Freedom of Information

Transparency in outsourcing: a roadmap

Information Commissioner's Office

Contents

Introduction

In this document we look at the question of how to achieve greater transparency about services and functions outsourced by public authorities, and the role that the Freedom of Information Act (FOIA) plays in this. We highlight the uncertainty about what information is in scope of FOIA and explain how we deal with this question. We set out an approach based on the idea of 'transparency by design' and we explain what this means. We also provide a view on whether contractors should be designated as public authorities and whether FOIA should be amended.

This is a discussion document, setting out thoughts on this issue. It is intended as a contribution to the growing discussion on outsourcing. It is not a guidance document or a code of practice. We have also published a separate document on outsourcing and transparency which gives practical guidance for public authorities.

Why transparency in outsourcing matters.

Contracting out accounts for around half of the

£187 billion

that the public sector spends on goods and services each year.

CBI estimate there could be £22.6 billion of savings if public service markets were fully opened up.

> "We expect to see all government bodies that contract out functions and public services, and the contractors themselves, having transparency, not commercial sensitivity, as their default position."
>
> Public Accounts Committee, chaired by Margaret Hodge

48%

of people said it was very important that companies acting on behalf of public authorities should be subject to FOIA.

Internationally, Brazil, Estonia and Macedonia all have more recent FOI laws which cover whatever public bodies are delivering public services or receiving public funds.

The UK government has stated it will "take steps to ensure transparency about outsources services is provided in response to freedom of information requests."

Four steps to greater transparency in outsourcing:

1 Better contracts

A fundamental problem in relation to FOIA requests related to outsourcing is deciding whether information is in the scope of a request. More precisely, the question is whether a contractor is holding information on behalf of a public authority.

The problem

The primary source to refer to is the contract between the authority and the contractor, but currently, outsourcing contracts focus on the procedures to follow when a request is received. They do not normally define specifically what information is held on behalf of a public authority. Specific FOIA clauses in contracts, as currently drafted, have so far failed to provide a complete answer to the question.

The story so far

The Model Services Contract used by government departments and public authorities for service contacts with a value more than £10 million goes some way to recognising this issue. Other contract clauses can also give an indication of why information is collected, what it is used for and who has rights in relation to it.

The solution?

It has to be acknowledged that it is not an easy task for public authorities faced with a FOIA request. This level of uncertainty is no longer acceptable. One approach would be for a legislative change, to give a more specific steer than the current concept of "held on behalf of". Another would be for public authorities and contractors to better consider this issue at the outset of their relationship.

Four steps to greater transparency in outsourcing:

2 Transparency by design

Our guidance is clear that waiting to address the FOIA question with a contractor until a request comes in is not a sound approach. We advocate earlier consideration of access to information, at the start of the contracting process.

Early consideration

When the contract is being drawn up, the public authority and the contractor should agree what types of information are held on behalf of the public authority (and is therefore in scope of FOIA requests). They should also set out the responsibilities of both parties in relation to how requests are handled.

The story so far

Transparency by design is about making information available proactively, as well as responding to requests. A default position should be that performance information is routinely published, although there may be exceptions for sensitive information. The default should also be that datasets related to outsourcing e.g. key performance indicators are disclosed in re-usable open formats and under an open licence.

When to say no

FOIA is intended to promote transparency, but the exemptions in the act allow for a balance to be struck by minimising prejudice to legitimate interests. Public authorities should consult with contractors at an early stage to anticipate information that is likely to be sensitive or may require consideration of exemptions. This is not about 'redlining' information that must never be disclosed, though: each request must be considered on its own merits.

Four steps to greater transparency in outsourcing:

3 Legislation

The growing interest in transparency about outsourcing has led to calls to extend the scope of FOIA. This would be a decision for the government to make, with options to extend the Act to cover work done by contractors, or indeed to designate the contractor themselves as a public authority.

The options

Section 5 of FOIA was intended to be used to designate major public sector contractors as public authorities, in terms of the public functions they deliver on behalf of the public authority.

Alternatively, FOIA could be amended so that all information held by a contractor about work under a contract is considered as held on behalf of the public authority.

The £5 million question

Given the range of outsourcing, it is clearly not proportionate for all contractors to be designated as public authorities. But we do feel there is a strong case for designating outsourced services as falling under FOIA when they are of significant monetary value and long duration: for example, those over £5 million in value or continuing over 5 years or where the contractor solely derives its revenue from public sector contracts.

Belt and braces

As discussed under 'Better contracts', in the majority of outsourcing situations, greater clarity on the issue of what information is in scope would improve transparency. We think the definition of information held should be amended, so that information held by a contractor in connection with their delivery of an outsourced service is always considered to be held on behalf of the public authority.

Four steps to greater transparency in outsourcing:

4 Standard contract terms

The use of standard contract terms would provide a consistent approach to FOIA in all outsourcing contracts, without the need for any change to the law.

The story so far

As discussed in 'Better contracts', standard contract terms already exist, in the form of the Model Services Contract (albeit this is only used in contracts over £10 million). But while this recognises that some information in the contractor's possession will belong to the authority for the purposes of FOIA, it does not help to define what that information is.

Government position

The government appears to favour standard contract terms over legislative changes. This fits its commitment to minimise regulatory burdens on business. We wait to see further action from the government to support this, including a promised code of practice on the issue.

Transparency requirements

We think there is scope for improving transparency requirements in standard contract terms. They could include a requirement for proactive publication of certain information, including the contract itself and performance against KPIs. They could also include provisions for specifying what information is in scope of a FOIA request.

Background

Calls for transparency

1. Outsourced public services are a large and expanding market in the UK, and represent a significant share of public spending. Expenditure on outsourced public services accounts for about half of the £187 billion that the government (including the NHS and local government) spends on goods and services[1]. The local government outsourcing market is said to be worth £30bn[2].

2. The main drivers for this are the government's belief that opening public services to a range of providers leads to better service provision, and the need to reduce public expenditure and provide "better services for less money"[3]. Continuing pressure on public finances, plus a rising demand for public services due to demographic change, means that outsourcing of public services is likely to increase. It has been estimated that savings of £22.6 billion could be achieved if public service markets were fully opened up[4] and estimates such as this are likely to encourage the trend towards more outsourcing. Local councils have been considering plans to outsource all of their public services[5].

3. At the same time, there have been growing calls for more transparency about how contractors are delivering outsourced services. These have arisen for a number of reasons: reported problems with the delivery of some contracts[6]; the wish to

---

[1] National Audit Office. The role of major contractors in the delivery of public services. HC 810 Session 2013-14. NAO, 12 November 2013. http://www.nao.org.uk/wp-content/uploads/2013/11/10296-001-Delivery-of-public-services-HC-8101.pdf Accessed 27 June 2014

[2] Local Government Chronicle. The size and shape of the market. 22 May 2014. http://www.lgcplus.com/news/growth/more-on-procurement/the-size-and-shape-of-the-market/5070944.article Accessed 03 March 2015

[3] HM Government. Open public services white paper Cm 811 HMSO, July 2011 p. 6 https://www.gov.uk/government/publications/open-public-services-white-paper Accessed 27 June 2014

[4] Confederation of British Industry. Licence to operate. Winning trust in public services markets. CBI, September 2013 p6 http://www.cbi.org.uk/media/2350136/licence_to_operate_final.pdf Accessed 27 June 2014

[5] BBC News. Northamptonshire County Council outsources services and redeploys staff. 19 February 2015. http://www.bbc.co.uk/news/uk-england-northamptonshire-31544256 Accessed 3 March 2015

[6] House of Commons. Committee of Public Accounts. Contracting out public services to the private sector. HC777. The Stationery Office, 14 March 2014.

build public trust in outsourcing; a desire to improve the management of outsourced contracts; and, not least, the need for public scrutiny of how the 'public pound' is spent.

4. The Institute for Government has said[7] that the government should professionalise its approach to commissioning and oversight of public sector markets and adopt a 'market stewardship' approach. Their recommendations on how to achieve this include increasing transparency. This means that government contracts should oblige all contractors to publish details of the funding they receive from government, their performance, their subcontracting activities, and user satisfaction levels. These points are about making information available proactively, but the Institute also comments on the availability of information in response to FOIA requests:

> "This transparency could also be achieved simply by clarifying (and if necessary adjusting) the rules on 'commercial confidentiality' to confirm which data that government holds in relation to contractor fees and performance can be subject to freedom of information requests."[8]

5. The CBI has said[9] that transparency about outsourcing is important to enable scrutiny, to improve service standards and to hold to account those responsible for service failures. They call on public service providers from all sectors to adhere to the CBI's statement of principles on transparency in public services. This statement covers both proactive release of information and releases in response to requests. It says that any exemptions from disclosure should be based on the exemptions in FOIA, having regard to previous decisions of the Information Commissioner, while ensuring there is no distortion to the competitive process.

---

http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpubacc/777/777.pdf Accessed 4 July 2014

[7] Gash, Tom et al Making public service markets work. Institute for Government, July 2013. http://www.instituteforgovernment.org.uk/sites/default/files/publications/Making_public_service_markets_work_final_0.pdf Accessed 4 July 2014

[8] Ibid p.38

[9] Confederation of British Industry. Licence to operate. Winning trust in public services markets. CBI, September 2013 p6 http://www.cbi.org.uk/media/2350136/licence_to_operate_final.pdf Accessed 27 June 2014

6. A recent report from the CBI[10] noted the decline in public support for outsourcing to the private sector. The proportion of people surveyed who agreed with the statement that "if a private sector company can provide public services more effectively than central government or local councils it should be allowed to do so" has fallen from two thirds in 2001 to half in 2014. The report identified building public confidence as a key challenge, and called for high levels of transparency to inform public debate. It argued that all service providers, including in house and external organisations, should publish baseline performance metrics.

7. The National Audit Office[11] (NAO) looked at the role of four major providers of contracted out services: Atos, Serco, G4S and Capita, who between them held government contracts worth over £4 billion in 2012-2013. They asked three questions about contracting out, including, how can we know whether contractors are delivering? They said that both the government and the public need transparency about the performance of contractors, in order to ensure that problems are not being hidden and that it is in the contractor's commercial interests to focus on the client's (ie the government's) needs. This goes beyond the normal process of reporting to the client on key performance indicators, and requires public reporting and public scrutiny. Their emphasis on public scrutiny raises the issue of what information is available on request under FOIA.

8. The House of Commons Public Accounts Committee[12] heard evidence from the four contractors that the NAO had studied. They noted that all four had said they were happy that FOIA provisions should apply to public sector contracts with their companies. The first area for improvement that the Committee identified was transparency. The Committee said that both government bodies and contractors should have transparency, not commercial sensitivity, as their default position. They recommended that the Cabinet Office should explore how the

---

[10] Confederation of British Industry. Our future public services. A challenge for us all. CBI, November 2014. http://www.cbi.org.uk/media/3589619/cbi_public_services_reform_report.pdf Accessed 10 December 2014

[11] National Audit Office. The role of major contractors in the delivery of public services. HC 810 Session 2013-14. NAO, 12 November 2013. http://www.nao.org.uk/wp-content/uploads/2013/11/10296-001-Delivery-of-public-services-HC-8101.pdf Accessed 27 June 2014

[12] House of Commons. Committee of Public Accounts. Contracting out public services to the private sector. HC777. The Stationery Office, 14 March 2014. http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpubacc/777/777.pdf Accessed 4 July 2014

FOI regime could be extended to cover contracts with private providers, including a FOI provision in standard contract terms.

9. In a further report on contract management, the Committee again emphasised the need for transparency[13]. They said that the way in which the government carries out contracting gives too much advantage to contractors, and that it should be rebalanced in favour of the taxpayer. They recommended that the Cabinet Office should require the publication not only of contracts but also of information on how the contractors are performing.

10. The Committee on Standards in Public Life has said[14] that common ethical standards should apply to all providers of public services, whether they are from the public, private or voluntary sector. This also reflects the views of the public in the research which the Committee carried out. The Committee said these standards should be based on the Seven Principles of Public Life, which include the following:

    - **Accountability**. Holders of public office are accountable to the public for their decisions and actions and must submit themselves to the scrutiny necessary to ensure this.

    - **Openness**. Holders of public office should act and take decisions in an open and transparent manner. Information should not be withheld from the public unless there are clear and lawful reasons for doing so.

11. The Committee noted the "grey area around the applicability of the FOIA when services are contracted out to the private sector", and welcomed the work which the government, the CBI and the ICO are doing on this. They also recommended that the Cabinet Office should ensure that ethical standards reflecting the Seven Principles are addressed in contractual arrangements.

12. There is also evidence that the public expect there to be transparency about outsourced services. In a recent survey

[13] House of Commons. Committee of Public Accounts. Transforming contract management. HC585. The Stationery Office 10 December 2014. http://www.publications.parliament.uk/pa/cm201415/cmselect/cmpubacc/585/585.pdf Accessed 10 December 2014

[14] Committee on Standards in Public Life. Ethical standards for providers of public services. Committee on Standards in Public Life, June 2014. https://www.gov.uk/government/publications/ethical-standards-for-providers-of-public-services Accessed 22 August 2014

carried out by ComRes for the ICO[15], nearly half (48%) of those surveyed said that it was very important that private companies acting on behalf of public authorities should be subject to FOIA, and a further 27% said it was fairly important.

13. Transparency about outsourcing can be seen as a tool to promote democratic accountability, but it also as a means of improving service delivery. A recent paper[16] from the Office of the Information Commissioner of Queensland and the Australia and New Zealand School of Government gives examples from several countries of how transparency can improve both value for money and performance quality in the delivery of outsourced services. The transparency measures they looked at included open book accounting and stakeholder involvement, as well as FOI.

Government policy

14. The government and wider public sector has made progress in the direction of greater transparency in procurement. It is government policy to publish proactively all new central government 'invitation to tender' documents for contracts over £10,000, and all new central government contracts over £10,000, in full[17]. These are available via the Contracts Finder website[18]. The government has also made commitments in relation to providing information in response to requests. In the National Action Plan for Open Government, published in November 2013, they said that "over the next 12 to 24 months" they would do the following:

> "Look to introduce standard transparency clauses into central government contracts in consultation with civil society organisations and the business community."

[15] ComRes Annual Track September 2014, published March 2015. https://ico.org.uk/media/about-the-ico/documents/1043485/annual-track-september-2014-individuals.pdf

[16] Mulgan, Richard. Transparency and the performance of outsourced government services. Office of the Information Commissioner Queensland and the Australia and New Zealand School of Government, March 2015. https://www.oic.qld.gov.au/__data/assets/pdf_file/0003/27444/paper-transparency-and-outsourced-government-services.pdf Accessed 17 March 2015

[17] Prime Minister's Office. Letter to government departments on opening up data. May 2010. https://www.gov.uk/government/news/letter-to-government-departments-on-opening-up-data Accessed 9 July 2014

[18] https://online.contractsfinder.businesslink.gov.uk/

and

"Take steps to ensure transparency about outsourced services is provided in response to freedom of information requests, by encouraging the use and enforcement of contractual provisions to maintain the levels of transparency provided by the Freedom of Information Act 2000; revised guidance will be provided in 2014".[19]

15. In its response[20] to the Public Account's Committee's report on *Contracting out public services to the private sector*, referred to above, the Cabinet Office addressed the Committee's recommendation that they should consider extending the FOI regime to contracts with private providers and including a FOI provision in standard contract terms. They said that by autumn 2014 they would agree key transparency principles with the CBI and also issue a new FOI Code of Practice and review its success in relation to contractors. However, the government has now said that they will not be able to bring forward the new Code of Practice in his session of Parliament[21].

16. The policy of openness in relation to procurement has also created new duties for local government. The mandatory Local Government Transparency Code[22] requires local authorities to proactively publish the details of any invitation to tender and any contract with a value of over £5000.

International developments

17. In other countries that have FOI legislation, there is a growing recognition of the need to maintain or extend transparency in

[19] Cabinet Office. Open government partnership UK national action plan 2013 to 2015. Cabinet Office, November 2013. pp30-31 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/255901/ogp_uknationalactionplan.pdf Accessed 4 July 2013

[20] Government responses on the forty fifth to the fifty first and the fifty third to the fifty fifth reports from the Committee of Public Accounts 2013-14. Cm8871, HM Treasury, June 2014 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/321493/9781474106672_PRINT.PDF Accessed 10 December 2014

[21] Simon Hughes MP. Procurement: Written question 224973 26 February 2015. http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-02-23/224973/ Accessed 17 March 2015

[22] Department for Communities and Local Government. Local government transparency code 2014. DCLG, May 2014 https://www.gov.uk/government/publications/local-government-transparency-code-2014. Accessed 4 July 2014.

outsourcing situations. A recent survey of Information Commissioners carried out by the Centre for FOI[23] noted that in countries with more recent FOI laws, such as Brazil, Estonia and Macedonia, there has been an attempt to future proof the legislation by providing that it covers whatever bodies are delivering public services or receiving public funds. A majority of the Information Commissioners surveyed agreed that "there are private bodies/NGOs carrying out public functions or receiving public funds, some of which should be made subject to the access to information law". An international survey of access to information legislation by the organisation Right2Info[24] notes that in most European countries, private entities that exercise administrative authority or perform public functions are covered, and in "a smaller but steadily growing number of countries", private entities that receive public funds are covered, whether or not they perform public functions.

18. Scotland has its own FOI Act. This has now been extended[25] so that bodies set up by one or more local authorities to develop and deliver various services, and which are financed wholly or in part by the local authorities, are FOIA public authorities in their own right in so far as they are carrying out certain functions. These functions include tourism-related activities, provision of public libraries, museums and art galleries, and providing recreational, sporting, cultural and social facilities. This should provide a way of maintaining transparency when local authority services are outsourced to arm's-length bodies.

19. Internationally, a number of organisations are leading work on developing standards for open contracting. The Open Contracting Partnership was set up in 2012[26]. As part of this work, an open contracting data standard was launched in November 2014. This sets out the key documents and data that should be published at each stage of the procurement process, and provides an open data specification describing the data fields and structures that should be used for publication.

---

[23] Dunion, Kevin. In the experience of Information Commissioners. The Information Commissioners' International Exchange Network survey 2014. Centre for FOI, November 2014. http://www.centrefoi.org.uk/edocs/pdfs/centrfoi_survey_november_2014.pdf Accessed 15 January 2015

[24] Private bodies and public corporations, Right2info.org, 13 September 2013. http://www.right2info.org/scope-of-bodies-covered-by-access-to-information/private-bodies-and-public-corporations Accessed 9 January 2015

[25] The Freedom of Information (Scotland) Act 2002 (Designation of Persons as Scottish Public Authorities) Order 2013 No.278. http://www.legislation.gov.uk/ssi/2013/278/pdfs/ssi_20130278_en.pdf Accessed 15 January 2015

[26] Open Contracting http://www.open-contracting.org/ Accessed 12 January 2015

Pushing and pulling information

20. We welcome moves towards more transparency because they are in the spirit of FOIA. Transparency enables scrutiny and accountability, and these bring benefits in terms of improving efficiency and avoiding waste. However, in our view, transparency depends on both a duty to provide information proactively and a right for people to obtain information on request. In other words, it is about people 'pulling' information from public authorities as well as authorities 'pushing' out information proactively.

21. FOIA encourages the proactive dissemination of information through the publication scheme provisions in section 19. These require public authorities to have a publication scheme (ie a list of the types of information they routinely make available) and to publish information in accordance with it. The ICO has produced a Model Publication Scheme, together with definition documents setting out the types of information we expect authorities to publish proactively. These include details of contracts. Meeting current government requirements for publishing contract information, for example in the Local Government Transparency Code[27], will help public authorities to meet their FOIA duties in relation to publication schemes.

22. However, there must also be a right to information, giving people the ability to obtain it, whether or not the public authority has a policy of, or a commitment to, providing it. Such a statutory right is far less susceptible to change and revision than a local or even a national policy, and acts as a safeguard for scrutiny and accountability. It also provides a stimulus for public authorities to review what they publish, to publish more information proactively and to keep information in the public domain, in order to reduce the burden of answering individual requests.

23. Publishing more information about contracts proactively means that some of the information that people might otherwise request under FOIA is already available to them. However, our experience suggests this does not mean that more proactive publication will make the right to request information under FOIA redundant. Indeed, proactive publication may stimulate an appetite for information, rather than satisfying it. FOIA

[27] Department for Communities and Local Government. Local government transparency code 2014. DCLG, May 2014 https://www.gov.uk/government/publications/local-government-transparency-code-2014. Accessed 4 July 2014.

requests can challenge an authority's assumptions about what should be made public. It is always possible that people will want to see information that was not foreseen in publication plans, and their right to request this information is an important element of transparency.

Four steps to greater transparency in outsourcing:

1 Better contracts

24. In our experience of dealing with FOIA complaints, one of the most difficult questions is deciding whether the information is held by the public authority. This is because there are two parts to the definition of 'held by a public authority'. It means both information that the public authority holds and also information that someone else holds on its behalf. The difficulty arises in deciding whether a contractor holds information on behalf of the authority or only on its own behalf.

25. In the context of outsourcing, a public authority will hold information that it has produced itself, and this is clearly in scope of FOIA. It will also hold information that it has received from third parties, for example the tenders submitted by companies bidding for a contract or the performance information submitted by the contractor under the terms of the contract. This is also in scope, because the authority is holding it for its own purposes[28].

26. However, there will be other information which is held by the contractor, eg information about their work in delivering the service, and which is not physically held by the authority. Does the contractor hold this information on behalf of the authority? If it does, then it is in scope of a FOIA request; if not, then there is no right to obtain it under FOIA.

27. To take a practical example, if a local authority runs a leisure centre, then all the information it holds about that centre is potentially accessible under FOIA. This could include, for example, information on: the facilities offered; numbers and types of users; costs and income; future plans; staffing structure, salary bands, training given to staff, levels of sickness absence; physical assets; and the goods and services that the centre procures. On the other hand, if the local

[28] In the case of *University of Newcastle upon Tyne v the Information Commissioner and the British Union for the Abolition of Vivisection, [2011] UKUT 185 (AAC), 11 May 2011*, the Upper Tribunal said that if an authority holds information to any extent on its own behalf, it holds that information in terms of FOIA (paragraphs 21-22).

authority outsources the management of the centre to a contractor, then how much of that information is still accessible under FOIA? The contractor physically holds all the information but how much of it do they hold on behalf of the authority and how much do they hold only in their own right?

28. While there are general principles that are sometimes proposed as helping to answer these questions, such as 'following the public pound', the task for public authorities, and for the ICO when dealing with complaints, is to establish an objective reason for deciding whether certain information is held by a contractor on behalf of a public authority. We consider that the primary source to refer to is the contract between the authority and the contractor.

29. We recognise that outsourcing contracts do not normally define specifically what information is held on behalf of a public authority. Typical FOIA clauses in contracts are usually about the procedures to follow when a request is received, which does not address the issue of what is in scope. Similarly, FOIA clauses often require the contractor to provide information to assist the authority in responding to a request, but this could be information that, in FOIA terms, it holds on behalf of the authority or alternatively some other information that may be useful. However, the contract does define the relationship between, and the responsibilities of, the two parties. In dealing with FOIA complaints we have found that contract clauses can often give us an indication of why information is collected, what it is used for and who has rights in relation to it. It can therefore provide an objective, evidence-based justification for deciding who holds information in a particular case.

30. For example, the contract may indicate what information the contractor is required to provide to the authority for monitoring and reporting purposes. This information can generally be considered to be held on behalf of the authority, even if it has not actually been provided to them.

31. In our guidance document on Outsourcing and freedom of information we explain further how we have used contracts in establishing whether information is held, with examples from our case work.

32. We have explained how we approach this task in dealing with complaints, but it has to be acknowledged that it is not an easy one for public authorities faced with a FOIA request. The complex reasoning involved also means that it is difficult for contractors, requesters and the public at large to anticipate

what information is likely to be in scope. At a time when there is growing recognition of the need for greater transparency about outsourcing, this level of uncertainty is no longer acceptable. Clarifying the issue of what information is in scope of FOIA would improve transparency. The challenge is to achieve this without unduly increasing the administrative burden on public authorities and contractors.

33. In some countries, the issue of whether information held by contractors is in scope is made easier because it is addressed directly in their access to information laws. For example, in New Zealand, where an independent contractor is engaged by a public authority, any information the contractor holds "in his capacity as such contractor" is deemed to be held by the public authority[29]. Similarly, Ireland's new FOI law provides that where there is a contract between a service provider and a FOI body, "a record in the possession of a service provider shall, if and in so far as it relates to the service, be deemed for the purposes of this Act to be held by the FOI body"[30]. These provisions are more specific than the FOIA concept of "held on behalf of", which, as we have seen, can be problematic in practice. This may not be a complete answer to the problem, as in some cases there may still be issues as to what specific information relates to the service. Nevertheless, it appears to offer a potential way to address the problem we have identified, and we believe that the government should consider whether a similar amendment to FOIA would be helpful.

34. Whether or not there is a legislative change of this nature, we think that public authorities and contractors could clarify this specific issue and improve transparency and accountability more generally by adopting what we call a 'transparency by design' approach. In the following section we explain what this means.

[29] Official Information Act 1982 s2(5). http://www.legislation.govt.nz/act/public/1982/0156/latest/DLM64790.html Accessed 9 January 2015

[30] Freedom of Information Act 2014. Number 30 of 2014. http://www.oireachtas.ie/documents/bills28/acts/2014/a3014.pdf Accessed 9 January 2015

Four steps to greater transparency in outsourcing:

2 Transparency by design

35. As outsourcing becomes an even more significant part of the public sector landscape, the case for a proactive approach to transparency will become stronger. We advocate earlier consideration of access to information, at the start of the contracting process, so that transparency is effectively designed into the relationship.

36. The concept of privacy by design is a well-established concept in relation to data protection compliance and has been promoted for over 10 years. As well as developing the privacy by design concept, the Information and Privacy Commissioner of Ontario has also developed guidance on the concept of 'access by design'[31]. The proposed EU Data Protection Regulation, currently being negotiated, also includes the concept of data protection by design and default.

37. An effective transparency by design approach will require senior level support in organisations and a joined up approach involving staff in procurement roles as well as freedom of information officers. Alongside guidance from the ICO, effective partnerships will be needed to convey the key messages about transparency by design, involving sector-based umbrella bodies and professional bodies involved in procurement standards.

38. Transparency by design involves a principle of 'open by default' and proactive disclosure from both the public authority and the contractor. It includes designing in transparency as part of the contractual process, including establishing what is held for FOIA purposes. We also propose the development of transparency impact assessments as a tool to enable resources to be targeted at the most important areas and to retain a level of proportionality.

39. A transparency by design approach to contracting covers a number of elements of good practice. In essence, it is about:

[31] Information and Privacy Commissioner of Ontario. Access by Design. https://www.ipc.on.ca/images/Resources/accessbydesign_7fundamentalprinciples.pdf Accesssed 12 January 2015.

- Making information available proactively
- Agreeing what information is held, in terms of FOIA.
- Setting out responsibilities in handling FOIA requests
- Considering what information may be exempt from disclosure.

40. Here we give a brief outline of each of these elements. There is more detail about these in our guidance document on Outsourcing and freedom of information.

Making information available proactively

41. Transparency by design is about making information available proactively, as well as responding to requests. As we have seen, there are growing calls for both contracts and performance information to be published as a matter of routine. We agree that this should be the default position, although there may be some sensitive information that is not routinely published. Public authorities should plan how to do this, including making information available on the web in open formats and under open licences, so that the information can be analysed and re-used. In this regard, we welcome the Institute for Government's work on drafting new standard contract terms that encourage proactive publication, not only of the contract itself but also of performance information.

42. This information can then be included in the FOIA publication scheme, which all public authorities are required to produce. As we have noted in the section on Transparency = pushing and pulling information, this is a list of the information that it routinely makes available. We already published guidance[32] saying that public authorities should publish their contracts; adopting a transparency by design approach means that authorities would be publishing more information proactively, including information on how the services are being delivered.

Agreeing what is held

43. The public authority and the contractor should agree what information is held on behalf of the authority, for the purposes of FOIA, and set this out in the contract. This can be a list of

[32] ICO. Definition documents https://ico.org.uk/for-organisations/guide-to-freedom-of-information/publication-scheme/definition-documents/ Accessed 15 January 2015

broad types of information, rather than a detailed list of documents. The aim of this exercise is to identify the types of information that are held by the contractor but which may be in scope of a FOIA request. Doing this at the outset will help to address the specific problem we have identified of information held on behalf of a public authority. It will also assist both public authorities and contractors in dealing with requests, and it will promote transparency for requesters and the public.

44. This exercise is not about deciding whether disclosure would prejudice the contractor's or other interests, but about agreeing what is potentially in scope of a request. Furthermore, it should not be used as an opportunity to limit transparency by defining too narrowly the scope of information. The contract is a guide to what is held, but in the event of a complaint the Information Commissioner will reach his own decision on what is held, based on all the circumstances of the case.

Setting out responsibilities in handling FOIA requests

45. Public authority contracts often contain clauses relating to FOIA requests. The government's Model Services Contract[33] is an example of this. We encourage the use of contract terms to set out the responsibilities of authorities and contractors when the authority receives a FOIA request relating to the contract. These terms should recognise the authority's duty to respond to requests under FOIA. The contractor should provide the authority with any relevant information that it holds on their behalf. The authority should consult with the contractor where disclosure may affect the latter's interests, and also where the contractor may hold further information that would assist the requester. This is in line with the provisions of the section 45 Code of Practice[34] on Freedom of Information, in relation to consultation with third parties. However, it is for the authority to decide what information should be released and whether any exemptions apply.

[33] Crown Commercial Service. Model services contract. Cabinet Office, 2014 https://www.gov.uk/government/publications/model-services-contract Accessed 14 January 2015

[34] Secretary of State for Constitutional Affairs. Code of practice on the discharge of public authorities' functions under Part 1 of the Freedom of Information Act 2000. Department for Constitutional Affairs, 2004. Part IV https://www.gov.uk/government/publications/code-of-practice-on-the-discharge-of-public-authorities-functions-under-part-1-of-the-freedom-of-information-act-2000 Accessed 23 December 2014

Considering exemptions

46. FOIA is intended to promote transparency, but in dealing with a request it is also necessary to consider whether disclosure could prejudice the contractor's (or other party's) interests. The exemptions in FOIA allow for a balance to be struck between promoting transparency and minimising prejudice to legitimate interests. Public authorities should consult with contractors in advance, at an early stage in the contract, to identify potentially sensitive areas of information. This will assist the process of answering FOIA requests and help to ensure that the public authority is aware of the relevant issues when making its decision on disclosure.

47. This is not about 'redlining' information that must never be disclosed. Each FOIA request must be considered in the circumstances of the case, and the sensitivity of information can change over time.

Four steps to greater transparency in outsourcing:

3 Legislation

48. The growing interest in transparency about outsourcing has led to calls to extend the scope of FOIA. It has been suggested that contractors themselves should be subject to FOIA, at least in respect of their work they are doing under contract.

49. The Public Accounts Committee considered this in 2012, in their report on the introduction of the Work Programme[35]. They were particularly concerned about a lack of transparency about companies that derive a major part of their income from public sector contracts :

> "We remain of the view that in the interests of transparency, where private companies provide public services funded by the taxpayer, those areas of their business which are publicly funded should be subject to the Freedom of Information Act provision."

50. The suggestion that certain areas of a company's business should be subject to FOIA tends to imply that the company should be designated as a public authority, at least in respect of those areas. It is possible for the government to do this within the current provisions of FOIA. Section 5 of FOIA gives the Secretary of State power to designate an organisation as a public authority not only if it "appears to exercise functions of a public nature" but also if it "is providing under a contract made with a public authority any service whose provision is a function of that authority." Furthermore, some organisations (eg the BBC and the Bank of England) are already listed in FOIA as public authorities only in respect of certain information they hold. However, to date the government has not used the power

[35] House of Commons Committee of Public Accounts. Department for Work and Pensions: the introduction of the Work Programme. HC1814. The Stationery Office, 15 May 2012. Page 6 http://www.publications.parliament.uk/pa/cm201012/cmselect/cmpubacc/1814/1814.pdf Accessed 20 August 2014

in section 5 to designate any contractors as public authorities, whether wholly or partially.

51. The Campaign for Freedom of Information has proposed a two-fold approach: contractors holding large contracts and those whose work is mainly with public authorities should be designated as public authorities, and FOIA should be amended so that all information that a contractor holds about its work under a contract is considered as held on behalf of the public authority[36].

52. The idea of amending FOIA has also been reflected in recent private members' bills. John Hemmings' Transparency and Accountability Bill[37], which did not receive its second reading, sought to amend section 3(2) of FOIA, so that all information that relates to the performance of a contract and that is held by a contractor, subcontractor, or anyone else on their behalf, would be deemed to be held on behalf of the public authority. Grahame M. Morris' Freedom of Information (Amendment) Bill[38] proposed to add private healthcare companies and other bodies bidding for health service contracts to the list of FOIA public authorities.

53. The Scottish Information Commissioner recently published a report on the designation of public authorities under the Freedom of Information (Scotland) Act 2002 (FOISA)[39]. She argued that the scope of FOI has reduced over time as public service delivery models have changed. This means that there has been a loss of access rights in some areas, for example where social housing is now delivered by housing associations. She said that this was a result of the Scottish government's reluctance to use its powers in section 5 of FOISA (which is equivalent to section 5 of FOIA) to designate as public authorities bodies that exercise functions of a public nature or provide public services under contract. She put forward the principle that rights should follow functions and proposed a

---

[36] Campaign for Freedom of Information. Extending FOI to contractors. http://www.cfoi.org.uk/campaigns/extending-foi-to-contractors/ Accessed 21 August 2014.
[37] Transparency and Accountability Bill 2014-15. http://services.parliament.uk/bills/2014-15/transparencyandaccountability.html Accessed 21 August 2014.
[38] Freedom of Information (Amendment) Bill 2014-15. http://services.parliament.uk/bills/2014-15/freedomofinformationamendment.html Accessed 17 December 2014
[39] Scottish Information Commissioner. FOI 10 years on: are the right organisations covered? SIC, January 2015. http://www.itspublicknowledge.info/home/SICReports/OtherReports/otherReports.aspx Accesed 27 January 2015

multi-factor approach for Ministers to use in assessing whether a body is carrying out functions of a public nature. In particular, she said that housing associations and private prisons in Scotland should be designated as public authorities.

54. We think that the government should consider designating service providers as public authorities in terms of FOIA, where there is a major contract for outsourced services. This could be assessed in terms of its value or length and thresholds could be established for this such as £5 million in value or five years' duration, or where the contractor solely derives its income from public sector contracts. We acknowledge that more research is needed to assess the benefit and impact of designating large scale contractors, to identify the exact threshold. Major contracts such as these, where public services are being delivered with public funds, require the highest possible levels of transparency. This means there is a case for designating service providers as FOIA public authorities in relation to their delivery of those services. If some large service providers were designated as public authorities in their own right it would be possible after a certain period to review the outcome and evaluate the effectiveness in terms of transparency and the burden on those providers.

55. We do not think that it would be proportionate to designate all or most service providers as public authorities. In the majority of outsourcing situations greater clarity on the issue of what information is in scope of FOIA would be helpful. That is why we think that the government should also consider amending the definition of information held, so that information held by a contractor in connection with their delivery of an outsourced service is considered to be held on behalf of the public authority. As we have noted in the section on Better contracts, there are examples in other jurisdictions of similar clauses that could be considered.

Four steps to greater transparency in outsourcing:

4 Standard contract terms

56. It has been suggested that, rather than making legislative changes, standard contract terms could be used to maintain levels of transparency. As we have noted earlier in this document, the Public Accounts Committee said that the Cabinet Office "should explore how the FOI regime could be extended to cover contracts with private providers, including the scope for an FOI provision to be included in standard contract terms"[40]. The Justice Committee also favoured using contract terms rather than designation, in its post-legislative scrutiny report on FOIA:

> "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."[41]

57. In its response to the post-legislative scrutiny report,[42] the government did not favour designating contractors as public authorities, mindful of the need to minimise regulatory burdens on business. However, they did expect contractors to assist public authorities in meeting their obligations in regard to

[40] House of Commons. Committee of Public Accounts. Contracting out public services to the private sector. HC777. The Stationery Office, 14 March 2014. http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpubacc/777/777.pdf Accessed 4 July 2014

[41] House of Commons. Justice Committee. Post-legislative scrutiny of the Freedom of Information Act 2000 HC96-1. The Stationery Office, July 2012 paragraph 240 http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/96.pdf Accessed 21 August 2014

[42] Ministry of Justice. Government response to the Justice Committee's report: Post-legislative scrutiny of the Freedom of Information Act 2000. Cm 8505. The Stationery Office, November 2012. Paragraphs 53-58. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217298/gov-resp-justice-comm-foi-act.pdf Accessed 21 August 2014.

information held on their behalf. They also encouraged public authorities and contractors to interpret their obligations broadly and provide useful information on a voluntary basis, even if it is not technically covered by FOIA. The government said they would address this issue in a revised section 45 Code of Practice, though at the time of writing this is still awaited. Finally, they did not rule out possible use of the section 5 power to designate if the results of their light touch approach proved to be inadequate to ensure accountability.

58. We think there is scope for improving transparency requirements in standard contract terms such as those in the Model Services Contract[43]. In addition to the current clauses about dealing with FOIA requests, they could include a requirement for proactive publication of certain information, including the contract itself and performance against KPIs. They could also include provisions for specifying what information is in scope of a FOIA request. Having these clauses in a standard template would assist public authorities in applying the transparency by design approach that we have advocated in this document.

[43] Crown Commercial Service. Model services contract. Cabinet Office, 2014 https://www.gov.uk/government/publications/model-services-contract Accessed 14 January 2015

Conclusion

59. It is generally recognised that there is a need for more transparency in relation to outsourcing. We believe that the current uncertainty around what is in scope of FOIA is an obstacle to transparency.

60. We are advocating a solution that combines improving practice through transparency by design, making standard terms more fit for purpose and considering possible changes to legislation. We think that, taken together, these can address the transparency gap that has opened up in the provision of public services.

61. Building in transparency by design is a task for both public authorities and contractors. New standard contract provisions would certainly assist this. Consideration should be given to designating larger service providers as public authorities subject to FOIA in respect of those services. The case for amending FOIA to make clear that information held by a contractor relating to a service they are providing for a public authority is held by that authority for FOIA purposes should also be considered.

62. We believe that these measures, taken together, have the potential to achieve the levels of transparency which are required. However, if there is no significant progress on these, and the transparency gap continues, the Commissioner will consider using his power to report to Parliament on this issue.