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Director General, Propriety & Ethics
[redacted]

John Edwards
Information Commissioner
[redacted]

09 February 2023

Dear John,

GOVERNMENT RESPONSE TO ICO'S CONSULTATION ON PRIORITISING ACCESS TO INFORMATION COMPLAINTS

The Government is grateful for the work of the Information Commissioner and his Office in deciding complaints that information requests have not been dealt with in accordance with Part I of the Freedom of Information Act ("the Act"). We welcome the Commissioner's decision to consult on his proposed approach to prioritising access to information complaints and recognise the work and careful thought that has gone into the Commissioner's proposals. The Government's response to the Consultation is set out below. This response is specifically focused on the Information Commissioner's Office's ("the ICO") approach to the performance of its functions under the Freedom of Information Act and should not be taken as a broader Government view on the ICO's management of all of its regulatory regimes and their associated casework.

The Government recognises the recent success of the Information Commissioner and his Office at reducing the backlog of casework at the ICO. We agree that it is in the interests of all parties and of transparency that this should be addressed and delays kept to a minimum. The Government supports the ambition of the ICO to clear their backlog and to explore new approaches to casework which will help them manage their caseload effectively going forward.

The Information Commissioner is independent of Government, and it is not for the Government to interfere or intervene with the way in which he chooses to organise the resources available to him in order to perform his regulatory functions. It is, however, for the Government to ensure that the provisions of the Act are implemented as Parliament intended them to be, and to set the policy framework for Freedom of Information. The Government has considered the ICO's questions seriously from the perspective of the legislation underpinning the office, and whether the proposals are in accordance with the way in which Parliament established the office and the FOI regime. Our individual responses reflect this consideration.

The Government supports the Information Commissioner prioritising complaints in truly exceptional cases, where there is an objective urgency to deciding the complaint and where the Commissioner is satisfied that it is justified. Any process of expedition or new approach to casework should meet the principles underpinning the Act and those of public law.

Our response to the specific questions asked in the Consultation are as follows.

Question 1: Do you agree that, to maximise the benefit from the resources available to the Commissioner for his work on access to information complaints, he should prioritise cases of more significant public interest rather than continuing the 'cab rank' approach of dealing with cases in date order? If you don't agree, please explain why?

It is in the interests of all parties and of transparency for requests to be dealt with as quickly as possible throughout all stages of the decision-making process and the Government is committed to working constructively with the Commissioner to achieve this.

The Government believes that individual complaints should only be prioritised over other complaints in truly exceptional cases, where there is an objective urgency to deciding the complaint and where the Commissioner is satisfied that doing so is justified. The prioritisation of certain types of request or applicant, will impact on all applicants. In our view, the Commissioner should therefore give consideration to the requirements of, and the potential delay to, those whose complaints are not prioritised, as well as to the public authorities involved which may need to divert resources from other priorities to meet tight deadlines.

The threshold which an applicant must cross before their case is expedited and given preferential treatment should be high. In exercising his discretion to deploy the resources available to him, we would recommend that the Commissioner follows the procedure of the Courts and Tribunals, in establishing whether there is an objective urgency to deciding the claim, the nature of the 'urgency' and whether it is justified. Urgency should be considered on a case by case assessment and the question that should be asked is whether it is 'absolutely essential' that a decision notice is served by a given date.

The consultation suggests that cases of 'more significant public interest' should be prioritised. The 'public interest test' is a significant feature of the Act itself, but it is a second order question which follows a determination of whether or not a qualified exemption applies. Although there is a general presumption running throughout the Act favouring disclosure, the consideration of the public interest arguments must relate specifically to the exemption applied and that can only be done once it has been established that the correct exemption has been applied.

The consultation states that prioritisation does not mean that ICO will predetermine the outcome of the case, however the Commissioner may wish to acknowledge that the act of identifying and giving special preference to cases where he believes there is a public interest raises expectations amongst all parties that he will favour the arguments for disclosure even though he will not at that stage have considered all the factors as required.

Question 2: Do you agree with the proposed factors that will inform the ICO's decisions on which cases to prioritise? If not, which do you not agree with and why? Are there any additional factors you would include?

The Government supports complaints being prioritised in truly exceptional cases, i.e. where there is an objective urgency to deciding the complaint and where the Commissioner is satisfied that it is justified. Complaints should not be prioritised on an assessment of the 'public interest', especially where the factors to be considered are subjective.

The proposals in the consultation, in the Government's view, would create a two-tier system based on the characteristics of the applicant or the request, providing a significant group of applicants with quicker access to justice than others. The right of access in the Act is not restricted; 'any person' can make a request for information to a public authority. There is no need for an applicant to have a particular standing to seek information nor is there anything in the Act that gives greater rights to a certain class of applicant or request.

We consider that this equality of access is a fundamental feature that is intended to flow through all stages of the decision-making process. There is no statutory basis for the institution by the Commissioner of a rigid, two-tier system of complaints handling or of hard-edged criteria. As we understand it, the proposal is that it will be sufficient for the request/applicant to meet just one of the criteria to have their request prioritised above others. In introducing the Act the then Government was clear that no single factor would constitute the "public interest", that the outcome of a public interest test could not be predicted in advance and that a case-by-case approach would be necessary.

We would therefore strongly urge the Commissioner to drop the proposed criteria and instead apply an 'objective urgency' test.

Should the Commissioner not be minded to do so, we make the following comments on the criteria/factors that are outlined on pp 4-5 and at Annex A of the consultation.

Impact of Complaint

The Commissioner proposes measuring the impact of the complaint (by which we presume he means measuring the impact of the disclosure of the information sought) by considering the following factors:

- Significant media interest
- Needed for public consultation within 1-6 months
- Involves large amount of public money

None of the above factors are, of themselves, objective tests of the 'public interest' or of 'urgency'. In particular, case law has established that there is a distinction to be made between matters which are in the interest of the public to know and matters which are merely interesting to the public; the degree of media interest is not an objective test of the public interest.

Requestor raising information rights awareness

The Commissioner proposes that requests from the following groups should be prioritised:

- journalists
- civil society groups, or otherwise on behalf of others
- elected representatives

Using the identity of the applicant as a determining factor for prioritisation runs contrary to the fundamental principles underpinning the Freedom of Information Act.

As stated above, the right of access in the Act is not restricted; 'any person' can make a request for information to a public authority and there is no need for an applicant to have a particular standing to seek information. Equality of access is reflected in all parts of the Act including in section 50(1) which states "any person… may apply to the Commissioner".

It is well-established that the consideration of a request should be treated as applicant-blind. That requirement does not end once an application is made to the Information Commissioner. In the consultation, the Commissioner equates the applicant-blind principle to the fact that a disclosure to an applicant is, in effect, a disclosure to the wider public. We consider this a narrow interpretation of the principle.

Seeking the disclosure of information for public or private interests are equally valid uses of the rights contained in the Act and one motive should not be favoured over another. We would caution against the underlying presumption in the consultation that the characteristics of an applicant automatically imbues their request with a higher value than those of others. Whilst members of the groups listed in the consultation may be seeking information which is in the public interest, there will also be instances where information sought by those groups is for their own private interests. It does not automatically follow that because the applicant is a journalist or MP, their request carries an urgency, and invariably raises issues of public importance, such as to justify the placing of their request ahead of other applicants. If cases from such persons were invariably fast-tracked then this would be a re-writing of the constitutional scheme for FOI requests without Parliamentary scrutiny.

Moreover, logistically we are concerned that by favouring certain groups above others, the Commissioner may create a false economy whereby applicants seek to have their requests sponsored by individuals in those groups. It should also be noted that elected representatives already have avenues beyond that of the ordinary citizen to obtain information (e.g. PQs for MPs; access to papers for councillors, etc).

We note that ICO will be changing their processes so that requestors will self-identify if they fall within one of the prioritised categories. Many requestors, including journalists and NGOs, use private email addresses or whatdotheyknow. Some applicants will reasonably not want to self-identify their profession (e.g. a whistleblower), and will be disadvantaged as a result. Requiring applicants to provide additional personal information in order to receive preferential treatment seems inappropriate and possibly raises UK GDPR issues on the necessity of processing of

such sensitive data. Most problematic is any proposal that an applicant unable or unwilling to elaborate on their identity and/or motive is penalised both by the delay to consideration of their complaint, and by the devotion of reduced resources to the consideration of it.

Vulnerability of impacted individual/group

The Commissioner will prioritise those applications where the disclosure of the information requested would:

- potentially have a significant impact on vulnerable people or groups;
- has a high potential impact or harm on a proportionately large number of people nationally or in a particular locality;
- that may directly affect the requestor's health or another issue that means they need a swift resolution (e.g. it may impact on treatment or is about a live court case).

It is foreseeable that applicants in this category may submit requests that meet an 'objectively urgent' test. However, such an assessment could only be made on a case by case basis and the question that should be asked is whether it is absolutely essential that a decision notice is served by a given date.

Again, there appears to be an underlying presumption in the consultation that the characteristics of an applicant automatically imbues their request with a higher value than those of others. Whilst members of vulnerable groups listed in the consultation may be seeking information which is in the public interest, they may also be seeking information for their own private interests, particularly where the information relates to their own treatment or civil court cases.

Regulatory Benefit

The Commissioner says that he will prioritise those cases where there is a regulatory benefit such as requests which are:

- novel or could provide the basis for guidance or support for other regulated bodies;
- linked to a response to several similar cases, and quick resolution would help this; or
- part of a round robin request.

We welcome the Commissioner's consideration of new and innovative approaches to his casework to enable him to process all requests more quickly. Triaging cases on the above basis seems a sensible approach but we are not convinced that any of the factors listed are relevant to a public interest test and, of themselves, justify prioritisation.

Question 3: Do you have any comments on the service standards (or Key Performance Indicators) we should set for dealing with our FOI and EIR complaints?

We welcome the Commissioner's ambition to complete 90% of all cases within six months of receipt. For the reasons set out above, we do not agree that there should be a group of requests that is prioritised above others.

We note that the introduction of prioritisation principles is designed to address "some of the delay that has crept into the system". Any delay in the decision-making process is detrimental to the purpose of the Act, and we welcome the ICO's commitment to tackling its backlog. However, we are not certain that the introduction of a further level of decision-making at the initial application stage would allow the ICO to meet its targets or would result in a speedier system for all applicants. We would also question whether, holistically, the prioritisation of certain cases at the ICO stage will be of benefit, especially in those cases which are contested and likely to be the subject of appeal.

Question 4: Do you agree that 6 weeks is sufficient time to bring a complaint to the ICO? If not, please explain why you think additional time is needed or what any exception criteria should include?

The duty of the Information Commissioner is to make a decision on all complaints made to him and Parliament has chosen to prescribe in the legislation those limited circumstances in which the Commissioner may decide not to investigate. In making our comments on this question and question 5 we are mindful that a decision not to investigate using section 50(2) denies the applicant the right to appeal to a tribunal on the substance of their request.

The term "without undue delay" requires a case-by-case analysis, taking into account the circumstances and conditions of each case. We agree that six weeks is usually sufficient time to bring a complaint to the ICO. However, given that an individual's only recourse to justice if the Commissioner decides not to make a decision is an application via Judicial Review, the Commissioner will want to be satisfied that the implementation of this deadline is not arbitrary.

Question 5: Do you have any comments on the ICO's approach to implementing the Commissioner's statutory right to not make a decision where a complaint is vexatious or frivolous?

We do not agree with an interpretation of 'frivolous' that equates to "not of high public interest" and do not consider that this was Parliament's intention when including "frivolous" as one of the specific circumstances in which the Commissioner can decide not to investigate. A frivolous claim is one of no serious intent and it would be wrong to read into that definition a public interest test. In accordance with the general right of access running throughout the Act, the legislative threshold for the Commissioner refusing to decide a complaint has been set high.

The extent of the powers enjoyed by the Commissioner under section 50(2) is strictly circumscribed. It requires the exercise of a judgement, made by the application of the

criteria set out therein. We would be concerned by any attempt to expand or confine the criteria, expressed in ordinary language by statute.

Additional Comments

Environmental Information Regulations 2004

Most of the comments we have made apply to both the Act and the Environmental Information Regulations 2004 ("the EIRs"), but it is essential to note the international obligations underlying the EIRs. These obligations are derived from the UK's position as a Party to the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters ("the Convention").

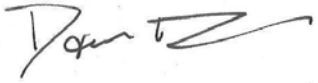
The Convention gives the Parties considerable freedom to establish their domestic review procedures. The United Kingdom has made provision in the EIRs for an internal review and subsequently an appeal to the Information Commissioner. In requiring an appeal to the Information Commissioner as an administrative step before an appeal to a court of law, the EIRs follow the same procedure as in Part IV of the FOI Act.

The Aarhus Convention treats all applicants as equal: any natural or legal person may submit a request for environmental information to any public authority in any Party to the Convention. Applicants exercise those rights "without an interest having to be stated" and without needing to give their name. This means that applicants opting to be entirely anonymous do not surrender any access rights and enjoy the same standing as applicants who identify themselves and their professional or personal interest in the environmental information requested. The proposed criteria would benefit some classes of applicant while delaying resolution of complaints for other applicants, generally to the disadvantage of those applicants choosing to exercise their legal right to anonymity.

Information rights are a devolved matter in the UK, although currently only Scotland has its own legislation, Information Commissioner, and appeals procedures. The rights and remedies under the Convention must be available across all parts of the UK. This means there is a risk that the UK Commissioner's introduction of a system for prioritising complaints may give rise to accusations of unequal compliance across the UK if the Commissioner diverges from the approach taken by the Commissioner in Scotland.

Thank you, once again, for the opportunity to comment on this work.

Yours sincerely,



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