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POST LEGISLATIVE SCRUTINY OF THE FREEDOM OF INFORMATION ACT

Submission to the Justice Select Committee

by the

CAMPAIGN FOR FREEDOM OF INFORMATION

February 14, 2012

Introduction

This submission is divided into three parts.

The first describes some areas where we believe the Freedom of Information (FOI) Act and Environmental Information Regulations (EIRs) are not working as well as they should. We suggest a number of improvements which include the introduction of more specific time limits for responding to requests and dealing with internal reviews; the lifting of some absolute exemptions; changes to the duty to advise and assist and other measures.

The second deals with the contracting out of public authority functions to bodies which are not subject to the FOI Act. Recent measures to encourage this process are likely to substantially undermine the public's rights to information.

The third responds to suggestions that changes to the right of access may be introduced to protect cabinet papers, to introduce fees for FOI requests or to make it easier for public authorities to refuse requests on cost grounds. Finally, we propose one cost saving amendment to the Act.

I. IMPROVEMENTS TO ACT

Delays

Requesters frequently experience substantial delays by public authorities in answering requests and carrying out internal reviews.

In 2010, 17% of requests to government departments (4,696 out of 27,290) took more than 20 working days to be answered.¹

- Twelve per cent of the delayed requests (3,245) overshot the 20 working day response period through simple failure to meet the statutory deadline. No information appears to be available about the length of these delays.
- In 5% of requests (1,451) departments took what the Ministry of Justice (MOJ) refers to as “permitted extensions to deadlines”. These are FOI requests where the authority took additional time to consider the public interest test. They also include EIR requests where the deadline was extended by up to a further 20 working days because the request was both complex and voluminous.² Many of these extensions were excessive.

Public interest extensions

The FOI Act allows authorities to extend the standard 20 working day response period to consider the public interest test, where this is “reasonable in the circumstances”.³ The Information Commissioner’s guidance states that extra time should not normally be needed but that where the public interest considerations are “exceptionally complex” a longer period, not exceeding a further 20 working days, may be necessary.⁴

MOJ statistics for central government departments in 2010 show that almost half of all cases involving public interest extensions took *more* than the extra 20 working days recommended by the ICO.

- Only 53% of these cases (665/1,260) complied with the ICO recommendation, that the extension should not exceed 20 extra working days.

¹ Ministry of Justice, Freedom of Information Act 2000, Statistics on implementation in central government, 2010 Annual and Q4: October - December 2010. (Hereafter referred to as ‘MOJ 2010 Annual Report’) Table 4.

² Under regulation 7(1) of the EIRs

³ FOIA section 10(3)

⁴ Information Commissioner’s Office, ‘Freedom of Information Good Practice Guidance No. 4. Time limits on considering the public interest following requests for information under the Freedom of Information Act 2000

- 12% (157) took extensions of between 41 and 60 working days in addition to the standard 20 working days. These requests were not answered for 3 to 4 months.
- 4% (45) took extensions of 61-80 extra days: the replies to these took between 4 and 5 months.
- 3% (43) took up to six months in total to answer.
- 2% (28) of requests made in 2010 took more than 6 months to answer.⁵
- 98 requests, originally made in 2009, were not answered until 2010 after delays of over 6 months.⁶ The actual length of delays in cases taking more than six months has not been monitored.

MOJ statistics refer to these requests, including those unanswered for more than six months, as being dealt with “in time”.⁷ It appears that so long as a department notifies the requester within the original 20 working day period that a public interest extension is being taken, the eventual response is considered “in time” regardless of how unacceptably late it may be. This practice ignores the statutory requirement that any extension must be “reasonable in the circumstances” – many of the extensions clearly are not. It also ignores the ICO guidance that the extension should not exceed a further 20 working days. We think MOJ should abandon the misleading practice of describing all requests extended on public interest grounds as being answered “in time”.

Additional time to consider the public interest test should not be needed; we note that no such extension is available under the Scottish FOI Act and do not believe it should be available under the UK Act either. If an extension is needed at all, it should be available only where the volume and complexity of a request, and in particular the need to consult third parties, makes it impossible to provide a considered response within the standard 20 working day period. In this case, an extension, of up to a maximum of 20 working days, on the lines of the extension permitted under the EIRs, might be justified.

Monitoring of the length of delays is restricted to requests involving public interest extensions. The majority of delays are simple failures to meet the standard 20 day deadline. The length of these delays are not monitored: they should be.

⁵ MOJ 2010 Annual Report, Table 15

⁶ MOJ 2010 Annual Report, Table 16

⁷ MOJ 2010 Annual Report, page 2 and Table 5

Internal reviews

The time taken by government departments to complete internal reviews in 2010 shows a similar profile:

- 59% (743/1,259) were completed within 20 working days.
- 24% (308) took from 21 to 40 working days
- 8% (101) took 41 to 60 working days
- 4% (53) took 61 to 80 working days
- 2% (28) took 81-100 working days.
- 2% (26) took over 100 working days (ie more than 5 months).⁸
- A further 60 internal reviews relating to requests made in 2009 but not completed until 2010 also took more than 5 months.⁹ The actual delays in these cases is not known.

It appears that some requests are subject to lengthy delays both in replying and in carrying out internal reviews.

The Information Commissioner's guidance states that internal reviews should be completed within 20 working days and that where exceptionally a longer period is needed it should never exceed a further 20 day working days. Although authorities are not required to carry out internal reviews under the FOI Act, where they do, these time limits should be mandatory (as they are under the EIRs)¹⁰.

Annual statistical returns

Although the MOJ produce detailed statistics about the performance of central government bodies most other authorities do not. This makes it harder for the ICO to formally monitor those authorities which are repeatedly failing to comply with time limits.¹¹

⁸ MOJ, 2010 Annual Report, Table 12

⁹ MOJ, 2010 Annual Report, Table 13

¹⁰ Environmental Information Regulations 2004, regulation 11(4)

¹¹ One of the circumstances in which the ICO will formally monitor an authority's performance is if it fails to comply with the required timescales in at least 85% of requests.

We think all authorities should be required to produce an annual statistical return containing the numbers of FOI/EIR requests they have received; the numbers answered in full, in part or refused; the numbers answered in time and the length of any delays; and the numbers of internal reviews carried out, the time taken to complete these and the outcomes.

ABSOLUTE EXEMPTIONS

We think the Act's absolute exemptions (i.e. those not subject to the public interest test in section 2 of the Act) are unnecessary and that all exemptions should be subject to the public interest test, unless an equivalent provision already applies.¹²

Section 44 (statutory prohibitions on disclosure)

The absolute exemption in section 44(1)(a) of the FOIA for information whose disclosure is prohibited by statute is a significant obstacle to the Act's proper functioning.¹³

Many of the statutory prohibitions prevent regulatory bodies disclosing information which they have obtained in the course of their functions. They generally predate the introduction of the FOIA and are designed to protect the privacy or commercial interests of third parties. They should be unnecessary under FOI where third party interests are well protected by the exemptions for personal data (s.40), breach of confidence (s.41) and prejudice to commercial interests (s.43). Separate exemptions also protect an authority's investigatory or regulatory functions.¹⁴

We note that these statutory provisions do not apply to environmental information. The right of access under the EIRs expressly overrides any such restriction.¹⁵

¹² An equivalent test already exists in relation to section 41, the exemption for breach of confidence, as the common law of confidence itself incorporates a public interest test. A new test may not be needed in relation to section 40, at least for non-sensitive personal data, as the test of fairness required under the exemption already balances the interests of those seeking the information against the interests of those whose personal data are involved. Nor is it needed in relation to section 21, as the test of whether information is "reasonably" accessible to the applicant already, provides a form of balancing test.

¹³ Section 44(1) states: "Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it—(a) is prohibited by or under any enactment, (b) is incompatible with any Community obligation, or (c) would constitute or be punishable as a contempt of court."

¹⁴ Eg section 30(1) which applies to information that may lead the authority to institute criminal proceedings or decide whether charges should be brought or section 31(1)(g) which protects the exercise of the regulatory functions referred in section 31(2).

¹⁵ Regulation 5(6) of the Environmental Information Regulations 2004 states: "Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply."

Examples of information which has been withheld under section 44 include:

- equal opportunity monitoring statistics supplied to Ofcom by licensed television and radio broadcasters¹⁶
- information about the accuracy of domestic gas and electricity meters tested by Ofgem¹⁷
- safety audits carried out by the Civil Aviation Authority on the cargo airline MK Airlines¹⁸
- safety audits carried out by the Civil Aviation Authority on the Fire and Rescue Service at Liverpool John Lennon Airport¹⁹
- two research reports relating to the MMR vaccine submitted to the Legal Services Commission in support of a legal aid application to fund the MMR litigation.²⁰ The author of one of these reports appears to have been Dr Andrew Wakefield, who was subsequently struck off the medical register for serious professional misconduct, part of which involved dishonestly securing legal aid²¹
- correspondence between the Office of Fair Trading and the Department for Business, Enterprise & Regulatory Reform about a possible investigation into the cost of credit card borrowing²²
- anonymised information from a number of Home Office licenses to conduct animal experimentation²³
- communications between UK and Icelandic authorities relating to the British Government's order freezing the assets of the collapsed bank Landsbanki²⁴

¹⁶ Disclosure prohibited by section 393(1) of the Communications Act 2003. Upper Tribunal, OFCOM v Morrissey and the Information Commissioner [2011] UKUT 116 (AAC)

¹⁷ Disclosure prohibited by section 105 of the Utilities Act 2000, ICO Decision Notice FS50070198, Ofgem, 8 May 2006

¹⁸ Disclosure prohibited by section 23 of the Civil Aviation Act 1982. Information Tribunal, EA/2009/0033, Civil Aviation Authority & Information Commissioner & Malcolm Kirkaldie, 22 January 2010

¹⁹ Disclosure prohibited by section 23 of the Civil Aviation Act 1982. First Tier Tribunal, EA/2009/0085, Ian Phillips & Information Commissioner, 10 February 2010

²⁰ Disclosure prohibited by section 20 of the Access to Justice Act 1999 and section 38 of the Legal Aid Act 1988. ICO Decision Notice FS50072941, Legal Services Commission, 30 August 2007.

²¹ General Medical Council, Dr Andrew Jeremy Wakefield, Determination on Serious Professional Misconduct (SPM) and sanction: 24 May 2010.

²² Disclosure prohibited by section 237 of the Enterprise Act 2002. ICO Decision Notice FS50253248, Office of Fair Trading, 29 June 2010

²³ Disclosure prohibited by section 24 of the Animals (Scientific Procedures) Act 1986. British Union for the Abolition of Vivisection & Home Office & Information Commissioner, [2008] EWCA Civ 870

- details of financial promotions withdrawn at the request of, or after discussions with, the Financial Services Authority²⁵
- information about the safety of a particular manufacturer's underwater breathing equipment²⁶
- the number of complaints received by the Office of Fair Trading about the products sold by a French company, with an address in Hammersmith²⁷
- information submitted to the London Borough of Newham by bidders tendering for a casino license²⁸
- many requests submitted to the Parliamentary and Health Service Ombudsman, the Local Government Ombudsman and the Northern Ireland Commissioner for complaints, usually by complainants seeking more information about the handling of their complaints, are refused under statutory restrictions in the Ombudsman legislation.²⁹

The effect of the statutory restrictions on disclosure together with section 44(1)(a) of FOIA is that these requests are refused without consideration of their merits. Questions of whether disclosure would harm third party interests, or might be justified in the public interest, are not considered.

Some of these statutory restrictions permit disclosure where it is for the purpose of the authority's functions. However, the Upper Tribunal has ruled that in such cases the decision on whether a disclosure is necessary for the authority's functions cannot be reviewed by the Information Commissioner (IC) or the First Tier Tribunal (FTT). The only remedy is judicial review.

In the case which gave rise to this ruling the Broadcasting and Entertainment Cinematograph and Theatre Union (BECTU) sought the race equality monitoring data submitted to Ofcom by each of 138 broadcasting license holders. The Commissioner

²⁴ Disclosure prohibited by section 348 of Financial Services and Markets Act 2000. ICO Decision Notice FS50362418, Financial Services Authority, 31 August 2011

²⁵ Disclosure prohibited by section 348 of Financial Services and Markets Act 2000. ICO Decision Notice FS50212107, Financial Services Authority, 14 April 2010

²⁶ Disclosure prohibited by section 237 of the Enterprise Act 2002. ICO Decision Notice FS50232320, Cornwall Council, 18 March 2010

²⁷ Disclosure prohibited by section 237 of the Enterprise Act 2002. Information Tribunal, EA/2006/0057, Malcolm James Dey & Information Commissioner & Office of Fair Trading, 16 April 2007

²⁸ Disclosure prohibited by a Code of Practice issued under Schedule 9, paragraph 6(1) of the Gambling Act 2005. ICO Decision Notice FS50374999, London Borough of Newham, 18 October 2011

²⁹ See: section 11(2) of the Parliamentary Commissioner Act 1967; section 15(1) of the Health Service Commissioners Act 1993; section 32(2) of the Local Government Act 1974; Article 21(1) of the Commissioner for Complaints (Northern Ireland) Order 1996

and First Tier Tribunal both held that disclosure was restricted by a statutory bar.³⁰ Ofcom was free to disclose the information if it considered that this would further its statutory functions,³¹ which include the promotion of equal opportunities amongst broadcasters' staff.³² Ofcom's predecessor body, the Independent Television Commission, had published this equality monitoring data, even though it had been subject to a similar statutory restriction on disclosure. Both the IC and the Information Tribunal considered that Ofcom's decision not to disclose the data was within the range of reasonable options available to it. However, the Upper Tribunal held that neither the IC nor the Tribunal had the power to even consider the reasonableness of such decisions or to overrule a decision, even if it was unreasonable.³³

This is precisely the type of decision that we believe should be tested on its merits under FOI and which should not be subject to any statutory restriction.

One way of doing this would be to lift such statutory restrictions in relation to FOI requests, while leaving them in place if necessary, as a sanction against the unauthorised release of information outside of the FOI regime.

This solution has been adopted in relation to certain statutory bars. A restriction in section 28(2) of the Health & Safety at Work etc Act 1974 prohibits the release of information obtained by the Health & Safety Executive and Commission through the exercise of their statutory powers. It was amended in 2005 so that it did not apply to disclosures made under the FOI Act. The same was done in relation to the prohibition on disclosure in section 118 of the Medicines Act 1968, which prevented the release of information about pharmaceutical product safety. This approach should now be followed in relation to the remaining statutory bars.

The Royal Family

We regret that the qualified exemption for the Royal Family has been partly replaced by a new absolute exemption for information relating to communications with the monarch and the heir and second in line to the throne. The new exemption applies for 20 years or until 5 years after the death of the individual concerned, whichever is later.³⁴

³⁰ Section 393(1) of the Communications Act 2003 ("the 2003 Act"), which prohibits the disclosure of information about a particular business obtained by Ofcom through the exercise of its statutory powers.

³¹ Section 393(2) of the 2003 Act

³² One of Ofcom's statutory functions is to take "such steps as they consider appropriate" to promote equal opportunity amongst employees providing broadcasting services (section 27(2) of the 2003 Act) and Ofcom is specifically empowered to impose equal opportunity conditions on license holders under section 337 of the Act.

³³ Upper Tribunal, OFCOM v Morrissey and the Information Commissioner [2011] UKUT 116 (AAC).

³⁴ It was introduced by Schedule 7 of the Constitutional Reform and Governance Act 2010. Information relating to communications with other members of the Royal Family remains subject to the original qualified exemption in section 37(1) of the FOIA, and is subject to the Act's public interest test.

This amendment was introduced with minimal Parliamentary scrutiny in the ‘wash-up’ period prior to the dissolution of Parliament before 2010 general election. It appears to have been prompted by FOI requests for Prince Charles’ correspondence with government departments. The Information Commissioner had upheld the departments’ refusals in these cases³⁵ though the decisions are currently subject to an appeal to the Upper Tribunal.

The Commissioner’s decisions, though they did not explicitly say so, left open the possibility of disclosure where, for example, Prince Charles’ intervention proved to have a decisive effect on government policy. We think that is appropriate.

Last year the Guardian newspaper highlighted the fact that Prince Charles’ consent is required before any bill that might, even incidentally, affect the interests of the Duchy of Cornwall can be introduced into Parliament. Details of some of the bills submitted for his consent were obtained by the paper under the FOI Act before the section 37(1) exemption was made absolute – an exercise that could not now be repeated.³⁶ It is not known whether the Prince has at any time refused consent. But the fact that Prince Charles has the power to veto legislation in secret in our view makes an overwhelming case for the absolute exemption to be removed.

Section 36 and Parliament

Section 36 is subject to the Act’s public interest test in relation to all public authorities *other than* the Houses of Parliament, when it becomes an absolute exemption, established by a conclusive certificate. We question whether this arrangement is appropriate, particularly in light of the separate absolute exemption that exists in section 34 for Parliamentary privilege.

Late claiming of exemptions

Public authorities sometimes raise new exemptions for the first time during the ICO investigation into a requester’s complaint, or at later stages in the appeal process. (The Court of Appeal has recently ruled that public authorities are entitled to do so.³⁷)

The ICO itself may sometimes, during an investigation, invite an authority to consider relying on an exemption which the authority has not previously raised³⁸ or even

³⁵ See for example Decision Notice FS50114757, Cabinet Office, 15 December 2009

³⁶ ‘Prince of Wales: a private individual’s effective veto over public legislation’, Guardian 30.10.2011; ‘Reveal Prince Charles’s input on planning law, government urged’, Guardian 31.10.11

³⁷ Birkett & Department for the Environment, Food and Rural Affairs. [2011] EWCA Civ 1606

³⁸ See for example the decision notice which stated: “The Commissioner contacted the public authority again on 5 February 2009. It was noted that some of the arguments that the public authority had advanced in connection with section 31(1)(f) in fact appeared more relevant to section 38(1)

introduce a new exemption itself (for example, section 40, which protects the privacy of individuals).³⁹

There is no obligation on the ICO or the authority to inform the applicant when a new exemption is relied on in this way. This may deprive the applicant of any opportunity to respond to the new exemption claim.⁴⁰

The Upper Tribunal has commented:

We are conscious that there have been cases where the first a requester has known about some entirely fresh point raised by the public authority has been when he has seen it in the Commissioner's Decision Notice, many months (sometimes years) after the information request was originally made. If novel exemptions can be raised as of right, however late, this seems to turn the time limit provisions of ss.10 and 17 almost into dead letters. It can also create a strong sense of injustice, because the requester will usually not have been given any opportunity by the Commissioner to comment on the new exemption. This can lead to unsatisfactory decisions by the Commissioner and unnecessary appeals (because sometimes the requester has a response to the new exemption which shows that it is not valid).⁴¹

We think that any party which raises a new exemption in the course of an ICO investigation should be required to notify the applicant, who should be given an opportunity to respond before the investigation is concluded.

Consideration should also be given to introducing statutory authority for the Commissioner and Tribunal to refuse to permit the late claiming of exemptions where there are no reasonable grounds for doing so and the late claiming is not necessary to protect third party rights or essential state interests. Until relatively recently, the Commissioner and Tribunal believed that they had this power.

(endangerment to health and safety). The public authority was asked to respond confirming if it did wish to also cite section 38(1) and, if so, to explain why...The public authority responded to this on 5 March 2009 and confirmed that it did wish to cite the exemption provided by section 38(1)(a) (health) and 38(1)(b) (safety)." In this case, the ICO went on to find that section 38(1) exemption and exemption which the authority had initially claimed both applied but that the information should nevertheless be disclosed on public interest grounds. Decision Notice FS50173181, Youth Justice Board for England and Wales, 10 December 2009

³⁹ Eg "The public authority cited section 42(1) and not 40(1) in its refusal notice and its internal review. The Commissioner has decided as the regulator of the DPA to use his discretion to consider whether section 40(1) applies to the requested information. The Commissioner will not proactively seek to consider exemptions in all cases before him, but in cases where personal data is involved the Commissioner believes he has a duty to consider the rights of data subjects." Decision Notice FS50300314, Intellectual Property Office, 6 July 2010.

⁴⁰ See the Information Tribunal's decision in EA/2009/0035, Alasdair Roberts & Information Commissioner & Department for Business, Innovation and Skills, 20 November 2009

⁴¹ All Party Parliamentary Group on Extraordinary Rendition & Information Commissioner & the Ministry Of Defence, [2011] UKUT 153 (AAC)

Two differently constituted panels of the Upper Tribunal had adopted different approaches to the issue. In one case, the UT held that there was no discretion to refuse to permit new exemptions to be raised at any stage.⁴² In the other, though it was not called on to decide the matter, the UT noted:

we confess to some general concerns that an indefeasible right in the public authority to raise whatever exemption it thought fit whenever it wanted to would raise a number of real problems with the scheme of the Act. The Act contemplates a process of application, reasoned decision within 20 days (or longer in certain cases), internal review, complaint to the Commissioner, and appeal. A willingness to readily admit novel points in late claims may frustrate the statutory policy of prompt response and investigation and the ability of the requester to know where they stand in the statutory processes. Hence one might have thought that late claims should only be permitted where a reasonable justification is shown that is consistent with the statutory purposes, which include the provision of an effective right to information alongside considerations of the public interest and protection of the rights of third parties.⁴³

Although the Court of Appeal later found that the authorities were entitled to rely on new exemptions at a late stage, Lord Justice Carnwath expressed regret that no submission had been made to the court in favour of a “middle way” which presumably might have allowed a public authority to rely on new exemptions at a late stage, subject to the discretion of the Commissioner or Tribunal. This suggests that the Court of Appeal may have been prepared to consider the kind of suggestion we propose above.

Advice and assistance when cost limit exceeded

An authority which refuses a request because it estimates that the cost of complying would exceed the £600 or £450 cost limit is expected to provide advice and assistance to enable the requester to submit a refined, less time-consuming version of the request and to suggest what information could be provided within the cost limit.⁴⁴

⁴² DEFRA v Information Commissioner and SB, [2011] UKUT 39 (AAC); Information Commissioner v Home Office [2011] UKUT 17 (AAC)

⁴³ All Party Parliamentary Group on Extraordinary Rendition & Information Commissioner & The Ministry Of Defence, [2011] UKUT 153 (AAC)

⁴⁴ “Where an authority is not obliged to comply with a request for information because, under section 12(1) and regulations made under section 12, the cost of complying would exceed the “appropriate limit” (i.e. cost threshold) the authority should consider providing an indication of what, if any, information could be provided within the cost ceiling. The authority should also consider advising the applicant that by reforming or re-focussing their request, information may be able to be supplied for a lower, or no, fee.” Secretary of State for Constitutional Affairs’ Code of Practice on the discharge of public authorities’

In practice, authorities sometimes comply with this provision merely by suggesting that a narrowed request may stand a better chance of success, but providing no indication how or by what extent the request should be narrowed.

We think authorities should be expressly required to notify the applicant of their estimate of the cost of complying with the request, and to explain how this has been calculated. This would help them identify which aspects of the request had been most time-consuming and judge by what degree they would be required to revise the scope of their original request. This would be in line with the ICO's own advice.⁴⁵

Fees

The FOI cost limits do not apply to requests for environmental information. The EU Directive which gave rise to the EIRs permits charging but require that any charge "shall not exceed a reasonable amount"⁴⁶ This precise phrase is used in the Scottish EIRs.⁴⁷

However, the UK regulations do not follow this wording. Instead, they state that any charge "shall not exceed an amount which the public authority is satisfied is a reasonable amount".⁴⁸ This subjective test is presumably intended to limit the Information Commissioner's ability to review public authorities' charges. We think the qualification should be removed, and the regulations should precisely reflect the wording of the directive.

On some occasions, authorities have made what the ICO regards as unreasonable charges for information. If the requester has paid these, the ICO cannot require the authority to refund them.⁴⁹

functions under Part I of the Freedom of Information Act 2000, Issued under section 45 of the Act. November 2004, paragraph 14.

⁴⁵ For example, the ICO has stated: "When citing section 12, the public authority failed to provide any breakdown of the cost estimate. The public authority should be aware that the Commissioner considers it appropriate and in line with the obligation to provide advice and assistance imposed on public authorities by section 16(1) for a breakdown of how the cost limit would be breached to be provided where section 12 is cited. The Information Tribunal confirmed that it would expect the same in *Gowers* and the London Borough of Camden (EA/2007/0114) when stating: "...a public authority seeking to rely on section 12 should include in its refusal notice, its estimate of the cost of compliance and how that figure has been arrived at, so that at the very least, the applicant can consider how he might be able to refine or limit his request so as to come within the costs limit..." (paragraph 68)...The public authority should take note of this and provide a breakdown of its cost estimate in any future case where section 12 is cited." Decision Notice FS50246244, Ministry of Defence, 15 June 2010

⁴⁶ Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, Article 5(2).

⁴⁷ The Environmental Information (Scotland) Regulations 2004, Regulation 8(3)

⁴⁸ Regulation 8(3) of the EIRs.

⁴⁹ This appears to be the case under both the EIRs and FOIA

For example, the ICO found that an EIR charge of £900 which a requester paid for information about amount of heat sold by a council owned energy company was unreasonable and recommended its refund. The Council refused to do so.⁵⁰ We believe the ICO should be able to require a public authority to refund an unreasonable charge.

Destruction of requested records

An authority which deliberately destroys a requested record, in order to prevent its disclosure, commits an offence under section 77 of the FOI Act. However, Section 127(1) of the Magistrates Court Act 1980 prohibits a prosecution from being brought more than 6 months after the offence has been committed. The delays which often occur in responding to requests and carrying out internal reviews mean that more than 6 months may have passed before the applicant is in a position to complain to the ICO. If the deliberate destruction of the record is then discovered, it will be too late to mount a prosecution.

We think it should be possible to prosecute for this offence provided proceedings are brought within 6 months of sufficient evidence of it *coming to the prosecutor's knowledge* - rather than within 6 months of the offence being committed - provided this is done within 3 years of the offence occurring. The time limit for prosecuting a number of other offences has been extended in this way.⁵¹

Copies of documents

Applicants should be able to specify that they wish to be supplied with information in the form of a copy of an existing record containing the information.

Under section 11(1) of the FOI Act, applicants are entitled to express their preference for the means by which information should be communicated to them; authorities are required to comply with that preference so long as that is reasonably practicable. However, the available preferences are limited to those set out in section 11(1), and do not include being supplied with a copy of an existing record such as a photocopy of a document.

⁵⁰ Decision Notice FER0298988, Nottingham City Council, 21 March 2011

⁵¹ See for example: section 31 of the Animal Welfare Act 2006; section 11A of the Employment Agencies Act 1973 (inserted by paragraph 5 of Schedule 7 of the Employment Relations Act 1999); section 64A of the Public Health (Control of Disease) Act 1984 (inserted by paragraph 22 of Schedule 11 of the Health and Social Care Act 2008); section 12(4A) of the Theft Act 1968 (inserted by section 37 of the Vehicles (Crime) Act 2001); section 129 of the Fair Trading Act 1973; section 431 of the Insolvency Act 1986; regulation 14(1) of the Consumer Protection from Unfair Trading Regulations 2008 No. 1277 and section 13 of the Climate Change and Sustainable Energy Act 2008, which extended the time limits for prosecuting a failure to comply with the energy conservation requirements of the Building Act 1984.

At present an authority can disregard any expression of preference for a photocopy, even if it would be practicable to provide one, and instead retype the document for disclosure or print it out again from an electronic copy. The released version may omit any exempt information without any indication of the location or length of any deleted passages. A right to obtain copies of original records, where practicable, would supply that context.

Composition of the Tribunal

Currently some of the Information Rights Tribunal's lay members are employees of public authorities where they work either as FOI practitioners or lawyers likely to be involved in FOI cases.^{52,53}

We have never seen any evidence of a lack of impartiality by such members. However, the issue has been raised with us by an appellant concerned to find that employees of the authority involved in his case were amongst the Tribunal members (though were not hearing the case in question).

Tribunal members clearly could not sit on cases involving their own authorities. But some cases involve the interpretation of widely used provisions of the Act which have implications for all public authorities. A Tribunal member may, in their capacity as a public authority FOI practitioner, be relying on a particular interpretation of a statutory provision in dealing with requests while at the same time serving on a Tribunal which is ruling on how that provision is to be interpreted. That would clearly be undesirable. We suggest that future appointments to the Tribunal should not include current employees of authorities subject to the Act.

⁵² www.justice.gov.uk/downloads/guidance/courts-and-tribunals/tribunals/information-rights/who-are-the-tribunamembers-may-2011.pdf

⁵³ The lay members were originally appointed expressly to represent the interests of FOI requesters and public authorities under sections 6(6)(aa) and (bb) of the Data Protection Act 1998. These provisions were the result of amendments to the DPA made by the Freedom of Information Act. They have since been repealed by The Transfer of Tribunal Functions Order 2010

II. CONTRACTING OUT

FOI requests and contracts

The contracting out of public authority functions to bodies which are not subject to the FOI Act is likely to severely undermine the public's rights to information. This process will be accelerated by the Localism Act 2011, which exposes virtually all local authority functions to a procedure which may lead to competitive tender. The Health and Social Care Bill will lead to NHS functions increasingly being performed by private providers.

Any information which the authority itself holds about a contract will be subject to FOI, as will information which the contractor holds *on the authority's behalf*. This is provided for under section 3(2)(b) of the Act.⁵⁴ However, other information about the contract or the contractor's ability to perform it is unlikely to be available.

The difficulty is in distinguishing between the information which a contractor holds for its own purposes and that which it holds on the authority's behalf. The Information Commissioner has held that this depends on the contract itself. Where the contract requires the authority to keep particular records or to provide specified information to the authority on request, that information will be held on the authority's behalf and be subject to the FOI Act.⁵⁵

Where the status of particular information is not addressed in the contract, the information is likely to be considered to be held for the contractor's purposes and to not be subject to FOI.

For example, in 2007 an FOI request was made to Islington Council for information about additional payments and Argos points provided to parking attendants as incentives. The requester also sought anonymised information about numbers of parking tickets issued by the 'best performing' attendants and subsequently cancelled. He clearly suspected that the incentives were leading attendants to issue unjustified tickets.

The parking attendants were employed by National Car Parks Ltd, under a contract with the Council. The Information Commissioner examined the contract and found that it

⁵⁴ Section 3(2)(b) of FOIA states "For the purposes of this Act, information is held by a public authority if...it is held by another person on behalf of the authority."

⁵⁵ For example, in discussing a request to the Cabinet Office for information held by the bodies which certify which authorities meet the standards required for a Customer Service Excellence Mark, the Commissioner noted: "In the Commissioner's view, information would be held on behalf of the Cabinet Office if the Certification Bodies were contractually obliged to gather that information to provide to the Cabinet Office and held the information primarily for the Cabinet Office's purposes rather than their own." Decision Notice FS50264382, Cabinet Office, 29 July 2010.

imposed no requirement on NCP to provide the authority with statistical information about the Argos points, performance payments to individual staff or the criteria used in awarding them. He concluded that this information was therefore not held on the council's behalf and was not accessible from it under the FOI Act.⁵⁶ We fear this pattern will be increasingly repeated as more public authority functions are dealt with under contract.

During the House of Lords stages of the Localism Bill, Lord Wills proposed an amendment which would have established that any future contract let by a local authority was deemed to include a provision dealing with FOI requests. Any information held by the contractor about the performance of the contract would then be considered to be held on behalf of the authority – automatically bringing it within the scope of the FOI Act.⁵⁷ We believe a provision of this kind should apply to all public authority contracts.

The Health and Social Care Bill

Under the current NHS reforms, the new commissioning bodies (clinical commissioning groups and the NHS Commissioning Board) will be subject to the FOI Act. However, the private sector contractors with whom they have contracts will not be covered by the Act.

The contracts themselves will contain disclosure requirements along the lines of that already found in the standard NHS contract. This states:

"27.5 Where the Provider is not a Public Authority, the Provider acknowledges that the Commissioners are subject to the requirements of the FOIA and shall assist and co-operate with each Commissioner to enable the Commissioner to comply with its disclosure obligations under the FOIA. Accordingly the Provider agrees:

27.5.1 that this Agreement and any other recorded information held by the Provider on the Commissioners' behalf for the purposes of this Agreement are subject to the obligations and commitments of the Commissioners under the FOIA"⁵⁸

(The term "Commissioners" here refers to the commissioning bodies.)

⁵⁶ Decision Notice FS50162002, London Borough of Islington, 9 June 2009,

⁵⁷ Hansard, House of Lords, 23 Jun 2011, Column 1432 onwards.

⁵⁸ Department of Health, 2011/12 Standard Terms and Conditions for Acute Hospital Services.

These provisions require some unpicking. The requirement that providers co-operate with commissioning bodies to comply with their disclosure requirements under the FOI Act is circular. The commissioning body's obligations under the Act are merely to disclose information which it holds itself or which the provider holds on its behalf. The real question is what information is held on the commissioning body's behalf.

The contract itself does specify that various types of information are subject to FOI or have to be published or provided to the commissioning body on request. This includes information about the service specifications; prices and payments; numbers of patients treated; time taken to treat them; performance quality reports against a range of specific indicators; figures on MRSA and Clostridium difficile infections; and reports on complaints, equality monitoring and certain other matters. There are also obligations to comply with NHS dataset requirements. In addition, the commissioning body may request "any other information it reasonably requires in order to monitor the Provider's performance in relation to this Agreement".

However, if the commissioning body does *not* consider that it requires particular information to monitor the provider's performance, the information will not be available under FOI.

Suppose there are suspicions about the use of out-dated or potentially substandard or even contaminated supplies by hospitals. For an NHS hospital, the FOI Act could be used to obtain details of stocks of the product, analysis results, correspondence with suppliers, minutes of meetings at which the problem was discussed, concerns about the issues raised by staff and details of how they were handled and information showing what measures were considered, why particular options were rejected and what was done.

This level of information would not be available in relation to independent providers treating NHS patients. A commissioning body may take the view that it does not itself require this information to monitor the provider's performance under the contract, because it does not believe that there is a real problem – or because it does not believe that the particular information sought by the requester would throw light on it or because it is already feels satisfied, from its own knowledge of the provider, that any problem would be properly handled. In that case it seems unlikely that there would be any contractual obligation on the commissioning body to seek the information or on the provider to produce it. In cases of doubt, we think contractors would be likely to vigorously oppose any attempt to interpret a contractual provision of this kind expansively.

The Information Commissioner and contractors

A further problem is that key aspects of the FOI Act cannot apply to contractors. The Information Commissioner's powers relate only to public authorities. He cannot investigate a contractor's claim that it does not hold or cannot find the information needed to answer an FOI request. His power to serve Information Notices, requiring public authorities to supply him with information required for an investigation, do not extend to contractors. He cannot serve a decision notice or an enforcement notice on a contractor or take action against a contractor which appears to be failing to comply with its contractual obligations to assist with FOI requests.

The offence which applies to a public authority which deliberately destroys, alters or conceals a requested record in order to prevent its disclosure does not apply to a contractor which does this to prevent the authority disclosing it in response an FOI request.

Once a contract has expired, any contractual disclosure requirement may lapse, removing the right to information about past events. Even if the contract stipulates that disclosure requirement survives, it could only be enforced by a civil action for breach of contract against the contractor. The prospect of such action being taken for failing to assist in replying to an FOI request is highly implausible.

The FOI Act envisages that contractor who provide a service on behalf of a public authority, which it is the authority's function to provide, can be designated as a public authority subject to the Act in its own right.⁵⁹ We think the use of this provision to make contractors directly subject to FOI should now be considered.

Failing that, the Act should be reassessed in light of contracting out and amended to ensure that the public's rights to information about public authority services and functions are fully preserved when these are provided by contractors.

⁵⁹ FOI Act, section 5(1)

III. POSSIBLE RESTRICTIONS TO THE ACT

Cabinet documents

We are concerned at suggestions that a new exemption should be created for cabinet documents. In recent newspaper interviews, the former cabinet secretary, Lord O'Donnell, has advocated this, though he has appeared to suggest that his main concern was to protect cabinet minutes from disclosure.⁶⁰ In fact, the government has already demonstrated that it is prepared to exercise the ministerial veto under section 53(2) of the Act to prevent such releases.⁶¹

Any new exemption in this area is likely to be designed to protect not merely *minutes* but all cabinet and cabinet committee *papers*. We assume it would be an absolute exemption, not subject to the Act's public interest test and apply for 20 years.

This is what the last Labour government proposed, after announcing that old government records would in future become public after a 20 rather than a 30 year period.⁶² But the government later concluded that such a change should only take place "if it is essential" to maintaining collective responsibility. It reported that "on balance the Government does not consider such enhanced protection to be necessary as a result of the reduction to 20 years".⁶³

We assume one of the reasons for this conclusion was the government's recognition that it could always resort to the veto to protect such materials if it thought that the Commissioner and Tribunal had wrongly ordered disclosure. We think the existence of the veto is wrong in principle, particularly in light of the multiple-stage appeal process available to government. However, so long as the veto exists, we believe there is no justification for a new cabinet records exemption. We think it far preferable that the government is required to address this issue case by case, inconvenient though it may find that, than a new far reaching blanket exemption be adopted.

⁶⁰ See for example, "Keep Cabinet secret, says Civil Service chief", The Times, 18.1.12

⁶¹ The only three vetoes exercised so far have been in relation cabinet and cabinet committee minutes

⁶² In his statement on Constitutional Renewal, the then Prime Minister Gordon Brown said: "as part of extending the availability of official information, and as our response to the Dacre review, we will progressively reduce the time taken to release official documents. As the report recommended, we have considered the need to strengthen protection for particularly sensitive material, and there will be protection of royal family and Cabinet papers as part of strictly limited exemptions." (emphasis added) Hansard, Commons, 10.6.2009, Col. 797

⁶³ Ministry of Justice, Government Response to the 30-Year Rule Review, February 2010, Paragraph 49

Our particular concern is the vast range of information that is dealt with by the cabinet committee system, often via correspondence rather than in meetings. This is illustrated by Cabinet Office's guidance on the cabinet committee system, which states:

Policy or other proposals will require consideration by a Cabinet Committee where they meet one or more of the following conditions:

- the proposal takes forward or impacts on a Coalition agreement
- the issue is likely to lead to significant public comment or criticism
- the subject matter affects more than one department
- the Ministers concerned have failed to resolve a conflict between departments through interdepartmental correspondence and discussions...

The kind of proposals which will almost certainly require collective consideration include:

- any issue which would have an impact on the good operation of the Coalition, or which takes forward government policy in an area covered by the Coalition Agreement
- publication of consultation documents and Green and White Papers
- responses to Select Committee Reports
- adoption of negotiating stances for international meetings
- agreeing final policy proposals before legislation is introduced
- new regulatory or deregulatory proposals.⁶⁴

A new cabinet exemption would, thus, by definition, apply to discussions of any new proposals likely to result in "significant public comment or criticism". This would be a self-targeting secrecy provision, designed to automatically focus on any new government proposals likely to concern the public.

The guidance also makes clear that some materials which do not have to be dealt with by a cabinet committee can be circulated as Cabinet Correspondence "for information only". This highlights a very real risk that material could be introduced into the cabinet committee system purely in order to attract the protection of a new exemption.

A new exemption would apply to cabinet documents not merely while they were under active consideration but for 20 years afterwards. No account could be taken of the public interest in disclosure, the absence of likely harm, the need to learn from past mistakes, the fact that the material might contain no advice, opinion or evidence of ministerial disagreement or might by the time of a request be a decade or more old. If this provision was now in place, information relating to political events occurring as long ago as 1993, including the latter stages of the BSE crisis, would still be outside the scope of FOI.

⁶⁴ Cabinet Office, 'Guide To Cabinet and Cabinet Committees'

FOI and the media

We are dismayed at the way media requests are portrayed by some public authorities. According to the MOJ memorandum, some appear to regard the media's use of the Act as "illegitimate".⁶⁵ Elsewhere, media requests are linked with vexatious requests⁶⁶ or described as a "drain on resources".⁶⁷

At one point the MOJ memorandum appears to suggest that the Act is intended for *individuals* and that its use by anyone else represents a deviation from its true purpose.⁶⁸ We think that is misguided. A more realistic approach appears in an extract from a 1998 report of the Public Administration select committee, also quoted in the memorandum, which concluded that the proposed FOI Act would:

Make it easier for politicians, journalists and members of the public to hold the government to account by making government cover-ups more difficult⁶⁹
(emphasis added)

We think it is essential that the media, who are the eyes and ears of the public, should be significant users of the Act. The media's failure to make much use of the 1994 Code of Practice on Open Government, which preceded the Act, was one of the reasons why the Code had little impact. By contrast, the range of significant information obtained by press requests can be seen from two reports available on our web site, summarising 1,500 press stories published during the Act's first three years.^{70, 71} A selection of more recent FOI press reports will be published shortly.⁷²

The fact that some journalists make FOI requests via private email accounts is apparently regarded as evidence that they are seeking to obscure their excessive use of the Act.⁷³ An alternative explanation is that journalists believe that the are

⁶⁵ "There was a view that some of these requests are coming from individuals with the sole purpose of gathering information for what was seen as illegitimate use i.e. a 'good' media story or to irritate organisations." Ministry of Justice, Memorandum to the Justice Select Committee, Post-Legislative Assessment of the Freedom of Information Act 2000, page 127

⁶⁶ The Ipsos-MORI research reported that: "some respondents struggled to cite benefits to their organisation given the time and resource taken up by the Act – specifically in dealing with requests from the media, serial requesters and "vexatious individuals". Memorandum, page 123

⁶⁷ Memorandum, page 112.

⁶⁸ "It is worth evaluating, as far as is possible, the question of to whom public authorities should be accountable. The ostensible focus of FOIA is on the individual seeking information with which they can then hold their public authority accountable. In practice, a great deal of FOI requests come not from private individuals but from journalists, commercial requesters and campaign groups. Memorandum, page 57

⁶⁹ Public Administration Committee, Third Report 1997-98, HC 398-1, "The Government's Proposals for a Freedom of Information Act", paragraph 3.

⁷⁰ '500 Stories from the FOI Act's First Year', www.cfoi.org.uk/pdf/foistories2005.pdf

⁷¹ '1,000 FOI Stories from 2006 and 2007', www.cfoi.org.uk/pdf/FOIStories2006-07.pdf

⁷² This will be available at www.cfoi.org.uk/pdf/FOIStories2011.pdf

⁷³ Ipsos-Mori quote one interviewee as saying "It was well recognised by most that journalists have started to use other email accounts in requesting information as a way of masking the origin of the

discriminated against by public authorities, who are more guarded and slower in responding to their requests than those of other requesters.

Some ministers insist on being provided with journalists' requests before they are answered, which in itself delays the answers to such requests.

Another source of delay affecting journalists resulted from the requirement that departments refer sensitive FOI requests to the Clearing House established by the then Department for Constitutional Affairs to advise departments. Its involvement typically added significantly to the delays facing requesters. One category of request required to be referred to the Clearing House was "Requests relating to high profile issues, whether current or historical" – which would clearly be likely to catch many media requests. This category has since been replaced by one referring to "High likelihood of harmful media interest/story running at the time".⁷⁴

The press's belief that they were singled out for special treatment appeared to have been partly confirmed by a High Court case, in which it was accepted that a request from a press agency had been treated differently from a similar request from elsewhere.⁷⁵

Changes to the Fees Regulations

The memorandum highlights pressure from public authorities for the Fees Regulations to be changed to reduce the volume of requests and cost of complying with them. However, there is no indication that the *savings* resulting from FOI requests, which are a considerable deterrent against wasteful spending, have been taken into account.

It is not clear how measures intended to address apparently heavy use of the Act would or could distinguish between requesters making significant use of the Act in pursuit of complex matters of real public interest and those making many requests for what appear to be less important reasons. Such factors do play a part in determining

request. *"They'll send in requests from Gmail to disguise [the fact] that they are from the media"*. Memorandum, page 110.

⁷⁴ Ministry of Justice, Referral triggers for freedom of information and Environmental Information Regulations requests to Ministry of Justice Clearing House.

www.justice.gov.uk/downloads/guidance/freedom-and-rights/foi-clearing-house-referral-triggers.pdf

⁷⁵ We understand from the applicant that in fact two identical requests had been submitted, one by the press agency and another by a requester in Australia which appeared to have been dealt with more favourably. This prompted the applicant to apply to the department concerned, the Home Office, for its internal deliberations on the handling of his other requests.

The High Court observed: "The fact that – albeit on just the one occasion – one of his requests for information had been handled differently from a similar request made by someone else called (a) for the disclosure of the information about how the request for that information had been handled so that he could see why there had been differential treatment, and (b) for the disclosure of the information about how his requests for other information had been handled so that he could be satisfied that this had been simply an isolated incident of differential treatment." Home Office & Ministry of Justice & Information Commissioner, [2009] EWHC 1611 (Admin), paragraph 27.

whether requests are vexatious, but it is not clear how they could be incorporated into the Fees Regulations.

The Regulations exclude any consideration of public interest. The £600 and £450 cost limits are inflexible and cannot be exceeded even in relation to an issue of overwhelming public importance. The types of changes being canvassed involve either reducing the cost limit, or enabling it to be reached more easily, and would presumably affect requests of obvious public interest as well as those of less obvious merits.

Similar concerns are said to have prompted the 2006 attempt to amend the Fees Regulations. The Frontier Economics report suggested that just 5% of requests to central government bodies supposedly accounted for 45% of the total cost of FOI.⁷⁶ But in reality, little attempt had been made to target the proposed restrictions at the 5% in question. As the government itself acknowledged, the proposals would have had a greater impact on journalists, MPs, campaign groups and researchers than on private individuals.⁷⁷ The result would have been a substantial reduction in the use of the Act to hold public authorities accountable.

For example, one of the proposals was to allow the aggregation of all requests to an authority by the same individual or organisation within a 60 day period, regardless of their nature. (Currently, only requests which relate to the same or similar information can be aggregated.⁷⁸) The proposal would have meant that a local newspaper might be able to make just one or two requests a quarter to a local authority, and having used its quota up on, say, a child abuse issue would be unable to seek information about other questions relating to education, road safety or housing until the next quarter. A national newspaper or broadcasting organisation might reach the cost limit with a single request to the Home Office about immigration and then be unable to submit further requests to it even on an entirely different issue such as passport controls, drugs policy, policing or animal experimentation.

The government later published more details of how the new aggregation provision might work, proposing that authorities should be more ready to aggregate requests made by an individual for commercial “or professional purposes” than for other reasons.⁷⁹ We assume that requests by doctors’ organisations concerned at the impact of NHS reforms, or campaign groups concerned with issues of public interest, would thus have been particular targets for the new measures.

⁷⁶ Memorandum, page 52

⁷⁷ Department for Constitutional Affairs, Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007, Consultation Paper 28/06, 14 December 2006, paragraphs 40-41.

⁷⁸ The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004, Regulation 5(2)

⁷⁹ Department for Constitutional Affairs, Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007, Consultation Paper 28/06, 14 December 2006

Some of the suggestions raised by those interviewed for the purposes of the memorandum may have a similar impact.

For example, some interviewees suggest that *consideration time* (the cost of the time officials spend considering exemptions and the public interest test) should count towards the cost limit.⁸⁰ This was a key element of the 2006 proposals. We believe this would have had, and would still have, a disastrous effect on the Act.

Any request raising a new issue will involve significant consideration time when it first arises. Once the initial cases have been settled (and particularly once Commissioner and Tribunal decisions are available) the time needed to consider similar requests will be greatly reduced. For example, requests involving the section 40 exemption for personal data raise the complex relationship between the Data Protection Act and FOI Act. These initially proved extremely difficult and time-consuming to decide. The substantial body of Tribunal case law on the issue that now exists means that many s.40 cases are now easily and quickly dealt with. Had consideration time been allowed to count towards the cost limit in the past, these requests would invariably have been rejected on cost grounds and no progress on the issue would have been made. The proposal would have allowed many cases involving new, complex or contentious issues to be refused, undermining the Act's purpose and causing the Act to stagnate.

Similar arguments would apply to *consultation time*. Under the 2006 proposals the time which a public authority spent consulting other persons, including other public authorities, about a request would also have counted towards the cost limit. This would mean that any request for information obtained from a third party would be more likely to be refused, because of the time spent consulting that party. The more bodies which needed to be consulted, the less likely disclosure would be. There would be particular difficulty in learning about matters involving multi-agency action, interdepartmental co-ordination or discussions with multiple organisations.

Any proposal to allow either consideration or consultation time to count towards the cost limit would be particularly vulnerable to manipulation. Authorities could propose to involve a lawyer, talk the matter over with one or two extra officials, or consult additional third parties, where it was not strictly necessary, simply to increase the chances of refusing the request on cost grounds. The Information Commissioner would face substantial difficulties in policing such matters.

⁸⁰ Requests can be refused in the authority reasonably estimates that the cost of dealing with the request would exceed £600 (in the case of Government Departments & Parliament and the equivalent bodies for Wales and Northern Ireland) or £450 (for other authorities). Costs are estimated at a standard rate of £25/hour, but may only take account of the time spent establishing whether information is held, and locating, retrieving and extracting it.

Fees

We would be strongly opposed to the introduction of application fees for making FOI requests. At present, any written request for information is automatically deemed to be an FOI/EIR/subject access request regardless of whether the requester cites the legislation. People who ask for information in writing are entitled to the benefits of the statutory rights even if they are unaware of them.

The introduction of application fees would mean that those who explicitly relied on their statutory rights would pay, whereas those who sought information without invoking, or in ignorance of, their rights would not. This would create a two-tier system in which those who could not pay, or were unaware of the access right, might have information unjustifiably withheld, even if it was clear that this could not be done under the legislation.

While fees would presumably be intended to deter high use of the Act, their effect would primarily be felt by those of limited means. Larger media organisations, well funded charities and businesses might continue to make frequent use of the Act, while small scale users might ration or forego their use of it. While it might be thought that a fee of, say, £10 per request⁸¹ might not trouble most requesters, someone in dispute with an authority might need to make a series of requests to it; some issues may require that requests be made to a variety of involved agencies; and some research may be carried out by making the same request to comparable authorities.⁸²

Fees: Ireland's experience

In 2003, a €15 application fee was introduced under Ireland's Freedom of Information Act for non-personal data requests. A fee of €75 for internal review and €150 for appeals to the Information Commissioner were also introduced. Ireland's Information Commissioner was not consulted prior to the announcement of these proposals.⁸³

⁸¹ This is the fee currently charged to someone making a subject access request for their own personal data under the Data Protection Act.

⁸² For example, a small group like the Association for the Improvement of Maternity Services (AIMS), run entirely by unpaid volunteers, occasionally makes FOI requests to a small sample of NHS trusts to obtain examples of particular kinds of policy documents. A £10 application fee would probably deter such groups from using the Act in this way.

A 2009 article in the AIMS journal reported: "When women are threatened with Social Services and, by implication, having their baby taken into care, we advise them that it is important to obtain a copy of the maternity unit's protocol which will describe the actions that the midwives and health visitors are required to follow when they consider that a baby is possibly 'at risk'. In order to find out more about the procedures involved and the criteria that is used AIMS decided...to write to ten randomly selected maternity units to ask them for a copy of their Local Safeguarding Children Board's pre-birth protocol used by midwives and health visitors." 'Safeguarding Children Protocols', Beverley Beech, AIMS Journal Vol 21, No 2, 2009, 10-11.

⁸³ Office of the Information Commissioner (Ireland). Review of the Operation of the Freedom of Information (Amendment) Act 2003, June 2004.

In the year following the introduction of fees:

- non-personal requests (ie those subject to the new fees) fell by 75%
- media use declined by 83%
- business use dropped by 60%.⁸⁴

In 2010, the total number of non-personal requests to all public bodies was still only 56% of the 2002 figure.⁸⁵ Ireland's Information Commissioner has described the fees as "a major obstacle to the use of the FOI Act"⁸⁶ which "seems to suggest that the people are seen as adversaries and nothing more than lip-service is being paid to the principles of open, fair and accountable government."⁸⁷

Ireland's Commissioner later contrasted the Irish government's approach with the UK's, quoting with evident approval Gordon Brown's explanation of why he was not proceeding with proposals to restrict FOI requests.⁸⁸

The cost of section 36

Some cost savings could be achieved by amending section 36(2) of the Act. This exemption is unlike any other harm-test exemption in that the harm referred to (eg to the free and frank provision of advice or the effective conduct of public affairs) is not decided objectively but is determined by 'the reasonable opinion of a qualified person'.

This provision was designed to protect decisions from full scrutiny by the Information Commissioner. The Public Administration select committee had called for this special protection to be removed.⁸⁹ However, ministers claimed that it would be "worrying" to

⁸⁴ Office of the Information Commissioner (Ireland), Annual Report 2004

⁸⁵ Office of the Information Commissioner (Ireland), Annual Reports for 2002 and 2010

⁸⁶ Office of the Information Commissioner (Ireland), Annual Report 2007

⁸⁷ "Public Trust in the Civil Service - Room for Improvement", Speech by Emily O'Reilly, Ombudsman and Information Commissioner at the Annual Conference of Assistant Secretaries, 3 March 2005.

⁸⁸ "Interestingly, the UK Government in 2007 proposed to use cost restrictions as a device to "ration" FOI usage but, in the end, decided against such an approach. As Prime Minister Gordon Brown explained on 25 October 2007: *"When anything is provided without cost, it does risk being open to abuse. However, the Government does not believe that more restrictive rules on cost limits of FOI requests are the way forward. ... We do this [drop restrictions proposal] because of the risk that such proposals might have placed unacceptable barriers between the people and public information. Public Information does not belong to Government, it belongs to the public on whose behalf government is conducted. Wherever possible that should be the guiding principle behind the implementation of our Freedom of Information Act."* Office of the Information Commissioner (Ireland), Freedom of Information The First Decade, May 2008

⁸⁹ Public Administration Select Committee, Third Report Session 1998-99, HC 570, paragraph 90

allow the types of prejudice referred to here to be determined by an “unelected person” such as the Information Commissioner.⁹⁰

The result is that ministers must be personally involved each time this exemption is cited. They must also brief themselves fully before sanctioning the use of the exemption: if the minister appears not to have considered the issues properly, the Information Commissioner is likely to reject the exemption claim.

The section 36(2) exemption is subject to the public interest test, and the fact that the qualified person has expressed a reasonable opinion does not determine the test’s outcome. It only demonstrates that some prejudice would or would be likely to occur. The Tribunal has made it clear that the Commissioner must still reach his own view about the severity, extent and frequency of the prejudice when considering the public interest.⁹¹

Section 36 is the only regularly used provision of the Act which requires a minister’s personal involvement. Frontier Economics estimated that requests involving ministers costed £495 on average, more than double the cost of other central government requests.⁹² It found that 19% of central government requests involved a minister or board level official.⁹³ In 2010, the section 36 exemption was used 220 times by departments of states.⁹⁴ Removing this requirement is likely to significantly reduce FOI costs in central government.

The same is true in other authorities, where the “qualified person” is usually its most senior figure, for example, the chief executive of an NHS body, the chief officer of a police force, the chief executive or monitoring officer of a local authority or the vice-chancellor of a university.⁹⁵ The decisions cannot be delegated.

The Scottish FOI Act’s equivalent to section 36 is an ordinary exemption which operates without reference to the reasonable opinion of a qualified person.⁹⁶ Bringing the UK exemption into line would both simplify the provision and produce savings.

⁹⁰ Hansard, House of Commons, Standing Committee B, Standing Committee B, 27 January 2000,

⁹¹ Information Tribunal, EA/2006/0011 & EA 2006/0013, Guardian Newspapers Limited & Heather Brooke & Information Commissioner & British Broadcasting Corporation, paragraphs 91-92

⁹² Frontier Economics, Independent Review of the impact of the Freedom of Information Act
A Report Prepared for the Department for Constitutional Affairs, October 2006, page 22

⁹³ Frontier Economics, page 21

⁹⁴ MOJ Annual Report 2010, Table 10

⁹⁵ <http://webarchive.nationalarchives.gov.uk/20100512160448/http://www.foi.gov.uk/guidance/exguide/sec36/annex-d.htm>

⁹⁶ Freedom of Information (Scotland) Act 2002, section 30