



House of Commons
Constitutional Affairs
Committee

Freedom of Information Act 2000 — progress towards implementation

First Report of Session 2004–05

Volume I

EMBARGOED ADVANCE COPY
Not to be published
in full, or in part, in any form before
00:01 on Tuesday 7 December 2004



House of Commons
Constitutional Affairs
Committee

**Freedom of Information
Act 2000 — progress
towards implementation**

First Report of Session 2004–05

Volume I

Report, together with formal minutes

*Ordered by The House of Commons
to be printed 30 November 2004*

The Constitutional Affairs Committee

The Constitutional Affairs Committee (previously the Committee on the Lord Chancellor's Department) is appointed by the House of Commons to examine the expenditure, administration and policy of the Department for Constitutional Affairs and associated public bodies.

Current membership

Rt Hon Alan Beith MP (*Liberal Democrat, Berwick-upon-Tweed*) (Chairman)
Peter Bottomley MP (*Conservative, Worthing West*)
Mr James Clappison MP (*Conservative, Hertsmere*)
Ross Cranston MP (*Labour, Dudley North*)
Mrs Ann Cryer MP (*Labour, Keighley*)
Mr Jim Cunningham MP (*Labour, Coventry South*)
Mr Hilton Dawson MP (*Labour, Lancaster and Wyre*)
Andrew Rosindell MP (*Conservative, Romford*)
Mr Clive Soley MP (*Labour, Ealing, Acton and Shepherd's Bush*)
Keith Vaz MP (*Labour, Leicester East*)
Dr Alan Whitehead MP (*Labour, Southampton Test*)

Powers

The committee is one of the departmental select committees, the powers of which are set out in House of Commons Standing Orders, principally in SO No 152. These are available on the Internet via www.parliament.uk

Publications

The Reports and evidence of the Committee are published by The Stationery Office by Order of the House.

All publications of the Committee (including press notices) are on the Internet at www.parliament.uk/conaffcom

Committee staff

The current staff of the Committee are Roger Phillips (Clerk), Dr John Gearson (Second Clerk), Richard Poureshagh (Committee Assistant), Alexander Horne (Legal Specialist), Julie Storey (Secretary), Tes Stranger (Senior Office Clerk) and Adèle Brown (Committee Media Officer).

Contacts

Correspondence should be addressed to the Clerk of the Constitutional Affairs Committee, House of Commons, 7 Millbank, London SW1P 3JA. The telephone number for general enquiries is 020 7219 8196 and the email address is conaffcom@parliament.uk

Media enquiries can be addressed to Adèle Brown, Committee Media Officer, House of Commons, 7 Millbank, London SW1P 3JA. Telephone number 020 7219 0724 / 07711 155 722 and email address brownac@parliament.uk

Cover photo credit

We would like to thank the Ministry of Defence for kind permission to use one of the posters of their Departmental Freedom of Information campaign as part of the front cover of this Report.

Contents

Report	<i>Page</i>
Summary	3
1 Introduction	5
2 Background	7
The Decision to Adopt the 'Big Bang' Approach	8
3 Snapshots of preparedness by Sector	10
The Police Service	10
ACPO Views on the Role of the DCA	12
Conclusion	14
The Health Sector	15
The NHS FOI Project	15
Preparedness of Individual Contractors	17
Conclusion	19
Local Government	20
Points of Concern	24
Conclusion	26
4 The Role of the DCA	27
Co-ordination from the Centre	29
The Lord Chancellor's Advisory Group	30
Staff Turnover in the DCA	31
FOI Champions and Sanctions for Non-compliance	32
The 20 Day Deadline for Responding to Requests	34
Timing of Issuing Guidance	36
The Fees Regime	38
Publication Schemes	39
Training advice	41
5 Conclusions	43
Conclusions and recommendations	45
Formal minutes	48
Witnesses	49
List of written evidence	50

Summary

The Freedom of Information Act 2000 comes fully into force on 1 January 2005, providing a general right of access to information held by some 100,000 public authorities. This is an important piece of legislation and one which is very welcome—the Committee fully supports its aims and looks forward to its successful operation in the future. This inquiry focused on three representative sectors: the police, the health sector and local government. It provides a snapshot into the state of preparedness in the final months before full implementation of the Act. The Department for Constitutional Affairs (DCA) is responsible for overall co-ordination, with the Information Commissioner, of adequate preparatory measures.

The further one goes away from Whitehall departments, the more ‘patchy’ is the state of preparedness. Of the sectors we considered, the police service was apparently as well prepared as any public body, the health sector did not appear to be as close to achieving full compliance with the legislation, and in local government a varied picture emerged—with some authorities well advanced and others less so. Some public bodies did not feel that an effective co-ordinating body was in charge of the FOI process. Even where there were clear areas of responsibility for the DCA, it appeared incapable of timely production of necessary guidance and advice—a point made repeatedly by our witnesses. In our view, the Department did not provide timely advice and guidance, most notably in the latter stages of the preparations for implementation in 2004.

The DCA’s failure to provide early guidance on technical matters and gaps in its leadership on FOI have emphasised the problems to be overcome rather than the benefits of FOI and therefore risked creating the impression that FOI implementation is another chore to be undertaken, rather than a catalyst for a cultural shift to greater openness. Whatever the level of requests that emerge following full implementation, the law demands that all areas of public service covered by the Act should be ready by 1 January 2005. We are not confident that adequate preparations have been made to ensure that this will be achieved.

1 Introduction

1. The Freedom of Information Act 2000 (hereafter FOI Act) comes fully into force on 1 January 2005, providing a general right of access to information held by public authorities. **This is an important piece of legislation and one which is very welcome—the Committee fully supports its aims and looks forward to its successful operation in the future.**

2. As part of our oversight of bodies related to, or accountable to the Department for Constitutional Affairs (DCA), the Committee took evidence from the Information Commissioner, Mr Richard Thomas, and senior officials in his office in May 2004, which provided insight into a number of issues surrounding the implementation of the Act.¹

3. We subsequently decided to conduct a short inquiry into the state of preparedness of public bodies for implementation of the FOI Act in January 2005, focusing on representative sectors. The inquiry's terms of reference were to address:

- The state of preparedness for the implementation of FOI legislation;
- Issues of implementation for central government departments;
- Issues of implementation for local authorities and smaller public bodies;
- The role of the DCA in co-ordinating the implementation of the Act.

4. The scale of what is being undertaken in implementing a major piece of legislation across the whole public sector presents a significant challenge for those charged with implementing it and for the Government in overseeing this process. We had previously been told by the DCA that the preparedness of central government departments appeared to be progressing reasonably well and this was confirmed by evidence from the Information Commissioner in May 2004. Accordingly, the Committee decided to focus its inquiry on representative sectors away from central government, along with issues relevant to all sectors arising from this work. This report offers a snapshot into the state of preparedness in the final months before full implementation of the Act.

5. Our report is not a full sector-by-sector assessment across the 100,000 public sector bodies that will be covered by the legislation from 1 January 2005. The Department produces its own annual report into the state of preparedness and issued its latest report on 29 November 2004.² The National Audit Office (NAO) has been engaged in a detailed study of a number of central government departments in association with the DCA, the results of which were drawn on in the production of their 'Good Practice Guide' for implementers, *Counting Down—Moving from need to know to right to know*.³ However, although its circulation was claimed to be wide, the guide was actually only produced for

1 Constitutional Affairs Committee, oral and written evidence 11 May 2004, Session 2003–04, *The Work of the Information Commissioner*, HC 593–i

2 Department for Constitutional Affairs, *Annual Report on proposals for bringing fully into force those provisions of the Freedom of Information Act 2000 which are not yet fully in force*, 29 November 2004, HC 5

3 National Audit Office, *Counting Down: Moving from the Need to Know to Right to Know*, October 2004. This was produced in association with the DCA and ICO

central government bodies and not for the majority of public sector bodies covered by the FOI Act.⁴

6. The DCA has suggested that it has sought to learn from the lessons of other countries in implementing the FOI Act. Some of the lessons, according to the Lord Chancellor, were “sobering”.

Implementation has been beset by three problems in other parts of the world. A lack of leadership. Inadequate support for those who are administering access requests. And a failure to realise that Freedom of Information implementation is not an event: it is a process which demands long-term commitment.⁵

Lord Falconer added: “I am determined that we in this country will avoid these mistakes”.⁶ We consider below how far these dangers have been avoided and whether the DCA has met the challenge of effectively supporting preparations for implementation.

7. We decided to test the extent to which the Department had lived up to its stated aims. We selected: the police service; the health sector; and; local government, as being representative of the wide range of bodies facing the challenge of preparing for FOI implementation. We aimed to draw attention to issues of concern, which, even at this late stage, may benefit from attention by the DCA and Information Commissioner. In particular we considered the preparations for effective compliance, which has proved in other jurisdictions to be as important as the legislative framework.⁷

8. We took oral evidence from representatives of the National Archives, the Campaign for Freedom of Information, the Association of Chief Police Officers, the National Health Service, the British Medical Association, the Local Government Association, the Improvement and Development Agency, the Information Commissioner’s Office and the Department for Constitutional Affairs. We also received written evidence which is listed on page 49. We are grateful to all those who contributed.

4 Covering letter to *Counting Down*, *op cit*

5 Lord Falconer of Thoroton, speech to Campaign for Freedom of Information, 1 March 2004, www.dca.gov.uk/publications.htm

6 *ibid*

7 Rick Snell, “Administrative Compliance and Freedom of Information in Three Jurisdictions”, (1999), at www.ucc.ie/ucc/depts/law/foi/conference/snell99.html

2 Background

9. The FOI Act will apply to approximately 100,000 public authorities, including central and local Government, Parliament, the National Assembly for Wales, the armed forces, the police, hospitals, GPs, dentists, schools, universities, publicly funded museums and many other bodies.⁸ The Scottish Parliament has enacted separate Freedom of Information legislation introduced by the Scottish Executive, which applies to bodies within the competence of the Scottish Parliament.⁹ The Scottish Act will come into force on 1 January 2005 and will be promoted and enforced by an independent Scottish Information Commissioner.¹⁰ Northern Ireland has decided to adopt and operate the FOI Act in line with England and Wales.

10. The FOI Act establishes a statutory right of access to information. Following full implementation, a person who writes (or sends an email) to a public authority and asks them for information will have the right to be informed in writing whether the authority has the information, and, if it does, will be entitled to have the information communicated to them, subject to clearly defined exemptions. Applicants do not have to specify that they are making the request under the Act. The Act is fully retrospective, i.e. it applies to all information held by an authority, not merely information created or acquired by it after 1 January 2005. Anyone may apply under the Act, including non-citizens and people living abroad.

11. The Act contains exemptions, which specify the circumstances in which information may be withheld. Many of the 'exemptions' will be subject to a 'public interest test'. Where the public interest test applies, the authority concerned will still be required to disclose the information, unless it can demonstrate that the public interest in withholding the information outweighs the public interest in disclosing it. The public interest is not defined in the Act. Other exemptions are 'absolute', which means that the public interest test does not have to be applied.

12. Any decision not to disclose information may be subject to an appeal to the independent Information Commissioner, currently Mr Richard Thomas. Decisions of the Information Commissioner can be challenged by the applicant or the public authority to the Information Tribunal, free of charge, and then to the courts on a point of law. The Act gives Ministers at Cabinet level the ability to override the Commissioner's decision that a Department (or other public authority specified by Order) disclose exempt information in the public interest.

13. The FOI Act received Royal Assent on 30 November 2000, since when there have been four years to prepare for implementation. Some procedural parts of the Act have already come into force: in particular, the provisions which require public bodies to adopt and maintain publication schemes, setting out details of information that is routinely made available. Where a large number of public authorities all perform very similar functions the Act allows for model publication schemes to be developed. Such model schemes contain

8 The DCA website provides a list of the bodies covered by the legislation. www.dca.gov.uk/foi/coverage.htm

9 The Freedom of Information Act (Scotland) 2002

10 The Scottish Information Commissioner's website is at www.itspubliknowledge.info

pre-defined classes of information with general titles, as well as standard information about charging and manner of publication and must be approved by the Information Commissioner's Office (ICO). The main provisions for granting the public a right to information come into force on 1 January 2005.

The Decision to Adopt the 'Big Bang' Approach

14. The Department decided to implement the FOI legislation across the 100,000 public sector bodies concerned simultaneously, using what has been called a 'big-bang' approach. Critics have suggested that it would have been prudent to roll implementation out in stages starting with central government first and moving on to other parts of the public sector later. A counter-argument put forward by the DCA is that there has been a phased approach: a first phase covered the publication schemes that each public body has been required to produce; a second phase is the implementation which is to take place on 1 January 2005.

15. Mr Maurice Frankel of the Campaign for the Freedom of Information told us that the big-bang approach was ill-conceived from the outset:

I think [the big-bang approach] is bad verging on potentially catastrophic...central government could have done this much earlier, had a lot of experience from the Open Government Code and could have dealt with a lot of the problems which are going to come up relatively easily. Instead of that, every single authority in every sector is confronting the same problem simultaneously with no opportunity to learn from anybody going ahead.¹¹

He added that:

[Furthermore] the Information Commissioner...will start to receive complaints across the whole public sector at roughly the same time instead of having it come in sector by sector with some dividing time of months to adapt to.¹²

16. Birmingham City Council told us that, "we feel that the Government has taken an ambitious step in implementing the Act, after the Publication Scheme provisions, in one single go".¹³ Other local government witnesses agreed that a phased approach would have been preferable, not least as it would have allowed for better training based on real-life UK experiences. Ms Katherine Matley of the Association of Greater Manchester Authorities said:

We also feel that because we have been referred to cases abroad—we have been referred to Ireland for case histories, we have been referred to Canada—we have no real local government experiences and we found that a difficulty when training our staff. We would have liked to have trained staff on exemptions and given real experiences and we have not been able to do that.¹⁴

11 Q 87

12 Q 87

13 Ev 71

14 Q 186

The Parliamentary Under-Secretary of State told the Committee that “a lot of work went into deciding how best to take freedom of information forward” which included consideration of other approaches, but the approach of ‘big bang’ had been adopted in order to make it clear to the public what their rights were from one date in a clear way.¹⁵

17. Given the decision to implement the Act across the whole public sector at the same time, the process of implementation has created special challenges. We recognise the practical difficulties placed on those responsible for implementing this legislation on a single start date. We review (below) the situation in a number of different sectors.

3 Snapshots of preparedness by Sector

The Police Service

18. Of the non-central government public bodies, one of the best prepared appears to be the Police Service, made up of 44 Police Forces across England, Wales and Northern Ireland and represented by the Association of Chief Police Officers (ACPO). In its written submission to us the DCA described the police as “well prepared for implementation of the Act”.¹⁶ Preparations for compliance were co-ordinated by ACPO which develops policing policies on behalf of the Police Service as a whole. FOI Matters come under the ACPO Information Management Committee, which is chaired by Tom Lloyd, Chief Constable of Cambridgeshire Constabulary. The FOI Portfolio is one of 8 under that Committee and is chaired by Deputy Chief Constable Ian Readhead of the Hampshire Constabulary.

19. ACPO established a national project for FOI implementation in December 2001, after the Chief Constables’ Council agreed to provide funding; all forces paid £3,500 to fund the project until January 2005. A Project Manager (a Chief Inspector) and a Project Support Officer were recruited from and are housed by Hampshire Constabulary. The ACPO FOI project is currently on stage 9 of an expected total of 10 stages. The project is due to finish in March 2005. The project’s objectives were to produce the following:

- A Model Publication Scheme, approved by the Information Commissioner
- A Communications Strategy for the Police Service
- FOI Compliance Guidelines: best practice and lessons learnt from overseas public authorities
- A Training Strategy for the Police Service in conjunction with Centrex
- A Manual of Guidance detailing a common interpretation of responsibilities required under the Act and guidelines for action where legislation allows discretion to be applied
- A national template for local administration of FOI legislation, completed under a Workflow system
- A Single Point of Contact to advise and assist the Police Service on FOI issues and to provide an interface with other organisations (including the Information Commissioner).¹⁷

20. By October 2004 the project had produced and circulated to all police forces a ‘Compliance Toolkit for the Police Service’ which:

- Introduced the national project team and described what the project team would produce.

16 Ev 88

17 Ev 64, para 1

- Provided an overview of FOI
- Gave guidance on Section 45 Code of Practice—Discharge Functions
- Gave guidance on Section 46 Code of Practice—Records Management
- Provided LCD draft regulations on fees
- Introduced and described the ACPO Publication Scheme
- Provided useful references.¹⁸

21. However, there were certain areas where ACPO highlighted concerns about effective implementation. For example, while ACPO has produced a 350 page *Manual of Guidance for FOI implementation*, it is not clear how consistently it will be applied across 44 different police forces:

The Manual of Guidance will be submitted to the Bichard Working Group to ensure it is linked to the new Code of Practice for Police information management [...] This is a key area where we need consistency. Although there are 44 forces we are all doing the same role, i.e. policing, and there is a massive opportunity for the Service to be “divided and conquered” by requests if there is inconsistent application of the Manual of Guidance.¹⁹

22. Another factor, as explained by Deputy Chief Constable Ian Readhead, is that every chief constable is operationally independent and ACPO has no enforcement powers.

[ACPO] has no right to enforce our policies upon any chief officer. Every chief constable is a data controller in their own right. What we seek to do is promulgate best practice and corporate policy across the service which hopefully drives through good efficiency savings and adds to the consistency that you would like to see in every force.²⁰

That said, most forces tend to follow ACPO guidelines and there was no indication that significant problems of compliance with the work approach had arisen.

23. The Police Service was particularly concerned to learn from the experiences of the Soham case and the resultant Bichard inquiry, which included police procedures for national data-sharing among its recommendations.

[W]e have worked very hard over the last two years with great assistance from the Information Commissioner’s Office to ensure that we have corporacy across the service. I would have to say that this has caused a shudder through the backbone of some of my colleagues especially in Special Branch and in the Police Service in Northern Ireland for quite obvious reasons, but what we have tried to do is to communicate to them how we think the legislation will impact on their business, how they will meet compliance and how they can use the Act legitimately in order to

18 Ev 64–65, para 2.1

19 Ev 68, para 4.1

20 Q 151

sustain public confidence and public safety whilst at the same time being transparent and accountable as a public service. So we are confident that we have achieved the core aims of the legislation.²¹

24. Overall, the ACPO representatives expressed themselves confident that, while some forces were well ahead of others, all the police forces would be compliant on 1 January 2005. Nationally they had trained 350 decision-makers and were putting in place framework agreements for procurement of workflow systems with 28 forces.²² Regular communications on developments are facilitated through a regional structure of six groups (plus Scotland as a seventh, whose ACPO collaborated with England, Wales and Northern Ireland on FOI). These groups meet regularly, and a national database facility called 'Genesis' provides guidance on the Act.²³

25. ACPO's confidence was supported by the Information Commissioner's Office (ICO). The ICO described the police service approach as "highly structured" and "well advanced", and concluded that ACPO had made "excellent use of the time between Royal Assent and final implementation to get the police service into an advanced state of preparedness". However, the ICO also questioned whether the preparations "will in fact prove to be sufficient to meet the reality of the live FOI environment".²⁴ **The structured approach of ACPO created an impression of much greater readiness for full implementation than the two other areas of public service which we deal with below. Although ACPO is only an advisory body, the organisational traditions of the Police Service lend themselves to a more coherent overall approach to the implementation of freedom of information legislation than other areas of the public service which may involve independent professional practitioners or a diverse range of activities on widely differing scales. We doubt that many areas of the public service, away from central government, can be as confident as the Police Service of full implementation on 1 January 2005.**

ACPO Views on the Role of the DCA

26. In its evidence to the inquiry ACPO identified some areas of concern regarding the central co-ordinating role of the DCA. For example, they argued that the DCA missed an opportunity to implement the Act efficiently by failing to establish a process for handling requests for data that might belong to different agencies—an occurrence which is common for the police service. They argued that, "this topic should have been addressed by the DCA across the whole public sector to provide an overview to all public authorities".²⁵ ACPO described this as an area where they had "major concerns".²⁶

27. ACPO also pointed out that the DCA failed to provide strategic guidance in the establishment of a central referral process to manage requests that are issued to several police forces at the same time. In its submission it states:

21 Q 153

22 Qq 171–174

23 Q 163

24 Ev 82, para 2.3

25 Ev 66, para 2.11

26 Ev 69, para 6.2

A central referral process is required to manage requests that are issued to several (or all) forces at the same time. To date several such requests have already been received. The Police Service require an essential overview of these requests, to ensure that all forces respond uniformly and to allow the determination of best practice and lessons learnt to be shared across all forces.

We note that this is an area that we felt should have rested with the DCA to develop a strategy for public authorities in general. This is an example of a missed opportunity, which could have prevented the duplication of effort across public bodies.²⁷

28. ACPO further alleged that tardiness by the DCA may have cost tax payers millions of pounds. A variety of public sector bodies each had to produce a statement of requirement for a workflow system to log and process FOI requests, rather than this work being carried out centrally by the DCA early enough. ACPO said that the statement of requirement that was promised by the DCA in November 2003 only arrived in May 2004 and substantially constrained the procurement process.²⁸

29. The DCA told us that it had decided not to procure a system centrally, preferring to issue a generic specification for the whole of the public sector which could then buy individually specific systems. It admitted that this decision on the procurement of common IT systems did not occur until “April 2004”, following “active discussion” in “the latter part of 2003”.²⁹

30. ACPO pointed out that there were some good examples of how the DCA and the ICO worked well together with them in preparatory work for implementation:

A Model Publication Scheme has been adapted by all 44 forces. The DCA and the ICO were instrumental in organising meetings to design and agree the Publication Scheme. This is an example of successful collaborative work between the Police Service, the DCA and ICO.³⁰

But although the DCA did begin the process towards implementation early enough, ACPO’s view was that the “tremendous energy” from the Department was not evident after June 2003 when the publication schemes were approved.³¹

31. Thereafter, advice on the procurement of the national workflow systems, manuals of guidance and training did not mature under the DCA’s leadership as they had expected.³² This lack of support in a number of key areas may have been due to the high turnover of staff in the Department. ACPO noted that different officials attended each quarterly meeting of the Lord Chancellor’s Advisory Group.³³ This turnover, ACPO told us, “did not

27 Ev 66, para 2.10

28 Ev 66, para 2.8

29 Qq 310–311

30 Ev 65, para 2.2

31 Q 156

32 *ibid*

33 Q 159 (This group is discussed below in Section 4)

assist the strategic development of the Act in the way in which we had seen it develop up until the publication scheme³⁴.

32. Faced with inadequate guidance on a number of important areas, ACPO was forced to seek legal advice such as on how the public interest test for exemptions would be interpreted because guidance from the Department came so late, with the result that staff training had to be changed.³⁵ Another issue on which they had taken their own legal advice was that of defining what constitutes the supply of a name and address. Deputy Chief Constable Readhead told us that:

There are some elements of the Act which have certainly caused us some concern in relation to its interpretation. For example, the name and address of the applicants. We are not clear, and the legislation does not help us, whether that means somebody has to put their full name and address or whether it can be an e-mail address. We had conversations with the Information Commissioner and the Commissioner took the view that an e-mail address was sufficient. We had some concerns about that and sought legal advice. I have to say the likelihood is that the Information Commissioner is going to be right in relation to address but perhaps not right in relation to name. So if we get Mickey Mouse making an application to us we might take a view that could come from a vexatious applicant ...³⁶

33. ACPO also noted that the state of preparations amongst agencies they work with was not consistently good.

[W]hen we have looked at data-sharing and we have gone to other organisations who we share data [with we] sense that they are pretty under-developed in relation to their compliance strategy [...] I think it is still a bit patchy in some of the public service areas.³⁷

ACPO added that “all the guidance issued by DCA has been Whitehall centric and consideration to other authorities has not been given”.³⁸

Conclusion

34. ACPO concerns were focused on certain areas. **Central guidance appears to have been lacking in important areas including organising co-operation between different departments and agencies, ensuring consistency between different police forces in dealing with requests and lateness in producing general guidance on technical issues such as IT systems. It is also clear that a significant change occurred from June 2003, possibly as a result of staff changes in the DCA (this issue is dealt with below in Section 4).**

34 Q 157

35 Q 161

36 Q 161

37 Q 179

38 Ev 69, para 6.8

The Health Sector

35. In contrast to the apparently solid picture on the part of the police service, the Information Commissioner was less sanguine about preparedness in the health sector. He said:

The range in size and role of the public authorities in the Health sector covered by the FOI Act presents particular challenges. The information available to us regarding the state of preparedness suggests a mixed picture. Larger health authorities appear broadly to be aware of the Act and its requirements. Moving through Primary Care Organisations to individual practitioners such as GPs and NHS dentists, levels of awareness fall.³⁹

The NHS FOI Project

36. The National Health Service established a FOI Project to support progress across the health sector toward implementation. The NHS FOI Project had three broad aims:

- To ensure the orderly introduction of the Act in the NHS on the basis of good understanding, support and recognition of the benefits conferred by the Act by all NHS organisations in England.
- To ensure that effective Publication Schemes approved on the basis of model schemes by the Information Commissioner are in operation in all NHS organisations in England by 31 October 2003.
- To review and evaluate this implementation plan and recommend how best to take forward the requirement for full access regimes to be in place by 1 January 2005.⁴⁰

The Project began in August 2002 and ran until January 2004. Its activities covered some 800 NHS organisations in England.⁴¹

37. Thereafter, it was unclear what would replace the project. On the NHS FOI website it is stated that:

Subject to completion of the review and evaluation of the project it may be extended to implement the requirement for full access regimes, or superseded by alternative arrangements if these are thought to be more beneficial.⁴²

According to our witnesses, the FOI Project Board reviewed the best way forward in January 2004 and decided that:

39 Ev 82, para 2.4

40 www.foi.nhs.uk/proj_home.html

41 Q 129

42 www.foi.nhs.uk/proj_home.html

there was a sufficient performance management framework within the strategic health authorities and within governance arrangements of NHS trusts to enable that to be the main performance management framework for the full access regimes.⁴³

In effect, after January 2004, responsibility had passed to individual trusts and primary care trusts and the Healthcare Commission, which regulates trusts. The Department of Health has ultimate responsibility through 28 strategic health authorities (SHAs).⁴⁴ One of our witnesses described the project as having gone “as far as it could in raising awareness”.⁴⁵ The Information Commissioner suggested that the lack of central coordination in the health sector was a potential weakness.

I am aware that the health area is one where perhaps there have been no co-ordinating bodies. There has been for central government, there has been for the police and there has been to quite a considerable extent for local government. I am aware that in the health area it is a very complex area of very many players involved and that there has not been the co-ordination one might have liked. There have been two people on the Advisory Committee, one from the Health Service Confederation, another who is an ex-Department of Health civil servant who has been a consultant to the various bodies in the Health Service and they have given us reasonably positive feedback as to what has been happening in the health area. We have not had that much direct engagement ourselves.⁴⁶

38. The NHS FOI project website identified a number of risks it said the project would address:

- Retrospective impact of legislation
- ‘Information migration’
- Third party disclosure in terms of key partners
- Concern over impact of wave of ‘bad news’ stories which are in fact historic but are prompted by the newness of the legislation
- Distraction/impact of GMS contract.⁴⁷

The website does not include the results of this work.

39. The NHS FOI Project also supported the large number of individual contractors working in the health sector, most significantly general practitioners (GPs) and dental practitioners.

43 Q 129

44 Qq 130–134

45 Q 129

46 Q 287

47 www.foi.nhs.uk/proj_benefits.html

Preparedness of Individual Contractors

40. The British Medical Association (BMA) through its medico-legal committee, worked with the NHS Freedom of Information Act Project Team to produce a Model Publication Scheme for GPs. All GPs received a letter from the Information Commissioner in May 2003 alerting them to the scheme and the General Practitioners Committee of the BMA also made GPs aware of an example of a customised model, which had been prepared by a Local Medical Committee(LMC).⁴⁸ Practices were advised to adopt the approved publication scheme rather than develop their own, which would have required separate approval from the Information Commissioner. The BMA was involved in organising half day seminars for GPs and practice managers on the Freedom of Information Act, which were held on 5 and 15 December 2003.⁴⁹ The requirements of the Act were further published through newsletters circulated to all Local Medical Committees.

41. The FOI Act 2000 specifically defines GPs as public authorities (Schedule 1, paragraphs 44 and 45). Like larger health sector bodies, GPs are therefore required, under section 19 of the Act, to adopt and maintain a publication scheme for the publication of the information held. The publication schemes must be approved by the Information Commissioner. They essentially consist of a list or index of:

- the types of information that a practice holds
- a description of how it can be obtained
- an explanation of any charges that might apply (regulated by the Act)
- an explanation of the types of information that the GP holds but cannot make available (and why).⁵⁰

42. The proposed approach, according to the BMA, was that the Information Commissioner agreed that Primary Care Organisation (PCO) websites could host practice publication schemes so reducing the administrative burden and costs on GPs. Local Medical Committees were to coordinate this with PCOs at a local level. However, according to the BMA,

In practice this has often been difficult to arrange and GPs have relied on the NHS Freedom of Information website for publication.⁵¹

In effect they took the easy option and completed their publication schemes on the NHS FOI website.⁵² Across the NHS more generally, all the trusts and strategic health authorities adopted the model publication schemes that were compiled from pilots, saving a lot of work.

48 Local Medical Committees are statutory bodies which represent the interests of NHS GPs

49 Ev 61, paras 8 and 9

50 Ev 60, para 2

51 Ev 60, para 3

52 Q138

43. The BMA told the Committee that GP's, while willing to comply with the legislation, were often overwhelmed with work and had received no financial assistance in preparing for implementation.

The question is going to be one of workload and the resources required to deal with it. The difficulty of course for GPs is that we have had no extra resources to cope with this and we do not know about payment schedules and so on. We do not know what, if anything, we will be allowed to charge for and, if so, how much or indeed how little if it mirrors the Data Protection Act. That would have been helpful to know.⁵³

The uncertainty of the potential number of requests, for example, had caused a number of practices to be concerned about the potential effect on patient treatment.

If we get a small volume of requests, I think they will be dealt with very well. If we get a high volume of requests, I think it just may be that practices will be overwhelmed because of all the other things that they have to do as well and I think there is very little doubt that practices will take the view that if they are completely overwhelmed, things that relate to individual patients and their care will have to take preference over things that relate to freedom of information.⁵⁴

44. Some of the evidence on implementation of FOI in the health sector gave the impression of FOI simply being regarded as another hurdle that had to be surmounted, with little sign of the cultural change in attitudes towards openness which the DCA has suggested will follow from FOI. The Information Commissioner admitted anxiety over the responses which he had received from health sector bodies.⁵⁵

45. In its written submission to the Committee, the BMA claimed that a number of GPs claimed to have received little or no information about the Act.

Some PCOs have been proactive in organising presentations, training for practice managers and are sending out flyers to practices reminding them of their responsibilities. LMCs have assisted by publicising General Practitioners Committee (GPC) guidance via their newsletters or by preparing their own guidance. However, a number of GPs have reported that training has been unhelpful or non-existent and the information they have received has been minimal. As a result, some GPs have had to research the requirements under the Act on the internet themselves. Some practices claim to have never received anything and only found out about their obligations through speaking to colleagues.⁵⁶

Rather worryingly, the BMA added that:

many GPs seem to be unaware of the full requirements under the Freedom of Information Act and consider that their duties ended with the production of the publication scheme. A high percentage of GPs have responded to say that they have

53 Q 139 (This evidence was given on 12 October 2004, before the Lord Chancellor's announcement on fees)

54 Q 139

55 Q 288

56 Ev 61, para 12

not received any requests under the Act and seem to be unaware that the Act does not come into force until 1 January 2005.⁵⁷

46. The BMA submission also points to the fact that many GP practices do not seem to be prepared in advance for requests and have stated that they will look into this when a request comes through.

The 20 day time limit may therefore need to be made very clear so that practices do not put the requests aside until they have time to look into the policy. Practices do not have plans in place to categorise requests i.e. to distinguish between Freedom of Information Act requests and requests under the Data Protection Act etc.⁵⁸

The BMA added that “practices feel that there is minimal information available which communicates their responsibilities in a simple, user friendly way. Information received by practices from PCOs to date has been confusing”.⁵⁹ The DCA’s Annual Report on FOI implementation notes that its guidance was available on the Department’s website and would “serve as a useful reference tool for public authorities”.⁶⁰ The guidance was not necessarily accessible in a user-friendly way to all those who might need it. As Dr John Grenville from the BMA put it:

I think the increasing way of running things, where if something is published on a departmental website, it is in the public domain and everyone is assumed to know about it, causes us problems. The average GP does not actually sit down before morning surgery and log on to the Department of Health website to see what is new today, let alone the DCA website, the Home Office website, the DEFRA website, et cetera, et cetera, so to some extent GPs do rely on getting specific information directed to them to know what they have to do to comply with legislation.⁶¹

47. **It is clear from its evidence that the BMA does not believe that the message on FOI implementation has been given effective profile.** Our inquiry has caused the BMA to contact LMCs around the country to inquire as to the state of preparedness amongst GPs. Its submission to the Committee concludes that:

Assistance is needed in raising the profile of the Act amongst GPs, especially given the legal requirements it places upon practices. We hope that the Department will work with the BMA to ensure that further guidance reaches practices.⁶²

Conclusion

48. Given the scale of the health sector, it is unlikely that a consistent approach to release of information will be easy to achieve. ACPO in its submission expressed concern about consistency of approach by just 44 police forces. Across the vast health sector the

57 *ibid*, para 13

58 *ibid*, para 14

59 Ev 62, para 24

60 *op cit*, HC 5, para 2.2

61 Q 139

62 Ev 62, para 25

challenges were even greater to avoid variation of response. Mr Stephen Morris of the NHS FOI Project told the Committee in October that:

I met at the end of last month with the heads of corporate affairs of the 28 SHAs to discuss where people felt this was at so as to get the local knowledge in their discussions with their local trusts and PCTs and, yes, of course there will be some variations, but the use of networks is well developed in seeking to understand where we are with this, particularly between communications teams. What we decided at that meeting as we run into 1 January is that we put a little bit more resource at this point into the website because that is used widely within the NHS and we associate that with an e-based helpline so that people can actively have managed issues which they are coming up with on a day-to-day basis and we will continue that through into the early part of 2005 and see what the level of activity actually looks like, so there will be an additional piece of support which will enable people to compare what is the actual experience.

49. Our witnesses professed themselves “cautiously optimistic” that preparations were underway for implementation across the health sector.⁶³ **It is not clear that the whole of the health sector will be in a position to comply fully with the law on 1 January 2005. There are significant problems with ensuring consistency of approach across such a wide range of bodies which are covered by the Act. We do not underestimate the difficulties associated with introducing FOI on one date across the whole of the health service. Nevertheless, there is little evidence that the DCA has been sufficiently active in providing the necessary leadership to ensure that many of the organisational and technical problems have been addressed in time in this sector.**

Local Government

50. In its October 2004 submission to the Committee the DCA admitted that the picture across local government was uneven—a view previously expressed to the Committee in May 2004 during evidence by the Information Commissioner. The DCA stated that:

Some local authorities have gone to great lengths to co-ordinate with neighbouring authorities on implementation. Preparation by smaller district councils is good but less advanced. However, the Department is working with the Office of the Deputy Prime Minister to encourage greater engagement at political and chief executive level.⁶⁴

This clear picture of resolve was not the impression of our local government witnesses, who reported to be unclear about where responsibility lay and eager for clear guidance to emerge from somewhere. Furthermore, the Information Commissioner’s office highlighted rather more concerns about the state of preparedness in local government in its October 2004 submission to the Committee.

63 Q 140

64 Ev 85

The picture here remains variable with concerns about the apparent lack of preparation in many local authorities, but some impressive examples of emerging good practice. In some areas with two tiers of principal councils the opportunity has been taken for county and district councils to co-ordinate their activities, facilitating a joined-up and consistent service to requesters.

We have had much experience of local authority officers who have been given responsibility for implementing FOI expressing concern that they struggle to engage the interest of their corporate leaders, both chief officers and elected members. In many cases the legal and practical issues of compliance are recognised by the senior managers responsible and front-line staff have been trained. However, the wider implications of a cultural shift towards greater transparency and accountability are not appreciated.⁶⁵

51. The Local Government Association (LGA) represents the local authorities of England and Wales.⁶⁶ Like the medical sector, local government presents particular challenges for FOI implementation because of the diverse range of bodies and activities covered. Local authorities vary in size from those that employ 30,000 staff and have a gross revenue of over £2 billion to those that employ 150 staff and have a gross revenue of £30 million.⁶⁷

52. The LGA has supported local government preparation for FOI through a number of activities including: participation in the Lord Chancellor's Advisory Group on implementation of the Act; consultation and discussion with government departments (specifically, the DCA, and the Office of the Deputy Prime Minister), and the Information Commissioner on implementation issues; delivering advice (together with the Information Commissioner) to local authorities on developing publication schemes and working with a 'pilot' group of district, county and single-tier local authorities on implementation issues. In association with the Constitution Unit, University College London, the LGA also published two practical guides to the Act for local authorities: *Freedom of information—a practical guide* (published 2001) and *Delivering freedom of information* (published February 2004).⁶⁸

53. Another body supporting local government in preparing for implementation is the Improvement and Development Agency (IDeA) which was established by and for local government in April 1999. It acts at the national level to provide a focus for the implementation of local e-government and to enable local authorities to co-ordinate and share progress. It also champions the interests of local government with central government, suppliers and other sectors. The IDeA told the Committee that it had supported local authorities preparing for FOI in a number of ways including providing: an e-learning package on FOI; an FOI page on the IDeA Knowledge website; a topic briefing and resource pack on FOI and; free advice and support to individual authorities by either the e-government strategic advisor for data legislation or by a peer group of local

65 Ev 81, para 2.2

66 Ev 75, para 1.1

67 Ev 76, para 1.4

68 Ev 76, para 2

authorities which have offered to help other authorities not as advanced with FOI as themselves.⁶⁹

54. According to survey results provided by the LGA from earlier in 2004, only 4% of local authorities expected to be ready by 1 January 2005.⁷⁰ This picture emerged from an annual self-assessment statement on local authorities' implementation of electronic government.

The 2003 statement, for the first time, included a question on the authority's readiness for the implementation of FOI.

When these returns were collated and analysed by the IDeA in April 2004, it was found that, out of the 372 returns, only 15 (4%) local authorities had assessed themselves as 'green', meaning that they expected to be able to fully comply with FOI by January 2005.

189 (51%) authorities identified themselves as 'red', meaning that they were in serious danger of not being ready by that time; and 70 (19%) declared themselves 'amber', meaning that they thought there was some risk that they may not be able to comply. The remaining 98 (26%) responded as 'black', meaning that they either felt that the Act had no relevance to them or that they were waiting for something else to happen before they could progress with implementation.

IDeA followed up the 15 'green' authorities in an attempt to identify good practice and to share it with other authorities. At that stage, it became apparent that there had been some ambiguity in the wording of the question and approximately half of the group re-classified themselves as red or amber.⁷¹

In oral evidence Dr Lydia Pollard of the IDeA explained that this referred to being confident that their various systems (including records management for example) would allow local authorities to meet the 20-day response time.

I think when they said 4% they meant being fully compliant in terms of having an electronic records management system, in terms of having logging and tracking systems and complaints systems in place and that is why the vast majority of authorities said that they did not feel they would be ready. The majority still feel that they will not have an electronic records management system in place by then. I think they feel that somehow they will be able to deal with the enquiries but that they will have to do it manually. So their main concern is the time that it will take them to do it and the resources they will have to put in.⁷²

55. The LGA described some of the particular problems with which they have been faced, notably records management and complex ageing IT systems. Of great concern has been the late arrival of guidance from the centre, which had often arrived in the middle of process already begun by local authorities. Two problems were described by Ms Faith Boardman, Chief Executive of Lambeth Borough Council:

69 *ibid*

70 Ev 77, para 4.3

71 *ibid*, paras 4.2–4.5

72 Qq 191–194

The first is a practical one, which is the nature of a local authority's business, because we provide something like 300 different services. The records management is legitimately different in that it is governed by statutes between all of those different services. I think we are peculiar in the public service in terms of the complexity of the services that we do and that certainly knocks on into issues like IT. We are moving reasonably swiftly in our case from a situation where we have had no IT in some services, very old IT in others and more modern even further, but there is a business need which all local authorities are tackling to join those systems up and modernize them. That is a very big issue and takes several years. As that comes through then I think the practical position will ease considerably. The second issue that I think we have had in practical terms is the understandable difficulty in getting guidance out to us. Obviously, in terms of actually setting out the detail of the processes and procedures and indeed the detail of the training, we do need to have that guidance in front of us. Very often, because of the timetable that we have been trying to follow, we have received them when we were part-way through doing that phase of the work and they have proved useful, but often it is as a check-list in terms of what we have been doing rather than being there at the start of each phase.⁷³

56. In its written submission to us, the LGA argued that Government and ICO guidance on FOI implementation was better suited to central government departments which in turn were supporting their relevant public bodies (such as schools and hospitals):

Some authorities expressed concerns that central government did not understand how local authorities operated.

When looking for guidance and advice we referred to other government departments who are supporting their users in a much more efficient way, e.g. DfES for schools and the NHS. DfES understands that information required should be in plain English, written for people who do not have a legal or records management background, that it is all about the business process and not the functional requirements of an IT system.

S46 code⁷⁴ seemed abstract and used terms LA officers don't understand. It seems to be based on culture and business needs of civil service legal departments. Local government records reflect the degree of improvisation needed to manage large organisations with constantly changing structures. Certain services (e.g. finance) have a completely different approach to information storage, where the language of 'file closure' or the idea of discrete files for items of information are not suitable.⁷⁵

Local authorities were also concerned about the timescales required by the Act and the true costs of complying with a request, and overall, the LGA concluded that the level of readiness for FOI among local authorities "varies greatly".⁷⁶ Our witnesses from local government believed that 90–95% of local authorities would meet the deadlines for

73 Q 200

74 Section 46 of the FOI Act—a Code of Practice on the Management of Records, which was produced by the then Lord Chancellor's Department in November 2002

75 Ev 79, para 6.3

76 *ibid*, para 7.1

straightforward enquiries. Dr Pollard said that if there are: “complex enquiries which require information from several different sources and not a single service then I think [local authorities] may struggle to meet the 20 days”.⁷⁷

Points of Concern

57. The LGA’s evidence implied that there seems to be a degree of complacency amongst the chief executives of some local authorities, who have mistakenly assumed that the existing Access to Information regime operating in local government is similar to the Freedom of Information requirements that will be in force from January 2005:

There is some doubt as to whether it is worth devoting much effort to FOI, when a lot of effort was put into the 1998 Data Protection Act and the Year 2000 initiative, yet both had little impact on local authorities in the end. There is considerable uncertainty as to the volume and nature of requests that local authorities might expect after 1 January. These factors, and the lack of recognition by central government that implementation has resource implications, are influencing the approach of senior managers and members to prioritising implementation.⁷⁸

We believe that Chief Executives in all local authorities should ensure full compliance with FOI.

58. The FOI Act contains no explicit financial penalties for non-compliance, but if the Information Commissioner deemed a public body not to be compliant it could take that body to the High Court for contempt. This issue is discussed below in section 4.

59. The LGA states in its submission that resources are the single most important issue of FOI compliance:

[B]y far the largest issue for local authorities is the lack of resources. They do not have the time, money or personnel to easily organise information on a corporate basis in order to allow ready retrieval for FOI purposes. The costs of organising their manual systems and/or introducing an electronic document and records management system (EDRMS) are beyond many of their means.

There has been no direct funding from central government for the implementation of FOI. The assumptions used to estimate costs prior to introducing the Act did not take into account issues affecting local government.⁷⁹

60. A major concern was removed with the eventual decision on the fees regime that would operate under the Act (discussed below in Section 3), but it came very late according to the LGA. Furthermore, there still has been no detailed guidance from the DCA on the fees regime that will operate for the FOI Act, although it has been repeatedly promised. The LGA’s noted in its submission sent in before the Lord Chancellor’s announcement on costs, that:

77 Qq 191–194

78 Ev 78, para 5.3

79 Ev 77, para 5.2

Of particular concern is that, even at this late date, the final regulations on fees are not known. This is delaying authorities from drawing up procedures and detailed planning regarding costs and charging, and authorities fear that they will not now have these in place by 1 January.⁸⁰

In oral evidence to the Committee, the Vice Chairman of the LGA, Cllr. Peter Chalke, noted that:

Only a very short time before the Act comes into place we have now seen a speech from Lord Falconer on the fees. I would remind you that we also still do not know the fees on the Licensing Act. We have been preparing, but if Government had prepared earlier and let us have the information earlier it would have made life a lot easier.⁸¹

61. While the concerns raised by our local government witnesses are similar to concerns expressed by other sectors, the LGA argued that the particular challenge for local government is the sheer range of services provided by various authorities—300 different services—with particular problems of records management and pressures on information systems. As Ms Faith Boardman put it:

I think we are peculiar in the public service in terms of the complexity of the services that we do and that certainly knocks on into issues like IT. We are moving reasonably swiftly in our case from a situation where we have had no IT in some services, very old IT in others and more modern even further, but there is a business need which all local authorities are tackling to join those systems up and modernize them. That is a very big issue and takes several years.⁸²

Another witness, Dr Lydia Pollard of the IDeA, indicated that procuring electronic records management systems, which are essential for long term FOI compliance was beyond many authorities.

If you are talking of implementing an electronic records management system, you could easily spend £250,000 on such a system. If you are a small district authority then that is an enormous sum of money and so before you would invest in anything like that you would need to be sure that you were getting the right number of enquiries to justify implementing such a system.⁸³

62. Furthermore, the National Archives, which advises on records management, had focused its efforts on advising unitary and county councils. Local and district councils, possibly with even greater challenges, were therefore not receiving the advice they needed.⁸⁴

80 Ev 78, para 5.4

81 Q 200

82 *ibid*

83 Q 201

84 Qq 45–48

Conclusion

63. While many local authorities will be compliant with the FOI legislation when it comes fully into force in January 2005, some will not. Successful compliance will be dependent on a relatively low initial level of requests. A 'business as usual' approach is far from the intention of the Act, which aimed to introduce a culture change in the handling of information. It seems clear that, so far, too few common standards for handling FOI requests across local government have been established. It is likely that different local authorities will handle similar requests in very different ways.

64. Late guidance from the DCA on such matters as fees has meant that issues of central importance have had to be addressed by local government at the last moment. We are concerned that the necessary guidance for enabling all staff to understand the requirements of the Act has been produced so late. In some respects the result has been that local government has been given a few weeks rather than four years to prepare fully for the advent of FOI.

4 The Role of the DCA

65. The DCA has prime responsibility for the FOI implementation process and the Lord Chancellor's stated intention for his department is unambiguous:

My Department, the Department for Constitutional Affairs, has successful FOI implementation as one of its principle objectives...We are providing clear and emphatic leadership across Whitehall in relation to FOI...we will not be passive in this role.⁸⁵

The Lord Chancellor chairs the ministerial sub-committee on Freedom of Information which has as its terms of reference: "To oversee the Government's strategy on Freedom of Information and its preparations for the commencement of the Freedom of Information Act 2000".⁸⁶

66. The DCA has decided to focus its efforts on preparations by central government departments, leaving the Information Commissioner's Office to concentrate on all other public bodies. It publishes annual implementation reports as required by s87(5) of the 2000 Act. A Code of Practice under s45 has been issued giving guidance on the provision of advice and assistance. The DCA sets out its role as the department responsible for the FOI Act and secondary legislation made under the Act.

[T]he Department has a specific (non-statutory) role for leading and co-ordinating the work of government departments in preparing for implementation and application of the Act. The Information Commissioner's Office has responsibility for promotion and enforcement of the Freedom of Information Act 2000.

The Department and the Information Commissioner's Office have agreed their respective roles [...] the Department is focusing its resources on central government and the Information Commissioner's Office is working across the whole of the public sector, but is concentrating on public authorities outside central government.⁸⁷

67. The Lord Chancellor and the Information Commissioner decided in 2001 to form an Advisory Group on Implementation of the Freedom of Information Act. The group was jointly chaired by Lord Filkin, Parliamentary Under-Secretary of State at the Department for Constitutional Affairs (since replaced by Baroness Ashton), and Mr Richard Thomas, the Information Commissioner. There is also a Freedom of Information Practitioners' Group consisting of DCA and other public sector officials. The DCA has drawn up guidance on the exemptions, in addition to that produced by the Information Commissioner, who has responsibility for the wider public sector. The DCA FOI webpage contains details of its implementation plans and the Information Commissioner's website

85 Speech to Campaign for Freedom of Information, 1 March 2004, *op cit*

86 HC 5 (2004-05), para 2.1

87 Ev 85

has a series of guidance notes for FOI practitioners.⁸⁸ The National Archives produced a model action plan for records management for public bodies to follow.

68. In anticipation of full implementation on 1 January 2005, all relevant bodies had to have publication schemes in place in advance. The Lord Chancellor referred to these as being: “Schemes whose quality is independently tested by the Information Commissioner”.⁸⁹ The reality has been that given its limited resources (there are 33 FOI staff at the Information Commissioner’s Office)⁹⁰, the ICO approved only the format of the vast majority of publication schemes, not their content.⁹¹

69. In December 2003, the DCA produced a Model Action Plan, detailing the actions that needed to be taken by Government Departments to be ready for full implementation of the Act. The NAO considered implementation in the summer of 2004 and concluded that “generally Government bodies have made good progress”.⁹² The NAO report supported the Department’s assertion in a later submission to the Committee that “implementation of FOI was being taken seriously across Whitehall and that departments were making good progress towards effective implementation”.⁹³ The ICO agreed.⁹⁴

70. As we note above, in May 2004, the Information Commissioner had made it clear to the Committee that the picture was mixed the further one got from central government departments.⁹⁵ On the subject of raising public awareness of the Act he commented, “we have not really started yet”.⁹⁶ The DCA claimed it recognised a need to reach out and ensure effective steps to implementation amongst non-government department bodies:

DCA recognises the importance of communication between the centre...and local authorities. As a result, DCA is embarked on a series of presentations at Regional and County Discussion Groups of Access to Information Practitioners, chaired by local authorities. DCA has also undertaken initial scoping research into “plugging into” existing relevant networks within the health, education and Police Sectors.⁹⁷

In a speech in March 2004, the Lord Chancellor spoke of sharing best practice and of establishing networks to support implementers on an on-going basis.

We will foster Freedom of Information networks to share best practice, and to disseminate case law and training. The first networks are in place, and others will follow. I see a need for continuing support for these networks from my department.⁹⁸

88 www.informationcommissioner.gov.uk

89 Speech to Campaign for Freedom of Information, 1 March 2004, *op cit*

90 Q 264

91 Q 272. See also para 102 below

92 *Counting Down*, *op cit*

93 Ev 87, para 5

94 Ev 81, para 2.1

95 *op cit*, HC 593-i, Q 22

96 *op cit*, HC 593-i, Q 29

97 www.dca.gov.uk/foi/implement.htm

98 Speech to Campaign for Freedom of Information, 1 March 2004, *op cit*

71. How far this support network has effectively functioned was called into question by the evidence that we received during our inquiry. As one local government witness put it:

We were expecting that a network of FOI practitioners would be facilitated centrally and we registered our interest but heard nothing more. A web-based community of practice would have been very useful for practitioners to post their own procedures, flowcharts, training, presentations etc, and to host a forum for questions and answers.⁹⁹

72. The picture which emerged from the evidence we received was of uneven levels of success and a strong perception of a lack of strategic control and support from central government to other public bodies. The cause appears to have been a combination of a lack of consistent leadership by the DCA and an unclear division of responsibility for implementation between the DCA, the ICO and other government departments.

Co-ordination from the Centre

73. The LGA complained to us of a lack of co-ordination from the centre.

There is a feeling that the delivery of guidance on FOI should have been co-ordinated by a single, central government department but this has not been the case. There is also confusion as to which department has prime responsibility for FOI. This may have caused delays in the release of information.¹⁰⁰

The LGA also highlighted a lack of clarity in the delivery of guidance and the feeling that no single body was responsible overall for the implementation of FOI. Comments received from LGA members included the following:

There is a continuous stream of guidance coming from six government bodies (Information Commissioner, Department for Constitutional Affairs, Office of the Deputy Prime Minister, National Archives, DEFRA and DfES. The guidance seems uncoordinated and appears on the six websites on a drip-feed basis. No-one in central government appears to be managing the overall process.

Local authorities also feel that the guidance that is provided is aimed at central rather than local government and is too high level. There is a strong feeling that examples that could be copied would have been very useful and would have saved local authorities a great deal of time. This would also have helped to achieve consistency of approach. It was suggested that FOI should have been made a national project with dedicated funding to produce products that could be used by local authorities¹⁰¹.

74. By mid-October 2004, the DCA still had not produced its long promised guidance for officials on how to deal with information requests. We were told at the start of our inquiry that these were “in preparation”.¹⁰² The guidance finally was produced on 26 October with little more than six working weeks until implementation. Furthermore, **there appears to**

99 Ev 79, para 6.4

100 Ev 78, para 6.1

101 Ev 78, paras 6.1 and 6.2

102 Ev 85

have been some confusion amongst public sector bodies about where to seek advice and about which department or agency was responsible for supporting them. The LGA noted that:

There has been a lack of timely, practical guidance. The guidance from central government is seen as being written in legalistic terms and at a high level. Practical examples and case studies would be more appropriate to aid understanding, and help authorities start developing procedures and training.¹⁰³

The Lord Chancellor laid before Parliament a Code of Practice on the discharge of public authorities' functions under Part 1 of the Freedom of Information Act 2000, with only 24 working days remaining, including the Christmas period, before the Act comes into force.¹⁰⁴

The Lord Chancellor's Advisory Group

75. The Lord Chancellor's Advisory Group, which brought together a number of representatives from relevant public sector bodies (including a number of our witnesses), should have provided an important tool to co-ordinate guidance and training, ensuring that the various concerns of the disparate public sector bodies. The Group's terms of reference are:

To provide advice to the Lord Chancellor to assist him in preparing his annual report to Parliament in accordance with section 87(5) of the Freedom of Information Act 2000 by:

- Monitoring progress on implementation;
- Identifying best practice in information management and recommending approaches to its dissemination in and between types of public authorities;
- Advising on the needs of users of the Freedom of Information Act, how authorities might best meet those needs, and proposing ways of raising the public's awareness of their rights;
- Receiving reports on, and advising on, the preparations being made by the Information Commissioner to ensure procedures are established and guidance produced in a timely manner;
- Promoting a new culture of transparency in public authorities by assisting in the development of training and education programmes.

To undertake other tasks related to the implementation of the Freedom of Information Act as may be agreed by the Lord Chancellor and the Information Commissioner.¹⁰⁵

103 Ev 78, para 5.4

104 HC 33 (2004-05)

105 www.dca.gov.uk/foi/agimpfoia.htm

76. However, ACPO told us that the Lord Chancellor's Advisory Group had suffered from a lack of synergy from Board members. In effect it was a good idea that was not properly fulfilled. In oral evidence to the Committee the Information Commissioner admitted that they were "rather ambitious terms of reference"¹⁰⁶ and that it did not turn out to be "very much more than a useful information exchange".¹⁰⁷ One of the key reasons in the opinion of our witnesses why the Board's synergy failed to materialise was the constant changing of staff representatives from the DCA (noted above in para 31). Deputy Chief Constable Ian Readhead noted that this resulted in a loss of useful guidance.¹⁰⁸

77. Mr Maurice Frankel pointed out that since the Lord Chancellor's Advisory Group was set up in January 2002 there had been a succession of four different Ministers chairing it: "it has not had the consistency, it has not had somebody there getting on top of the issue, sticking with the issue and seeing what needs to be done to shake the thing up a bit where that is necessary".¹⁰⁹ The Parliamentary Under-Secretary of State, Baroness Ashton, did not accept these criticisms and noted:

I have not had the privilege of Chairing that Board as yet [...] it was ambitious in what it set out to do [...] I think it has done a good job and I am hoping it will do an even better job as we move forward.¹¹⁰

The Board was co-chaired by the Information Commissioner, Mr Richard Thomas, who did provide some non-political continuity.

Staff Turnover in the DCA

78. The Committee was told that in addition to the DCA representatives attending the Project Board meetings never being the same, there also has been an unusually high turnover of staff at the DCA department concerned with FOI more generally. Furthermore, it has been suggested that because nobody is left within the DCA FOI team who was involved in writing the legislation, this is causing problems in interpreting the legislation in certain areas.¹¹¹ Mr Maurice Frankel told us of the negative effect of the exceptionally high turnover of staff in the DCA FOI team during the period since the Act was passed.

[...] there has been a turnover of Ministers and you might say, "Well, at least the officials continued", but we have had a similar turnover of officials because you have had, I think, three directors of that division and two acting directors in less than three years, so you have had four Ministers and five heads of the division over a very short period of time, so everybody has started getting on top of it and by the time

106 Q 253

107 Q 252

108 Q 159

109 Qq 101-102

110 Q 312

111 Ev 69, para 6.3

they have figured out what is to do, they have handed over to somebody else. That has been a very unhelpful aspect of the process...¹¹²

ACPO agreed with this assessment:

There have been high staff turnover levels in the DCA since the development of the Publication Scheme in 2003. Indeed, the individuals who drafted the legislation in the DCA have since moved on and it is our belief that there is nobody left within the team who was involved in writing the legislation. This is causing problems in interpreting the legislation in certain areas and ACPO are having to take QC advice on certain sections where the wording is not clearly defined (e.g. Section 8).¹¹³

79. The Parliamentary Under-Secretary of State rejected these charges and stated that she was “very confident about the way in which we have organised our staffing”.¹¹⁴ The DCA’s Constitution Director, Dr Andrew McDonald, claimed that the turnover of staff had not been as dramatic as suggested by our witnesses and where it had occurred, was often part of a policy of renewing the personnel to make sure a team was in place with “appropriate skills and competencies for the long haul”.¹¹⁵ He added that the benefits would be seen in the coming years. However, the cost appears to have been on continuity during the preparatory phase, as witnesses confirmed.¹¹⁶

80. Our local government witnesses stated that they preferred dealing with the Information Commissioner’s Office when they needed advice rather than the DCA. As one witness put it:

I have had comments back that getting through to the right person within the DCA can be difficult and getting a response that is meaningful to them can be difficult as well.¹¹⁷

Dr McDonald accepted that “there are aspects of these [staff] changes that we might have communicated more explicitly”.¹¹⁸

81. We formed the impression from the evidence provided that the high staff turnover in the DCA during the period between the agreement of publication schemes in the summer of 2003 and the autumn of 2004 seriously interfered with the delivery of co-ordination.

FOI Champions and Sanctions for Non-compliance

82. The Committee has heard that with only three months to go before implementation, many FOI officers were having difficulty in getting senior managers to take the requirements of FOI implementation seriously. If true, the DCA policy of having

112 Q 103

113 Ev 69, para 6.3

114 Q 313

115 Q 314

116 Q 156

117 Q 226

118 Q 315

nominated senior officials in each public sector body pushing through FOI implementation (or 'FOI Champions' as they are called), does not appear to have been successful. One explanation has been that the penalties for non-compliance are not clear. Moreover, if the FOI champion is not senior enough, their ability to energise the public sector body has been limited. We understand that a by-product of the Committee's inquiry has been to move FOI implementation higher up the agenda.

83. The Information Commissioner, Mr Richard Thomas, stated in evidence to the Committee in May 2004 that he would not be sympathetic about any lack of preparation on the part of public bodies:

I have made it very clear in press statements and conference speeches and I make it clear again this morning that, given the long run-in time, I cannot accept from any organisation, "We are not yet ready." They have had nearly four years to get ready and, if they get a request in January or February next year and they have to respond within 20 working days and they say, "Oh, we weren't ready for this, we're not expecting it", I cannot be tolerant and I have made it clear that now is the time to get things ready. As the date gets closer, I think minds are concentrating more and more.¹¹⁹

However, Mr Maurice Frankel told the Committee that some staff did not really believe that their managers thought that non-compliance was all that serious:

It is a common thing to have questions asking, "What are the penalties for non-compliance?", hoping to be told that they are Draconian, not hoping to be told that they can get away with it, but hoping to be told that they are powerful so that they can go back and frighten the boss and frighten the top managers.¹²⁰

84. The approach has been to rely on the FOI Champions in each organisation to take responsibility for energising the organisations and ensuring adequate preparations for compliance. While this appears to have worked quite well amongst some central government departments, the approach does not seem to have achieved consistent results. Lack of consistency was a message repeatedly relayed to the Committee, as well as a failure to share good practice early enough across differing sectors. An example was the practicing of procedures for dealing with requests. We understand that DEFRA practised dry-runs of dealing with FOI requests across the whole department, but that this useful exercise has not been adopted by many other departments.

85. The Information Commissioner's policy is to secure compliance by a process of educating and advising Public Authorities. However where compliance cannot be achieved by this informal route he will consider exercising his formal enforcement powers. If the Commissioner's Office is satisfied that a Public Authority has failed to comply with any of the requirements of the Act it may serve an enforcement notice requiring the Authority to comply. If the Public Authority fails to comply with the enforcement notice the Commissioner's Office may certify that fact in writing to the High Court. The Court may then deal with the Authority as if it had committed a contempt of court.

119 *op cit*, HC 593-i, Q 23

120 Q 114

86. In the course of preparing evidence for this inquiry a number of public bodies reviewed their preparations for implementation. While this was welcome, we would have liked to have seen more evidence that the Department was encouraging this degree of thoroughness at an earlier stage.

The 20 Day Deadline for Responding to Requests

87. A major concern of all our witnesses has been the time available to public bodies to respond to FOI requests. The FOI Act has set a relatively demanding deadline of 20 days for public authorities to respond to requests for information, either with the information, or explaining why it was being withheld—even if they are not formally described as a FOI request by the applicant. The relatively short deadline was surprising given that research commissioned by the DCA itself found that a number of countries with existing FOI legislation have struggled to meet short deadlines for responses.¹²¹ A number of our witnesses suggested that there should be some flexibility on this point, especially during the initial stages of implementation. Other concerns have been raised by bodies such as schools which have long summer holidays when staff are not in post at particular times of year. Contained within the Act is a provision for the Secretary of State to grant extensions to these time limits up to a maximum of 60 working days.

88. Birmingham City Council was one local authority which highlighted the problems they felt would be faced by local authorities in meeting the deadline of 20 days, a challenge that had been exacerbated, it claimed, by the late delivery of DCA guidance.

[...] not many local authorities, we believe, will be able to guarantee that all routine requests will be dealt with, in full, within the statutory 20 days. There are a number of reasons, namely:

1. local authorities are unable to estimate, at this moment in time, with any degree of certainty, the number, size, nature and extent of requests for access to information. They will, of course, not wish to expend vital Council resources without due cause. This is in part due to the radical nature of the Act, both in terms of the scope of the Act in relation to domestic legislation and the number of potential applicants; and
2. local authorities will be unable to test, in full, the IT and manual systems and procedures being put in place by them to deal with FOIA requests. This is due to a number of factors, the primary factors being unable to anticipate the number of requests made, and the fact that much of the guidance and regulations, including:-
 - the Fees Regulations and Environmental Information Regulations;
 - amendments to schedule 12a of the Local Government Act; and
 - the appointment of qualified persons under s36 of the Act;

¹²¹ *Management of Freedom of Information Requests in Other Jurisdictions*, Department for Constitutional Affairs research paper, October 2003, www.foi.gov.uk/impgroup/07_07c.pdf

still needs to be concluded by the Government, with less than 3 months before the scheduled implementation date of 1 January 2005. All of those documents form vital parts of the entire FOIA framework and, as such, these current “gaps” leave the FOIA potentially unworkable, at the present moment in time.¹²²

89. Birmingham City Council proposed that no penalties should fall on public authorities that fail to comply with the Act and that a staggered introduction to the Act should be considered:

- i) We would suggest that local authorities should not suffer any penalty or censure for failing to comply with the Act, for a bedding in period of, say, one year, provided they could demonstrate to the Information Commissioner that they had taken reasonable and adequate steps to try and comply with the request;
- ii) An alternative approach would be for the Government to initially extend the period to respond to a request to, say, 40 days for routine requests, in line with the Data Protection Act timescales for an initial period of, say, one year, whereafter it would revert to the 20 working days at present intended by the Act; and
- iii) Invite the Government to consider the “staggered” introduction of the retrospective effects of the Freedom of Information requests—as highlighted in this paper—in an effort to make more operationally manageable the orderly and effective implementation of the Act on 1 January 2005.¹²³

90. The Committee was told by the Deputy Information Commissioner, Mr Graham Smith, about a consultation being carried out in Whitehall about the possibility of extending the 20 day deadline for responding to FOI requests:

I have been informed by the Department, that there has been a consultation within Whitehall just in the last six months [...] asking the departments whether they wanted to suggest that in certain circumstances that 20 working days should be extended. I understand that a submission has been put forward to the Minister and some draft regulations are being formulated, but my understanding is that that was an exercise purely within central government and I am not sure whether the Local Government Association were consulted or not, but my understanding is that they were not. We have not been formally consulted [...] I understand that there may be some regulations between now and 1 January.¹²⁴

No information on this had been provided to the Committee by the DCA and our witnesses from local government and elsewhere do not appear to have been aware of it either. The Parliamentary Under-Secretary of State appeared unaware of the concerns expressed repeatedly to the Committee about the pressures of meeting the 20-day deadline

122 Ev 72. The draft Environmental Information Regulations 2004 were laid before the House on 27 October 2004. The draft Freedom of Information (Time for Compliance with Requests) Regulations 2004 were laid before the House on 4 November 2004

123 Ev 72

124 Q 281 (Mr Smith)

for responses and stated that only two examples had come her way—schools and the armed forces (who might be actively deployed for long periods overseas).

Those are the only examples that have come my way. I have checked that there has been no correspondence or request for any others that have come through any other meetings. We have been in discussion, as you rightly say, with central government, but there have been no other areas where this has been particularly raised. As I say, schools was a classic example in a sense, but no others to date. If we receive any others, of course, we would look at them.¹²⁵

However, if the consultation exercise was only being held within central government departments then it is not surprising that further representations had not been received. It is curious that even the Information Commissioner's office was not consulted. **We do not consider that the question of possible extensions of the time limit of 20 days has been effectively handled by the DCA in respect of public sector bodies outside central government.**

Timing of Issuing Guidance

91. As noted above, the Act contains 'exemptions', which specify the circumstances in which information may be withheld. Many of the exemptions will be subject to the public interest test. Where the public interest test applies, the authority will still be required to disclose the information, unless it can demonstrate that the public interest in withholding the information outweighs the public interest in disclosing it. Other exemptions are 'absolute', which means that the public interest test does not have to be applied.

92. It remains to be seen how the exemptions regime will work in practice, but the Information Commissioner told the Committee that in cases of disagreement with Ministers he intended to make public reports to Parliament.

93. The Information Commissioner highlighted the issue of late decision-making in his submission. In particular, he cited the question of the authorisation of a qualified person under Section 36 (5) of the Act (i.e. a person who can grant exemptions) as a matter that had not been covered. There was a lack of clarity about whether this was the responsibility of DCA or ODPM.¹²⁶

A lack of concrete examples on how and when exemptions will apply has been cited as an issue that is causing delays in determining procedures and staff training.

In particular, the decision on who will be the 'qualified person' within a local authority (the person who will assess the application of the section 36 exemption) has yet to be formally agreed and specified. The application of section 36 is an area of some considerable concern to senior officers and elected members. This is an area where detailed guidance and case study examples would be valuable to help local

125 Q 305

126 Ev 83, para 3.7

authorities. Time is now very tight for this area and for developing local procedures for appeal.¹²⁷

94. Cllr. Peter Chalke of the LGA also told us of his concerns on this matter:

We need to set up a system so that we know that the person who is the qualified officer will be trained and ready to take the decisions. At this moment we suspect it may be the monitoring officer. It cannot be too difficult to nominate who that is. Those sorts of things could have been done so much earlier on in this and would have made life easier [...] It is the department's job to nominate that officer. We are not getting the information, so it has to come back to the DCA.¹²⁸

Other witnesses stated that they had raised this matter with the DCA in the Lord Chancellor's Advisory Group, but with no apparent effect.

95. The Constitution Director, Dr Andrew McDonald, denied that the decision on who a qualified person would be was a particularly important one, saying: "this is a relatively minor detail within the Act". He added that what was important was that this guidance was settled by January 2005. The person nominated would not require any particular training and would not need to be an expert in the whole Act.¹²⁹ Given that this person will be authorising exemptions under the FOI Act we are surprised that the DCA would not expect such a person to be knowledgeable about the whole Act. Furthermore, even if the DCA does not think it is an important issue, the Information Commissioner and local government do not agree with this interpretation. **The Department's attitude to such questions, which are exercising those who will have to implement the Act, illustrates deficiencies in its approach to supporting the process towards implementation.**

96. In his submission the Information Commissioner admitted that guidance on exemptions still remains to be finalised. It appears that this is another area of responsibility shared between the DCA and the ICO.

The Department for Constitutional Affairs have prepared guidance for Government Departments on the exemptions under the Act and on various procedural issues. However, these remain in draft form and are not yet published.

ICO guidance is directed at all public authorities, including Government Departments. Much of this has now been published and, although there has been some slippage in the timetable for its completion, the remainder will be published shortly. In some cases the guidance on exemptions has been delayed pending discussions with those departments or other interested parties most likely to be affected.¹³⁰

Guidance on exemptions is a further example of late decision-making which reduced the amount of preparation time to a matter of weeks for legislation which has been on the statute book for four years.

127 Ev 78, para 5.4

128 Qq 227-228

129 Qq 326-329

130 Ev 81, para 2.1

The Fees Regime

97. An important example of late guidance arose over fees. The question of what fees would be charged to applicants requesting information under FOI had exercised many, but as of mid-October 2004 there still had been no guidance from the DCA on the fees regime for the Act. The Information Commissioner posted a fees update on his website in March 2004. This referred to the Fees Working Group, led by the DCA which met for the final time in April 2004. A range of possible approaches to the fees regime question was considered by the Group. The Group did not reach a consensus on all the issues discussed and, rather than recommend a single approach to Government, it produced a paper setting out a range of options for consideration.

98. Campaigners and practitioners in public authorities have complained since 2002 that no decision had been reached on the fees regime likely to operate from 1 January 2005. The Information Commissioner told us:

In working with public authorities across the spectrum and particularly through engaging with their representatives at conferences, seminars etc, a recurrent theme has been their concern at the apparent lack of progress on the fees regime. From the very first Lord Chancellor's Department road shows in 2002 initiated by the Minister then responsible, Mr Michael Wills MP, public authorities were expressing concern about the proposed fees regime and how it would operate in practice. It is a great concern that there has as yet been no formal announcement as to the final content of the fees regulations, particularly as there is now only 10 weeks or so left of the long lead-in time to full implementation.¹³¹

Indeed, the Information Commissioner was so concerned with the lack of progress on this question, that he wrote to the Lord Chancellor himself in June 2004 asking for the matter to be resolved.¹³²

99. Finally, in a speech in Newcastle on 18 October, the Lord Chancellor announced that:

The vast majority of requests made under the new Freedom of Information rights will be free [...] For information which costs public bodies less than £450 to retrieve and collate, there will be no charge. This is roughly equivalent to two and a half days of work, for free. Government departments will only be able to charge where costs rise above £600 (which equates to about three and a half days work).¹³³

Furthermore, these limits only cover the costs of finding the information, not the cost of assessing whether it should be disclosed or not.¹³⁴ In his announcement the Lord Chancellor did not issue the accompanying fees guidance and regulations for public bodies (setting out exactly how things will operate). Instead the DCA indicated that these regulations would emerge "in November"—this did not happen.¹³⁵ The Information

131 Ev 83, paras 3.5 and 3.6

132 Ev 90 and 91

133 DCA Press release 508/04, 18 October 2004

134 Q 291

135 DCA Press release 508/04, 18 October 2004

Commissioner told the Committee that, “I have to say that is very late in the day”.¹³⁶ We welcome the Department’s decision to waive fees for requests below £450/£600 which will cover the vast majority of requests. However, this decision came unnecessarily late and created avoidable uncertainty for the public sector bodies concerned. Detailed guidance on the fees regime still has not been produced and needs to be as a matter of urgency.

100. The guidance will cover what will be an appropriate hourly charging rate for assessing whether a request has come in under the limits which have been set.¹³⁷ **While the removal of fees for the majority of applications is a positive step towards encouraging ease of access to official information, under the terms of the Act there is no requirement for public bodies to make information available if the cost of retrieval exceeds these limits. While public bodies may choose to provide the information on a full-cost basis, there is no requirement under the Act to do so. Paradoxically, while the non-imposition of fees will make many applications easier, this may also mean in effect that any request for information that takes more than 2–3 days to retrieve can be refused.**¹³⁸ Therefore, whether intended or not, the setting of the fees limit sets an arbitrary and potentially vast exemption to the scope of information which can be required to be produced. Notwithstanding this fact, the ICO emphasised to the Committee that this did not remove a public body’s obligation to give what assistance it could:

[...] public authorities will have a duty to provide reasonable advice and assistance, so if your request takes you to £750, the authority must come back and say, “What is it you really want? Can we agree a smaller amount?” They cannot simply say, “Over the limit”, and walk away from it. They have to assist you in reformulating your request.¹³⁹

101. We hope that the decision to waive fees for most FOI requests does not inadvertently lead to a more restrictive approach to the application of freedom of information.

Publication Schemes

102. As discussed above, the Freedom of Information Act 2000 requires public authorities to adopt and maintain a publication scheme which has been approved by the Information Commissioner. This requirement to adopt an approved publication scheme was phased in between July 2002 and April 2004. However, the sheer number of schemes approved in the time available meant that these schemes were apparently assessed in terms of their form, not their content. That is, the ICO staff did not have time to check what the publication schemes actually contained, but rather how they were structured. The Deputy Information Commissioner explained as follows:

[W]e said to [public authorities] in our guidance that they ought to be publishing more information than was already available. When they were submitting their

136 Q 291

137 *ibid*

138 Qq 292–298

139 Q 297 (Mr Phil Boyd)

publication schemes, they were required to complete a form which asked them whether, and what, additional information was made available under their publication scheme which previously had not been put into the public domain, so that was one of our criteria, but given the size of the task, it was not possible for us to cross-check each and every instance of that.¹⁴⁰

103. It has been suggested that this has resulted in some cases in rather un-ambitious schemes, which according to campaigners means that the opportunity of the publication schemes to promote freedom of information objectives was lost. Mr Maurice Frankel told the Committee that:

the main test [of a publication scheme] is what it adds to what went before. I think in too many cases the answer is practically nothing...what you see is schemes built up by taking stuff that is on the website already and just a link to it being put on the publication scheme [...]¹⁴¹

104. Mr Frankel went on to state what he thought the publication schemes should achieve:

I think we would have liked to see, and would still hope to see, schemes being used, first of all, to make previously inaccessible or unpublished information available and, second, to provide material which will help people understand what it is that departments hold, what type of material goes into their files, what type of documentation is produced at different stages in the decision-making process so that people can anticipate what will be there that addresses the issue they are interested in rather than have a black box into which people have to fire at random with no idea whether there is a target they can hit.¹⁴²

Mr Frankel also suggested that the publication schemes could support FOI objectives by helping requesters identify what material was being disclosed and what was not.

What we also would like to see is departments and public authorities publishing their request logs and their disclosure logs, and this co-ordinated system of monitoring would provide a basis for that so that people can see what is actually being disclosed and people can see what is being treated as exempt and what is not being treated as exempt. I think that will help to improve the level of disclosure because it then becomes very difficult for the people who have not done the work, departments which have not thought about it or authorities, to withhold stuff which their colleagues in other departments have been releasing. It helps to drive the standards up if that is published.¹⁴³

105. It is clear from other evidence we have received that a number of publication schemes may not have met the aim of the freedom of information legislation, notably in the medical sector.¹⁴⁴ The ICO placed a 'sunset clause' on its approvals for the

140 Q 272 (Mr Smith)

141 Q 124

142 *ibid*

143 *ibid*

144 See above, paras 41–42

publication schemes and intends to review these approvals after four years from initial approval.¹⁴⁵

Training advice

106. Another concern raised by our witnesses has been training advice. The BMA reported that guidance and training has been non-existent in some cases:

a number of GPs have reported that training has been unhelpful or non-existent and the information they have received has been minimal. As a result, some GPs have had to research the requirements under the Act on the internet themselves. Some practices claim to have never received anything and only found out about their obligations through speaking to colleagues”.¹⁴⁶

The LGA told the Committee that concern had been expressed about the availability of good-quality training, as some of the commercial training courses could give misleading information. For example, it quoted a comment from a LGA member as follows:

When I attended a seminar (held by a law firm) around October last year, we were told that the request had to be from inside the UK to be a valid request.¹⁴⁷

In fact, any foreign national or UK citizen, whether resident in the UK or abroad, can make a FOI request as long as a name and address is provided.

107. Some local authorities felt that the Information Commissioner or the DCA should have either carried out training or provided a list of recommended/approved trainers.¹⁴⁸ According to one of our witnesses, the Manchester group of authorities simply set up their in-house training scheme, “purchased ... as a consortium from a private company because we could not wait for an e-learning package to come out from the Government”.¹⁴⁹ The Parliamentary Under-Secretary of State tried to claim that the range of training needs for FOI implementation was so broad so as to make any attempt at a core training syllabus unworkable.

We have tried to suggest to organisations that they need to identify their own training needs within the framework of what we think they need to be able to do and to have done, and then to determine, in the way that they normally would—because they buy and organise training all the time—what is needed in their particular organisation. To be too prescriptive would have been wrong, because it is different in each different case.¹⁵⁰

145 Q 272

146 Ev 61, para 12

147 Emphasis added. Ev 78, para 5.4

148 Ev 79, para 6.5

149 Q 218 (Ms Matley)

150 Q 360

108. Given that the guidance that was required to structure such training properly was only put on the DCA website on 1 July 2004,¹⁵¹ it is not surprising that public bodies either did not undertake training or instead formulated their own programmes expecting to have to amend them once the DCA delivered what it had promised. **In our view the DCA should have recognised the need for training to start earlier and should have issued relevant advice in a timely way.**

151 Department for Constitutional Affairs, *Managing Information and Training—A Guide for Public Authorities in implementing the Freedom of Information Act and the Environmental Information Regulations*, www.foi.gov.uk/guide2nl.pdf

5 Conclusions

109. It is questionable whether the ‘big-bang’ approach to implementation of the FOI Act was the correct approach given the numerous concerns expressed during this inquiry and in any case it has caused significant disquiet amongst implementers. However, once decided, the onus was on the DCA to ensure that adequate preparatory measures were put in place.

110. On the general question of the role of the DCA, there remains a variance between the evidence we have received and the views expressed by the DCA and the ICO about the division of responsibility between them. While the two bodies may have responsibility for overall effective implementation in partnership, there appears to have been no clear demarcation of responsibilities between them which could have been understood by those implementing the Act.

111. Given the limited resources of the ICO, it was not within its capacity to support implementation across the whole public sector outside central government. The DCA was the only department that could (and should) have taken on this role. From the evidence we received, a significant number of public bodies do not appear to have felt that an effective co-ordinating body was in charge of the FOI process. Most worryingly, even where the DCA had clear responsibility, it appeared incapable of timely production of necessary guidance and advice—a point made repeatedly by our witnesses. In our view, the Department did not provide enough timely advice and guidance, most notably in the latter stages of the preparations for implementation in 2004.

112. We have received convincing evidence that a number of publication schemes are unambitious and often do not represent more than a rewording of previously published material. The publication schemes that have been adopted across all the bodies covered by the Act should have been properly assessed for content as well as form and the ICO should have been properly resourced to carry out this task. As things stand, the schemes are of questionable value and the pressure on the planned review process in several years time will be significant.

113. It is also clear that common guidance for all sectors would have been helpful much earlier. According to the evidence we have received, numerous public bodies felt that too many departments were giving out guidance advice of varying sorts (and quality). The guidance that was issued was too often related to central government needs and was not timely. The DCA should have been more active in co-ordinating all advice.

114. The Lord Chancellor’s Advisory Group, was a good concept which should have helped to avoid some of the problems that have arisen. It did not meet its ambitious terms of reference and represented a missed opportunity on the part of the DCA. Of even greater concern was the high level of staff turnover in the DCA division responsible for FOI and the resultant loss of continuity. We were not convinced by the explanations provided by the DCA witnesses about this matter. To allow significant turnover of staff in the final months before implementation appears to have been a misjudgement.

115. Staff turnover may also have been a contributory factor in another major complaint about the DCA—late decision-making. This represents a key shortcoming on the

Department's part and is all the more surprising given the very long run-up to implementation and the Government's decision to implement most of the Act on a single date. With less than four weeks until implementation, key areas of detailed guidance on issues such as fees and nominated persons able to issue exemptions remained unpublished. Furthermore, the question of whether or not the 20-day deadline for responding to requests is to be applied without exception remains unresolved. We believe it is unacceptable that a discussion on the very important question of whether or not to be flexible in extending the 20 day deadline could be going on in central government departments as late as October/November 2004 and that other stakeholders were not consulted about this possibility.

116. It is unclear what level of requests will be faced by public bodies following full implementation on 1 January 2005: will it be a flood of requests or a trickle? It is reasonable to suppose that there are some requests waiting in the pipeline, but only time will tell about the extent of the use of FOI. If an initial flood of requests leads to an unexpectedly large number of complaints, we believe that the DCA must ensure that the Information Commissioner is properly resourced to deal with them. Whether the system is used a great deal or very little, the law requires that all areas of the public service covered by the legislation should be ready on 1 January 2005. We are not confident that adequate preparations have been made to ensure that this will be achieved.

117. The DCA's failure to provide early guidance on technical matters and gaps in its leadership on FOI have risked creating the impression that FOI implementation is another chore to be undertaken, rather than a catalyst for a cultural shift to greater openness. It remains to be seen whether the fundamental cultural change in the provision of information, which the Act was intended to bring about, will accompany implementation or will take much longer to happen.

Conclusions and recommendations

1. This is an important piece of legislation and one which is very welcome—the Committee fully supports its aims and looks forward to its successful operation in the future. (Paragraph 1)
2. Given the decision to implement the Act across the whole public sector at the same time, the process of implementation has created special challenges. We recognise the practical difficulties placed on those responsible for implementing this legislation on a single start date. (Paragraph 17)
3. The structured approach of ACPO created an impression of much greater readiness for full implementation than the two other areas of public service which we examined. Although ACPO is only an advisory body, the organisational traditions of the Police Service lend themselves to a more coherent overall approach to the implementation of freedom of information legislation than other areas of the public service which may involve independent professional practitioners or a diverse range of activities on widely differing scales. We doubt that many areas of the public service, away from central government, can be as confident as the Police Service of full implementation on 1 January 2005. (Paragraph 25)
4. ACPO concerns were focused on certain areas. Central guidance appears to have been lacking in important areas including organising co-operation between different departments and agencies, ensuring consistency between different police forces in dealing with requests and lateness in producing general guidance on technical issues such as IT systems. It is also clear that a significant change occurred from June 2003, possibly as a result of staff changes in the DCA. (Paragraph 34)
5. Some of the evidence on implementation of FOI in the health sector gave the impression of FOI simply being regarded as another hurdle that had to be surmounted, with little sign of the cultural change in attitudes towards openness which the DCA has suggested will follow from FOI. (Paragraph 44)
6. It is clear from its evidence that the BMA does not believe that the message on FOI implementation has been given effective profile. (Paragraph 47)
7. It is not clear that the whole of the health sector will be in a position to comply fully with the law on 1 January 2005. There are significant problems with ensuring consistency of approach across such a wide range of bodies which are covered by the Act. We do not underestimate the difficulties associated with introducing FOI on one date across the whole of the health service. Nevertheless, there is little evidence that the DCA has been sufficiently active in providing the necessary leadership to ensure that many of the organisational and technical problems have been addressed in time in this sector. (Paragraph 49)
8. We believe that Chief Executives in all local authorities should ensure full compliance with FOI. (Paragraph 57)

9. While many local authorities will be compliant with the FOI legislation when it comes fully into force in January 2005, some will not. Successful compliance will be dependent on a relatively low initial level of requests. A 'business as usual' approach is far from the intention of the Act, which aimed to introduce a culture change in the handling of information. It seems clear that, so far, too few common standards for handling FOI requests across local government have been established. It is likely that different local authorities will handle similar requests in very different ways. (Paragraph 63)
10. Late guidance from the DCA on such matters as fees has meant that issues of central importance have had to be addressed by local government at the last moment. We are concerned that the necessary guidance for enabling all staff to understand the requirements of the Act has been produced so late. In some respects the result has been that local government has been given a few weeks rather than four years to prepare fully for the advent of FOI. (Paragraph 64)
11. The picture which emerged from the evidence we received was of uneven levels of success and a strong perception of a lack of strategic control and support from central government to other public bodies. The cause appears to have been a combination of a lack of consistent leadership by the DCA and an unclear division of responsibility for implementation between the DCA, the Information Commissioner's Office (ICO) and other government departments. (Paragraph 72)
12. There appears to have been some confusion amongst public sector bodies about where to seek advice and about which department or agency was responsible for supporting them. (Paragraph 74)
13. We formed the impression from the evidence provided that the high staff turnover in the DCA during the period between the agreement of publication schemes in the summer of 2003 and the autumn of 2004 seriously interfered with the delivery of co-ordination. (Paragraph 81)
14. The approach has been to rely on the FOI Champions in each organisation to take responsibility for energising the organisations and ensuring adequate preparations for compliance. While this appears to have worked quite well amongst some central government departments, the approach does not seem to have achieved consistent results. Lack of consistency was a message repeatedly relayed to the Committee, as well as a failure to share good practice early enough across differing sectors. (Paragraph 84)
15. In the course of preparing evidence for this inquiry a number of public bodies reviewed their preparations for implementation. While this was welcome, we would have liked to have seen more evidence that the Department was encouraging this degree of thoroughness at an earlier stage. (Paragraph 86)
16. We do not consider that the question of possible extensions of the time limit of 20 days for responding to FOI requests has been effectively handled by the DCA in respect of public sector bodies outside central government. (Paragraph 90)

17. The Department's attitude to questions relating to the nomination of qualified persons able to grant exemptions and related training, which are exercising those who will have to implement the Act, illustrates deficiencies in its approach to supporting the process towards implementation. (Paragraph 95)
18. Guidance on exemptions is a further example of late decision-making which reduced the amount of preparation time to a matter of weeks for legislation which has been on the statute book for four years. (Paragraph 96)
19. We welcome the Department's decision to waive fees for requests below £450/£600 which will cover the vast majority of requests. However, this decision came unnecessarily late and created avoidable uncertainty for the public sector bodies concerned. Detailed guidance on the fees regime still has not been produced and needs to be as a matter of urgency. (Paragraph 99)
20. While the removal of fees for the majority of applications is a positive step towards encouraging ease of access to official information, under the terms of the Act there is no requirement for public bodies to make information available if the cost of retrieval exceeds these limits. While public bodies may choose to provide the information on a full-cost basis, there is no requirement under the Act to do so. Paradoxically, while the non-imposition of fees will make many applications easier, this may also mean in effect that any request for information that takes more than 2–3 days to retrieve can be refused. Therefore, whether intended or not, the setting of the fees limit sets an arbitrary and potentially vast exemption to the scope of information which can be required to be produced. Notwithstanding this fact, the ICO emphasised to the Committee that this did not remove a public body's obligation to give what assistance it could. (Paragraph 100)
21. We hope that the decision to waive fees for most FOI requests does not inadvertently lead to a more restrictive approach to the application of freedom of information. (Paragraph 101)
22. It is clear from other evidence we have received that a number of publication schemes may not have met the aim of the freedom of information legislation, notably in the medical sector. (Paragraph 105)
23. In our view the DCA should have recognised the need for training to start earlier and should have issued relevant advice in a timely way. (Paragraph 108)
24. It is unclear what level of requests will be faced by public bodies following full implementation on 1 January 2005: will it be a flood of requests or a trickle? It is reasonable to suppose that there are some requests waiting in the pipeline, but only time will tell about the extent of the use of FOI. If an initial flood of requests leads to an unexpectedly large number of complaints, we believe that the DCA must ensure that the Information Commissioner is properly resourced to deal with them. Whether the system is used a great deal or very little, the law requires that all areas of the public service covered by the legislation should be ready on 1 January 2005. We are not confident that adequate preparations have been made to ensure that this will be achieved. (Paragraph 116)

Formal minutes

Tuesday 30 November 2004

Members present:

Mr A J Beith, in the Chair

Peter Bottomley

Mr James Clappison

Ross Cranston

Mrs Ann Cryer

Mr Clive Soley

Dr Alan Whitehead

The Committee deliberated.

Draft Report [Freedom of Information Act 2000 — progress towards implementation], proposed by the Chairman, brought up and read.

Ordered, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 117 read and agreed to.

Conclusions and recommendations read and agreed to.

Summary read and agreed to.

Resolved, That the Report be the First Report of the Committee to the House.

Ordered, That the Chairman do make the Report to the House.

Ordered, That the provisions of Standing Order No 134 (Select Committees (Reports)) be applied to the Report.

Several papers were ordered to be appended to the Minutes of Evidence.

Ordered, That the Appendices to the Minutes of Evidence be reported to the House.

[Adjourned till Tuesday 7 December at 9.15am]

Witnesses

(See Volume II)

Tuesday 14 September 2004

Sarah Tyacke CB, Mrs W Jones and Susan Healy, The National Archives Ev 1

Tuesday 12 October 2004

Maurice Frankel, Campaign for Freedom of Information Ev 11

Christine Miles, The Royal Orthopaedic Hospital NHS Trust, Birmingham, Ev 16

Stephen Morris, Department of Health and **Dr John Grenville**, Member of
BMA General Practitioners Committee

Deputy Chief Constable Ian Readhead, Hampshire Constabulary and the Ev 21

Association of Chief Police Officers (ACPO) and **Chief Inspector Paul Brooks**,
Hampshire Constabulary

Tuesday 19 October 2004

Councillor Peter Chalke CBE, Local Government Association, **Dr Lydia** Ev 27

Pollard, Improvement and Development Agency, **Faith Boardman**, London
Borough of Lambeth and **Kath Matley**, Association of Greater Manchester
Authorities

Richard Thomas, Information Commissioner, **Graham Smith**, Deputy Ev 33

Information Commissioner and **Phil Boyd**, Assistant Information
Commissioner

Tuesday 26 October 2004

Baroness Ashton of Upholland, Parliamentary Under-Secretary of State and Ev 44

Dr Andrew McDonald, Department for Constitutional Affairs

List of written evidence

(See Volume II)

The National Archives	Ev 58
British Medical Association (BMA)	Ev 60
Kath Matley, FOI co-ordinator, Association of Greater Manchester Authorities (AGMA)	Ev 62
The Association of Chief Police Officers (ACPO)	Ev 64
Birmingham City Council	Ev 71
Fred J Perkins, Chairman and Chief Executive, Information TV Ltd	Ev 73
Local Government Association (LGA) and Improvement and Development Agency (IDeA)	Ev 75
Information Commissioner	Ev 81
Department for Constitutional Affairs (DCA)	Ev 85
Information Commissioner	Ev 90
Leicester City Council	Ev 91

Reports from the Constitutional Affairs Committee

The First, Second and Third Reports of Session 2002–03 were published by the Committee under its previous name, Committee on the Lord Chancellor's Department.

Session 2002–03

First Report	Courts Bill <i>Government response</i>	HC 526 <i>Cm 5889</i>
Second Report	Judicial Appointments: lessons from the Scottish experience <i>No Government response expected</i>	HC 902
Third Report	Children and Family Court Advisory and Support Service (CAFCASS) <i>Government response</i>	HC 614 <i>Cm 6004</i>
Fourth Report	Immigration and Asylum: the Government's proposed changes to publicly funded immigration and asylum work <i>Government response (Second Special Report, Session 2003–4)</i>	HC 1171 <i>HC 299</i>

Session 2003–04

First Special Report	Protection of a witness – privilege	HC 210
First Report	Judicial appointments and a Supreme Court (court of final appeal) <i>Government response</i>	HC 48 <i>Cm 6150</i>
Second Special Report	Government Response to the Fourth Report on Immigration and Asylum: the Government's proposed changes to publicly funded immigration and asylum work	HC 299
Second Report	Asylum and Immigration Appeals <i>Government response</i>	HC 211 <i>Cm 6236</i>
Third Report	Work of the Committee 2003	HC 410
Fourth Report	Civil Legal Aid: adequacy of provision <i>Government response</i>	HC 391 <i>Cm 6367</i>
Third Special Report	Further Government Response to the Second Report on Asylum and Immigration Appeals	HC 868
Fifth Report	Draft Criminal Defence Service Bill <i>Government response</i>	HC 746 <i>Cm 6410</i>
Fourth Special Report	Additional Government Response to the Second Report on Asylum and Immigration Appeals	HC 1136