, we remind everyone involved in both using and determining that space that the Act was intended to protect high-level policy discussions. We also recognise that the realities of Government mean that the ministerial veto will have to be used from time to time to protect that space. (Paragraph 201)

The pre-publication exemption in Scotland

We recommend section 22 of the Act should be amended to give research carried out in England and Wales the same protection as in Scotland. While the extension of section 22 will not solve all the difficulties experienced by the universities in this area, we believe it is required to ensure parity with other similar jurisdictions, as well as to protect ongoing research, and therefore constitutes a proportionate response to their concerns. Whether this solution is sufficient and works satisfactorily should be reviewed at a reasonable point after its introduction. (Paragraph 214)

The Act and the Animal (Scientific Procedures) Act 1986

As section 24 of the Animal (Scientific Procedures) Act 1986 remains under review by the Home Office following changes in European law we make no recommendation as to how the Government should act but will consider the outcome of the review when it is received. It should not be necessary

to amend the Freedom of Information Act to meet the concerns of universities in this area. (Paragraph 221)

We strongly urge universities to use to the full the protection that exists for the health and safety of researchers in section 38 of the Act, and expect that the Information Commissioner will recognise legitimate concerns. No institution should be deterred from carrying out properly regulated and monitored research as the result of threats; this was not Parliament's intention in passing the Act and we are happy to reiterate that that remains the position. (Paragraph 222)

Publicly and privately-funded functions

We do not have sufficient evidence to come to a conclusion on whether section 43 operates effectively to protect the competitiveness of public bodies when competing for public sector contracts. However, there is a strong public interest in competition between public and private sector bodies being conducted on a level playing field to ensure the best outcome for the taxpayer. With the increasing contracting out of public services we recommend the Government keeps this issue under review, and if public sector bodies are found to be at a disadvantage we expect either that section 43 will be amended or another model found to protect such commercial interests. (Paragraph 231)

We agree with the Information Commissioner that universities are an important part of the public realm and we believe that they are generally regarded by the public and by those working in universities as important public institutions. We do not therefore recommend that universities should be removed from the jurisdiction of the Act. We make separate recommendations in paragraph 214 to deal with potential problems the Act may create for university research. (Paragraph 232)

Private companies and public funding

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

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

Action on Smoking and Health

About ASH

Action on Smoking and Health ("ASH") is a campaigning health charity that works to eliminate the harm caused by tobacco. It was established in 1971 by the Royal College of Physicians. The organisation is headed by its Chief Executive, Deborah Arnott, and is governed by a Board of Trustees. Its Patron is HRH the Duke of Gloucester. ASH provides the secretariat for the All Party Parliamentary Group on Smoking and Health. Its funding is provided principally by Cancer Research UK and the British Heart Foundation. ASH has also received specific project funding from the Department of Health for work on the implementation of Government tobacco policy.

General Considerations about the FOI Act

ASH strongly supported the introduction of the Freedom of Information Act 2000 (FOIA). The Act marked an important step away from the traditionally opaque and secretive traditions of the British Government and civil service. It also represented an important step towards control and adequate regulation of the tobacco industry, which for many years had been engaged in private lobbying of Ministers and officials, with a view to frustrating legislation and public policy designed to reduce tobacco consumption.

ASH makes FOIA requests quite frequently, perhaps up to ten times a year. In the recent past we have used freedom of information requests to establish the nature and extent of tobacco industry lobbying of Government over the introduction of standardised packaging of tobacco products and over action to tackle the illicit tobacco trade. The information supplied under these requests has certainly been important in pressing the case for standardised packaging, leading to Parliament approving regulations in March 2015. In general, we consider that the FOIA helps public health organisations to engage with Government on tobacco policy on more equal terms with the major tobacco manufacturers and the "front groups" they fund, which of course have vastly greater financial resources than organisations working on tobacco control. We would therefore strongly oppose any changes to the FOIA which would weaken its provisions and make it more difficult for us to monitor and report on tobacco industry lobbying activity.

The United Kingdom is a Party to the World Health Organisation Framework Convention on Tobacco Control (FCTC), the world's first public health treaty[5]. Article 5.3 of the FCTC states that: "in setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law".

Guidelines on the application of Article 5.3 were approved by the FCTC Conference of the Parties at its third session in November 2008[6].

These require Parties to the FCTC not to:

- Treat tobacco corporations as "stakeholders" in public health policy.
- Invest in the tobacco industry.
- Partner with tobacco corporations to promote public health or other purposes.
- Accept the tobacco industry's 'corporate social responsibility' schemes

There are a number of prohibited actions under the Guidelines, including:

- Partnerships, and non-binding or non-enforceable agreements between tobacco industry and governments.
- Voluntary contributions by tobacco industry to governments.
- Tobacco industry-drafted legislation or policy, or voluntary codes as substitutes for legally enforceable measures.
  Tobacco industry representation on government tobacco control bodies or FCTC delegations.

[5] Framework Convention on Tobacco Control: English text, World Health Organisation
[6] Guidelines on Article 5.3 of the FCTC: English text, World Health Organisation

There are also transparency measures established under the Guidelines, including:

- Transparency of government interactions with the tobacco industry, through public hearings, public notice of interactions, and disclosure of records.
- Disclosure of tobacco industry activities, including: production, manufacture, market share, revenues, marketing expenditures, and philanthropy
- Disclosure or registration of tobacco industry affiliated entities, including lobbyists.
- Disclosure of current or previous work with tobacco industry by applicants for government positions related to health policy, and of plans to work for tobacco industry by former public health officials.

The FOIA provides an essential mechanism to ensure that the UK Government is meeting its obligations under Article 5.3. It enables ASH and other tobacco control organisations to request and receive information from Government which establishes its conformity or otherwise with Article 5.3 and the accompanying guidelines. An example of our use of FOIA was to establish the extent to which the lobbying firm Crosby Textor, which had been retained by Philip Morris International, was in contact with Ministers and officials over the legislation on standardised tobacco packaging.

Tobacco control work proceeds on the principle that any intervention, including proposed legislation and other Government policies and initiatives, must be evidence based. Tobacco control organisations do not propose new policies without first establishing their predictable positive effects, based on robust evidence. The FOIA provides us with an essential mechanism for ensuring that Government consideration of and decisions about tobacco control policy is also evidence based, and not unduly influenced by industry lobbying. It can and should be used to ensure that the information on which Governments rely for their decisions on tobacco control policy is both accurate and appropriate.

ASH is therefore strongly opposed to any amendments to the FOIA which would provide a means for Governments and public bodies to refuse to disclose relevant information relating to tobacco control policy formation and its practical implementation. In the event that such amendments were placed before Parliament we would be obliged to inform parliamentarians of the possible negative implications for our work.

It should be noted that the FOIA is also used by the tobacco industry and its paid lobbyists and researchers, generally to try to disrupt policy formation and other initiatives relating to tobacco control, as well as to support legal challenges, including the current industry case against the UK Government over standardised packaging. Numerous public bodies in the health sector have received FOIA requests of this kind. However, the FOIA is a tool of transparency which supports free democratic accountability and debate and it can be used by any individual or organisation. We regard the tobacco industry's use of FOIA requests as a price well worth paying in order to ensure that appropriate information is placed in the public domain.

Consultation Questions

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

Question 2: What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?

Taken together, these questions imply that the Commission may make proposals intended to provide wider exemptions from the FOIA for information related to policy formation and implementation. In particular "information which relates to the process of collective Cabinet discussion and agreement" suggests that a wide range of Cabinet papers and supporting information could be kept confidential, regardless of whether there is a public interest in their disclosure. We note with alarm that a member of the Commission has already stated his view that there should be "a class exemption, full stop, that

exempts information if it relates to the formulation of development of Government policy". This could allow exemption for information in at least the following categories:

- Research reports
- Opinion polls
- Statistics
- Scientific and technical information
- Contacts with lobbyists, including those from the tobacco industry and its surrogates, and
- Consultation responses.

ASH would regard such a wide exemption as retrograde and unjustified.

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

This question appears to cover cases such as the refusal of the Government to disclose NHS Strategic and Transitional Risk Registers during the passage of the Health and Social Care Act 2008. Following FOI requests, the Information Commissioner recommended release of both registers. The Department of Health appealed to the First-tier Tribunal, which recommended the release of the Transitional but not the Strategic Register. On 8 May 2012, the Secretary of State for Health issued a certificate blocking release of the Transitional Register.

Risk registers of this kind are likely to contain observations about risk that may be open to misrepresentation – an accurate assessment of risk must include both the nature of the risk and the likelihood of the relevant events occurring. However, this problem is best mitigated by appropriate drafting of register entries and by the Government or public body framing publication in an appropriate way. Keeping assessments of risk confidential generally does not help in the passage of good legislation. The Health and Social Care Act might have been substantially improved if the registers had been published to inform Parliamentary debate, and it is hard to avoid the conclusion that the veto on publication had more to do with avoiding political embarrassment than with protecting properly confidential information.

In the case of the NHS risk registers, the existing legislation produced a result that was arguably too restrictive; it certainly does not provide grounds for restricting the publication of such information even further.

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

ASH does not believe that reinforcing a right of veto for the executive would be an improvement on the present legislation. The courts, from the First-tier Tribunal up to the Supreme Court, should have oversight when a veto is applied. Good grounds for a veto do not include the protection of the executive – or the Crown – from public embarrassment. The right of veto by Ministers, which already exists in the FOIA, should be applied only in extremely restricted circumstances. Ministers should not be able to overturn a court decision simply because they disagree with the court's decision, and have a different view on what constitutes the public interest.

We therefore consider the claim in the consultation document that the judgement of the Supreme Court in R (on the application of Evans) and another (Respondents) v Attorney General (Appellant) "raised serious questions about the constitutional implications of the veto, the rule of law, and the will of Parliament" to be grossly overstated.

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

ASH considers the current enforcement and appeal system to be satisfactory.

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

It is true that the FOIA places an administrative burden on public authorities. However, we consider this to be more than compensated for by the better development and implementation of public policy that follows the introduction of a more transparent system of decision-making. We do not consider that a total number of requests to central Government bodies of around 45,000 to 50,000 a year is excessive. We also note from the IPSOS-Mori research for the Ministry of Justice referenced in the call for evidence that the total cost to central Government bodies of processing such requests was around £8.5 million in 2012, which represented about 0.0015% of total central Government spending in hat year[7]. Again, we consider this far from excessive in view of the great gains in transparency and accountability secured by the FOIA.

We would therefore strongly oppose any proposal to impose fees or charges on FOIA applications. This would simply privilege large and well-funded organisations using the FOIA at the expense of small organisations and individuals. In the case of tobacco control, such charges would benefit the tobacco industry at the expense of organisations and individuals working on public health. We would also oppose making it easier for public bodies to refuse FOIA requests on cost grounds.

[7] UK public spending 2012

Aldersgate Partners LLP

Dear Sirs,

Response to Public Consultation on FOI

We have the honour to respond to the Independent Commission on Freedom of Information's request for consultation about the Freedom of Information Act and its operation.
Our qualifications and experience of FOI Aldersgate Partners is a management consulting firm that among other things specializes in information and valuation. We advised many public bodies on FOI and assisted in training more than 10,000 public servants in FOI when the Act was coming into force. At that time, we conducted extensive work with many public bodies to assist them in preparing for FOI, including:

- Atomic Weapons Establishment
- Cambridgeshire Constabulary
- Harrow Council
- HM Treasury
- Inland Revenue
- Ministry of Defence
- Police Service of Northern Ireland
- Suffolk Constabulary

Our team that worked on FOI was highly experienced and qualified, including a full professor, several PhDs, several holders of then current developed vetting or security clearance, and various professional qualifications, including law, engineering and accountancy. We have submitted over 150 FOI requests since then, mainly in relation to client work. This letter is based on our experience and observations.

Seven points about the FOI Act

1. FOI is the modern counterpart of universal suffrage and democracy—FOI is a vital part of a free and civilized modern society. The intent of the Act is to ensure that public information is made public. This is surely right and good.
2. The inconveniences and costs that opponents of FOI cite are, in the great majority of cases in our experience, grossly exaggerated. In the private sector, the Data Protection Act has become the excuse of choice for an incompetent or lazy or plainly uncooperative counterpart to refuse to do something legal and uncomplicated. Similarly, in the public sector, there is a large body of people who make a mountain out of a molehill and use the cost of the mountain as an argument against FOI. In at least 80% of cases where our FOI requests have been refused on cost grounds, we are reasonably certain that the costs given result mainly from incompetent management and from being poorly organized, not from necessary costs.
3. It is a well known fact that the State is poor at enforcing most laws, especially administrative measures, and most particularly the State is poor at following such laws itself. Enforcement is difficult. The squeals from some civil servants and politicians about FOI is a measure of its effectiveness in this regard. MPs expenses are a well know example of this. If an ordinary person steals, they may well go to prison; if an MP peculates, there is nothing but FOI in practice to stop them. The fact that so many MPs are still in denial about expenses is proof of this.
4. It is a fundamental principal of property rights that the public, having paid for information to be created, should have access to it, subject to reasonable precautions in matters of security etc.
5. Our experience is that most of those who oppose FOI are people who have not come to terms with IT and that IT is now a normal part of working life. They are the people who wish IT could be disinvented. They have on the whole not made a sincere effort to upgrade their own skills and attitudes.
6. Most of the problems that are said to exist in FOI are not real, but stem from a failure to understand the Act, both what it does require and what and how it exempts information from the Act.
7. Compliance with the Act has overwhelming benefits. Opponents have focused on costs, which they also exaggerate, but there are overwhelming benefits. Compliance forces one to organize and manage information well. We live now in an information society and our wealth comes from an information economy. FOI forces the public sector to manage information efficiently

and effectively. Complying with FOI means that the official and the organization will know what information is held, where it is, and why it is held. This will help protect information from our enemies and deploy it in the fight against terrorism, and in more mundane activities.

Responses to your questions

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

Our experience inside and outside public bodies is that no changes are necessary. The Act allows authorities to delay publications, for example, in an extraordinarily simple way—by saying so in a publication scheme. The failure of so many critics to use this and other provisions of the Act is almost beyond belief.

Question 2: What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?

No special treatment is required. Discussions can be minuted in two parts, for normal publication under FOI, and exempt.

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

Is there candid assessment of risk right now? Is it not anyway gamed? The Act in any case already contains provisions for withholding this information, it is simply not being used often enough.

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

No. The executive cannot be trusted. It will in effect use its fear of being embarrassed as a reason to withhold publication.

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

The Information Commissioner should be given double the existing budget. No other change is necessary.

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

The burden is an illusion. In 80% of cases at least, we estimate, the people answering the request are making a mountain out of a molehill, often unwittingly, but because they do not understand the Act well enough, often in turn as they have not been trained well enough; and otherwise they are terrified of revealing incompetence or a simple mistake.

We remain, Sirs, your humble servants,

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on Freedom of Information

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Animal Aid

Summary

Animal Aid investigates and exposes animal cruelty, and our evidence is often used by the media, which brings issues to people's attention, and has led to changes in policy from several organisations, and to criminal convictions and custodial sentences.

Our investigations have, on many occasions, included submissions under the Freedom of Information Act (FOIA). An extensive, but not exhaustive, list is provided in the annex.

The FOIA has been and continues to be an important tool for politicians, campaigning groups and the wider public. It is an indicator of a free and fair society, and the non-financial benefits of the act are priceless.

Responses to individual questions

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

This protection should remain as it currently is.

Whilst it may be important for public bodies to have an internal deliberative space, it is essential that the original intentions of the Act, to "*transform the culture of Government from one of secrecy to one of openness*" and to "*raise confidence in the processes of government*", are honoured and protected.

These intentions should be at the forefront of any deliberations and amendments to the Act. To restrict the freedoms created by the Act would be a retrograde step.

The extensive list of FOIA requests which Animal Aid has submitted (see the annex) illustrates how public bodies can be reticent to act for the public good, unless prompted to do so by the intelligent use of information, much of which must be sought via FOIA requests. A case in point is example number 1 in the annex. Following our investigation of Cheale Meats in 2012, the Food Standards Agency (FSA) examined our evidence and investigated the firm. Two men were jailed for violent crimes against animals. However the FSA action was only taken after our FOIA requests. Initially, they refused to investigate the company.
http://www.animalaid.org.uk/h/n/NEWS/news_slaughter//2688//

Question 2: What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?

This protection should remain as it currently is.

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

This protection should remain as it currently is.

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

This protection should remain as it currently is.

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

This protection should remain as it currently is.

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

Undoubtedly, the 'burden' on public authorities is completely justified by the public interest in the public's right to know.

Controls are not needed to reduce this 'burden'; controls would be unjustifiable. It is not possible to determine whether any burden is 'disproportionate' without knowing the worth, to the requester, of the information. The value of the information may be impossible to quantify in monetary terms. Therefore, no restrictions should be imposed.

An excellent illustration of this is example number ten in the annex. The badger cull is a very contentious issue of enormous concern, not only to those financially effected by bovine tuberculosis (bTB), but also to those living in the cull areas; those concerned about the welfare of badgers; those monitoring the shooting; scientists: and countless members of the public in the United Kingdom and further afield. When something such as a cull happens, and it is challenged on so many fronts (scientific, economic, welfare and ethical), people need to be given the fullest amount of information possible, in order to determine the robustness of the strategy. Most of the information about the badger cull came to light due to FOIA requests.

Whilst some may argue that it is fiscally beneficial to 'reduce the burden' of FOIA on public authorities, this is not acceptable. The information can have an important non-financial value. As Animal Aid's examples show, it could: ensure violent, criminal acts are correctly punished (example 1); safeguard public health (example 23); educate the public about matters which are of great concern to them (example 10); reveal issues which concern public money (example 11); clarify animal welfare issues (example 11); stop animals being killed (example 7); and clarify the correct state of affairs and stop rumours and conjecture (example 12).

More restrictions or higher charges for the submission of FOIA requests are not justified. It cannot be ascertained which FOIA requests are likely to create a 'disproportionate burden on public authorities' as it may not always be clear why this information is being requested, or what its intended use is and therefore what its 'value' is to the requester.

Example 23 in the annex shows how one piece of information can have multiple uses, making its utility even harder to calculate. In addition to the animal welfare aspect of the information, there is also a very important message for human health, supported by the WHO announcement that processed red meat was to be categorised as carcinogenic.

In conclusion, Animal Aid is opposed to any tightening of the Freedom of Information Act which would serve to make information harder to obtain, more costly or in any other way, inhibit, restrict or control the application of FOIA requests by politicians, members of the public, charities or campaign groups.

Annex

CCTV / Slaughter

1. In 2011, after the FSA refused to investigate Cheale Meats (a company where Animal Aid had exposed workers stubbing out cigarettes on animals' faces and beating them), Animal Aid, via our solicitors, requested information described as "*All letters, emails, policy statements, guidance or other documents (whether internal to the FSA, or between the FSA and Defra, or between the FSA and another third party or third parties) containing, explaining, justifying or otherwise referring to Defra's position, or its advice or guidance to the FSA, with regard to the bringing of criminal proceedings where the initial allegation is based on CCTV footage gained without the consent of the relevant Food Business Operator."*

2. We submitted a Freedom of Information application regarding the internal veterinary survey 2011. As a result, the FSA gave us more information about it.

3. In October 2010, we submitted a Freedom of Information application to the FSA regarding the cruelty at Dawn Cardington (it had arisen during a tribunal that a cows' tail was twisted until it broke). The response contained redactions, including the reason why the person's licence was revoked, but it did supply us with other information.

4. In 2008, we submitted a Freedom of Information application to the FSA regarding the mistreatment of two horses at an abattoir. The information was withheld as it fell under an exemption.

5. Animal Aid submitted a number of Freedom of Information applications regarding documents or other material held by the FSA recording the contents of, or referring to, meetings or other communications between any FSA Board Members and any meat, livestock or farming industry employee or representative, in relation to the issues of: (i) CCTV, (ii) Animal Aid's slaughterhouse investigation(s), or (iii) matters related to and arising from (i) or (ii).

Wildlife persecution

6. Animal Aid submitted a Freedom of Information application about the number of wild animals killed on the Royal Windsor Estate. The resultant information was widely covered in the media: http://www.mirror.co.uk/news/uk-news/windsor-wildlife-massacre-7000-animals-3173907

7. Animal Aid was successful in stopping the cull of geese at Windermere. We submitted several Freedom of Information applications relating to research conducted, evidence of damage and pollution, numbers of birds and who the 'management' committee were and what their credentials were.

8. The number of deer to be killed at Tullos in Aberdeenshire only came out as a result of our Freedom of Information application.

9. Animal Aid submitted a Freedom of Information application which told us how many boar were being 'culled' in the Forest of Dean.

10. A great deal of what we know about the badger cull came as a result of Freedom of Information requests, including: the definition of 'humane' and that it was the cries of dying badgers that would be the criteria of humaneness; that farmers could place armed farm workers in the vicinity of protestors; how the culls would be monitored; and how many licence applications had been received. Crucially, the cost was only revealed through persistent Freedom of Information applications.

11. Animal Aid, alongside local campaigners, submitted a number of Freedom of Information applications and these yielded how many Monk parakeets had been caught; the methods used; how many birds died during capture; how many adults and chicks were killed by the government's agents; and how many went to 'holding facilities' and the cost of these proceedings.

12. Via Freedom of Information applications, we ascertained that a council in Norfolk was not culling wildlife, despite local rumours.

Other

13. Animal Aid submitted a number of Freedom of Information applications to local authorities relating to the number of animal welfare prosecutions by Trading Standards. This revealed important information that was used in a Green Party paper about the failure of regulating welfare on farms.

14. In 2007, we submitted Freedom of Information applications to Cumbria re the number of fallen animals who were disposed of inappropriately and the response was 209. It also revealed that just one person was prosecuted.

Horses and the racing industry

15. Animal Aid submitted a Freedom of Information request regarding the names and addresses of all UK slaughterhouses registered to slaughter horses and the annual figure for the number of race horses slaughtered in the UK.

16. Animal Aid submitted a Freedom of Information request regarding the number of horses slaughtered or killed in UK abattoirs for the years 2010, 2011 and 2012.

17. Animal Aid submitted a Freedom of Information request regarding the number of horses slaughtered or killed, for human consumption, in UK abattoirs for the years 2010, 2011 and 2012.

Birds and shooting

18. Animal Aid submitted a Freedom of Information request regarding how much money was awarded, for each of 5 years, under the Rural Development Plan (RDP) for Wales including, as applicable, projects under Axis 1, 2 (e.g. Tir Gofal, Glastir), 3 and 4 on moorland or upland areas, where grouse shooting takes place.

19. Animal Aid submitted a Freedom of Information request regarding how many recipients, who own or manage grouse moors, received funding for projects under the RDP.

20. Animal Aid submitted a Freedom of Information request regarding how many horse races were sponsored by the BBC – including by local BBC stations – for two complete calendar years and also how much such sponsorship was worth, either in monetary value or in kind.

21. Animal Aid submitted a Freedom of Information request regarding how much money for each of five years had been awarded for Rural Development Contracts - Rural Priorities (RDC - RP), including, as applicable, projects under axes 1, 2 and 3 on moorland or upland areas, where grouse shooting takes place. And how many recipients, who own or manage grouse moors, received funding for a contract.

22. Animal Aid submitted a Freedom of Information request regarding Clissold Deer Park, Hackney.

Meat and animal farming

23. In March 2015, Animal Aid sent a Freedom of Information request to every acute NHS hospital trust in the UK to determine whether they had processed red meat on patient menus and what their provision was for vegan patients. Of the 181 that Animal Aid wrote to: six did not reply, three refused to give the information, stating that it was held by a non-public body, one replied that it did not have patient menus and 171 provided us with the information we requested.

24. Animal Aid also submitted some Freedom of Information requests in order to gather statistics about on-farm mortalities. These were mostly unsuccessful as the relevant bodies claimed they didn't hold the information. Animal Aid did make some successful Freedom of Information applications to bodies including the Environment Agency relating to specific case studies, relating to flood risk assessments.

Article 39

I am a children's rights campaigner and registered social worker. Between 2000 and 2012, I ran the Children's Rights Alliance for England, during which time myself and colleagues made frequent use of the Freedom of Information Act 2000 ('FOI Act'). In February 2015, my book 'Children behind bars. Why the abuse of child imprisonment must end' was published by Policy Press. I made hundreds of FOI requests whilst researching the book, and thereby elicited extensive information never before placed in the public domain. Article 39 was formed in April 2015, to promote and protect the rights of children living in institutional settings. These children are extremely vulnerable, often placed many miles from home with limited or non---existent family contact. Children in locked environments are particularly vulnerable, since their contact with the outside world is restricted, and penal settings implicitly rely on fear, intimidation and secrecy. Poor children, disabled children and children from Black and minority ethnic communities are disproportionately more likely than their peers to be living in institutional settings. The FOI Act remains a vital safeguard for them, and must not be weakened.

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

Article 39 does not support any changes to the FOI Act which would make it more difficult to obtain information about how laws and policies have been developed for children.

Case study 1 provides evidence of statutory exemptions being used to prevent information being placed in the public domain about the lawfulness of the infliction of pain as a form of restraint in child prisons. This compromises the safety of extremely vulnerable children. That the infliction of pain is authorised in some custodial settings but not in others contradicts one of the principal recommendations of the Children's Safeguards Review, that "Government should ensure legal protection against abuse and harm is consistent in all settings in which children live away from home".[1] The Review was established 20 years ago in the wake of widespread revelations of child abuse in residential settings. Notwithstanding questions about the general lawfulness of inflicting severe pain on children as a form of restraint, and the insurmountable opposition to such practices, we believe the unequal protection from pain---inducing restraint could constitute a violation of Articles 3, 8 and 14 of the European Convention on Human Rights, together with Articles 2, 3, 19 and 37 of the UN Convention on the Rights of the Child (UNCRC). We therefore contend there is overwhelming public interest in the government being transparent about the legal basis for its policy in this area.

CASE STUDY 1

Infliction of severe pain as a form of restraint in child prisons – lawful?

In 2014, I obtained the report of the medical panel which considered the inclusion of the mandibular angle technique in the new system of restraint in child prisons.[2]

The mandibular angle technique appears to involve digging the tip of a thumb or finger into a sensitive area of the child's neck, in order to cause severe pain.[3]

The medical panel which reviewed the application of the mandibular angle technique on children gave its provisional approval to its authorisation **"conditional on legal advice to the effect that the use of a pain---inducing technique for restraint is lawful in England and Wales"**.[4]

Further to receiving the medical panel's report, I submitted an FOI request to the Ministry of Justice with three parts:

a) A request for the date on which the government **requested** legal advice on the use of pain---

inducing techniques for restraint in the children's secure estate in England and Wales.
b) A request for the date on which the government **received** legal advice on the use of pain---inducing techniques for restraint in the children's secure estate in England and Wales.
c) A request for a copy of the legal advice obtained by the government on the use of pain---inducing techniques for restraint in the children's secure estate in England and Wales.

I had anticipated a refusal to the third element, but not the first two. All three elements were refused under Sections 35 (1) (a) and 42(1) of the FOI Act. I pursued to internal review, which supported the blanket refusal.
A parliamentary question from Baroness Stern also failed to establish whether ministers have obtained the legal advice upon which the medical panel's authorisation relied.[5]
The following demonstrates the very high level of concern among statutory agencies, human rights bodies and others, bringing into question the legality of inflicting pain as a form of restraint:

- In 2006, the independent inquiry into physical restraint, solitary confinement and strip---searching in child prisons conducted by Lord Carlile concluded, "Pain compliance and the infliction of pain is not acceptable and may be unlawful"[6]. The inquiry was established following the restraint---related deaths of two children, Gareth Myatt and Adam Rickwood, in custody in 2004. Fourteen year---old Adam Rickwood hanged himself after being unlawfully restrained in Hassockfield secure training centre. Adam was subject to the 'nose distraction'. He left behind a note asking what gave staff the right to hit a child in the nose
- In 2008, the parliamentary Joint Committee on Human Rights declared, "There can be no justification for [restraint] practices which involve the deliberate infliction of pain…and we therefore recommend their abolition without delay"[7]
- In 2009, the European Torture Committee recommended the UK "discontinue the use in juvenile establishments of manual restraint based upon pain compliant methods"[8]
- In 2011, statutory guidance prohibited the deliberate infliction of pain as a form of restraint in all children's homes, including secure children's homes (which care for remanded and sentenced children)[9]
- In 2011, the Office of Children's Commissioner recommended the prohibition of the deliberate infliction of pain to enforce order and control[10]
- In 2012, the Restraint Advisory Board, established by ministers to review the techniques in the Minimising and Managing Physical Restraint (MMPR) system, reported that restraint without the infliction of pain *had never been considered* by those commissioning and developing the new methods[11]
- In 2013, the UN Committee Against Torture recommended the UK "ban the use of any technique designed to inflict pain on children"[12]
- Also in 2013, the National Preventive Mechanism, charged with preventing torture in places of detention, told the UK Government, "The use of pain to secure compliance is unacceptable"[13]
- In 2014, the Prisons and Probation Ombudsman published a bulletin on the use of force in prisons. This stated, "One area where we have expressed concern is the use of pain compliance techniques. There are specific, approved techniques for pain compliance such as the Mandibular Angle Technique, which uses a pressure point below the ear. The justification for such techniques is to end resistance quickly. However, their use on young people is particularly controversial and the Ombudsman has been very critical where it cannot be demonstrated that a non---painful alternative could not have achieved the same outcome"[14]
- In 2015, the four UK Children's Commissioners, in their submission to the UN Committee on the Rights of the Child, stated, "pain should never be deliberately inflicted in order to restrain a child"[15]

- Her Majesty's Inspectorate of Prisons reported on 18th November 2015 that officers in young offender institutions **commonly inflict pain, including through the mandibular angle technique**, in breach of policy (and therefore the law): "Restraint policy agreed by ministers states that staff should only use pain as a last resort to prevent an immediate risk of serious physical harm, but we found that pain---inducing techniques were used frequently in YOIs, and that in most cases staff were not compliant with this requirement."[16]

Case study 2 provides evidence of statutory exemptions being used to prevent information being placed in the public domain about the sexual abuse of female prisoners (women and girls).

CASE STUDY 2
Sexual abuse in Downview prison – what lessons to be learned?
Acting prison governor Russell Thorne was jailed in July 2011 for five years for misconduct in a public office after coercing a young female prisoner to engage in sexual acts with him.[17] Allegations were made about other prison officers at Downview prison in Surrey,[18] which had a dedicated unit for girls, and a prison service review was established in 2012.[19] Surrey police established a special investigation, called Operation Daimler, which involved interviews with over 200 present and former prisoners. Using the FOI Act, I asked the force how many girls were seen as part of this investigation: the answer was none.

After being instructed by the Information Commissioner to release the information,[20] the Ministry of Justice confirmed in May 2014 that four officers working at Downview prison had been suspended, dismissed or convicted between January 2009 and October 2013 "as a result of a sexually inappropriate behaviour with women prisoners or a young offender". However, the ICO did not support disclosure of the report from the prison service review, so this remains hidden. Downview prison no longer holds girls or women, though clearly there are lessons to be learned about preventing the abuse of prisoners elsewhere. Furthermore, without publication of the internal review report, it is impossible to assess whether the prison and other bodies (including the prison service, the Youth Justice Board and local authorities) acted appropriately to protect girls and women once they became aware of the abuse.

Question 2: What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?

Article 39 does not support any changes to FOI legislation which would make it more difficult to obtain information about Cabinet discussion and agreement in respect of children. Public interest considerations must continue to apply. The Commission will be aware that the coalition government pledged in 2010 to give due consideration to the UNCRC when developing law and policy.[21] This commitment was reasserted by the current government in July 2015.[22] The FOI Act provides a vital mechanism for scrutinising the implementation of the UNCRC pledge.

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

Article 39 does not support any changes to FOI legislation which would make it more difficult to obtain information about Cabinet discussion and agreement in respect of children. Public interest considerations must continue to apply. We note the ICO and tribunal have set a very high threshold for release of Cabinet minutes.

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

Article 39 does not support any changes to FOI legislation which would make it more difficult to obtain information in respect of children. We note the Supreme Court ruling in respect of the disclosure of letters written to government departments by HRH The Prince of Wales. This reiterated the longstanding constitutional principle that ministers are subject to the rule of law.[23] We urge the Commission to unequivocally support this principle.

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

Case study 3 provides evidence of the appeal system supporting public knowledge of restraint techniques used in secure training centres, which are places of detention for children aged 12 to 17.

CASE STUDY 3

The release of the manual governing restraint in secure training centres run by G4S and Serco

In May 2007, as National Co---ordinator of the Children's Rights Alliance for England (CRAE), I made an FOI request to the Youth Justice Board (YJB) for a copy of the manual governing restraint in secure training centres. The request was refused initially, and on internal appeal. The YJB stated the security of secure training centres would be compromised by disclosure "because young people could learn and practice against the restraint techniques taught in the manual, which could result in staff and other young people being injured if a violent individual could not be restrained effectively".[24]

CRAE appealed to the ICO, which supported disclosure. Its decision notice, issued in December 2009, said:

Given the level of debate and controversy surrounding the use of physical restraint, on both legal and ethical grounds, and the evidence that these techniques can result in physical harm, the Commissioner believes there is a significant public interest in full disclosure of information about these techniques.[25]

The YJB appealed the ICO decision. Days before the scheduled First---tier Tribunal hearing, in July 2010, the YJB informed CRAE it would disclose the manual. CRAE received a settlement of
£3,000 for some, but not all, of its in---house legal costs. Throughout these proceedings, the YJB was funded by the taxpayer.

Following receipt of the manual, CRAE and its lawyer conducted a legal review and successfully persuaded the Ministry of Justice to remove information from the document which contravened the law. These amendments were made prior to the Ministry of Justice uploading the information onto its website. The charity also wrote to every Director of Children's Services and Chair of Local Safeguarding Children Board (LSCB) in England alerting them to the shocking methods approved for use on children and urging them to use their statutory powers to protect children. On this latter point, the Commission may be interested to note that statutory safeguarding guidance has, since March 2010, required LSCBs to scrutinise restraint in custodial settings. Moreover, Her Majesty's Inspectorate of Prisons has recommended in its report on behaviour management, published this week, that "LSCBs and local authorities should ensure that they have sufficient expertise to enable effective independent oversight of restraint".[26]

This successful FOI appeal led to information about restraint techniques authorised for use in child prisons being placed in the public domain for the first time. This was 13 years after the Children's Safeguards Review recommended public education for parents and staff on the risks children can face in institutional and foster care settings. "Policy for child discipline, including measures of control" was included in the list of information the Review said parents need in order to assess whether their child is safe.[27]

The Commission should be aware that secure training centres no longer use the restraint techniques covered by the FOI disclosure above, the details of which were placed in the public domain in 2010. All three secure training centres, together with three young offender institutions holding juveniles, now follow the Minimising and Managing Physical Restraint (MMPR) system. The manual depicting MMPR techniques was published in July 2012 with 182 redactions. My FOI request to the Ministry of Justice for an unredacted copy of the 2012 manual was refused on much the same grounds made by the YJB between 2007 and 2010. In this latest case, the ICO has not supported disclosure; my appeal to the First---tier Tribunal failed; and the case is due to be heard at the Upper Tribunal on 11 February 2016.

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

Article 39 sees the FOI Act as a vital component of a healthy democracy. The work of public bodies is funded predominantly by the taxpayer and citizen. Transparency should be embraced as a one of the key functions of public bodies, rather than as an optional extra or burden. When public bodies are responsible for the care and well--- being of children, the case for transparency becomes ever greater (with safeguards to protect the privacy of children and their families). We urge the Commission to consider the extension of FOI responsibilities to organisations, public and private, who are publicly funded to look after children in residential settings. Of 1,760 children's homes in England on the Ofsted register on 31 March 2014, 73% were run by private companies, 21% by local authorities and 6% by voluntary sector organisations.28 All three secure training centres are run by multinationals.
The Commission conspicuously does not ask for evidence of the FOI Act safeguarding the rights of vulnerable people. Case study 4 illustrates how the legislation has played a significant role in protecting vulnerable children from abusive strip---searching.

CASE STUDY 4
Strip-searching in child custody
During research for Children behind bars, in 2013, I submitted an FOI request to the Youth Justice Board (YJB) for data on strip---searching in young offender institutions, secure training centres and secure children's homes. Several years earlier, the Carlile Inquiry had found appalling examples of children being subject to degrading strip---searches, including when being held under restraint by groups of officers. It had concluded, "Strip searching is not necessary for good order and safety".[29] Children who took part in research for the Youth Justice Board, itself a consequence of the Carlile Inquiry, described strip---searching as being like rape and other forms of sexual abuse.[30] Routine strip---searching had been banned in all women's prisons in 2009 because it was accepted by ministers to be demeaning and abusive.[31]
My request sought to find out the frequency of strip---searching, the ages of children being subject to such treatment and the number of times force was used to remove children's clothes. The YJB provided all of the data I requested. Headline points include:

- There were 43,960 recorded strip---searches in 25 child prisons and secure children's homes in the 21 months up to December 2012 (the figures are incomplete so this is an under--- estimate)
- The youngest person to be strip-searched was aged 12
- Physical force was used to remove children's clothes 50 times in 3 prisons (34 times in Wetherby young offender institution)
- Forty---five percent of those made to remove their clothes were children from Black and minority ethnic communities (they comprised 29 percent of children in custody at the time)
- Just 226 items were found in 2011/12 and 49 items in 2012. The single most common contraband was tobacco.

Parliamentary questions were subsequently asked about strip---searching and the Howard League for Penal Reform cited the data, which was reported by the Guardian newspaper[32] and by many other media outlets, in its government lobbying. A few months after the release of the information, the government announced a pilot of risk---assessed strip---searching[33] and the policy of routinely strip---searching children ended in all child prisons in 2014.

Other information about the care and treatment of children which would not be in the public domain without the FOI Act includes:

- The number of prison officers subject to disciplinary proceedings for mistreating children (released following internal review)
- The number of abuse allegations made by children in young offender institutions and secure training centres, and the response of local authorities to such allegations
- Information about incidents where children have struggled to breathe or been seriously injured during restraint in secure training centres and young offender institutions
- Details of broken bones and fractures suffered by children during restraint in Castington young offender institution
- Information about the use of restraint for concerted indiscipline in Hassockfield secure training centre *after* the Court of Appeal ruled such use to be unlawful
- The frequency and types of self---harm occurring in young offender institutions and secure training centres
- The placement of children in special cells in young offender institutions
- Children's use of the Prisons and Probation Ombudsman complaints procedure
- Children's use of the Youth Justice Board appeals procedure operating in secure training centres
- Children's use of the Office of Children's Commissioner for England advice service
- The payment of £1.1 million to Serco for running Hassockfield secure training centre for 50 days when there were no children on the premises.

We would be happy to provide further information to the Commission.
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[20] ICO Decision Notice FS50525192, 24 April 2014.
[21] In her written ministerial statement in response to the Dunford review of the Office of Children's
Commissioner for England, the former children's minister, Sarah Teather MP, stated: "Dr Dunford recommends that a reshaped Children's Commissioner for England holds Government to account against the UNCRC. I agree with Dr Dunford that for this to deliver benefits to children, Government and policy makers must be receptive to that approach and advice. I can therefore make a clear commitment that the Government will give due consideration to the UNCRC Articles when making new policy and legislation. In doing so, we will always consider the UN Committee on the Rights of the Child's recommendations but

recognise that, like other State signatories, the UK Government and the UN Committee may at times disagree on what compliance with certain Articles entails", 6 December 2010.

[22] In response to a parliamentary question, Lord Nash stated on 22 July 2015: "The government remains committed to giving due consideration to the United Nations Convention on the Rights of the Child (UNCRC) when developing new policy and legislation and the commitment given by the coalition government stands. We believe that embedding children's rights in government policy can strengthen services and improve outcomes for children."

[23] [2015] UKSC 21

[24] Letter to CRAE's Legal Director from YJB, dated 17 July 2007.

[25] ICO Decision Notice FS50173181, 10 December 2009, paragraph 41.

[26] Her Majesty's Inspectorate of Prisons (2015) Behaviour management and restraint of children in custody. A review of the early implementation of MMPR by HM Inspectorate of Prisons, page 13.

[27] Utting, W. (1997) People like us. The report of the review of the safeguards for children living away from home, The Stationery Office, page 73.

[28] Department for Education (2014) Children's homes data pack, page 31.

[29] Carlile, A. (2006) An independent inquiry into the use of physical restraint, solitary confinement and forcible strip searching of children in prisons, secure training centres and local authority secure children's homes. The Howard League for Penal Reform, page 13.

[30] User Voice (2011) Young people's views on safeguarding in the secure estate. A User Voice report for the Youth Justice Board and the Office of the Children's Commissioner. Youth Justice Board for England and Wales, page 29.

[31] Corston, J. (2007) The Corston report. A review of women with particular vulnerabilities in the criminal Justice system. Home Office, page 31.

[32] Allison, E. '43,000 strip---searches carried out on children as young as 12', Guardian newspaper, 3 March 2013.

[33] Cited in Guardian newspaper, 'Children in custody pilot scheme could bring end to strip-searching', 16 August 2013.

Associated Newspapers Limited

Introduction

This response to the Independent Commission on Freedom of Information's Call for Evidence is submitted by Associated Newspapers Limited ("ANL"). ANL is the publisher of the Daily Mail, Mail on Sunday, Mail Online and Metro.

Senior representatives of ANL have already signed a letter to the Prime Minister from various signatories dated 21 September 2015. That letter expressed serious concern about the government's approach to this review of the Freedom of Information Act 2000 ("the Act") and about the composition and terms of reference of the Commission on Freedom of Information. ANL's particular concerns can be summarised as follows:

There appears to be no proper basis for a review. The Commission has been established despite the finding of the Justice Committee in 2012 that the Act has been a "significant enhancement of our democracy".

The review appears to be proceeding on the basis of a presumption that freedom of information needs to be restricted. There is no indication that the Commission will be expected to consider how freedom of information might be promoted. The Commission's apparent focus is on how to impose new restrictions on the operation of the Act to suit the government's anti-FOI agenda.

At least two of the five members of the Commission have previously expressed criticism of the way the Act operates. Indeed, the government appears to have appointed Jack Straw precisely because of his view that the Act is defective and is a legislative measure he regrets was ever passed. The other members of the Commission are establishment figures and there is no representative of the media, academia, or any other FOI user or advocate for the benefits of FOI. In short, the Commission does not fairly represent the range of people with an interest in FOI and is heavily weighted in favour of those who favour, or are likely to favour, greater restrictions on access to information.

Since the letter of 21 September the Commission has published its call for evidence. ANL is concerned about the nature of this call for evidence, which seems to it to be flawed and one-sided and to exhibit a clear prejudice against transparency in public affairs. In particular:

The questions are focused principally on the protection of information rather than access to information; on controls on the public's right to know rather than its entitlement to information; and on the burden of FOI on public authorities rather than the benefit to society of FOI.

The call for evidence emphasises the importance of governance and administration at the expense of transparency and encourages the view that the Act is prejudicial to good governance and administration. Thus question 1 says "The Commission is interested to understand … the impact that the Act has had on the internal, deliberative space of public bodies". There is no acknowledgment in any of the questions of the benefits of FOI to the public generally.

Although the questions are meant to be a call for evidence (defined as "objective, factual information about the impact or effect of freedom of information"), they are frequently not susceptible to evidence-based responses, but invite policy arguments. The policy behind the Act was the subject of extensive debate before the Act was passed. There is no reason to revisit those policy arguments now.

To the extent that the questions are susceptible to evidence-based responses, most of those questions can only really be answered by public authorities as it is only public authorities that possess the evidence solicited by the questions.

There is no proper time for users of the Act to gather and present their evidence. The Commission was established in July 2015. It issued its call for evidence in October 2015 and has asked for responses within little more than a month.

One of the matters that has prompted the review is the Supreme Court's decision in *R (Evans) v AG and others [2015] 2 WLR 813*. According to the Call for Evidence: "In March this year, the Supreme

Court ruled … that the veto could no longer be used as the Government had previously understood. It is generally understood that the circumstances in which the veto can now be exercised are extremely narrow, but there remain considerable uncertainty" (emphasis added). This is a surprising interpretation of the decision. The effect of the decision is quite clear. The veto cannot be used by the executive just because the executive takes a different view of the need for disclosure than the Tribunal. It is a source of concern to ANL that an important driver for this review appears to be the government's unhappiness that the country's highest court has reached (quite properly) a decision that means the veto, which was only ever intended as an exceptional measure, can "no longer" be used in the way the government thought it could, i.e. without proper scrutiny by the courts. That is not a proper basis for reviewing a constitutionally important piece of legislation that, as will be demonstrated below, is operating very much in the public good.

In light of the above, ANL is sceptical about the value of this entire exercise. In his announcement of the establishment of the Commission on 17 July 2015 the Parliamentary Secretary for the Cabinet Office claimed that after more than a decade in operation it was time that the Act was reviewed to make sure it was operating effectively. But by framing the Commission's terms of reference as it has done, by appointing critics of the Act to the Commission and excluding users of the Act from it, and by the nature of the questions the Commission has asked in its call for evidence, it does not seem to ANL that the government is undertaking a proper review of the effectiveness of the Act at all. Rather, the government has decided to undertake a partial review of the operation of the Act with a view to obtaining material to support its perception that the Act has an adverse impact on the way public bodies, and in particular central government, wish to work. If the government had really wanted to undertake a proper evidence-based assessment of the Act, it would and should have gone about its task very differently. In particular, the terms of reference and the questions on which evidence is sought would not have been focused on "the need for sensitive information to have robust protection" and the "burden of the Act on public authorities", but would also have emphasised the merits of freedom of information and in particular its value in holding public authorities to account.

Despite the above, and subject to the restraints imposed by the unsatisfactory nature of this consultation process, ANL provides below its answers to the questions that have been posed. But ANL is also taking the opportunity in this document to address some of the issues in relation to which the Commission has not sought evidence, believing that this document would otherwise be unhelpful to the Commission as it would provide an incomplete picture of how the Act has operated since it came into force in 2005. It is ANL's firm belief that the Act has been a force for good and that any attempt to restrict its effectiveness by placing further limits on the provision of information by public authorities is entirely contrary to the public interest. ANL reminds the Commission of the words of the former Prime Minister Gordon Brown, which ANL wholeheartedly adopts and endorses:

> *"Because liberty cannot flourish in darkness, our rights and freedoms are protected by the daylight of public scrutiny as much as by the decisions of Parliament or independent judges. So it is clear that to protect individual liberty we should have the freest possible flow of information between government and the people. In the last ten years in Britain we have created a new legislative framework requiring openness and transparency in the state's relationships with the public. The Freedom of Information Act has been a landmark piece of legislation, enshrining for the first time in our laws the public's right to access information. Freedom of Information can be inconvenient, at times frustrating and indeed embarrassing for governments. But Freedom of Information is the right course because government belongs to the people, not the politicians."* Gordon Brown, October 2007

On 29 October 2015 the Leader of the House of Commons, the Right Honourable Chris Grayling MP, was reported by the Guardian and other media as having described some FOI requests by journalists as a "misuse" of the Act. It is apparent from this extraordinary remark that the government has lost all sight of the purpose of the Act. The government's desire for less open government is a matter of deep concern to ANL as it firmly believes that this is wholly contrary to the public interest.

ANL's experience of the operation of the Act

Journalists working on ANL titles make regular use of FOI requests in order to obtain information on matters of public interest and importance. The information thereby obtained is frequently published and is indeed quite often the reason why a story is published.

By way of examples of stories containing information of public importance that would not have been published but for the Act, ANL has prepared a schedule to this document. The schedule contains information about and links to 12 stories that have been published in the last five years and which contain information derived from FOI requests. This shows the value to the public of the rights of access to information enshrined in the Act. The stories are merely representative of a much larger body of stories.

Additionally, ANL highlights the following public interest stories that have resulted from FOI requests:

- ANL made a FOI request of councils to ascertain how many were paying for their staff to have private medical insurance. It found that 2000 council employees are charging private medical insurance to the taxpayer. ANL had to use FOI to uncover this, because none of these councils were making it public that they were doing this. MPs are now calling for this to be banned and the Chancellor has indicated he will be looking at the issue.

- Pursuant to FOI requests on public sector pay, it emerged that the local authority with the most employees in receipt of remuneration over £100,000 was the London Borough of Haringey with 68. When ANL looked into why this was, it spoke to a whistle-blower who told it that many members of staff who had been involved in the Baby P case or children's services at Haringey had subsequently been given public money to sign a gagging clause. When ANL inquired specifically about this the council admitted that since the death of Baby P, it had spent a total of £914,534 on paying off former members of staff so that they would sign confidentiality deals. Thanks to a FOI request ANL was therefore able to expose that former staff at a council where there had been a major scandal over the death of a child were being silenced from talking about it - with public money.

Daily Mail journalists used FOI to expose how hospitals were being paid millions to put patients on the Liverpool Care Pathway, a system of care for the dying. The Liverpool Care Pathway, first cleared for use in all hospitals in 2004, was - until the Mail's campaign on the issue - the method used across the country to guide the care of patients judged to be dying. It involved the withdrawal of life-saving treatment and its replacement by measures to control pain and make the patient comfortable. The Mail started a campaign on the issue after a whistleblowing surgeon raised concerns about the pathway. Members of the public later came forward to make allegations that it had been used in some cases on patients who were not imminently dying and, in others, without patients' families being told. The Mail's reporters could not understand why patients were being put on this pathway without the consent of - or even consultation with – their families. So they asked whether hospitals had a financial incentive to put patients on the pathway. The Department of Health told a Mail reporter:

- 'There is currently no central Department of Health fund or tariff to support use of the Liverpool Care Pathway.' However, following a FOI request, it emerged that NHS hospitals had been paid tens of millions of pounds to adopt the controversial Liverpool Care Pathway on their wards. They had been encouraged to introduce the method in payments earmarked for 'quality and innovation'. Among 20 hospitals which have given information under FOI, £4.5 million had been paid in return for the use of the Pathway. After the Mail put this story on its front page, an independent review was launched of the Liverpool Care Pathway. The review recommended abolition of the pathway, and that incentive payments for staff who put patients on end-of-life treatment plans should be banned, describing them as "totally unacceptable". The pathway has now been scrapped.

- Prompted by Mr Grayling's already notorious remark quoted above, a much longer list of stories containing information derived from FOI requests has been published by the Guardian: http://www.theguardian.com/media/2015/oct/30/freedom-of-information-act-chris-grayling-misuse-foi. This list is also merely representative of a much larger body of stories based on information obtained through FOI requests. It contains links to over 100 public interest stories that were published in the first half of 2015 across the national, local and trade press, including in ANL's titles.

- It is obvious that information obtained from FOI requests is now an important source of information to the public about the activities of the public bodies they pay for and depend on for the provision of a huge variety of public services. It is equally obvious that the imposition of

> restrictions on access to such information will inevitably reduce its future availability. It is ANL's belief that the quality of public services is improved by greater public scrutiny. ANL knows of no members of the public who wish there to be further controls on access to public information than already exist in the numerous exemptions contained in the Act. The only people who appear to want greater controls are those who hold the information.

It is ANL's experience that the Act has prompted a cultural change within most public bodies in relation to the release of information to the public. Because public bodies know that they will receive a FOI request if they do not provide certain kinds of information, much information is currently released on a voluntary basis without the need for formal FOI requests. ANL is concerned that if the Act were to be tightened as a result of recommendations by the Commission, that would not just affect individual FOI requests in specific cases, but would have a significant indirect effect on the willingness of public bodies to co-operate with journalists in providing information to the public. Much information is currently provided outside the strict FOI regime but as a result of it and the Commission should not ignore the indirect benefits flowing from a healthy FOI regime or the adverse effects likely to result from a less open system.

That ANL has been able to obtain information through the use of FOI requests is not to say that the Act is operating as it should or that public bodies accept their responsibilities under the Act. The Daily Mail Investigations Unit has been recently investigating public sector pay. It has become apparent during that investigation (and has indeed been apparent to ANL's reporters for much longer) that many public bodies, far from embracing openness and accountability, take active and sometimes elaborate steps to prevent the public from knowing what they are up to and to circumvent FOI requests. Robust freedom of information legislation is needed to deal with this.

Among the steps taken to avoid scrutiny in the context of public sector pay are the following:

Redaction of important data. Some public bodies redact the minutes of their remuneration committees when publishing them online so as to remove the sums discussed. An example of this was highlighted by the Daily Mail this month: details of a £4,500 pay rise for a senior official at the NHS regulator Monitor were blacked out.

'Hiding' details in the footnotes. Many public bodies claim they are transparent about pay because they declare directors' salaries, pension deals and expenses in their annual reports. But many of the extraordinary deals that have been uncovered by the Mail and the Taxpayers' Alliance have been hidden in footnotes of these reports which seem designed to deliberately obscure the full size of some individuals' pay deals. For example, an NHS quango chief, Alan Perkins, earned a pay deal worth nearly £850,000 last year (while still charging the taxpayer £1.40 for a bus ticket.) But the huge pay deal – which included a £300,000 'golden goodbye' – was hidden in the footnotes of NHS accounts, which on first reading suggested he had earned less than half that amount. The report misleadingly states that Mr Perkins's 'total emoluments' for the year 2013/14 were between £315,000 and £320,000. This was made up of a salary of between £145,000 and £150,000 and pension benefits of £172,000. A footnote in the accounts, however, added that he was also 'awarded a bonus of £6,256 during the year' relating to his work the year before, 'whilst working for the Department of Health'. The note went on to explain how Mr Perkins also received an additional exit payment of £306,538 from the Department of Health in 2013/14 'due to restructuring leading to termination of his employment by them'. Further enquiries by the Mail revealed that Mr Perkins had been made redundant even though he turned 60 in February last year – and has a £1.48million NHS pension pot. This includes a tax free pension lump sum – of between £215,000 and £220,000 – which he was entitled to claim when he turned 60. In total, therefore, Mr Perkins is believed to have earned a package of at least £844,794 last year. But he still claimed £12,866.65 in expenses – a figure which is nearly half the average UK salary. He even claimed bus fares costing £1.40 in June 2013, and £1.45 in March 2014, from the taxpayer.

Mis-describing payments. Some public sector bodies list 'ex-gratia' payments they have made that year. These are payments an employer makes when under no legal or contractual obligation to do so. But what they do not always reveal is what these payments are for - or that they went to senior members of staff. In the case of the £5,700 paid to one doctor to compensate her for her cancelled holiday, there was no reference in any public document to this specific payment, or to the fact that an ex-gratia payment had been made to the chair of the trust. It was simply subsumed into the total sum

for ‘ex gratia’ payments that year. A spokesman for Colchester NHS Foundation Trust said: ‘The reimbursement to [the doctor] is included under the “Losses and Special Payments” section of our Annual Accounts. It is included alongside “Ex gratia payments”. Individual ex gratia payments are not itemised, which is standard practice in Annual Accounts.’

Refusal to respond to FOI requests. Some public bodies simply refuse to answer freedom of information requests from journalists. For example, the Mail and the Taxpayers’ Alliance asked NHS Trusts for details of the pay of staff earning more than £100,000. While every other Trust in the UK responded, North East London NHS Foundation Trust simply refused to respond, implausibly saying it was "not able to determine" how many staff were paid more than £100,000.

Refusal of FOI requests on spurious grounds. Public bodies who do not wish to provide information frequently justify their refusal on grounds that are spurious, most commonly that it would cost too much to answer the question, or that the information is covered by data protection.

While there are of course mechanisms for challenging public bodies who refuse to respond to FOI requests or rely on spurious grounds for refusal to provide the information requested, the experience of ANL's journalists has been that these mechanisms are hopelessly slow and frequently incompatible with news schedules. It is also time-consuming to set out in writing detailed objections to a refusal.

ANL recognises that any appeal mechanism must necessarily involve some delay and cost. Given the inherent limitations of such processes, it is therefore particularly important to encourage a culture of openness, responsibility and co-operation among public authorities faced with FOI requests such that journalists and others are not fobbed off and left to rely on cumbersome reviews and appeals. For that reason, ANL is dismayed that instead of making encouraging noises to public bodies to get behind the Act, the government has instead chosen to set up this Commission and to do so in a manner which plainly conveys its lack of enthusiasm for freedom of information. A likely outcome of the government's regrettable management of this process – combined with the sound-bites of its spokesmen such as Mr Grayling - is that those public bodies already inclined to be obstructive will continue to be obstructive or be even more obstructive in the future.

In the time available to respond to this call for evidence, ANL has been able to gather only limited data from its journalists. That data is, however, sufficient to make the following statements:

Many FOI requests ought not to have been necessary as the information requested, such as statistical information, internal reports and minutes of meetings, ought already to have been released pursuant to the public authority's publication scheme. This fact alone indicates that many public bodies are yet properly to embrace even the most basic concepts of freedom of information.

Many requests are refused and many others are subject to delay and prevarication. Many requests are simply not made because of "self-censorship" by journalists who believe, from experience, that they're a waste of time as they will inevitably be refused on grounds of time and cost.

At least one of ANL's journalists maintains a record of his FOI requests. Since January 2014 he has made 97 requests. Of those, 38 were refused, 11 are still outstanding and the other 48 were answered. Other journalists estimate that only about 50% of their requests are complied with fully. One journalist asked the Home Office for information about how many Olympic competitors had overstayed their visas. The Home Office took more than six months to deal with the request.

Some public bodies are much worse at answering FOI requests than others. While the evidence is to some extent anecdotal, ANL believes that the Cabinet Office, the Ministry of Justice and the Home Office are at times particularly bad at answering FOI requests. (It is ironic that the Cabinet Office now has responsibility for FOI. One ANL journalist said: "Central government is terrible [at answering requests], particularly the Cabinet Office".) The NHS has been described by one of ANL's journalists as "the worst public body for trying to conceal information which it is in the public interest to reveal". ANL's health correspondent has noted that the Department of Health refuses for more information than individual hospitals By contrast, ANL perceives police forces to be quite helpful.

Central government departments frequently say that it would cost too much to compile the information. ANL is highly sceptical about that as it believes the data requested is usually readily available. One

ANL journalist recently made a request of HMRC where they kept suggesting he refine his request but whenever he did so, they kept on refusing it on cost grounds.

ANL is also sceptical about other reasons given for refusals. For example, one of its journalists asked HM Courts Service for the full copy of a report mentioned in their annual accounts concerning some disastrous property sales. They refused on the grounds that it would 'prejudice the commercial interests of any person, including the department which holds it' even though the department is not a commercial organisation. An internal review was requested but that confirmed the initial refusal. The Courts Service would not even publish a redacted version of the report.

More than one ANL journalist has noted that some public bodies cite the s 22 exemption (information to be published in due course), but then decline to publish the information at all or in limited form.

Several requests have been refused on grounds of policy discussion even though the policy had already been agreed.

ANL journalists commonly challenge refusals unless the story has become irrelevant by that time, but rarely take matters as far as the ICO. This is because the process takes so long and requires a significant investment of time and effort. ANL perceives that some public bodies know this and deliberately exploit it.

Some ANL journalists who make occasional FOI requests would be willing to pay for FOI requests if there was a guarantee that they would be answered sensibly. One ANL journalist has observed that it costs £3 to download a Land Registry file so he would be willing to pay something similar for an FOI request but only if he knew I would get a quick, full response. However, it should be noted that while such a fee is modest for a one-off request, the cumulative total of fees for multiple requests would have a real deterrent effect. ANL's recent investigation into public sector pay involved some 6,000 FOI requests. The imposition of any standard fee for FOI requests would therefore have a serious impact on investigations that seek to obtain a nationwide picture of an activity or practice within, say, police forces, councils or NHS organisations.

One ANL journalist has said he would regard the imposition of a fee for appealing against a refusal as an encouragement to public bodies to refuse every request (thereby illustrating his cynicism about how far some public bodies can be trusted to observe the requirements of the FOI Act). Another has said she would regard an appeal fee at any level as a deterrent.

ANL's response to the specific questions in the Call for Evidence

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

ANL has no quarrel with the propositions that (a) there exists a legitimate need for public authorities to protect their sensitive information; and (b) such organisations sometimes need a private space for internal deliberation. The Act already recognises this and contains very extensive protection for sensitive information, including information and views exchanged during the course of policy discussions and other deliberative processes where harm might arise by precipitate publication.

ANL knows of no evidence to suggest that the protections under the Act are insufficient. The ICO Guidance on sections 35 and 36 seems to ANL to be entirely sensible. What is a problem is the failure of some public authorities to appreciate the limits of the need to protect their deliberative space. That public authorities have a tendency to exaggerate the need for protection is evident from, for example, the case of *Department for Education v Information Commissioner and Evening Standard* (EA/2006/0006, 19 February 2007). In that case the former Cabinet Secretary Lord Turnbull gave evidence (among other witnesses) to the effect that the disclosure of minutes of meetings at which school budgets were set would have 'grave adverse effects'. The DfE's arguments were first that the threat of future disclosure would discourage candour and boldness in the giving of advice, the consideration of options and the exchange of views. Second, it argued that the role and integrity of the

whole civil service could be threatened, including by the identification of particular civil servants, resulting in 'sofa government' by trusted political advisers. Third, it said the risk of disclosure would discourage the proper keeping of minutes.

The Information Tribunal was (rightly) unconvinced by any of these extravagant submissions and upheld the ICO's order for disclosure. Among other things, the Tribunal noted that confidentiality as to communications with senior officials was "not always, we think, treated by ministers as sacrosanct … It is not unknown for a minister to announce, in the face of public clamour, what information or advice he or she was or was not given by his or her officials, perhaps in order to protect his or her personal career. If that is so, it is hard to see why, in an appropriate case, political opponents should not have access, after the event, to material of a similar nature which might expose the minister to challenge."

The case concerned a request made in early 2005 for minutes of meetings between June 2002 and June 2003. The Tribunal noted that by the time of the request the policy changes under consideration had resulted in a ministerial statement in the Commons in July 2003 announcing a new policy framework for the two following years. In July 2004 the Schools Minister announced details of the funding for 2005- 2006. As the Tribunal correctly noted: "It is clear that the time and space needed had been available and put to good effect."

The Tribunal's decision recognises that each case will turn on its own facts, but subject to the general principle that there is a very strong public interest in transparent policy making on matters involving public funds and which raise issues of public concern. That being so, it is impossible to answer the question as to how long information as to internal deliberations will remain sensitive after a decision has been made. This will necessarily depend on the facts of the case. But what the DfE case makes abundantly clear – and ANL respectfully agrees with the Tribunal – is that while disclosure of policy discussions and options may well not be in the public interest while the discussion is continuing, it is a lot less likely that it will not be in the public interest once the decision has been taken. Whether that is one month or one year is a matter that has to be judged in all the circumstances of the case (as the Act requires). It would be absurd, and contrary to the wording of the Act, for there to be any general prescription as to how long ago a decision was made before the disclosure of information as to how the policy was formulated is to be regarded as properly in the public interest. This circumstance-based approach is reflected in later case law such as *Home Office v Information Commissioner* (EA/2014/0310, 12 November 2014), where the Information Tribunal held that as the request in question had been sent after the pilot phase of a project had been completed, disclosure would not harm the policy process or policy development.

ANL considers that the case law in the context of sections 35 and 36 strikes the correct balance and notes that the Information Tribunal has upheld use of the exemptions on numerous occasions, an example being *Weiss v Information Commissioner* (EA/2011/0191, 20 February 2012) where it was acknowledged that particular weight should be accorded to the need for frank discussions in politically sensitive policy areas, in that case in the context of a pilot scheme providing for the removal of homeless EEA nationals. Other decisions make it clear that the need for private space is unlikely to arise in the context of policy implementation where there is an iterative process involving no "obvious need to bat policy options or potentially controversial solutions to and fro" (*Slater v Information Commissioner and Department for Work and Pensions* (EA/2013/0145, 148 and 149, 19 March 2014)) and that caution should be exercised when considering whether a private space should be extended to third parties outside government (*Department for Business, Enterprise and Regulatory Reform v Information Commissioner and Friends of the Earth* (EA/2007/0072, 29 April 2008)).

ANL is of the view that the DBERR decision in particular is an excellent example of the Information Tribunal's even handed approach, as it accepted that "a similar private space should be extended to third parties who are genuine advisers to government such as external consultants or experts called upon to advise neutrally on policy options being considered by ministers and civil servants and whose professional services would normally be paid for" but at the same time noted that there is a strong public interest in "understanding how lobbyists, particularly those given privileged access, are attempting to influence government so that other supporting or counterbalancing views can be put to government to help ministers and civil servants make best policy" and in "ensuring that there is not, and it is seen that there is not, any impropriety" . Ultimately it took the view that while there were no doubt occasions when the CBI and wider public interest coincided, it could not be overlooked that it

existed to promote a sectional interest and it was not possible to distinguish between the CBI's influencing and advisory roles, so there was a strong public interest in transparency.

Similarly, the question as to whether the different categories of information in sections 35 and 36 should be accorded different degrees of protection seems to ANL to introduce the prospect of an undesirably rigid framework into the Act. A merit of the Act is that it requires public bodies to assess requests on a case by case basis, including where relevant the public interest. ANL considers to would be quite wrong to confer blanket protection on some categories of information by virtue only of the general nature of the information in question. It is far better to retain the flexibility of sections 35 and 36 so that requests can be considered on their individual merits.

Ultimately ANL believes that sections 35 and 36 should remain as they are. Aside from the case law, which as discussed above is sceptical as to the evidence of any 'chilling effect', there is no independent evidence of it. A paper published by the UCL Constitutional Unit in 2010 noted that "the adverse impact of FOI seems negligible to marginal. The dominant view was that nothing has changed". It stated that there was substantial hostility to FOIA in the upper echelons of Whitehall, that the assumption of a chilling effect could be an inference drawn by those who were 'anti-FOI' and that Whitehall had an interest in perpetuating the notion that there was a chilling effect. ANL agrees with this assessment and takes the view that the chilling effect perceived to result from FOIA is largely illusory and is not a legitimate basis for amending the Act.

Question 2: What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?

The Act does not confer special protection on information relating to Cabinet discussions above and beyond that available for other kinds of information covered by sections 35 and 36. In ANL's view, that is exactly as it should be. For the avoidance of doubt, ANL accepts that there should be an appropriate FOI exemption for communications between Ministers: it does not suggest for one minute that the public should have immediate and automatic access to such communications. But it sees no reason – and knows of no evidence – why Cabinet discussions should be subject to any different regime than other kinds of exempt information covered by sections 35 and 36, particularly given the tendency of retired ministers to published detailed (and usually self-promoting) accounts of their activities in government within a short time after retirement.

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

It is not at all clear why the Commission appears to think that further provision is required for information involving the "candid assessment of risks". The Call for Evidence says that "if risk assessments are to be of utility, then they need to consider all of the risks, no matter how unpalatable, and to express clearly the consequences of those risks. If risk assessments were to be regularly released, the government argued, then they would start to be drafted as public documents, and this would lead to them becoming anodyne and uncontroversial".

ANL finds it extraordinary that the government (or the Commission) should be seriously suggesting that if a civil servant knew that a risk assessment might be published, he or she might deliberately draft such a risk assessment in an anodyne and uncontroversial manner. Why would a civil servant do such a thing when it would quite plainly undermine the whole point of the risk assessment? In any event, civil servants and others within public bodies who prepare risk assessments already know that those risk assessments may well be published because they are not covered by an absolute exemption and are therefore subject to publication provided there is a suitable public interest in doing so. There is no evidence to suggest that because of that possibility, officials are currently preparing "anodyne and uncontroversial" risk assessments and such a thing seems inherently improbable.

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

ANL does not approve of the ministerial power of veto contained in s 53 of the Act, but it accepts that it exists in a duly constituted Act of Parliament which it considers to be a sensible piece of legislation overall with which it sees no reason to interfere. In ANL's view, the Act contains sufficient protection for sensitive information in the numerous exemptions it contains without the need for a veto by the executive. It notes that there is no veto in respect of environmental information.

It appears that the Commission is unhappy that the Supreme Court may have restricted the effectiveness of the veto as ministers may have formerly (wrongly) understood it. If that is indeed the effect of the Supreme Court's decision in the Prince of Wales case, ANL welcomes the decision. It is quite wrong, as a matter of constitutional principle and the rule of law, that the executive should be free to reverse the decision of a specialist tribunal without the possibility of judicial review.

ANL refers further to the response to Q4 by the Media Lawyers Association, the broad thrust of which ANL supports.

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

There is a serious problem with the time it takes to appeal against a refusal. In practice, the delay inherent in the system operates a huge disincentive to pursue a request in the face of a refusal. However, short of providing the ICO with further resources, ANL sees no easy solution to the problem. It does, however, suggest that removing the need for internal review of a decision before an appeal may lie would be a sensible way of reducing delay. In ANL's experience, internal reviews seldom produce a different result.

It appears from the Call to Evidence that the Commission is contemplating making it more difficult to appeal. Considering the existing disincentive to appeal because the inherent delay is likely to frustrate the effectiveness of any appeal, ANL would consider it a regressive step if the appeal process were to be made even more difficult.

The statistics on page 19 of the Call to Evidence are a questionable basis for any reform of the appeals system as they ignore the numerous cases in which appeals are simply not pursued. In other words, there are likely to be large numbers of cases in which requests are unjustifiably refused, but these do not appear in the statistics because nobody knows about them. The number of wrongful refusals of FOI requests is therefore likely to be a lot higher than the page 19 statistics suggest. Moreover, evidence from ANL's journalists suggests that they tend not to make requests that they apprehend will be refused, justifiably or otherwise.

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

ANL is not in a position to assess the burden of FOI on public authorities. It is unimpressed by the statistics on pages 17 to 20 of the Call to Evidence. However, if it is correct that the total cost to central government is only £8.5m, then it is readily apparent that this is a very modest cost indeed to pay for the enormous advantages of freedom of information.

ANL notes that Kent County Council has said that FOI requests are "diverting valuable resources away from arguably more important public services, such as social care, education and highways." ANL would wish to know a lot more about what figures are actually involved before commenting further, but unless the costs of FOIA are unusually high, the argument appears specious. Local authorities and other public bodies have all kinds of overheads and expenses which mean that of

course not every pound they collect can be spent on services. But it is a necessary part of their functions that in order to provide their services to the public they need to engage staff, rent premises, purchase insurance and so on. It is ANL's view that compliance with the Act is a necessary part of the functions of any public authority and the cost of such compliance should not be viewed as a "diversion" of resources from more worthwhile purposes. As ANL has said above, freedom of information has the clear potential to improve public services by encouraging accountability. Moreover, as ANL has also said above, many FOI requests would be unnecessary if public bodies simply made more information voluntarily available on their websites (as in many cases they are already obliged to do pursuant to the regime for publication schemes). The remedy is therefore to an extent in the hands of public authorities such as Kent County Council themselves: the more information that they put on their websites, the fewer FOI requests they will receive.

SCHEDULE to ANL's response

Sample stories published by ANL on the basis of information obtained through FOI requests

"How much do bosses at YOUR council earn?" published in the Daily Mail on 9 November 2015 and on MailOnline. This article revealed the high salaries and other payments made to public sector executives at the same time public services budgets are being cut and despite the Government's stated intention to eliminate the deficit in public finances.

(http://www.dailymail.co.uk/news/article-3309596/The-shocking-scale-fat-cat-pay-public-sector-exposed-today-major-Daily-Mail-investigation.html#ixzz3qzLebG4V)

"Is the Met hiding sex claim files? First indication Dickens dossier on Westminster paedophile ring may have been found" published in the Mail on Sunday on 13 July 2014 and on MailOnline. In response to a FOIA request concerning the missing "Dickens Dossier", believed to name up to eight public figures involved in child sex abuse, this article revealed that the Metropolitan Police confirmed that "the requested information is held". This is a matter of huge public importance given the potential that senior figures in politics and/or the police may not have acted on child sex abuse claims.

(http://www.dailymail.co.uk/news/article-2690121/Is-Met-hiding-sex-claim-files-First-indication-Dickens-dossier-Westminster-paedophile-ring-found.html)

"Number of children being taught in 'titan' primary schools of at least 800 pupils rises fourfold to 52,000 in just three years" published on MailOnline on 9 November 2013. This article revealed the drastic increase in the number of children taught in certain primary schools.

(http://www.dailymail.co.uk/news/article-2494211/Number-children-taught-titan-primary-schools-800-pupils-rises-fourfold-52-000-just-years.html#ixzz3qzM4jmDm)

"999 response times now 50% longer in some areas than three years ago: Warnings public safety is being jeopardised by delays" published on MailOnline on 8 April 2015. This article revealed the significant increase in waiting time for emergency assistance as the police budget faces cuts.

(http://www.dailymail.co.uk/news/article-3029993/999-response-times-50-longer-areas-three-years-ago-Warnings-public-safety-jeopardised-delays.html#ixzz3qjPHz168)

"The health tourist 'hit and runners' who rip you off…with £24million in unpaid NHS bills as abuse of free care by non-EU patients doubles in just one year" published in the Mail on Sunday on 30 June 2013 and on MailOnline. This article revealed the sums owed to the NHS by non-EU patients – with only £23 repaid for every £100 spent (and with one individual owing £217,000).

(http://www.dailymail.co.uk/news/article-2351637/The-health-tourist-hit-runners-rip--24million-unpaid-NHS-bills-abuse-free-care-non-EU-patients-doubles-just-year.html#ixzz3qzO1JTq8)

"100 war criminals apply for UK asylum in a year: Border agency blocks claims made by suspects accused of genocide" published in the Daily Mail on 30 July 2013 and on MailOnline. This article details the number of foreign war criminals attempting to enter the UK.

(http://www.dailymail.co.uk/news/article-2381211/99-war-criminals-apply-refuge-Britain-Border-agency-blocks-claims-suspects-accused-genocide.html#ixzz3qzMXrrsO)

"British police take 67 return flights to Portugal as cost of Madeleine McCann search nears £9million" published on MailOnline on 11 February 2015. This article concerns the increasing cost to the public of the Madeleine McCann search by detailing the money spent on 67 return flights in 2014 by the British police.

(http://www.dailymail.co.uk/news/article-2949479/British-police-67-return-flights-Portugal-cost-Madeleine-McCann-search-nears-9million.html#ixzz3pzz5UfzN)

"School knife crime incidents reported to police across Britain every HOUR in week that teacher Ann Maguire was stabbed to death in her classroom" published on MailOnline on 21 July 2014. This article revealed the frequency of school knife crime incidents in the week where a teacher was stabbed to death in a school in West Yorkshire.

(http://www.dailymail.co.uk/news/article-2699872/School-knife-crime-incidents-reported-police-Britain-HOUR-week-teacher-Ann-Maguire-stabbed-death-classroom.html#ixzz3qjWts93j)

"Price of land for high-speed rail link between Birmingham and London slashed 90 per cent by the Government" published by the Daily Mail on 3 September 2012. This article revealed that the cost of land to be used for developing HS2 had been significantly cut by the Government by reducing the 'landscape impact value' of the land.

(http://www.dailymail.co.uk/news/article-2197156/Price-land-high-speed-rail-link-Birmingham-London-slashed-90-cent-Government.html#ixzz3qzPhu3MU)

"Fresh BBC sexism row as Corporation pays top male employees 10% MORE than women" published on MailOnline on 14 April 2012. This article exposed the significant gender pay gap at the BBC and that almost twice as many men hold senior positions than women.

(http://www.dailymail.co.uk/news/article-2129654/Fresh-BBC-sexism-row-Corporation-pay-male-employees-10-MORE-women.html#ixzz3qzRCBohU)

"How you pay £100m a year to aid immigrants who can't speak English: Shock figures reveal huge sums spent on translators by police, councils and hospitals" published by the Mail on Sunday on 11 January 2015. This article revealed the huge cost to the public of translation services provided to help immigrants who cannot speak English.

http://www.dailymail.co.uk/news/article-2904814/Shock-figures-reveal-huge-sums-spent-translators-police-councils-hospitals.html

"Criminal! Crime tsars redeploy frontline officers as backroom staff then complain they don't have enough police to fight crime" published in the Mail on Sunday on 8 November 2015. This article revealed that Police and Crime Commissioners were taking senior police officers off crime-fighting duties to do their back-office work.

http://www.dailymail.co.uk/news/article-3308744/Crime-tsars-redeploy-frontline-officers-backroom-staff-complain-don-t-police-fight-crime.html

Association of School and College Leaders

The Association of School and College Leaders (ASCL) represents more than 18,000 heads, principals, deputies, vice-principals, assistant heads, business managers and other senior staff of maintained and independent schools and colleges throughout the UK. ASCL has members in more than 90 per cent of secondary schools and colleges of all types, responsible for the education of more than four million young people. This places the association in a unique position to consider this issue from the viewpoint of the leaders of secondary schools and of colleges.

It would not be appropriate for ASCL to comment on matters such as the Cabinet veto, and it is not in a position to know the effect of the Act on central government.

However, as the schools and colleges which are run by ASCL members are for the most part public authorities the association does have an interest in the burden placed by the Act on such bodies and hence in your question 6.

Colleges were already incorporated at the time of the Act, but the majority of publicly funded schools were at that time part of local authorities. As many schools transfer to academy status they become public authorities in their own right, or as part of a trust or a chain. The effect is to create many new public authorities which are much smaller than local authorities.

Freedom of Information requests can have disproportionate costs in such circumstances, as the numbers, though likely to be small, vary from year to year. The cost of taking legal advice about what should (and should not) be divulged may also be disproportionately high for such small public authorities.

While there is no strong feeling about Freedom of Information amongst school and college leaders at present there have been cases of requests which might be considered vexatious or disproportionately expensive, especially when repeated to many schools and colleges as a blanket request (from a journalist or academic seeking to obtain research data for example, or from a commercial organisation looking for potential customers).

It would therefore be helpful for there to be a standard fee chargeable. This would discourage frivolous or blanket requests, and would be easier for small public authorities to charge than a fee based on an estimation of costs.

I hope that this is of value to your consultation, ASCL is willing to be further consulted and to assist in any way that it can.

Martin Ward
Public Affairs Director

Barming Parish Council

Good morning

As a busy parish councillor and borough councillor, I feel very strongly that FoI needs a complete rethink: it needs to be far more focussed in its aims, stricter in its applications, and more clearly understood by the public.

Many members of the public use foi to request information that they could obtain simply by either making more use of their local councillor, or by simply asking the question of the authority. Such an approach would enable questions to be absorbed into ‘the day job’ instead of having to be put through a separate burdensome and resource-thirsty process.

The original intentions of the Act were highly commendable, but unfortunately they have led to costly unintended consequences for councils at county, borough and parish level, where resources have become increasingly constrained. Officers at all levels continue to struggle with not just timescales but amount of work involved in answering individual questions.

Most councils – certainly Maidstone Borough Council and Barming Parish Council - are far more open than they ever were in the past, and they take their communications seriously when endeavouring to involve the public in decision making, for example via regular articles in local newspapers, special roadshows, residents questionnaires, newsletters, etc.

Increasing fees and making it easier to refuse requests may seem like a good idea, but it will alienate the public and increase negative perceptions of local government, at a time when we are trying to improve and encourage involvement in the electoral process, and trying to improve openness and accountability.

Fay Gooch
Chairman, Barming Parish Council
MBC Ward Member for Barming & Teston

The British Broadcasting Corporation

Introduction

As a media organisation, the BBC continues to use the Freedom of Information Act 2000 to hold public bodies to account on behalf of the public, and values the rights it provides. The requirement imposed by the Act that public authorities have an approved publication scheme under which certain categories of information are routinely made available has served to improve openness and transparency, but the greatest benefit is derived from the ability to make specific requests for information which is often not covered by such schemes.

The use of the Act has resulted in high-profile disclosures of information, which have often been opposed by the public authority concerned, but the benefit of the Act has not been limited to issues of national political importance. From information on delays in transferring patients from ambulances to A&E, through vehicle performance in MOT tests, to the cost of over-running road works, requests under the Act have revealed information which is in the public interest and of real relevance to people's lives and communities. The rights afforded under the Act are a vital tool in enabling the public, whether directly or via the media, to understand the activities of public bodies and hold them to account.

The BBC is in the unusual position of also being a public authority under the Act, for certain specified purposes, and therefore receives and responds to requests. In 2014 the BBC received more than 2,000 requests under the Act, and over 1,000 of those were for information considered to be in scope and eligible for disclosure, i.e. held for purposes other than those of journalism, art or literature. While the BBC, in accordance with its commitment to openness and transparency, also voluntarily disclosed information in response to hundreds of requests deemed out of scope, the derogation afforded to the BBC and other public service broadcasters, in respect of information held for the purposes of its output, is critical in giving our programme makers and journalists the creative freedom to deliver high quality impartial content.

The BBC's experience as both a requester and a public authority under the Act leads to the conclusion that while the Act is a powerful democratic tool, the substance of which ought to be fiercely protected, there are a limited number of areas where amendments might be considered.

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

The BBC believes that the current protections afforded to public authorities under the Act, by sections 35 and 36 for government departments and section 36 for other public authorities, strike an appropriate balance between the public's right to know and the need to ensure that public authorities have a safe space for free and frank internal deliberations and decision making. The BBC would not support the weakening of the right of access to such information under the Act, whether by excluding such material from the scope of the Act altogether, making either of these exemptions absolute or the exemption under s36 class-based. The current flexibility provided by the Act in allowing the specific circumstances pertaining to the requested information to be taken into account in determining its sensitivity, the duration of any sensitivity, and the balance of public interest is desirable and ought to be maintained. Accordingly, the BBC does not consider that any change to the level of protection currently provided by these exemptions is either necessary or justified.

The BBC acknowledges the need for public authorities to be able to develop and deliberate on policies freely and frankly, and the evidence shows that this space has in the vast majority of cases been respected by the Information Commissioner, tribunal and courts, with the result that Cabinet minutes and other sensitive internal deliberations and policy documents are not routinely disclosed under the Act. While there have been individual cases where the public interest has been determined to weigh in favour of the disclosure of information, including in relation to information held by the BBC, these have been limited and decided on the basis of their specific facts and the BBC is of the view that the protections afford sufficient safeguards.

The BBC considers that the question of how long information remains sensitive after a decision is one of fact, dependent upon the individual circumstances of the case. It would not be appropriate to create artificial periods during which categories of information would be deemed sensitive, regardless of the prevailing situation. The BBC accepts, in accordance with the Information Commissioner's guidance, that the need for a safe space is likely to be strongest when an issue remains live and that the passage of time will be a relevant factor in considering whether and to what extent disclosure would or would be likely to create prejudice, but this will not necessarily be determinative. The BBC supports the phased reduction in the definition of what constitutes a historic record.

Question 2: What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?

The BBC considers that the existing protection provided for information relating to the process of collective Cabinet discussion and agreement (that is to say the class-based qualified exemption provided by s35 with the recognition that there is a strong public interest in the maintenance of the exemption) provides sufficient protection for this type of information. The BBC would not support the exclusion of such material from the scope of the Act or the removal of the public interest balance to create an absolute exemption. The current flexibility provided by the Act in allowing the specific circumstances pertaining to the requested information to be taken into account in determining the balance of public interest is desirable and ought to be maintained.

In the exceptional cases where the Information Commissioner or tribunal has concluded that the public interest in disclosure has been overwhelming in the specific circumstances of the relevant requests, in some of these cases the Ministerial veto has nevertheless been exercised to prevent publication. Cases in which the exemption was engaged but the public interest has been held to favour disclosure include in respect of: details of the number of meetings a Cabinet sub-committee had had[8]; minutes of cabinet discussions concerning the takeover of Rowntree Mackintosh by Nestlé in 1988 (which by the time of the request were 20 years old and would have been made publicly available from 1 January 2016 in any event)[9]; redacted feasibility study on the impact of ID cards which had been produced after the decision had been taken to introduce the scheme, in circumstances where the public authority had failed to recognise any factors in favour of disclosure as part of its balancing exercise[10]; and, redacted Cabinet minutes relating to the March 2003 decision to take military action in Iraq sought 4 years later[11] (which were subsequently subject to Ministerial veto).

The Call for Evidence specifically identifies the case[12] in which the Cabinet Office was required to disclose minutes relating to the Cabinet meeting at which Michael Heseltine resigned over the Westland affair, which stemmed from a request by a BBC journalist. It is worth noting that in that case the Information Commissioner did not order the disclosure of all the requested information and found that the public interest favoured the maintenance of the exemption in respect of the Cabinet Secretary's notebooks and the minutes of Cabinet meetings on 12 and 19 December 1985 and 23 January 1986. In ordering and upholding, respectively, the disclosure of the minutes of the Cabinet meeting on 9 January 1986, both the Information Commissioner and the First-Tier Tribunal (Information Rights) were influenced to a certain degree by the age of the requested information (being 19 years old at the time of the request) and, crucially, the fact that the Prime Minister had made a contemporaneous statement to Parliament which included *"unequivocal statements as to Cabinet discussions"*[13] on the relevant dates, and that *"No fewer than eight ministerial participants in the 9th January meeting… produced memoirs featuring Westland and 9th January, 1986. Of them, only Lord Young displayed any reticence as to what had been said, citing the dictates of collective responsibility, which lie at the heart of this appeal"*[14]. The Tribunal recognised the importance of respecting the convention of collective Cabinet responsibility and reached a number of *"conclusions of principle"*

[8] Cabinet Office v Information Commissioner (EA/2013/0119), 27 November 2013
[9] Cabinet Office v Information Commissioner and Gavin Aitchison, Appeal No. GIA 4281 2012
[10] Secretary of State for Work and Pensions v Information Commissioner (EA/2006/0040), 05 March 2007
[11] Cabinet Office v Information Commissioner (EA/2008/0024; EA/2008/0029)
[12] Cabinet Office v Information Commissioner (EA/2010/0031) and FS50088735, 22 December 2009
[13] Cabinet Office v Information Commissioner (EA/2010/0031), para.12
[14] Ibid, para.14

which ought to provide comfort in respect of the protection of information relating to the process of collective Cabinet discussion and agreement[15], including:

- *"By reason of the convention of collective responsibility, Cabinet minutes are always information of great sensitivity, which will usually outlive the particular administration, often by many years"*.

- *"The general interest in maintaining the exemption in respect of them is therefore always substantial. Disclosure within thirty years will very rarely be ordered and then only in circumstances where it involves no apparent threat to the cohesive working of Cabinet government, whether now or in the future"*.

The Tribunal's reasoning reiterated:

> *"58. We have no doubt that this is one of the few cases in which the maintenance of the exemption is not shown to outweigh the public interest in disclosure, mainly due to the weakening of the requirement of confidentiality on the particular facts of this case but also to the specific positive factors favouring disclosure that we have noted.*
>
> *59. We repeat, however, that this Decision does not mean that the public interest will commonly require the disclosure of Cabinet minutes. We foresee that disclosure will be a rare event and that the interest in maintaining the exemption will be particularly strong where the meeting was held in the recent past."*

The BBC does not consider that these decisions reflect any lack of respect for the principle of collective Cabinet responsibility, and believes that the existing law provides adequate protection.

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

A number of the examples identified in the Call for Evidence relate to requests for information that fall within the scope of the Environmental Information Regulations 2004 ('EIRs'), which implement European Council Directive 2003/4/EC on public access to environmental information (derived from the Aarhus Convention), rather than under the Act and therefore appear to be outside the remit of the Commission. The BBC accepts that it is necessary for risk registers to candidly record identified risks in order to be effective, but considers that in practice it appears that these are only likely to be required to be disclosed in exceptional circumstances and that the existing protection provided by the Act is adequate. The current flexibility provided by the Act in allowing the specific circumstances pertaining to the requested information to be taken into account in determining its sensitivity, the duration of any sensitivity, and the public interest balance, is desirable and ought to be maintained.

On the occasion referred to in the Call for Evidence when the publication of a redacted risk register was ordered[16], this was in respect of a transitional risk register which dealt primarily with operational and implementation risk, rather than policy considerations. In relation to the transitional risk register, having reviewed the document itself, the Tribunal found that it contained *"the sorts of risks one would expect to see in such a register from a competent Department"*. The evidence in that case, from a Government minister, was that following the publication of Gateway reviews under the Act, which were considered to be similar but not equivalent to risk registers, *"there was no evidence that a chilling effect developed as a result of the release of the reviews"*. The First-Tier Tribunal (Information Rights) concluded that the public authority was not required to disclose the strategic risk register. The Tribunal recognised that this was *"a difficult case"* and that *"the public interest factors for and against disclosure are particularly strong"*. Their decision was also heavily influenced by the timing of the requests and whether at the relevant times the Government had been reviewing policy or whether its policy was fixed. The BBC considers that, again, this decision appears to have been confined to its facts and notes that the Tribunal recognised that *"The public interest in understanding the risks involved in such wide-ranging reforms of the NHS in the circumstances just described would have been very high, if not exceptional in this case"*.

[15] Ibid, para.48
[16] Department of Health v Information Commissioner and another (EA/2011/0286 & 0287), 05 April 2012

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

The effect of the Supreme Court's decision in R (On the application of Evans) v Attorney- General [2015] UKSC 21 is to limit the use of the veto in its current form under s53 of the Act to circumstances where, in respect of any decision of the First-Tier Tribunal (Information Rights) or superior court or tribunal, there has been a material change in circumstances, or facts or matters have come to light at some point which indicate that the judicial decision being overturned was seriously flawed, but also cannot give rise to an appeal against that decision.

While the BBC is not opposed in principle to a Ministerial veto, and notes the conclusion of the Justice Select Committee that it provides *"a necessary backstop to protect highly sensitive material"*, the circumstances in which any veto might be exercised ought to be carefully defined with the effect that the veto could only be exercised with the agreement of the Cabinet in exceptional defined circumstances, with any such decision being supported by detailed reasons and subject to judicial review (with the limitation period running from the publication of the Information Commissioner's report of the exercise of the veto rather than the exercise of the veto itself and any member of the public being considered to have sufficient standing). The BBC considers that the scope of the veto as understood following the decision in Evans is adequate.

The BBC considers that in the event that consideration is given to the redrafting of the Ministerial veto, the terms ought to be subject to specific public consultation prior to any Bill being introduced.

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

The BBC considers that it is desirable to maintain the existing structure of the enforcement and appeal system for freedom of information requests, including the internal review stage and the role of the Information Commissioner, which provides an appropriate mechanism of oversight and redress. The BBC does not consider that it would be appropriate to move to a system whereby decisions as to disclosure would be challenged in the High Court by way of judicial review, which would add unnecessary complexity and expense and would increase the burden on the courts.

As set out above, in 2014 the BBC received more than 2000 requests under the Act. The BBC regularly records compliance with the statutory 20 working days deadline at a rate in excess of 90%. In the same year the BBC conducted 93 internal reviews, that is in relation to approximately 4% of requests. The BBC endeavours to complete internal reviews within the Information Commissioner's guideline 20 working days and certainly within the 40 working day backstop. The BBC does not offer an internal review in respect of information held for the purposes of journalism, art or literature, and therefore some cases progress directly to the Information Commissioner following refusal. In that year the BBC logged 89 cases as being referred to the Information Commissioner, again representing approximately 4% of requests (this may not include cases which were withdrawn after referral to the Information Commissioner but prior to the BBC being asked to make submissions). The BBC would not support a change in focus from the decision of the Information Commissioner being under appeal to that of the public authority, as this could result in inappropriate diversion from examining the correctness of the decision to the manner in which it was made.

The BBC has both brought (as a requester and as a public authority), and been a public authority additional respondent to, appeals at Tribunal level and through the courts. The BBC has participated as a public authority additional respondent party in more than 30 appeals (some of which were subsequently conjoined); that figure does not include appeals brought in respect of the BBC's information but to which the BBC was not joined as an additional party. In almost all of these, the appeal was dismissed (and in a number of cases was struck out as having no reasonable prospect of success at an early stage), or was withdrawn - in some cases following the voluntary disclosure by the BBC of information. This would appear to be broadly consistent with (if not an improvement on) the figures cited at Annex B to the Call for Evidence, which state that in respect of all public authorities at the First-Tier Tribunal the Information Commissioner's decision was upheld in 77% of decided appeals.

The internal review system provides an opportunity for public authorities to review responses and provide further information about the reasoning behind a decision to requesters or to consider whether an informal resolution might be appropriate, thus preserving public resources.

The BBC would not support a change in focus from the decision of the Information Commissioner being under appeal to that of the public authority, as this could result in inappropriate diversion from examining the correctness of the decision to the manner in which it was made.

The BBC considers that the Information Commissioner, as an independent regulator, acts as a valuable and proportionate arbiter and the BBC would not support the abolition of the Commissioner or the First-Tier Tribunal or their replacement with a right of appeal to the High Court or the potential to bring judicial review proceedings.

The BBC does not believe that a change in the role of the Information Commissioner to provide non-binding reviews of the decisions of public authorities would be desirable; if his recommendations were not followed by public authorities, the Information Commissioner would not maintain the confidence of the public and the expense of providing such a system would become unjustifiable. The resource required to respond to complaints to the Information Commissioner is far less than that to deal with appeals to the Tribunal or would be required to deal with cases brought before the High Court.

As the First-Tier Tribunal allows for the provision of witness evidence, its role as the ultimate arbiter of issues of fact is preferable to its jurisdiction being limited to adjudicating on points of law. The BBC has successfully appealed to the First-Tier Tribunal on matters of both fact and law[17]. While handling appeals to the First-Tier Tribunal (Information Rights) does incur resources, the cost of an appeal to the High Court would be substantially higher and prohibitively expensive for individual requesters and even the media in all but the most significant cases. The requirement that any appeal be by way of judicial review could potentially increase the number of potential claimants beyond the requester, increase the grounds on which an appeal could be brought and, in certain cases, would create a right of disclosure around the making of decisions. However, the threshold for bringing an appeal would be significantly increased, particularly following the commencement of s84 Criminal Justice and Courts Act 2015, and the right severely curtailed in this respect. A right to bring judicial review proceedings may arise in any event if the right of access to information is recognised as falling within Article 10 of the European Convention on Human Rights[18].

In practice, the Information Commissioner often gives requesters an indication of its likely position, and offers an opportunity to withdraw an appeal. While this may limit the Information Commissioner's caseload, in circumstances where submissions have been sought from and provided by public authorities, the BBC considers that it would be preferable for decision notices to be issued as these provide a useful body of (non-binding) precedent and this would limit the prospect of repeat requests being made for the same information.

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

The BBC believes that it is important to retain the principle that access to information under the Act ought to be free. Although the number of requests submitted to the BBC has more than doubled since the introduction of the Act, the BBC considers that, for the majority of requests, the burden imposed on authorities is justified by the public's right to know and the BBC would not support any amendments to the Act or The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Regulations') which would create significant detriment to requesters' right of access.

[17] BBC & One Transport Ltd v Information Commissioner & Davis (EA/2010/0150) LEGAL DIVISION
[18] Although the UK Supreme Court has held that Article 10 of the European Convention on Human Rights does not create a right to information (see Kennedy v Charity Commission [2014] UKSC 20), the issue is currently under consideration by the European Court of Human Rights in Magyar Helsinki Bizottság v Hungary (18030/11). This would enable judicial review challenges on the grounds of proportionality to be brought.

The BBC would not support the provisions of the Act which enable fees to be charged being brought into force[19]. The experience in Ireland of the introduction of a relatively low up-front fee, of €15, resulted in a reduction in the number of requests by approximately half[20]. The BBC considers that this would be a retrograde step which would undermine the rights afforded by the Act, and would be likely to have the greatest impact on individual requesters. Furthermore, the administrative cost of processing a fee at this level would no doubt exceed the amount of the fee itself and would therefore diminish openness and transparency while increasing the burden on public funds. It is noted that Ireland has now abolished such fees.

As regards the calculation of the appropriate limit, the BBC does not consider that the inclusion of, for example, the time spent considering the application of redactions would strike an appropriate balance between the rights of requesters and the need to preserve the resources of public authorities, and considers that this may be open to abuse.

In order to apply the provisions of sections 12 and 14 to requests as appropriate, in appropriate cases, that is to say in cases where requesters submit multiple requests on the same or similar subject matter within a 60 working day time period or where requests are vexatious, it is necessary to know who is requesting the information. On occasion the BBC receives requests under obvious pseudonyms, i.e. under the names of film or cartoon characters, in which case these can be easily identified and rejected for failure to comply with s8(1)(b) of the Act. However, it would appear that the BBC does receive requests from individuals operating multiple accounts using pseudonyms which are not obvious, with the result that it is very difficult if not impossible for the BBC to assert its rights under sections 12 and 14 of the Act, imposing an unjustified burden. The BBC therefore considers that it would be expedient to explore the benefit that may accrue if the provision of identification from a requester could be required in circumstances where multiple requests were being submitted and there was reason to suspect that the requirements of s8(1)(b) of the Act were being flouted. Any such power would have to be subject to appropriate safeguards to ensure that the principle that requests are processed in a manner that is applicant and motive blind would not be encroached upon, and this might be achieved by referring the requests and requester to the Information Commissioner to seek identification and independently determine the validity of the request.

Following the Court of Appeal's decision in Dransfield v Information Commissioner & Devon County Council[21] earlier this year, the circumstances in which the application of the exemption under s14 for vexatious requests may properly be exercised have become less certain. The Information Commissioner's guidance on the application of the exemption, which has not yet been updated following the Court of Appeal's decision, suggests that the value of serious purpose of the request must be balanced against the detrimental impact on the public authority, whereas the Court of Appeal's judgment appears to place greater emphasis on and, indeed, to identify as an overriding factor, the public interest in the disclosure of the requested information[22]. To provide an example of the impact of this decision, the BBC regularly receives multiple requests (on occasion in excess of 20 on the same day), albeit on a variety of subject matters, from an individual requester, who has a history of dispute with the organisation. As the requests do not constitute related requests for the purposes of Regulation 5 of the Regulations, these requests fall outside s12 of the Act. The BBC is not permitted to designate the requester as vexatious, the tone of the correspondence is appropriate, and the specific requests may be for information which could be considered to be in the public interest to disclose. While it is apparent that the burden imposed on the BBC by this individual's requests is heavy, following the Court of Appeal's decision, it is not clear that the BBC is entitled to take the step, which can be interpreted as hostile and is therefore only used after careful consideration, to determine the requests as vexatious if they are *"aimed at the disclosure of important information which ought to be made publicly available"*. The BBC would therefore welcome clarification of the intended scope of this provision, and we note that in the Information Commissioner's response to the Call for Evidence he suggests that he would *"be open to strengthening the guidance on section 14 by putting it on a statutory basis"*.

[19] S9 of the Act
[20] http://www.bbc.co.uk/news/uk-politics-18282530
[21] Dransfield v Information Commissioner & Devon County Council; Craven v Information Commissioner & Department for Energy and Climate Change [2015] EWCA Civ 454
[22] Ibid, para.68 and para.72

Better Government Initiative (BGI)

The Better Government Initiative (BGI) is an informal body made up of people with practical experience in government at a very senior level who have no links to particular political parties (www.bettergovernmentinitiative.co.uk). In the light of the background and experience of our members we would like to focus our evidence principally on civil service advice to ministers, in particular in relation to Questions 1 and 3 in the call for evidence (on deliberative space and protection for information on assessment of risk).

The purpose of the BGI is to promote high standards in the processes of government. We lay stress on the need for:

- robust policy-making procedures based firmly on evidence;
- full disclosure of the factual information on which policy decisions are based.

The BGI is accordingly strongly in favour of arrangements such as those in the Freedom of Information Act that will enable the facts that were taken into account and the conclusions reached in formulating a policy decision to be thoroughly scrutinized by parliament and public.

It is sometimes argued that the risk of having such information made public will severely limit the preparedness of civil servants to give frank advice to ministers and to provide a clear record of the process of deliberation and the decisions taken. Although we recognise that such problems could arise, we believe that the dangers are overstated. Well before the introduction of the Freedom of Information Act there were occasional “leaks” of sensitive information and civil servants have long been accustomed to framing their advice in terms that would not be open to misrepresentation if made public. Similarly they are fully seized of the need to ensure that there is an effective audit trail when government decisions, particularly those with financial consequences, are taken.

There are however practical limitations on the speed and detail of the release of information. Any decision-making process is necessarily iterative as the facts are assembled and examined, alternatives are considered and whittled down, and a final choice is refined and developed. Publication at any of these intermediate stages might give a wholly false impression and result in a political outcry that would cause what might otherwise have been a sensible and beneficial policy to be blown off course.

The problem is perhaps particularly acute when risk analysis is involved. Comprehensive assessment of risk necessarily involves consideration of a wide range of possibilities. At the extremes some of them will have a very low probability of occurring but very serious consequences if they do occur. If these are misrepresented as a likely outcome the whole risk/reward balance of the policy will be undermined.

A further concern of the BGI is that the civil service should continue to be able to provide a source of expert disinterested and impartial advice to governments of different political persuasions. This too has implications for the timing of the release of information. The civil service works assiduously to support the policies of a governing party until shortly before the next general election. If recent advice provided to a previous administration were immediately available to a new government of another party it would perhaps give a false impression of the willingness of the civil service to support a different policy direction. The problem would be much reduced when time had passed and they were able to make their own judgement of the capacity of their civil servants.

For all these reasons the drafting of the original Freedom of Information Act sought to provide a “safe space” within which advice to ministers from their civil servants could remain confidential until an appropriate period of time had passed. Experience has shown, however, that this has not been achieved. Judicial examination has revealed that the “safe space” is far more limited that was originally intended.

The reasons for seeking to provide a “safe space” remain valid, however, and the Act should be amended to restore the pattern of protection of information originally envisaged. But in the interests of transparency the degree of protection should be limited to what is strictly necessary to preserve the functioning of the “safe space”.

We recommend that all factual information, including the obligatory regulatory impact assessments and other relevant benefit/cost analysis, that has played a part in the development of policy should be made available as soon as the policy is announced. Material relating to the deliberative process itself should remain protected for longer but a period of twenty years seems excessive, going far beyond the duration of a single Parliament. We would invite the Commission to consider whether a period of five or perhaps six years would be sufficient.

On a somewhat different topic, we are aware that there have been cases where the Act's provisions have been exploited with no clear public interest justification in an endeavour to acquire a commercial advantage by seeking market and competitor information. The Commission may wish to seek further information on the extent and seriousness of this practice.

Better Government Initiative
61 Petty France
London SW1H 9EU

12th November 2015

Big Brother Watch

About Big Brother Watch

Big Brother Watch is a civil liberties and privacy campaign group that was founded in 2009. We have produced unique research exposing the erosion of civil liberties in the UK, looking at the dramatic expansion of surveillance powers, the growth of the database state and the misuse of personal information.

Specific to this consultation we have made use of the Freedom of Information Act on a large number of occasions. Producing reports on subjects as varied as the use of Communications Data by police forces, breaches of data protection within the NHS and the number of council officials who can enter your home without a warrant.

Additionally the organisation is dedicated to ensuring transparency at all levels of government, a call which flows throughout our work.

Key Points

- **Introducing mandatory charges will do more harm than good.**
- **The case-by-case approach to publication under the Act are preferable to a catch-all scheme.**
- **Good leadership and a renewed emphasis on pro-active publication are more effective at reducing the burden of the Act than implementing charges.**

Big Brother Watch's use of the Act

As an organisation Big Brother Watch has made extensive use of the Act since 2009. For a full breakdown please visit the report section of our website: https://www.bigbrotherwatch.org.uk/research-and-reports/ .

A few examples of this are:

1. In September 2012 we released Class of 1984 a report which showed for the first time the number of CCTV cameras that were being used to monitor children in schools.[23]
2. Our March 2013 report found that a number of councils were circumventing the Protection of Freedoms Act 2012 by hiring private investigators to carry out surveillance.[24]
3. In November 2014 we used Freedom of Information requests to show that NHS bodies suffer 6 data breaches every day.[25]

Response

Ware concerned that Questions 1, 2, 3 and 4 all call for a suggested time limit for the release of sensitive information. To avoid pointless repetition throughout this response we will address this issue here. The Act already deals with sensitive information. If a response is deemed to be sensitive in

[23] Big Brother Watch, *Class of 1984*, September 2012: https://www.bigbrotherwatch.org.uk/files/school_cctv.pdf
[24] Big Brother Watch, *Private Investigators*, March 2013: https://www.bigbrotherwatch.org.uk/wp-content/uploads/2013/03/Private-Investigators-Final-Report.pdf
[25] Big Brother Watch, *NHS Data Breaches*, November 2014, p. 3: https://www.bigbrotherwatch.org.uk/wp-content/uploads/2014/11/NHS-Data-Breaches-Report.pdf

some way it can be refused. Under Section (2) 36 information can be refused if it may "*prejudice, the effective conduct of public affairs*".[26]

The current process of releasing data on a case by case basis, after deliberation and scrutiny of the public interest value should remain. The alternative, of treating all data with the same level of sensitivity in order to restrict access to it until 30 years have passed, would, if implemented be an absolute attack on government transparency and the ability of the citizen to engage in government activity.

It should also be noted that the timing of this Independent Commission, given that it comes just two years after the Justice Select Committee carried out post-legislative scrutiny of the Act could be seen as inexplicable.

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

Big Brother Watch believe that the current arrangements offer sufficient safeguards to the decision making process.

Making it difficult to access information used as part of a decision making process has the potential to exempt a lot of important material from disclosure.

The decision making process which can reveal:

- Factual material
- Research reports
- Opinion polls
- Statistics relating to decisions not yet taken
- Scientific or technical evidence
- Contact with lobbyists
- Consultation responses.

This material can under the right circumstances promotes transparency and improves understanding of the process of government and beyond

It is worth noting that the Justice Select Committee's post legislative scrutiny of the Act considered this issue and found that the existing provisions of the Act "*could be used more effectively to give assurance that there was no need for high-level policy discussions, and the recording of such discussions, to be inhibited by the Act*".[27]

Question 2: What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?

Big Brother Watch believe that the current arrangements offer sufficient safeguards to the decision making process.

[26] Freedom of Information Act 2000, Section 2, Clause 36: http://www.legislation.gov.uk/ukpga/2000/36/section/36
[27] Information Commissioner's Office, *Working Effectively: lessons from 10 years of the Freedom of Information Act*, 1st October 2015: https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2015/10/working-effectively-lessons-from-10-years-of-the-freedom-of-information-act/

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

Big Brother Watch believe that the current arrangements offer sufficient safeguards to the decision making process.

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

It is sensible to allow the government a veto over the release of certain information. Although it is important that this veto; as with other methods of refusing the disclosure of certain information, can be challenged, as was the case when the Supreme Court overturned the use of a ministerial veto on Prince Charles' correspondence with ministers. Any veto must not be used to permanently block the disclosure of information.

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

The Information Commissioner's Office is the correct body for an appeals process. It has the knowledge and expertise to be able to handle appeals efficiently as well as being a recognisable and trusted body.

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

The burden on public authorities is not as onerous as is often claimed. The Ministry of Justice's statistics show that between 2005 and 2014 there was an overall increase of 8698 requests to central government bodies. This is the equivalent of 22.9%. This shows that the burden, broadly speaking, has remained consistent since the introduction of the Act in 2005. It would be wrong to argue that the burden on public bodies has risen exponentially or has seen a sudden and dramatic increase.

The cost in terms of staff time sounds significant when taken in isolation, but when set against the bigger picture the £35.5m per year cost to central government is not as big as it may at first seem. The £108m which is spent annually on funding trade unions puts the £35.5m figure into perspective. Importantly uncovered through Freedom of Information requests by the Taxpayers' Alliance .[28] Additionally the Daily Telegraph have used the laws to reveal that 186 councils had spent around £40m on things such as "*dinners at Michelin-starred restaurants, leisure trips and expensive gifts including iPads and video games*".[29]

There are already a range of options open to organisations if a request appears as though it may be too burdensome to respond to. Already requests can be refused if they threaten to exceed cost and time limits:

1. £600 for central government.
2. £450 for local government.

Related requests and questions can be aggregated to remove the need for officials to duplicate work. This does not take into account the money which can be, and indeed has been, saved by public bodies as a result of inefficiencies uncovered by requests. The Justice Select Committee noted the cost of meeting the requirements of the Act can be reduced by good leadership and a clear strategy

[28] City AM, *Trade Unions received £108m from the taxpayer last year*, 9th September 2014: http://www.cityam.com/1410222716/trade-unions-received-108m-taxpayer-last-year
[29] http://www.telegraph.co.uk/news/politics/council-spending/8542909/Councils-spend-100m-on-taxpayer-funded-credit-cards.html

for dealing with requests. It warned that authorities complaining about the Act will "*ring hollow*" if they have "*failed to invest the time and effort needed to create an efficient freedom of information scheme*".[30]

In light of this it would be a grave error to introduce a system of mandatory charges. Even something as low as £10, a figure suggest by Rt. Hon Jack Straw MP in his evidence to the Justice Select Committee's inquiry into Freedom of Information, would have a negative impact on the ability of people to make use of the Act.[31]

FOI is predominantly used by members of the public. The Campaign for Freedom of Information has noted that individuals of limited means will be effectively excluded from using the Act if they need to use it to question multiple bodies, as is often the case when attempting to resolve a complex issue.[32]

For campaigning organisations such as Big Brother Watch, the £10 charge would impose real penalties on the work we do, work which has brought awareness to the general public and has assisted MP's and Peers in drawing attention to unfair and costly practices. As an example, for us to afford to make the number of requests we have made from October last year to October 2015 it would have cost us £18,050 if a £10 charge had been in effect.

When the Irish Government began charging for Freedom of Information requests in 2003 the following year the Irish Information Commissioner recorded a 50% drop in the number of requests (this is excluding requests for personal information, equivalent to DPA requests in the UK as charges were not introduced for this type of information). The Irish Information Commissioner called the changes "*a major obstacle to the use of the Freedom of Information Act*".[33]

She added that the move risked sending a signal that "*people are seen as adversaries and nothing more than lip-service is being paid to the principles of open, fair and accountable government*".[34]

It's unclear as to what exactly a charge would achieve, it may cut the number of requests but it would not bring the Act any closer to being more self-funding than is already the case. If the local government had charged £10 for every request made in 2010 it would only have recouped £1,977,370 of the £31.6m cost. This is a point recognised by the Justice Select Committee, their final report on the issue argued that "*fees at a level high enough to recoup costs would deter requests with a strong public interest and would defeat the purposes of the Act*".[35] A far more effective way of cutting costs and reducing the burden of the Act would be to follow the Information Commissioner's advice and become more effective at publishing information in the first place.

In summary it is worth considering the Information Commissioner's evidence to the Justice Select Committee. When asked about the potential for charging the Commissioner responded that it was "*a bit rich*" to see organisations complaining that they received a large number of requests "*when they do not have an adequate publication scheme*".[36] As stated earlier a way to cut the number of requests and make savings in this area, removing the need for charges, is for organisations subject to FOI to focus on ensuring as much pro-active publications as possible as was originally proposed when the Act was made law.

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[30] Ministry of Justice Select Committee, *Post Legislative scrutiny of the Freedom of Information Act 2000*, 26th July 2013, p. 38: http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/96.pdf
[31]Ministry of Justice Select Committee, *Post Legislative scrutiny of the Freedom of Information Act 2000*, 26th July 2013, p. 30: http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/96.pdf
[32] Campaign for Freedom of Information, *Stop FOI restrictions*: https://www.cfoi.org.uk/campaigns/stop-foi-restrictions/
[33]Ministry of Justice Select Committee, *Post Legislative scrutiny of the Freedom of Information Act 2000*, 26th July 2013, p. 36: http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/96.pdf
[34] Ibid p. 36
[35] Ministry of Justice Select Committee, *Post Legislative scrutiny of the Freedom of Information Act 2000*, 26th July 2013, p. 36: http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/96.pdf
[36] Ministry of Justice Select Committee, *Post Legislative scrutiny of the Freedom of Information Act 2000*, 26th July 2013, p. 36: http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/96.pdf

The Bingham Centre for the Rule of Law

Introduction

The Bingham Centre for the Rule of Law welcomes this opportunity to respond to the consultation by the Independent Commission on Freedom of Information concerning the Cabinet veto, the practical operation of the Freedom of Information Act 2000 in respect of the deliberative space afforded to public authorities, and the balance between transparency and the burden of the Act on public authorities more generally. However, the Bingham Centre is disappointed that the Commission's Call for Evidence does not seek views on extension of the FOI framework to further enhance openness, transparency and accountability. The Centre's response is authored by Dr Eric Metcalfe, who is a fellow of the Bingham Centre and a co-author of the fifth edition of Blackstone's Guide to the Freedom of Information Act 2000[37].

About the Bingham Centre

The Bingham Centre for the Rule of Law was launched in December 2010 and is devoted to the study and promotion of the rule of law worldwide. Its focus is on understanding and promoting the rule of law; considering the challenges it faces; providing an intellectual framework within which it can operate; and fashioning the practical tools to support it. The Centre is named after Lord Bingham of Cornhill KG, the pre-eminent judge of his generation and a passionate advocate of the rule of law. It is part of the British Institute of International and Comparative Law, a registered charity based in London.

The Bingham Centre has a particular interest and expertise in the law relating to Freedom of Information. In his book, The Rule of Law[38], Lord Bingham stressed the need for transparency as a central aspect of the rule of law. First, the law itself must be accessible to

the public at large and, so far as possible, intelligible, clear and predictable[39]; secondly, ministers and public officials at all levels must exercise the powers conferred on them in good faith, fairly, and for the purpose for which the powers were conferred[40]; and thirdly, the law must afford adequate protection for fundamental human rights, including the freedom "to receive and impart information and ideas without interference by public authority".[41]5 As Lord Bingham held in his leading judgment in R v Shayler:[42]

Bingham Centre Response to the Independent Commission on Freedom of Information (Nov 2015).

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

37 Oxford University Press, 2013.
38 Penguin Books, 2011
39 The Rule of Law, pp37-47
40 Ibid, pp60-65.
41 Ibid, p78. See also e.g. the decision of the European Court of Human Rights in Társaság a Szabadságjogokért v Hungary (App no. 37374/05) (14 April 2009) in which it noted that the Court had "recently advanced towards a broader interpretation of the notion of "freedom to receive information" … and thereby towards the recognition of a right of access to information" (para 35).
42 [2003] AC 247 at para 21.

The Bingham Centre has also had practical experience of the operation of the Freedom of

Information Act. Among the Centre's current projects is a review of the law governing the use of intercept material as evidence and on 19 September 2014 the Information Tribunal upheld the Centre's appeal under the Freedom of Information Act 2000 against the Home

Office's refusal to disclose legal advice on this issue[43].

About the Freedom of Information Act

The Bingham Centre notes that the Commission's inquiry comes just three years after the

House of Commons Justice Select Committee[44] reported the conclusions of its post-legislative scrutiny of the Freedom of Information Act. In particular, the Committee found that the Act:

(i) was "a significant enhancement of our democracy" that has "improved openness, transparency and accountability"[45]; and

(ii) had not had a harmful effect on the ability to conduct business in the public service, but that the additional burdens were "outweighed by the benefits"[46].

Aside from identifying a need to put time limits for the handling of requests on a statutory footing, and proposing the introduction of a research exemption along the same lines as s27(2) of the Scottish Freedom of Information Act, the Committee saw "no pressing need for legislative change to an Act which is serving the nation well"[47].

Although there have been several developments over the past three years - not least the judgment of the Supreme Court in R (Evans) v Attorney General[48] concerning the operation of the so-called veto under section 53 of the Act - the Bingham Centre does not consider that there has been any shift in the underlying conditions that supported the Committee's conclusions in 2012. In the Centre's view, the Act remains a significant enhancement to our democracy and we do not see that any pressing need has arisen for changes to the Act.

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

In our view, the exemptions contained in sections 35 (formulation of government policy, etc) and 36 (prejudice to effective conduct of public affairs) of the Act already provide significant protection for the internal deliberations of public bodies and we see no basis for either altering or extending these protections any further. Specifically, no information may be disclosed under the Act where a public authority (or, on appeal, the Information Tribunal) considers that:

a. the requested information either 'relates to' one of the grounds set out in section 35(1) or its disclosure, in the reasonable opinion of a qualified person, either would or would be likely to prejudice or inhibit one of the interests set out in section 36(2); and

b. in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information (section 2(2)(b)).

[43] Bingham Centre for the Rule of Law v Information Commissioner [2014] UKFTT 2014/0097 (GRC). On 3 June 2015, the Upper Tribunal remitted the case to be re-heard by a differently constituted First-Tier Tribunal and the hearing is scheduled for 27 November 2015.
[44] Post-legislative scrutiny of the Freedom of Information Act 2000 (HC 96, 26 July 2012
[45] Ibid, paras 53 and 241, and para 7 of the conclusion.
46 Ibid, para 241.
[47] Ibid at 243
[48] [2015] UKSC 21.

Moreover, Sir Alan Beith MP, then Chairman of the Justice Select Committee, said at the time of the Committee's 2012 report on post-legislative scrutiny of the Act: "The Act was never intended to prevent, limit, or stop the recording of policy discussions in Cabinet or at the highest levels of Government, and we believe that its existing provisions, properly used, are sufficient to maintain the 'safe space' for such discussions. These provisions need to be more widely understood within the public service. They include, where appropriate, the use of the ministerial veto"[49].

The Commission invites submissions on "how long after a decision does such information remain sensitive". In our view, however, it is not necessarily the case that information is "sensitive" simply because it relates to the internal deliberations of a public body. Indeed, the premise of the question (that information necessarily remains sensitive for some certain, unspecified period) appears to disregard the carefully-wrought scheme of exemptions under sections 35 and 36 of the Act.

First, the exemption under section 35 is classed-based: information is therefore prima facie exempt if it "relates to" one of the grounds identified. The exemption under section 36, by contrast, is prejudice-based: it requires the reasonable opinion of a qualified person that the disclosure of the information in question would (or would be likely to) cause prejudice to one of the identified interests. Secondly, the Act does not prescribe or indicate any particular period over which the information in question may be exempt under sections 35 or 36. It is, of course, correct that both the Information Commissioner's guidance and the case law of the Information Tribunal identifies the passage of time as one factor that may bear on the existence of prejudice under section 36(2) as well as the balance of the public interest under section 2(2)(b).[50] It would, however, be both unhelpful and inappropriate in our view to seek to lay down any prescribed period under which information relating to internal deliberations either cannot be disclosed under the Act or its disclosure made more difficult.

The Centre considers that there is no evidence that the existing scheme fails to strike the correct balance between the competing public interests in this area, and that the imposition of a prescribed period would only damage the considerable flexibility accorded to public authorities and the Information Tribunal under the existing exemptions. Again, we do not see any basis for either altering or extending the protections that currently apply under sections 35 and 36.

Question 2: What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?

Cabinet discussions (including those of the Welsh Cabinet and the Northern Ireland Executive) are already protected under the head of 'ministerial communications' set out at section 35(1)(b), as well as the exemptions under sections 62 and 63 where minutes of those discussions have been transferred to the Public Records Office. The principles governing the disclosure of Cabinet minutes were extensively addressed by the Information Tribunal in its decisions in Cabinet Office and Lamb v Information Commissioner (the minutes of the Cabinet's discussion of the Iraq War)[51] and Cabinet Office v Information Commissioner (the minutes of the Cabinet's discussion of Westland plc).[52] In the latter case, the Tribunal summarised these principles as follows:[53]

- By reason of the convention of collective responsibility, Cabinet minutes are always information of great sensitivity, which will usually outlive the particular administration, often by many years.

- The general interest in maintaining the exemption in respect of them is therefore always substantial. Disclosure within thirty years will very rarely be ordered and then only in

[49]See http://www.parliament.uk/business/committees/committees-a-z/commons-select/justicecommittee/news/foi-report/
[50] 14 See Information Commissioner's Office guidance on "Government Policy (Section 35)", "Prejudice to the effective conduct of public affairs (section 36)" and "Section 36: Record of the qualified person's opinion".
[51] EA/2008/0024 and EA/2008/0029, 27 January 2009.
[52] EA/2010/0031, 13 September 2010.
[53] Ibid, para 48.

circumstances where it involves no apparent threat to the cohesive working of Cabinet government, whether now or in the future.

- Such circumstances may include the passage of time, whereby the ministers involved have left the public stage and they and their present and future successors know that such disclosure will not embarrass them during the critical phase of an active political career.

- Publication of memoirs and ministerial statements describing the meeting(s) concerned may weaken the case for withholding the information, especially where versions conflict, either factually (which is not the case here) or in their interpretation of what took place.

- The fact that the issues discussed in Cabinet have no continuing significance may weaken to a slight degree the interest in maintaining the exemption but the importance of the convention is not dependent upon the nature of the issue which provoked debate.

- There is always a significant public interest in reading the impartial record of what was transacted in Cabinet, no matter what other accounts of it have reached the public domain. Where the usual interest in maintaining confidentiality has been significantly weakened, that interest may justify disclosure.

- The public interest in disclosure will be strengthened where the Cabinet meeting had a particular political or historical significance, for example the discussion of the invasion of Iraq at the meeting under consideration in Cabinet Office v Information Commissioner (Lamb)).

Applying those principles to the Westland minutes, the Tribunal found that some nineteen years had passed between the date of the Cabinet's discussion and the request made under the Act, such that no "member of that Cabinet could justifiably feel traduced by the publication of those minutes in 2005"[54]. Overall, it concluded that "balancing the interests for and against disclosure we have no doubt that this is one of the few cases in which the maintenance of the exemption is not shown to outweigh the public interest in disclosure, mainly due to the weakening of the requirement of confidentiality on the particular facts of this case but also to the specific positive factors favouring disclosure that we have noted"[55].

It is clear from its case law that the Information Tribunal accords considerable constitutional importance to the principle of collective Cabinet responsibility and the confidentiality of its discussions but that it remains open under the Act for minutes to be disclosed where the balance of the public interest favours such disclosure. In Cabinet Office v Information Commissioner, the Tribunal took pains to stress that "this Decision does not mean that the public interest will commonly require the disclosure of Cabinet minutes. We foresee that disclosure will be a rare event and that the interest in maintaining the exemption will be particularly strong where the meeting was held in the recent past"[56]. In the Centre's view, the principles identified by the Tribunal in relation to this exercise are entirely sound.

As indicated previously, moreover, the Centre does not consider that there is any merit in seeking to specify any particular period in which such material must remain confidential. In our view, this would unnecessarily constrain public bodies and the Tribunal from disclosing material where they considered that it was in the public interest to do so.

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

The Act does not provide specific protection for information which involves the candid assessment of risks. Nor, in the Centre's view, is it necessary to provide such protection. This is because risk assessments - whether candid or otherwise - are not, in themselves, an inherently sensitive category of governmental information. Indeed, in the Centre's view, if a public official has produced such an

[54] Ibid, paras 51-52.
[55] Ibid, para 58.
[56] Ibid, para 59.

assessment for some governmental purpose, the default position should be that it should ordinarily be disclosed to the public unless there is some compelling reason why it should not be. In our view, it would be a mistake for the Commission to proceed on the apparent misapprehension that risk assessments are somehow inherently confidential or sensitive.

If, however, a candid assessment of risks falls within one of the existing exemptions, such as one of the grounds under section 35(1) or its disclosure would, or would be likely to, cause prejudice to the effective conduct of public affairs under section 36(2), then the Centre agrees that such assessments may be lawfully withheld, assuming that the balance of the public interest under section 2(2)(b) of the Act does not favour their disclosure notwithstanding the engagement of the exemption.

As before, we do not consider that there is any merit in seeking to identify how long a risk assessment may remain sensitive. This, in our view, must remain something to be assessed according to the facts of each particular case and it would be damaging to the sensitivity and flexibility of that assessment to seek to introduce some particular statutory time limit or minimum period.

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

In its Call for Evidence, the Commission states that it is "clear that its terms of reference require it to look carefully at the implications for the Act of the uncertainty around the Cabinet veto"[57]. The Centre notes, however, that the Commission's terms of reference do not refer in terms to the so-called veto under section 53 of the Act nor to any such uncertainty concerning the operation of that section[58].

ndeed, the Centre strongly doubts that there could be any lingering uncertainty concerning the operation of section 53 in the wake of comprehensive judgments on that issue delivered by the Upper Tribunal,[59] the Divisional Court (presided over by the Lord Chief Justice)[60], the Court of Appeal (presided over by the Master of the Rolls)[61] and, most recently, a panel of no less than seven Supreme Court justices, presided over by both the President and the Deputy President[62]. As the President himself noted[63]: A statutory provision which entitles a member of the executive (whether a Government Minister or the Attorney General) to overrule a decision of the judiciary merely because he does not agree with it would not merely be unique in the laws of the United Kingdom. It would cut across two constitutional principles which are also fundamental components of the rule of law.

As he went on to explain[64]: where, as here, a court has conducted a full open hearing into the question of whether, in the light of certain facts and competing arguments, the public interest favours disclosure of certain information and has concluded for reasons given in a judgment that it does, section 53 cannot be invoked effectively to overrule that judgment merely because a member of the executive, considering the same facts and arguments, takes a different view.

In respect of the veto contained in section 53, the Bingham Centre agrees with the President of the Supreme Court (Lord Neuberger) in Evans that, "it is a basic principle that a decision of a court is binding as between the parties, and cannot be ignored or set aside by anyone, including (indeed it may fairly be said, least of all) the executive"[65]. Moreover, it is "fundamental to the rule of law that decisions and actions of the executive are, subject to necessary well established exceptions (such as declarations of war), and jealously scrutinised statutory exceptions, reviewable by the court at the suit of an interested citizen"[66]. Like Lord Neuberger, we take the view that, where a court or tribunal has

[57] Call for Evidence, at p4.
[58] See terms of reference here: https://www.gov.uk/government/speeches/freedom-of-informationnew-commission
59 [2013] UKUT 075 (AAC).
[60] [2013] EWHC 1960 (Admin).
[61] [2014] EWCA Civ 253
[62] [2015] UKSC 21
[63] Ibid, para 51.
[64] Ibid, para 59
[65] Ibid, para 52.
[66] Ibid

reached a final decision on the question of the balance of the public interest under section 2(2)(b), the executive should abide by that decision[67].

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

23. In the Centre's view, although there have been increasing problems with delays by public authorities in responding to requests under the Act, the existing system of enforcement and appeals appears to remain broadly effective.[68] We are aware that there has been some discussion of allowing greater use of charges by public bodies for requests under the Act, and that there has already been consultation on the possible introduction of fees for appeals to the Information Tribunal.[69] In our view, the introduction of either measure would be a seriously retrograde step. The Act already provides for public authorities to set fees for dealing with requests under section 9 and the Centre has not seen any evidence to suggest that public authorities have found these provisions inadequate. In addition, any increase in fees for requests under the Act could particularly affect those with good reason to make a series of requests, for example to all local authorities in order to see the national picture. More generally, we are concerned that the introduction of fees for appeals to the Information Tribunal is likely to inhibit the effective operation of the Act and access to justice more broadly.

Further fees for requests or appeals would also, in our view, lead to an unwelcome divergence between the treatment of requests under the Act, on the one hand, and that of requests under the Environmental Information Regulations 2004 ('EIR'), on the other hand. As the Commission is undoubtedly aware, the definition of 'environmental information' under the EIR is extremely broad. The potential scope for requesting information under the EIR is not widely appreciated by the public at large. Moreover, as an EU measure, its requirements are not open to amendment in the same manner that the Act may be. Any introduction of restrictions on requests or appeals under the Act with the aim of reducing the burden on public authorities is, therefore, likely to backfire, resulting instead in members of the public seeking information under the EIR wherever possible.

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

For the reasons already set out above, the Bingham Centre does not agree that any further controls are required in order to reduce the burden of the Act on public authorities. As the House of Commons Justice Select Committee found only three years ago: "we do not believe that there has been any general harmful effect at all on the ability to conduct business in the public service, and in our view the additional burdens are outweighed by the benefits";[70] and "FOI has costs, but it also creates savings which accrue from the disclosure of inappropriate use of public funds or, more importantly, fear of such disclosure"[71].

As to the question whether controls should be targeted at "the kinds of requests which impose a disproportionate burden", the Centre notes that section 12 of the Act already entitles public authorities to refuse requests where the cost of compliance would exceed the limits prescribed by the Secretary of State (currently £600 for central government and £450 for all other public authorities). We do not consider those limits to be particularly onerous.

Moreover, public authorities may also refuse to comply with requests that are "vexatious" under section 14; "vexatious" being defined by the Upper Tribunal as denoting a "manifestly unjustified,

[67] To the extent, however, that section 53 provides for such a veto, the judgment of the majority of the Supreme Court in Evans sets clear restrictions on how that veto may be exercised.
[68] See e.g. Information Commissioner's Office, "Ministry of Justice monitored over unacceptable delays to Freedom of Information Responses", 11 September 2015.
[69] Ministry of Justice, "Court and Tribunal Fees: Consultation on further fees proposals" (August 2015).
[70] Post-legislative scrutiny of the Freedom of Information Act 2000 (HC 96, 26 July 2012) at para 241.
[71] Ibid at para 53

inappropriate or improper use of a formal procedure"[72].36 Again, the Centre considers that these existing controls are more than sufficient to ameliorate any burdens imposed on public authorities under the Act.

Indeed, the Commons Justice Select Committee concluded in its report that "evidence from our witnesses suggests that reducing the cost of freedom of information can be achieved if the way public authorities deal with requests is well-thought through. This requires leadership and focus by senior members of public organisations. Complaints about the cost of freedom of information will ring hollow when made by public authorities which have failed to invest the time and effort needed to create an efficient freedom of information scheme"[73].

Lastly, the Bingham Centre notes recent comments made by the former Lord Chancellor, Chris Grayling MP, in which he claimed that the Act "is, on occasion, misused by those who use it as, effectively, a research tool to generate stories for the media, and that is not acceptable".[74] The Centre is concerned that the former Lord Chancellor's remarks appear to reflect a profound misunderstanding as to the principles governing the Act. In the first instance, it is clear that any distinction between "the media" and "the public" in relation to requests under the Act is simply untenable for, as the Information Tribunal emphasised in 2007, the Act is:[75] applicant and motive blind. A disclosure under FOIA, is a disclosure to the public [ie the world at large]. In dealing with a Freedom of Information request there is no provision for the public authority to look at from whom the application has come, the merits of the application or the purpose for which it is to be used.

Secondly and in any event, the Centre notes that the media play an essential role in the free exchange of information and ideas in our society in general, and in informing the public about the activities of government in particular. That function would be hopelessly impaired if the Act sought to pursue a specious distinction between 'the media' and the public at large. As Lord Bingham held in Shayler: "The role of the press in exposing abuses and miscarriages of justice has been a potent and honourable one. But the press cannot expose that of which it is denied knowledge"[76].

[72]Information Commissioner v Devon County Council and Dransfield [2012] UKUT 440 (AAC) per Upper Tribunal Judge Wikeley at para 27.
[73] Post-legislative scrutiny of the Freedom of Information Act 2000 (HC 96, 26 July 2012) at para 90.
[74] See Commons Hansard 29 October 2015 at Column 522. See also e.g. BBC News, "Journalistsmisuse Freedom of Information Act, says Chris Grayling", 29 October 2015.
[75] S v Information Commissioner and the General Register Office, EA/2006/0030, 9 May 2007, at para 80.
[76] See n6 above at para 21.

Birth Trauma Association

On behalf of the Birth Trauma Association – a registered charity.

Comment:

FOI is about access to justice. If it becomes easier for public bodies to refuse to deliver up information under the FOI either on the grounds of cost or by imposing charges on those making the request then it will make it harder for organisations like ours to gain access to relevant information.

As we know, relevant information is often deliberately kept out of the public domain to enable public bodies like the NHS to spin their version of events. If we don't have access to the relevant information it makes it more difficult to challenge public bodies. This means public bodies are subject to less scrutiny and in turn less accountable to the public who fund their existence through their taxes.

For there to be proper and effective democracy there needs to be equality of arms so that all parties have access to the same relevant material as public bodies.

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The Campaign for Freedom of Information

This paper is an updated version of the submission previously made to the Commission on Freedom of Information. In particular, it adds further Tribunal cases to the survey at paragraphs 36 to 76 and a discussion of their implications.

The Campaign

1. The Campaign for Freedom of Information was established in 1984 to promote freedom of information legislation in the UK. We played a key part in encouraging the government to introduce what became the FOI Act and in improving the bill during its Parliamentary passage. We work to improve the operation of the legislation, assist requesters in using it, promote good practice and provide training to both requesters and public authorities.

INTERNAL DISCUSSION

2. The Campaign's view is that the FOI Act's existing approach to the disclosure of internal discussion provides more than adequate protection for sensitive information. There is no case for providing greater protection.

The public interest test

3. The FOI Act's exemptions for internal discussions are found primarily in section 35(1)(a) for information relating to the formulation and development of government policy; section 35(1)(b) for information relating to ministerial communications; section 36(2)(a) for information likely to prejudice collective responsibility; and sections 36(2)(b)(i) and (ii) for information likely to inhibit the free and frank provision of advice or exchange of views for the purposes of deliberation.

4. These provisions are all subject to the Act's public interest test. Exempt information can only be withheld if the public interest in maintaining the exemption outweighs that in disclosure. The public interest test is of particular importance in relation to the section 35(1)(a) exemption because of its vast and indiscriminate approach. It protects all information relating to policy formulation, regardless of its source, content or sensitivity. It does not focus on advice, assessment or exchange of views but catches anything which relates to policy under consideration, including newspaper editorials, published reports, purely factual information, research studies, consultation responses and other material which may reveal little if anything about the particular options under consideration or the views of the officials or ministers considering them. Without the public interest test all such information would be protected for 20 years, regardless of its sensitivity.

5. The public interest test is also the route by which the public may obtain technical insight into the background to policy issues. It may explain the shortcomings of statistics, the reasons why a statutory definition has taken a particular form, why specific research findings need to be treated with caution or why a problem falls outside the reach of legislation which might be thought to address it. Access to such material may improve the public's understanding of an issue or allow those with the knowledge and interest to discuss it with government in ways that contribute to better decisions. It may also highlight shortcomings in the official approach to an issue, which government itself may not recognise or prefer not to acknowledge. It may assist those trying to persuade the government to pay attention to an issue not on its agenda – or those trying to dissuade it from taking action of which they disapprove. The public interest test is what opens those doors. Without it the exemptions would keep them permanently shut.

6. The suggestion that these exemptions might operate without the public interest test, whether for 20 years or some shorter period, would be an enormously retrograde step entirely at odds with the public's expectations, the requirements of accountability and the government's own declared commitment to openness.

7. In this context we note the prime minister's 2010 declared intention that Britain should become 'the most open and transparent in the world'[77]. We also note the recent statement by the Leader of the House of Commons, Chris Grayling, that FOI:

> 'is a legitimate and important tool for those who want to understand why and how governments make decisions, and this government does not intend to change that'.[78]

That strongly suggests that access to internal discussions should *not* be restricted.

'Safe space' and 'chilling effect'

8. In considering requests for information about internal discussions, the Commissioner and Tribunal apply two separate concepts: 'safe space' and the 'chilling effect'. The first refers to the shielding of the decision-making process from the difficulties that may be caused by the public peering over the shoulders of officials or ministers as they develop their thinking. An early decision of the Information Tribunal explained:

> 'The timing of a request is of paramount importance to the decision. We fully accept the DFES argument, supported by a wealth of evidence, that disclosure of discussions of policy options, whilst policy is in the process of formulation, is highly unlikely to be

[77] http://www.opengovpartnership.org/country/united-kingdom
[78] House of Commons debates, 29 October 2015, col. 522

> in the public interest, unless, for example, it would expose wrongdoing within government. Ministers and officials are entitled to time and space, in some instances to considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy'[79]

9. By definition, the need for this 'safe space' is held to come to an end once the decision is announced or shortly afterwards. That does not mean that advice or other policy materials are then freely available on request. Any harm to the public interest that may then be caused also has to be assessed and this is often done by focussing on whether disclosure would have a 'chilling effect' on the recording of similar material in future. The chances of that are assessed in light of factors such as the frankness of any views, the sensitivity of the issue, the age of the information at the time its disclosure would occur and the consequences of the disclosure. Particular weight is given to disclosures that might damage working relations within government, perhaps as a result of an official's comments being used by critics to attack the minister, in turn making the minister less likely to seek such views in future. If such a 'chilling effect' is likely, a further question is asked: whether the public interest in avoiding that harm outweighs the public interest in disclosure.

10. It may be difficult to demonstrate whether a 'chilling effect' has occurred. The Upper Tribunal (UT) has recently overturned a First-tier Tribunal (FTT) decision precisely because the FTT gave weight to the fact that after 10 years of FOI the government had still failed to provide direct evidence of it. The FTT had suggested the department should have compared records before and after FOI to look for such changes. The Upper Tribunal described this as an 'unrealistic and unattainable' expectation.[80] We think that overstates the problem. The exercise may be complex, but it is certainly not unattainable.

11. Such research was carried out in 2001 by the National Archives of Canada as part of a review of Canada's Access to Information Act (ATIA). Archivists examined numerous series of government records to see whether any difference could be found between similar records created before and after the Act's 1983 introduction. The selected series of records included minutes of a permanent secretary level committee dealing with fisheries, minutes of a ministerial advisory council on the environment, records relating to two prime ministerial visits to Moscow one before and one after the Act, records used to advise ministers on the progress of public works projects and all the operational files of four central agencies including the Treasury Board, a body with many of the functions of the UK's Cabinet Office.

[79] EA/2006/0006, Department for Education and Skills & Information Commissioner & The Evening Standard, 19 February 2007.
[80] Department for Work and Pensions v Information Commissioner, John Slater and Tony Collins [2015] UKUT 535 (AAC) (20 July 2015)

12. The study examined the volume, comprehensiveness and completeness of narrative of records before and after the ATIA.

13. The researchers assumed that they would discover that the Act 'had a significant and negative influence on record-keeping'. In fact their results showed that:

- 'the quantity of records was stable before and after the Access to Information Act'.
- 'The issues dealt with in records after 1983 remained as significant and complex as they were prior to the legislation.'
- 'The content/narrative remained unchanged after the introduction of the…Act. All elements of records were captured from beginning to end in a comprehensible fashion and consistently for all Government areas we examined.'
- The only detected changed was a reduced volume of central agency records following changes to archiving instructions but in these cases the retained records 'were more substantial…quality made up for quantity'

14. The National Archives concluded:

> 'At the outset of the investigation, it was expected that we would find differences in record-keeping in the Government with the implementation of the Act in 1983. However, after extensive analysis, this was not found to be the case.'[81]

15. This study does not of course tell us what has happened in the UK. Its significance is that it demonstrates that *assumptions* about a 'chilling effect' may not withstand critical examination. They should not be the basis for legislative changes.

16. The Tribunal has often asked officials giving evidence to it whether FOI has deterred them from recording what should have been recorded. The standard reply appears to be for witnesses to insist that they have never done so, but fear that weaker-willed colleagues elsewhere may have.

17. If officials *fear* that what they write will be disclosed under FOI, their recording may well become more careful. It does not follow that this will involve the omission of significant information, let alone omissions which undermine good government. It may simply involve a

[81] The Access To Information Act and Record-Keeping in the Federal Government, August 2001, National Archives of Canada. Available online at the time of writing at http://fs.huntingdon.edu/jlewis/FOIA/CanATI/Attallah02paper-records1-e.html

reduction in the use of uninhibited language or expressions of exasperation that occur, particularly in emails, between colleagues who know each other well.

18. A more important question may be whether their fear of disclosure is well founded – or based on a misunderstanding of the level of protection actually provided under FOI.

19. The Justice Committee's 2012 report on its post legislative scrutiny of the FOI Act reported the evidence of the former Home Secretary, Jack Straw, a member of the present Commission, who had been responsible for taking the FOI Bill through Parliament. Mr Straw told the committee that he and ministers:

> 'sort of believed that in section 35 we were establishing a class exemption, but that has not turned out to be the case because of the way it has been interpreted by the courts. It has also led to, frankly, some rather extraordinary decisions by the Freedom of Information Tribunal, in which *they suggested that it can apply only while policy was in the process of development but not at any time thereafter. That is crazy and it is not remotely what was intended*.'[82] (emphasis added)

20. In July 2015, the chair of the House of Commons Public Administration committee appeared on BBC Radio 4's 'Today' programme to discuss the work of the present Commission. He spoke in similar terms:

> 'The restrictions on policy advice were intended to be permanent but they have been reinterpreted to mean that *unless the policy is actually under discussion, well, the policy advice can be disclosed'*.[83] (emphasis added)

21. Both comments express the mistaken view that policy advice has no protection from disclosure once a policy decision has been taken.[84] Officials hearing this from such distinguished sources are likely to become more guarded in what they record in the belief that everything they write will be disclosable after the decision. Such comments are likely to produce a 'chilling effect'. The answer to that is not to restrict the Act but to promote a more accurate explanation of the protection it provides for sensitive discussions.

[82] House of Commons Justice Committee, Post-legislative scrutiny of the Freedom of Information Act 2000, First Report of Session 2012-13, Volume 1, paragraph 159.
[83] BBC Radio 4, 'Today' programme, 18 July 2015
[84] The views above may partly result from differences in terminology. To a specialised FOI audience, the terms 'safe space' and 'chilling effect' refer to two distinctive concepts the former, by definition, ending with the taking of a decision. In Whitehall parlance the term 'safe space' may embrace both. For those who use the term in the latter sense, it may come as a shock to read that the Commissioner and Tribunal believe the need for a 'safe space' (which in their terms may mean any protection at all) comes to an end once the policy decision is taken.

22. We assume that similar comments are also made by ministers and senior officials, whose view of FOI is coloured by the particular FOI cases which come to their attention, which will be a distilled concentrate of the most sensitive and to them most troublesome cases.

23. We have been privately told by the head of a major body, that FOI has severely restricted the willingness of his board colleagues to express views in writing. When asked which organisation he was referring to, he named a body which is not subject to either the FOIA or the related Environmental Information Regulations (EIR). The contamination of this debate by unrealistic fears highlights the need to look with particular care at claims that the FOI Act has had, or threatens to have, a harmful effect on the government's ability to carry out its functions.

24. Concern about a chilling effect may partly echo concerns about leaks. Their effect is likely to be far more drastic than FOI disclosures. A leak is likely to occur at the time of maximum sensitivity, not months or years later. It may have been deliberately selected for greatest political impact and is not subject to the scrutiny of a regulator before it is made. The former Cabinet minister Kenneth Clarke wrote in his memoirs that during John Major's term as prime minister 'the Cabinet became as leaky as a sieve and no minister wished to raise any serious business there'.[85]

25. Lord O'Donnell, the former Cabinet Secretary has said that Tony Blair 'was reluctant at times to take as many Cabinet discussions as possible, because he felt that they would become very public very quickly'. The same was true of Cabinet Committees because Mr Blair 'would have thought that that wasn't a safe space'.[86]

26. Government may not believe it can do much about leaking, particularly by Cabinet ministers. But it may feel it can do something about FOI, which is a creation of statute. It is possible that a degree of anxiety about the former has been transferred to the latter, perhaps even colouring Mr Blair's own well-known regret over the introduction of FOI.[87]

[85] Quoted in Peter Hennessy: "The Prime Minister: The Office and its Holders since 1945" (Palgrave Macmillan 2001)
[86] Evidence of Lord O'Donnell to the Chilcot Inquiry, 28 January 2011.
[87] Although Mr Blair complained in his memoirs that FOI inhibited the expression of views in policy making he also acknowledged he regretted FOI because it might help expose his own administration's 'scandals'. These, he said, were just as damaging as those of the previous government:

27. A feature of many section 35 tribunal cases is the disconnect between the severe consequences that government maintains would flow from *routine* disclosure of policy advice and the innocuous content of the disputed material involved in the particular case.

28. The very first section 35 case to be heard by the Information Tribunal (as it then was) was a request for minutes of senior DFES management meetings which had discussed the response to a schools 'funding crisis'.[88] It led to the department providing emergency funds and making new funding arrangements for future years.

29. The FOI request, in January 2005, related to minutes of meetings between June 2002 and June 2003. The Information Commissioner found that sections 35(1)(a) and (b) of the FOIA (the exemptions for policy formulation and ministerial communications) were engaged but ordered disclosure on public interest grounds. The decision was appealed.

30. Those giving evidence at the tribunal included Lord Turnbull, the former cabinet secretary. He warned that the disclosure of policy discussions would strike at the heart of civil service confidentiality, threaten the role and integrity of the civil service, reduce the neutrality of the civil service, undermine frank policy-making, lead to the transfer of accountability for decisions from ministers to officials and expose officials who were apparently identified with the policies of an outgoing government to suspicion from new ministers. Other senior officials referred also to the loss of frankness and candour, the impact on record keeping, the danger of government by cabal and the increased risk of 'sofa government'.

31. The Tribunal did not dispute the importance of these arguments. But it held that the public interest in withholding the disputed minutes by the time of the request 18 or more months later was 'tenuous at best' particularly as the minutes themselves were 'fairly skeletal'. The public interest in confidentiality did not outweigh the public interest in disclosure.

"What I failed to realise is that we would also have our skeletons rattling around the cupboard, and while they might be different, they would be just as repulsive. Moreover, I did not at that time see the full implications of the massive increase in transparency we were planning as part of our reforms to 'clean up politics'. For the first time, details of donors and the amounts given to political parties were going to be published. I completely missed the fact that though in Opposition millionaire donors were to be welcomed as a sign of respectability, in government they would very quickly be seen as buying influence. The Freedom of Information Act was then being debated in Cabinet Committee. It represented a quite extraordinary offer by a government to open itself and Parliament to scrutiny. Its consequences would be revolutionary; the power it handed to the tender mercy of the media was gigantic. We did it with care, but without foresight. Politicians are people and scandals will happen. There never was going to be a happy ending to that story, and sure enough there wasn't. The irony was that far from improving our reputation, we sullied it." Tony Blair, A Journey, Hutchinson, September 2010, page 127. For a fuller account see: www.cfoi.org.uk/2010/10/the-blair-memoirs-and-foi-2.

[88] EA/2006/0006, The Department for Education and Skills & Information Commissioner & The Evening Standard (19 February 2007)

32. The disclosed minutes can be found at *Appendix 1.* Elements of the documents (marked in green) had already been disclosed following internal review. Further passages (marked in purple) were released prior to the Tribunal hearing. The disputed information consisted solely of the non-highlighted passages.[89] These included comments such as:

> 'Andrew Wye[90] confirmed that it would be possible to provide 3-year declarations of amounts available and the formulae for distribution. Action: Tom Goldman to complete list of grants.'
>
> 'Stephen Kershaw to produce a note on how the Department is channelling significant funds into remodelling and why this is such a top priority'
>
> 'There was a discussion around extra funding for local authorities to take into account changes to the level of Standards Fund grant. It was noted that this will lead to a softening of some cliff edges but not all.'
>
> 'Local Authorities had not consciously sought to divert funds and the public debate was unfortunate'
>
> 'It was crucial to balance our response and maintain our room to manoeuvre for both this and next year.'
>
> 'It was very difficult to get meaningful figures as there was such a mix of different factors in their individual positions.'
>
> 'The difficulties rose from lack of action rather than anything deliberate. Part of our strategy should be to lead those authorities who genuinely did have the money to ease school difficulties to make a rapid decision.'

33. The only undisclosed passage which referred directly to policy options stated:

> 'Stephen Crowne updated on ongoing work the purpose of which was to arrive at a package of measures built around a commitment of a guaranteed per-pupil increase to create stability for the next two years. Remaining questions were how this was to be achieved and there were two funding routes:

[89] The highlighting is by the Tribunal or the DfES
[90] The department did not attempt to argue that the names of officials mentioned in the minutes should be withheld under section 40 of the FOIA.

i. via EFS (with passporting)

ii. via a ring-fenced grant to LEAs.

Which option is a matter of ongoing discussion with the centre but we needed to move fast for an announcement before the end of the month. Both had risks: there is the potential for passporting to be unsuccessful or even perverse; the ring-fenced grant ran the risk of squeezing local services and /or leading to a rise in Council tax. Discussion brought home the seriousness of the issue.

34. In fact, the commitment to a guaranteed per-pupil increase in funding was announced in Parliament in July 2003, 17 months before the FOI request, together with an account of the combination of means by which it would be achieved.[91] The only additional information provided in the minute is the recognition of the fact that neither of the two options mentioned was entirely risk-free. This would not have been news to anyone familiar with school funding.

35. The case illustrates a theme which has regularly recurred in section 35 and 36 cases. The government resists disclosure not (we assume) primarily because of the consequences of releasing the particular information at issue but because it fears that it will set a precedent for the future disclosure of related but more contentious information. The response of the Commissioner and Tribunal is that their decisions are based on the facts of each case and that the disclosure of innocuous examples of information does not mean that sensitive material will be treated in the same way.

TRIBUNAL DECISIONS

[91] Hansard, House of Commons Debates, 17 July 2003, cols. 454-8

36. In this section we describe decisions involving central government departments issued by the First-tier Tribunal (FTT) or Upper Tribunal (UT) involving the FOI exemptions relating to internal discussions.[92] It does not attempt to deal with cases involving the corresponding EIR exceptions. The summaries cover, as far as we are aware, all the cases decided during the three years from December 2012 to November 2015. We have not focussed on Information Commissioner (IC) decisions as these have been dealt with by the IC's own submission. However, the tribunal cases are sometimes more revealing as they include cases where the government has not accepted the IC's findings.

37. The effect of disclosure and the public interest arguments are assessed at the time that the request was refused or the refusal upheld on internal review. The passage of time between that time and the date on which the Commissioner or Tribunal considers the case is disregarded.[93] The question asked is whether the refusal was justified at the time it took place and not whether it can be disclosed at the time of the appeal.

EXEMPTION UPHELD

38. This group of cases describe the FTT cases during the last three years which found that the public interest test favoured the withholding of the disputed information. Some of these cases also involve exemptions other than those relating to internal discussions. The summaries below generally disregard these other exemptions.

Two Chancellors

39. A request was made for information relating to meetings between the Chancellor of the Exchequer, George Osborne, and the former Chancellor, Lord Lawson, over the previous 22 months. The Treasury said it held the transcript of a telephone conversation between the two which it withheld in part under section 35(1)(a). The Information Commissioner confirmed that the exemption was engaged and found the public interest favoured withholding the information. The FTT agreed. It accepted there were public interest factors in favour of disclosure, but the need for a safe space was 'very strong'. The Chancellor needed to be able to consult people like former chancellors on matters of fiscal and banking policy while that policy was being formulated and developed. The request, six months later, was made 'relatively soon' after the conversation, policy was 'live' and the conversation related to policy of 'extreme importance to the country's financial stability'. Disclosure might also have a chilling effect on the willingness of senior figures from business and politics to engage in

[92] These are described in paragraph 3 above. The survey does not include cases decided on the basis of section 36(2)(c)
[93] Evans v Attorney General, UKSC 21, paragraph 73.

discussions of this sort and to allow them to be recorded if they were liable to be disclosed prematurely.[94]

Bradford and Bingley

40. The Cabinet Office was asked for information about the sequence of events leading up to and after the nationalisation of Bradford & Bingley (B&B) in 2008. The request also asked whether the matter had been discussed at Cabinet. The IC found the public interest favoured withholding the information and refusing to confirm or deny whether Cabinet discussions were held. The FTT agreed. 'The argument that the detail of scenarios that needed to be considered in the B&B situation may have to be revisited in the future by Ministers and their advisers is a powerful one' and was 'the most significant factor'. The policy issues were still 'live' at the time of the request in March 2011 and a safe space continued to be required. Disclosure of whether Cabinet had discussed and approved the nationalisation would 'intrude upon the Cabinet's discretion to decide how such decisions are made' and would 'create expectations or pressure for certain types of decisions to be taken at Cabinet level'.[95]

Domestic abuse

41. Minutes of meetings of a task group set up by the Welsh Assembly Government to assist with proposed legislation on domestic abuse were requested. At the time of the request, a few weeks after the white paper consultation ended, policy formulation was 'still underway (and indeed at quite an early stage)'. The Information Commissioner decided the public interest favoured withholding the information to protect the Welsh Government's safe space to develop policy. The FTT agreed, particularly 'when viewed at the time when the request was submitted'. The requester argued that the public interest favoured disclosure because the focus of the proposed legislation had changed during the group's deliberations from being gender neutral to targeting violence by men upon women. The FTT found that the issue of gender balance was addressed in the group's report and there was no evidence of any concealed shift in emphasis in the disputed records themselves.[96]

Briefings on PQs

42. The FTT upheld the Information Commissioner's refusal under section 36(2)(b) to order disclosure of the briefing notes provided to the prisons minister in support of draft answers to a series of Parliamentary Questions. These sometimes dealt with the background to the question and the possible motive or interest of the MP asking it. The Tribunal gave substantial weight to the need to avoid deterring: 'any possibly astute advice that might

[94] EA/2013/0074, Brendan Montague & Information Commissioner & HM Treasury (7 January 2014)
[95] EA/2012/0251, Bradford & Bingley Action Group & Information Commissioner & Cabinet Office, 10 June 2013
[96] EA/2013/0278, Tony Stott & Information Commissioner & Welsh Assembly Government, 16 July 2014

appear risky, hostile to a member or simply indiscreet but which nevertheless, in the opinion of the official, needs to be given'. It continued:

'The Tribunal is frequently pressed by government departments with claims as to the "chilling effect" on frank communication of disclosure of internal discussions and reports. The Tribunal is not always impressed by them. Here, though, we are dealing with a vital and sensitive interface between minister and civil servant. This is an area of government where the need for confidentiality is clear because the points that need to be made to a minister may be based on evidence of varying strength and may involve strong criticism of the questioner or another member or third party. The official offering advice may be understandably reluctant to make them public, whilst properly concerned that they should be before the minister. It is for the minister to decide what should be used, what rejected, what is too tenuous to be relied upon…

Whether or not disclosure of these particular notes would affect the way that the officials concerned perform their duties is less significant than the question whether the threat of publicity might affect briefings generally in future. We consider that there is considerable force in the contention that a very important channel of communication would be seriously inhibited.' [97]

Building Schools for the Future

43. In 2010 the government announced the cancellation of Labour's 'Building Schools for the Future Programme'. Following judicial review, the decisions relating to a number of affected councils were retaken in July 2011. One of the affected authorities, Sandwell Metropolitan Borough Council, later made an FOI request for information about the decisions affecting its funding which was refused in part in February 2013. The IC ordered disclosure. The disputed information consisted of 7 submissions to the Secretary of State. The FTT found the information fell within section 35(1)(a) and that the public interest favoured its withholding. 'It would expose a very significant part of the relationship between Ministers and the politically neutral civil service to a deeper and not necessarily constructive degree of scrutiny.' There was a 'plausible risk' that disclosure would cause policy submissions to be written differently with 'an eye to a public audience' and ministers may be less inclined to seek and rely on formal advice.[98]

Education Secretary's letter to schools

[97] EA/2011/0267, Angela Kikugawa & Information Commissioner & Ministry of Justice, 20 May 2012
[98] EA/2014/0079, Department for Education & Information Commissioner, 28 January 2015

44. A request sought information about the Education Secretary's decision to write to local schools about workshops offered to them as part of the Tottenham Palestinian Literary Festival. The letter, in September 2011, had reminded schools of their statutory duty to provide a balanced account of opposing views about political issues and asked for assurances that this would be done. The request, sent a few weeks after the letter – and therefore after the need for 'safe space' - sought the correspondence with a third party which had expressed concerns about the festival to the Secretary of State and the associated internal discussion. The requester argued that the public interest justified disclosure as the Secretary of State, who had intervened personally, had also received and declared a donation from a Zionist organisation. The Tribunal accepted that this could create a perception of bias but found that the advice given to ministers did not display bias and the sending of the letters was not unreasonable in the circumstances. The FTT upheld the ICO's refusal to order disclosure, agreeing that this would be likely to prejudice frank discussions between officials and between officials and third parties (section 36(2)(b)(i) and (ii)). It would also discourage third parties from reporting concerns about the promotion of potentially extreme views at schools. (section 36(2)(c)).[99]

Request about a request

45. The requester sought information about the handling of a previous request he had made to the Home Office about the appointment process for selecting a chief constable. The new request was made 3 months after the decision on the previous request. The IC found that the information contained frank comments and had been properly withheld under section 36(2)(b)(i). In its decision, the FTT agreed finding that 'stakeholders would be less free and frank in their input' to future decisions and that 'this "chilling effect" would have a significant negative impact on responses to requests under the Act'. The Tribunal found no evidence of inappropriate behaviour by the Home Office and held that the public interest favoured withholding the information.[100]

Boating accident

46. The request sought information about a boating accident which had occurred in Cherbourg Marina in September 2011. Some ministerial correspondence relating to the incident was held. The IC upheld the MOD's refusal to disclose the advice under section 36(2)(b)(i). The FTT also did so, finding that: 'there was a compelling argument that a Minister should be able

[99] EA/2012/0204, Dr Bart Moore-Gilbert & Information Commissioner & Department for Education, 23rd September 2013.
[100] IEA/23/0059, Howard Roberts & Information Commissioner & The Home Office

to receive candid confidential advice from his or her civil servants and that this would be undermined if the advice provided here was liable to disclosure and public scrutiny.'[101]

Archbishop of Canterbury

47. Correspondence between the then Archbishop of Canterbury, Rowan Williams, and the Prime Minister David Cameron during the PM's first 13 months in office was withheld under section 36(2)(b)(ii). The IC upheld the refusal finding that disclosure would have a 'severe' inhibiting effect on exchanges between them. The FTT agreed finding that there was 'a public interest in the PM being able to develop that relationship in order to have confidence that the Archbishop would not feel inhibited in his correspondence'. It added that 'had there been (which there wasn't) evidence of the Archbishop saying things in private which were not consistent with what he was saying in public, that would have significantly influenced our judgment on the public interest test.'[102]

Blair/Bush telephone conversation

48. A request was made to the Foreign and Commonwealth Office in February 2010 for a record of a telephone conversation between the Prime Minister Tony Blair and the US President George Bush in March 2003 in the run-up to the invasion of Iraq. The requester alleged that a comment, made by the former Foreign Secretary Jack Straw to the Chilcot inquiry, indicated the heads of state had agreed to misrepresent a comment by the French President in order to justify abandoning further efforts to secure a UN resolution before taking military action. The FCO withheld the information under section 27 (international relations) and under s.35(1)(b) as the record had been passed from Mr Blair to the then Foreign Secretary, and was therefore a ministerial communication. The IC upheld the refusal to disclose Mr Bush's comments under s.27 but ordered the disclosure of Mr Blair's side of the conversation. The FTT largely upheld the decision. However, the Upper Tribunal set it aside, finding that it was unrealistic to isolate one side of the conversation from the other and would encourage potentially misleading speculation. A different FTT panel reconsidered the case and found that the public interest favoured withholding the information: the 'overwhelming considerations' were the 'highly confidential' nature of the information and existence and stage of the Chilcot Inquiry. It added that it had not found the disputed information to contain any 'smoking gun'.[103]

Getting your bill through the Lords

[101] EA/2013/0214, Nick Dunnett & Information Commissioner & Ministry of Defence, 26 March 2014.
[102] EA/2012/0245, Adam Roberts & Information Commissioner & Cabinet Office (25 October 2013)
[103] EA/2011/0225 and 0228, Stephen Plowden & Foreign and Commonwealth Office & Information Commissioner, 28 January 2014 (rehearing).)

49. A request was made for a copy of "Getting your bill through the House of Lords" a guide produced for officials handling government bills by the Government Whips Office in the House of Lords. The version of the guide had been produced for the coalition government in 2013. The IC had found that although the guide did not relate to any specific policy proposal, the process of passing a bill related to the formulation of government policy and a guide to that process also engaged section 35(1)(a). The public interest in improving public understanding of the Parliamentary process justified disclosure except for specific passages referring to the handling of the bill during a coalition government. The Cabinet Office (CO) appealed. The FTT accepted its argument that the guide was also a ministerial communication. It had been produced on behalf of the Chief Whip, a minister, for communication to other ministers. The Tribunal found that parts of the guide repeated information that was publicly available but that parts would reveal tactical advice which could enable peers to delay or frustrate the passage of legislation and indirectly have a chilling effect on future editions of the guide. If ministers' decisions about the handling of legislation appeared to conflict with the guide's advice this could also undermine collective responsibility. The FTT found that the guide should be disclosed with the passages capable of producing these effects redacted, but rejected the CO's argument that even disclosure of a redacted copy of the guide would be damaging. [104] The CO has appealed to the Court of Appeal.

Legal action against the Pope

50. In the run up to the Pope's September 2010 visit to the UK some campaigners had sought to have him arrested. A request in November 2011 sought information from the Cabinet Office about its strategy to deal with such legal threats. Most of the information was withheld under section 27 (international relations) but a s was withheld under section 35(1)(a) and (b). The FTT upheld the Commissioner's decision that the public interest favoured withholding these materials.[105]

Huntingdon Life Sciences

51. A request sought information from the Department of Business, Innovation and Skills about its provision of banking and insurance services to Huntingdon Life Sciences Limited (HLS) since 2001. DBIS and its predecessor departments had taken this unprecedented step because HLS had been unable to obtain these services due to the threat of violence from animal rights groups against firms doing business with it. The request was made in April 2011. The withheld documents included two ministerial communications to colleagues. The FTT upheld the refusal under section 35(1)(b) commenting that 'Government ministers must feel free to

[104] EA/2014/0223, Cabinet Office & Information Commissioner, 22 July 2015
[105] EA/2012/0259, European Raelian Movement & Cabinet Office (6.12.13)

exchange candid opinions, options and possible solutions without fear that their exchanges may be disclosed, perhaps long after they look place, thereby endangering the commercial interests of HLS and other identified entities or, still worse, the personal safety of their staffs.' Such concerns remained 'very serious live issues, even after the passage of several years'. The case for withholding under s.35(1)(a) was 'much less compelling' because decisions had been taken 10 years before the request, 'time has passed and policy has been formed and maintained'. Other exemptions were also upheld.[106]

EXEMPTION NOT UPHELD

52. This section describes FTT decisions which have *rejected* the department's claims under section 35(1)(a) or (b) or section 36(2)(b) of the FOI Act. This does not necessarily mean that the information has been disclosed: in some cases the information may have been withheld under other exemptions or further appeals may still be pending. The case of the badger cull risk logs was dealt with under the EIR not the FOIA but is included here as it is referred to in the Commission's call for evidence.

Badger cull risk logs

53. Four 'risk and issue' logs relating to the badger cull were withheld by DEFRA following an EIR request. The IC ordered disclosure. DEFRA's appeal was dealt with by the UT because of its power to make an enforceable order relating to the anonymity of witnesses. The UT dealt with the case on its merits, not on a point of law.[107]

54. A DEFRA project board had considered the risk logs in the summer of 2010. The UT considered that at that time there had been 'powerful pointers' to the need to maintain a safe space to protect its ability to think in private. The public interest in withholding information did not last only until a policy had been formulated and announced. Nor did the UT consider that the issue was whether at the relevant time (in this case the date of DEFRA's internal review, September 2012) the department still needed a 'space to think privately'. Instead, it said, the question was 'whether at that date the public interest in keeping the 2010 thinking private outweighed the public interest in its disclosure.' DEFRA listed a series of adverse consequences it felt would flow from disclosure. Disclosure would increase the chances of the identified risks, particularly legal challenge, materialising; require a substantial diversion of resources to be spent on explanation; endanger farmers; jeopardise relations between the NFU (who were represented on the project board) and its members; deter the NFU or other

[106] EA/2012/0158, Rhonda Moorhouse & Information Commissioner & Department of Business Innovation and Skills, 12th June 2014

[107] DEFRA v Information Commissioner and The Badger Trust [2014] UKUT 526 (AAC) (28 November 2014)

bodies from participating in future projects or lead to such material being drafted in a less frank fashion in future.

55. The UT found the contents of the risk logs themselves to be 'anodyne' and DEFRA's arguments so unconvincing that it did not ask the other parties to even present their case. By the time of the request's refusal, the risks well known; the logs contained no legal advice or information that would assist opponents in bringing a legal challenge and in any event an unsuccessful judicial review had already occurred; the proposed counter measures were not 'surprising or informative'; disclosure would not increase the risk to farmers, as none were identified; and people of the calibre selected to serve on the project board would not be inhibited by the prospect of future disclosure. Moreover, the contents of the logs were so 'anodyne' that the UT spent time considering whether it was actually possible to draft them in a *more* anodyne manner. They contained 'nothing that an intelligent reader would not expect to see'. It found that the public interest arguments against disclosure 'were effectively spent' by the date of the request's refusal, 'including those advanced that disclosure would inhibit future robust discussions and risk assessments'. But the public interest in favour of disclosure remained.

56. The disclosed logs are attached as *Appendix 2*. An indication of the lack of details can found in their account of the risks legal challenge being brought. This it is said could delay implementation and damage DEFRA's reputation. The proposed steps to mitigate this risk are:

> '1.Process in place to ensure all evidence and options are presented to Ministers. 2. There is an audit trail. 3. Early and close working with lawyers to identify and consider all potential legal issues. 4. Examine/learn from the Welsh legal challenges'

If the risk materialises, the suggested contingency measures are described as: 'Use current information/knowledge on the potential legal challenges'.

57. A separate entry deals with the possible 'failure to get industry acceptance' resulting in 'no delivery of a cull'. The mitigation steps in full are 'Early and close working with the industry'. The contingency plan should the risk materialise is described as: 'Take into account current knowledge of how the industry see a cull working'.

Planning Aid

58. At the end of November 2010 the Royal Town Planning Institute was informed that government funding for its Planning Aid England service, on which it was almost wholly dependent, would cease from the following March. Shortly afterwards it applied to the

Department for Communities and Local Government (DCLG) for information about the decision including any background papers that had informed it. The DCLG, which had had its own budget cut by 33%, said the decision was based on 3 ministerial submissions which it withheld under section 35(1)(a). The IC found that the public interest balance favoured their disclosure. The department appealed. It argued that at the time of the request it was still considering new arrangements to fund a range of organisations to provide community planning advice and policy formulation was still underway. New arrangements would be made in the context of the Localism Bill then before Parliament. Planning Aid might be eligible for funding under these (it subsequently received some funding).

59. The FTT accepted that decisions on new funding arrangements were still underway but found that the decision to cease funding of Planning Aid was 'a 'sufficiently discrete decision' that had been 'definitely decided by the minister' with the 'implications and processes having been thought through and advised upon; announced; and at the initial stage of implementation'. The public interest favoured disclosing information about this decision to inform the ongoing debate, partly stimulated by the ending of the service's funding. The fact that the decision had been taken without a clear idea of what would replace the service added substantially to the public interest in disclosure. However, decisions on the *new* arrangements were still continuing at the time of the request. The FTT found that the public interest favoured withholding information about these to allow the department to formulate policy 'free from premature disclosure and distracting scrutiny.'

60. The documents disclosed in this case are attached as *Appendix 3.* They mainly describe the service provided by Planning Aid and the implications for it of various options, much of which had been discussed with Planning Aid at the time. Some recommendations are contained in the documents though these are also described in the FTT decision, presumably having been disclosed by DCLG in open session at the hearing.[108]

EC Infraction proceedings

61. The DWP refused to disclose a letter from the UK government to the European Commission setting out its position in relation to infringement proceedings against the UK for contravening EU social security legislation. In 2011, the European Court of Justice had issued a decision requiring a revision to UK policy. The DWP claimed that at the time of the request in September 2013 its policy was still being discussed and a safe space was still required. The FTT did not agree that the UK's letter to the Commission related to policy formulation or development at all. It was a 'snap-shot' of the UK's position on the issue in 2013. The fact

[108] EA/2012/0071, Department of Communities and Local Government & Information Commissioner & Nic Posford, 23 January 2013

policy may change did not mean a statement of the existing policy involved policy formulation. The FTT observed that had it accepted that section 35(1)(a) was engaged it would not have accepted that a 'safe space' was still necessary. The proceedings had been ongoing for four years at the time of the request with no indication of resolution in the foreseeable future. The DWP case amounted to a 'denial of information' for 'an indefinite period', 'an untenable and unacceptable claim'.[109]

62. The case was appealed to the UT which found an error in the FTT's approach to the section 27 exemption, which had also been involved. Section 35 is not mentioned in the UT decision. By the time of the UT hearing the infraction proceedings had been withdrawn and the DWP was prepared to release the disputed letter.[110]

Free school applications

63. The Department for Education refused a number of FOI requests for the list of applications to open new free schools during a specified period, the areas in which they would operate, the faith, if any, and details of applications to open university technical colleges or technical academies. The IC ordered disclosure and the DfE appealed. It argued that at a later stage public comment would be invited on the applications which had not been filtered out by then. At the time of the requests decisions on free schools policy were still being made and the department was drawing on the lessons learnt from these applications. The FTT found that the requests did not seek any deliberations or advice nor any selection of the facts that might have been fed into policy making. They sought 'the whole factual matrix without any selection, prioritisation or evaluation' and this did not engage the s.35 exemption. The Tribunal was also 'unimpressed' with the department's argument that negative publicity might discourage further applications, prejudicing the effective conduct of public affairs (s.36(2)(c)). It was critical of a survey submitted in support of the DfE position which purported to show that almost half of the proposers of new schools would have been less likely to apply if they knew that details would be made public. The question wrongly led applicants to believe that their personal details would be disclosed and this bias 'fatally undermines' the results. The Tribunal ordered disclosure finding that 'The benefit of transparency and the ability to inform the public debate was of far greater importance than

[109] EA/2014/0197, Sir Roger Gale MP & Information Commissioner & Department for Work and Pensions, 21 December 2014
[110] Department for Work and Pensions v Information Commissioner and Sir Roger Gale [2015] UKUT 0599 (AAC), 4 November 2015.

the slight administrative inconvenience for civil servants of receiving representations and arguments at a time that was not convenient to them.'[111]

Andrew Lansley's ministerial diary

64. A journalist sought access to the ministerial diaries of a number of Department of Health ministers, later narrowed to that of the then Health Secretary Andrew Lansley. The entries related to the period during which the Health and Social Care Bill was before Parliament. The IC upheld reliance on a number of exemptions (for personal information and security bodies) for certain entries but did not accept that section 35(1)(a) applied. The FTT held that section 35(1)(a) and (b) did apply. However, it concluded that because the diary entries 'give no detail about the anticipated discussions or the intended objectives, disclosing them would in general be unlikely to compromise the freedom to think the unthinkable, consider all options and argue for and against positions. The evidence has not satisfied us that there are entries in Mr Lansley's diary which required protection for the preservation of substantive safe space.' The FTT gave high weight to the public interest in revealing which external organisations the minister had met during this time, particularly lobbyists. Personal engagements referred to in the diary were exempt under section 40(2). It was particularly unimpressed by the evidence of senior civil servants. One witness said that the quarterly releases of information about ministerial engagements 'fully met' the public interest in transparency, although the releases for the relevant period had not been published at the time and were not in fact published till many months later. They also omitted telephone or video conference contacts. The witnesses' argument that the public therefore already had a complete record of who the minister had met 'did not correspond with reality and lacked rational justification'. The Tribunal was particularly critical of their argument that if the diary entries were released showing blank spaces, ministers would feel obliged to schedule entirely pointless meetings simply to ensure that they were not criticised for inactivity, a suggestion the Tribunal described as 'incredible'. The Upper Tribunal dismissed the department's appeal. It is currently appealing to the Court of Appeal.[112]

Universal Credit

65. Several documents used to assess the risks in implementing the Universal Credit Programme (UCP) were requested under FOI in March and April 2012. Universal Credit is a new benefit that is replacing 6 existing benefits and tax credits. The FTT observed that the programme offered 'immense' savings to the exchequer, but if the highly complex system for calculating

[111] EA/2012/0136, EA/2012/0166 and EA/2012/0167, Department for Education & Information Commissioner & British Humanist Association, 15 January 2013

[112] Department of Health v Information Commissioner & Lewis, [2015] UKUT 0159 (AAC)

benefits broke down there would be 'widespread anxiety and hardship' and 'a major threat' to the whole venture. Both the National Audit Office (NAO) and the Public Accounts Committee (PAC) had produced highly critical reports on the management of the programme. The requested documents were a high level 'Project Assessment Review'; a 'Risk Register' evaluating the likelihood and severity of potential risks and the measures to prevent them; an 'Issues Register' describing problems and failures; and a 'High Level Milestone Schedule' setting out the projected and actual completion dates for key milestone events. The DWP argued that disclosure would undermine candour and robust comment both by those interviewed for such reviews and by the drafters. Disclosing the risk and issues registers would destroy their 'blunt and pithy' quality, damage relations with external parties and make it more likely that some of the risks would result. The Milestone Schedule could easily mislead if the assumptions were not understood. Providing the necessary explanations would divert resources from the project itself.

66. The FTT noted the sharp contrast between the NAO and PAC criticism and the 'unfailing confidence and optimism' of DWP press releases and ministerial statements. It highlighted the fact that the government seemed to be suggesting that the programme would be completed on schedule even though milestones had not been achieved on time. There was a particularly strong public interest in allowing the public to judge whether criticism of the programme was well–founded.

67. The government should have been able to document a 'chilling effect' after 10 years of FOI. In the absence of such evidence, the FTT was not persuaded that this would occur, particularly in light of the large measure of courage, frankness and independence likely from senior officials assessing risk and providing advice. The PAR itself was drafted in management consultancy terminology, not 'designed to proffer blunt or biting opinions nor speculative suggestions'. The problems described in the Issues Register were of a predictable kind, unlikely to prompt much public reaction. The Milestone Schedule listed a variety of completed and missed milestones in the past, not the current situation. The public's views would not be distorted by the fact that the Risk Register focussed on problems rather than successes, once its purpose was explained. Although there might be some prejudice of the kind claimed by the DWP, the public interest required disclosure.[113] This decision was set aside by the Upper Tribunal. It held that the FTT was wrong to attach weight to the government's failure to document evidence of a chilling effect, which might have occurred but be difficult to prove. It was also wrong to draw conclusions about the absence of a chilling

[113] EA/2013/0145, 148 & 149, Slater & IC & DWP, 24 March 2014

effect from the release of a related document, which it had not seen. The case will be reheard by a new FTT panel.[114]

Reducing regulation

68. The Cabinet Office (CO) refused to disclose the number of times the Reducing Regulation Committee, a cabinet sub-committee, had met in the past two years. It argued that disclosure would damage collective responsibility by exposing the committee structure to external accountability. The pressure of public opinion might lead ministers to schedule meetings that were unnecessary but deemed prudent in presentational terms. The IC found the public interest favoured disclosure and the FTT agreed. A rehearing was ordered after the UT found that the FTT had misunderstood one part of the CO's argument.[115] The new FTT panel also ordered disclosure. It was critical of the CO evidence, which had suggested that what it called 'the pollutant of publicity' would lead ministers to change their behaviour. The CO evidence was 'materially flawed and its reasoning unpersuasive'. The request 'did not ask for any details, sensitive or otherwise about the meeting', it 'simply asked for a global figure'. The FTT found it hard to believe that 'hard bitten, street wise, fighting politicos would scurry about trying to fill a mental quota of meetings simply because this release had taken place'. It was possible that the information might of little value but it noted that this particular committee 'may be a species that merits deeper consideration – it was a new animal in Whitehall; it was very much trumpeted by the 2010 incoming government'.[116] At the time of writing a further appeal was still possible.

Steiner schools

69. The British Humanist Association (BHA) applied for Department for Education documents discussing whether Steiner schools would be likely to meet the criteria to enter the Free Schools programme. The DfE argued that policy on the criteria was still being formulated, disclosure would have a 'chilling effect' and undermine public confidence in its approach towards Steiner schools. The IC found the public interest favoured disclosure. It argued that free schools were a radical new policy, Steiner schools have unique philosophical and educational features, the public was entitled to know how DfE engaged with those and there was strong public interest in a fully informed debate about them. It doubted whether policy formulation rather than decisions on individual school applications was taking place and 'struggled' to understand what impact disclosure would have. The FTT found the IC's

[114] DWP v IC, John Slater and Tony Collins [2015] UKUT 535 (AAC), 20 July 2015
[115] Cabinet Office v Information Commissioner 2014 [UKUT] 0461 (AAC)
[116] EA/2013/0119 (remitted), Cabinet Office & Information Commissioner, 12 November 2015

submissions on the public interest test 'persuasive to the point of being overwhelming' and DfE arguments weak and ordered disclosure.[117]

70. The disclosed documents are attached at *Appendix 4*. They highlight areas where the approach of Steiner schools conflict with Ofsted requirements, although the outcomes at age 16 are above national standards. They suggest questions that should be raised with Steiner schools making free school applications. Most significantly, they discuss serious complaints received from some parents (publicly available on the Internet) about the alleged failure of Steiner schools to deal with bullying. This is said to be linked to the belief in 'karma' or destiny, part of the philosophy underpinning Steiner schools, and the suggestion that to be bullied may be a child's 'karma', a concern of substantial public interest.

'Go Home' campaign

71. The Home Office withheld emails sent to the Home Secretary in July and August 2013 relating to the 'Go Home' campaign. This was a pilot project in which vans were driven round six London Boroughs with the message, targeted at illegal immigrants, 'Go Home Or Face Arrest'. The FTT upheld the IC's decision that the emails should be disclosed. It found that by the date of the request, the day the pilot exercise concluded, the need for a safe space had ended, although the evaluation phase of the project was continuing. The emails had accompanied weekly situation reports for ministers, which had already been disclosed. The FTT held that there was 'nothing particularly remarkable or compelling about the withheld information' which was largely factual and did not contain opinions or subjective assessments. It demonstrated 'the unexceptionable but still reassuring fact that considerable care and attention was given by Home Office officials to reporting progress on the pilot so that proper ministerial oversight could be exercised'. It revealed 'the mechanisms by which decisions about this pilot were taken and this attracts a very strong public interest in favour of disclosure.'[118] This decision is currently under appeal to the Upper Tribunal.

72. Although the FTT in this case considered whether the 'safe space' was needed at the time of the *request*, it would have been entitled to consider the issue at the date of the *refusal*[119] which has sometimes been taken to be the date of internal review.[120] In the present case the HO refused the request on 21 October 2013, the day before the Home Secretary told

[117] EA/2014/0017 Department for Education & Information Commissioner & Richy Thompson on behalf of British Humanist Association, 24 June 2014

[118] EA/2014/0310, Home Office & Information Commissioner, 29 June 2015

[119] See the Supreme Court decision in Evans v Attorney General, UKSC 21, paragraph 73.

[120] [2013] UKUT 526 (AAC), Cabinet Office v Information Commissioner & Gavin Aitchison, paragraph 15.

Parliament that the project had been evaluated and would not be continued. The internal review upholding the refusal was completed 5 months later, in March 2014.

Tweeting arrests

73. The Home Office had carried out a series of arrests of suspected illegal immigrants in August 2013. It tweeted information about the operation as it happened, accompanied by photographs and video footage. This use of Twitter itself proved highly controversial. An FOI request about the decision use Twitter was refused under section 36(2)(b). The FTT found that the HO no longer required a safe space at the time of the request and doubted that there would be a chilling effect. The information was neither 'startling nor dramatic', revealed evidence of 'good administration' and contained nothing that would alarm those considering the impact on future exchanges. It ordered disclosure.[121]

Data Protection Directive

74. The Ministry of Justice (MOJ) was asked for letters from the European Commission (EC) to the government in 2004 and 2006 concerning deficiencies in the way the UK Data Protection Act (DPA) had implemented the Data Protection Directive. The FTT found that the information was exempt under section 27(2)[122] but not under section 35(1)(a). At the time of the request, in May 2011, most of the alleged infraction issues had been resolved and those remaining were not being pursued. The lead official responsible for the negotiations was not even aware of which remained outstanding. The negotiations appeared to have been 'parked by both sides' as attention had shifted to the shaping of the EC's proposed new Data Protection Regulation, which would replace the Directive. The FTT found there was 'no evidence before us' that the alleged infractions represented live policy issues or that a safe space had been needed at the time of the request. However, it was in the public interest to understand the deficiencies of the DPA to allow public participation in influencing the government's approach to the new law.[123]

Employment Judges' remuneration

75. In a March 2011 report, the Senior Salaries Review Body (SSRB) recommended that the role of salaried Employment Judges should be re-graded, with a consequent pay increase. The government deferred any decision on the recommendation due to its public sector pay freeze without undertaking to implement it later. The SSRB complained about the matter in its March 2012 report. A September 2012 request for information about the issue was refused under section 35(1)(a). The MoJ argued that, in the absence of any final decision, disclosure

[121] EA/2015/0030, Home Office & Information Commissioner & Alistair Sloan, 20 July 2015
[122] Information provided in confidence by another state or international organisation
[123] EA/2012/0110, Ministry of Justice & Information Commissioner & Dr Chris Pounder, 23 July 2013

would intrude on the safe space and lead to less candid policy discussions. It would also make it 'impossible' for officials to offer ministers advice, a claim the FTT considered to be 'overstated'. The Tribunal found that the MoJ had relied 'mainly on generic considerations' without giving sufficient consideration to the specific contents of the documents or the particular public interest in disclosure. The documents did not contain 'blue sky thinking' or 'specially robust discussion' nor was the subject matter particularly sensitive. There were also special features particular to the case such as 'the public interest in the preservation of an independent and high quality judiciary' and 'the constitutional significance of the protection of judicial remuneration through a mechanism such as the SSRB'. The MOJ had not even acknowledged these as relevant to the public interest test even after the requester had expressly drawn attention to them. The failure to implement SSRB recommendations for several years was a 'very significant departure from previous practice' which 'tends to undermine the standing and credibility of the SSRB'. The FTT found the public interest in disclosure outweighed the ordinary need for safe space for policy making.[124] The MOJ appealed against the decision to the Upper Tribunal but subsequently withdrew the appeal.

Ministerial portfolio

76. In November 2012 the Guardian newspaper reported on an interview with the then Secretary of State for Energy and Climate Change, the Liberal Democrat Ed Davey MP.[125] He revealed that he had asked the Prime Minister to remove responsibility for renewable energy from his Conservative Minister of State, John Hayes MP, known for his vigorous anti-windfarm stance. FOI requests were made for Mr Davey's letter, and related correspondence. The FTT found that section 35(1)(b) was engaged but the public interest in upholding it was limited as the minister had voluntarily made the contents of the letter public. This 'undermines the usual or normally high public interest in protecting sensitive ministerial correspondence on a matter of internal governance'. The Tribunal was not persuaded that the space for frank discussion between the P.M. and a Cabinet Minister had been impaired or that future discussions would be affected. It added: 'On the contrary, we are of the view that when government ministers voluntarily conduct a discussion, argument or debate in the public forum, it is important that the public are properly informed of the facts, the background and the context'. It was in the public interest 'to ensure that the public know and understand what such dispute is about and the effects if any on public policy, and governance'.[126]

SOME OBSERVATIONS ON THESE CASES

[124] EA/2013/0127, Jonathan Brain & Information Commissioner & Ministry of Justice, 15 September 2014

[125] http://www.theguardian.com/politics/2012/nov/23/ed-davey-interview-energy-deal; http://www.theguardian.com/politics/2012/nov/23/lib-dems-tories-green-energy

[126] EA/2013/0287 & 0288, DECC & Information Commissioner, 4 November 2015.

77. These accounts indicate that the FOIA provides substantial protection for internal discussion. The protection applies both to information requested while policy formulation is underway and to information sought afterwards, where disclosure might affect future discussions. Examples of material withheld because of the likely chilling effect include information about:

- the DfE's refusal to disclose officials' submissions on the Building Schools for the Future programme, decided 11 months before the request (paragraph 43)
- background notes to Parliamentary Questions which had been answered between 2 and 4 years before the request (paragraph 42)
- information about the nationalisation of Bradford and Bingley, 3 years before the request (paragraph 40)
- a record of the Blair/Bush telephone conversation, which took place 7 years before the request (paragraph 48)
- ministerial exchanges about the provision of banking and insurance to Huntingdon Life Sciences, where the relevant decision had been taken 10 years earlier (paragraph 51).

78. The cases where the FTT has *not* upheld the government's claim are those where it has found that:

- *the relevant exemption was not engaged* because the information did *not* relate to the formulation or development policy. See the cases of the EC Infraction proceedings (paragraphs 61-2) and the Free school applications (paragraph 63)
- *the decision-making process had come to an end without a decision* (eg the case of the Data Protection Directive, paragraph 74)
- *the information was judged too anodyne to have a chilling effect.* These include the cases of the badger cull risk logs (paragraphs 53-7), the Lansley diary (paragraph 64) and the number of meetings of the Reducing Regulation Committee (paragraph 68).
- *the particular circumstances justified disclosure on public interest grounds of information which might otherwise have been withheld*. Examples include information about the withdrawal of Planning Aid funding (paragraphs 58-60), the risk assessments on the Universal Credit Programme (paragraphs 65-67), concerns about Steiner schools (paragraphs 69-70), employment judges' remuneration (paragraph 75) and the ministerial correspondence whose substance the minister himself had publicised (paragraph 76).

79. Some of the above decisions are not final and are subject to a further appeal (Lansley diary) or a rehearing (Universal Credit) or at the time of writing could still become subject to further appeals (Better Regulation Committee).

80. We comment further on some these issues below.

Risk assessments

81. One of the cases where the FTT has found the disputed information to be anodyne involves the badger cull risk and issue logs. This is a particularly significant as it falls into a category which the Commission's call for evidence suggests may require special protection. Risk assessments are not a special case. The impact of disclosure depends on the sensitivity and frankness of their contents and the timing of the request. Policy advice generally often includes the discussion of risk. The UT decision in the badger cull case made it clear that had the information been requested 18 months earlier, it would have ruled against disclosure. By the time of the actual request, the case for confidentiality had lost its force. The public, and the public interest, benefit from such a discriminating approach. To exclude risk assessments from access, permanently or for a given period, as a class would deny the public significant information whose disclosure may do no harm at all.

82. Not all risk assessments are anodyne. Some are clearly more substantial including those relating to the Universal Credit Programme described above. In the past the Tribunal has ordered the disclosure of reviews dealing with the Identity Card Programme.[127] It has supported the government's refusal to disclose a strategic risk register dealing with the NHS reforms finding a safe space was required at the time. It ordered the disclosure of a transitional risk register dealing the risks in implementing the NHS reforms which it found did not involve policy formulation.[128] That decision was vetoed. It has been prevented from ruling on the release of assessments of the HS2 rail project by the last minute withdrawal of an appeal to the FTT and the use of the veto instead.

83. In those decisions on which the Tribunal has expressed a view, it has recognised the need to protect the safe space but not been persuaded that any chilling effect outweighs the public interest in disclosure. Indeed, in its earlier decision on the Identity Card reviews, the Tribunal

[127] EA/2006/0068 and 0080, Office of Government Commerce & Information Commissioner (2 May 2007). This decision was quashed by the High Court because the Tribunal's use of a select committee's findings was held to contravene Article 9 of the Bill of Rights 1689. A new hearing dated 19 February 2009 also ordered disclosure.

[128] EA/2006/0068 and 0080, Department of Health & Information Commissioner & John Healey MP & Nicholas Cecil, 5 Aril 2012

quoted an experienced former civil servant involved in producing such reviews who said he already drafted them with the possibility of disclosure in mind, as a result of leaks:

> 'There is always a concern that these reports, like other public documents, may occasionally enter the public domain, for example as a result of leakage. For myself, therefore, I always try to ensure that the reports are drafted diplomatically so that if this did happen there would be no unnecessary political embarrassment and no unnecessary damage to the relationship between Government and officials. The style of the reports is therefore sensitive to that consideration.'[129]

84. If other reviewers already adopt this approach there may be little risk that any disclosure under FOI would produce a further 'chilling effect'.

Ministerial behaviour

85. The Lansley diary case (paragraph 64) involved a request for slightly more comprehensive information about ministerial meetings, than that which the government already publishes proactively. The government's witnesses failed to persuade either the FTT or UT that disclosure would be damaging. Among their arguments was the suggestion that ministers would be so worried about the implications that could be drawn from blank spaces in their diaries that they would be obliged to schedule completely pointless meetings to avoid criticism - and a disclosure which forced them to misuse their time in this way would not be in the public interest. The UT observed that if ministers were capable of deliberately wasting their time for such reasons, the public interest in scrutinising their diaries was even greater. It found that these views 'undermined the weight to be given to…[the witnesses'] objectivity, accuracy, and reasoning as a whole'. There are other criticisms of the civil service witnesses, for making claims that were 'unrealistically absolute', 'did not correspond with reality' or being 'keener to repeat generalised lines to take than to give direct answers to…questions'.[130]

86. Remarkably, the government is using *this* case to try and establish the principle that the FTT should show 'deference' to civil servants' evidence[131] – an extraordinary claim in light of the serious criticism of officials' evidence in the case. It is currently appealing to the Court of Appeal.

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[129] EA/2006/0068 and 0080, Office of Government Commerce & Information Commissioner, decision of 2 May 2007, paragraph 89

[130] EA/2013/0087, Department of Health & Information Commissioner

[131] According to Mr Justice Charles in the Upper Tribunal 'Effectively, this generally based argument was that, having regard to the novel subject matter of this request under FOIA, the deference due to the Department's two witnesses meant that…what the FTT (and the Information Commissioner before them) should have done…is to effectively accept the Department's view, and thus the validity of the reasoning and opinions of its witnesses, without subjecting them to critical analysis or such a degree of critical analysis. *Department of Health v IC and Lewis* [2015] UKUT 0159 (AAC), paragraph 61

87. The FTT and UT accounts of the government's case in the Lansley diary (paragraph 64) case may be contrasted with that in the FTT's decision in the Buildings Schools for the Future case (paragraph 43), where the more balanced approach of the department's witnesses significantly enhanced its case.[132]

Cabinet committee meetings

88. The FTT has not been prepared to accept that disclosing how often the Reducing Regulation Committee had met (paragraph 68) may be 'very damaging' out of context.[133] This appears to be another example of 'anodyne' information. The supposed harm flows from the fact that the committee is a Cabinet committee and that any disclosure about such committees is assumed to be harmful. It should be recalled that it was formerly asserted that even revealing the *names* of Cabinet committees would be damaging. This view evaporated overnight when the then Prime Minister, John Major, authorised the regular release of the names and composition of Cabinet committees in 1992. [134]

89. There may be cases where revealing a sudden flurry of activity by a particular committee may indicate that a specific policy issue has suddenly become 'live'. If so, that may qualify for exemption on the facts of the case. Revealing the number of meetings over a 2 year period on an issue which the government itself has declared to be a priority raises no such issue.

90. An illustration of what the government *has* been prepared to accept in relation to disclosures of Cabinet Committee papers, is shown at *Appendix 5,* a 2005 paper of the Ministerial Working Group on Asylum and Migration, part of the Cabinet Committee system. This paper was released under FOI in response to a 2009 Tribunal decision.[135] A key part of its reasoning was that the report 'set out the pros and cons neutrally without assigning views to any Minister or department'. The report was released without a further appeal or veto, indicating that disclosures within this class are possible.

91. Any attempt to exclude Cabinet, and particularly Cabinet committee, papers from access would be particularly damaging. Much government discussion between departments takes place via the Cabinet committee system. Much of this is dealt with by correspondence and does not involve meetings at all. At the time of the coalition government the official guidance on the Cabinet committee system stated:

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[132] 'Mr McCully was an entirely open and candid witness. The fact that he was willing to accept there would be no particular harm from disclosure of certain material and, for example, that there would be a heightened public interest following the Judicial Review challenge, gives his evidence in relation to his principled position in relation to disclosure of Ministerial submissions considerable weight.' EA/2014/0079, Department for Education and Information Commissioner, 28 January 2015.

[133] EA/2013/0119, *Cabinet Office & Information Commissioner* (decision of 12 November 2015) paragraph 18.

[134] House of Commons debates, 6 May 1992, col.64

[135] EA/2008/0073, Cabinet Office & Information Commissioner, 7 January 2009.

> 'Policy or other proposals will require consideration by a Cabinet Committee where they meet one or more of the following conditions:
>
> • the proposal takes forward or impacts on a Coalition agreement
>
> • the issue is likely to lead to significant public comment or criticism
>
> • the subject matter affects more than one department
>
> • the Ministers concerned have failed to resolve a conflict between departments through interdepartmental correspondence and discussions...
>
> The kind of proposals which will almost certainly require collective consideration include:
>
> • any issue which would have an impact on the good operation of the Coalition, or which takes forward government policy in an area covered by the Coalition Agreement
>
> • publication of consultation documents and Green and White Papers
>
> • responses to Select Committee Reports
>
> • adoption of negotiating stances for international meetings
>
> • agreeing final policy proposals before legislation is introduced
>
> • new regulatory or deregulatory proposals.'[136]

Similar principles, minus the references to 'coalition government' no doubt continue to apply.

92. The fact that issues likely to result in 'significant public comment or criticism' are required to be dealt with under the Cabinet committee system highlights how unacceptable a new exemption for Cabinet or Cabinet committees would be. It would automatically exclude all contentious proposals from FOI. It would also provide a means of guaranteeing secrecy for any inconvenient information, on any subject, by ensuring that it was circulated 'for information' through the Cabinet committee system.

93. We note the view of the then Attorney General, Dominic Grieve, who in his 2012 evidence to the Justice Committee (albeit before the Supreme Court's ruling in *Evans*) opposed the idea of a new FOI exemption targeted merely on Cabinet 'minutes':

> 'there may at times be good arguments for Cabinet minutes to be revealed. One argument might be that this is all a long time in the past and is essentially a request for historical information early. I suppose another argument might be - again, I am dealing with hypotheticals - that, if there was something so extraordinary in the Cabinet minutes that concealing it from the public was maintaining a fiction that might, for example, be regarded as scandalous, that might have a bearing on it. It all depends on what the minutes are about, what they show and the context in which the meeting took place...
>
> I have heard it suggested, and it has been suggested in the past, that one might exempt Cabinet minutes and remove the veto; it is a decision for Parliament. As I said earlier, if you

[136] Cabinet Office, 'Guide To Cabinet and Cabinet Committees'

do that, you may inadvertently lose the benefit of sometimes being able to get Cabinet minutes revealed. There would be a potential loss there because Westland illustrates that there was a circumstance in which it was possible to do that'[137]

Policy advice disclosed in the public interest

94. We have identified at paragraph 78 (4th bullet point) FTT cases where the weight of the public interest arguments have led to decisions for disclosure of information from civil service submissions that might otherwise have been withheld. The category includes one case (Universal Credit Programme) where the FTT decision has been set aside and a new hearing ordered. These account for a very small number of the cases dealt with by the FTT in the last 3 years. Since these cases presumably include those where the government has been dissatisfied with the IC's decisions, that small number is significant. The chances of any one of the large numbers of Whitehall submissions produced each day being requested and ordered to be disclosed having gone through the appeals system is extremely low. The number of officials directly affected must be tiny. That is relevant to any assessment of a 'chilling effect'.

95. In those cases disclosure was based on a variety of different public interest arguments. These include the fact the information in question related to:

- a ministerial communication whose substance had been openly disclosed by the minister making it
- potentially serious concerns about a group of schools that had applied to enter the Free Schools programme
- the decision to withdraw funding for a significant public advice service at short notice and without a clear idea of what would replace it
- a decision affecting the credibility of the Senior Salaries Review Body and the quality of the judiciary
- the management of the Universal Credit Programme, a reform of immense significance which if not handled effectively could cause 'widespread anxiety and hardship'.

96. These are all serious arguments about the public interest. It is in the nature of the balancing exercise involved that there may be weight on both sides of the case. The question is not whether these decisions are all indisputably correct but whether the public interest is served by a system which allows for such decisions to be taken by independent, experienced

[137] Justice Committee, Post–legislative scrutiny of the Freedom of Information Act 2000, First Report of Session 2012–13, Volume II, evidence given on 16 May 2012, Questions 488 and 489

tribunals, carefully considering the evidence and argument both ways, without their options being restricted to exclude particular information altogether. We have no doubt that it is.

THE MINISTERIAL VETO

97. The veto, in section 53 of the FOIA can be used to overturn an order to disclose exempt information under the section 2 public interest test.

98. In the proceedings involving Prince Charles' correspondence (in which the Campaign for Freedom of Information intervened) the government appeared to maintain that the power of veto went beyond this. It suggested that it could be used to overturn the common law public interest test incorporated into the section 41 exemption for breach of confidence and the balancing test applied under the section 40(2) exemption for personal data. The Supreme Court decision in *Evans v Attorney General* UKSC [2015] makes clear that veto is available only in relation to the section 2 public interest test.[138]

99. The veto can be used if a Cabinet minister or the Attorney General has 'on reasonable grounds'[139] formed the opinion that the balance of public interest favours withholding exempt information. The government argued that this merely meant that the minister's grounds needed to be rational.

100. However, the decision which the government vetoed in *Evans* had been taken by the Upper Tribunal, a superior court of record with the same status as the High Court. Its decision had been reached after a six day hearing in which the parties had been represented by leading and junior counsel, arguments had been vigorously tested and constitutional experts from both sides had given evidence and been cross examined. It resulted in a 65-page decision, described by the Divisional Court as 'a most elaborate, thorough and fully reasoned determination'[140] plus several annexes one of which was 109 pages long.

101. Lord Neuberger, the President of the Supreme Court, supported by Lord Kerr and Lord Reid concluded that to overturn a judicial decision required a minister to do more than merely hold a different rational view and prefer his or her view to that of a court or tribunal:

> 'A statutory provision which entitles a member of the executive (whether a Government Minister or the Attorney General) to overrule a decision of the judiciary merely because he does not agree with it would not merely be unique in the laws of

[138] See in particular the judgement of Lord Wilson at paragraph 172(b). His approach was supported by Lord Mance and Lady Hale at paragraph 124.
[139] FOIA section 53(2)
[140] [2013] EWHC 1960 (Admin) at paragraph 55

> the United Kingdom. It would cut across two constitutional principles which are also fundamental components of the rule of law.
>
> First, subject to being overruled by a higher court or (given Parliamentary supremacy) a statute, it is a basic principle that a decision of a court is binding as between the parties, and cannot be ignored or set aside by anyone, including (indeed it may fairly be said, least of all) the executive. Secondly, it is also fundamental to the rule of law that decisions and actions of the executive are, subject to necessary well established exceptions (such as declarations of war), and jealously scrutinised statutory exceptions, reviewable by the court at the suit of an interested citizen. Section 53, as interpreted by the Attorney General's argument in this case, flouts the first principle and stands the second principle on its head. It involves saying that a final decision of a court can be set aside by a member of the executive (normally the minister in charge of the very department against whom the decision has been given) because he does not agree with it.'

102. To overturn these principles required the legislation to be 'crystal clear' that this was Parliament's intention. Lord Neuberger did not find such clarity in section 53 and the use of the veto had therefore been unlawful.

103. Two other Supreme Court judges (Lord Mance and Lady Hale) adopted a different approach to Lord Neuberger's but agreed that the veto had been unlawful. Section 53 required 'a higher hurdle than mere rationality'. Although a cabinet minister could substitute a different view on the weighing of the public interest arguments, the Attorney General had in effect substituted his own findings on the evidence for those of the Upper Tribunal without even explaining why he considered its factual findings had been wrong. The Supreme Court held, by a majority of 5 to 2 that the veto had been unlawfully used.

104. By a majority of 6 to 1 it also found that the veto could not be used at all in relation to environmental information, because its use was incompatible with the EU directive which gave rise to the UK's Environmental Information Regulations.

Parliament's intentions

105. The government maintains the Supreme Court's ruling that something more than the normal judicial review test of rationality is required for the veto to be exercised undermines Parliament's clear intentions. A statement issued by the prime minister, on 26 March 2015 said:

> 'Our FOI laws specifically include the option of a governmental veto, which we exercised in this case for a reason. If the *legislation does not make Parliament's intentions for the veto clear enough*, then we will need to make it clearer.' (emphasis added)

106. Mr Straw, who as Home Secretary took the FOI Bill through the House of Commons and was closely involved in decisions about the veto told BBC Radio 4's Today programme on 14 May 2015:

> 'Parliament was absolutely clear that there should be protection for this kind of correspondence and…Parliament was exceptionally clear that if necessary the Attorney General could be given a right of veto over the Information Commissioner's and Tribunal's decisions to publish. And one of the really worrying aspects about this case which has not received enough attention is that *the Supreme Court on a split decision decided in their wisdom to literally to rewrite what Parliament had decided* and there is a serious question there for justices of the Supreme Court to reflect on whether they are exceeding their power which in my view they are' (emphasis added)

107. The Commission's call for evidence states:

> 'in March this year, the Supreme Court ruled that the veto could no longer be used *as Parliament had understood it would work when its provisions were being enacted*. One consequence of the Supreme Court's judgement is that the circumstances in which the veto can be exercised are now extremely narrow, although there remains considerable uncertainty about the precise scope of the veto. This judgement raised serious questions about the constitutional implications of the veto, the rule of law, *and the will of Parliament.'* (emphasis added)

108. The above statements all suggest that the Supreme Court's decision has undermined the will of Parliament. However, there is no indication in Hansard that Parliament was ever told that the veto could be used against a decision of the *tribunal or courts*. It is *this* use of the veto which the Supreme Court (like the Court of Appeal before it) has found to be unlawful.

109. When the FOI Bill was originally introduced, the public interest test was purely voluntary - the Information Commissioner would only have been able to *recommend* not *require* disclosure on public interest grounds. This would have meant that a public authority would have decided for itself whether it was in the public interest for it to disclose exempt information which, for example, revealed its own incompetence or misconduct.

110. During the Bill's Commons stages, Mr Straw agreed to make the public interest test legally binding. However, he insisted that ministers should have a power of veto over the *Commissioner's* decisions under the public interest test. There was no suggestion that the veto could also be used against a decision of the *Tribunal or High Court*, both of which dealt with appeals under the scheme set out in the bill as originally drafted.

111. In the extracts below, the veto is sometimes referred to as an "Executive override" or "exemption certificate". The italicising is ours.

112. Thus, Mr Straw told the Commons during the FOI Bill's report stage on 4 April 2000:

> 'The issue remains of what happens if, notwithstanding *the commissioner's order*, the public authority continues to believe, for sound reasons, that the information should not be disclosed. Most regimes that we have surveyed have some sort of Executive override of one sort or another, and we propose to have one.' [col 921]

113. A few moments later he said:

> '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' [col. 922]
>
> 'I do not believe that there will be many occasions when a Cabinet Minister with or without the backing of his colleagues will have to explain to the House or publicly, as necessary, why he decided to require information to be held back *which the commissioner said* should be made available. [col. 923]
>
> 'The possibility of an Executive override means that a Minister will *not be able to appeal against a decision by the commissioner.* Such a provision would otherwise be otiose. I accept that if we removed the Executive override, we would need to provide for an appeals mechanism. [col. 923]
>
> 'Circumstances could arise in which Ministers genuinely considered - we are talking about fine judgments - that the public interest *overrode the commissioner's judgment* about disclosure or non-disclosure '[col. 924]

114. The following day, 5 April 2000, Mr Straw said:

> 'I do not happen to believe that a Minister would seek to use an exemption certificate to prevent the release of factual and background information when that was *ordered by the commissioner*. '[col.1023]
>
> 'Hon. Members are aware that as a result of representations that were made to us, we have changed the Bill, partly in its text and partly by tabling amendments on Report…so that that the *commissioner will have a power to order disclosure subject only to Executive override* in the limited circumstances which I described yesterday' [col. 1094]
>
> 'I believe that, from the Government's point of view, it would be disingenuous for us to send the Bill to the other place having incorporated *the change to the position of the commissioner* - who would have a power to make an order for disclosure rather than simply what is at the moment a provision for recommendation - without also having on the face of the Bill the balancing arrangement by which there could, in limited circumstances, be an Executive override.' [col. 1095]
>
> 'However, it is my judgment…that the new clause is better in the Bill because then the complete scheme of change in principle - the change from discretionary disclosure to a *power to the commissioner* and a duty to abide by that *save for the circumstances of Executive overrid*e - is there.' [col. 1106]

115. At the bill's second reading in the Lords on 20 April 2000, Lord Falconer the Minister of State at the Cabinet Office explained:

> 'Clause 52 sets out the exception to the duty to comply with decision or enforcement notices. This is the so-called executive override provision. It is important to note the limitations on this provision…First, this is not a general override *of the commissioner's decisions*; it applies only to decisions taken under Clause 13.[141] Secondly, the Minister must explain publicly why *he has chosen to disagree with the commissioner*. Thirdly, the decision is subject to judicial review and *the commissioner will have the locus* to seek such a review. Thus, this is not an easy provision for Ministers to use.' [col. 828]
>
> 'If the *information commissioner* rules against the Minister, under Clause 52 the Minister is entitled to override it. In another place my right honourable friend said that if possible he would introduce amendments to ensure that, as far as concerned central government, only a Cabinet Minister could override the *decision of the information commissioner* after a collective process had taken place.' [col. 890]
>
> 'If the Minister *overrides what is said by the information commissioner,* he or she must explain why. The Minister must have the support of Cabinet colleagues and his or her decision is subject to judicial review. It is for this House to decide whether or not Cabinet Ministers would *regularly overrule the information commissioner* and persuade all their Cabinet colleagues to take a political risk in relation to this matter.' [col. 891]

116. At Committee stage in the Lords on 25 October 2000, Lord Falconer said:

> 'There will be a limited, defined, restricted override…We believe that in such cases, which will be those dealing with the most sensitive issues, it should be a senior member of the Government, able to seek advice from his Cabinet colleagues, who should decide. Cabinet Ministers are accountable in a way *which the commissioner cannot be*. It is right that responsibility and accountability should rest at that level for this aspect of the freedom of information regime.' [col. 442]
>
> 'The clause is drawn in this way because the circumstances in which it will be necessary for the Cabinet, in effect, *to override the information commissioner* are not predictable from where we stand at present' [col. 445]
>
> 'it is worth noting that the effect of this provision is not that *any decision of the information commissioner* can be overridden: the only decision *of the information commissioner that can be overridden* is one on the balance of the public interest under Clause 13. If, for example, the *information commissioner* determined that something was not covered by an exemption, then the ministerial override would never apply.' [cols. 445-446]

117. Finally, at Report stage in the Lords on 14 November 2000, Lord Falconer said:

> 'the Government believe that there will be certain cases dealing with the most sensitive issues where a senior member of the Government, able to seek advice from his Cabinet colleagues, should decide on the final question of public interest in relation to disclosure. We believe that Cabinet Ministers are accountable in a way in which *the commissioner* cannot be. It is right that responsibility and accountability should rest at that level for this very important aspect of the freedom of information regime.' [col. 258]

[141] The order of clauses was later changed, and what was clause 13 is now section 2 of the FOI Act.

118. The debate in both Houses therefore took place entirely on the assumption that the veto could be used to overturn decisions of the Information Commissioner - not the Tribunal, still less the High Court.[142]

119. It may be that ministers themselves were not aware of this possibility. But if they were, they did not share their knowledge with Parliament.[143]

120. The only way in which Parliament could be assumed to have intended that the veto could be used against the tribunal or court would be if Parliamentarians were assumed to have worked this out for themselves, from the text of the bill, without the benefit of any indication to this effect from ministers.

121. However, Lord Neuberger supported by two other justices pointed out the Supreme Court had previously held that Parliament would not be assumed to have intended to interfere with fundamental rights unless 'it had made its intentions crystal clear'.

122. The Court of Appeal had held that fundamental rights:

> 'cannot be overridden by general or ambiguous words. This is because there is too great a risk that the *full implications of their unqualified meaning may have passed unnoticed in the democratic process'*. The text of the relevant provisions of the Act fell short of these standards.[144] (emphasis added)

123. The italicised words precisely describe what has happened in relation to the veto. Lord Neuberger concluded that FOIA itself 'falls far short' of providing the necessary clarity.

124. At the time of the FOI Act's passage, the proposition that ministers could veto decisions of the *Information Commissioner* had itself been controversial, not least because the government's 1997 FOI white paper had explicitly rejected it, saying:

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[142] The High Court's functions under the FOI Act have since been transferred to the Upper Tribunal.

[143] The proposed arrangements for the veto changed during the bill's House of Lords stages. The initial position was that a government department had no right of appeal against a notice ordering disclosure on public interest grounds. Its only option would have been to exercise the veto. That was subsequently changed to the present position which allows departments to either appeal against such a decision or use the veto. (House of Lords debates, 25 October 2000, cols 444-5)

However, even as the bill stood during this interim stage, the possibility that the veto might be exercised against the tribunal or court should have been apparent to the government. A requester would have been able to appeal against a decision notice by the Commissioner which failed to order disclosure in the public interest. If the tribunal found in the requester's favour, the government is likely to have considered whether the veto could then have been used against the *tribunal* decision. If the requester lost an appeal to the tribunal but then successfully appealed to the High Court, the possibility of a veto against the *High Court's decision* should then have been apparent.

[144] Paragraphs 56-58

> 'We have considered this possibility, but decided against it, believing that a government veto would undermine the authority of the Information Commissioner and erode public confidence in the Act.'[145]

125. The idea that the veto could also be used not merely against the Commissioner but against the *tribunal and courts* including the House of Lords, now the Supreme Court (which the Lord Chief Justice has confirmed to be the case[146]) would have been explosive. It is clear that Parliament had no idea that this was possible. The Supreme Court decision could not be said to disregard the will of Parliament.

126. We do not believe a veto should exist at all, particularly in light of the Act's elaborate appeals process. We note that on 4 of the 7 occasions on which the veto has been exercised so far it was used against a decision of the Information Commissioner which had not been appealed against to the Tribunal. In those cases the government had not attempted to secure the outcome it sought by use of the conventional appeal mechanism.

127. If a revised veto power is to be introduced, we do not believe it would be acceptable for the only substantive safeguard to be the standard judicial review test requiring merely that the minister's view should not be irrational. That is not a proper basis for overturning the considered decision of court or tribunal, reached after detailed consideration of argument and evidence. A more appropriate test, which accords weight to the degree of scrutiny and argument applied to the decision by the decision taker, is essential.

ENFORCEMENT

128. There can be substantial delays in dealing with FOI requests, both at the initial response stage and in completing internal reviews. Section 10(3) of FOIA allows the normal 20-working day deadline to be extended when considering the public interest test. The extension is not subject to any statutory limit, other than the requirement that it be 'reasonable in the circumstances'. This provision has clearly been abused on occasions. The former National Offender Management Service (an MOJ executive agency) in the past issued 12 consecutive monthly extensions under this provision, delaying its response to an FOI request by a whole year.[147]

[145] Your Right to Know. The Government's Proposals for a Freedom of Information Act', Cm 3818, December 1997, paragraph 5.18

[146] Evans v Attorney General, [2013] EWHC 1960 (Admin), paragraph 8

[147] Information Commissioner, Practice Recommendation, National Offender Management Service, 10 March 2008

129. We do not consider that the public interest test requires extra consideration time. The need to consider whether an exemption applies and if so whether disclosure on public interest grounds should take place are part of a single continuous process. No government department requires 20 working days to decide whether particular information relates the formulation of government policy – and then a further 20 working days to consider whether disclosure should take place on public interest grounds. If there is a case for extending the time scale it should be where significant external consultation is involved, for example with third parties whose commercial interests may be affected by disclosure or where a request involves a substantial volume of information. The maximum extension should be specified, as has been done in regulation 7(1) of the EIR.

130. Delays in carrying out internal reviews are a greater problem, because there is no statutory basis for such reviews under FOI. This means the Information Commissioner has no power to take formal enforcement action against an authority for excessive or even deliberate delays at this stage.[148]

131. The MOJ recommended a statutory 20 day maximum extension to the public interest test in its 2012 report and similar statutory limits for internal reviews. The government did not accept these recommendations. It indicated in its response that it was minded to amend the Code of Practice under section 45 of the FOIA to suggest that internal reviews should normally be completed within 20 working days,[149] but has not done so.

132. We question the value of internal review. It may merely impose a further delay on the requester while reducing the pressure on authorities to reach a correct decision initially. MOJ statistics suggest that the requester's case is partly upheld at central government internal reviews in 13% of cases, and fully upheld in a further 8%.[150] We suspect that these 'successes' may be illusory and largely involve upholding complaints that time limits for initial responses have been exceeded

BURDEN

133. The Commission's call for evidence raises the question of whether the FOI Act creates a disproportionate burden on public authorities.

[148] The government's response to the Justice Committee's report appears to have assumed that such a power exists. While that is the case under the EIR the IC has no such power under FOIA. See: Government Response to the Justice Committee's Report: Post-legislative scrutiny of the Freedom of Information Act 2000, November 2012, Cm 8505, para 28

[149] Paragraph 31

[150] Ministry of Juistice, Freedom of Information statistics: Implementation in Central Government 2014 Annual and October-December 2014, 23 April 2015, Table 13.

134. We believe the Act provides exceptional value for money. The most recent costing for central government bodies, referred to in the call for evidence, suggest the Act's annual cost to central government is £8.5 million. Moreover, the figures indicate that the volume of requests to central government bodies has grown by only 23% over 10 years, a surprisingly low figure given the Act's high public profile. We think the Act provides substantial benefits both in terms of improved accountability and scrutiny – and pressure on wasteful spending.

135. Following the Justice Committee's report on post legislative scrutiny of the FOI Act, the coalition government published proposals to amend the Act's cost limits, to make it easier for requests involving 'disproportionate burden' to be refused. The target of these measures was said to be requesters making 'industrial' use of the Act.[151] The potential measures largely involved making it easier for public authorities to refuse requests on cost grounds.

136. However, the measures proposed did not target individuals making excessive use of the Act. They would have applied to *all* requests including those from people making modest and occasional use of the Act. The main proposals involved reducing the existing cost limits (of £600 for government departments and £450 for other authorities) to some lower figures (which would potentially affect all requests); allowing additional activities to be included when calculating whether the cost limit had been reached; and permitting unrelated requests by one individual or organisation to the same authority to be aggregated and refused if the total cost exceeded the cost limit for a single request.

137. The last of these proposals could have meant that an individual or organisation might be limited to just a single request to an authority in a 3 month period. One request which fell just short of the cost limit might then have prevented the requester making any further requests to the authority until the end of the 60 working day period referred to in the fees regulations, which would presumably have been applied.[152] The impact of such a proposal on, say, a specialist journal or journalist whose work focussed on a particular authority, or a local MP or councillor, or campaign or amenity group, would be particularly severe.

138. Shortly after these proposals were published, the Upper Tribunal issued its decision in the *Dransfield* case, subsequently endorsed by the Court of Appeal.[153] The terms of this decision are strikingly similar to the terms in which the coalition government set out the case for changes to the cost limit. The Upper Tribunal held that the purpose of the Act's provision on

[151] Government Response to the Justice Committee's Report: Post-legislative scrutiny of the Freedom of Information Act 2000, CM 8505, November 2012.
[152] The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004, regulation 5(2)(b)
[153] Dransfield v The Information Commissioner [2015] EWCA Civ 454 (14 May 2015)

vexatious requests (section 14(1)) was 'to protect the resources (in the broadest sense of that word) of the authority from being squandered on disproportionate use of FOIA'.

139. The consequence of that decision has been a redrawing of the IC's approach to section 14(1) which previously did not permit a request to be refused *solely* on the grounds of the burden it might impose on the authority. Where *cost alone* was the issue, the IC had held that an authority would have to demonstrate that the cost of locating, retrieving and extracting the requested information exceeded the section 12 cost limit. However, the cost limit did not permit the costs of processing a high volume of easily found material to be taken into account. A request for the entire contents of a filing cabinet could not be refused under the cost limit, since the cost of finding and extracting that information was negligible. The burden lay in its *processing* and in particular in identifying and redacting exempt information. The new approach has permitted such requests to be refused if those activities involve a disproportionate burden not justified by the value of the information.[154]

140. This approach has a significant advantage over changes to the cost limit, since it takes account of both the burden and the public interest involved in complying with a demanding request. By contrast, the cost limit takes no account of the public interest. It is a purely mechanical calculation based on the number of hours needed to deal with the request, which allows the shutters to automatically be brought down once the cost limit is reached regardless of value of the information.

141. We believe the present approach addresses the concerns relating to 'disproportionately burdensome' requests and that further action to deal with that issue should not now be necessary.

Charges

142. We would be particularly concerned by any move to introduce charges for requests. The experience under Ireland's Freedom of Information Act, in which the introduction of application fees led to an immediate crash in the volume of requests to one quarter of its previous level, is a particularly acute warning of the potential consequences of any such approach. Ireland has now abolished application fees.

[154] See for example FTT decision EA/2013/0270, Department for Education & Information Commissioner & McInerney, which involved a request for what turned out to be 25,000 pages of material about free school applications; and Information Commissioner decision notice FS50544833, which involved a request for metadata about all emails sent to or received by the Home Secretary during a one week period, including the sender's name, the date and time, subject and names of attachments.

143. When the UK Act was passed, the government originally intended to allow authorities to charge a fee of up to 10% of the estimated costs of locating, retrieving and extracting the requested information. It ultimately decided not to adopt this approach.

144. We understand this was because the cost of generating the invoice would normally have exceeded the costs recovered. It would also have exposed FOI officers to a substantial additional workload, of routinely estimating the costs of complying with every request received, generating invoices and keeping track of whether payments had been received and cheques cleared, before work on the request could commence.

145. Scotland's experience suggests that the UK decision was correct. Charges similar to those initially envisaged under the UK Act can be made under the Freedom of Information (Scotland) Act 2002. No charge is made for the first £100 of estimated costs, but thereafter 10% of the estimated costs of locating, retrieving and providing the information can be charged.[155]

146. In practice, virtually no charges are made. The Scottish Information Commissioner's statistics show that although Scottish public authorities received a total of 44,863 FOI requests in the year from October 2014 to September 2015, fees notices were served on just 64 occasions, that is in relation to 0.14% of requests.[156] That suggests that charges are not an attractive proposition for authorities, perhaps because of the work involved in administering them.

147. The call for evidence raises the possibility of a standard flat rat application fee, similar to the £10 fee that can be charged for subject access requests under the Data Protection Act. However, this subject access fee is likely to be abolished under the new EU Data Protection Regulation which is now being finalised.

148. An application fee for FOI requests, at whatever amount, would cause a number of difficulties.

149. It would conflict with the existing principle that all written requests for recorded information must be dealt with under the Act (or the EIR) regardless of whether the requester cites it. At present, someone who requests information automatically benefits from the Act's legal rights, even if the requester is not aware of those rights and does not refer to the Act.

150. An application fee would lead to a two-tier system, distinguishing between those who formally exercise their rights and pay the fee and those who ask for information without citing the

[155] The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004
[156] https://stats.itspublicknowledge.info/report/generate

legislation. Authorities would presumably be expected to continue answering informal requests free of charge. They could hardly refuse to reply to someone who wanted to know why the service which the authority was required to provide had not been received and who wanted figures about the authority's compliance with standards. However, in answering such requests without a fee they would presumably be freed from the obligation of complying with the Act's requirements. This would permit them to withhold information even where it was clear that this could not be justified under any FOI exemption. That would be a particularly unattractive proposition.

151. Application fees would also make the use of email for FOI requests difficult. Applications might have to be made by letter with cheques, unless authorities provided the facilities for online payment and for matching payments to requests. Existing web-based facilities for making requests would presumably have to be adapted to comply. A resource such as the *whatdotheyknow.com* website, which has become a valuable source of information for public authorities as well as requesters would no doubt become defunct.

152. Fees would also deter those who made more than occasional use of the FOI Act. Anyone wishing to compare their authority's performance with those of neighbouring authorities would quickly find the prospect of multiple application fees a problem. The use of FOI to produce surveys, often of information which is relatively simple for authorities to provide, is likely to cease if requesters were obliged to pay a fee to each authority.

153. Such surveys have made a valuable contribution to public debate. For example:

> The All Party Parliamentary Group on Vascular Disease has produced a report, based on an FOI survey, comparing the rate of amputations for patients with diabetes by NHS trust and Clinical Commissioning Group. This showed that the likelihood of losing a limb because of shortcomings in the quality of medical care was twice as high in the South West as in London.[157]
>
> An FOI based survey published in the British Medical Journal in 2014 revealed that nearly 60 per cent of NHS trusts were failing to routinely monitor several common hospital-acquired infections and 75 per cent kept no records of associated deaths.[158]
>
> HealthWatch, the statutory consumer body dealing with the NHS and care services, used an FOI survey to document the fact one third of NHS trusts fail to formally record or investigate complaints about poor healthcare or mistreatment of patients made by visitors, contractors or other 'citizen whistleblowers'.[159]

[157] http://appgvascular.org.uk/media/reports/2014-03-tackling_peripheral_arterial_disease_more_effectively__saving_limbs__saving_lives.pdf
[158] http://www.bmj.com/content/349/bmj.g5656
[159] http://www.healthwatch.co.uk/news/those-who-witness-poor-care-being-denied-right-complain-nhs

> An FOI survey of taser use by police forces found that 57 per cent of taser shots struck the chest area, although the manufacturer of the device expressly warns that the chest areas should be avoided because of the risk of inducing cardiac arrest.[160]
>
> The Howard League for Penal Reform used an FOI survey to reveal that there were approximately 53,000 overnight detentions of children under the age of 16 in police cells in 2008 and 2009, some less than 10 years old.[161]

154. Finally, fees would substantially undermine the value of the Act in exerting pressure on wasteful public authority expenditure. The threat of exposure via FOI is a potent deterrent against extravagance. For example:

> Glasgow councillors spent over £24,000 in three years visiting overseas flower shows. The councillors had attended horticultural events in Tokyo, Madrid, Barcelona, Paris, Amsterdam, Dublin, Belfast and the German spa town of Baden Baden. The Tokyo trip alone had cost over £6,500. An official claimed that the trips helped to keep Glasgow at "the forefront of world-class horticultural achievement". The practice stopped after the expense was revealed by an FOI request.[162]
>
> Local authorities and NHS trusts spent £220m over 12 months buying and leasing luxury cars. One local authority hired a Lotus Elise while another leased a Jaguar XJ, the same model as the Prime Minister's official vehicle. Between 2010 and 2011, public bodies hired almost 600 Mini Coopers and more than 650 BMWs, and purchased 17 Audis. Sunderland was the biggest spending city council, spending more than £800,000.[163]
>
> A FOI request has revealed that West Midlands police spent £19,000 on two Unmanned Aerial Vehicles, which according to a senior officer cannot be used at night or in the rain. Two of the high-tech machines were purchased at a cost of £8,502, while training cost a further £10,620. The force's response to the request admitted that no arrests have been made from their use.[164]
>
> Durham Free School, which was open for less than two academic years before being closed by the Education Secretary, cost the taxpayer almost £1 million. In response to an FOI request, the Department for Education confirmed the School received £300,000 in pre-opening funding, the flat-rate grant given to all secondary free schools. In addition, £304,881 was spent on capital costs; £212,663 on construction works, furniture, fittings and equipment and ICT (the Department said much of the ICT equipment could be re-used); and £92,218 on legal and technical adviser fees.[165]
>
> NHS England's axed patient feedback service, Care Connect, cost £1.2 million, an average of £1,600 for every patient query resolved during the pilot phases. The service enabled patients to use a number of channels: online, phone, text or social media, to ask a question, provide feedback or log concerns on their experiences of the NHS. It was due to be rolled out across England by February 2014. However, the service was

[160] http://www.guardian.co.uk/uk-news/2013/jul/14/police-tasers-cardiac-arrest-warnings?INTCMP=SRCH
[161] http://www.howardleague.org/research_overnight_detention/
[162] Cash-strapped Glasgow council sends staff on £24K overseas jaunts to flower shows, Daily Record, 11 April 2008
[163] £220m for official cars, The Sunday Times, 7.8.11
[164] West Midlands Police's £19k drones 'can't fly in the rain', Birmingham Mail, 15.11.15

[165] 'The £1m free school (now shut), Schools Week, 15.5.15

never widely picked up by patients and consequently cost the NHS extortionate amounts per use.[166]

It cost Medway Council almost £350,000 during two school closures just to cancel existing photocopier leases.[167]

London Underground spent £933,000 in 2009-10 hiring fake passengers to observe the "ambience" at stations and to test the knowledge of staff.[168]

Speaker of the House of Commons John Bercow billed the taxpayer £172 to take a chauffeur-driven car from Parliament to Carlton Terrace, a journey of less than one mile. The data was requested by the Press Association under the FOI Act. The request also revealed that the Speaker spent £367 on being driven 34 miles to Luton to give a speech on how MPs were restoring their reputation after the expenses scandal.[169]

An NHS scheme to give patients more control over their personal care has resulted in millions of pounds being spent on luxuries such as summer houses, a boat ride and holidays, according to a widely-reported investigation by Pulse, a magazine for GPs. Information obtained by Pulse under the FOI Act showed that Clinical Commissioning Groups (CCGs) in England expected to spend £120m on 4,800 patients taking up the personal health budgets scheme this year. FOI responses from NHS Nene CCG and NHS Corby CCG revealed that patients had been funded to go on holiday, purchase an iRobot and build a summer house. NHS Kernow CCG spent over £2,000 on aromatherapy as well as allocating funds for horse riding and pedalo boating.[170]

The Government's policy of culling badgers to stop the spread of tuberculosis to cattle has cost £16.8m to-date, which works out at £6,775 for each of the 2,476 badgers culled. The information was obtained by the Badger Trust from the DEFRA via an FOI request.[171]

The Ministry of Justice paid Serco over £1m to run an empty secure unit for children over a seven-week period. Serco had been contracted to run the Hassockfield secure training centre near Consett since 1999. This expired in September 2014 but was extended by the MoJ before the unit closed on 20th November 2014, when the remaining children were moved elsewhere. However, Serco continued to be paid to manage what was by then an empty building until 9th January 2015. The money it received during those 50 days came to a total of £1.1m. The information was obtained under the FOI Act by Article 39, a charity which aims to protect the rights of children living in institutions.[172]

The IRIS recognition system, which scans the unique patterns of travellers' irises to confirm their identities, was so under-used that it cost nearly £2 per arrival. The system had been used just over 4.7 million times between 2006 and 2012. The technology cost just over £9m, the equivalent of £1.94 for each person that had used it. Earlier in 2012

[166] Axed patient feedback service cost £1.2m, Digital Health News, 16.11.15

[167] £350k just to take away photocopiers, The Medway Messenger, 23.9.11

[168] Rapid rise of the citizen shopper spies for hire, Sunday Times, 30.1.11

[169] John Bercow slammed by colleagues after claiming £172 on a taxi journey of less than a mile, Independent, 25.7.15

[170] Revealed: NHS funding splashed on holidays, games consoles and summer houses, Pulse, 1.9.2015

[171] Culling costs £6,775 per single badger, figures reveal, Daily Mail, 2.9.2015

[172] MoJ paid Serco £1.1m for running secure children's unit after it closed, Guardian, 21.10.15

year the government announced the system was being scrapped after revealing the software used was already out of date.[173]

Between 2012 and 2014, the London Borough of Tower Hamlets sold off more than 50 homes using out of date valuations, costing taxpayers thousands of pounds on each transaction, according to data released under the FOI Act. Tower Hamlets sold one two-bedroom flat in 2012 based on a valuation made seven years earlier, failing to take advantage of a 30 per cent price rise in the area over that period. It sold a one-bedroom flat for £42,000 when it was valued at £142,000. A two-bedroom maisonette was sold for £40,000 when it was worth at least £125,000. The London borough of Sutton also revealed that it had sold off several flats at a 70 per cent discount, allowing one tenant to buy a £173,000 home for just £70,000. Discounts of 70 per cent are allowed under the policy for tenants who have lived in their homes for many years, but critics of the policy insist they are too high.[174]

A council spent £330,000 in redundancy payments to 25 staff who were subsequently re-employed by the authority. One worker who agreed a redundancy package with Stoke-on-Trent City Council spent just 27 days away from the authority before returning to a new position. A further two workers waited just 32 days after agreeing a settlement before being re-employed. The council stated that redundancy agreement had now been redrafted to provide that nobody can return to work at the Council within a year and a day.[175]

Councils in England have inherited more than £30m debt as a result of schools converting to academies, FOI requests by the BBC have revealed. Under the academies scheme, when local-authority-run schools choose to convert to academies, councils pick up the bill for the costs of conversion including the cost of any deficit and legal fees. The FOI responses showed that £32.5m has been spent by councils on clearing debts since the Academies Act was introduced in 2010.[176]

[173] Revealed: failed airport eye scanners have cost £2 for every passenger who used them, The Independent, 1.5.12

[174] Council houses have been sold at 70% under their market value,Guardian, 11/09/2015

[175] Council spends £330,00 in redundancy payments then rehires staff 27 days later, The Daily Telegraph, 10/08/2011

[176] Schools converting to academies cost councils £300m, BBC reveals, BBC, 25.7.2015

Campaign Against Arms Trade

Since it came into force in January 2005, the Freedom of Information Act (FoIA) has helped shed light on the arms trade, a highly controversial area of UK government-supported activity with major consequences both in the UK and overseas. The FoIA has brought great benefits to CAAT's work and, we believe, the wider public. Without the FoIA, much information about corruption and arms sales to Saudi Arabia, and, while Gaddafi was still in power, meetings between his and UK Ministers and officials to discuss arms sales, would not have come to light. The information shows the extent of misjudgements which, hopefully, in the longer term if not sooner, will start to change Government practice.

CAAT is dismayed by the tone of the Independent Commission's Call for Evidence. This quotes the Justice Select Committee in 2012, which said the FoIA "is a significant enhancement to our democracy", before immediately disregarding it by focussing on the ways the FoIA inconveniences, or, more accurately, embarrasses the executive. All the questions presuppose that the FoIA is a burden; none ask for suggestions for strengthening the FoIA or extending its scope.

In consequence, this submission is made more in the hope, than in the expectation, that by adding its voice to the many working to, at the very least, preserve the FoIA in its current form, the Commission will come to realise the damage that will be done if the FoIA is weakened in any way.

The culture of greater openness initiated by the FoIA needs time to fully embed itself, or, in some cases, enter into the thinking of officials. To give an example, in August 2015, a full ten years after the FoIA came into force, CAAT made an FoI request to the Government's arms sales agency, the UK Trade and Investment Defence & Security Organisation (UKTI DSO) for details of meetings its head had with external bodies during 2014. Similar information had been provided for earlier years, but the 2014 data was lost when his electronic diary was deleted on his leaving his post in February 2015. The records were lost even though the public interest in them had previously been demonstrated.

At present, it frequently takes requesters such as CAAT much perseverance to obtain material that should be in the public domain. Any dilution of the FoIA would mean a substantial step back in terms of information provision, providing more loopholes and allowing more tactics which might assist obstructive departments.

The introduction of the FoIA was part of a welcome general trend towards openness and accountability which assisted rational and informed debate. The FoIA must not be weakened, as to do so would not only have practical implications, but would also undermine part of the democratic process.

The use CAAT has made of the Freedom of Information Act

CAAT's first FoI request was made in January 2005. Since then, CAAT has made FoI requests to a broad range of public authorities. CAAT has taken cases as far as the Information Tribunal, now known as the First-Tier Tribunal (Information Rights), including one where, for the first and, to the best of CAAT's knowledge, so far only time, a Special Advocate was used.

As an indication, some of CAAT's FoI requests cover:

* details about the UK's arms to Saudi Arabia, including UK financial and military support, as well as UK government knowledge of corruption with regard to the deals;
* meetings between the UK government and the arms industry, in particular the support given through the arms sales agency, currently the UKTI Defence and Security Organisation, and the meetings between government officials and arms company employees;
* speeches made by Ministers at arms industry conferences and dinners;
* reports and other research materials used to support claims about the economic and employment effects of arms sales;
* local authority and university investments in arms companies.

To give just one example, the information disclosed has transformed understanding of the history of the UK's arms deals with Saudi Arabia, and the role of corruption in them. This complemented the

public debate and judicial processes taking place at the time as a result of the ending of the Serious Fraud Office inquiry into corruption allegations regarding BAE Systems and Saudi Arabia. The released documents showed the SFO investigation covered just one small part of a long-standing pattern of misdemeanour in Anglo-Saudi arms deals.

On the financing of the Saudi arms deals, the FoIA led to it becoming public knowledge that for many years UK taxpayers could have lost £1billion if Saudi Arabia failed to pay for the arms. Risk assessment documents showed that members of the Government were worried about this, even as late as 2005 when the FoIA was coming into force.

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

The Call for Evidence suggests that there may be a need for more protection for internal deliberations which take place while options are being considered. It is felt that civil servants and others considering options might be inhibited by the knowledge that their suggestions could be made public.

It seems likely that few, if any, FoI requests for material about internal deliberations would be granted before the relevant decision has been made. It is, therefore, to be presumed that any additional protection would be with regard to the release of material after the decision. In these circumstances, the current application of the Public Interest test makes the greatest sense. The time that has elapsed since the decision as well as other pertinent factors can then be taken into account.

The existence of any "chilling effect", self-censorship or moves not to officially record discussion or options by public officials, is surely part of the still prevailing culture of secrecy. The FoIA will not have reversed this in ten years, but it, hopefully, has started the process of doing so. The public authorities work on behalf of the public. Information obtained under the FoIA, whether by campaigning organisations, journalists or individuals, is an additional tool to help the public hold the authorities to account, an absolutely vital component of a democracy. For this, it is important that citizens can find out the sources of information that fed into a decision, as well as any assumptions behind it. If elected representatives and public officials are reluctant to open their deliberations to such scrutiny, there will always be the suspicion it is because they did not act in the public interest.

Question 2: What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?

Cabinet deliberations should be subject to the same rules as all other information. This should apply to all papers on issues which need interdepartmental agreement. Policy at this level is central to the working of a democracy and it is arguably even more important that material informing the decisions taken is made public.

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

The Call for Evidence says that: "If risk assessments are to be of utility, then they need to consider all of the possible risks, no matter how unpalatable, and to express clearly the consequences of those risks". It goes on to suggest that, if the risk assessments might be made public, they were likely to be drafted so as to be uncontroversial and, consequently, less useful.

Again, however, in a democracy citizens should have the right to see the information on which decisions that might affect them is based. Risk assessments would, surely, only be rendered anodyne by elected representatives and public officials who had reason to be embarrassed by the content. Those producing a thorough risk assessment of a proposed policy should be confident of its contents.

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

Any greater use of the veto would be a move away from openness.

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

The Call for Evidence suggests that the UK appeals system is unusual in the number of steps it has, saying it can be a lengthy drawn-out process. However, the current system has the advantage of, at the internal review stage, allowing the public authority to look again at its own decision, before, at the Information Commissioner stage, allowing both parties to present their arguments.

After this, however, the advantage is very definitely with the public authority with its greater resources, enabling it to employ lawyers. At an Information Tribunal hearing in 2008 the Foreign and Commonwealth Office and the Ministry of Defence were represented by a leading QC plus a second barrister, who himself became a QC the following year. CAAT's resources limited it to a junior barrister. Any requester without legal assistance at the Tribunal level is at a definite disadvantage, a problem which is compounded when there are closed sessions.

Changes to the enforcement and appeal system should be towards levelling the playing field between the requester and public authority at the Tribunal level.

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

It is suggested that the FoIA is too much of a burden on public authorities, particularly costing a lot by way of the use of public officials' time. The Call for Evidence points out that there is provision in the primary legislation for fees to be charged.

Costs could be reduced if a culture of openness was encouraged in the public sector. Where officials have been helpful, costs can be lower. For instance, in 2006 the National Audit Office's Head of Corporate Affairs explained the NAO's report terminology to CAAT, enabling an FoI request to be framed which elicited the information wanted with little cost to either party.

Conversely, costs, on both sides, can rise unnecessarily where the authority is unhelpful and puts unnecessary hurdles in the way. For example, not anticipating anything other than a quick response, in 2008 CAAT asked UKTI DSO for lists of the members of its Defence and Security Advisory Panels. However, the information was not forthcoming until the internal review stage and then only released after UKTI DSO, citing Section 40(2) had received permission to do so from each of the individuals concerned. However, the panel members all came from companies, trade associations and the like, and CAAT had discovered the names of several from information given without hesitation to parliamentary committees or the media before the lists were released. It would be most surprising if any of them had expected their membership of the Panels to remain a secret.

UKTI DSO has also made blanket refusals when only part of the information requested merited exemption. In one case, relating to meetings with Algerian officials about arms sales, the initial request was refused using sections 24, 26, 27 and 43. When an internal review requested that information that was not considered exempt should be supplied, UKTI DSO upheld the original decision but, “to be helpful”, decided to provide some of the previously withheld information. There appears to be no reason why this should not have been provided in the first instance rather than after a total of 136 working days and setting a bar of an initial refusal.

Democracy requires informed debate. Material obtained under FoI requests has done much to enhance this in the last ten years. Charging for information would be likely to discourage all except the larger, better resourced, organisations from making FoI requests. This would be a huge backward step.

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Campaign Against Censorship

Dear Sirs

FREEDOM OF INFORMATION ACT

We believe that the Act should be extended in scope to remove exemptions not contained in the Republic of Ireland Act.

Yours for freedom of expression

E. Goodman
Chair of CAC

Campaign Press and Broadcasting Freedom

The Campaign for Press and Broadcasting Freedom is an independent voluntary organisation supported by 20 national trade unions and other civil society bodies, which has campaigned for more accountable, open and diverse media since its creation in 1979. Issues around which it has worked include, effective freedom of information legislation, the statutory Right of Reply, ownership and control in the media, the nature of the internet and computer based communications, representation within the media of the diversity of groups in society, the accountability of regulator structures, the need for independent alternative media and the importance of sustaining and developing public service media.

Since our inception we worked with other civil society organisations and trade unions for the establishment of an effective freedom of information law in the UK. In particular we campaigned alongside the Campaign for Freedom of Information and the National Union of Journalists and welcomed the Freedom of Information Act in 2000. This Act, gives people the right to access information held by government and other public bodies. It is regularly used by the journalists to obtain information which would otherwise have been kept secret, and hold government and other public bodies to account, which is crucial in a democracy.

We are concerned that the Government's decision to launch a review of the Freedom of Information Act is likely to lead to more secrecy, less accountability, more mistakes and bad decisions. The review came as a surprise last July, news of which emerged just hours after a FOI request revealed how British pilots were involved in Syrian air strikes – a fact ministers had kept from the public. Rather than see restrictions on the public's right to know, by narrowing the Act's parameters to make it almost meaningless, we would like to see the existing FOI legislation enhanced and expanded.

We support the submission to the review by the National Union of Journalists, in particular we would reinforce their view that, "As part of our democratic process, citizens should be able to have access to information about public spending and decisions made on their behalf by political representatives and public bodies. (The CPBF along with) The NUJ applauds the continuing efforts of all journalists who seek to use the Act for the benefit of society. .."(page 1, 5th para)

We are also concerned about and oppose introducing charges for the supply of information, expanding the basis for refusing requests and strengthening power to deny access to certain types of information – which would weaken the Act, making it "almost meaningless" . Like the NUJ "we are also concerned about the composition of the existing Commission because it excludes working journalists and civil society representatives. This implies the FOI requester's perspective has not been considered within the deliberations so far." (page 2, 8th para). It is simply not good enough to exclude working journalists from the Commission and shows contempt for the 'watchdogs' of our society.

We further agree with the NUJ when it says that, "Charging for FOI requests would have a chilling effect on the free flow of information and the media's ability to investigate and report in the public interest. The next step forward should be to encourage public bodies to efficiently store their data (to make it easier and cheaper to respond to FOI requests) and to make more information available. These measures would reduce the existing costs. In addition, there should be a reduction in the number of exemptions from the FOI Act and public services that have been outsourced and privatised should no longer be unaccountable to the public." (page 2/3, 13th para).

Finally we would quote Roy Greenslade, Professor of Journalism, City University of London, NUJ member and blogger in *The Guardian* who, writing in the Evening Standard 4 November said, "The only way to know whether taxes are being properly spent, authorities are acting appropriately and government is behaving wisely is by winkling information out of public bodies, The 'knowledge is power' cliché is hugely relevant to this argument. Yes there will be misuses. But in the vast majority of cases, inquiries have been justified…"

Along with Professor Greenslade, the NUJ and thousands of others, we believe that the government should think again about this illiberal attempt to stifle investigative journalism and the public's right to know.

Barry White
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Celtic Research

Re: Proposed Restrictions to FOI Act 2000
To whom it may concern,

I own a small probate genealogy company and I am writing to express my disappointment to hear that it is the intention of HM's Government to curtail the Freedom of Information Act (FOI) 2000. I would like to inform the Commission that the proposed restrictions upon the FOI Act would reduce the efficacy with which my company is able to locate missing heirs to unclaimed Bona Vacantia estates, by her HM Government Legal Department (GLD).

It is often the case that information about the deceased person, whose estate is seized by the GLD, is held by both local authorities and the GLD, but it is only through the GLD that any FOI requests are handled –which means that in its present form, the FOI Act is only effective in limited form and should be expanded, not restricted. As it is, the GLD often refuse FOI requests and the changes would only make it easier for them to restrict information. Even now, results of FOI requests which they had previously made public are no longer being put online, thereby restricting the current release of information.

As it is, many local authorities simply state they have no information, rather than comply with the Act – and it is only when I resolve the case and get access to the files from local authorities that I am able to see that this information was withheld. Thus, it is often the case that the GLD is the only place I may be able to obtain information about a deceased person and their family, in order to locate their next-of-kin and ensure their assets go to their legal beneficiaries. Narrowing the scope of the FOI Act would only restrict the information available to my company and other probate researchers searching for missing heirs, as well as members of the public seeking to claim assets that rightfully belong to them.

The results from FOI requests have allowed my company to solve dozens of cases over the last 15 years, since it came into effect, allowing us to distribute thousands if not millions of pounds to the rightful heirs of Bona Vacantia estates. My company's work can be seen on the BBC1 series, *Heir Hunters*, which we've been filmed for the last 11 years.

We believe that it is not in the public interest to restrict the FOI Act rather, we believe it should be strengthened and expanded because in its current form it is only barely effective.

Yours faithfully,
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The Centre for Public Scrutiny

About CfPS
The Centre for Public Scrutiny is a charity whose principal focus is on scrutiny, accountability and good governance, both in the public sector and amongst those people and organisations who deliver publicly-funded services.

We believe that accountability, transparency and involvement should be the foundations of planning and delivering public services.

The Centre supports individuals, organisations and communities by sharing research and analysis of current and developing best practice through publications, consultancy and events. The bulk of our work focuses on local government and the wider localism agenda, but we also work extensively with and for health and social care bodies, and others such as police, park and fire authorities, housing associations and other housing management organisations, universities, regulators, Parliament and select committees and government departments.

We are funded by the Local Government Association to provide support on governance and scrutiny to local authorities in England. The Department of Health also provides us with funding to assist in research and practical local support to accountability structures and systems in the NHS.

The Centre for Public Scrutiny is an independent charity (charity number 1136243) and company limited by guarantee (company number 5133443), governed by a Board of Trustees and supported by an Advisory Board. There are three Trustees from our founder members (LGA, CIPFA and LGiU) and six independent Trustees, including our Chair, Lord Bob Kerslake.

Introduction
Freedom of information is not only a bulwark to an effective democracy and a check on power, it is also a means for improving services. FOI is a critical part of the wider "culture of transparency" in public services – a culture which has arguably been slow in developing since the 1994 Code of Practice on Access to Government Information, and which is still fragile. Yet the management, political and constitutional benefits of FOI are clear, and any move to withdraw the modest rights that FOI enshrines in law would risk harming Government's wider objectives on openness and transparency. We agree with those who, in their responses to the Commission's call for evidence, raise concerns about the undue focus of the call for evidence on the assumption that the Act causes "burdens".

We note that the call for evidence focuses, in part, on the experience in freedom of information regimes overseas. Although it is interesting to reflect on the experiences of other jurisdictions (and, indeed we note in more detail below experiences in the Republic of Ireland and Australia), there is a limit to the amount that can be learned from looking at FOI in isolation in other jurisdictions. In other countries, FOI will sit at the centre of a broader constitutional settlement, invariably regulated and defined by a codified written constitution. Public expectations, and the expectations of decision-makers, about the interaction between citizen and state will often be quite different to those which apply in the UK. Information and data might be provided through mechanisms outwith statutory provision itself (as, indeed, happens in the UK). As such, we would caution against using the experience of other countries as anything other than illustrative – particularly when it comes to the use of charging, a point on which we comment in more depth below.
It is, however, worth noting that (to our knowledge) no western democracy has amended their FOI regime to bring about a diminution in the nature of the information which it covers.

We trust that the Commission will – in the interests of transparency and openness – make clear their own deliberations, and produce findings which allow us, and others with a stake in public sector openness, to fruitfully debate the next steps with Government.

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

The need for a "safe space" for policy development is an accepted part of the freedom of information regime. The Justice Select Committee's comprehensive post-legislative scrutiny of the Act in 2012 highlighted that most people, whatever their opinion on the detail, accept that the existence of some "safe space" for policy-making is necessary[177].

Tied to this is the must less well-accepted assertion that the Act has resulted in a "chilling effect" amongst public officials, who might be:

- Less inclined to put information in writing because of a fear of political embarrassment for Government should information be released;
- Less inclined to offer full and frank advice under any circumstance, for the above reasons.

The issue of "political embarrassment" causes us problems when it is expressed as a reason why civil servants might be unwilling to put frank advice in writing. It seems to us that civil servants are responsible for discharging their duty to Ministers by providing advice so as to allow Ministers to make decisions using the best possible information available, and that in withholding information, civil servants would be effectively second-guessing what Ministers might consider to be "embarrassing" if published.

While we recognise that civil servants have to be aware of the political dynamics of the world in which they operate, this level of politicisation of the process is one which we are not sure exists. Certainly, no evidence has to our knowledge been proferred to support it. The Justice Select Committee were equivocal about the possibility of this chlling effect existing[178]; in relation to local government (our area of expertise) the Constitution Unit felt that on balance such an effect might exist, having heard anecdotal examples[179]. It has been suggested, amongst others by the Justice Select Committee[180] and by the ICO[181], that particular criticisms and concerns about the operation of the Act, like those which exist around the "chilling effect", arise from misunderstandings and misinterpretations of the Act by officials.

We can understand why Ministers might be unwilling to put material in writing because of the risk of political embarrassment, but this begs two questions:

- If information, once released, might cause political embarrassment, ought this not cause the writer to reflect on the advice being given or statements made in a substantive sense? Embarrassment will usually arise when information might be – for example – wrong-headed, drafted in pejorative terms, not evidence based, or where it might demonstrate that information critical to understanding a decision is being withheld deliberately to avoid scrutiny. In this context "embarrassment" might be seen as shorthand for "the revelation of improper or unwise behavior", which is hardly a good reasoning for withholding information;
- Would this information – if penned by Ministers and/or circulated as part of Cabinet deliberations, be covered in any case by wider restrictions around Cabinet minutes and discussions?

We would have thought that the "chilling effect" would operate in the opposite way – that civil servants, Ministers, and public officials more generally would be inclined to put more information down in writing, to pre-empt FOI requests by being able to demonstrate that the decision-making process, and the business of Government, is carried out in a proper, diligent and reflective way.
There is, of course, a risk that the "safe space" might in fact be too wide. The Information Commissioner has, in a number of cases, interpreted the public interest test so as to favour the

[177] "Post-legislative scrutiny of the Freedom of Information Act 2000" (Justice Select Committee, 2012), para 155 onwards
[178] JSC 2012, para 145 onwards, para 200 in particular
[179] "Town Hall Transparency?" Worthy et al (Constitution Unit, 2015), p17
[180] JSC 2012, para 46
[181] ICO's evidence to the Commission, 16 November 2015, paragraph 19 on routine disclosure

withholding of information. The submission made by the Open Government Network provides specific examples.

The existence of a safe space assumes that opening decision-making up to a wider range of people, and perspectives, has a detrimental effect. In fact, such opening-up makes decision-making better, by giving formal decision-makers access to a wider range of insights, evidence and viewpoints which are unavailable in a closed system. Government has, through the preparation of Command Papers in various forms (Green Papers, White Papers, other discussion documents) accepted that this wider range of viewpoints can and does have a positive effect. Furthermore, where policy-makers' assumptions can be constructively challenged through FOI – and where this leads to a broader culture shift around decision-makers' willingness to submit to scrutiny – there is an opportunity for significant benefits. Decision-makers are not always best placed to make the judgment of where and how a wider range of people might be involved in policy development. A system which gives Government (and other decision-makers) the exclusive responsibility to bring in those other voices only where it is seen as convenient is unbalanced; freedom of information, and wider transparency initiatives, redress this balance by creating the expectation that some of this work must be carried out in public even where it might result in short-term inconvenience for Government.

We have carried out significant research to support this view, and can point to examples of councils using public, quasi-deliberative systems such as overview and scrutiny to gather evidence from different sources and consequently improve the quality of decision-making[182]. This demonstrates that a culture of openness, and bringing a wider range of people into decision making, can result in better decisions and runs counter to the argument that the walled garden of the "safe space" is always the most appropriate environment for decisions to be made. It is not therefore the case that steps to reduce the scope of that safe space will always result in worse decision-making.

Question 2: What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?

Further to the arguments expressed above, there seems no compelling public policy reason why collective Cabinet discussion and agreement should be subject to further restrictions, over and above what is already present. There are already systems in place which permit for the restriction and classification of official Government documentation and while a public interest test applies to its release, the ICO and the various tribunals have in the past taken pains to weigh competing interests carefully[183]. Most information of this type is, in any case, subject to the standard 20 year rule before disclosure[184]. In our view there is no reason for substantive change here.

Cabinet papers, and Cabinet decision-making, constitute a tiny proportion of the total volume of FOI requests[185]. We do not consider that a focus on the business of Cabinet by the Commission is especially productive, or that this issue has wider application for the way that FOI operates in respect of information requests more generally.

We comment on more specific issues around Cabinet business in the section below on the ministerial veto.

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

We do not consider that there is a reason why information relating to risk should be dealt with separately from other information. Risk analysis and management is central to the deliberative

[182] See CfPS's "Successful scrutiny" series (particularly examples focused on the provision of information such as Westminster Council's review of the reported break on cancer referrals undertaken by Imperial College NHSFT)
[183] "Public interest test: guidance" (ICO, 2013)
[184] Under the Public Records Act 1958
[185] Contained in material published by the House of Commons Procedure Committee, as occasionally collated by the Institute for Government

process for public authorities – which is why access to risk registers has become of such interest to campaigners and those who are seeking to hold public authorities to account.

The understanding and evaluation of risk has been central to the business of public administration for some years. The controversy over the release of the NHS Transitional Risk Register[186] is testament to risk's centrality.

It is correct that risk information presents a particular challenge when it comes to FOI, and openness more generally. Taken out of context, risk information could provoke alarm and/or derail decisions, because of the poor public understanding of risk and how it is used.

However, we consider that this is less an argument about what should or should not be released, that it is one about how official information is drafted and presented in the first place. If risk information might be readily misunderstood by the public there is presumably an associated risk that it will be misunderstood by professionals, and politicians. In a way the issue with risk information presents a case study about the way that the debate on transparency is framed, between "reactive" and "proactive" approaches to information provision[187]:

- Reactive: information governance is about compliance, with provision of information being made piecemeal, as a result of FOI requests or other similar formal arrangements. Here, where information is originally drafted, it is done with an internal audience in mind, and the FOI process is used (by some professionals) on the basis of a presumption that information will be withheld. An expansive approach is taken where the presence of any potentially exempt information renders a whole document being withheld, rather than redactions being made, contrary to ICO guidance[188]. In these circumstances it is more likely that risk registers will be drafted in such a way that renders them less understandable by ordinary citizens, and so subject to greater misunderstanding and misinterpretation;
- Proactive: information governance is founded on a presumption of openness and a sense of the public's "right to know". As a matter of course internal management documents are written to provide their own context, and to be understandable to non-professionals. The act of preparing a document with a potentially public audience in mind concentrates the mind of the author on ensuring that the material is consistent, rational and evidence-based. It is then more likely that risk registers will be drafted in such a way that renders them comprehensible.

It is important to note that more "proactive" release of data (further to Government commitments made since 2010 in particular) cannot be seen as a substitute or replacement for reactive approaches. Both are interdependent. In particular, responses to requests (reactive disclosure) will help public bodies to understand what information they ought to make available proactively – possibly in different forms and formats.

Our experience is that the long history of openness in local government has led to a more mature approach to the publication of risk information in this sector[189]. Risk registers are, at various points, regularly submitted to councilors and are written with a lay audience in mind. Risk information provokes rational and reflective discussion on policy objectives, bringing to bear on those issues perspectives other than those of formal decision-makers, acting to improve the quality of the decisions eventually made.
We do not consider that restriction of risk information should occur, and would suggest that the public interest in favour of disclosure in fact be recognised as being a particular factor in the release of this critical information.

[186] On which point it should be noted that the Government were ultimately able to refuse to release the complete risk register (Government press release, 8 May 2012)
[187] See "Your right to know" (CfPS, 2013)
[188] "The right to recorded information and requests for documents" (ICO, 2014)
[189] "Your right to know" (CfPS, 2013), "The change game" (CfPS, 2015)

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

Under ordinary circumstances we would not consider that the operation of the ministerial veto is deserving of significant study. However, the call for evidence states that the recent judgment in *R (Evans) v Attorney General*[190] (hereafter *Evans*) raises "fundamental questions about the operation of the Act", and the *Evans* judgment has been cited by Ministers to justify the reopening of debates and discussions on freedom of information that we consider to have been settled both by the lengthy public policy discussions in the 1990s that preceded the Act, and by the comprehensive study undertaken by the Justice Select Committee in 2012. Indeed, the *Evans* judgment has been used as the catalyst, at least in part, for the work on which they Commission is now engaged.

We consider that the argument in the call for evidence that the Supreme Court's veto means that "the veto [can] no longer be used as Parliament had understood it would work when its provisions were being enacted […] [t]his judgement [sic] raised serious questions about the constitutional implications of the veto, the rule of law, and the will of Parliament" is incorrect.

The analysis used in the Commission's call for evidence reaches a different conclusion to that reached by the majority in *Evans* on Parliament's intentions. We attempted to clarify this point by e-mail with the Commission in October 2015 but unfortunately received no reply. Even Lord Neuberger's leading judgment, which asserts a more expansionist, "common law constitutionalist" approach than the judgment of Lord Mance, asserts that the veto remains in place and continues to be operational – and that the restrictions to which it is subject are ones which might have been predicted by Parliament. The reasoning of the majority in the Supreme Court in *Evans* (Lord Neuberger in particular) is carefully framed to observe the continued presence of the veto as drafted in the Act. Lord Neuberger's judgment can be seen to have four components:

- It is a principle of administrative law that executive action is subject to review by the judiciary. The phrasing of question 4 in the call for evidence (in particular, the assumption in parentheses that a veto would be subject to judicial review) suggests that the Commission accepts this point;
- Logically, it follows as a result that a Minister is not permitted to set aside the judgment of a court, where he simply disagrees with it and/or where his weighting of the evidence is different to that of the court (the latter point is one with which Lord Mance and Lady Hale disagreed – see below);
- In order to permit a Minister to set aside a judgment of a court in this manner, the Act setting out this power must make the intention of Parliament "crystal clear". Lord Neuberger cites the reasoning of Lady Hale in *Jackson*[191] to support the view that Parliament would not impinge so dramatically on the rule of law without stating as much, unambiguously. The possibility that elements of Lady Hale's judgment might be considered *obiter* is of no relevance to this argument;
- Parliament did not so intend. It is important to note that Lord Neuberger and his brother judges did not, in their judgments, feel the need to use *Pepper v Hart*[192] to rule on Parliament's intentions. As was held in *Jackson*, their conclusion was that it was unambiguously the case that Parliament *had not* intended for the relevant function to be interpreted so as to give Ministers this broad power.

Lord Neuberger, between paragraphs 71 and 79, sets out comprehensively the circumstances in which a section 53 certificate might still be issued. This directly contradicts the assertion in that call for evidence that there "remains considerable uncertainty about the precise scope of the veto".
Lord Neuberger's statement in the conclusion of his judgment (at para 86) that, "it was always envisaged that section 53 would be rarely invoked (see paras 19 and 20 above), and the fact that it may well have an even narrower range of application than the executive seems to have assumed is not a particularly forceful point."

[190] [2015] UKSC 21
[191] R (Jackson) v AG [2005] UKHL 56
[192] [1992] UKHL 3

Lord Mance's judgment (with which Lady Hale agreed) accepted these general points but sought to provide a more expansive construction on the operation of the veto, focusing on its reasonableness in public law terms. Lord Mance's judgment suggests that a section 53 certificate which engaged with the reasoning of a lower court but which reached different conclusions (in particular, based on the application of the public interest test) would be permissible – although it seems that the bar, under these circumstances, would be set quite high.

It should be noted that Lord Mance's arguments and Lord Neuberger's are not necessarily mutually exclusive. They approach the issue from different angles – Neuberger on the basis of fundamental constitutional principle, Mance on the basis of conventional "reasonableness" – but both reach the same conclusion.

Lord Wilson, dissenting, constructs his argument on the basis that rather than granting a power of absolute override, section 53 permits (and the use of the word "reasonable", he contends, supports this interpretation) a different evaluation of public interests. However, Mance's judgment in particular raises the point that, as far as can be ascertained, no different evaluation was carried out (certainly, no such evaluation was set out in the certificate itself); in the absence of a demonstration that this did happen, the certificate must still be unlawful. We only cover Lord Wilson's judgment to highlight this logical oversight.

Our view would therefore be that the veto remains available. Its scope remains very limited – as Parliament intended. For Government to achieve the intention it wishes it would have to either:

- Legislate to specifically exclude the opportunity for judicial review of the issuing of a section 53 certificate, which would be an extraordinary move in constitutional terms and practically unworkable. If the law is changed to purport to make a section 53 certificate (or an equivalent) non-justiciable, it would be impossible to go to court to enforce the certificate if it were breached;
- Legislate with a new form of words to attempt to achieve the same legislative end as that which they assumed already existed. Given that this would be subject to judicial review in the same way as current arrangements, identical uncertainty around the application of such a power would exist until a case on the matter came to be decided by the Supreme Court. The Court would then be in a position to refine its view as to which viewpoint should have precedence – Lord Neuberger's more expansive constitutionally-based constructions, or Lord Mance's, based on more traditional administrative law principles. From Government's point of view, this does not seem to us to be a particularly effective way to formulate public policy.

Lord Neuberger's judgment highlights the risks that apply where Government considers that it can interpret legislation so as to limit the power and remit of the courts.
To avoid further uncertainty about the operation of the veto, Government could take three courses of action:

- leave it as it is – accepting its limitations and recognising that as with all legislation, further refinements will be expressed over time through court action;
- remove it, relying on the judgments of the courts to weigh and consider evidence on disclosure, or non-disclosure, in line with the public interest test as the Act requires;
- create a new absolute exemption for Cabinet documents, as exists in Australia. However, as in Australia, this could lead to attempts to use such an exemption being subject to repeated legal challenge[193].

In our view, the courts offer the best solution to reached reasoned, evidence-based conclusions on disclosure based on arguments which can be tested through the adversarial process – as such, we would be in favour of removing the veto entirely. Government must accept that its administrative decisions will be justiciable and that this will always involve an element of uncertainty. This can be managed through both extremely sparing use of the existing veto, or public interest-based arguments on withholding information – which, if they relate to nationally-sensitive issues around policy formulation, would undoubtedly be looked upon sympathetically by the ICO and the Information Tribunal.

[193] JSC 2012, para 177

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

Although the call for evidence suggests that the current enforcement and appeal system is overly complex, this is not an assessment with which we would agree. There is a clear, settled and understood process for managing complaints and appeals, which places the ICO's reasoning at first instance rightfully central. Witnesses submitting evidence to the Justice Select Committee in 2012 did not raise concerns about the operation of the enforcement and appeal system[194].

The call for evidence appears to suggest that the focus on the ICO's judgment as the source of evidence for later appeals is confusing. This is surprising, because the focus on administrative decisions is at the heart of judicial review, and therefore the focus on the ICO is entirely appropriate. Although at first glance a focus on the requester gives them more control over the process, the uncertainty inherent in this approach could compel the Upper Tribunal, and other courts, to delve into the requester's intentions and objectives in requesting the information, which goes against the grain of the "requester blindness"[195] which is, rightly, at the heart of the Act.

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

Costs issues

Responding to FOI requests involves a cost. Evidence already cited, and evidence gathered and submitted by a range of public authorities and interested parties as part of the Justice Select Committee inquiry in 2012, highlights that it is difficult to know which costs should be included, and which excluded. It is very difficult however to identify what this is – mainly because there is no standardised agreement about what costs should be included[196]. In part, this cost can be defrayed through a modern approach to information governance and proactive approaches to information release, as noted above. This may account for the huge variation in costs ascribed to FOI by public bodies, ranging from the nugatory to many hundreds of pounds. For requests where the financial cost is significant, public bodies may refuse requests on cost grounds.

To impose a blanket charge on FOI requests – even if it were set at a comparatively low figure (£15 or £20) would be unacceptable for a number of reasons:

- It would not meet the public policy objective of defraying costs associated with complex requests (and would consequently unreasonably cause those making more simple requests to be seen as subsidising those making requests which might be more costly);
- It would unreasonably restrict the availability of official information for which citizens will already have paid through taxation;
- It would adversely affect those on low incomes, who would be disproportionately affected by such charges and hence less able to assert their democratic rights (this is a factor which would need to be borne in mind in any equalities impact assessment carried out relating to a plan to introduce charging);
- It would adversely affect those who, for legitimate reasons, wish to submit FOI requests to multiple organisations on the same issue.

Provisions already exist to reject requests which are vexatious; we consider that the argument that a charging regime would prevent "frivolous" requests is not made out, given that there is no common understanding of what a frivolous request looks like. The Justice Committee were not persuaded by arguments that the scope of "vexatious" might be expanded[197].

[194] Other than making comments on the ICO's own internal mechanisms, which it noted had significantly improved in recent years. JSC 2012, para 115 onwards
[195] "Consideration of the identity or motives of the applicant" (ICO, 2015)
[196] For example, the Government's reported intention to include "thinking time" when costs are being assessed, and how this might be defined.
[197] JSC 2012

It should be noted that in the Republic of Ireland, a charging regime was introduced for FOI in 2003[198]. Following an inquiry undertaken by the Joint Finance Committee of the Oireachtas, to which CfPS gave evidence[199], the Government decided to remove this regime[200]. The findings and recommendations of that inquiry are instructive and comprehensive on this point. We note the experience of other countries on charging, but would repeat our warning about interjurisdictional comparisons made at the head of this submission.

It should also be noted that the ICO, in their evidence to the Justice Select Committee, noted that more work was necessary by public authorities to manage their costs – through the more effective use of publication schemes, for example – before charging could be considered as a realistic option. The Committee came out against recommending charging, certainly until far more comprehensive information about costs was made available, and even then was inclined to agree with the ICO's point about finding more efficiencies within public authorities' information governance systems[201].

We consider that a more sustainable approach to cost management for public bodies – local authorities in particular – would be better information governance and management, more robust plans and strategies relating to the proactive publication of datasets and the development of the existing (but fragile) culture of openness to consider the financial benefits of the regime.

Burden vs benefits

Although, as we note above, we recognise that there is a cost associated with responding to FOI requests, we do not agree with the premise of the question that seeks to balance that "burden" only by offsetting it by reference to general democratic principles. This is a reductive argument which does not take account of the significant practical benefits that public authorities themselves have experienced from the existence of the Act.

Our work in local government has given us particular insight into the use of FOI in that context. There are several points we would like to make as to its benefits:

- Generally, the Act has contributed to more of a culture of openness in the sector, which is growing but remains fragile. The Constitution Unit study found some positive evidence here[202].
- Some elected councillors have used the Act to get hold of information about their own councils. Although this has not been widespread[203] it does speak to a wider cultural issue in the sector. In our evidence to the Justice Select Committee's inquiry into FOI in 2012, we highlighted experiences in two councils where councilors had been compelled to use the Act to access data held by the authorities of which they were members. Since this date, the Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012[204] have given councilors enhanced information rights, but the availability to councillors of information remains a live issue in which the presence of the Act, setting the cultural tone and laying out a range of expectations on information governance, is central. Information access and provision by councilors was central to the scandals around patient safety at Stafford Hospital and child sexual exploitation in Rotherham[205]. We know that councilors continue to experience difficulty accessing information held by their own authority; changes to the FOI regime would send a negative message about the importance of openness and transparency;
    - There are a number of specific examples of the Act – or, significantly, the threat of use of the Act - having been used to uncover poor practice, and to provoke councils and their partners to improve services. The Oxford Mail newspaper has recently identified a large number of examples of this having occurred following FOI requests made by its

[198] Freedom of Information (Amendment) Act 2013
[199] "Report on hearings in relation to the Draft General Scheme Freedom of Information Bill 2012" (Joint Committee on Finance, Public Expenditure and Reform, 2013)
[200] In the Freedom of Information Act 2014, repealing the 1997 and 2003 Acts and introducing a regime which would involve charges only for internal reviews and appeals, not for the initial request.
[201] JSC 2012, para 69 onwards
[202] Worthy et al, 14
[203] Ibid, 11
[204] SI 2012-2089
[205] "Hiding in plain sight" (CfPS, 2014)

journalists[206] - other local and regional newspapers have used the opportunity of the Commission's call for evidence to highlight similar examples.

There has been limited serious research carried out about the impact of the Act on the local government sector.
With the notable exception of the 2011 Constitution Unit study (see below) much of this has been superficial in nature.

Some elements of the media narrative have focused on "eccentric" FOI requests – unsurprisingly, where FOI has led to change or where it has revealed failure, its use has been less visible, and the local government sector has consequently been somewhat less willing to acknowledge it. It is particularly important to bear in mind the FOI is a single component of a wider local governance framework, aspects of which intersect and interact. Seeking to ascribe action or outcomes solely to one of these components is difficult and inadvisable[207].

It is easier for local authorities to consider FOI as a burden for two reasons:

- The "costs" of FOI are easy to ascertain because they are obvious and quantifiable, with FOIs being routed through FOI, or information governance, teams. The benefits are in general gradual and distributed across the whole council.
- The FOI regime is inconvenient, in the short term, for those who hold information. It introduces an element of unpredictability and – we would argue – dynamism into the decision-making process. Poor decision-making, and poor decision-makers, are unable to take into account such unpredictability.
- Decision-makers may find it politically difficult to admit that they are wrong.

A focus on cost, divorced from impact, is one symptom of this cultural caution towards increased openness. FOI, and information governance, can be treated as a compliance issue. The Constitution Unit's cautious evidence of growing openness and transparency since the coming into force of the Act is both a cause for optimism, and for concern. Optimism because it points towards a future where, by steps, cultural norms will develop to allow a level of openness which might currently be politically or organisationally difficult, for the benefit of democracy and decision-making. Concern, because steps to restrict the scope of the Act now – particularly through the imposition of a charging regime – would further encourage FOI to be treated as a transactional issue, divorced from broader issues of local government improvement, good governance and local democracy.

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[206] Press Gazette, 12 November 2015 12
[207] "Accountability works" (CfPS, 2010)

Channel Four Television Corporation

This is a response to the call for evidence by the Independent Commission on Freedom of Information (the "Commission"). Channel 4 is a statutory non-profit making corporation funded commercially and not through public resources. It submits this response in its role as a public authority for the purposes of the Freedom of Information Act 2000 ("FOIA").

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

We recognise that there is a strong public interest in promoting openness and accountability. However, we consider that there are times when this is far outweighed by the public interest in preserving the safe space in which Channel 4 is able to seek advice about, and candidly discuss, live issues and policy proposals. Accordingly we consider that it would not be in the public interest to prejudice and potentially limit or inhibit the scope and effectiveness of internal decision-making and advice seeking processes.

We consider that there is a strong public interest in ensuring Channel 4 is able to freely explore all possible strategies available to it, in confidence, in order to ensure that all proposals are thoroughly reviewed, and that fully informed decisions are made which will best allow Channel 4 to fulfil its obligations. Accordingly we support the protections currently set out in section 36.

We would like to see clearer guidance on the protection FOIA provides for information relating to the internal deliberations of public bodies. We have found that the ICO guidance in relation to section 36208 is not entirely clear, which leaves to uncertainty as to how to proceed in and document the internal deliberations of a public authority including where we seek advice. It is hard to know how "safe" a space we are really acting in when discussing sensitive issues internally, or with government. This can lead to inhibition in areas which are sensitive to our business and to the wider industry. For example, the Guidance says that it's the effect of disclosure on the decision-making process that must be considered, and not the information itself. Paragraph 45 of that Guidance states:

"Note that these exemptions are about the processes that may be inhibited, rather than what is in the information.[….] the information requested does not necessarily have to contain views and advice that are in themselves notably free and frank."

However, it goes on to say:

"On the other hand, if the information only consists of relatively neutral statements, then it may not be reasonable to think that its disclosure could inhibit the provision of advice or the exchange of views. "

Since this point goes to the heart of what is exempt from disclosure, the guidance needs to be clarified; clearly the information itself is relevant and needs to be taken into account.

What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?

No comment.

[208] Prejudice to the effective conduct of public affairs (section 36) 20150319 Version: 3 – ICO

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

As above for internal deliberations, we would like to see clearer guidance on what protection FOIA provides for information which involves a candid assessment of risks.

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

No comment.

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

We think the appeals and enforcement system generally works well. That said, the split into the two tier tribunal system in 2010 appears to us not to make appeals more efficient, less costly or less time consuming. We would assume that any introduction of judicial review would be similarly unwieldy and time consuming.

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

Although Channel 4 is not publicly funded, it is a public asset and it has a public service remit, as such there is a public interest in ensuring transparency and accountability.

Having said that, the number of requests we receive which are for information that could be argued to contribute to the public's understanding of Channel 4's governance and processes is minimal.

The vast majority of requests we receive are about our creative output, and although this information is outside the scope of FOIA[209], we sometimes need to dedicate a significant proportion of time in processing and answering these, particularly where they become subject to internal review. In 2014 29.5% of requests received, and 50% of the internal reviews carried out, related to Channel 4's creative output.

The most common type of onerous request is from businesses looking to tender for contracts. In 2014 requests for details of contracts, including expiry dates and tender related information accounted for 8% of the enquiries we received, in 2013 it was 14%. These requests are usually made in relation to IT maintenance and support contracts, telephony provisions and so on. It can take a very long time to pull all relevant information together and there is arguably very little benefit to the public, as dealing with these requests involves diverting staff time away from their day-to-day responsibilities and in C4's case no public money is spent on these contracts. What's more the information provided to requester is not requested with the intention that it be disseminated more widely, but instead is intended to give their organisation a commercial advantage over others.

On a more positive note, the case law that has grown up around section 14 FOIA, particularly in recent years, has been very helpful in closing down vexatious requests relatively quickly and efficiently. Vexatious requests were a category that in the past had posed a significant burden on our resources and a more common-sense approach to the application of this exemption has been extremely helpful.

In terms of numbers of FOI requests, the figures for the last three years are as follows:

[209] The "Derogation" - see Footnote 1, above.

2012 - Total Requests: 103, including 5 internal reviews and 1 appeal to the ICO.
2013 - Total Requests: 114, including 3 Internal Reviews.
2014 - Total Requests: 119, including 4 Internal Reviews.

Channel Four Television Corporation
20 November 2015

Charity Commission

About the Commission

The Charity Commission ("the Commission") is the independent registrar and regulator of charities in England and Wales. The commission was established as a statutory corporation under the Charities Act 2006 and continues as a body corporate under s.13 Charities Act 2011.

We are a non-ministerial government department and our functions are performed on behalf of the Crown (s.13(3) Charities Act 2011). Under s.13(4) "in the exercise of its functions the Commission is not subject to the direction or control of any Minister of the Crown or of another government department".

Our objectives and functions are set out in sections 14 and 15 of the Charities Act 2011.

We are governed by a non-executive Board. Paragraph 1 of Schedule 1 of the Charities Act 2011 sets out the requirements for membership of the Board.
Day to day and operational management is delegated to the Chief Executive. The staff of the Commission (apart from the members of the Board) are civil servants. Like many other government departments, the Commission has experienced cuts over recent years; since 2007 our budget has been cut by around 50% in real terms. We currently employ 287 full time equivalent staff.

Our Response to the Call for Evidence

The Commission welcomes the review of the Freedom of Information Act 2000 (the Act) as this presents an opportunity for us to contribute our experience of how the provisions of the Act impacts upon our important regulatory activities and the burden it places upon us as a small non ministerial department.

Three of the questions within the Call for of Evidence have a direct bearing on the Commission's activities. Therefore our response is focused specifically on questions three, five and six.

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

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

Currently the Commission relies on a number of exemptions under the Act to protect its internal deliberations. Unlike other government departments, as a regulator many of the Commission's most sensitive internal deliberations often relate to specific operational cases rather than matters of policy, although such cases can have wider policy implications.

Therefore the Commission cannot rely on section 35 to protect the safe space relating to the *process* of decision making for operational decisions in the way that the process of policy making is protected under s.35(1)(a). It also cannot rely on s.35(1)(b) because the Commission has a Board rather than a Minister.

Therefore, when withholding information about internal deliberations, we have to, for each response, consider the legal framework for the exemptions in sections 31, 32 and 36. The exemption in s.31 requires us, on a case by case basis, to consider whether the disclosure of information would, or would be likely to, prejudice the exercise of our functions for any of the purposes specified in section

31(2). For the Commission, these include the following purposes (but not all will be relevant to each case):

a. the purpose of ascertaining whether any person has failed to comply with the law,
b. the purpose of ascertaining whether any person is responsible for any conduct which is improper,
c. the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise…
d. the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
e. the purpose of protecting the property of charities from loss or misapplication,
f. the purpose of recovering the property of charities.
g. For those charities which have a statutory inquiry open under s.46 Charities Act 2011, we can rely on section 32(2) which protects:
    (a) any document placed in the custody of a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration, or .
    (b) any document created by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration.

We have also in the past sought to rely on section 36 of the Act to protect the free and frank provision of advice and the free and frank exchange of views which robust regulation requires. However, as section 36 requires the opinion of a qualified person, for the Commission this requires a decision of its whole Board.

The exemptions in sections 31 and 36 require that we demonstrate prejudice. Our concern is that the safe space required to protect the *process* of internal deliberations regarding operational matters where appropriate is not available in the same way that section 35 protects the process of policy formulation which requires no prejudice test. The Commission, as with other non-ministerial departments, have further difficulty protecting internal deliberations where appropriate because references to Ministers in the Act do not extend to non-executive Boards such as that which governs the Commission.

We also have concerns that the legal framework is cumbersome to navigate given the interplay of the different exemptions and also difficult for the public to understand.

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

The Information Commissioner's Office has accepted in a number of decision notices relating to the Commission that the public interest is strongest to withhold information about decisions falling with the exemption in section 31 where the case is live or where a case has recently closed.
However, for a number of significant operational decisions, our internal deliberations can remain sensitive long after the case has closed. This may be, for example, because the options considered for the regulation of a particular charity will be relevant to other charities in a similar situation in the future. Or it may be that the information on which the internal deliberations were heavily based remains sensitive, for example in some of the Commission's counter-terrorism cases. The Charity Commission was successful in persuading the Supreme Court (Kennedy v. Charity Commission [2014] UKSC 20) that in respect of inquiries the protection of section 32 does not end when the inquiry closes, but when the information becomes a historical record. This was essential to the protection of the Commission's information as the sensitivity of some information does not cease the moment a case or an inquiry is closed.

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

It is our view that, although it may be able to rely on the exemption in section 31 of the Act, given the way the different sections are constructed, to avoid any gaps in protection the need for the protections afforded by section 36 are not negated.

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

What protection should there be for information which involves candid assessment of risks?

The Commission publishes both a "Risk Framework" and the "Application of the Risk Framework" so that the public are aware of how the Commission assesses and manages risks: see link at (https://www.gov.uk/government/publications/risk-framework-charity-commission). Where we are able to do so we publish individual Inquiry Reports and even some Case Reports, which often contain or demonstrate an assessment of risk. However, in line with other Regulators and other Government Departments, if we were to reveal our underlying candid discussions on risk in cases/generally and internal systems/databases which may assist the assessments, then we could not fulfil our statutory functions. Charities could not be protected by a regulator whose systems are exposed and so open to abuse.
FOIA requests are made very frequently not only in respect of particular Charities, but also our systems themselves. In respect of systems our experience is that protection can be more difficult owing to techniques deployed by some requestors which are intentionally targeted at information that does not obviously fall within the scope of exemptions. These can be sought in a piecemeal way in order to build the bigger picture. The Commission has recent experience of this by a body which wishes to map the data storage systems of Central Government Departments down to their file plans and the column headings of data sets and has used the technique of repeatedly requesting information which in our view appears to be more focused on the technique of requesting information rather than the value of the information itself.

For how long does such information remain sensitive?

Please refer to the Commission's response to Question 1 above.

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

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

The Commission acknowledges the important contribution that the Act makes to government's desire to create a culture of appropriate openness. Yet we would not be unique in reporting that responding to requests for information diverts resource away from our core statutory objectives. Our duties in statute are, amongst other things, to ensure that charities are safeguarding their funds and applying them properly and effectively for the public's benefit. We have a further statutory obligation to ensure, through our regulation, that the public may maintain trust and confidence in charities.

The importance of this statutory obligation cannot be underestimated. Charities in England and Wales make a vital contribution to our nation; they support the vulnerable and needy, preserve our heritage, promote health and well-being and contribute to the development of society in general – in many

instances defraying costs which might otherwise fall to the public purse. The public's trust and confidence in charities can easily be dented with an inhibiting effect on public donations which consequently threatens charities' ability to operate for the public benefit.

To be effective as a regulator we need to make every resource count. We regularly conduct reviews to ensure that our approach to requests for information is resource-effective and continuously improved, however we remain of the view that compliance with the Act places a disproportionate burden upon us as a small department when compared to the public's right to know.

Table 1 overleaf reveals the volumes of requests dealt with over the past three years.

We calculate that around 5.5 full time officers are engaged in the direct handling of initial requests, and these are posts that cannot consequently be directed at core regulatory activity.

In subsequent stages of review, such as internal review or appeal to the Information Commissioner's Office, further staff resource must be applied, generally requiring input from more expensive senior or specialist staff. For example, an internal review may require two day's deliberation by a senior officer, plus administration time.

Table 1: Volumes of requests for information or appeals with application of exemptions.

Year	2012	2013	2014
No. of requests received	814	624	612
Use of s12	10	19	35
Total no. of exemptions used	303	319	310
Number of Internal Reviews conducted	20	27	13
Number of appeals to ICO	4	4	4

Further resources are consumed as cases are escalated to appeal, and these can be very significant indeed if the Commission is required to defend an appeal through the various tiers of the Tribunal, or beyond.

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

Information that holds us to account for our use of public funds is generally less burdensome to locate and prepare, for example information about what we do and how we have spent our resources. Information relating to our complex regulatory role requires far more careful and time consuming deliberation. In other parts of our submission we have explained some of the reasons why it is often to the public's benefits for information to be withheld so that we can maintain appropriate confidentiality about our regulatory approaches and actions.

Our experience is that a disproportionate burden arises from requests about charities and/or our engagement with them. Charities are not authorities for the purposes of the Act. Consequently we receive many requests from the public, media and other parties for information about charities. We calculate that some 65% of our cases relate to request for information about charities. They

themselves are not obliged to provide information yet the Commission is required to search for this information, retrieve it and then engage considerative effort assessing whether exemptions should apply and what information must be redacted prior to release to avoid undermining our regulatory effectiveness.

Burden is created where information requires considerable treatment before it can be released. Only in fairly isolated instances can the process of retrieving and extracting information be considered.

One burden lies in the consideration of exemptions, particularly where the legal issues are complex or where there the public's interest in disclosure is finely balanced within the public's interest in withholding information.

The far more burdensome aspect, however, is the often lengthy process of reviewing and redacting information prior to release which we are prohibited by the Act for including in the costs calculation relevant to s.12. Table 1 shows that over the past three years the Commission has only been able to apply the costs limit to an average of 3% of requests

We quote, by way of example, a request for a wide range of information relating to our register an organisation and the subsequent review of that decision. It was relatively easy to locate and retrieve the information on our system but there was a considerable amount of material to look at. Much of this was background material provided by the organisation in support of its application for charitable status. We had to consider all of this material with a view to applying exemptions, and we also had to contact third parties for comment. We could not claim section 12 on this occasion, although the whole exercise, including redacting, took us well over 3.5 days.

In two other cases, it was known publicly that we had engaged with well-known charities for the purposes of determining our regulatory role, if any, relating to concerns which had been raised about them. We held information provided by a number of sources. We received several requests for information which could easily be located, however it was extensive and required very careful consideration, document by document, of exemptions to avoid releasing information which could damage the charities' reputations or undermine our ability to engage with those charities and perform our regulatory duties.

We see no logical rationale for costs of reviewing information and preparing it for release to be excluded from the calculation of costs. In our opinion the burden on departments could be significantly reduced if the time taken to review materials and prepare and redact information prior to release formed part of the routine consideration of whether s12 cost limits apply.

An alternative would be to reduce the cost limit, and we consider that 2 days per request is an appropriate limit for departments.

Please note that the Commission does not levy a charge for responding to requests under the Act. For a department of our size we do not consider charging a cost-effective option in that setting up and operating a system would create further demand on resources which would not be offset by receipts.

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The Chartered Institute of Journalists

The Chartered Institute of Journalists (CIoJ) is the world's oldest professional association of journalists and operates under a Charter granted in 1890 by HM Queen Victoria.

We represent staff and freelance journalists across all sectors of the media including local and national newspapers, periodicals, broadcasting and electronic publishing.

The CIoJ welcomes the opportunity to submit views on the Freedom of Information Act, however we are disappointed at the overarching direction that this review seems to take. The consultation document appears to have been written slanted towards offering more protection to public authorities and those who should otherwise be obligated to provide openness and transparency.

In our view the commission should be looking at ways in which to encourage greater openness and transparency in public sector organisations.

What protection should there be for internal deliberations of public bodies

In our view the current provisions for protection are adequate.

What protection should there be for information which relates to the process of collective Cabinet discussion and agreement

In our view the current provisions for protection are adequate.

What protection should there be for information which involves candid assessment of risks

In our view the current provisions for protection are adequate.

Should the executive have a veto (subject to judicial review) over the release of information

The consultation document seems to argue that the Supreme Court ruling in relation to the release of correspondence between HRH Prince Charles and government departments was a game changer for the executive veto. However, it also points out that there remains 'considerable uncertainty' about the actual implications of the ruling.

This Institute argues that given the complex nature of the ruling, and the multi-layered appeals that this particular case went through, there can be no call for greater powers when it comes to the executive veto.

Indeed, allowing this one case to shape an enhanced protection of veto would have a resultant 'chilling affect' on the power of the media to access important information on behalf of the public.

Instead, the Institute would argue for the following reforms to the absolute exceptions

Absolute exceptions apply to

- Information supplied by, or relating to, bodies dealing with security matters (s23)
- Information relating to Court records (s32)
- Parliamentary privilege (s34)
- Information provided in confidence (s41) and
- Information prohibited from disclosure by any other piece of legislation or enactment (s44)

Exemptions that are absolute only in part include:

- Information that would prejudice the effective conduct of public affairs (s36), and
- Personal information (s40)

The Institute believes that after 50 years these absolute exceptions operate only instrumentally in terms of administrative convenience. They can operate unjustly particularly in bona fide investigations into personal and family history, academic and media history research.

The Institute strongly urges the Commission to reform the legislation so that after 50 years, a public interest test is applicable. The argument is based on the practice by security bodies such as the Security Service, GCHQ and the Foreign and Commonwealth Office in respect of Secret Intelligence Service matters, to release files to the National Archives on historical matters, but then apply the absolute exception when FOI requests inevitably arise as a result of the release of those documents. UK state security bodies also regularly give access to their historical files to selected academics for the research and publication of institutional histories. This is particularly the case with MI5 in 2009 and MI6 in 2010.

The Institute believes that the UK Supreme Court ruling in Kennedy (Appellant) v The Charity Commission (Respondent) 2014 demonstrates that absolute exceptions are vulnerable to legal challenge under English and Welsh common law as well as ECHR jurisprudence and Human Rights law. The Institute strongly advises the Commission to adopt the public interest test for these exceptions after a passage of 50 years in order to make the legislation compatible with essential common law and human rights principles. The Institute believes that after 50 years there can be hardly any matters relating to security bodies, for example, that require concealment from public interest enquiry. It is a grave injustice that the existing FOI infrastructure of application, appeal and investigation should be barred from evaluating release in the public interest.

What is the appropriate enforcement and appeal system

The Institute argues that the existing enforcement and appeal system is operating fairly and effectively and offering a process for access to justice for those appealing a decision by public authorities to reject an FOI application.

Internal review and investigation on the merits of a decision by the Office of the Information Commissioner has clarity and process for evaluation.

The Information Tribunal system at first tier and with its upper level offers an effective balance for more informal involvement of lay appellants and traditional legal process where there is representation of public authorities by counsel.

The Tribunal process provides a forum for a greater depth of adversarial inquiry on important issues arising. It also extends the evaluative space and time for public authorities, including the ICO, to reconsider their position when extended evidence and submissions are tabled for oral consideration and analysis in tribunal hearings.

The Institute recommends that there is an amendment to Rule 10 of the THE TRIBUNAL PROCEDURE (FIRST-TIER TRIBUNAL)
(GENERAL REGULATORY CHAMBER) RULES 2009
S.I. 2009 NO. 1976 (L. 20)

> Orders for costs(b)
> 10.—(1) [Subject to paragraph (1A)], the Tribunal may make an order in respect of costs (or, in
> Scotland, expenses) only—
> (a) under section 29(4) of the 2007 Act (wasted costs) and costs incurred in applying for such costs;
> (b) if the Tribunal considers that a party has acted unreasonably in bringing, defending or conducting the proceedings;

The Institute is concerned that this rule is a significant disincentive to an individual journalist acting in the public interest in pursuit of information concealed by a public body. It is our recommendation that

the rule includes a provision for agreement by all the parties at the beginning of a tribunal hearing that there will be no application for costs where the bringing of the proceedings is considered 'reasonable.'

The Institute has discussed the question of the ten year delay between the time of the original FOI application and decision of the Supreme Court in R (on the application of Evans) and another (Respondents) v Attorney General (Appellant) 2015- the Guardian and Prince Charles letters case.

We believe this delay has been excessive and is contrary to the spirit of the legislation. Justice delayed to this extent is justice denied; particularly in the field of journalism.

We would recommend some acceleration of the route of appeal in Freedom of Information disputes on merits and points of law. This could be achieved within the Tribunal system as well as subsequent to transfer to the court system. There would be some justification in the current Information Tribunal system identifying appeals from the ICO that raise issues of potential precedent and seriousness. These should be heard at first instance by the Upper Tribunal thereby taking out one layer of appeal.

The Guardian case was complicated by the intervention of the Attorney General and subsequent process of judicial review of his exceptional use of the veto under section 53 of the legislation.

Ordinarily The Upper Tribunal is an independent court, which is both an expert tribunal and a superior court of record, effectively with the same status as the High Court of Justice.

Consequently the next step in any appeals process should operate to the Court of Appeal Civil Division and then to the UK Supreme Court. We would suggest a shortening of the appellate route when challenges to section 53 certificates are made so that a Divisional Court ruling made in the Guardian case proceeds on appeal directly to the Supreme Court.

And is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know

The Institute argues that there is no evidence at all of the existing FOI system operating as a significant cost and bureaucratic burden. The number of FOI applications and appeals is falling. The existing system appears to be serving the interests of democracy by balancing the pressure for transparency in decision making as well as protecting the necessary integrity, privacy and confidentiality required for responsible governance.

Any argument by public bodies that FOI requests are putting them under unacceptable cost and operational stress, is invalidated by recognizing that had they made the information available and accessible in the first place in terms of their everyday media and public communications policy, the so-called 'burden' would not exist.

The real cost and burden argument is that public bodies can reduce expenditure by putting into the public domain through digital platforms information and data usually requested in the public interest by media and private citizens.

Journalists are the eyes and ears of the public, with a duty to scrutinise those in power and hold them to account. There should be no cost implication in providing this essential role in a democracy.

Chelmsford County Council

POA

- Consultation to be fed back to IRMS and LGA.
- Consider including some views from other officers e.g. Ann Coronel, Rob Hawes,

Questions to respond to

- **Question 1:** What protection should there be for information relating to the internal deliberations of public bodies? For how long after a decision does such information remain sensitive? Should different protections apply to different kinds of information that are currently protected by sections 35 and 36?
- **Question 2:** What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?
- **Question 3:** What protection should there be for information which involves candid assessment of risks? For how long does such information remain sensitive?
- **Question 4:** Should the executive have a veto (subject to judicial review) over the release of information? If so, how should this operate and what safeguards are required? If not, what implications does this have for the rest of the Act, and how could government protect sensitive information from disclosure instead?

We do not feel it is necessary to comment on these questions – we believe these are more targeted at Central Government organisations and therefore Chelmsford City Council do not have strong views on these topic areas.

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

We feel the current process is fair, and matches best practice complaints processes (S1 – S2 – LGO)

Question 6:

- Is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know?
  In most cases, no. In our view, there are too many requests for information which are *fishing* for information with the hope that the requester will capture an interesting bit of information. Occasionally these requests may end up with an interesting bit of information which the public should know, however these occasions tend to be rare and it can be argued that the resources put in to responding to these requests cannot be justified with the end result.

- Or are controls needed to reduce the burden of FoI on public authorities?
  Yes – suggestions below
    - Introduction of a charge per request (the Ireland model) to reduce circulars e.g £10 per request. This would not cover the actual admin costs of providing the information and could slow down target times awaiting payment, however, it would reduce the volume of requests.
    - If controls were reduced would people find another avenue i.e would journalists contact press teams more?
    - A hosted, national FOI system (like whatdotheyknow) – monitor circulars, more consistent approach, better monitoring of performance/ costs
    - Only accept requests by online form – to again reduce circulars (could be a form in system as above). This would also support the Gov.Uk movement forward in terms of digitalising services.
    - Increase organisation powers/ exemptions e.g. reduce the appropriate cost limit per request to £150 instead of £450.

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

Yes, they should be targeted at these kinds of requests as well as giving public authorities more power to reject requests from particular requesters. For example, the handful of persistent complainers that a public authority deals with uses up a disproportionate amount of resources. These persistent complainers will in most cases be drawn to submitting FOI requests because they know they will receive response. In a large proportion of these cases, there is no public interest with the information being provided and it takes resources away from providing good services to the public.

- Which kinds of requests do impose a disproportionate burden?
    - National/ regional press circulars – although recognition that cases such as MP expenses do have a national context
    - Consultants and supplier circulars
    - Persistent complainers

Children's Rights Alliance for England

About the Children's Rights Alliance for England

The Children's Rights Alliance for England (CRAE) believe that human rights are a powerful tool in making life better for children. We work with over 150 organisational and individual members to promote children's rights making us one of the biggest children's rights coalitions in the world.

We fight for children's rights by listening to what children have to say, carrying out research to understand what they are going through and using the law to challenge those who violate children's rights. We campaign for the people in power to change things for children and we empower children and those who care about children to push for the changes they want to see.

General Comments

CRAE welcomes the opportunity to submit evidence to the Freedom of Information Commission. We would be pleased to meet with Commission members to further discuss our concerns about any restrictions to the Freedom of Information Act (the Act).

CRAE believes the Act is central to a strong democracy as it helps ensure Government transparency and accountability. It also enables civil society organisations, such as CRAE, to obtain relevant information which helps them to fulfil their charitable objectives. We agree with the Justice Committee's conclusions during its post-legislative scrutiny of the Act that it has 'contributed to a culture of greater openness across public authorities, particularly at central government level' and that it 'is a significant enhancement to our democracy… ' 210

The Act is an important tool for CRAE in holding the Government to account on its obligations under the UN Convention on the Rights of the Child (CRC), which the UK ratified in 1991. It enables us to bring to light key child rights violations on a range of issues and push for change to ultimately make life better for children. The CRC specifically recognises the role of civil society organisations in monitoring its implementation.

Impact of changes to legal aid on children
CRAE submitted a Freedom of Information (FOI) request to the Ministry of Justice to assess the impact of changes to legal aid on children. The information showed there has been a significant decrease in the number of children granted legal aid to assist them to have their voices heard when their parents separate (down 69%) and in education (down 84%).
We used this information in our civil society report to the UN Committee on the Rights of the Child [211] *as part of their examination of the UK Government to provide an accurate picture of the effect of the changes on children. We will also be using the information to ensure that the impact of the legal aid changes on children, are included in the review of legal aid due to take place in Sumer 2016.*

We are very concerned about the proposals put forward which would restrict our ability to use the Act to gain information which assists in safeguarding children's rights. We are particularly alarmed about proposals to impose charges for requests, to make it easier to refuse requests on cost grounds, and make it more difficult to obtain public authorities internal discussions or excluding some from access altogether.

Data on Taser use on Children
As part of the research for CRAE's State of Children's Rights in London report (2013), CRAE submitted a FOI request to the Metropolitan Police Service (MPS) to find out how many times Tasers had been used on children across London between 2008 and 2012. CRAE had been unable to uncover this data through other routes as Taser data was not routinely published at the time.
The results of CRAE's FOI request to the MPS revealed that the use of Taser on children increased nearly six-fold between 2008 and 2012. In total, police used Tasers on children in London 131 times in this period. Between 2008 and 2012 Tasers were used on children in all but nine boroughs, but far

[210] Justice Committee (2012) - First Report Post-legislative scrutiny of the Freedom of Information Act 2000
[211] Children's Rights Alliance for England (2015) UK implementation of the UN Convention the Rights of the Child: Civil society alternative report 2015 to the UN Committee – England

more frequently in some boroughs that others. The data showed that in four boroughs children were Tasered 51 times, accounting for 40% of the total. 70% of the occasions on which police used Tasers on children occurred in just a quarter of London boroughs.
The figures uncovered by CRAE's FOI request had a significant impact. They were covered extensively in the media when the report was published. Since publication of the Taser data revealed through the Act, CRAE has embarked on a programme of work on Taser use on children. Successes have included briefing London Assembly members on Taser use; feeding into specific police training and guidance on the use of Taser on children with the College of Policing; securing a commitment from the police watchdog to look at how often children complain about treatment and examine how to monitor use; interest and commitment on Taser use on children from the Scientific Advisory Committee on the medical implications of less-lethal weapons. CRAE also now sits on the MPS Joint Firearms and Taser Reference Group – the only children's organisation to do so.

CRAE welcomes the UK Government's leadership to date in the Open Government Partnership (OGP) both as a founding member and member of the Steering Committee. Yet we question how any regressive reforms to the Act could be in line with the Government's wish to be 'the most open and transparent government in the world'.212

Any regressive changes to the Act would undermine the Government's commitment to OGP in a domestic context but would also send a negative message to countries which look to the UK for leadership on governance issues, such as the Commonwealth. It could also give less scrupulous governments an excuse to not be more transparent and open to scrutiny.

CRAE is very disappointed that the consultation and its questions appear to be framed by a view that the Act should be restricted and does not look at the benefits it has had to date or how it could be strengthened.

Strip searching children at police stations
In 2013, CRAE submitted FOI requests to police forces in England on the use of strip searching on children. Of the five police forces that responded, strip searching had almost doubled between 2008 and 2012. The youngest child strip searched was 12 years-old. In almost half of the cases no appropriate adult was present and almost half were released without charge.
We used our findings to intervene in the case of PD v Chief Constable of Merseyside Police *where a 14 year-old girl had been strip searched, ostensibly for her own protection, in the police station without an appropriate adult present. The court was very concerned and questioned how '*It should have been thought appropriate immediately to remove the clothes of a distressed and vulnerable 14 year-old girl without thought for alternative and less invasive measures to protect her from herself.'

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

The UN Committee on the Rights of the Child (the UN Committee) – the treaty monitoring body for the CRC - has set out how it expects States Parties to implement article 4 of the CRC to *'undertake all appropriate legislative, administrative and other* measures *for the* implementation *of the rights'* in its General Comment on the General Measures of Implementation.[213] This includes carrying out a child rights impact assessment (CRIA) as part of policy or budgetary decision-making - a key mechanism to ensure that the CRC is fully implemented.

Unlike in Wales and Scotland, there is no statutory duty in England to give regard to the CRC in Ministerial decision-making. However, In December 2010, the then Children's Minister gave a Ministerial Commitment that *'Government will give due consideration to the UNCRC articles when*

[212] UK Government (2013) UK Action Plan 2013-2015
[213] UN Committee on the Rights of the Child (2003) General Comment No. 3 on the General Measures of Implementation

making new policy and legislation.' [214] This commitment is also included in the Cabinet Office guidance to making Legislation.[215]

CRAE has used the Act on several occasions to assess how this commitment is being adhered to across Government departments.[216] Whilst we accept the need for public bodies to have a "safe space" in which to discuss and develop policy proposals, we believe the current protections which already apply to internal decision-making are already sufficient. We wish to highlight that in 2012 the Justice Committee *'was not able to conclude, with any certainty, that a chilling effect has resulted from the FOI Act'* and cautioned against change in the *'absence of more substantial evidence.'* [217]

Moves to exempt information relating to internal deliberations of public bodies without being subject to a public interest test could undermine our ability to assess how well the Government is considering the CRC as part of its decision-making process.

Whilst we are someway off having a similar duty to that included in the Rights of Children and Young Persons (Wales) Measure on UK Government Ministers, we none the less hope that such a duty and a corresponding statutory CRIA will at some point be introduced. A key element of good practice for carrying out a CRIA is openness and transparency. We would be concerned if changes to the Act prevented such openness to take place.

Question 2: What protection should there be for information which related to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?

CRAE believes that the current system already gives sufficient protection to information related to collective Cabinet discussions and agreement. Since 2005, the UK Government has only used their veto four times in relation to Cabinet discussions. This demonstrates that the Act is functioning as it was intended.

We would be alarmed by moves to exempt such information from the Act. Such decisions will sometimes have an impact on children's rights and external scrutiny of such decisions through use of the Act should be possible. This would be in the spirit of the CRC which specifically recognises the role of civil society in monitoring its implementation.

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

We are concerned about Government proposals to introduce Tribunal fees. For small organisations like ours, with very limited funds, any fees to appeal against decisions concerning FOI requests are like to be a barrier to CRAE, and organisations like ours, from appealing a decision that denies us the information requested. We feel this is inappropriate given that our appeals are likely to be in the public interest by seeking to make information relevant to monitoring the UK Government's child rights obligations publically available. We were only able to obtain the Youth Justice Board Restraint Manual following an appeal (see case study below).

Information on the use of restraint on children held in four privately run child prisons - Secure Training Centres (STCs)

The use of "distraction techniques" in STCs – techniques designed to deliberately inflict pain on children - was uncovered by the Carlile Inquiry established by the Howard League for Penal Reform in 2004. As part of the Carlile Inquiry CRAE learned of the use of authorised nose, rib and thumb distractions. Two children, Gareth Myatt and Adam Rickwood died in STCs in 2004 following restraint-related incidents involving painful "distractions".

The use of painful "distractions" has been condemned by a wide range of bodies including the UN

[214] HC Dec 6 2010, Col 17WS
[215] Cabinet Office (2015) Guide to making legislation
[216] Children's Rights Alliance for England (2013) State of Children's Rights Alliance for England
[217] Justice Committee (2012) - First Report Post-legislative scrutiny of the Freedom of Information Act 2000

Human Rights Council, the European Committee for the Prevention of Torture, the Council of Europe Human Rights Commissioner, the Parliamentary Joint Committee on Human Rights (JCHR), the four UK Children's Commissioners, the Royal College of Paediatrics and Child Health, the coroner presiding over the death by restraint of 15 year-old Gareth Myatt as well as numerous children's and penal reform charities.
CRAE submitted a series of FOI requests to the Youth Justice Board (YJB) and Home Office to uncover data on the use of "distractions" and information on policy decisions relating to restraint in STCs. One of our FOI requests sought a copy of the Physical Control in Care (PCC) manual – the document governing the use of restraint in the country's four STCs. An initial FOI request for the manual in 2007 was only partially met with the YJB releasing only pages 1-59 of the manual to CRAE, followed by the release of pages 60-114 in May 2010. On 10 December 2009 the Information Commissioner instructed the YJB to handover the full document to CRAE within 35 days. The YJB chose to appeal this decision. Following an appeal to the Information Commissioner and days before an Information Tribunal set for 6/7 July 2010 to consider whether release of the manual was in the public interest the YJB withdrew its appeal and a copy of the manual was sent to CRAE.
The information that CRAE uncovered was instrumental in the introduction of a new system of managing physical restraint in child custody.

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

CRAE strongly believes in line with the Justice Committee that 'the additional burdens [of the Act] are outweighed by the benefits' As the examples of how CRAE has used the Act to further children's rights show, it is a crucial mechanism for government transparency and accountability and of significant public interest.
There is already a statutory price cap for government departments and parliament (£600) and public bodies (£450) which equates to 24 hours and 18 hours work respectively. We believe this isn't a particularly helpful way of weighing up the benefit of disclosure as it does not take into account the public interest of the information being made public. We would therefore be further concerned by plans to include the time it takes to redact information or decide whether or not to release the information to also be included. We think this could make it significantly easier for requests to be refused on grounds of costs.
We are very apprehensive about the suggestion to introduce charges for FOI requests. The way that data is currently collated on many areas of policy, means that often CRAE has to make multiple requests on the same issue in order to obtain a national picture and scrutinise good or bad practice in different regions.
A key example of this is the way in which data concerning the use of Taser is collected. Currently, this information is only held by Police Forces and not collected centrally by the Home office. In order to get a detailed picture of the use of Taser on children across the country we need to submit a large number of FOI requests to individual police forces. For a small charity like ours, working with a very limited budget, charges would make such requests prohibitive and as a result key data on child rights violations would not be uncovered and addressed.
The UN Committee has been clear that it experts States Parties to collect and fully disaggregate data across the spectrum of children's rights. In 2008, it called on the Government to make improvements to this end.218 The Act is a key mechanism for organisations to use to ensure that such information is publically available.

Louise King, Co-Director
Children's Rights Alliance for England
lking@crae.org.uk 020 7278 8222
November 2015

[218] UN Committee on the Rights of the Child (2008) Concluding Observations the United Kingdom of Great Britain and Northern Ireland

CN Group Limited

Dear Sirs

I wish to respond to the consultation being conducted with the Freedom of Information Act.

CN Group is an independent local media business based in Carlisle. We publish 2 daily titles, 5 paid for weekly titles, 3 free distribution weeklies, 3 local magazines and have 2 radio stations.
We have made numerous use of the Act and have been able to enlighten our readers on a variety of actions being taken by local authorities that they were unaware of.
This leads to my first point which is that the FOI Act is a vital part of democracy at a local level whether it is being used by individuals or the local media. The Commission must therefore not recommend any changes that would weaken this situation. It is not just about national issues.
My second point is just to confirm that we are members of the News Media Association (NMA) and fully support their submission.

If you have any queries or would like further information, please feel free to contact me.

Yours faithfully,

Robin Burgess
Chief Executive

Colleges in the University of Cambridge

This response

This response (which may be regarded as an open document) is sent on behalf of the thirty-one Colleges in the University of Cambridge, namely:

Peterhouse, Clare College, Pembroke College, Gonville and Caius College, Trinity Hall, Corpus Christi College, King's College, Queens' College, St Catharine's College, Jesus College, Christ's College, St John's College, Magdalene College, Trinity College, Emmanuel College, Sidney Sussex College, Downing College, Girton College, Newnham College, Selwyn College, Fitzwilliam College, Churchill College, Murray Edwards College, Darwin College, Wolfson College, Clare Hall, Robinson College, Lucy Cavendish College, St Edmund's College, Hughes Hall, and Homerton College.

Contact details

This response is sent by Dr Matthew Russell, Head of the Office of Intercollegiate Services, 12B King's Parade, Cambridge CB2 1SJ (tel: 01223-768735; e-mail mgr12@cam.ac.uk) on behalf of the Colleges.

The questions

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

The Colleges make no comment in relation to section 35, which does not affect them.

The Colleges believe that the exemption afforded by section 36 should be absolute, rather than qualified.

The section applies to the Colleges in relation to information the disclosure of which, in the reasonable opinion of the qualified person,

- would, or would be likely to, inhibit the free and frank provision of advice, or
- the free and frank exchange of views for the purposes of deliberation; or
- would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

It is unnecessary and undesirable to add a test of the balance of public benefit to the decision of the qualified person. The qualified person's decision is itself required to be reasonable and (if it is not) can be challenged through an application to the Information Commissioner under section 50. Reasonableness ought to be a sufficient test.

Question 2: What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?

The Colleges observe simply that decision-making by all public authorities deserves a proper degree of protection, which has been lost through the operation of the Act more widely than in relation to the Cabinet.

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

Protection is in principle afforded by section 36, but that section should be strengthened by our suggestion in response to Question 1 above.

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

No comment.

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

The Colleges support the rôle of the Information Commission as a first line of resort for a dissatisfied applicant. They regard it as essential, however, that an effective appeal should lie beyond that stage. Cases involving the Act have reached the Court of Appeal and the Supreme Court on matters of substantial importance and it should be recognised that the implications of a decision for a public authority (and potentially for an applicant) may extend well beyond the immediate impact or consequence of the information sought.

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

The burden on the Colleges is excessive. It is ultimately a financial burden, but also a significant deflection of skilled resources from the Colleges' primary purpose of education.

In each of the previous two years the Colleges together received rather over 1,000 requests. Many have found it necessary to employ Freedom of Information Officers, and the annual cost to the Colleges collectively is of the order of £450,000 a year.[219] The Colleges receive no public funds. They receive student fees, which in the case of most undergraduates are paid from student loans funded from the public purse. However, those fees are to pay for the education of students.

The Colleges publish a great deal of information on their websites and have been encouraged to do so by the Act. However, they are often faced with detailed questions (for example, related to student admissions) the answers to which cannot be given by reference to published material but require substantial work to derive.

The Colleges have been faced with requests that are plainly commercially driven and seek information likely to be sold on for commercial gain.

The Colleges have received many requests from journalists seeking to have their work done for them at the expense of the College.

Section 12 is wholly inadequate in that the cost limit is much too high. From time to time the section 12 exemption applies, but often considerable work is needed falling short of 18 hours of staff time.

Section 12 is wholly inadequate in that the cost of redaction, which normally requires skilled and extensive work, is entirely omitted from allowance against the cost limit. Yet, as the Consultation

[219] It has not proved possible in the time available for response to make a detailed analysis of either the precise number of requests or the total resulting cost. The information stated is a conservative best estimate only.

Paper observes, redaction is not an optional matter: if the section 40(2) exemption applies it must be invoked and a redacted version of the information must be supplied.

A charge should be made for applications of any sort, albeit perhaps at a nominal level. The Data Protection Act provides for a £10 charge to be levied (though the level of that might reasonably by now be subject to review). Charging is permitted under the Environmental Information Regulations. There is neither logic nor justification for a different policy regarding the Freedom of Information Act.

The kinds of requests that impose an unreasonable burden on the Colleges are

- those of a highly detailed and specific nature requiring extensive searches;
- those including elements of personal data which require redaction (and for which exemption cannot be claimed *in toto*);
- those requiring detailed numerical analysis or data extraction from information held by the College, but not in a form that conveniently adapts to the request;
- vexatious requests (for although they may be dealt with under section 14(1), the Colleges are generally reluctant to apply that exemption at an early stage).

The Act should be restricted to public authorities in the narrow sense of that term—in other words, to Government Departments, local authorities and similar bodies. The test might be applied that the body should be sufficiently public to be subject to the Public Contracts Regulations.[220]

The Colleges in any event should be outside the scope of the Act, being charities not in receipt of public funds.

This is sent on behalf of Dr Matthew Russell, Head of the Office of Intercollegiate Services, 12b King's Parade, Cambridge, CB2 1SJ (tel: 01223 768735; email: mgr12@cam.ac.uk or oisadmin@hermes.cam.ac.uk).

[220] in other words the State, regional or local authorities, bodies governed by public law (as there defined) or associations formed by one or more such authorities or one or more such bodies governed by public law, and including central government authorities (but does not include Her Majesty in her private capacity)

Commonwealth Human Rights Initiative

Executive summary

The Commonwealth Human Rights Initiative, which has been promoting a right to know in the Commonwealth for over 15 years, recommends that the Independent Commission on Freedom of Information should take advantage of best practice in other Commonwealth states in recommending improvements to the UK Freedom of Information (FoI) Act, 2000. It should appreciate that the UK is not a leader in this strategy for enhancing participative democracy. It may find inspiration from Commonwealth governments operating FoI in more straitened economic circumstances. It should encourage the UK to redouble its efforts to recognise the public value in effective FoI, at a time when only a third of Commonwealth nations have this legislation, and their leaders' commitment at the Abuja summit, 2003, is in danger of being forgotten.

Introduction

The Commonwealth Human Rights Initiative (CHRI) is a unique, specialist, non-governmental body which focuses on the realisation of its human rights commitments by the 53 states of the Commonwealth. It is providing evidence to the Independent Commission on the basis of many years' work for FoI around the Commonwealth, coordinated by a team led by Venkatesh Nayak under the Director, Maja Daruwala.

Initially a voluntary coalition of three Commonwealth bodies the CHRI was formally constituted in 1990 in London as a registered UK charity and non-profit company by the Commonwealth Journalists Association, Commonwealth Lawyers Association, Commonwealth Medical Association, Commonwealth Trade Union Council and Commonwealth Legal Education Association. Subsequently the Commonwealth Parliamentary Association and Commonwealth Broadcasting Association joined the CHRI.

In 1993 the main office transferred to India, where a majority of Commonwealth citizens live, and the Vice-President of India officiated at the opening. The CHRI is now run by a Director and staff from New Delhi, with small offices in London and Accra assisted by their own executive committees. Ever since 1991, when it published an influential manifesto-report "Put Our World to Rights" prior to the Harare Commonwealth summit, the CHRI has released biennial reports on thematic issues affecting citizens in member countries. Its latest, "Civil Society and the Commonwealth – reaching for partnership", prior to the Heads of Government Meeting in Valletta, focuses on the relationship of civil society bodies with the London-based Commonwealth Secretariat, in the context of a narrowing space for civil society, freedom of assembly and expression, in many member states.

Since the late 1990s the CHRI has concentrated on two areas of work and advocacy: to spread effective Freedom of Information (FoI) or Right to Information (RtI) laws, and their full implementation in Commonwealth countries; and to support reform of policing and prisons around the Commonwealth, in conformity with human rights standards. Inevitably, with major challenges in both fields in India and South Asia, CHRI staff have devoted much effort to raising standards in their own region. Nonetheless the CHRI has pushed energetically, in conjunction with national campaigns, for the passing of FoI laws in Commonwealth states, and a review of CHRI programmes in New Delhi in August 2015 concluded that, in spite of funding difficulties, more energy should be applied to Commonwealth-wide advocacy.

At the Abuja summit, 2003, where the Mugabe regime took Zimbabwe out of the Commonwealth because it could not accept the commitment to human rights, the CHRI was encouraged by leaders' statement in paragraph 7 of the Aso Rock Declaration:

> *We commit ourselves to make democracy work better for pro-poor development by implementing sustainable development programmes and enhancing democratic institutions and processes in all human endeavours. We recognise that building democracy is a*

> *constantly evolving process. It must also be uncomplicated and take into account national circumstances. Among the objectives we seek to promote are….the right to information.*

Following this statement the Commonwealth Secretariat prepared and distributed to governments a model Bill for FoI, and the British Council was among the agencies that promoted FoI. The Commonwealth Parliamentary Association, for example, has held workshops for parliamentarians on FoI in Dominica, Ghana and Fiji (with the CHRI) which have been funded variously by the Canadian International Development Agency, World Bank and NZ Aid.

Follow-up over the last twelve years has been poor. The CHRI is disappointed that only 17, fewer than a third of Commonwealth sovereign states, have FoI laws (see appendix A); in addition two dependent territories, the Cayman Islands (UK) and Cook Islands (New Zealand) have legislation. Surprisingly, given that the European Union is also committed to FoI, the republic of Cyprus is one of only two EU members yet to pass and implement a law though this could happen before the end of 2015.

Hence any action by the UK Government which would appear to reduce the scope and effectiveness for citizens of FoI in this country would damage its stated pledges to spread this legislation to more Commonwealth partners. The CHRI strongly believes that FoI is a valuable tool for democracy world-wide, and the greater participation of citizens in an age of digital awareness. Recognising that FoI laws in the Commonwealth vary in quality and implementation, it will continue to press for higher standards. Arguments for state secrecy, and the inconvenience or cost of responding to citizen requests for FoI, are ones that will reverberate among lazy, disorganised or secretive and unaccountable government departments in other Commonwealth countries. The CHRI will collaborate with British bodies which seek to strengthen rather than dilute the Freedom of Information Act, 2000.

The Freedom of Information Act, 2000, in a Commonwealth context

Informed persons and governments throughout the Commonwealth are aware that the UK is rarely a leader in the enhancement of democracy. British film audiences, watching “Suffragette” recently, were reminded that full women’s suffrage only arrived in the UK in 1928, a quarter of a century after it was a reality in Australia and New Zealand. More recently the independent Electoral Commission UK was only established in 2001, following many visits by UK parliamentarians to observe elections in other Commonwealth countries which had such commissions. The UK Supreme Court, which withdrew judges from the second chamber of the legislature, was established in 2009, six years after the British Prime Minister joined other heads of government in Abuja in commending the separation of powers (the Commonwealth Latimer House Principles). Controversy in the UK over the composition and 820 plus membership of the House of Lords is noted elsewhere as an example of UK backwardness.

When the UK passed the Freedom of Information Act, 2000, which took effect five years later, it was not in the forefront of Commonwealth moves for government transparency. Ten fellow members had implemented legislation earlier, and some much earlier (see appendix A for list of states with FoI laws); Australia and New Zealand had laws in effect from 1982, Canada from 1983, Trinidad & Tobago from 1999 and South Africa, whose move to full democracy with a modern constitution had been widely admired, had FoI from 2000.

Those charged with drafting the UK legislation in 1999-2000 consulted Commonwealth colleagues, especially those in countries with a similar parliamentary culture, such as Australia, Canada and India; they aimed to benefit from others’ experience and, with 100,000 British organisations potentially subject to a UK law, there were concerns about exemptions, cost, and impacts on the work of civil servants, local authorities and others. Arrangements for an Information Commissioner, and a graduated appeal system, were included in the knowledge of operations elsewhere.

Nonetheless, in spite of the efforts of the UK government, MPs and officials at that time the resulting legislation is not given top ranking in the Commonwealth. The Global Right to Information has

analysed all countries with this legislation according to seven factors: right of access, scope, requesting procedures, exemptions, appeals, sanctions, promotional measures. Whereas the UK was awarded 100 out of 150 points, significantly above the Commonwealth average of 92.4 or the world average of 85.1, India had 128 and five other Commonwealth states were more highly rated (see appendix B) than the UK. The UK, Canada and Australia were all marked down because of the number of exceptions they allow, significantly more than in India and South Africa for example.

Reviews of FoI in elsewhere in the Commonwealth

Five other Commonwealth states which are operating FoI have already reviewed their legislation. They are Australia, Belize, Canada, Jamaica, and New Zealand (see appendix C). Although the motive for and nature of these reviews have varied it is worth listing some recommendations which have emerged, relevant to the current inquiry by the Independent Commission in the UK.

For example in Australia the review undertaken for the Attorney-General by Dr Allan Hawke (2013) rejected the idea that frank and fearless advice from civil servants needed stronger protection because "officials should be happy to publicly defend any advice given to a minister and if not happy should rethink the advice." It questioned the scope of some of the exclusions in schedule 2 of the Freedom of Information Act, 1982.

In Belize the Political Reform Commission (2000), working for the Prime Minister, recommended that the government should amend the Freedom of Information Act, 1994, "with the objective of narrowing the scope of the Act's definition of documents exempted from public access"; it also urged the automatic release of all government documents after 15 years.

In Canada the Canadian Information Commissioner, Suzanne Legault, tabled a report to parliament (2005) with 85 recommendations to bring the Access to Information Act (1983) up to date in an era of digital information and centralised government. She stated that exemptions were overly broad, that there was a need for proactive release of information, and the original Act had only given the Commissioner the power to *recommend* release and not to *require* the release of information.

In Jamaica a joint parliamentary select committee, reviewing the Access to Information Act, 2002, proposed empowering an Access to Information Unit to enforce compliance; repealing the Official Secrets Act, 1911, inherited from the British colonial administration; and widening the public interest test to include many of the exemptions in the 2002 Act.

In New Zealand the Law Commission reviewed the Official Information Act, 1982 and the Local Government Official Information and Meetings Act, 1987; it reported in 2012, making 137 recommendations, and arguably limited the scope of these Acts by spelling out and replacing the broad "good government" ground for withholding information from the public. It set out seven reasons for not giving out information to avoid prejudice to the effective conduct of public affairs: collective and individual ministerial responsibility; the political neutrality of officials and negotiations between political parties to form or support a government; free and frank expression of opinions by or between ministers and certain others in the course of their duty; the ability of ministers to consider advice tendered; to prevent ministers and certain others from being improperly pressured or harassed; and to preserve the confidentiality of communications by or with or about the Sovereign and her representative [the governor-general]. The Law Commission also recommended that the term "public interest" should not be statutorily defined, that all agencies covered by the legislation should be listed and advertise the fact, and that parliamentary offices should be covered.

The reviews listed above only scratch the surface of debates in Commonwealth countries which have, or are considering having, FoI legislation. Many concerns are similar to those in the UK over the last 20 years. Civil society and media organisations have pressed for more effective implementation, and have quoted facts and abuses that would never have come to light without FoI. At the same time there has been a push-back among certain officials and politicians who have resented what they see as extra work or exposure. Following the Snowden and Wikileaks revelations, the vulnerability to hacking

of all official information is in the public domain. Campaigners for FoI are disappointed that, although the legislation has made a difference, it has only been one element in moves towards greater transparency and has been insufficiently transformative.

Significance of the questions raised by the Independent Commission for other Commonwealth states

In the Commonwealth no state or government, least of all the UK, is an island when it comes to legislation, the common law, or parliamentary or administrative culture. The essence of the Commonwealth is of continuous interchange, using the English language, operating simultaneously at levels which are governmental, popular and professional. In the internet era such exchanges happen within minutes. Hence the answers reached by the Commissioners to the six questions they table, and on which they seek evidence, may not only determine the availability of information to the British public but the way in which British commitment to a participative democracy today is perceived elsewhere in the Commonwealth, and in the wider world.

The first three questions raised by the Commission are also covered in legislation in other Commonwealth states, where there is usually some protection for the internal deliberations of public bodies, for Cabinet papers, and for the candid assessment of risk. Many of these are questions of degree and fine definition, and the CHRI would draw attention to Dr Hawke's view in Australia that officials should be happy to publicly defend any advice given to a minister, and if not should rethink the advice. In many Commonwealth parliaments, including the UK, it is common for officials to be questioned by MPs and committees in public on the advice they tender. There are also protections for whistle-blowers. The Commission will note that the Justice Select Committee in the UK, reviewing FoI three years ago, concluded that worries about inaccurate recording or early release of policy discussions did not require amendment to the Act, but could be dealt with by "the proper application of the protection provided in section 35 of the Act."

Question 4, relating to an executive veto over the release of information may be justified with regard to national security, already covered by exemption in the legislation, but the right to veto the release of information could be used to cover up executive incompetence or malfeasance; such a veto might well be so used in other Commonwealth jurisdictions. Hence such vetoes should be narrowly drawn, with strong judicial safeguards. When Commissioners answer Question 5, relating to enforcement and appeals, they would do well to consult authorities in other Commonwealth states, which have stronger and speedier enforcement and appeal mechanisms.

Question 6, related to how far the burden on public authorities under the Act is justified by the public interest in the public's right to know, is one where Commonwealth experience may be particularly valuable. Many Commonwealth governments rated higher than the UK in the global ranking referred to above, including India and South Africa, would argue that they are much less well-endowed than the UK. All Commonwealth governments and their public authorities have to work within tight financial parameters, and Commissioners will be interested to see how other states manage their FoI economically. Departments and organisations covered by FoI around the Commonwealth have reformed and simplified their systems to the benefit of both governors and governed.

Conclusions

Knowledge is power and, in a democracy, any restriction on the release of official information to citizens must be narrowly drawn and justified in terms of the likely benefit or protection of citizens. The UK's Justice Select Committee concluded (paragraph 241) that the British legislation had enhanced democracy and lacked any harmful effects and, in the light of evidence from other Commonwealth democracies which have FoI, the CHRI advises the following:

UK Commissioners should survey and borrow from more advanced FoI legislation in fellow member states of the Commonwealth when they consider their two main concerns – on the public interest balance between transparency and the protection for sensitive information, and on the balance

between the public right to know and the burden on public authorities. They should be informed of relevant legal decisions elsewhere in the Commonwealth, and the trend of opinion among Information Commissioners responsible for operating FoI, and civil society which uses it.

UK Commissioners should acknowledge the benefits to government and democracy from the operation of FoI in other Commonwealth states as well as the UK, following the Abuja decision of 2003, and should avoid a perception that the UK is backing away from its commitment to a robust right to know. They should borrow best practice from other Commonwealth states.

They should recommend improvements to public policymaking and administration, to match the aims of FoI more expeditiously and economically, and recognise the overriding importance of the public interest to an educated democratic electorate.

Given the rapid changes in data collection and information systems, and their vulnerability to cyber-attack, they should recommend that the committee system in the House of Commons in the UK conducts regular scrutiny not only of the operation of FoI but of the security of information of citizens which is held by government agencies, with continuing awareness of developments in the wider Commonwealth.

Richard Bourne, London, and Maja Daruwala, New Delhi, November 2015, on behalf of the Commonwealth Human Rights Initiative, and with acknowledgement to colleagues in New Delhi and London.

APPENDIX A): A Table of Commonwealth Countries with Freedom of Information Legislation: the date the law was passed, amended (if applicable), and entered into force

FOI Act Commonwealth States	Year Passed	Year Amended	Year Effective*
Antigua and Barbuda	2004	-	-
Australia	1982	-	-
Bangladesh	2008	-	2009
Belize	1994	2000	2000
Canada	1983	-	1985
Cayman Islands (under UK law)	2007	-	2009
Cook Islands	2008	-	2009
Guyana	2013	-	-
India	2005	-	2005
Jamaica	2002	-	2003
Maldives	2014	-	-
Malta	2008	2012	2012
New Zealand	1982	-	-
Nigeria	2011	-	2013 (only adopted by 2 states)
Pakistan	2002 (ordinance); 2010 (amendment to constitution)	-	-
Saint Vincent and the Grenadines	2003	-	-
Sierra Leone	2013	-	-

South Africa	2000	-	-
Trinidad & Tobago	1999	-	-
Uganda	2005	-	2006
United Kingdom	2000	-	-

***** For countries where the 'year effective' has been left blank, there is either no sufficient evidence for when the FOI Act was made effective, or it has not yet been entered into force.

Sources:

http://www.rti-rating.org/country-data

http://laws.gov.ag/acts/2004/a2004-19.pdf

http://www.austlii.edu.au/au/legis/cth/consol_act/foia1982222/

http://www.freedominfo.org/wp-content/uploads/documents/Belize%20FOIA%201994.pdf

http://unpan1.un.org/intradoc/groups/public/documents/tasf/unpan025201.pdf

http://laws-lois.justice.gc.ca/eng/acts/A-1/page-1.html

https://www.gov.uk/government/publications/freedom-of-information-in-the-cayman-islands

http://www.digplanet.com/wiki/Official_Information_Act_2008

http://rti.gov.in/webactrti.htm

http://moj.gov.jm/laws/access-information-act

http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8962&l=1

http://www.legislation.govt.nz/act/public/1982/0156/latest/whole.html

http://www.nigeria-law.org/Legislation/LFN/2011/Freedom%20Of%20Information%20Act.pdf

http://foiapakistan.com/right-to-information.html

http://www.law-democracy.org/wp-content/uploads/2010/07/10.05.Sierra-Leone.FOI_.official1.pdf

http://www.thesierraleonetelegraph.com/?p=5415

http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/southafrica/Calland%20&%20Dimba%20-%20FOI%20Country%20Study.pdf

http://www.foia.gov.tt/

http://www.legislation.gov.uk/ukpga/2000/36/contents

https://en.wikipedia.org/wiki/Freedom_of_information_laws_by_country

(APPENDIX B): Ranking of Commonwealth Countries according to the Global Right to Information Ranking Index (GRIR) - http://www.rti-rating.org/

Country	Right of access (max. 6)	Scope (max. 30)	Requesting procedures (max. 30)	Exceptions (max. 30)	Appeals (max. 30)	Sanctions (max. 8)	Promotional Measures (max. 16)	Total (max. 150)	Ranking (out of 102 countries)
India	5	25	25	26	29	5	13	**128**	**3**
Sierra Leone	0	29	25	18	28	7	15	**122**	**7**
Maldives	2	28	20	17	29	8	12	**116**	**10**
Antigua and Barbuda	3	24	20	23	24	5	14	**113**	**12**
South Africa	6	25	19	25	14	6	14	**109**	**17**
Bangladesh	2	25	16	20	23	6	15	**107**	**20**
United Kingdom	2	25	20	13	23	7	10	**100**	**30**
Uganda	6	26	21	22	11	6	5	**97**	**33**
New Zealand	4	16	22	18	23	6	5	**94**	**36**
Trinidad and Tobago	3	24	15	20	15	3	9	**89**	**46**
Jamaica	3	18	23	14	17	5	8	**88**	**48**
Nigeria	3	29	12	22	4	7	11	**88**	**49**
Australia	2	10	21	15	23	2	10	**83**	**51**
Belize	1	19	20	16	19	2	6	**83**	**52**
Canada	3	13	15	11	22	6	9	**79**	**59**
Malta	0	19	21	12	10	2	14	**78**	**62**
Saint Vincent and the Grenadines	2	21	17	18	2	2	8	**70**	**77**
Cook Islands	4	15	16	15	14	3	2	**69**	**79**
Guyana	4	15	16	10	9	4	11	**69**	**80**
Pakistan	5	16	8	11	18	5	3	**66**	**84**
Cayman Islands	*NO DATA – UNDER UK JURISDICTION*								

Global average total score – **85.1**/100
Commonwealth average total score – **92.4**/100

Green *indicates those countries which fall into the* ***top 25%*** *of countries on the GRIR –* ***Red*** *indicates those countries which fall into the* ***bottom 25%*** *of countries on the GRIR*

(APPENDIX C) FOI Reviews in the Commonwealth

Australia
Review of the *Freedom of Information Act 1982* and the *Australian Information Commissioner Act 2010* (2013)
The Attorney-General of Australia, Nicola Roxon, commissioned Dr Allan Hawke AC to review and report on the operation of the Freedom of Information Act 1982 and the Australian Information Commissioner Act 2010. The terms of reference requested Dr Hawke to examine *"the extent to which those Acts and related laws continue to provide an effective framework for access to government information"*. The full terms of reference can be accessed here: http://www.ag.gov.au/Consultations/Documents/ReviewofFOIlaws/TOR%202%20year%20review%20-%20final.doc

Dr Hawke concluded his report, somewhat discouragingly, stating *"Unfortunately, after 30 years resistance and needless secrecy still exists in some places as well as an unwillingness to embrace the objects of the FOI Act"*. He opines that a pro-disclosure approach continues to be resisted and has not yet become an integral part of the everyday public service ethos. He states that the Australian Government must continue to pursue a deliberate strategy of reform and adaption, from the top, in order to comply with the FOI Act. The full report can be accessed here: http://www.ag.gov.au/Consultations/Documents/FOI%20report.pdf

Notable mentions include:

- Rejection of the suggestion that frank and fearless advice needs stronger protection with endorsement of the principle that *"officials should be happy to publicly defend any advice given to a minister and if not happy should rethink the advice"*;
- A questioning of the scope of some of the exclusions from the Act in Schedule 2;
- Recommendation that the current position remains unchanged with regard to not charging an application fee, not charging for personal information, providing five hours free processing time for other requests, and no charges for internal reviews;
- That the scope of the Act should extend to all parliamentary departments (save for the librarian) in respect of documents of an administrative nature;
- A 40 hour fixed cap on processing time;
- Unspecified changes to provide new protection for information about the conduct of surveillance, intelligence gathering and monitoring activities;
- Recommendation for a conditional exemption for incoming minister briefs, question time and estimates briefs;
- The recommendation that intelligence agencies should remain entirely outside the scope of the Act.

Although Dr Hawke made 40 specific recommendations to alter the Act (as evidenced above, some are not conductive to increasing the ease of access to information), he expressly states that a more extensive review ought to be commissioned by the Government. He is of the opinion that complete rewrite of the FOI Act is now necessary, to be conducted in conjunction with the recommended comprehensive review.

Unfortunately, since the review, the Australian Government has proceeded in the opposite direction to the conclusions elucidated by Dr Hawke. The Freedom of Information Amendment (New Arrangements) Bill was introduced to Parliament in October 2014, seeking to abolish the Office of the

Australian Information Commissioner. In the government's subsequent budget they provided funding to the OAIC only until the end of 2014 – an issue that caused a constitutional earthquake when the Senate refused to pass the legislation, leading to the government having to re-instate some funding.

Belize

Final Report of the Political Reform Commission (January 2000)

The Political Reform Commission of Belize was mandated by the Prime Minister to conduct a wide-ranging review of the system of governance with scope to make recommendations to amend the Constitution or other legislation, with a view to achieving greater democracy.

A review of the Freedom of Information Act 1994 was included within the review and the Commission made specific reference to the fact that the definition of documents that are exempt from access by the Act is very broad in scope, such that almost every document coming out of government ministries can be categorised as exempt.

The Commission made two recommendations for strengthening the Act:

- First, that the *"Government reviews and amends the Freedom of Information Act* [1994] *with the objective of narrowing the scope of the Act's definition of documents exempted from public access."* [Recommendation 99]; and

- Secondly, *"the Commission further recommends that the Act be amended to provide for the automatic release of all government documents after fifteen years have passed"* [Recommendation 99].

The full report can be reviewed here:
http://ambergriscaye.com/pages/town/FINALREPORTOFTHEPOLITICALREFORMCOMMISSION-complete.htm

Canada

Striking the Right Balance for Transparency – Recommendations to modernize the *Access to Information Act* (March 2015)

In March 2015 the Canadian Information Commissioner, Suzanne Legault, tabled a report in Parliament having reviewed the Access to Information Act. She made 85 recommendations to bring the Act up to international standards. Notable recommendations include the following:

- **Coverage of the Act**
  A modern access to information law provides for broad coverage of all branches of government. The Information Commissioner recommends a series of criteria to extend the coverage of the *Access to Information Act* (Act) to, for example, institutions that perform a public function or that are controlled or funded, in whole or in part, by the government. The Information Commissioner also recommends that specific institutions be covered by the Act. These are: the Prime Minister's and Ministers' offices, institutions that support Parliament and institutions that provide administrative support to the courts.

- **The Right of Access**
  The Information Commissioner recommends a number of improvements to facilitate the exercise of the right of access such as extending this right to all persons no matter their residency, establishing a legal duty to document and a legal duty to report the unauthorized destruction or loss of information. The Information Commissioner also recommends allowing institutions to refuse to process requests that are frivolous or vexatious and limiting the circumstances under which an institution can refuse to confirm the existence of a record. Finally, information should be made available free of charge, in an open, reusable and accessible format.

- **Timeliness**
  As the Federal Court of Appeal recently stated "timely access is a constituent part of the right of access". It ensures that requesters receive responses while the information is still relevant, and that they are able to hold governments to account for their decisions. In order to reverse the culture of delay, the Information Commissioner recommends to limit extensions to what is strictly necessary, based on a rigorous, logical and supportable calculation, and up to a

maximum of 60 days. Any extensions longer than 60 days would require the permission of the Information Commissioner. Her recommendations also include a tighter framework for consultations and a more detailed notification to requesters when requests are extended.

- **Maximising disclosure**
  The Act provides that government information should be available to the public and disclosure may only be restricted by limited and specific exemptions. In the way the Act is currently constructed, however, exemptions are overly broad and some information is outright excluded. The Information Commissioner recommends a new framework where exemptions protect only what requires protection, to maximize disclosure. The recommendations include exclusions including for Cabinet confidences (to be replaced with exemptions where necessary).Changes are proposed to all most commonly used exemptions including personal information (section 19), national defence (sections 15 and 69.1), law enforcement and investigations (section 16), advice and recommendations (section 21) and third party information (section 20) as well as to the exemptions for information obtained from other governments (sections 13, 14 and 15) and solicitor-client privilege (section 23). The Commissioner also recommends the review of restrictions to the right of access found in other legislation and a review of the exemptions and exclusions for institutions brought under the coverage of the Act as a result of the *Federal Accountability Act*.

- **Strengthening oversight**
  Independent and effective oversight is essential to the effectiveness of the access to information regime. The Information Commissioner recommends strengthening oversight by adopting an order-making model. The Information Commissioner also recommends the ability to undertake education activities, research and compliance audits as well as the statutory authority to provide advice on access to information matters.

- **Open Information**
  The Information Commissioner recommends amending the Act to reflect the government's open government initiatives and commitment to a culture of openness by default, including additional requirements for proactive disclosure, the obligation to publish information of public interest and the requirement to adopt publication schemes.

- **Criminal Liability and civil responsibility**
  The Information Commissioner recommends adding a spectrum of sanctions for non-compliance with the requirements of the Act including criminal sanctions, administrative monetary penalties and disciplinary measures.

- **Mandatory review of the Act**
  The Information Commissioner recommends a mandatory parliamentary review of the Act every five years.

The full report can be accessed via this link:
http://www.oic-ci.gc.ca/eng/rapport-de-modernisation-modernization-report.aspx
It does not look as though the Canadian Parliament has taken any action at this time.

Jamaica
Report of the Joint Select Committee to Consider and Report on the Operation of "The Access to Information Act, 2002" Relative to the Review of the Legislation as Provided by the Act (2011)
In 2011 a parliamentary committee reviewed the Access to Information Act and produced a report with recommendations to strengthen it. Some of the notable recommendations include:

- Empowering the Access to Information Unit to enforce compliance with the Act as a statutory body;
- Repealing the Official Secrets Act of 1911;
- Widening the public interest test to include many of the exemptions;
- Revising contradictory legislation to align with the Access to Information Act.

The full report can be accessed here:
http://www.ati.gov.jm/sites/default/files/Documents/Joint%20Select%20Report%20on%20ATI%20Act%20March%202011.pdf
In May 2015 the Minster with responsibility for information, Sandrea Falconer, stated that a new Access to Information Act would be tabled and passed this financial year.
A copy of the draft Bill is not available at this time.

New Zealand
The Public's Right to Know: Review of the Official Information Legislation (June 2012)
The New Zealand Law Commission produced the above named report, evaluating the Official Information Act 1982 and the Local Government Official Information and Meetings Act 1987, and making 137 recommendations for change. Notable recommendations include:

- **Spelling out a good government exemption**
  8. Sections 9(2)(f) and 9(2)(g) of the OIA (the "good government" grounds) should be replaced by a provision stating that:
  The withholding of the information is necessary to avoid prejudice to the effective conduct of public affairs by protecting:
  (i) collective and individual ministerial responsibility;
  (ii) the political neutrality of officials; negotiations between political parties or Members of Parliament for the purpose of forming or supporting the government;
  (iii) the free and frank expression of opinions and provision of advice or information by, between or to Ministers of the Crown or members of an organisation or officers and employees of any department or organisation in the course of their duty;
  (iv) the ability of Ministers properly to consider advice tendered, whether that advice was requested or not;
  (v) Ministers, members of organisations, officers and employees of any department or organisation from improper pressure or harassment;
  (vi) the confidentiality of communications by or with or about the Sovereign or her representative.

- **No statutory definition or limitation on public interest**
  33. The term "public interest" should not be statutorily defined or limited by a list of factors to be taken into account. Instead, the Ombudsmen's Guidelines should provide clear examples of previous cases in which the public interest in disclosure has, and has not, been sufficient to justify overriding a withholding ground.

- **Oral and any form of electronic request**
  48. A new provision in the OIA and LGOIMA should state that:
  requests may be made in any form (in hard copy, electronically, or orally);
  (a) requests do not need to make express reference to official information legislation;
  (b) where it is reasonably necessary to clarify an oral request, agencies may ask for it to be put in writing;
  (c) if the requester declines or is unable to put an oral request in writing, the agency should record its understanding of the request and provide a copy of it to the requester.

- **Urgent requests**
  56. A new provision in the OIA and LGOIMA should provide the following: a requester may make an urgent request provided that reasons for urgency are given;
  (a) an agency must treat such a request as urgent if it would be reasonably practicable in the circumstances to do so; and
  (b) a response to a request treated as urgent should be notified promptly and, where the

decision is in favour of release, the information should be provided to the requester as soon as reasonably practicable in the circumstances.

- **All agencies covered by the legislation should be listed and advertise the fact**
  116. The schedules to the OIA and LGOIMA should be comprehensive and identify all agencies covered by the OIA and LGOIMA respectively.
  118. There should be a statutory responsibility on all agencies subject to the OIA and LGOIMA to state that fact on their website.

- **Parliamentary offices should be covered**
  124. The Office of the Clerk of the House of Representatives and the Parliamentary Service should be subject to the OIA by inclusion in Schedule 1. The definition of "official information" in section 2 of the OIA should state that, in relation to these agencies, "official information" includes only:
  (a) statistical information about the agency's activities;
  (b) information about the agency's expenditure of public money; information about the agency's assets, resources, support systems, and other administrative matters.
  125. The Speaker in his or her role as responsible Minister in relation to the Office of the Clerk and Parliamentary Service should be subject to the OIA by inclusion in Schedule 1. The definition of "official information" in section 2 of the OIA should state that only information held by the Speaker in that capacity is included.

The full report can be accessed here:
http://r125.publications.lawcom.govt.nz/the+public%27s+right+to+know%3A+review+of+the+official+information+legislation#slide_101

Review of OIA Practice (2015)
The Chief Ombudsman in New Zealand, Dame Beverley Wakem, instigated a wide ranging review of the Official Information Act, conducted under the Ombudsmen Act 1975.

12 central government agencies have been selected for formal review, with a further 63 agencies and all 28 Ministers' offices requested to complete a survey covering all aspects of OIA practice.

A summary of the terms of reference can be accessed here:
http://img.scoop.co.nz/media/pdfs/1412/OIA_Review_Project_Summary.doc

It does not look as though the report has been concluded at this time.

Competition and Markets Authority

Background

The Independent Commission on Freedom of Information has published a call for evidence on the Freedom of Information Act 2000 ("the Act").
The Competition and Markets Authority ('the CMA') is both a non-ministerial government department and a regulatory authority. It is the UK's principal competition and consumer authority.

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

The CMA believes it is important that in considering the adequacy of section 35 and 36 to protect a safe space for the effective performance of public functions by ministers, it is important it takes into account the needs of public bodies with regulatory functions like the CMA as well as central policy formation by government.

The CMA is committed to providing a high level of transparency when performing its regulatory functions and giving reasons for its decisions: see our published transparency guidance [1]. But it also considers it is important that decision-takers within the CMA (be they the CMA Board, independent panel members, or officials with delegated powers, and those advising them) have a safe space for frank debate internally before making those decisions.

The CMA's experience is that the potential protection from disclosure provided by these provisions is not always clearly applicable to its internal policy discussions. To the extent that the CMA acts as a law enforcement body its work enjoys the protection of section 31 of the Act, but not only is the CMA more than just a law enforcer, contributing advice to other public bodies, including government, on the development of policy and the performance of their functions; it also has to develop policies of its own, for example, to enable us to set priorities in deciding for our enforcement work and which markets to investigate. Our experience is that internal documents discussing such matters sometimes fall between the two stools of sections 31 and 35 in terms of protection from inappropriate disclosure, leading to the need to consider reliance on the exemption at section 36 (2) (b) (i) and (ii) and section (2) (c) as an alternative. We see this as unsatisfactory: the section 36 exemption should be reserved for exceptional circumstances rather than common internal debates on how to perform our functions. Accordingly, we encourage the Commission to see if section 35 could be revised to more clearly cover regulatory and enforcement policy discussions by regulatory bodies.

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

The public's right to know about matters that affect its interests is obviously of great importance, as is the ability of individuals to obtain information they need to develop their potential as citizens and protect their legitimate interests. But the public resources allocated to providing such information clearly needs to be as effectively targeted as possible.

[1] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270249/CMA6_Transparency_Statement.pdf.

Currently, under the Act, any person has the absolute right to require officials to undertake 24 hours (around three days) of work at public expense simply at his or her option. There is no requirement that the work up to that cut-off point should be in any way justified. Public authorities are debarred from having regard to the intention behind requests except in the special case of a request that can be said to be 'vexatious' under section 14 of the Act. The CMA wishes to identify certain areas from its experience where the current arrangements are not in its view optimal.

CMA experience

The CMA does not receive large numbers of requests by comparison with some authorities. However, a significant proportion of those it does receive tend to be costly to process.

As a competition and consumer authority, the CMA's work commonly involves sensitive commercial and personal information, normally supplied by the subjects or third parties. Such information is protected by law and as such is often exempt from disclosure, but the administrative exercise of assessing if any information needs to withheld and can lawfully be withheld under the Act necessarily involves significant costs. Where requests are unduly vague or broad, these costs are inevitably high, and yet are liable to disregarded even for the purpose of deciding whether a request involves excessive cost.

The CMA is not suggesting that the requests it receives are all valueless. But it does consider that where an authority is already required by statute (and its general transparency policy) to give and publish detailed reasons for its regulatory decisions under statute, the additional burdens of disclosure under the Act cannot always be justified as proportionate to the public benefit that may result.

Possible controls

Charging. The CMA does not consider that the problem of disproportionate burden would generally best be addressed by introducing charges for making requests. There is an obvious risk to the purpose of the legislation if persons or businesses with limited means are deterred from seeking information of real importance to them or to the public. In principle such risks could be addressed by limitations on the requirement to pay charges, or use of different scales of charges for different categories of requester or case. But such limitations would be difficult, and therefore expensive, to police, undermining the value of having a system of charging.

We can see there might be some role for charges in certain cases. For instance, there could be a case for allowing requesters to pay for information where there is no strong public interest at stake, and the request might therefore otherwise be refused access to it solely on costs grounds. But in general, the effect of compulsory charging would seem to us likely to be to leave the right to make unnecessarily burdensome requests intact, merely confining it to better-off requesters. That would not be an attractive outcome.

Section 12 reform. An alternative way to address the issue of potentially excessive burden on authorities appears to the CMA to be to amend section 12 of the Act which determines the appropriate limit/cost threshold for dealing with requests. At present, it gives any person (including non-UK citizens/companies) a right as mentioned above to any non-exempt information that can be provided at a notional cost up to the equivalent to 24 working hours. The CMA considers this is excessive, particularly since certain kinds of work may not be counted, including that in connection with the application of exemptions, and suggests it might be more usefully replaced with a proportionality rule.

The CMA accepts that there should be a right to information without any question as to its value, up to a point. Any publicly funded authority can expect to give basic answers to questions about its work

generally, just as it can be expected to respond properly to complaints, as a matter of ordinary good administration. But the CMA suggests that a right to command a maximum of (say) half a day of the time of a public official, rather than three days, would be more in line with reasonable expectations. Where a request requires work over a longer period, the requester should still have a right to the information, but not regardless of whether the costs of processing it are disproportionate to its potential value.

The right to information generally is qualified by exemptions in the public interest. A proportionality test could be applied by replacing the current section 12 by an exemption allowing authorities to refuse disclosure where an information request would involve costs disproportionate to any value that disclosure is likely to have. In line with the purposes of the legislation, "value" would need to be defined broadly, including the public interest in individual citizens educating themselves and realising their economic potential, and also the legitimate interest of individuals in defending their human rights. Refusal to disclose by reference to a proportionality test would, within the existing framework of the legislation, have to be reasoned, with indications as to how an over-broad request could be narrowed, and requesters would enjoy a right to complain to the Information Commissioner and potentially the Information Tribunal.

It is not suggested that requesters should be required to fill in detailed questionnaires requiring information in support of requests, or arguments regarding costs and benefits. But authorities would of course be required to take into account anything requesters chose to say by way of explaining their requests. At present, requesters nearly always do give some indication as to why they think disclosure is needed, despite the fact that under current legislation there is no scope for authorities to take any account of such indications. Public guidance on the Act could usefully provide pointers as to how best requesters can help authorities to assess the value of their requests.

Where a request is refused by reference to proportionality, the requester would have the right to invoke the Information Commissioner's Office, which would then carry out an assessment similar to that which it very commonly does at present in relation to other refusals based on exemptions. Most exemptions in the Act involve applying a public interest test.

A further reason for replacing the 24 hour rule with a proportionality test is that, although it is for most purposes too high, in exceptional cases where there is a particularly strong public interest case for disclosure it is also capable of being too low. That is the nature of an arbitrary cut-off point. The section 12 mechanism is also inflexible in that it requires a process of calculation founded on some costs being always allowable and some being never permitted. The CMA considers it is important that the scope of the activities whose cost can – where appropriate - be taken into account in assessing proportionality should be extended to cover reading, consideration of exemptions and more generally, and redaction, including, but not limited to, redaction of personal data. At present permitted (countable) costs are unrealistically narrow.

Corruption Watch

Access to information and the transparency it brings in public administration is central to the fight against corruption. The UK is signatory to the UN Convention against Corruption which states at Article 10:

> "*each party shall, in accordance with the fundamental principles of its domestic law, take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organisation, functioning and decision-making processes where appropriate.*"

The UK's compliance with UNCAC, by having the Freedom of Information Act, is critical to its ability to show global leadership in fighting corruption. Corruption Watch is very concerned that any attempt to weaken the current Act, by charging for information sought, by asserting a ministerial veto over information where such a veto has been rejected by the courts, by making it easier to refuse requests for information on the basis of cost, or restricting access to information about government decision making will seriously dent the UK's reputation and its credibility in trying to assert global leadership on corruption.

The UK government has committed, in its 2013 National Action Plan under the Open Government Partnership (OGP) to being "*the most open and transparent government in the world.*" Under the OGP, the UK government committed to ensuring that the public "*can see and understand the workings of government through more transparency*".

The Compact between government and civil society organisations (CSOs) meanwhile commits the government to ensure "*greater transparency by making data and information more accessible, helping CSOs to ... hold government to account*" (Compact, 1.4).

It is hard to see how creating greater restrictions under the Freedom of Information Act for information that relates to government policy making would be compatible with the government's OGP commitments and its Compact with Civil Society Organisations. Transparency is well recognised to be beneficial in developing genuine accountability and creating better decision making. Without good access to the records of government decision-making, organisations and individuals will be unable to hold the government to account. Furthermore, there is a danger that where government officials and ministers are less accountable they may be more likely to make decisions in response to vested interests – a trend that is likely to exacerbate public distrust of government and politicians.

Our experience of using the Act is that there is almost always a knee-jerk response from the government department concerned not to disclose rather than to grant access, even when asking for basic statistical information. It takes considerable effort, time and persistence to carry through a Freedom of Information Act request. That is to say it is already hard enough for the public to gain access to basic information about the workings of government. To make it even harder would reduce accountability even further and undermine public trust in the administration of government.

Corruption Watch believes that the introduction of charges would be seriously detrimental to transparency in public administration. It would essentially mean that access to information would be determined by whether an individual or organisation could afford to pay for it. This is fundamentally unjust and would skew the types of request being made. For instance, private sector organisations who could afford to make requests would be more likely to continue, while public watch dog organisations who play a vital role in holding the government to account would be less likely to be able to. Given that, as we noted in para 6, the knee jerk response from government departments' is to refuse access in the first instance, if costs were to escalate as one progressed a request to internal review and appeal stage, this would make access to information the privilege of a minority rather than a public good.

Cotswold District Council and West Oxfordshire District Council

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

This submission is on behalf of both Cotswold and West Oxfordshire District Councils.

The area of the Commission's work which we wish to comment on is its consideration of the balance between the need to maintain public access to information and the burden of the Act on public authorities.

We have already submitted data to the Local Government Association relating to the numbers of FOI requests received, where they originate from in terms of different types of organisations and individuals, and the most common FOI requests in terms of subject matter. Whilst our data will therefore be taken account of in the Local Government Association's evidence, there are some further points which we would like to make.

A large number of requests appear to come from businesses seeking information for their own benefit rather than in the public interest (as opposed to the media, charities and lobby groups etc, and private individuals). In 2014/15, the FOI requests which were openly from businesses totalled 33% at Cotswold DC and 25% at West Oxfordshire DC. However, we also receive many enquiries where the enquirer does not reveal that they are an organisation, but which by their nature and the regularity with they are received suggest that the enquirer is a business as opposed to a private individual. For instance, we regularly receive requests for lists of properties with a Business Rates credit balance from people using a gmail address and not disclosing any information about themselves. In our view these requests are from businesses as it seems unlikely that a private individual would want this data. In our view, therefore, the number of businesses submitting FOI requests is considerably in excess of the figures mentioned above and we suspect that other councils will have similar experiences.

It seems to us that a large number of the enquiries we receive are made for marketing purposes. On occasion we are asked to complete Excel spreadsheets with details of council officers or contract dates etc which we believe will be imported into a company's database and used to market products and services to us, or to other businesses which we may have identified in our replies. Whilst we accept that it is legitimate for businesses to market their products and services to public bodies and others, our disquiet is that this appears to be a major use that the FOI Act is being put to, rather than, for instance, (in the case of local authorities) disclosing information to local people about the running of their council or about local concerns.

Both councils have attempted to reduce the inflow of FOIs by publishing databases, both those required under the Local Government Transparency Code and also those about subjects where we receive a large number of enquiries eg Non Domestic Rates. However, the number of FOI requests continues unabated and although some may be dealt with by sending the enquirer a link to the database, many of the enquiries are more complex and require an individual response.

If FOI requests were confined to enquiries from the press, lobby groups and charities, private individuals and businesses pursuing genuine concerns we would consider that the burden imposed by the legislation was reasonable. However, given the amount of officer time which is being taken up with responding to marketing related enquiries (whether to market to us or other individuals), we are concerned at the burden that the FOI Act has created.

As a general point, both councils, in order to promote openness, seek to respond to all FOI enquiries received, however complex, and only apply the 'costs exemption' under S12 of the Act in exceptional circumstances. However, this does have an impact on resources.

Our estimate is that at Cotswold over 2,738 hours a year are taken up dealing with FOIs, in general, at an estimated cost of over £49,000 per year. At West Oxfordshire, our estimate is that over 2,323 hours are taken up, at a cost of almost £43,000 per year.

To increase transparency across the process as a whole, it may be preferable for an enquirer to provide a full name and address and, if appropriate, the name of the business/ organisation on whose behalf the request is being submitted.

Cruelty Free International

Introduction

Cruelty Free International welcomes the opportunity of responding to the Call for Evidence.

Cruelty Free International campaigns against animal experiments. It does so principally on ethical grounds but it also points out the often scientific unreliability of animal research. It adopts a pragmatic approach in that, wherever possible, it looks for a reduction in the number of animals used in experiments and in the suffering they endure. In particular, whilst campaigning for a change in the law, it seeks to ensure that animals in laboratories are in practice given the protection which existing legislation is intended to give them.

Cruelty Free International has been active in making and pursuing requests under the Freedom of Information Act 2000 (FOIA). It believes strongly that there needs to be far more information available about animal experiments, to inform both ethical and scientific debate and to ensure parliamentary and public accountability of governmental regulation. In our experience and in the experience of other organisations, there remains, despite some moves towards greater transparency, a real culture of secrecy around animal experiments in this country, whether at universities, private companies conducting animal experiments, the Home Office (which regulates animal experiments under the Animals (Scientific Procedures) Act 1986 (ASPA)) or other public bodies which regulate related areas (such as the Medicines and Healthcare products Regulatory Authority). The first FOIA case to reach the Court of Appeal was a Cruelty Free International one (sub nom the BUAV). 221 The organisation gave oral and written evidence to the Justice Select Committee (ISC) 2012 as part of the committee's post-legislative review of FOIA.

We have enjoyed significant success in our FOI work, which has led to greater (though still limited) scrutiny of animal experiments and the way they are regulated. Universities, for example, are now generally more willing to disclose information about their animal experiments following an FOIA request, although we may have to seek an internal review.

We always ask for information in anonymised form, even where the researchers have attached their names to animal research by publishing it or discussing their involvement on university websites. We are interested in what is being done to animals, for what purpose and with what result rather than who is doing it.

We have also made a number of successful requests for information held by EU institutions under Regulation No (EU) 1049/2001 and recently obtained a favourable ruling from the European

[221] *BUAV v The Home Office and the Information Commissioner* [2008] EWCA Civ 870 (30 July 2008)

Ombudsman in a landmark case following the refusal of the European Chemicals Agency to disclose certain information. 222 We have also used FOI laws in other jurisdictions.

Our experience has reinforced our belief that FOIA is a vital constitutional tool for greater accountability of public authorities, improved decision-making and more informed public participation in the democratic process. We are, therefore, extremely concerned at suggestions that FOIA should be weakened in a number of respects. We believe that it should in fact be strengthened.

If and to the extent that FOIA is being misused by people with unreasonable obsessions, or by commercial organisations for their own commercial purposes, the solution is to address those particular problems, not make the obtaining of information, and the accountability which follows, more difficult for everyone. For example, we would have no objection if the vexatious requests exemption were amended to embrace vexatious requesters (and strengthened in other ways).

A number of concerned individuals and organisations will be responding to the Call for Evidence. Rather than duplicate responses, we will focus on one issue (burdens on public authorities) about which we have particular concerns. In relation to question 5 (enforcement and appeal), we can say, however, that we recognise that there is a case for removing one of the current fact-finding tiers where a request has been rejected (internal review, Information Commissioner and First-tier Tribunal (Information Rights)). The process is slow and laborious for both parties and there does not need to be this many fact-finders.

Burdens on public authorities

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

The first point to make is that the various estimates which have been made of the national cost of responding to FOI requests – in the low to middle tens of millions of pounds a year – seem remarkably good value, given the improvement in decision-making (and very often, therefore, savings) which increased transparency and accountability bring. Moreover, in many cases, enhanced scrutiny may result in <u>better</u> spending. Of course, there has to be a reasonable limit on FOIA costs but the total sums currently involved are extremely modest.

The Call for Evidence also makes the point that, under the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the fees regulations), only what might be termed 'physical tasks' can be taken into account in determining whether a request would reach the 'appropriate limit'. What might be termed 'thinking time' – considering whether an exemption applies,

[222] Complaint 2186/2012/FOR (16 June 2015)

deciding what to redact and so forth – cannot be taken into account. That is a correct statement of the current position: see *The Chief Constable of South Yorkshire v Information Commissioner*. [223] We would be extremely concerned if there was any suggestion that this should change.

We note that the Government has previously rejected a proposal to allow thinking time. The Ministry of Justice Memorandum to the JSC referred to the recommendation of the report by Frontier Economics in 2006 that thinking time should be taken account, although an agreed methodology would be needed. However, the Constitutional Affairs Committee (CAC) rejected the recommendation [224] and the Government agreed with it.

The arguments pointing to retention of the status quo may be summarised as follows:

i. Removal would seriously circumscribe the right to information which FOIA creates. In the *Chief Constable of South Yorkshire* case, the Information Tribunal had cautioned:

> '*It is also clear from the time limits in the Fees Regulations [18 hours and 24 hours depending on the nature of the public authority], that if it covered the time cost of redactions, in addition to the tasks listed in regulation 4(3), many, if not most, requests involving exemptions, particularly multiple exemptions, could be refused. This ..., in our view, could not have been the legislative intent*'.

In the High Court Mr Justice Keith agreed: [225]

> '*if the time spent redacting information which is exempt from disclosure is included in the calculation, I suspect that the appropriate limit would be exceeded very much sooner than anyone could have intended*'.

In other words, removal of the exclusion would in practice result in a *substantive* change of legislative policy, not merely a change of detail. Parliament chose to include as many as 24 exemptions in FOIA. Some, such as that relating to personal information (section 40: data protection), are extremely convoluted and require consideration of separate, complicated legislation. Others, such as information provided in confidence (section 41), appear straightforward on their face but incorporate other areas of law including a mass of recent and difficult caselaw. Parliament cannot have intended to give with one hand – the right to information – but then to take away with the other – because of the inevitable need to spend time considering whether one or more exemptions apply (irrespective of whether in fact they do).

The CAC recognised that, the more contentious a request, the more time is likely to be spent considering it: [226]

> '*We conclude that the proposed regime could result in public authorities avoiding answers to embarrassing, contentious or high-profile cases as the number of internal consultees rises in proportion to the sensitivity of particular requests*'.

The result, inevitably, would be that requests in contentious areas – where the need for public scrutiny is likely to be at it strongest – could easily be rejected.

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[223] [2011] EWHC 44 (Admin)
[224] http://www.publications.parliament.uk/pa/cm200607/cmselect/cmconst/415/415.pdf
[225] Para 26
[226] Para 37

ii. There is another important aspect to this. The focus in the Memorandum was on the time spent by employees of public authorities. But 'cost' in the fees regulations also extends to legal advice. Public authorities, quite properly, do take legal advice (including external advice) about the applicability of exemptions in difficult cases. It hardly needs pointing out that the appropriate limits of £450 or £600 would be reached very quickly were legal advice sought.

iii. It is very difficult to see how thinking time could be assessed in any objective, consistent way. Some people read quickly, some less quickly. Whether an exemption applies should not depend on the lottery of whether a request comes before a slow reader or a quick reader. Similarly, some FOIA officers will be more conscientious than others in considering the exemptions. The more conscientious an officer is, the more likely the request would fail an expanded section 12 test. In some cases an almost limitless amount of time considering caselaw could be spent. The length of a document cannot be determinative – it may be more difficult to decide whether an exemption applies with a short document than with a much longer one. Would time thinking about a request in the bath be allowed? If not, why not? The Frontier Economics report acknowledged the need for an agreed methodology, but devising one would be seriously problematical if not impossible.

iv. It would be too easy for a public authority which did not want to disclose particular information to invoke the cost of compliance if thinking time were included. Public authorities should, of course, approach their task in an objective manner, disinterested as to whether application of the FOIA tests leads to disclosure or non-disclosure. The reality, sadly, is different. Ministers may become involved with controversial requests and politics therefore enter the fray.

In an FOIA request made by Cruelty Free International (then called the BUAV) of Newcastle University, the university strongly resisted the BUAV's request for information in two project licences – despite the fact that the researchers had voluntarily published the research. This is how the Information Tribunal described one of the university's major arguments – that it did not (for technical legal reasons) hold any information relating to the very extensive animal research it conducted: [227]

> *'[The BUAV's advocate] submitted that the result for which the University contended was an affront to common-sense. He submitted it would be remarkable if the University did not hold important information about extensive animal research carried out on its premises by its employees, for which it received the funds, for which it provided the facilities, the training, the ancillary staff, the drugs, the routine equipment and the necessary insurances, in respect of which the University owed duties of care to safeguard employees and the local community from biosecurity risks, in respect of which the University claimed intellectual property rights, and for which its Registrar acted as the certificate holder representing the governing body and protecting the interests of the University. We agree …, and consider the common-sense answer to be the correct one on the facts of this case …*'

[227] *BUAV v Information Commissioner and Newcastle University* EA/2010/0064

> The Newcastle example shows the length to which some public authorities may go to hide behind legal arguments, however unmeritorious, so that they do not have to disclose information. Whether suspicions of bad faith are warranted in a particular case is not the point. The very fact that suspicion exists undermines confidence in the working of FOIA. Allowing thinking time to be included would increase suspicion that public authorities could easily dispose of any request that they did not want to meet.
>
> Simply instructing external lawyers – as Newcastle did – would guarantee the appropriate limit being reached. Newcastle in fact spent over £250,000 fighting the request, according to its press release. [228]

The Coalition Agreement of the last Government said: '*The Government believes that we need to throw open the doors of public bodies, to enable the public to hold politicians and public bodies to account*'. [229] The current Government has not suggested any change in this belief, yet allowing thinking time to be taken into account would have the opposite effect.

The Call for Evidence notes that a relatively small number of requests take up a disproportionate amount of resources. That is not surprising: controversial or complicated requests are likely to be more difficult to deal with than uncontentious, straightforward ones. Nor is it a bad thing in itself: it simply means that the system is working properly. Of course, if some are taking a disproportionate time because of the unreasonable way a requester conducts himself, that should be dealt with appropriate new powers (for example, via the vexatious requests exemption). Once again, the baby should not be thrown out with the bathwater.

Otherwise, if it were felt that some lessening of the burden on public authorities is needed, it should be limited to a small reduction in the 18 and 24 hour limits spent on 'physical' activities.

We would not support the imposition of fees, however. Whilst a small flat-rate (as opposed to hourly rate) fee might not seem much of a deterrent for most potential requesters, it must be borne in mind that often, to create a picture, requests must be made of numerous authorities. For example, Cruelty Free International has made requests of universities for very basic information about the animal experiments they conduct. There are 156 universities in the UK. The burden for each university supplying the information (if animal experiments are conducted there) is very small. But it would be prohibitively expensive were Cruelty Free International to be required to pay a fee for each of the requests. The result would be that the public was denied the information. There are many other examples where multiple requests need to be made.

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[228] Dated 8 December 2011: http://www.ncl.ac.uk/press.office/press.release/item/newcastle-university-releases-project-licences1

[229] http://www.general-election-2010.co.uk/full-conservative-and-liberal-democrat-coalition-government-agreement/election-2010-coalition-government-government-transparency

Cumbria County Council

I am responding to the Call for Evidence issued by the Commission on October 2015. Please see below for the response from Cumbria County Council.

Overall summary:
Cumbria County Council welcomes the opportunity to provide evidence in support of a review of the Freedom of Information Act. Fundamentally, the Council fully supports an open data approach where openness, trust and transparency of information should be key components of a system that is designed to support the public to hold the Council to account for its decisions and actions.

The Council's position on the FOIA however is that over time it is increasingly the case that requests for information are made without regard to the intended spirit of the act. The Council is firmly of the opinion that the act should enable a common sense approach to be applied when considering and responding to information requests. In that way, inefficient and excessive use of officer time and unnecessary costs could be avoided, which we consider to be in the public interest at a time where the Council is seeking to meet the challenge of significant and unprecedented budget pressures.

The Council's responses to the specific questions posed are set out below:

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

The Council is strongly in favour of provision being made for 'safe space' to be afforded for internal deliberation on matters of strategic importance. The public interest is not always served by disclosing internal deliberations before the Council has reached a settled position or decision on a matter. Section 36 of the Act does provide some protection, however it is used sparingly by the Council and as a 'last resort' option to protect the Council from disclosing information relating to internal deliberation.

Currently, requests for information under the FOIA are required to be handled immediately (20 working days), however the Council is strongly in favour of closer alignment with the provisions of Regulation 12(4) (d)-(e) of the Environmental Information Regulations 2004. These allow public authorities to take account of incomplete, unfinished or documents still in the course of completion or internal communications. Additionally, it is the Council's view that information may remain sensitive after a settled position has been reached, however this is circumstantial and based on the issues attached to each individual case.

Taking account of the gap between FOIA and EIRs would begin to address the 'chilling effect' of the current legislation and some of the recordkeeping practices of public authorities. Many public

authorities are already concerned about the lack of protection afforded to specific types of information by the FOIA. In the Council's experience there is an increasing expectation from those requesting information that nothing should be exempt from disclosure and the existing provisions of the Act offer little by way of protection for the legitimate interests of public authorities.

What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?

Whilst the council understands that this applies to collective Cabinet or ministerial responsibility it is in broad agreement that information generated at this level should be afforded a reasonable level of protection. However, there should not be any distinction made in the level of protection given to information classified as 'collective Cabinet discussion' and 'internal deliberation', as this could potentially be difficult to administer and defend in future. It is clear that there should be some provision to protect internal discussions and the right to deliberative 'safe space'.
Where there is an overriding, demonstrable public interest in disclosing information this protection should be waived.

The time period quoted in the consultation document (20 years) appears reasonable.

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

The Council is strongly in favour of space to be afforded within the Act for candid identification, assessment and recording of risk and associated mitigating actions. In certain circumstances, disclose of risk information may not be in the public interest, and could increase the risk of litigation against the Council.

The Council is therefore strongly in favour of protection to enable proper and rigorous risk management processes to be applied and recorded in order to protect the Council's interests and to protect the interests of local Council Tax payers.

It is the Council's view that the timing of a disclosure should be dependent on an objective view, balancing the public interest with any potential damage to the Council and local taxpayers. In certain circumstances information may require to remain sensitive for up to the full 'litigation period' of 6 years from the point of recording risk information.

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

The Councils in favour of a veto based on case by case basis and that responsibility to exercise a veto should be at officer level. The veto should rest with the Council's Monitoring Officer whose role it is to ensure the Council is acting lawfully.

Any veto should be the product of an objective, common sense view based on the balance of public interest in each case, and not restricted to the interests of a small number of individuals.

In line with the response to 01 above, the balance of public interest should include consideration of the actual cost and resources required to make a disclosure, as well as the public interest in the information itself.

Should the Council's Monitoring Officer have a veto, this will have obvious implications for the rest of the Act as it will effectively override all other exemptions.
It is important to note that the veto would not be used to simply prevent disclosure of information that may embarrass the Council or Council Officers. It would be the importance and seriousness of the information requested that would tip the balance in favour of public interest and disclosure.

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

In the Council's experience the current three tier process: (1) request response,(2) Internal Review and (3) ICO Complaint/Tribunal; is ineffective, resource intensive and very rarely results in any amendment to the initial disclosure. Consequently, the Council is in favour of a system where our initial response is fully considered and signed off at a senior level, allowing for the applicant to complain directly to the Information Commissioner. Consequently, the Council is strongly in favour of removal of the 'Internal Review' process.

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

The Council fully supports an open data approach where openness, trust and transparency of information should be key components of a system that is designed to support the public to hold the Council to account for its decisions and actions.

However, the Council's view is that over time the genuine public interest angle has been diminished and that provision should be made to reduce the burden of the FOIA.

In practice it has become increasingly evident that we are missing the point of the act, which should be about enabling access to information in order to hold the Council to account.
Consequently, the Council is strongly in favour of a redefinition of the purpose of the Act that will support the Council to take a common sense approach to disclosing information. In turn, this would enable the Council to balance the public interest with cost and resources required to provide information.

In order to reduce the burden further, and in line with the original spirit of the Act, Council's should be afforded the right to decide whether requests are vexatious and frivolous, and should be able to refuse 'commercial' requests that are submitted by requesters to avoid cost and proper process eg property search. Council's should also be enabled to refuse media requests that could be considered as 'lazy journalism' that will clearly not inform genuine investigative journal ism or that will not result in 'news' that is not in the public interest.

All of the above types of requests create a disproportionate burden and in line with the response above on the executive veto, the Council is in favour of these being considered on a case by case basis.

Finally, S12 of the Act allows the Council to refuse a request on the grounds of unreasonable cost and the current threshold is set at 18 hours of officer time. This threshold currently represents just under 50% of a full time equivalent post and the Council is strongly in favour of a significant reduction of the threshold to nearer 7 hours which is closer to a full working day.

Duncan McQueen
Senior Manager - Performance and Risk