House of Commons

Constitutional Affairs Committee

Freedom of Information: Government's proposals for reform

Fourth Report of Session 2006–07

HC 415

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Report, together with formal minutes, oral and written evidence

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The Constitutional Affairs Committee

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Committee staff

The current staff of the Committee are Roger Phillips (Clerk), Dr Rebecca Davies (Second Clerk), Kate Akester (Adviser (Sentencing Guidelines)), Judy Wilson (Inquiry Manager), Maïk Martin (Committee Legal Specialist), Ian Thomson (Committee Assistant), Jane Trew (Committee Assistant - EDRM), Chryssa Poupard (Secretary), Henry Ayi-Hyde (Senior Office Clerk) and Jessica Bridges-Palmer (Committee Media Officer).

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1 Introduction

Background

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

2. Last year, we held an inquiry to examine the first year's experience of FOI and our Report, *Freedom of Information — one year on* was published in June 2006.[2] In that Report we concluded that the Act had already brought about significant and new releases of information and that this information was being used in a constructive and positive way by a range of different individuals and organisations.[3]

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

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

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

3 HC (2005-06) 991, para 109

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

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

6 HC (2005-06) 991, Q217

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

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

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

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

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

The charging regime

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

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

9 HC (2005-06) 991, para 104

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

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

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

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

i. Including reading time, consideration and consultation time in the calculation of time spent towards the appropriate limit;

ii. Aggregating non-similar requests made by any person or persons apparently acting together;

iii. Reducing the appropriate limit thresholds from £600/£450;

iv. Introducing a flat rate fee for all requests.

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

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

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

2 Proposed changes to the FOI charging regime

Proposed regime

Reading, consultation and consideration time

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

Aggregation

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

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

The Government's case for change

The review of the charging regime

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

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

14 DCA first consultation paper, para 39

15 Ibid