

Independent Commission on Freedom of Information: Responses from organisations to Call for Evidence: M – P

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Updates to the document

This document was amended on 16 December to include footnotes previously omitted in the response submitted by MedConfidential (at page 4).

Manchester City Council

Re: Call for Evidence

Manchester City Council supports transparency and openness and agrees in the words of the Transparency Code that 'transparency is the foundation of local accountability and the key that gives people the tools and information they need to enable them to play a bigger role in society.' It fully accepts that the availability of data can also open new markets for local business, the voluntary and community sectors and social enterprises to run services or manage public assets.

Whilst supporting openness it is the case that dealing with FOI requests does place a significant burden on the Council. The number of Freedom of Information requests received by us has increased from 465 in 2005 (when the Freedom of Information Act (FoIA) came into force) to 2081 in 2014. The number of FOI requests received so far this year is 1842 and it should be noted that many of the requests received have multiple parts and as such require substantial officer time to deal with.

The sheer volume of requests received, coupled with the complexity of many of the requests, places increasing burdens on the Council when we are already trying to deliver more for less. Prioritising dealing with FOI requests is challenging when balanced against the need to deliver arguably more important front line council services such as social care.

For this reason it is suggested that consideration is given to one of 2 options: Either:

1. reduce the costs limit for local authorities which is currently £450 (equivalent to 18 hours) to £250 (equivalent to 10 hours) or
2. retain the 18 hour limit but allow activities such as reading, redacting, and consideration of exemptions to be taken into account.

In terms of 'safe space' exemptions the Council supports the need for internal deliberative space and recognises that section 36 FoIA goes some way to providing this.

Any change to the provisions relating to deliberative space should in our view apply to local government in the same as way they will apply to central government.

Yours sincerely,

Liz Treacy
City Solicitor

MedConfidential

Responsibilities and burdens of Public Authorities

MedConfidential exists because of bureaucratic secrecy. We formed primarily in response to NHS England's the care.data project to collate the medical histories of every citizen, which, when the public found out about it, collapsed under the weight of public scrutiny, and as statements by both NHS England,¹ and the Parliamentary Under-Secretary for Health to Parliament,² were proved false by FOI request.³

Our issue is the access to the nation's medical records. Both the broad records of the NHS, and also additional studies incorporating medical records such as "Whitehall II"⁴. For the purposes of health, the NHS creates a national scale, linked database of everyone's medical care throughout their life. This is both deeply intrusive on an individual level, but necessary for research at a wider level. The tradeoff being managed by, those in the study, being told what the rules will be as the basis for their involvement - their consent is on that basis.

However, once that is in place, there are many who will wish to circumvent the rules via special pleading⁵ that this committee has received. Projects wishing to use data may make public claims of transparency, with statements that papers would be published, but in practice on make such documents available to the public under FOI.⁶ At the time of writing, no papers have been published for meetings since May.⁷ That's your medical history being used in ways which are only accessible because of Freedom of Information legislation.⁸ The burden on citizens of the need for Freedom of Information is usually exorbitant, the burden responding places on public bodies is comparatively negligible.⁹

medConfidential

November 2015

coordinator@medconfidential.org

¹ "every household in England" <https://www.england.nhs.uk/2014/01/06/better-info-better-care/>

² "Royal Mail was contracted to deliver the leaflet to every household in England"
<http://www.theyworkforyou.com/wrans/?id=2014-02-11a.186539.h>

³ "This means that the leaflet has not been delivered to households that have registered with the Royal Mail's 'door to door opt-out'"
https://www.whatdotheyknow.com/request/royal_mail_contract_for_caredata

⁴ <https://www.ucl.ac.uk/whitehallII>

⁵ <http://bmj.com/content/351/bmj.h5087>

⁶ https://www.whatdotheyknow.com/request/caredata_programme_board_minutes

⁷ <https://www.england.nhs.uk/ourwork/tsd/care-data/documents/>

⁸ e.g. <https://mq.b2i.sg/snow-owl/#!/terminology/snomed/242614007>

⁹ see comments from Private Eye & others. e.g.
<https://twitter.com/rbrooks45/status/665100240702304256>

Independent Commission
on Freedom of Information

The Media Lawyers Association

Independent Commission on Freedom of Information
9th Floor
102 Petty France
London
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20th November 2015

Dear Lord Burns

Re: Freedom of Information Commission/ Media Lawyers Association submission

I attach the submission by the Media Lawyers Association ("MLA"), to the Independent Commission on Freedom of Information: Call for evidence.

The Media Lawyers Association is the association of in-house media lawyers from the United Kingdom's leading newspapers, broadcasters, magazines, book publishers and news agencies.

This submission is endorsed across the media industry – by the leading news and media groups of the UK. A full list of the MLA's members is set out in Annex 1.

Any correspondence on this please reply to my email address: john.battle@itn.co.uk or ITN address: Head of Compliance, 200 Gray's Inn Road, London WC1X 8XZ.

The BBC is making its own submission and is not part of the group making this submission.

Yours sincerely

John Battle
Chair, MLA
For and on behalf of Media Lawyers Association

This is a response to the call for evidence by the Independent Commission on Freedom of Information (the "Commission"). It is submitted on behalf of the Media Lawyers Association (the "MLA") which is an association of in-house media lawyers from many of the United Kingdom's leading newspapers, magazines, book publishers, broadcasters and news agencies. A full list of the MLA's members is set out in Annex 1 to this response.

Summary of MLA's Response

1. In response to the Commission's call for evidence in relation to the Freedom of Information Act 2000 ("FOIA"), the MLA's position is that:
 - i. The Commission's limited terms of reference and the specific questions posed by it cannot be considered in isolation from the general purpose of FOIA which is to promote transparency and accountability. The Commission's consultation and proposals must be set within this broader context of FOIA.
 - ii. FOIA has made a central contribution to the democratic process in the United Kingdom since 2005. It has led to the exposure of matters of indisputable public interest and has furthered the public's ability to challenge authority and hold it to account. It has also led to significant financial savings where the wasteful or improper expenditure of public monies has been identified. The rights set out in FOIA should not be considered a "burden" but an essential aspect of the role of a public authority.
 - iii. The public's right of access to information set out in FOIA is a critical element in promoting transparency and accountability. The media plays an essential and critical role in this process, as they are, in the words of the Information Commissioner, the "main route via which the public receives information disclosed via FOIA."¹⁰ The media's role in promoting accountability and transparency using FOIA should not be diminished but promoted.
 - iv. The present balance of rights and exemptions in FOIA, including s.35 and s.36 which are specifically identified by the Commission, should not be recalibrated to restrict access to information held by public authorities, thereby reducing transparency and accountability. On the contrary, FOIA should be strengthened and extended to cover the increasing number of private sector organisations carrying out public administrative functions.
 - v. It is essential that qualified exemptions are not reclassified as absolute exemptions where the public interest in disclosure cannot be considered. Each case must be considered on its own facts, balancing the public interest factors in favour of and

¹⁰ As set out in the response of the Information Commissioner to the Independent Commission dated 16 November 2015 at paragraph 72

against disclosure. The formulation of policy cannot be a “trump card” above all other relevant public interest issues. Bright lines should not be drawn to determine automatically when the passage of time means that the sensitivity of information or the perception of a “chilling effect” has sufficiently diminished to favour disclosure. Each request must be considered on its own facts.

- vi. There is no clear and cogent evidence of any “chilling effect” in respect of the potential disclosure of information presently protected by s.35 and s.36 FOIA. Any perception of a “chilling effect” arises out of misunderstanding and misconception rather than reality. In fact, the number of requests where the Information Commissioner has not upheld reliance on s.35 and s.36 by central government public authorities in recent years is very small.¹¹ The risks of disclosure are therefore very small and the concerns about disclosure are disproportionate. The Commission should not propose changes to FOIA which would result in less transparency and less accountability absent compelling, cogent and independent evidence. To do so would amount to an unwarranted infringement on the public’s right to know. Any concerns are far more properly and proportionately addressed by better training, rather than recalibration of important parts of FOIA.
- vii. The decision of the Supreme Court in *R (Evans) v AG and others* [2015] 2 WLR 813 which set out the limits on the use of the veto must not be used to make access to information under FOIA more difficult by reclassifying information presently protected by qualified exemptions.
- viii. There is space for a very limited and exceptional scope of the executive veto, but only in the circumstances set by the Supreme Court in *Evans*. Any broader use of the veto would both undermine the rule of law and also undermine the very principles of transparency and accountability which underpin FOIA.
- ix. Fees for making a FOIA request or for bringing an appeal should not be introduced. Nor should there be any restrictions placed on the s.12 FOIA cost limits for considering requests. The clear evidence is that the introduction of fees disproportionately impacts upon journalists acting in their role as the public’s “watchdog” and that the introduction of fees would have a highly detrimental impact upon the proper and effective impact of the legislation.
- x. FOIA must retain an enforcement and appeals process which permits the ICO and the Tribunal system to require the disclosure of information. Any proposal that a ruling of the ICO or the Tribunal system should not be binding upon a public authority would

¹¹ Ibid, paragraphs 12-16.

render FOIA toothless and its use futile. Increasing the role of judicial review as a method of appeal would only add to the financial and administrative “burden” imposed on public authorities and the judicial system.

- xi. The present system works well, but is far from perfect. The problem with the current system lies much more in the culture of obstruction and secrecy which permeates too many public authorities than in the administrative or financial “burden” which FOIA imposes on public authorities. Increased training for public authorities and changing this culture will decrease the “burden” on the public purse for public authorities, the Information Commissioner and the Tribunal system alike.
- xii. The Commission should consider whether there should be an enhanced ability of the Information Commissioner and the Tribunal to impose sanctions in cases where it is determined that public authorities have deliberately and unreasonably obstructed the rights of access to information which is established by FOIA. This would ensure that public authorities are deterred from seeking to benefit from their own obstruction in delaying the release of public interest information. Such powers would result in a more streamlined, co-operative and transparent implementation of FOIA.

Overarching Issues

- 2. The MLA recognises that the Commission’s terms of reference are limited and that the Commission seeks information on the specific issues addressed in its call for evidence. However, those specific issues cannot be assessed in isolation from the broader importance of FOIA, its objectives, and its operation. To do so would be to exclude highly relevant material from the Commission’s consideration and would lead to a skewed and misconceived approach to the fundamental issues of transparency and democratic accountability which lie at the heart of FOIA.
- 3. FOIA is an important constitutional statute which enables ordinary citizens to obtain information held by an authority and therefore to know what authority knows. It sets out a clear framework and a prima facie right to the disclosure of such information, save where that right was qualified by the terms of FOIA itself, including by making the information in question exempt from disclosure. The qualifications and exemptions embody a careful balance between the public interest considerations militating for and against disclosure. FOIA contains an administrative framework for striking that balance, and the framework operates under judicial supervision through a system of appeals to independent bodies and then through a tiered tribunal and court system.¹² This system provides an independent and proper method of determining disputes between requestors, the ICO and public authorities.

¹² See *Kennedy v Information Commissioner* [2015] AC 455 per Lord Sumption at [152].

4. FOIA had two principal and interconnected purposes: (i) increasing the openness and transparency of government and (ii) making government more accountable.¹³ Subsidiary aims which flow from these two principal aims are a corresponding improvement in the quality of government decision-making, an improvement in public understanding of government, an increase in public trust in government, and an increase in public participation in government.¹⁴
5. FOIA includes an assumption that the disclosure of information by public authorities on request is in itself of value and in the public interest, in order to promote transparency and accountability in relation to the activities of public authorities.¹⁵ The common law has often recognised that there is an inherent public interest in information held by public authorities and that a court will only restrain such publication where disclosure is likely to injure the public interest¹⁶:

“But it can scarcely be a relevant detriment to the government that publication of material concerning its actions will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticise government action. Accordingly, the court will determine the government’s claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected.”

6. The twin aims of increasing transparency and accountability are not merely desirable in a vibrant and modern democracy such as the United Kingdom; they are keystones on which on the democratic process rests. The MLA is concerned about the questions posed by the Commission and in particular by any proposal to restrict the public’s right to know as set out in FOIA. Put simply, there can be no overall public benefit from restricting either transparency or accountability. There is no compelling or cogent evidence of the need for any such restrictions. Any attempt to restrict FOIA would be a retrograde step which would have a significantly deleterious impact upon the quality of the democratic process in the United Kingdom. Any such move would unnecessarily restrict not only the public’s right to know, but the public’s right to debate and question democratic processes and decisions.
7. There is also no evidence of any public appetite for limiting accountability or transparency by introducing new restrictions on the current balance of rights and exemptions set out in FOIA. Although the Conservative Party’s 2015 election manifesto did not mention FOIA at all, it did contain a commitment to “continue to be the most transparent government in the world”. The Liberal Democrats’ manifesto contained a pledge to extend FOIA to cover private companies delivering public services. The Labour Party’s manifesto made a similar pledge and recognised that “our Freedom of Information laws have shone a light into the darker corners of government and are a crucial check on the power of the Executive.”

¹³ See paragraph 1.2 of the Government’s White Paper ‘Your Right to Know’ published on 28 February 1998

¹⁴ The Impact of the Freedom of Information Act on Central Government in the UK: Does FOI Work?, Robert Hazell and others, 2010, p.18.

¹⁵ Office of Government Commerce v ICO and HM Attorney General on behalf of the Speaker of the House of Commons [2008] EWHC 774.

¹⁶ Attorney General v Observer Ltd [1990] AC 109 at 258

8. In this regard, and in accordance with the principles set out in the decisions of the CJEU¹⁷ and Upper Tribunal¹⁸ in *Fish Legal v Information Commissioner*, the MLA believes that the scope of FOIA should be extended to private companies who are carrying out public administrative functions. The increasing privatisation of public services means that this is an increasingly important area which requires proper public scrutiny and transparency. The definition of a public authority under FOIA should focus on the nature of the relevant activity being undertaken by the entity in question, rather than whether it is included in a list in a schedule. The increasing disjunction between entities which are subject to requests under the Environmental Information Regulations but which are not subject to FOIA should be reduced by extending the scope of FOIA. The MLA believes that extending FOIA in this way is an important recommendation which the Commission should make.
9. FOIA is a vital and proper journalistic tool which has significantly enhanced public debate and accountability, and contributed to important reforms at all levels of the democratic process in the United Kingdom. A complete list of journalistic publications of undeniable public importance and significance cannot be readily reduced to paper, but examples of information which would not have been made public without FOIA include¹⁹:
- i. Details of the MPs' expenses claims, which led to the very high profile scandal and prison terms for 7 Members of the Houses of Parliament.
 - ii. Data relating to significant delays for A&E ambulances having to wait at hospitals.
 - iii. Figures revealing that 6,000 offences, including murder, robbery and rapes have been committed by London rioters since 2011.
 - iv. How some hospitals in the UK were incinerating miscarried and aborted fetuses as clinical waste, sometimes in waste-to-energy power plants.
 - v. How police officers have used Taser stun guns on children, including a mentally ill 12 year old girl.
 - vi. How vulnerable children – even babies- have routinely vanished from council care.
 - vii. The involvement of UK aircrew in the bombing of Syria.
 - viii. The government's knowledge of Christmas rail chaos in 2014 and its failure to act.
 - ix. The publication of restaurant hygiene ratings as the norm, not the exception.
 - x. The financial contribution made by football clubs to the cost of policing high profile football matches.
 - xi. How hundreds of thousands of calls to the new 101 hotline have gone unanswered.
 - xii. How only 40 of 250 returning Jihadis in UK have faced prosecution.
 - xiii. How more than 500,000 care home visits last less than five minutes.

¹⁷ C-279/12, [2014] QB 521

¹⁸ [2015] UKUT 0052 (AAC)

¹⁹ In addition, see both the list of examples of FOIA derived media stories set out at paragraph 72 of the Information Commissioner's response to the Commission and the many examples given in submissions by individual media groups, for example the annex to the submissions of Associated Newspapers, the submissions of ITN, the Society of Editors and the News Media Association.

- xiv. That 12 murderers and 10 rapists are amongst hundreds of dangerous criminals on the run in the UK
 - xv. The use of security guards by hospitals to restrain dementia patients.
 - xvi. How thousands of criminals tried to get jobs as teachers.
 - xvii. How Sheffield City Council spent £190,000 in relation to HS2 lobbying.
 - xviii. The spiralling cost of policing the Ecuadorian Embassy in London while Julian Assange remains there.
 - xix. The number of racism allegations made against police officers.
 - xx. The lobbying of the highest levels of government by HRH Prince Charles.
 - xxi. How local councils employ double the number of communications staff of central government.
10. The specific questions raised by the Commission must be set in the context of the workings and purpose of FOIA overall. If they are addressed in isolation, the questions risk undermining the positive aims of FOIA which should be strengthened and extended, not restricted and curtailed. As the courts have recognised, any restriction on the rights set out in FOIA must have constitutional significance.²⁰ For the reasons set out below in relation to each of the questions raised by the Commission, it is essential that the important rights of public access to information under FOIA are extended, not weakened.

Responses to Specific Questions in Consultation Paper

Deliberative Space

Q.1 What protection should there be for information relating to the internal deliberations of public bodies? For how long after a decision should such information remain sensitive? Should different protections apply to different kinds of information that are currently protected by sections 35 and 36?

11. The MLA believes the current provisions of s.35 and s.36 FOIA set out a proper and fair balance between the public's legitimate right to know about the formulation of public policy and the importance of preserving a "safe space" in which policy makers can exchange candid and wide-ranging views for the formulation of better public policy. These exemptions should remain unchanged.
12. The MLA acknowledges that, in principle, the formulation of public policy requires a safe space in which public officials and elected office holders can freely and frankly deliberate public policy with a degree of confidentiality. However, there are also compelling arguments in favour of disclosure which arise in relation to the disclosure of policy formulation, including not least an

²⁰ Dransfield v IC and others [2015] EWCA Civ 454

improvement in the formulation of policy itself. The government itself has recognised this, stating:

“The Government recognises that that the public interest against the disclosure of much material covered by collective responsibility will often be strong, but that the scheme of the Act does not make protection absolute. Accordingly, the draft of the section 35 exemption reflects Parliament’s intention that in some circumstances, the public interest in relation to information covered by it may fall in favour of release. So in particular cases the public interest in favour of the disclosure of material covered by collective responsibility may prevail.The importance of this practice is that by these actions it is considered that each section 35 case must be considered on its individual merits.”²¹

13. The MLA agrees. It is essential that each case is considered on its own facts, rather than by way of a blanket approach which does not distinguish between the different factors and the weight of those factors in any given request.
14. The issue is therefore the extent of the ‘safe space’ which is necessary to permit a candid exchange of views for the purpose of policy formulation. The right to receive information is a right protected by Article 10 ECHR and Article 11 of the EU Charter of Fundamental Rights. Therefore any restriction on the right to receive information must be kept to the minimum necessary to achieve any legitimate purpose for which they are restricted.
15. The MLA disagrees with the Consultation Paper’s assertion that the tension between these rights is brought into “sharp relief” in the context of decision making processes or policy formulation. These rights and similar rights are the subject of an intense focus and balancing exercise in many areas of FOIA which reflect a carefully calibrated approach of rights and exemptions, across the many and varied areas of information which FOIA encompasses. S.35 and s.36 exemptions are no different.
16. There is no valid reason of principle why policy formulation and deliberative communications which are protected by s.35 and s.36 FOIA should be elevated over the other types of information protected by qualified exemptions in FOIA; for example, s.26 FOIA which protects information whose disclosure would prejudice the defence of the United Kingdom, s.29 FOIA which protects information whose disclosure would prejudice the UK economy, or s.31 FOIA which protects information whose disclosure would prejudice the prevention or detection of crime. Providing a reasonable and balanced framework of protection for the internal deliberations of policy makers is important, but it is certainly not more important than protecting information which prejudices national defence, the economy or the prevention or detection of crime.

²¹ Statement of HMG Policy on the Use of the Executive Override under the Freedom of Information Act 2000 as it relates to information falling within the scope of s.35(1).

17. There is a cogent argument for enhancing public rights of access to information by rejecting the hierarchical approach reflected in s.35 vis-a-vis s.36 which gives greater protection to the formulation of central government policy and ministerial communications than deliberative processes and communications of other public authorities. S.35 FOIA is currently a broader class based exemption, rather than the narrower prejudice oriented exemption set out in s.36. Accepting the principles of transparency and accountability at the heart of FOIA, there is a cogent argument that s.35 should be updated to make it a prejudice based exemption in the manner of s.36, s.26, s.29 and s.31 (amongst others). If information does not prejudice the effective formulation of government policy, there would appear little good reason for not allowing the public access to such information. The formulation of government policy is important, and the principles of collective responsibility should be respected as an important constitutional convention, but these are no greater than similar issues which arise in the increasingly decentralised framework of political power and public responsibility around the United Kingdom.
18. However, on this occasion, because of the independent research conducted by the UCL Constitutional Unit,²² the MLA does not advocate the further liberalisation of s.35 to increase the public's right to information by making s.35 a prejudice based rather than a class based exemption. This is because the only independent evidence on the impact of FOIA shows that the current framework is not resulting in any evidence of a "chilling effect" on the formulation of government policy and that "the adverse impact of FOI seems negligible to marginal. The dominant view was that nothing has changed". The research shows specifically that:
- a. FOIA has not affected the quality of advice and submissions to ministers and that some of the interviewees were surprised by the question that it might do so.
 - b. Any fears of committing information to paper could not be attributed to subsequent release under FOIA.²³
 - c. the impact upon the 'audit trail' of policy making was 'slight' with only some officials tracing a negative impact back to FOIA, but with many others dismissing this or believing it had had a positive effect.²⁴
 - d. FOIA has had no impact on the way government departments work together.²⁵
 - e. There is also significant anti-FOIA feeling in the upper reaches of Whitehall. The same state of affairs appears to exist in Westminster-style systems abroad, where there is controversy without evidence. Whitehall, as with other countries above, has an interest in

²² The Impact of the Freedom of Information Act on Central Government in the UK: Does FOI Work?, Robert Hazell and others, 2010.

²³ Ibid, pp.164-166.

²⁴ Ibid p.172.

²⁵ Ibid p.173

perpetuating the discussion about a “chilling effect”. The assumption of a widespread chilling effect may be inference drawn by those who are ‘anti-FOI’.

f. FOIA has not affected decision-making or the effectiveness of government overall.

19. The MLA agrees with this independent academic research. This was also the conclusion of the House of Commons’ Justice Committee in 2012 who stated that it was “not able to conclude, with any certainty, that a chilling effect has resulted from [FOIA]”. There is therefore no empirical independent evidence of the “chilling effect” under the current FOIA framework as opposed to anecdote and perception. The Commission should not propose changes to FOIA which would result in less transparency and less accountability absent compelling, cogent and independent evidence of such an effect. To do so would amount to an unwarranted infringement on the public’s right to know.
20. This view is supported by the Information Commissioner himself who emphasises that the legislation is working “pretty well”. He has also stated that both he and the Tribunal recognises the importance of a “safe space” for policy deliberations. The Information Commissioner however believes that the real threat to the safe space comes not from any actual disclosure as a result of FOIA, but from civil servants perpetuating a myth that FOIA meant that information could not be written down and recorded. In his words, the chilling effect therefore becomes a ‘self-fulfilling prophecy’.²⁶
21. In this regard, it is essential to note that the ICO, the First-Tier Tribunal and the High Court have repeatedly recognised a “strong public interest” in permitting public authorities to have a ‘safe space’ for active discussions about policy formulation and the conduct of public affairs both with third parties and within a public authority.²⁷ The principal of a ‘safe space’ is clearly recognised and not in dispute. By way of example, in January 2015, the FTT upheld the principle of the “safe space” when refusing to order disclosure of information relating to the ending of the “Building Schools for the Future” programme.²⁸
22. The MLA notes and agrees with paragraphs 12-16 of the Information Commissioner’s response to the Commission which identifies how frequently the Information Commissioner upholds the use of s.35 and s.36 by central government departments. The number of occasions where reliance on these exemptions is not completely upheld is very small – in 2015, 83% of appeals against a public authority’s reliance on s.35 were rejected by the Information Commissioner. In 2015, only 4 appeals against the application by s.36 by central government departments were

²⁶ Public remarks made at the Society of Editors Conference, 19 October 2015 and speech given to the LSE ‘Working Effectively: lessons from 10 years of the Freedom of Information Act’ dated 1 October 2015.

²⁷ See paragraphs 194-203 of the ICO’s Guidance on s.35 FOIA, paragraphs 57-61 of the ICO’s guidance on s.36 FOIA, *DBERR v IC and Friends of the Earth (EA/2007/0072, 29 April 2008)* and *Friends of the Earth v IC & Export Credits Guarantee Department [2008] EWHC 638 at [38]*.

²⁸ *Department of Education v Information Commissioner [EA/2014/0079]*, 29 January 2015.

successful before the Information Commissioner. These statistics strongly suggest that the perception of the risk of disclosure is far greater than reality and that these qualified exemptions provide an effective protection for the 'safe space' of policy formulation in appropriate cases. As the Information Commissioner states at paragraph 16 of his submissions "disclosure is in fact far from routine; the reality is that only a very small proportion (less than 3%) of requests for this type of information results in an order to disclose any part of it."

23. The issue which therefore arises is whether the mere fact of a need for a 'safe space' should be a factor which always outweighs other countervailing arguments. Clearly it should not. It cannot be a 'trump card' which always outweighs all other public interest considerations. Maintaining both s.35 and s.36 as qualified exemptions which are subject to a public interest test is essential. The rights protected in this area are no more important than those found elsewhere in FOIA. The ICO and the First-Tier Tribunal have repeatedly recognised that a fact sensitive and calibrated approach is necessary in each case.
24. The ICO and the FTT recognise that where policy decisions are still "live" the likely "chilling effect" of disclosure will carry "significant weight". However, the more removed any disclosure is from the relevant policy formulation, self-evidently the more difficult it will be to establish any "chilling effect" on the candour of public officials. This is the correct approach. There cannot be a bright line for determining when the risk of any "chilling effect" has sufficiently diminished to be offset by the public interest in disclosure. Each case must be considered on its own facts. In particular scenarios, a shorter or a longer time period may be appropriate. The proper approach is the current one which requires public authorities to provide appropriate evidence in support of any opposition to disclosure, and the determination of the merits of this evidence and arguments against it by an independent, and specialist body, either the Information Commissioner or the Tribunal. It would be wrong in principle to define specific periods after a decision has been reached in policy formulation to permit disclosure. One size cannot fit all.
25. Further, the likely "chilling effect" must not be considered in isolation but in the context of the operation of s.40 FOIA which protects the disclosure of personal data where it would not comply with the data protection principles. Therefore in appropriate cases, disclosure of advice will not be linked to named officials, who may well have their identities redacted, particularly with regards to junior officials.²⁹
26. When assessed with a proper and contextual understanding of the operation of FOIA, it therefore is apparent that fears about a "chilling effect" are borne of misconception not of evidence. The proper and proportionate approach to remedy this is training and improved internal guidance, not recalibrating and restricting the scope of FOIA in this important area

²⁹ See for example Home Office v ICO and Sloan (EA/2015/0030, 16 December 2014 at [36]).

which provides public access to information of real public importance. There should be no new restrictions placed on the current qualified exemptions.

Collective Responsibility

Q.2 What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?

27. The MLA believes the current provisions of s.35 and s.36 FOIA set out a proper and fair balance between the public's legitimate right to know about Cabinet decisions and the need to protect the decision making process and the convention of collective responsibility. This should not be altered.
28. There is a particularly acute public interest in certain circumstances in the disclosure of information relating to Cabinet policy and its deliberative process. However that public interest will not arise every time and on many occasions it will be outweighed by the need to safeguard the convention of collective responsibility as recognised by the Commission. However each case must be considered on a fact sensitive basis, weighing the competing rights which arise in any particular case. That is why it is essential to preserve the public interest test found in the qualified exemptions for s.35 and s.36 FOIA.
29. The Commission acknowledges that both the Information Commission and the FTT recognise the public interest in protecting the convention of collective Cabinet responsibility after a decision has been made. It also notes that on the overwhelming number of occasions, the Information Commissioner has upheld the withholding of Cabinet Minutes and has only ordered the disclosure of Cabinet minutes on six occasions since 2005. Only two of those decisions ultimately resulted in disclosure. The principles of collective responsibility clearly have not been undermined by those two disclosures; the convention of collective responsibility continues to be accepted and respected.
30. In the *Westland* decision, the Information Tribunal (as it then was) recorded that its decision to order the disclosure of Cabinet minutes did not mean that the public interest will commonly require the disclosure of Cabinet minutes and that such disclosure would be rare. The currency of the minutes would also be an important factor in any disclosure. The order for disclosure in *Westland* took place 24 years after the relevant Cabinet meeting and after many ministers had left the public stage and written extensively about the events in question in their memoirs. Similarly, the disclosure of Cabinet Minutes relating to the takeover of Rowntree by Nestlé concerned events which had taken place some 25 years previously. It would be contrary to

public policy in such circumstances not to afford public access to documents of historical record when no prejudice or damage to the principle of collective responsibility can be established. Indeed, the public interest in such circumstances accentuates the importance of disclosing the official record so as not to allow for the reimagination of history by those involved.

31. The four requests where the disclosure of Cabinet minutes have been the subject of a Cabinet veto all relate to significant events where the public interest was particularly acute. On three of the occasions, the veto was exercised after the decision of the Information Commissioner. Although the Supreme Court did not decide the point in *Evans*, Lord Neuberger did recognise that the constitutional implications which led to his decision to quash the veto were arguably less serious than would be the case when the veto was used following a decision of the First Tier Tribunal or Upper Tribunal. For the reasons discussed more comprehensively in answer to Q.4 below, the veto remains available to the executive in exceptional and appropriate cases. As it has been very rare for the disclosure of Cabinet minutes and notes to be ordered by the Commissioner of the FTT, it would be wrong in principle to elevate Cabinet minutes and notes to a special category of information where the public interest cannot be considered.
32. There will be cases where the public interest in disclosure of such information does outweigh the strong public interest in maintaining the convention of collective responsibility. Again, there can be no bright line which determines when Cabinet documents should or should not be disclosed because the “sensitivity” of the information has sufficiently diminished; each request must be considered on its own facts. It is therefore essential to maintain the qualified exemptions in s.35 and s.36 FOIA in order to allow cases to be considered on a case by case basis. Removing any public interest argument for access to such important information in appropriate cases will send a very negative message about parliament and government’s support for FOIA. Such a change would suggest to the public that there is one rule for Cabinet, and another rule for the numerous other public authorities exercising significant power and influence over the public. Any restriction of the public’s right of access would reduce the scope for transparency and accountability in respect of the highest echelons of policy making. This would be detrimental to the democratic process and should be resisted.

Risk Registers

Q.3 What protection should there be for information which involves candid assessment of risks? For how long does such information remain sensitive?

33. There is no difference of principle between risk registers and the type of information addressed in Q.1 The MLA submits that risk registers should remain the subject of qualified exemptions in either s.35 or s.36 FOIA so that each request can be considered on a fact sensitive basis and

the public interest in disclosure can be weighed against the public interest in withholding the relevant information.

34. Again, there can be no temporal bright line which relates to the sensitivity of a risk register. Each request must be considered on its own facts. The “sensitivity” of the risk register is but one factor to be considered in weighing the public interest arguments in favour of and against disclosure. These factors should be assessed and reviewed by independent specialist bodies such as the Information Commissioner or the Tribunal in cases of dispute, in light of the relevant evidence.
35. The policy issues which relate to the full and frank discussion of policy set out in Q.1 apply equally to risk registers. However, there is no evidence of a “chilling effect” in relation to risk registers specifically. This issue was comprehensively addressed before the FTT in *Department of Health v Information Commissioner and others (EA/2011/0286 & 0287)*. The FTT recorded there was “no actual evidence of such a [chilling] effect” [66]. It also noted the Applicant’s views that as a former Minister, there was “no evidence that a chilling effect developed as a result of the release of the reviews even after he moved to the Treasury” [67] and that “in his experience as a Minister, that the quality of submissions on policy had tended to improve since the above disclosures [of risk registers]” [70]. In the same case, the FTT also noted that a number of risk registers had previously been disclosed, including in relation to the controversial potential third runway at Heathrow in 2008, and by other public authorities such as NICE and the CQC. As the Information Commissioner also points out at paragraph 40 of his submissions to the Commission, some public authorities publish risk registers, often in some detail, such as the Care and Support Reform Programme Board and the Health and Social Care Information Centre.
36. None of these disclosures has resulted in any chilling effect or affected the quality of submissions. Risk registers continue to be used as tools of policy formulation by government and are used uninhibited by the risk of disclosure through FOIA. There is no reason of principle why there should be any restriction imposed on the public’s right of access to such important tools of policy making in appropriate cases, where the public’s right of access outweighs the public interest in withholding disclosure. As the Commission recognises, the rare occasions where risk assessments have been ordered to be disclosed relate to “controversial and highly political projects [where] there was a strong interest in understanding exactly what risks these programmes posed.”
37. The MLA therefore contends that no changes should be made to the protection afforded to risk registers under FOIA. They are not a special category of information. It would significantly undermine transparency and accountability if risk registers were to be afforded any greater protection from disclosure under FOIA.

Q.4 Should the executive have a veto (subject to judicial review) over the release of information? If so, how should this operate and what safeguards are required? If not, what implications does this have for the rest of the Act, and how could government protect sensitive information from disclosure instead?

38. The MLA does not dispute that the government should have the ability to veto the release of information under FOIA in very exceptional cases. However, the MLA does strongly contend that the use of this veto should be confined by the clear limits set out by the Supreme Court in *R (Evans) v AG and others* [2015] 2 WLR 813. These limits on the use of the veto are essential to safeguard the rule of law and to prevent the entire rationale of FOIA being undermined.
39. The use of the veto should not be permissible in circumstances where the executive simply takes a different view on the same facts as has been considered by a specialist Tribunal which forms part of the judicial system. The veto should only be exercisable in exceptional cases, where new evidence arises, where there is a manifest error of law, or where the competent person can explain with the clearest possible justification in the grounds why the Tribunal was wrong to make the findings and proceed on the basis which it did. These were the limited circumstances correctly identified by the Supreme Court in *Evans*.
40. These proper limits on the use of the veto must certainly not be used as a basis for creating more absolute exemptions in FOIA where qualified exemptions which are subject to a public interest balancing exercise exist. The veto has been used on 7 occasions in relation to hundreds of thousands of FOIA requests since 2005. The veto has been successfully used on 6 occasions without challenge. It has only been used on very rare occasions, as was always intended. It is only relevant in the most exceptional cases. As a matter of principle therefore it would be quite wrong to redraw the series of checks and balances carefully provided for by Parliament after extensive debate to address any apparent concern about such a small number of cases.
41. Further, the Statement of HMG Policy on the use of the veto shows that it was never intended by Parliament or the government that the veto would be used against a decision of a specialist Tribunal.³⁰ The then Secretary of State for the Home Department, Jack Straw MP, told parliament that:
- “I do not believe that there will be many occasions when a Cabinet Minister – with or without the backing of his colleagues – will have to explain to the House of publicly, as necessary, why he decided to require information to be held back which the commissioner said should be made available.” (emphasis added)*
42. The veto was therefore only ever intended to be used on rare occasions against a decision of the Information Commissioner. The kernel of the decision in *Evans* is clearly focused on the scope given to government to exercise a veto after a specialist tribunal, part of the judicial

³⁰ Statement of HMG Policy: Use of the executive override under the Freedom of Information Act 2000 as it relates to information falling within the scope of Section 35(1)

system, has ruled in favour of disclosure. The decision of the Supreme Court in *Evans* illustrates that there are fundamental constitutional issues at stake which are far wider than the use of the veto in the context of FOIA, if the executive can simply chose to exempt itself from an order of a judicial body. As the speech of Lord Neuberger PSC shows, that issue goes to the heart of the democratic separation of powers in the United Kingdom. The MLA agrees with the reasoning and approach of the President of the Supreme Court in *Evans*.

43. The executive can and does have a veto which is subject to judicial review. It would be wrong to revise the role of the veto simply because on one occasion the government has been overturned in its use of the veto by way of judicial review. That is a proper part of a functioning democracy. Executive action which was not susceptible to judicial review would undermine a critical part of the rule of law. The entire rationale of judicial review is that on appropriate occasions, executive decisions will be overturned. The decision in *Evans* does not provide any proper basis for recalibrating the careful balances between competing public interests set out in FOIA.
44. In this context it is important to note that irrespective of any changes to the exercise of the veto in FOIA, there is no right of veto in respect of environmental information which is the subject of a decision notice in relation to a request under the Environmental Information Regulations which implements the Aarhus Directive. This is a matter of European law. This itself emphasises why as a matter of policy, the scope for any veto in respect of non-environmental information under FOIA must be kept within strict limits.
45. It should also be noted that the fears put forward by the Attorney General in *Evans* about the consequences of disclosure if not vetoed by government have not materialised following disclosure of Prince Charles' advocacy correspondence. Indeed it is noticeable that according to a YouGov survey conducted in 2014, the majority of the public appear to support Prince Charles being able to express him on matters of importance to him and that his popularity has increased while there has been increased awareness of his advocacy correspondence over the course of the *Evans* litigation.³¹ The fears within public authorities about the effects of disclosure often prove not to be substantiated when disclosure is in fact ordered. This is as applicable to the *Evans* litigation as it is to the concerns about the "chilling effect" in respect of risk registers or other areas of policy formulation.
46. Amending FOIA because of concerns about the utility of the veto or broadening the scope of the veto itself would be using a sledgehammer to crack a nut. The very purpose of FOIA is to permit the disclosure of sensitive information where there is an independent determination that the public interest in disclosure outweighs the public interest in withholding the information. In very rare cases, it may be appropriate to withhold disclosure by way of veto, but it is an essential part

³¹ <https://yougov.co.uk/news/2014/01/26/thumbs-up-Prince-Charles-wider-role/>

of the rule of law and democratic accountability that the use of the veto is subject to close scrutiny as occurred in *Evans*. The use of the veto must not be expanded or FOIA redrafted to restrict the opportunity to advance public interest arguments in favour of disclosure.

Q.5 What is the appropriate enforcement and appeal system for freedom of information requests?

47. It is essential that the appeals and enforcement system in respect of FOIA permits independent bodies such as the ICO and the First Tier Tribunal to make binding directions requiring public authorities to disclose information. The current mechanism for appeals could be further streamlined and speeded up, in the manner suggested below, but the structure of the appeal system, with roles for the requester, the Information Commissioner and the Tribunal which includes two lay members should be maintained. Access to public information under FOIA and public confidence in the system will be eroded and undermined if the current independent and binding appeals mechanism is weakened.
48. An appeals mechanism which only permits non-binding recommendations by the independent appeal body and which leaves the ultimate decision up to the public authority, subject to judicial review, will increase the cost of appeals, the legalism of the appeal mechanism, and the length of time it takes for requests to be determined. It will force appeals to the High Court rather than a specialist tribunal which is relatively well designed to determine these issues. Increased recourse to judicial review will only add to, rather than diminish, the burden on public authorities, not least because of the obligations of disclosure and candour which are an integral aspect of such a claim. Further, the Tribunal system has specific mechanisms for considering the requested information itself which are presently not available to the High Court. As Lord Carnwarth recognised in *Kennedy v Charity Commission*³² the use of ordinary judicial review principles to review a public authority's refusal to provide information is not sufficiently comparable to the scrutiny which must take place under Article 10(2) ECHR to satisfy the requirements of Article 10(1) ECHR. Therefore, any suggestion of removing the power of the Information Commissioner or the Tribunal to order disclosure of information from a public authority and requiring appeals to be conducted by way of judicial review will therefore increase costs, increase the role of lawyers and increase the length of time it takes for requests to be determined.
49. The MLA believes that it currently takes too long for requests for information under FOIA to be determined. However, in the experience of MLA members, the primary fault cause of this lies in the culture of withholding information and obstruction which still permeates too many public authorities. By way of example, as recently as July 2015, the Information Commissioner issued a Decision Notice which criticised the approach of the Cabinet Office, which is the central government department now responsible for FOIA:

³² [2014] UKSC 20

“The Commissioner is extremely disappointed that he needed to serve an Information Notice in order to obtain a response from the Cabinet Office in this case. He acknowledges that the Cabinet Office often has to deal with a range of internal and external stakeholders when preparing its responses. He also acknowledges that it often has to deal with requests for sensitive information. He accepts that this can give rise to unavoidable delays from time to time. For this reason, he asks the Cabinet Office at the start of any new case to keep him informed about likely delays and anticipated resolution times. Lack of meaningful communication with the Commissioner and his case officers about delay in the process is both unhelpful and fuels general concerns about timely compliance.”³³

50. This criticism illustrates a problem repeatedly faced by journalists around the country. Rather than reworking FOIA or the appeals mechanism, it would be far more efficient and effective to improve training within public authorities of FOIA obligations, including in particular the s.16 duty to assist requesters. If public authorities properly complied with s.16 obligations to assist requesters in shaping and targeting their request, the practical implementation of FOIA would be significantly boosted. Too often, in the experience of MLA members, the duty of public authority in s.16 only comes into focus when the matter is considered before the FTT, often many months after the original request was made. The MLA believes that many appeals might well be avoided if sanctions could be enforced in circumstances where public authorities are found unreasonably to have failed to comply with s.16 duties to assist requesters.
51. The impact of this culture on the public's right to know is further accentuated by the continuing and unacceptable delays in public authorities responding to FOIA requests within the statutory time limits. It is deeply concerning that one of the public authorities which is currently the subject of monitoring for its failure to respond to more than 85% of FOIA requests within the 20 working day limit is the Ministry of Justice. Equally, the Cabinet Office, has also had numerous decision notices issued against it by the ICO in recent months. On two previous occasions it has also been the subject of special monitoring by the ICO for its inadequate performance in the processing of FOIA applications.
52. The obstruction and delay described in the following example illustrates the experiences of many MLA members' journalists legitimately seeking access to information to which they have a right under FOIA. A journalist made a request for information from the Cabinet Office. It took four and a half months to respond to the request. When the Cabinet Office did, it responded by stating that the information was exempt as it would be published in the future, but did not specify any anticipated date for publication. When the journalist requested an internal review, the Cabinet Office failed to respond for a further four months. The journalist complained to the ICO about the failure to respond to the request for an internal review. Only then did the Cabinet Office actually respond with an internal review which upheld the original decision, but which also still failed to specify a date of publication over 9 months after the original request had been made. The journalist then appealed to the ICO who took 15 months to consider the request,

³³ ICO Decision Notice FS50556590 dated 23 July 2015.

eventually issuing a Decision Notice which described the Cabinet Office's actions as amounting to "a denial of that right [of access to information] through procrastination [which] is contrary to the spirit of the legislation." The Cabinet Office then appealed the ICO decision notice, further delaying the publication of the information, before suddenly withdrawing its appeal and publishing the information, some 27 months after the original request.³⁴

53. In this example, the public authority had successfully delayed the publication of information for over two years when it should have been provided within a month under FOIA. It did so without consequence or penalty. This delay and obstruction undermines the very legitimacy of FOIA and reduces the public interest in contemporary access to information. The MLA believes therefore that the Commission should consider whether the ICO and the FTT should be given powers to impose sanctions on public authorities who are found to have unreasonably and deliberately obstructed access to information in the manner described at paragraph 52 above. Although it is anticipated that any such powers would be sparingly used, the power to penalise public authorities who deliberately obstruct the rights in FOIA would operate as a practical deterrent to such behaviour and streamline the implementation of the legislation.
54. Another aspect of this culture of obstruction and delay is demonstrated where public authorities treat legitimate media enquiries to the media or press office as FOIA requests to be responded within the Act's framework, rather than simply providing answers in the ordinary way. This should not be the approach adopted by public authorities.
55. In the experience of MLA members, public authorities belatedly raise exemptions before the FTT which have not been raised previously. Although the law currently permits public authorities to raise new exemptions before an appeal as of right,³⁵ the implementation of FOIA might be streamlined if this right was curtailed. Instead public authorities should be required to identify their objections to the disclosure of information at the earliest opportunity, with cost consequences if those objections are found to be manifestly unreasonable or if new exemptions are raised belatedly when they could and should have been raised earlier. An appeals and enforcement structure which penalises unreasonable and obstructive behaviour by public authorities and which encourages constructive, reasonable and transparent engagement with FOIA by all parties will significantly streamline the process and reduce the delays in the system, permitting the ICO and the Tribunals to concentrate on cases where the issues are genuinely finely balanced and which justifiably require an independent authority to reach a determination.
56. The appeals and enforcement structure must therefore retain and enhance the ability of the ICO and the Tribunal to reach prompt and binding determination of FOIA requests. If the ICO and the Tribunal were provided with additional enforcement powers to penalise deliberate of

³⁴ As described by Martin Rosenbaum, a leading Freedom of Information journalist, at <http://www.bbc.co.uk/news/uk-politics-33696753>

³⁵ *Birkett v DEFRA* [2011] EWCA Civ 1606

obstruction of the rights in FOIA, this would minimise delays and create a culture which encourages transparency and co-operation within public authorities. Any reform which minimises the power of the ICO and the Tribunal to enforce FOIA will systematically undermine the importance of the legislation and make it a “toothless tiger” which just adds bureaucracy rather than transparency and accountability.

Q.6 Is the burden imposed on public authorities under the Act justified by the public interest in the public right to know? Or are controls needed to reduce the burden of FOI on public authorities? If controls are justified, should these be targeted at the kinds of request which impose a disproportionate burden on public authorities? Which kind of requests do impose a disproportionate burden?

57. The MLA believes that Q.6 is based on a fundamental misconception. The requirement in FOIA to provide information held by public authorities and which promotes accountability and transparency should not be regarded as a “burden” but as an essential part of the role of a public authority. Transparency should not simply be about the provision of information which public authorities want to publish in a manner and timing of their choosing. Responding to proper and legitimate requests for public interest information about the workings of a public authority is a vital part of the democratic process. The public’s right to know should not be characterised as the imposition of a ‘burden’.
58. The benefit of FOIA for accountability, transparency and democracy cannot be reduced to finances. To do so ignores the fundamental contribution to public debate and democracy to which FOIA has played such an important role. Moreover, assessing the financial impact of FOIA according to the costs incurred by public authorities also completely ignores the savings and benefits which can arise from the very scrutiny which FOIA provides. For example, the Independent Parliamentary Standards Authority, established in the wake of the parliamentary expenses scandal calculated in 2013 that it had cut MPs’ expenses payments by £35 million.³⁶ This saving alone broadly accounts for the costs of implementing FOIA provided by the Ministry of Justice to the Justice Select Committee in 2011.
59. FOIA requests have also exposed other areas of public spending which have led to significant savings, for example the tens of millions of pounds spent by local councils on credit card bills, including luxury travel and designer jewellery. The spending was described by the then Communities Secretary as “wild” who went on to set out the benefits of FOIA:

“now that we are forcing councils to release details of their expenditure, the culture of wild overspends and excess which became the norm [...] will hopefully become a thing of the past.”³⁷

³⁶ <http://www.bbc.co.uk/news/uk-politics-24063954>

³⁷ <http://www.telegraph.co.uk/news/politics/council-spending/8542909/Councils-spend-100m-on-taxpayer-funded-credit-cards.html>

The MLA agrees with this assessment. Assessing the financial impact of FOIA on public authorities by the cost of compliance completely ignores the scope for actual savings which the transparency requirements of FOIA can deliver.

60. The MLA strongly opposes:
- a. the introduction of fees for making FOIA requests;
 - b. extending the scope of activities which can be considered in determining the cost of the request for the purpose of s.12 FOIA;
 - c. reducing the financial limits set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004; and
 - d. introducing charges for appealing to the Information Commissioner, the First Tier Tribunal or the Upper Tribunal.
61. The MLA agrees with the Campaign for Freedom of Information's contention that any one of these measures would have a serious impact on the operation of FOIA and that taken together they would substantially undermine the effectiveness and purpose of FOIA. The MLA's experience of obstruction by many public authorities in the provision of information would only be accentuated by any of these proposals which would become yet a further tool in the armoury of public authorities who wished to oppose the disclosure of public interest information under FOIA.
62. The payment of a fee for information which the public has a right to know should be resisted as it undermines the fundamental principle of equal access to information.
63. The introduction of a fee for FOIA requests would have very serious and far reaching consequences. FOIA only requires a request to be made in writing and with contact details provided. As set out at paragraph 53 above, routine and day-to-day enquiries by the media to a public authority's press or communications team are often treated as FOIA requests. These routine enquiries by the media would therefore be subjected to a fee. Indeed, the introduction of fees would encourage public authorities to treat such enquiries as a FOIA request, as it would be a potential method of raising revenue. This would result in a severe curtailment of the free, legitimate and necessary flow of information between public authorities and the media which ordinarily should fall outside the scope of FOIA. The consequences would not be limited to the media; for example routine queries and interactions between members of the public and their local councils might well fall within the scope of FOIA and be subjected to a fee.
64. Moreover, the entirely detrimental consequences of introducing fees for access to public authority information was demonstrated by the recent experience of the Republic of Ireland who

introduced a fee of €15 in 2003 in respect of their equivalent of FOIA. The result of that change was summarised by the Office of the Information Commissioner in the Republic who stated³⁸:

“While I expected to find a decline in usage of the Act I did not believe that it would be as immediate or as dramatic in scale as proved to be the case: between the first quarter of 2003 and the first quarter of 2004 the total number of requests fell by over 50%. In addition, I found that requests for non-personal information had fallen by 75% over the same period while requests for a mixture of personal and non-personal had fallen by 20%. Even allowing for a surge in requester activity in the first quarter of 2003, I have found that the amendment of the Act and, perhaps more crucially, the introduction of fees, have had an impact on the operation of the Act far beyond what I believe could have been envisaged either by the authors of the High Level Group Report, the Government or members of the Oireachtas when passing the amendment Bill.”

65. The United Kingdom’s Information Commissioner,³⁹ the English⁴⁰ and the European⁴¹ courts have all recognised the essential role which the media play in disseminating information of public interest and importance to the public at large. Therefore, it is very significant that the analysis of the Republic of Ireland’s Information Commissioner emphasises the particularly disproportionate impact which the introduction of fees has for journalists. The number of requests from journalists fell immediately by 83% in the first year and continued to further decline across public authorities generally. The trends in respect of specific types of public authority were even “more alarming” in the words of the Commissioner. Requests from journalists in relation to the civil service fell 84% between the first quarter of 2003 and the first quarter of 2004 and a further 46% between the last quarter of 2003 and the first quarter of 2004. In respect of the Department of Finance, a key government department responsible for guiding policy and spending decisions within the Republic of Ireland, there was a 90% fall in requests from journalists. The impact of the introduction of fees for on journalists, acting in their legally recognised role as the “watchdog” of society and the “eyes and ears” of the people could not be clearer.
66. Journalists were not the only group severely impacted by the introduction of fees, although they were the group most disproportionately affected. The decline in requests from businesses fell by 53%, while requests by members of the legislature fell 40% between 2003 and 2002.
67. The Officer of the Information Commissioner in the Republic of Ireland also commented on the introduction of appeal fees and noted that the income which it had received had been far exceeded by the cost of setting up the relevant scheme to collect such fees. In his own words⁴²:

³⁸ <http://www.oic.gov.ie/en/Publications/Special-Reports/Investigations-Compliance/Review-of-the-Operation-of-FOI2003/Up-front-Fees.html>

³⁹ See paragraph 72 of his response to the Commission dated 16 November 2015.

⁴⁰ *McCartan Turkington Breen v Times Newspapers Limited* [2000] UKHL 57; *R (Guardian News and Media Ltd) v City of Westminster Magistrates’ Court* [2013] QB 618

⁴¹ *Társaság a Szabadságjogokért v Hungary* (2011) 53 EHRR 3

⁴² <http://www.oic.gov.ie/en/Publications/Special-Reports/Investigations-Compliance/Review-of-the-Operation-of-FOI2003/Up-front-Fees.html>

"I find this hard to reconcile with one of the state aims of the introduction of fees which was that these fees (would) contribute to addressing the administrative cost of the burden of FOI."

68. This analysis accords with a study which found that the fees recouped amounted to only 1.6% of the estimate costs of administering the Republic of Ireland's equivalent of FOIA (which also includes rights of access to personal data).⁴³
69. This evidence in respect of the introduction of fees is clear and unequivocal. Fees will undermine the purpose of FOIA and may well contribute little if anything to the cost of its administration. Introducing a fee structure can cost more to administer than is collected in revenue. If fees are set too high to avoid this possibility, those high fees will have an undoubted chilling effect on the use of FOIA. In light of this evidence, it is unsurprising therefore that the Republic of Ireland recently voted to remove any upfront application fees for making requests under their equivalent of FOIA.
70. The experience of the Republic of Ireland is reflected in very similar trends in employment tribunals in the United Kingdom. Since tribunal fees were introduced in July 2013, there has been a "steep decline" in the number of employment tribunal claims, which have fallen by 67%.⁴⁴
71. The MLA therefore strongly urges the Commission to heed this clear evidence which aptly demonstrates the adverse consequences of the introduction of fees.
72. It would also be inappropriate to restrict the workings of FOIA by increasing the activities which can be taken into account in determining compliance with the statutory cost limits for addressing requests under s.12 FOIA. Permitting time spent "considering" a request to fall within the scope of s.12 FOIA would introduce subjective criteria and encourage innocent or deliberate manipulation of the system. It might well encourage public authorities to employ more junior members of staff who might take longer to "consider" a request than more experienced staff. It would operate against the disclosure of information which may not have been requested previously and would therefore take longer to consider. It would also mean that requests which took a long time to consider but where a decision was ultimately made that disclosure should be allowed would fall outside the scope of FOIA because of the length of time which had been spent "considering" the issue. This is wrong as a matter of basic principle. Moreover, it often will not be possible to know how long it will take to "consider" an issue until that consideration has actually taken place. Such a proposal is apt to cause manipulation whether innocent or deliberate. The same applies for other potential changes such as including the time spent on

⁴³ http://issuu.com/tascpublications/docs/an_economic_argument

⁴⁴ House of Commons Library, Parliamentary Briefing Paper on Employment Tribunal Fees, Number 7081, 15 September 2015.

redaction. Such a proposal would have a very detrimental impact upon the workings of FOIA and the promotion of transparency and accountability.

73. Fees should not be introduced for appeals because that would simply encourage public authorities to resist the disclosure of information, well aware that such fees would act as a deterrent to any appeal by a requester. Fees on appeals would disproportionately affect requesters who make up the majority of appellants. It should be noted that some of the most important FOIA disclosures have only resulted from appeals, such as the MPs' expenses scandal. If the aim is to prevent fruitless or vexatious appeals, this can be readily achieved by imposing cost consequences for these type of appeals, rather than applying fees to all appeals generally. Any restriction on the right of access to information must be proportionate and no greater than necessary to achieve the relevant aim.
74. Moreover, higher fees should not be levied for an oral appeal rather than an appeal on the papers. This would lead to a game of 'call my bluff' between the parties who might both wish to have an oral determination of an appeal, but would wish the other side to pay for that opportunity. Similarly, the Tribunal itself can require an appeal to be determined at an oral hearing rather than on the papers. Oral hearings are often more appropriate where the matter is complex and the public interest issues are accentuated, requiring oral evidence from witnesses. It is wrong as a matter of principle to impose fees for such cases and it would undermine the proper and effective appeals process to do so.
75. The MLA believes that the proper way of streamlining the impact of FOIA is to make better use of the tools and mechanisms already available to public authorities and to deter public authorities from obstructing the rights to access information set out in FOIA. For example, the Court of Appeal has recently confirmed that requests which create a disproportionate burden on public authorities are those which are already protected by s.14 FOIA.⁴⁵ The Court of Appeal's decision confirms the ruling of the Upper Tribunal which had previously held that s.14 FOIA is designed "to protect the resources (in the broadest sense of that word) of the authority from being squandered on disproportionate use of FOIA".⁴⁶ The Upper Tribunal itself had noted that the starting point for assessing such disproportionality would be a request which was "likely to cause distress, disruption or irritation without any proper or justified cause." This approach reflects not only the effect of the request, but also its purpose and motive.
76. There is therefore adequate scope within FOIA's existing powers to reject requests which impose a disproportionate burden on public authorities where such requests do not fulfil FOIA's proper purpose of increasing accountability and transparency. As the previous government recognised, s.14 FOIA is "an important tool in preventing the inappropriate or disproportionate

⁴⁵ Dransfield v IC and others [2015] EWCA Civ 454

⁴⁶ 2012 UKUT 440 AAC

use of FOIA [and government was] factoring it into development of proposals for burden reduction".⁴⁷ The Court of Appeal's decision only further emphasises the ability of public authorities to reject such requests under s.14 FOIA.

77. In light of this decision, it would be premature to impose any new restrictions on the use of FOIA as a legitimate tool for access to information and enhancing transparency and accountability. FOIA already includes the power to reject requests which place a disproportionate and unwarranted burden on public authorities. Any reform of FOIA which restricts or diminishes the ability of journalists to use FOIA to seek disclosure of genuine public interest information is therefore not only unnecessary, but also disproportionate and detrimental to the compelling public interest benefits which derive from FOIA.

⁴⁷ Letter from Lord McNally, Minister of State at the Ministry of Justice to Maurice Frankel, Director, Campaign for Freedom of Information dated 5 June 2013.

Annex 1

List of current MLA members

1. **Associated Newspapers Limited**, publisher of the Daily Mail, the Mail on Sunday, Metro and related websites.
2. **Bloomberg**, leading publisher of business and markets news, data, analysis and video
3. **The British Broadcasting Corporation**, a public service publisher of 8 UK-wide television channels, interactive services, 9 UK-wide radio/audio stations, national and local radio/audio services, bbc.co.uk and the BBC World Service.
4. **British Sky Broadcasting Limited**, a programme maker and broadcaster, responsible for numerous television channels, including Sky News and Sky One.
5. **Channel 5 Broadcasting Limited**, a public service broadcaster of the Channel 5 service and 2 digital channels, interactive services and related websites.
6. **Channel Four Television Corporation**, public service broadcaster of Channel 4 and three other digital channels, plus new media/interactive services, including websites, video on demand and podcasts.
7. **CNBC (UK) Limited**, world leader in business news, providing real-time financial market coverage and business information
8. **The Economist Newspaper Limited**, publisher of the Economist magazine and related services.
9. **Express Newspapers**, publisher of the Daily Express, the Sunday Express, the Daily Star, the Daily Star Sunday and related websites.
10. **The Financial Times Limited**, publisher of the Financial Times newspaper, FT.com and a number of business magazines and websites, including Investors Chronicle, Investment Adviser, The Banker and Money Management.
11. **Guardian News & Media Limited**, publisher of the Guardian, the Observer and Guardian Unlimited website.
12. **Independent Print Limited**, publisher of the Independent, the Independent on Sunday, the Evening Standard, i and related websites.
13. **Independent Television News Limited (ITN)**, producer of ITV News, Channel 4 News, Channel 5 News, internet sites and mobile phones.
14. **ITV PLC**, a programme maker and a public service broadcaster of the channels ITV1 (in England and Wales), ITV2, ITV3, ITV4 and CITV, interactive services and related websites.
15. **The National Magazine Company Limited**, publisher of consumer magazines including Cosmopolitan, Good Housekeeping, Harper's Bazaar and Reveal.
16. **News Group Newspapers Limited**, publisher of The Sun and related magazines and websites, and part of NI Group Limited.
17. **News Media Association**, which represents the publishers of over 1200 regional and local newspapers, 1500 websites, 600 ultra local and niche titles, together with 43 radio stations and 2 TV channels.

18. **Pavilion Books Group Limited**, publisher of books and related publishing services specialising in non-fiction subject matter.
19. **PPA (The Professional Publishers Association)**, which is the trade body for the UK magazine and business media industry. Its 250 members operate in print, online, and face to face, producing more than 2,500 titles and their related brands.
20. **The Press Association**, the national news agency for the UK and the Republic of Ireland.
21. **Telegraph Media Group Limited**, publisher of the Daily Telegraph, Sunday Telegraph and related websites.
22. **Thomson Reuters PLC**, international news agency and information provider.
23. **Times Newspapers Limited**, publisher of The Times and The Sunday Times and related websites, and part of NI Group Limited.
24. **Trinity Mirror PLC (including MGN Limited)**, publisher of over 140 local and regional newspapers, 5 national newspapers including the Daily Mirror, Sunday Mirror and The People and over 400 websites.
25. **Which?**, the largest independent consumer body in the UK and publisher of the Which? series of magazines and related websites.

Merseyside Fire and Rescue Authority

Freedom of Information Call for Evidence

Merseyside Fire and Rescue Authority (MFRA) would like to make the following comments in relation to questions 3 and 6 of the Independent Commission on Freedom of Information Call for Evidence:

Question 3: What protection should there be for information which involves candid assessment of risk? For how long does such information remain sensitive?

The Service considers that there should be some protection for public authorities in relation to the release of risk registers. High level information about risks and mitigation is appropriate for release and many authorities will publish this as a matter of course. When a request is made for detailed risk registers relating to on-going projects or activities, this is much more difficult for this Service to deal with. It is vital when ensuring that public services are being delivered effectively, that all risk are considered and that staff feel able to “think the unthinkable”. Often these risks are mitigated, but they still remain in risk registers and are open to misinterpretation or being sensationalised. The Service would request that consideration be given to risk registers of this type only being release after the project is completed.

Equally releasing risk mitigation measures prior to the completion of the project may compromise the measures themselves exposing services to additional risk.

Question 6: Is the burden imposed on public authorities under the Act justified by the public interest in the public’s right to know? Or are controls needed to reduce the burden of FoI on public authorities? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? What kinds of requests do impose a disproportionate burden?

The Service is supportive of the Freedom of Information (FoI) Act, and values its role in allowing people access to information and giving them the right to find out about matters and decisions that affect them. However, use of the Act has become increasingly popular and the volume of FoI requests has increased over the years. For example, the table below shows the increase in requests to MFRS since 2011:

| Year | FoI requests received | FoI requests believed to be for commercial purposes (as far as can be established with the information available) |
|-------------|--------------------------------------|--|
| 2011 | 72 | Not recorded |
| 2012 | 80 | Not recorded |
| 2013 | 101 | Not recorded |
| 2014 | 138 | 13 |
| 2015 | 131 (up to 9 th November) | 17 |

Dealing with this increase in requests has had an impact on the Service which for Merseyside Fire Authority undoubtedly places increased pressure on relatively small teams. Over the last four years, the Fire and Rescue Authority has had to make savings of £20 million as a result of Government spending cuts. The Authority is required to make a further £6.3 million savings in 2015/16. It is also clear that the Authority will also face further significant cuts over the course of the next Parliament. The Authority has already made significant reductions in its support services and staffing, which means there are fewer staff available to service FoI requests. To save £6.3 million in 2015/16, the Authority has identified another £2.9 million to be cut from support services, further reducing capacity.

Whilst the Service respects the rights of citizens to ask for information that may affect their lives and communities and recognises the role that journalists may play in seeking out inefficiencies or poor

practices in the public sector, there is a cost associated with that. The staff collecting, collating, checking, redacting and authorising release of the requested information all have other work to do. As a result, dealing with a FoI request is likely to take staff away from core business.

What the Service believes is particularly difficult to justify is the extent to which commercial organisations use FoI to request information to develop new business leads or seek a commercial advantage. The private sector is effectively using the diminishing resources of the public sector for free, when those resources could be put to better use and there is no return on that investment for the public sector.

What we would ask the Commission to consider is either, levying a charge for such requests, or the ability for an organisation to refuse the request where the applicant is not able to demonstrate that the request is in the public interest.

Even when requests could be considered to be in the public interest, for example in relation to a public consultation on the Service's plans, the enthusiasm of some members of the public to seek more and more detailed information can place significant pressure on a small authority. Five requests from one person for similar but subtly different complex information in the space of one or two months does result in disproportionate effort. This is despite the fact that individually, the cost of meeting the requests would not be sufficient to justify refusal and the subtle differences between requests rule out treating them as vexatious. It is the cumulative effect that has the impact.

It is also difficult to treat requests as vexatious or indeed classify the work required as excessive without it being perceived by the requestor or indeed the public or press as defensive – so in effect services provide the information for fear of being perceived as less than transparent.

Merseyside Fire & Rescue Service has been recording the time spent by all officers involved in processing all FoI requests since July 2015 (32 completed requests). Given it was already keen to understand and share the impact of such requests with the Authority and Government departments.

As such the total time spent since recording began has totalled 153 hours spread across a range of staff from administrators to the Chief Fire Officer. This equates to an average of 4.8 hours per request. If this was applied to the total number of requests received so far this year it would total 629 hours or 90 working days. With the lost time costs in the thousands.

This is resource that can be ill afforded during these times of austerity, so it is vital that the FoI requests processed are of valid public interest and not to further the profits of a commercial organisation.

The Service has welcomed the opportunity to contribute to this call for evidence and looks forward to the publication of the outcomes.

Methodist Church

Introduction – the value of Freedom of Information

The Baptist Union of Great Britain, the Church of Scotland, the Methodist Church and the United Reformed Church submit this joint response to the call for evidence. Our churches are among the largest free churches in the UK and together have a membership of over 800,000 people. We engage regularly with MPs and MSPs in the UK and Scottish Parliaments in a range of policy areas including welfare, energy and climate change and foreign affairs.

Greater access to information enables our Churches and others to examine evidence for proposed change in policy and this in turn improves the quality of public and parliamentary debate.

Regrettably the level of trust in politicians among the UK public is not as positive as we would wish and has diminished in the past seven years.⁴⁸ Our Churches are aware that this is also the case in the attitudes of our own membership. We seek to counter this by promoting citizen engagement with politicians. More open and accountable government encourages engagement with MPs and MSPs as people can have greater confidence in the accuracy of the responses that they receive from elected representatives.

Before addressing the questions posed by the Consultation Document we would like first to comment on the mandate of this inquiry and explain our own experience in the use of Freedom of Information requests (FOIs).

The experience of our Churches in the use of Freedom of Information requests

The Joint Public Issues Team that serves the four Church partners has made use of Freedom of Information requests in the course of public policy analysis. The focus of our FOIs have been around the claims made about the benefit system and the people it serves, most recently investigating the operation and effects of the benefit sanctions system.

The Department of Work and Pensions (DWP) use of statistics has come under a great deal of justified criticism - including by the national statistician.⁴⁹ Disingenuous ‘facts’ have been released to coincide with the implementation of benefit reductions.⁵⁰ FOIs from ourselves and others raised suspicions and also allowed confirmation of the details of the misleading information. It is important to note that it was a combination of concerned individuals writing FOIs, often as a response to personal experiences, and organisations submitting FOIs in a systematic way that allowed a full picture of both the misleading statements and the reality that they were designed to obscure.

The four church partners alongside the Church in Wales recently published a report exploring the Benefit Sanctions system.⁵¹ The description of the operation and outcomes of the system by government was profoundly at odds with reports the churches were receiving from their members, via church-based foodbanks and other contacts. We set about understanding how the system was operated. Much of the relevant information would quite reasonably not normally be in the public domain – training manuals, guides on decision making procedures etc. FOIs were important in allowing us to build a fuller understanding of this system.

More focused FOIs allowed us to show that those with mental health problems were being increasingly affected by sanctioning and to provide the first public estimate of the number of children affected by

⁴⁸ IPSOS MORI poll - Trust in Professions <https://www.ipsos-mori.com/researchpublications/researcharchive/poll.aspx?oltemId=15&view=wide>

⁴⁹ “Fixing the Figures” The Economist, April 25 2013, <http://www.economist.com/blogs/blightly/2013/04/government-statistics>

⁵⁰ For examples see <http://www.jointpublicissues.org.uk/truth-about-poverty-please/> and <http://www.jointpublicissues.org.uk/truthandliesaboutpoverty/>

⁵¹ Time to Rethink Benefit Sanctions; <http://www.jointpublicissues.org.uk/resources/rethinksanctions/>

the policy. This was not information that was deliberately hidden – it was simply that our experience (and that of others) led us to believe these were important questions, while very reasonably government with other needs and experiences did not prioritise this. FOIs by others have also led to enough information being gathered to show that the official presentation of sanctions statistics is misleading (in a way that supports current government policy). The national statistician has made recommendations to rectify this but this would not have come to light without the submission of multiple Freedom of Information requests.⁵²

The mandate of the Inquiry and composition of the Commission

The inquiry has been established in order to respond to felt concerns around the maintenance of ‘safe space’ for deliberation of policy and the burden of the Freedom of Information Act on public authorities. We note that the review of the Freedom of Information Act carried out by the Constitution Unit to the Department of Justice in 2013 did not suggest that concerns in these areas warranted changes. In our view there is equal value in evaluating whether the Act provides sufficient access to Freedom of Information and how this access can be improved. We hope that this might be explored by the Inquiry.

The members of the Commission all have demonstrable capacity and experience. They all have valuable backgrounds of service in Government or on Government bodies but there is no Commissioner with experience from the perspective of ‘consumers’ of freedom of information. While the opportunity for consultation is welcome, we regret this lack of balance on the Commission.

Question 1. What protection should there be for information relating to the internal deliberations of public bodies? For how long after a decision does such information remain sensitive? Should different protections apply to different kinds of information that are currently protected by sections 35 and 36?

The consultation document expresses concern that the Freedom of Information Act reduces the safe space available for civil servants to advise on policy.

It would appear that there is little evidence to suggest that there currently exists a ‘chilling effect’ that compromises the effectiveness of policy making. The report of the Constitution Unit to the Department of Justice Post-legislative scrutiny of the Freedom of Information Act in 2012 determined that the chilling effect was “negligible to marginal”.

There is no evidence to suggest that there are barriers to the appropriate use of section 35. We note that exemption related to formulation of Government policy is the fifth most frequently used exemption by Departments of State having been applied on 257 occasions in the first six months of 2015. We would be concerned if the role of the Information Commissioner in determining the public interest with respect to these exemptions was to be reduced.

Information such as the advice of civil servants to Ministers may well remain sensitive in various ways after a policy decision has been made. However ‘sensitivity’ must not inhibit publication of such information once the internal process of policy deliberation has been concluded. It is reasonable after the event to expect disclosure of the process with which a policy decision has been made. The potential for embarrassment of Government ministers or officials will be a feature of the continued ‘sensitivity’ of information after a policy decision has been determined. Yet exemptions should not be available for the purpose of protecting Government ministers or officials from embarrassment. Consequently we judge that exemptions to publication of information under section 35 should apply only prior to a policy decision being made, even in the case of information deemed sensitive.

⁵² <http://www.statisticsauthority.gov.uk/reports---correspondence/correspondence/letter-from-sir-andrew-dilnot-to-dr-david-webster.pdf>

What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?

The Information Commissioner has tended to uphold the principle of cabinet collective responsibility and maintained this protection for decades after the event.⁵³ In our view the more critical questions are not around duration of protection (and this consideration should not be used to further restrict disclosure). Instead attention should be concentrated on achieving a balance between protecting a general principle of Cabinet collective responsibility and satisfying the public interest associated with a particular cabinet decision. The Information Commissioner has on a few occasions overruled after disclosure was initially denied when the matters discussed were not matters of the routine business of government but had far-reaching significance. The Information Commissioner ruled for release of information regarding the Hillsborough disaster, the takeover of Rowntrees, and the minutes of Cabinet meetings immediately prior to the declaration of war with Iraq in 2003.⁵⁴ Such disclosure has been quite exceptional and we feel that the accountability of cabinet and its members around matters of substantial public interest could be improved by permitting greater disclosure.

Question 4: Should the executive have a veto (subject to judicial review) over the release of information? If so, how should this operate and what safeguards are required? If not, what implications does this have for the rest of the Act, and how could government protect sensitive information from disclosure instead?

The argument for permitting a veto to be exercised by the executive is that there are a small number of instances where a cabinet minister (rather than the Information Commissioner or tribunal) will be best placed to assess the public interest of disclosure or non-disclosure. However it is difficult to imagine instances when this might be the case beyond the need to protect national security. In the case of national security, Government ministers may be better placed to judge the impact of a release of information on our allies or on governments or foreign groups that might present risks to the UK.

We cannot envisage instances in any other area of public policy where a Cabinet minister may be in a better position to evaluate the public interest test than the Information Commissioner or tribunal. Therefore, in our view, the narrowness of the criteria to determine the appropriate use of the executive veto is appropriate.

Question 6: Is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know? Or are controls needed to reduce the burden of FoI on public authorities? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kinds of requests do impose a disproportionate burden?

FOIs have been key to understanding policies, political statements and the operation of government bodies. Importantly it is the poorest, and those who seek information about the poorest, who need the FOI system most. The poorest are easiest to ignore, the easiest to misrepresent and the least likely to get their questions answered satisfactorily without the backing of law. Any financial charge on FOI is likely to distance this system from those who need it most.

⁵³ For example recently with respect to an information request relating to a campaign to save the Settle to Carlisle Railway in the 1980s the Information Commissioner agreed that disclosure should not be granted even though the Ministers and the Permanent Secretary concerned "are either deceased or no longer involved in politics". See Information Commissioners Office, Decision Notice Ref FS50579032, 25 August 2015. https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1432432/fs_50579032.pdf

⁵⁴ **Statement of the Information Commissioner, Christopher Graham, 1 Oct 2015**

Independent Commission
on Freedom of Information

Steve Hucklesby, Policy Adviser

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Mishcon de Reya LLP

Dear Sirs

Call for Evidence

Background

1. We refer to your Call for Evidence document dated 9 October 2015.
2. This firm acts for individuals who, and businesses which:
 - a. make requests for information under the Freedom of Information Act 2000 (FOI) (and, to the extent relevant to our comments, below, the Environmental Information Regulations 2004 (EIR)); and
 - b. are called upon by, or otherwise make contact with, public authorities to give their views as to whether in the case of qualified exemptions our clients consider that there may be grounds for exempting the information requested by third parties from disclosure under FOI.
3. This firm also acts for public authorities to whom requests are made, or who have an interest in the decision of another public authority, under FOI.
4. We have referred in this letter to 'businesses'; we use that term in this letter to cover any non-private individual who has an interest in FOI: charities, journalists, academic institutions, for example, all of which type of entity we have acted for in respect of FOI over the 10 years since FOI came into force.
5. As such, we consider ourselves to be experienced practitioners in the use of FOI, how public authorities respond to FOI requests for information, and how third parties consider themselves affected by FOI requests and responses.
6. Our general view is that FOI provides a good balance between the interests of individuals and businesses, of democratic society and of public authorities. The essence of good public service is for the public to be provided with a true, a helpful and a structured narrative, and based on our work with our clients, FOI provides a useful means of shining an appropriate level of light on the workings of public bodies.
7. Nothing should be done to FOI that might in any way make it harder for public wrongdoing of any description to be uncovered, and any iniquity in relation to public policy making should not be covered by any exemption or restriction to FOI.
8. We conclude our opening remarks by noting the text of a speech given by the Prime Minister in October 2013 (<https://www.gov.uk/government/speeches/pm-speech-at-open-government-partnership-2013>):

"we've got to get out there and really make the argument for open government. We can't just sit there and assume there's some great, inexorable trend towards political freedom. History isn't written for us, it is written by us. When people tell us that all this is self-satisfied lecturing and pie in the sky nation building – we've got to say, 'No, it is people who are demanding open government', from anti-corruption campaigners in India, to the popular uprisings in the Arab world.

If you look around the room, we have 61 members, over 1,000 specific commitments between us in just 2 years. We've got the Liberian government here, who've pioneered citizens' budgets, giving people a greater say on how their money is spent. We've got representatives from the Philippines, who are letting the public

audit major government projects. We've got people here from Brazil and Croatia, who've introduced their first freedom of information laws. These are huge practical steps."

Question 1:

What protection should there be for information relating to the internal deliberations of public bodies? For how long after a decision does such information remain sensitive? Should different protections apply to different kinds of information that are currently protected by sections 35 and 36?

9. Currently, internal discussions and deliberations of public bodies cannot generally be obtained via a request for information under FOI whilst a decision is being considered. (Section 35(1) FOI).
10. Section 35(2) FOI addresses the special position of statistical information used to provide an informed background (so-called, evidence-based policy making) and which may be disclosed once a decision as to government policy has been taken. It is arguable that to give greater confidence in evidence-based policy making, all facts used in support of policy be disclosed, by way of supplementary legislative publication at the time of the proposed legislation (Bills and draft Regulations).
11. As external advisers, we cannot comment on whether there has been a negative impact on the internal, deliberative space of public bodies, or whether FOI has led to an erosion in the public record, or an increase in the inappropriate use of less formal means for decision-making.
12. We would expect that the more free and frank the debate in formulating policy, the more there is an argument for maintaining the secrecy of that debate. And without addressing the various decisions of the various tribunals and courts that have been asked to consider the application of section 35, there have been decisions going in both directions (for and against disclosure), in such a way as to lead to a conclusion that whilst the protagonists might not be able to see this for themselves, there is a system of check and balance built into the workings of the Act which seems to us to work.
13. We do not consider that a time threshold makes sense – some decisions of public bodies remain sensitive for many years after they have been made; others do not carry that level of weight and controversy.
14. We do not consider that breaking section 35 down in respect of different kinds of information makes sense either: setting in stone now different treatments for different kinds of information is bound to have to be reviewed legislatively in a short period of time; allowing the tribunal and courts to make a judgement based on the information and arguments put to them at the time of the request (and subsequent dispute) better reflects how a good policy of open Government (and governance) should work.
15. One considerable, and we would argue, positive effect, of the 'public interest test' is that it operates so as to prevent mistakes (or examples of maladministration) from being hidden. In the context of various public services (healthcare, most notably) there is a move towards greater accountability and visibility; we believe that an open approach to government is an important aspect of a democratic system, and that in many ways, the public interest test could even be reversed from the current FOI position; we are not advocating that reversal, and are content that the current PIT arrangements fairly allocate the interests of those making requests and those to whom requests are made.
16. We are of the view that the current allocation of public bodies between section 35 (certain aspects of government information) and section 36 (all other public body information) is reasonable.

Question 2: What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?

17. We are of the view that the ICO/tribunal/court system provides a sufficient check and balance to the issue of disclosure of information relating to the process of collective Cabinet discussion and agreement (and, indeed, that of any other body).
18. We note the passage included in the Call for Evidence relating to the Information Commissioner's views on the 'strong public interest in protecting the convention of collective Cabinet responsibility'.
19. And we note both the decisions upholding the withholding of information requested that is cited in the Call for Evidence, and the residual use of the veto.
20. We consider that the current arrangements provide an appropriate level of protection.
21. We appreciate that good arguments can be made for allowing Cabinet discussions a greater level of protection than other information; we do not believe that there are good grounds for creating an absolute exemption from disclosure for Cabinet information.

Question 3: What protection should there be for information which involves candid assessment of risks? For how long does such information remain sensitive?

22. In the NHS Risk Register case addressed in the Call for Evidence, the Information Tribunal decided (Case No.s EA/2011/0286 & 287 5 April 2012 http://www.informationtribunal.gov.uk/DBFiles/Decision/i729/2012_04_05;%20DOH%20v%20IC%20%20Healey%20final%20decision.pdf at paragraphs 89 and 90) as follows:

"89. This is a difficult case. The public interest factors for and against disclosure are particularly strong. The timing of the request is very important. We find the weight we give to the need for transparency and accountability in the circumstances of this case to be very weighty indeed. We find that at the time the TRR (the Transitional Risk Register) was requested and the DOH dealt with the application of the public interest test, the public interest in maintaining the s.35(1)(a) exemption did not outweigh the public interest in disclosure.

90. In contrast we find that at the time the SRR (the Strategic Risk Register) was requested and the DOH dealt with the application of the public interest test, the public interest in maintaining the exemption did outweigh the public interest in disclosure."

23. In other words, the tribunal was able to make a clear distinction between risk registers which could, and risk registers which could not, be withheld; again, the balancing act was undertaken after due consideration. Issues like sensitivity and timeliness might be factors a tribunal would consider in any given case before it. We do not believe that fixing a time before which information would be absolutely exempt from disclosure is appropriate.
24. Explaining his subsequent use of the veto in respect of the transitional risk register, the Secretary of State of the day stated as follows:

"I have carefully considered the tribunal's decision and discussed it thoroughly with Cabinet colleagues. Following these discussions, I have decided to exercise the ministerial veto, as allowed by the Freedom of Information Act, in relation to the disclosure of the transition risk register. This decision represents the view of the Cabinet. I have decided to veto rather than appeal the decision to the upper-tier tribunal, because the disagreement is on where the balance of the public interest lies and is a matter of principle and not a matter of law, as would be the focus of any further appeal. I recognise that this is an exceptional step; it is not one that is taken lightly. There is no doubt that reform of the NHS has attracted huge public interest, but my decision to veto, while an exceptional case, is also a matter of wider principle and not just about the specific content of the transition risk register."

(<http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm120510/debtext/120510-0001.htm#12051029000007>)

Question 4: Should the executive have a veto (subject to judicial review) over the release of information? If so, how should this operate and what safeguards are required? If not, what implications does this have for the rest of the Act, and how could government protect sensitive information from disclosure instead?

25. We note that the Environmental Information Regulations 2004 (EIR) implement a European Union Directive (Council Directive 2003/4/EC) on public access to environmental information. Article 6 of the Directive requires that:

"Member States shall ensure that an applicant has access to a review procedure before a court of law or another independent and impartial body established by law, in which the acts or omissions of the public authority concerned can be reviewed and whose decisions may become final."

26. We do not believe that an EIR veto is compatible with that.

27. As such, it might be argued that the concept of veto in the FOI is also misplaced. It is inconsistent to have one set of rules relating to environmental information and another to other information – FOI and EIR should be consistent, and to that extent, the FOI veto should be removed.

28. The small number of times that the veto has been exercised since 2005 would indicate that there is no need to expand the existing arrangements, either in respect of central government information or other public body information.

29. We consider that as part of the balance, it is appropriate to maintain the veto arrangements in FOI as currently practised (that is, subject to judicial review).

Question 5: What is the appropriate enforcement and appeal system for freedom of information requests?

30. We are sympathetic to the argument that there are too many layers of appeal. But we would not seek to reduce the layers too far. It is important that decisions of public bodies are open to independent review.

31. In our experience, most of our clients faced with a decision to withhold information do not pursue the matter further. They sometimes seek an internal review, and very occasionally ask the ICO to review the decision, but, generally, the process of openness also leads those requesting information to accept that a proper process would have been followed by the public body, and additional rounds of review are unnecessary. On the other hand, there are occasions when further review is needed to satisfy our clients that information is being properly withheld; we support that right to appeal.

Question 6: Is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know? Or are controls needed to reduce the burden of FOI on public authorities? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kinds of requests do impose a disproportionate burden?

32. We understand that public bodies might believe that the cost burden to them might outweigh the public benefit in disclosure. The public body does not need to seek to apply exemptions to information requests, but it is the process of application of exemptions which appears to be costing public authorities money. Finding what information is held is rarely the issue, and indeed, good public governance would require public bodies to maintain their information in a readily accessible way.

33. We do not believe that increasing the hourly rate applicable to fee limits, or reducing the fee limits, is the right way forward. In our experience, most applicants seek information because they have either a direct personal/business interest in the information sought, or are seeking to hold the public body to account for its actions for some other reason. We would not object to increased hourly rates if that were implemented alongside a higher fee cap.
34. We would not expect individuals making requests to be faced with increased costs associated with making information requests; we would have less concern about businesses being required to make a modest payment for information.
35. In our experience, our clients would be willing to pay for time spent in locating information (but not in seeking to apply exemptions), and would amend the fees rules to require public authorities to proceed with searches for information sought in the applicant wished to pay for it.
36. Our clients have been supportive of initiatives taken by Government to open up public bodies to greater scrutiny; for example, under the Contracts Finder Archive scheme (<https://data.gov.uk/blog/improved-search-contracts-finder-archive>), which clients have referred to when bidding for public works, or considering entering the UK marketplace. Generally better information handling practices should result in reduced cost of complying with FOI requests.

Yours faithfully

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mySociety, WhatDoTheyKnow and Alaveteli

On behalf of mySociety, operators of WhatDoTheyKnow.com and developers of the international Freedom of Information software, Alaveteli.

Key Points

- We strongly oppose the introduction of application fees for Freedom of Information requests. Evidence shows that fees will deter people from seeking information. The ability of individuals and groups to effectively scrutinise public bodies, and engage with them constructively from an informed position, is a key part of a functioning democracy.
- While effective Freedom of Information laws are essential for our democratic system to function, we advise that it is best accompanied by more routine proactive publication of information held by public bodies. This would efficiently aid the Government in their aims of openness and accountability.
- We are disappointed that the public sector's response to the introduction of the Freedom of Information Act has been more focused on creating a bureaucracy around dealing with requests rather than on changing the culture of the public sector towards operating in a more open and transparent manner.

About mySociety, WhatDoTheyKnow and Alaveteli

- WhatDoTheyKnow.com is a public webbased service that has helped people make over 300,000 Freedom of Information (FOI) requests to over 16,000 public authorities since 2008. Our own recent research shows that over 12% of UK FOI requests, and around 15% of requests to central government in the UK, are made and published via the site. This figure rises to 20–30% for requests to key departments including the Department for Work and Pensions and the Home Office.⁵⁵
- WhatDoTheyKnow has over 90,000 registered users, who use the site either to make requests themselves or to follow requests made by others and read the responses provided. 500,000 monthly visitors read material published on the site. Our users include elected representatives, journalists and campaigners as well as those contacting public bodies for the firsttime.⁵⁶
- mySociety has made Alaveteli, the software behind WhatDoTheyKnow, openly available for use by others. The mySociety team actively works with groups around the world setting up local services using the software to open up access to governments and other public bodies. Alaveteli has been translated into 20+ languages, and deployed in 25 jurisdictions. We are part of a global community of digital civic practitioners, a group which includes those who use other software and approaches to promote access to public information.

⁵⁵ <https://www.mysociety.org/2011/07/01/> "WhatDoTheyKnow's Share of Central Government FOI Requests – Q2 2011", Alex Skene, mySociety, July 2011 & <http://www.theyworkforyou.com/wrans/?id=20120130b.92119.h> Work and Pensions written question, House of Commons, 30 January 2012

⁵⁶ <https://www.mysociety.org/files/2014/12/manchester.pdf> "The Third Sector and Online Citizen Empowerment: the Case of mySociety", Rachel Gibson, Marta Cantijoch, and Silvia Galandini, University of Manchester, November 2014

Application Fees

- Introducing a fee for making a Freedom of Information request would have a significant negative impact on our users' ability and willingness to obtain information from public bodies and would make it difficult, if not impossible, for us to continue to serve our users as well as we do now.
- Around a third of WhatDoTheyKnow's users have only ever made one Freedom of Information request via our service; these people are not habitual or professional users of the Act. We expect the introduction of an application fee will particularly deter those who have never made a request before and are not familiar with, or feel intimidated by, the legislation.
- As noted in the Ministry of Justice's memorandum to the House of Commons Justice Committee's PostLegislative Scrutiny of the Freedom of Information Act in 2012⁵⁷, WhatDoTheyKnow has successfully promoted the rights people have to access information held by public bodies. It has also been recognised that our service has made it easier for people to keep track of and follow up requests. Application fees would create a new hurdle for those considering making a request and undo the work we've done to attempt to make the process of submitting a request less daunting.
- The Alaveteli software is used in a number of jurisdictions, including some where Freedom of Information application fees apply, such as New South Wales and the Northern Territory in Australia (we note that the Commission's call for evidence states "In Australia, the fee is around \$15 per hour to search and retrieve documents" however RightToKnow.org.au advises "Making a Freedom of Information request to a Federal or ACT authority is always free. For other states and territories there is an application fee around \$30" which we understand is a better summary of the position. Requests which are deemed to be of public interest do not incur a charge)⁵⁸.
- While experience in Australia shows some people abandon a request following a request for payment, we also see requesters being encouraged or advised to make a public interest case for waiving a fee. We also see public bodies inviting "informal requests", apparently so they can avoid having to refuse to release information when a fee has not been paid. Asking officers to determine if the public benefit in releasing material is sufficient to warrant waiving a fee creates added complexity and extra bureaucracy.
- Our Australian partners also advise requesters on making applications for fees to be waived on the basis of the requester's inability to afford to pay. We do not want to see a situation where public information is only accessible to the wealthy or those able, and prepared, to demonstrate financial hardship.
- The Commission has drawn a parallel between the application fee for a Subject Access request under the Data Protection Act and the mooted application fee for making a Freedom of Information request. Freedom of Information requests have a different character in that the information released is not specific to an individual. The information released is public information which is often of interest not only to the requester but to many others as well. The Commission also notes Companies House and the Land Registry make

⁵⁷ p110 [Ministry of Justice's memorandum on the Freedom of Information Act to the House of Commons Justice Committee's PostLegislative Scrutiny of the Freedom of Information Act in 2012](#)

⁵⁸ <https://www.righttoknow.org.au/help/requesting#fees> "Does it cost me anything to make a request?", Australian Alaveteli service "Right To Know".

a charge for access to some information. We note both organisations are increasingly offering more information as open datasets in recognition of the fact many uses of the data requiring bulk access would be impractical if a perrequest fee was levied limiting the potential societal benefits of the registers.

- Often very useful Freedom of Information requests involve requests to a number of bodies; such requests will become impractical for those without substantial financial backing if an application fee is imposed.
- We have multiple examples of requesters who have used WhatDoTheyKnow to carry out research in the public interest which required them to make requests to many bodies, and so would have been especially hard hit by a perrequest fee. However for the purposes of this document we will list only a few:
 - https://www.whatdotheyknow.com/user/kiara_vincent **Dr Kiara Vincent** who sought the release of information about weekend working by consultants in the NHS. The responses were reported in the national media, including the [Mirror](#) and [Independent](#).
 - https://www.whatdotheyknow.com/user/clare_lucas **Clare Lucas**, “Activism Lead” at the charity Mencap, who researched the provision of short break (respite) services for children with a learning disability.
 - https://www.whatdotheyknow.com/user/l_reynolds_4 **L Reynolds** who requested information on the use of Community Safety Accreditation Scheme powers from each police force in the UK.
 - https://www.whatdotheyknow.com/user/chris_ebberley **Chris Ebberly** who investigated whether and how local authorities utilised sponsorship and promotional activities to generate revenue, for his MBA dissertation at the University of Leicester.
 - https://www.whatdotheyknow.com/user/graham_atherton **Graham Atherton** who researches the extent, and costs, of problems of damp and mould in council homes.
 - https://www.whatdotheyknow.com/user/stuart_lawson **Stuart Lawson**, https://www.whatdotheyknow.com/user/ben_meghreblian **Ben Meghreblian** and others who researched payments by universities to academic journal publishers. They have [published the resultant dataset](#) and have [written about their research](#).
- Freedom of Information requests also have value beyond research: in 2012, this [list of 366 things we would not have known without the Freedom of Information Act](#) was picked up and published by the Guardian newspaper, providing an informative, entertaining and useful resource to its readers.
- Under current Freedom of Information law in the UK it is very rare for someone making a request under the Freedom of Information Act to be asked to pay a fee or costs. However, public bodies often include forbidding warnings about potential fees and costs on web pages about Freedom of Information or when acknowledging requests. Despite the reality of fees being rare, our postbag tells us that very existence of provisions enabling fees and costs to be levied in certain circumstances worries, and perhaps puts off, some of those considering making requests. Reassuring people that making a Freedom of Information request is nearly always free is something we’ve done as part of our efforts to help people to use their rights to access public information.⁶
- Our fellow activists and civic technology campaigners from countries including the USA,

Germany, Hungary, Spain, Australia the Czech Republic and Ireland⁷ have been in touch to warn us about the impact application fees for Freedom of Information requests have had in their countries. They have told us that the effect of fees has been negative in a variety of ways, from drastically reducing the number of requests made by the general public and journalists, to allowing the application of fees (per piece of information) so prohibitive that very few requesters would pay. We urge the Commission to learn from the experiences of other countries and not to repeat mistakes they have made:

- **Republic of Ireland:** The Irish Government has recently reversed its decision to impose a fee, citing restoring balance and bringing the country into line with international best practice.⁵⁹
⁶⁰ While the Irish constraints were in place, overall usage of the FOI Act fell by over 50%, and requests by the media, who have a key role in informing public debate, fell by over 83%.
- **United States of America:** MuckRock.com, a Freedom of Information website operating in the USA, has reported that a system of fees based on the amount of work a public body says is required to deal with a request has sometimes resulted in fees reaching levels far beyond the reach of ordinary requesters. Examples cited include \$270,000 for [details of contracts between the FBI and a contractor](#), and \$452,000 for [summary information on a mail surveillance program](#). Payment of fees has been requested in these cases despite the fact that fees are supposedly waived when there is a public interest case for doing so.
- **Germany:** In Germany their Freedom of Information fee regime has been [challenged by the courts](#) which have ruled that charges must not restrict access to information by deterring applicants from making requests. [Fees are thought to deter requesters](#), and as in Australia some requests are abandoned when a request to pay a fee is made. Some public bodies appear keen to provide information despite the fee regime, leading to significant variations in the fees charged. As in the UK, bodies are not only subject to Freedom of Information law but also other access to information legislation including that required by the European Union's environmental information directive, under which the scope for public bodies to levy charges is strictly limited.
- Simply by continuing to run our service at WhatDoTheyKnow.com in the way we do now, cases of refusals to release information for the want of payment of a fee would be made public. The refusal of reasonable requests risks damaging public bodies' reputations and negatively impacting how the UK state is viewed.

Reducing the Burden of Freedom of Information on Public Bodies

- We are in favour of efficient government, so we support measures that enable public bodies to deal with Freedom of Information requests more quickly, easily and cheaply.
- Information released via Freedom of Information responses is used to inform debate and

⁵⁹ <http://tinyurl.com/op97j32> "What happens when you restrict Freedom of Information? Experiences from around the world" mySociety blog, 20 Nov 2015

⁶⁰ <https://www.irishtimes.com/news/politics/cabinetabolishes15freedomofinformationfee1.1851481>

scrutiny at all levels from local community meetings, through local council chambers, to the House of Commons. Our democratic system does cost money: elections, councils, Parliament are all expensive. Freedom of Information helps ensure we get value for that money, and helps our democracy function, by enabling deliberations and decisions to be well informed.

- Money spent responding to Freedom of Information requests needs to be considered in the context of wider public spending. In 2012 it was reported that Staffordshire County Council had spent £38,000 in a year responding to Freedom of Information requests. The then Director of mySociety, Tom Steinberg, commented: “From this I can see that oversight by citizens and journalists cost only £38,000 from a yearly total budget of £1.3bn. I think it is fantastic that Staffordshire County Council can provide such information for only 0.002 per cent of its operating budget.”⁶¹
- Information held by public bodies is information owned by the public who have funded its creation via taxes; people shouldn't have to pay to access material they have already paid to produce.
- More proactive publication of material will prevent people having to ask for it, and if requests are made they can quickly, cheaply and easily be replied to by just pointing to where the information is published.
- We are disappointed that the public sector's response to the introduction of the Freedom of Information Act has been more focused on creating a bureaucracy around dealing with requests rather than on changing the culture of the public sector towards operating in a more open and transparent manner.
- We would like to see more requests dealt with promptly, simply and cheaply, as ‘business as usual’ avoiding the unnecessary complex and costly procedures for logging correspondence and monitoring compliance with Freedom of Information law which have been created by some public bodies.
- We would be happy to see public bodies engaging with requesters, proactively offering advice and assistance, and suggesting ways a requester can be satisfied while minimising effort required by a public body. Public bodies assisting requesters by explaining how they hold information and how a request could best be formulated in the interests of both requester and public body is all too rare. There appears to be a significant opportunity to improve the functioning of our access to information regime though a change in culture and mindset in this area.
- As an example: a request for a contract can appear innocuous and straightforward, but the contract may incorporate many documents that are only held on paper, some of which may contain personal information. In cases like this, it would be perfectly reasonable for a public body to discuss a request with a requester with a view to narrowing it down. Such discussions already occur when the Freedom of Information Act cost limits are exceeded, but could also occur around simpler requests, or where consideration is being given to redactions which can't be taken into account for the purposes assessing if costs exceed the limits.
- Some public bodies do already react to receiving many requests for certain types of

⁶¹ <http://www.expressandstar.com/news/2012/09/06/freedomofinformationcostsstaffscouncil38000/> “Freedom of information costs Staffs Council £38,000”, Express and Star, 6 September 2012.

information by proactively publishing material. For example WhatDoTheyKnow have seen many requests to the Department for Education for information about schools which were dealt with by officers extracting the requested material from the 'Edubase' database. The Department now offer an 'Edubase' data download, making requests easier to respond to, and perhaps reducing the number of requests made.

- Provisions relating to datasets in the Freedom of Information Act (introduced by the Protection of Freedoms Act 2012) require public bodies to publish whole datasets when requests are made for information contained in them as well to proactively publish updated versions of datasets which have been requested and released. These principles could be extended to other information accessible via Freedom of Information requests. For example if a request is made for the papers of a particular committee that should prompt a public body to consider proactively publishing the papers for that committee in the future. A request for an organisation's policy on, say, 'Home Working' should prompt consideration of proactively publishing all the organisation's Human Resources policies and keeping what's published up to date.
- We note that from time to time people cite requests which clearly have no serious purpose, and as such are vexatious, as examples of the burden Freedom of Information puts on public bodies. At WhatDoTheyKnow we do take steps to reduce, and deter, abuse of our service; nonetheless we think most such requests that do get through can be dealt with quickly and easily, by means of a single sentence response. And in any case, there needs to be caution when dismissing requests as frivolous: there are examples of public bodies spending money on, and therefore holding recorded information on, subjects such as ghosts, UFOs and homeopathy. On the face of it, the requests may appear frivolous, but the results are all facts about public expenditure, which should be openly available so that the public may decide whether their money has been responsibly allocated.
- Sometimes public bodies appear to struggle with technology, and for example print documents out before scanning them to release: such approaches create an unnecessary workload. This could be addressed by requiring the release of information electronically and in reusable form where practical. Again this is something the Act already requires in relation to datasets.
- When documents are being created, or more importantly processes designed, in public bodies consideration should be given to the proactive publication of material, and Freedom of Information requests at an early stage. Such consideration could reduce the burden created by requests for information. For example if a contract, or report, is structured so that personal and confidential material is contained within separate annexes, the main body of the report can be more easily published or released than if redactions are required throughout first.

Commercial Users of Freedom of Information Requests

- Use of Freedom of Information by commercial organisations is sometimes criticised. We at WhatDoTheyKnow.com are happy for our service, and Freedom of Information rights, to be used by those pursuing a commercial interest. It is good for both the public sector and commercial organisations if businesses can, for example, find out about services which the public sector needs and offer to provide them in better and cheaper ways.
- Proactive publication of public sector contracts would satisfy many of the requests from commercial organisations which can be seen both on WhatDoTheyKnow.com and on public bodies' disclosure logs.

- The Leader of the House of Commons, Chris Grayling, said, of the Freedom of Information Act⁶²: “It is, on occasion, misused by those who use it as, effectively, a research tool to generate stories for the media, and that is not acceptable.” We consider journalists using Freedom of Information to uncover newsworthy material from public bodies, which they then bring to wider public attention, to be the law working well and as intended. Journalists are excellent, professional users of the Act, whose work informs the wider public, and elected representatives. Many journalists are signed up to WhatDoTheyKnow.com, making particular use of the features we have for tracking requests and responses related to public bodies of interest.

A Safe Space for Internal Deliberations

- Many of our users have requested the release of “risk registers” but have had their requests rejected on the basis of both Section 35 (information relating to “the formulation or development of Government policy”) and in the case of the Health and Social Care reforms in 2012, the invocation of a ministerial veto⁶³. We consider that the publication of risk registers and risk assessments would improve the quality of public debate and enable more effective scrutiny of Government proposals. We anticipate that it may take the media, politicians and the wider public some time to get used to interpreting and properly applying the information in such documents but think their routine, proactive release, would assist in improving how we consider, and debate, such matters in our society.

Ministerial Veto

- We believe that central Government should be treated like any other public body, and that decisions on what to release should be made on technical, legal grounds rather than political ones. It is important for the public to know what information our elected representatives are basing decisions on. If there are crime, security, safety or other concerns then there are specific exemptions which can be invoked in such cases.
- We are in agreement with Maurice Frankel of the campaign for Freedom of Information, when he says:

“When the FOI Bill was passed, parliament assumed the veto could be used against decisions of the Information Commissioner in certain circumstances. The possibility of it being used against a court or tribunal decision, as in the Prince Charles case, was never debated. In that case the Supreme Court ruled ministers must show they are relying on new evidence, an error of law or, at least, have proper grounds for rejecting a court or tribunal’s factual findings, if that was what they were doing. It couldn’t meet any of these tests.

Ministers are now suggesting that they should be able to overturn a judicial decision under the FOI Act simply because they prefer their own view, disregarding the fact that the court may have tested the arguments rigorously and persuasively justified its findings. That is too much power for ministers to have. They should appeal against decisions they disagree with, not simply overturn

⁶² <http://www.theyworkforyou.com/debates/?id=20151029a.522.1> Chris Grayling MP, House of Commons, 29 October 2015.

⁶³ <https://www.whatdotheyknow.com/request/117164/> “Health & Social Care Bill Risk Register”, Freedom of Information request, & correspondence, J A Lord, WhatDoTheyKnow.com, January 2012

them.”⁶⁴

Further Proposed Improvements to Freedom of Information Law

- The content of the Commission’s call for evidence implies that it is not intending to consider opportunities to strengthen access to information laws during its review. We consider the Commission’s terms of reference⁶⁵ to be broad enough to warrant reviewing potential changes to the law, and changes to practices within public bodies, with a view to improving transparency and accountability, in the public interest. A review considering only restricting rights of access to information would be unbalanced and a missed opportunity to assist the Government in meeting its stated aspirations to strengthen accountability, make it easier to access information, and ultimately to improve public services and ensure public money is spent in a responsible manner.
- We would like to see the scope of the Freedom of Information Act extended to more public bodies. At WhatDoTheyKnow we list bodies which distribute substantial public funds, regulate professions or control significant national infrastructure whether they are formally subject to the Freedom of Information Act or not.
- We would like to see it made easier to use the Freedom of Information Act to obtain information held by providers of outsourced services (such as prisons run by Serco).
- Many shared service providers are set up as joint ventures with minority stakes held by private companies (e.g. Southwest One Ltd, Liverpool Direct Ltd) meaning they are not currently within the scope of Freedom of Information law, but given their substantial public role we think they should be. Housing Associations are one set of bodies not subject to the Act which we often get asked to add to our site. We do list Housing Associations and often they are keen to operate openly and transparently; we think bringing them within the scope of the Freedom of Information Act is required for those cases when they don’t.
- We oppose moves by universities seeking to be removed from the scope of the Freedom of Information Act, on the basis of universities’ significant public role in controlling access to professions, awarding degrees, and their ability to discipline their members.
- The public interest test extension allows public authorities to delay final responses to a Freedom of Information Act request for a ‘reasonable’ time while the balance of the public interest is considered. There is no statutory limit on the time that can be taken for this. The internal review process that is required before complaining to the Commissioner also has no statutory limit. Although the Information Commissioner has produced guidance that sets absolute limits on what is ‘reasonable’ in each case, these do not have the direct force of law and have proved ineffective in practice. Fixed time limits for conducting public interest tests and internal reviews should be added to the Act, in line with the position in Scotland. We believe that this change would provide more certainty and reduce delays which undermine the purpose of the Act. It is in everyone’s interest that our access to information laws operate efficiently: delays and dragging out proceedings over months or even years does not benefit anyone.
- We are also concerned about the time taken for the Information Commissioner to investigate delayed responses and to respond to applications for decisions on if a public

⁶⁴ <https://www.cfoi.org.uk/2015/05/campaigncriticisescgovernmentvetoproposals/> “Campaign criticises government veto proposals”, CFOI, May 2015

⁶⁵ <https://www.gov.uk/government/speeches/freedomofinformationnewcommission> Written statement by the Parliamentary Secretary for the Cabinet Office Lord Bridges, 17 July 2015

body has complied with its duties under the Freedom of Information Act.

- The exemption in Section 21 of the Freedom of Information Act covering “information accessible to applicant by other means” appears to allow public bodies to exempt any material they can describe, and put up for sale for a price, from the provisions of the Act. In one egregious case a council appeared to advertise a policy document for sale for £45 after a request had been made for it.⁶⁶
- There is no requirement in the Freedom of Information Act for a public body subject to the Act’s provisions to publish contact details. We suggest such a provision should be introduced and think public bodies should be required to provide an email address for information requests.
- Existing powers under Section 75 of the Freedom of Information Act should be used to review and repeal unnecessary restrictions on information publication. The legislation ‘Impact Assessment’ process should include the effects of the new law on FOI and transparency. Parliamentary legislation scrutiny committees should draw MPs’ attention to any FOI restrictions proposed.
- Section 79 of the Act extends privilege to public authorities issuing requesters with defamatory information. We recommend this privilege be extended to third parties who re-publish such information without malice, allowing campaigners or journalists working with such material a level of legal protection. This would help maximise public benefit from the public resources put into responding to Freedom of Information requests.

This response has been compiled by contributors from the staff of mySociety and the volunteer administration team at WhatDoTheyKnow, with input from international partners and associates.

www.mysociety.org/about/

www.whatdotheyknow.com/help/abouthello@mysociety.org

support@whatdotheyknow.com

⁶⁶ https://www.whatdotheyknow.com/request/school_pe_policy#comment63675 “School PE Policy” Freedom of Information request made via WhatDoTheyKnow.com, 8 September 2015

National Association of Local Councils

Dear Sir / Madam,

Independent Commission on Freedom of Information – Call For Evidence

I am writing in response to your Call for Evidence on the Independent Commission on Freedom of Information.

The National Association of Local Councils (NALC) is the nationally recognised membership and support organisation representing the interests of around 9,000 parish and town councils and many parish meetings in England.

The Association overall considers that the Freedom of Information Act 2000 ('the Act') does broadly strike the appropriate interest balance between transparency, accountability and the need for sensitive information to have robust protection. Broadly, parish councils have not indicated to NALC in response to this consultation that they consider the operation of the Act does not adequately recognise the need for a 'safe space' for policy development and implementation and frank advice.

Our main observations on the Call For Evidence are as below (answers to the consultation's specific consultation questions are given subsequent);

- **One: The Act seems to have more application within the local government context to principal local authorities which we have heard do have to spend inordinate amounts of time responding to Freedom of Information requests;**
- **Two: The Association does broadly urge the Commission to re- consider the balance between the need to maintain public access to information, and the burden of the Act on public authorities as at a time when local government writ large is shrinking, there is hardly the resource to both deliver adequate services and use Freedom of Information as a genuine transparency tool; &**
- **Three: The requirements of the Transparency Code for smaller authorities adequately cover we believe the needs of public access to fiscal and legal information governing small parish councils – Freedom of Information would in this context otherwise be a duplication of effort.**

Summary

NALC's answers to the specific questions contained in this consultation can be summarised as below:

Question 1: What protection should there be for information relating to the internal deliberations of public bodies? For how long after a decision does such information remain sensitive? Should different protections apply to different kinds of information that are currently protected by sections 35 and 36?

NALC has not received additional suggestions from its member councils for information relating to the internal deliberations of public bodies. We believe that all information access regimes must balance the right of the public to have access to information about the decisions taken on their behalf with the legitimate need for public authorities to protect sensitive information. We believe that the length of time for which most decisions affecting local government would remain sensitive would be a pure function of the type of decision being made (usually this be for a maximum of one electoral cycle we would suggest). We do not believe that different types of protection should be used to protect the various information types currently covered by Sections 35 and 36 – providing these information types are strongly enough protected.

Question 2: What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?

NALC has no formal view on the type of protection there should be for information which relates to the process of collective Cabinet discussion and agreement – at a local or national level – as parish councils use committee systems. However, we believe that in principle this information is entitled to at least the same protection to that afforded to other internal deliberative information. We agree with the reduction from 30 to 20 years of the protection period for historic records for transparency purposes.

Question 3: What protection should there be for information which involves candid assessment of risks? For how long does such information remain sensitive?

We have not received a request from parish councils to change the current level of protection for information which involves candid assessment of risks. On this basis we do not believe it is possible to standardise a length of time for how long such information remains sensitive, as we see that such data will depend on a case by case analysis.

Question 4: Should the executive have a veto (subject to judicial review) over the release of information? If so, how should this operate and what safeguards are required? If not, what implications does this have for the rest of the Act, and how could government protect sensitive information from disclosure instead?

We believe that if the executive at national level did have a veto (subject to judicial review) over the release of information this could in principle impinge on the principle of free speech and information. The cost of judicial reviews at a time of austerity also arises. If this were to be introduced it should operate on the basis of similar other vetoes (legal) used by the executive at present – Parliament would also have to agree the use of such a veto. The Government would need to review and implement tighter checks on its transparency measures if no veto was introduced.

Question 5: What is the appropriate enforcement and appeal system for freedom of information requests?

NALC has received no formal written views in response to this Call For Evidence from parish councils regarding an appropriate enforcement and appeal system. Whilst we know that the form of these appeals varies by jurisdiction internationally, we also think that within local government it should be the Local Government Ombudsman who is the appropriate enforcement and appeal system for freedom of information requests.

Question 6: Is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know? Or are controls needed to reduce the burden of FoI [Freedom of Information] on public authorities? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kinds of requests do impose a disproportionate burden?

Whilst NALC received no formal responses from parish councils in answer to this specific Call For Evidence question – we do believe in the principle of the Act. However – there are probably some efficiencies which on any level would be sensitive to introduce – such as reasonable controls (along the lines of the Wednesbury principles of reasonableness) – to reduce the burden on public authority responses to requests. Such controls should be imposed - yes – on those requests which do impose a disproportionate burden on public authorities – in local government on those requests which are not otherwise covered by the Transparency Code.

NALC defends the principle of free information and speech but does think that the changes suggested in answer to question 6 need to be made..

About the National Association

The National Association of Local Councils (NALC) is the nationally recognised membership and support organisation representing the interests of around 9,000 parish councils and many parish meetings in England. Our councils serve over 15 million people in places ranging from small rural communities to large towns and small cities.

NALC provides support and advice directly to our member councils through a network of county associations. Working with and for our member councils, we are actively involved in working with, and influencing, Government and other bodies at a national level to advance and protect the interests of local councils and the communities they serve.

About our local councils

The parish councils and parish meetings we support and represent serve electorates ranging from small rural communities to major cities, and raise a precept from the local community. Together, they can be identified as among the nation's most influential grouping of grassroots opinion-formers. Over 15 million people live in communities served by our parish councils, around 35% of the population, whilst over 260 new local councils have been created since 1997.

Parish councils and parish meetings work towards improving community well-being and providing better services at a local level. Their work falls into three main categories:

- representing the local community;
- delivering services to meet local needs; and
- striving to improve quality of life in the community.

Through a range of powers, parish councils provide and maintain a variety of important and visible local services including allotments, bridleways, burial grounds, bus shelters, car parks, commons, community transport schemes, crime reduction measures, footpaths, leisure facilities, local youth projects, open spaces, public lavatories, planning, street cleaning, street lighting, tourism activities, traffic calming measures, village greens and litter bins. I hope that the Department finds this submission helpful. Should you require any further information on this matter then please do not hesitate to contact Chris Borg on 020 7290 0741 or via email at chris.borg@nalc.gov.uk .
Yours sincerely,

CHRIS BORG
POLICY AND DEVELOPMENT MANAGER

National Council of Voluntary Organisations (NCVO)

Established in 1919, the National Council of Voluntary Organisations (NCVO) represents over 11,000 organisations, from large 'household name' charities to small voluntary and community groups involved at the local level. NCVO champions voluntary action: our vision is a society where we can all make a difference to the causes that we believe in. A vibrant voluntary and community sector deserves a strong voice and the best support. NCVO works to provide that support and voice.

Since the Freedom of Information Act's (FOIA) implementation in 2005, charities have found Freedom of Information (FOI) requests to be a versatile and powerful tool in allowing them to better understand and support their beneficiaries. The voluntary sector has proven success in using FOI requests to collect and bring together fragmented data from across public authorities, which allows them to highlight and advocate on issues where their beneficiaries are not being best served. Further restrictions on exemptions to the FOIA, and the possibility of charges for FOI requests, would dramatically reduce the voluntary sector's ability to understand how their beneficiaries are being served by public authorities and how they can better hold them to account.

In its post legislative scrutiny of the FOIA, the Justice Select Committee concluded that the increased openness, transparency and accountability of public authorities brought about from the Act has led to a significant enhancement of our democracy⁶⁷. NCVO believes that the FOIA is crucial for enabling the UK to be one of the most open and transparent governments in the world and would view any introduction of charges, or further exemptions, as a substantial step backwards for the government's transparency agenda.

For further information on this submission please contact Karina Russell, Policy Officer Public Services (email: Karina.Russell@ncvo.org.uk; tel.: 0207 5202416).

Question 1: What protection should there be for information relating to the internal deliberations of public bodies? For how long after a decision does such information remain sensitive? Should different protections apply to different kinds of information that are currently protected by sections 35 and 36?

NCVO accepts that public officials need to have a 'safe space' for policy development, but believe that the current protections offered by the Freedom of Information Act are sufficient.

When considering information withheld under sections 35 and 36, the Information Commissioner will apply a public interest test. The call for evidence suggests that this test creates uncertainty about which information may be suitable for release, which could in turn lead to less frank recording of views. In its post-legislative scrutiny report the Justice Select Committee stated that, if a 'chilling effect' did exist, then the mere risk that information could be disclosed might be enough to create behavioural changes in policy makers, but, crucially, that no evidence of a chilling effect was identified⁶⁸.

Furthermore, the annual freedom of information statistics for central government in 2014 show that the percentage of cases where section 35 and 36 exemptions were made and

⁶⁷ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217298/gov-resp-justice-comm-foi-act.pdf

⁶⁸ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217298/gov-resp-justice-comm-foi-act.pdf

requester complaints were then upheld by the Commissioner was 2.75%⁶⁹. This low percentage suggests that central government departments seem to understand well where the exemptions should be applied. It could be the case that a small number of high profile cases are disproportionately affecting the perceptions of the FOIA within government.

In 2009, research from the Constitutional Unit at University College London found no evidence that the FOIA was actually impacting on the decisions of government, and that no actual policy decisions had changed because of FOI concerns⁷⁰. NCVO believes that without a stronger case that a 'chilling effect' is affecting government policy practice and outcomes, the public interest test for sections 35 and 36 should be maintained, with the Ministerial veto available in exceptional circumstances as a back stop.

Question 2: What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?

Cabinet responsibility is a specific example of deliberative space. As above, NCVO considers the current system to be adequate for information relating to the process of collective Cabinet discussions and agreement.

A study into FOI in 2010 found that there were actually few requests for Cabinet information, and that leaks are a far more common cause of Cabinet discussions coming into the public eye⁷¹. The UK Government has only used the Ministerial Veto 7 times, with 4 cases relating to Cabinet discussions. It seems that its relatively infrequent use to protect information of this kind demonstrates that there is little threat to Cabinet discussions.

Question 3: What protection should there be for information which involves candid assessment of risks? For how long does such information remain sensitive?

The voluntary sector plays a key role in providing a voice for disadvantaged and marginalised communities. Being able to understand the risks that policy choices present for these groups is a crucial advocacy tool.

Risk assessments can contain material that covers a wide range of exemptions, not just sections 35 and 36, but also information that may be protected due to security concerns or commercial interests. Because risks assessments can cover such a wide range of government material, any further protections for risk assessments would be incredibly difficult to legislate for and could create a very broad area for exemptions that would cause additional confusion.

As with information relating to internal discussions and Cabinet material, it seems that a small number of high profile cases are altering the view of how the FOIA is working in relation to disclosing risk assessments. There are few instances where the release of risks assessments has been problematic and NCVO therefore believe that the protections assured by the Act are sufficient.

⁶⁹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/423487/foi-statistics-oct-dec-2014-annual.pdf

⁷⁰ <https://ico.org.uk/media/about-the-ico/documents/1042359/ucl-report-government-policy-in-the-context-of-foi.pdf>

⁷¹ Hazell, Robert, Worthy, Ben and Glover, Mark (2010) Does FOI Work? The Impact of the Freedom of Information Act 2000 on British Central Government. London: Palgrave Macmillan

Question 4: Should the executive have a veto (subject to judicial review) over the release of information? If so, how should this operate and what safeguards are required? If not, what implications does this have for the rest of the Act, and how could government protect sensitive information from disclosure instead?

NCVO believes that the ministerial veto is an adequate safeguard for the protection of sensitive information in exceptional circumstances. As the ministerial veto has only been used in 7 cases since the Act came into effect in 2005, it doesn't seem to be problematic.

The Justice Select Committee understood the confusions involved with the veto and the application of the word 'exceptional'. However, after considering appropriate solutions to the issue, they concluded that the FOIA had provided one of the most open regimes in the world for access to information, and therefore considered the veto an appropriate mechanism to protect policy development at the highest levels⁷².

NCVO agrees with the Justice Select Committee and also believes that the veto is a more appropriate and proportionate backstop for sensitive information than turning sections 35 and 36 into absolute exemptions would be.

Question 5: What is the appropriate enforcement and appeal system for freedom of information requests?

NCVO has heard from a number of our members about the process involved in appealing. Most frequently, charities have had to ask for internal reviews when requests took longer than the 20 allocated days. On occasions requests from our membership have taken up to 100 days, and often with no explanation of why. Without a named contact in an FOI team, it is difficult to hold anyone to account and find out why requests have taken so long to process.

The Government recently published proposals to introduce fees into Tribunals, including appeals for the First-Tier Tribunals against the Information Commissioners' FOI decisions. NCVO believes that this is not appropriate for FOI appeals, as unlike other tribunal proceedings, FOI appeals seek to promote public interests rather than private interests. The introduction of fees to appeals for Employment Tribunals has dramatically cut the number of unfair dismissal claims. It is likely that the introduction of fees for FOI Tribunals will similarly affect the number of appeals, and therefore affect the provision of information the public and the voluntary sector has access to.

Question 6: Is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know? Or are controls needed to reduce the burden of FOI on public authorities? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kinds of requests do impose a disproportionate burden?

NCVO acknowledges that the public sector as a whole faces significant pressures on how they spend public money. When assessing the cost of FOI requests it is important to put them in context. It is estimated that central government departments spend less than 2% of their external communication activities on complying with the FOIA⁷³. This is a small price to pay, particularly when the public benefits of this spend are also taken into account. These can be difficult to quantify but should not be ignored for this reason.

Charities use FOI requests in a number of different ways, from building up research to understanding how decisions have been made on issues relating to their beneficiaries. In

⁷² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217298/gov-resp-justice-comm-foi-act.pdf

⁷³ <http://www.foiman.com/archives/2072>

particular, our membership have told us that a substantial part of their FOI activity comes from asking for already held information because data is not routinely published or easily accessible. This is especially true for health and social care sectors. NCVO believes that better routine publication of data already held by authorities would significantly reduce the number of FOI requests made and in turn the burden placed on public authorities.

Mind, the national mental health charity, told us they frequently send FOI requests to local authorities, NHS trusts and national bodies to access information about mental health spending, services and welfare, in order to gain a nationwide picture of mental health. In 2014 and 2015 they sent FOI requests to all local authorities with public health responsibilities, asking what proportion of public mental health budgets were spent on mental health. Mind had to submit FOI requests in order to access this information because currently 'public mental health' is classified as miscellaneous in reporting to the Department of Health, and grouped with 14 other health areas. Through the data they received, Mind were able to identify a huge underinvestment in public mental health, which accounts for only 1% of public health budgets, and have since been able to raise the profile of the importance of public mental health.

Other national health and social care organisations have told us they have faced similar obstacles when trying to understand spending in their health areas. Often, where data is openly published by an authority, it's not broken down into different spending areas, which makes it impossible to determine the national picture. As this activity makes up a large proportion of the use of the FOIA, a better routine publication of detailed and useful data would significantly reduce the number of FOI requests made and in turn the burdens placed on public authorities.

At the same time, proactive and reactive transparency should not be seen as mutually exclusive. Open accessible data does not render FOI redundant, as the decision of what information the public wants to see is not for public authorities to decide. Both tools should be used together to ensure the transparency and accountability of government, but better and more accessible open data would reduce the burdens placed on public authorities by FOI requests. It's also important to note that with or without the FOIA, interest in public authorities' activities and requests for information will always exist - the FOIA simply grants a right to request this information.

NCVO believes that any attempt to create charges for submitting FOI requests would be a step backwards for the openness and transparency of the UK. A small flat fee would not cover the cost of responding, but rather act as a deterrent for reasonable FOI requests. Because of the fragmented state and poor practice in routinely published data, charities must routinely submit FOI requests to public bodies nationwide to determine the national picture. Any charges, whether flat fees for submitting or charges based on staff time would quickly run into thousands of pounds. This would reduce charities ability to access information that helps them better understand and support their beneficiaries and divert charitable funds to paying for information that should be freely available.

When a €15 application fee was introduced to Ireland for their freedom of information act in 2003, the usage of the Act dropped quickly and dramatically. In the first year of the fee's introduction, the total number of requests fell by over 50%, with the Information Commissioner admitting that the introduction of fees 'had an impact on the operation of the Act far beyond what I believe could have been envisaged...'⁷⁴. Ireland's fees for requesting information were later dropped.

⁷⁴ <http://www.oic.gov.ie/en/Publications/Special-Reports/Investigations-Compliance/Review-of-the-Operation-of-FOI2003/Up-front-Fees.html>

National Deaf Children's Society (NDCS)

About NDCS

The National Deaf Children's Society (NDCS) is the leading charity dedicated to creating a world without barriers for deaf children and young people. We believe that every deaf child and young person should be valued and included by society and have the same opportunities as any other child. NDCS helps deaf children thrive by providing impartial practical and emotional support to them and their families, and by challenging governments and society to meet their needs. We represent 28,000 parents and carers of deaf children in the UK.

NDCS uses the word 'deaf' to refer to all levels of hearing loss, from mild to profound. Deaf children and young people communicate in a range of ways, including hearing amplification, sign language and lipreading. There are over 45,000 deaf children and young people in the UK. Deafness is not a learning disability and, given the right support and effective teaching, there is no reason why most deaf children cannot achieve as much as other children. As deafness can present particular challenges in developing communication and language skills, it is critical that deaf children, parents and mainstream teachers receive specialist support.

In too many parts of the UK, deaf children are not getting the support they need. This is unacceptable. The support that deaf children receive should be determined by what they need, not by where they live. NDCS challenges key decision-makers across the UK to ensure decisions about education for deaf children meet the needs of deaf children and young people and their families.

Introduction

NDCS welcomes the opportunity to respond to the *Independent Commission on Freedom of Information* but we are very concerned that a statutory right for individuals and organisations, as is enshrined in the *Freedom of Information Act 2000* (FOIA), to have access to information from public bodies may be watered down or reduced. The Act exists to make public bodies and governments more transparent, open and accountable to those they serve. Any reduction of these rights would be contrary to the government's own policy of open government and should be strongly resisted.

Throughout our submission, we highlight the importance of FOI requests to:

- a. Hold local authorities accountable to those they serve – something which is more important than ever in the context of increasing localism and contracting out of public services;
- b. Assist NDCS in providing parents with the knowledge and information to effectively challenge the services their children rely on and to ensure they are of sufficient quality – this is information that it would be impossible for parents to collate, monitor and analyse themselves;
- c. Support good decision-making by ensuring public bodies know that they can and will be challenged on the decisions they make and that their decisions must be based on robust evidence and consultation with users;
- d. The difficulty that charging for requests for information would cause to organisations like NDCS who monitor and compare the work of large numbers of public bodies to build up a national picture of services for deaf children.

Although we would be strongly against the reduction of rights to request information from public bodies, or for charging for FOI requests, we would support the mandating of these bodies to provide information proactively as a way of reducing the costs of the FOI process. This would be an improvement to the current arrangements as long as organisations could request:

- (1) That information is broken down to the necessary level of detail held by the public body eg. GCSE results for children with a hearing impairment in England, rather than GCSE results for all children with an identified Special Educational Need (SEN);
- (2) That information is provided in appropriate formats, such as a spreadsheet rather than a locked PDF document, which would allow the data to be manipulated and machine-read.

Response

The following sections provide a response to question 6, which we feel we have the most experience of and are able to provide an informed response.

Question 6: Is the burden imposed on public authorities under the Act justified by the public's right to know? Or are controls needed to reduce the burden of FOI on public authorities? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kinds of requests do impose a disproportionate burden?

- **We believe that the burden imposed on public authorities under the Act is justified by the public's right to know in regard to the information NDCS requests under it.**
- **What does NDCS use FOI requests for?**

NDCS uses FOI requests as part of our work to hold public authorities to account for the services they provide to deaf children and their families. One example of this is to monitor the amount that councils spend on their education provision for deaf children and young people and to track the numbers of staff that are employed to work with them year on year. This information is crucial in allowing us to ensure that services deaf children rely on are preserved and that a good level of service is being provided.

Generally the requests we make are for data not correspondence. **We would welcome more data about deaf children and the education, health and social care services they receive being collected as standard and automatically being in the public domain** (subject to data protection safeguards). However, it is unlikely that in this situation FOI requests could be entirely avoided because local authorities are likely to provide information in varying formats that may not be able to be compared. But the burden of these requests on public authorities could certainly be reduced and made simpler by improving upfront transparency, reducing the time it takes for public bodies to fill them in. As an organisation we usually make 3 or 4 FOI requests for data each year. These requests are almost always to groups of public authorities, e.g. NHS Trusts or local authorities, that span England or the UK, and when collated the information allows us to compare responses and build up a national picture of services.

- **How does this benefit deaf children and their families?**

The information we collect from FOI requests helps our members because it provides evidence, unavailable through any other means, to be able to challenge decisions made about the services they rely on.

Because parents of a disabled child will have a much greater level of interaction with public authorities this knowledge is crucial for them to get the right support to allow their child to develop in the same way as any other child. We know that nationally, there is a big gap between the educational achievement of deaf children when compared with their hearing peers – according to the most recent data available 36% of deaf children achieved 5 good GCSEs (inc. English and Maths) compared to 57% of their hearing peers.⁷⁵ Challenging government to reduce the gaps between deaf children and their hearing peers is central to NDCS's mission and objectives as an organisation. FOI requests can also give us early warning of policies or decisions that affect services that are vital in supporting deaf children and their families. It gives us the opportunity to inform our members, (parents of deaf children) who are also members of the public, about any changes which may affect them and their families.

⁷⁵ Department for Education, GCSE and equivalent attainment by pupil characteristics 2014. This data is not routinely published and is provided to NDCS annually by officials in the Department for Education.

In the same way that information allows local authorities to plan services and provide appropriate provision, this information can also allow NDCS to plan our service provision and be aware of any gaps that may arise as a result of decisions made by public bodies. Unfortunately, the only way to get this information at the moment is through FOI requests as public bodies do not publically disclose much of the information they collect.

- **Fragmentation**

As national and local government provides fewer services directly than was the case in the past, it is crucial that citizens have a direct route to challenge the decisions made by providers of public services.

The FOI process provides this direct route to those responsible for public services where the line of accountability may otherwise be blurred. It would be very hard to challenge the decisions of sub-contracted services without the robustness of the current FOI process to enforce this. In some situations this fragmentation has already happened and private contractors are not duty bound to respond to requests for information because of 'commercial confidentiality' or other similar reasons. Ensuring that certain information from sub-contractors of public services is published or subject to FOI requests would benefit the public and ensure the principles of the Act are upheld. Any further fragmentation of this accountability would be negative for the users of services.

- **Comment on the burdens of the FOIA for public authorities**

The FOIA has clearly added costs to the running of government since its introduction, but has benefited civil society, democracy and individual citizens in many ways that are not easily calculable. Alongside high profile examples mentioned in the consultation documents, the FOIA has allowed a number of seemingly small or mundane issues to be tracked by citizens and the organisations that represent them.

In addition to the benefit of the information from FOI requests, public authorities know in advance that their decisions can be challenged by those they represent, which supports robust and evidence based decision-making, including proper consultation with service users. Holding public bodies to account for the decisions they make on the behalf of citizens is a key tenet of democracy. Receiving information from FOI requests can also allow protracted legal cases with public bodies to be avoided. Where we have information from an FOI request that allows us to make an early decision on whether there are grounds for legally challenging a decision made by a public body, legal costs on both sides can be avoided.

Other points

1.1 Localisation

Since the *Localism Act 2011* devolved responsibility for an increasing number of public services to local authorities it is crucial that we can compare the services they provide with one another to ensure that a postcode lottery does not exist. The FOIA is an important tool for comparing the performance of public services and challenging them to improve.

1.2 Proactive disclosure

The *Open Public Service White Paper 2011* suggests that accountability and transparency underpins the direction of government policy in this area.

"To make informed choices and hold services to account people need good information, so we will ensure that key data about public services, user satisfaction and the performance of all providers from all sectors is in the public domain in an accessible form. This will include data on user satisfaction, spending, performance and equality."

The principle above is commendable but not yet realised. We would like to see more data that is collected by public authorities proactively published (subject to relevant safeguards of privacy and confidentiality) - although greater transparency is unlikely to remove the need for the FOI process entirely - it should reduce requests and therefore costs.

1.3 Data collection and management

The reported length of time taken to service FOI requests by public bodies seems high considering the basic nature of the information we usually request from public bodies e.g. the number of deaf children supported by a local authority. It's possible that outdated systems and inefficient or not sufficiently joined up processes are responsible for the high cost of these requests. **Much of the data requested by NDCS should, we feel, already be being collected by public authorities in order to direct and prioritise the services they provide.** If councils do not consistently collect this information it is often left up to external bodies, such as charities, to do so in order to monitor progress and to use this evidence to understand spending on services. The panel should consider how a greater commitment to upfront transparency and improvements to data management could reduce the costs of the FOI process.

It is worth noting here that there is a considerable cost in staff time to those requesting information under the FOIA, such as charities like NDCS, which could be reduced by increasing the amount of data proactively published by public authorities. FOI requests are not used without good reason.

1.4 Costs for charities

As a charity we have to think carefully about what we prioritise in terms of charitable activities and funding priorities. If a charge was applied to requesting information this is likely to negatively impact our work and particularly our ability to monitor public bodies and their provision of services for deaf children. We would be likely to be much more affected than individuals as we would typically use information from FOIs to track and compare services against one another. Any charge, however small, would have a big cost implication which may as a result take money away from other charitable activities such as providing events for families with deaf children.

Our members and supporters would not be able to collate this information through individual FOI requests, nor would they be able to analyse it in a way that would allow public bodies across the country to be held to account.

Any charge would naturally affect national charities more acutely as our remit covers a wider area than local charities or organisations. As has been mentioned above, the increased focus on local decision-making and service provision has made the collating of local information much more important to allow a national picture for deaf children's services to be built up and understood.

2. Summary of key points

- There is a need for more data about deaf children and the education, health and social care services they receive being collected as standard and automatically being in the public domain (subject to data protection safeguards). Greater transparency would reduce some of the need for FOI requests and the burden on public authorities.
- The information NDCS collects from FOI requests helps our members because it provides evidence, unavailable through any other means, to be able to challenge decisions made about the services they rely on.
- As national and local government provides fewer services directly than was the case in the past, it is crucial that citizens have a direct route to challenge the decisions made by providers of public services.
- The FOIA is key in holding public bodies to account for the decisions they make on the behalf of citizens.
- The FOIA is an important tool for comparing the performance of public services and challenging them to improve.

- Much of the data requested by NDCS should already be being collected by public authorities in order to direct and prioritise the services they provide.
- If a charge was applied to requesting information this is likely to negatively impact our ability to monitor public bodies and their provision of services for deaf children.
- Our members would not be able to collate this information themselves through individual FOI requests, nor would they be able to analyse it in a way that would allow public bodies across the country to be held to account.

National Union of Journalists

The National Union of Journalists is the representative voice for journalists and media workers across the UK and Ireland. The union was founded in 1907 and has 30,000 members. We represents staff, students and freelancers working at home and abroad in the broadcast media, newspapers, news agencies, magazines, books, public relations, communications, online media and as photographers.

We would support reforms to the existing FOI legislation that enhance and expand the current provisions.

The NUJ Code of Conduct was first established in 1936 and it is the only ethical code for journalists written by journalists. The code clearly states that a journalist should uphold and defend the right of the public to be informed.

The NUJ has been a great supporter of the Freedom of Information (FOI) Act and we are extremely disappointed that the Commission and Government may curtail the existing legal framework.

In his speech to the Society of Editors last month, Culture Secretary John Whittingdale MP, said: "We obstruct the ability of the press to be free to investigate and publish uncomfortable truths at our peril." The NUJ believes the looming threat of FOI restrictions are an attack to the public's right to know and restricting FOI risks harming the ability of journalists and the press to investigate and publish information in the public interest.

As part of our democratic process, citizens should be able to have access to information about public spending and decisions made on their behalf by political representatives and public bodies. The NUJ applauds the continuing efforts of all journalists who seek to use the Act for the benefit of society.

The NUJ Delegates Meeting, the sovereign decision-making body of the union, has agreed that the Freedom of Information Act has "brought about a profound change for the better in the political life of this country" and the union remains strongly opposed to any attempts to restrict the current FOI provisions.

The union also opposes introducing charges for the supply of information, expanding the basis for refusing requests, strengthening powers to deny access to certain types of information and any potential redundancies among those who are currently employed to respond to requests for information.

Furthermore, we are concerned about the composition of the existing Commission because it excludes working journalists and civil society representatives. This implies the FOI requester's perspective has not been considered within the deliberations so far.

There is a vast amount of evidence from journalists and media organisations to show the benefit of FOI and politicians have agreed. For example, during the post-legislative scrutiny of the Act in 2012 Alan Beith MP, Chair of the Parliamentary Justice Committee, said: "The Freedom of Information Act has enhanced the UK's democratic system and made our public bodies more open, accountable and transparent. It has been a success and we do not wish to diminish its intended scope, or its effectiveness."

The NUJ believes there are already sufficient protections in place for information relating to the internal deliberations of government and public bodies including risk assessments. We do not support the removal of the public interest test, or broadening the scope of absolute exemptions, qualified exemptions or other measures that would increase levels of secrecy.

Government ministers already have powers to veto and block information from being released in response to an FOI request. These decisions should continue to be subject to judicial review and the NUJ welcomed the Court of Appeal decision to overturn the Government's decision to suppress the

release of lobbying letters written by Prince Charles. Ministers should be compelled to argue their case rather than have the power to impose it.

The NUJ does not support introducing new charges for FOI requests or measures that would increase the costs. This would inflict insurmountable problems on freelance journalists, students and even small media companies. When Eric Pickles MP was the Local Government Secretary he responded to the request by Hampshire county council to charge organisations that may benefit commercially from receiving information. He said: "If town halls want to reduce the amount they spend on responding to freedom of information requests they should consider making the information freely available in the first place. The simple act of throwing open the books, rather than waiting for them to be prised apart by the force of an FOI, might even save a few pounds in the process. Greater local accountability is essential to accompany the greater powers and freedoms that the new Government is giving to local Government." The Commission and Government should be championing the culture of openness.

Charging for FOI requests would have a chilling effect on the free flow of information and the media's ability to investigate and report in the public interest. The next step forward should be to encourage public bodies to efficiently store their data (to make it easier and cheaper to respond to FOI requests) and to make more information available. These measures would reduce the existing costs. In addition, there should be a reduction in the number of exemptions from the FOI Act and public services that have been outsourced and privatised should no longer be unaccountable to the public.

The NUJ welcomed the decision made by the Irish government to abolish up-front application charges for FOI requests in 2014. The NUJ in Ireland consistently argued the fee ran contrary to the spirit of the FOI legislation and government transparency. New charges in England and Wales would make our political representatives and public bodies less accountable and would undermine the significant reforms contained in the existing FOI Act. A fee would also introduce financial barriers and deterrents that would undermine the ability to ask simultaneous questions across a range of different organisations.

The NUJ does not support reducing the cost limit or introducing new measures that would restrict the time spent on FOI requests (including the time spent redacting the information prior to release) and the union is opposed to the introduction of charges for appeals to the Information Rights Tribunal. The existing cost limits should be subjected to annual increases in line with inflation and FOI requesters should be able to ask for the costs limit not to be applied in specific cases on the basis of public interest. The NUJ would argue that there is a cost to FOI but then again there is a cost to all elements of democratic government because an open and transparent democracy is not a burden and it comes at a price.

Newcastle City Council

Newcastle City Council feels it can only really offer evidence regarding question 6 of this call for evidence.

Q6 Is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know? Or are controls needed to reduce the burden of FOI on public authorities? If controls are justified should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kind of requests do impose a disproportionate burden?

The volume of requests is a burden on local authorities. Based on the figures used within the consultation of an average of 7.5 hours per request and the volume of FOI requests dealt with by NCC for the financial year 2014/15 of 1312, an estimated £246,000 was spent by NCC in answering FOI questions based on the statutory amount of £25 per hour.

Whilst Newcastle City Council (NCC) accepts the principles of the FOI Act it is frequently misused and a tightening of the rules around requests should be implemented

FOI has a purpose of providing information in the public interest however the process is often hijacked by questions relating to commercial interests. As an example requests for specific and itemised software packages are a time consuming and unnecessary request when details of commercial relationships are already matters of public record. Such request are not in service of the public record and serve only as an attempt to further the commercial interests of the requestor. Frequently however the requestors never actually bid for council services making such a request a waste of public funds. Given the Governments new transparency guidance relating to the publication of contracts this seems like the time to strengthen the commercial exemptions and consequently reduce the burden.

FOI is often used by campaigners seeking additional information during periods of consultation. This puts a strain on officer time and the information requested is often not germane to the matter under discussion. It also has the result of reducing engagement between members of the public and the officers and elected members involved in the consultation or project. It is therefore suggested that exemptions are enhanced to allow such requests to be refused during consultation periods and that the requestor may be referred to the correct process. This would reduce unnecessary burdens on officers and serve the public interest at the same time.

The current 18 hour time limit is costly for Local Authorities and often allows large and unwieldy requests. It is suggested that a reduction to 12 hours would be more appropriate as it would drive more directed requests at the onset and reduce time consuming fishing expeditions. It would also allow for Councils to charge at an earlier time.

Ideally we would wish to see a greater geographical restriction on FOI requests however recognise that as requests are requestor blind this would be difficult to police.

News Media Association

The News Media Association is the voice of news media in the UK – a £6 billion sector read by 42 million adults every month in print and online. Newsbrands - national, regional and local newspapers in print and digital - are by far the biggest investors in news, accounting for more than two-thirds (69 per cent) of the total spend on news provision in the UK.

The Questions:

Question 1: What protection should there be for information relating to the internal deliberations of public bodies? For how long after a decision does such information remain sensitive? Should different protections apply to different kinds of information that are currently protected by sections 35 and 36?

Question 2: What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?

Question 3: What protection should there be for information which involves candid assessment of risks? For how long does such information remain sensitive?

Question 4: Should the executive have a veto (subject to judicial review) over the release of information? If so, how should this operate and what safeguards are required? If not, what implications does this have for the rest of the Act, and how could government protect sensitive information from disclosure instead?

Question 5: What is the appropriate enforcement and appeal system for freedom of information requests?

Question 6: Is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know? Or are controls needed to reduce the burden of FOI on public authorities? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kinds of requests do impose a disproportionate burden?

Questions 1-3 – These are answered together

- Freedom of information is a democratic right. If the Government controls the supply of information, it can withhold information that it fears will make the electorate less likely to vote for it. In 2000, Parliament finally acknowledged this by passing the Freedom of Information Act (FOIA). The Act has not disappointed. From the revelation that RAF pilots were involved in the bombing of Syria without Parliamentary approval to the existence of cracks in the nuclear power plant at Hinkley Point, the range of information that the Act has put in the public domain is breath-taking. As innovative as the FOIA was when it was adopted, it was not revolutionary. Its principles were the logical next step in the steady diminution of the privileges and immunities of the Crown that took place during the second half of the twentieth century and the emergence of a patchwork of information rights for specific purposes under various other pieces of legislation.⁷⁶ The societal forces that drove this – mass democracy, mass media, the decline of deference – are if anything stronger now than when the Act was passed, thanks to the digital revolution and the rise of social media. Diluting or reversing aspects of the Act would be a quixotic attempt to go against the grain of irreversible cultural and social change. A far better idea would be to look at the ways in

⁷⁶ In *Conway v Rimmer* 1968 (AC) 910 House of Lords ordered the production of documents against the wishes of the Crown. For other info rights in legislation see, for example s1 Data Protection Act 1998 (right to access data concerning oneself held by private and public bodies); Local Government (Access to Information) Act 1985 – sets out rights to access papers relating to council meetings

which the Act could be extended so that it keeps up with the public's evermore informed and discerning expectations of those in authority. That is why the News Media Association agrees with the Information Commissioner, Christopher Graham, when he told the LSE in October 2015: "*Based on the facts ... the [Freedom of Information Act 2000] is working effectively. The interesting questions are about how to keep FOIA effective for the future – not to limit its effect today.*"⁷⁷

4. We particularly welcomed the Commissioner's emphasis on the facts. In our submission, we will show that the evidence clearly points to a system that works well at balancing the need at times for official confidentiality and the public's right to know. In order to persuade, the critics of the FOIA will need to demonstrate that cases are being wrongly decided; that injudicious FOI releases have been derailing policies and sent the sense of collective responsibility of sitting Cabinets crashing down. They will also need to demonstrate that claims of a chilling effect are grounded in reality and not in myth. Nothing less will do, as FOI is a democratic right and its weakening could only be justified on the very strongest evidence. To date, the Act's critics have failed to supply this evidence, even when the House of Commons Justice Select Committee invited them to do so in 2012. We do not consider much to have changed between then and now.
5. When Parliament passed the Freedom of Information Act it intended that in certain circumstances, it would be possible to obtain under FOI information relating to internal deliberations, policy advice, correspondence with stake-holders, risk registers and on occasion Cabinet minutes. The fact that this material is available under FOI therefore is not some loophole or aberration. Parliament could have placed these under an absolute exemption but in its aim to "transform the culture of government from one of secrecy to one of openness" it did not.⁷⁸ Instead, this information was placed under qualified exemptions: Sections 35 for information related to the formulation of government policy; and section 36 for information that could be prejudicial to the conduct of public affairs.
6. These still represent a major exception to the presumption in favour of disclosure that underpins the Act. There has to be an assessment of whether or not the public interest is best served by publication or by maintaining the exemption. If there was not a public interest test and the information was absolutely exempt, then even information that contained evidence of conflict of interest or serious wrong-doing would have to remain suppressed for some arbitrary length of time. The NMA considers that it is better that these matters are decided on the facts rather than determined by blanket, arbitrary devices such as embargoes and absolute exemptions.
7. When assessing where the public interest lies, both the Commissioner and the Tribunal are consistently and predictably deferential to the concerns set out in the call for evidence about the need to preserve a safe space for policy development and the delivery of frank advice. The NMA considers that the approach they adopt of robustly protecting information during the formulation of policy, and then weighing up the public interest in releasing it thereafter, is sensible and the best way of reaching fair outcomes that reflect the facts of the case.
8. Whenever a case engages s35 or s36 the "safe space" is the central consideration, particularly the need for one during the period when a policy is being formulated is strictly observed. The position on this was set out by the Tribunal in Department for Education vs

⁷⁷ "[Working Effectively: Lessons from 10 years of the Freedom of Information Act](#)", Christopher Graham, 1 October 2014

⁷⁸ Secretary of State for the Home Department, 2nd Reading, Hansard HC vol 340 col 714, 7th December 1999)

IC and the Evening Standard 2007: *“the timing of a request is of particular importance to the decision. We fully accept the argument that disclosure of discussions of policy options whilst policy is in process of formulation is highly unlikely to be in the public interest, unless for example, it would expose wrong-doing in Government. Ministers are entitled to time and space to hammer out policy by exploiting safe and radical policies alike.”*⁷⁹

9. As a result, it is practically unheard of to be able to obtain under FOI any information that relates to any policy prior to its official announcement. Indeed, the call for evidence document does not provide an example of where FOI has been used to obtain policy advice prior to the announcement of the policy.
10. The same approach is taken to risk registers. Again these can expect to remain secret at least until the subject matter is settled policy. In deciding in favour of a request to the Department of Health to publish the Transitional Risk Register for the reforms enacted in the Health and Social Care Act, the tribunal attached importance to the timing of the request, which was made *“at a time when consultation had ceased and policy seemed to be fixed”*, reducing the need for a safe space.⁸⁰ Similarly, in his decision on the HS2 risk register (technically an EIR case), the Commissioner attached importance to the fact that HS2 was settled, announced policy: *“The Government’s major announcement on HS2 was made on 10th January 2012. The announcement explained the decision to give the go-ahead to the HS2 project. The Commissioner finds that the decision and the announcement were a major milestone in the policy process related to HS2. A “macro” decision had been made. The request by the complainant was made on 14 May 2012 and the Cabinet Office responded substantively on 27 June 2012, significantly after that milestone.”*⁸¹
11. After announcement of a policy, the weight accorded to safe space arguments begins to diminish. If ministers are to be held to account for their decisions, it will often be necessary to know the basis on which they were made, the options that were accepted or rejected by them and whether public account they gave of them matched the advice they were receiving from experts. The tribunal has explained that the purpose of confidentiality *“is the protection from compromise or unjust public opprobrium of civil servants, not ministers... we were unable to discern the unfairness in exposing an elected politician, after the event, to challenge for having rejected a possible policy option in favour of a policy which is alleged to have failed.”*⁸²
12. However, the fact that the safe space diminishes after announcement, does not mean that it suddenly evaporates at that point, denuding everyone involved of protection under the Act: *“a parliamentary statement announcing the policy ... will normally mark the end of the process of formulation... we do not imply by that that any public interest in maintaining the exemption disappears at the moment that a minister rises to his or her feet in the House. Each case must be decided in the light of the circumstances.”*⁸³
13. When the Upper Tribunal decided in favour of releasing the risk register into the badger cull, it emphasised that the argument that the policy had been announced and was already being implemented was not enough on its own to determine the matter and that the full

⁷⁹ [Department for Education and Skills & Information Commissioner & the Evening Standard](#), EA/20060006 19th February 2007, p23 (iv)

⁸⁰ [Department of Health & Information Commissioner & Rt Hon John Healey](#) EA/2011/0286 & 287 1st & 2nd November 2011 page 18, para 84

⁸¹ [EIR Decision Notice: FER0467548](#), ICO, 6th June 2013,

⁸² [Department for Education and Skills & Information Commissioner & the Evening Standard](#), EA/20060006 19th February 2007, p23 (iii)

⁸³ Ibid para (v)

circumstances of the case had to be looked at.⁸⁴ The decision to disclose reflects not just the fact that the pilots were already underway, but also, and crucially, that the contents of the risk register were sufficiently uncontroversial, “*anodyne*” to defeat arguments that they should be kept secret.⁸⁵

14. If a public authority can demonstrate strong reasons why secrecy should be maintained it will be. For example, earlier this year, the tribunal backed the Department for Education in not releasing internal discussions documents on the 2012 decision to axe the “Building Schools for the Future” programme. The request post-dated by two years the decision to scrap the project and the tribunal acknowledged that there was a “strong public interest” in making the information available. However, it concluded that this was outweighed by the need not to erode the confidentiality between ministers and the civil service. Disclosure would, the Tribunal said “*expose a very significant part of the working relationship between Ministers and the politically neutral civil service to a deeper and not necessarily constructive degree of scrutiny. The impact would no doubt differ from case to case, but there are plausible risks that exposure of policy submissions would cause submissions to be written in a different way with an eye to a public audience and presentation, and could further change the inclination of Ministers to seek and rely on formal advice, or to take advice only in circumstances that tend to be less fully committed to paper.*”⁸⁶
15. The tribunal also acknowledges that there will often be no stark dividing line separating policy development and policy implementation. This means that even after a policy has not just been announced but is being implemented, the publication of information relating to it can be blocked if it is being used to inform an on-going decision-making process. The tribunal has said: “*We are prepared to accept that there is no straight line between formulation and development and delivery and implementation... a need for policy review and development and delivery may arise from implementation issues which in themselves require ministers to make decisions giving rise to policy formulation and development.*”⁸⁷ In that case the tribunal distinguished between releasing the NHS transitional risk register (TRR), which was purely about implementing the policies set out in the Government’s 2010 Health white paper and the strategic risk register which was informing on-going policy-formulation. Although the Government, controversially, wielded the veto on the release of the TRR, it cannot be said that the Tribunal failed to apply its mind to “safe space” argument: “*The TRR largely covers operational and implementation risks being faced by the DOH to deal with the introduction of new policies, not in our view direct policy considerations. This register would have informed the public debate at a time of considerable public concern... In contrast we find that at the time the SRR was requested and the DOH dealt with the application of the public interest test, the public interest in maintaining the exemption did outweigh the public interest in disclosure. By this time the government was again back into policy formulation and development mode. The SRR was provided for the Departmental Board who were requiring to consider risk at a largely policy rather than implementation level. This register was deserving of a protected safe space so that the Government could consider how to best deal with the unprecedented level of public debate following the publication of the Bill.*”

⁸⁴ DEFRA v The Information Commissioner and The Badger Trust [2014] UKUT 526 (AAC) 28th November 2014 at para 51 & 52: “...to the extent that there may be a need for a space to think in private concerning Departmental deliberations, no-one doubts that generally speaking the need to maintain that privacy diminishes over time. There have been suggestions in First-tier Tribunals in the past that once a policy had been formulated and announced there could be no further public interest in withholding information from publication. We do not accept that (see OGC v Information Commissioner [2010] QB 98 at paragraph 101.) It all depends on the facts and circumstances of the individual case. 52. For this reason we reject the argument advanced by the Badger Trust that disclosure must be ordered of any risk which has been deleted from the RILs as no longer current.”

⁸⁵ Ibid paras 59 & 60

⁸⁶ [Department for Education v IC](#), FTT January 2015 para 59

⁸⁷ [Department of Health v IC and Healey](#) FTT April 2012, para 28

16. The safeguards that surround Cabinet minutes are already more stringent than those around other forms of internal deliberation and do not require re-enforcement. The principles that underpin their protection are similar, but the safe space continues for substantially longer. Also, because of the importance attached to the maintenance of collective responsibility, it is far harder to argue that the public interest is best served through disclosure. The approach the Tribunal adopts to Cabinet minutes was summarised in *Cabinet Office v IC FTT* 22nd December 2010: “*Cabinet minutes are always information of great sensitivity, which will usually outlive the particular administration by many years. The general interest in maintaining the exemption in respect of them is therefore always substantial. Disclosure within 30 years will be very rarely ordered and only in circumstances where there is no apparent threat to the cohesive workings of Cabinet Government, whether now or in the future.*”⁸⁸ Those circumstances, the tribunal went on, are: where the ministers have left the public stage; where the publication of memoirs and ministerial statements describing meetings concerned have already been published; if the events have no continuing historic significance; and where the meeting had a particular historic significance. Critics of the current position will need to explain why this position is unreasonable, particularly what the justification would be to keep secret for a generation Cabinet minutes about events that have passed into history or the Cabinet ministers themselves have leaked or otherwise published accounts of the meetings.
17. The Commissioner and tribunal reliably adhere to these principles. Earlier this year, the tribunal joined the ICO in refusing to order the disclosure of minutes of Cabinet discussions in 2006 regarding the admission to the EU of Bulgaria and Romania. The tribunal’s grounds were: “ i) *The Minutes include content attributable to individual Ministers, either by name or by the nature of the subject matter recorded. A high number of those involved remain in front line politics and may well return to Government in the near future. ii) The Minutes provide some insight into how individual views held by Ministers contributed to the formation of the collective Cabinet decision.*” The tribunal added that even though the information was five years old by the time of the request, eastern European immigration remained a “*highly contentious issue of government policy.*”⁸⁹
18. Similarly, the Commissioner refused in 2009 to order the disclosure of the notes that were taken during the 2003 Cabinet meetings where ministers debated the opportunity to host the Olympic Games in 2012 because they contained opinions that were attributable to named individuals who would be forced to defend the arguments that they had made in the discussion: “*This would not only undermine the safe space in which Ministers need to discuss issues relating to the Olympics, but also result in pressure on the government to debate and defend the views of individuals which were advanced during the meeting.*”⁹⁰
19. However, because it could not be plausibly argued that the 1986 Westland Affair was still a contentious issue of policy in 2010 when a request for the Cabinet minutes from the time came before the ICO, the Commissioner ordered disclosure. Similarly, the Information Tribunal sanctioned the disclosure of the Cabinet minutes relating to it. Likewise, the 1988 takeover of Rowntrees by Nestle was no longer dominating British politics in 2011 when the Upper Tribunal overruled a Cabinet Office refusal to disclose the minutes where it was discussed. The decision to release the Cabinet minutes regarding Hillsborough came nearly a quarter of a century after the disaster itself.

⁸⁸ *Cabinet Office v Information Commissioner* 22nd December 2010 EA/2010/0031 At page 19

⁸⁹ [Razvan Veer v Information Commissioner & Cabinet Office](#) 21 May 2012 EA/2011/0255, p8 (i)

⁹⁰ [ICO Decision Notice Ref: FS50185739 16th March 2009](#), para 68

20. A decision that caused particular alarm to ministers was the Information Tribunal's ruling in 2009 in favour of a request made in 2006 to release the minutes of Cabinet meetings in the immediate run-up to the Iraq War (2003). Even though the events in question had not quite passed into history when the release (later vetoed by ministers) was ordered, the reasoning of this decision can hardly be considered reckless or a departure from the principles that underpin these cases. The Tribunal ordered this in part because of the exceptional public interest in such a momentous decision but also attached importance to the fact that the only two Cabinet ministers who had dissented had *already* made it clear to the public that they had done so: "*On the particular facts of this case the importance of maintaining the convention is diluted by the extent to which some of the information had already been disclosed, through formal and informal channels*".⁹¹
21. As has been outlined, obtaining this information under FOI is difficult and most requesters will not succeed at the ICO. According to the ICO submission to this consultation: "at the current time, and certainly over the last five years, a significant percentage of the Information Commissioner's decisions have fallen in favour of protecting policy making processes and deliberative space." The Commissioner adds that in 2014, the number of cases in which central government departments were ordered to disclose information that they had sought to withhold under s35 and s36 was very small compared to the number of times the exemption had been applied. Disclosure was ordered in 10 out of 598 cases where s35 had been applied by departments (1.7 per cent) and 18 out of 420 s36 cases (4.3 per cent). The ICO warns that "given these figures we are concerned that a very small number of high profile cases may be having a disproportionate effect on perceptions of FOIA within government, particularly at a senior level."⁹²
22. Published newspaper investigations based on information that engages s35 and s36 are consequently rare. Searching through our digital database⁹³ of national press articles for this year we could find very few - no more than half a dozen - that clearly relied on FOI requests from newspapers⁹⁴ for such material and only one of these concerned internal policy advice.
23. Because of the public interest hurdles that journalists have to clear to obtain information that engages either of the two sections, the resulting stories are invariably pieces of serious, public interest journalism. Internal policy advice obtained by *The Independent* revealed that although the part of the public justification for the Help to Buy programme was that it would stimulate new construction and not just demand, the advice the Chancellor was receiving from his officials was actually that "it will have a limited impact on housing supply since most of the sales are likely to be for homes which would have been built anyway".⁹⁵ *The Times* obtained under the FOIA email correspondence between Treasury and Office of Budget Responsibility officials in which the former appeared to be trying to influence the latter's preparation of its forecasts.⁹⁶ The revelations were considered sufficiently serious to prompt the Treasury Select Committee to investigate. In September, the Times also obtained an internal report by the Army outlining financial and

⁹¹ [Cabinet Office & Information Commissioner & Dr Christopher Lamb](#), EA/2008/0024 and EA/2008/0029 27th January 2009 at para 78

⁹² <https://ico.org.uk/media/about-the-ico/consultation-responses/2015/1560175/ico-response-independent-commission-on-freedom-of-information.pdf> p5-6

⁹³ This was a keyword search for "Freedom of Information" stories through the NMA's access to ClipShare. The stories were then read to see if they were based on internal deliberations. This was not a scientific or exhaustive study, but the results are indicative of how rare these stories are.

⁹⁴ Newspapers have of course run stories based on other organisation's procuring of internal reports & discussions: eg "Fracking could hurt house prices, health and environment, official report says", Guardian 1 July 2015

⁹⁵ "[Chancellor ignored advice from Treasury to launch Help to Buy scheme](#)", Independent 6th February 2015

⁹⁶ "Treasury has sought to meddle with OBR forecasts", Times, 14th September 2015

planning mistakes associated with medical centres it ran in partnership with the charity Help for Heroes.⁹⁷ A month later, *The Mirror* reported that it had used FOI to obtain emails from Lord Prior, when he was chairman of the CQC to a US health consultancy in which he suggests that 50 per cent of NHS beds could be axed. Lord Prior is now NHS Productivity Minister.⁹⁸

24. In earlier years, the fact that internal deliberations can be obtained under FOI was why newspapers were able to reveal that civil servants had told ministers that the “Big Society” initiative would necessarily involve allowing public services to fail and collapse (P.Curtis, “Let schools fail to secure reforms, ministers urged, *Guardian* 11 July 2011); that civil servants had serious concerns about the drafting of a dossier published by the Government to justify the war in Iraq and that officials were under pressure to firm up their original conclusions (R. Prince, *Telegraph*, “Whitehall worries about WMD dossier in secret emails,” 13th March 2009). They also revealed the reticence of Bank of England officials towards the Treasury’s plan to sell off the country’s gold reserves between 1999 and 2002 (J.Groves, “Brown defied Bank warning over his £6bn gold give away,” *Daily Mail* 1st April 2010).
25. The public interest in all of these stories is clearly strong. They informed the public of the background of the major Government initiatives of the era. If s35 and 36 were absolute exemptions, the information contained in these could have been suppressed for a generation. This would be to deny the public its democratic right to understand the basis on which the governments they elect decide the policies that they pay for and that shape their lives.
26. But just as these stories are important, it cannot be said that the FOI releases derailed the policy in question or seriously destabilised the department responsible. In some cases, it may have caused some transient embarrassment for a minister, but protection against embarrassment has never been one of the acknowledged arguments for official secrecy.
27. In the call for evidence, it is noticeable that the document does not provide any account of specific damage that any one of the releases it refers has inflicted to a particular policy, department, civil service career or the sense of collective responsibility of a sitting Cabinet. What was the fallout of the decision to publish the Westland minutes a quarter of a century later? Did chaos break out? Similarly, did the long-awaited but ultimately low-key release of the HS2 risk register derail HS2? It appears not. How has the fact of publishing the badger cull risk register materially impacted on the fight against bovine TB? Three new culls were announced this September.
28. Instead, the argument against these aspects of the Act in the call for evidence is not based on any documented or demonstrable harm, but the fact that they exist at all. This, it is argued, creates “uncertainty” for ministers and civil servants, resulting in a “chilling effect” whereby civil servants will dilute and distort their advice or deliver it informally because they fear publication at a future date.
29. Over the years, independent assessments of whether or not the chilling effect exists have found that such fears are neither objectively grounded nor having the distortive effect attributed to it.

⁹⁷ "[Millions spent on Help for heroes centres with empty beds](#)", *Times*, 29th September 2015

⁹⁸ "[Top Tory claims half of NHS beds are facing the axe fuelling fears of health privatisation](#)", *Mirror* 6th October 2015

30. The Information Commissioner, in his speech to the LSE in October 2015, expressed dismay that civil servants were still talking of a chilling effect, despite the lengths that his office and the tribunal go to in order to protect the safe space. He said that the facts demonstrated *“that the safe space is respected, both by the Commissioner and by the Tribunal. But, despite the weight of the evidence, senior Whitehall figures criticise the operation of FOIA and warn of its icy blast. In response, I observe that if mandarins keep talking about a chilling effect, theirs is a self-fulfilling prophecy.”*
31. Testifying before the Justice Select Committee in 2012, Professor Robert Hazell of the UCL Constitutional Unit said that his research into the effect of the FOIA did not find that it was causing a chilling effect. Hazell said: *“We looked very hard for evidence of the chilling effect in all the interviews that we conducted, in a big two-year research project looking at the impact of FOI on Whitehall and in a related project commissioned by the Information Commissioner. We interviewed, in total, about 100 Ministers and middle and senior-ranking officials. What they told us, in sum, was that, yes, there has been a deterioration in the quality of record keeping in Whitehall, but that, no, on the whole FOI has not been the cause of that... We asked every person we interviewed whether FOI had contributed to a chilling effect, and the majority said that it had not. We then pressed those who thought that it might have done, asking, “Has it changed the way that you work? Has it changed the way that your colleagues work?” We found very little direct evidence that FOI has contributed to a diminution of the record.”*⁹⁹
32. This led the committee to report: *“We are not able to conclude, with any certainty, that a chilling effect has resulted from the FOI Act.”*¹⁰⁰ As a result, it said it would not recommend any restrictions on the Act based on a “chilling effect” justification.
33. The Information Tribunal has drawn similar conclusions to the UCL Constitution Unit. In its ruling on the NHS risk register, the Tribunal attached importance to the fact that risk registers had been released in the past resulting in no observable chilling effect and that the senior civil servants who testified against disclosure were unable to substantiate their claims. The tribunal noted the release several years before of the risk register for a third runway at Heathrow and said that *“there was no evidence presented to us that the release of the Heathrow risk register had had a chilling effect on their use by Government”* adding that the arguments against disclosure advanced by Lord O’Donnell, then head of the civil service, *“were based mainly on conjecture of what might happen if there was routine disclosure of risk registers..”*¹⁰¹
34. The Tribunal has also over the years been rightly wary about indulging claims from the civil service that if judges enforce the rights of citizens under FOI, they will deliberately neglect their duties to deliver honest advice and maintain proper records. In *DfE v Evening Standard* 2007 the tribunal made it clear that the public has the right to expect a higher standard of conduct than that from its public servants: *“(vii) ...In judging the likely consequences of disclosure of officials’ future conduct, we are entitled to expect of them the courage and independence that has been the hall mark of our civil servants. These are highly educated and sophisticated public servants who well understand the importance of their impartial role as counsellors to ministers of conflicting convictions.”*
35. If senior management in the civil service are aware that civil servants are putting advice on post-it notes or deploying other evasive strategies, then those civil servants should be

⁹⁹ [Justice Committee Minutes of Evidence](#), answers to Q62-64

¹⁰⁰ [Justice Committee Post Legislative Scrutiny of the Freedom of Information Act 2000](#), “Policy Formulation Safe-Spaces and Chilling Effect”, at para 200

¹⁰¹ DoH & Information Commissioner and Rt Hon John Healy, 5th April 2012, paras 71 & 73

rebuked for their unprofessionalism and disabused of their misconceptions about the implications of FOI. This poor conduct should not be validated by petitioning ministers for major legislative change on the back of it.

36. The Tribunal has also reminded civil servants that FOI is not the only source of public scrutiny of their work. They can be hauled before a parliamentary select committee at any time, where they will be named, questioned and under a duty to tell the truth. Public inquiries are also frequent and can require the same. And of course, there are always leaks.
37. Weakening FOI would therefore give them only a modest increase in the certainty they are looking for, but it would come at a huge cost to the public's democratic right to know. The alternative to the "uncertainty" of a multiple levels of oversight examining matters "in all the circumstances" is blanket secrecy and arbitrary embargoes which a 21st century public in a mature democracy will find sinister and insulting.
38. It has been demonstrated here that any strengthening of s35 and 36 based on concerns about the chilling effect would not be evidence-based. The Act only allows the release of this information when it is in the public interest, and the agencies that apply the public interest do so diligently and on the basis of clear, predictable principles. As a result information obtained under these sections is often illuminating but not destabilising of the safe-space for the formulation of policy. Backsliding on FOI on the basis of the "chilling effect" arguments mounted by officialdom would be a dismal capitulation to conjecture and civil service self-interest. This is not a strong enough evidential basis for eroding the public's right to know to know.

Question 4 - Vetos

39. We do not favour any strengthening of the executive override power set out in s53 FOIA. The Supreme Court decision¹⁰² in March 2015 – where the court overturned the Government's veto of the release of Prince Charles's lobbying letters to ministers - has narrowed the circumstances in which it can be wielded, but we consider that this was a necessary development bearing in mind the way in which the veto was being used.
40. Prior to the Supreme Court's decision earlier this year, the veto was being exercised in a manner that allowed ministers to quash decisions they did not like just because they took a different view, even when that decision had come from the Tribunal. The only safeguard was judicial review which most requesters would shy away from because of the costs and the high threshold of proving irrationality on the part of the minister.
41. This gave the executive almost a free rein to substitute a court's decision for its own even where the court had tested all the arguments thoroughly and concluded with a decision that was well-reasoned and contained no error in law. On three occasions it has been used against the tribunal including once against the Upper Tribunal, which had sat for six days listening to the evidence.
42. The situation represented an exception to the long-established principle that ministers are subject to the rule of law and therefore also to the principle of equality before the law, as the requester is always bound by the court's decision, while the minister can walk away from it.
43. These principles have deep historical roots. They are a fundamental part of the

¹⁰² [R \(Evans\) v Attorney General \[2015\] UKSC 21](#)

constitutional settlement that has underpinned this country for centuries. Lord Neuberger made this clear in the Supreme Court judgment in *R (Evans)*: “A statutory provision which entitles a member of the executive (whether a Government Minister or the Attorney General) to overrule a decision of the judiciary merely because he does not agree with it would not merely be unique in the laws of the United Kingdom. It would cut across two constitutional principles which are also fundamental components of the rule of law. First, subject to being overruled by a higher court or (given Parliamentary supremacy) a statute, it is a basic principle that a decision of a court is binding as between the parties, and cannot be ignored or set aside by anyone, including (indeed it may fairly be said, least of all) the executive. Secondly, it is also fundamental to the rule of law that decisions and actions of the executive are, subject to necessary well established exceptions (such as declarations of war), and jealously scrutinised statutory exceptions, reviewable by the court at the suit of an interested citizen. Section 53, as interpreted by the Attorney General’s argument in this case, flouts the first principle and stands the second principle on its head.”¹⁰³

44. Later in the judgment, Lord Neuberger cites Lord Templeman in *M v Home Office* “the proposition that the executive obey the law as a matter of grace and not as a matter of necessity [is] a proposition which would reverse the result of the Civil War.”
45. The use of this sort of power would only have been tolerable and sustainable if it had been used extremely sparingly. The Ministry of Justice’s guidance on the veto states that its use is supposed to be “exceptional”. One of the guiding principles is that it will not “*routinely use the power under section 53 simply because it considers the public interest in withholding the information outweighs that in disclosure.*”¹⁰⁴ The guidance also only discusses use of the veto in connection with upholding Cabinet collective responsibility.
46. Since 2009, the veto appears to have been used seven times. The first exercises of it (over the release of Cabinet materials concerning Iraq and devolution) appear closely connected with concerns about upholding Cabinet collective responsibility. In more recent uses of the veto, the connection with Cabinet collective responsibility becomes less obvious. The veto has been used to quash the release of risk assessments of controversial policies (NHS reforms, HS2) and to protect Prince Charles’s lobbying correspondence. The use of the veto in these instances appears primarily aimed at protecting those in authority from embarrassment and scrutiny over their decisions or conduct.
47. The Supreme Court decision in March was welcome and necessary in the context of ministers’ increasing use of the veto to wriggle out of adverse court decisions and to block the release of information for what appeared to be essentially reputational reasons. As a result of the judgment, ministers will have to demonstrate either that the facts have changed or that the court was wrong in law. It is very difficult to see in what other circumstances it would be reasonable not to carry out the ruling of a court that has heard the evidence and tested the arguments. Critics of the judgment will need to explain what those are.
48. As for the Call for Evidence’s suggestion that the judgment may not accord with the will of Parliament, Lord Neuberger dealt with this in the judgment. Citing previous authority that Parliament had to make it “crystal clear” when legislating contrary to the rule of law, Lord Neuberger states that “*In my view, section 53 falls far short of being “crystal clear” in saying that a member of the executive can override the decision of a court because he disagrees with it. The only reference to a court or tribunal in the section is in subsection (4)(b) which provides that the time for issuing a certificate is to be effectively extended*

¹⁰³ At para 52

¹⁰⁴ [Ministry of Justice: Statement of HMG policy: Use of the executive override under the Freedom of Information Act 2000 as it relates to information falling within the scope of Section 35 \(1\)](#)

*where an appeal is brought under section 57. It is accepted in these proceedings that that provision, coupled with the way that the tribunal's powers are expressed in sections 57 and 58, has the effect of extending the power to issue a section 53 certificate to a decision notice issued or confirmed by a tribunal or confirmed by an appellate court or tribunal. But that is a very long way away indeed from making it "crystal clear" that that power can be implemented so as to enable a member of the executive effectively to reverse, or overrule, a decision of a court or a judicial tribunal, simply because he does not agree with it.*¹⁰⁵

49. To that, the Campaign for Freedom of Information has added that *"Parliament never intended the veto to be used against the Tribunal or courts – that possibility was not mentioned at all let alone debated during the Bill's passage. The veto was seen as available only in relation to the Information Commissioner's decisions."*¹⁰⁶
50. The NMA agrees that it cannot be assumed that Parliament was agreeing to this when it passed the FOIA 2000 in the absence of any clear specific reference to this in the statute or parliamentary discussion of this scenario and its implications.
51. In the aftermath of the Supreme Court ruling, the Prime Minister indicated that the Government would return to the Act and redraft the veto power to give ministers the power to overrule domestic courts. If it does, the legal and political controversy that this would generate would likely dwarf even that generated by the debate over whether the UK government should be able to set aside the rulings of the European Court of Human Rights
 - a. a non-binding foreign court to whom we are linked by an international treaty.
52. Even if it succeeded in putting such a change on the statute book, its victory would likely prove hollow and fleeting. The courts of this country have always been very alert to attempts to oust their jurisdiction and successful at unpicking them.¹⁰⁷ There is a seam of case law going back to the mid-19th century where the courts have beaten a path through attempts by the executive, even when expressed in statute, to block or neuter judicial review or otherwise shield its decisions from scrutiny.¹⁰⁸
53. The efforts that the Government went to in order to block the release of Prince's letters were lengthy, expensive¹⁰⁹ and completely backfired. The lesson to be learned from it is not that the FOIA needs to be redrafted but that ministers need to develop a better sense of when a course of action is more trouble than it is worth. If they press ahead with some foolhardy, discreditable attempt to extend the veto power and/or limit judicial review, they will demonstrate that they have learned nothing.

Question 5 - Appeals

54. The call for evidence is correct to identify the appeals process as an area that could benefit from reform. It is lengthy and requests can get stuck in limbo for an excessive amount of time. NMA's recommendation is for a statutory time limit on the length of time that public authorities can spend carrying out an internal review of a refusal notice, just as there is for the handling of the original requests. Journalists often complain that the lack of a time limit on internal review is exploited by public authorities as a means of long-grassing requests

¹⁰⁵ *R (Evans)* at 58

¹⁰⁶ ["Welcome for Supreme Court's ruling on the ministerial veto in Prince Charles case"](#), press release, Campaign for Freedom of Information, 26th March 2015

¹⁰⁷ For example, *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, where the House of Lords held that a statutory exclusion clause does not deprive the courts from their jurisdiction in judicial review, unless it expressly stated this. The clause in question provided that any "determination by the commission" in question "shall not be called in question in any court of law".

¹⁰⁸ This is set out in paras-54 and 55 of Lord Neuberger's judgement

¹⁰⁹ ["Ministers spend £250,000 on Prince Charles letters legal row"](#), Guardian, 28th March 2014

that they do not want to answer.

55. Another practice that would encourage speedier resolution of requests by public authorities would be to place them all under a requirement to publish performance data on the timeliness of request handling and internal reviews. This is considered best practice and a number of authorities (central government departments already publish this information quarterly) already do this.
56. Both of these proposals were endorsed by the Justice Select Committee's post-legislative scrutiny of the FOIA in 2012. Regarding a statutory time limit for internal review, the Committee said: "*It is not acceptable that public authorities are able to kick requests into the long grass by holding interminable internal reviews. Such reviews should not generally require information to be sought from third parties, and so we see no reason why there should not be a statutory time limit—20 days would seem reasonable—in which they must take place. An extension could be acceptable where there is a need to consult a third party.*"¹¹⁰
57. On publishing performance data, the Committee said: "*We recommend that all public bodies subject to the Act should be required to publish data on the timeliness of their response to freedom of information requests. This should include data on extensions and time taken for internal reviews. This will not only inform the wider public of the authority's compliance with its duties under the Act but will allow the Information Commissioner to monitor those organisations with the lowest rate of compliance.*"¹¹¹
58. We would not, however, support cutting back on the layers of oversight in the appeals process. A state committed to openness should regard secrecy as a last resort and such decisions should be subject to challenge.
59. While the vast majority of requests will be straightforward and disposed of by the original FOI officer, there will be some that require very fine and complex assessments of competing interests. Several tiers of appeal to escalating expertise are necessary to ensure that the right balance is being struck.
60. In their consultation response to Ministry of Justice proposals on the introduction of fees, the Campaign for Freedom of Information cited a number of compelling cases where the Information Tribunal uncovered new facts or mistakes in earlier decision-making.
61. *In Dr Peter Bowbrick & Information Commissioner & Nottingham City Council EA/2005/0006*, a requester asked for copies of contracts and other information about the transfer of a failing school from the local authority to another body. The council refused the request, saying that it had already put what little information it had on this into the public domain. The Commissioner endorsed the authority's position, a decision which the requester appealed to the tribunal. The tribunal discovered that on receiving the request, the council had privately acknowledged holding around six to seven lever arch files of the requested material. The tribunal held that the local authority had misled the requester and the Information Commissioner. It forced it to disclose the information and to pay the requester's costs.¹¹²
62. Serious errors in the Commissioner's reasoning were also detected in the case of Joanna Bryce & Information Commissioner & Cambridgeshire Constabulary EA/2009/0083. The requester had complained to the police about the adequacy of the murder inquiry it had carried out in to the killing of the requester's sister by her husband. As a result, an independent review was carried out by another force, but the report of this was withheld from the requester. The requester challenged this decision with the ICO but met with only

¹¹⁰ [Justice Select Committee](#) "Delays and Enforcement" at para 103

¹¹¹ *Ibid* para 109

¹¹² <https://www.cfoi.org.uk/wp-content/uploads/2015/09/Court-and-Tribunal-Fees-Consultation-on-further-fees-proposals.pdf> p4

limited success. The ICO considered the report to be her personal data under the Data Protection Act and was therefore exempt from FOI. Parts were disclosed to her under the Data Protection Act. The requester appealed to the tribunal pointing out that while those parts of the report describing her own dealings with the police were her personal data the inquiry's findings on the police conduct of the investigation could not be. The Tribunal agreed and ordered disclosure of large parts of the report.¹¹³

63. In Miguell Cubells & Information Commissioner & Nottingham City Council, EA 2005/0006 the tribunal overturned a decision by the Information Commissioner because of an error of law. The requester's mother had died in hospital after a wrong diagnosis. They made an FOI request to the NHS trust for the information that it had supplied to the Health Service Ombudsman to whom they had complained. The trust argued that it was prohibited from disclosing this information under the Health Service Ombudsman Act 1993. The Information Commissioner upheld the trust's position on this. The tribunal, however, overturned it, explaining that the Act only restricted the Ombudsman from making disclosures, not other bodies from revealing what they had sent to it. The CFI said that this was an important decision. *"If this decision had not been challenged, it would have led public authorities to refuse to reveal any information supplied by them to the Health Service Ombudsman, the Parliament Ombudsman or Local Government Ombudsman - all of whom are subject to a similar restriction. The result would have been a new and damaging layer of secrecy around all maladministration cases."*¹¹⁴
64. These cases demonstrate that the additional layer of oversight that the tribunal provides is necessary. The statistics do the same. The figures from the Ministry of Justice and Information Commissioner supplied in the call for evidence show that a sizeable proportion (38 per cent) of appeals to the ICO of public authority refusal notices succeed either wholly or in part including nearly a fifth of those against central government departments.
65. Nearly a quarter (23 per cent) of appeals to the Information Tribunal of decisions made by the Information Commissioner are successful wholly or in part. Of those brought by requesters, who will often not have legal representation, the appeal success rate is 21 percent. Thirteen per cent of appeals to Upper Tribunal on a point of law succeed wholly or in part. Of those brought by requesters, 12 per cent succeed.
66. The Call for Evidence appears to place emphasis on the fact that a majority of public authority decisions – particularly central government departments – are allowed to stand. However, it should be remembered that the reason behind an appeals process, any appeals process, is not that there is a fear that a numerical majority of cases are wrongly decided at first instance. This will almost never be the case. It is because the UK legal system abhors error and injustice and wants to root it out whenever it occurs.
67. The cases and the statistics show that the appeals system for FOI is doing just that. They show that the decision-making of public authorities, the ICO and even the First Tier Tribunal is not flawless. Errors of fact and law are still being identified high up the chain. If the appeals process is curtailed there is a real danger that these errors will go undetected and that information that should be shared with the public will remain under lock and key.
68. The figures also undermine any suggestion that the volume of decisions being appealed represents a burden to the public authorities being challenged. The figures provided by the Ministry of Justice statistical bulletin only refer to central government departments and agencies but these show that the number of refusal notices that are appealed is small and

¹¹³ [Campaign for Freedom of Information, Response to Court and Tribunal Fees: Consultation on further fees proposals](#), September 2015, p4-6

¹¹⁴ Ibid

shrinking. ¹¹⁵Out of all the requests received (46,806), 5.3 per cent were internally reviewed in 2014, a decrease of eight per cent on the year before. Three hundred and ninety-five were referred to the Information Commissioner, compared to 408 in 2013, representing around 15 per cent of internal reviews less than one per cent of all requests received (0.8 per cent).

Question 6 – Cost and charges

69. The NMA strongly opposes any introduction of fees for making requests or any measure that would make it easier for requesters to hit the existing cost thresholds. Charging for FOI requests would be a tax on a democratic right. It would also represent the triumph of a wilfully blinkered view of FOI that only sees costs and burdens and ignores the great value to society and the economy of openness, scrutiny and accountability. Considering these benefits, the tiny fraction of an authority's budget that is spent on FOI represents great value for money. What is more, the law already allows for public authorities to refuse vexatious, obsessive and unreasonably burdensome requests, but there is evidence that authorities are not using the existing law to the full. If public authorities are not taking the steps available to them to minimise costs, it would be wrong to concede to any demands from that quarter to change the law in a way that disadvantages everybody else.
70. Introducing charges would be a draconian and backward step. We know this because when fees of EUR15 were introduced in Ireland in 2003, the numbers of people making requests collapsed by 75 per cent in the space of a year, and 83 per cent for those from the media.¹¹⁶ For that reason, the policy was reviewed in 2012 and fees for requests have since been abolished.¹¹⁷ We strongly urge the Commission not to recommend to ministers that they embark on the same mistake that the Irish government did in 2003.
- a. Few pieces of legislation have been as effective at exposing Government waste as the FOIA which is surely a major reason why public authorities don't like it. By dragging information about incompetent or extravagant spending to the fore, FOI puts authorities under pressure to address waste and pre-empt it in future. The most famous example of this is the FOI request that lit the fuse of the discovery that millions of pounds of taxpayers' money was being used to fund MPs' bizarre, extravagant and in some cases fraudulent expense claims. This led directly to the creation of an independent body to oversee MPs' pay and expenses in an effort to rationalise spending and restore public confidence.
71. It is also thanks to FOI that we learned the following:
- A Mail/Taxpayers' Alliance FOI investigation revealed that Essex County Council spent £874,640 on private medical cover for senior managers over three years. Westminster City Council has spent £409,639 since 2012 on private medical cover for more than 50 senior managers, including £160,392 last year alone. The former leader of Pembrokeshire Council claimed over £2,300 a month on expenses to drive a Porsche to work. And it also revealed that there are 537 town hall staff who earn over £150,000, which means they are paid more than the Prime Minister. ¹¹⁸
 - An investigation by the *Times* and the *BMJ* using FOI and public board papers found that clinical commissioning groups have awarded 437 contracts to companies, clinics and

¹¹⁵ [Ministry of Justice Statistical Bulletin, Implementation of FOI in Central Government](#), 2014 Annual and October-December 2014, p3-4

¹¹⁶ Review of the Operation of the Freedom of Information (Amendment) Act 2003 - An investigation by the Information Commissioner into the effects of Amendment Act and the Introduction of Fees on access requests 2004 <https://www.oic.gov.ie/en/Publications/Special-Reports/Investigations-Compliance/Review-of-the-Operation-of-FOI2003/-Review-of-the-Operation-of-the-Freedom-of-Information-Amendment-Act-2003.pdf> p1&2

¹¹⁷ "[Cabinet abolishes 15 euro Freedom of Information Fee](#)", 1st July 2015

¹¹⁸ "[How much do bosses at your council earn? Mail investigation reveals huge pay deals for the public sector fatcats](#)", Mail, 8th November 2015

hospitals in which their board members have declared direct personal interests. The value of the contracts exceeds £2.4bn. GP leaders in Birmingham awarded contracts worth £1.7 million to a company in which three of them were shareholders and one was its medical director.¹¹⁹

- FOI has revealed the extent to which NHS trusts have had to pay agency staff exorbitant fees to plug staffing shortages. The *Telegraph* revealed that an NHS trust spent £11,000 for a single locum to cover a three-day weekend.¹²⁰ The *Yorkshire Post* used FOI to report that 10 NHS trusts in Yorkshire spent £113m on agency staff, up a third on the previous year and with several trusts having drastically under-predicted the increases when drawing up their budgets.¹²¹ The Government is now consulting on introducing caps on agency fees.¹²²

1.5 Clinical commissioning groups in the Bristol area spent £214,674 on homeopathic treatments, up from £197, 508 in 2013/14.¹²³ Meanwhile, a widely-reported FOI-based investigation to CCGs across the country revealed the money set aside for personal health allowances is being spent on holidays, games consoles, pedalos, aromatherapy and even the construction of a summer house – all at a time when funding for services of proven medical merit is being cut.¹²⁴

1.6 Poor planning has resulted in a network of Help-for-Heroes medical centres with empty beds, while costs – met by the charity and the Army - have spiralled from £70m over four years to £350m over 10 years.¹²⁵ The *Times* report on this has since generated discussion on how these centres can be used to help a wider group of people, such as civilian amputees.

1.7 The Home Office spent over £250,000 chartering a private jet to deport a single deportee.¹²⁶

1.8 The Ministry of Justice paid Serco £1.1m to run an empty children's secure unit after it had closed its doors.¹²⁷

1.9 By 2014, Ministry of Defence Police had spent £360,000 on tasers, despite only needing to discharge one once since 2007.¹²⁸

1.10 Network Rail spent more than £7.2m on car allowances for senior staff last year, bringing its total spend on the perks over the past five years to £32m. The money was paid out to 1,339 individuals and was 27% up on the sum paid to 1,053 in 2010.¹²⁹ In response, the Department for Transport acknowledged that Network Rail's corporate culture required reform.

1.11 St Helens Council spent £45,000 on celebrity acts to perform at a single event despite the council having seen its central government grant slashed by over 50 per cent, forcing it to cut back on jobs and services.¹³⁰

1.12 And FOI is still being used to check up on how MPs are using their perks. It uncovered that the Speaker of the House of Commons billed the taxpayer £172 for a 0.7m taxi journey and also £367 for a taxi journey to deliver a speech on how MPs were restoring their reputations following the expenses scandal.⁵⁶ It also uncovered that MPs have

¹¹⁹ "[GPs award £2.4bn deals to their own companies](#)", Times, 11th November 2015

¹²⁰ "[NHS Locum Doctor paid £11,000 to work a weekend](#)", Telegraph, 16th August 2015

¹²¹ "[Yorkshire hospitals £113m 'rip-off' agency staff bill](#)", Yorkshire Post, 19th September 2015

¹²² "[Jeremy Hunt bans rip-off agency fees for locum doctors and nurses](#)", Telegraph, 13th October 2015

¹²³ "[NHS spends more than £200,000 on homeopathic treatments in Bristol](#)", Bristol Post, 2015

¹²⁴ "[Investigation: The luxury goods purchased with NHS money](#)", Pulse, 1st September 2015

¹²⁵ "[Millions spent on Help for heroes centres with empty beds](#)", Times, 29th September 2015

¹²⁶ "[Private jets to deport asylum seekers: After stretch limo farce, now taxpayers are hit with a £15m bill to send migrants home on half-empty planes](#)", Mail, 16th October 2015

¹²⁷ "[MoJ paid Serco £1.1m for running secure children's unit after it closed](#)", Guardian 21st October 2015

¹²⁸ "[MoD police spend £360,000 on huge stockpile of Tasers - despite using the weapons just once in eight years](#)", 17th January 2015

¹²⁹ "[Railway chiefs' £32m car perks](#)", Sunday Times, 6th September 2015

¹³⁰ "[St Helens council defend £45,000 splurge on celebrity acts for Christmas lights switch on](#)", Liverpool Echo, 20th May 2015

commissioned £250,000 of portraits of fellow MPs since 1995.¹³¹

72. The role of FOI in exposing waste and driving up standards of governance was acknowledged by the Public Accounts Committee of the House of Commons in 2014, which recommended extending FOI to private sector companies that carry out public services. The Committee considered FOI an important part of the solution to the poor performance and cost and deadline overruns that have plagued government contracts with companies such as G4S, Serco and Atos.¹³² We have long called for this extension and it is a pity that the call for evidence does not invite views on that proposal, when there has been a groundswell of support for it expressed by major political parties and wider civil society.¹³³
- The Prime Minister, David Cameron, told leaders at the Open Government Summit in 2013 that economic success is built on official transparency: *“the best way to ensure that an economy delivers long term success, and that success is felt by all of its people, is to have it overseen by political institutions in which everyone can share. Where governments are the servants of the people, not the masters. Where close tabs are kept on the powerful and where the powerful are forced to act in the interest of the whole people, not a narrow clique. That is why the transparency agenda is so important.”*¹³⁴
 - Keeping *“close tabs on the powerful,”* as the PM says we should, would become prohibitively expensive if charges for FOI requests were introduced.
 - Before elaborating on the impact on newspaper journalism of charges, it should be remembered that the majority of people who use FOI are members of the public not journalists. FOI is often used by citizens who need to mount a case against a public authority. This could be because they are parents facing child protection proceedings or they are trying to get to the bottom of how a relative died in state care. This will often require multiple FOI requests to NHS trusts, local authorities and clinical commissioning groups and so on, particularly if the authority refuses to release the information when asked and insists instead that the requester takes the FOI route.
 - In the answer to Question 5 (appeals) we saw how the sister of a murder victim had to fight all the way to the Information Tribunal for the release under FOI of a review into how the police had conducted the inquiry, as did a bereaved son trying to get information out of the NHS trust whose doctors had misdiagnosed his mother.
 - The *Hull Daily Mail* has recently been covering the plight of the family of a young woman who committed suicide shortly after being refused a place on a ward by nurses at the mental health trust. Her family were concerned about the standard of care their daughter had received in the run-up to her death and sought more information from the trust, which would not hand it over but instead said they had to go through FOI. The young woman’s mother described this as *“an ordeal”*, saying that *“every single piece of paper we have requested has gone through a similar convoluted and tortuous process.”*¹³⁵ A coroner later

¹³¹ ["John Bercow claimed £367 for going to Luton to talk about expenses scandal"](#), Guardian, 24th July 2015

⁵⁷ ["MPs spend £250,000 of public money on vanity portraits"](#), Evening Standard, 14th January 2014

¹³² House of Commons Committee of Public Accounts: ["Contracting out public services to the private sector"](#), 26th February 2014

¹³³ The idea found its way on to the 2015 general election manifestos of the Labour Party and the Liberal Democrats and is endorsed by transparency campaigners such as the Campaign for Freedom of Information and Transparency International.

¹³⁴ [PM speech at Open Government Partnership Summit 2013](#), 31st October 2013

¹³⁵ ["Sally Mays death: Coroner's damning verdict as NHS Trust accused of causing 'unimaginable suffering'"](#) Hull Daily Mail, 24th October 2015

found that Sally's death could have been prevented and criticised the mental health trust for the way it treated the family.

- If a charging system was in place, families in these situations would have had pay over and over again for requests, reviews and appeals that they were forced to go through in their protracted battles with public authorities who in many cases should have just given the information when asked.
- Many people in this situation would simply not use FOI, even though they might have very good reason to. Among those who would be discouraged from using FOI would be journalists investigating public authorities. Making FOI requests, often multiple FOI requests, is a central part of many journalists' jobs. If they are on a national newspaper and are reporting on the performance of police forces nationwide for example, they will need to find answers from a reasonable number of forces in order to make meaningful conclusions about how police are performing. The same applies to any investigation into NHS trusts, clinical commissioning groups or any branch of local government such as a local education authority or housing standards enforcement.
- In September 2015, the *Independent* reported that FOI requests it had sent to police forces in England and Wales revealed that over 3,000 police officers in England and Wales were under investigation for alleged violence against members of the public and that just two per cent were suspended while the investigation was carried out.¹³⁶ In the requests, the paper had asked about the ethnicity of the complainants and the answers revealed that a disproportionately large number of people of black or Asian backgrounds were among those alleged to have been assaulted by the Metropolitan and West Midlands Police Forces, the two forces that accounted for half of the total number of incidents. The paper reported: "*Black and minority ethnic people make up one in three of London's population but represent 55 per cent of alleged victims of brutality by Met officers. The disparity is even worse in the West Midlands where nearly half of assault complaints against police come from black or Asian people – though just 14 per cent of the population is black or ethnic minority. This means black and Asian people are 3.5 times more likely to allege assault by officers.*" This was clearly a rigorous and public-spirited investigation by the paper that yielded a lot of important information. If charges of £20 per request were in place – which is one of the figures that has been briefed as a possibility - this investigation would have cost £860 to carry out.
- In August this year, the *Telegraph* reported that NHS A&E departments have half the number of senior doctors on duty at weekends compared to during the working week.¹³⁷ Across the 50 A&E departments whose trusts answered the paper's FOI request, there were 210 consultants working midweek compared with 95 at the weekend. The weekend numbers fell to just 38 at nights. The paper found that some hospital trusts have no consultants working in A&E on weekend nights and rely on senior doctors who are on call. The report came against the backdrop of research revealing that mortality rates spike for patients admitted at weekends. The *Telegraph* obtained the information from NHS trusts by FOI. There are 155 NHS acute trusts. To FOI them all with a £20 charge in place would cost £3,100.
- The *Times* piece cited above on conflicts of interest at clinical commissioning groups is another good example of the value of multiple FOI-based investigations. The newspaper received responses from 151 CCGs. According to the NHS Confederation, there are 209 CCGs. Under a fee-regime, this investigation would have cost £4,180 and the paper would

¹³⁶ "[Over 3,000 police officers being investigated for alleged assault - and almost all of them are still on the beat](#)", *Independent*, 24th September 2015

¹³⁷ "[Revealed: the alarming shortfall of A&E doctors at weekends](#)" *Telegraph*, 30th August 2015

have had to pay the fee to the CCGs who did not answer, even though others found the information perfectly retrievable.

- A regional paper, the *Northern Echo* reported over the summer that over 1,500 children in local authority care had been reported as missing in the North East since 2011.¹³⁸ In one year, 500 were lost track of in Middlesbrough alone. This information was obtained through FOI. In recent years, the region has been hit by a wave of scandals over the way in which police and local authorities dealt with children, often in local authority care, being groomed to perform sexual favours for gangs of men. There was intense public interest in establishing the record of local authorities in keeping track of the children whose care is entrusted to them. If charges were in place, requesting the information from the five councils cited in the report would have cost the *Echo* £100. Regional newspapers have very finite resources. Councils should not demand payment from them - or anyone else - before revealing how many children they have lost.
- It is not just large-scale, multiple-agency investigations that would be hit by charges. Any local newspaper's day-to-day reporting on the town hall would be too as this will often entail FOI requests on various aspects of its work. Since 2014, the *Sheffield Star* has used FOI to uncover a panoply of important information about Sheffield City Council. As a result, in an 18-month period, it has used FOI to reveal that the Council had spent £3m on temps for senior positions in four years, with two people being paid £75 an hour to perform "interim ad hoc" work;¹³⁹ pursue a "hidden" Council report on libraries thought to be under threat;¹⁴⁰ to reveal that the Council lost, misplaced or leaked confidential data 22 times since February 2012;¹⁴¹ that it had spent £17,000 on chairs – working out at £73 per chair;¹⁴² that it was planning to cut down 1,200 trees;¹⁴³ that there have been 250 "paupers' funerals" in South Yorkshire since April 2012 and that the numbers are increasing;¹⁴⁴ that 46 pubs have closed in Sheffield since 2010;¹⁴⁵ to investigate whistleblower claims that the Council was re- hiring "in droves" staff it had previously laid off;¹⁴⁶ to discover that only 30% of those who bid for council housing in Sheffield are successful;¹⁴⁷ and that there has been a 41% surge in the number of children taken into care.¹⁴⁸
- If there were charges, the bill for keeping such regular, diligent tabs on town hall would run into several hundreds of pounds. This is not an extravagantly wealthy sector. It has been through hard times. If fees were in place, local newspapers would have to cut back on this important work that tests the claims that councils make for themselves. That in turn, would mean that their readers would receive less information on how councils are performing to inform how they vote in local ballots.
- It is no answer to the complaints of newspaper journalists that there are other ways of

¹³⁸ "[More than 1,500 North-East children missing from care since 2011: Echo investigation](#)", *Northern Echo*, 29th August 2015

¹³⁹ "[Freedom of Information: Council £3m temp bill](#)", *Sheffield Star*, 5th May 2014

¹⁴⁰ "[Town Hall 'hid library review'](#)", *Sheffield Star*, 23rd January 2014

¹⁴¹ "[Sheffield Council lost document of children's names - authority's data breaches exposed](#)", *Sheffield Star* 5th November 2014

¹⁴² "[Sheffield Council's £17,000 bill ... for chairs](#)" *Sheffield Star*, 13 March 2014

¹⁴³ "[1,200 trees facing the chop](#)," *Sheffield Star*, 18th January 2014

¹⁴⁴ "[Too poor to die... More than 250 paupers funerals in South Yorkshire since April 2012](#)", 16th February 2015

¹⁴⁵ "[Sheffield's pub closure hotspots](#)", *Sheffield Star*, 23rd February 2015

¹⁴⁶ "[Sheffield council rehiring droves of staff it made redundant](#)", *Sheffield Star*, 24th November 2015

¹⁴⁷ "[Sheffield Council defends record on social housing shortage and pledges more building](#)," *Sheffield Star*, 14th July 2015

¹⁴⁸ "[Forty-one per cent surge in children taken into care in Sheffield 'reflects tougher stance on neglect'](#)", *Sheffield Star*, 22nd September 2015

obtaining information. The time limits, cost limits and large number of exemptions on FOI can make it a protracted, unwieldy and legalistic way of getting information especially when up against an authority that has not embraced the spirit of it.

- FOI is only used when it has to be, but often it does have to be. The information put in the public domain by authorities is limited. A journalist investigating how the police treat domestic violence will often not even be able to find basic information such as the number of people charged and convicted per year on a police force website.
- Questions can be put to press offices, which will usually be the first port of call for a journalist, but the more difficult or awkward the question, the less likely they are to get an answer. This requires them to take the FOI route. We have heard that press offices will insist that journalists use the cumbersome, legalistic route of FOI instead of just giving them the information. The Thames Valley Police press office, for example, insisted that a journalist at the *Oxford Mail* put his request about whether the force had used powers under the Regulation of Investigatory Powers Act to obtain journalists' phone records through FOI to find out. The request, which was actually submitted to the force's FOI team by the press office on behalf of the journalist, was still then refused as "vexatious."¹⁴⁹
- Even where the information put in the public domain by authorities is expanded through Open Data initiatives, this is no substitute for FOI. Open data drives are welcome and we do not discourage them, but they still put officialdom in control of what it publishes about itself. The proactive inquiries from newspapers and members of the public will often concern information that goes beyond the prescribed dollops of data they get given from the Government. The Cabinet Office did not include as part of the information that it routinely publishes the complete correspondence with Downing Street that took place over the award of a knighthood to Cyril Smith. Only an FOI request - doggedly pursued by the *Mail on Sunday* - could get to it and the same applies to any internal report that an authority decides not to publish. Equally, while Manchester City Council does publish a range of data sets as part of its publication scheme, these do not include the numbers of taxi licences that it hands out to convicted sex offenders. The Manchester Evening News had to obtain these through FOI.¹⁵⁰
- Because of these benefits to the economy and business environment of the UK, we consider that FOI is great value for money. There are costs associated with compliance but these are invariably a tiny proportion of a public authority's budget and a fraction of what it spends on external communications and PR.
- Research by *Press Gazette* found that central government departments will have spent around £6m in total on compliance with FOI which represents 0.001 per cent of the £577.4bn that they spend each year and equates to two per cent of the £289m they spend on external communications (according to the Government's own Government Communications Plan 2014/15).¹⁵¹
- At council level, local authorities rarely put into the public domain what they spend on FOI. However, on those rare instances where they do, the estimate that they provide emerges as a very small proportion of what they spend on services.

149 "Oxford Mail branded 'vexatious' by Thames Valley Police - for RIPA FOI submitted by force's own press office", *Press Gazette* 18th March 2015

¹⁵⁰ "[Revealed: How officials let sex offenders, paedophiles and a rapist drive your taxis](#)", *Manchester Evening News*, 16th December 2014

¹⁵¹ "[Cost to central Government of complying with 50 times less than external comms budget](#)", *Press Gazette* 13th October 2015

- In 2015, Staffordshire Council complained to the press that it spent in 2014 £160,800 on FOI.¹⁵² During that period, the council was spending over £500 million a year overall on delivering services (£512.6m in 2014-15¹⁵³ and £531.9m in 2013-14¹⁵⁴). The figure the council cited for FOI appears to represent around 0.03 per cent of that.⁸²
- In April 2014, the leader of Essex County Council criticised the cost of FOI and provided a figure of £185,000 for the previous year.¹⁵⁵ During that time, Essex County Council was spending around £1.9bn delivering services.¹⁵⁶ The FOI figure given represents around 0.01 per cent of that.
- London Borough of Hounslow says on its website that it spends £371,800 on answering FOI.¹⁵⁷ There is no explanation on how it calculated this figure and it does not appear in the annual statement of accounts. For the last financial year, the council spent £181m overall. So the FOI figure given by the council represents 0.16 per cent of that.¹⁵⁸
- London Borough of Merton on its website put its FOI cost at £235,753.¹⁵⁹ It says this is based on the 2010 formula used by UCL in its research into FOI of assuming an average per request of 6.3 hours work to answer at £25 per hour, coming to around £158. That figure, which the council stresses is guideline only equates to 0.15 per cent of the £158.4m that it spent on services in 2014-15.¹⁶⁰
- In 2012, Merthyr Council told the BBC that it “could have” spent £160,000 answering FOIs in 2011.¹⁶¹ During that period, the council was spending just over £106m delivering services. The £160,000 spent on FOI would have represented 0.15 per cent of that.¹⁶²
- The above councils feel so strongly about FOI that they feel the need to discourage citizens from using it either explicitly in the press or implicitly by putting the cost on the FOI pages of their websites. Yet all of them spend on FOI substantially less than one per cent of what they spend overall on delivering services.
- The introduction of FOI charges and subsequent drop-off in requests would have a negligible impact on councils’ financial position, but, as the Irish example has shown, it would have a calamitous effect on the exercise of this important, democratic right. Charging for FOI would therefore be a wholly disproportionate response to the costs of administering the system.
- The FOI law as it stands offers safeguards against unmanageable cost and burdens, yet there is evidence that even though councils complain about the cost of FOI, they are not using these safeguards.
- Section 12 of the Act entitles public authorities to issue refusal notices to requests that would exceed specified cost limits. These are £600 for central government departments and £400 for other authorities. Requesters can also be charged for any postage and photocopying involved in answering.

¹⁵² "[Information requests cost Staffordshire Council £160k](#)", Express & Star, 11th September 2015

¹⁵³ Staffordshire Council: [Statement of Accounts for 2014/15](#), p3.

¹⁵⁴ Staffordshire Council: [Statement of Accounts for 2013/14](#), p3

¹⁵⁵ "[Essex Council leader criticises cost of 'trivial' FOI requests](#)", BBC News, 12 April 2014

¹⁵⁶ Essex County Council [Annual Report 2013/14](#), p22 & [Essex Council Annual Report 2012-13](#) p19

¹⁵⁷ http://www.hounslow.gov.uk/index/council_and_democracy/foi/foi_send_request.htm

¹⁵⁸ London Borough of Hounslow, [Statement of Accounts 2014-15](#)

¹⁵⁹ <http://www.merton.gov.uk/council/dp-foi/foi.htm>

¹⁶⁰ LB of Merton [Statement of Accounts 2014/15](#) p2

¹⁶¹ "[Freedom of Information requests 'puts strain on councils'](#)", BBC News, 14th October 2012

¹⁶² <http://www.merthyr.gov.uk/media/1360/statement-of-accounts-2011-2012.pdf> p2

- Requests can also be refused if they are considered “vexatious” or “repeat” requests under s14 of the Act. “Vexatious” (s14 (1)) is not defined in the Act, but the Upper Tribunal considered its meaning at length in *Information Commissioner v Dransfield* [2012] UKUT 440 (AAC). The tribunal said there are four main factors to consider: the burden, motive, the value or serious purpose, and whether the request causes distress or harassment to staff.
- Under these principles, authorities are entitled to refuse to answer requests that are part of an obsessive pattern of requesting or one that is aimed purely at disrupting and annoying the council in the pursuit of a grievance against it. Requests that are part of a co-ordinated public affairs campaign, by a union or charity or example, can also be declined as vexatious if they are disproportionately burdensome.¹⁶³ And requests that contain offensive language or unsubstantiated allegations against an authority may be considered vexatious too.
- Importantly, the Court in *Dransfield* said that the breadth and scope of a request can be relevant when considering vexatiousness. This is separate from the cost limits in s12, which cover certain costs such as the time taken to read and locate information in documents, but not others such as redaction, or considering what may need to be redacted. The *Dransfield* definition of s14 means that where answering a request would cause a disproportionate burden to an authority in ways other than those set out in s12 the authority may be able to refuse them. There is now a clear line of decision notices at ICO level that requests that take an excessive amount of time to redact or to assess what falls in scope for release, or are in other ways “grossly oppressive” can be refused under s14 “vexatiousness”. For example:

6.1 In September 2015, the Commissioner upheld the Ministry of Defence’ application of s14 (1) to a request for eight specific documents concerning the peaceful use of nuclear explosives. The MoD embarked on the answer but then realised that the time it would take to assess the material and weigh judgments about what needed to be redacted represented a much greater undertaking than it had anticipated. The Commissioner acknowledged that there are strong public interest arguments in favour of ordering publication, but came down in favour of the MoD saying that it was “*satisfied that complying with this request would, or more accurately did, place a grossly oppressive burden on it.*”¹⁶⁴

6.2 In July this year, the ICO also found in favour of an NHS ambulance trust applying the exemption to a request for the ambulance response times for every incident since 2015 as well as other data including the street, the date, the postcode, and the category of complaint. The trust said that some of this was disclosable but some of it could render individuals identifiable and would need to be redacted. The Commissioner agreed, saying that “*he does not consider this to be a proportionate or sensible use of the Trust’s resources.*”¹⁶⁵

6.3 In March 2015, the ICO upheld London Fire Brigade’s use of s14 (1) to refuse a request for all of its policies and procedures since 2008 on the grounds that the time taken to assess what needed to be redacted and what did not would be in the region of 100 hours and it only had a two officers working on FOI: “*The*

¹⁶³ [ICO Decision Notice: FS50593969](#) 2nd September 2015 - The Information Commissioner found that the National Gallery had properly applied s14 when refusing to answer a request that was part of a co-ordinated campaign of FOI requests from the PCS union over an out-sourcing contract.

¹⁶⁴ [ICO Decision Notice FS50578749](#) 21st September 2015 paragraph 31

¹⁶⁵ [ICO Decision Notice: FS50569582](#) 12 July 2015 at para 35

Commissioner considers any reasonable person would find it difficult to conclude that this would place anything but a grossly excessive burden on the two members of staff at LFB who would be burdened with undertaking the task.”¹⁶⁶

7 Public authorities should therefore feel confident in refusing under s14 (1) requests where the burden of assessing what can be released and redacting it if necessary is manifestly unreasonable. The wording of the Act on this does not need to be revisited given the ICO’s consistent application of the principles set out in *Dransfield*. The introduction of new hard and fast statutory limits, plucked out of the air, for redaction and thinking time, would make it easier for authorities to flatly refuse requests and harder for the requester to challenge the grounds. It would also restrict the ability of the ICO to look at the request in the round and weigh the public interest in the request against the additional burdens that may be involved in releasing it. The further the Act goes in the direction of automatic cost-bars and other devices that catch requesters out regardless of the merit of their request, the more it will drift away from its purpose of bringing to the fore information that the public has a right to know.

8 Sometimes, additional effort to carry out a request is proportionate, where the public interest is strong and there is a serious purpose behind it. Furthermore, since *Dransfield*, some public authorities have been observed to have overstated the burden that a particular request would generate in order to apply the exemption. For example:

8.1 In 2013, a requester asked the CQC for copies of all emails sent and received by CQC chief executive David Behan in 2013, which contain any of the following terms: ‘winterbourne’, ‘private eye’. The CQC tried to argue that trawling through the emails, which were often part of chains and contained lengthy attachments, was necessary to identify sensitive/personal information that would need to be redacted. This it said would place an oppressive burden on its resources and this preliminary task alone would take over 30 hours. The Commissioner accepted that there would be over 300 pages to review. However, the Commissioner a) was sceptical about how long this would really take and b) considered that the public interest around the Winterbourne View abuse scandal justified putting the CQC to the trouble: *“the Commissioner concludes that the request does not impose a grossly oppressive burden upon the CQC and that the impact upon the CQC is justified and proportionate given the purpose of the request and the value to the public of the majority of the information within its scope.”¹⁶⁷*

9 If councils and other authorities are concerned about costs, it is essential that they use the tools available to keep them down. There are some troubling indications that they do not use them to the full and then blame the Act for the expense incurred by their own flawed administration of it.

10 The leader of Essex Council, cited above, when attacking FOI reportedly said that answering requests about “apocalypse zombies or the number of lavatories” was wasting the council’s money. In 2014, the Local Government Association put out a press release listing the “wacky” requests that have been made to councils under FOI: *“One Wigan resident must have watched one too many episodes of ‘Game of Thrones’ before asking his council what plans they have to protect the town from a dragon attack. Officers at Worthing Borough Council were surprised to be asked if the seaside town was ready to cope with an asteroid*

¹⁶⁶ [ICO Decision Notice FS50569583 17th March 2015](#)

¹⁶⁷ [ICO Decision Notice: FS50532615 20 August 2014](#)

crash. Elsewhere, Rossendale Council was asked if it had paid for exorcisms to be performed on possessed pets and animal-lovers in Cambridge quizzed the City Council how many animals it had frozen".¹⁶⁸

- 11 If councils are answering questions about zombies, dragons and pet exorcisms, then yes, they absolutely are wasting taxpayers' money. All of these can be safely refused under the Act as vexatious. There is no need under the Act to answer any of these at all.
- 12 The release added that "councils are also having to answer requests for information readily available on council websites, such as for staff telephone numbers." This is wrong. Councils are not "having to" do this. There is an absolute exemption under the Act for information that is publicly available. If council officials are wasting time and money by not using the exemption that is available to them, it really is not the Act's fault.
- 13 The Information Commissioner has noted that councils and public authorities do not make full use of the Act's provisions to minimise the burden. He said "*public authorities are, rightly, empowered to say "enough is enough" and refuse a vexatious request. The ICO has a good clear track record of supporting public authorities when they have relied reasonably on these provisions to refuse to deal with a request. What's surprising is that more public authorities don't use these provisions more often, but instead complain about having to deal with requests which could validly be described as vexatious – lacking in serious purpose, excessively burdensome, or designed to disrupt or annoy.*"
- 14 He added that authorities "*invariably choose not to raise a fee for the supply of information even when they are entitled to do so*" and made it clear that he considers that this diminishes the force of their complaints and undermines any argument in favour of charging for requests: "*If fees for simply making a reasonable request for information were to come back on the agenda, it would indeed be a retrograde step - particularly when public authorities are not using the powers they already have to refuse the unreasonable or charge for the most costly.*"¹⁶⁹
- 15 Not only is FOI a tiny fraction of spending for public authorities, but the existing rules offer plenty of under-used scope for them to make it cheaper still. Changing the Act, to bring in charges for requests or new limits under s12, is not only unnecessary but would diminish the Act's power to shine a light on how taxpayers' money is being spent. The more information on that which is kept in the dark, the less incentive and pressure there is to ensure that every penny is spent wisely. The predictable result will be that it will not be spent wisely and that more would find its way into business class travel for officials, lavish car allowances, vanity projects, rip-off staffing agencies, bungling contractors, dubious medical treatments and all the other places where money ends up when there is insufficient scrutiny to put a stop to it. Any meaningful, far-sighted cost-benefit analysis of FOI would conclude that cutting back on FOI is a false economy and that extending it is the enlightened way forward.
- 16 Finally, the NMA concludes by inviting the Commission to consider the case for extending FOI to private sector companies contracted to carry out public services, along the lines endorsed by the Public Accounts Committee in 2014. We would be happy to brief the Commission on the issues and consider this a far more enlightened way of developing freedom of information law in this country than that set out in the call for evidence.

¹⁶⁸ "[Councils quizzed on dragon attacks, asteroid crashes and possessed pets in wacky FOI requests](#)", Local Government Association, 16th August 2014

¹⁶⁹ Information Commissioner speech to the LSE 1st October 2015

Newsquest Media Group

Dear Commissioners,

Newsquest Media Group makes this brief submission to register its endorsement of the submission of the News Media Association on behalf of the national and regional press.

The prospect of weakened rights to freedom of information has spread dismay among regional newspaper editors and their readers. They recognise that the Freedom of Information Act 2000 has at last begun to chip away at the encrustations of secrecy and furtiveness that (in our experience) cover so much of government and the public sector. These are centuries-old bad habits that have long obstructed democratic openness and accountability, and indeed, the process of good government. On a daily basis, the regional press – in their role as watchdogs for the public – are using the Act to give insight into the workings of local government and public services. Good democratic government works by the consent of those governed. There can be no good government without a properly informed electorate.

One of our newspapers, the *Oxford Mail*, recently devoted 15 of its pages to examples of past coverage showing readers just how important the Act has been locally in providing them with this knowledge. Only this week, another Newsquest daily newspaper, the *Evening Times*, published detail of the claims for compensation made against education authorities for losses or injury suffered by children on school premises. It's a small but nevertheless important issue. Any dispassionate observer might well say that information of this kind ought to be made available as a matter of course without the need for tedious application for disclosure from its local authority guardians. Over some years, various Newsquest newspapers around the UK have sought disclosure from local councils of the identities of councillors who have failed to pay their council tax. Again, you might have thought this elemental piece of information ought to be readily available to the electorate, especially since it means the councillors concerned are automatically barred by law from voting on certain matters as a result, effectively disabling them in the purpose for which they were elected. And yet our experience has been depressingly familiar, with refusals regularly received. One of those refusals is currently under appeal to the Upper Tribunal by the *Bolton News*.

One of the principal complaints of critics of the Act is that it imposes an unreasonable burden on public authorities. If there is such a burden, then to a great extent it is one of their own making. Anyone who recalls the debates that gave birth to the Act will also recall that public authorities were expected to banish their bad habits and embrace the principle of openness. It was expected that reams of information would be published freely, using the internet, precisely so that applications for disclosure would not usually be necessary. This simply has not happened. Instead, more bureaucrats have been employed who manage to find ways of using the Act to justify continuing secrecy, often appearing not to know very clearly why they are doing it. The presumption of openness that the Act was meant to encourage is lost on them. Concepts of confidentiality, privacy and data protection are stretched to fit. Of the materials that do get distributed voluntarily by public authorities, so often the selection seems to have been determined by party political interest and fear of criticism, and it is propaganda not information that is put on the menu. The solution to many of the perceived problems is not to dilute the Act, but revitalise and accept it as it was really intended, as a treatment for the sclerotic culture of government.

We formally endorse the evidential submissions from the News Media Association.

Yours faithfully,

Simon Westrop

Head of Legal - Newsquest Media Group

North Yorkshire County Council

Internal deliberations of public bodies? For how long after a decision does such information remain sensitive? Should different protections apply to different kinds of information that are currently protected by sections 35 and 36?

North Yorkshire County Council suggests a general exemption for internal communications, similar to that offered by regulation 12(4)(e) of the Environmental Information Regulations, and also subject to the public interest test.

One of the risks of disclosing internal communication is that individual officers come to be seen to be publicly accountable, rather than the Council as a whole. Where an officer makes a decision under delegated powers, it is right for him or her to be accountable. A planning consent would be an example. Otherwise, publishing opinions and suggestions by individual officers, especially if contrary to the eventual decision, exposes them to unjustifiable public comment and perhaps even criticism. It is the Council's collective decisions, and reasoning, which should be subject to public scrutiny and challenge, not the views of individuals.

However it is important that "sign-off" of such an exemption should be by a qualified person, as with Section 36, and subject to the public interest test.

In addition the Council is receiving an increasing number of wide ranging 'fishing' requests which ask for large amounts of internal correspondence. Such requests represent a great burden to the Council in terms of locating and retrieving the information from a number of sources (often individual officers themselves), reviewing the information, redacting the information and consulting with third parties. The time spent responding to them is disproportionate to the public benefit of disclosure – their disclosure does nothing to further the public's ability to challenge decisions or become involved in the activities of their local council. Arguably they may help the public understand a decision however there is not likely to be any further reason for a decision revealed through the disclosure of internal communication than has been expressed publicly. An exemption to withhold internal communication would go some way to resolve this.

Question 2: What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?

Question 3: What protection should there be for information which involves candid assessment of risks? For how long does such information remain sensitive?

Question 4: Should the executive have a veto (subject to judicial review) over the release of information? If so, how should this operate and what safeguards are required? If not, what implications does this have for the rest of the Act, and how could government protect sensitive information from disclosure instead?

Question 5: What is the appropriate enforcement and appeal system for freedom of information requests?

It is not clear why in some cases the ICO chooses to issue a decision notice when in the majority of cases they do not, however generally speaking from the Council's point of view the current system works well. That said we should point out that in the Council's experience complaints are rarely taken beyond ICO.

The government may wish to consider imposing a small charge, as under the Irish system, for reviews and ICO complaints. This would discourage the pursuit of hopeless, frivolous and vexatious

complaints. It would also provide an alternative revenue stream for the ICO in light of the likely removal of the data protection registration fees.

Question 6: Is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know? Or are controls needed to reduce the burden of FoI on public authorities? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kinds of requests do impose a disproportionate burden?

The Council is in favour of openness and transparency, but considers that the financial and resource burden placed by the FOI regime in totality needs some additional control to ensure that reducing resources are targeted in the most appropriate way.

Therefore the Council has suggested above a fee for internal reviews and referrals to the ICO. In addition, whilst any additional controls in reducing the burden in welcomed, it is not considered that reducing the time limit by a small amount, for example from 18 hours to 16 hours, would have a worthwhile impact on the increasing burden of FOI. Rather we would suggest extending the range of activities which can be taken into account. Currently the fees regulation excludes time spent on reviewing information, considering exemptions, consulting with third parties and making redactions. These activities can need very significant amounts of time, even when (say) an automated search has retrieved information in a matter of minutes.

Northern Ireland Civil Service

Introduction

The Northern Ireland central government departments (see Appendix 1) are separate public authorities under the provisions of the Freedom of Information (FOI) Act 2000. All departments have been consulted and this NICS composite response represents the evidence provided by, and views of, officials. By way of background, we would ask the FOI Commission to note the following summary of the key NICS casework statistics.

Freedom of Information Annual Reports (published for each calendar year since 2005) show that the departments which compose the NICS received 31,221 requests for information between 2005 and 2014 inclusive. The number of requests received each year has been consistently around the 3,000 mark. Most of them were received from members of the public. The media and the business sector were the next most prominent sources of requests. Over the ten years, the Northern Ireland departments responded to 86% of requests within the statutory time limits and, in 71% of cases, the information requested was disclosed in full. The exemption engaged most frequently was that for personal information (section 40 (2)). Commercial interests (section 43), the formulation of government policy (section 35), and Health and Safety (section 38) were the next most prominent exemptions used by the departments. The order of prominence of these exemptions varied from year to year. 1,193 internal reviews were conducted, and 210 complaints were made to the Information Commissioner, who has issued 136 Decision Notices involving the departments. 18 cases have been escalated to the First-tier Tribunal (Information Rights), and three of these cases have been further appealed to the Upper Tribunal.

The FOI Commission should note that while FOI is a 'transferred matter', in 2000 the then Executive Committee of the Northern Ireland Assembly ('the Executive') decided not to introduce separate FOI legislation. Therefore, Northern Ireland is covered by legislation passed by Westminster.

The Questions

Question 1: What protection should there be for information relating to the internal deliberations of public bodies? For how long after a decision does such information remain sensitive? Should different protections apply to different kinds of information that are currently protected by sections 35 and 36?

Departments recognise the importance of demonstrating accountability and appreciate how important it can be for the public to understand the background to policies and decisions. They also recognise that the development of policy requires frank and open discussion, and that this can be difficult to maintain if records of such exchanges are disclosed into the public domain prematurely.

Departments generally accepted that different protections could apply to different kinds of information that are currently protected by sections 35 and 36. There was, however, an appreciation that the subdivision of the wide range of information captured by the current clauses would be challenging. For further comment on this point, see the response to Question 4.

One department favoured the option of a **prejudice-based absolute exemption**, stating:

'This would allow each decision to turn on a single test of whether release of the information in question would prejudice the legitimate interests of the Department or not, and would avoid the need to make a value judgement on whether any such prejudice is outweighed by the public interest. It would also avoid the blunt approach of a class-based absolute exemption, which it is felt would so weaken the fundamental policy principle of FOI as to make the legislation largely redundant.'

As regards the longevity of the sensitivities attached to policy-making information, departments were of the view that this would depend very much on the circumstances of each case.

Question 2: What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?

The Office of the First Minister and deputy First Minister (OFMDFM) issued a document entitled the 'Conduct of Executive Business' to all departments earlier this year. It states: 'Executive Secretariat [a Division within OFMDFM] should be consulted about and will provide views on all requests for information associated with Executive business to ensure a consistent approach to the disclosure of such information.' More recently (12 October 2015), an OFMDFM response to an Assembly Question states: 'Executive business and all aspects of the Executive decision-making process are confidential.' As far as we are aware, there have been no disclosures of information relating to the operation of the Executive since the FOI Act came fully into effect in 2005. It is also worth noting that OFMDFM's retention and disposal schedule states that records relating to the 'Operation of the Executive' are to be retained (in the Department) for 30 years and then transferred to the Public Record Office of Northern Ireland (PRONI).

The two exemptions which could apply to most of the information related to Executive business are sections 35 and 36. Both exemptions are 'qualified' and a case by case public interest test must be carried out on all information under consideration for disclosure. While departments have been advised not to assume that Executive-related information can be withheld, in practice, it is highly unlikely that such information (eg, agenda and minutes) would be disclosed by departments in response to requests. Given the background and approach taken by OFMDFM as regards Executive-related information, it is the Department's view that the provision of a prejudice-based absolute exemption would be the best means of protecting this information.

Question 3: What protection should there be for information which involves candid assessment of risks? For how long does such information remain sensitive?

OFMDFM disclosed its corporate risk registers (dating from 2011) following an ICO decision notice of 27 March 2014.

Another department dealt with two requests relating to risk, both in 2006. They concerned the provision of the Department's Corporate Risk Register, which was released in full, and an assessment of the relative vulnerability of the Department's business areas to the risk of fraud. In the latter case, the detailed assessment was withheld under Section 36 (2) (c) on the grounds that release of the information could be of use to prospective fraudsters, and would have the potential to prejudice the effective conduct of public affairs.

That Department considers that each request for the release of such information should be considered carefully and that the exemptions which are available currently should continue to be available as a means of protection. Varying degrees of sensitivity clearly exist, therefore, a case by case approach remains the most appropriate method of determining the level of protection required.

How long information about risk remains sensitive will depend very much on its nature and scope, and the circumstances of each case. Therefore, it is very difficult to suggest a timeframe that would suit all cases.

Question 4: Should the executive have a veto (subject to judicial review) over the release of information? If so, how should this operate and what safeguards are required? If not, what implications does this have for the rest of the Act, and how could government protect sensitive information from disclosure instead?

The veto has never been used by the First Minister and deputy First Minister acting jointly, as 'accountable persons' under the provisions of section 53 (7) and (8)(a) of the FOI Act. Potential for the veto to be used probably came closest in the case involving the Northern Ireland Attorney-General's legal advice to Edwin Poots (the then Health Minister), which was used to justify a lifetime ban on gay men giving blood. In the end, the First-tier Tribunal overturned the ICO's decision notice which ordered release.

No procedure or protocol has been developed for the use of the veto by the First Minister and deputy First Minister acting jointly but it is likely to differ from current practice at Westminster, whereby the Minister in charge of a department must consult with the entire Cabinet. The Executive is composed of Ministers from five different political parties, whereas the Cabinet is composed of Ministers from one party. This is in contrast to the wide range of exemptions which the FOI Act makes available to public authorities, and which demand a reasoned approach to their engagement.

Departments are of the view that the use of the veto by the devolved administration here is likely to be a very rare occurrence. Moreover, given the Supreme Court's ruling – in the case of HRH Prince of Wales' letters – that the veto could no longer be used as Parliament had understood it would work, there would be even less scope for exercising it here. It may be practicable to strengthen other provisions (particularly sections 35 and 36) in the FOI Act. For example, there is a statutory requirement already within section 36 for ministerial input. The minister's 'reasonable' opinion could be given more weight and the exemption given an 'absolute' status in the case of certain classes of sensitive information (eg, Minutes of the Executive). This would shorten the process of consideration (eg, by removing the need for a public interest test), reduce casework costs and help to manage the expectations of requesters.

Consideration should be given to whether certain classes of information captured under current section 35 provisions should require ministerial input. At present, any information which 'relates to' the formulation or development of government policy is scoped. This makes section 35 cases unwieldy at times. Particularly sensitive policy information, the disclosure of which departments would contest as a matter of principle, should be afforded greater protection. Again, the availability of an 'absolute' exemption to provide the necessary protection for very sensitive information seems to us a viable policy option and one worth exploring.

Question 5: What is the appropriate enforcement and appeal system for freedom of information requests?

Over the years the UK government has extended ICO's role and powers. However, it is important to note that a Triennial Review of ICO is still in progress. The Information Commissioner's final term of office ends next year and the government may avail of the opportunity to revise the ICO's role and structure. We are not clear as to whether the outcome of the Triennial review will influence the Commission's thinking or whether the Commission's report will influence the Triennial review.

While only a small number of departmental cases have been appealed to the Information Tribunal and its successors, the First-tier and Upper Tribunals, departments were generally of the view that the current multi-layered appeal system is too cumbersome and expensive. It was noted that a number of decisions made by the First-tier Tribunal (Information Rights) contained errors in law and were overturned subsequently by the Upper Tribunal. Such cases add to the cost of FOI, delay a resolution, and undermine confidence in the appeal system. The Department of the Environment reports that it is currently awaiting two Upper Tribunal decisions on requests received in 2010 and 2012.

The Scottish model may offer a much cheaper and speedier case resolution process. Scottish FOI legislation provides for a strong Information Commissioner, whose decisions can only be appealed directly to the courts (ie, there are no Information Tribunals).

Question 6: Is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know? Or are controls needed to reduce the burden of FOI on public authorities? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kinds of requests do impose a disproportionate burden?

Serial requesters

In 2015 OFMDFM received five requests (from a journalist) within the space of 30 minutes. All were valid requests on a variety of subject matter and the Fees regulations could not be used to refuse them. One of the requests scoped a substantial amount of documentation, which was easily identified

and assembled but which required careful reading, extensive consultation with third parties and the engagement of several exemptions along with associated public interest test arguments. It is estimated that staff spent over 100 hours on non-chargeable activities. While there may have been a vexatious motivation behind the submission of the requests in such quick succession, it would have been very difficult to have proven this to the satisfaction of the ICO.

Another department reported that it received over 50 requests on one topic during an eight-week period during 2014. Evidence suggested that these requests were encouraged by various campaigning groups but all were valid. That number of requests within a short period of time imposed a significant burden on a business area managing a contentious policy area, and proved to be a real distraction from its core work.

Departments need more protection from serial requesters whether the requesters are acting in a vexatious spirit or not. A nominal fee for making such requests is unlikely to deter certain categories of requester. Moreover, as the vast majority of requesters are members of the public, the introduction of a fee would act as a deterrent and thereby deny legitimate access to information. Indeed, the introduction of a fee would add to the burden on departments, as they would have to set up and administer a charging regime.

Being able to charge for additional activities under the Fees regulations would allow departments to refuse particularly burdensome requests. Records management policies, procedures and systems are generally sound, so determining whether information is held, and locating and retrieving it (ie, the chargeable activities), is rarely expensive. The real burden lies in reading the information, determining whether or not it can be disclosed, conducting third party consultations and weighing up the public interest arguments if a 'qualified' exemption is engaged. Furthermore, a lot of time is spent redacting information, particularly personal information (eg, officials' names): all non-chargeable activities.

Fees regulations

Moreover, the £600 'appropriate limit' based on a standard charge of £25 per hour (for staff time regardless of the actual cost of the staff time taken) has been in place for a decade and needs to be revised, as staff costs have increased significantly over that time period.

Vexatious requests

This type of request continues to be a problem for departments. There have been over 60 such requests (across all departments) received during the period 2005-2014. While this figure is not a significant proportion of the total number received, it does not reflect the disproportionate amount of staff time often required to process vexatious cases. Many cases proceed to appeal and dossiers have to be compiled to demonstrate compelling evidence of vexatiousness. This can involve the assembly of extensive historical correspondence about grievances or disputes that are often associated with vexatious requests.

While the ICO has encouraged greater use of section 14, and has revised its guidance, departments remain frustrated with its provisions. Proving vexatiousness is a demanding test with a high threshold. Case law to date has been of limited value, therefore greater clarity around what constitutes vexatiousness in primary legislation or at least in the FOI Act's Code of Practice would be welcome.

Round-robin requests

We would draw to the Commission's attention a point made in our response to the Justice Select Committee's post-legislative scrutiny exercise, which concerns a particular disadvantage the Northern Ireland devolved administration labours under. If a request is received by one of the Northern Ireland departments that requires a NICS-wide response or the same request is sent to each of the 12 departments separately, then 12 individual responses issue. Whereas the same request to either the Scottish or Welsh governments generates one response. If the Northern Ireland departments were able to aggregate the cost of processing such requests, then a significant number of them could be refused.

Correction to Call for Evidence statement on page 9

The call for evidence states: 'Alongside the changing definition of "historical records", the duration of the s.35 and section 36 exemptions in the Act are being lowered from 30 years to 20 years (other than for Northern Ireland).' The correct position is as follows:

The Protection of Freedoms Act 2012 amended section 63 of the FOI Act by extending certain FOI provisions in the Constitutional Reform and Governance Act 2010 to Northern Ireland. The provisions limit the exemptions from disclosure which can be applied to 'historical records', so the maximum period for which information can be withheld is reduced from 30 years to 20 years for

- sections 30(1) (investigations and proceedings conducted by public authorities), 32 (court records), 33 (audit functions), 35 (formulation of government policy) and 42 (legal professional privilege); and
- section 36 (prejudice to the effective conduct of public affairs), **except for subsection (2)(a)(ii) (information which would or would be likely to prejudice the work of the Executive Committee of the Northern Ireland Assembly) and section 36(2)(c), in so far as disclosure would prejudice the effective conduct of public affairs in Northern Ireland where the lifespan of the exception remains at 30 years.**

APPENDIX 1

List of the Northern Ireland Departments

Department of Agriculture and Rural Development (DARD)
Department of Culture, Arts and Leisure (DCAL)
Department of Education (DE)
Department for Employment and Learning (DEL)
Department of Enterprise, Trade and Investment (DETI)
Department of the Environment (DOE)
Department of Finance and Personnel (DFP)
Department of Health, Social Services and Public Safety (DFP)
Department of Justice (DOJ)
Department for Regional Development (DRD)
Department for Social Development (DSD)
Office of the First Minister and Deputy First Minister (OFMDFM)

The Northern Ireland Open Government Network

The Northern Ireland Open Government Network is an alliance of individual citizens and representatives of community and voluntary sector organisations. Our aim is to contribute to delivering a more open, transparent and accountable government that will empower citizens to shape decisions that impact on their lives.

The purpose of the network is to actively engage a broad and diverse group of citizens and organisations in advocating more open government in Northern Ireland.

In accordance with the principles of the Open Government Partnership Declaration, the Network aims to contribute to:

- broadening participation in government
- increasing transparency and the availability of, and access to, data
- enhancing accountability
- improving policy making
- delivering better service provision and increasing confidence in government

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Introductory Comments

Reviews of policy and legislation are important in order to better understand and improve their impact for citizens. Therefore, the NI Open Government Network welcomes the opportunity to respond to the 'Call for Evidence' relating to the review of the Freedom of Information Act (2000). The Network strongly supports the initial objective of the 1997 Freedom of Information Act: "To encourage more open and accountable government by establishing a general statutory right of access to official records and information."

Under the Freedom of Information Act (2000), public authorities are obliged to publish information about their activities and members of the public are entitled to request information from, for example, government departments, local authorities, the National Health Service, state schools and police forces. Although there are some weaknesses with the 2005 Act, it is internationally recognised as a model that helps the citizen to access and use information.

'The Right to Information' is a cornerstone of the Open Government Partnership, to which the UK is a founding signatory. Prime Minister David Cameron has championed open government in the UK, pledging to make the UK government "the most open and transparent in the world." Any attempt to weaken the Act undermines the principles of open government and the commitments which the UK has endorsed through the Open Government Partnership.

We share the UK Open Government Network's concerns regarding the Freedom of Information Commission and Tribunal Fees, expressed in an open letter to Matthew Hancock MP, Minister for the Cabinet Office:

"We regard the Act as a fundamental pillar of the UK's openness arrangements. So too did the coalition government which stated that the Act had been 'successful in achieving its core aims of increased openness, transparency and accountability'. We do not believe that the Act's important rights should be restricted and consider that attempts to do so would be likely to undermine the Open Government Partnership (OGP) process itself."

The views of the NI network are now outlined under a series of thematic headings.

Terms of Reference

We are disappointed about how the consultation is framed and by its limited terms of reference. In the call for evidence overview document, the independent commission focuses on the negative impact of the FOIA for government, without recognising or reflecting on its benefits.

The call for evidence states:

“The Commission will review the Freedom of Information Act 2000 to consider whether there is an appropriate public interest balance between transparency, accountability and the need for sensitive information to have robust protection, and whether the operation of the Act adequately recognises the need for a “safe space” for policy development and implementation and frank advice. The Commission may also consider the balance between the need to maintain public access to information, and the burden of the Act on public authorities, and whether change is needed to moderate that while maintaining public access to information.”

The terms of reference indicate that the Commission intends to focus on the case for restricting freedom of information and will not consider ways of enhancing the right of access, increasing the number of organisations subject to the Act or removing unnecessary obstacles to disclosure. The Commission is essentially asking to what extent the right of free access to information should be curtailed.

The Commission appears to be working on the assumption that transparency is burdensome – administratively inconvenient, politically unnecessary and democratically superfluous. Accordingly, the terms of reference frame the debate in transactional terms – it is about time and money wasted through dealing with FOI requests, rather than about the more important relationship between transparency and democracy.

FoI is a driver of good public authority practice. The Act has enabled government to change how it interacted with the citizen and allows the citizens to understand and engage more with democracy. The FoI Act should be strengthened in a way that makes government more transparent. There is no defence, for example, for failing to extend FoI to private companies contracted to take on public services, as the Public Accounts Committee suggested.

The Composition of the Commission Panel

We have concerns about the composition of the Panel and strongly believe that the government should have avoided appointing members who have already reached and expressed firm views on the issues around FoI.

We are concerned that the Panel members on the Commission, weighed down by preconceptions, are unlikely to approach their task with an appropriate level of objectivity. They seem less concerned with safeguarding the freedom of information than with imposing new restrictions on its flow; more preoccupied with enabling government to avoid awkward questions than enabling citizens to reveal inconvenient truths.

Loaded Language

We have concerns about the vague, undefined and loaded use of language in the call for evidence. Wording like ‘safe space’, ‘frank advice’ and ‘the burden of the Act on public authorities’ are loaded terms that, without any evidence, create the sense that the FOI Act curtails the work of Government.

The first term of reference concerns the balancing of ‘sensitive information’, but a coherent definition of ‘sensitive information’ is missing from the Commission’s call for evidence. In fact, the word sensitive is only mentioned once in the entirety of the Freedom of Information Act; and when it is mentioned under

schedule 6, it clearly refers to personal information which is otherwise covered by the Data Protection Act.

The House of Commons Justice Committee

We believe that the Proposals under consideration are unnecessary and regressive.

In 2012, the cross party House of Commons Justice Committee carried out an extensive investigation into the operations of the Act. It reported:

“The Freedom of Information Act has been a significant enhancement of our democracy. Overall our witnesses agreed that the Act was working well. The right to access information has improved openness, transparency and accountability.”

The Justice Committee review took seven months, considered 140 pieces of evidence and heard oral evidence from 37 witnesses. The FOI Commission is due to report by the end of November and has a composition which reflects the interests of government with an extremely limited remit.

It is highly perverse for this useful and much needed legislation to be placed under threat by a review that is merely looking at proposals to weaken the Act. The Committee's comprehensive report addresses all the concerns which, according to the Government, its new review has been established to consider. Why then the sudden pressing need for another one?

Proposals such as strengthening the government veto, removing some types of information from FOI altogether and charging for requests are regressive and unnecessary. The Act already contains robust safeguards for sensitive information and it has revealed far more wasteful spending by public authorities than it has cost to administer. The FOI Act already offers discretion as to what can and cannot be accessed. Much of the data the public deserves to see remains undisclosed. FOI has never been a free-for-all; our right to free access to information should be extended, not watered down.

Protection for information relating to the internal deliberations of public bodies

Question 1 from the Commission asks:

“What protection should there be for information relating to the internal deliberations of public bodies? For how long after a decision does such information remain sensitive? Should different protections apply to different kinds of information that are currently protected by sections 35 and 36?”

We believe that notions like ‘protection of internal deliberations’ are highly inappropriate in the context of publicly elected representatives making decisions that impact our lives.

Public scrutiny is awkward. For decades public institutions have operated freely behind closed doors to prevent perceived nosy citizens from interfering, criticising and asking awkward questions. Institutions and their employees should operate in a manner that reflects their duty to the citizen.

The Freedom of Information Act was designed to: “transform the culture of Government from one of secrecy to one of openness; raise confidence in the processes of government, and enhance the quality of decision making by Government.” However, the agenda underpinning this review runs contrary to this cultural transformation.

If we limit information about internal discussions of public bodies, then:

- a) Critical mistakes by public authorities could remain undisclosed for decades
- b) Public authorities might feel free to ignore inconvenient evidence in reaching decisions

- c) Public authorities might feel free to take decisions that satisfy commercial lobby groups

Democracy and transparency go hand in hand, and so the suggestion that a monetary burden may outweigh a democratic need is detrimental to our democratic society. Access to information is essential to the spirit and practice of open government. It supports good governance, effective and efficient public administration, compliance with laws and regulations, efforts to combat corruption and greater government transparency, and participation in decision-making.

The Open Government Network supports reform of FOI, not to diminish democracy, but to facilitate maximum disclosure. Any organisation that delivers services supported by public funds should be required to answer FOI requests. Public services are increasingly being delivered by private contractors which means that rights of the public are inconsistent as it is difficult to distinguish between information that is held on the authority's behalf, and private information.

We propose that either a disclosure obligation should be introduced, requiring any information held by contractors or subcontractors relating to the contract to be considered as being held on the authority's behalf, or by using budget trails so that public spending can be traced effectively and decisions can be based on complete information. As the open-source community insists, open access to information will produce more knowledge and greater processes.

Safe Deliberative Space for Ministerial Discussions

One of the aims of the review is to ensure that the Freedom of Information Act, "adequately recognises the need for a 'safe space' for policy development and implementation and frank advice." Through the FOI process the Information Commissioner and the tribunal have the power to question whether disclosure genuinely undermines such a, "safe space. Besides, an exemption already exists and any tightening of this exemption could mean civil servants would no longer be accountable to the public for the advice they offer to government.

At present section 35 of the Act allows the withholding of policy development work, private office communications and letters between ministers. Section 36 allows ministers to withhold other information as well which would undermine safe space for discussion.

When dealing with the concept of 'Deliberative Space' the Commission states:

"It is difficult for organisations to have frank, internal deliberations if those internal deliberations are to be quickly made public."

It goes on to quote the Justice Committee:

"Good government requires: Ministers to be provided with full, frank advice from officials about the possible impact of proposed policy, even—or especially—where that advice acknowledges risks; Ministers and officials to be able to discuss and test those proposed policies in a comprehensive and honest way; and the records of those discussions and the decisions which flow from them to be accurate and sufficiently full...it is generally accepted that a 'safe space' is needed within which policy can be formulated and recorded with a degree of confidentiality." (Justice Select Committee, Post-Legislative Scrutiny of the FOI Act, July 2012)

But the Commission fails to note that the Justice Committee also said:

"The Constitution Unit's research on FOI is the first major piece of research of its kind and is a valuable contribution to the debate around FOI. In its consideration of the chilling effect, the Unit broadly concluded that the effect of FOI appeared negligible to marginal."

The Justice Committee also said:

“The evidence shows time and time again that the Information Commissioner and the Information Tribunal have supported the principle that there should be a safe space for the development of policy. Cabinet minutes are not routinely outed. The only ones you get to hear about are the ones where the Information Commissioner or the Information Tribunal have ruled in favour of publication. Nobody is interested in the vast majority of cases, when we look at the balance of interests and say, “No; we think that the principle of collective Cabinet responsibility trumps any other argument.”

Committee Chairman Sir Alan Beith insisted that:

“The Act was never intended to prevent, limit, or stop the recording of policy discussions in Cabinet or at the highest levels of Government, and we believe that its existing provisions, properly used, are sufficient to maintain the ‘safe space’ for such discussions.”

While we recognise the need for a ‘safe space’ for policy making and for ministerial collective responsibility, we do not feel that this report has been open and honest in its presentation of arguments for and against a deliberative space.

The Commission and the Government must provide stronger evidence for the need to strengthen its protection for ‘safe space’.

Section 35 of the Act already provides an exemption for formulation of government policy; Section 36 already provides for, “prejudice to effective conduct of public affairs,” particularly collective responsibility.

The use of the words ‘safe space’ suggests that information needs protection from public scrutiny, but public involvement for policy development and implementation is actually beneficial to effective decision making and allows for a fresh-eye approach, leading to innovative solutions to otherwise stagnant situations.

The Act should not be viewed by the Commission as a hindrance to public authorities, or a way for journalists to invent new and scandalous headlines, but as a means to a more informed decision making process that may avoid later, heavier costs by weeding out mistakes early on.

The Justice Select Committee said recently that, “good government requires: Ministers to be provided with full, frank advice,” but this does not explain why there is a need for a safe space. In every community, decisions should be made at the level at which they are impacting. Advice can, and should, be given openly. Citizen engagement can only be achieved with access to information relevant to all stages of government policy development and implementation, including identification of need, delivery and evaluation.

Protection for information related to Cabinet discussions and collective agreement

In Question 2 the Commission asks:

“What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?”

But it admits that such protection already exists:

“In the UK, the public interest in maintaining the convention of ministerial collective responsibility is recognised in the Act through the protection afforded for the process of collective agreement through sections 35 and 36.”

The suggestion is that the FoI Act makes it too hard for government advisors to speak freely, but there are exemptions which ensure the formulation of government policy is not harmed by FOI. There is also the ability to redact the names and roles of those offering advice. So, is there really a problem protecting collective cabinet discussion and agreement?

Section 35 of the Act already provides an exemption for formulation of government policy and Section 36 for ‘Prejudice to effective conduct of public affairs’, particularly collective responsibility.

In the second quarter of 2015, these were the ninth and eleventh most used exemptions by government departments in response to FOI requests. Cabinet members can also exercise a ministerial veto. The Commission’s call for evidence notes government concern at a changed legal interpretation of the veto, but the veto has only been used seven times since 2005.

The Justice Select Committee examined this issue in 2012, finding it was difficult to assess whether the Act had had the alleged ‘chilling effect’ on government policy. Some in policymaking had suggested it was a problem but research by the Constitution Unit found only a ‘marginal effect’.

Given the value of ‘increased openness’ brought about by the Act, the Justice Select Committee concluded it was, “cautious about restricting the rights conferred in the Act in the absence of more substantial evidence,” – in other words, it would need compelling evidence to recommend changes and there was none.

In its response, the previous Coalition Government agreed: it felt that, “the legal framework of the FOIA, through both the exemptions and the availability of the veto, offers sufficient protection for Cabinet records and safe space.

An Executive or Cabinet Veto over the release of information

“Should the executive have a veto (subject to judicial review) over the release of information? If so, how should this operate and what safeguards are required? If not, what implications does this have for the rest of the Act, and how could government protect sensitive information from disclosure instead?”

In outlining this issue, the Commission’s highly selective editing of the findings of the Select Committee reveals bias and creates misunderstanding:

“...we believe the power to exercise the ministerial veto is a necessary backstop to protect highly sensitive material...” (para 179, JSC post-legislative scrutiny, July 2012).

The full quote shows that the Select Committee recommends that the Government revise its policy:

“... It would be better for the Statement of Policy on the use of the ministerial veto to be revised to provide clarity for all concerned.”

While we believe the power to exercise the Executive Veto may be a necessary backstop to protect highly sensitive material, the use of the word ‘exceptional’ when applying section 53 is confusing in this context. If the veto is to be used to maintain protection for cabinet discussions or other high-level policy discussions rather than to deal with genuinely exceptional circumstances, then it would be better for the Statement of Policy on the use of the ministerial veto to be revised to provide clarity for all concerned.

We have considered other solutions to this problem but, given that the Act has provided one of the most open regimes in the world for access to information at the top of Government, we believe that the current veto arrangement is an appropriate mechanism to protect policy development at the highest levels.

The FOI Act itself and the Information Commissioner and Tribunal system in judging FOI Act requests already protect ongoing government discussions and have found in favour of the government numerous times. Whilst the ministerial veto has only been used on seven occasions since 2005.

What is most concerning are the current exemptions under Part 2 of the Act; (s. 33-37 in particular). Whilst we understand the relevance of protecting information relating to security, defence and criminal activity etc., we fail to see why agendas such as the formulation of government policy (s.35), or communications with the Crown (s.37) should be held away from the public eye. This is a complete undermining of the democratic society that we would like to see the UK upholding.

There must be a public interest test that is tested by an independent third party, rather than the government. This has been highlighted by our partners in the UK Civil Society Network:

“As ruled by the Supreme Court, it is not reasonable for a government minister to be able to override a judicial decision.”

In short, as Green Party Justice Spokesperson, Charley Pattison said:

"Transparent and accountable decision-making is essential to a successful democracy. Freedom of Information requests have often been the strongest weapon used against corruption in government. The FOI Act already contains adequate protections for sensitive information; any further restrictions will most likely be to protect politicians rather than the public."

Reducing the burden of FOI on public authorities

“Is the burden imposed on public authorities under the Act justified by the public interest in the public’s right to know? Or are controls needed to reduce the burden of FOI on public authorities? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kinds of requests do impose a disproportionate burden?”

Clearly, what the Commission Panel has in mind here is restricting access to information through charges and tighter rules around the time spent finding information. The burden would be much lighter if councils and government departments kept better records, were more open with information in the first place and worked harder to make FOI a smoother process.

As the Justice Committee clearly stated, some of the cost burden associated with FOI is self- imposed:

“Evidence from our witnesses suggests that reducing the cost of freedom of information can be achieved if the way public authorities deal with requests is well-thought through. This requires leadership and focus by senior members of public organisations. Complaints about the cost of freedom of information will ring hollow when made by public authorities which have failed to invest the time and effort needed to create an efficient freedom of information scheme.”

Moreover, in some cases the release of information through FOI requests saves public money, in some cases huge amounts of money. If and when government improves access to information by default, FOI requests will become less necessary. Until then,

the cost of FOI requests may be an issue, but the cost is most prohibitive to those organisations which are most distrusted: people make a lot of enquiries of them.

We should ask why it is that a monitoring mechanism like FOI is soaring in popularity and why the public feel compelled to search for answers on this platform. A creeping, and not undeserved, mistrust in government is contributing to the FOI's popularity.

Charges for access to information would:

- a) deter large numbers of requests (for example, when a 15 euro fee was introduced in Ireland in 2003, this "resulted in the number of requests falling to 25% of its previous level).
- b) prevent individuals and journalists from making legitimate requests for information on matters of public interest- everyday newspapers run stories exposing waste, incompetence and cover-ups that would never have come to light but for the FOIA. These stories result in policies being changed for the better and action being taken to improve people's lives.
- c) reduce the scrutiny on public authorities – the cost of secrecy may be much greater than the cost of transparency and more dire if critical mistakes are not revealed early on.
- d) make it easier for public authorities to say they are doing one thing when they are really doing the opposite.

Any suggestion of charging for FOI requests to ease the burden on public authorities would completely undermine the integrity and purpose of the FOI Act and turn it into a tool for the wealthy and powerful. It would create a farcical situation in which we pay to get information about how the government practices corruption and deceit. Large corporations may be more than happy to pay a few hundred Euros for research or data that may increase their profit margins by millions, but the vulnerable and the poor, cannot. To charge, would simply increase the gap between those who make FOI requests in the name of profit, and those who make them to highlight injustice and improve government services: the very reasons the Act was implemented in the first place.

FOIA impact in Northern Ireland

Although the focus of the commission is UK Government level it is important to highlight some of the impacts of FOI in Northern Ireland.

Despite the notable failures in FOI response times by numerous government Departments in Northern Ireland, the ability of citizens to freely access information has been vitally important to revealing issues of public importance and contributing to policy and legislative changes. Examples include:

How integrated are our schools?

Using FOIA, The Detail, an investigative news and analysis website, established that almost half of Northern Ireland's schoolchildren are being taught in schools where 95% or more of the pupils are of the same religion.

<http://www.thedetail.tv/articles/how-integrated-are-schools-where-you-live>

In March 2015, The Detail used the FOIA to highlight that there have been over 6,000 paramilitary 'punishment' attacks on men, women and children across Northern Ireland since the start of the Troubles, they used the data to map all paramilitary attacks in their article 'Above The Law: paramilitary 'punishment' attacks in Northern Ireland' <http://www.thedetail.tv/articles/above-the-law-paramilitary-punishment-attacks-in-northern-ireland>

In August 2015, The Detail revealed the extent of road collisions.

They requested a detailed breakdown of all fatal and serious road collisions which took place during 2013 and 2014. The data they received from the PSNI includes the date, time and location for each

incident, road type, speed limit on the road and light, weather and road conditions. They also received the age and gender of all of the casualties involved in fatal and serious collisions over the two year period. Two years of death and serious injury on Northern Ireland's roads.

<http://www.thedetail.tv/articles/two-years-of-death-and-serious-injury-on-northern-ireland-s-roads>

Public access to information contributed to revealing one of the largest environmental crime sites ever witnessed in Europe. It brought to public attention the widespread criminality in the waste management sector in NI and the systemic failures of environmental regulation in NI. The illegal landfill site, located on the rural Mabuoy Road, only 1.5km from Londonderry, NI's second largest settlement, was shown to contain over half a million tonnes of putrefying illegal waste releasing a toxic soup and dangerous gases into the environment. It resulted in an independent report which estimated that known illegal waste sites identified over the past ten years in NI are likely to leave the UK tax payer with an estimated £250 million clean-up cost. The Department's Environmental Crime Unit is now examining another 26 priority sites of suspected illegal landfilling spread across Northern Ireland.

Concluding comments

Without transparency, accountability is impossible. Therefore, public information should be open and available to the public.

"It seems that the Commission has been tasked with removing the assumption that the 'public has the right to know', and replacing it with 'the public has a right to know, so long as we want them to know, and it's not too much of a hassle for us to tell them'" (David Higgerson).

But the public and civil society have become used to greater openness. And this attempt to take, "no privacy for you, no scrutiny for us," to a whole new level, will come across as highly hypocritical in the current climate.

The process and principles of openness – public deliberation, dialogue, debate and disagreement – may be inconvenient. But they're critical to democracy and essential to ensuring that services are being planned and delivered in the best interests of all citizens.

The Odysseus Trust

Introduction

The Odysseus Trust¹⁷⁰ 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, who is assisted by his senior researcher Caroline Baker and Parliamentary Legal Officers, Clare Duffy and Zoe McCallum.

This document responds to the Call for Evidence made by the Independent Commission on Freedom of Information on the Freedom of Information Act 2000 (“the Act”).

Deliberative space

We agree that a “safe space” is required for the frank discussion necessary for good government and comprehensive policy formulation; policy decisions cannot be conducted in a goldfish bowl. But there is a difference between a safe space and “a desire for secrecy across a broad area of public sector activity.”¹⁷¹ Absolute exemptions are too broad and protect unnecessary secrecy in government. They are contrary to the public interest in transparency, openness and accountability. There are already strong and sufficient safeguards in the Act through the qualified exemptions provided in sections 35 and 36 and the application of the public interest test on a case-by-case basis.

In their 2012 report *Post-legislative Scrutiny of the Freedom of Information Act 2000*, the House of Commons Justice Select Committee investigated the subject of policy formulation, safe spaces and the chilling effect. The Committee took evidence from former Ministers and civil servants including the Rt. Hon. Jack Straw MP, Rt. Hon. Francis Maude MP and Lord O’Donnell. They all thought that the freedom of information regime had resulted in a marked chilling effect. According to their evidence the “chilling effect” had resulted in less information being recorded in writing, more oral briefings and meetings taking place in more informal settings where they could not be recorded (e.g. by mobile phone).

On the other hand the Constitution Unit’s research indicated only a marginal effect. They also pointed out that a shift to informal meetings and fewer records is influenced by a range of drivers other than the Act including: “time and resource pressure; technology, news media and electronic communication; increasing numbers of civil servants from private sector backgrounds; leaks; the longstanding front-page test [caution about expressing something on paper which would be embarrassing to read in a newspaper, which pre-dated FOI]; more informal workspace; and other accountability and access mechanisms, such as select committee inquiries or judge-led inquiries.”¹⁷²

The Justice Select Committee’s inquiry was unable to conclude with any certainty that an adverse chilling effect has resulted from the Act. The Committee concluded that the evidence did not support any major reduction in the openness created by the Act.¹⁷³

¹⁷⁰ For more information on the work of the Trust, please visit www.odysseustrust.org

¹⁷¹ Information Commissioner’s Office, *Independent Commission on Freedom of Information: Call for Evidence. Response of the Information Commissioner*, 16 November 2015, p.4, §10

¹⁷² Justice Select Committee’s report, *Post-legislative scrutiny of the Freedom of Information Act 2000*, First Report of Session 2012-2013, 26 July 2012, HC 96-I, p.71, §188

¹⁷³ Justice Select Committee’s report, *Post-legislative scrutiny of the Freedom of Information Act 2000*, First Report of Session 2012-2013, 26 July 2012, HC 96-I, p.75, §200-201

We endorse the Justice Select Committee's view that the increased openness introduced by the Act is of value. Absolute exemptions would lead to a return to a culture of unnecessary secrecy in government. We support the maintenance of the qualified exemptions in sections 35 and 36 and the continued application of the public interest test which takes into account timing, the need for deliberative spaces, and the facts and circumstances of individual cases.

The value of the public interest test is that it requires the Government or other public authority to weigh the public interest in maintaining the exemption against the public interest in disclosure. According to the Information Commissioner's Office Guidance, public interest is defined as public good, not what is of interest to the public, and not the private interests of the requestor.¹⁷⁴

The Commissioner's and the Tribunal's approach to the public interest test is that policy discussions will not normally be disclosed if they were requested *before* the policy decision was announced. We agree with the Information Tribunal that:

"Disclosure of discussions of policy options, whilst policy is in the process of formulation, is highly unlikely to be in the public interest, unless, for example, it would expose wrongdoing within government. Ministers and officials are entitled to time and space, in some instances to considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy."¹⁷⁵

If a request is made *after* the policy announcement, the Commissioner or Tribunal will consider whether the public interest in preventing that "chilling effect" outweighs the public interest in disclosure. Where discussions are very frank, this will weigh heavily against disclosure. If they are anodyne or old, disclosure is more likely. But all the circumstances are taken into account.

The Information Commissioner is alert to the need for a deliberative space when applying the public interest test. In 2015 he upheld complaints against public authorities applying a section 35 exemption in only 1.7% cases and a section 36 exemption in only 4.3% of cases. We share his concern that a "very small number of high profile cases may be having a disproportionate effect on perceptions of FOIA within government, particularly at a senior level."¹⁷⁶ We believe that such a small number of cases does not warrant replacing the application of the public interest test with absolute exemptions for sections 35 and 36.

The Act currently strikes the correct balance between protecting the deliberative space and public transparency. Decisions should continue to be made by applying the public interest test on a case-by-case basis.

Cabinet papers

The Act recognises the public interest in maintaining the convention of Ministerial collective responsibility through the protection afforded by sections 35 and 36. In particular, section 35

¹⁷⁴ Information Commissioner's Office, *Guidance to the public interest test: Freedom of Information Act*, version 2, p.2

¹⁷⁵ *The Department for Education and Skills v Information Commissioner and the Evening Standard*, Information Tribunal Appeal No: EA/2006/0006

¹⁷⁶ Information Commissioner's Office, *Independent Commission on Freedom of Information: Call for Evidence. Response of the Information Commissioner*, 16 November 2015, p. 6, §15-16

exempts Ministerial communications, and section 36 exempts information which would prejudice Ministerial collective responsibility if disclosed. Both of these exemptions are qualified and subject to the public interest test. Sections 35 and 36 are mutually exclusive, although they can be claimed in the alternative. Any decision to withhold Cabinet material under sections 35 and 36 is subject to appeal to the Information Commissioner, Information Tribunal and courts.

The Information Commissioner rightly recognises that there is a strong public interest in protecting the convention of collective Cabinet responsibility. Unlike the public interest in protecting the safe space for policy deliberation, he considers that the public interest in protecting the convention continues after a decision is made:

“Whether or not the issue is still ‘live’ will not reduce the public interest in maintaining collective responsibility (although it will affect the weight of related safe space arguments). This is because the need to defend an agreed position will, by its very nature, continue to be relevant after a decision has been taken.”¹⁷⁷

The qualified exemptions in sections 35 and 36 are all subject to the public interest test on a case-by-case basis. The Information Commissioner adopts a nuanced approach and makes decisions both in favour and against disclosure. In a report on the minutes about devolution he maintained exemptions where the content would have identified Ministers or dealt with more sensitive areas of policy, but considered that disclosure of the remainder of the minutes “would not be likely to harm the convention of collective Cabinet responsibility given the passage of time.”⁹ The Commissioner also considered the public interest in informing debate on devolution, and the public interest in transparency in decision-making.

There is insufficient evidence to support the claim that the Act has had a chilling effect on policymakers and interdepartmental discussions. Instead, the evidence indicates that current qualified exemptions contained in sections 35 and 36 provide sufficient protection for information relating to the process of collective Cabinet discussion. In 2012-2015 the Information Commissioner found that public authorities had applied section 35 and 36 exemptions correctly in 87% of cases which engaged collective responsibility arguments.¹⁷⁸

We believe that the requirement to weigh the public interest in maintaining the exemption against the public interest in disclosure ensures transparency and openness in decision-making without harming the convention of collective Cabinet responsibility. We agree with the Information Commissioner that the small number of cases where the public interest overrides the principle of collective Cabinet responsibility (such as the 2003 Cabinet minutes on the Iraq War) are “exceptional and demonstrate the importance of the public interest test.”¹⁷⁹

We welcome the 2010 amendment to the Public Records Act 1958 decreasing the period after which records of historical interest are transferred to The National Archives from 30

¹⁷⁷ Information Commissioner’s Office, *Guidance to Government Policy (Section 35): Freedom of Information Act*, version 2.0, §212

¹⁷⁸ Information Commissioner’s Office, *Independent Commission on Freedom of Information: Call for Evidence. Response of the Information Commissioner*, 16 November 2015, p. 11, §28 House of Commons Justice Select Committee, *Post-legislative scrutiny of the Freedom of Information Act 2000*, First Report of Session 2012-2013, 26 July 2012, HC 96-I, §172

¹⁷⁹ Information Commissioner’s Office, *Independent Commission on Freedom of Information: Call for Evidence. Response of the Information Commissioner*, 16 November 2015, p.12, §30

years to 20 years. This means that the section 35 and 36 exemptions cannot be claimed after 20 years. However, many documents could, and should, be made available in a shorter time period. This could be achieved by applying the public interest test to documents younger than 20 years old. Such documents would be disclosed only when concerns about safe spaces and the convention of Ministerial collective responsibility either no longer remain valid or are outweighed by the strong public interest in disclosure.

Risk Assessments

The Call for Evidence states that risk assessments are another example of the tension between the public's right to know, and the need for public bodies to have an internal deliberative space. Two of the seven Cabinet vetoes have been in respect of risk assessments (the NHS reforms risk register and the HS2 project assessment review). Risk registers can be shared between Ministers, and between officials during the development of policy.

Section 35 of the Act provides an exemption for information which relates to formulation or development of government policy. This section has previously been used to withhold risk assessments associated with a policy or programme. We oppose absolute exemptions for risk assessments. The section 35 qualified exemption appears to be working well.

In the case of the badger cull disclosure the Upper Tribunal ordered DEFRA to disclose “anodyne” risk registers about the badger cull. The Upper Tribunal accepted that if the material had been disclosed at the time of policy development, then it would have undermined the ability of the project board concerned to think in private. But by the time of the request's refusal, two years later, the Government had announced a limited cull and the arguments against disclosure no longer carried weight. The potential risks were now well known and the suggested counter measures revealed “nothing surprising or informative.”¹⁸⁰ We see no reason why “anodyne” information such as this should not be disclosed.

In the case of the disclosure of the NHS reforms risk register the Commissioner did not accept that disclosure of the register would affect the “frankness and candour” of future risk registers and did not accept that there was evidence of a chilling effect. Nor did he accept that disclosure of this register would set a precedent for the general disclosure of future risk registers. He stated that there would be circumstances in which it would be proper to withhold risk registers.¹⁸¹

Risk assessments should remain subject to the qualified exemption and public interest test provided for under section 35 of the Act. There is no evidence that current provisions have led to an adverse “chilling effect” or that the disclosure of risk registers has jeopardised government projects. Any reform to remove risk registers from the scope of the Act or to exempt absolutely such information from requests would be unjustified.

The Cabinet Veto

The Ministerial veto provided for in section 53 of the Act is used sparingly – it has only been exercised a total of seven times since

¹⁸⁰ Department for Environment Food and Rural Affairs v. The Information Commissioner and The Badger Trust [2014] UKUT 526 (AAC).

¹⁸¹ Information Commissioner, *Freedom of Information Act 2000: Ministerial veto on disclosure of the Department of Health's Transition Risk Register*, Report to Parliament, HC 77, Session 2012-13, § 7.5-7.9

2005.¹⁸² It cannot be used in relation to environmental information, as a veto would be incompatible with the UK's international obligations under EU law and the Aarhus Convention. When considering the existence and strength of the executive veto, the impact of any significant divergence between the two regimes should be carefully borne in mind. Following the recent Supreme Court judgment in *Evans* the circumstances in which the executive veto can be exercised are very limited. However, we disagree with the Call for Evidence that the Black Spider judgment "raised serious questions about the constitutional implications of the veto, the rule of law, and the will of Parliament." On the facts of the case the veto was used unlawfully against the Upper Tribunal decision, rather than against the Information Commissioner's decision.

This is the correct position. As Lord Neuberger held in *Evans* there is a basic principle that a decision of a court is binding between two parties and cannot be ignored or set aside by anyone, including the executive – save in rare cases where there has been a material change of circumstances since a decision was taken.¹⁸³ It is of constitutional importance that the decisions of an executive must be judicially reviewable.¹⁸⁴

There is a tension between the section 53 veto and section 57 appeal of a decision of an Information Commissioner. This tension was not resolved in the *Evans* case and in our opinion is not resolvable without undermining the rule of law, *unless* there were further restrictions or conditions introduced on the executive's ability to issue a section 53 certificate (notwithstanding the differences between a decision of the Commissioner and that of a court of record).

As a matter of principle it would be preferable to remove the executive veto over the release of information. Instead, all information requests should be subjected to a public interest test on a case-by-case basis. Sufficient protection is offered to the executive through a multiple-stage appeal process.

The scrutiny of the Commissioner and the Tribunal offers further protection and respects the safe space for policy making. Government statistics state that of the 263 appeals completed at the time of the Government's 2014 monitoring the public authorities' initial handling of the request was fully upheld in 81% of cases and partially upheld in a further 7% of cases. Therefore in only 12% of cases (31 in total) was the requestor's application upheld.¹⁸⁵ This demonstrates the seriousness with which the Information Commissioner considers the need to balance a "safe space" for policy making against the public interest.

The Upper Tribunal considers requests on judicial review principles. The process of judicial review contains numerous safeguards for the Government in the Civil Procedure Rules Part 54 – such as the three month application time limit, disclosure duties, permissions hearing, the residual and discretionary character of the remedies, and (in the event of a ruling against the Government) the right to appeal. Judicial review is limited to the legality of the Information Commissioner's decision, rather than with the merits of the request or reconsideration of the public interest test. Of the 34 cases brought by requestors in 2014-

¹⁸² Twice in relation Cabinet papers about the Iraq War; twice in relation to Cabinet papers concerning devolution; in relation to a Department of Health risk register; in relation to HRH Prince of Wales' correspondence; and in relation to HS2 risk assessments.

¹⁸³ *R (Evans) and Anor v Attorney General* [2015] UKSC 21, §52

¹⁸⁴ *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147

¹⁸⁵ *Freedom of Information Statistics: Implementation in Central Government 2014 Annual and Q4*, Ministry of Justice Statistics Bulletin, 23 April 2015, pp.18-19

2015 88% were either refused permission to appeal, were dismissed or withdrawn.¹⁸⁶ In cases where the applicant's claim is upheld, it remains open to the Government to appeal an Upper Tribunal decision to the Court of Appeal or Supreme Court.

Removing the veto would not result in a chilling effect on policy formulation. Currently it is one of two statutory safeguards to the "safe space" alongside exemptions to the right of access to classes of information in certain circumstances. The exemptions safeguard would remain, although ideally all exemptions should be qualified by a public interest test. We acknowledge that this provides less clarity for policy makers than an absolute class based exemption. However, a public interest test is in keeping with the object and spirit of the Act – "to encourage more open and accountable government" and to "empower people, giving everybody the right of access to the information that they want to see."¹⁸⁷

In principle we oppose a Ministerial veto, but we agree with the Information Commissioner that:

"[T]he possibility of a veto of the Commissioner's decisions, in exceptional cases, is a more proportionate response to the concerns [about the impact of the Act on deliberative space and collective responsibility], compared to converting sections 35 and 36 into absolute exemptions. This would not exclude the possibility of any use of the veto being judicially reviewed."¹⁸⁸

If a veto is retained then there needs to be greater clarity about the circumstances in which it may be exercised. It should only be used against an Information Commissioner's decision in the rarest of circumstances. Guidelines ought to be published to prevent its overuse and abuse by "appropriate persons" authorised to issue certificates.

Enforcement and Appeals

Enforcement

There are often substantial delays by public authorities in answering requests and, in particular, conducting internal reviews. In 2014 37% of internal reviews took over 20 working days, with 5% taking between 60 days and 100 days, and 2% more than 100 days.²¹⁸⁹

The lack of a statutory time limit for internal reviews elongates the process for both requestors and public authorities. The Code of Practice issued under section 45 of the Act merely states that internal review procedures should "encourage a prompt determination of the complaint."¹⁹⁰ This should be improved by introducing a statutory time limit for internal reviews, as occurs under the Environmental Information Regulations and the Scottish Freedom of Information Act. The Freedom of Information Act (Scotland) 2002 stipulates that an internal review should be completed within 20 working days following receipt of the request for review.¹⁹¹ This would be an appropriate limit in the rest of the UK, and would match the limit for answering requests.

¹⁸⁶ Independent Commission on Freedom of Information, *Call for Evidence* 9 October 2015, p.24

¹⁸⁷ *Your Right to Know – Your views on the White Paper*, 28 February 1998

¹⁸⁸ Information Commissioner's Office, *Independent Commission on Freedom of Information: Call for Evidence. Response of the Information Commissioner*, 16 November 2015, p. 15, 45

¹⁸⁹ *Freedom of Information Statistics: Implementation in Central Government 2014 Annual and Q4*, Ministry of Justice Statistics Bulletin, 23 April 2015, p.17

¹⁹⁰ Secretary of State for Constitutional Affairs' Code of Practice on the discharge of public authorities' functions under Part 1 of the Freedom of Information Act 2000, Issued under section 45 of the Act, HC 33, 25 November 2004, p.11, §39.

¹⁹¹ Freedom of Information Act (Scotland) 2002, section 21(1).

Appeals

The appeals process should remain the way it is. The Call for Evidence cites two drawbacks to the current system:

- that a multi-layer appeal system is expensive for both public bodies and requestors, and that it can be a lengthy, drawn-out process in some cases.
- that the appeals process focuses on the Information Commissioner's decision rather than the public authority's decision to withhold, and that as a result the original requestor sometimes ceases to play an active part in the proceedings.

We reject both these arguments as grounds for reducing the appeals protections currently in place:-

- Appeals give rise to a lengthy, drawn-out process, but it is important to retain a sense of proportion. Government statistics show that in 2014 there were 395 appeals to the Information Commissioner's Office representing just 0.8% of all requests received.¹⁹² Moreover, the Commissioner's decision was upheld in 77% of decisions which reached a First Tier Tribunal.¹⁹³ As the Call for Evidence states only 39 cases in 2014-2014 were decided by the Upper Tribunal, and further appeals to the Court of Appeal and Supreme Court are rare. The vast majority of cases are not embroiled in a drawn-out process.
- The appeals system plays an appropriate role in relation to the rest of the legal framework. To claim otherwise would be to attempt to undermine the role and importance of judicial review. To go further by removing the right to judicial review would be an affront to the rule of law. This would in turn undermine the principle of legality that "means that Parliament must squarely confront what it is doing and accept the political cost."¹⁹⁴

The suggestion made by the Call for Evidence that the appeals process should be restructured is not borne out by the comparative evidence nor by the statistics presented. The current system plays an appropriate role in relation to an established system of judicial review. To dilute the strength of the system currently in place would be a threat to the rule of law.

Burdens and Fees

Burden

The Act gives good value for money given the relatively low costs of handling freedom of information requests combined with the benefits it confers both in increasing the democratic accountability of government and in operating as a deterrent to wasteful public spending.

The Call for Evidence suggests that the Act imposes an excessive cost burden on public authorities. But, the statistics cited are selective. In particular the methodology of the Frontier Economics 2006 report has been criticised by the Constitution Unit for overstating the

¹⁹² *Freedom of Information Statistics: Implementation in Central Government 2014 Annual and Q4*, Ministry of Justice Statistics Bulletin, 23 April 2015, p.5

¹⁹³ Independent Commission on Freedom of Information, *Call for Evidence*, 9 October 2015, p.16

¹⁹⁴ *R v Secretary of State for Home Department, Ex p Simms* [2000] 2 AC 115, 131 E-F, per Lord Hoffmann.

number of requests received and inflating the average costs incurred as a result of requests.¹⁹⁵

The Act should be viewed in the context of broader communications budgets. Central Government departments spend less than £6m per year responding to freedom of information requests. Press Gazette research finds this expenditure represents around 0.001% of the £577.4bn central Government is due to spend in the 2015 fiscal year, and is less than 2% of the estimated £289m the Government Communication Service said it would spend on external communications activities in 2014/15.¹⁹⁶ An illustrative example of the relative value offered by the Act is the Department of Work and Pensions “workie” advertising campaign to promote the Government’s workplace pensions reforms. That campaign reportedly cost £8.54million to develop - outstripping the freedom of information budget across all central government departments for the same period.¹⁹⁷

The Call for Evidence highlights the cost of the Act, but gives no indication of the savings resulting from freedom of information requests. To calculate the costs associated with the implementation of the Act is to examine only one side of the equation. Freedom of information requests can be a considerable deterrent against wasteful spending. The lack of attention given to the cost-saving impact of the Act was highlighted in the Justice Select Committee’s report on post- legislative scrutiny of the Act.¹⁹⁸

The Act contains controls to ensure the burden on public authorities is not excessive. Section 14 of the Act excuses public authorities from the duty to comply with a “vexatious” or repetitious request was included in the Act to prevent any disproportionate burden. The Information Commissioner argues it is surprising “that more public authorities don’t use these provisions more often, but instead complain about having to deal with requests which could validly be described as vexatious.”¹⁹⁹ This provision should be retained.

If local authorities are feeling burdened with freedom of information requests then greater use of these provisions should be made. If there is a lack of knowledge about section 14, then local authorities require greater training in order to use the Act effectively. The Information Commissioner has indicated that he would be open to strengthening the guidance on section 14 by putting it on a statutory basis in a special code of practice issued under section 45.²⁰⁰ We support this sensible suggestion.

Another control to reduce any excessive burden on public authorities is the cost limit contained in section 9. Under the current Regulations²⁰¹ if a request exceeds “the appropriate limit” of £600 for a national government and £450 for local authorities, then a public authority may:-

¹⁹⁵ Anna Colquhoun, *The Cost of Freedom of Information*, Constitution Unit, University College London, December 2010, www.ucl.ac.uk/constitution-unit/research/foi/countries/cost-of-foi.pdf; Martin Rosenbaum, BBC Blog, www.bbc.co.uk/blog/opensecrets/2006/10

¹⁹⁶ William Turvill, *Cost to Central Government of complying with FOI 50 times less than external comms budget*, Press Gazette 13 October 2015.

¹⁹⁷ www.independent.co.uk/news/uk/politics/iain-duncan-smith-spends-85m-on-hairy-monster-cartoon-to-promote-workplace-pensions-a6702686.html

¹⁹⁸ House of Commons Justice Select Committee, *Post-legislative scrutiny of the Freedom of Information Act 2000*, First Report of Session 2012-2013, 26 July 2012, HC 96-I, pp. 23-24, §51-53.

¹⁹⁹ Christopher Graham, *Working Effectively: lessons from 10 years of the Freedom of Information Act*, 1 October 2015. See also: Information Commissioner’s Office, *Independent Commission on Freedom of Information: Call for Evidence. Response of the Information*

²⁰⁰ Information Commissioner’s Office, *Independent Commission on Freedom of Information:*

²⁰¹ The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004

- refuse to supply the information altogether; or
- supply the information provided the requestor agrees to pay the full cost, i.e. £600/450 plus the surplus.

The cost control is objectionable. It grants public authorities the discretion not to consider a claim at all if it exceeds the cost level, which frustrates the objective and purpose of the Act. The cost involved in obtaining information should not bar the claim in and of itself. If a claim is expensive then, at most, a requestor should have to make a reasonable contribution towards the costs.

If the cost control is retained, then it should not be expanded. Currently, 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. These limits guard against public authorities dragging their feet when processing freedom of information claims by excluding, for example, the time taken to consider the public interest test or to redact information.

The list of actions for determining the appropriate limit should not be expanded; any expansion would go against the spirit of openness and accountability underpinning the Act. Expansion could also, as the Information Commissioner argues, create a “perverse incentive” for public authorities to retain inefficient practices for handling freedom of information requests, so that “the requester pay[s] for the public authority’s shortcomings.”²⁰²

When considering whether the cost of the Act poses a disproportionate burden on public authorities it also needs to be queried how costs arise. The Justice Select Committee’s report suggested that a reduction in the cost can be achieved if public authorities handle freedom of information requests in a streamlined, efficient and well-thought through manner.²⁰³ The routine proactive publication of information online by public authorities could potentially reduce the number of requests received and their associative costs.

Fees

The Call for Evidence suggests that fees would alleviate the burden felt by public authorities. We strongly oppose the introduction of application fees for making freedom of information requests. There are several objections to such a move:

- First, the introduction of fees could invoke a two-tier system whereby persons invoking their statutory rights would encounter a payment requirement, whereas persons requesting information in ignorance of their rights would not.
- Secondly, fees would likely deter people from using the Act. This would particularly affect those on limited incomes and individuals making multiple requests, such as journalists and NGOs. It would also prejudice against a requestor in a dispute with a public authority requiring multiple requests to a variety of agencies.
- Any attempt to ‘target’ fees to certain classes of requestors, such as

²⁰² Information Commissioner’s Office, *Independent Commission on Freedom of Information: Call for Evidence. Response of the Information Commissioner*, 16 November 2015, p. 20, §65

²⁰³ House of Commons Justice Select Committee, *Post-legislative scrutiny of the Freedom of Information Act 2000*, First Report of Session 2012-2013, 26 July 2012, HC 96-I, pp. 37-

journalists or commercial companies, would violate the principle of requestor anonymity and be expensive to implement.

Fees will inevitably deter and inhibit the exercise of the public right of access to information and of freedom of expression. The Irish example provides an illustration of the deterrent effect of fees. When the Irish Freedom of Information Act was introduced in 1997 it did not include a fee for filing requests. That Act was amended in 2003 to introduce a charge of €15 per application, except for requests for personal information. Charges of €20.95 were also imposed for “search and retrieval” and copying, but *not* for reviewing the requested records to determine whether they might be exempt. This led to a significant drop in applications from 18,443 requests in 2003 to 10,704 in 2007. ²⁰⁴In 2014 the application fee was removed.

The 2009 decision not to introduce charging regulations under the Act was the correct one. Fees should not be introduced for an application for information. We agree with the Information Commissioner when he states that the imposition of application fees would be “a tax on the exercise of a democratic right – before it was clear what information could or could not be released.”²⁰⁵

It is notable that few public authorities choose to impose the fees which can be currently charged when the costs of handling a request exceeds the section 9 cost limit. Of the 46,806 requests received in 2014 only 624 (1.3%) were subject to a fee being levied by the authority involved, of which 621 were levied by the National Archives.²⁰⁶ The National Archives charged under a separate fees regime in section 19; therefore it appears that a maximum of 3 requests during 2014 used section 9.

However, if search fees are introduced and the section 9 provisions are used more often, then public authorities should charge search fees *only* to the first requestor who seeks particular materials. The fees should be waived for any subsequent requestors and where possible the information should be published online.

Fees should not be applied selectively to classes of requestors such as journalists or commercial entities. Suggestions that requestors be identified (and certain requestors charged) overlook the primary aim of the Act: to create a statutory right of access to information. To achieve that aim the focus is whether information ought to be disclosed in the public interest, rather than whether the person requesting the information is of sound character and motivation.

The former Lord Chancellor, the Rt. Hon. Chris Grayling MP, considers that the Act has been “misused by those who use it effectively as a research tool to generate stories for the media.”²⁰⁷ This statement undervalues the importance of journalists in upholding freedom of information and expression. The media are the eyes and ears of the public and use the Act for the public interest by holding public authorities to account. We strongly oppose any attempt to make it more difficult or expensive for journalists to use the Act.

In addition, a requirement that individual requestors are identified would be difficult to

²⁰⁴ *Freedom of Information The First Decade*, Office of the Information Commissioner, May 2008, p.15

²⁰⁵ Christopher Graham, *Working Effectively: lessons from 10 years of the Freedom of Information Act*, 1 October 2015, <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2015/10/working-effectively-lessons-from-10-years-of-the-freedom-of-information-act/>

²⁰⁶ *Freedom of Information Statistics: Implementation in Central Government 2014 Annual and Q4*, Ministry of Justice Statistics Bulletin, 23 April 2015, p.9

²⁰⁷ www.independent.co.uk/news/media/press/freedom-of-information-laws-misused-by-journalists-says-chris-grayling-a6713866.html

implement and enforce. The Justice Select Committee noted that such a requirement “could be easily circumvented by requestors using the name of a friend, family member or other person. Attempts to police such a system, either by public authorities or the Information Commissioner, would be expensive and likely to have limited effect.”²⁰⁸

Introducing fees differentiating between types of request or requestor would be costly to implement and would create an administrative burden on public authorities. It could result in discriminatory differences of treatment. The Information Commissioner notes that such subjective charging mechanisms are likely to increase the number of internal reviews for public authorities and procedural complaints to the Commissioner.²⁰⁹ We believe that fees should be strongly resisted for reasons of both principle and practicality.

Conclusions

We recognise the importance of the need for public authorities to have an internal deliberative safe space, the importance of collective Cabinet responsibility and that risk registers should involve candid assessment of risks. But absolute exemptions are unnecessary as there are already sufficient safeguards in the Act through the qualified exemptions provided in sections 35 and 36 and the application of the public interest test on a case-by-case basis.

The existence of the Cabinet veto is objectionable in principle, especially given the existence of a multi-stage appeal process available to the Government. However, if the veto is retained, then it should only be used against an Information Commissioner’s decision in the rarest of circumstances and guidelines ought to be published to clarify and regulate its use.

A statutory time limit should be introduced for internal reviews by public authorities. A 20 day limit would be appropriate and align with the limit for answering freedom of information requests.

The appeals system currently in place plays an appropriate role in relation to the rest of the legal framework and does not require reform.

Public authorities are sufficiently protected in the Act from being excessively burdened by freedom of information requests. The cost incurred by authorities should be tackled through training, the introduction of efficient streamlined procedures, and the routine proactive publication of information online.

We strongly oppose the introduction of further fees, especially application fees. Fees would run contrary to the spirit of the Act, stifle free speech and erode government transparency. The identity of the person submitting a freedom of information request should remain anonymous.

Overall, we believe that the Act represents good value for money and increases the democratic accountability of government. Reform should only be made to strengthen the Act in line with the Justice Select Committee’s 2012 Report.

²⁰⁸ House of Commons Justice Select Committee, *Post-legislative scrutiny of the Freedom of Information Act 2000*, First Report of Session 2012-2013, 26 July 2012, HC 96-I, p. 35, §80-82

²⁰⁹ Information Commissioner’s Office, *Independent Commission on Freedom of Information: Call for Evidence. Response of the Information Commissioner*, 16 November 2015, p. 20, §64-65

Ombudsman-problem.com website

Dear Sirs,

Freedom of Information and the Ombudsman system

I am not knowledgeable enough to comment sensibly on many of the issues raised in the consultation document, so I will confine myself to one area where I do have some experience. I would say, however, that the act seems generally to work well to me, and has produced many instances of hugely important information which would have otherwise been hidden. The MP's expenses scandal is one such case.

I suggest that the FoI Act as it currently affects the various ombudsman services, **should not be relaxed**. Many of these organisations have little if any outside scrutiny and essentially police themselves. The FoIA allows interested members of the public to discover what is going on and probe into how these organisations work and reach their decisions. It should be remembered that in general there is no real independent appeal process against ombudsmen's decisions, so errors are not picked up and the bodies press on under the impression that they are infallible. The ombudsmen know they can make their decisions knowing they will not be criticised.

The FoIA provides a way to probe and find out what is going on. As an example the Legal Ombudsman has no procedures for investigating bias or unfairness by ombudsmen*** so alleged bias or unfairness can only be investigated by judicial review and is thus beyond the reach of almost everyone. Without the FoIA this would not have been known.

Please do not change the Act to make it more difficult for the public to discover such things and hold public bodies and Government to account.

Yours faithfully

Paul Grenet

Ombudsman-problem.com website

*** FoIA response 13/5/2013

The Open Data Institute (ODI)

Open data is no replacement for robust Freedom of Information laws

The Open Data Institute (ODI) thanks the Independent Commission for the opportunity to provide input to its review of Freedom of Information laws in the United Kingdom. In this short submission, the ODI wishes to clarify [the relationship between government's open data commitments and the evolution of its freedom of information laws](#).

The UK is a world leader in open data. However, the UK's progress in proactively publishing and using open data should not be confused with, or viewed as a substitute for, robust Freedom of Information laws. Open data and FOI provide a natural balance between the proactive and reactive release of information. FOI laws will always be a necessary complement to the proactive disclosure of information as open data.

FOI laws:

- A. enable citizens to request information in relation to particular areas of current public interest, and improve their sense of civic engagement and participation
- B. allow civil society and business to request information to investigate opportunities for innovation or to support their current work
- C. promote the UK's position as an open and transparent place to do business
- D. provide a mechanism for access to information held by government where the community interested in that information is too small to justify its continuing release and maintenance as open data
- E. can help public sector bodies identify information and data that may have potential value if published openly

Any alterations to FOI laws should take into account these benefits, and take care that they are not lost or diminished.

There is always room for the public sector to use data more effectively to improve the efficiency of FOI management. To give just one example, [Transport for London](#) has begun using data about the FOI requests they receive to help shape how and what they publish openly. More public sector organisations could follow this lead.

There are areas in which data can provide the FOI Commission with greater insight into how FOI processes are impacting on the public sector. The Commission could:

- a) request that the public sector publish their internal management information about FOI requests they process each month as open data: the number of requests they receive, the nature of each request, how long each request takes to process, whether access was granted and whether there has been an appeal
- b) request that information about FOI requests be added to UK Government dashboards

Open data is an important mechanism for transparency and data innovation, but open data will never make FOI laws redundant.

The Open Data Institute

The Open Data Institute, founded by Sir Tim Berners-Lee and Sir Nigel Shadbolt, is a global non-profit organisation headquartered in London. The ODI's mission is to **connect, equip and inspire people around the world to innovate with data**. It does this through its network of nodes in 20 countries across six continents, startup incubation, research and development, training and expert advice provided to businesses, civil society and governments. The UK government has asked the ODI to [help connect government with businesses, start-ups and innovators](#).

Oxford Country Council

Dear Sir or Madam,

Freedom of Information Commission – Submission from Oxfordshire County Council

I refer to the call for evidence in respect of the Freedom of Information Act (hereinafter ‘the Act’). The following is the submission on behalf of **Oxfordshire County Council**. We would be grateful if the Commission could take account of the Council’s views.

The Act applies to Oxfordshire County Council (hereinafter ‘the Council’) as it is a public authority as provided for under the Act. The consultation and the proposed changes to the Act are very much applicable to the Council and therefore this Council welcomes the opportunity to offer its views on the questions posed by the Commission. We have provided our answers under each question which is relevant to this Council.

In short, the submission is based on:

- The changing context of local government – the Act was drafted in a time when local government had more resources; the age of austerity, which is unlikely to be reversed, requires some rebalancing of the Act
- Protection of internal deliberations – an argument for strengthening the ability for public authorities to engage in free and frank exchanges of views and advice for the purposes of deliberation;
- A more proportionate enforcement and appeal system – reviewing the extent to which ICO decisions should be binding

The Council has therefore responded to Questions 1, 5 and 6.

Question 1: What protection should there be for information relating to the internal deliberations of public bodies? For how long after a decision does such information remain sensitive? Should different protections apply to different kinds of information that are currently protected by sections 35 and 36?

In times of austerity, public authorities are experiencing a significant amount of budgetary cuts. As such, prudent authorities are more than ever required to consider radical options: internal deliberations are therefore essential to ensure all available options are explored in order to achieve the best outcome for members of the public and service users. While such deliberations are of public interest, the structure of the Act currently requires authorities potentially to disclose such material while a matter is current unless an exemption such as Section 36 is engaged and a public interest test is carried out that concludes such information should be withheld in the wider public interest.

Public authorities such as councils need to explore the most cost effective and creative solutions to the delivery of services in a very challenging climate. At present, the Act enables such considerations potentially to be disclosed during their currency. This has two effects: firstly the potential to inhibit the kind of free and frank exchange of views or advice necessary to ensure the kind of rigorous debate necessary to achieve effective solutions; and secondly, it diverts resource at a time when the persons involved in such deliberations should be engaged on the matters in hand. At present, the Act seeks to balance such considerations through a public interest test. However, the Council would argue that Section 36 should be an absolute exemption for the purposes for which the section is currently framed. This does not disregard the public interest in the emerging issues and options. Indeed, public authorities are legitimately required to engage both in public consultation and the assessment of equality on matters of significant service change and development. The requirements of the data transparency agenda also engender openness.

The Council considers it is inherently in the public interest that internal deliberations are not challenged prematurely, and considers that the balance of resource means that the Act could better reflect that, in such a climate, it is less demonstrably in the public interest that public authorities should meet every desired outcome for every member of the public.

In light of this, it is this Council's opinion that Section 36 should be an absolute exemption under its present terms, with the 'appropriate person' (Monitoring Officers, for principal councils) remaining as the arbiter of whether the exemption is engaged. The requirement for a public interest test would be removed. However, the key involvement of a statutory officer in determining the engagement of the Act affords significant accountability – and provides an oversight and supervisory role to alleviate any concern that an authority would opt to use a redefined Section 36 unduly. For each and every request whereby section 36 is raised as an exemption, an objective and proportionate opinion of the Monitoring Officer will need to be sought. Such a view would ultimately be subject to challenge by internal review and then to the Information Commissioner's Office.

With reference to the amount of time that the information should remain sensitive, the Council agrees with the framing of the question i.e. that internal deliberation should remain sensitive until a decision has been taken and is no longer 'live'. This could be a matter which remains in the view of the 'appropriate person'; or it could be aligned, for example, to an objective local standard e.g. as a proportion of the period within with a Council's published retention schedule. Should a 'date' be necessary, common to all public authorities, this is more arbitrary, but could potentially be six months to a year or relate to an authority's formal decision making cycle.

Question 2: N/A to Oxfordshire County Council

Question 3: N/A to Oxfordshire County Council

Question 4: N/A to Oxfordshire County Council

Question 5: What is the appropriate enforcement and appeal system for freedom of information requests?

The Freedom of Information (FOI) process involves an initial review and an internal review, a right of referral to the Information Commissioner, and then a right of appeal by either party to the First Tier Tribunal and then to the Upper Tier Tribunal. This is the case potentially for any request. Clearly, any meaningful access to information regime needs to be underpinned by robust appeal processes. As, currently, decisions of the Information Commissioner are binding on public authorities unless appealed, a public authority must weigh the public cost and benefit of appealing any such decision further to the tribunal stages. That some authorities do not appeal does not in itself mean that they agree with the Commissioner's decision nor that the outcome is necessarily the correct one. Decisions by public authorities whether or not to engage in any of these appeal processes owes as much, if not more, to cost and reputational considerations, having regard to the time and effort necessary to engage with complex appeals processes and the lengthy proceedings.

Oxfordshire County Council does not have frequent involvement with the Information Commissioner. We consider we are functioning well under the current system which is illustrated by the limited amount of investigations we receive. As such, whilst we have no strong views on whether the current system should be altered, the Council considers it is worth this Inquiry considering whether the Information Commissioner's decisions should effectively be non-binding. That being said the decisions should contain a strong presumption that they should be followed based on the Commissioner's role of upholding information rights in the public interest. This does not let public authorities 'off the hook' nor weaken the enforcement of rights contained in the Act. Rather, authorities would be expected, as now, to have regard to the body of guidance issued by the Commissioner and would need to justify the reasonableness of its position fully in respect of such guidance. This would mean the Commissioner also having greater regard to the quality and consistency of its guidance within the context of judicial review decisions.

The experience of other nations demonstrates that such a regime is common and worthy of consideration. Non-binding decisions against public authorities would not mean that they would automatically disregard such recommendations. Any recommendation would be taken seriously as consideration needs to be given to reputational issues if not followed as well as to the Wednesbury

Reasonableness of such a decision. Similar regimes occur in Europe for example, in France, Germany and Spain, where the Independent body can only make non-binding decisions; and, in the context of local government, the Local Government Ombudsman reviews Council actions and makes recommendations that are essentially non-binding but which are underpinned by a right to publicise such differences. Judicial review would then remain available. Indeed In the aforementioned countries, the local authority on the back of the independent body's recommendation makes the final decision. This decision is subject to Judicial Review which, as an option we have suggested, would bring the UK appeals system in line with our European neighbours.

Question 6: Is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know? Or are controls needed to reduce the burden of FoI on public authorities? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kind of requests do impose a disproportionate burden?

The provisions of the Freedom of Information Act were developed at a time that largely differs from the present circumstances of public authorities. Consistent pressure over several years to make savings has of course led to a greater emphasis on public authorities' ability to deliver essential services effectively and creatively. This is unlikely to abate or to return to pre-austerity levels. As such, there is an argument now for reviewing the mechanisms which balance the public right of access against the demand that requests can make on public resources.

Clearly one such solution would be to introduce a charge for all requests. This would not be entirely consistent with an Act that supports *freedom* of information. Targeted charging i.e. only for high-end users (e.g. those for commercial purposes) such as businesses and the media, would simply mean such requests would be made less transparently under individual names. More equitable – rebalancing public access alongside the demands on public resources – would be a reduction in the appropriate limit; and an inclusion within the limit of redaction time which, unlike 'thinking time', is more objective and flows as a natural consequence of engaging a statutory exemption. While the Select Committee previously considered reducing the limit to 16 hours, this hardly seems worth the legislative effort nor would it achieve an effective rebalancing. An appropriate limit of 10 or 12 hours would be more realistic, recognising the legitimate right of access to information and the needs of an authority to have regard to its resources in the public interest. To leave the appropriate limit at its current level, or substantially the same, would be to continue to risk the diversion away from the provision of essential services such as those (in local authorities) provided for by Children's and Adult's Social Care. A reduction to 10 or 12 hours would be a realistic balance and would save the necessity to introduce a standard fee. In a climate where public authorities are required to focus on essential priorities, it also seems equitable that the right to freedom of information is also tempered with an awareness of the constraints on public authorities and the consequent need to frame and focus requests with a greater recognition on their impact on public resources rather than as a free resource which does not, seemingly, have any such impact.

It is this Council's opinion that many requests which fall within the current Appropriate Limit, then go on to take a significant amount of additional time due to redaction. It is this Council's opinion that redaction is a given consequence of using the statutory exemptions and is therefore not avoidable. Therefore it seems at odds that this cannot be included in calculating the Appropriate Limit. It is this Council's view that redaction time should form part of the time allowance under the Appropriate Limit.

Charging for FOIA requests would be less arguably in the public interest, undermining the principle of freedom of access and also placing an administrative burden on authorities to take payment. The charge would need to be set at a reasonable sum to avoid restricting the public in making an FOIA request; this would be counter-productive as a sum that is set low by necessity would willingly be paid by requesters. Setting a charge for journalistic or business purposes would be unsuccessful as private email addresses would be used in order to 'get around' the charging regime.

A rebalanced and lower Appropriate Limit which better reflects the era of austerity will both protect the principle of freedom of access and on maximise the use of public resources in the wider public interest.

Independent Commission
on Freedom of Information

Yours faithfully

Glenn Watson

Glenn Watson
Principal Governance Officer

for and on behalf of Nick Graham
Chief Legal Officer and Monitoring Officer and
Head of Law and Governance

People for the Ethical Treatment of Animals Foundation (PETA)

Re: Independent Commission on Freedom of Information Call for Evidence

Dear Lord Burns,

These comments are submitted in response to the Commission's call for evidence regarding the Freedom of Information Act (2000) (FOIA) on behalf of the People for the Ethical Treatment of Animals Foundation (PETA) and its 400,000 members and supporters who are concerned about the lack of transparency and accountability surrounding the use of animals in experiments. Freedom of access to information is an essential part of the democratic process, which embodies the public's right to know how authorities operate, spend money collected from taxpayers and make decisions that have an impact on their lives. This is particularly relevant to the work that we do in relation to section 24 of the Animals (Scientific Procedures) Act 1986 (ASPA), which often prevents access to information on animal experimentation which is of public interest. PETA is a key stakeholder in the current review of section 24 of ASPA that is being conducted by the Home Office and has emphasised the vital role that the FOIA plays in scientific progress and public confidence in the regulation of animal experimentation. PETA, therefore, supports the core principles of FOIA and does not feel that significant changes to the Act are warranted.

PETA's responses to the 6 questions posed by the Commission follow.

Question 1: What protection should there be for information relating to the internal deliberations of public bodies? For how long after a decision does such information remain sensitive? Should different protections apply to different kinds of information that are currently protected by sections 35 and 36?

The FOIA already provides appropriate protection for sensitive information, particularly in Sections 22, 36, 38, 40, 41, 43 and 44. Further protection may also be gained through other statutes and torts that pertain to employment contracts, harassment, release of trade secrets, copyright, data base rights, the Public Interest Disclosure Act 1998 and the Data Protection Act 1998. With specific regard to testing on animals, further protection is offered under Recital 41 of the European Directive 2010/63/EU on the protection of animals for scientific purposes, which states that proprietary rights should not be violated and confidential information not revealed when objective information concerning projects using live animals is made publicly available. These statutes, torts and guidelines have been tried, tested and amended where necessary and, as such, stakeholders and the public can have confidence in their operation and application.

The current exemptions of the FOIA ensure a balance is achieved among the right to know, the delivery of effective government and other legitimate interests. Information may only be released if the public interest in releasing it outweighs the public interest in withholding it. Furthermore, the Information Commissioner's Office and Information Tribunal are consistently respectful of the need to protect a "safe space" for internal policy deliberations. Both have made it clear that it is extremely unlikely that they would consider it in the public interest to release information relating to internal deliberations of public bodies while policy is being formulated, unless it revealed wrongdoing on the part of ministers.

In a speech in October this year, the Information Commissioner, Christopher Graham, emphasised the respect that his office and the Tribunal have for the "safe space" for deliberations and indicated that "*in our evidence to the FOI commission, we will be submitting figures showing the balance of withhold versus disclose calls in relation to sections 35 and 36 in central government Decision Notices – updated since Post Legislative Scrutiny – showing the significant percentage of such DNs that sanction withholding*".²¹⁰

The ICO and Information Tribunal rightly consider however that the safe space does not continue forever. Once a policy has been formulated, decided upon and announced, it is usually held that the safe space starts to diminish, as the public is entitled to understand the rationale for the policies that affect their lives and not just rely on ministers' speeches and press releases. An assessment of how long information remains sensitive should be made on a case-by-case basis, as the duration will

²¹⁰ Graham, C. (2015). Working effectively: Lessons from 10 years of the Freedom of Information Act. London School of Economics, London. Available at: <https://ico.org.uk/about-the-ico/news-and-events/news-and->

depend on the specific content, the nature of the particular decision-making process, and the wider context (e.g. the effect on other live deliberations).

Where FOI releases of sections 35 and 36 material are justified in the balance of public interest, such information provides context, analysis, explanation and assessment of policy and performance and therefore provide the public with greater understanding of the policies that affect their lives.

The FOIA already provides appropriate protection for sensitive information relating to the internal deliberations of public bodies with associated guidance in place for the application of exemptions to disclosure under Sections 35 and 36, as such, stakeholders and the public can have confidence in the operation and application of the FOIA in its current form.

Question 2: What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?

As described in the context of question 1, the current regime already provides sufficient protection for sensitive information such as Cabinet discussion. Furthermore, the ICO and Tribunal set the threshold for disclosure of Cabinet minutes much higher than for other types of deliberation and the “safe space” continues for far longer than the announcement of the policy. Unless the subject matter is truly momentous or the events have clearly receded into history, the ICO/Tribunal will not sanction disclosure.²¹¹

The FOIA already provides important flexibility, which can protect sensitive information for significant periods of time if the context demands it; no changes should be made to the current regime.

Question 3: What protection should there be for information which involves candid assessment of risks? For how long does such information remain sensitive?

There is nothing in the FOIA to suggest that Parliament wanted an absolute exemption for risk registers and risk assessments. As with other information that may fall within the section 35 exemption, withholding risk assessments from the public is meant to be subject to a public interest test. The ICO and the Tribunal always weigh against this the need to protect a safe space for policy formulation. The safe space cannot stretch on forever, it has to start receding at some point and the most logical, credible point is after the policy has been formulated and publically announced. Both the Commissioner and the Tribunal can be relied on only to release this information after the policy-formulation phase is complete. No amendments should be made to the FOIA in this respect.

Question 4: Should the executive have a veto (subject to judicial review) over the release of information? If so, how should this operate and what safeguards are required? If not, what implications does this have for the rest of the Act, and how could government protect sensitive information from disclosure instead?

The possibility of a veto under Section 53 of the FOIA should remain as intended by the legislator within the FOIA in order to veto the Commissioner’s decisions in exceptional circumstances. Under no circumstances should Sections 35 and 36 of the FOIA be converted into absolute exemptions. However, the Commission should be mindful of the ruling by the Supreme Court in March this year that narrowed the circumstances in which a minister could ignore an FOI tribunal or court to where there are new facts or has been an error in law. The Commissioner can still be vetoed but the Supreme Court made it clear that the minister should use the appeal process instead.²¹²

²¹¹ Information Commissioner’s Office (2015). Prejudice to the effective conduct of public affairs (section 36) Freedom of Information Act. Available at: https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf (Date accessed: 17 November 2015).

²¹² R (on the application of Evans) and another (Respondents) v Attorney General (Appellant) (2015) UKSC 21. Available at: https://www.supremecourt.uk/decided-cases/docs/UKSC_2014_0137_Judgment.pdf (Date accessed: 17 November 2015).

Question 5: What is the appropriate enforcement and appeal system for freedom of information requests?

A state committed to openness should regard secrecy as a last resort and such decisions subject to challenge. While the vast majority of requests will be straightforward and disposed of by the original FOI officer, there will be some that require very fine and complex assessments of competing interests. Several tiers of appeal, of escalating expertise are necessary to ensure that the right balance is being struck. If the appeals process was curtailed, there is a real danger that errors of fact and law will go undetected and that information that should be shared with the public will wrongly remain shrouded in secrecy. There is no clear evidence for changing the overall structure and principles behind the enforcement and appeal system under the FOIA.

Question 6: Is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know? Or are controls needed to reduce the burden of FOI on public authorities? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kinds of requests do impose a disproportionate burden?

The government first published proposals for freedom of information in 1997. In the white paper *Your Right to Know*, the government explained that "*openness is fundamental to the political health of a modern state*" and "*unnecessary secrecy in government leads to arrogance in governance and defective decision-making*".²¹³ The FOIA has been successful in making a significant contribution to keeping the public informed in a variety of arenas and improving public confidence and trust in government and public sector bodies. In a 2013 survey carried out on behalf of the Information Commissioner's Office, nearly three quarters (73%) of the general public questioned agreed that being able to access information held by public authorities increases the public's trust in them.²¹⁴

The majority of private and public sector bodies questioned also agreed that the FOIA had increased trust (61%) and improved internal (53%) and external (59%) organisational knowledge.²¹⁵ Relying on the FOIA for the release of information is in the public's best interest and will allow the public to develop an informed opinion on research involving animals and to engage in a constructive debate over the continued use of animals.

The removal of barriers to information held by public bodies is of particular relevance to tests conducted on animals. Access to relevant information enables greater potential for sharing data to prevent duplication of work, thus saving resources and reducing the numbers of animals used in experiments. Public sector information is a valuable information resource that could be used by the private sector to develop value added products and services.

Imposing costs such as charging for FOI requests would be a backward step for democracy. It would be tantamount to a tax on a democratic right and it would be levied before the requester even knew if the information was available and could be disclosed. It should be noted that when a €15 application fee was introduced under Ireland's FOI Act in 2003, the volume of requests collapsed by 75 per cent.²¹⁶ Following a review, the Irish Government abolished the application fees in 2014 with Minister Howlin stating that "*My conclusions were strongly reinforced by discussions I had with colleagues and participants at the OGP Europe Regional Conference held in Dublin Castle in May which*

²¹³ *Your Right to Know* (White Paper): Freedom of Information (1997), CM 3818.

²¹⁴ Opinion Leader (2013), Information Commissioner's Office annual track: individuals, Information Commissioner's Office, London. Available at: http://ico.org.uk/about_us/research/~media/documents/library/Corporate/Research_and_reports/annual-track-2012-individuals.pdf (Date accessed: 23 May 2014).

²¹⁵ Opinion Leader (2013), Information Commissioner's Office annual track: practitioners, Information Commissioner's Office, London. Available at: http://ico.org.uk/about_us/research/~media/documents/library/Corporate/Research_and_reports/annual-track-2012-organisations.pdf (Date accessed: 23 May 2014).

²¹⁶ House of Commons Justice Committee (2012). *Post-legislative scrutiny of the Freedom of Information Act 2000*. First report of Session 2012-2013, Volume II. London: The Stationary Office, Ltd.

*highlighted the vital role of FOI as a cornerstone of openness, transparency and accountability of government and public administration*²¹⁷.

Controls on the release of information should not be imposed as public authorities are not obliged to deal with vexatious or repeated requests or with requests in which the cost exceeds an appropriate limit, which therefore negates the perceived burden on public authorities.

In conclusion, it is regretful that the Independent Commission is only looking at ways of restricting the Act and making it harder to use, rather than ways of improving it and expanding official transparency.

Should you require additional information, I can be reached at JuliaB@peta.org.uk or on 020 7837 6327 / 07731 878330.

Yours sincerely,

Julia Baines, PhD
Science Policy Advisor

²¹⁷ Department of Public Expenditure and Reform (2014). Minister Howlin announces Government approval for removal of FOI application fee. Press Release July 1 2014. Available at: <http://www.per.gov.ie/en/minister-howlin-announces-government-approval-for-removal-of-foi-application-fee/> (Date accessed 17 November 2015).

The Physiological Society

The Physiological Society (“The Society”) has represented UK and international physiologists since 1876. One of the principal reasons for the establishment of The Society was the recognition that experimental scientists should contribute not only to the development of physiological knowledge but also the legislation that impacts on research conduct and progress, at that time specifically relating to the use of animals in research, a core component of the research The Society’s Members undertake. As a result The Society has for over 100 years been working closely with related organisations and government in both the development and the refinement of legislation on the use of animals in research, including implementation of the ‘3Rs’.

The Society strongly supports greater openness concerning the use of animals in research. It was a founder organisation and signatory for the Declaration on Openness on Animal Research in 2010, and an active partner in the development and promotion of the Concordat on Openness in Animal Research, launched in 2014. Its Members are signatories to the Concordat and work actively to promote and achieve a greater public understanding of the need for, and the safeguards already enshrined in, the use of animals in research.

The Society and its Membership are strongly supportive of an environment in which Freedom of Information [FOI] is an expectation on public bodies, subject only to adequate protection of:

- a) personal information;
- b) information, including but not limited to the current FOI definition of intellectual property, requiring confidentiality for the public body to be able to operate in an internationally highly competitive environment;
- c) a ‘safe space’ in which regulators and the regulated can operate to maximise the benefits to the UK.

The Society believes, and has previously expressed concern in Government consultations, that FOIA, as currently operated, fails to provide the second and third of the above protections as far as animal-based research is concerned. It therefore risks the UK bioscience sector’s world-class research and the associated nationally-important social and financial outputs. The Society wishes to emphasize some points that are directly relevant to our Membership, concerning the relationship between FOIA and the regulation of research involving animals.

The use of animals in research is regulated by EU Directive 2010/63 and thereunder the Animals (Scientific Procedures) Act (ASPAs) 1986, as amended in 2013. During consultations with the regulators (the Animals in Science Regulation Unit of the Home Office [ASRU]) on revision of ASPA section 24, The Society was in agreement with ASRU that FOIA alone would currently be insufficient protection for UK animal-based research. This situation arises because of the legal requirement under ASPA to detail a large body of material solely for the purpose of gaining a licence to undertake the research. In many licences, much of this material is academically- confidential in the sense of being of value to scientific competitors. The Society is not aware of any other situation in which an equivalent regulatory requirement exists to specify so much confidential information to achieve a licence for an individual to operate.

Among The Society’s concerns are aspects that relate to the Independent Commission’s questions 1 and 6; they are summarised under the headings below.

Question 1. Protection for internal deliberations of public bodies

Research involving animals requires the writing and consideration by ASRU of a highly technical and detailed licence to operate under ASPA. The preparation for this ‘Project Licence’ requires multiple discussions between ASRU Inspectors, applicants and other members of the Institution to ensure that the scientific aims of the work can be met and that the welfare of the animals will be optimised, and thereby that the legal requirement for a successful harm: benefit assessment can be met. These discussions require written records to ensure proper understanding and coordination between all the parties involved, and in particular to assure legal compliance with ASPA. There is therefore a need for a ‘safe space’ in which full and frank exchanges can be had without concerns that written communication will risk burdensome FOIA requests and the potential release of information to scientific competitors or the public.

In terms of subsequent release, the information contained in and associated with the Project Licence is detailed and (despite the inevitable uncertainty associated with scientific advances) is intended in due course to benefit the health and wealth of the UK. In many cases the timescale over which such benefit may be realised is impossible to predict; many members of The Society are engaged in preclinical research, most of which does not have a predictable timescale for 'translation' to yield social or economic benefit. The only person(s) with the expertise to fully determine whether the details associated with a Project Licence could be further exploited for public benefit are the individual scientist(s) involved in the research. It is therefore essential for the scientific and economic future of the UK that any revised legislation recognises that it is the scientists within institutions who need to be able to control the release of the scientifically confidential information they have collated solely for the purposes of gaining a Project Licence to work under ASPA.

Question 6. The burden on public bodies

Because of the nature and length of the Project Licence, and the level of detail required, much of the scientifically confidential information is embedded within less sensitive material. There is therefore a major burden associated with redaction of such complex documents, much of which falls upon the individual scientists as the only person(s) able to identify what information would be of value to competitors. The time spent on these activities inevitably impacts adversely on the scientific endeavour, and therefore would result in reduced productivity. The combined costs of the time spent by experienced scientists and lawyers on FOIA requests in this delicate area become a major financial burden on public institutions.

The perceived risk of additional burdens associated with redaction will inevitably increase further the attraction for our members of undertaking their animal-based experiments abroad, where the bureaucratic load is generally much lighter; we are aware of examples of this happening already. The net result would be a loss of expertise and wealth from the UK, and a reduction in the oversight of animal welfare.

The Society therefore believes that FOIA is currently not adequate for protecting the academically confidential content of regulatory documents required for undertaking bioscience research involving animals. It does not generate confidence that there is the safe space required for the preparation and oversight of Project Licences under ASPA. Recent legal challenges under FOIA have generated major concerns over the bureaucratic burden to which scientists are liable, and the associated financial costs to their institutions. This situation poses an on-going threat to both - research and the economy.

We hope that the Commission will consider how FOIA could be modified to protect the legitimate interests of research that requires the use of animals. In particular we hope for consideration of the unusual situation of having to generate a large body of confidential material for the sole purpose of obtaining a legally-required licence to undertake research.

Should further information on these issues be of help to the Commission we would be pleased to help further.

Contact

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Paul Dacre

Background

1.1 I am Editor-in-Chief of Associated Newspapers, publisher of the Daily Mail, Mail on Sunday, Mail Online and Metro. However I am making this submission in a personal capacity, drawing on my experience as Chairman of the 2009 30-Year Rule Review . This Review recommended to the Government that the 30-Year rule for the transfer of official documents to the National Archive, and allowing of access to them, should be replaced with a 15-Year rule. Our recommendations were broadly accepted by the Government, although in the event the time limit was set at 20 years, rather than 15 .

1.2 Associated Newspapers will make a separate submission addressing concerns relating more directly to our journalism. This is being prepared by our Director of Editorial Legal Services, Liz Hartley.

1.3 Before I answer the points in the Call for Evidence in detail I would like, as Fleet Street's longest serving editor and Chairman of the 30-Year Rule Review, to make some general observations ...

- The proposal to restrict Freedom of Information is entirely antipathetic to the mood of the times, in which voters expect more, not less transparency in the way they are governed. The internet has changed traditional assumptions about confidentiality - a fact, incidentally, which Lord Justice Leveson singularly failed to recognise in his review of the media.
- At present the default position of Whitehall is that many things should be kept secret. In a digital age - where leaks are endemic on the internet, in the printed press and in instant political memoirs - this is unsustainable; there should be a cultural change whereby the default position should be an assumption of openness, unless there are over-riding reasons for secrecy.
- In my 27 years as an editor I have never seen Britain's political process held in such low esteem by voters. Curtailing FOi will inevitably contribute to even greater voter cynicism about an elitist political class protecting its own interests, rather than the public's.
- In the main, I suspect, dislike of FOi is driven by Whitehall's belief that civil servants should be exempt from public scrutiny. This is in my view counter - productive, and perceived by the public simply as a compulsion to cover backsides. Civil servants should remember that with authority comes responsibility. They should also remember who pays their wages.
- The cost of providing FOi is a red herring. The sum, relatively, is footling: according to the latest Ministry of Justice figures, the cost of FOi to central government (£5.6m) is £700,000 less than the cost of ferrying ministers in limousines provided by the Government Car Service (a figure which itself has been subject to cover-up).
- It is one-fiftieth of the cost of the Government's army of 3,650 press officers and spin doctors . There are now nearly as many Government press officers as there are national newspaper journalists.
- I have no doubt governments would like to govern by press release. One of the most insidious developments of the Blair Government was the politicisation of Ministerial press offices by Alastair Campbell, who was given civil service status so he could control them, and who purged traditionally neutral civil servant press officers and replaced them with party placemen . FOi is needed as an antidote to this.
- The concern that FOi discourages candour between civil servants and ministers and thereby encourages sofa government is in my view sophistry. There was sofa government long before FOi. One of our recommendations in the 30-Year Rule Review was that the Civil Service Code should be amended to compel civil servants to keep full, accurate and impartial records of their dealings with ministers. I note with some wryness this has not been acted on.

- During our research for the 30-Year Rule Review, we discovered that, by and large, many other advanced democracies were ahead of the UK in allowing access to state records. There was no discernible damage to the efficacy of their governmental systems as a result of this.

- Today the freedom of the press is under unprecedented attack: through the increasing use of the Data Protection Act by powerful individuals to suppress stories; the abuse of the Regulation of Investigatory Powers Act by police to expose journalists' sources; unreformed and punitive Conditional Fee Agreements; and the establishment by the Government of the Royal Charter and discriminatory exemplary damages to force newspapers into state-controlled regulation. The media as a whole will inevitably see any erosion of FOi as yet another move by an authoritarian political class to restrict their freedom.

1.4 One of the reasons I was happy to accept the then Prime Minister's invitation to chair the 30-Year Rule Review was that I believed it was constituted as a fair and balanced inquiry into a piece of legislation that had been in place for a considerable period of time and was genuinely in need of review.

1.5 The Government demonstrated its commitment to transparency by appointing a newspaper editor as the review's chairman. At the same time the interests of the other two groups most affected by any changes that might be recommended - civil servants and historians - were very ably represented by the other two panellists: Sir Joseph Pilling (a distinguished former Permanent Secretary), and Professor Sir David Cannadine (an equally distinguished historian).

1.6 We took evidence from 108 individuals and organisations, including 16 Government departments. We paid particularly close attention to understandable concerns from civil servants and politicians that earlier public access to official documents might inhibit the candour with which civil servants advised ministers, and have a chilling effect on official record-keeping. The phased introduction of the 20-Year Rule began in 2013. There has not yet, as far as I am aware, been any concern expressed that it is having any damaging effect on the workings of Government.

1.7 One of the strongest impressions I recall from my work on the review was my disquiet at the automatic presumption of civil servants and politicians, particularly those in central government, that the workings of government should be kept secret from the voters they serve, rather than asking why records shouldn't be released. It staggered me that the Bank of England's Monetary Policy Committee could issue its minutes - recording the views of named members - within a fortnight of meeting, but Cabinet minutes had to be kept confidential for 30 years.

1.8 I was equally disquieted at the extreme sensitivity of politicians to the release of any information concerning the Royal Family.

1.9 Significantly, it was intimated to me by senior ministers that my committee's recommendations for reducing the 30-Year Rule would be more sympathetically received if we could also recommend reform of the Freedom of Information Act. This pressure was resisted.

1.10 The previous regime of the 30-Year Rule had been in place for more than four decades, a period which had seen dramatic changes in information technology - digital record-keeping and the internet - and in public expectations of government. An issue to which we paid particular attention was the effects of the Freedom of Information Act, and concerns that it was creating 'patchwork history' by allowing early release of information on a piecemeal basis. Taking the view that transparency in government is a laudable aspiration of almost all modern societies, we concluded that it was the 30-Year Rule that required reform, rather than the Freedom of Information Act.

1.11 I am utterly unconvinced that, despite its title, the Independent Commission on Freedom of Information has been established with the same commitment to open inquiry as the 30-Year Rule Review. Not one of the five commissioners is a journalist or historian, the two groups apart from civil servants and politicians with the most direct 'professional' interest in official records. There is no one who can be said to represent the public, who make the vast majority of FOi requests, or lobby groups and businesses, who are also major users.

Lord Burns, the Chair, is a former Permanent Secretary at the Treasury.

Jack Straw steered the original Freedom of Information Act through Parliament, but as Lord Chancellor he also issued the first Cabinet veto against an FOi request (over access to the Government's legal advice on British military action in Iraq) and has subsequently consistently argued that the current FOi regime allows too much disclosure.

Lord Howard is also a former Home Secretary.

Dame Patricia Hodgson is Chair of Ofcom, a regulatory body subject to FOi. When she was deputy chair Ofcom said 'there was no doubt' FOi had a 'chilling effect' on official record-keeping.

Lord Carlile is a former independent reviewer of terrorism legislation who described the Guardian's publication of material leaked by Edward Snowden as a 'criminal act'. He now runs a security consultancy with former MI6 chief Sir John Scarlett.

1.11 Nor am I convinced that in the ten years since the Freedom of Information Act came into operation there have been any of the changes in information technology or expectations of government which made the 30-Year Rule Review so necessary.

2. The Prince of Wales and the Cabinet veto

2.1 The Commission's call for evidence focuses heavily on the Supreme Court's dismissal of the Attorney General's appeal against the Court of Appeal's decision over an FOi request to release the Prince of Wales's 'black spider memos'. The Commission says the Government believes this means the Cabinet veto can now only be used in extremely limited circumstances:

In March this year, the Supreme Court ruled, in a judgement that concerned HRH the Prince of Wales's correspondence with Government Ministers, that the veto could no longer be used as the Government had previously understood. It is generally understood that the circumstances in which the veto can now be exercised are extremely narrow, but there remains considerable uncertainty. ...The Commission is clear that its terms of reference require it to look carefully at the implications for the Act of the uncertainty around the Cabinet veto, and at the practical operation of the Act as it has developed over the last ten years in respect of the deliberative space afforded to public authorities.

2.2 The call for evidence cites no legal opinion to support this view. Indeed, it seems to me that the 'black spider' case involves a unique set of circumstances, from which it would be dangerous to draw any conclusions.

2.3 Firstly, it was not concerned with the 'deliberative space' of a public body making policy decisions, but with one individual - albeit a very elevated one - writing letters to politicians to pursue personal hobby horses. Nor did it have any bearing on the Commission's other two concerns, Cabinet collective responsibility, or candour in risk assessments.

2.4 Secondly, the then Attorney General's public justification for his use of the Cabinet veto - that writing letters to ministers about his pet subjects was part of the Prince's preparation for kingship - was based on a bizarre circular argument:

The Prince of Wales is party-political neutral. Moreover it is highly important that he is not considered by the public to favour one party of another. This risk will arise if, through these letters, The Prince of Wales was viewed by others as disagreeing with government policy. Any such perception would be seriously damaging to his role as future Monarch, because if he forfeits his position on political neutrality as heir to the Throne, he cannot easily recover it when he is king.

The Attorney General appeared to be arguing that if the Prince's letters were made public they would demonstrate that, as many suspected, he was abusing his constitutional position by seeking to influence government policy; the letters had to be kept secret, therefore, so that the fiction could be maintained that the Prince is politically neutral and the public deliberately misled.

In the event, when the letters were eventually published, the Attorney General's fears proved entirely unfounded. The Mail's columnist Stephen Glover typified the reaction of most commentators when he wrote:

Shock horror? Far from it. These so-called 'black spider memos' are generally about as controversial as back copies of The Beano. There is nothing in them of which the Prince of Wales need feel ashamed ... The man that emerges is one already familiar to us - someone who cares deeply about a wide range of subjects, many of which might slip below the radar of ministers, and is impressively knowledgeable about all of them.

2.5 Finally, the ruling of the Supreme Court was founded in the flaws in the arbitrary way in which the Attorney General took the decision to apply the Cabinet veto on this particular occasion. The summary of the Court's judgment makes this clear:

...section 53 FO IA 2000 does not permit the Attorney General to override a decision of a judicial tribunal or court by issuing a certificate merely because he, a member of the executive, considering the same facts and arguments, takes a different view from that taken by the tribunal or court. This would be unique in the laws of the United Kingdom and would cut across two constitutional principles which are fundamental components of the rule of law, namely that a decision of a court is binding between the parties and cannot be set aside, and that decisions and actions of the executive are reviewable by the courts, and not vice versa

The Cabinet veto has been applied on seven occasions since the FOi Act came into effect, and successfully challenged once, in very unusual circumstances. This does not seem to me a valid reason to consider emasculating the Act.

3. Collective responsibility

3.1 The Call for Evidence questions whether FOi threatens the principle of collective responsibility in Cabinet. It lists a number of occasions when attempts were made to use FOi requests to gain access to Cabinet papers. In fact only two of these were successful. One related to the minutes of the 1986 meeting during which the Westland affair was discussed; the minutes were eventually released in 2010, 24 years after the event. The other concerned the 1988 takeover of Rowntree by Nestle; the minutes were released in 2011, 23 years after the event. In both cases FOi was used to obtain information that would be placed on the public record anyway under the new 20-Year Rule.

3.2 I accept there are occasions when it is important that ministers are free to speak frankly in Cabinet, but then present a united front once a decision has been taken. I do not see any evidence that the FOi Act has threatened that principle.

3.3 However, I was very struck during my work for the 30-Year Rule Review how some other public bodies are able to operate very successfully with a far greater degree of transparency. I have already mentioned the Bank of England's Monetary Policy Committee, which in 1998 voluntarily decided to publish its minutes within two weeks, meaning the minutes of one meeting would be available before the next one. It has recently gone further still, and now publishes its minutes, including details of how named members voted, within 24 hours of concluding its meeting.

3.4 Similarly, we found that the Environment Agency published the agenda and open papers for its board meetings before they took place and made the minutes available shortly afterwards, and the Financial Services Authority published summary minutes of its board meetings shortly after they took place.

3.5 We also looked closely at the way politicians and others with knowledge of Cabinet discussions regularly go public by publishing memoirs soon after leaving office. Of 28 political memoirs we studied, ranging over a 25-year period, 12 were published within a year of the author leaving office, and another six within two years. Under 'Radcliffe' rules memoirs are submitted to the Cabinet Secretary before publication. However, as the Cabinet Secretary has no effective legal sanction against publication, it appeared determined authors could disclose almost anything they wanted.

The effect of this has been to put vivid, highly personal accounts of events into the public domain, long before official records are made available. Against this, the possibility of an FOi request, subject to the carefully constructed safeguards of the Act, seems a minor threat to collective responsibility. Indeed it may be a valuable antidote to politicians' attempts to 'spin' their own record.

4. Is open government a luxury we can't afford?

4.1 The Call for Evidence makes much of the burden FOi places on public bodies. However, apart from Ministry of Justice figures for requests to a list of 41 central government bodies, which show a total of 46,800 requests in 2014, there appear to be no reliable statistics. Estimates by various non-governmental organisations suggest the 'wider public sector' receives between 87,000 and 200,000 requests per year.

4.2 The Act applies to over 100,000 public sector bodies, ranging from schools and hospitals to government departments. Taking the highest estimate for requests to the wider public sector, and assuming there is no overlap with the figure for central government, the total number of requests is around 250,000. Clearly some bodies will receive many more requests than others, but over the public sector as a whole each body receives an average of two and a half requests a year. That does not seem to me an insupportable burden.

4.3 The figures for the cost of FOi quoted in the Call for Evidence are all estimates based on research conducted in the past. According to widely quoted recent research based on recent Ministry of Justice figures, the cost of FOi to central government is £5.6m. Add to that £36.7m for the wider public sector (Ministry of Justice research 2011-12) and the total is £42.3m, or just 0.0000056p .c. of central and local government spending. Hardly a heavy price for allowing taxpayers to find out how their money is spent - and even then one strongly suspects a large proportion of that figure is spent on government lawyers exploiting the labyrinthine appeals process to prevent information being released.

4.4 If the Commission is concerned about the time and money spent on FOi requests, the answer should be less secrecy rather than more. As I write this submission the Daily Mail is running a major

series, based on an investigation carried out in co-operation with the Tax Payers' Alliance, on the excessive salaries and allowances paid to many senior figures in the public sector.

The investigation has revealed, amongst many abuses: the chief executive of an NHS Trust on pay and perks of £1.26m a year despite presiding over a £4.4m deficit and failing to meet infection targets; a deputy chief constable who earned £737,500 in a single year; and a £390,000-a-year council chief executive who was paid £2,368 a month so he could drive a £90,000 Porsche to work.

4.5 Our reporters spent months examining the annual reports and remuneration committee minutes of more than 500 public bodies, spanning local government, the NHS, universities and the police.

They found many devices were used to hide information. Some bodies redact the minutes of their remuneration committee meetings to remove the sums discussed. One example we published concerned details of a £4,500 pay rise for a senior official at NHS regulator Monitor, which were blacked out in its minutes.

When asked why this had happened, we were told it was 'personal information' that had been 'redacted to comply with legal requirements governing data protection'. Data protection is an excuse often used by public bodies to avoid giving details of salaries and perks to reporters.

4.6 Many public bodies claim they are transparent about pay because, like public companies, they declare directors' salaries, pension deals and expenses in their annual reports.

But many of the extraordinary deals our investigation uncovered were hidden in footnotes to these reports, which appeared deliberately intended to obscure the full size of some individuals' pay deals. For example, the interim chief of one NHS quango was paid nearly £850,000 last year (while still charging the taxpayer £1.40 for a bus ticket.)

But NHS accounts misleadingly state that his 'total emoluments' for the year 2013/14 were between £315,000 and £320,000.

A footnote, however, added that he was also awarded a bonus of £6,256 relating to previous work at the Department of Health, an exit payment of £306,538 from the Department of Health, and was entitled to a tax-free pension lump sum of at least £215,000.

It took a freedom of information request and a parliamentary question to unravel the full detail of these payments.

4.7 As each NHS Trust, police force and university is an independent body, we and the Tax payers' Alliance had to make a total of 6,000 FOi requests to extract information that should have been freely available in annual reports and remuneration committee minutes.

Even then some failed to respond. While every other NHS Trust provided details of the pay of staff earning more than £100,000, the North East London NHS Foundation Trust flatly refused, claiming they were 'not able to determine' how many of their staff were paid this much.

The cost of responding to FOi inquiries - along with data protection issues - is a common reason given for failing to respond to requests for information. I can't help feeling that much less public money would be wasted if public bodies were genuinely transparent, and obliged to respond to FOi requests fully and promptly.

4.8 The Call for Evidence notes that the Freedom of Information Act allows for fees to be charged for answering requests, although the Government later chose not to introduce charging. It has been suggested, in evidence from Birmingham City Council to the Ministry of Justice, that a fee of as much as £25 should be charged for FOi requests.

This would have made our investigation into public sector salaries prohibitively expensive. A fee of £25 per request, for 6,000 requests, would have meant a total cost for the project of £150,000 - a very large sum even for a major national newspaper like the Daily Mail, and completely beyond the reach of a regional newspaper or magazine.

We have put all the information we gathered in our investigation - far too much to publish in the Daily Mail - on our website, as a free resource for the public to use. Already a number of regional newspapers have used it to examine excessive public sector pay in the communities they serve.

5. Questions raised in the Commission's Call for Evidence

I must say that most of these questions seemed to me to be based on a presumption that freedom of information should be restricted. However, these are my responses:

Question 1: What protection should there be for information relating to the internal deliberations of public bodies? For how long after a decision does such information remain sensitive? Should different protections apply to different kinds of information that are currently protected by sections 35 and 36?

As noted, I was astonished at the presumption of secrecy I discovered during my chairmanship of the 30-Year Rule Review and believe all public bodies should publish minutes of their meetings, as the Bank of England Monetary Policy Committee does.

Question 2: What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?

Whilst the present system of appeals is cumbersome, and the Cabinet veto must ultimately be subject to the jurisdiction of the Courts, I believe it offers as much protection to the principle of collective responsibility as can reasonably be expected. I would not support placing the decision of a Cabinet minister beyond the jurisdiction of the courts, which seems a very dangerous constitutional departure. As a general principle the 30-Year Rule Review recommended that all official records should be made available to the public after 15 years. I still consider that preferable to the recently introduced 20-Year Rule.

Question 3: What protection should there be for information which involves candid assessment of risks? For how long does such information remain sensitive?

The same considerations should apply as for the deliberations of public bodies. A risk assessment is by definition a matter of legitimate public interest.

Question 4: Should the executive have a veto (subject to judicial review) over the release of information? If so, how should this operate and what safeguards are required? If not, what implications does this have for the rest of the Act, and how could government protect sensitive information from disclosure instead?

As a matter of principle, no. I note from the Call for Evidence that the Commission was unable to find evidence of a similar veto in other countries, beyond one in New Zealand that has not been used for many years. However, rather than unravel the existing Act, I am prepared to accept the veto, subject to judicial review and appeal to the Supreme Court.

Question 5: What is the appropriate enforcement and appeal system for freedom of information requests?

I see no reason to tamper with the existing system.

Question 6: Is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know? Or are controls needed to reduce the burden of FOI on public authorities? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kinds of requests do impose a disproportionate burden?

I am convinced the burden, which is not large, is amply balanced by the public interest in the public's right to know. In an age when the public's lack of engagement with the political process is a matter of growing concern, the Government should be delighted that every year there are 250,000 requests for information about its workings, 60p.c of them from private individuals. I am dismayed that consideration is being given to putting obstacles in the way of the public finding out how their money is spent. If public bodies believe they are receiving too many FOI requests that is because they are keeping too much information secret. The answer is more transparency, not less.

6. Conclusion

The record of this Government, and the last, on transparency and freedom of expression is not strong. The Leveson Inquiry was hijacked by opponents of a free press and resulted in the first attempt in three hundred years to erect a structure for state-control led regulation of the press, underpinned by discriminatory laws. It also led to police forces ending all but the most formal, officially sanctioned contact between police and journalists, resulting in potential witnesses failing to come forward in high profile cases. Two dozen journalists have been prosecuted under medieval laws simply for doing their jobs - only for juries to reject every case but one (and that is under appeal). Now a Commission packed with politicians and civil servants is looking at ways of restricting freedom of information.

It took almost 40 years from the 1966 Fulton Report's recommendation that 'unnecessary secrecy' be eliminated from government to get the Freedom of Information Act on the statute books and into operation. Sweden passed the world's first freedom of information act in 1766; it has existed in its modern forms since 1949. The USA followed in 1966, France in 1978. The British Act, when it finally arrived, was cautious in the extreme: there are no less than four levels of appeal before contested refusals reach the Court of Appeal and the Supreme Court; Britain is the only country in the world which allows an active executive veto.

Despite this, it has been embraced enthusiastically by the public. I find it very disturbing that, rather than recognising this as evidence of the need for the Act, and celebrating its success, the Government sees it as a reason for restrictions to be imposed.

I have found nothing in the Commission's Call for Evidence which convinces me that the Act is not working as it should, and ten years is far too soon for a general review. The Act should be left as it is - or strengthened to allow more scrutiny of government.

Paul Dacre Editor-in-Chief
Associated Newspapers
Plaid Cymru

Plaid Cymru

To whom it may concern,

I wish to formally to express my strong view that the current Freedom of Information Act should not be amended. It is concerning that there is talk of the legislation being rescinded, watered down or made so that only people with money can access information under the act.

To row back from a commitment to providing information would be a retrograde step and would do nothing to restore people's faith in politics. In the last ten years, the Act has been a powerful force for good by shining a light on information that would otherwise be hidden from view.

It has led to information being released into the public domain that has shown that HMRC missed its target for handling benefit claims within 9 working days, how many private police forces there are in the UK and which postcodes qualify for industrial development assistance from the UK Government. My office has personally used the Act to uncover extortionate pay settlements to senior staff within public bodies, the failure to prosecute any employers for paying below the minimum wage and the number of ex-miners who had died while waiting for compensation from the UK Government for chest diseases. All these examples of information released under the FOI Act should be in the public eye.

There is no justification for keeping these matters private.

Introducing fees for the release of information will deter applications so I reject this proposal. Evidence from around the world has shown that fees will put people off. You should be cautious about engineering a system that will make access to information the preserve of the rich.

You should also be cautious about the comparisons the Ministry of Justice have made to other countries adopting some of the proposed changes as they give a one-sided perspective. The United States may have powers that allow the 'Office of the President and his personal advisors (to be) outside the scope of the legislation' but they also have 'open meetings.' This means that in the state of California are bound to conducting meetings in public unless specifically authorised not to. They are also compelled to accept public testimony.

I would like to echo the words of Information Commissioner Christopher Graham who said: "The act is not without its critics, but in providing a largely free and universal right of access to information, subject to legitimate exceptions, we believe the freedom of information regime is fit for purpose."

It may be in the interests of some politicians to shut down avenues for scrutiny and hide away information, but it is not in the interests of a healthy democracy and a political system people can have faith in to do so.

I understand that it can make life difficult for governments and public institutions and I also take heed that there is a financial cost to providing the

information. However, the principles of openness and transparency far outweigh these inconveniences.

Yours sincerely,
Leanne Wood AC

Press Association

1. The Press Association (PA) is the national news agency for Great Britain and Ireland, supplying 24-hour-a-day, 365-days-a-year services of news, pictures, video footage and webfeeds to national and regional newspapers, publishers and broadcasters, commercial concerns and government departments, as well as international news organisations.
2. PA would first like to make clear its concern at the manner in which this review of the workings of the Freedom of Information Act 2000 (FoI) is being conducted. It notes that the Commission was appointed after the Supreme Court decision²¹⁸ over the Attorney General's attempt to use the veto to stop the release of correspondence from the Prince of Wales to various Government departments. This decision, it seems, is being used as a pretext for a wide-ranging review of FoI, with the clear intention of limiting its operation.
3. PA has already expressed its concern about the composition of the Commission in a letter to the Prime Minister. Notwithstanding declarations of impartiality and objectivity it appears to have been chosen to increase the likelihood of further restrictions being placed on the operation of the Act. One member, former Home Secretary and Justice Secretary Jack Straw – the first minister to use the governmental veto to stop the release of Cabinet minutes relating to the run-up to the Iraq war in 2003 – is on record as wanting FoI to be much more restricted than it is at present.²¹⁹ Another member of the Commission, Lord Carlile of Berriew, is on record as having accused the Guardian of “a criminal act” when it published stories based on material leaked by former security contractor Edward Snowden from the US National Security Agency.²²⁰
4. In announcing the review the Government declared its intention to be the “most transparent” in the world. If that was the case the Government should be considering how it can improve the information supplied to citizens. But the opposite appears to be the case. In the written statements announcing the establishment of the Commission, Cabinet Office minister Matthew Hancock also said:

Our aim is to be as open as possible on the substance, consistent with ensuring that a private space is protected for frank advice. To that end as a government we must maintain the best environment for policy-makers to think freely and offer frank advice to decision-makers. The most effective system is when policy makers can freely give advice, whilst citizens can shine a light into government.

This is a clear indication that the intention is to reduce transparency and increase secrecy.
5. The Government's approach is also clearly indicated by the announcement simply tacked on at the end of the written statement, that:

²¹⁸ *R (Evans) and Another v Attorney General* [2015] UKSC 21; [2015] WLR (D) 151

²¹⁹ See, eg: <http://www.telegraph.co.uk/news/politics/9210126/Jack-Straw-calls-for-FOI-act-to-be-rewritten.html>

²²⁰ <http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/10401711/Publishing-Edward-Snowden-security-secrets-a-criminal-act-says-former-terrorism-watchdog.html>

The Prime Minister has also confirmed that policy responsibility for Freedom of Information policy will transfer from the Ministry of Justice to the Cabinet Office. This change will be effective from 17 July 2015.

6. What is alarming is that the Cabinet Office has long been known for its opposition to FoI, and has twice been the subject of monitoring by the Information Commissioner's Office (ICO)²²¹ because of its poor record in responding to FoI requests within the statutory limits. In addition, Cabinet Secretary Sir Jeremy Heywood himself told a recent hearing of the Public Administration and Constitution Select Committee that the FoI Act could lead to officials being "less candid" with ministers for fear of advice and correspondence being released to the public²²².
7. Citizens and the media – the “eyes and ears of the public” as has often been said – now find themselves in the position of attempting to limit the damage that the Commission appears set to recommend.
8. The Commission's terms of reference predictably prevent it considering whether the Act has achieved its stated objectives or whether it can be further improved, and its membership notably excludes any advocates of FoI. But PA believes it is important to state that even in its present form the FoI Act is a force for good, helping create greater public understanding of the workings of national and local government and ensuring that the public can scrutinise the work of those who devise and administer policies, and hold them to account.

The Commission's questions

9. The Commission asks the following questions in its call for evidence:
 - 1: What protection should there be for information relating to the internal deliberations of public bodies? For how long after a decision does such information remain sensitive? Should different protections apply to different kinds of information that are currently protected by sections 35 and 36?
 - 2: What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?
 - 3: What protection should there be for information which involves candid assessment of risks? For how long does such information remain sensitive?
 - 4: Should the executive have a veto (subject to judicial review) over the release of information? If so, how should this operate and what safeguards are required? If not, what implications does this have for the rest of the Act, and how could government protect sensitive information from disclosure instead?
 - 5: What is the appropriate enforcement and appeal system for freedom of information requests?
 - 6: Is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know? Or are controls needed to reduce the burden of FoI on public authorities? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kinds of requests do impose a disproportionate burden?

²²¹ From October-December 2010 and January-March 2014

²²² Oral Evidence by Sir Jeremy in response to Q365 at Public Administration and Constitutional Affairs Committee session on EU Referendum Bill: Part One: Purdah and Impartiality, Tuesday July 21, 2015.

10. PA will deal with these questions in four groups, taking questions 1-3 together, and questions 4, 5 and 6 separately.

Questions 1-3

11. The first point to be made is that these three questions are clearly based on the assumption that some protection needs to be given to information relating to the internal deliberations of public bodies, to the process of collective Cabinet discussion and agreement, of that involving candid assessment of risks. It fails to ask if any protection is necessary beyond that already given by the public interest requirement in the FoI Act.
12. All the information dealt with in Questions 1-3 can be exempt from disclosure under sections 35 and 36 of the FoI Act. But the exemption is subject to a public interest test. Observers believe, as does the PA, that the Commission is likely to recommend that these exemptions should be made absolute – in other words, that the veil of secrecy should be thrown back across all this information regardless of whether it is in the public interest for it to become public knowledge.
13. PA believes that further protection is unnecessary. Information Commissioner Christopher Graham has also suggested the same. In a speech to the London School of Economics on October 1 this year²²³ Mr Graham said there were “many, many, examples” of the Commissioner and the First Tier Tribunal upholding the so-called “safe space”. He went on:
- Section 35 of FOIA provides for exemptions from the presumption of disclosure which are very broad. These cover the formulation and development of government policy – and that includes advice to ministers. And ministerial communications - in other words communications between ministers – are protected too. This clearly includes cabinet material.
- Decisions on disclosure or non-disclosure are subject to the public interest test. And the balance of public interest has very often favoured maintaining the exemption and withholding the information.
- Then there is Section 36 which exempts disclosures that would inhibit free and frank discussion or the exchange of views for the purposes of deliberation. This is where the chilling effect is said to manifest itself (or one aspect of it, at least – the other being the failure to record advice and/or the reasons for decisions.)
- Again, we have to apply the public interest test. And recent ICO decisions have upheld withholding briefing notes and notes of discussions – one recent example, those between the Cabinet Secretary and newspaper editors.
- We also upheld the decision to refuse to release prematurely documents declassified for the purposes of the Chilcot Inquiry – on the grounds that FOI should not pre-empt the process or outcome of that inquiry by piecemeal disclosures.
- Or take Cabinet papers. A few years ago, just before my time, we refused disclosure of the minutes of the Cabinet meeting in 2003 when the opportunity to bid to host the 2012 Olympic Games was discussed. We upheld free and frank discussion. The decision had been made. There was no significant public interest in who said what. And we respected the principle of collective cabinet responsibility.
- To be clear, Parliament has made these exemptions subject always to the public interest test. Sometimes issues are of significant public interest and the balance tips in favour of disclosure. Such cases have included requests for information held about the Hillsborough

²²³ <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2015/10/working-effectively-lessons-from-10-years-of-the-freedom-of-information-act/>

disaster, the takeover of Rowntrees, and, famously, the minutes of Cabinet meetings immediately prior to the declaration of war with Iraq in 2003. Different factors were at play in each of those cases, but they were not matters of the routine business of government and each had far-reaching significance.

Later, he added:

In our evidence to the FOI commission, we will be submitting figures showing the balance of withhold versus disclose calls in relation to sections 35 and 36 in central government Decision Notices – updated since Post Legislative Scrutiny – showing the significant percentage of such DNs that sanction withholding.

I think the facts I have set out, and which we will submit in greater detail to the independent commission, show that the safe space is respected, both by the Commissioner and by the Tribunal.

But, despite the weight of the evidence, senior Whitehall figures criticise the operation of FOIA and warn of its icy blast. In response, I observe that if mandarins keep talking about a chilling effect, theirs is a self-fulfilling prophecy.

14. The “safe space” or “chilling effect” arguments were also put in the Upper Tier Tribunal, Administrative Appeals Chamber, in *Department of Health v IC and Lewis*²²⁴. They were roundly rejected by Mr Justice Charles, President of the UTT. The case was an appeal by the Department of Health against the decision of the Information Commissioner that information relating to the ministerial diary of Andrew Lansley from May 12, 2010, to April 30, 2011 should be released to Mr Lewis, the requestor. The diaries covered the period when Mr Lansley’s principal policy focus as Health Secretary was on the NHS reform programme. The Department of Health disclosed a redacted version of the diary. The Information Commissioner ordered the disclosure of most of the withheld information, and the FTT substantially upheld that decision when the department appealed. The department then appealed to the Upper Tribunal, arguing that the FTT erred in law by rejecting its argument that its approach to the department’s evidence should reflect that adopted in Public Interest Immunity certificate cases, and by proceeding on the basis that the public interest in disclosure could generally be set out.
15. Both arguments were rejected by Mr Justice Charles in a decision heavily critical of the Department of Health’s approach. The FTT, he said, had heard evidence from two senior figures - civil servant Sir Alex Allen, who became the Prime Minister’s Independent Adviser on Ministerial Interests, and Paul Macnaught, Director of Assurance at the Department of Health.
16. There was, said Mr Justice Charles, “a strong public interest in the press and the general public having the right, subject to appropriate safeguards, to require public authorities to provide information about their activities”.²²⁵
17. He was particularly critical of the evidence given by Sir Alex Allen and Mr Macnaught. Much of what they said in their witnesses statements “warranted a ‘Mandy Rice Davies’ side note”, he said, adding:

They are reminders of the secretive culture of the public service that the House of Commons Select Committee reported that FOIA would help to change for good ... and thus

²²⁴ [2015] UKUT 0159 (AAC)

²²⁵ At paragraph 10, emphasis as in original

of an approach that there should be transparency but only on departmental terms which the civil service find convincing but which courts often did not. They leave out important factors and, taken overall, lack objectivity in that they advance a 'party line' ...

18. The judge said it was being claimed that disclosure of the material sought would create the risk that, for presentational purposes, unnecessary meetings and appointments would be arranged, take place, and be entered in diaries. He went on²²⁶:

As such a risk of harm is based on Ministers and officials acting contrary to their better judgment and duties to promote the public interest, it seems to me that if it existed it would found an argument that supports disclosure so that the press and the public can obtain information to test whether a Minister or his officials are, deliberately and contrary to their better judgment, taking such steps and so in their opinion wasting their time and damaging the achievement of the Public Interest Purpose.

But, in my view, the reasoning in support of the existence of this risk of harm is so flawed that it cannot be accepted and has to be explained as a failure by the witnesses to stand back and properly assess what they were saying. So, like the FTT, I cannot accept that there is any such risk of harm. However, if there is, it would be a factor supporting disclosure in the public interest.

19. After dealing with what he described as other flaws in the evidence, the judge added:²²⁷

In my view, sadly these flaws mean that this aspect of evidence of the two witnesses falls way below the standards that the public and the FTT are entitled to expect of government departments and senior civil servants in advancing public interest arguments. Indeed, in my view, they show that this aspect of their evidence should be roundly rejected and taken into account as a factor that decreases the trust and reliance that can be placed on their overall evaluation of the public interest. If equivalent obvious flaws existed in the advice to a client from a lawyer, a doctor or other expert, the client would be fully entitled to seek, and would be unwise not to seek, a second opinion.

20. PA believes that claims that policy-makers need a greater "safe space" than they already have, and that FoI has a "chilling effect" on the ability of civil servants to do their jobs, are simply unsupported. No one making such claims has ever produced concrete examples of cases in which civil servants, fearful of FoI, have, in effect, not done their jobs properly. Sir Jeremy Heywood told the Public Administration and Constitutional Affairs Select Committee²²⁸: "... but there have been one or two areas, particularly when we are talking about speaking truth unto power in relation to projects, for example, or the risks of certain activities, where the fear that that might then be published within a year or so, *I think, probably would* lead people to be less candid in writing than they otherwise would be". A claim such as this, after the FoI Act has been in operation for 10 years, seems extremely weak.

21. Other objective assessments of the operation of the FoI Act have also in effect dismissed the "chilling effect" claims. The Justice Select Committee said in its report on its post- legislative scrutiny of the FoI Act in 2012: "We are not able to conclude, with any certainty, that a chilling effect has resulted from the FOI Act."²²⁹

²²⁶ Paragraphs 78-9 of the judgment

²²⁷ Paragraph 81

²²⁸ See Note 5 above – emphasis here added.

²²⁹ <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/9609.htm#a46>, at paragraph 200

22. The Constitutional Affairs Unit at University College London, which produced a two-year study of the FoI Act in 2009 and testified to the Committee in 2012, also dismissed the “chilling effect” claim. The unit’s director, Professor Robert Hazell, told the committee:

We looked very hard for evidence of the chilling effect in all the interviews that we conducted, in a big two-year research project looking at the impact of FoI on Whitehall and in a related project commissioned by the Information Commissioner. We interviewed, in total, about 100 Ministers and middle and senior ranking officials. What they told us, in sum, was that, yes, there has been a deterioration in the quality of record keeping in Whitehall, but that, no, on the whole FoI has not been the cause of that.²³⁰

23. It is also important to remember the real danger that should exemptions be widened for central government policy-making and discussions, local authorities are then likely to seek to obtain the same form of exemption for their own information and material, which the PA believes will simply add to the democratic deficit already affecting reporting of what councils are doing.

24. PA also believes – contrary to the suggestions in Questions 1-3 of the Call for Evidence – that there is no need for the introduction of any form of specified timescale for the “protection” of material. As is clear from the Information Commissioner’s speech quoted above²³¹ the public interest test which has to be considered in relation to whether information is exempt from disclosure includes consideration of whether it is sensitive, whether such sensitivity has lapsed with the passage of time, or whether the balance between protection and the public interest in disclosure has changed with time. Introducing specific time limits during which information would be “protected” from disclosure would amount to no more than the imposition of an unnecessary limitation on the public’s right to know with no justification. In effect, it would be a declaration that the politicians know best, and that those appointed to oversee the operation of the FoI regime cannot be trusted to make the right decisions. It might be that some information must remain secret, for example if disclosure would result in the unnecessary expenditure of large sums of taxpayers’ money. But what reason could there be for keeping a “candid assessment of risk” secret after a policy has been decided and implementation of that policy started? The sceptic would suggest that the motive for secrecy in such a case was at the least highly suspect – as happened when Andrew Lansley was accused of a “cover-up of epic proportions” when he vetoed disclosure of a document assessing the risks of the NHS reorganisation.²³²

25. The use by the media, and others, of FoI in relation to policy formulation, internal deliberations, Cabinet minutes and risk registers has led to a wide variety of interesting and informative disclosures on matters of public interest. These include:

- Chancellor ignored advice from Treasury to launch Help to Buy scheme – The Independent,

²³⁰ <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/120221.htm>, in answer to Q62

²³¹ See paragraph 12

²³² See, for example: Andrew Lansley under fire over NHS risk register FOI veto, at: <http://www.bbc.co.uk/news/health-18017197>

Thursday, February 5, 2015²³³

- Treasury has sought to meddle with OBR forecasts – The Times, Monday September 14, 2015²³⁴
- Council borders on corruption – Yorkshire Post, December 20, 2014²³⁵

26. But a much wider range of stories has also emerged from Fol requests. The Fol Directory website²³⁶ published on October 30 a list of 103 stories published this year alone which it described as being in the public interest, in response to the complaint by Leader of the Commons Chris Grayling MP on October 29 that journalists were “misusing” the Fol Act to research stories.

27. PA itself has produced a number of stories it believes to have been in the public interest, and to have justified the use of Fol. These include, as examples:

A request to every police force in England and Wales obtained the first agenda-setting statistics about so-called “revenge porn” – the release online of explicit pictures of ex-partners, which is now a serious crime. Not every force had details, which meant the story was indicative rather than conclusive, but it was enough to be used by journalists, lawyers and campaign groups. Following publication of this story, the Crown Prosecution Service updated its guidelines to police before the new law making “revenge porn” a criminal offence came into force. Revenge porn victims also spoke to PA, expressing their gratitude that the story was produced using Fol data.²³⁷

The existence of the so-called ‘John Lewis list’ which allowed MPs to claim, among other things, £10,000 for a new kitchen, £6,000 for a bathroom and £750 for a television.²³⁸

The fact that councils were using controversial spy laws intended to help fight terrorism to track dog foulers and litterbugs.²³⁹

A request to the Ministry of Justice for details of the number of parents taken to court for failing to ensure their children attend school, and the outcome of those cases, produced an important story, given the government's focus on school attendance, and highlighted the issue of how much say parents have over their child's education. The Department for Education responded by reiterating its “Zero Tolerance” approach to absences. The story, which also attracted comment from the Local Government Association, put the issue - which is important to parents – back at the top of the news agenda.²⁴⁰

PA sent each of the UK's 45 police forces Fol requests asking how many registered sex offenders were missing. Responses from 39 forces revealed police had lost track of 396 convicted sex offenders. The story prompted Labour to call for an “urgent review” into the way registered sex offenders were monitored. There was also a debate in Scotland over

²³³ <http://www.independent.co.uk/news/business/news/chancellor-ignored-advice-from-treasury-to-launch-help-to-buy-scheme-10027240.html>

²³⁴ <http://www.thetimes.co.uk/tto/business/economics/article4555954.ece>

²³⁵ <http://www.yorkshirepost.co.uk/news/debate/yp-comment/council-borders-on-corruption-1-7014248#axzz3qWhMXoWh>

²³⁶ <http://www.foi.directory/featured/exposed-103-cases-where-journalists-have-misused-freedom-of-information-requests-in-2015/>

²³⁷ Examples of coverage: <http://www.dailymail.co.uk/wires/pa/article-3163195/Police-rise-revenge-porn-allegations.html>; <http://www.theguardian.com/technology/2015/jul/15/revenge-porn-cases-increase-police-figures-reveal>

²³⁸ Examples: http://news.bbc.co.uk/1/hi/uk_politics/7295066.stm; <http://www.theguardian.com/politics/2008/mar/14/houseofcommons2>

²³⁹ Examples: <http://www.expressandstar.com/news/2012/08/23/spy-powers-used-600-times-by-local-authorities/>; <http://news.bbc.co.uk/1/mobile/uk/7468430.stm>

²⁴⁰ Examples: <http://www.shieldsgazette.com/news/crime/hundreds-of-south-tyneside-parents-fined-over-kids-school-absence-1-7529159>; <http://www.telegraph.co.uk/education/educationnews/11943386/Thousands-of-parents-fined-for-taking-their-children-on-holiday-during-term-time-figures-show.html>

Police Scotland's recording of information after the force claimed it had no "missing" registered sex offenders – but later admitted that it did not know the whereabouts of nine of them.²⁴¹

Requests from PA revealed that hundreds of police officers were convicted of crimes over a three-year period. This story again required FOI requests to all 45 UK police forces. It emerged that 309 police officers and police community support officers (PCSOs) were convicted of offences between 2012 to June this year. But the number of convicted officers is thought to be much higher, as only 25 of the 45 forces provided figures.²⁴²

PA disclosed that more than 2,000 suspected criminals avoid prosecution because of ill-health or age. This was the result of a FOI request to the Crown Prosecution Service in the wake of the Lord Janner case. The CPS disclosed that 1,892 criminal cases were dropped at courts in England and Wales in 2014 due to the "significant ill-health, elderliness or youth" of a defendant, while a further 439 cases were abandoned for the same reasons before the suspect was charged with an offence. Mark Shelton, whose former headmaster Colin Cope was considered too unwell to stand trial on sex abuse charges, waived his right to anonymity and said he did not feel that justice had been done because the case had not been tested in court, while Victim Support said it was "critical" that any decision not to prosecute suspected criminals was "properly explained" to those involved in the case.²⁴³

A PA political correspondent believed there were significant holes in the official data regarding the Speaker's travel and other expenses. A FOI request to the Commons for the receipts filed in support of the Speaker's spending, using a precedent set by the Court of Appeal earlier this year in relation to receipts for MPs' expenses, provided a much deeper level of detail, and exposed instances where the House had omitted to release material. As a result of the story the Speaker issued a statement making clear that "he intends to use the car service only in circumstances when it is absolutely necessary", which, it is to be hoped, will lead to significant savings for the taxpayer.²⁴⁴

28. Each one of these stories received widespread coverage from national and regional newspapers and broadcasters. As one of our reporters observed: "All of these stories wouldn't have emerged without the FOI Act". A government seeking to increase transparency and ensure that the public was able to understand the workings of government, national and local, would have provided the information we uncovered as a matter of course.

Question 4: The Ministerial Veto

29. It is a matter of considerable concern that the ministerial veto – which is, according to guidance issued by the Ministry of Justice²⁴⁵ only to be used "in exceptional circumstances" – has been exercised to suppress the release of information seven times since 2009. But in recent years it has twice been used to block the release of risk assessments of politically contentious policies and once to shield lobbying correspondence from public view. In effect, the veto is now being used as a tool to protect those in authority from mere embarrassment. In addition, ministers have been prone to wielding the veto before exhausting the extensive appeals process under

²⁴¹ Examples: <http://www.independent.co.uk/news/uk/crime/nearly-400-registered-sex-offenders-are-reported-as-missing-in-the-uk-police-figures-show-10097170.html>; <http://www.thecourier.co.uk/news/scotland/missing-or-wanted-police-scotland-criticised-for-difficult-response-to-sex-offender-query-1.849490>

²⁴² Examples: <http://www.itv.com/news/granada/2015-07-24/dozens-of-north-west-police-officers-are-convicted-criminals/>;

²⁴³ Examples: <http://www.mirror.co.uk/news/uk-news/numbers-suspected-criminals-avoiding-prosecution-6600895>; <http://www.dailymail.co.uk/wires/pa/article-3265973/More-2-000-suspected-criminals-avoid-prosecution-ill-health-age.html>; <http://www.irwinmitchell.com/newsandmedia/2015/october/new-figures-show-high-number-of-cases-avoid-prosecution-due-to-ill-health-or-age-jq-489273>

²⁴⁴ Examples: <http://www.bbc.co.uk/news/uk-politics-33649258>; <http://www.theguardian.com/politics/2015/jul/24/john-bercow-expenses-claim-chauffeur-journeys>

²⁴⁵ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/276160/statement-hmg-policy-veto.pdf

the Fol Act regime.

30. There are serious concerns that the decision of the Supreme Court in *R (Evans) and Another v Attorney General*²⁴⁶, which appeared to limit the right of ministers to use the veto, was a major factor in the decision to launch the Commission's investigation of the workings of Fol. This was the case in which journalist Rob Evans of The Guardian sought the release of the so-called "Black Spider letters" written to various government departments by the Prince of Wales. But the Attorney General purported to exercise the veto after the UTT upheld Mr Evans's appeal for release of the information. The Court of Appeal unanimously ruled last year that the Attorney General had "no good reason" for using his ministerial veto and overriding the decision of an independent tribunal, chaired by a High Court judge, in favour of disclosure of the royal correspondence. The Supreme Court held, by a majority, that the certificate issued by the Attorney General, notwithstanding a judicial decision to the contrary, was invalid and unlawful. But as the Campaign for Freedom of Information pointed out when the Supreme Court's decision was handed down:

Parliament never intended the veto to be used against the Tribunal or courts – that possibility was not mentioned at all let alone debated during the Bill's passage. The veto was seen as available only in relation to the Information Commissioner's decisions.²⁴⁷

31. Lord Neuberger of Abbotsbury, President, with whom Lord Kerr and Lord Reed agreed, said that a statutory provision which entitled a member of the executive to overrule a decision of the judiciary simply because, on consideration of the same facts and arguments, he did not agree with it, would not merely be unique in the laws of the United Kingdom, but would cut across two constitutional principles which were also fundamental components of the rule of law. First, it was a basic principle that a decision of a court was binding between the parties and could not be ignored or set aside by anyone, least of all the executive. Secondly, decisions and actions of the executive were reviewable by the courts at the suit of an interested citizen. If section 53 was to have such an effect it had to be crystal clear from the wording of the Fol Act and could not be justified merely by general or ambiguous words. Section 53 fell far short of being crystal clear, and it was not made that the legislation was intended to disapply fundamental constitutional principles. The section could fairly be given a narrow range of potential application, such as for cases where there had been a material change of circumstance since the judicial decision.

32. The Supreme Court's decision was widely seen as a welcome re-statement of the long-standing constitutional principle that ministers are subject to the rule of law, and that, just like the rest of us, they are bound by the decision of a court and cannot ignore its ruling simply because they disagree with it. It is also a well established principle of statutory interpretation that the court will treat with scepticism any attempt to oust its authority or shield decisions from scrutiny. These principles, which have been established for centuries, should not be

²⁴⁶ [2015] UKSC 21; [2015] WLR (D) 151

²⁴⁷ Campaign director Maurice Frankel, quoted in a press release: <https://www.cfoi.org.uk/2015/03/welcome-for-supreme-courts-ruling-on-the-ministerial-veto-in-prince-charles-case/>

considered a surprise or a threat to any modern democracy. In *M v Home Office*³¹ Lord Templeman put it thus: “[T]he proposition that the executive obey the law as a matter of grace and not as a matter of necessity [is] a proposition which would reverse the result of the Civil War.”

33. Introducing a ministerial veto which could override the decision of a court following an unsuccessful appeals process by a government department would have the effect of bringing about a major and unjustified constitutional change. The use of the veto in the case of the Prince of Wales’s letters was unnecessary and misguided, and the Attorney General was wrong to attempt to exercise it in the manner in which he did. Changing the law to enable such a thing to happen again would be a serious incursion on the principles of both the rule of law and the separation of powers – it would introduce a Divine Right of Ministers to echo the Divine Right of Kings so beloved of Charles I.

Question 5: The enforcement and appeals process

34. PA has no direct experience of the appeals process, having not taken any cases to it. But there are many examples of stories of public interest emerging either because an appeal has been taken, or because the public body seeking to withhold the material decided to release it after all in the face of a probable appeal – see, for example, a story in *The Guardian* headlined “Police forced to disclose more details of ghoulish and heartless spy tactic” from January 7, concerning the age of dead children whose identities were stolen by undercover Metropolitan Police officers²⁴⁸.
35. According to the Ministry of Justice FoI Statistical Bulletin for 2014²⁴⁹ the proportion of requests to government departments which reach even the first stage of an external review is small and growing smaller. Nevertheless, in the time the Act has been in force, the number of successful internal reviews sought by requestors has been growing.²⁵⁰
36. But there are strong indications that the decision-making at public authorities, the ICO and even the First Tier Tribunal is not faultless, which the PA suggests means that cutting or reducing the appeals process would be unjustifiable.
37. Figures from the MoJ/ICO in the annexes to the Commission’s call for evidence show that 38% of appeals to the ICO against decisions by public authorities were upheld either completely or in part. Almost a fifth of those appeals were against decisions by government departments. Some 23% of appeals to the Information Tribunal over a decision by the ICO succeeded

²⁴⁸ <http://www.theguardian.com/uk-news/undercover-with-paul-lewis-and-rob-evans/2015/jan/07/police-forced-to-disclose-more-details-of-ghoulish-and-heartless-spy-tactic>³³
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/423487/foi-statistics-oct-dec-2014-annual.pdf

²⁴⁹ [1994] 1 AC 377 at 395

²⁵⁰ MoJ Bulletin, Fig 7, page 16

completely or partially, as did 13 of the appeals to the Upper Tribunal on a point of law.

38. This strongly suggests that the current appeals process is necessary and is working well.

Curtailing the system would be more likely to reduce the information becoming available under Fol, and to allow errors of fact and law to get through the system undetected, undermining the entire principle of Fol.

Question 6: The 'burden' of Fol on public authorities

39. Public authorities, particularly councils, are fond of complaining about the "burden" they bear when dealing with Fol requests. They appear equally keen to publicise the waste they say this causes with examples of idiotic Fol requests²⁵¹.

40. For example, the Commission quotes Kent County Council complaining about an increase in Fol requests. Kent County Council has a budget of £1.8 billion. The amount spent on Fol requests is a tiny percentage – at most in the region of 0.016%. That seems a reasonable price to pay to improve public scrutiny and the accountability of a giant local authority. But the authority says nothing about savings and increased efficiency it might have been prompted to make by the use of Fol by citizens or the media. In 2009 the KM Group, the local media organisation in Kent, used Fol to reveal that absence through sickness at the county council was running at 90,773 days per year, at a cost of at least £4,211,867. The average annual absence of six days per worker was about 30% higher than that found in the UK working population. Another Fol request, by the Thanet Gazette, led to the disclosure that one group of Kent County Council workers each took an average of 18.25 days off sick between January 2010 and January 2011.

41. Local authorities might also be wrong in their assessment of the "burden" of Fol. In September 2014 St Albans City and District Council issued a news release saying that in 2013-2014 it received almost 1,000 Fol requests, which cost it £250,000²⁵². The council also provided a breakdown of the requests which indicated that almost 60% came from businesses, 15% from national media, and only 9% from the public. But it also said that 13% of the requests received were from the Metropolitan Police. As the Campaign for Freedom of Information pointed out, the council had clearly counted many non-Fol requests, including those in which police sought information for criminal investigations to the Fol total.

42. No doubt local authorities such as Kent County Council, health authorities, police forces – and indeed central government - would welcome any development which would reduce scrutiny through Fol. The imposition of charges for requests, as suggested by the Commission's Review document would certainly achieve this. But it would also damage the

²⁵¹ See, eg, Council asked: Are you ready for a zombie invasion? Hull Daily Mail, September 6, 2013;

²⁵² Details cited in a letter from the Campaign for Freedom of Information to Commission chairman Lord Burns on October 27, 2015.

public interest, governmental transparency, and investigative journalism.

43. Questions such as those PA has asked of all the police forces in the UK are a good example.

Were charges for Fol requests to be introduced at the rate of £25 per request

– as appears to be the suggestion put forward by Birmingham City Council – then PA would face a bill of £1,125 for asking each force to detail the number of sex offenders of whom it had lost track. This would be a cost which would have to be paid to each force without PA knowing if it would respond or whether the information was even held. In the cases of those forces which did not respond, the charge would simply be lost for nothing.

44. The total cost for all of the examples given above, which involved PA making 235 requests in all, would have amounted to £5,875.

45. Requests for internal review, or appeals, would, under a charging system, almost certainly be beyond the reach of the PA, as they would for all but the wealthiest news organisations.

Charities, small businesses, and individual citizens would almost certainly be deterred from seeking information which they should be able to access by right.

46. Charges for Fol requests, internal reviews and subsequent appeals would be anti- democratic, would damage the public interest in openness and accountability by those in government, and would effectively act as a tax on knowledge which was levied before any requestor could find out if the material sought was even available, never mind disclosable.

47. The same applies in relation to the cost limits for requests. These should not be reduced, and public authorities should not be given extra ways to increase the cost calculation for any request, for example by including “thinking time”, or, as has been suggested in the past, allowing public bodies to amalgamate requests from one requestor or organisation. Allowing amalgamation of requests from an organisation could, in the case of PA, mean that requests to local authorities across the country on issues as diverse as traffic management and council tax arrears would be bundled together and then rejected as being over the cost limit.

Conclusion

48. PA believes that the Fol Act is a major benefit to civil society, helping uncover waste and maladministration, and assisting citizens to reach a greater understanding of what government, local and national, and all the other public bodies for which they pay, do, and how they do it. Limiting its reach by extending secrecy in relation to the workings of government, extending the veto, or introducing charges would all reduce its effectiveness, and in so doing damage democracy. The effect of charges can be seen from the experience in Ireland, which saw a 75% fall in Fol requests when charges of €15 (£10.59) for a request, €75 (£52.96) for an internal review and €150 (£105.91) for an appeal to the Information Commissioner were introduced. So

drastic was the chilling effect that the initial fee for a request was dropped completely and the others were cut.²⁵³

49. There is, it is now often being said, a deep and growing divide between politicians and those they seek to represent. On January 19 this year the Financial Times carried a report headlined “Only 1 in 10 believes UK politicians want ‘best for country’”²⁵⁴ which reported:

Faith in politicians has fallen to such an extent that only one in 10 believe they want to do “their best for the country”, according to research.

The fall, down from 36 per cent 70 years ago, comes from a public so sceptical it believes politicians lack the knowledge to resolve the nation’s problems, according to the YouGov research on behalf of Southampton University.

A leading political analyst described May’s national poll as the “election of the aggrieved”, amid a surge in support for the UK Independence party, the Greens and the Scottish National party...

The research shows that there is a strong connection between distrust and voting patterns, with Ukip the biggest beneficiary. The odds of supporting Ukip are three times higher if a person expresses distrust in politicians, according to the Southampton academics.

50. Former PA Political Editor Chris Moncrieff summed it up thus in a recent column²⁵⁵:

The newspapers in particular, and the media in general, have done more than any Opposition party in the Commons to unearth scandals, wrong-doing, greed and even corruption among our so-called ruling classes. And that, in part at any rate, has been helped along by the Freedom of Information Act – although not entirely.

Whitehall mandarins claim the existence of the Act actually inhibits ministers from going about their legitimate business.

That, too, is absolute nonsense.

What have they to hide? And if Members of Parliament, ministers or not, are up to some skulduggery (sic) – as has been clearly evidenced in the past – then we, who actually pay their wages (they are our servants, after all) have a total right as employers to know what they are up to.

51. On March 3, 2010, the Daily Telegraph reported that public distrust of politicians had hardened in the wake of the MPs’ expenses scandal²⁵⁶ while in the Daily Mail on September 20, 2012, former Home Secretary David Blunkett opined:²⁵⁷

Faith in the traditional political process has never been lower than it is today. There is a widening chasm between voters and Westminster. The authority of Parliament has substantially declined, while trust in ministers and MPs has evaporated.

52. Any attempt by the government to reduce the accessibility of FoI, to widen government controls on what may or may not be disclosed, or to give ministers extra powers to use the veto – especially if they also involve powers to overturn decisions by courts and tribunals – would be likely to do yet more damage to public trust in politicians and in government generally. Rather, it would be taken to suggest that those who claim to rule us are concerned more about their own interests and reputations, and in trying to muzzle a free and inquiring press, than they are in

²⁵³ http://www.citizensinformation.ie/en/government_in_ireland/national_government/standards_and_accountability/freedom_of_information.html

²⁵⁴ <http://www.ft.com/cms/s/0/96edc3dc-9ff5-11e4-aa89-00144feab7de.html#axzz3qXZjvTzI>

²⁵⁵ Chris Moncrieff: Is Freedom of Information Act frightening our MPs? Western Morning News, November 3: <http://www.westernmorningnews.co.uk/Chris-Moncrieff-Freedom-Information-Act/story-28099485-detail/story.html>

²⁵⁶ <http://www.telegraph.co.uk/news/newstoppers/mps-expenses/7354390/MPs-expenses-public-distrust-and-scepticism-of-politicians-hardens-report-finds.html>

²⁵⁷ British politicians have rarely been so ridiculed and despised, and that should worry us all; <http://www.dailymail.co.uk/debate/article-2210945/British-politicians-rarely-ridiculed-despised-worry-all.html>

democratic government, accountability and transparency.

53. Fol may cost – but those costs must be kept in perspective. News industry trade publication Press Gazette reported on October 13²⁵⁸ that research it had done found that central Government departments spent less than £6 million a year answering Fol questions – about 0.001 per cent of the £577.4 billion the central Government is due to spend in the 2015 fiscal year. The figure was also less than 2 per cent of the estimated £289 million the Government Communication Service said it would spend on external communications activities in 2014/15. The costs of Fol could, of course be reduced by ensuring that all public bodies make public all information except that small amount which must be kept confidential for good reason, such as to avoid the misuse of public funds.
54. There are problems with the manner in which the Fol Act is working. For example, government departments and public bodies which fail to meet statutory obligations to respond to requests within the time-limit face no real penalty, and authorities can take much longer than might be considered reasonable when dealing with applications for internal reviews of refusals to disclose all or some of the information a requester seeks. It is also arguable that public bodies are failing to use the powers they already have to refuse excessively expensive requests and to recoup costs, for example by charging fees for photocopying.
55. It is regrettable that the Commission appears to be set on examining ways of restricting Fol – and public access to the information for which they pay, through their taxes – rather than making it more efficient, and widening its remit to cover the £4 billion or so of taxpayers' money spent through the hands of private contractors such as G4S, Serco, Atos and Capita. Fol needs to be improved to keep it effective in informing the public about what government is doing and why. Introducing new restrictions or limitations will have the opposite effect.

Peter Clifton
Editor-in-Chief, Press Association

<https://www.pressassociation.com/>

²⁵⁸ <http://www.pressgazette.co.uk/cost-central-government-complying-foi-50-times-less-external-comms-budget>

Press Gazette

Dear members of the Independent Commission on Freedom of Information,

I am writing as the editor of UK journalism news website Press Gazette in response to your consultation on changing the Freedom of Information Act.

The act as it stands is far from perfect. In fact it would benefit from being strengthened.

For more than a year we have asked each of the UK's police forces for information about their use of the Regulation of Investigatory Powers Act to secretly view the call records of journalists in order to identify their confidential sources.

We would argue that this sort of information is firmly in the public interest.

Yet every force has hidden behind a variety of exemptions under the act to refuse every single request we have made.

Our requests have been refused on various grounds under the act including:

12.1 – costs

14.1 – vexatious

23.5 - concerning security bodies

24.2 – national security

30.3 – investigations

31.3 – law enforcement

40.5 – personal information.

We would argue that the widespread police use of RIPA to collect the phone records of law-abiding journalists and their legal sources is a matter of clear public interest which should be subject to disclosure under Fol. Now is perhaps not the place for a detailed discussion of the issues around this particular case. But suffice to say that the act as it stands has very many ways for public authorities to avoid disclosing information.

Press Gazette, and the readers we represent, is extremely concerned about any moves to further weaken the act for requestors.

Notwithstanding our frustrations with Fol, it is a piece of legislation which has greatly improved public transparency.

Fees for Fol requests

On the detail of your consultation, I would like to emphasise that any fees for Fol requests would greatly reduce Press Gazette's ability to use the act. We simply do not have any budget for Fol requests and would be unlikely to be granted one in the future.

Many of our Fol requests involve surveys of every local authority, or every police force. We have used this method to collect details of public expenditure on PR and communications. Any fees would make it impossible for us to make such use of the act in future. I suspect many other small business and specialist news titles would also fall in the same category.

The broad thrust of your consultation

Press Gazette launched a petition on 21 October 2015 as part of the Society of Editors' Hands Off Fol campaign.

The wording of this petition responds directly to the terms of your consultation. It states:

The Freedom of Information Act established the broad principle that public bodies must release information if the public interest in doing so outweighs the public interest in it remaining secret. We, the undersigned, urge the Government not to do anything which would detract from that principle.

In particular we urge you:

- to ensure that the Act continues to allow for the release of internal discussions at local and central government level when there is a public interest in doing so
- not to seek to create any new veto powers over the release of information not to introduce charges for Freedom of Information Act requests or appeals.

Any charges could dramatically undermine the ability of requesters, including regional press journalists and freelancers in particular, to use the Act to hold authorities to account.

Investigative journalism is time-consuming, expensive and sometimes difficult to justify for news organisations which are under financial pressure. It needs to be nurtured and encouraged, for the benefit of society and democracy, not subject to Freedom of Information charges which would be effectively be a tax on journalism.

At the time of writing, more than 41,000 people have signed this petition. Their names, and reasons for signing, are attached to this submission. The latter runs to more than 400 pages. I hope you can take the time to look at these responses from journalists, and members of the public, all over Britain. They provide ample evidence of the extent to which people care passionately about having access to public information.

Signatories range from leading journalists like Robert Peston, the new ITV political editor, who said:

“The health of a democracy is directly related to our ability to hold its institutions to account, which in turn requires full and timely disclosure of their conduct and policies.”

To members of the public like Zoe Syson, from Farmfield, who said: “As a parent of a child with Autism I nearly used the FOI Act to support my child's educational placement and I know many parents in a similar position have and found it very valuable when gathering evidence to support cases.”

In nearly ten years of editing Press Gazette I have never known an issue to so galvanise both are readers and members of the public. It is completely unprecedented for a petition launched by us to gather such a high level of support.

Please do not recommend any further curbs on the public's right to obtain information from the government and local authorities.

Yours sincerely,

Dominic Ponsford Editor
Press Gazette

Prestatyn Town Council

- 1) Whilst a situation is still active and no decisions reached there should be a right to obtain a simple position statement on the item under review. Estimated timescales, if appropriate to complete deliberations and considerations should be provided if possible.

Similar rules should apply to both central and local government who share democratic processes and responsibility

- 2) No comment
- 3) Where public risks apply there should be an agreed process for dealing with such items. The focus should be public rather than individual risk unless there are defined reasons by Minister supported by independent judiciary. A position statement should be made available so public can understand situation.

- 4) The extent and scope of sensitive information would need to be defined in conjunction with senior politicians and security forces.

- 5) The current system can be burdensome and costly to local authorities, especially since the Freedom of Information Commissioners office continues to adopt an applicant/motive blind approach to every request despite judicial guidance note to the contrary. This has the effect of nullifying any use of the vexatious safeguards that were designed to prevent individuals abusing system by submitting unlimited requests and multiple appeals available at no cost to individual.

Vexatious complainants can and do exploit the FOI system and multiple appeals processes which detracts from its effectiveness. It is also costly to public purse.

Most public bodies already supply a wealth of information about their services, standards and own complaints procedures. FOI requests should therefore be in addition to these primary sources of information/processes.

Both Public Service Ombudsman Office and Audit Office seem to be able to screen out some issues/complainants effectively at an early stage but this does not seem to happen with FOI.

- 6) The application of FOI legislation at Town/Community/Parish Council level can result in a disproportionate amount of time and money spent on FOI requests. The sector is largely under resourced in terms of human resources and finance and the 18 hour or £450 limit per request is often more than Clerk's working week and wages in this sector. Originally the difficulty of small town/community councils was recognised by FOI who produced a specific model code for use by the sector.

Unfortunately the model code has not been recognised by operational front line FOI staff who seem unaware of the sectors particular circumstances. Any attempt to use the model code to limit FOI burden of vexatious request and appeals has been met with 'model code is guidance only and should be used when responding to FOI requests'

By removing the FOI applicant/motive blind approach it will enable easier use of legislation surrounding vexatious complainants. If the concept of proportionality and impact upon resources relevant to size and scale of public organisation this would also help to ease burden on smaller authorities.

Nigel Acott FCIS

29.11.15

Public Interest Investigations/Spinwatch

Consultation on Freedom of Information Act Submission 20 November 2015

- **Introduction**

Public Interest Investigations/Spinwatch undertakes investigations into social, political, environmental and health issues in the UK and Europe. Our core concern is in promoting equality and protecting fundamental human and democratic rights. Since 2008, Spinwatch has led the campaign for a statutory register of lobbyists in the UK.

Spinwatch strongly supports and has frequently used the Freedom of Information Act to uncover lobbying of the UK government by corporate interests.

There is a solid public interest case in exposing such lobbying to public scrutiny.

While lobbying can undoubtedly enhance public policy-making, it can also subvert decision-making, a case that has been made by many. The OECD, for example, states that 'lobbying can lead to undue influence, unfair competition and regulatory capture to the detriment of the public interest and effective public policies'.²⁵⁹

Commercial lobbying is also a matter of significant public concern. A 2011 survey found that nearly two thirds of the public – a striking number – believed that the UK Government is 'entirely' or 'to a large extent' run by a few big entities in their own interests.¹ This woefully low trust in government is damaging to the country as a whole, not just the government in power.

David Cameron acknowledged as much in a 2010 pre-election speech:

'I believe that secret corporate lobbying, like the expenses scandal, goes to the heart of why people are so fed up with politics. It arouses people's worst fears and suspicions about how our political system works, with money buying power, power fishing for money and a cosy club at the top making decisions in their own interest.'

The Prime Minister is right to draw attention to the covert nature of lobbying and how it is this secrecy, as much as anything else, which causes public unease and mistrust. Were the interactions of lobbyists and government to be routinely open to public scrutiny, we would see a professional industry at work, a picture that would be much more mundane than is popularly imagined.

The Coalition government did introduce the UK's first statutory register of lobbyists in early 2015, to 'shine the light of transparency on lobbying'. However, it has been widely criticised for its very narrow scope and does little to 'force our politics to come clean about who is buying power and influence,' as the Prime Minister promised.

In the absence of effective transparency regulations, therefore, the Freedom of Information Act is an essential tool in exposing the contacts between lobbyists and the government, enhancing public understanding of how government operates, and improving government accountability.

Below are examples of information released under the FOI Act. We strongly believe that they have brought to light important facts; helped to open up much needed debate on government policy, including potential undue influence on that policy and brought some much needed transparency to lobbying in the UK. It is but a small and illustrative snapshot, but we could provide the Commission with more information and evidence if needed.

- **Lobbying by private healthcare interests.**

In 2010-11, against a backdrop of evident professional and public concern about the government's reform programme, we submitted a series of requests to health bodies, including the Department of

²⁵⁹ OECD, 'Principles for Transparency and Integrity in Lobbying', 2013:
<http://www.oecd.org/gov/ethics/oecdprinciplesfortransparencyandintegrityinlobbying.htm>

Health, Monitor, and NHS London, to try and establish the extent of the interactions between certain private healthcare interests and the government.

This resulted in a series of discoveries that were subsequently covered in the mainstream press.

- **Private sector takeover of NHS hospitals**

Internal emails released under FOI by the Department of Health showed that the government was in early talks with private companies over the takeover of NHS hospitals.

The Guardian reported the story on the eve of the final Commons vote on the Health & Social Care Bill, as ‘the first tangible evidence that foreign multinationals will be able to run state-owned acute services, a market worth £8bn’.²⁶⁰

Documents from a number of freedom of information requests showed that meetings focused on ‘potential opportunities in London’ had been held between officials from the Department, the NHS, the management consultant McKinsey and one of the largest German private hospital chains, Helios. Internal emails between the Department and McKinsey also revealed what ‘international hospital provider groups’ considered as a minimum for running NHS hospitals.

On 9 November 2011, a McKinsey executive wrote to senior health official Ian Dalton, saying: ‘We had good discussions... on how international hospital provider groups may help to tackle the performance improvement of English hospitals.’ ‘They would be ready to step in if there were £500million revenue on the table, can keep real estate and pensions with NHS, needs free hand on staff management.’

‘This may now be a time when both sides [the NHS and foreign firms] may usefully explore their position as an input into how policy would be shaped,’ the email continues, which reveals something of the extent to which commercial interests can influence government policy.

Read in full: [German company involved in talks to take over NHS hospitals.](#)

- **Inside track to policymakers**

Further documents released under FOI law showed that a small, select group of companies that were jockeying to win an estimated £1bn of contracts in the new ‘commissioning support market’, had been granted regular access to senior health officials responsible for overseeing the creation of that market.

A series of emails showed that members of the Commissioning Support Industry Group, as it was known, ‘routinely’ held discussions with senior NHS officials, including Bob Ricketts, director of commissioning support services and market development at NHS England. Topics discussed included ‘access to specialist and niche providers’ and ‘market rules’.

Members of the group included: Capita, KPMG, EY, PWC, McKinsey and the US health insurer UnitedHealth.

Emails between UnitedHealth and NHS England managers also showed that UnitedHealth paid for an annual trip to the US for ‘senior-level executives from across the UK health system’ to find out how the company operates in the US and to ‘explore their applicability in the UK’.

Read in full: [Calls for greater disclosure on NHS chiefs' meetings with private US health insurer](#)

- **The debate over fracking**

In the current debate on fracking, the privileged access of the unconventional shale gas industry to Ministers has prompted much unease, particularly among potentially affected communities. Documents released under FOI revealed that Cuadrilla’s chairman in 2013, Lord Browne, met the then

²⁶⁰ Transparency International survey 2011: <http://www.transparency.org.uk/rss/12-blog/1210-is-there-a-problem-with-lobbying/1210-is-there-a-problem-with-lobbying>

Environment Agency's chair, Lord Chris Smith, at least three times to dispute whether regulations covering drilling waste should be applied to the company's operations.

The documents also revealed discrepancies within Government Departments over redacting. Smith offered Cuadrilla "a shortened two-week consultation process prior to determining permits", rather than the usual four weeks. The EA redacted this section when it released the meeting minutes under FoI rules, but DEFRA did not redact it in responding to a separate FoI request.

Read in Full: [Owen Paterson held urgent meeting for fracking boss, documents show](#)

Critical questions over the health impacts of fracking and whether the regulatory regime is adequate to protect health are also extremely pressing. Emails released under Freedom of Information revealed that one Conservative district councilor in Lancashire wrote to the local Tory MP for Fylde, Mark Menzies, about the Health and Safety Executive's lack of inspections to ensure the "integrity" of fracked wells. "If it wasn't so serious it would be laughable", Goodrich concluded. "The attitude of HSE is intolerable. They should be visiting the wells to check on well integrity." Menzies replied saying "this is, of course, very disappointing".

Read in full: [Lancashire County Council poised to approve two controversial shale gas sites, despite objections](#)

- **Human rights**

There are long-standing concerns about human rights of opposition activists, trade unionists and journalists in Azerbaijan. The British Government was under pressure to speak out more on human rights in the country, especially in relation to the Baku 2015 Games. However documents released under FOI reveal that the Prime Minister's trade envoy to the country offered to improve Azeri medal-winning chances and lobbied for Britain to send a "VVIP" (very, very important person) or a member of the Royal Family to represent the UK at the Games.

Read in Full: [Baku European Games 2015: British trade envoy offered to boost Azerbaijan's medal prospects](#)

- **Nuclear safety**

Documents released under the Freedom of Information Act have also raised concerns about the safety of the UK's nuclear plants and radioactive material. Police officers with the elite force that guards Britain's nuclear power stations – the Civil Nuclear Constabulary - have been caught drunk, using drugs, misusing firearms and also accused of sexual harassment and assault.

For More: [Safety fears over elite police officers drunk on duty at UK's nuclear sites](#)

Other documents released under FOI revealed that staff at Britain's most important nuclear site, Sellafield, did "not have the level of capability required to respond to nuclear emergencies effectively". The Office for Nuclear Regulation (ONR), an arm of the Health and Safety Executive (HSE), said errors by senior fire officers in a preparedness exercise at Sellafield "could have led to delays in responding to the nuclear emergency and a prolonged release of radioactive material off-site".

For more: [Nuclear safety watchdog criticises Sellafield's emergency readiness](#)

- **Specific Questions**

Question 1: What protection should there be for information relating to the internal deliberations of public bodies? For how long after a decision does such information remain sensitive? Should different protections apply to different kinds of information that are currently protected by sections 35 and 36?

We believe that the protection given over internal deliberations is totally sufficient. The Government already routinely uses Section 35 and 36 as well as Regulation 12(4)(e) EIR which is an exemption on internal communications to protect internal deliberations. Indeed, in recent years we have noticed a

steady increase in the use of these exemptions across all government departments. Any further strengthening would severely undermine the ability of external organisations to monitor the activities of the Government.

A quick and not exhaustive sample of the exemptions used by different government departments. Again we could provide a longer list if required. On some of these occasions we have had to resort to taking the case to the ICO to be resolved:

- **Cabinet Office** reply, dated 20 October 2011, concerning Minister Mark Harper meeting external lobbyists (FOI 315499);
- **Home Office** reply, dated 23 April 2013, concerning correspondence and meetings between Teresa May (and / or her special advisor on alcohol) and Diageo; Scottish Whiskey Association; Wine and Spirits Trade Association; Concerning the minimum price of alcohol and UK's Alcohol Strategy since 1 May 2010;
- **Treasury** reply, dated 25 September 2012, ref 12/880, concerning information on Ministerial meetings meetings with numerous different companies;
- **Culture Media and Sport** reply, dated 24 May 2012, asking for meetings and correspondence between Jeremy Hunt and representatives of News international, in particular Fred Michel. (Ref CMS 205395)
- **DECC** reply, dated 20 August 2012, to request for information relating to meetings and correspondence between EDF and Ministers and senior civil servants concerning Electricity Market Reforms since 1 January 2011 (Ref no. 12/0692)
- **HM Treasury** reply, dated 4 August 2015, regarding request for correspondence with petrochemical giant INEOS, and shale gas explorers Cuadrilla, Third Energy and various government departments (PHE, DECC, Environment Agency, Office of Unconventional Oil and Gas) between January and June 2015. (Ref :FOI201514129)
- **FCO** reply, dated 10 December 2014, concerning request for details of all correspondence and meetings between Peter Bateman / Irfan Siddiq, in their role as British Ambassador to Azerbaijan, and / or the First Secretary (Political) at the Embassy in Baku Charles Hendry, acting as the Prime Minister's official Trade Envoy to Azerbaijan from 1st November 2012: The Azerbaijani Ambassador to the UK, Fakhraddin Gurbanov or Tahir Taghizadeh; Tale Heydarov and / or Lionel Zetter, from the European Azerbaijan Society; Senior Executives at the National Olympic Committee of Azerbaijan and or executives from the Baku 2015 European Games Operation Committee (BEGOC); Concerning: the preparations for Baku 2015, including any British assistance; human rights in Azerbaijan, including arrest and detention of democracy activists, journalists as well as the ongoing conflict in Nagorno-Karabakh; Concerns about corporate or political corruption in Azerbaijan. (Ref: number 1031-14)

Question 2: What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?

Spinwatch believes that Cabinet discussions should have the same protection as other government deliberations.

The Open Government Network, of which we are a member, further elaborates on this question in its submission, which we have co-signed.²⁶¹

Question 3: What protection should there be for information which involves candid assessment of risks? For how long does such information remain sensitive?

There are already adequate procedures in place to mitigate any risks for releasing information. See also the Open Government Network submission.

²⁶¹ OGN Submission to FOI Commission, 20 November 2015

Question 4: Should the executive have a veto (subject to judicial review) over the release of information? If so, how should this operate and what safeguards are required? If not, what implications does this have for the rest of the Act, and how could government protect sensitive information from disclosure instead?

We believe the current system is adequate. See the Open Government Network submission for further details.

Question 5: What is the appropriate enforcement and appeal system for freedom of information requests?

We believe the current enforcement and appeal system is adequate.

Question 6: Is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know? Or are controls needed to reduce the burden of FOI on public authorities? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kinds of requests do impose a disproportionate burden?

We would argue that the administrative 'burden' that the FOIA 'imposes' on public authorities should be viewed as part and parcel of ensuring an accountable and transparent democracy. The total cost - as cited in the IPSOS-Mori research for the Ministry of Justice - to central government bodies of processing such requests was around £8.5 million in 2012; a fraction of overall government spending (0.0015%) and substantially less than its £150.7 million press and marketing budget last year. Indeed the FOIA has played an essential role in helping expose waste and maladministration – a process that can ultimately lead to greater savings and efficiencies in itself.

Charging citizens to use the Freedom of Information Act is in effect a 'tax on transparency'. We believe that the introduction of any kind of fee for FOI requests or tribunal appeals would act as a serious deterrent to legitimate public enquiry and scrutiny of a vast range of issues that impact on citizens' daily lives. Ireland's drastic drop in FOIs requests to just 25 per cent of its level after fees were introduced is a cautionary lesson.

It also creates a system of unfair advantage/privilege for those with the means to pay – big media companies for example against the many freelance journalists and smaller campaigning and research organisations working on investigations in the public interest. Not to mention ordinary individuals who comprise the largest percentage of requesters.

Independent freelance journalism would also be severely curtailed as freelancers would not be able to afford large payments for fees, especially when you realise that some Sunday newspapers pay in the region of £150 for a story, which may take months to research via FOI already. The ability to make multiple requests, often necessary to build a bigger picture or comparative research, would be critically curtailed. Whilst the Government might welcome the curtailing of freelance journalism, the Commission should not.

Styming the public's right to know how our institutions are run by introducing fees or lowering the cost threshold will only fuel further suspicion about what taxpayer-funded officials are trying to hide, and what deals are being done behind closed doors. As the former cabinet secretary Jeremy Heywood has recently said: 'in this day and age the public doesn't stand for secrecy'.

Pulse magazine

Question 1: What protection should there be for information relating to the internal deliberations of public bodies? For how long after a decision does such information remain sensitive? Should different protections apply to different kinds of information that are currently protected by sections 35 and 36?

We believe the status quo should remain. We believe that governments tend to withhold information whenever they can, but the Information Commissioner and the public interest tests provide at least a useful fallback for the media and citizens to get information that should be in the public domain.

Question 2: What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?

Again, we believe the status quo should remain. We do believe that the Information Commission tends to favour the withholding of Cabinet discussions too often, but it is important that there is an independent arbiter to release information that it is in the public interest. We would not favour strengthening the exemptions against releasing information.

Question 3: What protection should there be for information which involves candid assessment of risks? For how long does such information remain sensitive?

Risk registers must be subject to the Freedom of Information Act. It is the public's right to know what the risks are of implementing major government policy.

It is the Government's duty to produce 'frank' assessments of all the potential risks of any changes, and it would be poor government if officials produce 'anodyne' registers due to the fear that they can be made public.

Question 4: Should the executive have a veto (subject to judicial review) over the release of information? If so, how should this operate and what safeguards are required? If not, what implications does this have for the rest of the Act, and how could government protect sensitive information from disclosure instead?

We believe that a Cabinet veto undermines the point of the FOI Act, and the Supreme Court judgement was an important one. We understand that there needs to be safeguards for information that jeopardises the security of the country.

Question 5: What is the appropriate enforcement and appeal system for freedom of information requests?

No comments

Question 6: Is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know? Or are controls needed to reduce the burden of FOI on public authorities? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kinds of requests do impose a disproportionate burden?

We strongly believe that the burden on public authorities is far outweighed by the public's right to know and that the current safeguards around costs are more than adequate.

Any kind of charge would be an assault on the media and the public's ability to scrutinise public bodies.

We strongly believe that charges for FOI requests would be a significant blow to genuine public interest journalism.

We carry out numerous wide-ranging FOI requests that have scrutinised public bodies in the public interest.

This year, we revealed that GPs were being offered incentives to reduce the number of urgent cancer referrals they made.

We only found this out through FOI requests to the 210 clinical commissioning groups (CCGs) – such information was not available in public documents. It yielded 12 examples of such incentive schemes – schemes we would have missed were it not for free FOI requests²⁶².

Similarly, we revealed that CCGs had reduced the funding given to child mental health services. FOIs to all CCGs were the only way to build up a national picture that revealed there was a trend of funding being cut.²⁶³

We also showed that the state was spending more money of putting services out to competition.²⁶⁴

If there was a charge of even £10, such investigations would be impossible for a small media outlet like us.

Such investigations would be the domain of businesses, lobby groups and large media organisations.

Businesses and lobby groups would be more likely to carry out mass FOI requests in their narrow interests while large media organisations – in order to be value for money - are more likely to involve stories that were interesting to the public, as opposed to in the public interest.

Furthermore, it will be easier for public bodies to limit the information they make public, knowing that the public and media organisations will be less likely to make FOI requests due to charges.

The latest costs of FOIs listed in your document were £36.7m. This seems a small price to pay to allow public bodies to be properly scrutinised, especially compared with the communications budgets of public bodies.

²⁶² <http://www.pulsetoday.co.uk/news/commissioning/commissioning-topics/referrals/gp-practices-offered-payments-to-cut-urgent-cancer-referrals/20030100.fullarticle>

²⁶³ <http://www.pulsetoday.co.uk/clinical/mental-health/investigation-child-mental-health-cuts-to-put-pressure-on-gps/20006500.article>

²⁶⁴ <http://www.pulsetoday.co.uk/news/commissioning-news/majority-of-new-contracts-have-been-put-out-to-competition-since-april-by-ccgs/20004426.fullarticle>