

FREEDOM OF INFORMATION (EXTENSION) BILL

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Freedom of Information (Extension) Bill as introduced in the House of Commons on 19 July 2017 (Bill 23).

- These Explanatory Notes have been prepared by the Public Bill Office on behalf of Andy Slaughter MP in order to assist the reader of the bill. They do not form part of the bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill.
- The “English Votes for English Laws” (EVEL) provisions of the Standing Orders of the House of Commons related to public business do not apply to Private Members’ Bills. Therefore, these notes do not discuss the application of those Standing Orders.

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Overview of the Bill

- 1 The Bill seeks to amend the Freedom of Information Act 2000 so that the provisions of that Act (“the 2000 Act”) apply to social housing providers, local safeguarding children boards, Electoral Registration Officers and Returning Officers.
- 2 The Bill also seeks to amend the 2000 Act so that information held by contractors acting for or on behalf of public authorities will, where that information is held in connection with the performance or proposed performance of the contract, be deemed to be held on behalf of the public authority for the purposes of the 2000 Act or the Environmental Information Regulations 2004. The Bill will also extend the powers of entry and inspection to contractors holding information on behalf of public authorities. It also amends the provisions relating to the offence of destroying or altering requested information in order to prevent its disclosure.
- 3 The Bill’s long title as introduced included a reference to including the Housing Ombudsman as a public authority for the purposes of the 2000 Act. However, in the time since the introduction of the Bill and its publication, the Housing Ombudsman has been included in Schedule 1 to the 2000 Act by the Freedom of Information (Additional Public Authorities) Order 2018. The Bill text does not therefore refer to the Housing Ombudsman.

Policy background

Extension of the Freedom of Information Act to certain persons

- 4 The Freedom of Information Act 2000 confers a general right of access to information held by public authorities. Section 3 of the 2000 Act defines a public authority as a person listed in Schedule 1 to the 2000 Act, a person designated by order under section 5 of the 2000 Act, or a publicly-owned company defined in section 6 of the 2000 Act.
- 5 While the list of public authorities in Schedule 1 to the 2000 Act has been adjusted since it was passed, the 2000 Act does not currently list electoral registration officers, returning officers, acting returning officers, providers of social housing or local safeguarding children boards as public authorities.
- 6 Returning Officers and Electoral Registration Officers, while usually local government officers, are not considered public authorities for the purposes of the 2000 Act. Even if information is held on their behalf by a public authority, this information is not subject to the 2000 Act. Guidance issued by the Information Commissioner’s Office (“Definition document for principal local Authorities”) states that “We recognise that the offices of the Returning Officer and of the Electoral Registration Officer are separate to the functions of local authorities. Information held by a local authority on behalf of these two officers is not currently covered by the [the 2000 Act]”. This guidance was confirmed in decisions of the Information Commissioner, for example in a decision notice issued by the Information Commissioner’s Office in respect of Luton Borough Council on 19 November 2015, which stated that “a Returning Officer is not a public authority subject to [the 2000 Act]. Therefore information produced/received by the Returning Officer is out of scope of [the 2000 Act]”.
- 7 The Bill therefore seeks to explicitly include returning officers, acting returning officers, and electoral registration officers as public authorities for the purpose of the 2000 Act.
- 8 Registered providers of social housing (principally housing associations) and local safeguarding children boards are also not subject to the 2000 Act. The Bill seeks to list both as persons considered public authorities for the purpose of the 2000 Act.

Contractors

- 9 Section 3(2) of the 2000 Act states that information “held by the public authority” also includes information “held by another person on behalf of an authority”. Therefore, information that a contractor holds on behalf of a public authority is also in scope of a FOIA request, even if the authority never physically holds it in its own hard copy or electronic files.
- 10 However, this does not include all information that may be held by the contractor in connection with the performance or proposed performance of a contract. Guidance by the Information Commissioner’s Office (“Outsourcing and freedom of information - guidance document”) gives examples of cases where information held by contractors in connection with the performance of a contract has been deemed not to be held on behalf of the public authority, and therefore the information was not subject to disclosure under the 2000 Act. The cases referred to in the ICO guidance have included the training and qualifications of public authority staff seconded to a contractor, the technical construction files for bus lane cameras, and information regarding the procurement, preparation and handling of turf and seed by a contractor to a public authority. In these cases, the information held by a contractor was not deemed to be accessible under the 2000 Act.
- 11 This Bill therefore seeks to provide certainty regarding the position of contractors and sub-contractors, by requiring all contracts between a public authority and a contractor to be deemed to include a provision that all information held by the contractor or sub-contractor in connection with the performance or proposed performance of the contract is deemed to be held on behalf of the public authority, and is therefore in scope of the 2000 Act as per section 3(2).

Territorial extent and application

- 12 The Freedom of Information Act 2000 extends to the whole of the United Kingdom. As all of the provisions of this Bill seek to amend the 2000 Act, this Bill also extends to the whole of the United Kingdom.

Commentary on provisions of Bill

Clause 1 and Schedule: Extension of the Freedom of Information Act 2000 to certain persons

- 13 Clause 1 and the Schedule would amend Schedule 1 to the 2000 Act to include the persons listed in the Schedule to the Bill as “public authorities” for the purposes of the 2000 Act.

Clause 2: Application of the Freedom of Information Act 2000 to contractors

- 14 Clause 2 provides that information held by a contractor or sub-contractor about the performance or proposed performance of a public service contract is deemed to be held on the authority's behalf. It would then automatically be available to an FOI requester via a request to the authority unless an FOI exemption applied. Environmental information held by contractors would similarly be available under the Environmental Information Regulations.

Clause 3: Contractors: powers of entry and inspection

- 15 Clause 3 would extend some of the Information Commissioner’s powers to contractors and subcontractors. When the Commissioner investigates a complaint from a requester she can obtain the disputed information from a public authority by issuing an Information Notice under section 51 of FOIA. The clause would allow her to obtain information from a contractor

or subcontractor in the same way. The Commissioner can also apply for a search warrant to enter an authority's premises in certain circumstances. This power would be extended to a contractor's or sub-contractor's premises.

Clause 4: Offence of altering etc. records with the intent to prevent disclosure

- 16 Clause 4 replaces the existing section 77 of the 2000 Act, in order to make a number of changes to the offence that occurs when a person alters, defaces, blocks, erases, destroys or conceals information with the intention of preventing disclosure of the information to which a person applying under the 2000 Act would have been entitled.
- 17 The principal change, in subsection (2) of the new section 77, is to apply section 77 to any person holding information on behalf of the public authority. A public authority (or one of its employees) which deliberately destroys or alters a record containing information which has been requested with the intention of preventing its disclosure currently commits an offence under section 77 of the FOIA. This clause would extend that offence to a contractor or sub-contractor or their staff.
- 18 Proceedings for the present offence must be brought within 6 months of the offence occurring (the effect of section 127(1) of the Magistrates Court Act 1980). Until recently the same restriction applied to equivalent offence under the Data Protection Act (concealing information sought in a subject access request). However, section 173 of the new Data Protection Act 2018 allows a prosecution for this offence to be brought within 6 months of the offence coming to the prosecutor's attention, subject to a 3 year maximum period. The Bill adopts this approach for the section 77 offence.

Commencement

- 19 Clause 6 states that the 2000 Act comes into force three months after the day on which it is passed.

Financial implications of the Bill

- 20 Additional costs may arise where there is an increase in applications to the Information Commissioner for decisions, and any subsequent enforcement action taken by the Commissioner. The provisions of this Bill may lead to the number of applications increasing due to a greater number of public authorities to which the 2000 Act applies.
- 21 The 'Investigative study to inform the FOIA (2000) post-legislative review – cost exercise' by IPSOS MORI for the Ministry of Justice, published in March 2012, estimated that the average cost for central government of handling a request for information was £184 in staff time, and for public authorities in the wider public sector they estimated the average to be £164. There is no obligation for public authorities to comply with vexatious requests or those that exceed the costs threshold determined by the Minister for the Cabinet Office or the Secretary of State.
- 22 It is probable that additional costs to local authorities would arise due to the inclusion of Returning Officers, Acting Returning Officers and Electoral Registration Officers as public authorities covered by the 2000 Act. Unless the costs of processing Freedom of Information requests were deemed to be an electoral expense, and included in the permitted expenses under an Order made under section 29(3), (3A) and (4C) of the Representation of the People Act 1983, these costs would be probably be borne by the local authority to which the officer is connected as part of that local authority's normal expenditure.
- 23 The application of the 2000 Act to contractors will be likely to lead to provisions involving the cost of handling those requests being included in any contracts drawn up between the contractor and public authorities. It is difficult to estimate what the total public cost of these provisions would be as it would depend on the provisions of any contracts between public authorities and contractors. It is likely that some amount of the costs for handling requests would be borne by the public authority.
- 24 Based on the above cost implications, a money resolution will be required for this Bill. Clause 5 of the Bill contains financial provisions that are necessary due to the cost implications of the Bill.

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