



House of Commons
Constitutional Affairs
Committee

**Freedom of Information:
Government's proposals
for reform**

Fourth Report of Session 2006–07

*Report, together with formal minutes, oral and
written evidence*

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Contents

Report	<i>Page</i>
Summary	3
1 Introduction	5
Background	5
The charging regime	6
2 Proposed changes to the FOI charging regime	8
Proposed regime	8
Reading, consultation and consideration time	8
Aggregation	8
The Government's case for change	8
The review of the charging regime	8
Cost-benefit analysis	10
Basis for decisions about costs	13
Number of requests affected	15
3 Parliament	17
4 The Information Commissioner's Office	18
5 Conclusion	20
6 Conclusions and recommendations	21
Formal minutes	23
Witnesses	24
List of written evidence	25

Summary

This Report examines the Government's proposals for reform of the charging regime relating to Freedom of Information (FOI) requests. It also comments on the funding arrangements for the Information Commissioner.

The Freedom of Information Act 2000 was brought into force on 1 January 2005. We examined the preparations for implementation of the Act in 2004 and last year we reported on its first year of operation: *Freedom of Information — one year on*. The Government indicated last year that it planned to review the operation of the Act and has since commissioned a Review of the charging regime and published two consultation papers.

At the moment, there is a cost threshold, above which public authorities do not respond to Freedom of Information requests. The Government has proposed changes to the charging regime for Freedom of Information requests which would enable public authorities to attribute more of their time towards this limit and to aggregate a wider range of separate requests. The threshold would therefore be reached for a greater proportion of requests, giving authorities the ability to refuse requests more often.

We examined the Government's arguments for change and concluded that:

- The Government has not shown that it adequately reviewed whether the existing charging regime balanced public access rights with the needs of public authorities to deliver services effectively, before deciding to restrict public access rights further;
- We have not received sufficient evidence to support the need to change access rights in the way proposed;
- The cost-benefit analysis prepared by the Department for Constitutional Affairs (DCA) to support the proposed regime is insufficient;
- We have not received any evidence to show that the new charging regime would be transparent and subject to adequate review, nor how such a review process would operate; the proposed regime could result in public authorities avoiding answers to embarrassing, contentious or high-profile cases as the number of internal consultees rises in proportion to the sensitivity of particular requests; and
- The Ministry of Justice should now focus on improving compliance with the existing provisions of the FOI Act and on reducing the delays encountered by requesters seeking information. Any future proposed changes to the charging regime must be supported by a firm evidence base and take proper account of the impact they would have on the benefits which the public derive from FOI.

Finally, we examined the funding of the Information Commissioner's Office. In our view, this is insufficient to enable it to deliver an effective complaints resolution process. We repeat our recommendation (made in our Report last year) that the Information Commissioner should become directly responsible to, and be funded by, Parliament.

1 Introduction

Background

1. The Freedom of Information (FOI) Act 2000 was implemented on 1 January 2005, providing a general right of access to information held by public authorities in the UK. The Act was supposed to create a new culture of openness on the part of public authorities with an assumption that all information should be shared unless there were specific, clearly defined reasons to the contrary.¹

2. Last year, we held an inquiry to examine the first year's experience of FOI and our Report, *Freedom of Information — one year on* was published in June 2006.² In that Report we concluded that the Act had already brought about significant and new releases of information and that this information was being used in a constructive and positive way by a range of different individuals and organisations.³

3. Rt Hon Lord Falconer of Thoroton, the Lord Chancellor told us that the Department for Constitutional Affairs (DCA) (since 9 May 2007, the Ministry of Justice) was conducting an internal review of the FOI charging regime in order to establish whether there was a fair balance between providing information as freely as possible and the time taken by public authorities to find the information.⁴ When we asked Baroness Ashton, Parliamentary Under-Secretary of State at the DCA, to elaborate on why the review was considered necessary, she claimed that staff were “spending huge amounts of time simply finding files” and that staff spent “weeks and months trying to find all of the information that is relevant”.⁵ We were not convinced by this argument because the existing regulations already set a limit for the maximum search time for each request. Baroness Ashton also suggested that public money was being wasted on providing trivial information.⁶ However, Richard Thomas, the Information Commissioner, explained that there were already existing provisions in the Act for dealing with vexatious and repeated requests. He expressed surprise that government departments were not making more extensive use of these provisions.⁷ He, and other witnesses, considered that the existing charging regime was working well, that it was too early in the life of the legislation to introduce changes without first encouraging better use of provisions already available to minimise any waste of public officials' time.⁸ We agreed. We concluded that there appeared to be a lack of

1 Speech by Lord Falconer 21 March 2007 www.justice.gov.uk

2 Constitutional Affairs Committee, Seventh Report of Session 2005-06, *Freedom of Information — one year on*, HC 991

3 HC (2005-06) 991, para 109

4 Constitutional Affairs Committee, Oral evidence, *Department for Constitutional Affairs: Key Policies and Priorities*, HC 566-ii, Session 2005-06, Qq191-194

5 HC (2005-06) 991, Qq 209 and 213

6 HC (2005-06) 991, Q217

7 HC (2005-06) 991, Qq 99-102

8 HC (2005-06) 991, Qq 99-102, Q119, Ev 86, para 45

clarity and some under-use of existing provisions and that we saw no need to change the charging regulations.⁹

4. In October 2006, the Government published its Response to our Report,¹⁰ together with a report of its review of the charging regime (“the Frontier Economics review”).¹¹ The Response stated that the Government was minded to introduce two amendments to the charging regulations and in December 2006, the DCA published a consultation paper inviting views on the way in which it proposed to implement these two amendments.¹² The consultation period ran from 14 December 2006 to 8 March 2007.

5. We were concerned that the Government was planning to introduce a new FOI charging regime, despite the evidence from our inquiry that such a change was unnecessary and potentially damaging. We decided to conduct a short inquiry so that we could comment on the proposed regime before any new regulations were laid before Parliament. We invited written submissions and took oral evidence from representatives of requesters, the Information Commissioner and Baroness Ashton of Upholland.

The charging regime

6. The current charging regime (The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004) came into force at the same time as the Act, on 1 January 2005. Notwithstanding the term ‘fees’ in the title, which refers to power for authorities to make small charges for photocopying and posting information, the main effect of the regulations is to define an appropriate limit for the cost of handling an FOI request. Where the estimated cost is below the limit, the information is provided free of charge, but when the limit is exceeded, the public authority can refuse to provide the information. Once the cost limit is exceeded, authorities have the discretion to provide information and to make a charge for it if they wish, but requesters have no right to require the information to be released, even if they are prepared to pay a fee. In effect, therefore, the charge limit has defined the limit to the right to secure the release of information, and proposals to make the charging regime more restrictive are in reality proposals to reduce the ability to make use of the Act. Media and commercial requesters would be unlikely to be deterred by incurring charges: their concern is about the loss of right to information.

7. Under the current regime, the appropriate limit is £600 for central government and £450 for other public authorities, based on a set rate of £25 per hour for officials’ time. Authorities can take into account time spent locating, retrieving and extracting the information requested when calculating whether or not the limit would be exceeded. Authorities are also entitled to aggregate requests for similar information made within 60 days of each other by the same person or by people apparently acting together. This has the effect of preventing an applicant from circumventing the cost limit by breaking a large request which would exceed the limit into several smaller ones.

9 HC (2005-06) 991, para 104

10 Government Response to the Constitutional Affairs Committee Report, *Freedom of Information — one year on*, Cm 6937

11 Frontier Economics, *Independent review of the impact of the FOI Act*, October 2006

12 Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007, Consultation Paper (“DCA first consultation paper”)

8. The four options for change considered in the DCA's review were:

- i. Including reading time, consideration and consultation time in the calculation of time spent towards the appropriate limit;
- ii. Aggregating non-similar requests made by any person or persons apparently acting together;
- iii. Reducing the appropriate limit thresholds from £600/£450;
- iv. Introducing a flat rate fee for all requests.

The DCA rejected options (iii) and (iv) and adopted options (i) and (ii) in the new draft regulations.

9. On 29 March 2007, the DCA published a second consultation paper relating to the same draft regulations, but this time inviting comments on whether the 2004 Regulations should be amended at all.¹³ The closing date for this second consultation was 21 June 2007.

¹³ Supplementary consultation on draft Freedom of Information and Data Protection (Appropriate Limit and Fees) regulations 2007 ("DCA second consultation paper")

2 Proposed changes to the FOI charging regime

Proposed regime

Reading, consultation and consideration time

10. Under the new proposals, the £600/£450 limits and the set rate of £25 per hour would remain the same, but (as we note above in paragraph 8) in addition to the time spent locating, retrieving and extracting information, authorities would also be able to take into account time spent reading the information, consulting other bodies about it and considering whether or not to release it.

Aggregation

11. Authorities are already able to aggregate related requests (i.e. to treat similar requests as if they were one request and compare the total time for dealing with them against the cost threshold). The proposed changes would also enable them to aggregate *unrelated* requests made within a 60 day period by the same person or organization, if it was “reasonable” to do so. The factors which an authority could take into account when considering if it were “reasonable” to aggregate (and then refuse) unrelated requests are set out in the consultation paper.¹⁴ They include the level of disruption caused to the authority, whether the applicant is an individual or is acting in the course of a business or profession and the applicant’s previous record, where their “conduct in relation to previous requests has been uncooperative or disruptive”.¹⁵

12. The effect of these changes would be that the cost threshold would be reached for a greater proportion of requests. This would give authorities the discretion to refuse requests more often. No changes to the payment arrangements are proposed: information which can be provided within the cost limits would be provided free of charge, other than the same nominal charges for photocopying and postage.

The Government’s case for change

The review of the charging regime

13. Last year, the DCA told us that during the passage of the fees regulations through Parliament, DCA Ministers had committed themselves to reviewing them after the first 12-18 months of operation. It stated that:

“Contrary to media reports the Government has no “secret plan” to introduce deterrent fees. The purpose of any potential review will be to ensure that the Act is

14 DCA first consultation paper, para 39

15 Ibid

working well and that the fees regime continues to balance public access rights with the needs of public authorities to deliver services effectively.”¹⁶

14. During our current inquiry, we asked Baroness Ashton whether this review had been carried out. She told us that the DCA had received “a degree of anecdotal evidence from organisations about the pressures they were facing”, and that as a result, the DCA had commissioned the Frontier Economics review.¹⁷

15. The Frontier Economics review found that “a small percentage of requests and requesters were placing disproportionately large resource burdens on public authorities”.¹⁸ This finding was used by the DCA as the rationale for change in the Partial Regulatory Impact Assessment in the first consultation document (“the RIA”).¹⁹ The Campaign for Freedom of Information (CFOI) pointed out that the existence of some particularly time consuming-requests was not in itself significant, stating that “it is of course a statistical feature of any normal distribution of requests that some will be much more expensive than the average” and that “this will continue to be the case even if the current proposals are adopted.”²⁰

16. The Information Commissioner re-iterated his view to us that the existing charging regime was working well and no changes were necessary at this stage.²¹ He told us that during the first two years full operation of the FOI Act, his office had received a total of almost 5,000 complaints, but of these only 32 related to the cost limit provisions.²² Many of the examples of troublesome requests cited in the Frontier Economics review, and by Ministers, have related to vexatious requests.²³ The Commissioner again expressed surprise that more use had not been made of section 14 of the Act, which absolves public authorities from the obligation to comply with such requests, and told us that in his view “much of the ‘mischief’ which the draft regulations are apparently designed to address can be addressed using the existing provisions of the Act.”²⁴

17. No clear evidence to support the DCA’s decision that a change to the charging regime was necessary has been published. The data in the Frontier Economics review is not a satisfactory substitute since it merely confirms that the various change options would reduce requests rather than presenting a cogent argument to explain why such changes were considered necessary.

18. We have no evidence to indicate that the Government has adequately reviewed whether the existing charging regime balanced public access rights with the needs of public authorities to deliver services effectively, before examining ways of reducing

16 Constitutional Affairs Committee, Seventh Report of Session 2005-06, *Freedom of Information — one year on*, Ev 50 para 6

17 Q 51

18 Frontier Economics review, p2

19 DCA first consultation, pp31-32

20 CFOI response to DCA consultation p18, www.cfoi.org.uk

21 Ev 24 para 2

22 Ev 24 para 3

23 Frontier Economic review p3; 18 April 2006 Q80; HC Deb, 23 October 2006 col 1361

24 Ev 24 paras 5-7

compliance costs. Furthermore we have not heard sufficient evidence from the Department to support the need for a radical change in the arrangements for charging for Freedom of Information requests.

Cost-benefit analysis

19. The Frontier Economics review estimated that the total annual cost of delivering FOI was around £25m per year for central government (£35m in total for the entire public sector) and then considered ways of reducing this amount.²⁵ According to the RIA:

“There may be some cost to requesters, and the public at large, if the proposals result in a decrease in the volume of information released under the Act. It is impossible to quantify such costs.”²⁶

Despite this acknowledgment that it did not know the costs, the Government reached the conclusion in the same document that “the benefits of introducing the proposed changes would outweigh the costs.”²⁷ The evidential basis for this conclusion is not clear.

20. Witnesses gave us many examples of the benefits derived from FOI.²⁸ We were particularly impressed by the variety of examples provided by campaigning organisations, and the benefits of their work for members of the public. The World Development Movement described how its scrutiny of DFID aid spending of £13m for a water project in Guyana had revealed that Severn Trent Water International had failed to meet five of seven objectives set in the contract.²⁹ Bail for Immigration Detainees, a registered charity which challenges immigration detention in the UK, told us how it had used FOI to improve scrutiny of Home Office decisions to detain, and in particular to challenge the detention of children.³⁰ The Centre for Corporate Accountability explained how FOI had helped support its work in providing free, independent and confidential advice to families bereaved from a work-related death.³¹ Other examples of benefits derived from information released as a result of FOI were provided by *The Guardian*³² and many similar lists are published elsewhere.³³

21. One of our witnesses noted that the DCA’s assessment of costs of the FOI Act had not followed standard Treasury guidance to assess benefits as well as costs, and suggested various areas of benefits which could usefully have been assessed by the DCA.³⁴ These were:

25 Frontier Economics review pp1-3

26 DCA first consultation paper, p 42 para 44

27 Ibid p 45, para 53

28 e.g. Ev 33, Ev 50, Ev 55 paras 3.20-3.24

29 Ev 64 para 8

30 Ev 61 paras 2, 4

31 Ev 22

32 Ev 73 Annex B

33 e.g. CFI 500 stories from the FOI Act’s first year, www.cfoi.org.uk ; Times Online, *59 things that would have stayed secret, what they didn’t want you to know: A list of intriguing facts disinterred by the FOI Act*, 5 March 2007.

34 Ev 79

- Has the operation of the Act helped to reveal cases where public resources may be being misused or wasted?
- Has the operation of the Act helped to identify cases where the operation of machinery of government has been less than satisfactory?
- Has the operation of the Act helped to formulate guidance or training in Government operations?
- Has the operation of the Act improved confidence in public administration?
- What benefits have citizens felt from the operation of the Act?
- Has the operation of the Act produced any reductions of costs or increase of benefits for other agents in the economy?

22. No consideration was given to the particular benefits associated with those requests which required more consideration by the authority prior to its release. The FOIA Centre pointed out that “the very FOIA requests alleged to be particularly costly tend to be the ones most effective at using FOIA to hold public bodies to account”.³⁵ The DCA told us that it did not know anything about the nature of the ‘time-consuming’ requests which it is seeking to block, telling us that “the Frontier Economics research was blind on the nature of the request” because the DCA’s concern was “only with requests that impose disproportionate burdens ... regardless of what information has been requested.”³⁶

23. The Government did not attempt to define what it would regard as an acceptable cost for delivering FOI, nor explain why the current cost was too much. *The Guardian* told us that:

“Frontier Economics argues that the cost of answering freedom of information requests costs Whitehall £24 million a year. Even if we take that figure as being true, we believe that this is a relatively low figure. The Central Office of Information’s budget for public relations, advertising and marketing is more than £300 million a year. This is money spent by the government telling members of the public what ministers want them to hear. In contrast, freedom of information is about what the public wants to know – £24 million is therefore money well spent.”³⁷

24. The evidence provided by the DCA did not address some of the matters which we would have expected to have been thought through carefully. For example, there was no discussion in the Regulatory Impact Assessment or elsewhere of:

- the possibility that some costs associated with decision making would reduce after the first few years, once officials were able to refer to an established body of case decisions;
- ways in which costs could be reduced by making better use of existing provisions in the Act or by streamlining officials’ decision making processes;

35 Ev 55 para 2.3

36 Ev 75

37 Ev 72

- additional costs which would arise from introducing the new charging regime such as the costs of new guidance, training and administrative procedures and the staff time involved in additional internal reviews and complaints to the Information Commissioner. (Witnesses, including Clifford Chance, The Odysseus Trust and the BBC pointed out to us that the new regime would require new administrative procedures to be introduced in public authorities and that these would inevitably lead to additional internal reviews and appeals.)³⁸

25. The Frontier Economics review identified the likelihood that requests for reviews would increase as a result of the proposed changes.³⁹ The Information Commissioner agreed that the proposed new regime would lead to an increase in the number of internal reviews for public authorities and a significant increase in the volume of complaints. He estimated that there would be between 600 and 2,000 additional complaints a year to his Office, based on the figures published in the Frontier Economics review, and that his office would require additional funding of between £300,000 and £1m per year to deal with these additional cases.⁴⁰ Otherwise “there would be very undesirable implications ... in terms of the resolution of cases”.⁴¹ Baroness Ashton confirmed to us that she was aware of the Commissioner’s estimates of the likely additional costs for his Office,⁴² but this information was not made available to the public in either of the DCA’s consultation documents. Instead, the RIA stated that “the costs to public authorities of these proposals would be minimal”.⁴³

26. In our previous inquiry, we saw considerable evidence of unnecessary delays in responding to requests for information on the part of some public authorities. The Government has taken no account of the likelihood that some time spent by public officials dealing with FOI requests is unnecessary. Instead, it is proposing a regime which would reward slow and inefficient authorities by providing a mechanism for refusing requests which an authority chose not to process promptly.

27. The cost-benefit analysis used to support the proposed new regime is insufficient. The costs to the public of reduced access to information are ignored, the additional costs of the proposed new regime are omitted and alternative ways of making information provision more efficient are not considered.

28. The poor quality of information presented in the cost-benefit analysis, in particular the lack of information about the benefits of FOI to the public, suggests that little effort was made by the DCA to balance public access rights against the needs of public authorities to deliver services effectively. The focus of the DCA’s work has been entirely on cost reduction, despite the absence of any evidence that such measures were necessary; there is no evidence that the DCA took steps to assess the benefits of the present regime.

38 Ev 38 para 11, Ev 40 para 12, Ev 43 para 2.3

39 Frontier Economics review p8

40 Q 47

41 Q 34

42 Qq 88-89

43 DCA first consultation paper, p44, para 49

Basis for decisions about costs

29. The DCA case in favour of the reforms involved the argument that discussions about costs would be reached using objective criteria and that these decisions would be subject to independent review. For example, Baroness Ashton told us that the new regime would be “absolutely transparent” and subject to “a robust and open process” of review.⁴⁴ Vera Baird MP, Parliamentary Under Secretary at the DCA, gave similar assurances to Members during a Westminster Hall debate on FOI:

“We intend to increase the number of activities that will count toward the appropriate limit of £600 for reading, consultation and time. If that happens, it will be subject to guidance and a framework. It will be subject to principle, and the application of those principles will be subject to appeal. It is not a situation in which public authorities can cook up some means of extending the time that they take over an inquiry in order to obfuscate the progress of information that they want to conceal. Cases will be fully transparent and the framework will be totally transparent. It would take a huge leap of imagination to link that transparent way of considering the value of work on dealing with requests with trying to get rid of the most embarrassing, contentious or high-profile cases. There is no connection. I repeat that it is all subject to appeal.”⁴⁵

30. Witnesses questioned whether the proposed regulations could be implemented objectively, and instead explained to us why they believed that the provisions would be open to manipulation.⁴⁶ The proposal to include time for reading, consultation and consideration in the cost estimate would require authorities to estimate how long they expected to take on each of these activities and compare those estimates against the cost threshold. If the cost threshold was exceeded, authorities could refuse to provide the information and it would then not be necessary to conduct any of the predicted work. We asked Baroness Ashton how she could ensure that all public authorities used a fair and consistent framework for preparing these estimates. She told us that “it would be very possible” to put in place a costing framework for reading time which would set out expectations of the time taken to read per page:

“...if you have 5,000 sheets of paper which have to be read by somebody, then it is reasonable to suggest it takes X amount of time to read a sheet, therefore that is reasonable to cost it at this.”⁴⁷

31. The Information Commissioner disagreed that setting a fixed reading time per page would avoid the potential for authorities to manipulate reading time estimates, stating that:

“There is an inherent difficulty in standardising the approach to calculating the time it takes to read and examine information held. Recorded information is held in a variety of formats and varies in complexity. Font size, paper size, the use of diagrams, tables and illustrations will all have a bearing on reading or examination time. An

44 Q 63

45 HC Deb, 7 February 2007, Col 317WH

46 e.g. Ev 33, Ev 40 para 18, Ev 47 para 21

47 Q81

average time might be used for the purposes of a “ready reckoner”. However it would be very easy for a public authority creating, say, a report which it wanted to keep out of the public domain to increase the font size and the margins to increase the number of pages comprising the report, thus boosting the assessed cost of complying with a request for it.”⁴⁸

32. Creating a framework for consultation and consideration time is even more difficult. The CFOI explained the problem:

“Authorities which wished to resist disclosure could ensure that requests were considered by as large a group of officials as could plausibly be included. The more people who attended a meeting to discuss a request, the more hours would be accumulated and the more likely that the request could be refused. Meetings would not actually have to take place, as an estimate of the time needed would do. Similarly, it will be possible for authorities to deliberately boost the costs of requests by ensuring that lawyers, ministers, or other authorities potentially affected by disclosure are consulted, where they might not otherwise have been.”⁴⁹

The Information Commissioner agreed, stating that “the process of estimating the time which might be spent on the various activities which can be included when calculating whether the cost limit has been reached is thus uncertain, subjective and open to exaggeration, if not abuse.”⁵⁰

33. *The Guardian* pointed out that consideration and consultation time estimates would often anyway be higher for the most controversial information:

“We believe that this will inevitably mean that government departments will reject requests which are complex or politically sensitive. These are often the requests which produce the most valuable information for the public...The more controversial a request is, the more time ministers and senior officials will spend consulting and considering whether the information should be released.”⁵¹

34. The proposal to enable authorities to aggregate unrelated requests where “reasonable” would also pose problems. The Information Commissioner told us that he had “grave doubts about the extent to which the aggregation of non-similar requests would be workable in practice, particularly if determined applicants took steps to circumvent the new provisions.”⁵² The Odysseus Trust explained why this proposal would be open to abuse:

“A denial based on ‘reasonableness’ is discretionary, and one that creates a risk of abuse of discretion. This is especially so in light of the subjective nature of the factors that an authority may consider, namely conduct which ‘has been uncooperative or

48 Ev 30 para 9

49 CFOI Briefing for Adjournment Debate 7 February 2007, p7, www.cfoi.org.uk

50 Ev 31 para 14

51 Ev 71

52 Ev 30 para 6

disruptive’. Claims for information should not be rejected either because they are costly or because the claimant makes frequent requests for information.”⁵³

35. With regard to the independent review process, the Commissioner told us that he could not “be optimistic that any defensible systematic approach could be adopted and used by practitioners”.⁵⁴ He explained that:

“I think it would be very difficult for public authorities themselves, and certainly for my office, to start to measure and assess the reading time and especially the consideration time of civil servants and other public officials. Civil servants do not keep time sheets, there is no regular record of exactly how much time is spent on which activity, but these draft regulations seem to indicate that sort of substantiation of how much time is spent in reading, consulting, considering a particular request will be needed.”⁵⁵

36. We are convinced by the evidence presented to us that the measures proposed by the Department could either actually be manipulated by public authorities wishing to avoid disclosure of information, or seem to be so, and that it would be difficult and time-consuming to implement a system of review which challenged such real or apparent manipulation in an effective and systematic way. We note in particular that the Information Commissioner, who would be integral to the review process, is not persuaded that this system is able to be solved as simply as the DCA believes. The objection that the most serious questions are the most time-consuming is especially serious — whether a public authority was deliberately being slow with its response or not, the nature of careful, wide consultation on matters of great importance will tend to put requests for information that is potentially embarrassing for the public authority in the frame for being ruled out for response on the grounds of cost.

37. We have not received any convincing evidence that the new regime would be sufficiently transparent and subject to adequate review. It is unclear how a framework for independent review would operate. We conclude that the proposed regime could result in public authorities avoiding answers to embarrassing, contentious or high-profile cases as the number of internal consultees rises in proportion to the sensitivity of particular requests.

Number of requests affected

38. In its first consultation paper, the DCA stated that “the significant majority of requests submitted by applicants under the Act would not be affected by the proposed changes”. The proposals would only affect “any applicant submitting one of the small percentage of requests (four per cent) that result in reading, consideration and consultation time imposing disproportionate burdens for public authorities, and the small number of applicants who use the Act very regularly, and impose disproportionate burdens by doing

53 Ev 40 para 15

54 Ev 31 para 17

55 Q 31

so.”⁵⁶ This clearly contradicted the data in the Frontier Economics review which estimated that around four times this number of requests would be affected.⁵⁷

39. Witnesses considered that the impact would be even greater than the proportion predicted by the Review, partly because of the scope for public authorities to consult widely, as we have explained in the previous section of this Report. The view of the Information Commissioner was that the changes would “arrest the flow into the public domain of a very significant amount of information of genuine public interest which has been such a striking achievement since the Act was fully implemented in January 2005.”⁵⁸ The National Council for Voluntary Organisations told us that the proposed changes would severely curtail the ability of individuals, organisations and the media to hold government and other public authorities to account.⁵⁹ The BBC made the important point of principle that “the proposed changes would actually obstruct the aim of increasing transparency and openness in public life that lies behind the government’s introduction of FOI” and that from its perspective as an authority receiving requests, it saw “absolutely no need for the measures that are being proposed.”⁶⁰

40. The Odysseus Trust described the proposals as “a severe and unnecessary restriction upon freedom of information and expression” and questioned why the Government was proposing to block requests, rather than to provide applicants with a right to contribute to the costs of providing the information they required:

“Public officials would be endowed with excessively wide powers to reject applications for access to information, about the workings of government and other public bodies irrespective of the substance of the applications and the public interest to which they may relate... It frustrates the object and purpose of the Act to grant public authorities the discretion not to consider a claim at all if it exceeds the cost level. The cost involved in obtaining information should not bar the claim in and of itself. If a claim is expensive, at the most the requester should have to make a reasonable contribution towards the costs...”⁶¹

41. Last year, Baroness Ashton told us that the Government wished to minimise the amount of public money spent on handling requests for trivial information. This year she told us that some “completely legitimate requests” would be refused under the proposed regime.⁶² She explained that the proposed regime would create a situation where the discretion to provide information would ultimately rest with public officials. This would most typically be the case where the requesters were unable to refine their requests in a way which met the needs of the relevant public officials.⁶³ She told us that:

56 DCA first consultation paper, para 40

57 Frontier Economics review, p6 Table 2

58 Ev 25 para 8

59 Ev 54 para 5

60 Ev 44, paras 4.2 and 4.3

61 Ev 39 paras 5, 11

62 Q 62

63 Qq 62-64

“At the end of the day we want to give the backstop of being able to say “Actually, if you are not prepared to collaborate with us, we have to say no”.⁶⁴

42. Whilst the Government’s intention may have been to target a minority of particularly burdensome requests, it is clear to us that the actual impact of the proposed new regime would be far more extensive. The regulations are drafted such that they would, for all but the simplest requests, severely limit an individual’s right to know. To introduce a charging regime which requires applicants to negotiate the terms of their requests with public authorities, and which enables officials to refuse requests from applicants who do not collaborate with them, is a direct reversal of the open government principle that is a fundamental purpose of the FOI Act.

43. There is no objective evidence that any change is necessary. The cost-benefit analysis provided with the Government’s consultation papers is incomplete. There is clear evidence that the proposed amendments could be open to manipulation and abuse. There is no sign that any consideration has been given to proper funding of the independent review process. The proposed measures have the scope significantly to reduce the flow of information into the public domain. We recommend that the proposed new charging regime be withdrawn.

44. The Ministry of Justice should now focus on improving compliance with the existing provisions of the FOI Act and on reducing the delays encountered by requesters seeking information. Any future proposed changes to the charging regime must be supported by a firm evidence base and take proper account of the impact they would have on the benefits which the public derive from FOI.

3 Parliament

45. A Private Member’s Bill, the Freedom of Information (Amendment) Bill, has passed through the Commons and is awaiting debate in the House of Lords. Its effect would be to exempt Parliament from the Freedom of Information Act 2000. In the course of our various inquiries into the Freedom of Information Act 2000, we have been sent no evidence indicating a need for such an exemption or that existing protections for constituents’ correspondence were inadequate. We believe an exemption would be contrary to the culture of openness which we have argued should prevail in the public service.

4 The Information Commissioner's Office

46. Last year we heard that many requesters were experiencing lengthy delays before receiving responses from public authorities.⁶⁵ We urged the DCA to work with the Information Commissioner to improve compliance with the 20 day statutory response deadline, to reduce public interest time extensions and the time taken for internal reviews.⁶⁶ We heard that the ability of requesters to challenge such delays was curtailed by the fact that they often had to wait months for the Information Commissioner to start investigating their complaints.⁶⁷ We expressed concern that resource restrictions could limit the Commissioner's performance as an independent regulator⁶⁸ and asked the Commissioner to provide us with a mid-year report, documenting his progress in reducing the number of cases awaiting attention, together with other performance measures.⁶⁹

47. Last year, the DCA did not provide all of the additional funding which the Information Commissioner's Office (ICO) estimated was necessary to clear the backlog of cases and to establish an acceptable turnaround of new cases. The ICO's baseline funding for FOI work reduced from £5m in 2005–06 to £4.7m in 2006–07 to take account of a £300,000 efficiency saving and the DCA provided an additional £850,000, rather than the requested £1.13m, bringing the total budget for 2006–07 to £5.55m.⁷⁰ The ICO's mid-year progress report, demonstrated that improvements had been made, both in terms of the number of cases closed and the quality of decision notices produced, but that the backlog was reducing slowly:

“We move into the second half of the financial year knowing that our performance has improved and should continue to do so. However, the volume of new cases has risen and stayed nearly 20% above projections. Even with the current level of new cases, we are now closing more cases each month than we receive. But we remain acutely aware that we still have a substantial backlog and that this is not reducing as quickly as planned because of the higher than expected number of cases arriving each month. The legacy backlog and the increase in new cases mean that too many cases are taking — and will continue to take — too long to resolve.”⁷¹

48. The progress report stated that temporary additional funding of £750,000 for 2007/08 would enable the ICO to achieve acceptable service levels by early 2008, but that without this additional funding, complex cases would take over nine months, possibly considerably longer, to resolve.⁷² In February 2007, the Commissioner told us that he had eliminated the backlog of straightforward cases, but that there remained a backlog of around 600 complex

65 *Freedom of Information – one year on*, para 78

66 *Ibid.* paras 79, 82 and 85.

67 *Ibid.* para 52

68 *Ibid.* para 107

69 *Ibid.* para 62

70 Ev 28 para 35

71 Information Commissioner's Office, *Freedom of Information: ICO Progress Report*, October 2006, pp2-3

72 *ICO Progress Report* pp 30,31

cases awaiting attention.⁷³ Nevertheless, the DCA advised the Commissioner, once again very late in the year, that the ICO would receive only baseline funding of £4.7m for 2007–08.⁷⁴

49. We are not convinced that the funding of the ICO is sufficient to enable it to deliver an effective complaints resolution service. We question whether it is appropriate for the Ministry of Justice to set the funding levels for the independent regulator and thereby directly influence its capacity to investigate complaints. With regard to the proposed new charging regime, the cost-benefit analysis suggests that no significant additional resources would be provided to the ICO to enable it to manage the additional workload predicted in the Frontier Economics review. This suggests to us that the Government would be content to accept the consequentially slower complaints resolution process.

50. In our last Report on this subject we concluded that the relationship between the DCA and the ICO was not working as effectively as it might. We have not seen any improvement. We repeat our recommendation made in that Report that the Information Commissioner should become directly responsible to, and funded by Parliament.

73 Ev 28 paras 36-37

74 Q49

5 Conclusion

51. The current Government has successfully reformed the relationship between citizen and all of those engaged in public administration as a result of passing the Freedom of Information Act. It is difficult to overstate the importance of this legislation. So far, it has contributed to greater understanding of much of the work carried out in the name of the public. We fully support the aims of the Freedom of Information Act, in particular its objective of creating a new culture of openness on the part of public authorities.

52. We have carefully examined the case made by the DCA for amendment of the arrangements for handling Freedom of Information requests. We do not accept the arguments made in favour of the need for reform. Although it is undoubtedly true that Freedom of Information legislation carries with it a certain cost, we think that this is entirely justified. The extra burden on public authorities arising from the Freedom of Information Act is a necessary part of the basic reform which the legislation intended to carry out.

53. We welcome the Government's decision, announced on 29 March 2007, to consult further as to whether the Regulations should be amended at all, and we believe that this has provided an opportunity for ministers to abandon these unnecessary, unpopular and undesirable restrictions on the operation of the Freedom of Information Act.

6 Conclusions and recommendations

1. We have no evidence to indicate that the Government has adequately reviewed whether the existing charging regime balanced public access rights with the needs of public authorities to deliver services effectively, before examining ways of reducing compliance costs. Furthermore we have not heard sufficient evidence from the Department to support the need for a radical change in the arrangements for charging for Freedom of Information requests. (Paragraph 18)
2. The cost-benefit analysis used to support the proposed new regime is insufficient. The costs to the public of reduced access to information are ignored, the additional costs of the proposed new regime are omitted and alternative ways of making information provision more efficient are not considered. (Paragraph 27)
3. The poor quality of information presented in the cost-benefit analysis, in particular the lack of information about the benefits of FOI to the public, suggests that little effort was made by the DCA to balance public access rights against the needs of public authorities to deliver services effectively. The focus of the DCA's work has been entirely on cost reduction, despite the absence of any evidence that such measures were necessary; there is no evidence that the DCA took steps to assess the benefits of the present regime. (Paragraph 28)
4. We have not received any convincing evidence that the new regime would be sufficiently transparent and subject to adequate review. It is unclear how a framework for independent review would operate. We conclude that the proposed regime could result in public authorities avoiding answers to embarrassing, contentious or high-profile cases as the number of internal consultees rises in proportion to the sensitivity of particular requests. (Paragraph 37)
5. There is no objective evidence that any change is necessary. The cost-benefit analysis provided with the Government's consultation papers is incomplete. There is clear evidence that the proposed amendments could be open to manipulation and abuse. There is no sign that any consideration has been given to proper funding of the independent review process. The proposed measures have the scope significantly to reduce the flow of information into the public domain. We recommend that the proposed new charging regime be withdrawn. (Paragraph 43)
6. The Ministry of Justice should now focus on improving compliance with the existing provisions of the FOI Act and on reducing the delays encountered by requesters seeking information. Any future proposed changes to the charging regime must be supported by a firm evidence base and take proper account of the impact they would have on the benefits which the public derive from FOI. (Paragraph 44)
7. A Private Member's Bill, the Freedom of Information (Amendment) Bill, has passed through the Commons and is awaiting debate in the House of Lords. Its effect would be to exempt Parliament from the Freedom of Information Act 2000. In the course of our various inquiries into the Freedom of Information Act 2000, we have been sent no evidence indicating a need for such an exemption or that existing protections for constituents' correspondence were inadequate. We believe an exemption would

be contrary to the culture of openness which we have argued should prevail in the public service. (Paragraph 45)

8. We are not convinced that the funding of the ICO is sufficient to enable it to deliver an effective complaints resolution service. We question whether it is appropriate for the Ministry of Justice to set the funding levels for the independent regulator and thereby directly influence its capacity to investigate complaints. With regard to the proposed new charging regime, the cost-benefit analysis suggests that no significant additional resources would be provided to the ICO to enable it to manage the additional workload predicted in the Frontier Economics review. This suggests to us that the Government would be content to accept the consequentially slower complaints resolution process. (Paragraph 49)
9. In our last Report on this subject we concluded that the relationship between the DCA and the ICO was not working as effectively as it might. We have not seen any improvement. We repeat our recommendation made in that Report that the Information Commissioner should become directly responsible to, and funded by Parliament. (Paragraph 50)

Formal minutes

Tuesday 12 June 2007

Members present:

Mr Alan Beith, in the Chair

David Howarth
Mrs Siân James

Mr Andrew Tyrie
Keith Vaz

Draft Report (Freedom of Information: Government's proposals for reform), 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 53 read and agreed to.

Summary agreed to.

Conclusions and recommendations read and agreed to.

Resolved, That the Report be the Fourth 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 Memoranda were ordered to be reported to the House for printing with the Report.

[Adjourned till Tuesday 19 June at 4.00pm]

Witnesses

Tuesday 20 March 2007

Page

Rob Evans, The Guardian, and **Tim Jones**, World Development Movement Ev 1

Richard Thomas, Information Commissioner, **Graham Smith**, Deputy Information Commissioner, and **Jane Durkin**, Assistant Information Commissioner Ev 5

Tuesday 24 April 2007

Rt Hon Baroness Ashton of Upholland, a Member of the House of Lords, Parliamentary Under Secretary of State, Department for Constitutional Affairs Ev 12

List of written evidence

1	Society of Editors	Ev 21
2	Centre for Corporate Accountability	Ev 22
3	Information Commissioner	Ev 24
4	Newspaper Society	Ev 33
5	Clifford Chance	Ev 37
6	The Odysseus Trust	Ev 38
7	BBC	Ev 42
8	XIX Article 19	Ev 45
9	Press Gazette	Ev 48
10	Which?	Ev 50
11	National Council for Voluntary Organisations	Ev 54
12	FOIA Centre	Ev 55
13	Brian Deer	Ev 58
14	Mrs Josephine Hyde-Hartley	Ev 60
15	Bail for Immigration Detainees	Ev 61
16	Dr Nigel Dudley	Ev 62, Ev 63
17	World Development Movement	Ev 64
18	Intellect UK	Ev 67
19	Rob Evans	Ev 70
20	Department for Constitutional Affairs	Ev 75
21	Mr C P England	Ev 76
22	The Advisory Group on Campaigning and the Voluntary Sector: Working party on Freedom of Information	Ev 76
23	Alasdair Roberts	Ev 78
24	David Heigham	Ev 78

Reports from the Constitutional Affairs Committee

Session 2006-07

First Report	Party Funding <i>Government response</i>	HC 163 <i>Cm 7123</i>
First Special Report	Party Funding – Oral evidence from the Lord Chancellor on the role of the Attorney General	HC 222
Second Report	Work of the Committee 2005-06	HC 259
Third Report	Implementation of the Carter Review of Legal Aid	HC 223

Session 2005-06

First Report	The courts: small claims <i>Government response</i>	HC 519 <i>Cm 6754</i>
Second Report	The Office of the Judge Advocate General	HC 731
Third Report	Compensation culture <i>Government response</i>	HC 754 <i>Cm 6784</i>
Fourth Report	Legal Services Commission: removal of Specialist Support Services	HC 919
Fifth Report	Compensation culture: <i>NHS Redress Scheme</i> <i>Government response</i>	HC 1009 <i>Cm 6784</i>
First Special Report	Legal Services Commission's response to the Fourth Report on removal of Specialist Support Services	HC 1029
Sixth Report	Family Justice: the operation of the family courts revisited	HC 1086
Seventh Report	Freedom of Information—one year on <i>Government response</i>	HC 991 <i>Cm 6937</i>
Eighth Report	Reform of the coroners' system and death certification	HC 902

Session 2004–05

First Report	Freedom of Information Act 2000 — progress towards implementation <i>Government response</i>	HC 79 <i>Cm 6470</i>
Second Report	Work of the Committee in 2004	HC 207
Third Report	Constitutional Reform Bill [<i>Lords</i>]: the Government's proposals <i>Government response</i>	HC 275 <i>Cm 6488</i>
Fourth Report	Family Justice: the operation of the family courts <i>Government response</i>	HC 116 <i>Cm 6507</i>
Fifth Report	Legal aid: asylum appeals <i>Government response</i>	HC 276 <i>Cm 6597</i>
Sixth Report	Electoral Registration (Joint Report with ODPM: Housing, Planning, Local Government and the Regions Committee) <i>Government response</i>	HC 243 <i>Cm 6647</i>
Seventh Report	The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates <i>Government response</i>	HC 323 <i>Cm 6596</i>

Oral evidence

Taken before the Constitutional Affairs Committee

on Tuesday 20 March 2007

Members present:

Mr Alan Beith, in the Chair

David Howarth
Mr Piara S Khabra
Bob Neill
Mr Andrew Tyrie

Keith Vaz
Dr Alan Whitehead
Jeremy Wright

Witnesses: **Rob Evans**, *The Guardian*, and **Tim Jones**, World Development Movement, gave evidence.

Q1 Chairman: Mr Evans and Mr Jones, welcome. We are very glad to have you helping us this afternoon. Although this inquiry, on the face of it, appears to be about charges and fees, as you will both realise, that is not the reality at all. What we are discussing is what would happen if the Government placed certain restrictions on the operation of the Freedom of Information Act, restrictions both as to the cost figure above which they would not provide the information at all—not charge you for it, they simply would not provide it—and as to whether they will accept repeated requests from the same individual or organisation and whether the Government have any justification in taking these steps. I wonder if you might help us to start with by each giving us some illustration of how you have used the legislation and the public benefit you think has resulted from it?

Tim Jones: From the World Development Movement's point of view, we are a campaigning organisation that seeks to hold the Government to account on issues such as trade justice, debt cancellation, climate change and how it uses its aid round the world. I think the most relevant way in which we have used the Freedom of Information Act is in relation to the Department for International Development, where we have been particularly trying to monitor how they are spending their aid money in relation to water provision around the world. I think over the last two years we have submitted about 28 freedom of information requests on this subject, which tends to be asking for details on specific projects or programmes that they are funding or contracts which they have let out to certain private companies. That worked out at about three requests a month¹. On the amalgamation of the number of requests that you can put in, we think we would be severely restricted in how many requests we could put in and far less than we would otherwise have done. Obviously, when we are asking for this information on the projects that they are funding, we are doing this because we do not know what they are up to. I would be quite concerned already about how DFID publish the projects and programmes around

the world that they fund, and because we do not know already, we have to put in lots of requests where we think there might be something happening that we are interested in. So, we do not always get things out of it that we would use publicly but sometimes we do. A most recent example is in Guyana where, over the last few years since 1999, DFID have been funding a water privatisation process which has recently involved paying the fees for Severn Trent Water International, a British company, to run the water system in Guyana. We were recently given access to an evaluation of that contract, which showed that they had been missing five out seven targets and actually were in the process of the contract being terminated. This involved £13 million of Department for International Development money.

Q2 Chairman: How much—13 or 30?

Tim Jones: Thirteen million pounds over the course of last five years, I think, in Guyana, and involved £1.8 million going to Severn Trent Water International. Our valued judgment would be that this has been a big misallocation of aid. The public interest case is that this is something that the public should know about, but we would not know about this evaluation if it was not for the Freedom of Information Act and we would not be able to access these kinds of things and, because we have to put in so many different request to initially get this information, we have less chance of hitting it.

Q3 Chairman: Could not the Government say that you engaged for a legitimate purpose but, nevertheless, in an expensive fishing expedition calling for all sorts of information which did not reveal anything like that?

Tim Jones: I think that if they did that would be a very counter-productive argument on their part, because this is UK taxpayers' money. At the moment, if they were really concerned about looking at how this money was spent, they could be far more open in what they reveal already. My comparison is with the World Bank, who on their website publish all project documents for every project that they fund round the world, and DFID just do not have that approach at all. They leave it up to

¹ *Note by witness:* this should be “three requests every three month period”.

20 March 2007 Rob Evans and Tim Jones

organisations like to us do this investigation, and that results in us having to use the scatter gun approach. From their point of view, it would be far more effective for the Government to be more proactive to begin with, but given that they are not, I think this is not a costly exercise because it is the only way to hold them to account on things that people are meant to be most concerned about—how UK aid money is being spent around the world—actually finding out: what are they spending it on, what are the programmes that they are funding?

Q4 Chairman: Mr Evans, would you like to give us some illustration?

Rob Evans: How we have been using the Act?

Q5 Chairman: Yes.

Rob Evans: Yes. I sent a submission into the Committee which showed 50 stories which had appeared in *The Guardian* basically using the Act. I hope you have got it there. I did not write this list out to boast about what we were doing but to show that these are responsible stories, examples of how the media has been using the Act responsibly, and these are stories which, I think, are in the public interest. This is the type of stuff that the public ought to know about in order to enhance democracy. For example, the third story on the list is a list of the biggest carbon dioxide polluters in the UK. That was information we did not have before, and I think that is a very good example of why this Act is a success.

Q6 Chairman: Do you have any more of those, just to remind the members, if they are particularly effective?

Rob Evans: There is another one which I think is useful because it highlights what could happen if these regulations come into force. We have a story here which is about the first time that the Government actually released the amount of EU farming subsidy that each farmer in Britain receives. This had been a huge secret and, back in 2005, for the first time, the Government actually released this data for about 100,000 farmers in Britain, and we wrote a story showing that the Queen and Prince Charles and other land owners, basically the big land owners, got a large amount of money. You could say, "So what", but I think the point about that is that it is, hopefully, informing the public that this is what is going on and they can make their own judgment. Our worry with the regulations is that some of these stories are what I would call quite politically contentious or complex, and the more that the information is complex or contentious the more time the ministers will take over deciding whether or not to release it. Basically, taking the story about the EU subsidies, it did take quite a long time for the Government to decide whether or not to release that information, and I think it was the right decision but, I fear, with these new regulations, it could be just the type of thing that they would refuse to release.

Q7 Chairman: Have you had occasion to use the appeals process at all?

Rob Evans: Yes, I have.

Q8 Chairman: Have you completed it? Have you been successful in using it?

Rob Evans: What do you mean?

Q9 Chairman: To appeal against a government refusal.

Rob Evans: Yes, I regularly appeal against the Government, and sometimes you win and sometimes you do not.

Q10 Chairman: Have you got many matters still outstanding?

Rob Evans: Yes, that is the problem that we run into. Sometimes they take a long time to decide whether or not to release the information on appeal.

Q11 Chairman: Does the WDM use the appeals process?

Tim Jones: We have not appealed beyond an internal appeal on anything so far. I am concerned about this, taking the reading and consideration into account. I think we said in our submission that of the 28 requests, 10 have been considered to have some exemption and had a public interest test applied to them, and often that is to do with international relations or, when asking for contractual things with companies, commercial confidentiality. Often they end up being given to us in part and we get the information in the end, but it can sometimes take four or five months for DFID to finally reach a decision to do that. We have never had one so far which we felt was worth the time and effort for us to appeal against when they have not released it. I think five of the 28 have been refused outright.

Q12 Chairman: In general, the Act has worked for you, because you have been able to get most of the information you felt it right to get?

Tim Jones: Yes, eventually. I think where we have not been able to is where we have not been able to be specific enough in our requests because we have not known enough about what they are up to. So, although there are problems in the news we had to hand out, we did not think it was worthwhile following an appeal process because we could see that they were justified under the terms of the Act not to release it, although we would have liked them to have done.

Q13 Jeremy Wright: Can you help us with the number of requests that you make. Obviously, the practical effect of these regulations, if they are implemented, would be to reduce the number of times that you can make a request under the Act, and, if you are restricted to something like one every three months for a particular government agency, can you give us an idea of how many applications you normally make in an average three-month period, if there is such a thing, so that we can get a sense of how restrictive this will be for you?

Tim Jones: As I say, with DFID as the main department for us—we have worked it out—it is 28 since January 2005, which is three a month.

20 March 2007 Rob Evans and Tim Jones

Obviously it does not work out that we have three every month², but we would have periods. At the moment I am waiting. I think I have got four requests in at the moment since the start of the year, two of which we are still waiting on DFID to get back to. If we were restricted in our use, we would just have to try and make judgments and say: "Which is the most important one?", and when something came up immediately, you might think, "We cannot put in a request now because we might want to save our one for this period for later." So it cuts to a third at least what we currently put in, I think.

Rob Evans: *The Guardian* in a year makes around, I would say, 250 requests in total. It depends. They are to all departments. It is difficult to judge how many we would be stopped from making. The problem would come if you were looking at a particular department. Often the value of freedom of information for journalists is that you are putting it together with other information that you are getting. You have to dig away sometimes at government departments. The most interesting information is often the most heavily concealed; so if you are pursuing a department over a particularly long period of time, that is when you would be hindered in particular.

Q14 Jeremy Wright: Presumably, by definition, if you got a certain piece of information from a department, it might raise other questions to which you would also want to know the answer, so there would automatically be a second request?

Rob Evans: Yes, exactly, you have to pursue them. I do not think it is the case that often—. I do not think we are in the position where Whitehall departments or government will give you everything that you want straightaway. I think the Act has been good and it has been a success in terms of opening up. We are on the road, are we not, and we have gone a certain way down the road towards openness.

Q15 Jeremy Wright: Can I ask this, perhaps unfair, question, but in your judgment do you think there is an element of the Government not having anticipated what the effect of this Act was going to be in terms of the workload on the government departments in question?

Rob Evans: They should have known. The thing is that the Act was passed in 2000 and was not introduced—it did not actually come into force until 2005. The reason given back in 2000 why it could not come into force within two or three years was: "We have got to have time to prepare." What were they doing during that five years? I think they have had ample time to prepare.

Q16 Chairman: This Committee examined what they were doing and found that some of them were preparing very well and some of them were not.

Rob Evans: Exactly. I think that was wasted time really.

Q17 David Howarth: My question is similar to one of Mr Wright's. Is your experience similar to that of MPs asking parliamentary questions, that the answers you get might be characterised as minimal compliance and sometimes over-literal in the interpretation of the question? Is it your experience that you have to make repeated requests just to, effectively, make your first request in a way that the Government cannot misunderstand?

Rob Evans: There are two points. One is that compliance is patchy. You get some departments who are good, others who are not. I think what is crucial here is the culture. If you have a department that wants to give out information properly when it is in the public interest, then, yes, you can work with that department and they give the information properly, but if you have got a department that does not want to give out the information, they will use any excuse or any exemption. You have got to fight against that to prove that they are being unjustified. So I think you are right, yes, sometimes you have to make several moves just to get your first request.

Q18 David Howarth: And you suspect that if there were opportunities for manipulation of the new regulations, it would not be very surprising if they were used?

Rob Evans: I would not be surprised at all.

Tim Jones: I just want to add another example that we had on that where we requested the Secretary of State's public engagements for the year, and they kept on extending the public interest test on it. Obviously I made clear in the request that we acknowledged there would be security issues potentially just where they were really public engagements, and eventually, five months in, we were finally granted the request, after which time most of the public engagements on the list had already happened. I tried questioning the people in the Department for International Development about this: "Oh, they are very complex regulations"—you know. I have never been able to understand how it takes five months to adjudicate. That seems to me a waste of time. If they are spending five months making these adjudications, that is where the waste of money on their part is and not in terms of the requests that we are putting in.

Q19 Chairman: Do you think that 35 million a year is too much for the cost of freedom of information? That is the Government's claimed figure and the supposed basis for their concern.

Rob Evans: I do not, for two reasons. One is that £35 million is, I would say, quite a good price, if that is the right price. There are two points. One is that that figure is very small compared to the amount of money spent on the Central Office of Information, which is all about all the press officers, all public information films that the Government is putting out, whose budget is over 300 million, and that is information that the Government wants the public to know, but freedom of information is about the information that the public want to know, and I think it is a very good price. Secondly, I would surely

² *Note by witness:* this should be "three requests every three month period".

20 March 2007 Rob Evans and Tim Jones

hope that freedom of information would lead to better government and lead to cost savings in the long run.

Tim Jones: Obviously that is, in the scale of things, a tiny amount of money and, in terms of what these regulations mean, I think it is more about £11 million they are talking about being saved, which is even smaller. Just talking from our own experience, the one case of Guyana, £13 million is probably more than the £11 million, and we would say that is £13 million that has been misspent, but then beyond that, if you consider this is from a department which is responsible for probably about 1% of government spending and one request by quite a small organisation relatively from us, it is clear that if you were able to gather together all the freedom of information requests that have been made and the knowledge that has been gained from them and the openness, you have saved far more than that amount of money. The step that has been taken with this legislation to try and make the governmental processes in the UK more transparent has been very valuable, and it would be a horrible mistake for that to slip back.

Q20 Chairman: What is your response to the Lord Chancellor's claim, for which he gives some examples, that there are frivolous or silly but time-consuming requests—how many windows there are, or how many toilets there are in the department, or whatever it may be?

Rob Evans: How many Ferrero Rocher chocolates were given us?

Q21 Chairman: Yes.

Rob Evans: I think, if you look at the bigger picture, the number of so-called frivolous requests are tiny. That is using a small number of requests to tarnish and write-off the whole of the Act. There may be a few, but the point here is that the Freedom of Information Act is really quite young and we are settling down. You may get a few silly requests, but the more that the public learn about the Act and how to use the Act, the better the working of the Act and the more people will put in focused requests, and that will not waste so much time.

Q22 Chairman: Was there not a lady who inquired how many unmarried police officers there were in the local constabulary! Would you say the process can deal with that anyway?

Rob Evans: I think so. I do not see it as an insuperable problem.

Q23 Bob Neill: You made the point, both of you, about the need sometimes to go back because one question leads on to another question and you need more information. Can you give us any sense as to what percentage of the requests that you make trigger the need to go back for more because either they were minimal in terms of their compliance or because, very legitimately, what they have said raises yet another question in your mind?

Tim Jones: I think the main kinds of requests like that tend to be when we have got a particular strategy of doing that, so when we would ask for a list of certain kinds of projects and then look through it and think: which are the most interesting ones? There was a case where we wanted to follow up on some evidence that we had that DFID were working alongside USAID on projects and, when they were doing that, that meant the aid money that DFID was contributing was tied to being spent on US companies. As you may know, DFID are not meant to tie their aid to be used by UK companies, but we thought it might be that some UK aid was being tied to US companies. So we initially put in the request for where they were working with USAID and then sought to establish which ones of these might be the cases where there is this tied aid going on? Where we have had follow up requests, it has tended to be in that kind of strategic way and I think that is how the Act was meant to be used. There is no way under the regulations at the moment to ask for all you want initially, so you have got to get lists in order to then pare it down to the cases that would be most interesting.

Rob Evans: We do ask for an appeal on a large number of our requests, because we have come across quite a lot of instances of unjustified secrecy. The more times you appeal, the further you go, the better chance you have of getting the information.

Q24 Bob Neill: That raises another point. How satisfied are you with the robustness and the fairness of the appeals procedure?

Rob Evans: You mean the Information Commissioner.

Q25 Bob Neill: Yes. Does that seem to work—some you win, some you lose?

Rob Evans: Well, yes, it is a case of some you win—yes. The problem with the Information Commissioner is that it takes a long time to get results.

Q26 Bob Neill: So that is your main concern?

Rob Evans: Yes.

Q27 Bob Neill: That was the only other point I was going to come to as regards that. We have heard the argument that the Lord Chancellor makes about the burden on politicians. What do you estimate to be the burden upon yourselves or your organisation in terms of the resource that you have to put into making and following up these requests? Is it five minutes first thing in the morning or is it a bit more resource than that?

Tim Jones: We are an organisation that employs about 20 staff and I co-ordinate all our requests. It takes up a significant amount of my time, and a lot of the time I think that is probably why we have not followed up and appealed on some of these because I just do not have the time to think it through and

20 March 2007 Rob Evans and Tim Jones

there are other things to be done. Yes, putting percentages on it, 10, 20% of my time sometimes has been spent on trying to use the Act, but which I wish it could be more really.

Q28 Chairman: I was struck by the point you made earlier. Effectively what you said was that you had to submit a more elaborate series of requests because the department was not going to answer the question that you really wanted answered. That sounds as though the Government's way of responding to requests makes the process more expensive. Is that so?

Tim Jones: Initially when the Act came in, I went to training courses and had this concept that I could build up a relationship with the freedom of information people in order that I would just be able to phone them up and say, "This is what I really want. Can you get it for me?" That has not been my experience at all. When I have tried that, it has just been point blank: "Write it down. We will see what we can do." So there we have had to take a step back, and that equates with the US. We knew that there was no way—. If we asked for all the documents about all the cases where they were working with USAID, we would get back straight away: "It will cost too much money to find this." So we have to first try and get a list and then work out which ones look like they might be the most interesting.

Q29 Chairman: Is there a question you could have produced there which, if the Government had been more willing, would have cut the amount of time and money that they were committed to and would have achieved your purpose?

Tim Jones: Yes, the question would have been: "Where are you working with USAID where UK aid might be being tied to the US by US companies?"

Q30 Chairman: A perfectly straightforward question.

Tim Jones: I think initially in that case I might have tried that one, and they just said, "Our filing system cannot cope with that. We do not know. It would take an investigation by us", and I have got lots of other problems with learning about how the DFID filing system works. I am worried about how they keep track of things! There was no willingness on their part, and, of course, obviously it is a politically contentious question because this has been a major thing that the Government has proposed, how they de-link aid money from being tied to companies, and so this idea that there might still be being tied aid going on was a very political question and so they would not have a political reason to want to investigate it.

Chairman: Mr Jones, Mr Evans, thank you very much indeed.

Witnesses: **Richard Thomas**, Information Commissioner, **Graham Smith**, Deputy Information Commissioner, and **Jane Durkin**, Assistant Information Commissioner, gave evidence.

Chairman: Mr Thomas, Mr Smith, Ms Durkin, welcome back. It is good to see you again. I am going to ask Mr Khabra to start.

Q31 Mr Khabra: Last year you told the Committee, Mr Thomas, that you believed that the existing fees regime was working well and that it had "all the advantages of being simple, clear and straightforward and not being a deterrent." You say that much of the "mischief", as you called it, which the draft regulations are apparently designed to address can be addressed using the existing provisions of the Act. What then do you believe will be the actual impact of the proposed regulations?

Richard Thomas: Thank you very much. That is a very large question. I will do my best to address it. You are quite right, I did say last year (and I stand-by the words) that I believe the existing fees regime is simple, clear and straightforward and does not appear to act as a deterrent to requesters. In overall terms, I do not consider freedom of information is proving to be burdensome for public authorities, and I think the benefits, especially in terms of improved transparency, accountability and democracy are clear. I am mainly concerned about the practicalities of the proposals which are now under consideration. I recognise that the amount of what I call genuinely public interest information that would be released into the public domain will be significantly reduced, but I am concerned about the

practicalities for myself, for my office and for public authorities generally. You refer to the existing provisions of the Freedom of Information Act. A very important provision is section 14 of the Act, which sets out an exclusion for a request which is vexatious or for a repeated request. I have to say very frankly to this Committee that I am surprised that government departments and other public authorities are not using these provisions' exclusion for vexatious requests to any great extent. If there is a problem with this sort of request, then why is it that we are not being presented time after time with refused requests on the ground that they are vexatious? If there is a real problem in this area, then I make no secret, it is my view that a more robust use of the existing exclusion would to a very significant extent address the mischief at which the new cost proposals are directed. It is nearly two years now since my office published detailed guidance on section 14, which took a liberal interpretation, if you like, of section 14 and made it clear that we will be as supportive as possible of responsible public authorities dealing with genuinely vexatious requests. We have also since that time issued quite a number of decision notices upholding the conclusion of a public authority in a particular case that a particular request was vexatious. I think we have shared some details of these with the Committee for the purposes of today's inquiry. Looking at the new proposals, I fear that they will introduce new layers

 20 March 2007 Richard Thomas, Graham Smith and Jane Durkin

of procedural and, indeed, bureaucratic complexity. I think it would be very difficult for public authorities themselves, and certainly for my office, to start to measure and assess the reading and especially the consideration time of civil servants and other public officials. Civil servants do not keep time sheets, there is no regular record of exactly how much time is spent on which activity, but these draft regulations seem to indicate that that sort of substantiation of how much time was spent in reading, consulting, considering a particular request will be needed. I have to say, I am anxious (and I wish to share the anxiety with the Committee) about the volume of complaints which we are going to receive under the new regulations, because there will be the scope for an appeal to come to my office. If somebody believes that the new regulations have been improperly or incorrectly used to exclude their request, then they will come to my office and we will have to investigate, and, unless we are properly funded for this, there is a real prospect that our existing scarce resources will have to be spent with resolving these difficult, complex disputes about the new regulations, about the time being taken to deal with cases rather than resolving the substantive issues about what information should be disclosed under the terms of the Act. So, a long answer, I am afraid, to your question, which was a very wide-ranging question, and I make no secret that we do have anxieties about the practical implications of these proposals.

Q32 Mr Khabra: I am sure you are aware of the concerns of many organisations and individuals about the impact of the regulations which you have just recently mentioned. Is there any merit in your concerns? Is there any possibility that you are prepared to consider to address some of the issues which have been raised?

Richard Thomas: As I read the Independent Report, the Frontier Economics' Report and the Government's own statements and consultation proposals, I think the mischief can be summarised by saying that there is a small number of requests which are taking a disproportionate amount of time and effort and that this is proving particularly burdensome for public authorities. I have to repeat I think, I recognise that there may be a small number of such cases, and the Frontier Economics' report gave some empirical evidence to back that up, but if I could just repeat what I said about section 14 of the Act and if I may just read to you an extract from our own guidance on section 14, I think you will see how there is scope to address this problem by using the existing arrangements. Our guidance refers to the exclusion for a vexatious request and it says here, "The Commissioner's general approach will be sympathetic towards authorities where a request, which may be the latest in a series of requests, would impose a significant burden and clearly does not have any serious purpose or value, is designed to cause disruption or annoyance, has the effect of harassing the public authority or can otherwise fairly be characterised as obsessive or manifestly unreasonable." We thought at the time that that

wording, which was our interpretation of that single word "vexatious" was really recognising that there could be a problem out there, and we said we wish to keep compliance costs to a minimum and we wish to avoid damage to the credibility or reputation of the Freedom of Information framework. We put that in our guidance right back at the beginning of 2005, but I have to repeat my astonishment, given the proposals coming forward, that so few cases have come our way where a government department or other public authority have relied upon section 14 to exclude a case. There have been a handful of cases and we have adjudicated on those, and I think in more cases than not we have upheld the approach of the public authority.

Q33 Chairman: Your first answer to Mr Khabra, the latter part of it, pointed out this interesting point, that if the costs to you of adjudicating a larger number of matters of dispute is very significant, then of course that will take away a significant part of whatever savings is involved and it evokes the principle, which the department, with our support, has sought to establish, that if another department, let us say the Home Office, generates a requirement for more judicial procedures because of changes it makes in the law, then there should be a transfer of funds from the Home Office to the DCA to cope with the costs of whatever new requirement has been generated. The application of the same principle would suggest there would need to be a further allocation to your office from the DCA budget if your costs increased.

Richard Thomas: We have started discussion with the DCA. I think we all recognise it is very difficult to estimate just how many cases we would receive. We have taken some figures. We have suggested that if there were to be 10% of the number of cases which in Frontier Economics' estimate would be taken out of the system altogether that is 20,000. If 10% of those came to us, that would be something like 2,000 cases.

Q34 Chairman: It is quite a low estimate, only 10%, at least initially.

Richard Thomas: I think we all have great difficulty estimating. I think the department think that is on the high side. The figure they suggested last would be closer to 600, but even 600 cases on top of our existing case load of about 2,000 a year would be a substantial burden. In the longer run some of those cases may substitute for existing cases, but in the short-run, certainly in the first couple of years, they would almost certainly all be additional cases on top of our existing case load. So, I have to be plain to the Committee, there would be some very undesirable implications in practical terms for my office in terms of the resolution of cases.

Q35 Bob Neill: I am interested in that because you may have picked up the evidence of Mr Jones. He was saying he thought the system was fair enough, he did not really have a complaint with the substance, but it was length of time that was his

20 March 2007 Richard Thomas, Graham Smith and Jane Durkin

issue. Do you have any idea of the extra resource that might be required to keep on top of this in a timely fashion?

Richard Thomas: I think it is fair to say, Mr Neill, that the first year, 2005, my office and many public authorities were struggling a bit with freedom of information. This Committee expressed some reservations in its report last year, but overall the verdict of the Committee was that FOI was working well. What I think I can now say is that it is working dramatically better since that time. We have improved our performance to a very significant extent. I think that FOI has settled down far more inside public authorities. I think that requesters are behaving, for the most part, in a very responsible way. We often read about the headlines in the national press, but so often you also see the real benefits being delivered to ordinary people up and down the country in terms of freedom of information. We are not entirely happy with our own performance now, but this is not a journalistic exercise; we have to adopt a quasi-legal approach to adjudicate properly on complaints. It does take time, but we are now closing over 50% of cases within 30 days. Our target is to close 80% within the first year. We are now achieving 84%. Jane Durkin here is my Assistant Commissioner who leads on the operational side of our FOI complaints handling and she and her team have done a fantastic job in pushing through the cases, but I think it is fair to say that we are all anxious about the new skills which will be required, the new approaches which will be required and the time that might be taken in having to examine quite closely the issues around the time taken to deal with these cases. We are not just looking at how much time has so far been actually taken in reading, in consulting, in considering, but also an estimate of how much time would be taken in reading, considering and consulting, and then we get into questions like: is it reasonable? Is it reasonable for this official to be involved? Is it reasonable for that minister to be involved? There are going to be some quite challenging issues to address if these proposals go ahead.

Q36 Bob Neill: I see that, and I think you have made the point that there is a concern that there might be “an exaggeration”, I think was the phrase that was used, of the time taken. You have given us an outline, but can you give us any sense as to what changes you might have to make to those procedures? Does this require, for example, a much more inquisitorial sort of approach to almost cross-examining people at times? I do not know, we are all fishing around a bit here, are we not? You say there are likely to be some quite significant changes. Can you give us some sense as to what you are going to have to do differently to find out whether there is exaggeration or not or whether it is justified?

Graham Smith: If I could answer that, Chairman. One of the issues here is that we do have some experience of investigating cost limit cases under the current regulations where the issue is in the time taken for the location and retrieval of the information; and it does get to be quite a complex

business and public authorities are not in the habit of recording the time taken. They do not have a time-recording culture on the whole. I think what we would have to do is to spell out very early on, through guidance, what our expectations would be of public authorities, if they wished to take advantage of these new regulations, to try to persuade us that they had fairly estimated that they would have to undertake all these various activities and, therefore, the appropriate limit would be reached and they were, therefore, discharged from the obligation to comply with the request, but it is a very complicated matter. We also have some experience of appeals to the Information Tribunal, and it is clear that when they are looking at a single individual case their expectations of the nature and the extent of an investigation which we have undertaken are actually quite high. So we think that we would have to set out in advance, as best we could, the expectations that we would place on public authorities and, in turn, that would have to take account of the expectations we expect to be placed on us by the Information Tribunal; but, as with this process of FOI being very much one of learning from experience as we have gone along, that is something that we would quickly have to review in the light of experience. What we cannot anticipate is what public authorities would actually do if they had these regulations, because there are many choices that they have to make and that, again, makes the exercise of predicting what is going to happen, or what would happen if these regulations came into force, very difficult.

Richard Thomas: What we said in our response to the DCA is that the processes of estimating the time which might be spent on the various activities, which can be included when calculating whether the cost limit has been reached is thus “uncertain, subjective and open to exaggeration, if not to abuse”. We did also feedback what the Frontier Economics’ themselves had concluded, because they actually said, “If practitioners do not take a systematic approach, there is likely to be a substantial increase in requests for internal review”—that is inside the public authority—“and appeals to the Information Commissioner’s Office, with a substantial increase in costs.” We cannot be optimistic, frankly, that there will be the systematic approach which Frontier suggested would have to be brought into existence, because there are so many complexities and uncertainties in the draft regulations. Graham, my Deputy, and myself are both qualified lawyers, but I have to say we struggled quite a lot with the wording of these draft regulations. They are very complicated, very bureaucratic and very demanding for public authorities and our own staff. We think we know what they are trying to achieve, but it is worded, inevitably, in very convoluted language.

Q37 Bob Neill: The sense of what I get is, not only is there potentially an extra burden upon yourselves, but, in fact, if they are successfully to maintain their refusal to disclose, there may actually be a burden upon public authorities in terms of the changes that they will have to make to their working practices and

20 March 2007 Richard Thomas, Graham Smith and Jane Durkin

their ability to produce an evidence base, if you like, that they had complied with your expectations of them?

Richard Thomas: I do not think we could do other than expect documented evidence as to the time so far taken or a reasonable estimate of time to be taken in the future.

Q38 Bob Neill: Again, that reasonable estimate has to be based upon something?

Richard Thomas: Yes. In the legal field, where there are disputes about the costs of litigation, there is a whole industry of costs draftsmen and people like that with a century or more of experience looking at these sorts of issues. We will be doing that from scratch.

Q39 David Howarth: You have mentioned one possible area of manipulation, which is on time estimates. Could you comment on the other one that has been put to us by the Campaign for Freedom of Information, which I think you briefly alluded to, which is the question of consultation, on which other public authorities, or lawyers, or ministers could be consulted on the basis that they might potentially be affected, and that appears to be another possible area of dispute and manipulation. I appreciate it is difficult to estimate the likelihood that this might happen, but there are obvious benefits for local authorities of doing that. Could you just outline what powers you have to deal with that sort of manipulation, what penalties you could impose and what other powers you might think would become necessary if your present powers were insufficient?

Richard Thomas: I think we would all recognise that, in appropriate cases, consultation is a good thing. The so-called section 45 Code of Practice, which we have a duty to promote adherence to, says that public authorities should consult with outside parties in appropriate cases, and we encourage that. I think it is working reasonably well. If a public authority holds information relating to a private company, there will often be a process of consultation in that situation. We have not seen the evidence to suggest that is proving a major problem. I am sure there will be isolated examples, but as a general proposition I would say that the existing arrangements for consultation are working well. What we do not know is that, perhaps with the incentive of these new regulations, there may be more consultation than is strictly necessary. There may be consultation with other public authorities, there may be consultation with outside legal experts, there may be consultation with other forms of experts, and we will be then called upon. If you like, if time was clocked up in that process and that took it beyond the cost limit, then the requester would come to us in due course and appeal and we would have to make a judgement, and, in your particular example, we would have to say: what time so far has been spent on consultation? Do we agree or disagree with the estimate about what would be spent in the future? Is that reasonable? So, all those questions have to be unpacked from inside those regulations. We have no real sanctions at the end of the day, all

we can do is uphold or reject a complaint, and, as I say, it is difficult, but we would do our job; we would get on and we would do it. In principle, I suppose, if we came across a public authority which was persistently getting it wrong, then I think we could probably issue a practice recommendation or even an enforcement notice under the Act, but those are fairly exceptional sanctions.

Q40 David Howarth: Do you envisage the use of such sanctions rising given the proposed regulations?

Richard Thomas: I think where the volume would rise would be on the number of decisions—first of all the number of cases. I estimated somewhere between 600 and 2,000. I cannot yet give a more precise figure. None of us know, but we are currently working on those outside parameters, but somewhere between 600 and 2,000, at least in the first year, possibly the second year as well. The majority of those we would be under a duty to make a formal ruling on. In fact we are under a duty in every single case unless we can achieve a satisfactory agreed solution, and that would be demanding upon my office.

Q41 David Howarth: Going back to the point about reasonable consultation, what kind of evidence would you expect the public authority to be able to give to show to you that their decisions on consultation were reasonable?

Richard Thomas: I think it is difficult to generalise, because one of the features of freedom of information is the enormous variety of subject matter. Inevitably in this Committee we are looking mainly at government departments, but please remember, all the other local authorities, police bodies, education bodies, health bodies and so on, there are so many different sorts of public bodies under the umbrella of FOI, and so many different sorts of requests. If it was a request about the actual operation of the public authority, I would be a bit sceptical about the need to consult anybody, but if it is a request about that public authority's involvement with a range of outside organisations, then it would not be unreasonable to have some sort of engagement with those outside bodies. I am sorry to be uncertain in my answer, but there are so many different situations.

Q42 David Howarth: I do not know whether Mr Smith can give any examples?

Graham Smith: I can give a couple of examples. We see quite a lot of appropriate consultation with third parties where there is a request for information about a contract, a local authority waste disposal contract, for example, and there will be consultation by the local authority with the contractor with regard to how they regard the confidentiality and the consequences that might flow from the release of certain information with regard to contractual clauses. Another one might be in a social care context where a local authority has contact with a family or a group of people and the health authority might have contact with them, and so there will be

20 March 2007 Richard Thomas, Graham Smith and Jane Durkin

appropriate consultation there as well. Where I think we see consultation which should not be taken into account in these circumstances is where, for instance, a number of local authorities in one area all get the same request from the same requester. They like to consult, and one can understand from their point of view why they like to consult, so they are not embarrassed by all giving differential answers to the same questions—the same happens with government departments—but it is not strictly necessary that that consultation takes place in order for the public authority to comply with the request which has been made.

Q43 Chairman: In general do you think it is difficult to establish objective criteria in some of the areas on which you will be expected to rule?

Richard Thomas: I think, as we discovered with the initial introduction of the Act, there is going to be a huge learning curve. This will be a specialist learning curve. We, I am sure, will be putting out guidance on the regulations, if they go ahead. We will do our best to take, as always, a responsible and robust approach to our responsibilities. I think that the criteria will depend upon hard evidence. I indicated in one of my previous answers, there is going to be a mix in the majority of cases looking at actual time spent and prospective time spent. The actual time ought to be tolerably easy. There is no culture of time sheets inside public authorities except in legal departments, but I think there will have to be some sort of documentary evidence, but far more difficult will be estimates of prospective time. Having said that, as cases come forward on a repeat basis, if a second, third and fourth similar case came forward, I expect there would be some learning from the early cases. The one thing, Chairman, which really does concern me—I think we can cope pretty well with reading (and Mr Howarth's questions was about consultation time)—is consideration time, and it is considering whether or not particular exemptions apply and it is often considering where the public interest considerations fall. Remember that time is charged per person hour, so it is £25 per person. There will be occasions sometimes in my office when I look around and see six people discussing things for an hour, and we do not always reach a conclusion inside the hour. There may be a temptation, as it were, to pile on the people who need to consider whether a particular exemption or a particular public interest issue is to be answered one way or the other and time will clock up quite quickly; but for us to say whether it was reasonable to do that will call for some demanding judgements.

Q44 Chairman: Another issue on which you would have to rule, which is quite new, is whether different persons appear to be acting in consort or in pursuance of a campaign. You have got to judge whether there is a conspiracy.

Graham Smith: That is an existing provision at the moment, and it is not one that has been brought to our door very often, that is not something that has been alleged, but I think that is partly because, remember, before us the public authority had to

garner evidence to reach such a conclusion in order to justify it to us, but it is not something that has been brought to us. What is new about the proposed aggregation rules is the subject that was being talked about with the previous witnesses where the same people or people acting together are bringing similar³ kinds of requests, and I think it has been demonstrated, indeed, with some articles in *The Guardian* newspaper as to how easily those might be circumvented.

Q45 Dr Whitehead: Can I ask about the relationship between the backlog of cases which you have previously had with some of the new anticipated numbers of cases that may come in. You told us last year about the backlog of cases that you noted in your office, and in your progress report you indicated that about 450 cases were outstanding. Have you made further progress in removing the backlog and meeting your target since then, or does the backlog remain?

Richard Thomas: I will ask Jane Durkin to give you a fully up-to-date figure. I am glad, Dr Whitehead, you mentioned the progress report, because that was a very important record of where we got to in the autumn. We promised that to the Committee in the spring of last year and we made a lot of changes inside the organisation—structural changes, procedural changes, quality changes and so on—and we have completely reorganised the way we do things, and this sets out the record as it was in the autumn, and we shared with the Committee the figures as they were when we put our written evidence in. I think it is fair to say that in the first two months of this year we have done better still, and, whilst we have not eliminated our backlog, cases taking longer than we would want, we are not getting anything like the public concern, we are now prioritising cases and the vast majority, I think, are being handled in a far more acceptable time span. Perhaps Jane can say a bit more about the latest figures.

Jane Durkin: There are two key factors around this. The first is that when we were projecting forward we were estimating an intake of about 190 new cases a month, and actually that has averaged out at about 215. As far as getting to the 450, we have not at the moment, but at the end of February we had 559 cases waiting to have investigations started on them, and that has been our assessment of what constitutes the backlog of cases that have not yet started investigations. We are certainly on track and in the last two months, as Richard has said, we have been clearing a lot more cases than we receive, so that figure is reducing on a month-by-month basis.

Q46 Dr Whitehead: But, as you have mentioned, in terms of the new cases that might come your way in general projection terms that would presumably stop your progress on sorting out your backlog.

³ *Note by witness:* should be “non-similar”.

Ms Durkin: Absolutely.

Q47 Dr Whitehead: And possibly reverse it to some considerable degree.

Ms Durkin: Working through our estimates of costs and intake it became clear that we simply could not absorb this, given the current workload we have and the staffing and funding that we have. In fact, the practicalities of taking this work on would mean that we would need separate teams so that this work would not be sitting in queues. There would be specialist skills required and we have learned from the first year of the Act being in force that we cannot sit and work through these initial cases. We would have to develop expertise in concentrated teams so that we did not repeat any mistakes of the past.

Mr Thomas: At the lower end of the estimated flow it would be 600 cases, so we estimate that we would need another £300,000 for the first year. At the higher end, which would be about 2,000 cases in the first year, we estimate we would need another £1 million⁴. I have to say that there are no indications from the DCA at the moment that such money will be forthcoming, but we have to say very bluntly that if there is to be this additional caseload it has to be resourced from somewhere.

Q48 Dr Whitehead: But you have on the other hand stated that you are adopting a more robust approach to enforcement and that the suggestion perhaps from that more robust approach is that public authorities' FOI compliance might be speedier and that the time it would take you to deal with cases might therefore be reduced. Has that turned out to be the case?

Mr Thomas: We use the word "enforcement" to refer to our longstop enforcement powers. Where there are systemic problems on the part of the public authority that is when we can use our enforcement notice or our practice recommendation powers as opposed to the routine decision notice power when we are adjudicating on individual cases. We told the Committee last year that we were strengthening our approach. As our progress report documented, we introduced a new enforcement strategy in the autumn and we now have a fairly active sort of programme to watch particular authorities. I am bound to say that the majority are at local rather than national level but we have a watch list of bodies where there have been problems, where they have revealed in their handling of individual requests that they need a close watch. We have issued one practice recommendation, with another one coming to maturity quite soon. That is generally working. We are still adopting a co-operative, constructive approach with public authorities. As I said earlier, the Act is settling down now. There are not the alarms and the uncertainties and the anxieties which there were 12 or 18 months ago now, so the majority of public authorities are now far less alarmed and concerned about the impact of the legislation as a whole.

Ms Durkin: I think it is also fair to say that even our being more robust and public authorities becoming more expert in handling requests and subsequent appeals to us still does not give us the capacity to absorb the level of additional work that these proposals would create.

Q49 Dr Whitehead: I am trying to put a number of those different stresses and strains together, and in your progress report you suggested that you could clear the backlog of cases, which were at that time 450, for a one-off payment of £750,000. I know it sounds a little like used car sales negotiations but that is what was suggested. You have said in your subsequent written submission that you have to accept that you are going to receive only baseline funding, therefore no money to clear a backlog of cases, and you have also said that you have various estimates of what the cost of changes in the regulations would be. First, in terms of the background to your statement and that you say that you have to accept the baseline funding, what is the overall picture that that would create as far as future performance is concerned and will there be a situation, say, next year where you would say, "Things are now falling so far behind that we will need roughly the same amount of money that the Government is suggesting it will save on the new regulations to get our performance back in line"?

Mr Thomas: I think we are now talking about our funding for the next financial year starting in April. The DCA have confirmed to us that our grant is going to be £4.7 million, which is substantially less than we are getting in the current year, the year about to end, because the current year included temporary funding to help us with the backlog, so it is going to be quite a shock to come down to £4.7 million. We only settled our budget yesterday. We have transferred £475,000 from other activities into FOI case work, but that does, of course, mean that we can spend less on public education and less on supporting public authorities. Other activities are going to have to be put on hold for the forthcoming year. As Jane said, our performance has improved quite dramatically and we are producing the sorts of results that we can feel a great deal more comfortable about. In the first two months of this year well over 60 formal decision notices were issued quite apart from all the cases closed informally. Taking the two years as a whole, we have received something like 5,000 cases and closed 4,000, and just last week we passed the 500 mark in terms of formal decision notices. We will not eliminate the backlog altogether next year but we will make significant inroads into it. However, of course, all I have said in answer to your question has been predicated on the arrangements staying as they are. If the regulations over fees are going to be changed that would have the sort of negative impact we were discussing earlier.

Q50 Dr Whitehead: You mentioned a number of scenario costs. Have you looked in terms of your future at what your future budget might need to look like should some of the anticipated changes that you have been looking at come to pass?

⁴ *Note by witness:* These figures exclude the costs of the additional office accommodation that would be required.

20 March 2007 Richard Thomas, Graham Smith and Jane Durkin

Mr Thomas: What we have said is that, as Jane said, we would want to set up a discrete unit to deal with these sorts of cases because if they simply went to the back of the queue I think that would be highly undesirable. We have to make sure that they are progressed as quickly as possible. We would be talking to the DCA about whether we would be funded for that or not. If not then it would have the adverse impact upon the existing caseload that I have already mentioned. It depends on the timing, it depends on the exact detail of the regulations. Looking further ahead, there might be some

reduction in the overall number of what I might call ordinary cases we deal with and I think some of those cases would be blocked by the changes brought about by the regulations, so in the longer term there might be some reduction and there might be some balancing out, if you like, between the new cost-limit cases and the cases about whether the exemptions apply or not but that would not have any effect, I think, for the first couple of years.

Chairman: Mr Thomas, Mr Smith, Ms Durkin, thank you very much. You have been very frank with us and we appreciate it greatly.

Tuesday 24 April 2007

Members present:

Mr Alan Beith, in the Chair

David Howarth
Bob Neill
Keith Vaz

Dr Alan Whitehead
Jeremy Wright

Witness: Rt Hon Baroness Ashton of Upholland, a Member of the House of Lords, Parliamentary Under Secretary of State, Department for Constitutional Affairs, gave evidence.

Q51 Chairman: Last year you told us that you planned to review the operation of the Freedom of Information Act to ensure that it was working well and that the charging regime was balancing public access rights with the needs of public authorities to deliver services effectively. Did you conduct that review and how did you reach the decision that FOI costs had to be reduced?

Baroness Ashton of Upholland: As you rightly say Chairman, we said from 2005 that we wanted to ensure that the regulations were working effectively. I have said to this Committee before that it is very important that Government always do that and it is particularly important in this area. We did an internal review and we looked at what was happening in different organisations and also got back a degree of anecdotal evidence from organisations about the pressures that they were facing. From there, as you know, we asked the Frontier Economics organisation to look at specifically what needed to happen and to conduct a review around the cost to government in the broader sense of the word “government” and then to take it forward from there.

Q52 Chairman: You did not ask them to assess the balance between the public access rights and the needs of public authorities to deliver services effectively, you asked them to assess the costs to government. It is that that they did, not the balancing job. Why did you decide to give them that particular set of terms of reference?

Baroness Ashton of Upholland: We wanted to get an economic framework around the issues that were being raised with us. The issues that were coming forward, as you know because we have put them in the consultation documents, were when people were finding that they were spending considerable amounts of time reading or considering requests. Whereas some organisations, and we have very good examples, have been able to reach agreement with the requester to find a way through that which enabled them, for example, to release the information on a more gradual basis or on a regular basis or whatever, and that has been very successful and there are good examples from the Association of Chief Police Officers, Treasury and so on, in other cases this was having quite a dramatic effect. The implications of that were that individuals were being taken off the work they were doing—and this is particular relevant in front-line services, whether that is NHS, education and so

on—and having to spend time reading and considering the information. So we knew that we had a policy question and we wanted to put an economic framework around that as well. The two in a sense go together and they looked at the four options: whether you could make the change with fixed fees; whether you could do it by aggregation; whether you could do it by taking into account consideration and reading; and to consider what then should happen. It was based of course as well on the fact that 5% of freedom of information requests take 45% of the time.

Q53 Chairman: What was the timescale that Frontier Economics had in which to carry out the research for this work?

Baroness Ashton of Upholland: I cannot quite remember because it was some time ago and we have dealt with a lot of things since then, but it was in the region of weeks rather than months.

Q54 Chairman: A very short period in which to make an assessment of the costs and that was all they were doing, making an assessment of the costs of the freedom of information legislation and the impact which these various different options would have on cost saving.

Baroness Ashton of Upholland: They were doing a piece of work on the back of information we had already received and they were a professional organisation who did, as far as we are concerned, a good job against the remit that we had given them, that enabled us to then, through both talking to the FOI users’ group but also more importantly through the consultation, to be able to consider the options available.

Q55 Chairman: When you launched this new round of consultation, which is really more fundamental because it is asking whether these regulations should be amended at all, you said that there had been a wide range of responses, if I remember the phrase rightly. What proportion of the responses was generally supportive of the Government’s proposals?

Baroness Ashton of Upholland: We had nearly 230 responses. I do not have the exact percentage—I have read most of them, but not all of them—not least because had we not produced a second consultation we would have done the analysis fully for this Committee by now; we have not yet because we are waiting for the second consultation

24 April 2007 Rt Hon Baroness Ashton of Upholland

to be completed. The ones I read fall broadly into three categories: those who are completely hostile to the proposals that we have put forward—

Q56 Chairman: Is that a large category?

Baroness Ashton of Upholland: It is a substantial category. I would not say it is an overwhelming majority of the categories because of the other two, but I will explain the other two and then you will see where I am heading with this. The second category is those who can see the value of what we are trying to do but have concerns about what we are proposing. They range from those who might be concerned that it would be perhaps additional bureaucracy, or we would have to make sure this was done in a way that did not allow those who wished to “use it as an excuse”—the phrase that they would most commonly use—not to give out information to use it, or they would be worried that it would simply prevent good requests from being dealt with effectively. Then the third category was those who felt broadly that the Government are moving in the right direction. The third category is certainly the smallest.

Q57 Chairman: That is the smallest category?

Baroness Ashton of Upholland: If you take the three categories.

Q58 Chairman: Did it consist mainly of public authorities and bodies who were actually the recipient of freedom of information requests?

Baroness Ashton of Upholland: It is hard to remember them all offhand. My recollection—because, again, we want to produce answers properly, so let me give you my recollection as opposed to where the fine answers will be—is that in the main it would be public authorities who would feel this was a benefit. However, that is not to say that there were not public authorities who felt differently.

Q59 Chairman: So some public authorities thought the Government’s proposals would make life a bit easier for them and they said they were broadly supportive of them.

Baroness Ashton of Upholland: Indeed and the idea behind what we are proposing comes from those conversations with public authorities and organisations who find it difficult because of the impact of quite small numbers of requests in terms of the time it has required them to spend. My concern, as you would expect Chairman, is that if you are talking about front-line services, the balance has always got to be struck between those who are being paid to do a job in a front-line service who then have to devote what could be considerable numbers of hours looking and reading and considering that request. That is the balance we are looking for.

Q60 Chairman: What persuaded you that you needed another round of consultation?

Baroness Ashton of Upholland: I have met with anybody who has asked to meet me. It has mainly been members of the press, which will be of no surprise, but we have invited anybody who has wanted to come to talk to us and my officials have been talking to organisations, public bodies as well, as you would expect. What became clear was that as well as wanting to think about the aspects that we put forward, they wanted to consider the principle behind what we were seeking to do. That was completely reasonable and we decided to do a second consultation.

Q61 Dr Whitehead: When we heard from witnesses last year, including the Information Commissioner, they told us that it really was too soon after the implementation of the Act to make changes to the charging regime. Did you consider that costs for delivering freedom of information might, in any event, reduce once, for example, officials became more experienced at making decisions and there was an established body of decisions for reference purposes?

Baroness Ashton of Upholland: Indeed and my ambition is always that there are far more proactive releases. Ultimately, freedom of information should be about bodies putting out information as a matter of course and then requesters do not have to make the request in the first place. Of course we do expect the amount of cost to decrease for the Information Commissioner too as the number of appeals should hopefully decrease too, as he said in his latest evidence to you. The difficulty with this particular area is that it is about people’s time, which although you can cost of course, it is quite difficult to say that somebody who is involved in the Police Service or in the Health Service who is not doing the job that they should be doing because they are doing this, cannot be replaced by simply putting money at the problem because of their expertise and so on. That is why they need to be both doing their front-line job and also the person who is reading through the material. The specific difficulty was that it is a different kind of cost: it is a cost of the time of people who are necessarily not then doing what they would have been doing.

Q62 Dr Whitehead: If those public bodies become in general more efficient and they can make more effective use of existing provisions in the Act as they get more familiar with how the Act works, for example, then would some of those overlaps that you describe not give you scope for reducing costs anyway?

Baroness Ashton of Upholland: If I might give you an example, one of the issues that I know the Information Commissioner raised with the Committee, and which is an area of interest but a separate area, is section 14 about vexatious requests where he has expressed a concern and he described it in his oral evidence to you. He was surprised that section 14 was not used more often than it currently is. He has very helpfully issued additional guidance and we are talking to him about making sure people understand when it is appropriate to use

 24 April 2007 Rt Hon Baroness Ashton of Upholland

that. That is an area which you might think would be something, if it were used more effectively, would affect what I am describing, but it does not. What I am describing are completely legitimate requests that simply of their nature require a huge amount of work to be undertaken. The example I have been using with media organisations, which may well have found itself in the press, is a request to the Treasury for files relating historically to the way in which economic decisions have been made. This is completely legitimate as an academic piece of work and it would be part of the book by an eminent academic. I do not know who it is, but I am reliably informed it is. The Treasury are perfectly comfortable with releasing that information, but in order to release it, it will take about two years to do this on a regular basis. With that particular individual, they have accommodated each other and they are able to release the information to him on a regular basis as he writes the book and that is fine and a decision is made about which information comes out. In theory that individual could have demanded that information within the timetable that is available, that would have been completely legitimate, and the Treasury would have had to put a large number of people to work simply to go through the documents and of course they must all be read before they can all be released. We do not want organisations, public authorities to not release information. We do not want them to do anything other than be as cooperative as they possibly can be and indeed all the people who have raised this with us do so on the basis of saying "We want to find a solution ideally with the requester that will help us to give out the information" which in many cases will be finding a way by staggering the process or knowing what is coming. I understand the Association of Chief Police Officers produces information on a regular basis to a number of organisations, so do individual police forces to local newspapers and so on. They have found a way of accommodating each other, it works perfectly well, I do not want to get in the way of any of those arrangements, rather I want to encourage those arrangements to happen. It is possible to send off a request that says "I want everything you have ever done on X" which will require somebody who should be doing a job to have to look at it and where the requester will simply not amend the request or talk to them about what it is they really want so that it can be made to work; that is when we are in some difficulty. At the end of the day we want to give the backstop of being able to say "Actually, if you are not prepared to collaborate with us, we have to say no, because we cannot have people spending so much time on these requests". The way we wanted to approach it was in actually requiring organisations to work through a process with the requester that tried to get a solution that did not require them to say no.

Q63 Chairman: That is not what your proposals do. Your proposals are not about requiring requesters with very voluminous requests to engage in the process of discussion as to how these requests can better be accommodated.

Baroness Ashton of Upholland: No, but the guidance that will go alongside the proposals will. We have been talking to the organisations who have wanted to come to talk to me and to the stakeholders more generally on freedom of information and to the FOI users' group to say to them that is the approach we wish to take and ask what the issues are that we need to address within the guidance that will help those organisations who feel ultimately hostile to the proposals to understand what we are trying to do. For example, we have been asking members of the press, who feel that this could be a way in which they would not get as much information as possible, for their advice on what the guidance ought to say about how best to engage with them and the criteria that people should use, not least because the system has to be absolutely transparent in order that those who need to appeal or wish to appeal can do so in a way that the Information Commissioner will be able to look at very quickly against a robust and open process.

Q64 Chairman: You are saying "Please give us a machine gun; we are not really going to use it but it will enable us to persuade various people to adopt a more constructive approach".

Baroness Ashton of Upholland: It is not a machine gun. I am not a great one for analogies to do with weaponry because I am not good at it and never get it right. It is about having a backstop and it is important that when you look at a system and you have 5%/45%, so 5% requests taking 45% of the time, and then you start to unpick what is actually happening . . . In a sense forget central government departments for a minute, let us think about front-line organisations, where the success of FOI for me ultimately lies in what information can be available to citizens who are looking for information from public bodies, then you have to consider what could make a difference and where relations are successfully concluded between the requester and the requestee that is all to the good and absolutely not where we wish to go. We want to make sure that where possible organisations do conclude those relations, but there is no onus on the requester to do that at all. Many do because they are completely reasonable; not everyone does and we do not want these requests to be turned down and the bodies themselves do not want to turn them down, they just need to find a way of doing it where they possibly can. Ultimately, if you cannot find a way through it and where there are clearly huge pressures on organisations, then we need to find a backstop that will enable them to do it. As you know from your years in Parliament, the problem with anything legislative and regulatory is that you are dealing with the backstops and the extremes and not dealing in what you put forward to Parliament necessarily with all the things that go alongside it. That is where the guidance has been very important. Let me just add one other thing which is that we have also been very clear with everyone I have met that this is the problem we are trying to solve. People have understood that there

24 April 2007 Rt Hon Baroness Ashton of Upholland

is an issue here and if there are alternative ways of solving it, we are open to listening to what those alternative ways of solving it are.

Q65 Dr Whitehead: In terms of overall cost reduction and the other factors that went into how you decided to go forward in the way that you did, would you describe it as a feeling rather than any particular scientifically derived notion of where things were going? For example, when you published the partial regulatory impact assessment, the first consultation, it said in the document “... it is impossible to quantify” the costs to the public at large of the proposed changes. Then in the same assessment, you came to the conclusion “The Government believes that the benefits of introducing the proposed changes would outweigh the costs”. How did you reach that conclusion, if you did not know what the costs were likely to be?

Baroness Ashton of Upholland: This comes back to my point about the issue and the nature of the issue that is being described. I just go back to Frontier Economics. I gave three of the four aspects that they looked at. The fourth is of course to alter the limit from £600 down and we have not done that. You can address an issue which is to do with the use of people’s time in a number of ways. You could do it straightforwardly by saying that if the cost of people’s time is X million pounds, you simply put another X million pounds into the pot. The trouble is that it is not time on its own; it is the expertise that is then lost to the organisation while people are diverted into other work. You have to look, as we did, at the options that were available to us. We could have gone for a fixed fee option which would reduce the number of FOI requests quite significantly, but if you simply do that, then the people who are least likely to put in FOI requests will be the ordinary citizens whom we are keen to encourage and lots of bodies would find that acceptable and would be able to continue making FOI requests but, for me, we would have lost something pretty fundamental about the Act. We did not want to reduce the limits so we looked at how to describe what is the use of someone’s time who is a professional and the ways in which you could try to tackle that in a cost benefit analysis way. It is not about feelings in the touchy-feely sense, it is about saying it is quite difficult to quantify in financial terms precisely what is happening because you cannot simply say that if this person is taken off this job and is doing that, it costs X. What you are not able to quantify is the expertise that you lose on the way.

Q66 Dr Whitehead: So you quantified, or tried to quantify that expertise and the work that is involved in that, which perhaps is outside the strict terms of pounds and pence. What you have not done, although you did in your review report state that there would be potentially a substantial increase in requests for internal review and appeals to the Information Commissioner, with a consequent subsequent increase in costs, is you have not factored that into your overall analysis,

have you? You did not take any account of those additional costs. The Information Commissioner told us he thought he would need about an additional £1 million to take account of what were real additional costs to him as a result of changes in how the regime would work. Is that not then transferring one unquantifiable amount of concern and money to another unquantifiable area of concern?

Baroness Ashton of Upholland: The Information Commissioner makes his assumptions of course based on his experience and he is also hopeful, and with good reason, that the number of appeals will drop in any event; so there is a see-saw effect in a sense in any change that is made. One would anticipate, when you make a change around FOI, that there would be an increase potentially in appeals to begin with. The expertise in the Information Commissioner’s Office, which we have seen grow, enables him to deal with things more expediently and in a sense the precedent that they already have helps you to balance that back and of course organisations themselves get better at that. I am not going to pretend that we would not expect to see a change, nor would I expect to see that change continue indefinitely. I have been balanced by a reduction in appeals more generally or indeed itself being reduced but again, if you look at what the particular problem that we are trying to deal with is, you are back to the issue of real individuals and a concern that they have about the amount of time that they have to spend. That is a quantifiable cost in terms of their income and the costs that we have around those individuals; hard to quantify in terms of expertise. Again, looking at what the costs would be in appeals, based on experience we can see there would be, in a sense, certainly in the short term, an increase. However, the balance is not just a purely financial one: the balance is between enabling people to do their front-line jobs and the cost of the appeals that there could be in the short term but not in the long term.

Q67 Dr Whitehead: You mentioned the 45% of the time taken by 5% of the enquiries. Would it not have been possible to introduce a different charging regime, for example, for those enquiries and therefore at least go some way towards recompensing those organisations that had that additional work so that they could make additional arrangements to deal with it rather than simply put the boom down on that kind of request in the first place.

Baroness Ashton of Upholland: Again, that is a suggestion which fits into what I have asked people to do, just to give me the alternative proposition as to how to solve this. My immediate difficulty with that proposal though is that individuals asking for information may genuinely have a need to have quite a lot of information. It could be an individual concerned to get records or details or information about their local services because they directly affect them. That individual may not have much money, that individual may be deterred from asking a legitimate question because cost would be

important to them; for larger organisations that would not be a deterrent in the same way. I am always mindful that we have had a number of discussions about the possibility of just increasing having fixed fees or having commercial organisations pay fees and so on. We have always been requester-blind and that requires a change in thinking and I do not want to do anything that means ordinary citizens are deterred or prevented from getting information. This for me is a better solution; it does not mean I have ruled out all other solutions but thus far it feels like a better solution to a problem than having individuals paying more directly.

Q68 David Howarth: The point I was trying to come back to is the question of this method of proceeding. Does it not leave out, in the initial stage, the benefit to the public of having freedom of information? The way you are doing it is that you are talking about quantifiable costs and at the end you are coming to some subjective judgment about whether the costs measure up to the benefits to the public and you are saying you do not want to go that far. You are not feeding in the benefits to the public of having FOI available in the first place and does that not give the general impression that the Government are unsympathetic to the overall principle of FOI, the benefit of FOI to the public rather than to the Government?

Baroness Ashton of Upholland: Of course we introduced the Act because we recognised the benefit to the public and there is no doubt in my mind that if you want to have better government you need freedom of information. Unless people are able to challenge and question and get information then, first of all, decision-making is not of the highest quality and, secondly, it is very important that public servants know what it is the public are interested in and they are able to see and give out that information freely and it is all positive in my view. It is not right for me to be making a decision about an individual request at any point being in the public interest. What I might see from my perspective as in public interest may be different from the requester and that is absolutely right. The generality of FOI being in the public interest, absolutely; as much information as possible in the public domain, yes, please. That is about proactive release and, as you know I have said this many, many times, as much as anything it is absolutely critical that we get as much information as a matter of course going out. However, within that regime we have to look at whether you have areas which are causing difficulty and the difficulty that I am seeking to solve is where I am not convinced that the public services that are being provided, which we are paying for as taxpayers, to put it in financial terms, but which are essential, are always best served if somebody is unable to do their job. Now, I have indicated that the way we really want to approach this within the guidance is to enable requesters and requestees to come to agreements about how things can be done. However, if you do have an imbalance in the system, it could be argued

that the public interest more generally—and we could spend a great deal of time discussing this—is not always best served if somebody in the Health Service or the Police Service is not able to do their job. I am trying to balance that and I am trying to do it in a way that means it is not my decision that this particular request is in the public interest or not. Rather I am saying here are requests, whatever they are, from whomever they are, that by their nature, because they are large requests, in the sense that they either require huge numbers of pieces of information to be read or considered, need to be thought of in a slightly different way. That means: can we find a way through this, can you, as a public authority, demonstrate that you have tried to find a way to deliver this properly and appropriately? We are not talking about trying to persuade people these are vexatious, because they are not and where that is absolutely impossible, we should be able to say that actually on balance we should be able to refuse this on the grounds that individuals will have to spend—and this does happen—30 or 40 hours of time doing this request rather than doing the job that they are paid for.

Q69 David Howarth: Is it not an unfortunate coincidence that affects the public view of Government's attitude towards freedom of information in general, that at the same time as these proposals are coming through, there is a bill going through the Commons to restrict the application of freedom of information to the House of Commons and the House of Lords? It would help the Government's position, would it not, for the Government to come out against that bill and save me having to spend yet another Friday in the chamber of the House of Commons?

Baroness Ashton of Upholland: The Government have considered their position. Those members of the Committee who heard the Lord Chancellor on the radio this morning will know that the Government's position is to be neutral. We have three choices with private Member's bill, as you know: we can oppose them and we do where there are matters of policy with which the Government take a view that it is appropriate for the Government to disagree or where, for example, the policy is being dealt with in an alternative way; we support them, for example as I am doing in the private Member's bill in the House of Lords from Lord Lester of Herne Hill on forced marriages, where the Government have effectively, with his total support, rewritten the bill to make it part of the Family Law Act and is positively promoting the bill as a private Member's bill through the House of Lords; or Government remain neutral. The decision on the freedom of information, the David Maclean bill, is that we should be neutral. Parliament has to make its own mind up what it wishes to do on this. You are right to say that in doing so politicians have to think about what else Government are doing, their views on what they are seeking to achieve, perception and so on. That is for politicians to do and it is the Government's position to stay neutral.

24 April 2007 Rt Hon Baroness Ashton of Upholland

Q70 David Howarth: I should explain that I acted as a teller for the opponents of the bill on Friday so I got to see who was voting. That claim of neutrality would be far more credible were it not for the fact that many of the people going through the lobbies in favour of the bill were government whips. Is it the habit of government whips to act in a neutral way towards the Government?

Baroness Ashton of Upholland: When it comes to a private Member's bill, they are acting as MPs. It is their decision which way they vote.

Q71 Bob Neill: Can you help me? You said very clearly that these new regulations are not about frivolous and vexatious requests, right? They are nothing to do with it. I think you said that these are particularly designed to deal with legitimate requests which will require a huge amount of work. That is why you are changing regulations: to capture that type of case for all the reasons you have set out.

Baroness Ashton of Upholland: Yes.

Q72 Bob Neill: Why do you need that? Why do you need new regulations, because you have the existing fees regulations? They allow officials to set a maximum limit on the time spent locating and retrieving information. Why do you need these extra regulations?

Baroness Ashton of Upholland: Under the regulations they do not allow for reading time or consideration time, those are not included, therefore at the present time officials of any public body cannot refuse to do those things. The only way of addressing that specific point would be through the regulations and we do not want, as you would expect, there to be any leeway on what the regulations say; we want people to follow the regulations. So we need to deal with this in this way, if that is the way we choose to go.

Q73 Bob Neill: Certainly those other government spokesmen, who, like yourself, have talked about frivolous and vexatious matters, have really missed the point of this.

Baroness Ashton of Upholland: I am grateful to you for raising this again but it is very important that we do not assume that people who make quite voluminous requests are necessarily vexatious. The example I gave was of the Treasury and there are examples from chief police officers and indeed the NHS where there have been quite large requests to do with consultations around health services across the country, which is of itself a very interesting set of information but requires a huge amount of work to get it together. We are trying very, very hard to make it clear that we do not want people refusing requests; we want them to do the requests, but we have also to be able to tackle particular problems.

Q74 Bob Neill: I can understand your point that you do not want to shut out the ordinary member of the public who might have an issue which is of particular importance to them, but is there not the risk that many of these particular complex and time-consuming cases are the ones which are likely to

raise issues of very great broad public importance? Those are the ones that it will be the easiest now for officials to refuse.

Baroness Ashton of Upholland: First of all, the requester can refine their request. There is nothing to stop a requester actually refining the request in a way that will deal with the problem and that is what we are seeking to do. If, by producing the guidance, we enable people to have that dialogue with that objective in mind and to have to demonstrate that they sought to do that, which is important as well, then we hope that we will put, what is often a voluntary process that is working very well in some places, much more to be part of the process that people use in order to try to get there. It may well be the case, though I have to say that I suspect some of the most interesting requests that one might look at are public interest requests where there have been very direct questions for very particular things to be revealed, but it might well be that there are broader questions. The case in point of the academic with the work that is going on with the Treasury may well be the most definitive book on economic policy we have ever had. I hope it is. It is not about that, it is about trying to make sure, both with the guidance that goes out and then with the backstop stop, that we balance this problem of why public servants are employed and what the job we want them to do is in the main and how we make sure that we are giving as much information and as appropriate as we possibly can and for a lot of issues to do with freedom of information proactive release is actually the way we want to go in any event.

Q75 Bob Neill: Understood, but in terms of refinement, refining the request, a bit difficult if somebody comes along and says they want access to the information on the legal advice on the war in Iraq. It would probably be very complicated and time-consuming to retrieve that information. It is of massive public importance but it is very direct, you cannot refine it much more. Officials have been given a very good tool to refuse anything like that now, have they not?

Baroness Ashton of Upholland: If I take an alternative example, you could have a request for all of the information to do with the building and development of an NHS trust in a particular part of the country, which may be relevant for somebody who is doing an academic study or a history or a commercial outlet or whatever. It is quite possible with most requests to find ways of refining them, not least by asking for particular pieces of information. We make it quite difficult in a sense for public authorities to have that conversation at the moment. We want them to have the conversation where that is appropriate because we are trying to make the requester in a sense be the person who drives this process and be able to ask for information they want. Enabling people in these circumstances to have that dialogue is quite important. As a general rule we want to be requester-blind, we want to answer the question that is being asked and not try to redefine the question for all the reasons where you

would reasonably say that could have an impact on the quality of the information that is being released. It is very particular circumstances, very particular guidance. This is what you do, this is how you get the requester to refine it where possible. As I say, we are out to consultation so we will see what happens by 21 June on the consultation which is produced.

Q76 Bob Neill: I am just troubled. You say it is very specific circumstances and very specific instances, but the Information Commissioner gave evidence to us that the effect of the proposals “. . . will be to arrest the flow into the public domain of a very significant amount of information of genuine public interest”. That is more than just dealing with specific circumstances and refinements. It is a major change, is it not?

Baroness Ashton of Upholland: The Information Commissioner has, as ever, been extraordinarily helpful. He speaks his mind. He has been very clear about how he feels about this. He, of course, is essential to us in terms of thinking through how we would make this work. He has given his initial view to the Committee; he has certainly given his initial views to me and he is of course a member of the Freedom of Information Users' Group and they have all been pretty clear on their views as well. We have produced a consultation on the options. We have now started to talk about two things: one is, if this is not the way of tackling this, what is? Thus far the solutions that people have offered me capture other groups in a way that I am not comfortable with, like fixed fees or like commercial organisations. What is the definition of a commercial organisation, if you are requester-blind? Someone just sends you an email from their home email and it would be very difficult to judge. It does not mean that we would not look at it, but there are issues about that. Working then with organisations to address the genuine concern that they have that says that if you do it, you have to do it in a way that means it is not a method by which legitimate requests could fail to be granted to people, where information is prevented, and of course it always has to go alongside making people give out as much information as possible without having to be asked for it. In that context, we are just in discussion with the National Archives to look at whether we can create an archive of all of the freedom of information material that people can then access. It is early days, that is hot of the press, it is the first time that has been said, but that could be incredibly valuable as an extra resource.

Q77 Bob Neill: You have been very frank, I am grateful to you. From what you have told us, it is clear that there are important considerations here. Certainly on any view, on your own view I am sure, it goes well beyond merely adjusting the payment arrangements. It is much bigger than that, is it not?

Baroness Ashton of Upholland: I think you are quoting the Lord Chancellor's speech, are you not?

Q78 Bob Neill: I am quoting what are said to be the Lord Chancellor's words, which surprise me, given your evidence. It may be that you are going to tell us that he was slightly inaccurately reported. I do not know.

Baroness Ashton of Upholland: No, the Lord Chancellor was making an important speech—I think it was a Lord Williams of Mostyn's Memorial Lecture, a truly great man I have to say. I read bits of the speech as well, as you would expect me to do. The Lord Chancellor was making the point quite clearly that we are not seeking to try to change this regime; we are seeking to tackle this particular issue. What he was not able to do in his speech of course was go through the detail as I have sought to do—I am not sure how successfully—in order to give information about how it would work and what would go alongside it, so that you were actually able to create a system where we would just get that balance right between using people's time effectively around freedom of information and using people's time effectively for the job they have to do.

Q79 David Howarth: May I raise with you the point that a number of witnesses have put to us about the possibility of public authorities manipulating cost estimates as a way of pushing requests over the limit, for example the possibility of saying that a very large number of council officials need to think about this request or a very large number of outside organisations need to be consulted and if you charge them out at the appropriate hourly rate, you soon get above the limit. What provision is there in the regulations to stop that sort of thing happening, that sort of abuse?

Baroness Ashton of Upholland: First of all, the specific way in which we tackle that, though I have to say we are not seeking at all to give anybody an excuse not to provide information that is legitimate, is that we have to be very careful and clear about the guidance that we give and in that guidance will be clarity about how they approach the question of consideration, what has to be read, who needs to read it and so on. It is possible that you could have, not a particularly large request but a request which requires you to consult 26 governments across the planet and that could take quite an inordinate amount of time on the one hand. You would have to be clear that you could demonstrate that that is what you had to do. Those may take five minutes each, but they may take weeks. I merely give the example. Equally, there are circumstances where it is one official who simply has to read their way through much of the material that is available. In every case, they would have, under the guidance we produced, to be able to demonstrate exactly why they believe that this request should be turned down, alongside having to demonstrate that they have sought to try to refine it or alter it with the person concerned by getting to the nub of what the individual or the organisation is after in a way that does not bring you into this regime at all, which would be new within the Act.

24 April 2007 Rt Hon Baroness Ashton of Upholland

Q80 David Howarth: But a lot of it depends on estimations of how much time something takes and you do not have to do it before saying how much time it would take, this can be done in advance by an estimation of how much time it might take. The Commissioner himself said to us that the process of estimating the time which might be spent was “uncertain, subjective and open to exaggeration, if not abuse”. How would the guidance change that problem which seems to me to be inherent in relying so much on time estimates?

Baroness Ashton of Upholland: One of the things we have been talking about is how far you are very specific about the time that it would be expected to take. It is possible to give a time, for example, of how we would expect a file of 25 pages to be costed at. Just as we have costs of £25 per hour, the real cost is £34 but ministers are costed at £25 an hour in any event. We could plan to create a very clear regime of what it would cost. Part of the way in which one would prevent any perceived abuse of this would be by being absolutely transparent and the requester being able to see the transparency with which this has been done so that if you were unable to get the request refined, if it was clear that you were able to demonstrate, and could demonstrate to the Information Commissioner ultimately, that you had looked at the amount of work and costed it appropriately in that sense, the amount of time it would take, then you were in a sense able to use this regulation. These are exactly the issues that we have been talking to those who are most concerned about making sure—they may not want us to do it at all but suspending that for a moment—if this were to be, that we do it in a way that is open and transparent, clear and does not enable people to misuse it.

Q81 David Howarth: May I just stress the point about all this happening in advance of any real consideration going on? It is not a question of getting people’s timesheets and saying this officer spent this much time reading. It is an estimation in advance of anyone doing anything that officers will take this time. How is that going to work?

Baroness Ashton of Upholland: Certainly it is possible to do that on reading time because, if you take the Treasury example I gave, if there were 95 sets of files, it would be very possible, simply on the basis of a costing exercise that we could put in place, to say that if you have 5,000 sheets of paper which have to be read by somebody, then it is reasonable to suggest it takes X amount of time to read a sheet, therefore that is reasonable to cost it at this.

Q82 David Howarth: What about consideration?

Baroness Ashton of Upholland: Consideration time is very important and again we need to look at how you can seek to do that. As a minister, in the course of the Freedom of Information Act coming into being and my life in DCA, because all of the considerations come to me, I was trying to remember how many times I have actually been asked to consider things, usually to confirm that the public interest test is met and section 36 and so on. I think I added it up to 15 minutes in two and a half

years or something of that order. It is the quality of my officials you understand and the work they give me, but consideration time in many cases can be very short. In some cases it would be longer because there are issues of concern. Again, as we get better at this it gets less. We are looking to do exactly the same thing with consideration time, trying to put, as far as we possibly can, examples of what we would expect to see and so on and at the end of the day, if those were not considered to have been met then the Information Commissioner would be person who would decide.

Q83 Chairman: We touched earlier on the Information Commissioner’s additional workload that might arise from this. You seemed to be saying then that because his workload would decline in other ways as practice developed, it would all be covered by that. That is clearly not his view.

Baroness Ashton of Upholland: No, of course it is not his view and I was not trying to imply that directly. What I was saying was that the Information Commissioner quite reasonably looks at anything that might change and the implications for his workload. The point I was making, obviously not very well, was that in the evidence he gave to the Committee he was also pointing out that in other areas he would expect the workload to decrease because appeals, we trust, will decrease and so on. Obviously the Information Commissioner’s Office have become more adept at being able to tackle and deal with the queries and appeals that they get. I was trying to say that in the generality of his workload, I am mindful of anything we do and the implications for him, but I also have to put that in the context of what is happening more generally and the success that he has had in the steady state that he has achieved and the work he has undertaken. I was not suggesting for a minute that I was not very aware of his concerns and we would not have to factor those in. Absolutely.

Q84 Keith Vaz: Has he not asked for an increase in resources? He must have come to ministers and said at your meetings that you have with him that he needs more resources because of the increased workload.

Baroness Ashton of Upholland: Certainly when the consultation finishes and when—

Q85 Keith Vaz: No. Has he? Has he approached ministers and said to ministers that he needs more money to deal with this because he needs more resources? The Chairman has just said that when he came to give evidence to us he was very clear.

Baroness Ashton of Upholland: I was not evading the question. I was saying no, he has not specifically said to me that he wants more money because as yet we have not finished the consultation. What I was actually going to say was that when the consultation is over, if he believes there are resource implications, I am sure that he will talk to us about resources.

24 April 2007 Rt Hon Baroness Ashton of Upholland

Q86 Chairman: Last time he told you that his workload was increasing at a rate which required further resources you did not give him the further resources.

Baroness Ashton of Upholland: We gave him some further resources and we were looking, as you will recall, for him to achieve what he has been successful in doing, which was looking as efficiencies within his own Office. He looked at getting external advice to achieve that and he has had increases in resources. I am sure that he would say that he would like to see further resources available, but we are very pleased with the work he has done and the way in which he has managed to move us to what I would describe as a steady state.

Q87 Keith Vaz: Let us be absolutely clear. The Information Commissioner has not approached ministers either formally or informally and asked for an increase in resources to do his job. He has not done this, by letter, by memo, by email, in conversation.

Baroness Ashton of Upholland: In relation to these regulations?

Q88 Keith Vaz: In relation to the regulations or anything else.

Baroness Ashton of Upholland: Let me be clear in return. The Information Commissioner has made it perfectly clear to me that should these regulations come into force, he will seek additional resources. He has not formally requested them because the regulations have not come into force.

Q89 Keith Vaz: But has he informally done it, over a cup of tea?

Baroness Ashton of Upholland: More formally than that. He has certainly made it clear that he would be looking for more resources; I am not trying to mince words. It is purely that he has not formally requested it because we are not at that point yet.

Q90 Keith Vaz: Do we have a timetable for the introduction? The DCA must have hundreds of reviews. Whenever ministers come before this Committee, they are always reviewing something or the other. Do you have a timetable for this review?

Baroness Ashton of Upholland: We are always reviewing things because it is very important that Government keep things under review.

Q91 Keith Vaz: Maybe it is because it is not being run very well.

Baroness Ashton of Upholland: It is being run extremely well.

Q92 Keith Vaz: You would say that, would you not?
Baroness Ashton of Upholland: Of course I would, but I say it with hand on heart, believing it to be completely true. We have said that 21 June is when this second consultation is completed.

Q93 Keith Vaz: Thursday 21 June.

Baroness Ashton of Upholland: I do not know whether it is a Thursday, but I bow to your superior knowledge.

Q94 Keith Vaz: I can tell you that it is a Thursday. So that is the day.

Baroness Ashton of Upholland: I presume it is a significant date for you in that case.

Q95 Keith Vaz: It will be a significant date for you and that is the day it is going to be completed.

Baroness Ashton of Upholland: That is the day the consultation is completed.

Q96 Keith Vaz: So how long are you going to take? You are in the middle of all this reorganisation in the Ministry of Justice/Department for Constitutional Affairs, are you not?

Baroness Ashton of Upholland: The Ministry of Justice will come into being on 9 May.

Q97 Keith Vaz: So how long after 21 June is it going to take to review this, to consider what has happened as a result of the consultation?

Baroness Ashton of Upholland: All I can say at this stage is that I gather I have three months in order to put my formal response to the consultation in the public domain. That will be the determining timetable for this. After that, the regulations will go forward to Parliament.

Q98 Chairman: So if there are to be new regulations we are into the next parliamentary session not the current one.

Baroness Ashton of Upholland: It is possible to see the regulations coming in before the end of the session.

Q99 Keith Vaz: How? If you have had a consultation and you are to respond on 21 September—

Baroness Ashton of Upholland: I have to respond before 21 September. I am merely describing possibilities; I am not talking in certainties. It is feasible that it could happen.

Chairman: When you have responded you then have to draft the regulations and bring them to and get them through both Houses of Parliament.

Q100 Keith Vaz: And find the money for the Information Commissioner.

Baroness Ashton of Upholland: I said “feasible”, I did not say “certain”.

Chairman: I may say by way of conclusion that I welcome the fact that there is a further consultation and it may well be run out, but if this problem can be resolved, it might not be by the methods you originally proposed. That remains to be seen so we shall watch this space. Thank you very much indeed.

Written evidence

Evidence submitted by the Society of Editors

LETTER SENT TO BARONESS ASHTON OF UPHOLLAND, DEPARTMENT FOR CONSTITUTIONAL AFFAIRS

INDEPENDENT REVIEW OF THE IMPACT OF THE FREEDOM OF INFORMATION ACT

As you may have gathered from the last meeting of the Information Users' group, editors would find it difficult to accept your suggestion of merely providing practical objections to the proposed changes in the working of the Act rather than questioning the principles behind the proposals.

We believe that the proposals on charging and attempts to reduce the level of information requests are fundamentally flawed. They would undermine the ideas behind the legislation and interrupt valuable progress.

We have always believed, and the Government has previously shared the view, that the Freedom of Information Act was simply an essential but relatively small step towards a change in culture from one of pervading secrecy to one of openness in public affairs.

Against that background, the sum of £24 million which the Frontier Economics "Independent Review of the impact of the Freedom of Information Act" attributes to the working of the Act in central government and the £11 million in the wider public sector, including local government, represents a relatively small use of public funds. That is a surprisingly low level of investment in what the Prime Minister once described as the cornerstone of constitutional reform.

The society has always maintained a view the government previously appeared to endorse, that greater openness is crucial for greater public involvement, engagement in politics and decision making at national and local levels. Achieving such change need not be expensive but it does require adequate investment.

The proposals aimed at reducing the number of requests for information under the Act are, therefore, also at odds with stated policy aims. Encouraging participation in the political process surely implies an increase in public questioning. Indeed it should be welcomed rather than restricted.

You raised the issue of the cost to some public bodies of answering requests for information and suggested that answering questions interfered with their core activities. On a practical level that may indeed be the case but, given the aims described above, both the Government and those public bodies should be ensuring there is proper investment in the system for dealing with requests for information.

The Information Commissioner's own report provides a useful model in this. One of the issues undermining progress towards greater openness has been delays in decisions on information requests by the commissioner. He reports that relatively modest investment in extra resources has enabled his office to make significant progress on this issue.

Public bodies generally could benefit similarly by the allocation of modest extra resources to the provision of information in response to FoI requests. That would enable them to meet those requests without interfering with their important work.

Again that would be an investment in public participation that would bring direct but probably immeasurable benefits to the public bodies themselves.

The Frontier Economics review referred to information requests from commercial organisations. Such requests could be specifically targeted where there is a clear and direct commercial benefit to be gained. Requests by the media are made on behalf of the public and while parts of the media are commercial organisations it would be wrong to argue that there is a direct commercial benefit from asking for information on behalf of readers, listeners and viewers.

You may see all of this as an objection to the proposals in principle. We would argue, however, that these comments are aimed at the practical issues surrounding the working of the Act and, more importantly, the sentiments and policy targets behind it.

Bob Satchwell

23 November 2006

Evidence submitted by Centre for Corporate Accountability

PROPOSED AMENDMENTS TO FEE SCHEDULES OF FREEDOM OF INFORMATION ACT 2000

We would like to give the Committee in this letter further evidence of our concerns regarding these regulations. This letter should be read as an addition to our original letter to Lord Falconer on this matter dated 21 November 2006, which is appended for your convenience.

We remain very concerned at the proposals by the Government to amend the fee schedules of the Freedom of Information Act 2000.

The Centre is a voluntary organisation partly funded by the Joseph Rowntree Charitable Trust. The Centre runs a “Work-Related Death Advice Service” which provides free, independent and confidential advice to families bereaved from a work-related death on investigation, prosecution and inquest issues arising out of the death. Please find enclosed a copy of the Centre’s advice leaflet for your information. It also undertakes research and policy work.

Should you wish to find out any more information about our organisation then do not hesitate in contacting me.

POTENTIAL EFFECT ON OUR CASEWORK AND POLICY WORK OF THE NEW REGULATIONS

Our main concern with these regulations is regulation 7, which provides that public authorities may aggregate requests made under the Act in certain circumstances. Section 7(2)(b) sets out two situations when FOIA requests can be aggregated; that is when (i) those requests relate, to any extent, to the same or similar information; or (ii) it is reasonable in all the circumstances for the public authority to take account of the total costs of complying with all of those requests.

Looking just at our casework, it is unlikely that any requests that we undertake for multiple clients in any 60 day period would come foul of sub-section (i)—since each request will be dealing with information relating to a separate case. However we are concerned that, our applications could be affected by the very wide wording in sub-section (ii). This is for the following reasons.

1. *State bodies treating all requests for information as FOIA requests*

We noted in our previous letter that it was *possible* in our experience for a public authority to decide to treat requests from bereaved families as Freedom of Information requests falling under the Act even where this was not requested or appropriate, meaning that it was not possible for us to determine which or how many of our requests on behalf of clients (in casework) or ourselves (in policy or research work) would be regarded as requests under the Act. The HSE, the main body we deal with, sometimes characterises requests we send in as FOIA requests even when we do not see them in this way.

2. *Combining our casework and policy work*

Not only does the CCA make requests for information on behalf of clients, we also at times make significant requests for information to assist with our research and policy work. One of our remits is monitoring the role of the HSE—and as a result seeking information from them is an important part of our work. We have produced several important research reports and undertaken key campaigning on worker and public safety issues that have partly resulted from FOIA requests, usually from the Health and Safety Executive. These “policy” requests can be more complicated than casework requests, and therefore potentially more likely to bring us to the point where a public authority aggregating our requests decide not to respond any more in a given period, but are equally important to our work. We are worried that in order to try and ensure we are able to do FOIA requests for our clients, we might have to decrease or stop our FOIA requests for policy or research work.

We also explained that we put in requests on behalf of clients who are often too distressed to manage this sort of correspondence themselves, and that we feared that we would have to refuse to do this work for some clients if our “quota” of requests under the Act (FOIA requests) had already been filled for a given time period. It would be unacceptable if some of our clients were able to get help with this and some were not.

We do not believe that it is fair, necessary or democratic to put such a “chilling” effect on our activities in this way, especially when the people most likely to directly suffer as a result are our bereaved clients who may not feel able to undertake FOIA requests on their own behalf. We think this effect would extend to many organisations that provide advice and assistance to vulnerable members of the public, especially where such organisations also have any kind of research or policy function that might utilise FOIA requests.

In addition, we have a broader point for opposing these regulations. There are a number of organisations working broadly on issues of safety and corporate accountability—but we are probably the most specialist of these, and work effectively by obtaining information from state bodies dealing with safety. We therefore

tend to make more research and policy FOIA applications than other similar safety organisations—but the information obtained will be of interest to the much wider community of bereaved relatives, campaigners and others interested in health and safety.

More generally we believe that the public accountability of state bodies will be seriously undermined if these regulations prevent journalists, researchers, campaign groups and private individuals from accessing information, that the current Act enables them to have. We have heard no pressing cost or other reasons for such a drastic curtailment of the rights to information as threatened by these regulations.

We would therefore urge the Committee to advise the DCA against proceeding with these regulations, which are against the spirit in which the Act was adopted, and which could so profoundly increase the opacity in governance it was intended to remove.

Bethan Rigby

February 2007

Appendix

COPY OF LETTER SENT TO LORD FALCONER, DEPARTMENT FOR CONSTITUTIONAL AFFAIRS IN NOVEMBER 2006

We are writing to express our concern at the proposals by the Government to amend the fee schedules of the Freedom of Information Act 2000.

The Centre is a voluntary organisation funded by the Joseph Rowntree Charitable Trust. The Centre runs a “Work-Related Death Advice Service” which provides free, independent and confidential advice to families bereaved from a work-related death on investigation and prosecution issues arising out of the death. Please find enclosed a copy of the Centre’s advice leaflet for your information.

Should you wish to find out any more information about our organisation and its advice service then do not hesitate in contacting me.

THE PROPOSED CHANGES

We understand that the Government proposes the following:

- (a) To allow the time spent considering FOI requests to count towards calculating the cost limit;
- (b) To allow authorities to aggregate FOI requests from the same person or organisation and refuse them all if the total exceeds the cost limit.

We are extremely concerned about these proposals for a number of reasons.

First, we use the FOIA as a core part of both our casework and our policy work. In casework, we use it to request from investigatory agencies copies of relevant papers, particularly after the cases are done, so that our clients can have the fullest possible picture of how their case was investigated. We also occasionally use it to access information on previous investigations/prosecutions/notices served on companies currently under investigation, if this is what our clients wish. This facility has been of real benefit to our clients, who are bereaved relatives of those killed at work. We can put in multiple applications at a time if we have multiple clients who need this information. Our concern is that the proposals to effectively limit the number of applications we can put in would lead to us either having to discriminate between clients (prioritising some over others, aware that there is a limit we might reach which would result in an effective bar for other clients) which of course we would never do, or risk having an application for an equally distraught or needy family refused simply because we had already sought similar information for others. This would be a profound injustice and utterly unacceptable.

When we use the Act to support our policy work, this can take many forms. For example, we might ask for access to investigation/prosecution bodies’ policies on dealing with bereaved people, with a view to suggesting improvements, or we might request data from the Health and Safety Executive on workers killed in work-related road traffic accidents with a view to analysing the Executive’s work in this area. Because we specialise in worker and public safety it is inevitable that sometimes we will make multiple requests of a particular body in a particular period—such as the HSE, the Maritime and Coastguard Agency, the Police or the Crown Prosecution Service. All of these requests are core to our work and to have to cut back on them in order to remove the risk of a vital request being refused under this new regime will have a clear chilling effect on our work to protect safety.

Second, it is our experience that some bodies can sometimes filter all requests, wrongly, through FOIA—meaning that any potential requests would add up under the fees regulation much quicker than is necessary or proper and effectively putting an incorrect bar on further disclosures that should be covered by the FOIA. For example, we had a dispute with the HSE in July 2005 when one branch started treating every request for any information from a bereaved family as a FOIA request rather than something that could be dealt with, as it always otherwise would be, by an investigating inspector. This resulted in one case in a bereaved daughter being told by an FOI officer that she could have no information at all about her father’s death. We challenged this situation and got an apology and a change in policy from HSE, but we are concerned

that similar situations arise and then mean an effective ban on any disclosure at all. This in our view would contribute to a position on disclosure of information very much worse to that in existence before the Act came into operation.

In summary, these proposed changes would have the effect of preventing some bereaved families from being able to access information about the investigation/prosecution into the death of their relative, and would lead to an unacceptable and undemocratic removal of their rights to access information to assist in our work of protecting worker and public safety. The proposals as currently constituted would quite possibly make disclosure less possible than before the Act was implemented—worse even than nullifying the legislation.

Please reconsider your proposals. We will look forward to hearing from you.

Bethan Rigby

21 November 2006

Evidence submitted by the Information Commissioner

INTRODUCTION

1. I welcome the opportunity to contribute to the Committee's follow-up to its report "Freedom of Information—one year on". Although prompted by the Government's consultation on the proposed changes to the charging regime for FOI requests, I can provide an update on the ICO's Freedom of Information (FOI) work, particularly in relation to complaints-handling.

THE EXISTING COST LIMIT AND CHARGING REGIME

2. When I gave oral evidence to the Committee a year ago I expressed the view that the existing fees regime was working well and that it had the advantages of being simple, clear and straightforward. It did not appear to act as a deterrent to requesters. Nothing has occurred since then to cause me to change that view.

3. During the first two years' full operation of the FOI Act my office received a total of almost 5,000 complaints, but of these only 32 related either wholly or in part to the way the cost limit provisions under section 12 of the Act and the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 had been applied. Under these regulations, only the time spent by the public authority on searching for, identifying and retrieving the requested information can be included when estimating whether the cost limit is likely to be reached.

4. Of a total of 478 Decision Notices issued by my office as of the middle of February 2007, only 13 related to complaints where the cost limit was an issue. Most of these cases also involved a failure by the public authority to give appropriate advice and assistance to the requester, to enable the request to be modified, so as to bring it within the cost limit. This accords with good practice under the Secretary of State's Code of Practice issued under section 45 of the Act. In all but one of these cases the ICO was satisfied that there was evidence to support the estimate for compliance with the full request, so the decision that the cost limit would be exceeded was justified. A summary of these 13 Decision Notices, as published on the ICO website, is appended to this submission [*not printed*].

VEXATIOUS REQUESTS

5. In my evidence to the Committee last year, I also expressed my surprise that more use had not been made of section 14 of the Act, which absolves public authorities from the obligation to comply with vexatious requests. I have frequently repeated this view on public platforms and in meetings with Ministers, government officials and other public authority representatives and advisers, as have my staff.

6. Following the lead Decision Notice on this subject, involving Birmingham City Council, to which I referred last time, the ICO has issued a further 13 Decision Notices about requests which public authorities claimed were vexatious. In 8 of these cases the ICO agreed with the public authority. A summary of all these decisions, as published on the ICO website, is appended to this submission [*not printed*]. At the time of writing, 29 complaints involving requests which the public authority claim are vexatious are open, unresolved, at the ICO.

7. I have indicated in my response to the DCA consultation on the draft new Appropriate Limit and Fees Regulations 2007 my intention to review and strengthen the ICO's guidance to public authorities on handling vexatious requests in the light of the experience of the first two years. In my view, much of the "mischief" which the draft regulations are apparently designed to address can be addressed using the existing provisions of the Act.

RESPONSE TO THE GOVERNMENT'S CURRENT PROPOSALS

8. I have appended to this submission my response to the DCA consultation paper on the draft regulations. The Committee should treat this as being incorporated into this submission. I do not propose to rehearse my concerns about these proposals further here. However, I have grave doubts about the efficacy of the proposals on aggregation. I also believe that, if implemented and applied by public authorities, the total net effect of the proposals will be to arrest the flow into the public domain of a very significant amount of information of genuine public interest which has been such a striking achievement since the Act was fully implemented in January 2005.

9. My response to the consultation is focussed on the likely impact on the ICO. This has to be considered in the context of all the issues facing the ICO as the adjudicator on FOI complaints. In its report last year, the Committee reflected the widespread concerns regarding the ICO's complaints-handling performance in the first year of FOI, but recognised that significant steps were being taken to improve, applying the lessons learned and with the benefit of external support. The ICO Progress Report, published in October 2006, outlined the improvement achieved and indicated what still had to be done. The remainder of this submission provides the Committee with a further update on progress, to the end of 2006.

CASEWORK RECOVERY PLAN

10. The Casework Recovery Plan continues to provide a framework for complaint handling improvements. We have continued to improve our organisation and processes, providing detailed monthly reports of our performance. Induction and training has been completely overhauled, with new starters now participating in a rigorous programme of classroom and desk based training. On taking up post they have access to improved procedural guidance and a knowledge management system populated with lines to take and policy guidance. We have also built on the early changes we introduced to implement our "right first time" principle and this work will continue into 2007–08 when we face fresh challenges relating to funding.

FOI CASE RECEPTION UNIT

11. This unit reviews every case for eligibility on receipt. Where cases are ineligible, we contact the complainant, providing advice as necessary. When eligible, the case is acknowledged and we notify the public authority. This early contact can remind the public authority of the original request and this may prompt immediate release of information, effectively resolving the complaint within days.

12. The case is then passed to the appropriate team where it awaits allocation to a complaint officer. This case reception system continues to weed out cases which are not suitable for further consideration. It provides individuals with early notice of this as well as any advice to assist them in re-presenting their complaint. Public authorities also get earlier notification that an eligible complaint has been lodged against them.

FOI SECTOR TEAMS

13. Our sector teams, established in July 2006, are working well. There are six specialist teams altogether covering health and transport, education, police and justice, two for central government and two for local government. One of the central government teams is based in London. We also have small teams based in Cardiff and Belfast which consider eligible complaints about public authorities for which devolved administrations are responsible.

14. With six months experience we are confident that these teams provide the focus needed to resolve a broad spectrum of complaints whilst being able to identify sectoral issues and trends.

PROCESS IMPROVEMENTS

15. The process changes introduced in June 2006 have enabled us to make significant improvements in complaints resolution. Most notably on straightforward complaints which, if eligible, are now passed onto a complaints officer within four weeks of receipt.

16. Our greatest challenge continues to be the high number of complex complaints which are under investigation or remain in the current backlog. We may prioritise some cases, where the complaint might be time-critical or represents a path-finder case, resolution of which could close a number of others, or give direction on a particular topic. Cases can also be grouped if there are similarities with the parties involved or the issues raised.

17. However, individuals bringing complex cases which do not fit into these categories are still waiting too long before we can begin to consider their complaint in detail.

INDUCTION, TRAINING AND PROCEDURES

18. We now have a comprehensive induction programme in place. Following a successful pilot in July 2006, new starters now receive a mixture of desk and classroom training. Once in post, they are supported by a comprehensive procedures manual and improved knowledge management tools.

19. We will build on these achievements and in the spring of 2007 will pilot a bespoke training course for caseworkers. The aim will be to train staff to deal with cases in a way that is proportionate to the issues involved. We will focus on the issues that are central to the case and reach a decision in a realistic timescale. Our aim is to ensure that cases are dealt with quickly whilst maintaining quality.

IMPROVING QUALITY—"RIGHT FIRST TIME"

20. We have continued to develop this approach which builds quality into the investigation process from the beginning. Early changes introduced in April 2006 have speeded up the decision notice approval processes. We also use Case Review Panels to progress particularly complex cases by capturing input from a panel of internal experts in one session.

21. As we face a new financial year with resources limited to baseline funding, we are returning to this early work with a view to extending this principle further. The Commissioner has already signalled his intention to be tougher with Public Authorities now that they have had time to become familiar with the legislation. We have issued information notices and have made our first practice recommendation, but our more robust approach will also extend to the way in which we handle investigations.

22. In particular, we will be more demanding of public authorities expecting them to be able to set out full and final arguments for withholding information in one clear submission and to respond quickly to requests for information.

DECISION NOTICES

23. The preparation, content and dissemination of decisions is much improved. We have now improved the format of decision notices to give a clearer structure to more complex decisions. This enables the parties to better understand our reasoning and make a more informed decision whether to accept or appeal our ruling.

24. We now have a decision notices database on our website which was launched in August 2006. This allows swift retrieval of the notices, which are searchable by case reference number, name of public authority, section of the Act, date (month and year) and status (upheld or not). The improved content and accessibility of decision notices have enhanced the value of the decision notice as an educative tool for public authorities and other users of freedom of information.

POLICY DEVELOPMENT AND KNOWLEDGE MANAGEMENT

25. Our new policy team, created in June 2006 is now well established and sits alongside complaint teams, providing a crucial supporting role. It has developed a "lines to take" database, capturing agreed lines from casework, decision notices and Tribunal decision summaries.

ENFORCEMENT STRATEGY

26. We launched our Enforcement Strategy in October 2006. This aims to achieve compliance with the legislation and observance of the Codes through a combination of advice, negotiation and formal action. We continue to monitor the performance of public authorities and non compliance issues are normally dealt with informally in the first instance. We are increasingly using Information Notices where the public authority is reluctant to cooperate and these have resulted in the release of information needed to progress complaints resolution.

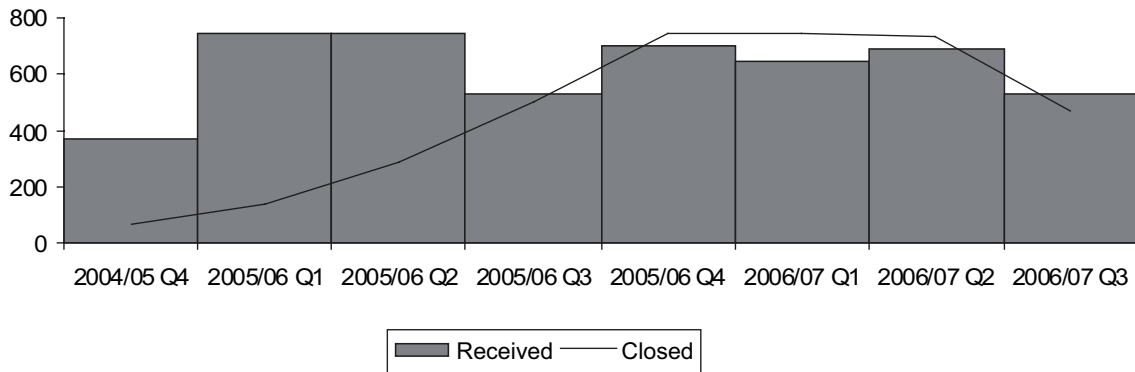
27. In February 2007 we issued our first Practice Recommendation to a local authority indicating the steps needed to achieve compliance of practice under section 45. We continue to work closely with The National Archives addressing issues relating to non-compliance with the section 46 Records Management Code.

PERFORMANCE

28. Each month we produce a performance "dashboard", a single sheet which summarises our performance against all the key performance indicators. December's dashboard is attached as Annex X [*not printed*].

RESULTS

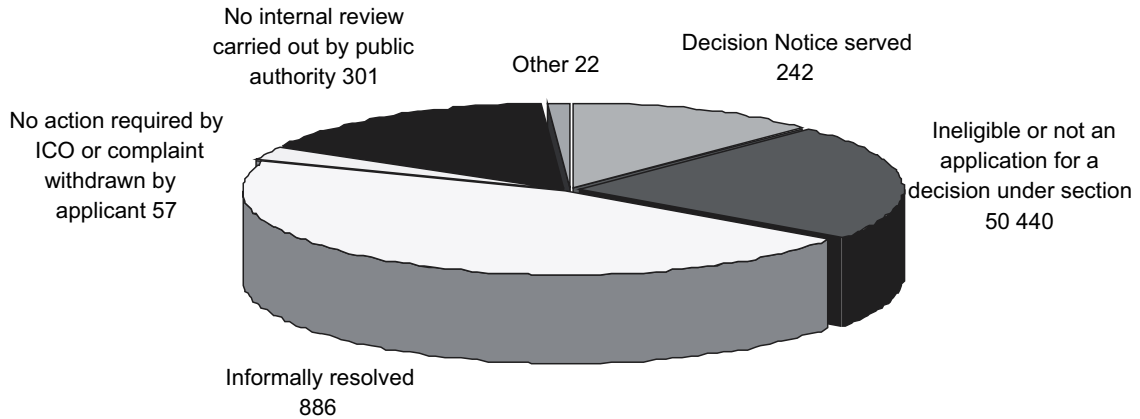
Cases received and closed



29. The figures for cases received show very clearly how the caseload dipped at the end of 2005 and then increased sharply at the beginning of 2006. This pattern was repeated at the end of 2006 and looks set to continue to follow last year's trend.

30. The closure figures show a steep rise in output in as we dealt with our backlog of more straightforward cases. This then levelled off and has started to reduce as we cleared the backlog of straightforward cases, leaving a core of complex cases awaiting resolution. Our caseload as at 1 January 2007 stands at 1310.

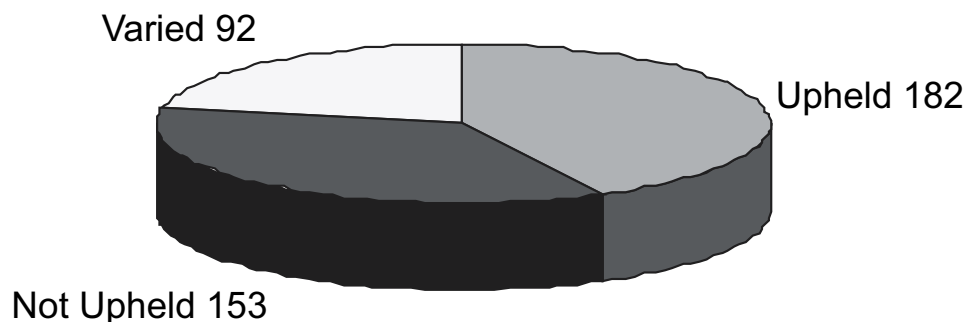
Outcomes of cases closed 2006/07 QTR's 1-3



Service Standard	Age of cases at closure			
	30 days or less	90 days or less	180 days or less	365 days or less
Target 2006-07	35%	40%	50%	80%
Performance to December 2006	54%	58%	67%	85%

31. We have continued to meet these targets but, as predicted in our October 2006 progress report, as we have started to close an increased number of older cases, the percentage of cases closed which are older than 90 days is increasing. We expect this trend to continue in the coming months.

Outcomes of Decision Notices served since January 2005



APPEALS TO THE INFORMATION TRIBUNAL

32. The Information Tribunal, to whom complainants and public authorities can appeal if they are unhappy with our decision, continues to make rulings which provide useful commentary and interpretation.

33. Since 1 January 2005, 127 decision notices have been appealed to date—27% of all the decision notices we have issued. The Information Tribunal has consolidated some cases (for example, where both the complainant and the public authority appealed the same notice, or where similar issues were dealt with by multiple notices), making 119 Tribunal cases to date. Of those cases that have concluded, the outcomes were as follows:

Appeals withdrawn	32% (17 cases)
Appeal dismissed	47% (25 cases)
Appeal allowed/partially allowed	21% (11 cases)

34. The Tribunal has substituted the Commissioner's decision in seven of the cases it has ruled on. Public authorities brought 23% (29 cases) of the appeals and complainants 77% (98 cases).

FUNDING

35. Our total budget for 2006–07 is £5.55 million. This includes additional funding from the Department for Constitutional Affairs of £850k to address our backlog on top of our baseline funding which reduced from £5.0 million in 2005–06 to £4.7 million, taking account of a £300k efficiency saving. Our baseline funding for 2007–08 is set at £4.7 million.

BACKLOG

36. We have eliminated the backlog of straightforward cases. Many of these are dealt with in less than 30 days by our case reception team, and the rest are passed through to a Complaints Officer within 28 days. Complex and sensitive cases need to be investigated by Senior Complaints Officers.

37. Our total caseload consists of all cases that are under active investigation and those that have been accepted as ready for investigation but have not yet been allocated to a caseworker. The current position is that we have a total caseload of around 1300, where just under 650 are under investigation and just under 600 are awaiting allocation (at any one time the remainder will be in the final process being signed off). It is these 600 cases which now make up our backlog and they consist solely of complex cases.

38. It is worth stating again that, had incoming cases remained at the projected level of 190 a month (as expected) instead of averaging out at 215, the improved productivity could have reduced our backlog by as many as 300 cases.

WORKLOAD FORECASTS

39. The business case we submitted to the Department for Constitutional Affairs in January 2006 was based on planning assumptions including, most importantly, a prediction of new cases each month. We developed these assumptions from the best information available at the time, in particular the last three months of 2005, which had shown a reduction of incoming cases. On this basis we projected 190 new cases a month.

40. Actual intake averages out at 215 cases a month. We now believe this reduction in the last three months of the year could be a seasonal trend and we saw a similar pattern in 2006. Our most recent planning assumes an average intake of 215 cases a month, assuming the legislation stays the same.

41. In the business case we also planned for an increase in productivity. Output increased from an average of just under 140 cases closed each month in 2005–06, to 245 each month closed in the first half of 2006–07. The latter months of 2006–07 saw a reduction in clearances as we eliminated the straightforward cases from the backlog, leaving a core of complex cases.

42. In our Progress Report we estimated that by the end of the financial year we would close 1,500 cases which, assuming current monthly intake remained at 215, would reduce our over caseload to 950. This, we estimated, would leave us with 450 complex cases in a backlog.

43. With three challenging months behind us, we have revised these estimates and now estimate that by the end of the financial year we will have closed 1,100 cases, leaving an overall case load of approximately 1,300.

LOOKING FORWARD TO 2007–08

44. We estimate that the intake of complaints will remain constant and have had to accept that we will receive only baseline funding to cover all our freedom of information activities. In our Progress Report we reported that with this baseline funding we would not be able to reduce the backlog of complex cases. This remains the case.

45. Nevertheless, the ICO's top priority for 2007–08 will be FOI casework. That means focusing the resources available to us on FOI casework. To achieve this, we have taken a number of difficult decisions relating to how we spend the limited funds available to us.

46. The number of staff working in other FOI areas within the ICO has been pared to the absolute minimum. This effects staff numbers working on FOI guidance and publication schemes in particular. We will be able to do some work in these areas, but it will be less than we had anticipated. Staff released from this work have been diverted to FOI casework.

47. We have also been forced to postpone a much needed move to additional accommodation and we have significantly reduced budgets in other areas. This includes communication, training and research. The money saved will be used to fund additional temporary resources for FOI casework.

Richard Thomas

February 2007

Appendix

RESPONSE TO CONSULTATION ON DRAFT FOI AND DP (APPROPRIATE LIMIT AND FEES) REGULATIONS 2007

INTRODUCTION

1. This paper is the ICO's response to the DCA Consultation Paper 28/06 issued on 14 December 2006. It makes a number of key points:

- a more robust application of section 14 (exclusion of vexatious requests) would, to a very significant extent, address the mischief at which the new cost proposals purport to be directed;
- there are grave doubts about the extent to which the aggregation of non-similar requests would be workable in practice, particularly if determined applicants took steps to circumvent the new provisions;
- the proposed concepts of reading, consultation and consideration time, will present very real difficulties for challenge and adjudication;
- the proposals will introduce new layers of procedural and bureaucratic complexity. There is likely—as feared by Frontier Economics—to be “a substantial increase in requests for internal review and appeals to the ICO, with a substantial increase in costs”;
- there will certainly be a surge of difficult procedural complaints to ICO which can be predicted to start no less than two months after the new Regulations have been implemented. Unless further resources are made available, regrettably, the net effect—at least for the forthcoming year—has to be the prospect of more time taken to resolve difficult cases, an increase rather than a reduction in the backlog of complaints and the diversion of resources onto complaints about costs rather than substantive issues of disclosure of official information in the public interest.

2. The ICO accepts that the policy content of this proposed legislation is a matter for government, subject to the necessary Parliamentary approval. In its role as adjudicator on complaints made under the FOI Act and promoter of good practice by public authorities, the ICO is primarily concerned with the practicality of implementing the proposed measures and their likely practical effect.

3. The ICO notes that the stated intention is to target the small percentage of requests and requesters that impose the highest burdens on public authorities. Such an approach encourages public authorities to look primarily at the cost of compliance and the identity of requester rather than the public interest in the disclosure of the information sought.

4. By way of general comment, the ICO remains very surprised that public authorities are not using the provisions of section 14 of the FOI Act more frequently or more effectively. This section removes the obligation on a public authority to comply with a request if it is vexatious. The ICO and the DCA have both issued guidance for public authorities on the application of section 14. The ICO has issued decision notices in relation to complaints on this point upholding the decisions of a number of public authorities that requests were vexatious (Birmingham City Council—ICO ref: FS50078594; Warwickshire County Council—FS50069395; Sussex Police—FS50099691; Cabinet Office—FS50099755; London Metropolitan University—FS50085398; Crown Prosecution Service—FS50130467; National Archives—FS50102437; Treasury Solicitors—FS50105213).

5. The ICO believes that a more robust application of section 14, in line with the published guidance and decision notices, would, to a very significant extent, address the mischief at which the new cost proposals purport to be directed.

THE PROPOSALS

Aggregation

6. The ICO has grave doubts about the extent to which the aggregation of non-similar requests would be workable in practice, particularly if determined applicants took steps to circumvent the new provisions. Public authorities and the ICO already have experience of requests being made by the same people using different addresses. Many requests are handled electronically and the actual identity of a requester using an email address can often not be linked to the same person making a request from a postal address. It would also be very easy for requesters to find proxies to make requests on their behalf.

7. Given that those targeted are identified in the consultation paper and in the Frontier Economics report as “experienced” users of the Act, many of whom have a professional interest in obtaining information from public authorities, it seems likely that they would be quick to identify legitimate means of circumventing the aggregation rules. Public authorities would find it difficult to identify and challenge such actions. Indeed doing so would in itself be a time consuming business. In addition, aggregation can—and doubtless will—be challenged by way of an internal review and a complaint to the ICO.

8. The aggregation proposals are not tempered by any duty to consider the public interest in disclosing the information requested.

ESTIMATING WHETHER THE COST LIMIT HAS BEEN REACHED

Reading Time

9. There is an inherent difficulty in standardising the approach to calculating the time it takes to read and examine information held. Recorded information is held in a variety of formats and varies in complexity. Font size, paper size, the use of diagrams, tables and illustrations will all have a bearing on reading or examination time. An average might be used for the purposes of a “ready reckoner”. However, it would be very easy for a public authority creating, say, a report which it wanted to keep out of the public domain to increase the font size and the margins to increase the number of pages comprising the report, thus boosting the assessed cost of complying with a request for it.

Consultation Time

10. Decisions on the extent to which third parties should be consulted will be a matter for the public authority receiving the request, although they are guided by the Code of Practice under section 45 of the Act. Once again, however, it would be possible for a public authority to embark on unnecessary but not unreasonable consultation with a view to avoiding compliance obligations under the FOI Act.

11. The Frontier Economics report highlights the issue of consulting Ministers, stating that this is “the most expensive stage of work for the average central government request”. The consultation paper and the regulations are not clear as to whether time spent consulting Ministers would count as consultation time for these purposes. The ICO’s view is that a Minister within a department cannot be a consultee for these purposes, as their involvement in handling the request is not as a third party. The ICO recognises that a Minister may be involved in the consideration of a request, in particular where he or she is the “qualified person” for the purposes of section 36 of the Act and the applicability of that exemption is being considered. However, this is not consultation for the purposes of calculating the cost of compliance with the request.

12. The ICO notes that, in any event, Ministers’ time is to be costed for these purposes (ie consideration time) at the standard £25 per hour (draft reg 4(2)) as indicated by Vera Baird MP, Parliamentary Under Secretary of State, when responding to a question in the House of Commons on 17 October 2006.

Consideration Time

13. Consideration time is likely to be the most difficult to estimate accurately for these purposes. By the same token, it will present very real difficulties for challenge and adjudication. There will be a number of key issues, including:

- How much time has in fact so far spent on consideration?
- How much further time would be involved?
- Was this “reasonable”?

Experience over many years with recording, challenging and approving historical (not prospective) litigation costs—where time-recording, scale costs and various types of experts are usually involved—demonstrates the difficulties which lie ahead for all concerned. Even if time-sheets or similar means to record the use of officials’ time were to be introduced, the tasks will be daunting. The estimate of time required for the activities in draft regulation 6(2)(e) and (f) (considering the applicability of exemptions and the public interest test) in particular could easily be inflated artificially. This will particularly be the case where multiple exemptions could apply, even though the compliance issue could quickly have been determined by reference to one exemption only. The lack of any bench-marks as to “reasonableness” will compound the challenges, especially until the Tribunal, and possibly the courts, begin to give definitive guidance by ruling on individual appeals.

COMPLAINTS TO THE ICO

14. The process of estimating the time which might be spent on the various activities which can be included when calculating whether the cost limit has been reached is thus uncertain, subjective and open to exaggeration, if not abuse. This makes it all the more likely that there will be further challenge when the Regulations are invoked to resist a request. Public authorities themselves would be the first to experience this. In real terms, the cost of this to the public authority will be high because the principles of internal review, embodied in the Code of Practice under section 45, include a requirement that the reviewer should be more senior than the original decision-maker.

15. Once the internal review has been completed (or if none has been completed within a reasonable time scale) the ICO will need to investigate any complaint it receives. This is likely to lead to a significant increase in the volume of complaints received by the ICO.

16. The proposals will introduce new layers of procedural and bureaucratic complexity. This point is recognised in the Frontier Economics report and reflected in the following extract from the executive summary (page 8):

“If practitioners do not take a systematic approach, there is likely to be a substantial increase in requests for internal review and appeals to the ICO, with a substantial increase in costs”.

17. The ICO is concerned that this may precisely be the consequence of the introduction of the new proposals and cannot be optimistic that any defensible systematic approach could be adopted and used by practitioners, at least in the short term.

18. Throughout 2005, during the first year of FOI complaints-handling, one of the features was the high volume of procedural complaints received by the ICO, particularly regarding non-compliance with time limits. However, in the first two years together the ICO received only 32 section 12 complaints (ie complaints about the application of the cost limit) out of a total of almost 5,000.

19. Issues regarding the ICO’s complaints-handling performance during that period are well documented and the most up-to-date account appears in our Progress Report, published in October 2006. There remains a significant backlog of complex complaints which are proving difficult to resolve. Slow but steady progress is being made in reducing this backlog. However an influx of significant numbers of new complaints about the application of new cost and aggregation rules will present a very serious set-back. The temporary additional resources for FOI complaints-handling made available to the ICO for 2006–07 will run out at the end of March 2007, apparently with no prospect of further funding above a baseline of £4.7 million for 2007–08. There will be a new surge of novel and potentially difficult procedural complaints which can be predicted to start within two months of the new Regulations. The net effect for the forthcoming year, regrettably, has to be the prospect of more time taken to resolve difficult cases, an increasing rather than decreasing backlog of complaints and the diversion of resources onto complaints about costs rather than substantive issues of disclosure of official information in the public interest.

20. Although it is impossible to predict the numbers with any accuracy, it seems reasonable to expect that there will be a significant proportion of challenges to refusals on cost limit grounds in the months immediately following the implementation of regulations as currently proposed. This can be expected all the more because the requests targeted are those made by experienced requesters. This will generate a new species of complaint which will differ from those which the ICO (and internal reviewers) have so far had to consider.

21. Using the estimates in the Frontier Economics report, approximately 20,000 FOI requests per year would be eligible for exclusion from consideration as a result of the measures now proposed in the draft regulations. If only 10% of these resulted in complaints to the ICO, this would see an annual increase in complaints to us of 2,000. In numerical terms this would almost double the current number of FOI complaints received annually by the ICO.

22. It is accepted that such a high proportion of complaints is unlikely to be sustained beyond, say, the first year of implementation. It is also accepted that where requests have been excluded from consideration on cost grounds, that request will not itself generate a substantive complaint about non-disclosure as the matter will not get off the ground. However, these long term effects will not be felt by the ICO for some years. In the meantime, with the current level of resources, the backlog would inevitably continue to build.

23. In order to handle the projected influx of cost limit and aggregation complaints, a discreet team of complaints officers will be needed to ensure that these complaints are addressed as quickly as possible. Until the eligibility of a request refused on cost grounds has been considered, it will not progress any further. It therefore seems right that some priority should be given to these cases so that, where appropriate, the request can be remitted back to the public authority for substantive consideration. Given the ICO's experience to date of public authorities failure to fulfil adequately its obligations under section 16 (advice and assistance to requesters) in cases where the current cost limit has been invoked, priority for these cases seems particularly appropriate.

24. Without additional (temporary) resources to cover this new work there will, however, be inevitable knock-on effects for the FOI complaints caseload as a whole. The overall backlog, already a matter of serious concern, will increase further.

COMMUNICATING THE ESTIMATE

25. One final, but important point on the draft regulations is the notable absence of any requirement on the public authority to communicate its estimate of cost to the applicant. Section 17(5) of the Act simply requires the public authority to give the applicant a notice stating that section 12 applies. If the proposals are implemented it is fundamental that such a notice should include the estimate of costs, broken down for each activity, so the applicant can see how the estimate has been reached, particularly by reference to the additional costs threshold and the additional costs ceiling. This should be a requirement of the regulations.

QUESTIONNAIRE

26. The consultation paper invites response to 7 specific questions. The ICO notes that these questions all assume that the key proposals in the consultation paper are accepted. The responses to these questions must be considered in the context of the ICO's response generally.

- Q.1 The ICO does not believe the regulations will ensure consistent calculation of the appropriate limit, nor does the ICO believe that this could be achieved by adopting a more prescriptive approach.
- Q.2&3 The inclusion of thresholds and ceilings for each activity is a welcome element of the proposals, if they are to be adopted it will ensure a more balanced approach to the issue of reaching the cost limit.
- Q.4 The ICO questions the practical efficacy of extending the aggregation provision.
- Q.5 Factors to be taken into account should be included in guidance rather than enshrined in legislation.
- Q.6 They may all be relevant factors but they are not an exhaustive list (so should not be included in the regulations.) There may be others which are relevant in individual cases.
- Q.7 The ICO supports the production of guidance which covers both EIRs and the FOI Act so that their provisions can be compared and contrasted. However, given that the appropriate limit and aggregation are not concepts which feature in the EIR charging regime the case for joint guidance on this subject is less compelling. Joint guidance would, however, be likely to demonstrate that the EIR offers a less restrictive access to information regime than the FOI Act.

Richard Thomas

February 2007

Evidence submitted by the Newspaper Society

1. The Newspaper Society represents the regional newspaper industry. Its members publish around 1300 local and regional newspaper titles with around 40 million adult readers.

2. The regional press is seriously concerned by the Government's proposals set out in its consultation paper *Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007*.

3. The regional press opposes the Government's proposals to allow public authorities in future to take into account the costs of reading the information, consulting other bodies and considering whether to release it and to allow authorities to aggregate unrelated requests from the same person or company if reasonable to do so in making the costs calculations.

4. These changes will allow public authorities to refuse requests simply on costs grounds, irrespective of the absence of other grounds to refuse lawfully the request or the public interest in the release of the information.

5. As the Government's partial regulatory impact assessment and consultants' report recognised, these changes will have a particular effect upon journalists and campaigning groups, as well as MPs and their researchers. Allowing reading, consultation and consideration time could be used to justify refusal to release contentious or sensitive information which the public body would prefer was not made publicly available. Allowing aggregation of requests would allow any local authority or other local public body, however wide its range of responsibilities, to accept just one request a quarter from any regional newspaper company, even though the requests may have been completely unrelated, made by different specialist correspondents or general news reporters from one title, or from various different titles, in order to obtain accurate and authoritative information from different departments of the same public body.

6. The proposals could have a hugely detrimental effect upon the use and effectiveness of the Freedom of Information Act at local level by the local press and their readers. The Government's consultants estimated that media requests to public bodies outside central Government cost around £1.4 million. This cost does not justify the proposed restrictions to cut use of the Act. Regional and local press requests have not dealt with trivial matters—they have revealed cracks in local nuclear power stations, MRSA infection rates in local hospitals, precise manner of expenditure of public funds by the local public bodies. The Government's proposals do not take into account the benefits which have resulted from the information revealed by those requests, including the beneficial effect of the resulting greater openness, public scrutiny and public accountability, upon the activities, administration, decision-taking of public bodies in discharging their public functions.

7. I attach the Newspaper Society's letter of 29 November to the Parliamentary Under Secretary of State which details the reasons why the regional press are so deeply disturbed by the proposals and opposed to such changes. I would be grateful if the Committee could also consider this letter and the issues raised by the industry set out in that letter. The draft regulations' suggested cost thresholds and ceilings do not alleviate the concerns described since they would still allow requests to be refused on estimated costs grounds alone, in circumstances where that would not be currently possible.

8. The Government may suggest that the regulations are intended to assist public bodies faced with a potentially time consuming request which the requester is reluctant voluntarily to refine or agree an extended timetable. But the proposed legislative change would extend the right of all public bodies to refuse to supply any information to anyone, simply on estimated time and costs grounds. The costs involved hardly provide justification for undermining the freedom of information regime within just two year of its introduction.

9. Regional and local newspapers have published numerous articles, detailing the information which their readers and reporters have obtained as a result of the Act and their opposition to the proposals which could undermine its effectiveness. Many examples were given by Members of Parliament during the adjournment debate on 7 February on the Government's proposals. Editors and publishers have and will continue to explain their real concerns to the Government, ministers and officials and ask them to reconsider its intentions.

10. The Newspaper Society hopes that the Government will reconsider its proposals and decide against bringing forward any regulations or other legislative proposals that take away the public's right to information under the Freedom of Information Act.

11. The Newspaper Society would be happy to provide any further information.

Santha Rasaiah
Political, Editorial and Regulatory Affairs Director

February 2007

COPY OF LETTER SENT TO THE PARLIAMENTARY UNDER SECRETARY OF STATE,
DEPARTMENT FOR CONSTITUTIONAL AFFAIRS 29 NOVEMBER 2006

The Newspaper Society welcomed the Prime Minister's statement at the Newspaper Conference Annual Lunch at the House of Commons on Monday that the Government "will certainly consult" the Newspaper Society and others "very widely" on its proposals to change the Freedom of Information Act and that the Government "will listen carefully" to what is said and will "take on board seriously" the concerns expressed by the regional newspaper industry and others.

The regional newspaper industry is deeply disturbed by the Government's announcement in its response to the Constitutional Affairs Committee Report on the first year of the FOI Act that it is "minded to

- include reading time, consideration time and consultation time in the calculation of the appropriate limit (£600 for central government, £450 for other public bodies) above which requests could be refused on cost grounds; and
- aggregate requests made by any legal person, or persons apparently acting in concert, to each public authority (eg Government department) for the purposes of calculating the appropriate limit."

These could have a hugely detrimental effect upon use of the FOI Act at local level.

The lives of the 40 million adult readers of the local and regional press are closely affected by the work of their local public services and local public bodies—these public bodies make the decisions, allocate and spend public funds and provide the public services of immediate importance to the lives of those readers and their families—from all aspects of health, education, housing, to the effectiveness of controls over crime and anti-social behaviour, clean restaurants, speeding or parking fines, the provisions of sport and leisure facilities. Our members' 1,300 local and regional newspapers obviously each continually monitor and report on the activities of the specific local and regional public bodies and services which affect their local community. Private individuals and journalists have therefore used the FOI Act from the outset to obtain authoritative and accurate information from the relevant regional and local public bodies about a range of issues of interest and real importance to the public. This has assisted local public scrutiny of local public bodies, facilitating openness, transparency, probity and accountability. Such requests and the local media stories engendered by the information released have also helped to encourage those public bodies to release more information of interest to the public and of public interest, via publication schemes or otherwise, independent of specific requests. We fear that the Government's proposals will effectively prevent such use of the Act and discourage the development of greater openness.

As the Information Commissioner's progress report says, the first 18 months of FOI "has been very much a learning experience" for the Information Commissioners' Office and public authorities. The Information Commissioner comments "The vast majority of public authorities are taking freedom of information seriously. Regrettably, some are not."

The Government's first proposal would provide an easy way for local public bodies to block investigation of matters of public interest. The time calculation would not as now only prevent requests from local journalists or private individuals for a large volume of information, or for information that is difficult to locate because of the "search and location" time involved, (which if refused at least provides an opportunity to make a more manageable request, within the cost thresholds). The inclusion of reading time, consideration time and consultation time in the calculation of the £450 limit (calculated at £25 per hour) could provide a very easy way to simply refuse any "difficult" request in its entirety, without give any reason or justification by reference to the Act other than cost estimate—and without any other ground for review or appeal.

Thus the public right to receive information would be defeated by a time/cost estimate. The Government's proposal will become a useful tool for any public body which does not wish to provide information that it would be otherwise obliged under the Act to release, perhaps because the disclosure could embarrass the body or officials or members, elected or otherwise. The proposal would indeed encourage those public bodies who are not taking FOI seriously to avoid any improvement of their attitude, compliance, records management, practice, procedures and training.

The local public body could all too easily claim that anything other than a simple request, for which there is already precedent for release, becomes cost barred. The public body might claim that it will take too long and exceed the cost threshold because it would have to consider the application of the Act very carefully, because it related to an unfamiliar area, or a sensitive area, especially if the request would otherwise require the release of information which the public body does not want to reveal. Easily located information which has not previously been requested would become subject to the cost threshold because any public body might claim it required careful consideration of exemptions, application of the public interest tests, or it might require liaison between different departments of local authorities, or might require the involvement of various senior staff and thence to the chief executive, who is supposed to be championing FOI, the time spent reading, considering and consulting adding up at every stage. The local public body could notionally factor any or all such time for reading, considerations and consultations into the total time estimates and costs calculations and then be entitled to refuse the request as exceeding the £450 limit. The requester could

not then attempt to reframe the request so as to reduce the time and cost, by reducing the volume of information required or more tightly defining the parameters of the request. The subject matter might indeed require substantive consideration and consultation time, but these should not automatically be disincentives permitting refusal.

The Government's proposed change in itself could not only encourage refusal contrary to the intention of the legislation, but also discourage use of the Act, by press and public alike, for anything but the most straightforward request strictly following such early precedents as have been set and insofar as the backlog of appeals to the Information Commissioner and Tribunal have allowed the parameters of the Act to be considered. The true boundaries of what the public has a right to know and what information the public sector is obliged to share would then never be properly delineated and institutional secrecy reinforced. There will be no culture change precipitated by the Act.

However, the problem is compounded by the Government's second proposal. The intention to allow aggregation of requests would permit the local public body to take into account all the time taken and all costs estimated for the purpose of the costs threshold of all requests from any and all individuals working for the same company, or same organisation, considered to be a "legal person", as well as all requests made by the same person over any 60 working day period request. Thus in a local newspaper context, the first change would work against any individual journalist who submitted a request raising difficult issues, occasioning consideration and consultation time over the maximum cost threshold. However the second would work against any general news reporter or investigative journalist or specialist reporter such as the health or crime or local government correspondent who might be putting in different requests on different subjects to the same local public body, by allowing the cost threshold to be calculated by reference to all requests from that particular journalist and the time taken on each, including reading, consulting and consideration time, to be aggregated, irrespective of whether they were dealing with the same issue or different issues. Even worse, it would also allow a local authority or police force or any local or regional public body with wide ranging public functions to aggregate all the FOI requests in any 3 month period independently made by all and any journalists working for the same newspaper company (which might include a number of local and regional titles and their websites or multimedia activities in the region served by the public body). The time and hence the cost thresholds could quickly be exhausted and so practically all the journalists' requests would be refused on that ground alone, rendering the Act useless to the local media.

The combined effect of the Government's two proposed changes could thus effectively restrict the use of the Act by any local newspaper company to one request by one of its journalist per quarter to any public body, despite the importance and range of that public body's responsibilities and diverse interests of the public whom it served, possibly across a wide geographic area. It could kill any use of the Act by the local media.

This problem is illustrated by one of the reports cited by The Frontier Economics Report. The Report does admit that there is no information available on the volume of FOI requests or the costs of such requests to public bodies other than central government. It carried out no research itself. However, it refers to the I&DeA Freedom of Information Act 2000: The first six months—The Experience of Local Authorities in England, 30 September 2005. The survey therefore covered the local authorities' reactions to this initial period combining peak numbers of requests and maximum unfamiliarity in dealing with the Act. It was based on substantive responses from 200 of the 387 local authorities in England. That report suggested private individuals were the largest single category of requesters (60%), followed by business (20%) and then journalists (10%). In the first six months district councils received on average around 50 requests and larger councils (county, metropolitan, unitary and London) around 150. The monthly volume of requests declined over the first six months, but the complexity of requests had grown. Only 8% were refused of which a third were subject to internal reviews because of requester dissatisfaction.

The local authorities estimated that the time taken to deal with the average request took around 12 hours for districts and 14 hours for other councils although "a small number of complex requests mostly from local pressure groups and journalists which took considerably longer". Two third of councils made no charge and of those that did, were mainly for copying and postage.

Yet under the Government's new proposals, had they been part of the Act as introduced, any one of those more difficult requests or any second request regardless of subject matter or complexity from any of those individuals, businesses or journalists could well have been refused for no reason other than the new basis for calculation of estimated time and/or aggregate of requests counting towards the £450 cost limit.

No review or appeal would have been possible other than on cost grounds. Few would have enthusiasm for another attempt. The Act would have been stifled at birth.

Yet what real justification could there have been to refuse the information which was actually released? The public did have the right to know—the Act required its release; it could not be lawfully withheld under any exemption. These requests were not frivolous, or vexatious, or particularly time consuming because an excessive volume of information had been requested or huge numbers of requests made by serial requesters. Media use was not identified as a problem, nor journalists accused of wasting public bodies' time and resources. After all, the biggest problems of compliance reported by the local authorities were "applying

exemptions, including the public interest test; distinguishing between FOI and EEIR regimes; persuading colleagues to comply with timescales and use request tracking systems; and coping within stretched resources, sometimes with no budget and with staff allocated to FOI on a temporary basis”.

These are issues which the Government should be encouraging local public bodies to address, rather than providing them with an easy way to avoid releasing information in response to requests. According to the report, recognition of the importance of better records management was actually cited by the local authorities as one of the benefits of FOI. Indeed, although the local authorities were unhappy about the use of FOI by business, far from condemning media use of FOI, or deploring the time spent on consultation between departments because of FOI or requiring the involvement of senior management on FOI, they welcomed all these as positive advantage of the Act: “Other benefits are better engagement with the public and the media, identifying stakeholders and their concerns, and identifying problem in service delivery. FOI had also helped to increase co-operation and communication between departments.” Suggestions for good practice included “seeking to ensure the continuing positive involvement of senior management in the context of the relationship of the council with the public and positive development of the publication scheme”.

We would prefer that the Government encouraged local and regional public bodies to improve their systems and publicised such positive benefits instead of encouraging new ways of obstructing the release of information under the Act.

The Prime Minister did ruefully remark to the audience at the NS Newspaper Conference lunch that “It’s a pity in some ways we don’t get a little more credit for actually having opened ourselves up in a way no government has done before us”.

The regional press has been a strong supporter of freedom of information over many years and supported Labour’s manifesto commitments on FOI for many years. Despite its opposition to the dilution of Labour’s original proposals for the Act and its lobbying for the legislation’s improvement during its parliamentary passage, the regional press has since worked with the Government to raise awareness of the Act as passed and the benefits that it might bring. The regional media’s own anticipated interest, in addition to its encouragement of its local readers’ use, has indeed been used by the Government to focus national, regional and local public bodies’ attention on the need to make proper preparations for the Act.

Lord Irvine, when Lord Chancellor, suggested that the Government and the Newspaper Society should work together to alert both local public bodies and the local press to the opportunities provided by the Act. Local and regional newspaper editors wrote to all their local public services and bodies, enclosing a letter from the Lord Chancellor, in order to open a constructive dialogue on preparations for the Act and the public’s and media’s use of it. The then FOI Minister chairing the Advisory Group on implementation of the Act welcomed our follow up survey ‘The Challenge for Freedom of Information’ as part of awareness raising to encourage preparation for the Act. You wrote to the NS on its publication, which revealed that further work needed to be done, that nonetheless “The Freedom of Information Act is already making a very real difference to people’s lives. More and more information is being released by local authorities and central government departments as they operate under the FOI regime. Freedom of Information marks a significant and hugely important change and the Government is fully committed to spearheading this process of change.”

The Government has used examples of regional press stories to illustrate the success of the FOI Act. The Lord Chancellor has highlighted some of them in his speeches. The Campaign for Freedom of Information and Information Commissioner have given examples of local newspaper stories derived from effective use of the Act. A quick search of regional press websites, or sites such as [holdthefrontpage](#) or [Press Gazette](#) archives which cover the regional press, would reveal a multitude of articles and investigations, where local and regional newspapers’ journalists had used the Act to obtain information of interest, relevance, importance to their readership—and often prompted local public bodies in future to release such material as part of publication schemes. The regional press credit the Freedom of Information Act for releases of that information and thereby the Government.

Regional and local newspapers have welcomed the opportunities presented by the Act. They appreciate information released by central government which was unavailable in the past, and now repays analysis for relevant regional and local stories but the FOI requests that they have made to local and regional public bodies have also yielded much valuable and important information for stories of real public interest and strong relevance to the local community.

Our concern is that the Government’s two proposals will undo ‘the significant and hugely important change’ to which you say it is fully committed. We find it very surprising that the Government wants to introduce any changes that will shut down release of information to the public and shut out the media, just as central government and local public bodies and the Act’s users are acclimatising to the beginnings of the cultural change which the Act was indeed supposed to initiate.

Our lack of understanding perhaps is unsurprising since the Government has not yet published any detailed consultation document, provided no policy justification, provided no regulatory impact assessment, and produced no evidence based research on its local impact.

The Prime Minister referred to the cost benefit analysis. The Frontier Economics Report stated that it had no information about the number and cost of FOI cases outside central government. It estimated the annual total costs of FOI was estimated to be £35.5 million, of which an estimated £11.1 million was attributed to public bodies other than central government departments including an estimated £1.6 million attributed to dealing with journalists' requests (£1.4 million for requests and £140,000 internal reviews).

These seem paltry sums for any search for savings to justify such drastic restrictions on use of the legislation. We find it hard to believe that it can provide any justification for the Government's proposals which could sabotage freedom of information, within just two years of its introduction.

The Newspaper Society therefore asks the Government to reconsider its intentions on changing the Act and to honour the Prime Minister's commitment to consult widely before bringing forward any legislation to restrict use of the Act, directly or indirectly.

Santha Rasaiah

Political Editorial and Regulatory Affairs Director

November 2006

Evidence submitted by Clifford Chance

This submission is made on behalf of Clifford Chance LLP, in response to the invitation by the Constitutional Affairs Committee to submit evidence on the proposals published by the Department for Constitutional Affairs to amend the fees regulations for freedom of information.

1. We very much welcome the Committee's decision to examine these proposals and welcome the opportunity to submit our views. We trust that the Committee will find our comments helpful and constructive.

2. Clifford Chance is the largest law firm in the world with 29¹ offices in 20 countries throughout Europe, the Americas and Asia. We are regulated in this country by the Law Society of England and Wales.

3. We have advised a considerable number of companies and public sector bodies on making FOI applications and on the implications of the legislation for their activities. We have also made a number of FOI applications on behalf of clients to public sector bodies.

4. We agree generally with the Committee's views, expressed in its report of June 2006, "Freedom of Information: one year on", that the existing fees regime is working well and that changes are not necessary.

5. We query the scope of the review that was carried out by *Frontier Economics* ("the review"). The terms of reference ("the cost of delivering FOI across central government and the wider public sector, alongside an assessment of the key cost drivers of FOI; and an examination of options for change to the current fee regime for FOI") were narrowly focused on the costs of delivering FOI, when they could, and arguably should, have been more broadly drawn so as to look at how the fees regime was working more generally, and at whether it was possible to identify the concomitant benefits arising from FOI delivery. It might then have been able to consider, for example, whether those requests which it identified as giving rise to most costs, also delivered most public benefit. We are concerned that the review was asked to focus on the economic cost of the regime, and was not able to look at the wider context in which FOI operated and the public benefits which have accrued as a result.

6. We were also concerned that, within those terms of reference, the review was further slanted by being asked to consider the impact of four options. One important point which was not given sufficient weight in the review was the number of FOI requests which, before the passing of the Act, would have been made to government in any case and would simply have been responded to as a matter of course. The Act has made some progress towards changing the culture of public authorities to one of disclosing rather than concealing information, but it should not be forgotten that even without the Act the government, and other public authorities, are under a duty to communicate with the electorate and that, in many circumstances, it is in their interests to do so.

7. The review found that a flat rate fee was likely to have "the most substantial impact on reducing the volume of requests". It found however a flat rate fee would be highly unlikely to deter the most expensive cases. Although the review did not say so, it would seem likely that the types of requests identified by the consultancy as not being "in the spirit of the Act" would be discouraged by the introduction of flat fees. (Nor did the review mention that there are existing mechanisms within the Act designed to ensure that public authorities do not have to answer such requests.) No suggestion was made that the most expensive requests were not within the spirit of the Act. Indeed, these requests, which one would assume would include, for example, the request for the Attorney General's legal opinion on the legality of the war with Iraq, or the request for MPs' detailed expenses, would seem to fall very much within the spirit of the Act. From a policy

¹ Includes associate office in Bucharest. Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571. Registered office: 10 Upper Bank Street, London E14 5JJ. We use the word "partner" to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications.

point of view it would therefore seem wrong in principle to choose an option which would have the effect of blocking requests of enormous public interest and within the spirit of the Act, in preference to an option which would block requests identified as not being in the spirit of the Act.

8. For these reasons we believe that the government's review has not adequately scoped the issues, and does not form a sufficient basis for the government's proposals to amend the current legislation on fees, as set out in the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007 ("the draft Regulations").

9. We believe that the inclusion of examination and consideration time in estimating the cost of responding to a request could have the effect of excluding politically sensitive requests. We would therefore oppose this. However, if the government were to proceed with this amendment, we consider it would be advisable to include a "public interest override", so that a request could not be refused on grounds of cost where the public interest in disclosing the information was greater than the public interest in not disclosing, taking into consideration the cost implications. This would go some way in ensuring that requests for eg the Attorney General's opinion on the legality of the war in Iraq and the request for disclosure of MPs' expenses, could not be rejected without at least a possibility of appeal to the Information Commissioner on grounds other than cost.

10. Although the driver behind the draft Regulations appears to be to reduce cost, a number of the administrative provisions being introduced will, we believe, increase cost, and the administrative burden for public authorities. For example, in order to implement draft Regulation 7, public authorities will need to introduce a system for aggregating requests from the same entity or another entity acting in concert, which will entail logging, dating and cross-referencing requests. The calculation public authorities must do in order to work out whether the request will be exempt because of cost will also be much more complex.

11. We are not entirely clear what purpose will be served by the proposal to aggregate unrelated requests from the same entity, and to allow public authorities to refuse if they are from the same organisation. This provision is likely to disproportionately penalise journalists and pressure groups using FOI as a tool, as well as specialist FOI agencies and law firms making requests on behalf of multiple clients. Guidance on the Act makes it clear that the legislation is intended to be "motive-blind", ie that the identity of the requester is not relevant to whether the information will be disclosed or not. To take advantage of this, a number of companies and other entities ask a third party to make the request on their behalf. Law firms are also asked to make such requests because of the legal and technical nature of the replies received from public authorities which may entail, for example, detailed expositions of the law of confidentiality where section 41 is invoked. Public authorities are advised to seek legal advice when the section 41 exemption may be applicable.

12. The proposal to allow aggregation is also unnecessary. Provision already exists in the legislation to refuse to respond to vexatious requests and this has been translated by the Information Commissioner to include vexatious requesters. Therefore, the ability to refuse multiple requests from one source already exists. The proposal in the draft Regulations will simply put a new onus on public authorities to monitor and record requests and will penalise requesters, many of whom may wish to remain anonymous, simply for exercising their rights under the Act as well as those who act on behalf of requesters.

13. Shortly before the Act came into force, the Lord Chancellor, Lord Falconer, spoke² of the importance of the Act as a means of securing better government through transparency, accountability and honesty, as well as a means of achieving greater democratic involvement and greater confidence in government. We believe that these valuable public interest benefits would be considerably undermined were the Regulations to be implemented as drafted. If implemented, they would restrict the effective operation of the Act in areas in which it has been most significant and most effective.

Patricia Barratt

February 2007

Evidence submitted by The Odyssey Trust

1. The Odyssey Trust³ is a non-profit company limited by guarantee which seeks to promote good governance and the effective protection of human rights. The Trust is directed by Lord Lester of Herne Hill QC, together with his Parliamentary Legal Officers, Kate Beattie and Bonita Meyersfeld.

2. This document responds to the call by the Constitutional Affairs Committee for evidence regarding the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007 ("the proposed regulations").

² See for example his speech at the Law for Journalists Conference, 26 November 2004 at <http://www.dca.gov.uk/speeches/2004/lc261104.htm>

³ For more information about the work of the Trust, please visit www.odysseustrust.org.

A. EXECUTIVE SUMMARY

3. Public access to government and other official information is a civil right. The right of public access must not be restricted arbitrarily or unnecessarily. Because individuals in a democracy have a right to transparent, open and good government, the enjoyment of the right of public access should not be conditional upon the ability to pay a fee, and any charges must be reasonable and objectively justifiable.

4. There are serious deficiencies with both the current regulations and the proposed regulations. The deficiencies relate to the way in which fees are calculated, aggregated and charged, and the absence of effective safeguards against abuse.

5. The proposed regulations go far beyond remedying the concerns raised by the Department of Constitutional Affairs (“DCA”) and create fundamental problems. Public officials would be endowed with excessively wide powers to reject applications for access to information, about the workings of government and other public bodies irrespective of the substance of the applications and the public interest to which they may relate. This would frustrate the object and purpose of the Freedom of Information Act 2000 (“the Act”).

B. BACKGROUND

6. In January 2005 the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 came into force. These contained the following key provisions:

- (a) Public authorities may refuse to comply with a request for information if the request would exceed “the appropriate limit” which, in the case of central Government and Parliament is £600 and £450 for the wider public sector.
- (b) In determining the appropriate limit, public authorities may include the costs of (i) determining whether the authority holds the information, (ii) locating the information, (iii) retrieving the information and (iv) extracting it.
- (c) The standard rate for a public official’s time is £25 per hour.
- (d) When estimating whether a request will exceed the cost threshold, public authorities may aggregate the costs of two or more requests received from the same person or from persons who appear to be acting in concert or in pursuance of a campaign, provided the requests relate to the same or similar information and are received within a period of 60 working days.

7. The DCA commissioned an independent economic review of the 2004 regulations, which was published in October 2006. The review concluded that:

- (a) a small percentage of requests place a disproportionate burden on the resources of public authorities, particularly in respect of officials’ time; and
- (b) a small number of regular users of the Act account for a substantial proportion of the overall costs of delivering freedom of information.⁴ The DCA, however, does not specify the nature of the burdensome requests. It could well be that the information that the DCA finds is costly to review and disclose is in fact information of public interest.

8. In response to the review, the DCA drafted new regulations, incorporating the review’s recommendations. The DCA has requested comments concerning these regulations.

C. PROBLEMS

9. We have four main objections to the proposed regulations:

- (a) They would preserve the public authority’s discretion to refuse information requests outright solely on the ground of burdensomeness.
- (b) Fees would be imposed irrespective of the public interest in the information.
- (c) Broad discretionary powers would be delegated with wide scope for abuse and inadequate safeguards.
- (d) By imposing hefty fees, legitimate as well as vexatious claims would be affected. Requesters making genuine claims might not be able to meet the costs and, therefore, might well be deterred from pursuing them.

Problem One: The new regulations do not address a fundamental flaw in the current scheme that allows public bodies to refuse any information request if responding to the request would take too much time.

10. Currently, if a request exceeds the cost limit, the authority may:

- (a) Refuse to supply the information altogether; or
- (b) Supply the information provided the requestor agrees to pay the full cost ie £600/£450 plus the surplus.

⁴ Department of Constitutional Affairs, Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007 Consultation Paper, paragraph 3, page 3.

11. It frustrates the object and purpose of the Act to grant public authorities the discretion not to consider a claim at all if it exceeds the cost level. The cost involved in obtaining information should not bar the claim in and of itself. If a claim is expensive, at the most the requestor should have to make a reasonable contribution towards the costs, certainly where commercial interests are involved.

12. Furthermore, the refusal to consider requests on the grounds of cost is bound to result in an increase of appeals to the Information Tribunal in terms of Part V of the Act. Such challenges would place significant burdens on the Information Commissioner's Office and the Information Tribunal. In this regard, rather than saving time and money, the proposed regulations have the potential to drain further public resources.

Problem Two: The proposed regulations would worsen the current scheme by allowing information requests to be aggregated.

13. The proposed regulation would allow non-similar requests to be aggregated if doing so would be "reasonable in all the circumstances."

14. According to the DCA, reasonableness would be assessed on a case by case basis, taking into account factors such as the disruption to the work of the public authority and if the request is made by a person who, in the past, has made many requests or has been "uncooperative or disruptive".

15. A denial based on "reasonableness" is discretionary, and one that creates a risk of abuse of discretion. This is especially so in light of the subjective nature of the factors that an authority may consider, namely conduct which "has been uncooperative or disruptive."⁵ Claims for information should not be rejected either because they are costly or because the claimant makes frequent requests for information.

Problem Three: The proposed regulations would weaken the current scheme by allowing public authorities to include in their cost calculation the time taken to decide whether or not to release the information.

16. Under the current regulations, an authority may include in its charges the time it will take to check whether it holds the information, find the information, extract it, edit if necessary and submit it. It may not include the time spent in deciding whether the information has to be disclosed under the Act. Often this is the most time-consuming part of handling the request.

17. The proposed regulations would allow authorities to include in their calculation of costs the time for consideration and consultation (in addition to the current cost factors described above).

Problem Four: The proposed regulations would chill the use of the Act. People who make frequent requests and requests which are politically sensitive will be most seriously affected.

18. Politically sensitive requests involve substantial consideration and consultation.⁶ Under the proposed regulations, a request made for a plainly legitimate purpose might be rejected on the basis that it would be too burdensome for the relevant minister or public official to consider. Almost any politically sensitive request could be refused, thereby distancing ministers, civil servants and Parliament from the reach of the Act.

19. As the eyes and ears of the public, news and media bodies are responsible for the transmission of a variety of information. The Act is integral to the service such bodies provide. As the Fleet Street Lawyers' Society has indicated, the aggregation of requests would block a substantial proportion of all media requests.⁷ For example, a newspaper would be limited in the number of requests its individual reporters could make, with the result that once a request has been made, no further requests to that authority on any subject could be made during a three month period by any other journalist from the same organisation. That is a severe and unnecessary restriction upon freedom of information and expression.

D. RECOMMENDATIONS

20. The only reasons why a request should not be considered are if the request is vexatious or it falls within one of the exemption categories. Section 14 of the Act allows a public authority to refuse to comply with a request for information if the request is vexatious. In addition, the Information Commissioner has provided guidance on how its office deals with vexatious applications.⁸

⁵ Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007 Consultation Paper 28/06, 14/12/2006, page 14.

⁶ See the Campaign for Freedom of Information letter to Baroness Ashton of Upholland, 24 November 2006.

⁷ See Fleet Street Lawyers' Society letter to Baroness Ashton of Upholland, 13 December 2006.

⁸ "The Commissioner's general approach will be sympathetic towards authorities where a request, which may be the latest in a series of requests, would impose a significant burden and: clearly does not have any serious purpose or value; is designed to cause disruption or annoyance; has the effect of harassing the public authority; or can otherwise be fairly characterised as obsessive or manifestly unreasonable." *Information Commissioner, Freedom of Information Act Awareness Guidance No 22, Vexatious and Repeated Requests.*

21. The problems raised by the Government do not need to be tackled by the crude mechanism of imposing increased fees that inevitably will deter and inhibit the exercise of the public right of access to information and of freedom of expression. For this and the reasons stated above, we submit that the proposed regulations should be revised.

22. The DCA should draft new regulations to address the problems it identified as well as the problems noted above. In developing appropriate solutions we recommend that the DCA should have regard to good law and practice in other countries committed to open government and freedom of information.

23. We draw particular attention to the law and practice in the United States, where news media, educational requesters and public interest organisations are treated more liberally than other requesters because of the importance of freedom of information and expression. Such requesters are assumed to seek information of public interest and therefore they are charged only for duplication, and may not be charged at all for search and review costs. Commercial requesters, in contrast, may be charged fees for copying, searching for and reviewing documents (at an hourly rate, based on the level of the government official who does the searching and/or reviewing of the documents for release, as expressed in each public authority's published fee schedule).⁹ All other requesters are charged search fees and duplication only, and they generally receive the first two hours of search time for free, with the result that there is no charge for most simple requests. A requestor would not have to identify itself but if it does it will qualify for the reduced fees. We commend such a system.

24. Review costs should include only the direct costs incurred during the initial examination of a request for the purposes of determining whether the documents are in the possession of the public authority and whether the information must be disclosed.

25. In addition, public authorities ordinarily should charge search fees only to the first requester who seeks particular materials; these fees should be waived for any subsequent requesters, because the search has already been conducted. To the extent possible, information of public interest released to one requester should be posted on the public authority's website. This would reduce demands from different users for similar information.

26. In Ireland, the Freedom of Information Act 1997 originally did not include a fee for filing requests. When the Act was amended in 2003, a charge of €15 per application was added, except for requests for access to personal information. The Information Commissioner's study on the impact of the 2003 changes shows that the introduction of up-front application fees led to a significant drop in applications.¹⁰ Charges may also be levied for "search and retrieval" and copying. Charges may *not* be imposed for reviewing the requested records to determine whether they might be exempt. The search and retrieval charge is currently set at €20.95. No charge may be levied for search and retrieval of records containing personal information unless the request relates to "a significant number of records".¹¹

27. The Irish record illustrates the danger of imposing fees for filing requests. However, while we do not suggest filing fees in the UK, a flat filing fee of €15, coupled with a maximum search and retrieval fee of €20.95 is clearly far less onerous than the current and proposed scheme in the UK.

28. Ideally, there should be no fee for an application for information. Rather fees should be charged only for the "provision" of information.

29. The Freedom of Information Acts of Ireland, New Zealand, Trinidad and Tobago and Australia all require public authorities to assist the applicant prior to refusing a request on the ground of its unreasonableness.¹² The Australian Act specifies a number of conditions which must be met, including written notice and identification of an officer of the public authority or member of staff with whom the requester may consult in order to remove this ground for refusal. Moreover, there is a specific provision that refusal on the ground of unreasonableness is directly appealable.

30. The relevant provisions of the United States Freedom of Information Act read as follows:

"Section 552. Public information; agency rules, opinions, orders, records, and proceedings

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced . . .

⁹ For an example of the fee schedule and guidelines for a federal agency, see the State Department web site at <http://foia.state.gov/fees.asp>.

¹⁰ Information Commissioner's Report, <http://www.oic.gov.ie/en/Publications/SpecialReports/InvestigationsCompliance/File,571,en.pdf>. This report also contains a useful comparative table of charges across a range of English-speaking jurisdictions.

¹¹ Information supplied by Professor Maeve McDonagh, Law Faculty, University College Cork.

¹² "A head shall not refuse . . . to grant a request under section 7 [for unreasonableness] unless he or she has assisted, or offered to assist, the requester concerned in an endeavor so to amend the request that it no longer falls within that paragraph." Freedom of Information Act 1997, as amended 2003, sec. 10(2), Ireland; Official Information Act 1982, sec. 18, New Zealand; Freedom of Information Act 1999, sec. 21(1), Trinidad and Tobago; Freedom of Information Act 1982, sec. 24, Australia.

- (ii) Such agency regulations shall provide that—
 - (I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;
 - (II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and
 - (III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.
- (iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.
- (iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section—
 - (I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or
 - (II) for any request described in clause (ii) (II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.
- (v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed \$250 . . .”

E. CONCLUSION

31. For the above reasons, we submit that the draft regulations proposed by the DCA should be reconsidered and new regulations should be developed that protect the right of the public to access information.

Bonita Meyersfeld

February 2007

Evidence submitted by the BBC

In response to your call for evidence please find attached the BBC's submission to this short inquiry.

This submission also constitutes our response to the Department's Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007.

In addition you requested examples of FOI releases that might not happen under the new Government proposals. We believe that many of the disclosures contained on the site below could have been prevented by the new proposals.

<http://news.bbc.co.uk/1/hi/in—depth/uk/2006/foi/default.stm>

Andrew Scadding

Senior Adviser, Public Affairs, BBC

CONSULTATION ON THE DRAFT FREEDOM OF INFORMATION AND DATA PROTECTION (APPROPRIATE LIMITS AND FEES) REGULATIONS 2007

COMMENTS BY THE BBC

1. INTRODUCTION

1.1 The BBC is in a virtually unique position under the Freedom of Information Act, as a media organisation whose journalists make large numbers of FOI requests and as a public authority which receives many FOI requests. We are therefore aware of both perspectives on these issues.

1.2 We seek to adopt policies of openness and transparency. We welcome FOI as a tool which facilitates our relationship of openness with the public. We also welcome the fact that it helps our programme-makers to put material into the public domain where this is in the public interest.

1.3 We therefore do not wish to see changes to the FOI system which run counter to its spirit and would undermine its achievements and effectiveness. We believe that the government's current proposals would do this and are strongly opposed to them.

1.4 We welcome the fact that the DCA has initiated a formal consultation exercise. However we are disappointed with its narrow focus. We believe that the DCA should also be seeking views on the principle of what it is being proposed, not merely on the details of how to implement it.

1.5 We make some comments on the detailed questions asked. However, this is in the context of our fundamental opposition to the implementation of anything along the lines of the proposed new regulations.

1.6 We do not accept the costings analysis provided by Frontier Economics, which has numerous flaws. However, in this submission we concentrate on the merits and demerits of how the government is now proposing to administrate FOI.

2. EXAMINATION, CONSULTATION AND CONSIDERATION TIME

2.1 We are opposed to the proposal to allow examination, consideration and consultation time to count towards the cost limit. If implemented this proposal would curtail those FOI requests which are most important and of widest public interest. This is because it is generally these requests which are subject to the greatest amount of consideration and consultation. The proposed change is unlikely to affect the mundane, easily answered, routine requests. But requests on topics of significant and extensive public interest tend to be considered at length by numerous officials and ministers, and could easily exceed the proposed cost limit if time spent on deliberation could also be taken into account.

2.2 The proposal would also give public authorities a perverse incentive to employ particularly lengthy consideration and consultation processes for sensitive requests, so as to maximise the chance of refusing them by exceeding the cost limit. In the case of some public authorities this could become a crucial loophole. Inefficient authorities with wasteful processes will be better able to avoid difficult disclosures than decisive and efficient ones. So the proposal would mean that the government could perversely reward inefficiency in public authorities.

2.3 Furthermore the proposal, if implemented, is bound to provoke more time-consuming and expensive internal reviews and complaints to the Information Commissioner. This will reduce any cost savings that are hoped for.

Question 1. Are the Regulations prescriptive enough to ensure consistent calculation of the appropriate limit across public authorities or should they contain more detail? For example, taking into account the differing formats and quantity of information requested, should a standard reference (ie a "ready reckoner") for how long a page should take to read be included in the Regulations or guidance?

2.4 While we are opposed to the inclusion of examination time in the cost limit calculation, we believe that if this is to happen then there should indeed be a standard speed stipulated for reading times. This is necessary to curtail inconsistency and the creation of additional loopholes.

Question 2. Does the inclusion of thresholds in the regulations provide sufficient flexibility, taking into account the differing complexity of requests received?

Question 3. Are the thresholds the right ones to make sure the balance is struck between allowing public authorities to count these activities but not refuse requests on one of these grounds alone?

2.5 We would prefer the regulations to include thresholds and ceilings rather than not do so.

2.6 This is because if the proposals do go ahead we would wish to see their damaging effects mitigated, and thresholds and ceilings would go a small way in this direction.

2.7 For the same reason of mitigating the resulting harm, we would prefer to see the thresholds higher and the ceilings lower.

2.8 However the damage reduction would only be small. In practice, although this is certainly preferable to not doing so, little will be achieved by stipulating separate cost ceilings for consideration and consultation. Sensitive and difficult requests are likely to involve considerable amounts of both consideration and consultation, and, therefore, still exceed the cost limit.

2.9 It is also important to note that while it is better to have thresholds and ceilings than not do so, the increasing complexity of the cost calculations will surely lead to additional internal reviews and appeals to the Information Commissioner. In other words, as the government seeks to ameliorate the damaging impact of the proposals on openness by increasing their complexity, it is reducing the potential cost savings. In our view this is further evidence that the entire approach is wrong-headed and should be abandoned.

3. AGGREGATION

Question 4. *Are the regulations as drafted the best way of extending the aggregation provision?*

3.1 The aggregation proposal—to allow the aggregation of all requests made by any legal person to one public authority within 60 working days—would have bizarre and unacceptable consequences.

3.2 As the proposal stands, It would mean that if one BBC journalist puts one or more requests to a public authority which come close to the cost limit (and implementation of the first proposal increases the chance that just one request would do so), then quite possibly no other BBC journalist would be able to put an FOI request to that authority about anything at all for the next three months. Other major media organisations would be affected in a similar way.

3.3 Paragraph 29 of the Regulatory Impact Assessment notes that the proposal risks having “the effect of imposing rigid quotas” on frequent requesters, “particularly organisations”. This is indeed what would happen. Despite the impression given in the RIA, the proposed criteria for determining reasonableness do not mention the need to avoid imposing rigid quotas on organisations (such as major media corporations) that make frequent requests. These criteria will thus do little to prevent this risk materialising.

3.4 It is certainly better to state the aggregation must be “reasonable” than not to impose this condition, but this is only a very minor step towards mitigating the damaging effects of this proposal. It will still leave public authorities enormous scope to aggregate and thus reject FOI requests which they don’t like, while not bothering to aggregate the ones they have no difficulty with. Our experience suggests that it is likely to be those requests regarded as sensitive and difficult that will suffer.

3.5 Our answer to question 4 is therefore “No”.

Question 5. *Do the factors that need to be taken into account when assessing if it is reasonable need to be explicitly stated in the regulations or can this be dealt with in the guidance?*

Question 6. *Are these the right factors?*

3.6 If this deeply damaging proposal to allow aggregation does go ahead, and guidance is issued on when it is “reasonable” to aggregate non-related requests, we do not accept the right factors are listed and instead believe the following point is crucial.

3.7 The criteria for “reasonable” aggregation should take into account how widely the disclosed information may be distributed by the requester and thus the level of public benefit that follows from the disclosure. If the point of FOI is to promote access to information which should be available to the public, then its public benefits are greatest when that information is distributed most widely. It is therefore less reasonable to aggregate and reject requests from requesters who are likely to make the disclosed information widely and easily available to the general public (and thus maximise the public interest benefit from disclosure) than to aggregate requests from requesters who may keep the disclosed information to themselves or seek to sell it to others at a substantial price.

3.8 We again make the point that any cost savings would be reduced by an increase in internal reviews and appeals to the Commissioner.

CONCLUSION

4.1 The Regulatory Impact Assessment implies that those who would mainly suffer from the proposals are frequent FOI requesters. However in the case of the BBC we believe this is a fundamental misunderstanding. The people who would suffer are in fact our audiences who would be deprived of valuable information that we could no longer provide to them—information which would help hold public authorities to account and which would help facilitate public discussion of and informed participation in decision-making.

4.2 These proposals would dramatically curtail the ability of BBC journalists and others to put into the public domain material which merits disclosure in the public interest. In this way the proposed changes would actually obstruct the aim of increasing transparency and openness in public life that lies behind the Government’s introduction of FOI.

4.3 We believe that FOI has strengthened the BBC’s ability to achieve the objective of delivering greater accountability and transparency to licence fee payers. While our experience of handling requests has been challenging it has also been rewarding. From our perspective as an authority receiving requests we see absolutely no need for the measures that are being proposed.

4.4 We therefore hope the government will think again and withdraw these proposals.

4.5 We intend to make this response public.

Evidence submitted by the XIX Article 19

1. STATEMENT OF INTEREST

1. ARTICLE 19 is an international, non-governmental human rights organisation which works around the world to protect and promote the right to freedom of expression and information. We are well known for our expertise in the area of access to information legislation, and have played an important role in the adoption of a great number of domestic access laws in recent years. We are also a leading member of the Global Transparency Initiative, which has successfully pressured international financial institutions—entities such as the World Bank and regional development banks—into adopting or improving their disclosure policies.

2. ARTICLE 19 is concerned that the proposed new regulations would undo the newly-won benefits of a vibrant freedom of information regime, and on dubious grounds. In our view the overall cost of the FOI Act is modest, the consultation document overstates the savings that would result from the regulations, their enactment would have a disproportionately negative impact on public interest requests and alternative cost-saving measures exist which are less detrimental to the right to know.

2. SUMMARY OF RELEVANT FACTS

3. The Freedom of Information Act was passed in 2000 and entered fully into force on 1 January 2005. The Act was adopted, in the words of the Home Secretary, in order to “transform the culture of Government from one of secrecy to one of openness.”¹³ The Department of Constitutional Affairs (DCA) has praised the “constructive and positive way” the Act has been used and described its operation in its first year as a “significant success”.¹⁴

4. Under current rules, requests for information under the Act can be refused if the cost of processing them exceeds the “appropriate limit”, which has been set at £600 for central Government and Parliament, and £450 for the wider public sector. Costs are assessed at £25 an hour. In calculating the overall cost of a request, regard may only be had to time spent on determining whether the requested information is held, and then locating, retrieving and extracting it. To prevent requesters from circumventing the appropriate limit by breaking up their request, the cost of multiple requests may be aggregated. Aggregation is possible when two or more requests relate to similar information, are received within a period of 60 working days, and are made by the same person, or persons who appear to be acting in concert or in pursuance of a campaign.

5. In December 2006, the Government published a consultation paper proposing to amend the way the costs of processing requests are estimated. Broadly speaking, the existing rules will remain in force, but public authorities will be permitted to take additional factors into consideration when calculating whether a request exceeds the appropriate limit.

6. First, the time spent examining documents, consulting with others and considering whether the information is covered by an exemption will be included in the calculation of the total, up to a maximum of £400 for central Government and Parliament and £300 for the wider public sector. Reading, consulting and consideration costs will not be taken into consideration if they fall below a floor, set at £100 for central Government and Parliament and £75 for the wider public sector.

7. Second, public authorities will be permitted to aggregate unrelated requests if it is “reasonable in all the circumstances” to do so. The Draft Regulations do not elaborate on what constitutes reasonableness, although the DCA proposes a number of possible considerations.¹⁵

8. The proposed changes are based on recommendations from an independent economic review of the operation of the FOI Act commissioned by the DCA.¹⁶ Salient conclusions from this review are that the overall cost of administering the FOI Act is approximately £35.5 million annually; that 5% of requests account for 45% of this amount; and that the proposed measures would lead to annual savings of £11.8 million.

9. The stated purpose of the amendments is to address the top few percent of requests which “are imposing a disproportionately large burden on public authorities.”¹⁷ Under the heading “Types of Requesters”, the independent review of the FOI Act lists a number of examples of frivolous requests, such as one for the total amount spent on Ferrero Rocher chocolates in UK embassies and another for the contact details of eligible bachelors in the Hampshire Constabulary. This has led to a widespread public belief that the amendments are simply designed to put a stop to abuse of the Act. In fact, the four categories of

¹³ Jack Straw, then Home Secretary, on the introduction of the Freedom of Information Bill: *Hansard*, House of Commons Debates, 7 December 1999, col 714.

¹⁴ Constitutional Affairs Committee, *Freedom of Information—One Year On*, June 2006, HC 991, p 9.

¹⁵ Consultation paper 28/06, pp 13–14.

¹⁶ Available online at <http://www.foi.gov.uk/reference/foi-independent-review.pdf>.

¹⁷ Partial Regulatory Impact Assessment, para 20.

requesters identified by the government itself as making up the lion's share of "disproportionate" requesters are journalists, MPs, campaign groups and researchers.¹⁸ It concedes these groups would be hardest hit by the proposed changes.¹⁹

3. THE PROPOSAL IS BASED ON A FALLACIOUS COST-BENEFIT ANALYSIS

10. The Government has rejected the option of leaving the current cost rules intact because "[public authorities] would continue to be obliged to comply with requests that impose disproportionate burdens on them, which would in turn affect their ability to deliver other core public services effectively and efficiently."²⁰ This argument turns on three claims: that the overall cost of the Act is too high; that the 5% of requests which cost more than £1,000 impose a "disproportionate", in other words unjustified burden; and that complying with these requests compromises the delivery of public services.

11. As noted, the cost of implementing the FOI Act is £35.5 million annually or about 67p for every person in England and Wales. Total government expenditure stood at £555 billion in 2006,²¹ of which the FOI Act accounted for just 0.0064%. This seems to us a modest amount and good overall value for a law which has exposed serious inefficiencies in the way larger budgets are used, such as the £96 billion spent on health services.

12. The economic review commissioned by the DCA proceeds from the implicit assumption that all requests are of equal value, meaning that a loss of 5% of requests leaves 95% of the Act's utility intact. But, in practice, it would appear that the most useful requests are often precisely those that are most expensive. The fact that it is mainly journalists, MPs, campaigners and researchers—the groups which hold government to account—who make up the top 5% of most costly requesters is strong evidence of this claim. While the amendments might have the incidental consequence of ruling out some mischievous and genuinely "disproportionate" requests, their principal effect would be to prevent difficult questions from being posed on behalf of the public. Furthermore, there is no evidence to suggest that disproportionate or frivolous requests are concentrated among the more expensive requests and these measures do nothing to address such requests where they fall below the cut-off level.

13. Furthermore, the estimated figure of £11.8 million saved ignores the potential of those public interest requests which will be ruled out to save costs elsewhere in the long run. A robust freedom of information regime fosters efficiency in the public sector, generally by putting civil servants on notice that waste or corruption may not go undetected and specifically by exposing and thus bringing to an end inefficient and corrupt practices.

4. ANY COST-CUTTING SHOULD BE MINIMALLY DELETERIOUS TO THE RIGHT TO KNOW

14. Even supposing that the proposed amendments were based on a sound cost-benefit analysis, their simple economical rationale fails to take due account of the importance of the right to access information, which has been recognised as a fundamental human right under international law.²² The Inter-American Court of Human Rights, which fulfils a role similar to its European namesake, recently held that:

[R]estrictions imposed [on the right to information] must be necessary in a democratic society; consequently, they must be intended to satisfy a compelling public interest.²³

It may be doubted that any court applying this rule would find the nominal savings of £11.8 million (0.0021% of government expenditure) a sufficiently "compelling public interest" to justify a significant curtailment of the right to know.

15. It is a fundamental principle of international law that restrictions on freedom of expression should be carefully designed to cause the smallest possible degree of harm to the right. In the case noted above, the Court stated:

If there are various options to achieve this objective, that which least restricts the right protected must be selected. In other words, the restriction must be proportionate to the interest that justifies it and must be appropriate for accomplishing this legitimate purpose, interfering as little as possible with the effective exercise of the right.²⁴

The European Court of Human Rights has frequently reiterated that restrictions must be proportionate.²⁵

¹⁸ *Ibid*, para 40.

¹⁹ *Ibid*, para 41.

²⁰ *Ibid*.

²¹ Pre-Budget Report 2006, Summary, at <http://prebudget2006.treasury.gov.uk/page08.html>.

²² See Toby Mendel, *Freedom of Information as an Internationally Protected Right*, available at <http://www.article19.org/pdfs/publications/foi-as-an-international-right.pdf>. See also *Claude Reyes et al v Chile*, judgement of 19 September 2003, Case 12.108, Inter-American Court of Human Rights (not yet published).

²³ *Ibid*, para 91.

²⁴ *Ibid*

²⁵ See, for example, *Barthold v Federal Republic of Germany*, 25 March 1985, Application No 8734/79, para 55. See also *Gauthier v Canada*, 7 April 1999, Communication No 633/1995 (UN Human Rights Committee), para 13.6.

16. The setting of an appropriate limit above which requests may be refused is highly unusual and may well be unique to the UK. ARTICLE 19 is not aware of any other law where a similar ceiling operates, with the exception of Scotland, which is governed by a law from the same pedigree. In Australia, the FOI Act specifically states that no financial limit of this kind will be set by the government.²⁶ It is notable that many of the EU's poorer members, including Bosnia and Herzegovina, Bulgaria, Estonia and Romania, will process requests up to any cost, while charging the excessive part to the requester.

17. We believe the appropriate limit is not in keeping with the proportionality principle. It operates as a complete bar to expensive requests, regardless of the public interest therein and regardless of whether the requester is willing to carry the excess part of the cost him/herself. Should the Government insist on reducing the already modest cost of the FOI Act, a less harmful approach from the perspective of the right to know would be to use the power given to it under Section 13 of the FOI Act, which authorises the imposition of fees when the cost of complying with a request exceeds the appropriate limit. Moreover, to ensure that legitimate complex requests are not discouraged, the American model could be followed. Under the US FOI Act, requests from educational, non-commercial, scientific and news media representatives enjoy a discounted rate, while requests deemed in the public interests are processed for free.²⁷

5. COUNTING CONSIDERATION TIME WILL WORK AGAINST PUBLIC INTEREST REQUESTS

18. It is reasonable to assume that, in general, the amount of time required to read, consult and consider increases with the sensitivity of a request. This means that the new rules, far from ruling them out, would actually favour light-hearted requests when compared to serious political issues.

19. The draft regulations permit only time spent determining the applicability of a Part II exemption to be counted as consultation or consideration. While this helps bring some thorny requests back within the appropriate limit, it creates a bias for bland questions since these require proportionately less consideration under Part II. In a similar vein, the cost thresholds (below which consideration and consultation time may not be taken into consideration) and cost ceilings (over and above which any additional costs cannot be counted) would act in favour of straightforward requests while doing little to salvage contentious ones.

20. At a recent adjournment debate in the House of Commons, the Parliamentary Under-Secretary of State at the Department for Constitutional Affairs, Vera Baird, held the media culpable of wasting taxpayer money through "open-ended trawling and unspecific and unfocused inquiry."²⁸ The proposed regulations will do little to reward more targeted requests. Time spent locating, retrieving and extracting information is already counted under the existing rules; consultation time depends on the sensitivity of a request, much less on how well defined it is.

21. The proposed regulations also reward public authorities which engage in excessive consultation or consideration with a view to breaching the appropriate limit so as to deny access. The DCA consultation paper is confident that abuse can be prevented by providing proper guidance to public bodies. We do not share this optimism, which is not supported by the experience of other established democracies with long-standing FOI regimes, such as Canada and Australia. There will always be strong secretive tendencies within government, particularly where corruption, mismanagement or even simple waste is involved, and no amount of guidance will prevent this. We note that for similar reasons the US Freedom of Information Act specifically excludes such costs²⁹ and this was presumably the reasoning behind the current exclusion of such costs from the appropriate limit calculation.

22. It has been suggested that any threat of abuse of the new cost rules is effectively countervailed by the possibility of appeal to the Information Commissioner. This is at best only a very partial solution. The time and cost, including in terms of human resources, of such an appeal act as a significant disincentive to many requests. For many information requesters, especially the journalists who will be amongst those most affected by the new rules, time is of the essence and information loses its value if it cannot be obtained quickly. Furthermore, it will often be very difficult for the Commissioner to identify clearly abuse of this nature. These problems are exacerbated by the fact that the Commissioner is already burdened with a serious backlog of cases.

²⁶ Section 24(1) of the Australian Freedom of Information Act 1982 allows an agency or Minister to refuse a request if the agency or Minister is satisfied that the work involved in processing the request would "substantially and unreasonably divert the resources of the agency from its other operations". However, sub-section (3) further states that while considering this they are "not to have regard to *any maximum amount*, specified in regulations, payable as a charge for processing a request of that kind."

²⁷ Freedom of Information Act, 5 USC § 552 (4)(A)(i).

²⁸ Westminster Hall debates, Wednesday, 7 February 2007. Available online at <http://www.theyworkforyou.com/whall/?id=2007-02-07a.295.1&s= speaker%3A10709#g318.1>.

²⁹ Freedom of Information Act, 5 USC § 552(4)(iv) states that "review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section".

6. AGGREGATION OF NON-SIMILAR REQUESTS MAY BE APPLIED SELECTIVELY

23. The DCA has set out four criteria which public authorities may employ to decide whether aggregation of non-similar requests is “reasonable in all the circumstances”: (1) the level of disruption caused by dealing with the requests; (2) whether the applicant is acting in an individual capacity or for a business or professional reason; (3) the number of requests the applicant has made in the past; and (4) whether the applicant has previously been “uncooperative or disruptive”.

24. Lord Falconer has said that:

our FOI regime is blind to both the identity and purpose of requests. It is rightly blind. The decision whether to disclose must be based on an objective application of the principles to the information requested, irrespective of who has asked, and for what reason.³⁰

This statement reflects the position in a great majority of jurisdictions with access to information legislation.

25. Points 2–4 above contradict the principle of applicant-blindness, since in varying degree they entail value judgements on the person and motive of the requester. In effect, point 2 allows an assessment of whether the information is of sufficient importance to the requester; point 3 permits a judgement of whether he/she has already benefited from the Act enough; and point 4 whether he/she is a good partner and warrants further assistance.

26. The combined import of points 2–4 is that public authorities may place institutional requestors, such as journalists and NGOs, on an “FOI diet” of as little as £600 per 60 working days, although “cooperative” partners may be rewarded with a higher allowance. It is not hard to see how the discretionary element in disclosing information might be used to favour “loyal” reporters.

27. To conclude, the right to information is now widely recognised not only as a fundamental human right, but also as a key underpinning of democracy, a central tool in the fight against corruption and incompetence and an invaluable means of promoting public accountability. To save what is ultimately a very minor sum of money, the government is proposing changes which will undermine the country’s fledgling FOI regime just two years after it was put into place. We strongly urge the withdrawal of the proposed regulations.

Dr Agnès Callamard
Executive Director

February 2007

Evidence submitted by the *Press Gazette*

INTRODUCTION

Press Gazette—the weekly magazine for journalists—has been campaigning extensively since January 12 against the Government’s proposals to amend the Freedom of Information fees regime.

This has attracted massive support from our estimated 20,000 readers in print and from our larger internet audience.

So far just over 900 journalists have signed our e-petition opposing the changes—including more than 100 regional and national newspaper editors. This is an unprecedented response to a *Press Gazette* appeal.

Petition signatories range from the editors of national newspapers to people who edit obscure websites; journalists working in broadcasting, newspapers, magazines, wire services and online; it has supporters on tabloids and broadsheets of all political perspectives.

It has united the National Union of Journalists, the Society of Editors, and the Newspaper Society in opposition to the Government’s plans.

DETAILED CONCERNS

According to the review from the Frontier Economics commissioned by the DCA, journalists’ requests account for approximately 10% of all those sent to central government and between 10 and 23% of those sent to the wider public sector, at a total cost of around £3.9 million per year.

Both *The Guardian* and the BBC have disputed the methodology of the Frontier Economics report, arguing that the actual volume and cost of their requests is much lower than the estimate in the report, which was based on extrapolation from a single week.

Nevertheless, many of the “serial requesters” whose extensive use of FoI the Government hopes to curtail are journalists.

³⁰ See note 15.

So there is great concern among journalists that the draft Information and Data Protection (Appropriate Limit and Fees) Regulations 2007 would severely harm their ability to use FoI to hold public officials to account on behalf of their millions of readers.

Ministers have repeatedly cited the volume of trivial requests that “are not in the spirit of the Act”—such as the total amount spent on Ferrero Rocher chocolates in UK embassies— as justification for the need to reduce the volume of requests being made.

However, instead of reducing requests for trivia of this sort, the effect of the proposed fees regime would be to limit the most controversial requests, which take the most time to process.

The Frontier Economics report acknowledges that these changes would hit “journalists, MPs, campaign groups and researchers” hardest.

As Maurice Frankel of the Campaign for Freedom of Information said: “Simple requests would be unaffected, but if the issue was complex, contentious or just unfamiliar, the cost barrier would loom.”

There is also concern that these proposed rules are open to abuse. Public authorities could easily rebuff unwelcome requests simply by padding the estimated time for processing the request with unnecessarily consultations with lawyers or by packing proposed meetings about the request with additional staff.

The Government proposes to allow public bodies to aggregate multiple, unrelated requests from individuals or “legal persons”.

The DCA confirmed to us that this could be interpreted to mean that entire news organisations could be treated as a single “legal person”. In practice, this would mean that journalists working for any given newspaper or broadcaster would effectively be limited to two or three requests every two months to an entire Whitehall department.

This would have particularly perverse effects on journalists working for large news such as the BBC. A journalist working on Newsnight in London could, for example, have a request to the Home Office rejected because a radio journalist in Scotland, unknown to the first, had used up the corporation’s quota of requests on a completely unrelated matter several weeks earlier.

The Freedom of Information Act was intended to alter the culture of the public sector from a “need to know” to a “right to know” culture, in which the burden of justification is shifted from those seeking disclosure to those seeking to withhold information.

On 22 May 2006, the Lord Chancellor said: “Our FOI regime is blind to both the identity and purpose of requests. It is rightly blind. The decision whether to disclose must be based on an objective application of the principles to the information requested, irrespective of who has asked, and for what reason.”

However, implementation of the new regulations would require officials to establish a system of identifying “serial requesters” and different requesters working within the same organisation—and applying different principles to processing requests from different classes of requesters.

How this will be achieved is not clear. Answering a Parliamentary Question from Oliver Heald MP on 8 February, Constitutional Affairs minister Vera Baird confirmed that “there are no plans to introduce a requirement for people to provide proof of identity” when submitting requests.

ALTERNATIVE RECOMMENDATIONS

According to the Frontier Economics report, these options would increase the number of requests rejected on cost grounds by 17,469 and save a total of £9.9 million.

The Government must strike a balance between openness and limiting the cost of implementing the law. However, its draft regulations attempt only to reduce the total number of requests, without taking into account the varying public interest of various disclosures.

Instead, the Government should draft new fees regulations that deter trivial or self-interested requests but not legitimate requests about matters of significant public interest.

Other jurisdictions achieved a better balance between curtailing costs while concentrating available resources on requests which will result in disclosures of genuine public interest.

The United States Freedom of Information Act, for example, formalises the classification of requesters that is implicit in the Government’s proposals—and assigns a different fees regime to each category.

Requesters in the United States are separated into three categories, each subject to a different system of calculating the cost of officials’ time:

- “Commercial requesters” are charged for searching, deliberation and photocopying.
- By contrast, “educational or non-commercial scientific institutions” and “representatives of the news media” are charged only for photocopying expenses.
- Other requesters, such as private individuals, are charged only for the records search and photocopies.

In addition, all three categories of requesters can apply for a public interest “fee waiver” if they “can show that the disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations and activities of the Government and is not primarily in the commercial interest of the requester.”

The UK Government appears to be adopting regulations that specifically limit the ability of requesters who are most likely to request information of broad public interest, such as journalists, MPs and campaigners.

Enclosed is a selection of articles printed in Press Gazette over the last month which reflect the huge level of concern in Britain’s journalistic community about the proposed FOI changes.

Dominic Ponsford,
Editor

February 2007

Evidence submitted by Which?

Which? welcomes the opportunity to submit written evidence for the Committee’s one-off evidence session on Freedom of Information on 6 March 2007.

1. We are *opposed* to the draft regulations published by the Department of Constitutional Affairs; our submission to the formal consultation is not yet finalised but as soon as it is submitted, I will send a copy to the Committee [*see Appendix*].

2. ABOUT WHICH?

Which? is an independent, not for profit consumer organisation with around 700,000 members and is the largest consumer organisation in Europe. Which? is independent of government and industry and is funded through the sale of Which? magazines and books. For 50 years we have been campaigning to get a fairer deal for all consumers.

3. SUMMARY

3.1 Which? believes that the proposed changes will hinder our ability to be an effective campaigning organisation as we use Freedom of Information Act (FOIA) requests to forge positive change for consumers through our campaigning work.

3.2 Furthermore, we believe that the FOIA has not been in force long enough for the proposed changes to be either justified or necessary.

3.3 A core activity of Which? is to monitor the effectiveness and efficiency of public bodies and relevant legislation. We are recognised and relied upon by our members, the media and the general public for this work. We believe the draft regulations would limit our ability to continue to achieve this.

4. The proposed changes to the FOIA of most concern to us are:

4.1 That the cost of the time it takes to read, consider and consult on FOIA requests will be added to the cost limit (currently between £450–£600).

4.2 That unrelated requests from one organisation or individual over a three month period will be treated as one aggregated request.

5. Complex FOIA requests that Which? has made in the past, which might have been refused under the DCA’s proposals, includes our work on:

5.1 Restaurant inspection reports—“scores on doors”.

5.2 EU subsidies paid to individual farmers.

5.3 Enforcement policies of the Financial Services Authority.

5.4 Details of ministerial meetings with outside bodies.

6. The impact of the proposed changes for Which? could be that:

6.1 Due to the limit of one request per quarter, for our health campaigns work, one request about waiting lists for one medical procedure could prevent us from asking about other waiting lists for 60 days and bar us from enquiring about hospital cleanliness, food, surgical success rates, access to new treatments, medical negligence, ambulance services, facilities for the disabled, interpreting services, clinical trials, investment plans, staffing levels, service cuts and other aspects of patient care.

6.2 Any FOIA request that raises a new and complex issue for the first time is at risk of being refused without consideration of its merits. Such requests are by their nature time consuming at first because they challenge long held practices.

7. We have found that some public bodies, including some central government bodies, are more confident and willing to be open. Those that are less open are more likely to incur higher costs (and use more time) which will, in turn, act to curb FOIA requests.

8. We therefore believe that:

8.1 The aggregation of FOIA requests may well in fact act as a disincentive to those public bodies that are only now beginning to deal effectively with the impact of the FOIA.

8.2 Public bodies should invest in records management systems to make the processing of FOI requests more efficient rather than seek to limit the number of requests.

8.3 Public bodies should seek to pro-actively publish information so that FOIA requests are not necessary.

8.4 Interpretive guidance published by the Office of the Information Commissioner (OIC) is helpful to both requesters such as Which? as well as the public bodies responding. By implementing the proposed changes, such OIC guidance may diminish.

8.5 It may be sensible to require a proportion of FOIA fees to be invested in information technology and records management systems so as to meet current and projected FOIA demands, including adjusting staffing levels particularly in high volume areas, rather than seeking to limit the number of FOIA requests as a management tool.

8.6 The level of complexity in the FOIA could be reduced by amending the list of exemptions.

9. In December 2006, as part of a health related campaign we are currently working on, we submitted a FOIA request to 100 Primary Care Trusts (PCT). We are currently conducting an analysis of the PCTs' responses. Our preliminary finding is that there is a huge variation in both their response and their knowledge of the operation of the FOIA. There is a lack of consistency in both.

10. CONCLUSION

10.1 Which? has found the FOIA to be an extremely important tool in providing reliable information and equipping campaigners with more focused outcomes. We therefore believe that the damage done by these proposals would be out of all proportion to the relatively modest financial savings.

10.2 Which? hopes that the Constitutional Affairs Select Committee will recommend that Parliament should reject the draft regulations if they are ever presented to Parliament.

Mark McLaren

February 2007

Appendix

COPY OF SUBMISSION MADE IN RESPONSE TO DCA CONSULTATION

INTRODUCTION

Which? is the largest consumer organisation in Europe with around 700,000 members. Entirely independent and not-for-profit, we are funded through the sale of our Which? range of consumer magazines and books. We exist to make individuals as powerful as the organisations they come across in their daily lives.

BACKGROUND

The Freedom of Information Act (FOIA) is a fundamental indicator of how well a participatory democracy is functioning in the UK and of how transparent the processes and machinations of government are to its citizens.

Greater access to information which is generated by public authorities on behalf of citizens, and paid for by ordinary taxpayers, is essential for ensuring a highly informed electorate who can meaningfully engage with Government agencies who have a major impact on people's lives.

OUR VIEW

Which? is strongly opposed to the draft regulations. We note that our view is shared by over 100 MPs from all parties in the House of Commons who have supported EDW845 and that the Constitutional Affairs Select Committee in its June 2006 report "*Freedom of Information: one year on*" concluded that the problems they identified with the FOIA would not "*justify a review of the fees regulations, but it would demonstrate a serious shortcoming in some public authorities' records management systems*".

Though we hope the regulations will never be presented to Parliament, we also believe the regulations are so contentious that if they are ever presented to Parliament they should be subject to the positive resolution procedure.

We suggest that, rather than trying to save about one third of the £36 million spent on FOIA—a small sum when compared with overall Government spending—the Government should actually be investing more resources in making FOIA work as intended, including better funding for the Office of the Information Commissioner.

We also believe that the FOIA has not been in force long enough for the proposed changes to be either justified or necessary.

DETAILED COMMENTS

We welcomed the Government's decision to bring into force the FOIA which provided a general right of access to recorded information held by public authorities subject to conditions. We have consistently used the FOIA strategically in a range of areas including health, food, consumer market information and personal finance matters both to ensure the integrity of the work and research we conduct, and also to provide important information and advice to consumers.

It is disappointing now to see that the DCA seems to have taken a determined course toward retreating on the commitment towards a more open and transparent Government. In presenting the proposed draft regulations in this very advanced form we believe the DCA has missed a fundamental step in the consultation exercise, namely the preliminary question of whether it is necessary and/or proportionate to individual and organisational requesters to introduce these changes.

The consultation, such that it is, pre-supposes that the draft regulations have a sound basis for change; we disagree that they do. The proposal to aggregate claims is wrong in principle, and whether intentional or otherwise, will have the effect of reducing legitimate claims at a time when public authorities and the general public are still coming to grips with the operation of the Act. We believe the regulations are questionable and possibly challengeable at law.

In particular our concerns centre around two aspects of the proposals; the proposed new costs thresholds (DR6) and aggregation of claims (DR7).

1. *Draft Regulation 6 (DR6)*

The proposals contemplate a de minimus level below which costs associated with consultation and/or consideration are not to be taken into account. These are set at £100 for central government and £75 for wider public sector. The ceiling costs are to be £400 for and £300 respectively.

These threshold and ceiling provisions would apply separately to consultation and consideration activities to ensure that a request cannot exceed the appropriate limit because of the costs either of consideration or consultation activities alone. This in turn it is suggested is insurance against requests being rejected purely because they are "sensitive" or "difficult".

DR6 also proposes to include new costs which had not been previously included in the costs of compliance with a request under the Act. The new costs proposed are for examining the requested information, costs of consulting with other bodies about the request, and the costs of determining whether an exemption applies, including deciding on the public interest balance for qualified exemptions.

The costs of consideration and consultation time would be estimated at £25 per hour. Costs are to be subject to a reasonableness test exercised by individual authorities as to the estimated costs of each of these activities.

Our objections to these proposals are threefold.

Firstly, FOI should ideally be used as an avenue of last resort for obtaining Government information. Public authorities can significantly reduce costs by increasing the amounts of information they proactively publish on websites, annual reports and other public documents, so that the need to use the act is minimised. We note that many local and other public authorities have increasingly begun to do this. Which? has been greatly encouraged by the decision many local authorities took to publish the hygiene scores of local food outlets, largely as a result of a Which? led FOIA campaign last year.

We are very concerned that these regulations may well act as a disincentive to this positive development. In particular, some sectoral regulators who have been very slow in taking up the spirit of FOIA have more recently begun to engage in dialogue as a result of FOIA requests for information about their individual enforcement activities and initiatives.

Secondly, "any mechanism for disclosing Government information must have regard to issues of access and equity. Policies of charging for Government information run the risk of 'double taxation' if the information was created and collected at taxpayer's expense".³¹ It would be hard for the Government to argue that such information was not generated at the taxpayer's expense.

³¹ Administrative Law, Third Edition 1999: Douglas and Jones, Federation Press at p 81.

It is our view that, even with the assistance of “guidance”, Public Authorities will vary greatly as to how they will apply an assessment of what are reasonable costs which will broadly reflect current levels of inconsistency of knowledge which we have found exist across the public sector in applying the exemptions to the FOIA.

We found that when we sent requests for the same information under both the FOIA and EIR to a large number of local authorities concerning food hygiene inspections, the responses ranged from definite refusals to supply of everything including files. Sometimes these were from neighbouring authorities, thus defying any rational explanation.

The wide margin of discretion afforded to public authorities to deny access to requests on the basis of unreasonable costs creates in our view an avenue which may easily be exploited (or seen to be exploited), another layer of complication and a barrier to access for the requester.

Which? suggests that, if these new costs are to be included, then at least the upper limit of £600 and £450 should be increased. We think that the thresholds should be increased by £400 and £300 respectively so that the new thresholds should be £1,000 and £750 respectively, and be kept under regular review. In addition no request should be refused on the grounds of costs alone.

2. *Draft Regulation 7 (DR7)*

The second issue of paramount concern to us is the proposal to increase the scope for aggregation of claims.

The proposal in its current form will result in a restriction on Which? of the information we seek under the FOIA. We note that DR7 does provide that requests can only be aggregated where it is “reasonable in all the circumstances” to do so. One of the elements of what is reasonable, but which will not be expressed in the regulations, is whether the “requester is an individual who is not making the request in the course of business or professions”.

This would effectively tie up organisations like Which? and other not for profit organisations who represent public interests from obtaining information crucial to consumers and the broader community. We would say that this is an example of a criterion which could become by constant usage a blanket exclusion on the basis of “reasonableness”.

One example of how DR7 would impact adversely on Which? and consequently on consumers is the recent dentistry campaign conducted by our health team.

As you may be aware, Primary Care Trusts (PCT) became responsible for commissioning dentistry services in their local areas in April 2006. The requests are directed at what the PCTs are doing to discharge that responsibility and their responses are being linked up with our market research results for analysis and publication in a forthcoming Which? Dentistry Policy Report. The report will be distributed widely, including to Government and the PCTs themselves to help them identify gaps in the provision of this essential service. The PCTs responses form an important part of a market research exercise investigating patient’s experiences of gaining access to dental services.

Format FOIA requests were sent out on 23 October 2006 to 152 PCTs across the country. Several responses were received within the same month, a further 56 by the New Year, 18 more by end of February 2007 and the balance are still outstanding. The nature of the material sought is not contentious and therefore all requests so far have been allowed.

The Which? team spent some time negotiating the timeframe for the return of the requests with PCT officials affording them extensions of time to consider and gather the information. This courtesy reduced the time pressure on officials allowing them some flexibility and relieving the administrative burden on the authorities to deliver within the statutory time limits.

Significantly, the nature of these requests had the support of the Chief Dentistry Officer Dr Barry Cockcroft who observed that no other body is undertaking this important work at this time.

FOIA is now key to Which?’s ability to carry out rigorous analysis to ensure the integrity of its information. Ultimately though, it is providing a vital function for communities in helping secure greater accountability of public authorities towards their constituents at a local level.

Significantly for Which?, DR7 would allow a public authority when calculating the appropriate limits, to aggregate the costs of requests for information received from the same person or persons who “appear to be acting in concert or in pursuance to a campaign”. This section is aimed at campaigners with no reference to those organisations and individuals who act in the “public interest”. Furthermore, it allows civil servants to make subjective decisions about whether the previous conduct of requesters has been “uncooperative” or “disruptive”.

Our view is that this is a disproportionate response to the issue of how to handle requests for “sensitive” Government information which tests the boundaries of the new Act. This should not result in a sanctioning of requesters, but rather a rigorous evaluation of how best to promote the FOIA and bolster public confidence in the openness of Government.

We believe that the answer therefore lies in greater investment for FOIA/EIR individual staff and departments in training and IT infrastructure to enable them to respond in line with the current legislative regime, rather than seeking to amend the FOIA through the draft regulations.

Mark McLaren

March 2007

Evidence submitted by the National Council for Voluntary Organisations (NCVO)

1. NCVO is the largest general membership body for charities and voluntary organisations in England. NCVO has sister councils in Wales, Scotland and Northern Ireland. Established in 1919, NCVO gives voice to almost 5,000 organisations. NCVO champions voluntary action, our vision is of a society in which people are inspired to make a positive difference to their communities. A vibrant voluntary and community sector deserves a strong voice and the best support. NCVO works to provide that support and voice.

2. The Freedom of Information Act is a potentially powerful tool for citizens, communities and the organisations that work on their behalf. By giving people the right to know what government is doing in their name, the Act can promote more informed debate about public policy issues. For voluntary and community organisations, it can support their campaigning and advocacy work, drawing attention to the debates surrounding their cause.

3. In 2005 NCVO and Ashridge Business School undertook a survey to assess the extent to which voluntary and community organizations (VCOs) were aware of and/or had used the Act at that time. More than half of respondents said that they could see the value of using the Act to support their work, although only nine per cent of respondents had actually done so at that time. However, an overwhelming number of respondents (85%) said they needed more help and support to be able to understand how the Act works and how they could make use of it. This is in line with findings from the Constitutional Affairs Select Committee, which similarly concluded that there “appears to be a lack of clarity and some under-use of the existing provisions”.³²

4. Although anecdotal evidence suggests that the number of VCOs familiar with and using the Act has increased since then, nevertheless a lack of awareness or understanding of the legislation is of greater concern than so-called “frivolous” requests for information. In our view the Act should be made more accessible, not less.

5. As the Constitutional Affairs Committee has argued, the legislation has benefited a wide range of individuals and organizations, who have been able to use information released under the Act in a positive and constructive way. We agree with this and with the Committee’s conclusion that there is no need to change the fees regulations. The proposed changes would severely curtail the ability of individuals, organisations and the media to hold government and other public authorities to account.

6. We are also concerned that the consultation being run is in breach of the Compact, the agreement between government and the voluntary sector. The consultation is not meaningful it asks for comment on the impact of the regulations being in place rather than if they should be in place or not. The Compact consultation code of good practice 5.3 states:

“Consultation has to be a meaningful process if it is to command credibility. Government should make clear in the consultation process those matters which are open to change and those on which it has made a firm decision.”

7. We do not think that this consultation has been set up in a meaningful way. The Government has not made clear whether the proposals themselves are open to change, or even to being abandoned outright, should there be a strong negative response to the new regulations. It is therefore not Compact compliant. For this reason we would like to see the current consultation reissued so that both the process and content are meaningful and credible.

Saskia Daggett

February 2007

³² Constitutional Affairs Select Committee, 2005, *The Freedom Of Information Act One Year On*.

Evidence submitted by Mark Watts, FOIA Centre

1. INTRODUCTION

1.1 I am a co-founder and the co-ordinator of the FOIA Centre, a specialist research company that helps clients use the Freedom of Information Act (FOIA), and other “open-access” provisions, in the UK and overseas. We mainly act for newspapers, but also work for ordinary commercial companies, trade unions, campaign groups and private individuals.

1.2 I am also a freelance journalist. During the 1990’s, I was one of the first journalists in the UK, as head of the *Sunday Business* investigations unit, to make frequent use of FOIA in America and the Code of Practice on Access to Government Information, the non-statutory predecessor to the UK’s FOIA.

1.3 I have never directly campaigned for FOIA, but I believe that working as a FOIA consultant and practitioner since before its enactment in the UK has been an effective way of pressing for greater openness in government.

2. SUMMARY

2.1 The benefits of FOIA to society out-weigh its costs. The Government, as evidenced by its proposed amendments to the fees regulations, fails to appreciate this.

2.2 The Government has failed to make the case that its proposals would save significant costs overall—or at all. The Government would best direct its professed enthusiasm for saving costs in the area of providing information to the public towards its public-relations operations.

2.3 The very FOIA requests and FOIA requestors alleged to be particularly costly tend to be the very ones that are most effective at using FOIA to hold public bodies to account.

2.4 The proposed changes, both in assessing whether a request is too onerous or in extending aggregation, each would have a devastating impact on FOIA’s ability to hold government to account. They would be open to abuse by public bodies. They would result in requests being rejected because they are “sensitive” or “difficult”. They would add to the already excessive delay throughout the FOIA system. They would increase costly challenges. And they would have enabled public bodies to refuse many FOIA requests that, since 2005, have resulted in disclosures greatly in the public interest. (See pars 3.20 to 3.24 for some examples of such FOIA disclosures that I have elicited.)

2.5 The proposed amendments should be abandoned.

3. DETAILED POINTS

The proposals in general

3.1 I welcome the fact that this committee has decided to hold a follow-up evidence session on FOIA, specifically examining the Government’s proposed amendments to the fees regulations, which represent a major attack on “freedom of information” in practice in the UK.

3.2 The Department of Constitutional Affairs is failing to consult properly on the draft regulations as illustrated by the highly restrictive nature of the questions posed in its consultation exercise. It fails even to invite responses on all the changes proposed.

3.3 The changes are proposed on a false assumption, namely the need to curb the allegedly excessive cost of FOIA to public bodies, in particular that said to be caused by a small proportion of requests from professional requestors. It is ironic that the Government chooses to focus attention on the cost of FOIA rather than the cost of its public-relations operations. The department has relied on a flawed analysis, as summarised in the “Regulatory Impact Assessment”, that fails to make the case that the proposed changes would significantly reduce the cost of FOIA to public bodies overall—or at all.

3.4 The department has failed to appreciate the enormous benefits of FOIA, *inter alia*, in helping to hold public bodies to account, in particular regarding their use of public money. Greater openness tends to help keep spending by public bodies in check. The very FOIA requests alleged to be particularly costly tend to be the ones most effective at using FOIA to hold public bodies to account.

3.5 As this committee found in its review of FOIA last year, while FOIA has resulted in much disclosure serving the public interest, it has been beset by excessive delays. These delays plague all stages of FOIA requests, both at public bodies and the Information Commissioner’s Office, caused in part by the need to apply and interpret an already overly complicated piece of newly enforced legislation. The major changes proposed would add to the delays, introducing significantly different regulations that would inevitably result in (lengthy and costly) testing.

The “appropriate limit”

3.6 Additional costs of complying with a FOIA request, in assessing whether a request is too onerous, should not be introduced without a proportionate increase in the “appropriate limit”, the maximum amounts above which public bodies do not have to comply with a request. The proposed changes represent, in effect, a sharp reduction in the resources a public body would be required to spend in complying with a FOIA request. Indeed, they would have enabled public bodies not to comply with many FOIA requests that have resulted in disclosures since 2005 that helped hold public bodies to account and were therefore greatly in the public interest. Moreover, the proposed changes will impact far more requests than merely, in relation to central government, the 5% said to cost more than £1,000. The department claims that it is trying to tackle the problem of these kinds of requests: if so, it should accompany properly drafted changes to cost requests more accurately with an increase in, for example, the central government “appropriate limit” from £600 to £1,000.

3.7 The proposed changes in assessing whether a request is too onerous—the addition of time spent “examining”, “consulting”, “determining” whether any exemption applies to information requested, and “reaching a decision” on whether any such exemption should be applied—and to “aggregation” (and associated “factors”) are vague, would themselves require additional resources to assess (of which the department has failed to take account), and would be open to abuse by public bodies. Any amended regulations must be drafted more precisely. Refusals citing the new regulations, as proposed, would frequently be open to challenge by requestors. This would result in a large cost to public bodies, as they would have to deal with the inevitable challenges to the regulators and, potentially, the courts, all of which the department has failed to take account. Contrary to the department’s claim, this would be a persistent problem because of the delays already in the FOIA regulatory system.

3.8 The department has also failed to take account of the increased cost caused by requestors inevitably seeking more “advice and assistance” under FOIA as a result of the proposed changes than they already do.

3.9 The regulations require much more careful and precise drafting: the proposed regulations are so poorly drafted that they need completely re-writing.

3.10 There is no reason in principle why thresholds and ceilings, if appropriate in relation to consulting and considering are not also appropriate for examining. The inclusion of thresholds and ceilings for examining, comparable to those currently proposed for consulting and considering, would limit the damage slightly in ensuring that a public body cannot avoid compliance solely by examining material.

3.11 The inclusion of the ceilings as currently proposed, although ensuring that a public body cannot refuse complying with a request solely because of the costs to it of either consulting or considering, fail to prevent enabling public bodies readily to avoid complying with FOIA requests in part using either or both of these new devices. If a public body were to claim that a request requires the maximum allowable amount of consulting or considering, then there would be very little margin left to cover all other costs. Moreover, if a public body were to claim that a request requires a lot of consulting and considering, it would be able to refuse to comply with a request solely on this basis. As a consequence, and contrary to the department’s claim, requests would be rejected in either scenario, principally or solely, because they are “sensitive” or “difficult”.

3.12 The proposed changes to allow public bodies to impose charges for “consulting” and considering, without limit, would be open to abuse. There is no justification for allowing public bodies to impose these additional charges on FOIA requestors.

3.13 The damaging effects of the inclusion of consulting and considering would be slightly reduced with a reduction in the ceilings, which are best set at a per centage of the maximum limit for all costs (which should be increased to at least £1,000 for central government requests): I believe that it should be no higher than 10% for each.

Aggregation

3.14 I reject the idea of aggregating requests on different subjects from one requestor, or requestors alleged to be working in concert or in pursuance of a campaign, in assessing the costs of requests. The proposed change would particularly hinder media organisations and freelance journalists, who in effect make requests on behalf of the public at large, and other professional requestors (such as research companies and lawyers), who make requests on behalf of members of the public otherwise unable or unwilling to negotiate the complexities of FOIA. These types of requestor have proven to be most effective at using FOIA to hold public bodies to account on behalf of the public. Curtailing such requestors would therefore have a hugely damaging effect to the public interest. I have no doubt, given the evidence previously given to the Committee by the BBC, that members are fully aware of how media organisations have used FOIA to inform articles or great public interest. The FOIA Centre, which often works for media outlets, has had comparable success, and examples can be seen on its website at www.foiacentre.com. Had the proposals on aggregation already been in force, then many of the FOIA discoveries of significant public interest that were unearthed by the BBC and other media organisations would have remained hidden from public view. (See pars 3.20 to 3.24 for some examples of such FOIA disclosures that I have elicited.)

3.15 Under the proposals, public bodies would be able to deal with more media enquiries than they currently do only as FOIA requests, then aggregate such requests from a media organisation or freelance journalist and so refuse to deal with such enquiries at all. This would have the extraordinary consequence of FOIA tending to make public bodies in the UK less accountable than before FOIA was introduced.

3.16 The Office of the Information Commissioner has highlighted, and the recent *News of the World* case has demonstrated, how newspapers frequently obtain confidential personal information illegally. I am the author of *The Fleet Street Sewer Rat*, a book published in 2005 detailing how newspapers used Benji “the binman” Pell to obtain confidential information stolen from rubbish from professional advisors to notable people. While I have long argued against such information-gathering methods at or beyond the edge of legality, I have pointed out that newspapers in the UK employ these techniques because of its culture of secrecy. While that is no justification for routine use of illegal information gathering, a society that increasingly rejects such methodology must embrace “freedom of information”.

3.17 As a FOIA consultant, I spend a lot of time limiting the aspirations of newspapers, members of the public, and others asking for my assistance in seeking information under FOIA. For every request that I have filed on behalf of someone, I have also persuaded someone that filing some request or other would waste everyone’s time (including that of the relevant public body) thus stopping that request from being filed. The same affect applies to “reviews” and “complaints”. Curtailing requests from professional requestors, such as research companies and lawyers, would result in public bodies seeing a large number of time-wasting “unsifted” requests, and, indeed, having to provide members of the public with a good deal of assistance with FOIA that professional requestors, such as research companies and lawyers, currently provide. Again, the department has failed to take account of this.

3.18 Having stated my opposition to the aggregation proposals, I regard it as being imperative that the extended aggregation provisions do not apply to: journalists, media organisations (whether they publish newspapers, magazines or online, or broadcast on television, radio or online), professional researchers, research companies lawyers, and law firms. I am conscious that this raises difficulties about who or what qualifies under most of these categories, and I re-iterate my view that the best course is to abandon the aggregation proposals.

3.19 The aggregation proposals also change a fundamental principle of FOIA that the interests of the requestor is irrelevant to the decision as to whether the requested information should be disclosed. This principle should not be overturned in the underhand manner proposed and represents a further reason why the aggregation proposals should be abandoned. This is reinforced by the fact that even under the flawed analysis commissioned by the department, the saving that would allegedly be achieved by the aggregation proposals would be highly marginal.

Examples of requests

3.20 I have made many FOIA discoveries of significant public interest, the vast majority of which were made on behalf of newspapers. Examples can be seen at www.foiacentre.com/news.html. Some would have been kept hidden from public view if the proposed amended fees regulations had been in force since January 2005, and I cite four examples below.

3.21 One example concerned the Department of Constitutional Affairs itself. The background to the request was that I did not believe that Michael Burgess, then the coroner for the inquest into the death of Diana, princess of Wales (as well as then the Coroner for the Royal Household) had proper jurisdiction. I formed this view from my knowledge of coroners’ courts dating from my experience as an evening newspaper reporter. Therefore, on 18 January 2006, working for a newspaper, I filed a FOIA request to the department for “copies of documents relating to the choice of coroner”. The department granted itself an extension 10 times to consider the possible application of an exemption: it plainly would have used the amended fees regulations to evade disclosure in this case if they had been in force: regardless of whether such use was in fact justified. In the event, on 21 July 2006, it partly complied with my FOIA request by releasing a “summary” of information stating that Michael Burgess’s predecessor as Coroner for the Royal Household, the late Dr John Burton, had wrongly assumed jurisdiction in that capacity on the false basis that Diana would be buried in Windsor Castle (I still await the rest of the department’s response to my FOIA request of more than a year ago). Therefore, as I suspected, Michael Burgess did not have proper jurisdiction. Coincidentally, on the very day of disclosure, in response to my FOIA request some six months earlier, Michael Burgess announced his resignation as coroner for the Diana inquest. An account of this episode can be seen at www.foiacentre.com/news-diana060724.html. The FOIA disclosures were reported in the media, although the resignation itself attracted far more attention than the jurisdiction issue.

3.22 The Legal Services Commission took nine months to comply with my request for payments it had made to Cherie Booth QC and to Matrix Chambers. An account of this can be found at www.foiacentre.com/newscheriebooth051221.html. The disclosures were widely reported in the media. The Legal Services Commission said that the delay was caused by the difficulties in collating the information requested. This example illustrates that, because of typically chaotic information-management systems, public bodies can find it extraordinarily difficult to comply with straight-forward requests for information. As a consequence, many FOIA requests would fall foul of the proposed changes because of the inadequacies of public bodies’ information-management systems. The Department of Constitutional Affairs blames

FOIA requestors for failing to make well-focused requests even though public bodies are often unable to comply efficiently with even well-focused requests. Another manifestation of poor information-management has been illustrated by the difficulties the Home Office has had in dealing with data on overseas convictions. The Government should, for many reasons beyond FOIA, direct attention to overhauling public bodies' information-management systems. One by-product of this would be to make it much easier for them to reply to FOIA requests.

3.23 Similarly, Safety Camera Partnerships typically found requests for data on the proportion of speed-camera housings that actually contained cameras difficult to supply, and would no doubt have used the amended fees regulations to refuse disclosure: regardless of whether such use was justified. In the event, the data showed that, as tighter restrictions were imposed on the use of speed cameras, there had been a sharp rise in the proportion of speed-camera housings actually containing cameras. An account of the findings can be seen at www.foiacentre.com/newscameras050721.html. *The Sunday Times* also ran an article on the disclosures.

3.24 Another example concerns FOIA requests that I made on behalf of the parents of a child alleged to have suffered debilitating adverse reactions to the MMR triple-vaccination. I requested the minutes of various meetings held at the Department of Health. The requests resulted in a tortuous process, in which some minutes were said to have been inexplicably misplaced or destroyed, and extensions were claimed to consider possible exemptions for others. The department would have been able to use the amended fees regulations to evade disclosure if they had been in force: regardless of whether such use was justified. In the event, the department did disclose, with redactions citing exemptions, the vast majority of the minutes requested. And they reveal that the UK Government received a series of alerts from overseas about serious adverse reactions to the MMR vaccine, including meningo-encephalitis, prior to introducing it. I am currently preparing to write about these MMR disclosures for publication.

4. RECOMMENDATIONS

4.1 The proposed amendments should be abandoned.

4.2 Reforms to FOIA are needed to make it more effective at holding government to account. The most important area for reform is the Office of the Information Commissioner, which must have sufficient resources to clear the backlog of complaints.

February 2007

Evidence submitted by Brian Deer

This email summarises my experience, as an investigative Sunday Times newspaper journalist and Channel 4 television reporter, of the Freedom of Information Act 2000. I'm in no doubt whatsoever that the government's present stated proposals would neuter the act's substantive intended, purpose, whilst leaving a genuine problem unresolved. In addition to various Sunday Times reports, I've produced two Channel 4 investigative documentaries, which relied significantly on FOIA disclosures:

1. DISPATCHES: MMR—WHAT THEY DIDN'T TELL YOU (TX NOVEMBER 18 2004)

From the outset, this investigation, into the source and basis of what has become a worldwide alarm over the safety of the MMR vaccine, was dependent on documents released to me under FOIA: including releases made prior to the act's formal implementation, where public bodies followed guidance from the Lord Chancellor that its provisions, where possible, should be adhered to before implementation. Releases included those from the Legal Services Commission, a strategic health authority, the Medical Research Council, the Science Museum, an NHS hospital trust and a university. In some cases, applications were made post-broadcast, in the face of, unwarranted and discontinued, complaints.

I'm in no doubt that without voluntary releases of information in accordance with the act's provision, the public would remain seriously misinformed on the MMR issue. At stake is the safety of children by means of vaccination: a matter of rarely-paralleled public interest and concern.

2. DISPATCHES: THE DRUG TRIAL THAT WENT WRONG (TX SEPTEMBER 28 2006)

This programme focused on events at the Northwick Park hospital in March 2006, where six volunteers were seriously injured in a test of an experimental monoclonal antibody. Media coverage, including my own, was pivotally dependant on initial releases by the Medicines and Healthcare Products Regulatory Agency of complex technical information, following numerous applications from press and broadcasters. I made a successful supplemental request, appealing MHRA redactions of key, highly complex, passages of documents, which facilitated onscreen questioning of the agency's chief executive. In addition, I obtained a substantial quantity of material from the hospital's ethics committee, without which key inferences couldn't have been drawn as to responsibility for the incident.

Issues arising from the government's proposals

The public interest—and indeed, I think, democracy—is well served by journalists having access to information that's as accurate and complete as possible. The hallmark of both of my Dispatches programmes was the role of a reporter—ie myself—who strived to be a trustworthy guide to complex, contentious and potentially defamatory issues. Such journalism would be irreparably hampered were the government's proposed restrictions to be implemented.

Among other things, in my experience, the act has led to:

- (a) The opening of hospital ethics committee files. This has been a major advance, for the first time revealing the basis for decisions intended to protect from harm participants in medical research. Prior to the act, nothing was released by these committees, which invariably claimed blanket confidentiality for their decision making.
- (b) Releases of documents from the MHRA. In some cases, disclosures to me have run to hundreds of pages—requiring highly technical redactions by specialist staff, often tasked with the responsibility of balancing the public's right to know against legitimate—and legally protected—commercial confidences. Such releases have, for the first time, allowed considerable public scrutiny of the approval, safety monitoring and regulation of medicines.
- (c) Releases of hospital and university documents. These have made it possible to understand the operations of public bodies responsible for enormous slices of public spending, as well as, in my own work, to expose serious misconduct over the treatment of children involved in the MMR matter.
- (d) A release to me by the Medical Research Council. This made it possible to identify critical information on misconduct associated with the fabrication of purported evidence linking the MMR vaccine to autism, and to refer this for investigation by the General Medical Council.

Most of my applications have involved extensive, complex, material—often requiring considerable, fine-detail, redactions—that would likely fall foul of the government's plans to (a) incorporate “thinking time” into the £600 limit for the cost of applications, and (b) aggregate applications by any one individual or organisation for the calculation of the costs limit.

In my view, on vital issues of concern, key public bodies, especially government agencies involved in medicine and science, would be substantially exempted from the act, since most applications of genuine merit, such as mine, can be expected to take considerable time to responsibly redact and process, well in excess of the scope now envisaged by the Department for Constitutional Affairs.

I've made several other applications under the Act. Among these was an application to the MHRA concerning the drug Vioxx. My application was vigorously opposed by the drug company Merck, which was given an opportunity to comment (on grounds that the material might be challenged as commercially confidential). This application was delayed for months, and triggered a considerable, legitimate, expenditure of staff time. If the government's plans were implemented, applications which are opposed by interested third parties, or which might be expected to be opposed, would be at risk of being routinely disqualified.

Public bodies have referred several of my applications to lawyers. Self-evidently, reference to lawyers greatly increases the cost of processing the application. In complex matters, the risk arises from the government's proposals that public bodies who don't wish to disclose information may find an escape by merely contemplating the necessity of obtaining legal advice. Time and money may also potentially be expended, and hence incorporated into calculations, by seeking advice from the Information Commissioner.

Any rise in the number of applications rejected under the government's new proposals can only be followed by a substantial increase in the number of complaints to the Information Commissioner. I should say that two of my, strongly public-interest, applications over MMR, submitted on the first day of the act's formal implementation, are, more than two years later, still awaiting the commissioner's rulings. Thus, one upshot of the current proposals is likely to be an appeals machinery which may deliver information, if at all, so long after the application was first lodged that any eventually-released information becomes moot for the passage of time.

Genuine problems with the 2000 Act

I think it's important that the constitutional affairs committee recognises that there are difficulties arising from the act, which are of legitimate worry. Perhaps, there's a parallel with chairs in bookstores. In the United States, it's normal to be able to sit in a bookstore and read a book. In the UK, some customers seem to behave differently, given the opportunity. In essence, they pig out on free magazines, and whathaveyou, but don't really buy anything. In response, it seems to me, Borders, for example, has tended to cut back on comfy chairs. Similarly, with FOIA. It works well in the United States, and is a staple of the democratic process. But—possibly because the novelty hasn't yet worn off in Britain—there are a applicants who, I've personally observed, abuse the system.

There are countless FOIA timewasters, who will fire off an officious 50-word email, and set in train activities in public bodies that can consume many days of valuable staff time. What the applicant seeks is often related to some hobby-horse, of no interest to anybody but themselves. They'll ask the wrong questions, or approach the wrong body, make repeated requests, which are sometimes little more than vexatious, and thus squander cumulatively consequential public resources. I don't believe that many such persons are journalists.

Because FOIA requests are usually in nonstandard form, they often trigger disproportionate bureaucratic issues at the receiving authority. Recently-retired professionals (especially doctors) can be the worst for problem behaviour, as can persons involved in petty spats. It seems that these applicants sometimes have nothing better to do than patronize public authority staff. Academics, too, can sometimes churn out countless FOIA requests, perhaps thinking that the hapless employees of all manner of organisations have no other tasks to get on with.

In short, it's my view that FOIA + universal email is the real culprit for any legitimate problems the Government is seeking to tackle. I think it's worth recognising these problems in order to find a workable way forward.

A potential proposal for change

Under the data protection act 1998, applicants may be asked to pay a nominal flat fee of £10. It's my impression that they're almost always asked to do so, even though £10 is unlikely to cover the cost of its own collection. This fee must surely discourage some element of timewasting.

In my view, the constitutional affairs committee might consider adopting the recommendation that all FOI applications should likewise be subject to a flat fee (if necessary as a minimum "gatekeeping" fee). I would think that a great many armchair applicants, who have no real public interest motive, would be discouraged from unnecessary applications if they had to pay, say, £20, irrespective of what may later be legitimately billed by the public body. Even journalists, required to execute the clerical exercise of issuing a cheque, would likely think twice before tapping out a memo to a public body that perhaps wasn't wholly necessary.

As someone with extensive practical experience of the act (including three complaints to the commissioner, with one adjudication published), I can assure the committee that the government's plans would very seriously hamper important public interest inquiries. If curtailing investigative journalism is not the government's aim, then ministers should abandon the plans as proposed.

February 2007

Evidence submitted by Mrs Josephine Hyde-Hartley

It's about the meaning of "frivolity". I am concerned, as a disabled citizen that due to a clumsy and awkward approach, our requests can be too easily condemned as "frivolous", "scandalous" or even "wanting prosecution". We should remember that what gets classed as "frivolous" by one person, might be another person's very serious concern about "human rights", and be their sincere attempt to enact them.

Can we please bear in mind that all these IT systems are very new, as is the FOI Act itself, and we are all learning how to make the most of what we have got.

I should like to suggest that when things get "frivolous", citizens could be directed to the local level of governance, for example local councillors, where we might be able to sort out an appropriate "LINK" facility, if easier to clarify matters.

I am personally very much interested in the potential of our IT systems, in combination with the latest policies and facilities, to be used proactively in this way. Of course, I need my skills escalating appropriately, therefore I am submitting this message as an apology to stakeholders who might be scandalised.

In any case, we should be primarily concerned to put the interests of the citizen, first, in the most open and accountable, transparent and straightforward manner.

This would make a positive difference to our feeling that we "can't do right, for doing wrong".

Luckily our Government's latest campaign, to be called "Human rights: Common values, Common sense" (<http://www.dca.gov.uk/speeches/2007/sp070209.htm>) should help us all deal better with information on the front-line.

February 2007

Evidence submitted by Bail for Immigration Detainees (BID)

1. Bail for Immigration Detainees is a registered charity that exists to challenge immigration detention in the UK. Since 1998, BID has worked with asylum seekers and migrants, in removal centres and prisons, to allow them to exercise their right to apply for bail. BID:

- Makes free applications for release, on bail or temporary admission, from immigration detention for asylum seekers and migrants.
- Runs bail workshops in detention centres, publishes a Notebook on Bail and legal bulletins providing information to detainees to empower them to make their own applications for release.
- Encourages legal representatives to make bail applications for their clients, by way of training and the “Best Practice Guide to Challenging Immigration Detention”.
- Carries out research and policy work to push for the use of detention in the UK to be in line with domestic and international law and human rights standards.

2. In addition to detention for the purposes of removal from the UK, current detention policy allows for children in families to be detained, and for newly arrived asylum claimants to be detained for the fast processing of their asylum claim. Official figures show that upwards of 30,000 people, including 2,000 children, are detained each year. BID has published evidence about inadequacies and injustices in detention over the past four years.³³ There is also significant body of evidence documenting problems and human rights concerns about the detention of asylum seekers, particularly the most vulnerable; children, torture-survivors and the mentally ill. For example, HM Inspectorate of Prisons reports over a number of years, comments by the EU Human Rights Commissioner, reports into disturbances and deaths in detention by the Prison and Probation Ombudsman, and research by Amnesty International and Save the Children (to which BID contributed).

3. BID is concerned about the proposed limitations on the Freedom of Information Act (FOIA). The deprivation of liberty of asylum seekers and migrants for the administrative convenience of the State is a matter of public concern and is also contentious. A key part of our work is ensuring that the use of immigration detention is transparent and that detaining authorities are accountable. Whilst there remain significant areas of detention policy and practice that are not open to scrutiny, the implementation of the FOIA has greatly improved the public availability of information about detention. Prior to the implementation of the FOI Act, key information such as the number of children detained each year, the outcome of detention and the cost of detention was not available to public or parliamentary scrutiny.

4. BID has made a number of FOI requests to the Home Office and the Department for Constitutional Affairs since the implementation of the Act. On average, BID makes two or three requests a month but, due to the specialised nature of our work, these tend to be to the same two Government departments. We are therefore concerned that the proposals to allow authorities to aggregate requests may severely limit our ability to obtain important information. In BID’s view, the proposals will have a disproportionate impact on specialised research, advocacy or policy-focused charities as the nature of such work means that multiple requests are made to the same authority.

5. BID has used the FOIA to obtain information about the use of detention which has resulted in disclosure of information that has contributed to public debate, scrutiny and accountability, including by parliamentarians. For example, we have obtained information about:

- the detention of children under Immigration Act powers, including outcome of detention, age of the children, the length of their detention;
- asylum appeals lodged by men and women in the detained fast track, including the outcome of appeals and whether detained appellants were legally represented or not;
- the number of bail hearings made by detained asylum seekers and migrants and the outcome of such hearings; and
- disclosure of the evaluation report of the pilot phase of the detained fast track at Harmondsworth Immigration Removal Centre (IRC).

Much of this information has been used to submit to parliamentary inquiries, for example, the Joint Committee on Human Rights recent inquiry into asylum seekers.

³³ “Working against the clock: inadequacy and injustice in the fast track system”, by BID, July 2006.

“Fit to be Detained? Challenging the detention of asylum seekers and migrants with health needs” by BID, including a report by Médecins Sans Frontières, May 2005.

Justice Denied—Asylum and Immigration Legal Aid—A System in Crisis—Evidence from the front line—compiled by BID and Asylum Aid, April 2005.

“They took me away”—Women’s experiences of immigration detention in the UK, Asylum Aid and BID, September 2004.

“A Few Families too Many: The detention of asylum-seeking families in the UK”, March 2003.

Submission to the United Nations Working Group on Arbitrary Detention, September 2002.

“A Crying Shame: pregnant asylum seekers and their babies in detention” A joint publication by BID, Maternity Alliance and the London Detainee Support Group, September 2002.

6. The requests made by BID have been genuinely motivated by a desire to improve scrutiny of Home Office policy. On many occasions BID has to make follow-up requests to extract further clarification or detail on the response provided. Immigration detainees are among the most vulnerable in the UK to abuse and ill-treatment, so their situation deserves the most anxious scrutiny. In addition, this area of public policy is politically contentious and, in BID's experience, the Home Office have sought to restrict the amount of information that is in the public domain about the use of immigration detention. A number of the requests made by BID, if the proposals are implemented, may fall foul of the proposal to take into account the cost of considering an FOI request. BID is concerned that information that is in the public interest may therefore hit the upper cost limit and be refused.

7. BID is opposed to the introduction of the proposed regulations on the basis that they will undermine access to information that is of great public importance about policy areas, such as detention, which engage serious issues of human rights and justice.

Sarah Cutler

March 2007

Evidence submitted by Dr Nigel Dudley

The attached e-mail from the Royal Statistical Society, that I received a few days ago, helps to give context to why I was using the Freedom of Information Act 2000 to try to access e-mails and other information relating to the research work underpinning the outcomes and savings figures in the NAO report. If the NAO can make a factor of 17 mistake in a calculation and endeavour to keep quiet this degree of error in relation to small sums what would it do if it made even larger errors in its calculations that impacted on how wisely and well the taxpayers' money was spent? The NHS computer project is, and like other projects such as the one in Wessex many years ago, going to consume millions/billions in years to come.

If the Freedom of Information Act is altered in such a way as to limit requests, make unreasonable charges for requests, or include time spent by officials and others discussing whether to find or reveal information so as to legitimately be able to cost bar a request then this will not be good in a democratic society where there should be more open government.

We all make errors and in medicine nowadays these are admitted to patients and relatives at an early stage so as to help maintain trust and confidence and avert later much more serious complaints and service failings; the Freedom of Information Act in its current format without the proposed restrictions should be an encouragement to organisations and public bodies, including the NAO, to admit errors at an early stage rather than delay or obfuscate as when the truth is revealed that can be far more damaging than early disclosure. Medicine has learned its lessons and has recognised the potential impact on the public of its less than acceptable behaviours through cases such as Bristol, Neale, Ledward, Shipman and others; have other organisations outside medicine yet learned the lessons?

I hope this addition is helpful for the Committee and places the earlier communications in context and a clearer light as to what was attempting to be achieved with the FOIA requests; the e-mails exchanged between King's and the NAO between December 2005 to the end of February 2006 would have been likely to reveal crucial information as to who knew what and when about any errors in the NAO's/King's research modelling work that underpins the figures in both the NAO and PAC stroke reports. As it was, the use of a confidentiality clause when I made the request to King's College, a contract clause that can be utilised by both King's and the NAO to force me down a lengthy route via the Information Commissioner in relation to something that needs sorting out now before PCTs beginning investing in stroke services, prevented access to important information. Changes in legislation will shift the balance far to far in favour of those organisations and bodies wishing not to act openly and the Committee should be greatly concerned and act in the public interest to limit such a tightening of the Act.

Attachment

DETAILS OF EMAIL SENT BY A COLLEAGUE TO DR DUDLEY REGARDING ANOTHER FOI REQUEST

Sent: 29 March 2007

A Medical Section colleague looked briefly at NAO spreadsheet and suggests as follows:

"I've had a little look at the NAO's spreadsheet (attached to the email) and there does seem to be an error, namely that the cost of surgery is only counted in the 6% (0.3*(1-0.8)) of patients in whom surgery prevents a stroke, so that surgical costs are underestimated by a factor of 17."

You may wish to follow this up directly with NAO.

March 2007

Further evidence submitted by Dr Nigel Dudley

CORRESPONDENCE REGARDING AN FOI REQUEST

Details of email sent to Kings College in response to their email of 5 March 2007

Thank you very much for your response and clarification as to why such information is not able to be provided. I am sure that King's College is aware that there is a very long backlog of cases with the Information Commissioner; that means if I did take up your kind offer of contacting the College's legal compliance unit, wait for its response, and then when not satisfied with that response—as is on the balance of probability likely to be the case judging from this response and the NAO's use of the confidentiality clause to block access to e-mails that would be very helpful in bottoming issues of concern—proceed to contact the Information Commissioner, the College knows as well as I do that many more months, if not years will have elapsed.

The whole point of the Freedom of Information Act was to enable openness of Government; it is disappointing that the NAO's contract clause is being used in this manner; I expect that was not the intended purpose of that particular clause. Going through the legal motions with the Information Commissioner to show that to be the case is not a good use of my time when openness is needed in all of the circumstances of this case so that if information in the public domain is in error that this can be corrected or withdrawn.

The Constitutional Affairs Committee is looking at how the Freedom of Information Act is being used and abused and the tactics that are coming into play to make it more difficult to access information. I expect that the Committee would be slightly surprised to learn that the NAO appears to be less than willing in this particular case to be more open with information, especially information that is not commercially sensitive. I did flag this matter up briefly to the Committee when I submitted a response that has been published by the Committee in its evidence. This update may be of interest to the Committee.

My request to you at King's College was made so as to see what exchanges took place between NAO staff and King's College staff about the figures and statistics in the NAO's and Committee of Public Accounts stroke reports. The spreadsheets and other information obtained from the NAO would strongly suggest that the figures in the two reports about stroke outcomes and savings do not bear the weight of the interpretation placed on those spreadsheet data. This does have a public interest angle as the King's College research paper clearly identified that it could impact on how decisions were made about resource allocation; if the figures in the two reports are not supported by the assumptions and calculations there is a potential for the public, politicians and those commissioning stroke services on behalf of the public to pursue investment of limited health resources in areas of a stroke service that will not offer the best value for money. Under those circumstances money will not have been spent wisely or well and that is a matter of public interest especially as it is the main function of the NAO to see to it that taxpayers' money is put to best public use.

Thank you for your assistance with this matter and for all of your help over the past several months.

Dr Nigel Dudley LL.M. FRCP

Details of email received from Kings College in Relation to an FoI Request: 5 March 2007 09:12

Dear Dr Dudley,

The College has carefully considered your request for information under the Freedom of Information Act. Thank you for giving us an additional two weeks in which to do this. I can confirm that there are no emails or correspondence that we can send you that fall between the periods of the requests.

There is a confidentiality clause in the contract with the National Audit Office which

precludes us from forwarding any emails from them (and in any case the correspondence was primarily that to and from yourself, which you will have already seen). There is no relevant correspondence from Professor Wolfe in existence. The College has a system whereby emails in inboxes are deleted automatically after six months unless they are printed off or saved elsewhere.

If you have any complaints over the way this matter has been handled, you may take this forward by contacting the college's legal compliance unit at the address given at this website: <http://www.kcl.ac.uk/depsta/iss/archives/legal/foi/whatfoi.html>

Senior Assistant Registrar (Quality Assurance),
King's College London

Evidence submitted by World Development Movement

INTRODUCTION TO WDM

1. The World Development Movement (WDM) campaigns to tackle the root causes of poverty. With our partners around the world, we win positive change for the world's poorest people. We believe that charity is not enough. We lobby governments and companies to change policies that keep people poor. WDM is a democratic membership organisation of individuals and local groups.

2. One of WDM's roles is to scrutinise the effects of UK government policy and actions on communities in developing countries. One vital aspect of this work is accessing information on what policies and actions the UK government is pursuing. WDM thanks the Constitutional Affairs Committee for initiating this inquiry on freedom of information and for the opportunity to submit written evidence.

3. An important public interest role played by Non-Governmental Organisations (NGOs) is scrutinising the activities of government. The scrutinising of many government activities requires expertise of NGOs working on particular issues. If NGOs are restricted in their access to information, it is unreasonable to expect thousands of individuals to undertake such scrutiny instead. Below we set out how proposed government changes to the use of the Freedom of Information Act would affect WDM.

COSTS OF FREEDOM OF INFORMATION REQUESTS MADE BY THE SAME INDIVIDUAL OR ORGANISATION TO ONE AUTHORITY TO BE AGGREGATED OVER THREE MONTHS, AND REFUSED IF OVER THE £600/£450 LIMIT

4. WDM submits freedom of information requests to many different government departments. However, one of the main departments we seek to scrutinise is the Department for International Development (DfID).

5. Over the past two years, WDM has been campaigning against the use of DfID aid money to push water privatisation in developing countries, and for greater support to reform public sector water systems. We have also been campaigning for the UK to end the use of economic policy conditions in return for aid, such as requiring a country to privatise a particular company in return for the aid that DfID gives. In March 2005, the UK government announced it would no longer attach economic conditions to the aid it gives. Since then, WDM has sought to monitor how DfID has implemented that policy in practice.

6. Since the Freedom of Information Act came into force in January 2005, WDM has submitted 28 Freedom of Information requests to the Department for International Development. This averages three requests every three month period. Most of these requests have taken at least 20 working days to respond to, and many have been granted extensions to apply a public interest test. If the government change was made as proposed, the number of requests we could make would be significantly reduced.

7. WDM cannot claim that every single one of these requests has produced information we have publicly used. However, this is a natural inevitability of requesting information. We do not know what information we are getting until it is disclosed to us. However, if the number of requests we could make every three months were limited, we would have to try and make uninformed judgements on the most important requests to make. Of course, we cannot know which requests are most important until we are granted access to the information we are looking for. Below we list two examples of the importance of information which WDM has gained.

Example: DFID water work in Guyana

8. In February 2007, WDM was granted access to four audit reports by the consultancy company Halcrow, paid for by DFID, into the performance of Severn Trent Water International in a water privatisation management contract in Guyana. The audit reports show that Severn Trent Water International had failed to meet five of seven objectives set in the contract. By 2005, Severn Trent was meant to have expanded coverage to the Amerindian community in the Hinterland to 52.1%, but it was only 4.3%. Continuity of service should have been 16.75 hours a day, but stood at only 3.09 hours.³⁴

9. The privatisation in Guyana was heavily funded by the UK's Department for International Development. Overall DfID's support to the Guyana water sector for 2002–08 is planned to be £13 million. This included £1,857,662 paid to Severn Trent for their management contract fee up until February 2006, with a further provision of £1 million for 2006 to 2008.³⁵ In March 2006, although DfID already knew that Severn Trent were severely missing most of their targets, DfID defended the project in Guyana, saying the project is "*improving the effectiveness of GWI [Guyana Water Incorporated] management and the way GWI is regulated.*"³⁶

³⁴ Halcrow. (2006). Department for International Development: Determination of Year 3 Performance Against the Targets in the GWI Management Contract. DFID, London. July 2006.

³⁵ DFID. (2006). DFID Freedom of Information Act reply F2006/031 to WDM. DFID, London. 30/03/06.

³⁶ DFID. (2006). DFID Freedom of Information Act reply F2006/031 to WDM. DFID, London. 30/03/06.

10. DfID also funded consultancy work for the Guyana privatisation, including £879,068 paid to KPMG in 1999 which recommended restructuring the water sector and placing it under private management.³⁷

11. It is a matter of public interest how aid money from UK taxpayers is used. A public assessment in this case can only be made because WDM has managed to get information into the public domain through the Freedom of Information Act. It is unlikely such work will be done in the future if the proposed changes to Freedom of Information are made.

Example: DFID research on water provision

12. In May 2005, through the Freedom of Information Act, WDM was granted access to a research paper paid for with £358,582 of DfID money on “Meeting the Water and Sanitation Millennium Development Goal”. DfID had not otherwise sought to publish this information, and it was only made available on the DfID Freedom of Information Disclosures webpage following WDM’s request. At the moment, many pieces of research for DfID are only made available through the use of Freedom of Information requests. Spreading the cost limit across three months would mean WDM would effectively no longer be able to request the outcomes of such research. Again, it is clearly a matter of public interest that research paid for by UK taxpayers should be able to be evaluated and used publicly.

13. The research for DfID stated that countries were off-track in meeting the water and sanitation Millennium Development Goals where “Water sector activities tend to be driven by external agents, eg, donors and IFIs [International Financial Institutions—the International Monetary Fund and World Bank].” Unfortunately, in 2006, DfID awarded a contract to PricewaterhouseCoopers Africa to work on the privatisation of several companies in Sierra Leone, including Guma Valley Water Company—the water utility for the capital Freetown. The planned water privatisation is the result of conditions set by the World Bank and International Monetary Fund.³⁸ DfID’s decision to fund this work runs counter to the research it has commissioned, and there is a clear public interest in this case. But under Freedom of Information Act changes, it is unlikely we would know the results of such research.

THE COSTS OF THE TIME SPENT READING THE INFORMATION, CONSULTING OTHER BODIES AND CONSIDERING WHETHER TO RELEASE IT TO BE INCLUDED IN THE COST LIMIT

14. The proposal to allow the deliberation on whether exemptions apply to be included in the cost limit would also seriously hinder WDM’s ability to access information from government. Of the 28 requests WDM has made to DFID:

- 10 have been granted an extension to judge on whether an exemption is overridden by the public interest test;
- 5 have been refused within 20 working days; and
- 13 have been granted within 20 working days.

15. Given the high proportion of WDM requests which are evaluated against the public interest test, we believe it is likely that this will push many requests over the cost limit which would previously have been granted. The Guyana water request above is an example where a public interest test had been used in the course of gaining access to the material.

16. Furthermore, such a change could breed suspicion that authorities could deal with politically difficult requests by choosing to read, consult and consider to a level where the cost limit applies, automatically blocking publication of the requested information. There is a danger that this change creates the perception of a flexible loophole for authorities where freedom of information requests can be blocked on cost grounds, just because the authority regards publication of the material as contentious.

Example: Request for the Secretary of State’s public engagements

17. In March 2005, WDM requested a list of the International Development Secretary of State’s public engagements between March 2005 and April 2006. The planned response date was extended six times. In the end, WDM was given the information in September 2005, over five months after initially requesting it. The majority of the Secretary of State’s public engagements had already taken place by the time we received the information. We have never understood why responding to the request took so long, and how the public interest test in this case was complicated enough to take five months to adjudicate. However, it is clear that under the government’s proposed changes, such requests would be refused on cost grounds.

³⁷ DfID. (2004). Procurement contracts 1997–2004. Obtained by WDM from DfID through the Code of Practice on Access to Government Information. Received 19/10/04.

³⁸ WDM. (2005). Media briefing: UK support for water privatisation PR in Sierra Leone. WDM. London. August 2005.

FURTHER COMMENTS

18. The Government proposals on changes to freedom of information appear to be driven by cost concerns. The easiest way for governmental authorities to save money would be to make information available as a matter-of-course. Unfortunately, many governmental authorities still seem wedded to a culture of secrecy. WDM believes that there should be a presumption for authorities to automatically publish much of the information we request. For instance, there should be a presumption that the outcomes of DFID research or the details of aid projects should be published. In comparison with DFID, the World Bank provides far more information on the projects it is funding and the research it produces.

19. For now, Freedom of Information requests are a vital tool to force authorities to be more open. The limits proposed on their use will be a damaging blow to the process of making government more transparent within the UK.

20. WDM already believes that DfID have a culture of seeking to deny access to information. Below we list one example. The proposed changes to the Act will give DfID even more room not to respond to requests which are politically sensitive.

Example: Parliamentary scrutiny of DFID aid conditions

21. Parliamentarians in Malawi, Indonesia and Ghana, working with WDM tried testing a 2005 UK government conditionality policy commitment that states; “The UK will make our own aid conditions more transparent by publishing them on DFID’s [Department for International Development’s] website.”³⁹

22. Additionally, the policy states that the UK “aims to increase the transparency around the process of decision making on conditions, the conditions themselves, and the process for deciding to reduce or interrupt aid”. The paper also says, “It is critical there is a full and open national debate in country—including in parliaments and national assemblies—on the relative impacts of different policy options before the government takes final decisions on the way ahead.”

23. Clearly, for meaningful involvement in the development, scrutiny and monitoring of aid conditions to occur, national parliaments in both recipient (and donor) countries need timely access to details of what conditions have been set and proposed. Because details of all the relevant UK aid conditions are not available on the DfID website, in June 2006 WDM and MPs in the global South jointly submitted a request, under the Freedom of Information Act, for all existing and planned conditions associated with UK aid, and joint UK and World Bank support to each country. The MPs also requested information on the actions taken by the UK government if conditions associated with its aid were not met.

24. While the exact responses to these requests varied, they all failed to provide a reasonable overview of UK or joint UK/World Bank conditions, and so effectively denied the parliaments concerned the opportunity to put them under meaningful parliamentary scrutiny.

25. The UK Government stated that:

- In general, only the minority of aid conditions that had been set after January 2006 were available.
- Collating information on what other conditions had been set for each country would cost more than £600, so DfID was not obliged to do so.
- Even if the information requested was collected, it might come under exemptions to the Freedom of Information Act.
- DfID does not hold information relating to conditions which may have been set by other UK Government Departments.

26. DfID’s decision to refuse to provide the MPs with an overview of its activities in their countries indicates a lack of commitment to delivering its policy on transparency and parliamentary scrutiny. WDM and the relevant MPs are now exploring other ways to press DfID to provide the requested information.

Tim Jones

March 2007

³⁹ DFID, Foreign and Commonwealth Office and HM Treasury. (2005). Partnerships for poverty reduction: Rethinking conditionality. (London : UK Department for International Development). March 2005.

Evidence submitted by Intellect UK

1. INTRODUCTION

Intellect is the UK trade association for the IT, telecoms and electronics industries. Its members account for over 80% of these markets and include blue-chip multinationals as well as early stage technology companies. These industries together generate around 10% of UK GDP and 15% of UK trade.

Intellect welcomes this opportunity to respond to the Department for Constitutional Affairs' ("DCA") consultation on the draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007 (the "Draft 2007 Regulations").

We understand that the purpose of the Regulations is to "*ensure that in meeting their obligations under the Freedom of Information Act public authorities are able to better calculate the actual costs that would be incurred in complying with requests for information, to provide the right balance between access to information for all and the delivery of other public services*".

Those Industry representatives who have been involved in our own internal discussion this consultation felt that the consultation and the Frontier Economics "Independent Review of the impact of the Freedom of Information Act" had not made a clear case that reform of the 2004 Regulations is required. Whilst Intellect understands the need to control the cost and impact of Freedom of Information, we are concerned, for the reasons set out below, that the Regulations as drafted are not the best way to achieve the objective of reducing cost. We have therefore suggested alternative proposals later in the paper.

We have also set out in Appendix 1 answers to the questions set out in the Consultation document.

2. ISSUES

- The Regulations are based on the "estimate" of cost and not actual cost. We would like to understand what evidence will be provided to demonstrate how costs have been estimated?
- We believe clear guidance will be required to ensure that estimates are calculated in a clear and consistent manner. The Act is not prescriptive enough to ensure consistent calculations. There should be a template for assessing time.
- There is no apparent requirement to provide transparency around how the estimate is prepared. Time recording is not mandatory.
- There is a question of what evidence will be provided to the Information Commissioner if there is an appeal which is seeking to challenge a refusal to provide information on cost grounds. The Information Commissioner may well issue a decision that requires public bodies to produce accurate cost estimates and provide supporting evidence. The necessary changes to process and training required to implement the new fee arrangements could significantly add to the cost of implementing the Regulations.
- The Independent Review carried out by Frontier Economics would appear not to have had regard to the merits of individual cases. There is a serious risk that requests (albeit costly) of significant public interest and importance will be excluded. There is no mechanism to link the cost with the merits of the request for information.
- There will be divergent opinions and interpretations about what is and what is not regarded as being reasonable. 6(4)(b) is potentially very broad—"any other costs which is reasonably expected to incur for these purposes".
- The potential for the subjective application of these Regulations and interpretation of "estimate reasonably" and "same or similar" may increase the number of internal reviews and appeals to the Information Commissioner. The consultation document acknowledges that internal reviews and appeals to the Information Commissioner are costly. An increased level of appeals to the Information Commissioner would also detract from the consideration of more important substantive issues such as the application of the exemptions and what is now a good pipeline of cases providing useful and important clarity on key issues.
- The supplier community and members of the public have provided information to public bodies in good faith and on the assumption that information will be protected by appropriate application of the exemptions (for example S41 and S43). The approach often taken by many public bodies in their application of the Freedom of Information (FoI) Act has eroded confidence in the protection afforded by the exemptions. The Fee Regulations increase the probability that information will be disclosed without appropriate consideration of the exemptions. Public bodies who wish to comply with the overriding Objective of releasing information may release information without consultation or consideration because they fear proper consideration would push the request beyond the relevant threshold. The increased risk that information will be disclosed without

appropriate consideration of the exemptions could further erode the Industry's confidence with the result that some suppliers may choose not to work in the public sector with the corresponding impact on competition, innovation and value for money.

3. PROPOSALS

Rather than formally introduce these Regulations now, we suggest a pilot of the principles contemplated in the Regulations in a Central Government Department for 6–12 months. Such a controlled pilot would illustrate what cost savings can actually be delivered, how many appeals are generated which in turn provides time for the Information Commissioner's office to prepare for the introduction of the Fee Regulations if they are to become law.

The pilot would also provide time to carry out a more detailed review into the merits of those cases that are said to drive disproportionate cost. It may be that the merits and public interest benefits of long and detailed consultation are so important to be worth the additional time and cost. Lessons learnt during pilot phase could be used to improve guidance to both public bodies and those requesting information, for example (1) more rigorous push-back where request is too vague/broad (2) encouraging rigorous application of S14 of the FoI Act in relationship requests from vexatious requester. We have included additional suggestions in answer to Question 7 of Appendix 1.

4. CONCLUSION

Whilst we understand the purpose behind the proposed Regulations, we believe it is premature to introduce the Regulations in this form and at this time, and would request that consideration is given to our proposals above.

Intellect will be happy to discuss these issues in greater depth with DCA.

Appendix

DRAFT FREEDOM OF INFORMATION AND DATA PROTECTION (APPROPRIATE LIMIT AND FEES) REGULATIONS 2007

LIST OF QUESTIONS FOR RESPONSE

QUESTION 1

Are the Regulations prescriptive enough to ensure consistent calculation of the appropriate limit across public authorities or should they contain more detail? For example, taking into account the differing formats and quantity of information requested, should a standard reference (ie a "ready reckoner") for how long a page should take to read be included in the Regulations or guidance?

COMMENTS

The Act is not prescriptive enough to ensure consistent calculations. We believe a "ready reckoner" for how long a page should take to read is too prescriptive. However given the broad terminology used in the Regulations there should be a recommended template for assessing time estimates and recording actual time spent on answering a request. Guidance will be needed to help set the parameters to be used in the preparation of estimates. For example although a minister may like to be involved does a minister need to be involved?

QUESTION 2

Does the inclusion of thresholds in the regulations provide sufficient flexibility, taking into account the differing complexity of requests received?

COMMENTS

The ability to include the estimate of consultation costs of between £100 and £400 (Central Government) or £75 and £300 (other public authorities) should only really be relevant during the consideration of the exemptions under Part II of the FoIA. We believe further analysis should be done to assess the relationship between cost and complexity. There needs to be a greater understanding of the merits of more complex cases. It is difficult to see how the threshold will be flexible enough to deal with more complex cases. Further more

detailed analysis may illustrate that the type of cases that are regarded as complex and that require consultation and extensive reading time are those that should not be bound by any threshold. The type of cases that have public interest considerations of such importance that openness and not cost should be the priority.

QUESTION 3

Are the thresholds the right ones to make sure the balance is struck between allowing public authorities to count these activities but not refuse requests on one of these grounds alone?

COMMENTS

Following on from our answer to Question 2, we do not see any application for the additional costs threshold or the additional cost ceiling. In striking the balance we believe one of the key issues is whether consultation and reading are necessary and if the answer is yes the number of stakeholders that need to be involved. Cost savings could be achieved if the consultation and reading time of senior people is the exception rather than the rule.

QUESTION 4

Are the Regulations as drafted the best way of extending the aggregation provision?

COMMENTS

We believe that sections 14 or 21 and regulation 5 of the 2004 Regulation provide adequate mechanisms to deal with circumstances where aggregation might be necessary. Further guidance may be provided to supplement current decisions of the Information Commissioner on vexatious requests. We are concerned that the aggregation provisions in the Regulations give public authorities too much discretion in determining whether requests can be aggregated without due consideration of the public interest. We believe the Regulations would simply be used to encourage requestors to use other mechanisms such as making personal requests to avoid the Regulations.

QUESTION 5

Do the factors that need to be taken into account when assessing if it is reasonable need to be explicitly stated in the Regulations or can this be dealt with in the guidance?

COMMENTS

Both. We believe that the Draft 2007 Regulations should contain more detail on the factors to be considered. Greater clarity would also provide greater transparency to the Public and increase consistency of approach.

QUESTION 6

Are these the right factors?

COMMENTS

In short No—we believe that aggregating requests from different persons will in practice prove challenging. If the factors are to be retained, we suggest that as a minimum a public interest test should determine whether the aggregation is appropriate should replace the reasonableness test set out at regulation 7(2)(b)(ii) of the Draft 2007 Regulations.

QUESTION 7

What guidance would best help public authorities and the general public apply both the EIRs and the Act effectively under the new proposals?

COMMENTS

Types of Guidance for Consideration:

- More detailed criteria for assessing cost estimate—what are reasonable costs?
- Recommended methodology for preparing cost estimate.
- Guidance of whether consultation and reading by officials other than FoIA Officer are necessary with emphasis on reading, consultation being the exception and not the rule.

- If aggregation is to be implemented what clearer criteria.
- Guidance on using S14 to weed out vexatious requests.
- Guidance for the public that helps develop more precise requests.

Stacie Timms
Programme Executive

February 2007

Evidence submitted by Rob Evans, *The Guardian*

We write in connection with the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (“the Regulations”).

We strongly oppose the proposed changes and believe that they should not be implemented at all. We are very disappointed that the government is seeking to restrict severely the Act even though it is barely two years old. Lord Falconer, the constitutional affairs secretary, has claimed that the Act has been a great success as many people have been using it. Ministers now apparently want to destroy the very success for which they are claiming credit.

We are alarmed moreover that ministers appear determined to rush through these proposals. The government has said that it is intending to introduce the regulations in Parliament on March 19—a mere 11 days after the end of this consultation. It appears that ministers have already made up their minds and are going to push through the changes regardless of what anyone else thinks.

We believe that instead of seeking to emasculate the Act, the government should be making it work better so that members of the public find it easier to obtain information. The government should be tackling the real problems of the Act—departments which simply refuse to answer requests, delay their replies for months on end, or obstruct disclosure by citing unjustified reasons for their secrecy. We have attached as Annex A three opinion columns which have appeared in the *Guardian* since the proposed regulations were announced in October. These three columns also set out our views on this issue.

We believe that the consultation paper and the Frontier Economics report shows that the government has a very small-minded view of the role of the media in a democracy. There is nothing in either document which promotes the idea that the media provides vital information to inform the public. The media has produced many stories using the Act which are clearly in the public interest.

We have attached to this submission 50 *Guardian* stories which are based on disclosures under the Act (Annex B). We firmly believe that these are disclosures which have served the public well. These stories show the Act working as it should do—enabling the media to report important information to the public as part of its role in a functioning democracy.

It is clear that the proposed changes would restrict ability of the public to get access to information. The Government’s proposals appear to be targeted at “serial requesters”. The government’s view appears to be that applications by journalists or campaigning organisations are somehow less worthy than applications by individual members of the public. Yet the law lords have described the media as “the eyes and ears of the public”—probing for information is a necessary and legitimate role of the media and an integral part of the right to freedom of expression.

We believe that the Government has no power to implement these proposed regulations as they clearly discriminate between requesters. The Act explicitly states at clause one (under the heading of “general right of access to information held by public authorities”) that “any person” is entitled to be informed whether the public authority holds the requested information and then to have that information communicated to them.

Crucially, the Act only contains three statutory restrictions defining what “any person” means. Clause 14 says that public authorities can refuse a request if it is “vexatious” or a repeated request from the same person. Clause 8 states that a request must contain the name of the applicant and an address for correspondence. It is apparent that any person has the right to information, provided that the requirements in these two clauses are met. It is therefore also apparent that the Act makes no distinction between an individual who submits a number of requests and one who makes, say, one or two a year. Accordingly, we believe that a regulation which discriminates in such a way is contrary to the rights conferred under the Act.

The Information Commissioner has set out clearly his idea of how vexatious should be interpreted by public authorities. His views are set out in Freedom of Information Act awareness guidance no 22 on his website. It is plain that there is a very high bar to be crossed before a request can be deemed to be vexatious. We believe that the Information Commissioner is making it clear that vexatious requests are exceptional. He says on pages 2 and 3 of this guidance that vexatious has been defined in legal cases as being a request which is designed to subject a public authority to inconvenience, harassment or expense. He suggests that the definition should go further so that vexatious only applies to requests whose main effect would be disproportionate inconvenience or expense. It is therefore clear that requests from regular users such as the

media or campaign groups cannot be defined as vexatious. The better term for such regular users is professional requester—they are not people who make requests just for the hell of it, but for a proper purpose.

The current regulations allow a public authority to refuse to comply with a request for information if the costs of dealing with it exceed £600 (central government) or £450 (other public authorities). In calculation these costs, at the moment authorities can take into account the costs of searching for and extracting the requested information.

There are two proposals for changes in calculations of costs, to include the following:

1. Costs of time spent on the following activities: reading the material; consulting; considering. We believe that this will inevitably mean that government departments will reject requests which are complex or politically-sensitive. These are often the requests which produce the most valuable information for the public. Departments which are secretive will be able to abuse this rule to reject requests. The more controversial a request is, the more time ministers and senior officials will spend consulting and considering whether the information should be released. We have little confidence in the ceilings and thresholds set out on pages 11–13 of the consultation. We believe that these over-complicate matters and can easily be manipulated by departments which wish to evade disclosing information. The current rules on calculating costs appear to be relatively straightforward, so we see no reason why they should be changed.

2. Aggregating cases—the cost of unrelated requests from the same individual or organisation can be aggregated even if unrelated. If the costs of considering the aggregated applications exceed the costs limit (£600 central government, £450 other public authorities), the authority can refuse to respond to the request. It appears that, if requests are aggregated, once the costs threshold is reached no further requests can be made for 60 days.

This is an arbitrary and unfair rule which would severely limit the number of requests for information we could make.

For example, if a *Guardian* journalist was seeking information from the Home Office about prisons and another *Guardian* journalist was seeking from the Home Office information about immigration, these requests could be combined and the costs of complying could be added together so that both are rejected.

We believe that the Department for Constitutional Affairs has failed to justify this proposed rule on pages 13 and 14 of the consultation paper. The DCA says that public authorities can aggregate requests if it is “reasonable” to do so. The DCA suggests factors which could be taken into account in deciding what is reasonable. However we believe that this proposal is in practice too ill-defined and unworkable.

The first bullet-point of paragraph 39 is meaningless. We hope that the DCA could at some point actually explain what is meant by that bullet-point.

In the second bullet-point, the department says that public authorities can take into account the level of disruption. This is very vague and gives over-secretive departments another excuse to reject requests. We believe that the Act already contains adequate provisions to reject requests which are vexatious.

In the third bullet-point, the DCA suggests that authorities could take into account whether the requester is a business or professional. This breaks one of the provisions of the Act, which states that public authorities should take no notice of the identity of the requester (applicant-blind, in the jargon). We believe that the Act should remain as it is.

In the fourth bullet-point, the DCA states that the public authority could take into account requests made outside the 60-day period. As before, we believe that there is no need for such a provision as the Act already contains adequate provisions to deal with vexatious requests. All in all, this proposed rule once again over-complicates the Act when there seems to be no need for such complexity.

The DCA states that the proposed rule is needed to stop individuals who are using the Act too much, acting in concert or are pursuing a campaign. But this ignores a fundamental truth about freedom of information. Individuals often have to submit a series of requests to dig out information from departments which are determined to resist disclosure. Again, this is often the most useful information for the public. Allowing departments to invoke this rule merely allows the most closed and recalcitrant departments to conceal vital information. If these rules and the Act had been in force at the time, it would be difficult to imagine that Whitehall would have willingly disclosed information about the arms-to-Iraq scandal or the BSE disease under the Freedom of Information Act.

It is of course difficult to say exactly how many of the 50 *Guardian* stories would not have appeared if the new rules had been in force. However we fear that a significant number of them would not have published under these new rules.

We would like to give you two examples of stories which would not have appeared.

1. In March 2005, the government for the first time disclosed the amount of EU subsidy which each farmer in Britain receives. (Attached at Annex C are two stories which the *Guardian* wrote when the list of payments was released). The disclosure was clearly justified as it shows how taxpayers’ money was being spent. It showed that major landowners received the largest subsidies from the taxpayer. The public was able to see this clearly for the first time and decide for themselves whether such payments were justified. We believe that such information would

not have been disclosed under these new rules. We understand that there were extensive discussions involving ministers and senior officials to decide whether to release. Landowners objected vociferously, and many meetings were held. Under the new rules, it would simply have been too expensive and complex to answer this request.

2. In September 2006, The Guardian showed how multi-national drug companies have been lobbying ministers in an attempt to subvert the independent appraisal process and get their expensive new medicines approved for large-scale use in the NHS. (We have attached the story as Annex D). This story is clearly in the public interest as it shows how government policy is made and how commercial interests seek to influence it. We obtained the documents for this story by submitting eight requests to the Department of Health over a four-month period. Under the new rules, the Department of Health would have been able to refuse the requests.

If these proposals are accepted, they will encourage authorities to consult widely in order to raise costs in order to avoid disclosing information. Efficient authorities, who have developed cost-effective ways of responding to requests for information may feel “penalised” in that they will have to comply with requests for information more often (rightly) whereas inefficient authorities who unnecessarily increase costs will be able to maintain secrecy. This defeats one of the public interest purposes of the Freedom of Information Act—to expose maladministration and inefficiency and promote good practice.

In particular the proposed changes would be likely to prevent disclosure of information of the following types:

- Politically sensitive information.
- Politically contentious information.
- Complex requests.
- Initial applications for a new type of information.

It is difficult to know what is the aim of these proposals, other than to restrict access to information. The government has not put forward any reasons as to why it considers that the changes to the Regulations are desirable or necessary.

The proposals are based on the Frontier Economics Report. We have not had access to the raw data on which this report was based or information about the brief that was given to Frontier Economics.

We are dubious about the reliability of the calculations made by Frontier Economics in its report. We have set out our criticisms in more detail in an article in the *Guardian* on 30 October (attached as Annex E). Frontier Economics argues that the cost of answering freedom of information requests costs Whitehall £24 million a year. Even if we take that figure as being true, we believe that this is a relatively low figure. The Central Office of Information’s budget for public relations, advertising and marketing is more than £300 million a year. This is money spent by the government telling members of the public what ministers want them to hear. In contrast, freedom of information is about what the public wants to know—£24 million is therefore money well spent. We believe that the government should redress this imbalance by reducing the Central Office of Information’s budget and diverting that money to freedom of information. In a time when the public distrusts politicians and the political system, a healthy Freedom of Information Act is one of the most valuable ways of curing such distrust. We now live in an age when the public expects to be told how ministers are running the country.

The Frontier Economics report is lacking in detail and while the consultants interviewed public authorities to obtain their views, there was no consultation with those individuals or organisations who request information.

The Frontier Economics Report does not consider the principles on which the freedom of information regime is based and the extent to which these principles may be put at risk by the proposed changes.

The Frontier Economics Report does not consider other ways to make savings, for example by improving internal guidance and good practice in responding to requests.

The data on which the Frontier Economics Report is based appears to be flawed (the details have not been disclosed to the public). The report estimates that the Guardian makes 500–700 requests to central government annually. We believe that this is a gross over-estimate and is actually closer to 250.

The Freedom of Information Act has only been in force for a year, and it is likely that costs incurred in the first year are greater because of authorities’ inexperience in dealing with requests. As they become more familiar with the Act (and precedents are set by the Tribunal) the process should become more straightforward and efficient. It is clear that the number of requests were high when the Act first came into force in January 2005, but since then has fallen. It seems likely that the level of requests has settled down and is unlikely to rise substantially.

When Parliament made this legislation, it was apparent that greater access to information was likely to involve some costs. We believe that costs are being incurred because the culture has not changed—public authorities are approaching requests in a negative way, spending inappropriate lengths of time in seeking ways round Freedom of Information Act and too often referring requests to Ministers for consideration.

Annex A

Three opinion pieces from the *Guardian*

1. Afraid of the daylight, David Leigh, 4 December 2006
<http://politics.guardian.co.uk/foi/comment/0,,1963248,00.html>
2. Stepping into the dark, leader, 30 October 2006
<http://politics.guardian.co.uk/foi/comment/0,,1934924,00.html>
3. The Lord Giveth, 13 February 2007
http://commentisfree.guardian.co.uk/david_hencke/2007/02/in_just_over_three_weeks.html

Annex B

Guardian stories which have been written using the freedom of information since it came into force in January 2005:

- For the first time, the NHS published the death rates of individual cardiac surgeons. This allows patients to make a more informed choice on which surgeons should operate on them.
- How multi-national drug companies lobbied ministers in an attempt to subvert the independent appraisal process and get their expensive new medicines approved for large-scale use in the NHS.
- A league table of the biggest carbon dioxide polluters in the UK—the company at the top of the list emitted more carbon dioxide than Croatia last year.
- Documents showed that John Prescott's department was more involved than had been admitted in deciding whether US tycoon Philip Anschutz should be allowed to build a mega casino at the Millennium Dome.
- Nuclear inspectors raised serious questions over the safety of Britain's ageing atomic power stations, some of which had developed major cracks in their reactor cores.
- Documents which pinpointed the moment when the government's leading law officer changed his mind over the legality of the invasion of Iraq.
- The amount of European Union subsidy received by each farmer in UK was revealed for the first time—the list shows that the Queen and Prince Charles had received a more than £1 million in the last two years.
- The Government was forced to warn 14 countries that patients are in danger of developing the human form of mad cow disease as a result of contaminated British blood products sold abroad.
- Downing Street documents showed that Margaret Thatcher was poised to make a remarkable admission about a financial scandal involving her son which might have led to her resignation in 1984. She had pressed a foreign government to give a contract to a British firm which employed Mark.
- The Post Office published a list of local branches which are scheduled to close.
- Details of MPs' travel expenses were published for the first time. They revealed that a former Labour minister claimed more than £16,000 in mileage and a Tory backbencher over £5,000 in taxi fares.
- Report kept secret for more than 50 years revealed Britain's clandestine torture programme in postwar Germany—including harrowing photographs of young men who were systematically starved, beaten, deprived of sleep and exposed to extreme cold.
- How Shell improperly lobbied a cabinet minister over a huge gas plant in Russia.
- Documents revealed health and safety concerns about Shell's oil rigs in the North Sea.
- An official report suppressed for nearly 25 years revealed that the Peter Sutcliffe, the Yorkshire Ripper, had probably committed "many" more crimes than the 13 murders and seven attempted murders for which he was convicted.
- How ministers emasculated laws to prevent the payment of corrupt payments by firms abroad, following intense lobbying by BAE and other big companies.
- How 458 staff of English National Opera were furious that the chief executive and artistic director were appointed without others being interviewed.
- How George Robertson, former Labour minister, lobbied the Foreign Office to help a multi-national firm of which he is now deputy chairman. The firm, Cable & Wireless, was in dire financial trouble.
- How Greg Dyke wanted to be reinstated as director-general of the BBC a week after he was sacked over the Hutton report and why he was sacked in the first place.
- Tony Blair forced to disclose the dates on which he met Rupert Murdoch.
- Regulators expressed serious worries over high doses of the controversial cholesterol-lowering drug Crestor just two months before it went on the market.

- The broadcasting regulator drew up controversial proposals on the advertising of junk food for children after being lobbied on 29 occasions by the food and advertising industry.
- A dozen NHS trusts are technically broke, with no chance of meeting a legal obligation to balance their books.
- How City of London police officers have been accepting dinners and gifts worth thousands of pounds from the Scientologists.
- More than 160 prison officers were involved in inflicting and covering up a regime of torture over nine years at Wormwood Scrubs—inmates were beaten savagely, threatened with death and sexually assaulted.
- A survey of 200 local councils revealed the dirty and decaying state of school kitchens used to cook meals for children. Inspectors found that at one school, “something was seen jumping in the couscous”.
- How health inspectors voiced their criticisms of the hygiene standards of restaurants run by some of Britain’s most well-known chefs, including Gordon Ramsey and Heston Blumenthal.
- How the Met police realised that Ian Blair’s decision to block an independent inquiry into the shooting of Jean Charles de Menezes left them open to accusations of a cover-up.
- How the government gave financial support to a British firm, Mabey and Johnson, accused of bribery in the Philippines.
- The information commissioner ordered the Ministry of Defence to release the names and identities of its 500 arms sales officials.
- How tens of thousands of lives and homes are being put at risk because councils are allowing properties to be built in areas which have a serious chance of being flooded. Councils are ignoring the advice of the watchdog body, the Environment Agency.
- Despite the image of feckless fathers, new Child Support Agency figures show that more women than men persistently refuse to pay child maintenance.
- The Child Support Agency has had to refund hundreds of thousands of pounds in maintenance payments to more than 3,000 men after DNA tests revealed that they had been wrongly named by mothers in paternity suits.
- The consultant appointed by the government to scrap the Child Support Agency was paid £900 a day to find a solution—a higher daily rate than the country’s most senior civil servant, the Cabinet Secretary.
- How Margaret Thatcher tried to stop Sebastian Coe from competing and then winning gold at the 1980 Moscow Olympics. She tried to persuade him to support her boycott.
- Walter Wolfgang, the peace campaigner thrown out of Labour’s party conference for heckling, was under Special Branch surveillance as long ago as 1962.
- How the government’s education reforms failed to win the backing of headteachers, as just a handful of schools showed any interest in becoming self-governing trusts.
- A watchdog, the Medicines and Healthcare Regulatory Authority, named 25 hospitals which had bought body parts allegedly stolen in the US. There have been concerns that parts such as tissue or bones imported to help UK patients may have been infected with diseases such as HIV or hepatitis.
- A British ambassador warned that emergency services would not cope if terrorists blew up a strategically important oil pipeline heavily supported by the UK Government.
- An accident involving Trident nuclear warheads being moved on Britain’s roads could lead to a partial nuclear blast.
- The Treasury curbed a so-called creative accounting fiddle which has allowed Prince Charles to receive up to £1.2 million in “back door” payments from the Duchy of Cornwall estate to cover his personal expenses.
- The Attorney General intervened more than 300 times over three years to increase “unduly lenient” sentences received by convicted criminals, including killers, rapists and child abusers.
- How Special Branch penetrated the Anti-Apartheid Movement from top to bottom, infiltrating meetings, recruiting informers and obtaining documents.
- How the French Government tried to blame the British intelligence service MI6 for the sinking of the Greenpeace boat, the *Rainbow Warrior*, in 1985, in a campaign of “misinformation and smears” which infuriated the Thatcher government.
- Areas which have the highest numbers of obese people in England were revealed—top of the list were County Durham and Tees Valley.
- How Lord Falconer, as a barrister in the mid-1980s, provided vital legal advice to help break up the National Union of Mineworkers after the 1984–85 miners’ strike.
- The Security Services barred more than 200 foreign scientists from studying at British universities over four years, amid fears that they could present a terrorist threat.

- A list of train stations with the worst facilities for passengers was published. Many traditional facilities associated with the railway system such as waiting rooms, luggage trolleys, toilets, public telephones and clocks had disappeared since privatisation.
- Ministers were privately frustrated at police failures to enforce existing laws to tackle Britain's growing binge drinking problem. Ministers pressed police to single out, and crack down, on irresponsible pubs which encourage excessive drinking.
- Documents showed how Margaret Thatcher's government was split over the decision to grant South African athlete Zola Budd a British passport rapidly so that she could run in the 1984 Olympic Games.

Annex C

1. Rich land owners scoop up crock gold from EU, 23 March 2005
<http://politics.guardian.co.uk/foi/story/0,,1443970,00.html>
2. Royal Farmers get £1 million from taxpayers, 23 March 2005
<http://www.guardian.co.uk/country/article/0,,1443892,00.html>

Annex D

Drug firms' lobby tactics revealed, 28 September 2006
<http://business.guardian.co.uk/story/0,,1882965,00.html>

Annex E

Cabinet confidential, 30 October 2006
<http://politics.guardian.co.uk/foi/comment/0,,1935011,00.html>

February 2007

Evidence submitted by the Department for Constitutional Affairs

Thank you for your letter of 15 February 2007 concerning the proposed amendments to the Freedom of Information fee regulations.

I would welcome the opportunity to discuss the proposals with the Committee and share our analysis of the responses to the consultation prior to the laying of any Regulations. The consultation on the proposals closes on 8 March after which we will carefully analyse and consider the consultation responses, with the intention of publishing our response to the consultation within three months of this date in line with the Cabinet Office Code of Practice on Consultations.

As requested I enclose the following information which I hope the Committee will find useful in informing considerations of the proposals.⁴⁰ You will be pleased to note that the majority of this information is already in the public domain.

- (i) Analysis from the Frontier Economics report to support conclusion that small minority requests and requestors account for a disproportionate amount of the resources required to process FOI requests. Relevant sections in the Frontier Economics report have been flagged.
- (ii) Statistics to support analysis that these primarily came from serial requestors (particularly whether mainly from journalists). The relevant sections in the Frontier report have been flagged.
- (iii) A summary of data collected and a list of departments who participated in the costings exercise.
- (iv) The number of requests analysed for each department that took part.
- (v) The pro-forma for the costings exercise detailing the data fields included in the analysis.

You also asked for details of the information requested for those cases which had a disproportionate impact on resources. As emphasised in my previous letter, the proposals are not aimed at targeting specific types of requests. Our concern is only with requests that impose disproportionate burdens, on public authorities in terms of the time taken to process those requests, regardless of what information has been requested. The Frontier Economics analysis was blind on the nature of the request for this very purpose, focusing on the impact of FOI on resources and how this can be managed effectively.

As such when collecting the data from departments we were only prescriptive about the quantitative data required to assess the impact on resources of processing FOI requests. Information about the details of the request was not mandatory. Whilst some departments did choose to record information it was varied in quality and detail and was not used as part of the analysis.

⁴⁰ Items not printed.

I would be pleased to provide the Committee with a copy of all the consultation responses once the consultation period has ended and will keep the Committee informed of our progress to enable you to schedule an evidence session at an appropriate time.

The Baroness Ashton of Upholland
Parliamentary Under-Secretary of State

February 2007

Evidence submitted by Mr C P England

I wish to give evidence for the consideration of the Committee as follows.

I made application to Bexley Council for information about empty homes on the 5 February 2005. After being refused and using the Council's internal appeals and complaints procedures I applied to the Information Commissioner for a Decision on 18 April 2005. It was not until 25 July 2006 that the IC issued a Decision in the case—17 months after my request was made. Bexley Council appealed on 18 August 2006 and the case was heard before the Information Tribunal on 5 March 2007. I am waiting for a decision from the IC some two years after first making my FOI request.

It seems to me that this case dragged on because the ICO is unduly bound by considerations of a legal nature and because the ICO does not have any proper system of case management to ensure that the matter is being progressed properly and with all due expedition.

My case was dealt with by several officers at the ICO and there were very large gaps between items of correspondence without (or so it appeared) any action being taken to progress the case.

Despite several complaints my case was not progressed with any urgency.

My case was in the nature of a test case. For some time the Government has been concerned about the number of dwellings which stand empty and abandoned. I am concerned that local authorities do not use their extensive powers to bring such dwellings back into proper use. I consider that local authorities are negligent, slothful and very unwilling to act on this matter. The purpose of my application was to ascertain what action Bexley Council had taken to bring empty dwellings into proper use. The Decision of the IT will be watched with interest by other Councils and other persons and organisations (such as the Empty Homes Unit) and will be used as a precedent by them. As a precedent my case should properly have been given some special attention and by so doing the ICO would have saved itself and local councils a great deal of time and effort in dealing with other FOI applications which followed mine.

I ask that the Committee investigate the way my FOI application was dealt with and make such comment or criticism as the Committee Members may feel to be justified.

March 2007

Evidence submitted by The Advisory Group on Campaigning and the Voluntary Sector: Working party on Freedom of Information

These written submissions to the Constitutional Affairs Committee on Freedom of Information come from a working party set up by the recently formed Advisory Group on Campaigning and the Voluntary Sector. The working party has been set up to consider the issues relating to freedom of information as part of the wider remit of the group to review laws and regulations that govern campaigning by charities and voluntary organisations.

The advisory group is chaired by Helena Kennedy QC. Its membership consists of Amnesty International; Association of Charitable Foundations; Bates, Wells & Braithwaite Solicitors; Bindmans Solicitors; Doughty Street Chambers; NCVO; Justice; Liberty; Oxfam; People and Planet; Richard Fries (ex chief Charity Commissioner); RNID; RSPCA; and the Sheila McKechnie Foundation. The working party is led by Lawrence Simanowitz, a partner at Bates, Wells & Braithwaite.

These submissions focus on the draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007 (the Regulations) and the DCA's consultation paper on these Regulations that the working party responded to in March 2007. In addition, we have suggested some alternative measures to the government's proposed fees system in the Regulations which will protect the rights of persons to make legitimate freedom of information requests when it is in the public interest to do so.

The working party voiced concern in its response to the DCA's consultation paper on the limited scope of the DCA's consultation paper. If the revised Regulations are brought into effect, we understand that the cost saving will be relatively low—in the region of £10 million (based on figures in the regulatory impact assessment). Yet they could have a significantly chilling effect on transparency of government. Our view is that a broader consultation should be undertaken before implementing the Regulations.

The working party was particularly concerned about two main aspects of the proposed Regulations:

1. DRAFT REGULATION 6

This regulation proposes to include, in calculating the costs of complying with a request under the Act, new costs which previously had not been included. These are, the costs of examining the requested information, and the costs of determining whether an exemption applies including costs of consulting other bodies and deciding on the public interest balance for qualified exemptions.

Comments

1.1 It is noted that there is a de minimis level below which the costs associated with the consultation and/or consideration would not be taken into account (of £100 for central government and £75 for the wider public sector) and there is also a maximum threshold for these additional costs which could be included amounting to £400 for central government and parliament, and £300 for the rest of the public sector. Whilst these financial limits are appreciated they will do little to temper the potentially adverse consequences of the financial limits.

1.2 Whilst government costs incurred on these activities is estimated at £25 per hour, the consultation paper raised a concern with the difficulty in determining how long it should take to read a page and the working party agrees that this is of concern.

1.3 Of greater concern to the working party is that the addition of these elements makes it even more likely that FoI requests will be refused on the basis that the public authority's costs involved in responding to the request will be over the limit of £600/£450. The introduction of these new thresholds will serve to reduce the number legitimate freedom of information requests, many of which are made, in the wider public interest.

Alternative options for the government to save costs

1.4 If the intention of Draft Regulation 6 is to save costs, there are several alternative steps which the government could take which might achieve lower costs for FOI requests without further restricting legitimate freedom of information requests:

- One might be to take stronger steps to seek payment of the costs incurred in meeting a request, particularly for those requests which cost more than £1,000 and amount to more than 45% of the total cost of all requests.
- Another measure would be to take away the discretion of the public authority and to automatically allow the person making the request to choose, if they wish, to pay the full cost of the government in dealing with the request, where that cost is above the relevant thresholds. This would mean that the public authority would no longer suffer adverse financial consequences from any such request since it could legitimately recover its costs in responding to them. This measure would give the person making the request the opportunity to make the decision to pay for their request in circumstances where they believed the request was crucial to them.
- A third measure which could be introduced which would ensure that legitimate freedom of information requests were not excluded by these new proposals would be to require that an application for disclosure under the Act cannot be refused solely on grounds of costs where the application is made by a UK registered charity, or is otherwise made in the public interest. The DCA may wish to note that under the Charities Act 2006 charities can now only be established if it shown that they are for the public benefit, and that, furthermore, they are only permitted to act in a way which furthers their charitable purpose. Therefore it can be assumed that any freedom of information requests coming from a charity must be for the public benefit.

2. DRAFT REGULATION 7

The other element of the Regulations which the working party raised concern over was the proposal to increase the scope for aggregating of requests under the Act. Draft Regulation 7 proposes to allow the aggregation of requests which do not relate to the same or similar information.

Comments

This proposal will mean that legitimate groups will be very restricted in the information which they are able to receive under the Act. It is noted that the regulations do provide that such requests can only be aggregated where it is "reasonable in all the circumstances" to do so and that it is proposed that one of the factors that may be taken into account (but which will not appear on the face of the regulations) is "whether the requester is an individual who is not making the request in the course of a business or profession".

Public interest exemption

In a similar way to the proposal discussed in paragraph 1 above we would urge that a factor to take into account in any FoI request should be whether the request is made in the public interest. We believe that this should be included in Draft Regulation 7. We are concerned that even this will not sufficiently protect the underlying purpose of the legislation—namely to improve transparency of information—and would therefore suggest that there should be a specific exemption from the power to aggregate either in the Regulations or as an amendment to the Act where the request comes from a charity or is in the public interest.

We very much hope that the Constitutional Affairs Committee on Freedom of Information will consider these written submissions in their examination of the current Freedom of Information requests system and the Government's proposed new Regulations.

April 2007

Evidence submitted by Alasdair Roberts, Professor of Public Administration

1. I am a professor of public administration at the Maxwell School of Syracuse University in the United States. I am a Canadian and British citizen. I have used the disclosure laws of Canada, the United States, Australia, and European Union for several years. My research on the operation of disclosure laws has been widely published. I often conduct my research by filing FOI requests for information about the internal operations of FOI systems.

2. The UK FOI Act is, from the point of view of my personal experience, effectively inoperative. I am still waiting for the final resolution of seven FOI requests filed between April 2005 and February 2006 that relate to the operation of FOI systems. All of these requests are now the subject of complaints to the Information Commissioner. The oldest of these requests will mark its second birthday on Sunday, 22 April; the youngest is now well over one year old. Several of these complaints have not been assigned to investigators and are not, to the best of my knowledge, the subject of an active investigation.

3. In several of these cases, departments of central government relied on the advice of DCA and invoked section 36 of the FOIA. In one case, for example, MoD refused information about the handling of an FOI request on the grounds that "Parliament provided a powerful enforcement mechanism for applicants who are dissatisfied with the way in which their requests have been handled and there is considerable public interest in not engaging in a burdensome process which circumvents the statutory enforcement process."

4. I pointed out at the time, without effect, that this reasoning made an unwarranted and unflattering assumption about my motives in seeking information about the FOI process. Moreover, the assertion that Parliament has provided a "powerful enforcement mechanism" has proved to be completely unjustified, as the extensive delays in dealing with my complaints have proved.

5. In testimony which I submitted in February 2006, I observed that the inability of the OIC to act promptly on complaints had the effect of encouraging delays in responding to initial requests and conducting internal reviews. Given this circumstance, and the lack of any incentive for central government departments to reconsider their use of section 36, I ceased making requests under the UK FOIA in early 2006.

6. The effect of DCA's advice, and the OIC's performance, is to block access to information that is necessary to make an objective appraisal of the workings of the FOI system. Until this problem is addressed, it would seem to me to be imprudent to contemplate serious changes to the FOI regime, such as substantial fee increases.

7. I also have no doubt, given the past conduct of central government departments, that modified fees rules would be applied in an effort to block access to information which is now denied under section 36.

8. The present situation is deeply regrettable. Other jurisdictions routinely release information which is now denied by central government departments on the advice of DCA. The effect of this behavior is to undermine understanding of, and trust in, the Freedom of Information Act.

20 April, 2007

Evidence submitted by David Heigham

As a former Civil Servant, it appears on the face of the papers that the assessment of the costs of the Freedom of Information Act did not follow the standard Treasury guidance (which I assume is still in force) to assess benefits in such a case as well as costs. Major benefits, even if ill quantified, may outweigh marginal costs. Obviously, benefits cannot be quantified in the same fairly precise terms as costs; but a guiding principle in such assessments is that one should try to be approximately right, and always aware of the danger of being precisely wrong.

Some possible headings of benefits that might be approximately assessed include:

1. Has the operation of the Act helped to reveal cases where public resources may be being misused or wasted?
2. Has the operation of the Act helped to identify cases where the operation of the machinery of government has been less than satisfactory?
3. Has the operation of the Act helped to formulate guidance or training in Government operations?
4. Has the operation of the Act improved confidence in public administration?
5. What benefits have citizens felt from the operation of the Act?
6. Has the operation of the Act produced any reductions of costs or increase of benefits for other agents in the economy?

This list of possible headings is based on general principles only. I have no expertise in Freedom of Information matters; those who do will be able to list possible benefits more completely and relevantly. But from the general principles embodied in successive editions of the Treasury guidance, it seems difficult to see how Ministers can come to a properly informed decision if no attempt has been made to assess whether substantive benefits exist.

March 2007
