Independent Commission on Freedom of Information: Call for Evidence

Response of the Information Commissioner

16 November 2015

Introduction

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

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

    - Evidence to the Justice Select Committee's post legislative scrutiny of FOIA (2012)[1].
    - Response to the Ministry of Justice consultation on draft FOI and DP appropriate limit and fees regulations (2007)[2].
    - Speech by the Information Commissioner at the London School of Economics (2015).[3]
    - Response to the Ministry of Justice consultation on Tribunal fees (2015)[4].

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

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

[3] 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/

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

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

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

International benchmarks

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

6. There have been many studies seeking to compare and rank different countries' access to information legislation. Comparison is a difficult task. However, work by international bodies can illustrate emerging benchmarks for effective FOIA regimes. For example, a UNESCO study[5] states that 'exceptions should be clearly and narrowly drawn and subject to strict harm and public interest tests.'

7. It is also important to recognise the role that the Environmental Information Regulations 2004 (EIR) play in facilitating access to information in the UK. The EIR are based on Directive 2003/4/EC on public access to environmental information, and the Directive implements the international Aarhus

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

[5] Freedom of Information: A Comparative Legal Survey. UNESCO. http://portal.unesco.org/ci/en/file_download.php/fa422efc11c9f9b15f9374a5eac31c7efreedom_info_laws.pdf

Convention[6]. These instruments serve as useful indicative standards for access to information internationally. Whilst there are some differences between EIR and FOIA, they are broadly comparable and provide an effective overall system for access to information for England, Wales and Northern Ireland, and for reserved bodies in Scotland. The impact of any significant divergence between the regimes should be carefully considered.

8. As an international benchmark the Commissioner also highlights the relevance of the Council of Europe Convention on Access to Official Documents[7], adopted in 2008. Relevant extracts:

> *Article 3 – Possible limitations to access to official documents*
>
> *1. Each Party may limit the right of access to official documents. Limitations shall be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:*
>
> *…*
> *k. the deliberations within or between public authorities concerning the examination of a matter*
>
> *2. Access to information contained in an official document may be refused if its disclosure would or would be likely to harm any of the interests mentioned in paragraph 1, unless there is an overriding public interest in disclosure.*
>
> *Article 7 – Charges for access to official documents*
>
> *1. Inspection of official documents on the premises of a public authority shall be free of charge. This does not prevent Parties from laying down charges for services in this respect provided by archives and museums.*
>
> *2. A fee may be charged to the applicant for a copy of the official document, which should be reasonable and not exceed the actual costs of reproduction and delivery of the document. Tariffs of charges shall be published.*

[6] UN/ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters
http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf

[7] Council of Europe Convention on Access to Official Documents.
https://wcd.coe.int/ViewDoc.jsp?id=1377737 (the Commissioner acknowledges that the UK is not yet a signatory)

Article 8 – Review procedure

1. An applicant whose request for an official document has been denied, expressly or implied, whether in part or in full, shall have access to a review procedure before a court or another independent and impartial body established by law.

2. An applicant shall always have access to an expeditious and inexpensive review procedure, involving either reconsideration by a public authority or review in accordance with paragraph 1.

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

9. The Commissioner seeks to show that effective protections for internal deliberations are already available under sections 35 and 36. He has published updated guidance on both exemptions - learning from case law and his understanding of how public authorities work. In 2013 new guidance was issued on section 35[8], to clarify the Commissioner's approach to concepts such as 'safe space' and 'chilling effect' when considering the public interest test. In 2011 the Commissioner published revised guidance on section 36, clarifying his approach to considering the qualified person's opinion[9] and the public interest test.

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

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

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

[9] Information Commissioner. Section 36 guidance. https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf

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

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

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

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

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

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

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

15. The annual freedom of information statistics for central government for 2014 illustrate that the section 35 exemption was used to withhold information for 598 requests and for section 36 it was 420 requests[10]. It is relevant to look at these figures in the context of the number of decisions where the Commissioner has upheld complaints. This reveals that the percentage of cases where government departments have been ordered to disclose information, denying the protection claimed, is very small:

    Section 35
    10/598 = 1.7%

    Section 36
    18/420 = 4.3%

    Overall
    28/1018 = 2.75%

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

17. There is limited evidence from research to suggest that disclosures made under FOI have a significantly detrimental impact on the candour of advice, the quality of policy outputs or quality of record keeping. 2009 research

[10] Freedom of Information Statistics: Implementation in Central Government 2014 Annual and October – December 2014
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/423487/foi-statistics-oct-dec-2014-annual.pdf

conducted by the Constitution Unit at University College London made the following finding:

> *"Overall, however, none of the officials we interviewed thought that FOI was having or would have a significant impact on the nature of the decisions that the government was seeking to make (ie no actual decision would be different because of FOI concerns). And while, it might well lead to less being recorded in future, it was only one of a number of factors which were having a similar effect, including the greater informality of the relationship with Ministers and third parties, concerns about legal challenge; and resource pressures which were leading to less material being properly filed. In that sense, FOI was part of a general trend towards fewer written records rather than the dominant factor behind the trend. That said, the trend as a whole was not to be welcomed."*[11]

18. The Commissioner has not noted any impact of FOI on record keeping in the Information Management Assessments published by the National Archives[12].

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

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

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

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

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

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

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

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

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

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

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

- a safe space to reconsider options if debate is reactivated – paragraph 84;
- a safe space to present, explain and defend a decision (for a short time) – paragraph 87;
- a safe space for any related/similar ongoing debates – paragraph 89;
- generic chilling effect arguments (albeit of limited weight) – paragraph 201;
- specific chilling effect on other specified policy debates – paragraph 203;
- collective responsibility and the united front – paragraph 209.

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

> *'Even if the policy in question is finalised, a department might argue that disclosure would affect other policy debates. The weight of these arguments will depend on the circumstances. A department might still need a safe space for other ongoing policy debates if they are so similar or related that disclosure of one is likely to interfere with the other. Chilling effect arguments may also carry more weight if a department can point to a specific policy debate and explain why it is particularly likely to be affected. However, generic chilling effect arguments about unspecified future policy debates are unlikely to be convincing, especially if the information in question is not particularly recent.'*

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

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

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

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

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

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

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

27. The Commissioner has always accepted, in both his guidance and decisions, that the constitutional convention of collective responsibility must be accorded due weight when considering the public interest test under sections 35 and 36 (though the vast majority of cases fall under section

35). The process of collective Cabinet discussion and agreement is clearly deserving of significant protection. Maintaining the doctrine of collective responsibility will always carry significant public interest, even after a decision is taken. This may be reduced to some extent due to significant passage of time, if relevant individuals are no longer politically active, and/or confidentiality has already been undermined due to published memoirs or other public statements.

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

Outcome of decisions on collective responsibility arguments

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

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

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

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

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

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

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

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

30. The Commissioner recognises the small number of cases where he has ruled that the public interest has overridden the principle of collective Cabinet responsibility, most notably in the case involving the 2003 Cabinet minutes related to the decision to go to war with Iraq. [13] Such cases have been exceptional and demonstrate the importance of the public interest test. The veto was exercised to overrule the Commissioner's decision in the Iraq case. In the only other cases where the Commissioner ordered disclosure due to overriding public interest, the passage of time was also significant (at least six years, and in one case as much as 20 years).[14]

31. In the few remaining cases where the Commissioner has ordered disclosure, the key factor was either a very significant passage of time (between 19 and 22 years)[15], or the very high level or otherwise anodyne nature of the information, which did not reveal the actual content of a relevant discussion.[16]

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

33. The Commissioner welcomed the introduction of the 20-year rule (down from the previous 30 years), that meant that section 35 and 36 exemptions could not be claimed at all after 20 years. However, the Commissioner believes it is a much harder task to assess how long absolute protection

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

should last. The current regime provides important flexibility, which can provide protection for significant periods of time if the context demands it, and also better serves the public interest in disclosure.

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

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

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

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

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

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

39. Government policy on publishing information related to risk has changed over time. Previously, FOI requests for 'red, amber, green' (RAG) status of gateway reviews were refused. However the Major Projects Authority now publishes RAG status in a regular report summarising key indicators from project assessment reviews (PAR), the replacement for gateway reviews[17].

40. Some public authorities do publish risk registers, often in some detail. See, for example, the Care and Support Reform Programme Board risk register for 2014[18]. The Health and Social Care Information Centre has disclosed its Corporate Risk Register under FOIA[19].

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

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

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

- FS50497586 - Department for Work and Pensions – universal credit Risk Register. This was a later request for the risk register. The DWP noted that the content of the register had changed since the previous request. The Commissioner ruled that the weight of the safe space and

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

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

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

chilling effect arguments had lessened since the previous request as the relevant secondary legislation had been passed and the project was moving on, but they still carried strong weight because the project was being 'reset'. The DWP argued that there was a need for 'imaginative pessimism' in identifying all possible risks, and the Commissioner noted that there was a large amount of frank and candid consideration of risks, and this could be prejudiced in future if the information were disclosed now. This outweighed the very strong public interest in disclosure.

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

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

44. The veto has been used sparingly over the last 10 years, seven times in all. The Commissioner has on occasion expressed concern about its use in particular cases, questioning whether they were indeed exceptional; but overall the effect on the ability of FOIA to deliver transparency has been limited. The only time the Commissioner has sought to challenge the use of the veto via judicial review has been in the HS2 case under EIR, which was a broader matter of principle in relation to the EIR[20]. In the context of a public interest test applying to a wide range of exemptions, such as sections 35 and 36, the existence of an executive override, to be used in exceptional cases, can be regarded as a proportionate and reasonable provision.

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

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

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

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

47. If a public authority does not comply with a FOIA decision notice, enforcement notice or information notice, the Commissioner can instigate proceedings for contempt of court. This backstop ensures that the Commissioner's decisions and investigations are effective. Notwithstanding the observations on the veto made at paras 43-5 above, the Commissioner would be concerned if any fragmentation was made to his power to order disclosure in a binding decision.

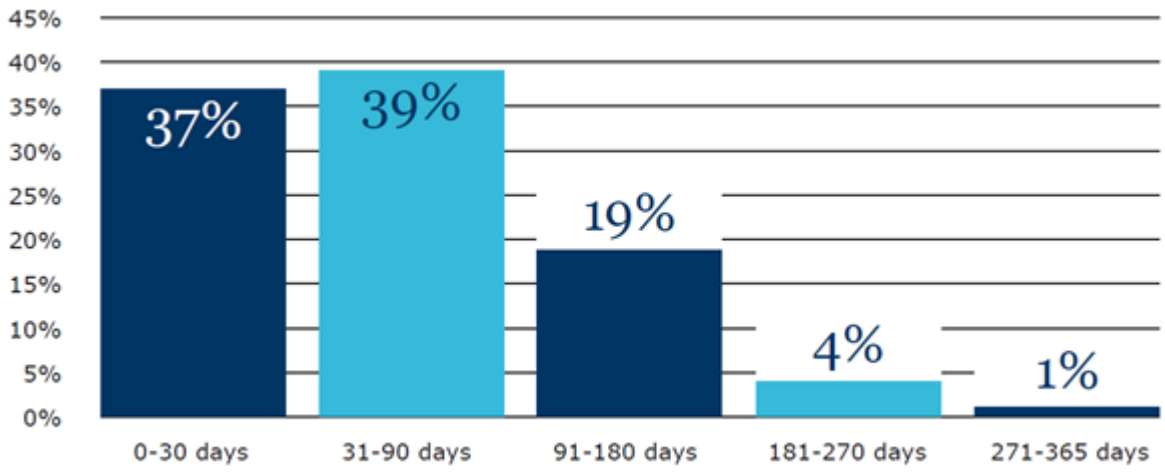
48. It remains a challenge for the Commissioner to tackle issues such as delays by public authorities in meeting the 20 working day limit, delays to internal review, and unreasonable extensions of time to consider the public interest test. The Commissioner highlighted the issue of timeliness in his evidence to the Justice Select Committee[21]. The Commissioner will continue to need the full range of his powers to tackle these issues and FOIA may need to be strengthened in this respect.

49. In terms of the performance of his office, the Commissioner can point to clear evidence as to how the ICO effectively resolves complaints. Concerns were expressed in earlier years regarding delays in complaint handling. Significant improvement has been achieved over the last five years. Recent annual reports illustrate the ICO's performance[22]. The latest data from the 2015 illustrates that over 90% of FOI complaints are resolved within six months.

[21] See sections 11 and 12 of the evidence.

[22] ICO annual reports https://ico.org.uk/about-the-ico/our-information/annual-reports/

50. Distribution of FOIA caseload as at March 2015



51. Customer Research commissioned by the ICO in 2012 showed 72% of FOI complainants fairly or very satisfied with our complaint handling. 37% of those who didn't get what they wanted nevertheless said they accepted the ICO's explanation[23].

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

53. The Commissioner recently responded to the Ministry of Justice's Consultation on Further Fees Proposals (September 2015). He responded to questions about fees for appeals made to the General Regulatory Chamber of the First-tier Tribunal and whether there should be an exemption from fees[24].

54. The response highlighted the public interest served by appeals to the First-tier Tribunal and how fees could impact on the process. The Commissioner also questioned whether fees would achieve the aims sought from reform. The response raised a number of questions about how fees may operate in practice and some possible unforeseen impacts. The Commissioner's response recognised that levying fees for appeals to the Upper Tribunal would be reasonable.

[23] https://ico.org.uk/media/about-the-ico/consultation-responses/1432482/complaint-handling-wave-1-research-report-september-2012.pdf

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

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

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

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

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

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

59. The Commissioner has consistently maintained that public authorities could make better use of the provision for vexatious requests under section 14. More confident application of the provision would prevent significant abuse of FOIA rights and excessive burdens from particular requests. He has

pointed out that most public authorities successfully apply the provision. Since the Commissioner's new guidance on section 14 was issued in 2013, he has accepted that section 14 was engaged in 84% of cases; for central government departments he agreed that section 14 was engaged in 78% of cases.

60. Case law on section 14 of FOIA has developed considerably over the last 10 years. The test for applying the provision has become more flexible. That is not to say that the public authorities should lightly move to reject requests using section 14; there are some significant thresholds to be met, but public authorities are often over-cautious in using the provision. Guidance on section 14 has evolved considerably since 2005. Initially the Commissioner's guidance focused on a multi-part test that had to be satisfied; this has now evolved to a more flexible test. If the request is 'likely to cause a disproportionate or unjustified level of disruption, irritation or distress then this will be a strong indicator that it is vexatious'[25]. This has recently been supported by the Court of Appeal in the case of Dransfield and Craven.

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

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

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

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

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

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

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

65. The impact of a flat fee in reducing the number of requests is well documented, evidenced from the charges imposed in the Republic of Ireland. The Commissioner is concerned that a flat fee would be a disproportionate measure because of its deterrent effect on a wide range of requests and requesters. It is worth noting that a flat fee of £10 (the same as for a subject access request under the Data Protection Act) would not enable public authorities to recover costs. It should also be recognised that charging a fee in itself creates an administrative burden, which is one reason why public authorities do not usually do it; the Constitution Unit found in 2010 that 62% of authorities they surveyed never quoted a fee for answering a request[26].

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

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

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

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

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

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

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

backstop of a strong FOIA and associated enforcement regime.

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

- MOT test data is now regularly published following an FOI request;
- Nationwide data on landlords who have been convicted of offences under the Housing Act 2004 is now available;
- The move towards standard publication of food hygiene ratings was driven by FOIA requests for restaurant inspections held by local councils;
- More information is now published about the process of applying to open free schools.

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

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

- An investigation by BBC Radio 5 Live into the number of outstanding child abuse cases, picked up by The Sun, Daily Mail and Daily Star (8/11);
- Town councillors claiming £1bn in allowances and expenses over five years (Sun 8/11);
- Police and Crime Commissioners redeploying senior officers to support them in administrative roles (Mail on Sunday 8/11);
- 26 'terror' prisoners being held in medium security Category B jails (Sunday Star 8/11);
- Action to be taken to stop primary schools 'cheating' at KS1 exams (Times 7/11);
- House of Lords reviewing its IT register after the Press Association exposed 'chaotic' record keeping (Mailonline 6/11);
- The number of children seeking advice about gender identity has risen by 100 per cent (Guardian 5/11);
- HMRC has £2.6 million in unpaid bills including invoices from small businesses and charities (Daily Mail 4/11);
- The Sunday Times (8/11) told the stories of several police widows, who were no longer entitled to their husbands' pensions because they had

remarried. The stories were backed up with information obtained through FOI about the number of spouses who lost pension rights in that way;

- The Sun (8/11) ran a piece about the number of mother and baby deaths in UK hospitals by speaking to families who had lost loved ones. The article was backed up with FOI information about the number of maternity units that had been temporarily closed.
- The Daily Mail covered an investigation by the Forum of Private Businesses that looked at 300 FOI responses to conclude that English councils are paying suppliers promptly (7/11).
- Most of the media covered a report by the Children's Society that drew on statistics obtained through FOI that some 45,000 teens were not reporting sex attacks (4/11).
- Plaid Cymru discovered, through FOI, that there are 1,240 full-time equivalent nursing vacancies across Wales' seven health boards (ITV, 2/11).

73. Evidence from local government indicates that the public are consistently the largest category of user making FOIA requests[27]. As just one example it is relevant to look at the different requests made by members of the public for information about school playing fields[28].

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

75. FOIA can rightly challenge and pose awkward questions to public authorities. That is part of democracy. However, checks and balances are needed to ensure that the challenges are proportionate when viewed against all the other vital things a public authority has to do. The Commissioner believes that the current checks and balances in the legislation are sufficient to achieve this outcome.

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

[28] Search results on "school playing fields" from FOIA request website "What do they know": https://www.whatdotheyknow.com/search/school%20playing%20fields/all

Appendix – outstanding areas of FOIA reform

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

Destroying records-enforcement of section 77

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

Private companies and public funding

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

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

Internal reviews

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

Other remedies for non-compliance with time limits

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

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

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

On the subject of outsourcing and FOI the Commissioner would also highlight the report he published in March 2015 – a roadmap for improving transparency of outsourcing[29]. This highlighted the need to consider a number of policy options, including designation under FOIA, to address the transparency gap emerging.

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