

The Information Commissioner's written evidence to the Public Administration and Constitutional Affairs Committee's inquiry into sourcing public services: lessons learned from the collapse of Carillion

Executive summary

- The collapse of Carillion should lead to a broader consideration about a lack of transparency in public sector outsourcing.
- The growth in the outsourcing of public services has led to a fall in transparency, as freedom of information laws have not always been able to follow the public pound.
- The Information Commissioner is clear that freedom of information legislation should be extended to enable greater transparency in the delivery of modern public services. This would promote democratic accountability but also act as a driver for improving contractual oversight and service delivery.
- The Commissioner acknowledges that while some progress has been made in trying to improve transparency in outsourcing, particularly in relation to contracts, these measures have not gone far enough. She believes that policy interventions are required to address the emerging transparency gap, and these may need to include formal FOIA designation of some outsourced providers and amendment to the definition of 'information held' in the Freedom of Information Act (FOIA).
- The Commissioner will be submitting a report to Parliament later this year calling for a modernisation of freedom of information.

Introduction

1. The Information Commissioner has responsibility in the UK for promoting and enforcing the Data Protection Act 1998 (DPA), the Freedom of Information Act 2000 (FOIA), the Environmental Information Regulations 2004 (EIR), the Privacy and Electronic Communications Regulations 2003 (PECR).
2. The Commissioner is independent of Government and upholds information rights in the public interest, promoting openness by public bodies and data privacy for individuals. She does this by

providing guidance to individuals and organisations, solving problems where she can, and taking appropriate action where the law is broken.

3. The Information Commissioner welcomes the opportunity to respond to the call for evidence. Her interest lies primarily in the question on oversight and accountability of public services:

Question 3. Given the concentration of outsourced public sector contracts into a small number of large companies do the rules on oversight and accountability of public services need to change?

4. Some of the most important public services, including the provision of housing, health and social care, public transport and the running of prisons, are delivered under contract by private sector organisations. Citizens' access to key information relating to the provision and delivery of these services is limited by the Freedom of Information Act. Contractor held information is available where the contract makes it clear that it is held on the public authority's behalf – where the contract is silent the information is likely to be outside the reach of the Act.
5. As the government itself acknowledges in its recent consultation¹ on the revised FOI code of practice "as more public services are contracted out to the private sector it is important that they are delivered in a transparent way, to ensure accountability to the user and taxpayer".

Background

6. In March 2015 the ICO published a discussion document 'Transparency in outsourcing; a roadmap'² to highlight how to achieve greater transparency about services and functions outsourced by public authorities, and the role that the FOIA plays in this. The document set out our thoughts on this issue and was intended as a contribution to the growing discussion on outsourcing.
7. At the same time we also published a separate document on outsourcing and transparency which gave practical guidance for

¹ Cabinet Office consultation - Revised Freedom of Information Code of Practice <https://www.gov.uk/government/consultations/revised-freedom-of-information-code-of-practice>

² ICO discussion paper - Transparency in outsourcing; a roadmap <https://ico.org.uk/media/for-organisations/documents/1043531/transparency-in-outsourcing-roadmap.pdf>

public authorities³. Since 2015 a number of measures have been introduced by both central and local government and progress has been made in some areas to bring about greater transparency in outsourcing. However these have not gone far enough in empowering citizens and enabling the exercise of democratic rights that would be appropriate in all contractual situations. Concerns about the public's access to information about outsourced services have not diminished.

8. The Commissioner acknowledges that while a range of measures have been introduced since 2015 by both central and local government and progress has been made in some areas to bring about greater transparency in outsourcing, the Commissioner's view is that these have not gone far enough in empowering citizens and enabling the exercise of democratic rights that would be appropriate in all contractual situations.
9. In her response to the Cabinet Office's recent consultation on the revised FOI code in relation to confidentiality clauses the Commissioner recommended that the code use stronger wording to make clear that blanket confidentiality clauses are rarely likely to be acceptable and parts of a contract marked confidential should be narrowly drawn.

Conclusions and next steps

10. The Commissioner's concerns about the public's access to information about outsourced services have not diminished. Transparency depends on both a duty to provide information proactively and a right for people to obtain information on request. She believes that policy interventions are required to address the emerging transparency gap on public service delivery, and these may need to include formal FOIA designation of some outsourced providers and amendment to the definition of 'information held' in the Freedom of Information Act (FOIA).
11. The Commissioner will be submitting a report to Parliament later this year on transparency in outsourced public services to ensure the right to know about public services is achieved, independent of the identity of the service provider. In her report she will be calling for a 'modernisation' of the Freedom of Information Act which recognises today's service delivery models and restores the public's right to know irrespective of

³ Outsourcing and freedom of information – ICO guidance document
<https://ico.org.uk/media/for-organisations/documents/1043530/outsourcing-and-freedom-of-information.pdf>

whether the service is delivered by public, private or third sector organisations.

Duty to document

12. The Commissioner has long been an advocate of the importance of the duty to create records in appropriate circumstances, often called the “duty to document”. This is about a positive duty in law to create records of significant decisions, actions and events. For example, this duty is contained in record keeping laws in some Canadian and Australian provinces, and New Zealand⁴. That means creating and maintaining records explaining and providing context as to why a specific course of action was taken. This duty would include minutes of important meetings, as well as documenting decisions that led to policy change and new initiatives.
13. The Commissioner considers greater transparency and better documenting of decisions can contribute to better outsourcing practices. Her office will start work to consider the evidence base for a legal duty to document as part of her mission to increase the public's trust and confidence in how information is used and to strengthen transparency and accountability and promote good information governance.

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⁴ Office of the Information Commissioner of Canada. Backgrounder on the duty to document. http://www.oic-ci.gc.ca/eng/communique-de-presse-news-releases-2016_4.aspx