## Justice Committee

Post-legislative scrutiny of the Freedom of Information Act 2000

Written evidence received

<table>
<thead>
<tr>
<th>Number</th>
<th>From</th>
</tr>
</thead>
<tbody>
<tr>
<td>FOI 02</td>
<td>Sophie Barnes</td>
</tr>
<tr>
<td>FOI 03</td>
<td>Neil Craig</td>
</tr>
<tr>
<td>FOI 04</td>
<td>Debbie Pugh-Jones</td>
</tr>
<tr>
<td>FOI 05</td>
<td>David Holland</td>
</tr>
<tr>
<td>FOI 06</td>
<td>David Smith</td>
</tr>
<tr>
<td>FOI 07</td>
<td>Adrian Kerton</td>
</tr>
<tr>
<td>FOI 08</td>
<td>Newcastle University</td>
</tr>
<tr>
<td>FOI 09</td>
<td>Dr Julia Hines</td>
</tr>
<tr>
<td>FOI 10</td>
<td>Lord Lucas</td>
</tr>
<tr>
<td>FOI 11</td>
<td>Dr Rodger Patrick</td>
</tr>
<tr>
<td>FOI 12</td>
<td>ACPO</td>
</tr>
<tr>
<td>FOI 13</td>
<td>Nottingham University</td>
</tr>
<tr>
<td>FOI 14</td>
<td>Alistair Sloan</td>
</tr>
<tr>
<td>FOI 15</td>
<td>Trevor Craig</td>
</tr>
<tr>
<td>FOI 16</td>
<td>Robert Wyllie</td>
</tr>
<tr>
<td>FOI 17</td>
<td>University of Bath</td>
</tr>
<tr>
<td>FOI 18</td>
<td>Nuclear Information Service</td>
</tr>
<tr>
<td>FOI 19</td>
<td>Durham University</td>
</tr>
<tr>
<td>FOI 20</td>
<td>John Campbell</td>
</tr>
<tr>
<td>FOI 21</td>
<td>Peter Silverman</td>
</tr>
<tr>
<td>FOI 22</td>
<td>Understanding Animal Research</td>
</tr>
<tr>
<td>FOI 23</td>
<td>Paul Gibbons</td>
</tr>
<tr>
<td>FOI 24</td>
<td>Lancashire Care NHS Foundation Trust</td>
</tr>
<tr>
<td>FOI 25</td>
<td>Ron Aroskin</td>
</tr>
<tr>
<td>FOI 26</td>
<td>Colin Peek</td>
</tr>
<tr>
<td>FOI 28</td>
<td>Birmingham City Council</td>
</tr>
<tr>
<td>FOI 29</td>
<td>NHS Business Services Authority</td>
</tr>
<tr>
<td>FOI 30</td>
<td>University of London</td>
</tr>
<tr>
<td>FOI 31</td>
<td>University of Salford</td>
</tr>
<tr>
<td>FOI 32</td>
<td>London Evening Standard</td>
</tr>
<tr>
<td>FOI 33</td>
<td>The Sunday Telegraph</td>
</tr>
<tr>
<td>FOI 34</td>
<td>Portsmouth Hospitals NHS Trust</td>
</tr>
<tr>
<td>FOI 35</td>
<td>The Russell Group</td>
</tr>
<tr>
<td>FOI 36</td>
<td>University of Bedfordshire</td>
</tr>
<tr>
<td>FOI 37</td>
<td>Derek Dishman</td>
</tr>
<tr>
<td>FOI 38</td>
<td>Audit Commission</td>
</tr>
<tr>
<td>FOI 39</td>
<td>NHS South of England</td>
</tr>
<tr>
<td>FOI 40</td>
<td>Foundation Trust Network</td>
</tr>
<tr>
<td>FOI 41</td>
<td>University of Westminster</td>
</tr>
<tr>
<td>FOI 42</td>
<td>University of Oxford</td>
</tr>
<tr>
<td>FOI 43</td>
<td>Newsquest Worcester</td>
</tr>
<tr>
<td>FOI 44</td>
<td>NAT</td>
</tr>
<tr>
<td>FOI 45</td>
<td>Financial Times</td>
</tr>
<tr>
<td>FOI 46</td>
<td>Rotherham Primary Care Trust</td>
</tr>
<tr>
<td>FOI 47</td>
<td>Republic</td>
</tr>
<tr>
<td>FOI 48</td>
<td>Herald &amp; Times Group Scotland</td>
</tr>
<tr>
<td>FOI 49</td>
<td>Northumbria University</td>
</tr>
<tr>
<td>FOI 50</td>
<td>University of Surrey</td>
</tr>
<tr>
<td>FOI 51</td>
<td>1994 Group</td>
</tr>
<tr>
<td>FOI 52</td>
<td>King's College London</td>
</tr>
<tr>
<td>FOI 53</td>
<td>British Union for the Abolition of Vivisection</td>
</tr>
<tr>
<td>FOI 54</td>
<td>West Midlands Police Constabulary</td>
</tr>
<tr>
<td>FOI 55</td>
<td>BBC</td>
</tr>
<tr>
<td>FOI 56</td>
<td>Peter Sharpe, Tender Management Consultancy Ltd</td>
</tr>
<tr>
<td>FOI 57</td>
<td>Teesside University</td>
</tr>
<tr>
<td>FOI 58</td>
<td>Local Public Data Panel</td>
</tr>
<tr>
<td>FOI 59</td>
<td>David Higgerson</td>
</tr>
<tr>
<td>FOI 60</td>
<td>Frimley Park Hospital NHS Foundation Trust</td>
</tr>
<tr>
<td>FOI 61</td>
<td>University of Sussex</td>
</tr>
<tr>
<td>FOI 62</td>
<td>Damian Holmes, Bradford Telegraph &amp; Argus</td>
</tr>
<tr>
<td>FOI 63</td>
<td>University of Manchester</td>
</tr>
<tr>
<td>FOI 64</td>
<td>Kent County Council</td>
</tr>
<tr>
<td>FOI 65</td>
<td>University of Bristol</td>
</tr>
<tr>
<td>FOI 66</td>
<td>University of Lincoln</td>
</tr>
<tr>
<td>FOI 67</td>
<td>Universities UK</td>
</tr>
<tr>
<td>FOI 68</td>
<td>Prison Reform Trust</td>
</tr>
<tr>
<td>FOI 69</td>
<td>NHS North Lincolnshire</td>
</tr>
<tr>
<td>FOI 70</td>
<td>Constitution Unit</td>
</tr>
<tr>
<td>FOI 71</td>
<td>University of Leicester</td>
</tr>
<tr>
<td>FOI 72</td>
<td>Kent Messenger Group</td>
</tr>
<tr>
<td>FOI 73</td>
<td>NHS Bassetlaw</td>
</tr>
<tr>
<td>FOI 74</td>
<td>Northern Ireland Civil Service Departments</td>
</tr>
<tr>
<td>FOI 75</td>
<td>Telegraph Media Group</td>
</tr>
<tr>
<td>FOI 76</td>
<td>Packet Newspapers</td>
</tr>
<tr>
<td>FOI 77</td>
<td>University of the Arts London</td>
</tr>
<tr>
<td>FOI 78</td>
<td>Royal Liverpool and Broadgreen NHS Trust</td>
</tr>
<tr>
<td>FOI 79</td>
<td>Campaign Against Arms Trade</td>
</tr>
<tr>
<td>FOI 80</td>
<td>Cranfield University</td>
</tr>
<tr>
<td>FOI 81</td>
<td>Whatdotheyknow</td>
</tr>
<tr>
<td>--------</td>
<td>-----------------</td>
</tr>
<tr>
<td>FOI 82</td>
<td>Liverpool Heart and Chest Hospital NHS FT</td>
</tr>
<tr>
<td>FOI 83</td>
<td>University of Reading</td>
</tr>
<tr>
<td>FOI 84</td>
<td>Information Commissioner</td>
</tr>
<tr>
<td>FOI 85</td>
<td>University of Cambridge Colleges</td>
</tr>
<tr>
<td>FOI 86</td>
<td>Index on Censorship</td>
</tr>
<tr>
<td>FOI 87</td>
<td>Newspaper Society</td>
</tr>
<tr>
<td>FOI 88</td>
<td>Liberty</td>
</tr>
<tr>
<td>FOI 89</td>
<td>Newsquest Somerset</td>
</tr>
<tr>
<td>FOI 90</td>
<td>Request Initiative</td>
</tr>
<tr>
<td>FOI 91</td>
<td>Leeds City Council</td>
</tr>
<tr>
<td>FOI 92</td>
<td>Society of Editors</td>
</tr>
<tr>
<td>FOI 93</td>
<td>The Press Newspaper, York</td>
</tr>
<tr>
<td>FOI 94</td>
<td>GM Freeze</td>
</tr>
<tr>
<td>FOI 95</td>
<td>Centre for Public Scrutiny</td>
</tr>
<tr>
<td>FOI 96</td>
<td>Ofcom</td>
</tr>
<tr>
<td>FOI 97</td>
<td>University of Sheffield</td>
</tr>
<tr>
<td>FOI 98</td>
<td>Andrew Watson</td>
</tr>
<tr>
<td>FOI 99</td>
<td>Andrew Montford</td>
</tr>
<tr>
<td>FOI 100</td>
<td>Gary Shipsey</td>
</tr>
<tr>
<td>FOI 101</td>
<td>Oxford Health NHS Foundation Trust</td>
</tr>
<tr>
<td>FOI 102</td>
<td>Richard Taylor</td>
</tr>
<tr>
<td>FOI 103</td>
<td>Greg Muttitt</td>
</tr>
<tr>
<td>FOI 104</td>
<td>Ganesh Sittampalam</td>
</tr>
<tr>
<td>FOI 105</td>
<td>John Cross</td>
</tr>
<tr>
<td>FOI 106</td>
<td>Helen Cross</td>
</tr>
<tr>
<td>FOI 107</td>
<td>Tom Boyd</td>
</tr>
<tr>
<td>FOI 108</td>
<td>Chaminda Jayanetti</td>
</tr>
<tr>
<td>FOI 109</td>
<td>Chris Boocock</td>
</tr>
<tr>
<td>FOI 111</td>
<td>Equanomics-UK</td>
</tr>
<tr>
<td>FOI 112</td>
<td>Wellcome Trust</td>
</tr>
<tr>
<td>FOI 113</td>
<td>University of Essex</td>
</tr>
</tbody>
</table>
As a journalism student I regularly submit FOIs to local authorities and government-run bodies. These have included the Ministry of Justice, the London Probation Trust, Hammersmith and Fulham Council and Hackney Council.

My experience is characterised by substantial delays. My first FOI request to Hammersmith and Fulham Council was only dealt with 30 working days after I had submitted the request, and only after I had twice written to the Council to ascertain why there was a delay in receiving the information.

Every other request I have submitted has taken 20 working days minimum to arrive with me, and often does not fully answer the questions I have submitted. There have also been a number of occasions where I have been told that the information I have requested is exempt from public disclosure. I feel that the statutes of law that are cited as reason for exemption are sometimes vague and can be used as an excuse not to reveal certain pieces of information that may not paint certain authorities in a good light.

I think that, in principle, the Freedom of Information Act 2000 is a welcome development to improving transparency in our democratic society. But in practice the process is inefficient, secretive and ultimately frustrates the democratic process more than aiding it.

December 2011
Written evidence from Neil Craig

I understand an investigation into how FoI's work is being made. Below is a blog article I did on some particular problems I have had with the Cabinet Office, the Scottish Environment protection Agency, Glasgow Corporation. The most serious problem I have found is that certain bodies claim never to have received a query. This is exacerbated by the fact that it is almost alway us the case, in the simplest as well as the most complex questions, that officials treat the maximum time limit allowed (20 working days ie 28 full days + holidays - call it a month) is invariably treated as the minimum.

This is particularly difficult if they claim not to have received the query & I suggest that officials shouls be asked to acknowledge such receipt immediately and automatically.

I would also like to repeat this from the blog

Perhaps if the law is to be so continuously defied it is time for the ombudsman to bring an actual prosecution. Certainly any civil servant in any way involved in breaking the law to deny us our rights should be instantly fired, as indeed should any superior who refuses to fire them.


Freedom of Information Enquiries - Glasgow Council, SEPA, BBC and the Coalition Break the Law

The law says that any member of the public can ask a public body for information and they have a legal duty to provide it, except in unusual situations like national security or material commercially sensitive to independent companies. This has to be done in 20 working days ) ie 28 days and no matter how simple actual answers never take less.Unfortunately it is becoming ever more common to simply ignore them and say the email got lost in the post.

Back in August I asked Glasgow Council whether they had, before cancelling the Hogmanay celebrations because they were turning a massive loss on it with ticket prices of £19, whether they had offered to franchise it out to any commercial firm who might find £19 a head in an open air venue something they could profitably do?

In due course the Council wrote back saying they knew nothing about this because they were in no way involved and it is all the responsibility of Glasgow Leisure, which looks exactly like the council Museums and Parks Dept. When the council leader spoke to the BBC on the matter, taking credit for thus saving public money he seemed unaware that he was uninvolved.

I did contact Glasgow Leisure and have now reminded them that nearly 2 months later, they have not replied.

Another FoI was to the BBC asking them how often the BBC allowed politicians to speak on air compared to their proven electoral support. In particular on "Brian's Big Debate" and "Question Time". Have they, for example, had BNP representatives on twice as often as Green ones since the former get twice the vote of the latter.

The BBC refused to answer on the grounds that there is an "artistic" get out clause in the Act and the impartiality of political reporting is an artistic matter. In fact we all know the answer - the BBC have Greens on almost constantly and are given so much obsequious support that they clearly believe they are entitled to it.

"I began, good naturally, by observing that the climate didn’t seem to be playing ball at the moment, and that we were having a particularly cold winter while carbon emissions were powering ahead.

Miss Lucas reacted as if I’d physically molested her. She was outraged. It was no job of the BBC — the BBC! — to ask questions like that. Didn’t I realise that there could be no argument over the science?"

In fact we all know perfectly well the answer to the questions the BBC refused to answer - the BNP has been on QT once and Brian never, UKIP do slightly better on QT and the Greens appear on both
regularly. Despite the BNP getting twice the vote and UKIP four times and neither have experience of being treated as if there could be "no argument" with their policies and the Greens get 40 times more coverage per vote than UKIP.

SEPA have once again been pushing their "radium at Dalgety Bay" fraud which has had a significant amount of coverage by the BBC, who know it is a lie, but not by the papers, who presumably care more about not being seen pushing an obvious lie. I sent them an FoI asking them, yet again to provide the evidence for their claim to have found radioactive paint or "radium and its daughter elements".

They have, yet again, simply refused to answer the FoI enquiry pointing to their website.

--------------------------------

Earlier in the year I put up an FoI to the government asking, in light of David Cameron's promise of a "unrelenting forensic" pursuit of growth, what forensic examination of the suggestion for putting money donated to scientific research partly in the form of prizes rather than grants. It has been proven that prizes would promote significantly more growth at no extra cost. The government refused to answer despite numerous repetitions of the enquiry, until I made an official complaint. The final answer was, of course, that though we have Cameron's word that there is an "unrelenting forensic" attempt to find how to grow the economy in truth absolutely no slightest examination of the question whatsoever has been done.

--------------------------------

Perhaps if the law is to be so continuously defied it is time for the ombudsman to bring an actual prosecution. Certainly any civil servant in any way involved in breaking the law to deny us our rights should be instantly fired, as indeed should any superior who refuses to fire them.

Neil Craig
"a lone wolf howling in despair in the intellectual wilderness of Scots politics"
You may be interested in my political blog
http://a-place-to-stand.blogspot.com/
Indexed
http://neilsindex.blogspot.com/
Written evidence submitted by Debbie Pugh-Jones

1. Summary of main points: Whilst I welcome the Freedom of Information Act which enables the public to have a right to know what is going on in publicly funded bodies I believe that it is being misused by commercial companies for financial gain.

The increasing number of requests from commercial companies are actually costing public authorities valuable resources which are being used to commercial advantage in the private sector.

2. My involvement: Yeovil District Hospital is a small acute hospital which employs around 2,000 staff and has 350 beds. One of my roles is responsibility for ensuring that the hospital complies with the Freedom of Information Act and responds to enquiries within the 20-day deadline.

3. The issue: The number of Freedom of Information requests we are receiving has increased significantly over the years from 26 in 05/06 to 250 in 11/12. The requests are now becoming far more detailed with numerous questions – however it is always difficult to evidence that it will take more than the 18-hour limit to comply with the request.

Requests were initially received from the media, individuals, health related organisations and politicians. However we are seeing an increasing number of requests which are obviously of a commercial nature.

For example:

- In the last six weeks we have had four requests about how much we have spent on different categories of agency staff over a number of years; asking who our suppliers are and when the contracts are due for renewal.
- We receive about one request a month asking for detailed information on our IT systems, suppliers, costs and contracts
- We have had numerous requests from drug companies asking how much we pay for our drugs and the quantities we use
- We are also seeing an increasing number of requests from companies asking about referral pathways and prescribing guidelines. They are asking to publish the information on commercial databases. Some of these companies are submitting requests on a regular basis.

Whilst some of these requests can be answered by administrators on many occasions I have to ask hard-pressed clinicians and pharmacy staff to provide me with very detailed information about drugs and treatments for commercial requesters. I have great concerns about this because clinicians should be concentrating on patient care and I believe this is a misuse of their valuable time.

4. Recommendations: To resolve this issue the Act needs to be amended to prevent this sort of misuse. The Act should not be a resource for commerce to gain from.

January 2012
Written evidence from David Holland

Executive Summary

1. “Freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated.”

   United Nations Resolution 59, 1946

2. The United Kingdom was among the last of the developed nations to embrace Freedom of Information in its law. Despite this, and the criticisms that will be presented here, the British legislation may be the most effective in the world available today in those cases where public authorities are committed to openness and transparency and what is requested is not controversial.

3. My experience has been mixed. Mostly my requests have been “resisted” by a collaborative network of individuals; and cogent prima facie evidence suggests that a significant number of hitherto highly respected individuals jointly blocked disclosure contrary to section 77 and regulation 19.

4. Does the FOIA work effectively?
   What are the strengths and weaknesses of the FOIA? Is the FOIA operating in the way that it was intended to?

   The answer to the first and third question is “not entirely” because of, firstly weaknesses in enforcement of the legislation and secondly the disparity in authority between the senior public authority employees who might prefer not to disclose information and their information officers who generally seek to apply the law correctly.

5. The greatest strength of the FOIA is that information requests are free. So is the appeal process to the First Tier Tribunal outside Scotland. The lack of a free Tribunal service diminishes the FOISA and EISR.

6. My experience relates mostly to the EIRs. In paragraph 30 of their memorandum to the Committee, the Lord Chancellor and Secretary of State for Justice note that the FOIA was intended to implement the information provisions of the Aarhus Convention. In this respect FOIA is deficient, and fails to work as it should.

Personal Information

7. I hold a Degree in Electrical Engineering and, though now retired, spent most of my working life in the computer industry. My acquaintance with FOIA has been more by accident than design and arose through an interest in climate change and the Intergovernmental Panel on Climate Change (IPCC).

8. Despite the internationally agreed “Principles Governing IPCC Work” requiring assessments to be undertaken on a “comprehensive, objective, open and transparent basis”, I discovered that they were selective, partisan,

---

secretive and opaque, and that the IPCC’s specific disclosure rules were consistently flouted. Even worse, leading scientists involved in the ongoing current assessment have recently, with the acquiescence of DECC officials, tricked the IPCC into deciding that its assessment process is an international official secret without first publishing their intentions.

Defects of the Legislation

Classification of Information

9. In many cases environmental information is willingly released under the FOIA and recorded as such leading to a tendency to discount the EIRs and under-represent them in training and publicity. In my experience public authorities routinely fail to classify environmental information correctly because it gives them greater opportunities to refuse its disclosure and delay any reconsideration of their refusal. Section 39 of the FOIA should be made an absolute exemption.

10. Greater stress should be put upon classification in the DCA code of practice on the FOIA, and a reference to section 39 should be added to section 1(2) of the Act. However, the best and most progressive solution would be to unify the EIRs and the FOIA. This would greatly reduce cost, regulation, confusion and deliberate delay. It is perverse that the most insignificant of environmental information should be subject to the presumption of disclosure and more limited exceptions to disclosure than information that is not environmental but of the greatest public interest.

Classification of Public Authorities

11. The BBC and Ch4, benefit greatly from the EIRs as applicants, but exempt themselves from them, relying upon a drafting defect. The EIRs, define the public authorities to which they apply through section 3(1) of the FOIA which in turn refers to its Schedule 1. In this the BBC and CH4 are listed as public authorities only “in respect of information held for purposes other than those of journalism, art or literature.” This absolute exemption under the FOIA, is routinely abused and ought to be replaced by a standard exception subject to the public interest test.

12. Regulation 2(2)(b)(i) excludes “any body or office-holder listed in Schedule 1 to the Act only in relation to information of a specified description”. The BBC and Ch4 interpret this to mean that they are entirely excluded from the EIRs. It must be a drafting error or a misinterpretation, since there is no exemption for them in the Aarhus Convention. Given that Directive 2003/4/EC requires the law to be consistent with the Aarhus Convention the proper course is to repeal regulation 2(2)(b)(i) and leave the BBC and Ch4 to rely upon the exceptions in regulations 12(1)(b) and 12(4)(b).

Permanent Unlawful Prevention of Disclosure

13. The most serious limitation of the FOIA and the EIRs is the ease with which lawful disclosure can be permanently prevented, arising in part from the

---

3 FS50242937 Ofcom; FER0238017 University of East Anglia.
Commissioner’s interpretation of regulation 19 and section 77, which have similar wording.

14. “Where a request for environmental information has been made to a public authority [etc] and the applicant would have been entitled to that information [etc] a person is guilty of an offence if he alters, defaces, blocks, erases, destroys or conceals any record held by the public authority, with the intention of preventing the disclosure by that authority of all, or any part, of the information to which the applicant would have been entitled”.

15. Despite both regulation 19 and section 77 beginning with the words “Where” rather than “When” and using the more complex tense “would have been” instead of “was”, the Commissioner has stated\(^4\) that it is the timing of the action being after the request which creates the offence. If the courts sustain this interpretation it makes it almost impossible to prove an offence, as it is most unlikely that both the timing and the intention can be proved.

16. The argument that an apparently lawful act should not become an offence retrospectively is without merit since in many other cases both the offence and the intention only become known at a later time. The 6-month time limit for prosecutions under regulation 19 and section 77 was highlighted by the Commissioner\(^5\) in relation the deletion of information that I had just requested from the UEA. Clearly, it should be a reasonable time, such as 6 months, from the discovery of the offence rather than its commission, possibly limited by a longer period of time elapsed since the offence.

17. In law, regulation 19 must be consistent with the Aarhus Convention, in which the United Kingdom undertook in Article 5(1) “to ensure that public authorities possess and update environmental information which is relevant to their functions”. This places a clear duty upon public authorities both to acquire and to retain the environmental information that is relevant to their functions. Aarhus Article 5(1) therefore requires a strict records management policy to ensure that environmental information, which is still relevant, is not permanently deleted.

18. To meet our Aarhus obligations, it must be a regulation 19 offence to permanently delete or conceal environmental information, which is still relevant, if the intention is that future applicants should not be able to receive it. Further it is not in the public interest that employees of any public authority should be allowed, in law, to delete any information that they might reasonably expect an applicant to request in the foreseeable future.

**Lawful Delay**

19. Information disclosure delayed can be as bad as disclosure denied. In the case of the FOIA there is no statutory time limit for reconsideration of a refusal, but section 50 requires the applicant to exhaust a public authority’s complaint procedure. A section similar to regulation 11 ought to be added to the FOIA.

\(^4\) Personal Communication.
\(^5\) FER0238017 University of East Anglia
20. However, a regulation 11 reconsideration can lawfully take 40 working days and even if the applicant had responded immediately to a refusal the outcome can be delayed 12 weeks. Complaints to the Commissioner are rarely decided any sooner. Thus DECC refused to publish a controversial procedural proposal until after it was decided by the IPCC and published. This deprived the public of their Aarhus Convention rights and rendered any complaint on regulation 5 pointless.

21. Public authorities suffer no penalty from using specious excuses, as a means of delaying disclosure until the purpose for which it was requested has perished. Where a request for environmental information is time critical an applicant should be able to refer the matter immediately to the Commissioner for an urgent decision, in the public interest.

**Personal Information**

22. The redaction of personal information is routinely undertaken where it is greatly in the public interest that it should not be. While it is right, for instance that an MP’s full address should not be published, sufficient information should be disclosed to enable the applicant for it to know if matters relating to it are being dealt with in conformance with Parliamentary rules and the law.

23. The names of professionals who actively court publicity for some matters should not be redacted from information that is disclosed, but which shows them in a poorer light or contradicts other published information relating to matters in which they are content to be named.

**Proactive Disclosure**

24. In his evidence to the Commons Science and Technology Committee (STC) investigating Climategate, the previous Information Commissioner, Richard Thomas CBE said

> “Public authorities ought to decide what really has to be kept away from the public. If it is particularly sensitive or there is a good reason for withholding it, fair enough, but where there is no good reason for withholding information, then why not proactively disclose it and avoid the hassle of large numbers of requests?”

25. *I know of no public authority which embraces Mr Thomas’ advice.* The FOIA and the DCA code of practice are so woolly on the matter that there is no prospect that it will improve in respect of the FOIA without legislative changes.

26. Conformance with regulation 4 is no better, despite the fact that it is a mandatory requirement and is fundamental the public’s rights guaranteed by the Aarhus Convention. One reason for what amounts to universal non-conformance with regulation 4 is the opinion of the Commissioner, that he has no powers to issue a decision notice under section 50 because no request has been made by the complainant.

27. *This is an error that I am challenging at the First Tier Tribunal.* The “*electronic means which are easily accessible*” required by regulation 4 can only be accessed by applicants for information making requests. The fact that they must do so electronically should not remove their Aarhus rights to
justice. Further, regulation 4 is subject to exactly the same exceptions as regulation 5 which the ICO does enforce. Enforcement of regulation 4 is in the public interest and in the long term will save costs.

28. Regulation 4 requires public authorities to progressively make environmental information available to the public by electronic means, which are easily accessible, and to take reasonable steps to organise the information relevant to its functions with a view to the active and systematic dissemination to the public of the information.

29. It is difficult to imagine how any public authority can achieve conformance with regulation 4 without an easily identifiable link on its Internet “home page” rather like a “CEOP button”. It has become very common for home pages to have easily accessible links to “Privacy Policy” and “Contact Us”. Public Authorities should be encouraged, if not required, perhaps through the DCA codes of practice, to have a standardised “Publication Scheme button”. I know of no valid regulation 4 publication scheme.

Case Study

30. This submission results from attempts that I began in 2007 to obtain information on the IPCC’s 2007 Fourth Assessment Report (AR4), from the Met Office⁶, the UEA and the University of Reading. Since 1993 by international agreement the IPCC assessment process has been required to be open and transparent. In 2002 Sir John Houghton had published a paper asserting that it was so⁷. Ministers have repeatedly stated that it is. In the public interest, it must be.

31. However, in each case senior employees unlawfully refused to disclose any information whatever, and obstructed less senior Information Officers. They did so on the advice⁸ of the American scientist who was a Co-Chair of IPCC Working Group One (WGI), which had assessed the physical basis of climate change.

32. On 27 May 2008 I made a formal information request to the Climatic Research Unit (CRU) of the UEA. It was only the sixth ever received by the CRU. It was refused and referred to the Commissioner. My efforts were widely reported on the Internet⁹ as were later requests from others that were also refused.

33. Nothing at all happened until what has become known as “Climategate”, in November 2009, when 1073 files of emails from the CRU were released. In one ¹⁰, dated 29 May 2008, the CRU Director asked an American to delete his copies of what I just requested and ensure that another did the same. The Director said two of his CRU colleagues would also do the same.

⁷ See section 5 page 5-6
⁸ http://www.rsc.org/ebooks/archive/free/BK9780854042807/BK9780854042807-00001.pdf
⁹ http://tinyurl.com/bwehxxu
¹⁰ http://junksciencearchive.com/FOIA/mail/1212063122.txt
34. Despite having avoided disclosing information for years, Climategate emails\(^{11}\) show that the CRU Director was lobbying for the IPCC to take steps to assist him in resisting FOIA/EIR requests by changing IPCC’s assessment process to be confidential - in total contradiction with the 1993 Principle that it should be open and transparent.

35. Climategate caused great concern globally over the integrity of the IPCC assessment process. The UEA established the so-called ‘Independent’ Climate Change Email Review (ICCER) that many considered to be a whitewash from its inception. Graham Stringer MP later called it a parody.

36. The ICCER held no public hearing and refused to publish my evidence submission to it. At the second hearing into the matter by the STC, Sir Muir Russell, referring to my submission told MPs “The team went into that pretty carefully.” However, a few weeks later, responding to a freedom of information request, the UEA confirmed\(^{12}\) that, although it had surreptitiously acquired a copy of my full evidence submission\(^{13}\), it only responded to an unpublished short, mutilated and anonymised version\(^{14}\) supplied by the ICCER from which key evidence\(^{15}\) as well as most formatting and footnotes references were omitted.

37. UEA admitted that it had used the format and footnotes of my original submission in its response in order to make it appear that it had been fully considered in its original form. The ICCER had then published UEA’s response\(^{16}\) enabling it to mislead the public and the STC. The ICCER had concluded, untruthfully, that it had seen no evidence\(^{17}\) of any attempt to delete information in respect of a request already made.

38. The largest part of the work of ICCER was undertaken at the University of Edinburgh whose computers systems held copies of most of the ICCER records. These were deleted\(^{18}\) from the University’s servers just days after the ICCER Report was published and long before the above mention facts were revealed. The ICCER records are now in an undisclosed location unavailable to the public under the FOIA/EIR.

39. In November 2011, further emails from the UEA were leaked including 3548.txt\(^{19}\) dated 9 May 2008, a few days after my first formal information request to the UEA. The CRU Director reported my request to 23 of his international IPCC colleagues and was urging that the IPCC take steps to prevent similar requests on subsequent assessments.

40. In 2526.txt\(^{20}\) dated 4 June 2008 the CRU Director told the Met Office that the information that I had recently requested from his two colleagues at the CRU had been moved from the CRU computers onto a memory stick. This

\(^{11}\) http://junksciencearchive.com/FOIA/mail/1242136391.txt and ibid 1249045162.txt
\(^{12}\) http://tinyurl.com/5uet222
\(^{13}\) http://tinyurl.com/2656ppl
\(^{14}\) http://tinyurl.com/35flw4j
\(^{15}\) Note, for instance, my paragraph 44 is omitted and see http://tinyurl.com/374ncm4
\(^{17}\) See paragraph 28 on page 92 http://www.cce-review.org/pdf/FINAL%20REPORT.pdf
\(^{19}\) http://di2.nu/foia/foia2011/mail/3548.txt
\(^{20}\) http://di2.nu/foia/foia2011/mail/2526.txt
fact was not reported by the ICCER which had spent £9,000\textsuperscript{21} to have access to this email and all the other emails of the CRU Director, 54 days before its Report was published.

41. Following the original Climategate release in 2009 and the debacle of COP15, the “Glaciergate” 2035\textsuperscript{22} error spurred the UN Secretary General into asking the InterAcademy Council (IAC) to review\textsuperscript{23} IPCC Procedures. The IPCC 2010 Plenary Session established a task group to advise the IPCC on changes to the procedures as advised by the IAC. Its Report would be considered at the May 2011 IPCC Plenary Session.

42. On 25 February 2011 I made requests of DECC for information as to what was being proposed for agreement at the IPCC Session in May. Despite the proximity of the meeting neither the IPCC nor DECC had indicated publicly what decisions were being proposed by the task group. My requests were refused, but a complaint to the Commissioner was then too late.

43. Between 10-13 May, in blatant contradiction of Aarhus Article 3(7), and without any discussion or vote\textsuperscript{24} the British Government’s delegate accepted the 18 proposed changes contained in the task group’s 21 page Report\textsuperscript{25}. In the Report’s preamble it claims them all to be the result of consideration of the IAC Report plus IPCC decisions from the previous session. The date stamp of the published document is 12 May although DECC must have had a copy earlier. Clearly it should have proactively published it under regulation 4(3)(a) and (b) and disclosed it to me under regulation 5.

44. Smuggled into what was represented as IAC recommendations is a confidentiality rule which neither the IAC nor the previous IPCC Plenary Session had put forward for consideration. It is what the CRU Director had first urged upon his fellow IPCC colleagues in May 2008. It is now being used in an attempt to frustrate FOIA/EIR requests and all open discussion on the Internet of the IPCC draft documents.

January 2012

\textsuperscript{21} http://tinyurl.com/7vbt6fh
\textsuperscript{22} http://www.thegwpf.org/international-news/459-new-documents-show-ipcc-ignored-doubts-about-himalayan-glacier-scare.html
\textsuperscript{23} http://reviewipcc.interacademycouncil.net/committee.html
\textsuperscript{24} http://tinyurl.com/73owoqx
\textsuperscript{25} http://www.ipcc.ch/meetings/session33/doc12_p33_review_tg_proposal_procedures.pdf
Written evidence from David Smith,

This a personal submission based on my personal experience of the Act. I am involved with a local group campaigning for democratic reforms at national and local level. This has motivated my recent use of the act, but this submission is made in a purely personal capacity.

1. Summary
I have used the Freedom of Information on a number of occasions from 2005 to date. As a result of this I have come to the following conclusions:

The Act has generally served me well until recently; however:

a) I have found Local Authorities to be more helpful in their replies than are departments of state. [para. 3]

b) There appears to be a trend towards avoiding any response in advance of the 20 day deadline. [para. 4]

c) Organisations subject to the Act can create work for themselves by failing to respond to less formal requests for information. This could be a factor in the increased use of the Act. The ICO should be encouraged to draw up a code of practice for supplying as much information as possible by less formal means. [para. 5]

d) Local authorities should not respond to the Act by avoiding recording their relationships with outside bodies in writing. [para 6 et. Seq.]

e) The Act should be amended to make all commissions of enquiry subject to the Act by default. Where there is a case for exempting a particular commission, this should be debated in Parliament. Use of the negative resolution procedure is not satisfactory. [paras. 9 and 10]

f) Vexatious requests tend to bring the Act into disrepute, and are therefore not in the interests of responsible users. The ICO should be encouraged to draw up a definition of the term 'vexatious' which it will apply as necessary. The ICO should encourage subject organisations to use this wording in responding to vexatious requests. [para. 11]

2. I have used the Freedom of Information Act on a number of occasions from 2005 to date. In no case was I seeking to make money by publishing the results, though I was seeking to draw public attention to examples of public incompetence, lack of accountability etc. Until recently I have generally, though not always, obtained the information sought. Recently however there have been several cases in which, although information was provided in accordance with the Act, I have not been able to get to the bottom of the matter under investigation. Although I could have persisted, I felt that the value of the information was time limited, and so I gave up. In describing these cases below, I am NOT asking the committee to look into the individual cases but am merely seeking to illustrate the difficulties.

3. Recent experience has confirmed that local authorities are likely to provide more information than was explicitly asked for. That is, they respond to the spirit of the request rather than the letter. This is often helpful. Government departments seem less likely to do this. The requester therefore needs to be extra careful in the way the request is worded. [conclusion a)].

4. In the last seven months I had to wait for almost exactly 20 working days for each response. Previously I could on average expect a response within a week. The law is still being observed, and
there are several possible reasons for this trend. However where a complicated matter is being investigated, and follow up questions are needed, the delay can get frustrating. [conclusion b]

5. The first case I wish to mention concerns the Weymouth Transport Package carried out by Dorset County Council as the highway authority, but with 95% government funding. It was intended inter alia to meet the Olympic Delivery Authority's requirement for a reliable and short journey time for competitors and officials between London and the sailing venue. The package was sold to the public as delivering lasting benefits to the community. Many people questioned this claim; geographical considerations make any real improvement very difficult to achieve. In fact the project caused much disruption, and threatened the viability of a number of local businesses. For months the subject was rarely out of the local press. A colleague and I decided to look into how decisions had been made. I started by looking at the business case as published on the website. There were some curious features and some gaps in the information. I phoned the appropriate person in the highways department but did not get the information I was asking for. I therefore put in the first Freedom of Information request, and my questions were answered on the deadline date, but the answers only posed further questions. In all we submitted four requests over several months, but have still not got the whole story. In the meantime the project has finished and the public outcry has died down. It is not relevant to this submission to outline our tentative views, but I feel that Dorset County Council would be seen in a better light if they had been more open and honest from the outset. Certainly if my informal questions had been answered much time and effort would have been saved. In short, it was not that the requirements of the Act were onerous, but rather that the culture of the organisation made life difficult for everyone.

Organisations subject to the Act can create work for themselves by failing to respond to less formal requests for information. This could be a factor in the increased use of the Act. The ICO should be encouraged to draw up a code of practice for supplying as much information as possible by less formal means. [conclusion c]

6. My second example also concerns Dorset County Council highways department. In November 2011 the main road into Weymouth was closed. I believe that this incident led to a significant loss of trade in Weymouth. I wondered why, instead of closing the whole road, SGN could not have moleed under the road, and I phoned DCC highways department to ask. I was told that they had asked, and the answer was that this could not be done because the pipe was 6 metres down and there was a safety issue. This made no sense to me. They had to dig a 6 metre deep trench regardless of the method used.

7. I therefore put in a Freedom of Information request asking for all correspondence and minutes of meetings. I have had a response with a number of emails and photos, but there was no reference to the possibility of moleing, or indeed any questions by DCC on the least disruptive way of proceeding. If questions were asked it seems that no written record was kept. Why not? You would have thought that it would be in DCC's interest to demonstrate they were concerned that they were trying to look after the public interest. It would appear from a House of Commons research note: Standard Note SN00739, Published 08 November 2011, that they do have powers to do so.

8. It has been suggested to me that some organisations have reacted to the Act by deciding not to keep written records of things that other considerations suggest they should. Some use this as an argument against the Act.

Local authorities should not respond to the Act by avoiding recording their relationships with outside bodies in writing. [conclusion d]

9. My final example concerns the Independent Commission on the Banking System (ICB). Creating
a stable financial system is vital for the future of our economy, and this inevitably involves banking reform. The ICB recommendations affecting stability related mainly to ‘ring fencing’ a watered down version of the separation of retail and casino banking proposed by Prof John Kay, and the smart money is saying that the banking lobby will succeed in further watering down the proposals. On macroprudential policy (the province of the Finance Policy Committee) it mentioned only capital ratios. Two radical but well argued proposals were summarily dismissed in the interim report and not mentioned in the final report. One of these could have been implemented as an instrument of macroprudential policy within a couple of months. No arguments were presented in support of these judgements.

10. I was puzzled in that at least one member of the commission had published views that appeared to be in support of the latter proposal. I wondered what influence the secretariat (composed of Treasury staff) had had. I submitted a Freedom of Information request. I was informed that the commission was not subject to the Act but that when the commission was closed down, all papers would be sent to the Treasury and once that had happened they would be subject to the Act. In due course, I therefore submitted a request to the Treasury. I asked for any evidence used to back up the judgements to dismiss the two proposals. Of course I got the reply that all the evidence (i.e. the submissions) was published on the commission's website – which of course is the case. I should have asked for the evidence and any analysis thereof! I could have submitted a revised request. However I decided that the time to pursue this matter would have been immediately on publication of the interim report, had the commission been subject to the Act. As it is, I have to accept that the commission served no useful purpose.

I now believe that any such commission of enquiry not subject to the Act should be dismissed as a whitewashing exercise. The Act should be amended to make all commissions of enquiry subject to the Act by default. Where there is a case for exempting a particular commission, this should be debated in Parliament. Use of the negative resolution procedure is not satisfactory. [conclusion e]

11. Recently I have been submitting Freedom of Information requests via the website: [http://www.whatdotheyknow.com/](http://www.whatdotheyknow.com/). This allows you to see other requests made on the same subject. I saw a number of requests made to the Treasury that I would regard as vexatious. Basically, although I had sympathy for the requesters' concerns, they were not seeking information. They were seeking to change the views of the Treasury! The responses to these queries did not call them vexatious but made some effort to answer the question. This chimes with the observation made in the MoJ memo that section 14(1) was little used. The trouble is that (as well as wasting the time of the subject organisation) requesters who do not understand the purpose of the Act might feel the answers to be inadequate.

Vexatious requests tend to bring the Act into disrepute, and are therefore not in the interests of responsible users. The ICO should be encouraged to draw up a definition of the term 'vexatious' which it will apply as necessary. The ICO should encourage subject organisations to use this wording in responding to vexatious requests. [conclusion f]

January 2012
Written evidence from Adrian Kerton

I made an FOI request to the University of East Anglia for climate data.

I was surprised to be contacted later by the Norfolk constabulary, asking for personal details of me, my family and our computing equipment, purely on the grounds that I had made an FOI request.

Norfolk police also contacted other people just because they had made an FOI request.

In a letter to my MP they state that I “was not and is not currently a suspect in the investigation”.

I felt intimidated. If I didn’t co-operate would they raid my house unannounced to take my computers? Hence I did co-operate. Although I am informed I am not a suspect they refuse to take my details of their computer systems and inform me they may never take them off until their investigations are complete.

I would like the inquiry to make it illegal for the police to question anyone, only on the grounds they have made an FOI request when there is no other evidence of suspected criminal activity.

I feel that my civil liberties have been abused, and that the police have acted beyond their remit. I feel that this exercise was designed to intimidate myself and others into not making legitimate FOI requests.

*January 2012*
Written evidence from Newcastle University

Summary

1. In June 2008, Newcastle University received a freedom of information request from the British Union for the Abolition of Vivisection (“BUAV”) which asked for disclosure of the information contained within the project licences, issued under the Animal (Scientific Procedures) Act 1986 (“ASPA”), which governed the primate research undertaken at the University that was discussed in certain published articles.

2. Newcastle University refused to disclose the project licences, in reliance on a number of the exemptions within the Freedom of Information Act (“FOIA”). It was understood that disclosure of any of the information contained in the project licences would be a criminal offence under section 24 of ASPA, which provided a statutory bar to disclosure and so the exemption in section 44 of FOIA applied. Clause 24 makes it a criminal offence to disclose the project licence information for purposes other than those of following ASAP. This seemed to us to be conclusive – that we had statutory bar on the release of project licences and therefore the FOI did not apply and this was supported by the Information Commissioner.

3. The other exemptions claimed were that disclosure of the information would prejudice the health and safety of University staff and students (section 38 FOIA) and would prejudice the University’s commercial interests (section 43 FOIA).

4. Following a series of appeals to the Information Commissioner’s Office (“ICO”), the First Tier Tribunal and the Upper Tribunal, Newcastle University was ordered to disclose redacted versions of the project licences to BUAV. It was found that section 24 of ASPA was not a statutory bar to disclosure, but that some information could be withheld under section 38 and section 43 of FOIA.

5. The Home Office confirmed that they did not consider it in the public interest to bring a prosecution under section 24 of ASPA as long as the disclosure was in accordance with the order of the Tribunal. They reserved their right to review this position. This suggests that any university carrying out animal research that receives a similar request for copies of project licences will be forced to incur the expense of appeals to the Tribunals until it is ordered to disclose the licences, otherwise it may still face prosecution under section 24 of ASPA.

6. This case has cost the University over £250,000 in legal fees alone. It has placed a considerable strain on a number of key individuals who hold specific responsibilities under ASPA. It is deeply regrettable that conflicts in legislation are left to such test cases to resolve. It was known when FOI was introduced that there would be a good deal of interest in the scientific work on animals and more care should have been taken in drafting the legislation to avoid the legal ‘catch 22’ situation that has arisen.

Recommendations

7. It is recommended that the conflict between ASPA and FOIA is resolved so that universities do not have to rely on the order of a Tribunal as protection from prosecution under section 24 of ASPA.
8. As a wider issue, the Government should proactively attempt to identify and resolve any other conflicts between FOIA and existing law, rather than relying on an educational charity bearing the costs of challenges through the tribunal system.

9. The ICO should make a judgement on all claimed exemptions when issuing decision notices, to avoid repetitive and costly tribunal hearings.

The Initial Request

10. The original request from BUAV was received on 10 June 2008. It asked for disclosure of the information contained within the project licences that governed the research carried out in three named published articles. There were two project licences relating to these articles.

11. Newcastle University refused to provide the information requested, relying on four grounds of exemption under FOIA:
   - Section 12 – where cost of compliance would have exceeded the appropriate limit of £450
   - Section 38 – where disclosure would endanger the mental or physical health or safety of University staff and students
   - Section 43 – where disclosure would prejudice the commercial interests of the University
   - Section 44 – where there is a statutory bar on disclosure. In this case, section 24 of ASPA would make it a criminal offence to disclose any information from the project licences.

12. Section 24 of ASPA states that:
   - A person is guilty of an offence if otherwise than for the purpose of discharging his functions under this Act he discloses any information which has been obtained by him in the exercise of those functions and which he knows or has reasonable grounds for believing to have been given in confidence.
   - A person guilty of an offence under this Section shall be liable:
     (a) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both;
     (b) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum or to both.

13. The University’s reliance on these exemptions was upheld on internal review, and so BUAV appealed to the ICO for a review of the request.

The ICO Decision

14. The ICO issued its decision notice in March 2010 and concluded that the licences were not actually held by the University for the purposes of FOIA. The licences were only held by specific statutory post holders in a personal capacity under ASPA (the ‘Named Veterinary Surgeon’ and the ‘Project Licence Holder’) for the purpose of carrying out their statutory roles.

15. The ICO also decided that, even if the licences were held by the University, disclosure would be a criminal offence under s24 of ASPA. Therefore, the section 44 exemption would apply and the licences should not be disclosed.
16. The ICO did not go on to consider the grounds of health and safety and commercial interests. This proved to be a costly omission for the University.

**Tribunal Decisions – Preliminary Issues**

17. BUAV appealed against this decision to the First Tier Tribunal (Information Rights). The appeal was heard at an oral hearing in September 2010.

18. The Tribunal concluded that the licences were held by the University. The Tribunal felt that the licences were not held by the statutory post holders in a personal capacity, but in specific roles as employees of the University. Therefore, the University must hold the licences for the purposes of FOIA.

19. The Tribunal also concluded that section 24 of ASPA would not prevent disclosure of the licences under FOIA. They reasoned that as the University, through the statutory post holders, was responsible for creating the information, it could not be said to have obtained the information in confidence. Therefore there could be no offence committed if the University was to disclose the information under FOIA.

20. The University appealed this decision to the Upper Tribunal, with a hearing held on 21 April 2011. The appeal was dismissed, and the Upper Tribunal confirmed the decision of the First Tier Tribunal.

**Court of Appeal**

21. The University applied for leave to appeal the Tribunal’s decision to the Court of Appeal on both of the preliminary issues. In a decision dated 29 June 2011, the Tribunal granted leave to appeal to the Court of Appeal on limited grounds, with respect to the criminal offence at section 24 of ASPA only. Leave to appeal was not granted with respect to the issue of whether or not the information was held by the University.

22. On 7 June 2011, the University received the personal view of a Home Office Inspector on the possible disclosure of the project licences under FOIA. Her view was that if there was release of the information held within either of the two project licences, there would have been an offence committed under section 24 of ASPA, by one (or more) of the statutory post holders. She felt that she would be obliged to report to the Secretary of State that section 24 of the Act had not been complied with, and to advise him on the action to be taken regarding the people involved in the release.

23. The University made contact with the Home Office to request an official view and to determine what their position would be if the University applied for them to be joined as an additional party to the appeal. The Home Office reply, dated 20 July 2011, stated that their position was that any statements they make about section 24 of ASPA are fact specific, and as they hadn’t been involved in the case they would rather not make any comment. On the second point, they stated that the Secretary of State had no current plans to apply to join the proceedings, but that they would consider the University’s application on its merits at the appropriate stage.
24. The University applied to the Court of Appeal for additional leave to appeal on the grounds of whether or not the information was held, and also applied for the Home Office to be joined as an additional party to the appeal.

25. In an order of the court dated 11 November 2011, the Court of Appeal refused permission to appeal on the grounds of whether or not the information was held. The court also refused permission to join the Home Office as an additional party. The Home Office had also given the view that they might well not actively participate in any event.

26. Given the Tribunal view that there could be no criminal offence if the information was held by the University, the prospect of success on the limited grounds was low. The University decided not to pursue this option any further and accepted the views of the Tribunals.

**Tribunal Decision – FOIA s.38 & s.43**

27. As the ICO had not made any decision on the application of the exemptions for health and safety (s.38) and commercial interests (s.43), a further First Tier Tribunal hearing was arranged to consider these issues. This hearing took place on 5 and 6 September 2011.

28. This Tribunal’s decision was that redacted versions of the licences should be disclosed. The Tribunal agreed to the redaction of details of unimplemented research ideas, to protect the University’s commercial interests, and a small passage that could result in the endangerment of the health and safety of individuals.

29. It was the order of this Tribunal under which the University disclosed redacted versions of the project licences to BUAV on 8 December 2011.

30. Immediately prior to this disclosure, the view of the Home Office was sought as regards to whether or not they would seek prosecution in this case. The view finally received was that the Home Office do not have exclusive jurisdiction to prosecute under section 24 of ASPA but that they could not see that it would be in the public interest to prosecute in this case as long as any disclosure was strictly in accordance with the order of the Tribunal. They reserved their right to review this.

31. The position of the Home Office does leave open the prospect of prosecution in future cases involving FOIA requests for project licences granted under ASPA. It appears that it is only the order of a Tribunal that would provide protection from prosecution. Newcastle University incurred legal costs of over £250,000 through this process. It would seem more appropriate for the apparent conflict between FOIA and ASPA to be resolved, rather than to expect universities to incur significant costs on tribunal hearings should similar requests be received in the future.

*January 2012*
Written evidence from Dr Julia Hines

1. Introduction

1.1 I am a resident of the London Borough of Barnet. I have made 4 Freedom of Information requests, 2 to Barnet Council and 2 to Transport for London. I also read a number of blogs written by other people, some of which rely on information obtained through FOI requests. I do not belong to any political party or union. I am not a journalist. I have never stood for public office. I doubt you will receive many submissions from people who use FOI requests so occasionally, which is why I thought you might be interested in how and why I have used the legislation.

2. Road safety

2.1 I became concerned about the number of road traffic accidents in Barnet. My concerns were reinforced when I saw the latest statistics published by Transport for London, which showed that Barnet had the highest number of fatalities of any London borough (9), and the second highest number of personal injuries (1520). These figures were for 2010. Barnet had abjectly failed to meet targets for road safety year on year.


2.2 The Cabinet member with responsibility for road safety is Councillor Brian Coleman, who is also an Assembly member of the GLA. He had made statements to the press to the effect that Barnet was a large borough with the longest network of roads, in particular trunk roads, which are maintained by Transport for London. He said that most of the deaths were on TfL roads.

2.3 I contacted TfL for further detail and discovered that

1. Barnet does not have the longest road network of any London borough.

2. It does have the longest network of trunk roads (30km out of the 750km of road).

3. 5 out of 9 fatalities occurred on trunk roads.

4. The vast majority of personal injuries took place on roads maintained by Barnet.

2.4 I obtained this information following a telephone call, with a call back 30 minutes later and was very pleased with the service I received.

2.5 It should be noted that, in the Council meeting on 1 November 2011, it was resolved that:
RESOLVED – Council notes that Barnet has the second highest number of casualties from road traffic accidents in London and one of the largest road networks, with 1,520 casualties last year – an increase of 8 per cent compared with 2009. Council notes that many of these casualties occurred on TfL controlled roads.

Council calls on Cabinet to continue to bring fresh innovative thinking on the subject of road safety, and to ask the Cabinet Member to bring a report on our road network to an early meeting of Cabinet which will include measures to reduce the number of casualties from road traffic accidents.

2.6 As I ascertained from Transport for London that the vast majority of accidents did not occur on TfL controlled roads, this concerns me. Councillors are entitled to their own opinions and policies; they are not entitled to their own facts. Freedom of Information allows proper scrutiny of resolutions like this.

2.7 The information I obtained informed my submission to the consultation on the borough’s draft Transport Local Implementation Plan, in my capacity as chair of Age UK Barnet. Essentially, my concern was that Barnet Council’s continued prioritisation of traffic flow over road safety, including removing all traffic calming measures such as speed humps & mini-roundabouts whenever a road comes to be resurfacd, was a significant contributing factor to the appalling road safety record. Councillor Coleman had accused me of “woolly thinking” and out of date ideas when I suggested this to him in earlier correspondence. He is also on record as saying that he is “very glad we don’t have any of those silly cycle lanes in Barnet”. I have 19 year old twin sons, both of whom cycle. I am not glad.

2.8 When the review of the consultation was delayed by many months I made an FOI request to see the consultation submissions. This showed me that Transport for London had comprehensively failed the draft Transport LIP, specifically highlighting road safety and provision for cyclists as inadequate. It also allowed me to see other people’s views and to make contact with other road safety campaigners in the area, although their names had (wrongly in my view) been redacted.

2.9 I made the request on 23 September 2011 and received a response on 19 October 2011.

2.10 In a similar vein, when Barnet Council announced their intention to remove all lollipop crossing attendants from local schools, in order to save £157,000, a local blogger made a FOI request for a breakdown of this figure, as it seemed extremely high given that lollipop crossing attendants are not highly paid, work part-time and there were only 12 of them. He discovered that the savings in salaries would be £41,500. The remaining £115,500 comprised management, HR and IT costs. This astonished me, and the 2,300 people who signed a petition for the retention of lollipop crossing attendants. It was also obvious that the full cost saving proposed by the Council was never going to materialise.

2.11 This FOI request provides a useful snapshot, in my personal opinion, of the excessive overheads and top heavy structure in Barnet Council and a helpful pointer as to where cuts might, more safely, be made.

3. Outsourcing and conflicts of interest

3.1 The third request I made concerned Barnet Council’s proposal to outsource its regulatory services, a tender valued at £250 million. I was personally concerned about this because Barnet intends to outsource its planning department. The company currently in the lead to obtain this contract, Capita Symonds, has been retained as a planning consultant by developers who own greenfield land to the rear of my home and have, over the past 5 years, represented these developers in 2 planning applications, 2 planning appeals, a village green inquiry and the independent examination in public of the draft LDF. I inquired about how the Council intended to manage such conflicts of interest in the contract.

3.2 I have written about my concerns here:


3.3 I made my request on 22 August 2011. On 18 October 2011 I was informed that my request would be processed under the Environmental Information Regulations 2004 and that my request had been refused.

3.4 I requested an internal review and on 15 November 2011 was told that my review had been upheld, however that I should defer my request until January 2012, as this would fit more neatly with the timetable of the competitive dialogue.

3.5 When I resubmitted my request at the appropriate time it was again refused. The matter is now with the Information Commissioner.

3.6 This matter is naturally of great personal concern to me, but I also believe that there is an important public interest. The conflict of interest in my case is relatively easy to uncover, and to understand, but it seems to me that there are equally strong concerns if, for example, a supermarket applies for planning permission and the company which holds the DRS contract also provides outsourced services for something like HR or IT to a rival, as is perfectly possible in the case of a company like Capita Symonds.

3.7 I am willing to be persuaded that this is a sensible contract to let, but I cannot be persuaded without the information I seek. Equally, I would like to be able to make detailed representations to my elected representatives before any contract is signed. I need information for that.

4. My most recent request
4.1 I inquired of TfL how much the enormous, self-congratulatory signs at Henlys Corner had cost. These essentially say TfL finished the road layout alterations on time. I was interested
because they are ugly and one of the stated aims of the design brief was to reduce unnecessary signage. I discovered they cost £5,000 each and will be removed after 2 months. I also asked who authorised them. This was unanswered. This may seem like a frivolous request; I don’t think so. I can think of better ways to spend £10,000. I tweeted the result and it was immediately retweeted by 5 other people, with a combined following of 7,737, so apparently I was not the only person interested in this.

5. Freedom of Information requests by others

5.1 I would like to highlight the extraordinary and valuable work of the “Barnet bloggers”: Mrs Angry, Mr Mustard, Mr Reasonable, Barnet Eye, and Citizen Barnet in their work in uncovering the MetPro scandal. This concerned the use of a security firm which was unlicensed by the SIA, and was unlawfully and covertly filming residents.

5.2 Through the use of FOI requests they uncovered breaches of:
1. Criminal law;
2. EU directives;
3. Safeguarding of children and vulnerable adults;
4. The Council’s own contract procedure rules; and
5. A wholesale mismanagement of procurement within the Council, leading to overspending and waste.

5.3 The Council’s own Audit investigation is detailed here:

http://committeepapers.barnet.gov.uk/democracy/meetings/meetingdetail.asp?meetingid=6790

5.4 They have saved the Council considerable sums of money. However, it remains a great disappointment to me that Barnet Council has not investigated the safeguarding issues highlighted, despite the fact that after MetPro were replaced by a licensed firm at Barbara Langstone House (a hostel for the most vulnerable homeless people in the borough, including families with children and people with serious mental health issues) reports of crime including drug abuse fell markedly.

6. Does the Freedom of Information Act work effectively?

6.1 In my limited experience straightforward requests are handled well. However, politically sensitive material is delayed as long as possible, omitted or refused.

6.2 The information I have received from Freedom of Information requests, or that others have received and disseminated has been extremely useful to me:
1. To allow me to engage in debate with my elected representatives;
2. To highlight issues of local concern in an informed way, for example at residents forums or in conversation with my neighbours; and
3. To contribute knowledgeably to local consultations.
7. What are the strengths and weaknesses of the Freedom of Information Act?

7.1 I believe it could be strengthened by compelling public bodies to put more information online. This would be easier for me and for the public body (as well as saving them money).

7.2 There seems to me to be some confusion where there may be overlap between the Data Protection Act and the Freedom of Information Act. For example, it is not clear to me that responses to public consultations should be redacted for names, or indeed payments to individuals or sole traders who provide services to public bodies under contract. On one occasion Barnet Council redacted the name of May Gurney plc in the mistaken belief that the large payments to Mr & Mrs Gurney’s daughter May, for handling Barnet’s waste recycling, should be private. This was clearly an error, but if large sums of tax-payers’ money were to be paid to a Miss May Gurney, why should that be a secret?

7.3 Settlements for personal injury claims are invariably not paid direct to the claimant, but via a solicitor’s account. Litigants-in-person will be more common if the LASPO Bill is passed, and payments for social care to people in receipt of personal budgets are increasing; these are the only situations I can think of where names should be redacted from expenditure lists. I do not think any should be redacted from contract payment lists.

7.4 The Henlys Corner sign example is another case in point. I was given the information as to cost and time (which I had not asked for, but happy to have) but not the name or job title of the person who authorised the expenditure. Guidance on this issue would be helpful.

7.5 I am concerned however that information which should rightly be in the public domain will not be accessible if increasing amounts of services are outsourced. As an example, if Barnet does proceed with the outsourcing of all its regulatory services, how will a member of the public obtain information about conflicts of interest? Would I be entitled to know about the existence and value of any contract a company like Capita Symonds has with any other company in the UK or indeed internationally? This seems to me to be a grey area and one which will in practice be difficult to enforce for most people, even if a right exists.

8. Is the Freedom of Information Act operating in the way in which it was intended to?

8.1 I believe it has improved the oversight of public bodies, from local issues such as the problems highlighted in Barnet by MetPro, or the lollipop crossing attendants, to issues of national significance such as the MPs expenses scandal.

8.2 It is well used, which is a sign of its importance and efficacy. If it is in any way a victim of its own success, the answer seems to me to publish more information in an accessible way.

8.3 I would rather have facts than spin.

January 2012
1) Executive Summary
   a) The Information Commissioner should be better able to influence how datasets are priced under FoI and publication schemes. Current arrangements allow public authorities to use pricing to unreasonably restrict access and thereby limit access to information and the growth of new businesses.
   b) UCAS’s use of publication schemes to extinguish free FoI access needs dealing with.

2) My experience of FoI
   a) I am an active backbench Conservative peer, and have made occasional use of FoI in that context; much greater use has been made by groups that I chair or are otherwise associated with, such as the London Motorists Action Group. I make considerable personal use of FoI in my commercial life as editor of The Good Schools Guide.
   b) As a user, I am broadly content with the workings of the act. I have pursued an appeal to the Commissioner and won (and also similarly in Scotland). Much patience was required, over several years (a faster system would be welcome) but the eventual judgement was careful and fair, and the Commissioner has been quick to enforce it subsequently. As a politician, I am in agreement with the Campaign for Freedom of Information in the improvements that they seek.

3) Payment for data which is intended for commercial re-use
   a) Part 6 of The Protection of Freedoms Bill proposes to amend the FOI Act, introducing new provisions facilitating access to, and the reuse of, datasets. These also specifically provide that a fee may be charged for the reuse of information.
   b) I approve of this. Why should I not share my revenue with the public bodies which have made it possible?

4) How much should be paid for data?
   a) The more that is charged, the more access is denied and use prevented. To offer three examples from my experience:
i) I currently obtain datasets under FoI from individual UK universities (UCAS and HESA have refused to supply). These are dirty and often presented in inconvenient formats; they take a lot of work to make useable. If I had to pay even the marginal cost of providing me with the data that would be a substantial barrier to my building a business in the university information area.

ii) I asked HESA for four simple datasets; they quoted £4,000 for them – well above their utility to me, and ten or twenty times their marginal cost.

iii) I would have a use for the house price data that the Land Registry collects – but not £40,000 per annum worth of use, which is the minimum price for the data I would need.

b) Pricing information highly reduces the use made of it and raises barriers to the creation of new businesses, other than by the well-financed. On the other hand, pricing it cheaply means that businesses using the data may not be paying a fair price for it. I do not have an easy formula to offer, but this is a familiar problem in commerce and one that I wrestle with myself; a licence based on the number of users and the proposed use is a common solution in my world.

c) In any event, I think that the Information Commissioner should be allowed to review publication schemes, even after they have been approved, to check that they measure up to a set of principles. Under the exemption in s.21 of the FoI Act, a public authority can refuse to supply information under FoI terms if it is reasonably accessible to the applicant other than by means of an FoI request. Section 21(3) provides that this applies even if the authority charges for the information - but only if the fee, or means by which the fee will be calculated, is specified in the authority’s publication scheme.

d) I suggest that the principles that publication schemes should measure up to might be:

i) If a public body wishes to charge more than the marginal cost of production for any dataset, then it must justify that charge in terms of the commercial value of the dataset to the user in question and the desirability of encouraging the commercial re-use of public data.

5) UCAS’s coach and horses

a) In their refusal of a recent FoI request from me, UCAS said:

i) “UCAS also considers that, even if data protection concerns did not prevent it from disclosing the information you have requested, your request would in any event have been refused on the basis of exemption s.21 (Information available by other means). Should it be possible to devise analysis specification which sufficiently minimises the risks of disclosure, this service is available from UCAS Media Ltd who offers a
bespoke data analysis service as described in the UCAS Freedom of Information Act Publication Scheme “Guide to Information” at http://www.ucas.com/about_us/foi/guidetoinformation/services (at the link “Statistical Services FAQs”)."

b) In other words, UCAS will never have to disclose data on FoI terms, because if it is disclosable under FoI then it comes under the publication scheme.

c) The minimum charge under the publication scheme is £200.

d) If this formula was adopted by all public bodies then that would be an end to free information under FoI.

e) In any event, UCAS’s exploit emphasises the importance of getting the pricing of publication scheme datasets right.

January 2012
Executive Summary:

The provisions of the Freedom of Information Act 2000 were utilised to access the evidence to substantiate the Doctoral Study, and subsequent academic articles, on the impact of Performance Management on the Police Service in England and Wales. Reflections on the experience of using the legislation as an academic device are outlined in the submission, as are examples of the type of information disclosed. It was established that the Act was a powerful means of accessing information with the potential to facilitate greater accountability. However, on its own it cannot ensure reform and further legislation may be necessary to realise its overarching objectives.

1. Rationale for utilising the Freedom of Information Act (FOI) as a research tool:

1.1 Participant observations as a Chief Inspector in the West Midlands Police had identified ‘gaming’ behaviour as an unintended consequence of Performance Management introduced as a means of improving Police governance and accountability. However earlier disclosures of similar perverse behaviours by practitioners (Young 1991) had been unable to establish an empirical pattern and was weakened by a lack of corroboration. The Police Federation had also responded to their members’ concerns by highlighting ‘gaming’ behaviours at their national conference in 2007 but were accused by the then Policing Minister Tony McNulty of ‘over-egging the cake’. The introduction of the Freedom of Information Act provided a means of accessing unpublished documents and detailed official statistics, thus addressing these methodological limitations.

1.2 Observations had identified four distinct categories of perverse behaviours designed to improve performance by unethical means, or give the false impression performance had improved. Such behaviours are referred to colloquially as ‘fiddling the figures’, ‘cooking the books’ or ‘good housekeeping’. In the academic literature they are referred to as ‘gaming’ behaviour and there is a body of theory on the subject (De Bruijn 2001 2007, Le Grand 2003 and Bevan & Hood 2006)

1.3 The four categories of ‘gaming’ behaviours identified are defined as follows:

- **Cuffing:** The under-recording of reported crimes, the term being derived from the magician’s art of making objects disappear up the sleeve or cuff (Young 1991).

- **Nodding:** This involves collusion between officers and suspects to admit to large numbers of offences, usually whilst in prison after sentence, in return for favours such as reduced sentences, access to partners, drugs or alcohol. The term is used to describe the act of a prisoner pointing out or ‘nodding’ at locations where they claim to have committed offences. (Wilson et al 2001:63)

- **Skewing:** This involves moving resources from areas of activity which are not subject to performance measures in order to improve performance in areas that are monitored for control purposes (Rogerson 1995).
• Stitching: This includes a variety of malpractices designed to enhance the strength of the evidence against a suspect in order to ensure the desired criminal justice outcome. Fabricating evidence or stitching someone up are forms of this behaviour.

1.4 All of these ‘gaming’ behaviours were operating in the West Midlands Police during the period 1996 to 1999 and had a major impact on the force’s performance (Patrick 2004, 2009 2011 2012a 2012b). In combination they can be regarded as a ‘perverse policing model’. The statistical profile of the force during this period provided a template for identifying similar practices in other forces.

1.5 Various ‘events’, some in response to the behaviours being uncovered by regulators or specific incidents which had the potential to become scandals, had resulted in the force conducting reviews of the concerning behaviours. The resulting documentation, much of which was completed prior to the introduction of the Freedom of Information Act (FOI), was never intended for public consumption. However when presented with a FOI request, the force released the documents. Many of these reports quantified the scale of the behaviours and by supplementing this information with analysis of national performance data it was possible to calculate the extent to which ‘gaming’ behaviour distorted results.

2. Use of the FOI Act to conduct an academic survey:

2.1 The introduction of a False Reporting Policy in the West Midlands Police in 2004 corresponded with a marked reduction in reported crime. It was argued that this represented a return to an evidential crime recording standard and the associated ‘cuffing’ (Patrick 2011). This demonstrated a flaw in the National Crime Recording Standard introduced in April 2002 with the stated objective of standardising crime recording procedures and eliminating such distortions. In order to establish if other forces had experienced similar reductions, when they introduced such a policy, all forces in England and Wales were sent a questionnaire under the provisions of the Act asking them to supply copies of any false reporting policy.

2.2 They were also asked to provide any analytical assessment of the problem of false reporting completed under the National Intelligence Model (NIM) and any Impact Assessment completed on the policy under the provisions of the Race Relations (Amendment) Act. It was hoped the National Intelligence Model assessment would quantify the scale of the potential threat from what was believed to be the bogus reporting of crime in pursuit of fraudulent insurance claims. The Impact Assessments should have been completed as the re-introduction of greater discretion into the crime recording process could be influenced by officer bias. Again some quantifiable results were being sought.

2.3 A 100% response rate was achieved. The identification of those forces operating ‘false reporting’ policies enabled a statistical analysis to be completed and this supported the hypothesis that the crime recording standard had reverted back to its pre NCRS interpretation. Unpublished data on the number of crimes which had been declassified as crimes i.e. ‘no crimed’, was released by the Home Office and this strengthened the academic argument.

2.4 Only two of the forces to have introduced false reporting policies had conducted NIM assessments on the threat and neither supported the introduction of the policy. None of the identified forces had carried out comprehensive impact assessments on the re-introduction of discretion into the crime recording procedures although one had identified the potentially discriminatory consequences of the refusal to issue crime numbers to those reporting passports stolen.
2.5 The ‘evidence of absence’ is a valuable facet of the Act and proved valuable when exploring why the Home Office ceased publishing the validation tests they carried out on the police recording rates in the British Crime Survey (BCS). A FOI request established that they ceased asking the relevant questions in the 2006/7 survey despite the fact that the results in 2005/6 indicated ‘under recording’ was increasing (Walker, Kershaw and Nicholas: 2006:52).

3 Accessing Statistics:

3.1 In order to quantify the extent of ‘noding’, associated with abuse of the Offences Taken into Consideration (TIC) procedures, it was necessary to analyse the impact of preventative action on the number of offences detected as TICs. The Home Office again released the data in response to a Freedom of Information request and the scale of the abuse could be estimated from the fall in TICs after the incident or scandal which stimulated the remedial action. A consistent and compelling pattern was evident in all the cases examined (Patrick 2012a).

4 Accessing Confidential Documents:

4.1 The information contained within sensitive and confidential documents had a major impact on the direction of the research and the conclusions reached. Whilst participant observation and knowledge of procedures was a great benefit, the willingness of organisations to comply with the statutory requirements was commendable. The release of a confidential force inspection report completed by Her Majesty’s Inspector of Constabulary (HMIC 1998) stimulated interest in the way regulators addressed ‘gaming’ when it was uncovered. It was clear from this document that HMIC were aware as early as 1998 that post sentence admissions, Prison Write Offs, were being converted to TICs and that the practice was prone to abuse.

4.2 A draft report on Nottingham Constabulary, following the Chief Constable’s admission that the force was struggling to cope with a marked rise in gang related murders, revealed that the redeployment of officers from specialist HQ squads to local policing units had not gone well. This ‘skewing’ of resources in favour of more affluent areas had been identified in the West Midlands and it appeared, in both cases, that it could have contributed to the rise in gang related crime or curtailed these forces’ ability to respond to the emerging threat. The paragraph referring to this was omitted from the published version of the report.

4.3 Confidential documents released by one force facilitated an assessment of the capabilities of the Independent Police Complaints Commission. The documents challenged their findings on an important investigation triggered by the death of a child (Patrick 2012b).

5. The Appeals Process:

5.1 In order to pursue the hypothesis that regulators may be pressurising forces to introduce ‘gaming’ type behaviours to improve their performance, information was requested from the Police Standards Unit (PSU). Specifically sought were their assessments and recommendations on West Yorkshire and Nottinghamshire police forces. It was known that both forces had experienced ‘gaming’ type problems during the late 1990s/early 2000s and the remedial action no doubt contributed to their low station on the national league tables. Their performance improved markedly after Police Standard Unit intervention and examination of their performance profiles suggested ‘nodding’ and ‘cuffing’ had been resurrected. The request for full disclosure was refused and this led to an appeal to the Information Commissioner.

5.2 Whilst the Information Commissioner found in favour of the appeal, the process took over three years to complete. This is believed to be due to a lack of resources at the Information Commissioner’s Office and is something the Committee may wish to comment on.
6. The scope of Organisations subject to the provisions of the Act:

6.1 The Act was again to prove invaluable when studying the behaviour of the regulators. In 2006 problems with the impact of ‘gaming’ on the reliability of detection data appeared to be behind the decision to audit a range of detections which did not involve the charging of a suspect. Contrary to long established practice the results were not published by Her Majesty’s Inspector of Constabulary (HMIC). However, despite the fact that HMIC are not subject to the provisions of the Act, they responded to a request from an unknown applicant and published the results on their web site. The exclusion of HMIC from the Act may be something the Committee may wish to review.

6.2 The audit of detections highlighted major quality failings, including insufficiency of evidence, in relation to cautions, penalty notices and informal warnings. Such deficiencies would have implications for the Criminal Record Bureau and the Association of Chief Police Officers (ACPO) who administer the Police National Computer (PNC). The use of the FOI to follow the documentary trail was not an option in relation to ACPO as this organisation is not covered by the Act. Again the Committee may wish to review the organisations covered by the legislation.

7. The Operating Philosophy of the Information Commissioner:

7.1 The evidential ‘blind spot’ in relation to ACPO was partially overcome when they wrote to the Information Commissioner admitting that the audit of detections had uncovered potential breaches of the Data Protection Act. All the documentation in relation to this exchange was released by the Commissioner’s Office. The subject of the correspondence was encapsulated by the following disclosure:

“From my perspective I am most concerned that individuals were not being informed that they were considered to be the perpetrator of an offence even though this did not involve a legal process, especially if such information could be used in future Enhanced Disclosure relating to them. This clearly breaches the requirement of the first data protection principle that the processing of personal data must be done fairly. I am also worried by the sufficiency of evidence used. If a police force is going to label an individual as the de facto perpetrator then they must have a good objective reason for doing so. Not having this could lead to a record being viewed as inadequate or inaccurate (breaches of the third and fourth principles respectively).” (Information Commissioner 26.3.2007: Unpublished)

7.2 Whilst ACPO were less than candid about the scale and nature of the ‘insufficiency of evidence’ uncovered by the audit, the decision by the Information Commissioner not to alert the public to the risk they had been exposed to demonstrated a tendency towards a ‘professional body’ approach to regulation, as opposed to a ‘democratic model’ where information is made available to the public in order for them to hold officials to account:

“I would prefer to work with chief officers to ensure compliance. I would like to know more detail about how this has come about and what action is being taken to ensure future compliance” (Information Commissioner 26.3.2007: Unpublished)

7.3 The reply from ACPO disclosed the fact that the Home Office and HMIC were also aware of the nature of the problem:

“Please rest assured that the issues that have come to light as a result of the recent Association of Chief Police Officers’ and HMIC audits have been taken extremely seriously by the police service. To this end a series of meetings have taken place in fast time with all relevant parties, including the Home Office, to consider how best to address the concerns
that you raised to which we are alive” (ACPO letter to the Information Commissioner 10.4.2007: Unpublished)

8. Conclusion/Discussion

8.1. The provisions of the Freedom of Information Act were an invaluable research tool overcoming a number of methodological limitations faced by previous studies. Whilst the findings could be damaging to the State, thus defeating the desired objective of enhancing public trust, research in this area suggests that such loss of trust can be transient (Van de Walle et al 2008). So in the medium to long term, greater transparency will lead to reform and better governance thus vindicating those who introduced the legislation.

8.2 It should also be borne in mind that the study referred to benefited from an element of surprise and many of the documents relied upon preceded the enactment of the legislation. Anecdotal evidence would suggest such candid documents are being shredded. It could also be surmised that they may not be commissioned at all. If this were to be the case then it could be argued the Act has been counterproductive.

8.3 The Information Commissioner appeared to give voice to this concern in Plymouth City Council Vs BBC (2006) (ICO Ref FSS0082254). In this case the BBC had requested full disclosure of the documents submitted to a serious case review into the death of a child by individual agencies. The Information Commissioner judged that the disclosure of the reviews conducted by individual agencies may deter them from being open thus limiting the ability to learn from experience. This rational was challenged by the deliberations following the death of Baby P.

8.4 Whilst the reluctance of Chief Officers to disclose relevant information to regulators or other forms of official inquiry can be addressed by legislation and conferring greater powers on investigators, this will be to no avail if the regulators themselves are not committed to making their findings public. The failure of the Financial Services Authority was a damning indictment of this approach. Structurally this flaw may be alleviated by aligning the regulators to Parliament and its Scrutiny Committees may be the most appropriate bodies to oversee their work.

8.5 Another consideration raised by the study was the means by which information uncovered by Freedom of Information requests is disseminated to the general public. Many of the documents disclosed were not made public or easily accessible on the web sites of the originating organisations, including the Information Commissioner’s Office. This is seen as good practice but is not a statutory requirement. The media is one outlet but they have their own agenda and move on quickly to the next breaking story (Howard & Waisbord 2004). Academic articles are one outlet but publication is slow. The official regulators appear to be the most obvious recipient but as can be seen from the evidence presented appropriate action may not follow.

8.6 In relation to the information uncovered by this study the most appropriate outlet would appear to be the Parliamentary Scrutiny Committees. Certainly something needs to be done for those citizens who have police records which are not justified. Witness testimonies and analysis of the Home Office data would suggest the same problems are occurring with offences dealt with as Restorative or Community Resolutions. It may be worth the Scrutiny Committees considering making themselves more accessible to un-solicited submissions.

January 2012
References:


Patrick, R. (2012a). ‘A Nod and a Wink’: Do ‘gaming practices’ provide an insight into the organisational nature of police corruption? (The Police Journal. Accepted for publication, 11.3.11 Ref.: Ms. No. PJ-D-10529R1).

Patrick, R. (2012b). ‘Public Champions or Protectors of Professional Interests?’ Observations on the performance of those bodies entrusted with the regulation of the Police Service during the era of New Public Management’ (The Police Journal. Accepted for publication 17.6.2011 Ref.: Ms. No. PJ-D-11536R1)


<table>
<thead>
<tr>
<th>Force</th>
<th>Data Testing</th>
<th>Charge</th>
<th>Summons</th>
<th>Cautions (Reprimands + Final Warnings)</th>
<th>TICs</th>
<th>PNDs</th>
<th>Formal Warnings for cannabis</th>
</tr>
</thead>
<tbody>
<tr>
<td>Avon &amp; Somerset</td>
<td>Poor</td>
<td>Fair</td>
<td>Fair</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
</tr>
<tr>
<td>Bedfordshire</td>
<td>Fair</td>
<td>Fair</td>
<td>Fair</td>
<td>Fair</td>
<td>Fair</td>
<td>Fair</td>
<td>Poor</td>
</tr>
<tr>
<td>BTP</td>
<td>Fair</td>
<td>Fair</td>
<td>Good</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
</tr>
<tr>
<td>Cambridgeshire</td>
<td>Good</td>
<td>Excellent</td>
<td>Excellent</td>
<td>Fair</td>
<td>Fair</td>
<td>Fair</td>
<td>Poor</td>
</tr>
<tr>
<td>Cheshire</td>
<td>Poor</td>
<td>Fair</td>
<td>Fair</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
</tr>
<tr>
<td>City of London</td>
<td>Good</td>
<td>Excellent</td>
<td>Fair</td>
<td>Good</td>
<td>Fair</td>
<td>Fair</td>
<td>Poor</td>
</tr>
<tr>
<td>Cleveland</td>
<td>Fair</td>
<td>Fair</td>
<td>Good</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td>Fair</td>
</tr>
<tr>
<td>Cumbria</td>
<td>Good</td>
<td>Excellent</td>
<td>Good</td>
<td>Poor</td>
<td>Poor</td>
<td>Fair</td>
<td>Fair</td>
</tr>
<tr>
<td>Derbyshire</td>
<td>Good</td>
<td>Excellent</td>
<td>Excellent</td>
<td>Fair</td>
<td>Fair</td>
<td>Fair</td>
<td>Poor</td>
</tr>
<tr>
<td>Devon &amp; Cornwall</td>
<td>Fair</td>
<td>Fair</td>
<td>Fair</td>
<td>Good</td>
<td>Fair</td>
<td>Poor</td>
<td>Poor</td>
</tr>
<tr>
<td>Dorset</td>
<td>Fair</td>
<td>Good</td>
<td>Fair</td>
<td>Good</td>
<td>Fair</td>
<td>Fair</td>
<td>Poor</td>
</tr>
<tr>
<td>Durham</td>
<td>Good</td>
<td>Good</td>
<td>Excellent</td>
<td>Good</td>
<td>Fair</td>
<td>Excellent</td>
<td>Fair</td>
</tr>
<tr>
<td>Dyfed Powys</td>
<td>Good</td>
<td>Good</td>
<td>Good</td>
<td>Fair</td>
<td>Fair</td>
<td>Good</td>
<td>Excellent</td>
</tr>
<tr>
<td>Essex</td>
<td>Fair</td>
<td>Fair</td>
<td>Excellent</td>
<td>Fair</td>
<td>Fair</td>
<td>Good</td>
<td>Poor</td>
</tr>
<tr>
<td>Gloucestershire</td>
<td>Poor</td>
<td>Fair</td>
<td>Fair</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td>Fair</td>
</tr>
<tr>
<td>GMP</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
</tr>
<tr>
<td>Gwent</td>
<td>Fair</td>
<td>Fair</td>
<td>Fair</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
</tr>
<tr>
<td>Hampshire</td>
<td>Fair</td>
<td>Fair</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
</tr>
<tr>
<td>Hertfordshire</td>
<td>Fair</td>
<td>Good</td>
<td>Fair</td>
<td>Poor</td>
<td>Poor</td>
<td>Good</td>
<td>Poor</td>
</tr>
<tr>
<td>Humberside</td>
<td>Fair</td>
<td>Fair</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
</tr>
<tr>
<td>Kent</td>
<td>Fair</td>
<td>Fair</td>
<td>No judgement</td>
<td>Fair</td>
<td>Fair</td>
<td>Fair</td>
<td>Poor</td>
</tr>
<tr>
<td>Lancashire</td>
<td>Fair</td>
<td>Good</td>
<td>Good</td>
<td>Fair</td>
<td>Fair</td>
<td>Good</td>
<td>Fair</td>
</tr>
<tr>
<td>Leicestershire</td>
<td>Fair</td>
<td>Fair</td>
<td>Fair</td>
<td>Excellent</td>
<td>Poor</td>
<td>Fair</td>
<td>Fair</td>
</tr>
<tr>
<td>Lincolnshire</td>
<td>Fair</td>
<td>Excellent</td>
<td>Poor</td>
<td>Good</td>
<td>Fair</td>
<td>Poor</td>
<td>Poor</td>
</tr>
<tr>
<td>Merseyside</td>
<td>Fair</td>
<td>Fair</td>
<td>Poor</td>
<td>Fair</td>
<td>Poor</td>
<td>Fair</td>
<td>Poor</td>
</tr>
<tr>
<td>MPS</td>
<td>Fair</td>
<td>Excellent</td>
<td>Poor</td>
<td>Good</td>
<td>Poor</td>
<td>Good</td>
<td>Fair</td>
</tr>
<tr>
<td>Norfolk</td>
<td>Good</td>
<td>Excellent</td>
<td>Fair</td>
<td>Good</td>
<td>Poor</td>
<td>Poor</td>
<td>Fair</td>
</tr>
<tr>
<td>North Wales</td>
<td>Fair</td>
<td>Good</td>
<td>Good</td>
<td>Poor</td>
<td>Poor</td>
<td>Fair</td>
<td>Poor</td>
</tr>
<tr>
<td>North Yorkshire</td>
<td>Excellent</td>
<td>Excellent</td>
<td>Excellent</td>
<td>Excellent</td>
<td>Fair</td>
<td>Good</td>
<td>Fair</td>
</tr>
<tr>
<td>Northamptonshire</td>
<td>Fair</td>
<td>Fair</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
</tr>
<tr>
<td>Northumbria</td>
<td>Good</td>
<td>Good</td>
<td>Excellent</td>
<td>Fair</td>
<td>Fair</td>
<td>Good</td>
<td>No judgement</td>
</tr>
<tr>
<td>Nottinghamshire</td>
<td>Fair</td>
<td>Good</td>
<td>Fair</td>
<td>Poor</td>
<td>Fair</td>
<td>Fair</td>
<td>Poor</td>
</tr>
<tr>
<td>South Wales</td>
<td>Good</td>
<td>Good</td>
<td>Poor</td>
<td>Good</td>
<td>Poor</td>
<td>Fair</td>
<td>Poor</td>
</tr>
<tr>
<td>South Yorkshire</td>
<td>Good</td>
<td>Excellent</td>
<td>Good</td>
<td>Fair</td>
<td>Fair</td>
<td>Good</td>
<td>Good</td>
</tr>
<tr>
<td>Staffordshire</td>
<td>Good</td>
<td>Good</td>
<td>Poor</td>
<td>Good</td>
<td>Fair</td>
<td>Good</td>
<td>Poor</td>
</tr>
<tr>
<td>Suffolk</td>
<td>Fair</td>
<td>Good</td>
<td>Fair</td>
<td>Poor</td>
<td>Fair</td>
<td>Poor</td>
<td>Poor</td>
</tr>
<tr>
<td>Surrey</td>
<td>Fair</td>
<td>Excellent</td>
<td>Poor</td>
<td>Poor</td>
<td>Good</td>
<td>Fair</td>
<td>Poor</td>
</tr>
<tr>
<td>Sussex</td>
<td>Fair</td>
<td>Fair</td>
<td>Good</td>
<td>Fair</td>
<td>Fair</td>
<td>Poor</td>
<td>Poor</td>
</tr>
<tr>
<td>Thames Valley</td>
<td>Fair</td>
<td>Fair</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td>Fair</td>
<td>Excellent</td>
</tr>
<tr>
<td>Warwickshire</td>
<td>Fair</td>
<td>Good</td>
<td>Poor</td>
<td>Poor</td>
<td>Fair</td>
<td>Poor</td>
<td>Poor</td>
</tr>
<tr>
<td>West Mercia</td>
<td>Fair</td>
<td>Fair</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
</tr>
<tr>
<td>West Midlands</td>
<td>Good</td>
<td>Excellent</td>
<td>Poor</td>
<td>Fair</td>
<td>Fair</td>
<td>Poor</td>
<td>Poor</td>
</tr>
<tr>
<td>West Yorkshire</td>
<td>Good</td>
<td>Excellent</td>
<td>Fair</td>
<td>Good</td>
<td>Good</td>
<td>Good</td>
<td>Fair</td>
</tr>
<tr>
<td>Wiltshire</td>
<td>Fair</td>
<td>Fair</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td>Fair</td>
</tr>
<tr>
<td>Force</td>
<td>Data Testing</td>
<td>Cautions (Adult)</td>
<td>TiCs</td>
<td>PNDs</td>
<td>Cannabis Warnings</td>
<td>Non Sanction Detections</td>
<td></td>
</tr>
<tr>
<td>-----------------------</td>
<td>--------------</td>
<td>------------------</td>
<td>----------</td>
<td>-------</td>
<td>-------------------</td>
<td>-------------------------</td>
<td></td>
</tr>
<tr>
<td>Avon &amp; Somerset</td>
<td>Fair</td>
<td>Good</td>
<td>Poor</td>
<td>Fair</td>
<td>Good</td>
<td>No judgement</td>
<td></td>
</tr>
<tr>
<td>Bedfordshire</td>
<td>Poor</td>
<td>Poor</td>
<td>Excellent</td>
<td>Poor</td>
<td>Poor</td>
<td></td>
<td></td>
</tr>
<tr>
<td>BTP</td>
<td>Poor</td>
<td>Fair</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td></td>
</tr>
<tr>
<td>Cambridgeshire</td>
<td>Good</td>
<td>Excellent</td>
<td>Good</td>
<td>Poor</td>
<td>Poor</td>
<td>No judgement</td>
<td></td>
</tr>
<tr>
<td>Cheshire</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td>Fair</td>
<td>Poor</td>
<td></td>
<td></td>
</tr>
<tr>
<td>City of London</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td>No judgement</td>
<td></td>
</tr>
<tr>
<td>Cleveland</td>
<td>Poor</td>
<td>Poor</td>
<td>Good</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td></td>
</tr>
<tr>
<td>Cumbria</td>
<td>Fair</td>
<td>Fair</td>
<td>Poor</td>
<td>Fair</td>
<td>Poor</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Derbyshire</td>
<td>Poor</td>
<td>Fair</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td></td>
</tr>
<tr>
<td>Devon &amp; Cornwall</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td>Fair</td>
<td>Poor</td>
<td>Poor</td>
<td></td>
</tr>
<tr>
<td>Dorset</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Durham</td>
<td>Poor</td>
<td>Fair</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td>Fair</td>
<td></td>
</tr>
<tr>
<td>Dyfed Powys</td>
<td>Fair</td>
<td>Good</td>
<td>Poor</td>
<td>Poor</td>
<td>Excellent</td>
<td>Poor</td>
<td></td>
</tr>
<tr>
<td>Essex</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td></td>
</tr>
<tr>
<td>Gloucestershire</td>
<td>Poor</td>
<td>Fair</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td></td>
</tr>
<tr>
<td>GMP</td>
<td>Poor</td>
<td>Good</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td></td>
</tr>
<tr>
<td>Gwent</td>
<td>Fair</td>
<td>Good</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td></td>
</tr>
<tr>
<td>Hampshire</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td></td>
</tr>
<tr>
<td>Hertfordshire</td>
<td>Poor</td>
<td>Good</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td></td>
</tr>
<tr>
<td>Humberside</td>
<td>Good</td>
<td>Excellent</td>
<td>Fair</td>
<td>Fair</td>
<td>Fair</td>
<td>Poor</td>
<td></td>
</tr>
<tr>
<td>Kent</td>
<td>Fair</td>
<td>Good</td>
<td>Poor</td>
<td>Fair</td>
<td>Poor</td>
<td>Poor</td>
<td></td>
</tr>
<tr>
<td>Lancashire</td>
<td>Poor</td>
<td>Fair</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td></td>
</tr>
<tr>
<td>Leicestershire</td>
<td>Good</td>
<td>Excellent</td>
<td>Poor</td>
<td>Good</td>
<td>Good</td>
<td>Poor</td>
<td></td>
</tr>
<tr>
<td>Lincolnshire</td>
<td>Good</td>
<td>Excellent</td>
<td>Fair</td>
<td>Fair</td>
<td>Poor</td>
<td>Poor</td>
<td></td>
</tr>
<tr>
<td>Merseyside</td>
<td>Poor</td>
<td>Good</td>
<td>Poor</td>
<td>Good</td>
<td>Poor</td>
<td>Poor</td>
<td></td>
</tr>
<tr>
<td>MPS</td>
<td>Poor</td>
<td>Fair</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td></td>
</tr>
<tr>
<td>Norfolk</td>
<td>Good</td>
<td>Excellent</td>
<td>Poor</td>
<td>Fair</td>
<td>Excellent</td>
<td>No judgement</td>
<td></td>
</tr>
<tr>
<td>North Wales</td>
<td>Fair</td>
<td>Excellent</td>
<td>Fair</td>
<td>Fair</td>
<td>Fair</td>
<td>Poor</td>
<td></td>
</tr>
<tr>
<td>North Yorkshire</td>
<td>Fair</td>
<td>Good</td>
<td>Poor</td>
<td>Fair</td>
<td>Excellent</td>
<td>Poor</td>
<td></td>
</tr>
<tr>
<td>Northamptonshire</td>
<td>Poor</td>
<td>Fair</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td></td>
</tr>
<tr>
<td>Northumbria</td>
<td>Fair</td>
<td>Fair</td>
<td>Poor</td>
<td>Poor</td>
<td>Fair</td>
<td>Poor</td>
<td></td>
</tr>
<tr>
<td>Nottinghamshire</td>
<td>Good</td>
<td>Good</td>
<td>Excellent</td>
<td>Poor</td>
<td>Good</td>
<td>Fair</td>
<td></td>
</tr>
<tr>
<td>South Wales</td>
<td>Poor</td>
<td>Fair</td>
<td>Poor</td>
<td>Poor</td>
<td>Good</td>
<td>Poor</td>
<td></td>
</tr>
<tr>
<td>South Yorkshire</td>
<td>Fair</td>
<td>Fair</td>
<td>Poor</td>
<td>Excellent</td>
<td>Excellent</td>
<td>Fair</td>
<td></td>
</tr>
<tr>
<td>Staffordshire</td>
<td>Excellent</td>
<td>Excellent</td>
<td>Excellent</td>
<td>Excellent</td>
<td>Excellent</td>
<td>Excellent</td>
<td></td>
</tr>
<tr>
<td>Suffolk</td>
<td>Poor</td>
<td>Fair</td>
<td>Poor</td>
<td>Poor</td>
<td>Fair</td>
<td>Poor</td>
<td></td>
</tr>
<tr>
<td>Surrey</td>
<td>Good</td>
<td>Excellent</td>
<td>Good</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td></td>
</tr>
<tr>
<td>Sussex</td>
<td>Fair</td>
<td>Fair</td>
<td>Poor</td>
<td>Good</td>
<td>Fair</td>
<td>Poor</td>
<td></td>
</tr>
<tr>
<td>Thames Valley</td>
<td>Good</td>
<td>Excellent</td>
<td>Fair</td>
<td>Good</td>
<td>Excellent</td>
<td>Excellent</td>
<td></td>
</tr>
<tr>
<td>Warwickshire</td>
<td>Good</td>
<td>Excellent</td>
<td>Fair</td>
<td>Fair</td>
<td>Good</td>
<td>No judgement</td>
<td></td>
</tr>
<tr>
<td>West Mercia</td>
<td>Fair</td>
<td>Excellent</td>
<td>Fair</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td></td>
</tr>
<tr>
<td>West Midlands</td>
<td>Fair</td>
<td>Good</td>
<td>Good</td>
<td>Fair</td>
<td>Poor</td>
<td>No judgement</td>
<td></td>
</tr>
<tr>
<td>West Yorkshire</td>
<td>Fair</td>
<td>Good</td>
<td>Fair</td>
<td>Poor</td>
<td>Good</td>
<td>Poor</td>
<td></td>
</tr>
<tr>
<td>Wiltshire</td>
<td>Fair</td>
<td>Good</td>
<td>Poor</td>
<td>Poor</td>
<td>Excellent</td>
<td>Poor</td>
<td></td>
</tr>
</tbody>
</table>
1. Executive Summary

1.1. Ian Readhead is the current Association of Chief Police Officers (ACPO) Director of Information and responsible for the ACPO Data Protection/Freedom of Information/Records Management portfolio within the Police service. Prior to this appointment, he was the Deputy Chief Constable of Hampshire and responsible for the introduction and implementation of the Freedom of Information Act (FOIA) within the service.

1.2. Although Home Office police forces are public authorities in their own right, ACPO in agreement with all Chief Constables’, formed a Central Referral Unit (CRU) in 2005 in order to support forces in their delivery of Freedom of Information (FOI). In essence, the CRU provides a vital and pivotal role in managing and delivering information which:

- Provides consistency in applying FOI principles
- Provides a comprehensive resource for FOI officers
- Ensures consistency in the publication of information
- Operates a referral system to monitor the possible impact on the service
- Prevents inappropriate information disclosures
- Delivers national FOI training across the Police service.
- Produces the ACPO FOIA Manual of Guidance.

1.3. The police service shares its data with numerous other partner agencies and the manager of the ACPO CRU is a current member of the NSLG (National Security Liaison Group) which advises on Sec 23 and Sec 24 FOIA issues. In addition, the ACPO CRU maintains a close working relationship with ACPOS (Association of Chief Police Officers Scotland) colleagues.

1.4. In anticipation of duplicate issues being raised by all 44 Home Office forces, ACPO have carried out their own consultation process with the forces and therefore the following comments represent the main observations from that work. Responses were based on the following terms of reference:

- Does the Freedom of Information Act work effectively?
- What are the strengths and weaknesses of the Freedom of Information Act?
- Is the Freedom of Information Act operating in the way that it was intended to?

1.5. ACPO fully supports the main objectives of the Freedom of Information Act 2000 (FOIA - the Act) and considers that when used properly, it is appropriate to have such a regime in place which encourages public Authorities to be open, transparent and subject to scrutiny and accountability by their local communities for their actions and decisions. However, the original purpose and remit of the Act has somewhat become lost because of the way in which it can be used and abused in its application by certain individuals. Whilst most requests are submitted by responsible and concerned citizens or organisations, a significant proportion are simply bizarre or obsessive in nature and do little to advance public knowledge or satisfy a wider public interest.

1.6. Overall, ACPO consider that the implementation of the act has been extremely successful; however the increasing number of requests and the current financial restrictions placed on forces is starting to have a substantial impact on their performance and delivery of FOI.

1.7. What is of concern is the fact that we continue to see a 20% year on year growth in requests in addition to a government led drive to publish more information (Datasets/Transparency Agenda). It is unclear in the current climate as to how public authorities can meet both demands.

1.8. ACPO would certainly welcome any changes to the legislation which reduces the current bureaucracy and assists public authorities in successfully challenging the vexatiousness of some requests. In addition, the “open fishing” experience which allows journalists or media
centre’s to trawl for stories without any specific public interest accountability remains a major concern to the service.

1.9. The following are the key points which ACPO believe to be current issues for further consideration and discussion with the select committee:

RECOMMENDATIONS:

1. If authorities are increasingly required to publish information, serious consideration must be given to alleviating the current burden in providing what are bureaucratic, duplicated and extensive legislative responses which are confusing and misleading to FOI Applicants.

2. There needs to be a program of education which provides the public with more realistic expectations as to the types of information they are likely to receive.

3. Making the process self-funding by charging a fee for all requests for information - similar to Subject access £10.

4. Lowering the appropriate fees limit and/or time permitted to complete FOI requests i.e from 18 hours to 10.

5. Consider charges specifically to those who use the legislation for commercial benefit.

6. ACPO recommends that reading and redaction time should be catered for within Section 12.

7. Exemption should be class based and absolute for ongoing criminal investigations.

8. A complex exemption which in ACPO’s view requires reviewing.

9. Authorities should be able to include all evidence of the applicants history, including that from other sources and be provided with a structure which removes the need to subjectively decide whether the motives of the applicant are valid or not.

10. ICO to provide clear guidance to authorities, and more importantly the public, that when considering Section 14 an analysis will be made of the individual and their motives.

11. Introduction of some form of deterrent which may prevent these individuals even attempting to misuse the legislation, which can be balanced if similar deterrents ensure public authorities carefully consider its application.

12. Suggestions from forces varied in proposing an increase to the response time of between 30-40 days.

13. ACPO recommends a further analysis of the scheme which identifies what the public want versus what is perceived they want for proactive publication in order to have a real impact in reducing the volume of requests.

2. Background Information

2.1 The Police service has dealt with some 190,000 FOI requests since the act was implemented and continues to see significant rises in volumes.

<table>
<thead>
<tr>
<th>Year</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>16,280</td>
<td>19,614</td>
<td>22,360</td>
<td>28,589</td>
<td>35,778</td>
<td>31,122</td>
<td>36,364</td>
</tr>
</tbody>
</table>

2.2 Interestingly however is the fact that we only receive internal review requests for approx 2.4% of our cases which possibly highlights some success in the overall delivery of the act. However, due to the current review on public spending and the need for Chief Officers to
realign their budgets, ACPO detects a move away from the current ability by forces to respond effectively to an ever increasing volume of requests. Emerging evidence to justify this point is being reported to the centre with a growing sense of frustration by staff in simply being considered as a “back office” and non-vital function within their own organisations in comparison to other more important police business areas.

2.3 There is also a notable recent increase in the number of information tribunal hearings which highlight a current concern that such appeal processes are effectively cost free to applicants and therefore possibly open to abuse. The costs incurred in defending such cases are extremely impactive and something which both ACPO and the Information Commissioners Office (ICO) wish to avoid where possible. However, ACPO warmly welcomed a recent tribunal decision to award costs to the Metropolitan Police Service and encourage similar acknowledgements within the process when applicants appear to be abusing their rights.

2.4 Whilst the Information Commissioner as a regulator is a recognised source of informed guidance and direction on the legislation, they sometimes lack understanding regarding those issues involving the disclosure of sensitive police information. This often requires detailed and time consuming interaction with the ICO as they are reluctant to accept what the police service would consider to be a sound and professional opinion as to the risks in seeking to withhold information. This leads to unnecessary duplication of effort in providing the same or similar arguments for each case. We would imagine this is repeated in other business areas such as government, health and education. Therefore, it would be beneficial if there was a less challenging culture by the regulator. In other words, professional and rational opinion should be recognised in applying other exemptions within the legislation, something which only occurs at present within the terms of the Sec 36 exemption.

2.5 On a positive note, FOI requests have actually assisted to identify poor performance or areas for improvement within the police service (Forces failing to identify police officers with Convictions, Murder investigation where FOI applicant turned out to be a vital witness) and therefore FOI requests are considered extremely beneficial in that aspect of business. Unfortunately, the ACPO CRU do not at present have the resources available to collate all force FOI requests which otherwise would provide vital performance data across the UK in some cases.

3. Bureaucracy

3.1 There must be a balanced approach to ensure that the information sought by FOI applicants is relevant to the requirements of the public as a whole. The act was never intended to provide a platform which allowed individuals to carry out a crusade based on a sense of frustration or perceived injustice in their dealings with the public authority.

3.2 On occasions there appears to be a belief held by some applicants that any refusal to provide the information they require is simply not acceptable. This can be based on conspiracy theories or a lack of understanding as to the sensitivities of some information, such as personal data or investigation material. Although relevant exemptions exist for authorities to consider withholding the information, their application has to take the form of a legalistic, technical refusal notice which does nothing to dispel the applicant’s frustration when not receiving the information requested.

3.3 This then leads to an escalation of the case to the ICO and/or Information Tribunal. For the public authority there then follows a complex process in again justifying the arguments already played out with the original applicant. This can take the form of lengthy responses to the ICO caseworkers up to the submission of voluminous duplicated bundles of evidence for a tribunal. Although the ICO has a policy of informal resolution and is often prepared to engage by E mail and telephone, our suggestion would be that this should actually become the norm. We have concerns that the ICO is actually moving away from this approach as they have recently adopted a “one chance” policy when engaging with them. This in itself increases the risk of cases then having to be resolved through the more expensive and legalistic tribunal system.

3.4 Recommendations: 1 and 2
4. Fees

4.1 There has been an overwhelming response from forces in seeking support for the introduction of charges in respect of FOI requests. The continued demand on resources has led to excessive and disproportionate effort in responding to FOI requests and there is a general perception that Government has failed to recognise the significant costs associated with the administration of the FOIA by larger public authorities such as the police service. Whilst all forces have at least one member of staff assigned to dealing with FOI requests, the majority of work is actually carried out by information owners spread across force areas who are responsible for locating and retrieving the information sought. As a result there is no formal record kept of the actual time spent on such work. Currently force FOI resources are reducing whilst the number of FOI requests continues to grow, against this backdrop the current situation in performance is not sustainable. ACPO strongly believes that this situation requires addressing urgently with a view to considering the following options in reducing the current financial burden on public authorities:

4.2 Recommendations: 3, 4 and 5

5. Cost

5.1 Experience in a recent case (City Of London police) highlights the disproportionate effort made in some cases in being required to read and assess vast amounts of information. In this specific case, there were over 1,830 records, totalling some 250,000 pages which were not catered for under Sec 12 excess costs. The information had been retrievable but required further reading and redaction time which would have amounted to some 2,976 days had the work been carried out. Whilst the force was able to eventually negotiate a solution with the applicant, there is currently nothing within the FOI legislation which caters for this excessive and disproportionate burden on FOI staff. If they had been pressed, there would have been no choice but to comply with the request and bear the associated resource costs.

5.2 Recommendation: 6

6. Exemptions

6.1 Sec 30 – Investigations

This exemption is currently listed as Class based and qualified, which means that it can be overturned if there is a public interest in doing so. Obviously, this activity is the core function of the Police service but our ability to defend the disclosure of related information was further complicated when the information tribunal ruled that the harm to any particular investigation should also be evidenced. We would submit that such is the sensitivities of investigations; this exemption should be modified to become class based and absolute. This would put an end to the significant amount of requests received which either by design or unwittingly undermine the investigation process. This can range from people trying to get off a speeding ticket to journalists trying to gain an advantage in producing a story before the matter appears before a criminal court (Raoul Moat, Madeline McCann, Phone Hacking scandal etc) which were all high profile investigations and requests made during a sensitive stage of the investigation process. The requirement for this level of protection would obviously reduce after the conclusion of any legal or court process when it could revert to a qualified exemption. This would create a sterile time in terms of information disclosure during which the police could focus their efforts on the investigation itself rather than needing to divert unnecessary resources to dealing with FOI issues.

6.2 Recommendation: 7

6.3 Sec 40 – Personal data

This is a complex exemption which covers both first and third person data. Its application is hindered by confusion as to the definition of what constitutes personal data and is generally subject to a “fairness test”. This is subjective in nature and is a constant source of dispute
with applicants. The exemption requires a review and a simplification in order for it to become easy to understand, not only by the public authority but also the general public. Whilst we agree that the publication of senior official expenses is appropriate, requests for other members of staff involve lengthy and complex evaluation regarding their personal expectations, such as current role within the organisation, grade and other relevant personal factors.

6.4 Recommendation: 8

7. Sec 14 - Vexatious

7.1 UK Police forces are becoming increasingly concerned that dealing with requests from certain individuals are disproportionate to current business processes and as a result have become a significant burden during difficult times of austerity. The Police service can evidence three individuals, just in recent times, who have virtually engaged whole FOI teams in specific forces with their unreasonable demands for information to the detriment of other requesters and the proactive publication of information. It is for these reasons that ACPO consider the legislation relating to Section 14 should also directly relate to the applicant as well as the request.

7.2 In addition ACPO have recently noticed conflicting decision notices emerging from ICO caseworkers which also appear to confuse the subjective approach in dealing with Sec 14. The key question relates to the evidence required from authorities, as on face value it should not be a chore, echoed by the ICO comment 'The Commissioner agrees with the Tribunal that the bar need not be set too high in determining whether to deem a request vexatious. He also agrees with the Tribunal that the term 'vexatious' should be given its ordinary meaning, which is that it 'vexes' (causes irritation or annoyance);'

7.3 One other area of concern relates to the ICO’s recent interpretation that public authorities cannot use information obtained from other public authorities in providing evidence in support of their Sec 14 vexatious application. Clear evidence exists of applicants using a “scattergun” approach to a large number of authorities. If applicants consider that authorities hold relevant or similar information pertaining to their request, then authorities should also be allowed to consult and discuss with each other in assessing their own position. In a recent case, the applicant (and associates) targeted numerous police forces and other authorities in seeking relevant information to their cause but ACPO would argue that the common theme attached across these requests is extremely relevant when considering the underlying context and purpose which sits across the whole of the applicant’s request.

7.4 The following “guidance” assists to prove the points:

‘...the consequences of finding that a request for information is vexatious are much less serious than a finding of vexatious conduct in these other contexts, and therefore the threshold for a request to be found vexatious need not be set too high...’ (paragraph 11, Hossack)

‘...the concept of vexatious litigants from other legal contexts is not an appropriate analogy to use because what s.14(1) does make clear is that it is concerned with whether the request is vexatious, not whether the applicant is vexatious...’ (paragraph 25, Gowers)

Further, the Tribunal in Gowers said that the test is an objective one, i.e. the threshold is whether a reasonable public authority would find the request vexatious.

7.5 We would suggest that this guidance is not actually followed. We regularly see the rationale of the applicant being adjudged as the most important issue, yet there are no guidelines around this. It is also clearly not an objective test; it would seem to depend on whether there is any sympathy with the applicant and whether the evidence from the public authority does seem to hit a high bar, in some cases, but not in others. ACPO have recently sought guidance from the ICO in respect of the following:

\(^{1}\text{FS50382601}\)
Can and should the request be motive blind?

If not, what motives are valid and which are not?

In the Tribunal of Burke, it states: ‘the ICO has accepted that there is a fine line between obsession and persistence.’ What exactly is that line?

When can forces use evidence obtained from other PA’s in support of Sec 14

Finally, the information tribunal has also stated that the required standard should be based on the balance of probabilities, supported by the ICO guidance that the test should be whether a reasonable public authority finds the request vexatious. If this is so, exactly what standards of evidence are required and where is the tipping point for this balance?

7.6 Recommendations: 9, 10 and 11

8. Timescales

8.1 Police forces in general are of the view that consideration should be given to extending the 20 working day response time. In some cases, particularly where it relates to National Security information, there is insufficient time to collate information, consult with other interested parties and formulate an agreed disclosure. Whilst ACPO recognise that forces are able to extend for public interest reasons, sometimes even this additional timescale is difficult to meet.

8.2 Recommendation: 12

9. Publication Scheme

9.1 Forces have expressed concerns regarding the current value of publication schemes. Experience has shown that they are not widely used by the general public and the press/media for example tend to ignore it and make requests without even first identifying if the information has already been published. Whilst there is a requirement to proactively publish more information (datasets), evidence shows that there is very little interest in publication schemes as indicated by what appear to be a low numbers of “hits” on force websites.

9.2 The Resources that are available need to be focused on either production of information linked to data sets and the transparency agenda or the processing of individual requests. The two are intrinsically linked however there is little evidence that making more data available actually reduces the number of requests. The inescapable conclusion must therefore be that either the publications are not what the public require or it is too easy to submit a request without taking responsibility in assessing what may already be available in the public domain.

9.3 ACPO also suggest further research is carried out with regard to the best method for publishing information in what is an ever evolving digital age. For example, would it be more beneficial for the portal to a public authorities information to be via social networking and media, rather than the current website only approach?

9.4 Recommendation: 13

January 2012
Written evidence from Nottingham Trent University

Whilst the Freedom of Information Act may have been intended to operate in the public interest by subjecting public bodies to increasing transparency and accountability, it has, in our experience, been too frequently used by some whose motives are far removed from the general public interest.

This has resulted in the diversion of valuable resources to respond to what seem to be frivolous requests.

In some cases, requests for information have clearly been made because the enquirer is in some way dissatisfied over their dealings with the institution, and so submit FOI requests purely to cause irritation; when a request is answered, the enquirer simply submits further requests on other topics to continue the irritation. In this way, the Act provides malcontents with a means to divert an institution’s time and resources simply to satisfy a desire for revenge.

In other cases, the enquirer is clearly engaging in speculative “muck-raking”, requesting information on a particular topic in the hope of achieving a journalistic scoop or otherwise demonstrating that an unfavourable opinion they hold about the institution (or the sector) is justified. When the enquiry does not yield the hoped-for revelation of waste, inefficiency, corporate corruption or other malpractice, the enquirer simply embarks on another speculative and (for the institution) time-wasting trawl.

Whilst the Act provides exemptions that permit enquiries to be legitimately rejected, we believe that it offers insufficient protection against the type of frivolous and nuisance requests described above. In particular, the test by which an enquiry may be deemed vexatious fails to address the problem of a nuisance enquirer who submits numerous frivolous requests on different topics, and is thus able to cause a substantial drain on the organisation’s resources for no good purpose.

In our view, the Act has been applied to a wide range of public bodies without any apparent acknowledgement of the material differences in their structure, operation, oversight and existing accountability arrangements. The Act was clearly intended to apply to the activities of national and local Government; the competitive environment in which HEIs operate, where students (as customers) and other clients can choose which HEI they do business with, makes them very different from governmental organisations. This is clearly evident in the extent to which the various types of organisation are dependent on the public purse; whilst most local authorities received the vast majority of their income from taxation and/or government grants, our institution (like most other HEIs) receives only a minority of its income from public sources (approx 40% in 2010/11) and this proportion will continue to decrease dramatically as Government policy makes further significant changes to the HE funding landscape over the next two to three years. This fact alone (irrespective of other arguments) prompts the question as to whether HEIs should continue to be subject to the Act.

The Government has recently announced its intention to extend the FOIA to cover around 200 other organisations; if HEIs are to remain subject to the Act, then we would wish to see it also apply to those private providers who are, or become, providers of HE to students who are eligible for public funding support, to ensure that there is indeed a “level playing field”.

January 2012
Written evidence from Alistair Sloan

[1] This is a written response to the Justice Select Committee’s call for evidence as part of the post-legislative scrutiny of the Freedom of Information Act 2000 (FOIA). I am a member of the public who uses Freedom of Information legislation primarily for my own research purpose and have in the past used FOI responses as the basis for posts on my internet blog. My evidence is based on my own experiences of having made requests for information under the FOIA and also on observations I have made of requests that other individuals have made under the FOIA.

[2] I am not of the view that there is a massive need for change to the Freedom of Information Act. On the whole it appears to strike the right balance between the release of information held by public authorities and withholding information for legitimate purposes. However, there are a number of changes that could be made to improve the legislation and ensure that existing information rights are maintained and not lost, particularly as the public sector is changing the way in which it is organised in order cut operating costs. I believe that most of the necessary changes are in the way in which the legislation is enforced by the Information Commissioner’s Office (ICO).

[3] The first area where I would like to suggest change is required is in the timescale for brining prosecutions under section 77 of the 2000 Act. The way in which the Freedom of Information Act operates practically means that the time a section 77 breach is identified it could very well be out with the current statutory timescales for brining a prosecution. The Scottish Government has identified a similar problem with the equivalent provisions of the Freedom of Information (Scotland) Act 2002 (FOISA) and as part of their consultative process on FOISA they are looking to extend the 6 month timescale to 12 months.

[4] I am not suggesting increasing the time limit for prosecutions as some way to “get at” public authorities. However, enforcement is key in making this legislation work and the Information Commissioner must have a full range of tools that he can use to ensure compliance by public authorities.

[5] The vast majority of requests that I make are through FOISA rather than the FOIA. This has helped highlight some of the difference between the two regimes and allowed me to consider where both pieces of legislation could be improved. One area where the FOIA could be improved to make the practical realities of making a request for information better is providing a statutory timescale for responding to a request for review. Currently, there is no statutory requirement for a public authority to conduct a review other than it must be done in a way that allows a prompt determination of the complaint (Section 45 code). One observation that I have made between the two FOI regimes is that under FOISA the internal review procedures are to be found within the main Act (Sections 20 and 21). I would suggest amending the FOIA to include provisions on the operation of a review process placing them on a statutory footing.

[6] I would strongly suggest providing a statutory timescale in which the conducting of a review should occur. Under FOISA that is currently set at 20 working days. I note that
the Information Commissioner’s Good practice Guidance (number 5) that covers the timescale of reviews suggests that 20 working days should be adequate for most requests for review. His guidance also goes on to say that only in the most complex cases should reviews take longer and in any event they should not take longer than 40 working days. However, in my experience I have often found myself having to contact public authorities after the 20 working days have expired for an update as to when they expect to respond (even where the review is not, on the face of it, a particularly complex one). I have two examples of this happening which are publically available on the internet which members of the select committee might find useful to look at.

[7] The first example came from a request made to Cumbria County Council and can be viewed here: [http://www.whatdotheyknow.com/request/compliance_2](http://www.whatdotheyknow.com/request/compliance_2). The second was a request made to Bristol City Council and that request can be found here: [http://www.whatdotheyknow.com/request/identity_checking](http://www.whatdotheyknow.com/request/identity_checking).

[8] I would have been less annoyed if the public authorities above had written ahead of the deadline to advise of a delay in responding to the request for review. Indeed, the Information Commissioner’s guidance suggests that public authorities write to applicants where an internal review cannot be completed within the initial twenty working days following its receipt.

[9] The above are by no means the only examples of this occurring with public authorities to whom I have made requests to under the FOIA. I cannot be sure as to why requests for review take as long as they do and why some authorities even appear to fail to comply with the guidance issued by the Information Commissioner. However, I am of the view that placing internal reviews onto a statutory footing with a statutory maximum timescale for responding will probably improve the situation. There are of course a very large number of public authorities subject to the Freedom of Information legislation and I am sure that there are numerous examples of good practice out there.

[10] Another matter that has caused a lot of frustration is the extension permitted to public authorities to consider the public interest test. I have experienced cases where it feels more like the public authority is using this as a delaying tactic than for what it is actually exists or where they have simply applied the provisions inappropriately. I raised this matter with my Member of Parliament and he in turn raised this with the Government by way of a written question in Parliament.¹ No such provision exists under FOISA. All requests must be responded to within twenty working days from the date of receipt, and this includes considering the public interest. I would suggest removing this allowance from the FOIA, or at the very least providing for a statutory maximum for the period of time by which the public authority can extend the original twenty working days. The current open-ended approach produces uncertainty for those using FOI and indeed for the Information Commissioner about just when a public authority is in breech and when he can accept a complaint.

¹ The question and answer can be read here [http://www.theyworkforyou.com/wrans/?id=2011-10-20b.75857.h&s=Freedom+of+Information+speaker%3A24733#g75857.q0](http://www.theyworkforyou.com/wrans/?id=2011-10-20b.75857.h&s=Freedom+of+Information+speaker%3A24733#g75857.q0)
[11] The FOIA creates a general right to information held by public authorities. It is quite right that on some occasions information should be withheld because the harm that its release would cause outweighs the general principle of being open and transparent. It strikes me that under the FOIA the "harm test" is a rather low one and permits a public authority to withhold information where the harm is only slight. The similar provisions under FOISA requires there to be "substantial prejudice" to a specified interest rather than "prejudice" to a specified interest. The guidance on the matter does suggest that the Information commissioner and the Government expect there to be a substantial prejudice before the harm outweighs the public interest in releasing the information and so it would make sense to put this onto a statutory footing and amend the legislation.

[12] There has been some suggestion that a fee should be introduced for those making FOI requests. This is something that I would strongly caution against. Research conducted for the Office of the Scottish Information Commissioner gives an example of what might happen if people were made to pay for information. That research\(^2\) suggests that around 64% of people in Scotland would be deterred from making a request for information if they were to be charged for it. I submit that this would damage the legislation and would ultimately defeat the purpose of the legislation. The current fee regulations are sufficient. It should be noted that on the whole public authorities choose not to charge fees where they probably could and certainly public authorities should be persuaded not to charge a fee unless absolutely necessary.

[13] The FOIA requires that public authorities produce publication schemes. I suggest that these are redundant and are a waste of time and money. I would suggest reforming this aspect of FOI and placing it in the hands of the Commissioner to direct public authorities as to the types of information that they should make readily available to the public. Pro-active disclosure should be the ultimate aim of FOI and any other "Open Government" projects. The more information that public authorities proactively make available the more accountable they become. There is, of course, nothing stopping a public authority from publishing information beyond the scope of such directions, but the same minimum information should be available from all public authorities. Perhaps, the directions would need to be slightly different depending on the function of an authority (e.g. the information that a police force and a local authority should publish proactively will be different in some respects). At all turns we should be encouraging public authorities to be more proactive in their disclosure. I would suggest that a good measure of whether FOI has been a success is that the number of requests submitted falls as a result of public authorities being more open and accountable proactively.

[14] There is, I submit, an argument for requiring larger public authorities to publish a disclosure log. Many public authorities already do so and from the point of view of a requester it makes things a lot easier. If I am looking for information that has previously been requested from a public authority it saves both the public authority and me time if that is something I can easily access. Not having worked for a public authority I cannot

comment on “repeat requests” with any great authority. However, I suspect that public authorities do receive a number of requests that are asking for broadly similar information. I suspect that this would occur around particularly high profile events. I certainly have anecdotal evidence of this being the case from FOI Officers who I have spoken to in the course of my own requests.

[15] Public education could be something that helps FOI work better. It certainly appears that most people are now aware of their basic rights under FOI. However, with all rights come responsibilities. Along with the right to access data comes a responsibility to do so in a responsible way. The “WhatDoTheyKnow”3 website provides some very good examples of why public education might not only be a good thing, but necessary.

[16] I have seen a lot of FOI requests on the What Do They Know Website where the requestor appears to have made the request in a rush. For example, the request isn’t as clear as it might have been if they’d thought about it (not to that point that it’s technically invalid, but that it doesn’t ask for what the requester actually wants or asks for far more than the requester actually wants). An FOI Officer has written an excellent blog article on ten top tips on making an FOI request4. All are very sensible and if followed by requesters would assist both the requester and the public authority.

[17] Any form of public education that occurs should not be aimed at putting people off making their request, but rather about making an effective request that does what they want it to do. The information is out there (the Information Commissioner also publishes guidance on making a request), but I do wonder if we could not be making these tips and guidance more accessible and raising public awareness of not only using the rights, but using them effectively and responsibly.

[18] There will always be a few people who abuse their rights and Information access rights are no exception. It would be disastrous for FOI if the many were to be penalised for the actions of the few. By that I mean any steps to make it harder to make a request or to introduce a fee for making a request based solely on a small few who abuse their FOI rights. I’m sure FOI Officers around the country receive requests from people who have, in effect, a grudge against the authority. I’ve seen examples on the WhatDoTheyKnow website where FOI is being used inappropriately to ask over and over again for broadly the same information as part of what could be described as a campaign against the public authority. In my view there are adequate provisions within the FOIA to deal with such individuals.

[19] If it were the case that Parliament was going to look at what more could be done to reduce the burden such requesters have on public authorities then it must be careful to ensure that there are no unintended consequences to such a move. For example, inhibiting the ability of local campaign groups to request information from public authorities on matters of great local concern (e.g. campaigns to save publically funded facilities such as libraries, swimming pools etc.) would be detrimental and should be

---

3 http://www.whatdotheyknow.com
4 FOI Man’s Top Ten Tips on Making Responsible and Effective FOI Requests http://www.foiman.com/foiguide1
avoided. Although, I am of the view that the current provisions surrounding repeated or vexatious requests are adequate for this purpose.

[20] It is essential that the Information Commissioner is properly resourced to conduct all his statutory functions. In evidence submitted to the Leveson Enquiry it sounded as though there may be real problems with the level of resources available to the ICO. In terms of handling a section 50 FOI complaint the time and effort that is required to investigate and draft a decision notice is not insignificant. Some section 50 complaints are complex either because of the information involved or because there have been so many alleged failures to be investigated (whether that be failure to abide by timescales, inappropriate deployment of the public interest extensions, inappropriately applying exemptions etc.). I do not make these comments to suggest some sort of conspiracy within the public sector. Some public authorities have a poor record on responding to FOI requests. It is vital that the Commissioner can do the necessary work with these authorities to ensure that their compliance improves. This in turn would reduce costs to public authorities by resulting in fewer requests for review and fewer section 50 complaints.

[21] I have personally been frustrated at having to make a Section 50 complaint to the ICO on the basis that the request has simply been mishandled by the public authority. The two requests that I directed members to above when discussing internal review timescales would be two examples where section 50 applications were made purely because of simple technical failures of the public authority. That said I also get frustrated when having to make requests for an internal review based on technical failings of a public authority rather than substantive failings.

[22] I have mentioned in this evidence quite a number of examples of bad practice and failures when it comes to FOI. I think doing this helps highlight where issues exist that if fixed could vastly improve the working of FOI. I do not believe that examples of failures or bad practice are, for the most part, part of any conspiracy by public authorities to avoid releasing information. I think a number of public authorities have failed to adapt to increasing numbers of requests and not moved quick enough with the times in terms of the “Open Government” agenda. Whether this is down to a failure to have adequate process, training or both is not something that I can really comment on. However, it is clear that if FOI is to continue to work in the future, and to work better, that public authorities must continue to adapt and improve their FOI processes to ensure the right staff are in the right places and with the right knowledge.

[23] I have mentioned earlier in my written evidence that it is important that existing information rights are not lost. The public sector is changing the way in which it operates. More and more public authorities are spending increasing sums of public money on outsourcing and information that was once available to the public through FOI is no longer because a private company has taken on roles traditionally done by public authorities. We must be careful to ensure that Schedule 1 is amended accordingly. I know that there are concerns regarding the changes to the NHS in England and Wales and the impact that this might have on information rights. I am aware that the Campaign for Freedom of Information raised this matter with the
Secretary of State for Health and I hope that the Government will ensure that information rights are not lost as a result of changes it makes to the NHS.

[24] As I said earlier in my written evidence, with the exception of the few matters I raised above, my view is that the FOIA does not need major overhaul. There do appear to be issues around enforcement, processes and knowledge within public authorities. This is where, I believe, focus should be turned to improve the way that FOI works. That is largely a matter for the Information Commissioner, but the Government should be seeking to see how it can best assist the Commissioner in those tasks. That may be by providing the Commissioner with additional powers or funding, but really the Commissioner is best placed to identify what would help him and his office to carry out its functions.

Summary of Recommendations to be considered

1. Increase time for Section 77 prosecution from 6 months
2. Introduce a statutory regime for internal reviews including statutory timescales
3. Remove public interest test extension, or at least place a maximum extension into the legislation
4. Consider amending the FOI legislation to ensure that existing information rights are not lost by changes in the way public authorities conduct their functions
5. Consider amending the “harm test” in the FOIA to cover situations only where the release of information would be of “substantial prejudice to a specified interest”

January 2012

http://www.cfoi.org.uk/pdf/Lansleyletter.pdf
As a library campaigner I have had call to use FOI quite regularly. I believe the act is a necessary safeguard. At local authority level the information that gets released when councils consult is always very limited and the little data that does get released has already been filtered and manipulated in such a way as to support the decision the council has put forward for "consultation".

Public bodies should always seek to follow the best current available evidence when making policy, we know sadly that in politics this isn't always the case and this is why it is important that in the interests of transparency and openness the FOI isn't curtailed.

The strength of the act is of course its ability to allow members of the public (not journalists as is often peddled by politicians) to see what is being done with their money. The weakness is of course the cost. Sadly if councils, Whitehall, Quangos and the MOD etc were open and transparent the act wouldn't be needed. I think the costs involved are a small price to pay to hold the people spending taxpayers money to account. Bad decisions are always made in secret.

There has also been anecdotal "evidence" that civil servants are terrified to write anything down in case it gets Foi'ed. This is clearly put out by politicians as they are terrified to be seen to be going against civil service advice. The anonymous civil servant is impartial and has nothing to fear from writing down their non-biased advice on a subject and this being made public.

I believe the FOI act is one of the greatest reforms our democracy has had in recent years, it is clear that those in the system want to see it curtailed as it sheds a light on bad government at all levels. Only in time when public bodies learn to be as transparent as the proclaim to be will we see usage of the act decrease. Further initiatives like the £500 spending data and the opengov schemes will help with this, the finances and decision making processes of all public bodies should be completely open, minuted, un-pivoted and available to be accessed by the people that pay for it. Otherwise bad policy will be made behind closed doors and the evidence will be ignored in favour of the lobby groups and other ideological special interests.

January 2012
Background

I use the Freedom of Information Act 2000 for my own private and academic research. It has enabled me to obtain information from a wide range of public authorities, and I have experience of its enforcement mechanisms. I am presently engaged as an Additional Respondent in an appeal before the First-tier Tribunal which is stayed pending the decision of the Court of Appeal on how the European Convention on Human Rights interacts with the 2000 Act.

I also have experience of using other freedom of information legislation. For example, I was featured as the youngest applicant to appeal to the Scottish Information Commissioner in his 2009 Annual Report to the Scottish Parliament. Some of the information disclosed through my requests have been the subject of articles in national newspapers.

Not having been closely involved with proceedings on what became the 2000 Act, I do not feel able to contribute to the Committee’s third question, on whether FOIA is operating in the way that it was intended to. However, I hope my other responses are helpful.

Question one: Does the Freedom of Information Act work effectively?

My experience of requesting information from public authorities suggests that the Act works effectively for the most part. The majority of authorities are helpful, provide considered and useful responses, and are receptive to feedback. The enforcement regime, while time-consuming and daunting, provides a thorough check on public authorities and should not be diluted.

Some public authorities may suggest to the Committee that it is necessary to make amendments to the legislative framework that will reduce what they perceive to be unnecessary burdens. Part 4 of the Government Memorandum outlines some concerns which have been expressed about the operation of the Act.

The question of who is covered by the Act is one issue raised in the Memorandum. It was regrettable that the Memorandum did not explore the difference in how the Act lists the public authorities which are within its scope, while the Environmental Information Regulations 2004 outline a general test against which any organisation can be assessed to see whether it needs to abide by that regime. Given the lack of evidence about which structure is best, I recommend the Committee seek evidence about the impact of the different regimes.

On a connected point, I agree with the approach of the Scottish Information Commissioner that FOI should “follow the public pound” and apply to organisations performing public functions such as those responsible for private prisons. Arguments to the contrary lead to the conclusion that value for money comes at the expense of accountability and fundamental rights. In this context, it was very distressing that there was no significant consideration of the role of FOI in the Government's Open Public Services White Paper. The Committee should take heed of the warning contained in the Scottish Information Commissioner's excellent Special Report to Parliament that failing to recognise the
One particularly controversial point is how the Act extends to scientific and academic information. Much of the recent debate has been stirred up by a request of the University of Stirling to provide information about how it conducted a research project, where the request came from a tobacco company. After having considered the matter, including reading the concerns of the researchers themselves I cannot but conclude that there is nothing in their complaints which has not already been addressed by Parliament in drawing up the legislative scheme. The only issue which is really specific to academia is whether universities should be classed as public authorities at all, but very few seem to be arguing for that. Therefore I do not consider it is fair to deal with these concerns separately from more general concerns of public authorities.

The Memorandum correctly identifies the problem of vexatious requesters as one that should cause concern. It is now plain that some people are using their rights in an irresponsible way, which spoils it for others and has the potential to bring the statutory scheme into disrepute. So recent decisions of the First-tier Tribunal which deal robustly with those using FOI rights to simply extend campaigns, engage in personal attacks, or attempt to overwhelm public authorities is welcome.

This developing case law will feed into the decisions of public authorities, the Information Commissioner and the Tribunal, and all FOI requesters must be prepared to be scrutinised by these bodies if they wish to access information. I think this point is too easily forgotten by those who suggest draconian steps such as levying a modest charge for any FOI request received by a public authority. This risks denuding FOI of its character as a fundamental right. By way of example, I believe my own use of FOI is responsible, and have never been criticised by any public authority in how I use FOI. But I would not have taken the trouble had a charging scheme been in place.

Interestingly, the Memorandum suggested public authorities are wary of using their powers to decline to comply with a vexatious FOI request because of the cost. I confess that I struggle to see why this is the case. This is because while a decision on whether a request is vexatious must be made with care, it can be made by a single decision-maker, who need not be a FOI specialist, having ready access to guidance. What is more, the decision-maker need not collect or examine the requested information in order to come to a decision. I suggest the Committee may find this to be a good example of misconceptions or inefficiencies on the part of public authorities leading to people having views about FOI which are unfair.

The Memorandum also explored the issue of the cost of requests to public authorities. Much of the debate centres on the question of what is a disproportionate burden, to which there is no clear answer. The requirement should be on those proposing changes to the fees regime to justify their position. I trust the Committee will wish to provide a more robust level of challenge to the assertions of public authorities than that found in the Memorandum. For example, it was regrettable that the Memorandum only adverted to the possibility that costs of FOI requests might reduce if a public authority undertook best practice in records management. The Committee may wish to examine the system for regulating records management to see whether it is fit for purpose. The Public Records

1 Scottish Information Commissioner, January 2012, Informing the Future: A Special Report to the Scottish Parliament. Available at www.itspublicknowledge.info/special
(Scotland) Act 2011 is one example of how a jurisdiction with a mature FOI regime felt it necessary to have a tougher system of records management supervision than that provided for in their FOI legislation, which was similar to the 2000 Act.

Question two: What are the strengths and weaknesses of the Freedom of Information Act?

Overall, the Government are quite right to assert that the Freedom of Information Act 2000 is a powerful tool for the citizen, and when compared with similar provisions around the world, is one of the better pieces of access to information legislation. Should the Committee agree with me on some of the areas of concern I address below, it must not lose sight of this core conclusion.

One of the problems with how people use the Act is that it forms but one part of a wider information law framework which is cluttered. For example, different rules apply depending on whether the information requested relates to the environment, or happens to be obtained from a local authority at the time their accounts are audited. This can lead to confusion, and does nothing to help practitioners or requesters. So I suggest that thought be given to harmonising similar provisions of the 2000 Act with other access to information legislation, such as the Environmental Information Regulations 2004 and section 15 of the Audit Commission Act 1998.

I have been concerned for some time about the scope of some exemptions. My earlier suggestion that the provisions of the 2000 Act be harmonised with other relevant legislation applies with particular force here. Exemptions dealing with parliamentary privilege, Royal communications, relations within the UK and the blanket security bodies exemption are all extraneous given how the rest of the statutory scheme has been interpreted. In any event, I see no reason why the cohesiveness of the law should not be enhanced in this way.

Perhaps another way in which the situation could be improved is to harmonise the exemptions in the 2000 Act with the provisions of the equivalent Scottish legislation. For example, one concern of mine surrounds how section 22 of the 2000 Act is used. That section exempts information intended for future publication, but there is no limit about when the information should be published. Following the Scottish provision would mean that the information which the public authority wants to keep private for the time being has to be published not later than twelve weeks after that on which the request for the information is made.

From my own experience, while central government is very keen to publish data proactively on its own terms, it can be especially unwilling to disclose information under FOI. I was therefore unsurprised to learn from the work of another FOI requester that out of the top ten public authorities with the most complaints against them under access to information legislation being upheld or partially upheld by the ICO since 2005, eight were central government departments. The reasons for this should be explored by the Committee.

Perhaps connected to this is the subject of the special exemptions given only to central government under section 35 of the 2000 Act. The Committee should consider whether, in the light of the interpretation of other exemptions especially the section 36 “prejudice to effective conduct of public affairs” exemption.

3 research available at http://twitpic.com/6r0zxh/full
4 especially the section 36 “prejudice to effective conduct of public affairs” exemption.
landscape, it remains correct that these should remain in their current form. In an age where the government grants very significant responsibilities to local bodies which were once the preserve of the centre, the difference between how central and local government is treated under the 2000 Act now looks unfair and requires very strong justification.

Another problem concerning late reliance has been revealed in a series of court and tribunal decisions. This is where a public authority claims, for example before the ICO, that particular exemptions apply to certain items of information when it gave no indication these exemptions could apply in earlier stages of the request for information. This delays the process and can be mean the person requesting the information is required to go through further hoops. It seems to me that Parliament should make it clear under what circumstances public authorities can rely late on exemptions.

I stated earlier that the enforcement mechanisms in the 2000 Act are thorough. But something revealed to me when engaging in the present appeal to the Tribunal is how complex they can be. Tribunal processes should be reformed to make them more user-friendly. It is daunting for a litigant in person to be up against a public authority which will often be represented by legal advisers, in a forum where legal aid is unavailable and where the sheer number of precedents one has to absorb can be very large. I do worry that many requesters will choose to throw in the towel to avoid the fuss, even if their complaints are justified.

I also believe the 2000 Act misses a trick in how it deals with the role of the Information Commissioner For instance, while the First-tier Tribunal has a User Forum for the exchange of views about how it operates, no similar arrangement is in place for the ICO. This adds to a sense that the ICO is remote and difficult to contact. Maybe the lead of the Scottish Information Commissioner can be followed in this respect: for example, it has used a Consumer Panel recruited by Consumer Focus Scotland to ask lay people for their views on its website.

The Government should review again the statutory prohibitions on disclosure which preclude disclosure under section 44 of the 2000 Act. The last review appears to have been in 2005.

Publication schemes should be abolished. They are of little use to the FOI requester, and seem to just make work. At a time when the Government are pushing forward with electronic government, it is far better for public authorities to have a good quality website, containing both easy to understand information about how to make a request and a significant quantity of proactively released information.

To me, using data.gov.uk to provide this kind of information, together with a single disclosure log for central government would harmonise practice and chime well with the Government's transparency agenda. It would also make clear that open data and FOI go together, and the former is not a substitute for the latter.

The Information Commissioner has previously told the Committee that the offence of altering records with intent to prevent disclosure should be amended so as to provide for a time limit of more than 6 months within which proceedings may be commenced. I agree

with this recommendation, which is replicated in clause 3 of the Scottish Government’s proposed Freedom of Information (Amendment) Bill.

Echoing my concerns about the inattention to FOI in the Open Public Services white paper, I was concerned to note that freedom of information played no part in the recent Justice and Security green paper. I hope this does not suggest a more deep-rooted antipathy to extending FOI. There would be merit in seeing how FOI can play its part as part of the plans contained therein to strengthen accountability of the security and intelligence agencies and the organisations which supervise them.

Finally, the Committee will wish to examine international standards of FOI in order to find out our own strengths and weakness. This is particularly important given the developing interpretation of the European Convention on Human Rights. For example, in Tarsasag a Szabadsagjogokert v. Hungary [2009] ECHR 618 the Court affirmed the view that freedom of information is an important element of the Article 10 right to freedom of expression. This could well have an important impact on the nature of any changes the Committee could recommend.

In this context, I am puzzled that the UK Government spent much time negotiating on the text of the Council of Europe Convention on Access to Documents, and yet has refused to sign it. This is especially odd when the Government has been at pains to promote access to information on the international stage, through the Open Government Partnership. The Government should sign the Convention at the earliest opportunity.

January 2012
Written evidence from the University of Bath

1. This is the University of Bath’s response to the call for written evidence for the post-legislative scrutiny of the Freedom of Information Act 2000.

Does the Freedom of Information Act work effectively?

2. The Act has certainly had the desired effect of obliging public authorities to not only routinely release information via the various publication schemes, but also to respond to FOI requests regarding the way in which they operate. The Act has also given an increasing awareness of the need to be accountable to the general public, including to individuals who may have very specific areas of interest. It is questionable whether the Act has had the adverse effect of encouraging public bodies to shy away from the previous open and frank discussions about operations due to concerns about requests under the Act. Perhaps naively when the Act was introduced it was not identified that its provisions would result in placing additional financial burdens on public bodies to enable them to ensure compliance.

What are the strengths and weaknesses of the Freedom of Information Act?

Strengths

3. The Act makes information publicly available to anyone who wishes to discover more about the policies, procedures, operations and expenditure of publicly funded bodies. The Act has exposed practices within certain public bodies which were hitherto concealed and which have subsequently been addressed, MPs expenses being a particular example.

Weaknesses

4. The Act is not robust enough in deterring habitual or vexatious requesters which places an unnecessary additional burden on organisations which are already bearing the brunt of financial cutbacks. As drafted the Appropriate Limit and Fees Regulations 2004 Regulations do not allow time spent redacting information to be included in calculations. This can be substantial and we would wholly support an amendment for time spent in redacting information to be included within the current maximum time periods. It should also be identified that the many requests that do involve close to the maximum 18 hours’ work involve a substantial cost to the institution, time that cannot be used in supporting its main purposes.

Is the Freedom of Information Act operating in the way that it was intended to?

5. The Freedom of Information Act came into force in 2005 to promote openness and transparency in public bodies. It was intended to make public authorities more accountable to the public at large and to be as open as possible in all its operations. The Act was also intended to improve decision making and better public understanding and participation in government, together with increased trust in those in charge of running public bodies.
6. The Act has undoubtedly resulted in greater transparency in the running of public bodies and a greater understanding by the public of the manner in which public money is being used. As many organisations have found, the largest number of requests come from journalists rather than individual members of the public soliciting information.

7. Increasing interest from journalists in the operation of public bodies and the use of public money may have had the opposite effect to that intended. Critics of the Act have rightly claimed that excessive use of the FOIA has resulted in public bodies exercising caution in discussing and recording matters which may subsequently become the subject of FOI requests.

8. Universities operate in a competitive arena and the fact that the FOIA applies to some higher education providers but not others (such as for profit providers, which will equally be receiving government money through the Student Loan Company) acts against a level playing-field. We understand that some organisations like the BBC are only subject to the FOIA in respect of their use of public money; a clear case could be put for a similar principle applying to providers of higher education.

9. The FOIA has placed an increasing financial burden on public bodies which have to use public money to provide resources to handle FOI requests. There has been an increase year on year in the number of requests processed by the University, as other universities have found.

10. Whilst understanding the need to balance public interest, the extent of the exemptions contained within the Act is very limited and it is arguable whether this is sufficient to protect the interests of higher education institutions and other public sector bodies. In particular, there is no equivalent in the FOIA to Section 27 (2) of the Freedom of Information (Scotland) Act which provides an exemption to specifically protect ongoing research. The University would strongly support an amendment to include such an exemption.

January 2012
Written evidence from Nuclear Information Service

Executive summary

1. Nuclear Information Service has used the Freedom of Information Act 2000 extensively to obtain information from public authorities as part of our research into the UK's nuclear weapons programme. In general we consider that the Freedom of Information Act works effectively although its effectiveness is limited by interpretation of exemptions to the Act by public authorities, the Information Commissioner, and the Information Tribunal. Information disclosure in response to our requests has not always been as comprehensive as we would wish, especially in relation to cost issues (section 43 exemption). We also have concerns about the use of sections 35 and 36 of the Freedom of Information Act by central government departments.

2. The strength of the Freedom of Information Act lies in the legal duty it imposes upon a very wide range of public authorities to provide information to members of the public upon request. We support extension of the act to cover relevant activities of private companies which have been contracted to provide public services and major government infrastructure schemes. The Act's principal weaknesses lie in the complexity of its appeal processes and the inadequacy of these processes in resolving appeals promptly, and in low standards of regulation and enforcement.

3. The costs of administering the Freedom of Information Act are reasonable and proportionate to its benefits. Public authorities are well aware of the provisions of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 and do not hesitate to apply the regulations to limit the scope of complex or extensive requests for information. There is no need for a change to the charging basis for the scheme, which as it stands is clearly defined and offers incentives for public bodies to take an open approach to information management. The Act already provides sufficient powers to allow public authorities to define and deal with vexatious requests, and no change is needed to the legislation in this respect.

4. A pro-active and open approach to information disclosure and provision of justifications for decision-making through publication of data and decision documents should help to reduce the reactive workload for a public authority in handling requests for information. Public authorities could do more to reduce their workload in handling reactive requests for information by putting more effort into clearly signposted publication schemes and internet resources. A 'right first time' approach would also help public authorities in limiting the costs of dealing with requests for information.

5. We conclude that the Freedom of Information Act has been a success and the benefits it has produced far outweigh the costs of its implementation. It would be a backward step to try to limit the scope of the Act or place further restrictions on the accessibility of information. In contrast, we would support steps to further extend the scope of the Act to cover a wider range of bodies.

Evidence to the Committee
6. Nuclear Information Service (NIS) is a not-for-profit, independent information service which works to promote public awareness and debate on nuclear weapons and related safety and environmental issues (see http://nuclearinfo.org for more information). Our research work is supported by funding from the Joseph Rowntree Charitable Trust.

7. To assist our research into the UK's nuclear weapons programme we use the Freedom of Information Act 2000 extensively to obtain information from public authorities. Over the last three years we have submitted between 30 – 50 requests each year under the terms of the Act to a wide range of public bodies: central government departments, non-departmental public bodies, police forces, health service trusts, and local authorities.

8. Many of the areas in which we are interested are by their nature sensitive, and in response to our requests we have frequently found that requested information is withheld under the terms of various exemptions under the Act. We accept that there will be certain types of information which it is not in the public interest to release, but it is our policy to challenge decisions where we consider that an exemption has been applied unreasonably or too restrictive a view has been taken in applying an exemption. We therefore have experience of using the internal review process for a number of public authorities; the section 50 appeal process to the Information Commissioner; and the appeal process for the First Tier (Information Rights) Tribunal.

9. Our evidence addresses the three questions asked by the Select Committee, using examples from our own experience. We are happy to provide further information on any of the matters covered in our submission if requested to do so by the Committee.

Question 1. Does the Freedom of Information Act work effectively?

10. In our experience public authorities show a mixed performance in their application of the Freedom of Information Act. From across the spectrum of different types of public authority we have received in response to requests for information both carefully considered, high quality responses and poor quality responses which do not comply with the Act's requirements. In general, understanding of the requirements of the Freedom of Information Act appears to be good at the corporate core of public bodies, but more hazy, without a good grasp of the scope of exemptions or arrangements for charging fees, further towards their peripheries.

11. In general we consider that the Act has been successful in promoting openness, transparency, and accountability in government by shining a light on how decisions are made. It has perhaps been less successful in improving decision-making and public involvement in decision-making. This is because in some areas of public policy (nuclear weapons are a good example of this) decisions are made principally on the basis of political dogma rather than costs, benefits, or strategic needs, and access to information will not on its own be sufficient to change this.

12. The Freedom of Information Act has been invaluable in Nuclear Information Service's work to unveil the scope of the costs of the programme to replace Trident nuclear weapons – a controversial high cost and high risk programme about which the government has been less than forthcoming. As an example, we have used the Act to investigate the Ministry of Defence's Nuclear Weapons Capability Sustainment Programme. This is a major programme of infrastructure investment work at the Atomic Weapons Establishment, the UK’s nuclear weapons factory, which will extend over the best part of two decades, currently costing around £0.5 billion per year. Other than two
brief written Ministerial statements\textsuperscript{1}, the government has made little effort to pro-actively inform the public about this programme and the costs and risks associated with it. The Atomic Weapons Establishment is operated by private contractors who claim that Freedom of Information legislation does not cover their activities. However, following a number of requests under the terms of the Freedom of Information Act made by Nuclear Information Service, the Ministry of Defence has released information about the inception and scope of the Nuclear Weapons Capability Sustainment Programme and individual projects within the programme, and has provided limited information about safety issues associated with individual projects and construction costs for projects where contracts have been awarded\textsuperscript{2}.

13. Work undertaken by other researchers using the Freedom of Information Act has exposed serious issues about reactor safety on board the Royal Navy’s nuclear powered submarines and shortages of suitably qualified and experienced personnel to run the Ministry of Defence’s nuclear programme\textsuperscript{3} – important concerns in the light of last year's nuclear emergency at Fukushima in Japan. The public have a right to know about potential shortfalls in nuclear safety arrangements and there is a clear public interest in using the Freedom of Information Act to highlight potential concerns and press for action to resolve them.

14. Information disclosure in response to our requests has not always been as comprehensive as we would wish, especially in relation to cost issues. Although programme costs are aggregated across a number of projects, meaning it is not possible to draw inferences about individual contracts, the Ministry of Defence has consistently refused to release information about the full programme costs of the Nuclear Weapons Capability Sustainment Programme. Information about spending on Ministry of Defence contract costs has also been withheld from public scrutiny by the department through a high level policy decision. Despite a commitment in the Coalition Agreement to require full online disclosure of all central government spending and contracts over £25,000\textsuperscript{4}, the Ministry of Defence maintains that EC guidance on procurement of 'war like stores' allows the costs of major equipment projects such as new Queen Elizabeth class aircraft carriers, Typhoon aircraft, and 'Successor' Trident replacement submarines to be withheld from the public\textsuperscript{5}. A 'temporary' exemption from disclosure has been granted by the Cabinet.

\textsuperscript{1} Atomic Weapons Establishment: House of Commons written ministerial statement by the Secretary of State for Defence. Official Report, 19 January 2005, Column 59WS.


\textsuperscript{5} For more details and supporting information please see 'Secrecy over military equipment costs 'makes a mockery of government openness claims". Nuclear Information Service, 20 September 2011. [http://nuclearinfo.org/view/policy/government/a2157](http://nuclearinfo.org/view/policy/government/a2157)
Office, which the government has “no immediate plans to lift”\(^6\). As a result spending on
the most controversial, high risk government spending projects run by the department
with the worst record for contract overspending has been hidden from public view.

15. In general, therefore, the Freedom of Information Act works effectively although its
effectiveness is limited by interpretation of exemptions to the Act by public authorities,
the Information Commissioner, and the Information Tribunal.

**Question 2: What are the strengths and weaknesses of the Freedom of Information Act?**

16. The strength of the Freedom of Information Act lies in the legal duty it imposes upon a
very wide range of public authorities to provide information to members of the public
upon request. This has established firmly the principle that public authorities in the UK
must operate in an open and transparent way. The Ministry of Justice has proposed the
possibility of extending the Freedom of Information Act to cover a wider range of public
bodies. We would support extension of the Act to cover relevant activities of private
companies which have been contracted to provide public services and major government
infrastructure schemes.

17. The Freedom of Information Act's principal weaknesses lie in the complexity of its appeal
processes and the inadequacy of these processes for resolving appeals promptly, and in
low standards of regulation and enforcement.

18. The Act does not set a binding timescale for public authorities to conduct internal reviews
of contested requests, nor for the Information Commissioner to issue a decision notice on
an appeal case. In our experience it is common for internal reviews and appeals to the
Information Commissioner to take well over a year. If handling of the original request
for information has been slow, this can result in a delay of well over two years before a
final decision is made, by which time the interest (although not value) in public disclosure
of the information requested may have faded as an issue loses its immediacy. We
therefore suggest that the Freedom of Information Act is amended to set binding
timescales for public authorities to complete internal reviews and for the Information
Commissioner to issue decision notices. Scottish Freedom of Information legislation
provides for public authorities to deal with internal reviews within twenty working days\(^7\)
and as a result the performance of Scottish public authorities in dealing with internal
reviews promptly is significantly better than that for the rest of the UK.

19. Although the Information Tribunal represents a means of appeal against decisions made
by the Information Commissioner, in our experience the Tribunal's workings are complex
and arcane\(^8\). To most lay participants there will be little difference between the
procedures and complexities of the Information Tribunal and the court system. The
Tribunal is run according to formal legal procedures and many of the Tribunal judges are

\[^6\] Parliamentary Question on Defence: Procurement by Paul Flynn MP. Official
Report, 10 Nov 2011: Column 454W.

\[^7\] Section 21, Freedom of Information (Scotland) Act 2002.

\[^8\] For an account of the frustrations of dealing with the Information Tribunal's
processes for a lay appellant please see 'Freedom of information appeals: the requester's
perspective. A talk at the Centre for Freedom of Information, University of Dundee.' Rob
Edwards, 19 October 2011.

themselves from a legal background. The complexities of the Information Tribunal are a formidable barrier to participation by most lay participants – particularly so as they will be facing experienced professional advocates engaged by the Information Commissioner and the public authority defending the appeal. We recommend that if an opportunity arises, the procedures of the Information Tribunal should be simplified. Consideration should also be given to levelling the balance between public authorities represented by legal advocates and lay participants at the Tribunal by providing limited legal support and advice to lay participants by means of a 'Counsel to the Tribunal' with a brief to advise individual appellants on points of law and act as advocates on their behalf.

20. We are disappointed in the standard of regulation for the Freedom of Information Act provided by the Information Commissioner. As well as being slow in dealing with casework, in our experience the Information Commissioner adopts low quality standards in reviewing cases and takes a timid approach to using its enforcement powers against public authorities which are not complying with their duties under the Freedom of Information Act. As an example, Nuclear Information Service asked the Information Commissioner to issue a decision notice in respect of a request we had made to the Ministry of Defence for information on co-operation between the US and UK governments on design of a new nuclear weapons production facility at the Atomic Weapons Establishment. The decision notice issued by the Commissioner neglected to address major issues, central to the case, which we had made in our submission and did little more than repeat the case made by the public authority involved in the case – the Ministry of Defence. As a result, Nuclear Information Service referred the case to the Information Tribunal. Shortly before the Tribunal hearing the Ministry of Defence conducted its own further review of the case and voluntarily agreed to release large portions of documents which had previously been claimed as exempt from disclosure. In a second example of what we consider to be inadequate regulation, Nuclear Information Service and a number of other researchers have complained to the Commissioner on a number of occasions about very slow response times within the Ministry of Defence in responding to requests for information. Rather than take formal enforcement action the Commissioner has taken the approach of monitoring and reviewing the Ministry of Defence's handling of cases and seeking an undertaking from the Ministry that performance will improve. In our view the department's performance in handling requests has been slow to improve as a result of this approach and has not yet reached an acceptable standard. No doubt the performance of the Information Commissioner as a regulator is in part determined by the resources at its disposal – and we would endorse calls for the staff resources available to the Commissioner to be increased – but there also appears to be a reluctance on behalf of the regulator to challenge public authorities in any serious way.

Question 3: Is the Freedom of Information Act operating in the way that it was intended to?

---

9 Information Commissioner Decision Notice FS50263570 and Information Tribunal appeal number EA/2011/0004.

21. Our response to this question highlights specific sections of the Freedom of Information Act which we feel are open to abuse by public authorities and addresses issues around the costs of handling requests and dealing with vexatious requests which have been raised by the Ministry of Justice11.

22. By its nature, some of the information which has been requested by Nuclear Information Service using the Freedom of Information act has been deemed to be exempt from release under the terms of section 24 of the Act (national security). As there is no government definition of 'national security', it is impossible to establish whether information is being withheld judiciously or arbitrarily under such circumstances. Guidance on use of the section 24 exemption should therefore be amended to include a working definition of 'national security'.

23. We also have concerns about the use of sections 35 and 36 of the Freedom of Information Act by central government departments. Section 35 applies to certain defined classes of information and is aimed at protecting the government policy-making process in order to maintain the delivery of effective government. Section 36 aims to enable the free and frank provision of advice and exchange of views for the purposes of deliberation and prevent prejudice to the effective conduct of public affairs. This is a fairly subjective area, making it difficult for an outsider to challenge the grounds on which it has been used by a government department. Aware of such concerns, the Scottish Information Commissioner has taken the view that use of the exemption on prejudice to the effective conduct of public affairs (section 30 of the Freedom of Information (Scotland) Act 2002) should only be used if the damage to the public interest has to be real and that it cannot be used as a 'class exemption' – every case has to be considered on its merits12.

24. Whereas the Scottish Information Commissioner appears to have taken a robust line in dealing with ill-defined claims that information is exempt on such grounds, the Information Commissioner for the rest of the UK seems less inclined to challenge public authorities on this issue. We have encountered examples of government departments claiming that information is exempt under one or both of these exemptions long after decisions have been announced by government departments, and well after the period when policy-making discussions can be expected to have concluded. We recommend that guidance is introduced to place a time limit (we would suggest one year after a decision has been announced) on the period when section 35 and 36 exemptions can be considered valid and specify that use of the exemption can only be based on concrete and specific concerns.

25. We would also recommend that section 43 of the Act is reviewed to reduce the scope of the 'commercial interests' exemption so that it cannot be used to withhold information about the projected costs of government contracts above a certain limit (we suggest £25,000, in line with the limit chosen by the government for disclosure of spending on government contracts13). In our experience the section 43 exemption is frequently used to withhold information about the costs of government projects where there is a clear public interest in revealing the scale of expenditure which will be funded by taxpayers. Claims that disclosure of such information would prevent the government from receiving value for money from contractors do not, in our view, stand up to scrutiny in an

---

12 'Prejudice to effective conduct of public affairs.' Briefing by Scottish Information Commissioner. [http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section30/Section30.asp](http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section30/Section30.asp)
environment where competitive tendering is the norm and government departments may themselves be dependent upon contractors for developing project cost estimates.

26. The Ministry of Justice has expressed concern about increasing request volumes and the potential cost to public authorities and impact on resources which may result. In our view increasing volume of requests is an indicator of the success of the Freedom of Information Act and should be a cause for satisfaction in government, not concern. As well as there being a cost to the authority in providing information, there is also a cost to the requester in terms of the time required to make a request for information. Meaningful requests must be often be carefully defined in order to ensure that they remain within the cost limits for handling requests for information, and in cases where there is a need to follow through an initial request using the appeals procedure, the process can be long and drawn out. Unlike the paid professionals tasked with responding to requests for information, those submitting requests are usually unpaid amateurs.

27. A pro-active and open approach to information disclosure and provision of justifications for decision-making through publication of data and decision documents should help to reduce the reactive workload for a public authority in handling requests for information. Public authorities could do more to reduce their workload in handling reactive requests for information by putting more effort into clearly signposted publication schemes and well structured internet resources which direct the enquirer to already published sources of information. Few public authorities have developed anything more than rudimentary publication schemes, and in many cases publications schemes do not appear to have been adequately updated and maintained since the Freedom of Information Act first came into force.

28. A 'right first time' approach would also help public authorities in limiting the costs of dealing with requests for information. In our experience authorities will often refuse to disclose information which is considered sensitive upon an initial request. Following an internal appeal a portion of the information is usually released, and an appeal to the Information Commissioner results in yet more of the contested information being released. A more considered approach at the earlier stages of the process, with greater regard being taken to the legal duties imposed by the Freedom of Information Act and a proper consideration of the risks resulting from releasing information, would enable public bodies to deal with requests for information in a cost-effective manner and avoid time-consuming appeals with their opportunity costs.

29. It is unreasonable to blame members of the public who exercise their rights to information for an increase in costs when public authorities do not handle information requests in a cost-effective and considered manner. Evidence presented in the Ministry of Justice memorandum to the Justice Select Committee gives undue attention to a small number of individual cases which have required significant resources to resolve and does not consider whether or how the bodies in question could have dealt with the case differently so as to have reduced the workload involved.

30. In our experience public authorities are well aware of the provisions of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 and do not hesitate to apply the regulations to limit the scope of complex or extensive requests for information. In such situations, a number of the authorities we have submitted

---

15 For example, paragraph 187, page 52.
requests to have adopted the good practice of providing advice under section 16 of the Freedom of Information Act on how a request could be redefined or reduced in scope to bring it within the scope of the cost limits.

31. Discussing the costs of administering the Freedom of Information Act, the Ministry of Justice argues that “there is something of an opportunity cost involved in that each hour spent by a staff member responding to an FOI request was an hour not spent on their ‘day job’”\textsuperscript{16}. However, as the Director of a non-departmental public body said to us, “When staff complain to me that dealing with Freedom of Information requests is getting in the way of their day jobs, I tell them that dealing with Freedom of Information requests is part of their day job. It's part of our duty as a responsible government agency to be open and transparent and push forwards standards of openness across the sector”. The view that providing information to the public is not part of a public servant's job is ultimately based on the archaic attitude that the public should not have the right of access to government information – a view which is fundamentally opposed to the central principle underpinning the Freedom of Information Act: that there is a general right of access to information held by public authorities\textsuperscript{17}.

32. Opening access to information and, when necessary, responding to requests for information has become part of the 'way things are done' in progressive and efficient public authorities in accordance with the requirements of the Freedom of Information Act and the principles of open government. There is no excuse for other authorities to take a more reluctant approach to the disclosure of information. In our view the costs of administering the Freedom of Information Act are reasonable and proportionate to its benefits. There is no need for a change to the charging basis for the scheme, which as it stands is clearly defined and offers incentives for public bodies to take an open approach to information management. Moves to increase the costs of information to those making requests it would be contrary both to the direction of travel proposed by the government in the reforms to Freedom of Information law outlined in the Coalition Programme for Government and to broad principles of liberal democracy.

33. Concerns have also been expressed by the Ministry of Justice about the difficulties in dealing with vexatious requests for information made under the terms of the Freedom of Information Act\textsuperscript{18}. In our view the Act already provides sufficient powers to allow public authorities to define and deal with vexatious requests, and no change is needed to the legislation in this respect. We consider that sensible handling of requests for information, with the authority making an effort to understand and clarify the scope of a difficult request, and accepting its duty under section 16 of the Act to provide advice and assistance to the requester, will prevent the vast majority of requests from becoming vexatious. It should be remembered that there is a difference between a genuinely vexatious request and a request which is inconvenient, difficult, or irritating for a public authority to handle, and the threshold for identifying a vexatious request should therefore be set at a reasonably high level. The fact that powers to deal with vexatious requests have been used infrequently by public authorities suggests that a relatively small number of genuinely vexatious requests are received under the Freedom of Information Act and that public authorities have adequate powers to deal with such situations.

\textsuperscript{17} Section 1, Freedom of Information Act 2000.
34. We conclude that the Freedom of Information Act has been a success and the broad benefits it has produced far outweigh the costs of its implementation. It would be a backward step to try to limit the scope of the Act or place further restrictions on the accessibility of information. In contrast, we would support steps to further extend the scope of the Act to cover a wider range of bodies.

January 2012
Written evidence from Durham University

Summary

1. The University understands and supports the objectives of the Freedom of Information Act 2000 and wishes to be open and transparent. However, it is the experience of the University that the legislation fails to deliver its intentions and has a significant number of weaknesses.

2. The University does not believe that the Act is operating in the way in which it was intended, primarily due to the burden on resources experienced and the environment of confrontation that it creates with the Press.

3. The University makes a number of recommendations to the committee. Primarily we believe that we should be removed from Schedule 1 as the legislation is unnecessary for us and the wider higher education sector. The University believes that the objectives of the Act could be achieved more effectively in the higher education sector through a code of practice, perhaps including the requirement to develop and maintain a Publication Scheme, and accountability to HEFCE rather than the Information Commissioner’s Office. Should the present legislation remain in force, we suggest amendments that could be made to improve its operation and reduce burden on public authorities.

Introduction

4. Durham University is a world-class university engaged in:
   - High quality teaching and learning
   - Advanced research and partnership with business
   - Regional and community partnerships and initiatives
   - Services for conferences, events and visitor accommodation.

5. The University has 16 colleges which provide residential, social and welfare facilities for their student members. Academic teaching and research programmes are delivered through departments contained within three faculties - Arts and Humanities, Science and Social Sciences and Health.

6. The University currently has over 16,000 students and employs just under 4,000 members of staff.

7. Durham University is submitting written evidence to this inquiry in its capacity as a public authority under Schedule 1 of the Freedom of Information Act 2000 (hereafter referred to as “the Act”).

Information for the Committee

Does the Freedom of Information Act work effectively?

8. The University does not believe that the Act is operating in the way in which it was intended, primarily due to the burden on resources experienced and the environment of confrontation that it creates with the Press.
9. The University has no evidence to show that release of information under the Act has encouraged better decision-making in the University or greater public involvement in decision-making. The most prevalent group to make information requests to the University are journalists and the information provided is either never published or is published in articles which do not, in the opinion of the University, generally encourage debate or involvement in University business. In most cases a more productive relationship would come from dialogue, whilst the Act encourages a very precise and mechanistic form of question and response.

What are the strengths and weaknesses of the Freedom of Information Act?

Strengths

10. The University understands and supports the objectives of the Freedom of Information Act 2000 and wishes to be open and transparent. However, it is the experience of the University that the legislation fails to deliver its intentions.

Weaknesses

The University believes that the following weaknesses lie within the Act:

11. Based on statistical evidence from recent years, the University’s opinion is that the greatest weakness in the legislation is that it can be used so readily by journalists fishing for a story because there are minimal resource implications on their part in doing so. If a journalist is unable to get the story they want out of the information they receive – or an exemption is applied to the information - then they will sometimes just submit a request for different information.

12. Our experience is that information – particularly statistics or financial data - is often provided to journalists with explanatory text but this is often ignored or edited when articles are published. As well as having a considerable resource implication for the University for what we believe is a small public benefit, these requests also have a much wider resource implication for the higher education sector. A significant number of requests the University receives from journalists are “round-robins”. Often only the responses from the three or four institutions perceived to best illustrate the story are used, out of twenty or thirty institutions which have had to use resources to respond to the request.

13. Requestors repeatedly fail to search for information themselves. In a significant number of instances the University has had to point requestors to information already publicly available through links in the Publication Scheme, or to information that is published elsewhere already on the University’s website. The public do not need to understand the Act – or related legislation such as the Data Protection Act 1998 - or properly consider their requests prior to submission. This places considerable burden on the University to clarify and help re-phrase requests and to provide explanations of the legislation, due to the Section 16 “Duty to provide advice and assistance” requirements of the Act.

14. The University is classed as a public authority under the Act and therefore all of our business activities are subject to the legislation, regardless of the fact that the University currently receives only about a third of its funding from the UK Government.

15. The public are not required to provide or justify their reasons for submitting requests. This makes vexatious or pointless requests too easy to make. Often, where requestors have volunteered their reasons, this has allowed the University to better tailor its response, sometimes respond to the request outside of the legislation and therefore
16. The University is required to spend up to 18 hours working on an information request. The University believes that this is too great as it diverts too much staff time away from core activities, especially when multiple requests are received on similar subjects.

17. The Fees Regulations do not appropriately take into consideration the true cost of dealing with many FOI (and subject access) requests. The University is obliged to spend many more than 18 hours work on some information requests due to the fact that we are unable to take time spent on reading and redacting information into consideration when calculating the estimated cost of a response. This has placed considerable burden on the central Data Protection and FOI requests service as complex requests often require considerable reading time and subsequent redaction time. The University is not often able to apply the Section 12 exemption “Where cost of compliance exceeds appropriate limit” as information is usually easily located and retrieved.

18. One request received by the University has progressed to internal review then ICO investigation – this has taken up a significant amount of time for administrators and senior managers and if more requests progress in this manner the University will suffer substantial disruption to some core functions.

19. The public’s right to know has too much prominence over the amount of resource that public authorities should reasonably be expected to expend upon responding to information requests. The University’s experience is that the numbers of information requests received have increased dramatically in the 5 years since it began compiling statistics in 2007 (see evidence below).

<table>
<thead>
<tr>
<th>Year</th>
<th>FOI Requests</th>
<th>Environmental Information Regulations Requests</th>
<th>Subject Access or Other Data Protection Requests</th>
</tr>
</thead>
<tbody>
<tr>
<td>2011</td>
<td>236</td>
<td>0</td>
<td>32</td>
</tr>
<tr>
<td>2010</td>
<td>172</td>
<td>0</td>
<td>27</td>
</tr>
<tr>
<td>2009</td>
<td>98</td>
<td>0</td>
<td>31</td>
</tr>
<tr>
<td>2008</td>
<td>101</td>
<td>1</td>
<td>28</td>
</tr>
<tr>
<td>2007</td>
<td>41</td>
<td>0</td>
<td>19</td>
</tr>
</tbody>
</table>

As a result, the University has needed to employ an additional member of staff since 2008 to almost exclusively deal with information requests as the increasing number of requests received made it evident that it required a full time resource. The volume and complexity of information requests received by the University also impacts on the progression of policy, training and guidance work.

**Is the Freedom of Information Act operating in the way that it was intended to?**

20. The University does not believe that the Act is operating in the way in which was intended for the reasons outlined in paragraphs 11-19 above.

**Recommendations**

21. Higher education institutions should be removed from Schedule 1 as the legislation is unnecessary. The objectives of the Act could be achieved more effectively in the higher education sector through a code of practice, perhaps including the requirement to
develop and maintain a Publication Scheme, and accountability to HEFCE rather than the Information Commissioner’s Office.

22. Should the current legislation remain in force, the University would like to see the introduction of a BBC-type model for the higher education sector, whereby the Act would apply only to those activities which receive public funding (e.g. science teaching).

23. A research data exemption (in line with FOIA Scotland) should be introduced to reduce burden on higher education institutions, or the publication of publicly-funded research data should be left to the discretion of funding councils rather than decided either through the Act or through the review of refused information requests by the Information Commissioner.

24. A fee should be introduced in line with the £10 charge that can be made for subject access requests to attempt to limit vexatious and repeated requests.

25. A limit should be imposed on the number of public authorities that can be asked to respond to an information request made by the same requestor at the same time on the same subject in order to reduce significant burden upon resources across a sector and also, as a result, upon individual institutions.

26. The Act should require the public to search an institution’s Publication Scheme and perform a reasonable search of its website before submitting an information request in order to reduce the burden on public authorities to spend time formally responding to requests where information is already publicly available.

27. The public should be required to provide an explanation for submitting an information request in order to help the public authority to provide as helpful a response as possible.

28. The amount of time that the University is required to spend on each information request should be reduced because of the continually increasing volume and complexity of requests and attendant increasing burden on resources.

29. The Fees Regulations should be amended to take into consideration reading and redaction activities.

January 2012
1. For a two-year period I sought to use the FOI Act to shed light on key aspects of the British asylum system which are unaccessible to outsiders, including academic researchers.

2. During the period 2007-9, I made about 15-20 FOI requests, the vast bulk of which were to the Home Office/UKBA but the remainder were to the Ministry of Justice. Many of the requests were not adequately dealt with by officials who often refused me access to key information. I had repeatedly to appeal initial refusals to obtain evidence on key policies and the implementation of key policies, on public expenditure in key areas, on the nature of legal aid, on how The Home Office implemented its policy of language analysis, on information about Home Office Presenting Units, and about how the Immigration and Asylum Tribunal operated (specifically the way it listed cases for country guidance). In nearly all instances officials sought to frustrate access to information; several times they not only took exception to my requests -- as evidenced clearly in their replies -- but in one case a request for research access to the Immigration Asylum Tribunal was specifically refused because the Deputy President was aware of my FOI Request and objected to it.

3. As an academic, a tax payer and a citizen I feel it is right that government should meet all reasonable FOI requests because many areas of government are cloaked in a degree of secrecy and/or because officials do not like to be made accountable for their decisions. It is my understanding that the Home Office has refused the decision of the Information Commissioner to provide information requested under the Act on a number of occasions; it has certainly refused to comply with a decision by the IC in relation to a request by me.

4. Based in part on my FOI requests I have published an academic paper which looks into one area of Home Office policy. The evidence before me clearly indicated that officials had extended a policy for which there was no evidence that the policy worked; their actions had probably also violated British law. I attach that paper for your information.

5. My paper on UKBA policy which is based primarily on material obtained under the FOI Act was subject to considerable delay and obfuscation by the Home Office/UKBA who: (a) repeatedly delayed replying to my requests, (b) sought to limit the information released by imposing a more limited definition on the material I requested; (c) and who ultimately refused to release information. I was forced to appeal to the unit in the Home Office, to no avail, and ultimately to the Information Commissioner who ruled that the information should be released. It has been over 12 months since that ruling and the Home Office has refused to release the information.

6. I hope that ILPA has made a submission to you regarding their reliance on FOI requests on behalf of the asylum appeals of their clients. It is often the case that the Home Office and other officials make unreasonable decisions or claim to take a decision on the basis of an policy when in fact no such policy exists. Far better that the FOI operates than for the government to face an even larger bill in the courts in the face of mounting Judicial Review applications taken out against officials for their unreasonable decisions.

7. I would like to see the government's rationale for limiting or ending the FOI Act. Cost cannot be a factor when official decision-making and unannounced policies are relied upon to deal with a problem which officials want to go away but which instead should be the subject of publicly disclosed information.
I run the Clean Highways campaign (www.clenhighways.co.uk) and use the FOI legislation to obtain relevant information.

Here are two examples showing how this has helped my campaign

Meopham Station, Gravesend, Kent – responsibility for cleaning clarified

Mr Brian Reynolds a rail commuter had complained to both Network Rail and Gravesend Council about the littered state of the road leading to the station and its forecourt. Neither side made it clear as to their respective responsibilities. To assist him I made an information request to Gravesend Borough Council which can be seen at: http://www.whatdotheyknow.com/request/approaches_to_meopham_station

..asking where the councils cleaning responsibilities ended and those of Network Rail began. They supplied a map which can be seen at: http://www.whatdotheyknow.com/request/87991/response/222785/attach/3/20111025083223641.pdf

This has enabled Mr Reynolds to pursue both bodies with a clear understanding of their respective responsibilities.

Department Of Transport – Misinformation exposed

In a letter letter to Nick Hurd MP of 31st March Mike Penning, the Under-secretary of State for Transport, commenting on my report “Our Littered Motorways” said that “Highways Agency has been in discussion with many of its managing agents with a view to improving the appearance of motorway verges and slip roads, to ensure that the requirements of the Environmental Protection Act 1990 are met across the network”.

I made an information request to the Highways Agency for copies of any documents relating to these discussions. My request and the documents supplied can be seen at this link.

The documents provided recorded only low grade communications and I was able to report back to the Minister that he had been misadvised about these discussions.

January 2012
Written evidence from Understanding Animal Research

Executive Summary

1. Animal research is vitally important to the development of new treatments for a range of serious conditions from cancer and heart disease to neurological conditions such as Parkinson’s disease, Alzheimer’s disease, spinal injury etc. However, it is controversial and while most of the public are supportive, it can provoke strong feelings among those who oppose it. Most of those opposed to animal research engage in passionate debate and sometimes employ radical propaganda, but campaign within the law. However, a small minority of radical animal rights extremists are prepared to use intimidation or outright violence to further their cause. This has ranged from threats to arson attacks and letter bombs.¹

2. The extremist tactic of targeting organisations involved in animal research by attacking the individuals that work for them or the companies that supply them, dates from the mid-90s. The threat to medical research became so serious that 10 years later the UK government developed a strategy and drew up specific laws to crack down on extremist activity against animal research. Freedom of Information requests have been used as a tactic by animal rights groups across the world to obtain information about animal research.

3. The Home Office regulates animal research by issuing licences. A project licence contains significant detail on intellectual property, information about the individual scientists conducting the research and the location of the establishments where animal research is conducted. It was never intended to be placed in the public domain. Obtaining copies of project licences is a key target for those who oppose animal research.

4. We believe that more information about animal research should proactively be made available to the public, while safeguarding information which could be used by extremists to target individuals and institutions.

Recommendations

5. We recommend that the following information should be exempt from the Freedom of Information Act and that this should apply to all public bodies:
   - the names and addresses of individuals and establishments involved in animal research, to help protect them from the possibility of attack by extremists;
   - information provided to the Home Office in confidence for the purposes of applying for a Project Licence.

6. We also propose that the Home Office should more closely define which sections of the Project Licence application form will contain confidential information and hence be excluded from publication through Freedom of Information requests. This advice will also clearly define the information which may be placed in the public domain.

¹ [http://www.understandinganimalresearch.org.uk/policy_issues/animal_rights_extremism]
About Understanding Animal Research

7. Understanding Animal Research is a membership organisation with over 110 member organisations and many more individual supporters. Organisational members are drawn from various sectors including academic, pharmaceutical, charities, research funders, professional and learned societies, and trades unions.

8. We aim to achieve broad understanding and acceptance of the humane use of animals in biomedical research in the UK, to advance science and medicine. The information provided by Understanding Animal Research is based on thorough research and understanding of the facts, historical and scientific.

9. Understanding Animal Research seeks to engage with and inform many sectors to bring about its vision. Key stakeholders include members of the public, the media, policy makers, schools and the scientific research community.

Introduction

10. We wish to address the specific application of the Freedom of Information Act (FOIA) to animal research conducted in UK Universities and other public bodies. We are concerned that FOIA may be used by animal rights extremists to obtain information which can be used to target individuals and institutions involved in animal research. We also have concerns about the release of intellectual property, which we know other respondents are addressing. In this response, we will deal principally with the safety concerns.

Regulation of animal research

11. There have been special controls on the use of laboratory animals in the UK since 1876. These were revised and extended in 1986 as the Animals (Scientific Procedures) Act (ASPA). This law safeguards laboratory animal welfare while allowing important medical research to continue. These controls are widely regarded as the tightest in the world.

12. Central to ASPA is a cost-benefit assessment which must be applied before any research project involving animals can go ahead. Thus the potential costs, in terms of animal suffering, must be weighed against the potential benefits of the research.

13. Three separate types of licence are required for animal research or testing. The Act says that animal procedures can only:
   • take place in research institutes or companies which have appropriate animal accommodation and veterinary facilities, and have been granted a certificate of designation
   • be part of an approved research or testing programme which has been given a project licence
   • be carried out by people with sufficient training, skills and experience as shown in their personal licence

14. The project licence is a detailed document often running to hundreds of pages. It outlines a plan of work covering up to six years from the time of writing. The information required in a project licence application enables the Home Office to decide whether to grant a project
licence. It will usually contain significant amounts of detail on intellectual property, information about the individual scientists conducting the research and the location of the establishments where animal research is conducted. It was never intended to be placed in the public domain.

15. In practice, a number of options included in the project licence may never be used. This is because it is difficult to reliably predict the detailed operation of the project several years ahead. For example, the early outcomes of the project will affect plans for later stages; and the publication of relevant or overlapping results by other research groups can occur at any time and affect the planned project. The licence often contains options that depend on the progress of the programme of work, and the researcher will choose which options to use as the research programme builds. Therefore a significant but unpredictable proportion of what is in the application will never happen under that licence.

16. There is currently a process whereby applications for Project Licences are first discussed in Ethical Review Process meetings. This process ultimately concerns the securing of maximum welfare standards while achieving optimal scientific outcomes in medical research using animals. The free and frank exchange of ideas will be undermined if the full minutes of these meetings are published following FOI requests and the members of the committee could be targeted if their identities were known.

17. A key part of the application is the inclusion of a project abstract. The project abstract is designed to be published on the Home Office website and is written using lay terms. It summarises the information in the project licence without containing the personal information or information about the location of the work. This is part of the move towards greater openness and is an expectation of all project licences.

Safeguarding information

18. It has been a tenet of both the existing Animals (Scientific Procedures) Act 1986 (ASPA) and the European Directive 2010/63/EU, which is in the process of being transposed into UK legislation, that certain information must be safeguarded because of the possibility of extremist attacks and to prevent the loss of intellectual property. This is worded in different ways in different regulations but essentially the advice is the same.

19. The Guidance on the Operation of ASPA2 explains that the purpose of Section 24 of the Act, which makes it an offence for those with responsibilities under ASPA to disclose information given in confidence, is to safeguard:

“the names and addresses of individuals and establishments, to help protect them from the possibility of attack by extremists;” and

“detailed information that must be provided in licence applications (so that the cost/benefit assessment can be carried out and the scope for using alternatives reviewed) which might be commercially sensitive or intellectually valuable.”

---

Submission from Understanding Animal Research to the Justice Select Committee - Post-Legislative Scrutiny of the Freedom of Information Act
20. The European Directive 2010/63/EU\(^3\) states that published information “should not violate proprietary rights or expose confidential information” and that “published details should not breach the anonymity of the users”.

**The threat from extremists**

21. There is evidence that the international threat to animal research from extremists is again growing, and collaboration between UK and international animal rights groups is also increasing. The protection of individuals and organisations involved in animal research, both entirely within the UK and as part of international collaborations, is still important and remains part of the purpose of current legislation regulating animal research.

22. The threat from animal rights extremism in the UK has diminished since 2005 but has not gone away entirely. In the past year there has been one arson attack in the UK\(^4\) and a number of arson attacks throughout Europe\(^5\) aimed at the employees of organisations involved in animal research. There is growing evidence that European animal rights groups are exchanging information with each other and working together.

23. In the USA, animal rights groups have also resorted to illegal acts and have been targeting both university staff and individual students. They have published names, addresses and contact details of individuals with the clear implication that these people should be targeted by extremists. One group, Negotiation is Over (NIO) has even resorted to targeting the children and grandchildren of researchers and has also offered rewards for information about individual students studying on courses involving animal research. This organisation is using US freedom of information laws to gain the information they need to intimidate researchers. There is growing evidence that UK based animal rights groups have developed links with NIO and that the groups are sharing information.

**Case study**

24. In 2008, Newcastle University received an FOI request for project licences relating to specific projects in a particularly sensitive area: the use of non-human primates in research. The request was initially refused using three exemptions: health and safety (endangering the safety of an individual), commercial interests and prohibitions on disclosure. The prohibition on disclosure related to the licences having been issued by the Home Office under ASPA. This was accepted by the Information Commissioner when Newcastle’s original decision was challenged, but over-ruled by the Information Tribunal on appeal in 2011. Newcastle University has now released the information under FOI. In addition to the risk which the university believes this poses to individual members of staff, this decision also places staff at risk of prosecution for disclosing the information because in this instance FOI is in conflict with ASPA Section 24.

---


\(^5\) References available on request
25. This decision by the Information Tribunal has led to similar requests being received by a number of other Universities and public bodies.

Balancing Freedom of Information and protection of researchers

26. There is a need to balance the public interest in how and why UK research involving animals is undertaken, against the protection of researchers from the possibility of attack by extremists. It is clearly not in the public interest to identify institutions or individuals when the sharing of this information results in putting them at risk of intimidation or harassment. Intimidation and harassment from animal rights extremists could lead to added fear among institutions, avoidance of controversial research, decreased openness and driving such work to less regulated countries.

27. The main aim of animal rights groups is to try to prevent animal research from taking place. Information on projects that are either in progress or have not yet been undertaken is therefore likely to be a focus for protest or illegal activity. Experience shows that details of completed work can safely be placed in the public domain.

28. All parties are agreed that it is desirable to have more openness and transparency about the use of animals in research. Some years ago, Understanding Animal Research published a researcher’s guide to communicating about animal research in an attempt to encourage more openness, and has an active ‘openness’ programme working with the academic sector. The programme and the guide encourage universities, as a first step, to publish material about their animal research on their websites. Many universities have published their policies about animal research and some go much further. This proactive openness provides important information about animal research undertaken by a University while protecting information which could be used by extremists.

Conclusions

29. Scientists and other staff working in animal research institutions must be protected from harassment, intimidation or worse. The work that they conduct is vitally important to the development of new treatments for a range of serious conditions from cancer and heart disease to neurological conditions such as Parkinson’s disease, Alzheimer’s disease, spinal injury etc.

30. UK and European legislation recognises the threat from extremists and attempts to build safeguards into the legislation to mitigate the threat. At the same time, legislation recognises that there may be important intellectual property and commercial interests associated with the research undertaken by these scientists. ASPA legislation contains a specific section to protect the confidentiality of the detailed information required to assess whether a project licence should be granted. This information includes personal information about the applicant, information about the location of animal research facilities and


2 Two current examples of good practice are:
http://www.ox.ac.uk/animal_research/index.html
http://www.nottingham.ac.uk/animalresearch/index.aspx
Submission from Understanding Animal Research to the Justice Select Committee - Post-Legislative Scrutiny of the Freedom of Information Act
intellectual property. Section 24 of ASPA was designed to protect this information from publication.

31. However, the Freedom of Information Act makes it possible to obtain the same information from other public bodies that ASPA Section 24 was designed to keep confidential. Release of this information may result in extremist targeting of individuals and institutions.

January 2012
Appendix One - Project Licence

The Project Licence is a detailed form often running to hundreds of pages. It outlines a variety of information and is a plan of work covering up to six years from the time of writing. The current project licence application contains seven distinct sections:

A. PROJECT LICENCE HOLDER
B. PLACE(S)
C. SCIENTIFIC BACKGROUND
D. PLAN OF WORK
E. PROTOCOLS
F. DECLARATIONS
G. PROJECT ABSTRACT

Section A – Project Licence Holder

Personal information about the person applying for the licence who has overall responsibility for the programme of work. This includes name, address, date of birth, knowledge, skills and experience, etc.

Section B – Place

Details of where the animal procedures will be conducted.

Section C – Scientific background

Contains the scientific justification for the project. It includes an assessment weighing up the possible adverse effects on the animals to be used in the programme against the potential benefit resulting from the work specified in the licence. This is supported by a number of published and/or unpublished references.

There is considerable intellectual property in this section of the licence. There is also much information that is personal to the applicant (eg references to published and unpublished work) that would lead to ready identification.

Section D – Plan of work

The plan of work outlines how the objectives of the research will be achieved.

It also describes how the programme of work cannot be achieved satisfactorily by any other practicable method not entailing the use of animals. It details how the proposed procedures use the minimum number of animals; involve animals with the lowest degree of neurophysiological sensitivity; cause the least pain, suffering, distress or lasting harm; and are most likely to produce satisfactory results.
If the work is to include cats, dogs, primates and equidae, the researcher must justify the use of these species. Similarly, if it involves endangered species or animals taken from the wild, a similar justification must be given.

Section E – Protocols

In this section, the researcher describes the procedures which will be applied to the animal(s) over the period covered by the licence, possible adverse effects of each procedure and how these adverse effects will be managed if they occur. In practice, the adverse effects may be extremely unlikely but the protocol must demonstrate that researchers are prepared for any eventuality, no matter how unlikely, and know how to deal with it.

The protocols section may run to dozens of separate protocols, especially if the licence covers a programme of work over several years. This section may be 100 pages in length or longer, and forms an important part of the intellectual property of the researcher.

In practice, a number of protocols may never be used. This is because it is difficult to reliably predict the detailed operation of the project several years ahead. For example, the early outcomes of the project will affect plans for later stages; and the publication of relevant or overlapping results by other research groups can occur at any time and affect the planned project. The licence often contains options that depend on the progress of the programme of work, and the researcher will choose which options to use as the research programme builds. Therefore a significant but unpredictable proportion of what is in the application will never happen under that licence. This is reflected in the Home Office’s annual statistics in which some Project Licence holders make zero returns. If published in full, the protocols would not give an accurate picture of the research programme.

The protocols which are not actually used in the programme may form an important part of the intellectual property of the researcher and can be used in later research programmes.

Section F – Declarations

This is signed by various members of the research team to declare that the information in the application is accurate, etc.

Section G – Project abstract

The project abstract is designed to be published on the Home Office website and is written using lay terms. It summarises the information in the project licence without containing the personal information or information about the location of the work. The Home Office guidance says that it should “Use lay terms and avoid confidential material or anything that would identify you or your place of work”. This is part of the move towards greater openness and is an expectation of all project licences. This is the only part of the project licence that is intended for public dissemination.
Written evidence from Paul Gibbons

Executive Summary

1. The Freedom of Information Act (FOI) works very effectively. In my opinion it appropriately balances the right to know with the need to ensure that public bodies can deliver public services effectively.

2. The Act has clearly, though to varying degrees, met its objectives of improving openness and transparency, increasing accountability, improving decision-making and supporting public engagement in decision-making.

3. The biggest obstacles to the effectiveness of FOI are a lack of cultural change within the public sector, epitomised by public statements from senior figures attacking the legislation, and irresponsible use of the Act by a small minority of requesters. Both should be more effectively countered in future.

4. I have made some recommendations which the Committee may wish to consider as part of its post-legislative assessment of the Act:

   Recommendation 1: There must be more leadership shown in Whitehall promoting the benefits of FOI and challenging negative perceptions.

   Recommendation 2: users of the legislation should be encouraged to follow best practice, perhaps set out in a formal or informal Code of Practice (a “highway code” for FOI requesters).

   Recommendation 3: there should be a transparency impact assessment (similar to a privacy impact assessment in Data Protection) of proposed amendments to FOI to ensure that existing levels of access to public information are at least maintained.

   Recommendation 4: the Act should be amended so as to ensure that the Information Commissioner can prosecute offenders under s.77 of the Act up to three years after the offence occurred.

   Recommendation 5: reporting statistics on FOI compliance should be made mandatory for all public authorities, and consideration given to a requirement to quote FOI in requests to ensure consistency in management and reporting.

   Recommendation 6: public authorities should be encouraged to proactively disclose as much information as possible, and to publish responses to requests via a Disclosure Log, but the requirement to maintain a central Publication Scheme should be dropped.

   Recommendation 7: section 14 of the Act, covering ‘vexatious’ requests, should be reviewed and possibly clarified. This might be linked to the idea of a Code of Practice for requesters.
Recommendation 8: maintain existing cost restrictions on FOI requests.

Recommendation 9: amendments to FOI must be considered in the context of the Government’s wider transparency agenda and must be consistent with the aims of that agenda.
1. Introduction

1.1. I have been working as a practitioner, responsible for implementing the legislation and answering requests made under its provisions, for several years. Between February 2001 and November 2003 I served as Parliamentary Records Manager, helping both Houses to prepare for the Act coming into force. Since then I have worked for the Greater London Authority (for 6 years), an NHS Trust and the School of Oriental and African Studies (SOAS).

1.2. In September 2010, I created the weblog and site http://FOIMan.com. The aim of the site is to give those interested in FOI an inside perspective on the legislation and related issues.

1.3. My evidence reflects my experience as both a practitioner of FOI in a range of public authorities and of my engagement with users of the legislation through social media. I am submitting this evidence in my own capacity – it is not intended as an official submission of any other body.

2. Does the Freedom of Information Act work effectively and is it operating in the way that it was intended to?

2.1. In my opinion, the FOI Act works very effectively. The long title of the Act is “An Act to make provision for the disclosure of information held by public authorities or by persons providing services for them…”,1 there is little doubt that vast quantities of information have been disclosed since the general right of access came into force on 1 January 2005.

2.2. One way to assess whether the Act works effectively is to look at the way it was intended to work. As the Ministry of Justice has pointed out,2 the Act had four main aims:
   o to improve openness and transparency of public bodies;
   o to make public bodies more accountable;
   o to improve decision-making;
   o to allow the public to engage in decision-making.

2.3. Research suggests that the Act has succeeded in making public authorities more open and transparent.3

---

1 Freedom of Information Act 2000, c.36
2 Memorandum to the Justice Select Committee – Post-Legislative Assessment of the Freedom of Information Act 2000, Ministry of Justice, December 2011, pp. 5-7
2.4. It is also clear that public bodies are now more accountable. One important point for the Committee to consider is the importance of the general right of access under FOI in holding public bodies to account. Public authorities decide what to disclose pro-actively. The general right of access allows members of the public to choose what must be disclosed, with limited restrictions.

2.5. Studies have struggled to find evidence that decision-making has been improved by FOI. This is, by its very nature, difficult to prove. My own view is that it is inevitable that the nature of decision-making will have changed to a degree, if only because officials and politicians are aware that there is more potential for outside scrutiny. To give an example, politicians and senior officials must surely consider more carefully what expenses they will claim now that they know their claims may well be made public, and have seen the reaction to the disclosure of MPs’ expenses claims in 2009. Similarly, it must focus the minds of officials making decisions involving major expenditure.

2.6. Some have suggested that FOI has had a ‘chilling effect’ on decision-making and record keeping. The Information Tribunal has been sceptical of this view. It has argued that effective record keeping is a management issue and should be reinforced through management guidance. There is also evidence from other jurisdictions that have been subject to a form of FOI for longer than the UK that the ‘chilling effect’ may not be as significant as some suggest. There are two main reasons proposed for this. Firstly, there is an element of self-preservation involved – officials want to record decisions in order to be able to defend their actions at a later stage. Secondly, the chances of any particular document being disclosed out of all the documents created by public authorities are slim, so employees still do not necessarily expect a particular document to be disclosed. In my own experience, there is little evidence that colleagues have stopped putting things in writing as a result of FOI.

---

4 Memorandum, Ministry of Justice, 2011, p.85
5 ibid., pp.59-61, also commissioned research at p.86; Worthy, Amos et al, Town Hall Transparency, 2011, p.16
6 See for example the comments made by the former Cabinet Secretary, Sir Gus O’Donnell at http://www.bbc.co.uk/news/uk-politics-16229867 or his predecessors in the House of Lords debate on Freedom of Information on 17 January 2012 at Hansard HL, 17 January 2012, Col. 532
7 See for example Department for Education and Skills v Information Commissioner and The Evening Standard, Information Tribunal decision EA/2006/0006, 19 February 2007, para. 72
8 Baker v Information Commissioner and the Department for Communities and Local Government, Information Tribunal decision EA/2006/0043, 1 June 2007, para. 18
9 Eagles, Taggart and Liddell, Freedom of Information in New Zealand, OUP, 1992, p.373
10 Ibid.
2.7. As a professional records manager, my experience is that whilst there have been some improvements in recording decision-making processes, for example through clearer demarcation of ‘closed’ items discussed in committee meetings, overall records management has not dramatically improved as a result of FOI. As before, there are ‘islands’ of good practice focussed on core organisational functions, but there is a mixed picture in other areas. Largely this is because outside central government there has been relatively little investment in records management,\(^{11}\) or in ensuring that systems, for example accounting systems, can be readily interrogated. This means that retrieving information to answer FOI requests can take longer than it would do if systems were better designed. It also means that there is a higher likelihood of requests being turned down on grounds of cost than there would be if record keeping had been improved.

2.8. There is evidence that FOI has allowed the public to better engage with decision-making. The Ministry has acknowledged this.\(^{12}\) One recent example was the campaign by disability campaigners against the Welfare Reform Bill currently before Parliament. The campaign used responses to the Department’s consultation on the Bill, obtained through an FOI request, to produce a report which was then widely circulated through social media and other mechanisms.\(^{13}\) Recent research into FOI in local government suggests that such use of FOI by NGOs is common.\(^{13}\) The National Council for Voluntary Organisations (NCVO) has produced guidance for such organisations to encourage their use of FOI.\(^{14}\) The guide contains a number of case studies demonstrating how groups have used FOI effectively.\(^{16}\)

2.9. There is clear evidence that FOI has met its objectives. Any proposal to reform FOI must be careful not to place the progress that has been made to date under threat.

2.10. One significant limit on the Act’s effectiveness in my opinion is the lack of cultural change within the public sector. It is well known that many public employees and politicians are cynical of the benefits of FOI and critical of its cost.

\(^{12}\) Memorandum, Ministry of Justice, 2011, p.59, para. 211
\(^{13}\) http://diaryofabenefitscrounger.blogspot.com/2012/01/i-support-spartacus-report.html
\(^{14}\) Worthy, Amos et al, Town Hall Transparency, 2011, p. 19
\(^{15}\) P. Hadley, Voicing your right to know: A guide to using Freedom of Information in campaigning, National Council for Voluntary Organisations, October 2010 http://www.ncvo-vol.org.uk/yourrighttoknow
\(^{16}\) ibid., pp.18-34
2.11. There is a lack of leadership in the public sector championing FOI. I will quote below a series of public statements on FOI from influential figures. If this is the attitude of senior officials, it is not surprising if these views pervade the public sector:

2.11.1. Former Prime Minister Tony Blair wrote in his memoirs: "Freedom of Information. Three harmless words. I look at those words as I write them, and feel like shaking my head till it drops off my shoulders. You idiot. You naive, foolish, irresponsible nincompoop. There is really no description of stupidity, no matter how vivid, that is adequate. I quake at the imbecility of it."17

2.11.2. Former Cabinet Secretary Lord Gus O'Donnell in an interview with the Times: “Freedom of Information that allows the public to ask questions about things is fine, but the bit that I’m really against in freedom of information is that bit where it reduces the quality of our governance…I want Cabinet to have real discussions, for people to be able to say, ‘I disagree with this policy’.”18

2.11.3. The Leader of Hampshire County Council: “I no longer believe that my staff should be spending their precious time on such spurious requests. I believe we should explain to the inquirer at the outset the lengths to which we will have to go to get the information and, if they persist, we should have the courage of our convictions and refuse to answer the inquiry. It should be left to the information commissioner to adjudicate as to whether the inquiry is a legitimate cost on the public purse and in the public interest”. [note that the Leader is effectively urging his staff not to comply with the requirements of the Act]19

2.11.4. The Registrar of the University of Warwick wrote in Times Higher Education: “Why does FOI legislation include universities within its remit when it so obviously undermines the whole idea of universities being independent, self-governing organisations?”20

2.11.5. Universities UK, the body representing Vice-Chancellors of universities across the country, recently said in a blog post: “We don’t think Parliament envisaged how it would apply within universities, and especially to university research, when the Act

---

17 A. Blair, A Journey, Hutchinson, 2010
18 ‘Cabinet debates should be private – Cabinet Secretary’, BBC News Website, 17 December 2011 http://www.bbc.co.uk/news/uk-politics-16229867
was passed in 2000. In any case, since that time, the proportion of funding universities get from public sources has fallen considerably, and will continue to fall, making their inclusion within the definition of ‘public authorities’ all the more strange.”

2.12. Although everyone is entitled to their opinion, there is a damaging drip, drip, drip of negative statements by senior officials and politicians about FOI which are not robustly challenged. This allows the belief to grow that Ministers sympathise with such views, undermining the work of practitioners to promote compliance with the legislation. The public nature of criticism seems out of proportion to the way such matters are normally debated by senior and influential people. Recommendation 1: There must be more leadership shown in Whitehall promoting the benefits of FOI and challenging negative perceptions.

2.13. Linked to these criticisms of the Act, and threatening its future, is the irresponsible use of FOI by a small minority of those submitting requests. Examples include a requester submitting the same request to over 1400 public authorities, and individuals using the legislation as a tool to harass public employees. In my view, these activities need to be robustly confronted, but this need not require significant legislative change. Users of the legislation need to be better educated about the impact of their use of the Act and encouraged to use it responsibly. I have produced a Guide to Making Responsible FOI Requests which is available via my website and has proved useful to a number of campaigners and others who use FOI (I am enclosing a copy as supplementary evidence). It may be helpful for a Code of Practice along similar lines to be produced and widely publicised. Potentially, compliance with the Code could then be taken into account by the Information Commissioner, particularly where an authority considers a request to be vexatious. Recommendation 2: users of the legislation should be encouraged to follow best practice, perhaps set out in a formal or informal Code of Practice (a “highway code” for FOI requests).

3. What are the strengths and weaknesses of the Freedom of Information Act?

3.1. The strengths of the legislation are the presence of an independent ombudsman, in the form of the Information Commissioner, and the requirement to balance the public interest of disclosing or withholding information when considering the application of an exemption. It is important that any proposed amendments to the legislation do not diminish the powers of the Information Commissioner or strengthen

---

21 UUK Blogpost ‘Yes to open debate and transparency in research, but FOI is the wrong tool for the job’, 11 January 2012
http://blog.universitiesuk.ac.uk/2012/01/11/foiexemption/
22 http://www.foiman.com/foiguide1
the existing exemptions (which are adequate). Any change should not disproportionally reduce the level of access available to requesters. This is particularly important at this time when there is intense scrutiny of and debate over public services. It is essential that members of the public, the media and campaigners remain able to effectively scrutinise public sector decision-making through FOI.

Recommendation 3: there should be a transparency impact assessment (similar to a privacy impact assessment in Data Protection) of proposed amendments to FOI to ensure that existing levels of access to public information are at least maintained.

3.2. Practitioners can find it difficult to persuade colleagues, especially senior colleagues, of the need to comply with FOI. At the moment, the sanctions for non-compliance are limited. One obvious weakness is the limitation on the offence of altering or destroying information at s.77 of the Act. At present, this can only be enforced by the Information Commissioner within 6 months of the offence occurring. In practice, it may well not be evident that an offence has occurred within this timescale. Recommendation 4: the Act should be amended so as to ensure that the Information Commissioner can prosecute offenders under s.77 of the Act up to three years after the offence occurred.

3.3. Reporting on FOI is inconsistent. Central Government reports statistics on FOI quarterly and annually. This does not happen routinely in other parts of the public sector. The Information Commissioner has indicated that he will keep authorities under review that are regularly failing to meet the requirement to answer requests within 20 working days. However, this will not always be evident as reporting is not consistent. I would suggest that all public authorities be required to publish statistics on FOI compliance, perhaps as part of existing annual reporting processes. This would enable the public to see which authorities are meeting their FOI obligations. Consideration might also be given to a requirement for requesters to quote the Act in requests to bring clarity to the management and reporting of FOI requests. Recommendation 5: reporting statistics on FOI compliance should be made mandatory for all public authorities, and consideration given to a requirement to quote FOI in requests to ensure consistency in management and reporting.

3.4. Freedom of Information has led to more pro-active publication of information. However, Publication Schemes are an outdated concept. They are rarely looked at by users of the Act, who are more inclined to use search engines to find information. A list of information that authorities are required to make available would be more useful, without stipulating where the information should be placed on the authority’s website. Authorities should be required to publish responses to FOI requests in a Disclosure Log. Recommendation 6: public authorities should be encouraged to proactively disclose
as much information as possible, and to publish responses to requests via a Disclosure Log, but the requirement to maintain a central Publication Scheme should be dropped.

3.5. In order to address the legitimate concerns of public authorities, it would be helpful for the provisions relating to vexatious and repetitious requests at section 14 of the Act to be clarified. However, any proposal to amend this section should be careful not to restrict legitimate and reasonable enquiries. It might be helpful to link the concept of vexatious requests to a failure to follow accepted best practice as set out in a Code of Practice. Recommendation 7: section 14 of the Act, covering ‘vexatious’ requests should be clarified. This might be linked to the idea of a Code of Practice for requesters.

3.6. It has been suggested that the cost of compliance with FOI is a matter for concern. It is true that answering some FOI requests can be time consuming. However, many FOI requests can be answered relatively quickly. Some of those that are time consuming have led to important revelations. The Committee should also be wary of figures quoted for the cost of FOI as there is currently no agreed methodology for assessing this, and published estimates such as the Frontier Economics report of 2007 have often attracted criticism. Such estimates rarely take into account the benefits of FOI which are harder to quantify. The existing fees regulations help authorities to manage FOI requests effectively, by allowing them to refuse the most onerous of requests. However, changes along the lines suggested by some practitioners could disproportionately affect legitimate research and scrutiny of the public sector at a sensitive time. Recommendation 8: maintain existing cost restrictions on FOI requests.

3.7. I welcome Government proposals to improve transparency more generally. Any proposals to amend FOI must be considered in this context. Recommendation 9: amendments to FOI must be considered in the context of the Government’s wider transparency agenda and must be consistent with the aims of that agenda.

January 2012

23 Memorandum, Ministry of Justice, 2011, pp.49 ff
24 ibid., para. 179
26 ibid.
28 Memorandum, Ministry of Justice, 2011, pp.127-128
29 http://www.cabinetoffice.gov.uk/content/transparency-overview
FOI Man’s Guide to Making FOI Requests

How to make responsible and effective FOI requests

The Freedom of Information Act 2000 (FOI) and Environmental Information Regulations 2004 (EIR) introduced a right to information held by public authorities which came fully into force in 2005. However, like all rights, it should be used responsibly by those who exercise it.

Here, FOI Man, a public sector employee with several years’ experience of advising on and answering FOI and EIR requests, outlines the best way to make sure you get the most out of both regimes without creating unnecessary burdens on public authorities.

Except where otherwise specified below, FOI is used to denote both pieces of legislation.

Why should I care?

FOI is a right. Full stop. You absolutely have the right to ask a public authority for any information that you like. Unless your request is invalid, vexatious, covered by one of the exemptions, or the authority doesn’t hold it, they have to make the information available to you. To an extent, you’re even allowed to dictate in which format they should provide it to you. So you have the power.

But should you use that power? And if you do use it, should you consider the impact it might have on the public authority concerned? In these times of cuts and mass redundancies, is it right that scarce resources are spent digging around for information that you might have lost interest in by the time you get a response? And if you’re a campaigner, trying to engage your local politicians, do you really want to risk getting on the wrong side of them through your use of FOI? Is it a Pyrrhic victory if you get your information at the cost of officials’ time that could have been spent on doing the things you’re campaigning for?

And there could be implications further down the road if we don’t use FOI responsibly. In other countries where FOI has been in place for years, enthusiastic early adoption has often led to a backlash from politicians and the courts. In Ireland, a prohibitive fees regime was introduced; in New Zealand, the courts considering appeals began to interpret exemptions restrictively. Over here, we’ve seen an attempt by politicians to remove themselves from FOI (thankfully rewarded with contempt from all sides), and there are regular calls from senior officials in various parts of the public sector for their particular area to be excluded from the legislation.

It’s really easy to fire off an email asking for information. You can even send it to several thousand public authorities in one go. But be aware of the resource and other implications of that simple act. Here are my ten top tips on how to make effective, responsible use of FOI.

FOI Man’s Ten Top Tips on Making Responsible and Effective FOI Requests

1. Count to ten before clicking ‘Send’
Or better still, sleep on it. Consider if you really do want the information, and if you do, whether you have asked the right questions.

2. Do your research

Is the information already available on the authority’s website, perhaps in their Publication Scheme? Is there information there that could be used to make your question(s) more relevant or incisive? Has the question been asked before? There may be a ‘Disclosure Log’ on their website, or failing that, you could check WhatDoTheyKnow.com.

3. Take care when making ‘round robin’ requests

Remember that the more organisations you send your request to, the more public money will be spent on answering your request. And use your research to weed out authorities that the request isn’t relevant to.

4. Try an informal approach first if possible

You may already have a professional relationship with somebody within the public authority. Alternatively, the authority may publish direct contact details for the department that deals with the issue you’re concerned about. Try contacting them first to sound them out. At the very least they may be able to advise you as to what to ask for, and occasionally, they may even be able to give you more information than you would be entitled to under FOI.

5. Be specific

If you do decide to make a FOI request, cite the Act in your request (you don’t have to but it can help to avoid confusion). Make your request as clear as possible. Don’t be ambiguous. You can’t blame a public authority for misinterpreting your request if you’ve not specified clearly what you want.

6. Don’t be greedy

It’s tempting to throw everything including the kitchen sink into your request. Don’t. Keep your request short and to the point. You can always make other requests later if you want more information.

7. Be polite

Try not to assume that the person reading your request is determined to avoid answering your question(s). It’s likely that members of your own family, perhaps some of your friends, are public servants. Would you feel content to send them your request?

8. Be patient

Your request isn’t the only request that will be received by the authority. The people who have to answer your request will also have a number of other responsibilities to meet. Try to be patient and accept that you may not get an answer as quickly as you would like. In the vast majority of cases you will get a response before the statutory deadline of 20 working days (and note that phrase, ‘working days’ – in effect, organisations have a month to respond, give or take a couple of days).
9. Read the response carefully, and if necessary, use the Appeal process

A lot of effort goes into answering FOI requests, even (often especially) when your request is refused. Make sure you’ve understood the response.

Accept that in some cases, the authority just does not hold the information you’ve asked for. You may think they should, but if they haven’t, you can’t use FOI to force them to create it. Often the authority will explain why they don’t hold it – try to read their explanation with an open mind.

If your request has been refused using one of the exemptions (FOI) or exceptions (EIR), the authority should have provided you with an explanation of which ones apply and how. Where a public interest test has been applied, they should have explained the arguments for and against disclosure.

Try to take a step back and consider whether their arguments make sense. For instance, although you might like to have access to information about employees, you probably understand that some of that information is protected by the Data Protection Act. Whilst you may not be happy with the response, it may be that the Act has been applied correctly.

If the arguments don’t make sense or you disagree with them, and you still want the information, use the authority’s Internal Review process. The authority should have sent you details of this process with their response. All you really need to do though is to write to them, asking for an internal review. It will help your case if you set out the reasons why you think the exemptions/exceptions don’t apply. Where a public interest test has been applied, you can put forward your own arguments for disclosure if you don’t think these have been considered.

Again, be patient whilst waiting for a response, and when you do receive it, read it carefully. If you are still dissatisfied with it, consider contacting the Information Commissioner and asking him to review the response. Bear in mind that this may take some time – though turnaround times at the Commissioner’s Office have improved considerably in the last year.

10. Use the information you receive responsibly

If you want to use the information you’ve been sent, do so responsibly. One example of this is asking for permission if you want to reproduce a document that’s been sent to you (or at the very least acknowledging the source). Even though you’ve been sent the information, the copyright will normally still belong to the authority concerned or whoever gave it to them.

If you’re reporting on the information disclosed, try to provide context. Often the response will include an explanation of why, for instance, so much was spent on the particular activity you’ve asked about, or how spending compares with other similar organisations. Even if it doesn’t, it will often be a straightforward task to find contextual data or background. Whilst it may not make for as spectacular a story, excluding these facts could distort the impression given to your audience. This impression may well be convenient in the short term, but it could damage your reputation with the organisations that provide information to you, and ultimately with your audience if they learn that they are being misled.

Other resources you may find useful
Information Commissioner’s guide to making FOI requests
Information Commissioner’s Charter for Responsible FOI Requests
Information Commissioner’s guidance on appealing decisions
NCVO guide to using FOI for campaigning

Reproducing this guide on your website

This guide has been written to help anyone who wants to make an FOI request. If you’re a campaign group, for example, and you have a website and would like to reproduce the above there, please feel free to do so, but I’d appreciate an acknowledgement and a link to my home page (http://foiman.com). Or if you prefer to put a link from your site to this page, that’s fine too.
Written evidence from Lancashire Care NHS Foundation Trust (LCFT)

This document has been prepared by Dave Tomlinson, Director of Finance, Lancashire Care NHS Foundation Trust (LCFT), on behalf of that body and is submitted both directly to the Justice Select Committee (“the Committee”) and to the Foundation Trust Network for use in preparing its response to the same call for evidence.

Executive Summary

1. The Committee has invited written evidence on the following issues:
   - Does the Freedom of Information Act work effectively?
   - What are the strengths and weaknesses of the Freedom of Information Act?
   - Is the Freedom of Information Act operating in the way that it was intended to?

2. LCFT is an NHS provider which is obliged to comply with the FOIA and takes its responsibilities in this regard seriously. In doing so its senior officers have to exercise expertise in judgement in determining whether exemptions apply to the information requested and do so judiciously, weighing up what is in the general public interest as its key test.

3. It is clear to LCFT, however, that the FOIA is often used by third parties to access information for purposes for which it was not originally designed, though we are not permitted to enquire as to the purpose of requests.

4. For instance, a significant number of requests are from commercial organisations seeking to access information to give them a commercial advantage in some respect, for instance:
   - Requesting information regarding existing contracts and/or the identity of organisational decision makers and/or organisational structures for use in making unsolicited commercial proposals to LCFT and those decision makers in the way of inducing them to break contracts, identifying staff vacancies to allow them to push replacement or agency staff
   - Requesting information to allow them to take legal action against a third party. One example of this is where an individual is persistently requesting information to ascertain confidential information about that third party, such as its pricing mechanisms, profitability, areas of business. When the requester is told that the matter has to be raised with the subject of that request to ascertain whether it considers such disclosure would breach a duty of confidence, the requester takes an aggressive and disproportionate response, demanding inappropriate release of such information
5. Requesters of information frequently demand that information is provided in a specified format and do not respond well to indications that it is freely available in an organisationally-determined form. The same comment often applies when a requester is informed that the relevant information is not maintained by LCFT.

6. LCFT is placed at a commercial disadvantage by being obliged to reveal sensitive, confidential information about its operations which private competitors are not obliged to reveal, and indeed in many cases competitors are the requesters of that information. This is exacerbated by the fact that LCFT and many other public bodies are obliged to resource the provision of such information, and it is estimated in the case of LCFT that the relevant resources are equivalent to 1.5 whole time members of staff. It is considered that such resourcing is not a good use of public funds, in direct conflict with LCFT’s obligation to ensure value for money and efficiency.

7. LCFT has to respond to a number of vexatious or serial requests where there is clearly an obsession with a certain matter and the requester is not to be satisfied. On several occasions such requesters become openly aggressive in their requests and seek to harass individual members of staff.

8. Requests often ask for LCFT’s opinion of LCFT’s on a particular matter, something which is clearly not within the remit of the FOIA.

9. LCFT would concur with a number of statements made within the Memo to the Committee, specifically as follows:

   • Many of those interviewed highlighted the increase in number of requests they were receiving, and within this their frustration at the number of request from serial requesters. There was a view that some of these requests are coming from individuals with the sole purpose of gathering information for what was seen as illegitimate use i.e. a ‘good’ media story or to irritate organisations. Although the Act contains an exemption to protect against vexatious requests (Section 14), a number of respondents still found it difficult to apply this exemption, noting that although such requests are perceived to be from “vexatious” individuals, the individual requests submitted cannot be considered to be vexatious in nature.

   • “There are certain people who will make requests, arguably for no public benefit at all, simply to irritate the public body concerned. Because it costs them nothing to do it, they can keep doing it and doing it. You can of course refuse to deal with requests when they’re coming from an individual who you deem to be vexatious. But actually, the definition of vexatious, certainly from the ICO's standpoint and from our own legal team’s stand point is a very, very high bar. Most people who put in these requests are never really at the level of being what you would call vexatious but they are more than irritating.” (Respondent – commercial organisation)

   • Whilst there was agreement that the public should not have to pay to access public information, it was suggested that a possible means of preventing such spurious and repeat requests would be through the introduction of a nominal fee. It was acknowledged this would require a number of considerations and possible exemptions. All were aware of the impact this would have on low income individuals. Furthermore, other respondents noted that the cost implications of introducing a fee may well outweigh the revenue.
A consistent message from the majority of respondents was a desire to see the appropriate limit reduced, or for other resourcing elements such as redaction, consultation and reading time to be included in some way. Currently the legislation sets the cost limit at £600 for government departments and £450 for all other public authorities, equating to three and a half person days and two and a half person days of work respectively. There was a general view that the current time given to dealing requests is too onerous, with the issue being particularly exaggerated by the recent budget cuts which have taken place.

“18 hours is an awful long time to divert people away from their work. We try not to issue fees notices but, or to refuse on the grounds of cost, but FOI is a huge drain on resources that, I’d like to see it lower than 18 hours”. (Respondent – non-departmental public authority)

“It’s counterintuitive to impose a greater burden on a public body at the same time as you reduce its ability to deal with it”. (Respondent – central government)

January 2012
Written evidence from Ron Aroskin

All my requests under FoI have been stonewalled in relation to a PPS7 planning application submitted in September 2004.

In 2004 an application was submitted to the local planning authority and to my delight the planning committee granted permission subject to ratification by Government Office before South East (GOSE).

At this point two neighbours with very deep pockets, who had objected to our planning application, went into overdrive employing a planning expert and made representations to GOSE. There followed a “call in” by the Secretary of State and eleven months later a planning enquiry began which to last for over 10 days.

In many ways that was the easy bit as at least all the proceedings that went on in the room were seen by all and recorded.

The intervening period was a camouflaged period of obfuscation and if there wasn’t so much riding on it would have been the makings of an episode of yes minister.

In January 2005 the Freedom of Information Act (FoI) came into effect and so keen to understand what had been going on at GOSE I applied under the FoI to see who had said what to whom.

The enquiry took its course and we had a team of experts on our side who were and are at the “top of their game.”

Our Planning Consultant who has an excellent record of successes. The RIBA chair of the panel that award outstanding design awards. The professor of historical architecture from Cambridge University. A leading country house architect with an excellent practice and who lectured on country house design to architecture students. Engineering and road consultants who worked for local authorities nationally. Our landscape expert was very well known in his field and went on to head up the judges at the RHS Chelsea flower show.

Despite all of the above and the backing of the planning committee at the local authority we needn’t have bothered turning up.

The planning inspectors report was published a few months after the enquiry and was a clean sweep in favour of the objectors. Neither or planning consultant nor Legal council approached had ever seen such a one sided report.
No weight had been given to anything that any of our expert witnesses had to say. Much weight had been given to evidence put forward by the experts representing the objectors
even where that evidence had been shown to be flawed under cross examination during the enquiry process in front of the planning inspector.

Photographs used by the objectors that had been cleverly edited and clearly misrepresented the reality on the ground were backed by the planning inspector even when he had seen the reality on the ground during a site visit.

The most troubling part of this process is that it has taken 5 years to try and get information out of GOSE and whilst some has been provided there is not enough to find the “smoking gun” and some of the information has in the intervening period been destroyed.

The commissioner of the Freedom of Information complaints procedure has overturned his own decision in our favour once GOSE objected to his findings.

All in all, if you believe you are living in a transparent democracy where all the government employees are playing by the rules, think again. They are playing by the rules but they decide which rules to pull out of the draw to use to get the outcome they want, hence my earlier reference to Yes Minster.

To this day despite the FoI and all the correspondence over 5 years I still am not allowed to know who said what to whom and what, if any, influence was brought to bear by the objectors and their representatives.

Sometimes laws are brought into place with the intension of giving us the feeling that we are getting our way in a democracy but don’t be fooled there are just as many rules behind these laws to make sure they are very rarely if ever allowed to be used.

I hope that this submission helps you in your deliberations as to whether or not the civil servants in this country have any regard for this law and the citizens of this country who are trying to follow the laws of the land but would appreciate a level playing field.

Should you wish to have more background relating to FoI requests made and responses received please let me know.

January 2012
Written evidence from Colin Peek

Through the website 'what do they know I have become aware that you are currently carrying out a review of the FOI and thought I would make you aware of my short experience. I worked for a county council and was extremely concerned that it appeared to be acting improperly, having spoken with an elected Councillor who had similar views I found myself being warned off from talking to him again. I felt that my position was being compromised and my integrity challenged and resigned immediately.

For a year I observed from a distance the council continuing to deny improper and illegal practices in the press, eventually I decided to look at what people who had enquired into this had been told, and found that information appeared to be being manipulated, so I have set about compiling what I expect to be a comprehensive document detailing matters that have caused concern and may be worthy of further investigation. So that my report is factual I have initiated a number of FOI requests in the last couple of months to a number of bodies who hold information that should confirm my beliefs. However the responses so far seem to be very guarded if not obstructive, I want my report to be able to be seen as based on facts but without cooperation it will contain some degree of personal view.

If the FOI is to be successful authorities must be made to understand that failure to comply will result in action against the authority (and individuals who are deliberately acting improperly). as currently they view those enquiring as 'troublemakers' and try to put questions aside as vexatious.

January 2012
Written evidence from Birmingham City Council

Executive summary

Birmingham City Council agrees that transparency and accountability are vital to good government. However, this has to be balanced against the ever increasing levels of requests for information being received by public authorities.

Requests received by Birmingham City Council have increased by over 400% since 2006.

It should be recognised that, in ensuring accountable and transparent government, there is an increasing demand for information. This demand should be adequately resourced and the additional cost to the local authority acknowledged.

We regard it as a strength of the FOI Act that it provides a legal right to information held by public authorities. This is invaluable in respect of allowing public bodies to be accountable to the public they serve.

In general terms, the Council is satisfied that the Act in operating in the way it was intended to given the original objectives.

There is, however, an increasing use of FOIA requests to support grievance, disciplinary and legal procedures (such as litigation).

Secondly, the proposed changes to the FOIA to include the release of datasets for re-use, add, in our view, a further objective of the Act that did not feature in the original sets of objectives.
Specific questions

\textit{Does the Freedom of Information Act work effectively?}

1. Requests

1.1 There is an increasing awareness of the rights granted by the Freedom of Information Act 2000. Requests received by Birmingham City Council have increased by over 400\% since 2006 – see figure 1 below.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure1.png}
\caption{FOI Requests Received by Birmingham City Council}
\end{figure}

1.2 In Birmingham City Council’s case, we do not log all requests for information, but rather requests for information which cannot be dealt with as ‘business as usual’.

1.3 Furthermore, the figures set out above, are merely a record of communications containing requests. Most of these communications have a number of questions within each request, thereby increasing the overall number of questions responded to and information provided.

1.4 A sample exercise, undertaken by Birmingham City Council in June 2011 of the requests it had received, sought to record the actual numbers of individual requests contained in the communications logged containing requests.

1.5 There were 135 logged letters containing requests. However, these contained 559 separate individual requests, an average of just over 4 requests per logged correspondence.

2. Requestor Type

2.1 Analysis of requestor types, making requests to Birmingham City Council over the past 3 years show an increase over that period of time of requests from the media, companies, organised groups and service users. This reiterates the fact that there is an increasing understanding of the Act within the various
requestor types and the purposes for which the requests are made reflect the differing interests of the requestors.

<table>
<thead>
<tr>
<th>Requestor</th>
<th>Total 2011</th>
<th>Total 2010</th>
<th>Total 2009</th>
</tr>
</thead>
<tbody>
<tr>
<td>Councillor / MP</td>
<td>20</td>
<td>17</td>
<td>20</td>
</tr>
<tr>
<td>Employee</td>
<td>38</td>
<td>12</td>
<td>20</td>
</tr>
<tr>
<td>Media</td>
<td>352</td>
<td>284</td>
<td>221</td>
</tr>
<tr>
<td>Company</td>
<td>221</td>
<td>124</td>
<td>113</td>
</tr>
<tr>
<td>Organised Group</td>
<td>276</td>
<td>201</td>
<td>212</td>
</tr>
<tr>
<td>Service User</td>
<td>543</td>
<td>469</td>
<td>412</td>
</tr>
<tr>
<td>Public Body</td>
<td>24</td>
<td>10</td>
<td>5</td>
</tr>
<tr>
<td>Solicitor</td>
<td>31</td>
<td>42</td>
<td>58</td>
</tr>
<tr>
<td>Trade Union</td>
<td>16</td>
<td>14</td>
<td>11</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>1521</strong></td>
<td><strong>1173</strong></td>
<td><strong>1072</strong></td>
</tr>
</tbody>
</table>

Figure 2: Requests to Birmingham City Council by requestor type

3. Resourcing

3.1 The increased volume of requests within the Local Authority sector presents a clear challenge during a period where funding is being reduced against a backdrop of increased expectation for information.

3.2 The experience within Birmingham City Council suggests that whilst the responses to responding to FOI requests within the 20 working day target is around 85-90%, to maintain this level, and avoid censure from the Information Commissioner’s Office, requires more rather than less resource. Even increasing the amount of information proactive released requires additional resource to reflect the demand for the different types of information and analysis that is required to satisfy the demand from the public.

3.3 In 2009, the Council carried out a short exercise to attempt to determine the costs associated with dealing with FOI requests. Taking a sample of two months during the year, the Council estimated that the average time taken for each request was approx 10-12 hours to locate, retrieve and review the information (based on the FOI Fees Regulations). Using this base and the £25 set out in the FOI Fees Regulations, the cost of locating the information the requests logged during 2009 was calculated as follows:

\[
10-12 \text{ hrs} \times £25 \text{ per hour} = £250-£300 \times 1072 \text{ requests} = £268,000 - £321,600
\]

When salary costs of staff employed in dealing with FOI (as well as other Information Rights work), this totals a further £475,000 approximately, resulting in an estimated cost of almost £800,000 in administering this area of activity.

*What are the strengths and weaknesses of the Freedom of Information Act?*

4. STRENGHTS

4.1 It provides a legal right to information held by public authorities. This is invaluable in respect of allowing public bodies to be accountable to the public they serve.
4.2 The exemptions are fairly clear with the emphasis upon release of information.

5. WEAKNESSES
5.1 Publication schemes

5.2 The Council’s view is that, in respect of the legal requirement for each public authority to maintain a Publication scheme, this does not reflect an effective use of public resources. The number of individuals who use the publication scheme is small and, in the experience of Birmingham City Council, there is little correlation between the information contained within Publication Schemes and the types of specific requests that are received.

5.3 The ineffectiveness of the Publication Scheme is largely due to the technology advancements made since the Act came into force and to the increased use of internet search engines. A more effective use would be to allow individuals to be able to search Local Authority websites to locate the information, or references as to how to obtain the information (if there is a charge).

5.4 Fees Regulations

5.5 Where there are large amounts of easily accessible data, for example emails, the Fees regulations do not take into account the time taken to redact or go through the information. For example, where a public authority receives a request for an enforcement file, whilst the information is held electronically, the time spent in locating the information is relatively minor. However, a considerable period of time is spent in a trained council officer having to go through the file to consider what information if any, should be withheld, under the relevant exemptions. This is a time consuming and resource intensive task requiring specialist knowledge, and is not reflected in the Data Protection and Freedom of Information (Appropriate Limits and Fees) Regulations.

5.6 To date, Birmingham City Council has only once received payment for additional work where it has issued a fees notice in accordance with the Data Protection and Freedom of Information (Appropriate Limits and Fees) Regulations

5.7 Costs of dealing with requests

5.8 There is no link between the costs of dealing with the request and the requestor. One only has to look at various websites, such as whatdotheyknow.com, to see individuals who have made, across the public sector, hundreds of requests, costing the public sector tens of thousands of pounds, without the requestor making any financial contribution towards the costs of the request.

5.9 Whilst Birmingham City Council agrees that transparency and accountability are vital, this has to be balanced that against the ever increasing levels of requests being received. It should be recognised in ensuring accountable and transparent government there is an increasing demand for information. This demand should be adequately resourced and the additional cost to the local authority acknowledged.
5.10 One possibility would be to adopt the charging regime for subject access requests, i.e. levying a flat rate initial fee of e.g. £25 per request. This would force requestors to moderate their requests to the information they need, rather than sending the same request to hundreds of public authorities, each of which would have to search or respond to the request or direct them to the Council website if the information has been published.

5.11 Requests received by any officer

5.12 The requirement that a request can be received by any council officer, rather than the Public Authority should be removed. Most public authorities advertise a designated email address and postal address. This would also ensure that requests are not misplaced or unnecessarily delayed.

Is the Freedom of Information Act operating in the way that it was intended to?

6 General comments

6.1 In general terms, the Council are satisfied that the Act in operating in the way it was intended to given the original objectives.

6.2 Use of FOI for litigation

6.3 There is evidence, however, to suggest an increase in the use of FOIA requests to support grievance, disciplinary and legal procedures (such as litigation). Under the Woolf reforms, as implemented in the Civil Procedure Rules, there was a focus on narrowing the scope of disclosure to the issues in hand. However, under FOI, there has been an increasing use by both litigants in person and solicitors to use FOI as an alternative means of disclosure.

6.4 However, any disclosure under FOI, in most cases, would be less than that which would be made available under the pre-action disclosure regime or the disclosure rules of the CPR, by virtue of the legal obligation to disclose all material information relevant to the claim. If a requestor, under the CPR, wanted information other than directly relating to the case, he would have to make an application for specific disclosure. However, in respect of public authorities, the requestor can just make a FOI request. This appears to undermine the focus of the CPR in trying to reduce the costs of litigation, as it encourages litigants to focus on FOI as a free means of accessing information, and encourages litigants to widen the scope of the litigation to issues not directly relating to the litigation.

6.5 Whilst the Courts have made disparaging reference to the use of access to information legislation for litigation purposes, this has done little to stem the number of litigation requests. One possibility to limit the use of the Freedom of Information Act as a litigation tool would be where it can be shown that the requests were made for litigation, the costs of such requests be included in the costs of the case, and thus, if the requestor is unsuccessful in the claim, the costs incurred by the public authority in dealing with the request could be recovered from the requestor, as per the normal litigation costs rules. This avoids the requirements for considering the purpose of the requests, when
dealing with the request, but instead, allows the public authority to recover some of the resources utilised if the litigation was unsuccessful.

6.6 Right to data

6.7 Secondly, the proposed changes to the FOIA to include the release of datasets for re-use, add, in our view, a further objective of the Act that did not feature in the original objectives. The original objectives of FOIA are based around

- Openness and Transparency
- Accountability
- Better Decision Making
- Public Involvement in Decision-Making

6.8 However, one of the key aims of the proposed revisions to the Act is to enable the release of data in open formats available for re-use for commercial exploitation and that Public Authorities should make information available for that purpose. This has implications for the Council, both in terms of the capacity to resource the effort involved in making the data available and also, potentially, impact existing income streams which are currently available to the Council from charging for data.

The key principles for publishing datasets that are held by public authorities are:

- responding to public demand
- releasing data in open formats available for re-use
- releasing data in a timely way

6.9 The current requirements for publishing datasets are:

- Local authorities should build and maintain an inventory of the public data that they hold so that people are able to know what is available to them.
- Publication should be in open and machine-readable formats. A 5 step journey to a fully open format is recommended, with level 5 being the most open format.
- Data should be made published as soon as possible following production even if it is not accompanied with detailed analysis and where practical, local authorities should seek to publish in real time.

January 2012
Executive Summary

1 The Act has provided many benefits but it has taken some time to realise them. Further initiatives to promote proactive publication, clearer guidance for requesters and public authorities and additional requirements to improve the visibility of responses would increase these benefits.

Does the Freedom of Information Act work effectively?

2 It is far more effective to proactively publish information of public interest than to react to piecemeal requests for it. Further developments within the Transparency agenda will help with this e.g. the recent Information Commissioner’s Office (ICO) guidance on the information Local Authorities should make routinely available. It would be helpful if these types of requirements were incorporated into the Act.

3 Many requesters assume data is held for longer than it actually is and that Public authorities hold more comprehensive data. This leads to a frustrating exercise for requesters where they have to apply to many different public authorities to obtain the information they seek.

4 Within the NHS a possible solution to this could be a high level map of who holds different information. Mandatory transfer of a request by a public authority, using such a high level map, would be helpful to requesters.

What are the strengths and weaknesses of the Freedom of Information Act?

5 Strengths

i) It has enabled information to be released into the public domain which would not have otherwise been released. This has in turn provided value to businesses, the media, interest groups and members of the public.

ii) Public authorities are proactively releasing information to reduce the resource impact of FOI requests meaning that such disclosures are demand lead helping to ensure the effective use of public resources.

iii) Public authorities have been held more accountable for their spending of taxpayers money

iv) Delivering FOI request responses effectively enhances a public authority’s reputation for openness.

6 Weaknesses

i) The benefits have taken time to be realised as requesters and public authorities have developed their understanding of it. Clearer
central guidance, as provided under the Cabinet Office transparency agenda, would have meant faster realisation of the benefits.

ii) Implementation of the act is rapidly evolving and it is not easy for public authorities or requesters to keep up to date with the latest decisions on how FOI should operate. This leads to inconsistent decision making and frustration for requesters. We have found that most of the time we use just a few exemptions, (Sections 12, 21, 30, 31, 40, 41 and 43). However, where a less frequently used exemption is considered, a summary consolidation of IICO and Information Tribunal decisions would be helpful.

iii) The phrasing of the appropriate limit in The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 leads to confusion about what the resource limit is. Simplified wording using 18/24 hours effort rather than £450/£650 cost would be helpful.

Is the Freedom of Information Act operating in the way that it was intended to?

7 We would welcome making FOI disclosure logs mandatory together with the ICO being required to audit sample responses where information was withheld. This would improve public authority accountability and the quality of responses made.

8 In addition, it would make it easier for requesters to determine what information the public authority held and what had already been made available.

9 The ICO does not have sufficient powers to enforce public authority compliance with the act. Powers similar to those available under the Data Protection Act would be helpful.

January 2012
1 Executive summary

1.1
The University is required to be transparent and accountable as part of its day-to-day business, both as a charity and as a University with a global profile.

1.2
In 2011, the University has received double the FOIA requests it received in 2010.

1.3
The University has concerns about the increasingly ‘non-public’ nature of its funding and its status as a ‘public authority’ under the Act. In particular, concerns about private competitors using the Act to obtain commercially sensitive information e.g. procurement, service contracts, business plans and operational metrics.

1.4
The University feels that the specific challenges facing the Higher Education Sector around FOIA have not been given adequate attention by the Information Commissioner, though the situation is improving.

1.5
The University supports the draft ‘research exemption’ submitted by Universities UK as part of the Protection of Freedoms Bill but would like to see further exemptions e.g. exemption for all non-publicly funded activity.

2 About the University of London

2.1
The University of London is a federal organisation and is one of the oldest, largest and most-diverse universities in the UK. It consists of 18 autonomous Colleges of outstanding reputation together with a number of prestigious Central Academic Bodies and Activities. The latter are collectively known as the ‘central University’; together they serve and support both the interests of the Colleges and the broader achievements of UK higher education.

2.2
This evidence return is made on behalf of the ‘central University’ and does not represent the view of the constituent colleges. Further details on the structure of the ‘central University’ can be found at the following link: http://www.london.ac.uk/structure.html
3 Consultation questions

3.1

The Committee has invited written evidence on the issues set out below:

- Does the Freedom of Information Act work effectively?
- What are the strengths and weaknesses of the Freedom of Information Act?
- Is the Freedom of Information Act operating in the way that it was intended to?

3.2

The four objectives of the Freedom of Information Act (FOIA) outlined in the Memorandum to the Justice Select Committee are as follows:

a) Openness and Transparency
b) Accountability
c) Better Decision Making
d) Public Involvement in Decision-Making

4 The University’s existing commitment to transparency

The University is required to be transparent and accountable as part of its day-to-day business, both as a charity and as a University with a global profile. The University publishes its ordinances and regulations, financial reports and governance minutes as a matter of routine. The outcome of the University’s external quality assurance is also regularly placed in the public domain. As well as statutory obligations, this is part of the University’s need to present itself as a world-class institution and attract students from all over the globe.

5 The increase in FOIA requests

The University has received a steady increase in the number of FOIA requests since the introduction of the Act. A sharp rise in 2011, when double the number of requests in 2010 was received, demonstrates the increasing amount of work required to meet the obligations of FOIA. The University has maintained 100% compliance but a continued increase of this proportion year upon year would be unsustainable over a long period.

6 The nature of our funding and FOIA

The increasingly ‘non-public’ proportion of our funding has made many in the HE sector question whether Universities should be classed as public authorities under the Act and therefore subject to FOIA. As our Annual Report and Financial Statement demonstrates:

The University’s own dependence on public funding is substantially less than most other UK Universities. The financial statements for the current year demonstrate this: funding from HEFCE accounted for 8.2% of total income and, when to this is added...
the contributions from the Colleges of £9.1M, the total direct and indirect reliance on public funding amounts to 14.4% of the total income of £146.8M. The English average for grants from HEFCE as a percentage of total income by comparison is around 34%.¹

As the cost of higher education is increasingly to be directed towards the student rather than the government, Universities cannot be expected to face the same regulatory burden and level of scrutiny as befits a central government department or local authority. The long-term prospects of more ‘private sector’ providers of higher education could create a two-tier situation where some Universities are subject to FOIA and its associated costs, whereas others can divert these resources back to core services such as teaching or research.

7  The benefits of FOIA

The Freedom of Information Act has allowed journalists, businesses and the general public to access a wide range of information about Universities. Whilst this information can often result in negative or subjective media coverage, the University accepts that it also expands public understanding of the complexity and challenges of our work. Section 46 of the Freedom of Information Act also provides a legislative driver for more effective records management policies and procedures, which has benefitted the internal business processes of the University.

8  The need for exemptions

8.1

The use of exemptions by the University is still relatively rare and most requests are responded to in full. However, in a climate of decreasing public funding, the University questions the appropriateness of FOI in relation to its non-publicly funded activities. Particularly when commercial competitors are not bound by the legislation.

8.2

The proposed ‘research exemption’ submitted by Universities UK as part of the Protection of Freedoms Bill would be a significant safeguard for Universities in FOIA. The nature of research data, and the competitive international environment in which it is produced, cannot be treated in the same way as government ‘data sets’ such as those published as a resource on sites such as http://data.gov.uk. Therefore the University supports this amendment to the existing FOIA regime.

9 The status of Universities with the ICO

9.1

It can appear that Universities have been an afterthought to the Information Commissioner and other information rights policy makers. Many centralised standards and decisions are led by a central or local government focus. This even persists in the current Memorandum.

9.2

The high-profile ICO decision notices involving Universities – University of Central Lancashire and its course material, the research data held by Queen’s University Belfast\(^2\) – have not recognised the more nuanced commercial interests and working practices of Universities. This has led to widespread anxiety in Universities about the impact of FOIA on their teaching and research in a competitive environment.

9.3

The ICO guidance for Higher Education around FOIA, published in September 2011\(^3\), was welcome in addressing some of the specific concerns of the sector. The developing dialogue between Universities and the ICO can only improve this relationship. It is hoped that this can make Universities more confident in exempting information that is commercially sensitive or prejudicial to the conduct of their public affairs without the fear that the ICO would order disclosure.


10 Calculating appropriate limits under Section 12

The grounds for refusal in Section 12 of the FOIA, ‘exceeding appropriate limits’, provides a vital safeguard for public authorities. It is often used as the basis for narrowing down requests for information with requesters. One issue that would make this more appropriate to the challenges inherent in the Act is the ability to include ‘redaction’ in the calculation of the 18 hours. Currently public authorities are only allowed to consider the following:

- determining whether we hold the information (this can include meeting and discussion)
- locating the information, or a document containing it
- retrieving the information, or a document containing it
- extracting the information from a document containing it

The redaction of information in response to a request often concerns the identification and removal of ‘personal information’ or ‘commercially sensitive’ information. Therefore it is a task for information compliance staff or a senior member of staff with a grasp of both FOIA issues and the nature of the information for disclosure. Redaction is often the most time intensive part of responding to a request.

January 2012
1.1 Executive Summary
1.2 It is the University of Salford’s view that serious consideration should be given to removing Universities from the ambit of the Freedom of Information Act because they are not “Public Authorities” in view of the now relatively small proportion of public funding to British Universities. Instead, robust and clear guidelines of best practice in access to information should apply.
1.3 In the event that Universities continue to be subject to the Act the University of Salford submits that its operation would be markedly improved in certain operational aspects. These areas are:
• The elements of dealing with a request which are included in the calculating whether a request has exceeded the Appropriate Limit;
• The definition of and demonstration of vexatious requests;
• The consideration of commercial interests;
• The interaction between the FoI and the Data Protection Act 1998;
• Proactive disclosure of information; and
• The dealing with “commercial” requests.

2.0 Does the Freedom of Information Act work effectively?
2.1 Please see our comments below.

3.0 What are the strengths and weaknesses of the Freedom of Information Act?
3.1 S12 Exemption where the cost of compliance exceeds appropriate limit
3.1.1 The Appropriate Limit of £600 for Central Government was decided upon to provide parity between the amount of work permitted for a FoI request and that for a Parliamentary Question (PQ). However, while MPs may make many PQs, there are only 660 MPs whereas there are millions of potential FoI requesters and many more requests are made under FoI than there are PQs.
3.1.2 The activities costed under The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 are too restricted and do not include some of the most time consuming elements of dealing with FoI requests. Simply reading and considering whether exemptions apply can take days but this activity does not count towards the Appropriate Limit.
3.1.3 Redacting does not count either and this element of a request can take significantly more time than the rest of the elements of dealing with the request put together. A recent request received by the University of Salford (which, in the end, was amended by the requester due to the high cost of disbursements) would have involved the redaction of multiple sections from every page of a document of some 4000 pages which would have taken weeks to undertake at considerable expense to the University.
3.1.4 If the Appropriate Limit is to include the administrative costs of extracting the information from documents containing it, it would make sense that the administrative costs of redacting exempt information from the documents to be released should also be included.
3.1.5 Recommendation: That the administrative costs of considering exemptions and the administrative costs of redacting exempt information are included in the calculation of the Appropriate Limit.

3.2 S14 Vexatious or repeated requests
3.2.1 The University has significant experience of the use of this section having received a large number of vexatious requests. To put these into context, the University received around 120 requests from around a dozen requesters in a three month period. The University deemed these requests to be related, aimed to cause inconvenience and part of a wider campaign of disruption being waged against the University. At the time our normal number of requests per year was around 80. Most of the people making these requests asked for an internal appeal, four complained to the ICO and one took the ICO decision to the Tribunal and having lost at each stage requested an appeal against the tribunal finding which was denied.

3.2.2 In one instance the length of time from the receipt of the first request to the decision being made by the First Tier Tribunal was 21 months. The number of staff involved, the time and money spent on dealing with a, these requests, b, the internal appeal, c, the investigation made by the ICO after it received complaints by the requesters and d, the tribunal proceedings were significant and diverted staff and resources from the normal work of the University. The University’s experience is that it takes more time and effort to demonstrate vexatiousness under the current legislation than it does to respond to a vexatious request. It is the University’s view that the resource implications of using s14 severely reduce the amount it is used with the result that genuinely vexatious requests are dealt with because, despite the significant inconvenience and disruption, this takes less resource than having to deal with subsequent investigations by the ICO.

3.2.3 The amount of information required and level of evidence of vexatiousness required by the ICO is, in our view, too high and it was only as a result of our persistence, and the efforts of dedicated staff that we received a ruling in our favour from the ICO which was subsequently supported by the Information Tribunal, establishing a test case for what the Tribunal described as a “denial of service attack”. Please refer to the Employment Tribunal findings on this recent case: [http://www.informationtribunal.gov.uk/DBFiles/Decision/i554/20110726%20Decision%20E A20110060%20%28w%29.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i554/20110726%20Decision%20E A20110060%20%28w%29.pdf)

3.2.4 The University’s conservative estimate is that this particular case cost the University in excess of £75,000 in staff time alone, plus substantial legal fees.

3.2.5 While the University accepts the general principle of FoI being purpose blind and the identity of the requester being irrelevant, in the case of vexatious requests and such requests coming from one or more requesters as a campaign, there needs to be a clear process for categorising these requesters as vexatious.

3.2.6 Recommendation: That there is a reconsideration of the rules associated with S14 to make it simpler for Public Authorities to make a compelling case for deeming a request to be vexatious.

3.3 Commercial Interests

3.3.1 The Act, and its current interpretation by the ICO, does not sufficiently recognise the impact on University commercial activities in that it places too high a burden on Public Authorities to demonstrate a prejudice or likely prejudice to its commercial interests especially in areas of research and intellectual property.

3.3.2 In the Higher Education sector, Universities are now funded more from non public funding than from public funding with the proportion of public funding set to decline even further in the next few years. This has an impact on the release of financial, contractual and other related information as well as what could be regarded as intellectual property.

3.3.3 Intellectual property is the University’s core product, be it relating to teaching and learning or to research. The disclosure of this information to the public domain has the potential to
put the University at a commercial disadvantage: having spent its income creating this intellectual property but then being unable to, or likely to find it very difficult to protect this intellectual property from being exploited by others including competitor organisations if released.

3.3.4 This is not intended to create a defensive wall behind which the HE community can hide: the University is committed to open access and the University of Salford is at the vanguard of the open access movement but on occasion it is vital, in the interests of the University and those of the public, that some data is withheld. The distinction between academic open access and FoI open access is clearly understood and supported by the University but decision notices in this area appear to demonstrate a lack of similar understanding by the ICO.

3.3.5 On many occasions, the ICO has failed to recognise the unique circumstances around the intellectual capital of University teaching, and more importantly, research materials and in the increasingly competitive nature of HE, it could very easily become commonplace for Universities to have their material poached by competitors through the offices of the FoIA.

3.3.6 Despite the comments of the Minister of State on this matter to the Grand Committee of the House of Lords when it considered Amendment 151 (as introduced by Baroness Warwick of Undercliffe, Chief Executive of Universities UK on behalf of the HE sector) of the Protection of Freedoms Bill, it is the view of Universities in the country that the Freedom of Information Act is unable to protect intellectual property created and held by Universities.

3.3.7 The University notes that the arrangements set out in the Scottish Legislation (s27 (2) of the Freedom of Information (Scotland) Act 2002 (FoI(S)A)) provide clarity on this position.

3.3.8 **Recommendations: That ICO takes a different approach and is sensitive to the commercial nature of some information held by Public Authorities, especially those which operate in a commercial field. That an additional exemption is included in the Act to cover research as previously recommended by Universities UK and as included in the FoI(S)A.**

3.4 **S40 Personal information**

3.4.1 Recent cases that the University has experienced demonstrate that there is confusion due to the complex nature of the crossover between the FoIA and Data Protection Act 1998 (DPA) and this grey area where the two Acts interrelate requires simplification and clarification.

3.4.2 **Recommendation: That the interaction between the FoIA and the DPA is clarified and simplified.**

4.0 **Is the Freedom of Information Act operating in the way that it was intended to?**

4.1 **Proactive disclosure**

4.1.1 While the idea of proactive disclosure via the Publication Scheme is a very powerful aspect of the Act, the attitude of the public and public authorities, together with the information searching and provision capabilities of the internet have superseded the premise of a Publication Scheme.

4.1.2 The HE sector is one of the most open of the sectors of public authority subject to FoIA and the University is committed to proactive disclosure of information. Evidence of this can be seen in our updated Disclosure Log which includes all requests received, responses and disclosures. Nevertheless it has reservations regarding the obligation to adopt a publication scheme.

4.1.3 The 2004 HE Model Publication Scheme was largely fit for purpose since it was appropriate and applicable to the HE sector. The subsequent consultation for the next incarnation of the HE Model Publication Scheme was conducted in a manner which indicated that the revised Model Scheme would also be fit for purpose. However, the results of the consultation were abandoned by the ICO and it instead decided upon a single model scheme for all 100,000
public authorities.

4.1.4 This resulted in a “best fit” scheme which is not tailored to the needs of any sector and since its roll out, the Act’s Publication Scheme principle has become less useful and therefore nothing more than an administrative burden.

4.1.5 After monitoring our internet logs, we observe that our Publication Scheme is seldom accessed. This is not surprising as Publication Schemes are not comprehensive descriptions of the information we publish. The reality is that all records within a particular description can never be published in their entirety due to their magnitude, the complex nature of records and the fact that exempt information will be contained in a great proportion of them. The records released are only ever going to be subsets of what falls under the description for each category. This effectively makes a publication scheme useless.

4.1.6 Regular updates of the Publication Scheme are time consuming; it is difficult to keep the Scheme up to date and impossible to ensure that it is as comprehensive as it should be.

4.1.7 Recommendation: That the purpose, usage and resource requirements of Publication Schemes are examined and a less time consuming and useful alternative is introduced.

4.2 Commercial requests

4.2.1 There are a large number of requests submitted by commercial organisations that are simply fishing for information to enable them to bid or compete for work. These are time consuming to deal with by sheer dint of the number received.

4.2.2 These commercial surveys are not made for any of the purposes for which the FoIA was enacted (viz: openness and transparency, accountability, better decision making and public involvement in decision-making) and are being used by commercial organisations as a free mechanism to obtain commercially useful information at the expense of the public purse.

4.2.3 Recommendation: That round robin commercial survey/fishing requests are no longer deemed to be requests made under the Act or that a charge for time taken to respond can be levied prior to the disclosure of the requested information.

January 2012
From the Managing Editor

1st February 2012

Sir Alan Beith
Justice Select Committee

Re: Justice Select Committee review of Freedom of Information Act review

Thank you for the opportunity for us to put forward comments for consideration as part of the Justice Select Committee’s review. I hope our comments below are helpful.

The Freedom of Information Act is a vital tool for journalists at all of our newspapers. We regularly research stories that relate to the work of public authorities, especially in London but also elsewhere in the UK, and there are a variety of matters we examine each year which lead us to use the Act.

On some occasions, in order to carry out a comparative analysis, we might make similar requests for information of the local authority in every London borough or of all academic institutions within a given area. This can mean that one journalistic exercise will result in numerous requests.

We do not make requests lightly, not least because we are very conscious of the fact that responding to them can be time-consuming. We frequently use the provisions of the FoI Act to uncover information about matters we are already investigating.

Listed below are just a handful among many examples of how we have used the Act in recent months:

1. The Evening Standard sought details about the number of people with diplomatic status arrested in London with accompanying details of the type of offence and embassy of the people concerned. The reply, from the Metropolitan Police, revealed that two people had been arrested on suspicion of rape and that several had committed offences such as drink driving, robbery and shoplifting. Clearly, there is a legitimate public interest in knowing about the extent to which diplomatic status is allowing potential offenders to escape prosecution.

   While the Foreign Office releases its own statistics on this issue, these are much less up to date than those provided by the Metropolitan Police and are less comprehensive.

2. The Evening Standard made a FoI request for financial information from the Royal Parks Agency which would not otherwise be available to the public because the agency’s executive holds no public meetings nor publishes minutes of the meetings it holds in private. One example of the information revealed was the £1 million a year cost of maintaining the Princess Diana Memorial Fountain.
3. An investigation by The Independent examined the frequency of contacts between banking executives and the Chancellor of the Exchequer in the weeks immediately after Sir John Vickers published his proposals to reform Britain’s banks. Our journalists uncovered the fact that there had been nine telephone calls or meetings between senior bank bosses and the Chancellor or other Treasury ministers, allowing scrutiny of the lobbying process that was very clearly in play over a matter of the deepest public interest.

4. The Independent on Sunday made FoI requests to almost 150 higher education establishments to find out the level of expenses claimed by university vice-chancellors in the course of their work. This enabled the newspaper to publicise the fact that senior staff at some institutions were claiming many thousands of pounds on top of their basic salaries. At a time when the finances of universities is under particular scrutiny, this was an important story to tell our readers.

It may be the case that some of the information obtained by FoI requests could, in theory, be sought from and provided by press offices of the public authority in question. However, press offices are working to the authority’s own remit and under pressure. Questions are not always answered fully nor with precise detail in which they have to be in response to FoI requests.

It is for this reason that the FoI Act is so important. Without it, we might not obtain information that is otherwise unavailable; nor would we be able to double-check that information provided by press offices in response to non-FoI requests was accurate and complete. There is no doubt that the advent of the Freedom of Information Act has significantly improved transparency, accountability and governance in British public life. We believe there are extremely good grounds for believing that wrongdoing, malfeasance and corruption have not, in certain situations, taken place because certain activities could become the subject of disclosure.

Nevertheless, within the current framework of the Act we find regular frustration — with requests often dealt with as slowly as possible and exemptions cited as justification for not providing the requested information. There is a wide spectrum of approaches on the part of information controllers, which itself highlights the intransigence of some set against the good example of others. There are some public authorities which seek to observe the spirit of the Act, while others grudgingly observe the letter only. We will, in some instances, appeal to the Information Commissioner in cases where a request has been met with refusal but because of the limitations on our own time and resources, we would not necessarily take that step as a matter of course, even though we regard all our initial requests as being backed by a public interest justification. If it would be helpful, we can provide some examples of requests that were refused by public bodies.

The Freedom of Information Act has been a hugely significant step towards enabling proper scrutiny of public life. The easing of current justifications for the non-release of information would improve matters further, as would a change in approach by some of those who are subject to the Act but resist the spirit of openness.

We hope this submission is useful. Please do not hesitate to contact me if I can assist further.

Yours sincerely

Doug Wills

Group Managing Editor

cc.: Society of Editors
Newspaper Society
Written evidence from Ben Leapman

Background


2. As a working journalist I have submitted dozens of requests under the Freedom of Information Act (FOIA) to Whitehall departments, public bodies, and councils. I now help to manage a team of reporters who regularly make FOIA requests.

3. In February 2007 I was one of around a dozen senior journalists and editors who met Baroness Ashton to lobby against proposed changes to FOIA, which arose from the Frontier Economics report commissioned by the Ministry of Justice (MoJ). We argued that the changes would severely curtail the public’s right to know. The proposals were later abandoned by Gordon Brown’s government.

4. I was one of the three journalists whose FOIA requests for details of MPs’ expenses led to a High Court defeat for Parliament in 2008, forcing it to agree to publish full details of expenses claims – which led directly to the leak to The Daily Telegraph and the scandal of 2009. The brief timeline is:

   - January 2005: The week FOIA came into force, I asked the House of Commons to disclose the full expenses claims, including receipts, submitted by six named MPs. Commons authorities rejected my request initially and again on internal appeal.

   - April 2005: I appealed to the Information Commissioner, who joined my request with others submitted by Heather Brooke and Jonathan Ungoed-Thomas.

   - June 2007: After two years of consideration, the Commissioner issued a decision notice requiring the Commons to publish more detail of MPs’ claims, but not the receipts.

   - Feb 2008: The Commons appealed to the Information Tribunal, but its case was rejected and instead the Tribunal backed a cross-appeal by the journalists, ordering full publication including receipts.

   - May 2008: The High Court rejected an appeal by the Commons authorities and ruled in favour of the three journalists, declaring: “The expenditure of public money through the payment of MPs’ salaries and allowances is a matter of direct and reasonable interest to taxpayers.”¹ Consequently the Commons agrees to publish expenses claims in full and began to transfer paper records to electronic form.

   - May 2009: Electronic records created as a result of journalists’ High Court victory were leaked to Telegraph before their official release, prompting publication of the “Expenses Files” investigation.

5. Examples of other news stories published as a result of my FOIA requests include:
- Police forces rated among the worst by the Home Office pay bonuses to their chiefs constables, while some of the best-rated forces pay no bonuses.  

- Two million crimes a year are “screened out” by police and deemed unsolvable within hours of being reported.  

- Convicted criminals commit 10,000 new offences per month while on probation.  

- Asylum seekers who accept free flights home under a Home Office voluntary repatriation scheme subsequently return to the UK and do it again.

**Does the Freedom of Information Act work effectively?**

6. FOIA has brought important benefits for the public, by lifting, in part, the veil of secrecy over the affairs of central and local Government. In particular, many requests by journalists have led to the disclosure of important information which would otherwise have remained secret. These disclosures have allowed the public to form a more accurate view of their elected representatives and of public bodies funded by taxpayers.

7. The culture of Whitehall and public bodies has to some extent become less secretive, with some information being released proactively that would previously have been withheld.

8. However, there is still a vast amount of information which would be liable for disclosure under FOIA but is not routinely proactively published. When asked to release such information, organisations often respond from a starting-point of reputation management rather than the public’s right to know. If they perceive that the release would damage their reputation, they often seek to delay and to find reasons to refuse, even when they have no legal grounds to do so – for example, by citing exemptions which do not in fact apply.

9. The Information Commissioner’s Office (ICO) under Richard Thomas took far too long to deal with appeals. I faced delays of more than 18 months, which was unacceptable. Under Christopher Graham, the ICO has speeded up its process.

10. In dealing with my MPs’ expenses request, arguably its biggest test, the ICO under Richard Thomas was insufficiently assertive and ended up bending to the will of MPs and Parliamentary officials seeking to prevent publication.

11. I consider it unacceptable that Mr Thomas's officials spent two years negotiating with the Parliamentary authorities over my FOIA request for MPs’ expenses details, without ever discussing the issues with me or the other requestors. It was also unacceptable that the ICO went as far as drafting a decision notice, dated Oct 2006, which would have ordered the release of the full details of expenses claims; but then, following a meeting in Dec 2006 between Mr Thomas, Jack Straw and three other senior MPs, Mr Thomas changed his mind and eventually issued a quite different decision notice, which did not order disclosure (and was overturned by the Tribunal and the High Court). This meeting was kept secret at the time, and did not come to light until a whistleblower leaked details of it to me in 2009.
12. A particular example of the Commissioner’s weakness was that around April 2005, the House of Commons authorities deliberately destroyed records for the 2001/2 expenses claims made by four MPs that were subject to my FOIA request – including Tony Blair. It is an offence under FOIA s77 to destroy information with the intention of preventing disclosure, yet the explanation offered by the Commons – that the destruction was due to incompetence, not deliberate – was accepted, and no sanction was imposed.

13. Today, the ICO under Mr Graham regularly seeks to avoid the issuing of decision notices by trying to persuade requestors to drop or settle their appeals. This strikes me as potentially counterproductive, because formal decision notices are a useful guide to public authorities and to requestors on what should and should not be released. It strikes me that by avoiding issuing them, the ICO may have to go back to first principles and duplicate its considerations in some cases.

What needs to change?

14. I would like to see some extention to the scope of FOIA, in particular to cover private-sector and voluntary organisations that are performing public services on contract for public-sector organisations funded by the taxpayer. I also believe housing associations should be covered. There is a strong public interest here in ensuring transparency, not least because scrutiny is required to ensure that the services are being performed well and efficiently. It is unfortunate that at present the transfer of work from the public sector to the private or voluntary sector, or the transfer of housing stock from councils to housing associations, is accompanied by a reduction in transparency.

15. There ought to be a statutory time limit for organisations to carry out internal reviews. There’s no point requiring organisations to respond to the initial request within 20 days, but then letting them consider their internal review for eight months, as happened when I asked the Home Office to release a blog written by then-Permanent Secretary David Normington on its intranet site.

16. I would like to see clear guidance issued by the ICO that ministers and their aides cannot avoid the scrutiny of FOIA requests simply by communicating through private email addresses or social networking sites rather than departmental email addresses and written memos.

Proposals to scale back the right to know

17. The MoJ memorandum to the select committee raises concerns over the cost to public bodies of implementing FOIA. It says the cost has been estimated at £40 million a year – although it admits that estimates vary widely.

18. I believe that if FOIA does cost taxpayers £40 million a year, it is money well spent.

19. Greater scrutiny of public bodies produces financial benefits which could be set against this cost, to obtain a more rounded view of the impact of FOIA on the public purse. To take just one example, MPs repaid more than £1 million of expenses after their claims were revealed in full. I expect that public officials and local politicians up and down the land are now claiming less in expenses, and
foregoing perks, for fear that they would be embarrassed if their spending was exposed through FOIA requests.

20. Estimates for the cost of implementing FOIA may turn out to overstate the true additional burden on taxpayers, because many public bodies now ask journalists to put in FOIA requests for information which they would, prior to 2005, have released through their press offices. It would have used just as much staff time for press officers to obtain and release the information under the old system. Thus these requests are not an additional cost, merely a switch of cost centre within the organisation.

21. Organisations could cut the cost of their FOIA releases by proactively publishing more information, so there was less need for requests to be made. For example, English Heritage routinely publishes public minutes of its board meetings on its website – but against each item number, there is only the phrase “This item is included in the protected minutes of this meeting as it contains information that is potentially protected from public access.” 7 Yet when I asked last month for a copy of the protected minutes for one board meeting, I was sent a much fuller document, headed “protected minutes”, with no redactions. If EH had put the fuller version on its website to begin with, it could cut the number and cost of FOIA requests, while better informing the public of its work.

22. The MoJ memo raises again the suggestion that costs could be cut by taking into account staff reading time and staff redacting time when calculating whether the cost of a particular release would exceed the statutory limit. This proposal – similar to what was considered and rejected in 2007 – would have the effect of allowing public bodies to turn down more requests on cost grounds. I believe this is a deeply flawed approach, for the following reasons:

a) At the £1-a-page reading cost floated in the 2006 Frontier Economics report, and with the current £600 cost limit above which a Whitehall department can refuse a request, this would mean that any Government report more than 600 pages long would remain secret, while shorter documents could be released. This cannot be right in principle.

b) In practice, a requester could get around the ban by requesting just half of the report. Later, another requester could request the other half. The cost of dealing with the separate requests would be higher than the cost of dealing with just one request. Taking the example of my MPs’ expenses request, I asked for details of just six MPs’ claims so as not to be barred on cost grounds. But the Commons authorities decided, rightly, that they would not release claims piecemeal; after they lost in the High Court they said they would release expenses details for all MPs, not just the ones involved in the case.

c) There is no reason to think that the requests blocked under this new approach would be ‘trivial’ or ‘unnecessary’ requests. They are more likely to be serious requests with a strong public interest behind them. The more sensitive and controversial the subject matter of a request is, the more reading and redaction it is likely to require.

23. The MoJ memorandum highlights unhappiness by public bodies about the volume of FOIA requests from journalists, including a complaint that FOIA is being used “for what was seen as illegitimate use ie a ‘good’ media story”. I think requests from the media to public bodies for
information, whether through FOIA or the traditional press office route, need to be seen as a vital element of democracy – potentially exposing the failings that public bodies do not want the public to see. The cost should be held up against the sum that public bodies spend on marketing, promotion and advertising to put across the message they do want the public to see – which I suspect is much higher.

January 2012

Footnote references

1 http://www.bailii.org/ew/cases/EWHC/Admin/2008/1084.html

2 http://www.telegraph.co.uk/news/uknews/1578918/Police-chiefs-rewarded-for-failure-by-bonuses.html


6 http://www.telegraph.co.uk/news/newstopics/mps-expenses/5412674/MPs-expenses-Information-commissioner-performed-U-turn-over-publication.html

7 http://www.english-heritage.org.uk/content/imported-docs/a-e/eb-public-minutes-13sept11.pdf
1. Does the Freedom of Information Act work effectively?
   1.1. The Act is effective in that it has facilitated a much more open public sector culture, and has improved public accountability. The Trust is fully supportive of the aims of openness and transparency and operates its Freedom of Information functions in that spirit.
   1.2. It is also an effective means of obtaining information with minimum burden placed on those making requests (e.g. a request only needs to be submitted as a single e-mail).
   1.3. The required process for applying qualified exemptions is not effective and (in most cases) is an additional exercise for a public sector organisation with little value gained for the requester.

2. What are the strengths and weaknesses of the Freedom of Information Act?
   2.1. The strengths of the Act are the ways in which it is working effectively (see section 1).
   2.2. It has engaged the public in some important current affairs and to some extent has increased public awareness in how public sector organisations operate and can serve as a means for public engagement with the public sector.
   2.3. A significant weakness in the Act is the level at which the time / cost exemption can be applied (18 hours). This means that a member of staff could potentially be required to spend over two days away from their day job in order to assist with a single Freedom of Information Request.
   2.4. Given the very challenging financial landscape it is difficult to justify this time and expense, especially where (for an NHS organisation) clinical or operational staff are involved. It is difficult to conceive that this kind of resource benefits the Trust or the wider public in any way – particularly where the information disclosed is of very limited public interest.

3. Is the Freedom of Information Act operating in the way that it was intended?
   3.1. In the main requesters can expect to receive a response to their request within the timeframe and is therefore in line with the Act’s intentions.
   3.2. If the Act was only intended to improve openness and transparency in the public sector then it is operating beyond of this intention.
   3.3. If the Act was also intended to stimulate the ‘information industry’ then it is operating largely in line with this intention.
   3.4. If the Act was also intended to stimulate competition for public sector contracts then it is operating largely in line with this intention, although disclosure of contractual information does not always favour competitive tendering or benefit the public sector organisation.
   3.5. The Act encourages use in certain ways where requesters disregard personal responsibility for the overall public interest and the burden of administration:
      3.5.1. The Act is used largely by the media in uninformed anticipation of story generation
      3.5.2. The Act is also used largely by commercial organisations in anticipation of sales and marketing communications to public sector staff and for tendering services provided (as above, disclosure of contractual information does not always results in competitive tendering). The public sector’s formal tendering process often makes direct marketing irrelevant and therefore ineffective.
      3.5.3. The Act has been used by students requesting information in support of their studies
      3.5.4. The Act has been used by industry colleagues from around the country as a way of identifying (for example) organisational policies, practices etc., as opposed to building networks and making direct contact with colleagues.
   3.6. The Act is frequently used in ways that were not intended. The main issue with the Act is that the current burden of administration and the financial and resource costs placed on the public sector means that there is a finite limit to its public interest.

January 2012
Written evidence from the Russell Group

Executive Summary

1. The Freedom of Information Act 2000 (FOIA) was introduced to bring greater openness and transparency to public authorities. Although universities are autonomous institutions and not public sector bodies, they are designated as public authorities in terms of FOIA compliance. Universities are only partially funded from UK public sources (they also receive income from private and charitable sources, nationally and internationally) and this proportion is likely to decline given the reforms to higher education.

2. The Russell Group believe that – for a proportion of FOIA requests – the designation of universities as public authorities is inappropriate and that universities are not comparable to other public authorities that come under the jurisdiction of the Act. In particular, the Russell Group believes that data collected in the pursuit of universities’ research missions should enjoy a partial protection which would allow universities to withhold publication until – and only until – the results of the research have been published in a peer reviewed journal or equivalent recognised outlet.

3. Universities, unlike the majority of public authorities, are competitive institutions, competing in national and global markets for students and financial resources. Data collected for the purposes of universities’ research mission are unlike any other data sets covered by the FOIA.

4. Universities are accountable for their expenditure of public (and private) funds through the large volumes of data and information they make openly available.

Recommendations

5. Universities should be treated as a special case for Freedom of Information (FOI): research data should be exempt from FOI and there should be parity in the implementation of FOI for comparable teaching data for all higher education providers, whether they are partially publically funded or fully private.

6. Current FOIA exemptions which may be used by universities are insufficient to protect from inappropriate release of research data and therefore an amendment to FOI legislation exempting research data should be introduced. We support an amendment to the Protection of Freedoms Bill that provides exemption, in limited circumstances, for pre-publication research in relation to FOI requests.
7. Consideration should be given to undertake a separate independent review of FOI in higher education to reflect on the impact of changes in the university sector since the inception of the FOIA, and the increasingly competitive environment that universities have to operate in.

A. Transparency in universities

8. Our universities recognise the importance of the key objectives of the FOIA of openness, transparency and accountability and make very large amounts of information publically available to meet these objectives. For example, universities make available information on their financial situation, staff and student populations. Universities make information readily and regularly available to academic and professional accrediting bodies to verify the quality of their teaching provision; they make data available to assess the quality of their research through the Higher Education funding councils; and they have agreements with research funders on making research data openly available in a timely and responsible manner. Russell Group Universities have been involved in developing the technologies that enable the open data revolution to be possible, and helping the Government to develop this world-leading initiative. So, it can be seen that universities are not secretive organisations.

9. There are elements of university-held information which have clear commercial interest, and form part of their competitive nature. UK universities operate in a global marketplace and compete with leading global universities. Changes in the funding environment are increasing domestic competition, as is the growth of private sector higher education providers. Our world-leading universities also collaborate with business and industry partners.

10. We believe that there is a strong argument for the exclusion of some elements of university-held information on the following grounds: comparability of treatment with commercial providers for equivalent data, especially competitive information; and risks arising from the inappropriate disclosure of research data.

B. University research and FOI

11. Our world-leading research plays a critical role in the global competitiveness of our top universities. University research is often a long and complex process so we believe it must be treated differently from other data and should be exempt from the FOIA, as is partially the case in Scottish law. Failure to understand the complexity of the research process can result in unhelpful implementation of the Act.

12. The UK research community is engaging actively in a debate about opening access to research data (see below). However, it is often critical to long-term outcomes that research data are not released too early or without consideration of issues such as data

---

1 For example, see RCUK Common Principles on Data Policy http://www.rcuk.ac.uk/research/Pages/DataPolicy.aspx; Wellcome Trust Policy on Data Management and Sharing http://www.wellcome.ac.uk/About-us/Policy/Policy-and-position-statements/WTX035043.htm
quality and robustness; potential for misuse of, misinterpretation of or risk of spurious findings from, data.

13. The length of time between undertaking the original research, gathering supporting data and delivering a known benefit can span many years: the Research Excellence Framework allows 15 years between publication of original research and a ‘research impact’; an analysis of Cardiovascular research showed that it can take between 10 and 25 years to translate into treatment2.

14. To progress from an initial research idea to an outcome will involve one, and often more, competitive funding bids, robust testing of hypotheses and evidence and sometimes evidence will suggest alternative research avenues to follow. These ‘twists and turns’ of the research process are extremely difficult to predict at the outset of a project.

15. The collective knowledge of a research team is built over many years and often from a critical mass of experts working together. The intellectual capacity of a research team is a critical element in the success of research. The accumulated years of knowledge gained and the investment by both universities and research funders could be undermined by having to disclose interim research data under the FOIA. The time lag between submitting written up findings of a research project and their publication in a peer-reviewed scientific journal can run to many months and sometimes longer.

16. Legislation in Scotland allows exemption of research data from FOI disclosure, but current legislation in the rest of the UK allows little protection. Universities in Scotland have confirmed that the research exemption has been used effectively. Exemptions under Section 22 of the Act (“information intended for future publication”) are insufficient to protect researchers in many cases and expectations from the Information Commissioner’s Office (ICO) on how quickly research is published can be overly optimistic. While the ICO has produced helpful guidance specific to the Higher Education sector, cases such as that of Newcastle University (which we outline below) have highlighted problems in implementation of ICO guidance.

17. There are many instances where open access to research data can benefit the public good. A Royal Society study is currently exploring the issues of open science and is due to report during 2012. Nevertheless, there are also risks which must also be considered in open access to research data, such as threats to intellectual property and maintaining patient safety in medical research.

18. On launching the study, the Royal Society said “Open access to scientific information is not in practice an unqualified good. A commitment to open science does not imply openness to everything, to anyone or for any purpose. Open science should be bounded by considerations of quality, legitimate commercial interests, privacy and security. This study will make recommendations as to how to best to ensure we obtain the benefits of

opening up scientific information, and how best to manage the challenges and financial implications of so doing."³

19. It is important to identify and distinguish between where research outputs have potential for commercial exploitation, where benefits can be accrued through open dissemination, and where research data and results are sensitive and require protection. We would suggest that it is the scientists and researchers who have the expertise needed and are best placed to differentiate between that information which should be open and that which is not yet appropriate for open access. While there may be more that the higher education sector can do on open access, the FOIA is not an appropriate vehicle for gaining access to research data that are not yet suitable for publication or otherwise sharing.

20. Universities in the UK are at the global forefront of promoting access to their research assets. For example, the BIS Working Group on Access to Published Research Findings, chaired by Dame Janet Finch, is exploring mechanisms to open up research to the widest possible readership in the UK and across the world, and UK universities are at the heart of the ‘Easy Access’ partnership on intellectual property⁴.

21. If the ability of the UK’s leading universities to exercise control over its core assets of research data and teaching materials is compromised by compliance with the FOIA, the UK’s ability to conduct leading edge teaching and research could be seriously jeopardised. Private sector and international partners would become more reluctant to work with UK researchers, as they could lose their own data if they shared it with UK researchers, with consequential damage to the UK economy and to UK universities if sponsors transferred their research funding overseas. UK researchers would lose the incentive to do empirical research themselves, if it meant they would have to share their data at an early stage of their research. Likewise, they would lose the incentive to innovate and create new teaching materials if rivals were able to readily access these materials. The world’s top researchers would no longer wish to live and work in the UK, if the potential loss of research data would make the UK much less attractive as a destination to conduct research. The quality of higher education teaching in the UK would suffer, and the world’s most talented students may no longer have an incentive to study here.

C. Competition in Higher Education

22. Universities operate in competitive national and global markets and costs of teaching are not supported solely from UK public funds. For example many postgraduate and international students pay their own tuition fees or are sponsored by private funders. Arguments for treating public and private providers differently are unsustainable. Protecting teaching materials is fundamental to a university’s market position and ability to compete with other UK universities, private providers and international competitors.

³Further details of the Royal Society Science as a public enterprise project can be found at http://royalsociety.org/policy/projects/science-public-enterprise/
⁴http://www.easyaccessip.org.uk/
23. The Government has encouraged the private sector to enter the higher education market. However, private providers are exempt from the FOIA compliance. New providers, such as those being encouraged by BIS, might seek teaching materials, which have been developed using public funds, for commercial gain but need not make their own material available. A recent Cabinet Office consultation even cited this as an example of open data.

24. The value of research to the UK economy is extremely high, but the commercial potential of research may not be clear at the early stages of research. Early release of research data could advantage a competitor or private business to the detriment of the University and its investment.

25. Compliance with FOIA can also hinder the negotiation of collaborative agreements between universities and business, from time-wasting disruptions to contract negotiation to, in a worst case scenario, risks to potential future funding of research, as can be seen from the following experiences of one of our world-leading universities.

- Significant university resources were needed to negotiate funding for a studentship with a large multinational company who were unhappy with the threat of FOI. Ultimately an exceptional compromise agreement was required as the University and company in question could not sign off the contract.

- One major national company is so attuned to FOI that its own specialist legal team demands an extensive FOI clause to contracts. In one case the University was forced to demand changes to the company clause.

- Another major national company was concerned about loss of competitive advantage if the University was forced to release research data or results (over which the company had exploitation rights) on projects close to market. Under the terms of the contract between the University and the company, the University was required to make best efforts to ensure disclosed information was treated as confidential and to co-operate with the company in any action taken to resist or narrow disclosure.

- Threats to the commercial interests of another multinational were a matter of concern which resulted in the company asking for a ‘right to sue’ clause in their contract with the University if the company disagreed with the University’s judgement when complying with the FOIA. Many months of protracted negotiation were required before the company signed the contract without the clause included.

26. In these examples, the University was eventually able to resolve the differences with the respective businesses involved. However, relationships between the university and

---

6 http://data.gov.uk/opendataconsultation
7 Russell Group *The economic impact of research conducted in Russell Group universities* (2010).
business are tarnished as a result of such difficulties at a time when the government is calling for greater collaboration between the two.

D. FOIA conflict with other legislation

27. It is critical that universities have clarity from Government on how the FOIA is implemented. A recent case emerging from a FOI request to Newcastle University has highlighted conflict between the FOIA and other legislation, resulting in inconsistencies in advice to the University, in this instance from the ICO and the Home Office. The Newcastle case is particularly complex and the details reveal inadequacies in the legislation that should be addressed8.

28. In June 2008, Newcastle University received an FOI request from the British Union for the Abolition of Vivisection (BUAV) requesting disclosure of details of contained within the project licences for primate research undertaken at the University. Project licences are issued under the Animal (Scientific Procedures) Act 1986 (ASPA). The University initially refused to disclose the project licenses in line with clause 24 of the ASPA, which makes it a criminal offence to disclose project licence information for purposes other than following the ASPA. This initial decision was supported by the ICO. However, BUAV appealed the decision, leading to the case going to First Tier Tribunal which found in favour of disclosure of the project licences, and then to Second Tier Tribunal which upheld the decision of the First Tier Tribunal. A second First Tier Tribunal was arranged to consider exemption from disclosure under sections 38 (health and safety) and 43 (commercial interest) of the FOIA, the decision reached being disclosure of the redacted project licences.

29. The University’s position with regard to the Home Office on whether they would be prosecuted for disclosure of the project licences was unclear. A definitive answer was only received following the final Tribunal decision, when the Home Office determined that it would not be in the public interest to prosecute in this case because disclosure was in accordance with the order of the Tribunal.

30. The Newcastle University case took over three years to resolve, at a cost of over £250,000 to the University in legal bills alone, and as a test case failed to produce a definitive resolution. It is far from clear from the Home Office’s stance whether they would indeed prosecute should a similar case arise, without it being taken to Tribunal. The implication from the outcome of this case is that any future similar case where conflict between the FOIA and the ASPA arose would have to go through this lengthy and expensive procedure.

January 2012

8 Further information can be found in Newcastle University’s submission to the Justice Committee inquiry.
The University is grateful for the opportunity to respond to this call for evidence and would like to cite the following areas as those which cause us most concern under the current legislation.

Resource Implications

2 The University's key concern is the cost of providing information in response to FOI requests. The current limit of 18 hours represents a high resource cost and considerable 'opportunity cost' as it diverts staff from engaging in other activities. There is an option to apply costs but in practice this is not always practical because: (i) it consumes further administrative resources that are not always commensurate with the costs recouped and (ii) can result in appeals and complaints that also consume further resources.

3 There is a significant tension between the commitment to transparency and openness that is enshrined in the Act and the government’s stated commitment to reduce the regulatory burden that legislation such as the Act places upon organisations.

Speculative Requests

4 The University receives a large number of requests that are made by journalists and commercial concerns. Enquiries from journalists frequently represent speculative ‘fishing expeditions’ to uncover information that may lead to the formulation of a story rather than the use of FOI to corroborate previously identified lines of enquiry. We increasingly find that many FOI requests are made to solicit information that is already in the public domain and are often the product of lazy journalism or an attempt to offset resource limitations within their own organisations by using University staff as de facto research assistants.

5 Enquiries from commercial concerns frequently seek information that will create commercial advantage and therefore are not always consistent with either providing information to defend an organisation's reasoning before public opinion or with detecting defective decision-making.

6 The use of e-mail has minimised the cost and ease of submitting FOI requests and this is leading to an increase in the incidence of such requests. This has significant resource implications for the University.

Vexatious Requests

7 The University has also had to deal with a number of individuals who have made FOI requests for vexatious reasons and who wish to deliberately cause nuisance by absorbing University resources and causing inconvenience for University staff. It is difficult to refuse multiple FOI requests from vexatious individuals when the focus of the Act is upon the information requested rather than the person making the request. The information requested may be reasonable when taken in isolation but the volume of requests from a vexatious individual can be significant.

January 2012
Written evidence from Derek Dishman

1 Introduction

2 My name is Derek Dishman. I write the Mr Mustard blog about Barnet Council (Mr Mustard) which came about following two events:

3 The increase in the spring of 2010 in car permit charges from £40 to £100 for residents to park in the CPZ; and

4 I attended a Residents Forum to ask about car permit prices and found that it was an undemocratic event and that the council was not open or transparent.

5 After a little research I found that there were already four busy & critical bloggers in Barnet (famousfivebarnetbloggers) and I was unable to stop myself from becoming the fifth.

6 The committee may be aware that at a CIPFA conference the Right Hon. Eric Pickles MP praised the work of bloggers in Barnet and mentioned three of us by name, as he values the scrutiny (or armchair audit as he called it).

7 Executive summary

8 I have had a somewhat strained relationship with Barnet Council and I sometimes feel management want to make my FOI life as difficult as possible. However, many staff are supportive, read the blog and a number answer FOI questions speedily and helpfully. Numerous obstacles have been put in my way but FOI has resulted in the highlighting of deficiencies which, once corrected, have led to huge monetary savings.

9 The issues

10 Does the FOI Act work effectively? Only if the responding organisation is happy to release the information.

11 What are the strengths and weaknesses of the FOI Act? The main strength is that routine information can be rapidly released into the public domain and leads to a greater understanding of government. The main weakness is that it is easy to dodge the question or put obstacles in the way and the ICO complaints procedure is a lengthy one. A second major weakness is that, if outsourced, services may not be subject to FOI legislation.

12 Is the FOI Act operating in the way that it was intended to? I don't believe so based upon the problems I have faced.

13 Counter-attacks

14 I started with my first published blog post on 10 March 2010. I am told that very quickly I was public enemy #1 at Barnet Council. I have recently discovered in an FOI response that the interim Assistant Director -
Communications, a Mr Chris Palmer, has described me in writing in an internal email as a "sad little Johnny no-mates". Although acting as an employee since, I think, June 2010, Mr Palmer invoiced the council for £114,912 through Renouval Ltd in the council tax year ended 31 March 11.

15 I was the subject of a referral to the Information Commissioner by the council on the grounds that I was not registered under the Data Protection Act. See The David Hencke blog.³ Technically Barnet Council made an enquiry to the ICO, but did so on a complaint form and referred to it as a complaint in the covering email. When they received the advice from the ICO that I had done nothing wrong they argued against it using EU case law.

16 I made pretty constant use of FOI in order to help me learn about the council when I started blogging, submitting a request most days. This led to Barnet Council saying that a blogger in Barnet had asked 175 questions in 6 months which £40,000. Although the blogger was not named it was a simple matter for the local papers to telephone the other 4 bloggers and eliminate them so I was publicly outed by default. Please see conservativehome.blogs.com.⁴

17 I challenged Cllr. Thomas to substantiate his figures and it turns out that he used a "typical" cost of £225 to form his estimate and that Barnet council did not keep track of the time spent on each request. Basically the £40,000 was a guess, and an over-statement, as many of the questions I posed were simple ones.

18 Vexatious requests

19 The following 3 questions, all submitted together, were deemed to be vexatious.

20 What are the names of the project manager for the SAP Optimisation project and the One Barnet programme manager. Are they employees or contractors? If they are employees please provide the salary range of their posts and if they are contractors please tell me which contractor supplied them and the daily rate of charge?

21 Do Logica provide any in-house consultants and if so how many, provide the names of the consultants and their daily charge rates?

22 What is your main job title please (asked of an employee in the One Barnet office)

23 SAP is multi-faceted computer software, which the council relies on for accounting, HR, payroll, management information and other administrative functions. It is extremely powerful and evidently complicated. The spend on it has spiralled out of control and has now cost more than £23 million just for software, from an original cost estimate of £2.5 million.

24 The grounds for deeming the requests to be vexatious were:
(i) Compliance would create a significant burden in terms of expense and distraction

(ii) The request has the effect of harassing council staff

25 I am the only person against whom the grounds of vexatious behaviour has been levelled by Barnet Council. With the arrival, on contract, of a sensible and professional FOI officer, with whom I have perfectly civil and businesslike correspondence (I stress that I am always civil - only the content of my questions is sometimes difficult as I insist on proper and correct answers) the accusation of vexatious behaviour was withdrawn and the information was provided.

26 Delay

27 I do not track the requests I make although I now give them my own unique reference numbers. Sometimes they are not acknowledged although they have been received and sent out to departments to answer. It is quite common for answers to be late. Rather than asking for a review, which uses up management time, I now nudge the council to respond which seems to work with them then often being able to answer on the day of the nudge. Part of the problem has been that their software is really not up to the job and they are currently installing new FOI software. I am hopeful that this will lead to an improved response rate.

28 Aggregation

29 Barnet council aggregate nine of my requests because they concerned nine companies who all appeared in the over £500 spending lists which the council has to publish. That was the only commonality. I pointed out that the requests were as similar as I am to my sisters (i.e. not at all) and I now await the formal review response which, I am told, upholds the aggregation and will probably end up on the desk of the ICO.

30 Refining requests

31 Although professional FOI offices realise they have a duty to be helpful this has not percolated through to the service areas. It is quite normal for requests to be rejected as they cost too much. An example was tablet computers on loan to temporary staff. The answer was that there were 462 managers who each kept their own record of issue and it would have taken too long for them to each look up the answer and aggregate it all. There was no suggestion by Barnet Council to refine my question. I then asked about just one department and was told it was still too large. I then asked how many managers were in that department and how many minutes each was expecting to dedicate to my question. That went unanswered for some time and I sent a further reminder with a copy to a known helpful officer. This led to the information that a "temp" does not get their final pay cheque until they hand in all their equipment and so there had been, as far as the council could tell, no losses. If I had been told this information at the beginning both sides could have saved a lot of time.
32 Redaction

33 Barnet council are very keen on redaction. I contrast their approach to that of Hackney council. I asked both of them for the recycling contracts held with May Gurney. Hackney Council provided theirs in full without a single redaction; all prices and terms were visible. Barnet Council crossed out masses of stuff, 98% of some pages and failed to provide some of the schedules until they carried out my requested review when they released a small amount of extra information but basically left me with a contract that was impossible to read coherently.

34 Overstating costs to justify refusal

35 Barnet Council seem to operate a bias in favour of inflating costs to justify a refusal. I asked the council to review 140 redacted entries in the over £500 spending lists which by their categories looked to me as if they should be published. The request was refused as each invoice would take 24 minutes to identify and retrieve which at £25 per hour would cost £10 per invoice. I asked another question: how much does each purchase ledger invoice cost to process? and the answer was £1.79 so I felt that the cost of retrieval had been over-stated.

36 Future publication

37 Whenever management structure is changed a number of senior people leave the employment of the council with £100,000+ cheques. This is only discovered once a year when the annual Accounts are published. The employee concerned may have left as long ago as 14 months. A request I have made for information on a particular ex-employee has been refused on the grounds that it is for future publication and that release of the information would hamper the work of the audit committee. I do not accept the second argument as the audit committee cannot get any money back from the ex-employee. They scrutinise the draft Accounts although they can only change incorrect figures not facts. The future publication argument is a valid one but I think that when the date is over a year in advance the exemption should not apply. I would like to suggest a period of 3 months as being more reasonable.

38 Errors

39 Accuracy of FOI responses is only as good as the data available or the care given to the question by the responder. I can think of 3 errors. In a public committee meeting a senior officer said that the council had 189 computer servers. Given the exactitude of the figure I expected a list would be readily available. It turned out that the officer did not mean servers, he meant software and a list was duly provided. It contained 177 entries. Responses to other later questions have turned up two other software systems which should have been included in the first answer.
40 I asked for a copy of the Gifts and Hospitality register for senior officers (those earning £58,200 p.a. or more). I put some of it on my blog and observed that the Chief Finance Officer had not been entertained by anyone. Some weeks later, possibly after the said officer had read my blog, a correction arrived out of the blue containing a list of the dozen or so lunches etc that had been enjoyed by him.

41 I asked a question about values invoiced by the top 50 suppliers to the council. A printout arrived quite quickly. I saw that the answer was easy to obtain and so I asked for the next 450 entries. When this second list arrived I noticed that "redacted" was the 80th largest supplier for over £400,000. I queried this entry and was told that it was the total of all redacted entries. Apart from the fact that "redacted" is not technically a supplier and was an amalgamation of a number of different redacted supplier entries there was another entry for "redacted" in the first 50 entries for £9.7 million, so the £400,000+ entry certainly was not the total.

42 Apparently not applicant blind

43 I saw that a payment of £150,000 had been made to PricewaterhouseCoopers. I asked what it was for. It was for 16 reports on the subject of Revenue Income Optimisation (i.e. price increases). I asked for the titles of the 16 reports intending to ask for one or two actual reports after that. I have been denied even the titles on the grounds that "PwC has specifically requested that Barnet does not disclose the titles of the reports or the items they looked at as doing so would give away their intellectual property and would potentially prejudice their commercial interests." It turned out that one of the reports themselves had already been provided to another requestor. He had passed it on to me and it had already been published on my blog.

44 Money saving

45 The Barnet bloggers discovered between them in the spring and summer of 2011, by using FOI, that Barnet council had used a number of security companies with the word MetPro in their name that were not registered with the Security Industry Authority and employed staff who had not had Criminal Records Bureau checks, despite the fact that this is a criminal offence and that they were in contact with vulnerable adults and children. These companies, one of which quietly took over work for the council after another MetPro company was liquidated, did not have formal written contracts with Barnet council, had not been through any procurement process, in breach of EU directives, and were paid in the region of £1.4m over 5 years. The security contract is now going through a proper tender process but in the meantime the work has been placed with another existing supplier who are 14% less expensive and will save the council £196,000 on the next £1.4m spent.

46 Following investigation into this scandal the council’s internal auditor’s own investigation into contracting led to her being able to give only limited assurance on the majority of departments.
47 I discovered in October 2011 that Barnet council were using a supplier called RM Countryside Services Ltd (“RMC”) to remove all parking meters throughout the borough. It was a public document which showed me that the tendering rules had not been properly followed and that led me to make an FOI request, which showed there was not a written contract in place and yet £2.6m has been paid to RMC since 2005 I also ascertained that their work for the council exceeded 25% of their turnover, a breach of the council’s Contract Procedure Rules. Until it was pointed out by me the council was unaware of this. The removal of parking meters has now halted whilst the tendering process is re-run. There is no question but that increased competition would have led to finer prices for some of the £2.6m spent with RMC.

48 At a much smaller level I questioned the amounts paid out for the use of meeting rooms around the borough for the Residents Forums. Following my question 2 of the 3 regular meetings now take place in council buildings saving about £2,000 p.a.

49 All of the Barnet Bloggers have highlighted the problems with procurement throughout 2011. This led to a Procurement Action Plan which includes a single Contract repository for the council and £436m out of a £531m spend now having compliant contracts. This can only have saved money for the council and eliminated risk from using less and/or unsuitable suppliers (the number of suppliers has been reduced from 8271 to 5820).

50 Copyright

51 Peterborough City Council had the following footer on their FOI responses in July 2011.

52 The information supplied to you in response to your request is the copyright of Peterborough City Council and is protected by the Copyright, Designs and Patents Act 1988. You may use it for the purposes permitted by that Act, including non-commercial research and news reporting. Any other re-use, for example commercial publication, requires the permission of the copyright holder. If you wish to re-use any information supplied you must first gain the council's explicit written consent. In order to make a request to re-use the information please contact me at the address above.

53 I wrote to them as follows:

54 I refer to your claim to have copyright in your reply. I repeat below the first section of the Copyright, Designs & Patents Act 1988. Are you claiming that your email is an original literary work ? or some other copyright work ? Please enlighten me.

1 Copyright and copyright works.

(1)Copyright is a property right which subsists in accordance with this Part in the following descriptions of work—
(a) original literary, dramatic, musical or artistic works,

(b) sound recordings, films [or broadcasts], and

(c) the typographical arrangement of published editions.

55 I never did learn if the response was supposedly a work of literature but Peterborough CC did at least then change their footers to the following:-

56 'You are free to use any documents supplied for your own use, including for non-commercial research purposes. The documents may also be used for news reporting. However, any other type of re-use, for example by publishing the documents or issuing copies to the public will require the permission of the copyright owner, where copyright exists. Such a request would be considered separately in accordance with the relevant Re-use of Public Sector Information Regulations 2005 and is not automatic. Therefore no permission is implied in the re-use of this information, until such request to re-use it has been made and agreed, subject to any appropriate conditions.'

January 2012

Hyperlinks to websites:
Dear Select Committee Members

Post-Legislative Assessment of the Freedom of Information Act 2000

The Audit Commission welcomes the Justice Select Committee’s inquiry into the post-legislative scrutiny of the Freedom of Information Act 2000 and has comments in response to three questions:

- Does the Freedom of Information Act work effectively?
- What are the strengths and weaknesses of the Freedom of Information Act?
- Is the Freedom of Information Act operating in the way that it was intended to?

Does the Act work effectively?

The Public Administration Select Committee, in its response to the White Paper, identified a purpose of FOI was to;

‘improve the quality of government decision-making because those drafting policy advice know that they must be able, ultimately, to defend their reasoning before public opinion.’

We believe there is a difference between simply providing ‘recorded information’ and helping the requestor to understand what that recorded information means. The original aims of the Act are still valid, but legislating and prescribing how organisations should provide information, in such a rigid way, can lead to the reverse. Information can be made public, but in a way that is difficult to understand, unless there is also context and interpretation.

Strengths and Weaknesses

In our view the Freedom of Information Act does not actively encourage public bodies to be helpful.

Understanding the needs of the requestor

The Commission has found that there can be difficulty in providing easily understandable information, if the Act is followed to the letter. The Act has two important weaknesses that should be addressed to help overcome this: Public authorities are not empowered to ask ‘who is making this request’, and ‘why is it being requested’.

1st Floor, Millbank Tower, London SW1P 4HQ
T: 0844 798 1212  F: 0844 798 2945  Textphone: 0844 798 2946  www.audit-commission.gov.uk
There are arguments that because the Act is ‘applicant blind’, each request is treated on its own merits. However, these two questions would enable us to understand the needs of the requestor. We would not only be able to provide the required information, but could supply additional information to assist the requestor further and tailor our response to their needs. The Act assumes that the requestor knows exactly what it is that they want – that is not always the case. Appropriate questions can elicit more information from the requestor, and enable a much more helpful response to be sent.

How to respond to requests

The Information Commissioner’s Office (ICO) has produced extensive guidelines and assistance to help public authorities to understand their duties under the Act. However, we see the requirement imposed on how responses should be drawn up in order to comply with the Act, as being overly prescriptive.

Many public authorities craft responses to requestors that are clearly designed for presentation to the ICO in case of a complaint. Responses are not always written in plain English, or in a way that could easily be understood. Instead there is a preference to adopt a more legal tone, often quoting the Act word for word.

Fear of reprimand

Paragraph 100 of the Memorandum says (in relation to the application of Section 14 – Vexatious and Repeated requests):

‘However, public authorities’ reluctance to use section 14 is sometimes compounded by a fear that the ICO will not back them up.’

Our view is that this fear of being reprimanded extends to the whole Act, not just section 14.

Some examples of responses we have seen made by other public authorities can be confusing to the requestor, in attempting to demonstrate that every element of the Act has been applied properly. We take the view that it is better to promote understanding by writing the main body of the reply in plain English, giving a better targeted answer to the request. In our replies we attach a separate note, which explains how we have interpreted the Act, and gives a clear explanation of any exemptions we have used. This keeps our answer and the legal interpretation of the Act separate.

For example, in order to be technically compliant with the Act, a Public Authority should issue a refusal notice for information that is already available by other means. We should confirm if we hold the information and then say that under section 21 of the Act, the information requested is exempt. Then under our duty to advise and assist we should consider signposting the requestor to the place where they can obtain the information. We should also close the response with the directions of how the requestor can appeal.

Alternatively, it could just say that it is already available, tell them where to find it and say please come back to us if you have any difficulties.

This is a very basic example, but one we hope demonstrates the difference in approach.
Is it operating in the way it was intended?

It is operating in the way it was intended to a certain degree. The Act has opened up public sector information, but our view is that it has not lived up to the principles behind it and has not increased public understanding of the decision-making process. It is a complex piece of legislation and, for the general public, it can be extremely difficult to understand what rights to information they have and what it means when exemptions are applied. For the public body it could also mean over-regulated replies, which may be less than helpful.

In our view the Act is onerous and expensive. For example, like many other Public Authorities, we receive requests from journalists who use the Act to source news stories of little relevance to our accountability. This is not in keeping with the spirit of the Act. Their requests are often wide-ranging and require a lot of staff effort, often from a number of different sections within the Commission, to gather the information requested within the timescales dictated by the Act. The limitations on which activities can count towards the cost limit often mean that we face significant costs from dealing with these requests. In our view, section 12 and 13 of the Act should be considered for amendment. We feel that the 'appropriate limit' should be reduced and Section 13 opened up to enable authorities to recoup costs and reduce the burden on the public purse.

I hope these comments are of assistance to the Committee.

Yours sincerely

[Signature]

Eugene Sullivan
Chief Executive
Executive Summary

1. There is recognition that the Freedom of Information Act has been beneficial in increasing general awareness of the work of NHS organisations and promoting transparency with regard to this.

2. The disclosure of information under the Act has helped lead to greater accountability as public authorities are scrutinised and held to account for their decisions and actions.

3. The Act is a good means by which credible information may be provided to any individual upon request.

4. However, the sheer volume of FOI requests, which effectively double each year, is placing huge pressures on the NHS.

5. Across the South of England, the NHS received over 12,000 FOI requests. The resource to deal with this volume now exceeds 100 personnel.

Areas of concern

6. **NHS resources**: Each year the number of requests received by NHS organisations almost doubles. Across NHS South of England, organisations dealt with more than 12,500 FOI requests in 2010/11. The NHS in the region has approximately 120 people who manage FOI full-time. This does not include the numbers of staff who help prepare the response, particularly if it is detailed (such as on NHS finances).

7. **Dealing with rising numbers of requests**: Staff in many NHS organisations have to devote time to working on requests often to the detriment of their main roles and with the subsequent impact on their workloads. It could be argued that more resource should be put into responding to FOI requests to meet demand, but at a time when the NHS is being asked to reduce management costs this is an issue that needs consideration.

8. **More complex requests**: Requests are becoming increasingly more complex and so they may require input from a combination of managers/directors and even legal advice, and are very labour-intensive. The cost of providing the responses to some requests is therefore considerable.
Legal costs have doubled each year.

9. **The changing nature of requests:** The majority of requests are coming from journalists and commercial companies and it is questionable whether these requests are in the spirit of what the Act was intended for. Journalists are often searching for stories and commercial companies are gathering information about the NHS to sell to other businesses e.g asking for contact information for staff which is then incorporated into directories which are sold commercially. Some requests could be seen as time-wasting – one asked how many complaints the organisation had received about ‘haunted’ buildings or ghosts in its premises and what action was being taken to address the complaints. The organisation cannot filter out these requests and has to process them and respond under the Act.

Suggested improvements

10. **Increase the length of time for responses from 20 working days.** This would help to balance the pressure on resources for the authorities due to the increasing volume of FOI requests.

11. **Reduce maximum time for working on a response – currently 18 hours.** This would help ease the burden on resources as 18 hours is seen to be a high cost for dealing with one FOI request.

12. **Calculating the cost limit.** Under the current legislation, a public authority can only include the time that it takes to identify and retrieve the information as part of the 18 hour limit relating to the cost of complying with a request. The authority cannot include time taken to read information, consider exemptions, make redactions and consult with colleagues which can be very time-consuming. This means that the true cost to the organisation of dealing with the request is much higher than the cost limit identified but the authority cannot refuse the request under Section 12.

13. **Need for clear guidance regarding applying exemptions.** Although FOI guidance from the Information Commissioner’s office is frequently updated and made available on the website, it is often hard to locate the right guidance that is needed, partly because there is so much of it. The staff on the ICO helpline are also only able to offer limited advice about the application of the Act with regard to specific cases. For complex cases, it is often therefore the case that the NHS needs to turn to lawyers for specialist advice, which increases the cost of compliance.

February 2012
1. The Foundation Trust Network (FTN) is the membership organisation for public providers of NHS services and gives a distinct voice to NHS Foundation Trusts and those working towards FT authorisation. The FTN has 216 members from across the acute, mental health, community and ambulance sectors.

2. We welcome the opportunity to submit the collected views of NHS providers on the operation of the Freedom of Information Act. We consulted our members in January 2012 and their feedback is summarised here – it is clearly an issue of significant interest for members given the number of responses submitted in a relatively short time, and the commonality of issues raised across the sector.

Executive Summary

3. The member responses were united in highlighting a concern that the Freedom of Information Act (FOIA) provisions were being used for commercial purposes rather than for scrutiny of issues in the public interest, for example:
   - competitors determining whether to bid for services;
   - alternative suppliers seeking to win business and requesting commercial information in respect of third parties;
   - companies compiling databases of contact information for selling on.

4. There were also concerns raised about:
   - the number of requests growing rapidly to the point of being overwhelming; and
   - the level of resource that was necessary to give over to these requests, including administrative time, but also front-line clinical time;
   - incorrect conclusions being drawn from FOI requests which had a negative reputational impact on the NHS.

5. The FTN fully supports the principles of openness and transparency, and is working with its member organisations to promote and share best practice in respect of communicating information between NHS foundation trust (FT) Boards, their governors and members, and the wider community, in order to enhance patient experience and drive quality improvement. Indeed one member reported a slowing of the rate of increase in requests after reviewing its publications policy and we are aware of a number of members looking at similar reviews.
6. While it is difficult to quantify the time given over to requests across the sector (whether legitimate, inappropriate or vexatious), in light of the financial pressures being faced by NHS providers we consider it would be sensible to re-focus FOIA activity more clearly on matters of the public interest and to streamline the process for responding to legitimate requests. It is also vital to apply the FOIA provisions to all providers of NHS services, not just those in public ownership.

Discussion

7. As highlighted above, members support the principles behind the FOIA, but members felt they had been inundated with inappropriate requests.

Commercial requests

8. Many of the requests were from commercial organisations wishing to obtain intelligence on products or services provided to, or supplied by, the NHS provider, particularly on IT contracts. One member organisation reported that in their case “commercially driven requests look set to overtake any other type of request origin (last year 30% compared to 37% media)”. This is a common observation, with many respondents reporting a similarly changing profile of requests towards business interests. We agree with the view reported in annex D of the MoJ memorandum that these requests are “against the spirit of the act” (footnote 172).

9. Another member reported:

“The [requests we get] are clearly from commercial companies who are merely trying to increase their awareness of potential business opportunities. I have no problem whatsoever with the concept of the Act which is to make Public Bodies even more accountable to the public – indeed I actively support this. However I do feel the Act is being misused by commercial companies and would welcome an attempt to perhaps limit its scope in that respect”.

10. Other examples included:

“We spend a lot of time responding to FOI requests from commercial companies who then sell the information on for database purposes”.

“A lot of requests are in relation to IT- how much do we have, who supplies it, what systems do we use. All are clearly from suppliers or consultants wanting work”.

“Regular requests come about clinical policies/ use of specific drugs - so the company can create a commercial database. Others want names and structures just to use for marketing”.

2
“We are particularly concerned at the proportion of FOIs relating to sales and marketing and companies research, where information is being procured simply to derive commercial advantage. It is also clear that individuals and institutions are also passing their research costs directly to the public sector using the FOI mechanism. Accordingly we think that around 50% of the requests we receive are outside the original intention of the Act”.

11. One member felt that requests should be limited to individuals, interest groups and the media, and that requesters declare that they were not requesting on behalf of a corporate/ commercial organisation. Another suggested that commercial organisations should be required to make their approach through the appropriate procurement process.

Level playing field

12. As some of these commercial interests are direct competitors for NHS contracts, it was felt that the ability to lodge requests with FTs but not independent sector providers of public services meant that an uneven playing field had been created. FTs are unable to seek out comparable competitor information from independent sector organisations. There was support for the principle of equity being applied, to all providers of public services, whatever their ownership model.

The growing number, and costs, of requests

13. One member reported a 31% increase in the number of requests over the last year, and certainly the experience of significant growth, in particular the last three years, is one that many NHS providers highlighted.

14. The growth in numbers experienced by respondents was accompanied by regular comments on the additional time given over to, and costs of, responding to requests:

\[I\ would\ estimate\ that\ for\ a\ small\ trust\ the\ cost\ is\ upwards\ of\ £50k\ per\ annum\ –\ just\ to\ employ\ dedicated\ staff\ to\ receive,\ log\ and\ process\ requests\ –\ it\ does\ not\ take\ into\ account\ time\ of\ other\ staff\ involved\ in\ reviewing\ and\ determining\ appropriate\ responses.\]

15. Another respondent reported:

\[We\ have\ a\ dedicated\ officer\ coordinating\ requests\ and\ responses,\ supported\ by\ staff\ in\ the\ services\ who\ have\ to\ respond\ with\ the\ detail\ of\ the\ requests,\ all\ supported\ by\ senior\ officers\ who\ provide\ expertise\ in\ reaching\ judgements\ as\ to\ the\ appropriateness\ of\ the\ request\ and\ the\ response\ made.\ There\ is\ further\ bureaucracy\ in\ operating\ and\ responding\ to\ the\ appeals\ mechanism,\ which\ has\ little\ effort\ for\ the\ applicant\ but\ considerable\ overhead\ for\ the\ Organisation.\]
16. Reports of 1 – 2 whole-time equivalent staff being employed to respond to requests are not atypical, possibly more in larger FTs. In some cases members reported that the staff resource given over to responses was impacting on the delivery of the principal purpose of the organisation, as staff who would otherwise, for example, book appointments, were diverted from this task by administering responses for one or two days. One member presented an extremely useful overview of their costs which illustrates the point well:

- Dedicated FOI resource is 0.5 w.t.e. administrator, plus 0.4 w.t.e. senior manager vetting time, c £60k
- Requests are frequently multi-faceted requiring input from right across the organisation which is unquantifiable
- Expenditure on legal advice on issues of interpretation of the Act
- Best estimated average cost per response in excess of £500
- Estimated cost in 2011/12 between £175,000 and £250,000
- Multiplied across a financially challenged public sector, significant sums of public money are wasted.

17. We were informed of one NHS provider experiencing difficulties from repeated and vexatious requests from dissatisfied service users. Despite formally designating these requestors as vexatious (as defined by the Information Commissioners Office (ICO)) considerable resources had been expended in administering these requests. In one case the Trust was referred to the ICO by such a vexatious complainant, the Trusts’ stance was upheld by the ICO but still, considerable time was spent defending this case.

*Managing requests and the Publication Scheme*

18. Each FOI request is different and a number of respondents reported that often requests had been framed so that data could not be presented in a readily available format. For example “Many requests are for similar information but with subtle differences, e.g. covering different time periods; occupational groups; or departments. Each request is individually researched with the administration involved in individual response”.

19. There was support from a number of members for existing data to be used where possible and a request for clarification of the provisions or guidance so that unreasonable time is not spent tailoring specific data requests when alternative presentation would meet the needs of the requestor.

20. Related to this point, some members reported that requesters of information frequently demand that information is provided in a specified format and do not respond well to indications that it is freely available in an organisationally-determined form. The point about ‘aggression’ can be applied more generally and instances of harassment or aggression have been reported for example when a requester is informed that the relevant information is not maintained by the FT, or when they have been informed that provision of commercially sensitive information would be a breach of confidence.
21. In this latest engagement with members we were informed that one member had seen a slowing of the increase of requests for information following a review of their Publication Scheme - in many cases, where the information is already published on the scheme, or has been requested previously, the requestor is referred directly to the scheme (these referrals are not counted within the FOI request numbers). This approach to reviewing the information made available in the publication scheme was corroborated by other members.

22. Some members recommended that specific guidance is needed from the ICO on what can and cannot be disclosed through publications schemes. The ICO should improve clarity over the publication scheme in order to improve transparency and consistency in what is disclosed.

23. As a general point, the FT sector is keen to ensure that information flows between the FT Board leadership, the FT governors, members and wider public are sufficient to hold the organisation to account for the services it provides and as a means of securing quality improvement, on both patient outcomes and experience.

The fees / 18 hour threshold

24. Echoing points in the Ministry of Justice Memorandum concerning the setting of the threshold, there were views expressed that the fee notice level should be modified downwards and support for widening the activities included in calculation of the time given over to the response. A limit of six hours, beyond which a fee could be charged, was suggested.

25. Furthermore, as also highlighted in the memorandum, there was some support for a nominal fee - respondents drew parallels with the Data Protection Act and suggested that a fee be payable for every request, as for subject access requests.

26. One member highlighted the difficulty presented in the requirement to provide advice to the applicant to reframe the question when advising them that it will exceed 18 hours to collect the information. It was considered unrealistic when considering existing resources for organisations to provide advice and assistance to applicants whose response cannot be met within the 18 hour timeframe.

Other issues raised by members
27. There were a number of other issues raised in general terms that we should like to summarise as follows:

- Clarity on the distinction between data protection and FOI – some trusts have been challenged on refusals to name staff other than Board members and NHS consultants, and feel that the position should be made clearer;
- Several members raised concerns about the “blanket” or “Round robin” nature of some requests – for example, requests made via the Whatdotheyknow website, are often made to all or substantial numbers of NHS Trusts/ public authorities nationally - the costs multiplied across all Trusts contributes to the waste in time and resources.
- A number highlighted that a proportion of FOI requests were from students wanting information for dissertations and other research projects not directly in the public interest;
- Instances of multiple FOI requests being brought together to create a media story, or biased questions being put, with the subsequent conclusions drawn being incorrect, not only having an unwarranted negative reputational impact on the NHS but taking significant time to correct;
- Frequent requests from journalists for significant amounts of information which have no direct public interest benefit but which “may” be useful for future reference; members report it is apparent that a substantial proportion of what is requested is consigned to the bin and never used, regardless of the cost to the public purse;
- Members reported occasions where journalists and media researchers have used numerous pseudonyms to repeatedly make requests of Trusts - the aim being to avoid the requests being aggregated and hence information being withheld under section 12.

Concluding remarks

28. There is much reported to us which complements the findings of the Ipsos MORI research outlined in annex E of the MoJ memorandum. Our member feedback suggests the volume of requests is increasing significantly. The profile of FOI requestors is broadly comparable to the Ipsos MORI findings, though members report that businesses are increasingly using the Act. We consider there would be merit in reviewing the 18 hour threshold to a lower figure and consider that all providers of public services, irrespective of ownership model should be brought in scope of the Act.

February 2012
Executive Summary

1. The Freedom of Information Officer at the University of Westminster offers evidence of concerns that relate to:

   (i) The application of the Act to Higher Education Institutions (HEIs)

   (ii) The use of HEI resources to support private needs rather than public interest,

   (iii) How public authority fees regulations impose a heavy burden on HEIs and how actual costs are likely to be unknown and rising,

   (iv) How the current Information Commissioner’s Office (ICO) guidance on the use of pseudonyms by requestors advises only considering the nature of the information requested rather than also wider issues relating to avoiding the correct estimation of costs and possible vexatious activities.

   (v) How the current ICO guidance on vexatious requests represents a very high burden on HEIs before a request is considered to be vexatious and does not offer an early opportunity for HEIs to challenge behaviour that, with their limited resources, can be disproportionately disruptive and harmful.

   (vi) The anomalies that exists when considering the disclosure of personal information under the Freedom of Information Act 2000 (FOIA) and the same information under the Data Protection Act 1998 (DPA) Data Subject Access provisions.

2. Whilst it is recommended that the application of the Act to HEIs would benefit from a regular review and statement of HEIs public authority status under the Act, other areas of concern would benefit from further consideration of regulations and guidance specifically for HEIs in relation to:

   (i) Limiting the diversion of scarce University resources to supporting private information needs.

   (ii) Reviewing fees regulations in relation to requests to HEIs.

   (iii) Reviewing ICO guidance on the use of pseudonyms by requestors and how vexatious requestors are identified in the HEI public authorities.

   (iv) Addressing anomalies that exist in considering the disclosure of personal information between the FOIA and the DPA.

Introduction

3. As the University of Westminster’s Freedom of Information Officer since December 2007, I have been well placed to observe and enact the provisions of the Freedom of Information Act 2000 (FOIA) as they affect my organisation, other Higher Education Institutions (HEIs)
and more generally the Higher Education sector. From January 2008 to December 2011 the University has received and responded to a total of 354 Freedom of Information requests, for which I have had operational responsibility.

Factual Information

HEIs Public Authority Status

4. The University of Westminster is a registered charity and company limited by guarantee. Full details can be seen at http://www.westminster.ac.uk/about-us/organisation-and-running-of-the-university/charitable-status

5. Since 2005, the status of the University and other HEIs as registered charities and companies limited by guarantee and their status as a ‘public authorities’ under the FOIA has not been subject to any specific review or statement as to the logic, consistency and desirability of such a situation. The University of Westminster would welcome, especially in the rapidly changing landscape of HEI funding and sources of income, regular reviews of the public authority status that HEIs have under the FOIA and public statements as to the reasons and desirability of such a position.

Openness and Transparency - University Resources Diverted to Support Private Interests

6. The University of Westminster has been subject to the FOIA since 2005. During the initial years, 2005 to 2008 there was a gradual increase in requests received, from 22 to 47 a year. However, since January 2009, the University has seen an 86% increase in FOIA requests. From a total of 72 FOIA requests in 2009, to a total of 135 FOIA requests in 2011.

7. Whilst FOIA requests from individuals are on the increase, a significant proportion of FOIA requests received by the University of Westminster have originated from the media, commercial organisations and campaign or pressure groups.

8. In 2011 journalists, commercial organisations and campaign groups were responsible for 48% of all FOIA requests received by the University. If this group were to include trade unions, a majority of 52% of all requests in 2011 would come from these organisations.

9. This means that rather than serve the public interests and concerns of individuals holding a public body to account, the FOIA and its associated costs, are increasingly being placed at the service of groups who often have narrow, commercial or very self-interested objectives.

10. In the case of the media, some requests can have the appearance of a ‘fishing expedition’, without any grounds or previous evidence that anything is amiss or that there is indeed any public disquiet or interest in the areas of information requested. These speculative requests divert scarce University resources and do little to inform public knowledge or debate.
11. The key issue in these and other FOIA requests is costs. No funding received by the University is ‘ring-fenced’ for enabling the provisions of the FOIA and therefore resources intended for other purposes, such as student support, have to be diverted to service FOIA requests.

Fees Regulations

12. The current FOIA regulations and fees allow for a maximum of around 2.5 days of effort from the University to be spent on locating, retrieving and extracting the required information for any one request. No other related activities, the consideration of applicable exemptions, the placing of the information in a meaningful context or the creation of response communications can be taken into account.

13. Additionally, in a complex organisation like a University, with a number of functions often operating in different physical locations, estimating effort or accounting for actual effort expended on any request is often impossible in reality. It would be true to say that the actual costs, which are likely to be rising, are not known for the operation of FOIA in Universities.

14. And as a majority of our FOI requests in 2011 came from bodies who may not have a wide public interest focus, it would be probably true to say that the associated costs to the public have not been matched to any real increase in information of public interest disclosed to inform public debate.

Use of Pseudonyms

15. In 2011 the University of Westminster was subject, like a number of other institutions, to a series of requests from a requestor who used a variety of names or was acting in collaboration with a number of other people. Around 10% of the University of Westminster’s 2011 FOIA requests probably came from this source.

16. Whilst the requirement for the actual name of the requestor is covered by the Act, the related Information Commissioner’s Office guidance asks institutions to consider the information requested in the context for the provision of a real name, not the fact that it is likely to be a pseudonym, potentially being used for a number of purposes not in the spirit of the Act. For example to circumvent the aggregation of costs related to a complex request, or to hide the identity of a serial requestor who has a narrow and personal interest, or actual attempts to annoy or disrupt disguised behind numerous false names and associated email addresses.

17. A great deal of public authority effort can be put into the service of individuals who, like some organisations, are not motivated by any public spirit of holding a public authority to account, but who have a very narrow and sometimes obsessive interest in a particular area,
that would not be shared by the public as a whole, or who are motivated by a wish to annoy and disrupt. The Information Commissioner’s Office guidance on the use of pseudonyms is not helpful in these situations.

Vexatious Requests

18. Additionally, the current ICO guidance and tests for a vexatious request, not requestor, are so comprehensive, that a great deal of actual requests, annoyance, disruption and effort need to have been expended before it is likely that a request, not a requestor, can be found to be vexatious. In a sector where resources are scarce, these activities can be disproportionally disruptive at a stage far before they would be considered vexatious under the current ICO guidance. Should HEIs be held to the same scale of abuse, often aimed at only one or two FOI officers or FOI assistants, which other public authorities face with whole departments?

Personal Information - Anomalies between FOIA and DPA

19. The interaction between the FOIA and the Data Protection Act 1998 (DPA) is one of the most complex areas of the FOIA. It also is possible to throw up anomalies, especially when contrasting how information relating to an individual is handled under FOIA and how it might be handled if requested by the individual under a Subject Access Request, with the FOIA including a public interest test, but no such provision being available under the DPA.

Recommendations for Action

20. Consider a regular review of the FOIA public authority status of HEIs, given the rapidly changing HEI funding and income conditions.
21. Consider whether the levels of effort that HEI public authorities are required by the Act to expend on any FOIA request are reasonable, given their resource limitations when put alongside other non-central government public authorities.
22. Look at the types of requestor and consider whether those with a narrow public interest should be the beneficiaries of so much publicly funded effort and related information.
23. Look again at the actions of requestors and the guidance on vexatious requests and see whether these are fair to smaller public authorities and their limited resources.
24. Continue to clarify and inform on the interaction of the FOIA and the DPA, and plan to address some of the anomalies that are present between how identical information is considered for disclosure under these Acts, potentially to the detriment of the individuals concerned.

February 2012
BRIEF INTRODUCTION TO THE UNIVERSITY

1. The University of Oxford has over 21,000 students, comprising 11,723 undergraduates and 9,327 postgraduates, and over 10,000 employees. External research grants and contracts are the University’s largest source of income, amounting to £376.7 million in 2010-11 (41% of total income). The University consistently has the highest research income from external sponsors of any UK university. Isis Innovation Limited, the University’s wholly owned technology transfer company, has created more than 70 companies, and files, on average, more than one patent application each week. Oxford was placed fourth in the Times Higher Education 2011 rankings of world universities.

EXECUTIVE SUMMARY

2. The Freedom of Information Act (FOIA) places a significant strain on the University’s resources, and provides inadequate protection against unreasonable and obsessive requesters, who impose a disproportionate burden. It also poses a risk to the University’s ability to conduct world-leading research, particularly in collaboration with private companies, and to raise private funds. Whilst reinforcing the University’s own initiatives to introduce a more open organisational culture, the FOIA has complicated the University’s decision-making process by discouraging staff from expressing themselves openly and honestly in writing. Consequently, it can be an obstacle to good governance.

STRUCTURE

3. This submission examines first the impact of the FOIA in the areas of resources, research, fund-raising and decision-making. It then addresses the three specific questions raised by the committee in its call for evidence.

IMPACT OF THE FOIA

Resources

Numbers

4. The following table shows the number of requests received by the University, compared with the monthly average for the higher education sector as a whole, as indicated by the annual survey conducted by JISC.
5. After an initial flurry of requests in the first year of operation, the number tailed off in the second and third years. However, in line with the sector as a whole, the number has risen significantly each year since 2008.

6. The most immediate impact has been an increase in the resources devoted specifically to responding to FOI requests. These have grown from 0.5 FTE in 2005 to 1.5 FTE in 2011, and are planned, subject to the availability of funds, to rise to 2.0 in 2012/13. This cost is not insignificant at a time when the University’s funding is under severe pressure. Equally important is the opportunity cost imposed on those employed to undertake other duties, whether teaching, research or activities that support teaching and research. We are not able to quantify this cost but can provide some illustrative examples.

   a) In the last 12 months, one academic with responsibility for managing admissions to a course has to date spent a total of approximately 30 hours providing information in response to multiple requests from one individual, who feels aggrieved at being rejected for the course some 10 years ago. All but one of these requests related to the course but, because the precise information sought in each case was different, and was far removed from the data produced routinely to meet normal business purposes, each one had to be completed as a separate task and required significant effort.

   b) A request for research data from a large national study, submitted by a company with a commercial interest in the data, disrupted the work of the researchers concerned for a year and resulted in significant legal costs. Further disruption and cost were avoided only because the company decided not to submit a complaint to the ICO, for reasons which appear to have been related to a take-over.

   c) The Undergraduate Admissions Office is staffed to co-ordinate the annual admissions process, to conduct outreach work, to encourage applications from non-traditional sources, and to provide admissions statistics for publication on the University’s website. But it also has to respond to requests for information under the FOIA, which divert resources (approximately 1.0 FTE) from its core functions. Undergraduate admissions has consistently been the single most popular topic for FOI requests and accounted for about a quarter of all requests in 2011.

---

\(^1\) Excludes routine requests

<table>
<thead>
<tr>
<th>Year</th>
<th>Total number of requests(^1)</th>
<th>Monthly average</th>
<th>Monthly sector average</th>
</tr>
</thead>
<tbody>
<tr>
<td>2005</td>
<td>185</td>
<td>15.4</td>
<td>N/A</td>
</tr>
<tr>
<td>2006</td>
<td>158</td>
<td>13.2</td>
<td>3.2</td>
</tr>
<tr>
<td>2007</td>
<td>137</td>
<td>11.4</td>
<td>3.6</td>
</tr>
<tr>
<td>2008</td>
<td>185</td>
<td>15.4</td>
<td>5.4</td>
</tr>
<tr>
<td>2009</td>
<td>201</td>
<td>16.8</td>
<td>8.2</td>
</tr>
<tr>
<td>2010</td>
<td>261</td>
<td>21.8</td>
<td>10.6</td>
</tr>
<tr>
<td>2011</td>
<td>330</td>
<td>27.5</td>
<td>Not yet available</td>
</tr>
</tbody>
</table>
7. It might be thought that the proactive publication of information would help to reduce the number of requests. This has not been our experience. Since 2005 there has been a sea change in the amount of information published on the University’s website, particularly in respect of admissions (graduate as well as undergraduate) and enrolled students\(^2\). However, this has not led to any reduction in either the total number of requests or the number relating to the subject matter of the published information. This is because requests often involve a variation (however slight) on the published data, for example, requests for applications and offers relating to specific schools. In addition, people probably find it easier to submit a FOI request than to search a website, even when the data in which they are interested is well sign-posted.

*Complex or vexatious requests from highly motivated individuals*

8. The figures above obscure the fact that most of the resource expended on FOI requests is likely to arise from a relatively small number of complex requests from individuals using the FOIA to pursue a personal or political agenda. The individuals concerned often have a grievance against the institution and are using the FOIA as a means of retaliating against those they feel have wronged them e.g. the case referred to in paragraph 6(a) above.

9. Some of these requests might reasonably be regarded as ‘vexatious’ and therefore as falling within the scope of Section 14 of the FOIA. However, the threshold set by the ICO for applying this provision is very high. A request must satisfy at least two of the following criteria: it must be obsessive, it must harass the authority, distress staff, impose a significant burden, cause disruption or lack any serious purpose or value. To assemble a case based on these grounds is time-consuming and difficult. Even if one can make a sufficiently strong case, the FOIA provides little incentive to do so, since Section 14 can apply only to the request, not the requester. It enables a public authority to refuse to respond to an individual’s request No. 50 but provides no defence against request No.51. In practice therefore it is easier for an authority to respond to a vexatious request than attempt to apply Section 14.

10. To reduce the burden posed by obsessive and unreasonable requesters, we recommend that where a request is found to be vexatious by the ICO, the public authority concerned should be entitled to refuse any further requests from that individual for a period of six months. This would provide significant respite for the public authority, whilst providing a ‘cooling–off’ period for the individual.

*Research*

11. The FOIA has made it more difficult for the University to pursue collaborative projects with private companies. Companies worry about the effect that the disclosure of information about a project will have on their business or their ability to exploit intellectual property rights. To try to assuage these concerns, the University has to engage in lengthy and complex negotiations with commercial partners over the treatment of FOIA in research contracts. Recent examples include a large multinational that refused to sign a contract for a studentship worth £24,000 a year; a major UK company that required the University to use its best endeavours to ensure any disclosed information was treated as confidential and to

\(^2\) [http://www.ox.ac.uk/gazette/statisticalinformation/#d.en.6207](http://www.ox.ac.uk/gazette/statisticalinformation/#d.en.6207)
co-operate with it in any action it took to resist or narrow disclosure; and a further multinational that asked for a clause that would allow it to sue the University if it disagreed with its response to a request under the FOIA.

12. If research data is released prematurely and in a piecemeal fashion, before the results have been validated through peer review, there is a real risk that the consequent publicity, which will inevitably involve an element of sensationalism, will lead to inaccurate and misleading perceptions, which could damage the credibility of the research, as well as the reputation of the individuals involved, reducing their chances of obtaining research grants in future. Funders of research in universities recognise that making research data available publicly is a complex issue, which needs to be treated differently from other types of data. The following statement from the website of the Engineering and Physical Sciences Research Council recognises that research data should be released only when it is ready:

‘EPSRC expects that research organisations will make appropriate use of the provisions available in the legislation to guard against inappropriate release of research data which might damage the collaborative research process, and work against the national interests of the UK. In this regard, EPSRC views the use of appropriate confidentiality agreements and publication plans as essential elements of research management strategy.’

13. Section 22 of the FOIA provides an exemption for information intended for future publication. The University has used this on a number of occasions to resist the premature release of information about research projects. However, the exemption provides no defence against requests for the underlying data, since this will not normally be published. The Protection of Freedoms Bill requires public authorities to release raw data proactively by including within their publication schemes any datasets disclosed in response to a request under the FOIA. We anticipate that research will be one area where we will face requests for datasets and that the disclosure of such data, in advance of the completion of a study, runs the risk of damaging that research, for the reason given in paragraph 12 above. To protect the integrity of data and the credibility of the researchers involved, we strongly support amending the FOIA to provide an exemption specifically for pre-publication research data, as exists in the Scottish FOIA. We emphasise that such an exemption should apply only at the pre-publication stage. Once the results of a study have been published, we recognise there may be a public interest in the disclosure of the underlying data.

14. The FOIA also has the potential to undermine the relationship between researchers and those who voluntarily provide their personal data for the purpose of research. Study participants expect researchers to treat their data as confidential and not to disclose it to third parties, particularly where it relates to their health or other areas of life regarded as private. The publication of data in an anonymised form does not provide an absolute assurance of confidentiality. If the data relates to a specific group that is relatively small and potentially identifiable e.g. people within a particular age range, living within a particular geographical area, during a particular period of time, who contracted a particular disease, it might be possible to identify individuals by cross-referencing the data with other

---

3 [http://www.epsrc.ac.uk/about/standards/researchdata/Pages/exploitation.aspx](http://www.epsrc.ac.uk/about/standards/researchdata/Pages/exploitation.aspx)
information or knowledge, particularly where the data is being investigated by determined and highly motivated individuals or organisations.

15. Even if confidentiality is assured, there is a risk that people will no longer be willing to volunteer their data if they know it could be used for purposes different or inimical to those for which it was originally provided. An individual who takes part in a study into cancer may not welcome the prospect of their data being made available to companies who have a vested interest in manipulating the data to support a particular conclusion. The controversy surrounding the efforts of Phillip Morris to obtain access to a study into the attitudes of young people to smoking is a good example. The University believes there are likely to be further cases such as this if universities are required to publish datasets relating to research in a premature fashion.

**Fund raising**

16. Fundraising is of considerable (and increasing) importance to this University and others. The pool of individuals who have both the financial resources to make major donations and the willingness to do so is very limited. An obvious source of “prospects” is those with an existing connection to the University. However, the University also seeks to attract major donors who do not have an existing University connection. It is of course inherently more difficult to attract those without an existing link.

17. The small pool of potential major donors will inevitably face a number of competing claims on their attention. Increasingly, their wealth is likely to be derived from activities on a global scale. Their philanthropy is likewise global, ranging across a number of different countries and different types of recipient. Oxford and other top UK universities face international competition in their fundraising activities, particularly from ‘Ivy League’ universities in the USA.

18. The fact of a donation may well be made public, and indeed a donor may have a strong desire for recognition and publicity. However, the discussions leading to the offer and acceptance of a donation are a different matter altogether. Donors and potential donors expect confidentiality and privacy in their dealings with the University prior to any announcement.

19. In our view any disclosure likely to discourage a donor from giving to a university would harm its commercial interests. It should be possible therefore to apply the exemption in Section 43(2) of the FOIA, relating to information prejudicial to the commercial interests of any person. In our experience, however, the ICO applies an excessively narrow definition of commercial interest, taking the view that it relates only to a public authority’s participation in the purchase or sale of goods and services in a competitive market. Such an approach effectively precludes a university from applying Section 43(2) to fund-raising activities, at least at the stage of ICO consideration. In a case involving the University of Central Lancashire, the then Information Tribunal adopted a broader definition of commercial interest, which would appear to allow the inclusion of activities such as fund-raising within the scope of Section 43(2)\(^4\). We are disappointed that the ICO has yet to revise its guidance on section 43(2) to take account of this decision or to give any other indication that it

\(^4\) Case ref: EA/2009/0034
recognises the potential applicability of Section 43(2) to activities beyond the purchase or sale or goods and services.

**Decision-making**

20. In recent years, members of the University have become increasingly aware that any recorded information is potentially disclosable under the FOIA (or the Data Protection Act (DPA), where the information constitutes personal data). There is anecdotal evidence that staff, particularly those occupying decision-making positions, are more reluctant to commit their views to paper and that where this is unavoidable, they are more circumspect in what they say. Minutes of meetings are increasingly written with disclosure in mind, so that they are more anodyne but less valuable as a record of discussion. Future historians will regret this. The exemption in Section 36(2) of the FOIA is intended to protect the candour of advice and discussion. But it is not used as often as it might be, given the procedural requirement to obtain the opinion of the ‘qualified person’ (in the University’s case, the Vice-Chancellor). This opinion has to be ‘reasonable’ and must have been reached in a reasonable manner. There is no corresponding exemption under the DPA and so decision-makers are even more cautious in what they say on paper about individuals.

21. The DPA applies to private companies as well as public authorities. However, requesters seeking information from a public authority, with which they had had some sort of prior relationship, effectively get two bites at the cherry, since they can seek information under either Act.

**SPECIFIC QUESTIONS RAISED BY COMMITTEE**

22. The committee has invited respondents to address the following three issues (whilst welcoming comments on other issues).

   a) Does the Freedom of Information Act work effectively?
   b) What are the strengths and weaknesses of the Freedom of Information Act?
   c) Is the Freedom of Information Act operating in the way that it was intended to?

23. We will address these issues together, as they seem to us to be closely inter-related e.g. any weakness of the FOIA is likely to be an example of it not working effectively or in the way it was intended to.

24. The overarching objective of the University is ‘the advancement of learning by teaching and research and its dissemination by every means’. Our response must therefore be based on an assessment of whether the FOIA has helped or hindered our ability to fulfil this objective.

25. The University accepts that any organisation in receipt of public funds must be accountable for its expenditure of those funds and that openness and transparency are essential to that process (as well as being desirable ends in their own right). There have been significant advances in these areas, which have occurred independently of the FOIA. For example, the introduction of a student contract has made clear what the student can expect in terms of teaching and support and what the University expects in return for providing that teaching and support. As mentioned above, there has also been a vast
increase in the amount of information that the University publishes on its website. The FOIA has helped to reinforce this trend towards greater openness.

26. The FOIA was intended to improve the quality of decision-making, as well as promote openness and transparency. We do not believe that the FOIA has improved the quality of the University’s decision-making. On the contrary, it has made the decision-making process more complex, for the reasons in paragraph 20 above. The University also has concerns about the impact of the FOIA on research and fund-raising, for the reasons in paragraphs 11 to 19 above, and does not believe that it was the intention of the FOIA to impair the conduct of research or the ability of universities to raise private funds.

February 2012
I write to submit evidence on the Freedom of Information Act to the Justice Select Committee Inquiry.

I do so on behalf of Newsquest Midlands South, particularly the 15 paid-for and free newspapers based at our Worcester and Stourbridge offices. These include the daily Worcester News, the Malvern Gazette, Evesham and Cotswold Journals; Kidderminster Shuttle; Stourbridge News, Bromsgrove and Redditch Advertisers; and the world’s oldest newspaper, the Berrow's Worcester Journal.

FoIs are an important tool for newspapers carrying out their job of holding public bodies to account and it would be damaging to local democracy and accountability if more restrictions were placed on the media’s use of FoIs.

We are opposed to any change that would make it easier to refuse an FoI request on the grounds of cost and time.

We take our responsibilities as local newspapers seriously and do not make spurious requests or overuse the system.

Most of our titles have used FoI over the years, although the most common is the Worcester News.

In the last two years the paper has submitted an FoI request every two months, on average.

Requests have been made to Worcestershire County Council; West Mercia Police; The Crown Prosecution Service; Worcestershire NHS.

The majority were made to the police. Most requests are made after the body has refused to answer a routine Press inquiry.

Examples of information gathered and publicised through the use of FoIs include:

- The cost to taxpayers of legal aid in local courts
- The amount of money from developers that the county council had stored away
- The £3m a year pension bill for retired local police officers who were still working for the force in civilian roles
- The fact that 60 Community Support Officers in south Worcestershire had not issued one fixed penalty notice in an entire year
- The growing cost of translation fees for dealing with immigrant crime in the county
- Drug arrest figures
- The number of threats to health in ‘serious untoward incidents’ in local hospitals
- Details of duplicate expense claims made by a councillor

As can be seen from the above, our FoI requests are on issues of considerable public interest (in the true sense of the phrase) and sparked considerable local debate.
In the case of legal aid, it led to one Worcester solicitor arguing for he and his colleagues to take a 50% pay cut for handling legal aid cases.

In many cases the FoI Act has helped to improve openness from some public bodies but, sadly, there remain others who see the role of the PR department as news management rather than helping the Press carry out their independent role on behalf of local people and communities. This is where the FoI plays an important part.

February 2012
Introduction

1. NAT is the UK's leading charity dedicated to transforming society's response to HIV. We provide fresh thinking, expertise and practical resources. We champion the rights of people living with HIV and campaign for change.

2. We welcome the Justice Select Committee's post-legislative scrutiny of the Freedom of Information Act 2000 (FOIA). This submission addresses the three questions posed by the post-legislative scrutiny providing evidence based on our experiences of requesting information under the FOIA. Overall we have found the FOIA to be a very effective resource, increasing the transparency of public bodies and assisting us in our policy and campaign work to support people living with HIV. We would be happy to provide further information if the Committee should require it.

Does the FOIA work effectively and what are the strengths and weaknesses of the FOIA

3. NAT feels that the FOIA is working effectively, enabling us to access information held by public bodies that would not otherwise be made available.

4. NAT has used FOIA requests to gain information in several recent projects. In December 2011 we used the FOIA when a number of local authorities failed to respond to NAT's survey on local authorities' use of money allocated to them to fund HIV social care. The majority of local authorities responded without the need for a FOIA request. However, some of the local authorities with the largest financial allocations did not respond. Without the FOIA process we would not have been able to find out how the money is being spent in these areas. NAT will now be using this information to develop a national picture of how this funding is being used; where the money is not being spent on HIV social care we will work with people living with HIV in these areas to hold local authorities to account. We have also been able to collect examples of best practice which we will share with other local authorities to encourage improved service provision. We would have struggled to get a high enough response rate to the survey without the FOIA.

5. In another recent project NAT used the FOIA to find out how many people have been affected by the Ministry of Defence's policy of redeploying armed forces personnel diagnosed with HIV. This was very helpful, particularly as we had found it difficult to get information directly from the Ministry of Defence through traditional correspondence. Access to this accurate and up-to-date information helped us shape our policy and campaign response to this current occupational exclusion.

6. Finally NAT is currently seeking information from Police Constabularies about their blood borne virus (BBV) policies and training. Of course it is important that police have appropriate occupational health policies in place to protect themselves from BBVs at work. However, disproportionate and inappropriate policies can stigmatis e people living with HIV and other BBVs and unnecessarily alarm police staff. NAT is reviewing police OHPs and related training to ensure police staff have the information they need to protect themselves at work without wasting police time and resources. Although NAT has found some police bodies to be very supportive and helpful, we have met some resistance to this work from some constabularies. We are now submitting FOIA requests to the police constabularies who have refused to share information. Without the FOIA NAT would have had no means of retrieving this information from the public bodies that are refusing to assist us.
7. When using the FOIA in these projects we have, overall, found the system to operate very effectively. The FOIA clearly defines the relationship between the requester and the public body and sets parameters and expectations for both parties to adhere to, making the process straightforward and accessible. In addition it is very helpful that every local authority has at least one person specifically responsible for dealing with FOIA requests. This publicly available point of contact encourages accessibility in organisations which can often seem impenetrable.

8. However, we have experienced problems with some local authorities not providing the information requested within the 20 day response period and not providing information as to expected timescale beyond this. Whilst we understand that 20 days may not be sufficient time for some information to be collated, there should be a greater onus on public bodies to keep in communication with the requester and advise them on timescales as soon as the likelihood of delays becomes apparent. The FOIA works most effectively when it is used to provide a framework for further communication and dialogue between public body and information requester.

C. **Is the FOIA operating in the way that it was intended?**

9. The FOIA was intended to increase openness, transparency and accountability (two of the four stated objectives of the Act). From NAT’s experience it has done this. It provides a vital mechanism to gain access to information which should be available to the public but which public bodies often do not proactively publish. It is important that we are able, for example, to hold local authorities to account for the decisions they make about the level and nature of the social care support they provide for people living with HIV, particularly if they operate within a high prevalence area. In order to do this in a meaningful way we need to have access to information about how the funding from central Government is being spent and how local authorities are assessing the needs of people living with HIV. The FOIA has given us a process through which we can do this.

10. NAT also believes that when local authorities and other public bodies can be compelled to provide information on the decisions they make they are encouraged to make better decisions (the third aim of the Act). If this power were to be removed or reduced we think it would have a negative impact on decision-making.

11. Finally, we believe that the FOIA has an important role in improving public trust in decision-making and increasing participation by the public in the decision-making process (the fourth aim of the Act). Through the information NAT receives via FOIA requests we can work with people living with HIV and give them the information and tools they need to participate in decision-making at a local and national level.

 January 2012
2nd February, 2012

Rt Hon Sir Alan Beith MP
Chairman
The Justice Select Committee
House of Commons,
Westminster,
SW1A 0AA

Dear Sir Alan,

Submission to the Post-Legislative Scrutiny of the Freedom of Information Act 2000

The Financial Times strongly supports the principles behind the Freedom of Information Act, and believes that, while there is room for improvement, it is well constructed.

The effect of the act
The Leveson Inquiry is tasked with examining to examine how to protect the “independence” of the media “from Government”. By allowing reporters to bypass politicians, the act gives extra independence to journalists.

The act makes it harder for officials to attempt to cut out journalists who would rather not have reported. Constraining requesters will empower press-handlers at the expense of enterprising journalists.

Even when relations with departments are cordial, our reporters find the act a helpful tool with which to establish facts about the operation of policy and departments which press-handlers might be loath to release.

The act is weak for finding out why decisions were taken: the policy process is well-covered by exemptions. But the legislation is a strong tool for finding out hard facts about implementation and their effects on the ground.

Our reporters believe that queries to press officers relating to technical issues get answered more promptly. Officials are keen to get information out promptly because they know disclosure of these items can be forced.

The volume of information released because of the act, therefore, is greater than official statistics or press coverage would suggest.

The act has also empowered the push for “open data”, which improves scrutiny and transparency: it allows journalists to obtain large quantities of machine-readable data with which they can analyse government.
The implementation of the act
Our experience of the act has been concentrated on national government departments more than smaller or regional public authorities. Even there, in our view, the act is still bedding down.

Public authorities are still learning how to implement the act: we routinely submit requests which require careful consideration because they seek forms of data that have never been sought before.

In our experience, junior officials who have never known the civil service before the act are comfortable with it. Complaints - and resistance to the act - come from senior officials, special advisers, press officers and ministers.

Older officials are often less familiar with the act as well. Most of the concern voiced about a "chilling effect" on internal discussions suggest that sections 35 and 36 of the act, which shield policy-making, are not widely understood.

Whitehall would benefit from better training in the Act. We would also support the elevation of the status of FoI officers within the civil service: these advocates for the requester need to be given more internal clout.

Reform of the act
We believe the act has several excellent features which should be retained:

The lack of a motive clause: It would weaken the act if requesters were forced to explain why they want information.

Even if a "motive" test were applied only to seemingly trivial requests, it could be extremely damaging. Important stories in the public interest often turn on micro-details: tracking meetings and phone logs.

It would weaken the effectiveness of the act as a tool for uncovering the truth if journalists were forced to disclose the purpose of their enquiries.

Indifference to the manner by which data is filed, sent or stored: Creating a category of documents (such as "cabinet papers" or "private email accounts") within departments which enjoy absolute exemptions will encourage ministers to retain information under those headings.

Officials have informed our reporters that they circulate memos marked as "restricted" and "policy" documents when they are nothing of the sort in order to enable evasion of the act.

The cost limit system: At present, cost limits only apply to the expense of locating and extracting information, but not redaction or other costs. These expenses must not be rolled within the cost ceilings.

Allowing officials to count such costs towards the limit would encourage them to consider exemptions or redact heavily in order to waste time, and thereby hit the cost limit without releasing any information.

We appreciate that, in some cases, information is easy to find but very expensive to redact, process and release. The rules should not be changed to cope with those rare examples. For most requests, the limits are sensible.
We would be concerned by attempts to change the rules on aggregating requests. The idea that each reporter (or newspaper) should be able to ask for one batch of responses every few months would hobble journalists.

We also believe it would be unenforceable, because individuals would soon use third parties.

**Indifference to the requester:** Journalists and campaigners should be permitted to ask questions in precisely the same manner as anyone else. While this imposes a cost on government, it is necessary - and desirable - that the press should use more than average.

Quite aside from the difficulty of defining a journalist, if parliament wants a free, sceptical and independent press which deals in serious inquiry and investigation, it would be perverse to allow it more restricted access to public information than members of the public.

**Problems**

**Time limits and delay:** We find requests are often late and there is too little focus on combating delay. The 20 day limit on replies would be sufficient, if it were adhered to.

We believe that delays drive the proliferation of requests by journalists, who may make several requests to secure the necessary information, in the hope that one will come back on time.

We would also note that, when replies are on time, they almost always come on the 20th day, even if the request is for data that is readily to hand.

**Misuse of exemptions:** Departments should face stern penalties for deliberate or systematic misuse of exemptions. The act assumes that, so long as the right decision is reached eventually, little else matters. But officials can keep information hidden for more than a year.

**Meagre penalties for retention breaches:** The penalties for failing to retain and release data are small. Failing to keep appropriately full records ought to be an offence under the Act. This ought to be of concern because the institutions have no record of how decisions were taken.

- Officials in several Whitehall departments use instant messaging systems alongside their email systems explicitly because these systems leave no record.
- Officials (particularly ministers and special advisers, but also some civil servants) use private, non-departmental email accounts from which they refuse to disclose the contents.
- One Fol release to the FT revealed that a senior official - an acting director at the Department for Education - destroyed all of his emails at the end of every month.

It is alarming that, even though officials occasionally go to extreme lengths to avoid disclosure, the offence of Fol evasion is so narrowly defined that it has still never been deployed.

**Treatment of journalists:** The central problem for the press in using the Freedom of
Information Act stems from the fact that journalists are treated differently to other requesters:

- Press officers are informed about journalists’ inquiries who monitor them for newsworthy returns. At the very least, this means that our replies come later than others’.
- We also know that they also attract more scrutiny (and delay). Replies are seldom timely and our reporters believe that political appointees push the use of sections 35 and 36.
- In another case, data requested by an FT journalist from the Department of Health was given in advance to a rival, who they believed would be more sympathetic to them. This rival publication published a story on it before we could scrutinise it. The DH has recognised that this was poor practice, but it is indicative of how requests from journalists are not treated like those from other people.
- The problem has never, in our experience, been information rights managers. They, as a class, have a favourable view of the Act and the principle of transparency.

These concerns have a cost: the time- and cost-intensive use of the act by journalists identified by the MoJ memo may be exacerbated by their attempts to disguise what they are doing from officials.

Requests which look like “fishing” may, in truth, be drafted to retrieve specific documents while not showing the real objects of their interest. This tactic is sometimes necessary because reporters have little confidence that data of interest will not simply be destroyed.

An innovation worth consideration would be to make requests genuinely requester-blind. Only the civil servant who fields the request (which, in most cases, will be a communications unit official) should know the requester’s identity.

Yours sincerely

[Signature]

Lionel Barber
Written evidence from Rotherham Primary Care Trust

Executive summary

Public bodies are currently expected to give up to 2.5 days of staff time in answering any one enquiry. This is proving ever more onerous. Such a volume of time is perhaps merited by only a subset of those that make enquiries. That subset should be those for whom the organisation is responsible.

Freedom of Information Act – workload for any one enquiry

1. The Act places obliges public bodies to supply (other than for well-documented exceptions) what information it has. To meet a request, they spend time on locating the information and/or assembling it. Only a request that would entail 2.5 days or more of staff time can be denied on the grounds that it is too onerous.

2. This PCT is not alone amongst NHS bodies in receiving a large number of requests from journalists that appear to have also been sent to most/all PCTs in the country. Just one request can entail a couple of days, but the time limit does not apply.

3. The one request to all PCTs in England could amount to 300 days work - the equivalent of one and a half full-time employees employed for a year. There is a similarly big impact on NHS provider trusts if they also receive the same request.

4. The nature of journalism is moving away from researching, following up leads and interviewing. Now, a journalist can simply speculate there is a story and then have a small army of NHS staff dig out the information that establishes if there is one or not. One ploy is to ask each PCT questions which might expose differences in commissioning practice between PCTs ie is there a postcode lottery? The information carefully assembled by so many often appears to go unused.

5. In a very short space of time - say one afternoon - a journalist could send to all PCTs a number of requests on different topics that then generates hundreds and hundreds of days’ work. In the eyes of many, this discredits the Act.

6. It cannot be right that individuals can blanket-request all PCTs in this way. On the other hand, an individual may have a ‘legitimate’ right for time to be spent in answering their enquiry.
7. The solution perhaps lies in the operation of the 2.5 day limit. I'm proposing that we remove that we restrict its application.

8. NHS Rotherham has responsibilities to all taxpayers in England, but arguably has a greater obligation to residents of Rotherham than those beyond. I propose that the 2.5 day work limit is available only to those who can demonstrate they reside in Rotherham.

9. The means by which this could be done is for the requester to supply a Rotherham postal address. (We are currently obliged to supply information even if all we have is an e-mail address.)

10. The corollary to this proposal is that those not within Rotherham's area should be entitled to a much smaller volume of work on their behalf. Perhaps 3 hours would be sufficient for those who are based outside of the geographical footprint? In this proposal the requester would only have to give their address if they wished the organisation to go beyond the 3 hours.

11. By extension, all PCTs could have the 2.5 days' obligation available only to its resident populations.

12. This idea is a less easily extended to NHS provider trusts as their served areas are typically “fuzzy” at the edges. But it is only a little less easily extended. What are their served areas could be agreed/publicised and then the 2.5 day limit be only for enquiries coming from within that geographical area. (It would not matter that there were overlaps ie NHS providers' areas are not mutually exclusive.)

13. The same principle could be applied to most other public bodies. Those which have a national remit would perhaps have the whole nation defined as its served population. The benefits of the change proposed here might be minimal for them. However, there would be substantial benefits for those public bodies with a smaller geographical footprint - such as PCTs and local authorities.

14. I recognise that a journalist could use the addresses of friends in different towns to receive the information and thus enjoy the benefit of the upper time limit. However, do journalists have that many friends?

15. A worthy exception would be Members of Parliament. Any MP - within or outside of the geographical footprint - does merit 2.5 days in handling their request.

16. It could be argued against this proposal that the excess over 2.5 days is chargeable. Firstly, that argument ignores the impact of a large number of requests taking nearly but not quite 2.5 days – see #3 above. Also, NHS bodies face nationally-set requirements about reducing staff numbers. It is not a question of the money. Whilst charging would cover costs, it would not deliver the staff reductions. It is our policy simply to say no if the request entails more than 2.5 days work for us.
17. In future, a large number of high-demand requests could see staff being assigned away from other duties to handle the responses.

18. I ask that consideration be given to introducing:-

- introducing a two-tier rule on time to be given (free of charge)
- developing the concept of served areas
- identifying the categories of any additional groups beyond simply ‘those served’ and who merit the higher of the two time limits.

February 2012
Written evidence from Republic

About Republic

1. Republic is a membership-based pressure group which lobbies and campaigns for the abolition of the monarchy in the UK. In addition to campaigning for this primary objective we also see our mission as being to hold to account the monarchy and royal household and to represent the views of republicans to a wider audience and to public authorities. We represent some 20-25% of the population and our campaign is supported by over 20,000 republicans from across the political spectrum, including 15 MPs.

2. Republic has long campaigned for the extension and reform of freedom of information law in relation to the royal household, supported by prominent transparency advocates such as Heather Brooke (author of Your Right to Know: A Citizens Guide to Freedom of Information), Roy Greenslade (Professor of Journalism, City University), Mike Harris (Index on Censorship) and Adam Tomkins (John Millar Professor of Public Law, Glasgow University).

Introduction and summary

3. This submission on the Freedom of Information Act 2000 has been prepared in response to the call for evidence from the Justice Committee. We have confined our response to those sections most relevant to our area of expertise.

4. While Republic is an enthusiastic supporter of the Act, we believe that the continued exclusion of the monarchy and the exemption on all communications between the royal household and other public authorities - an exemption recently made absolute for certain communications - are indefensible anomalies which undermine the government's commitment to transparency and prevents the public holding the royal household to account.

5. We invite the Committee to consider the following proposals:

- The royal household should be defined as a public authority within the Act.
- The absolute exemption on communications from the monarch, the heir and second in line to the throne should be reverted to a qualified exemption.
- The qualified exemption (Section 37) for communications from other members of the royal family or royal household should be removed entirely.

6. Republic would welcome the opportunity to support our written submission by giving oral evidence to the Committee. To arrange this, please contact:

Graham Smith
Chief executive officer
Republic

145-157 St John Street, London EC1V 4PY

07747 608 770
graham@republic.org.uk

The monarchy and the Freedom of Information Act

7. The Freedom of Information Act has never applied directly to the monarchy, because - unlike the other houses of parliament - the royal household is not defined as a public authority within the legislation. However, Section 37 of the Act provided a qualified exemption to communications between public authorities and the royal family and those acting on their behalf.

8. While a public interest test did apply, in practice there was always a strong presumption in favour of non-disclosure. Ministry of Justice guidance stated that 'the need to maintain the neutrality of the Sovereign, the need not to undermine diplomatic and goodwill work and the need to preserve personal safety' meant that 'it is likely to be in exceptional circumstances only that the public interest
will come down in favour of disclosure'.

9. The Constitutional Reform and Governance Act 2010 went further, removing the public interest test entirely on requests for communications from the monarch, the heir and the second in line to the throne. Such information can only be released 20 years after it was created, or five years after the death of the member of the royal family concerned – whichever is later. This puts correspondence between, for example, Prince William and the Department for Culture, Media and Sport about the Olympics in the same category as information about terrorist cells from state security bodies such as MI5, MI6 and GCHQ.

10. The exclusion of the monarchy is a serious anomaly that makes little constitutional sense. The FOIA essentially claims that at the pinnacle of the British constitution there is no public authority, only a private household. The monarchy is clearly a public authority in two respects: it is publicly funded and it is there to provide a public service through providing the nation with a head of state and all the functions that entails.

11. One effect of the monarchy's exclusion is that the public is prevented from scrutinising the monarchy, for example by accessing detailed information on how the royal household spends (or lobbies for) public funds. For an institution that directly receives around £40m of public money a year – and is likely to cost the taxpayer in the region of £200m annually - this is inexcusable, and directly contrary to the government's goal of financial transparency.

12. More significantly, the exemption that covers all communication between the royal household and the government conceals the extent to which members of the royal family may attempt to influence government policy. This has taken on a heightened importance in recent years as the Prince of Wales makes increasingly vocal interventions into contentious political debates. Indeed, it has been suggested by some – including the Campaign for Freedom of Information - that the absolute exemption was introduced precisely to conceal the political role he is taking.

Neutrality of the Sovereign

13. The maintenance of the monarch's supposed neutrality has been central to the argument for the royal household's exemptions from the Act. The Ministry of Justice has stated that the absolute exemptions are necessary to 'ensure the constitutional position and political impartiality of the monarchy is not undermined'

14. Clearly the political impartiality of the head of state is fundamental to the British constitution, but the argument confuses the appearance of neutrality with its practice. The exemptions are clearly intended to protect the former. But political neutrality needs to be evidenced, not simply professed. If a holder of public office is required to be impartial, then they must demonstrate that impartiality by being transparent and open about their actions.

15. The argument is even weaker when applied specifically to the Prince of Wales. Giving evidence in support of The Guardian's appeal over the government's refusal to release some of the Prince's correspondence (in response to a request submitted before the absolute exemption was introduced), constitutional lawyer Professor Adam Tomkins explained that:

16. 'The purpose of the confidentiality is not to create an appearance of political neutrality; rather it is to preserve the reality of political neutrality. You cannot preserve the reality of something that does not exist [...] If that political neutrality has already been surrendered, as is clearly (if regrettably) the case with regard to the Prince of Wales, the 'good constitutional reason' for the rule disappears.'

17. Put simply, if our constitutional arrangements are threatened by greater transparency then that is an

---

1 'Freedom of Information Guidance – Section 3', Ministry of Justice, 2006
2 'Maurice Frankel: An important blow has been struck for freedom of information', The Independent, March 2 2010
3 Ministry of Justice statement, June 10 2009
4 'Prince Charles's 'crusading' forfeits right to confidentiality, says expert', The Guardian, September 15 2010
argument for new arrangements – not more secrecy.

18. The issue of proper scrutiny is made all the more urgent when we consider the requirement on parliament to seek consent from the monarch or the heir for any legislation that affects their private interests. In response to an article in the Guardian in late 2011 the government and Clarence House confirmed the right still exists but refused to say on what occasions, if any, consent had been sought or refused, or if consent was granted on certain conditions\(^5\). Clearly there is a powerful public interest in knowing whether legislation is being directly influenced by either our head of state or her eldest son on the grounds of private interest, yet the Act currently forbids any public access to relevant material.

19. While there may be a case for a qualified exemption for communications between the head of state and heir and other public bodies it is hard to make the same case for all members of the royal household. The exemption is far too broad and includes many issues where constitutional concerns have no relevance, such as communications between junior royals and publicly funded bodies such as Historic Royal Palaces.

**Conclusion**

20. The government has pledged to ‘extend transparency to every area of public life’ and ‘throw open the doors of public bodies, to enable the public to hold politicians and public bodies to account’\(^6\). We can think of no better way of demonstrating the government’s commitment to its transparency agenda than bringing the monarchy and royal household fully into the scope of the Act. Doing so would make clear that no public official, elected or otherwise, is beyond the scrutiny of the British people, and that British citizens have a right to know in whose interests and for what reasons government decisions are being made.

February 2012

---

5 'Prince Charles has been offered a veto over 12 government bills since 2005', The Guardian, October 30 2011
6 *The coalition: our programme for government*, Cabinet Office, 2010
Written evidence from the Herald & Times Group

The Herald & Times Group is one of Scotland’s leading media companies and publishes The Herald in Glasgow, the Sunday Herald and the Evening Times. The company also owns the s1 internet advertising company, magazines and a print plant.

It is part of Newsquest Media Group which is a subsidiary of Gannett Inc. of the US.

Titles in the Herald & Times Group make Freedom of Information requests regularly though usually under the Freedom of Information (Scotland) Act 2002 relating to matters devolved to Scotland.

Examples of stories with major repercussions unearthed using FoI by the Sunday Herald are an illegal donation made to Scottish politician Wendy Alexander’s campaign to become Scottish Labour Party leader which led to her resignation, and questions over Labour MP Jim Devine’s expenses. He was later jailed.

We regard FoI as an extremely important piece of legislation which we use selectively to research matters which we feel are in the public interest.

We believe it could be improved by extending it to cover arms-length organisations and other publicly-funded bodies which at present do not come under the terms of the act. Basically, any freedom of information legislation should apply to organisations which rely on public funds, in the interests of transparency.

We have reservations about the clause of commercial confidentiality which can mask important spending decisions which should be exposed to public scrutiny.

We suggest the onus should be on public bodies to prove that commercial confidentiality is a real issue.

A frequent complaint public bodies put up about the FoI legislation is its cost and the fact that media organisations can use it as a fishing expedition.

We make FoI requests on a highly-targeted basis where we believe matters of genuine public interest are at stake. We believe that the benefits to public accountability and transparency outweigh any burden that public bodies may feel in meeting requests, many of which come from non-media members of the public,

February 2012.
Written evidence from Northumbria University

- Does the Freedom of Information Act work effectively?
- What are the strengths and weaknesses of the Freedom of Information Act?
- Is the Freedom of Information Act operating in the way that it was intended to?

Executive Summary

I have serious reservations as to the effectiveness of the Freedom of Information Act as a means of accessing information held within the Higher Education sector. Many of the requests made and the information sought (and the underlying motivations of the requesters) often do not appear to fall within the original spirit and intent behind the introduction of the Act.

I also question the continued applicability of the Act to a sector which has changed radically since the Act came into force in 2005, particularly in light of the new student funding reforms due to take effect in September 2012.

1. It is considered by many that from September 2012, when the radical change in home student funding takes effect, universities’ gradual move from the public to the private sector will finally be completed. The Freedom of Information Act was introduced in order to make public sector bodies more open, transparent, and accountable to the taxpayer who funds them. From September 2012 the direct public funding for universities from the public purse is slashed to a minimal level. Accordingly the question of whether or not universities should continue to be covered by the Act needs to be urgently addressed. There are very strong arguments why universities should be removed from the coverage of the Act (in a similar way to the coverage of the EU public procurement rules).

2. If it is decided that the Act should continue to apply to universities, the increasingly competitive environment in which universities now operate must be recognised and take account of in the application of the Act, and particularly its exemptions. Intense competition is not something with which most public sector bodies (eg central government departments and local authorities) have to contend. Some clarity on where that leaves the HE sector in terms of using “Commercial Interests” as an exemption to prevent the disclosure of core University assets, such as course materials, would assist greatly in ensuring future compliance.

3. The Freedom of Information Act was passed with the intention of making public authorities more transparent, accountable and effective by allowing members of the public access to information. In practice the majority does not submit requests for information that could be seen to challenge the accountability or effectiveness of the University, but rather they request information to fulfill personal or professional curiosity.

4. An Act designed to provide the public with a right to access information is in practice rarely used by the vast majority of the public. For many the Freedom
of Information Act is associated purely with controversial and/or newsworthy information published by the media. While the Act has allowed journalists to expose a number of high profile cases of misuse of public funds within government and local authorities, experience within the education sector has shown it to result in sensationalist headlines and misleading articles from cherry picked segments of the disclosed information.

5. The actual costs of responding to requests can often be greater than those costs covered under the FOI fees regulations, but the current regulations and guidance offered by the Information Commissioner’s Office do not take into account “real world” requests. Redaction of information can often take up the bulk of the workload. A common FOI request of late is one asking for copies of bank and credit card statements. Locating the statements can take only a couple of hours, but the statements themselves may contain account numbers, card numbers and in some cases home addresses of the card holders. When you are dealing with 600+ individual statements, all of which need to be checked and redacted, this can often take a lot longer than the actual searching for the documents but the guidance for the fees regulations direct that this may not be taken into account when calculating fees.

6. Whilst a good idea in theory, in practice the publication schemes have become relatively redundant in organisations that already publish everything listed within the scheme to their websites. A website which utilises a decent search facility should be able to find the information on the site quicker than an individual can navigate through a publication scheme containing titles that are only descriptive to the people who compiled the scheme. In some cases the publication scheme can be a hindrance to people searching websites as the publication scheme page will show higher in the search results than the actual page containing the information the page it links to. This means people are taken to the publication scheme page and instructed to click on a link, which wastes their time. In most organisations the publication scheme is a flat set of webpages with manually entered links. This means that a lot of time is spent chasing updates to redundant links.

7. The publication scheme has an advantage over webpages where the information is not already published on the site by virtue of it informing the applicant how they can access it (e.g. by asking for hard copy) and how much it will cost. However, since 2005 the University has only been asked once for a non-published item and there was no charge. Perhaps publication schemes are better suited to councils and government departments who do not already publish much of their content?

February 2012
Written evidence from the 1994 Group

Post-Legislative Assessment of the Freedom of Information Act 2000

The following is the 1994 Group’s response to the Justice Select Committee’s Post Legislative Assessment of the Freedom of Information Act 2000. For more detailed information please refer to the individual responses of our member institutions.

Members of the 1994 Group are: University of Bath, Birkbeck University of London, Durham University, University of East Anglia, University of Essex, University of Exeter, Goldsmiths University of London, Institute of Education University of London, Royal Holloway University of London, Lancaster University, University of Leicester, Loughborough University, Queen Mary University of London, University of Reading, University of St Andrews, School of Oriental and African Studies, University of Surrey, University of Sussex and University of York.

Introduction

We welcome this timely review of the Freedom of Information Act. Freedom of information and open access to the outputs of research is an important principle which the higher education (HE) sector embraces. The sector is proactive in this respect:

- Online publication repositories have been established by institutions to make the publications of academic staff publically available free of charge;
- Institutions pursue publication in open access journals wherever resourcing is possible. Open access journals make articles freely available globally in line with the ‘gold’ principle;
- Publications stemming from research projects funded by the research councils and many other key funders are required to be made freely available within electronic archives, for example the research council Research Outcomes System;
- Researchers commit to making the outputs of publically funded research projects available through publication schedules. Publication schedules are an important consideration in the award of Research Council funding;
- Institutions make data about their activities publically available in a variety of ways; publication of information on websites including annual accounts and providing detailed information on staff, students, income and expenditure to the Higher Education Statistics Agency. Detailed information is also made available for prospective students, including through the new Key Information Sets; and
- Institutions respond to growing numbers of requests for information under the Freedom of Information Act. The JISC InfoNet Annual Survey shows that the number of information requests received by institutions has grown by over 250% from 2005 to 2010.1

Institutions are committed to making information about their activities publically available. However, information provision must be balanced with the obligation universities have to the rigour and quality of their publically funded teaching and research and to maximising the benefit and outputs of such activities to the UK economy. The Freedom of Information Act in its present form does not adequately protect this balance.

---

1 The Information Legislation and Management Survey conducted in association with UniversitiesUK and GuildHE, available at: [http://www.jiscinfonet.ac.uk/foi-survey/index_html](http://www.jiscinfonet.ac.uk/foi-survey/index_html)
Research information

UK research, some of which is supported through public money, is acknowledged to be of world leading quality and the UK is recognised as one of most productive countries in the world in terms of research outputs.\(^2\) It is a necessary first principle that research is conducted to the highest standards. It is this principle, embodied by the peer review system, which has contributed to the UK’s international excellence in research. Requirements for research data and information to be made publically available must be in harmony with this principle, and cannot be allowed to jeopardise the viability of the research conducted in the UK.

The present Freedom of Information Act (FOIA) and the current Protection of Freedoms Bill progressing through Parliament presents some serious risks to this balance. The current FOIA does not do enough to protect research which has not reached its conclusion and the Protection of Freedoms Bill currently proposes that this lack of protection should be extended to cover research datasets. Whilst we endorse the public availability of research outputs there a number of serious risks presented by the current form of the FOIA and the proposals.

Research data should not be made publically accessible before rigorous analysis has been concluded by the researchers or until the analysis has reached the stage set out in the publication schedule. It is inappropriate to share data where analysis is partially completed or not verified. To do so would often be misleading, and would place at risk the ability of the UK-based researchers to publish their conclusions before competitors do. This is especially the case with longitudinal datasets which need a lengthy period of data collection before results will be meaningful.

Commercial interests are intrinsically linked to research which generates intellectual property and commercial possibilities. In a competitive environment commercial funders of research need to be assured that research data is confidential and secure until a project has reached fruition. The FOIA makes some exemptions for disclosure due to commercial interests, however this is conditional and must demonstrate that commercial prejudice would outweigh the public interest in disclosure. This complex clause may not in future provide funders with the necessary confidence in the UK as a desirable place to fund research. Funders from business and industry are easily able to take their research needs to international competitors should they have any concerns about the security of research data in the UK. This would be to the detriment of the UK’s knowledge economy and to the higher education sector.

Data confidentiality is not simply important for commercial reasons. It is vital that participants in research studies can be assured of their anonymity. If such a guarantee is not possible participants will be dissuaded from sharing information and it will not be possible to conduct sensitive and important research across all disciplines including medicine and the social sciences. Redacting data to anonymise data is a complex, time consuming process with high associated costs which are not provided for under the FOIA.

---

\(^2\) BIS (2011) InternationalComparative Performance of the UK Research Base

1994 Group (2011) Mapping Research Excellence: Exploring the links between research excellence and research funding policy
The data generated from research can involve many terabytes of information of great complexity and variety in format. Making research data publically available in an accessible form is highly resource intensive. Supplementary data i.e. additional datasets and meta data which provide data descriptions, are needed to underpin the data increases the burden of demands made for research information. Data may be need to be interpreted using specialist software or stored in specialist datacentres and the costs of translating this to publically accessible sources is huge. The present FOIA makes provision for requests to be refused if the costs would be over £450. However, the burden of proof and the associated resources falls upon higher education institutions. The Protection of Freedoms Bill proposes that datasets under FOIA should 'as far as is reasonably practicable, provide the information to the applicant in an electronic form which is capable of re-use'. This clause is not sufficiently defined and may lead to exorbitant costs being needed to make the information available.

The FOIA conflicts with other important legislature. The Animals (Scientific Procedures) Act prohibits the disclosure of the identity of individuals holding Home Office project licences. It is a condition of the Home Office licence that this is adhered to and is a matter of personal safety. However, the University of Newcastle has been forced to disclose details of licences relating to projects where animals are used for experimentation by the Information Commissioner following a tribunal. The University is now in breach of its Home Office licence. This is a situation where the personal safety of researchers has potentially been placed in jeopardy and where the FOIA is in direct conflict with another piece of legislature. It is not acceptable for the safety of individuals performing approved and licensed research to be threatened. This also undermines the viability of important research work in the UK. As these conflicts indicate, the FOIA threatens the feasibility of the UK’s research in a number of different ways. We therefore strongly support Universities UK in their call for an independent review of the effects of the FOIA on higher education institutions.

**Higher education institutions as public bodies**

Higher education institutions have traditionally been included within the FOIA. However, the higher education sector is fundamentally different in some respects when compared with public services. Higher education institutions operate in direct competition with each other for research funding and for students. Other public bodies, such as local authorities, do not operate in a market to such an extent. Furthermore, the higher education sector is undergoing a significant period of change to become even more competitive. The Government’s clear intention, as laid out in the Higher Education White Paper, is for private providers to enter the higher education sector and for competition to be increased. It is essential that there is a level playing field for all HE providers. We cannot have a situation where new private HE providers are exempt from FOIA requests whereas current HEIs are not. In future, students will be entitled to the publically supported student loan scheme regardless of whether they attend a private or current HEI. In a more competitive and market driven system it is entirely inappropriate, and against commercial interests, to subject one group of higher education providers to FOIA obligations for potentially commercially sensitive information.

Higher education institutions are funded through a diversity of sources, not simply through public funds. It has been commented in the Times Higher Education (THE) that as of 2012-13 the state will be contributing only 40 per cent of the sector’s costs as opposed to 60 per cent previously. The THE also highlights this will be below the 50 per cent European Union threshold for defining a public body.³ Universities UK modelling also shows that in 2014/15 public funds will contribute only 22% to overall teaching income in comparison to 66% in

2010/11. Given this, it may be more appropriate in future for some areas of higher education activity such as teaching to be exempted from FOIA legislation. We note this arrangement is currently in existence at the BBC and UCAS to protect some of the commercially sensitive activities of these organisations.

Universities are committed to making available appropriate information on teaching and learning resources. This will not change in the new funding environment. However, it will be important to protect the commercially sensitive information of higher education institutions in a sector which has been purposefully designed to be more competitive. Many of the anomalies and hazards outlined above arise from the blanket and increasingly arbitrary designation of universities as public bodies, rather than linking a public function, or an HE activity funded by the taxpayer delivered by any provider, under the act.

Conclusion

Higher education institutions are committed to making information about their publically funded activities freely available. However this must be balanced with the needs of universities to respond to a competitive market place in both teaching and research. Compliance with the FOIA in its current form places at risk the excellence of the UK’s research activity by forcing the release of data before project completion, deterring funders or placing researchers at risk. Since the implementation of the Freedom of Information Act the higher education sector has gone through a substantial period of change. A full and independent review is therefore needed to ensure that the FOIA and any forthcoming legislation from the Protection of Freedoms Bill is fit for purpose in the new funding environment. We strongly support Universities UK in calling for such a review. It is imperative that access to information enhances the quality, reputation and applicability of UK higher education rather than placing it at risk.

February 2012

---

Post-Legislative Scrutiny of the Freedom of Information Act 2000

1. Summary

1.1. The University of Surrey has seen a rise in requests for information received since the legislation was implemented. In 2005 we received 42 requests. This total has risen gradually since then and in 2011 we received 143 requests. In addition to this increase in volume, the University has also seen a rise in complexity of requests with a corresponding increase in workload and resources required to respond.

1.2. We have found that even when retrieval of information is achieved quickly, it can take considerable time to read, consider and redact information prior to its release. The University would welcome consideration given to widening the appropriate limit as defined in section 12 of the FOIA to include these activities within the limit.

1.3. Although the University finds the majority of exemptions within the Act to be effective in protecting information which is not suitable for release, there are some exemptions which we find harder to apply. The University would welcome changes to the exemption at section 36(2)(b) and 36(2)(c) to make it easier to apply.

1.4. We have found that the FOIA does not always recognise the unique position with regards to commercial interests. Universities compete with one another in a global market in a way that is not shared by other public authorities. The exemption at section 43 is of vital importance to the University of Surrey but the guidance surrounding this is sometimes hard to interpret within the Higher Education context.

1.5. The University of Surrey has also found it difficult to apply section 14(1) to potentially vexatious requests. In our experience it has been easier to respond to the potentially vexatious requests than to use the exemption. We would welcome a widening of this section to allow more requests to be defined as vexatious where repeated requests from one individual have caused an impact regardless of whether the subject of the requests is substantially different.

1.6. As part of our commitment to openness and transparency, the University of Surrey makes a great deal of information proactively available through our website. We have not found the publication scheme to be an effective method of disseminating information. All information within the publication scheme is available on our website and it is questionable as to whether the publication scheme is worth the resources required to maintain it.

1.7. An increasing number of requests for information are received from commercial organisations or Journalists. These requests are not considered sympathetically within the University and it seems against the spirit of the Act for individuals to gain financially from information they receive through Freedom of Information. The University would welcome consideration to measures aimed at preventing individuals from profiting from Freedom of Information requests.

1.8. The University has great concerns over the FOIA and the pre-emptive release of research data. There is a need for research data to remain undisclosed until the appropriate time, to ensure effective quality control through peer review, to ensure intellectual property rights are not breached, to ensure proper management of research data, and to ensure the effective commercialisation of research to the greater public good. All these aspects of research are put at risk by exposure of research data before the appropriate time. There is an increasing drive by research councils to ensure
sharing of research data at the end of research projects. It would therefore seem appropriate to widen the exemption at section 22 to include the assumption that all research data is considered to be intended for future publication and is therefore exempt from release until the completion of the research project.

2 Background: The University of Surrey

2.1 The University of Surrey offers over 50 subjects at undergraduate level as well as maintaining a world-class research profile. We currently have 14,441 students and over 2,300 members of staff. Our worldwide partnerships include Massachusetts Institute of Technology, California Institute of Technology, the University of California, Los Angeles and North Carolina State University. In only the second collaboration of its kind to be approved by the Chinese government, the Surrey International Institute offers joint undergraduate degrees with Dongbei University of Finance and Economics in China, giving UK students the opportunity to study at the Dongbei campus and vice-versa.

2.2 The University of Surrey ensures compliance with Freedom of Information legislation through its Information Compliance Unit. This Unit has responsibility for Freedom of Information and Data Protection compliance as well as ensuring the University manages its records effectively in line with the Records Management Strategy passed by our Executive Board in 2009. The Unit also ensures the University’s ongoing corporate memory is maintained through the University Archive.

2.3 The University has seen a rise in Freedom of Information requests since the legislation was implemented. In 2005 a total of 42 requests were received. By the end of 2011 the total was 143.

3 Does the Freedom of Information Act work effectively?

3.1 In the University of Surrey’s experience, the legislation has worked effectively for the most part. The Act’s aims of ensuring openness and transparency have been upheld. Out of 143 requests received in 2011, 93 resulted in the information being provided. The University did not hold the information requested for 25 requests out of the remaining 50. The increase in number of requests received to the Institution and the high number of cases in which the University released information shows that the FOIA is being used effectively as a way of gaining access to information.

3.2 The University has seen a large increase in requests over the past few years. In 2005 a total of 42 requests were received. This increased gradually to a total of 56 requests in 2008 and 95 in 2009. By the end of 2011 we received a total of 143 requests. Alongside the increase in numbers we have also seen an increase in complexity of requests. Many requests now require input from a number of different Faculties and Departments, with a corresponding increase in workload per request. Increasingly complex requests mean that in several cases the time taken to respond has increased, with 30 requests taking 19-20 working days to complete in 2011 (20%) compared to 10 in 2008 (17%).

3.3 Increasingly, the University is finding that even when retrieval of information is achieved quickly, it can take considerable time to read, consider and redact information prior to its release. This time is not currently included in the appropriate limit as defined by section 12 of FOIA and yet it is often the most onerous part of processing a freedom of information request. Requests such as those for senior staff expenses or credit card statements in particular take a large amount of time to consider and redact and there has been an increase in these types of requests over the past two years. If the time required to consider and redact the response could be included in the assessment of the appropriate limit, it would be of great assistance in the management of requests such as these.
3.4 The exemption at section 36 (particularly at 36(2)(b) relating to information the disclosure of which would be likely to prejudice the free and frank exchange of views for the purpose of deliberation and at 36(2)(c) relating to the disclosure of information that would otherwise prejudice the effective conduct of public affairs) is one that the University finds difficult to apply. In the case of Higher Education Institutions, the “qualified person” is the Vice-Chancellor. It is difficult to meet the requirement to gain the opinion of the “qualified person” that disclosure of the requested information would prejudice the public interest. If the list of “qualified people” could be widened out to include other senior individuals of significant authority (for example, Deputy Vice-Chancellors) in the Institution, it would help in practical terms.

3.5 The University of Surrey has generally found the remaining exemptions to be effective in protecting information which is not suitable for release. Most frequently applied exemptions are section 40 (2) to protect personal data and section 43 to protect the University’s commercial interests. However, Universities do operate in a unique position with regards to their commercial interests which is not always recognised in the FOIA. Universities compete with one another on a global market within the Higher Education sector in a way that is not shared by other public authorities. This affects the release of a wide range of information, from admission statistics to research and teaching information. More care has to be taken in the early stages of discussions with potential sponsors than before the implementation of FOIA to ensure all the implications of the Act have been raised.

3.6 There have been several occasions where the University of Surrey has considered the use of section 14(1) to deal with potentially vexatious requests. However, the University has not yet used this exemption and has found it difficult to apply. We have had several individuals who have submitted multiple requests of similar type within a very small timeframe. This causes an enormous strain on the Unit which deals with FoI requests and on the department that holds the information. However, as these requests have all been different and not designed to be disruptive it would be difficult to refuse them on vexatious grounds. In our experience it has been easier to respond to the potentially vexatious requests than to use the exemption with the associated risk and cost of internal review. The University would welcome a widening of the exemption at section 14(1) to provide more discretion to public authorities to decide when a request is vexatious. We would welcome the ability to define a request as vexatious when a series of requests within a period of time from one individual, although different in subject, have had a large impact on University time and resources.

4 What are the strengths and weaknesses of the Freedom of Information Act?

4.1 The FOIA provides a structure and a process for the University to provide information. The University is committed to openness and transparency and does make a wide amount of information proactively available. However, the existence of the FOIA has been helpful in identifying areas for this proactive provision of information. It is also a great strength to have an established process for identifying and providing other information that the University does not currently routinely make available.

4.2 The FOIA sees the requirement under sections 19 and 20 to adopt and maintain a publication scheme as being the best way to ensure public authorities continue to make information proactively available. In our experience, the publication scheme has not been a large factor in our decision to make information available and the publication scheme itself is not the most useful way to disseminate information. The University provides a great deal of information across its WebPages and in the documents it routinely publishes. This information is easily navigable to and accessible without reference to the University’s publication scheme. It may be the case that members of the public refer to the publication scheme and locate the information they need without contacting the University directly, but the University does not have any examples of individuals directly referencing the publication scheme when contacting the University.
for information. All the information within the publication scheme is available elsewhere on our website and it is questionable as to whether the publication scheme is worth the resources required to maintain it.

5 Is the Freedom of Information Act operating in the way that it was intended to?

5.1 One of the great strengths of the FOIA is that by making it possible to get a response to any question asked of a public authority, the authority becomes generally more accountable. However, the increasing number of requests for information from commercial companies and Journalists is not in the spirit of the Act. In 2011 the University of Surrey received 14 requests from individuals identifying themselves from commercial organisations who requested information for potential commercial use. These requests are not considered sympathetically within the University; especially as in some cases the information compiled from these requests is then sold back to the University. There is also concern that the information provided in response to these requests will result in an increase in cold calling and spam email directed at individuals. The University does not have any concrete evidence of this and so finds it difficult to apply any exemptions to these requests. We would welcome amendments to the Act to ensure that individuals are unable to profit from information gained via the FOIA unless they first guarantee the free publication of the information.

5.2 The University also received 24 requests from individuals identifying themselves as Journalists. Although some of these requests clearly operate in the public interest; others appear to be fishing for information from which to generate a news story. Many of these requests are written in a confusing and unclear manner and require resource-consuming clarification correspondence before the information can be sourced from departments. Requests of these types can generate a feeling of reluctance to provide the information as people feel they are conducting another person’s research for them.

5.3 The University also has concerns around the FOIA and release of research data. The University has only received 2 requests since 2005 directly requesting research data. These two requests highlighted many areas of concern and there is a great deal of anxiety surrounding this topic within the University. The first area of concern is that, unlike within administrative departments of the University, research data does not lend itself to effective records management. Researchers arrange and describe their data in a variety of ways. The data itself is often only accessible via bespoke systems, which are an innate part of the research project. This makes the location and provision of research data a much harder prospect which can involve a great deal of resources to achieve. Within the research community there is often enthusiasm for the sharing of research data. There is also corresponding anxiety at premature release of research data through a Freedom of Information request which would cause detriment to individual research projects and to the greater public good. Although there are exemptions that can be used to withhold research data, there is a feeling that these do not go far enough to ensure data is not released prematurely. Section 22 can apply to the small amount of research data which will be published as part of a peer reviewed journal article. However, it can be hard to identify at an early stage which data will be shared in this way, making section 22 difficult to apply in practice. There will also be a great deal of data that is not due to be published and will therefore not fall under section 22. Some research data may be clearly commercially confidential with formal patents in place or pending. However, section 43 may be difficult to apply in cases where a formal intellectual property process is not yet in place. Fear of premature release of data along these lines can make discussions with sponsors of research projects much more complex. There is a feeling that the general culture of research is becoming much more open with an increasing drive from funding councils to share research data appropriately at the end of a research project. In light of this drive for appropriate sharing, the risk of premature release of data seems all the more worrying to researchers. There is a clear need to protect research data from premature release, for example to follow established peer review processes to ensure quality control, even
where it does not fit exemptions at sections 22 and 43. The FOIA as it currently stands
does not protect this data, unlike the Scottish Freedom of Information Act. An
extension to section 22 which states that all research data should be considered as
being for future publication would help to resolve this issue.

*February 2012*
Written evidence from King’s College London

Post-legislative scrutiny of the Freedom of Information Act 2000: submission by

Executive summary

The College supports the principles of transparency and accountability underlying the Freedom of Information Act. However, based on our experience of its operation since 2005, we wish to draw the Committee’s attention to our concerns about the cost of compliance in relation to our core activities of education and research. The differences between the environment universities operate in, combined with their categorically different character to that of other ‘public authorities’ (as defined in the Act), should be taken into account in the application of the Act.

1. The College understands that Universities UK (UUK) intends to submit evidence to the Justice Select Committee in connection with the Committee’s scrutiny of the operation of the Freedom of Information Act 2000 (FOIA). Consequently, we have confined our brief submission to data and reflections which reflect the College’s experience in applying this legislation since 2005. Our responses are relevant to the Committee’s question “what are the strengths and weaknesses of the Freedom of Information Act?” and whether the legislation is operating as intended to provide a right to information without a disproportionate impact on the activities and resources of public bodies.

2. With more than 23,000 students and nearly 6,000 staff, King’s College London is one of the largest universities in the UK and is the sixth-largest recipient of HEFCE quality-related research funding.

3. Reflecting our prominence and the areas in which we operate (e.g. research involving animals, drug testing), the College receives a high volume of FOIA requests and has experienced dramatic year-on-year growth since 2005 (see figure 1).

Figure 1: total FOIA requests to King’s, 2005-2011

<table>
<thead>
<tr>
<th>Year</th>
<th>Requests</th>
</tr>
</thead>
<tbody>
<tr>
<td>2005</td>
<td>32</td>
</tr>
<tr>
<td>2006</td>
<td>41</td>
</tr>
<tr>
<td>2007</td>
<td>53</td>
</tr>
<tr>
<td>2008</td>
<td>87</td>
</tr>
<tr>
<td>2009</td>
<td>120</td>
</tr>
<tr>
<td>2010</td>
<td>154</td>
</tr>
<tr>
<td>2011</td>
<td>172</td>
</tr>
</tbody>
</table>
The average annual rate of increase over the six year period has been 34%, although that has slowed in the last two years. The College has also experienced significant year on year growth over the same period in subject access requests under the Data Protection Act (see figure 2).

**Figure 2:** total Data Protection subject access requests, 2005-2011.

![Data Protection Subject Access Requests](image)

The volume of FOIA requests received by King’s on a monthly basis in 2010 was significantly higher than the average for the HE sector as reported in the results of the annual information governance survey by the Joint Information Systems Committee (JISC) (see figure 3).¹

**Figure 3:** average FOIA requests per month in 2010 (King’s and HE sector average).

![Number of FOI Requests Per Month 2010](image)

4. The College takes its obligations under the FOIA legislation seriously. The overwhelming majority (89%) of requests received a response within the statutory 20 working day deadline in 2011. Complaints relating to our responses to requests are few: in 2011, we experienced 8 requests for an internal review (representing 5% of FOIA responses), and one complaint to the Information Commissioner’s Officer (ICO) which was resolved informally. Since 2005, the College has been the subject of four published decision notices by the ICO, three of which upheld the College’s position that the information requested was either not held or was legitimately exempt from release. The College publishes selected responses to FOIA requests through an online disclosure log.

5. The College supports the general principle of transparency underlying the FOIA legislation, which supports accountability by public bodies in the delivery of their functions. We agree that the FOIA has brought some benefits to society at large: for example, it has encouraged public authorities to proactively publish information (although we believe that the mission of universities means that the HE sector has a good track record in this respect), and a focus on good information management which also supports compliance with Data Protection legislation.

6. However, the benefits of FOIA also have to be balanced against the cost of compliance and its impact on resources that might otherwise be used towards the College’s core charitable, public benefit objects, “to advance education and promote research for the public benefit”. This is particularly true in an environment where direct public funding for higher education is decreasing. Universities have always been autonomous institutions expected to compete internationally for funding, staff and students, making the sector very different from many of the other areas to which FOIA applies.

7. We have so far not attempted to quantify the cost of FOIA compliance, although we are participating in an ongoing study by the JISC which aims to do so based on a sample of requests. The annual staffing costs (including management time) of the team responsible for overseeing compliance with FOIA and Data Protection legislation are around £114k. Outside this team, requests impact on the time and resources of the departments, and relevant academic and professional managers, who are called upon to provide the requested information, e.g. through determining whether information is held, locating it and extracting it. While individual requests require varying degrees of input, our experience suggests that the impact on the time of very senior staff in reviewing and signing off responses can be significant.

8. The provisions in section 12 of the FOIA and its secondary legislation relating to the ‘appropriate limit’ (set at £450 or 18 hours of staff time for universities) are intended to prevent an individual request from imposing a disproportionate burden on a public authority. However, the interpretation of these provisions by the ICO and the First Tier Tribunal (Information Rights) has excluded certain tasks - notably redaction, which can be very time consuming. FOIA s.12 was the second most widely applied exemption used by King’s in 2011 (after s.21, information accessible by other means) (see figure 4), indicating the frequency with which the estimated staff time required to comply with a request can be an issue. Given the rising volume of requests, the ‘appropriate limit’ is an imperfect mechanism to prevent the cost of compliance from impacting on core activities. We would suggest that redaction should be included among the tasks which public authorities are legitimately allowed to include in their estimates for the purposes of s.12. A small charge per request along the lines of the £10 statutory fee for Data Protection subject access requests, or the €15 fee charged in most cases for FOI requests in the Republic of Ireland, would discourage frivolous requests and allow some costs to be recovered.

---

2 King’s College London Charter and Statutes at http://www.kcl.ac.uk/college/policyzone/index.php?id=202
9. Although the College uses the exemptions in the FOIA sparingly, we would also like to briefly highlight some issues which we have experienced around their application. The Committee will no doubt receive similar views from other public authorities.

9.1 The interface between the Data Protection Act and the ‘personal data’ exemptions in section 40 of the FOIA is particularly complex. While a considerable body of case law in the form of ICO and Information Tribunal decisions has grown up around s.40, the balance between the rights of the College’s individual staff and students and the rights of requesters makes this a difficult area.

9.2 The commercial interests exemption in s.43, which involves a prejudice test and a public interest test, is particularly relevant to universities which, as we have indicated, operate in a competitive environment. The College has been as likely to apply this exemption to protect its own commercial interests as to protect the interests of third parties such as suppliers. Although we accept that there is a public interest in transparency in the spending of public money, universities receive a significant proportion of their income from non-public sources and are expected to operate in a businesslike way. The ICO and the Information Tribunal have tended to set a high threshold for the use of this exemption which we believe limits its usefulness in protecting legitimate commercial interests.

9.3 Individuals who seek to use FOIA to pursue a personal campaign on issues that are being or have been examined in other appropriate forums (such as the courts or regulatory bodies) can have a disproportionate impact, and requests can easily become personalised. The ICO has provided guidance around the exemption for ‘vexatious’ requests, but our experience is that it is often unclear when the requisite threshold has been reached. Attempts by applicants to use FOIA to circumvent decisions by the courts relating to disclosure have been of particular concern to the College.
9.4 The exemption in section 36(2)(b) relating to prejudice to the free and frank provision of advice/exchange of views has been used sparingly by the College in cases where we have felt it necessary to protect a ‘safe space’ for highly confidential and sensitive internal discussions or our ability provide candid views and advice to government. Although it is right that this exemption should be subject to a prejudice test and a public interest test, we fail to see why it should be singled out as requiring the “reasonable opinion of a qualified person”. For universities, this means the Vice-Chancellor or equivalent, which can pose operational issues when responding to requests as it requires the close engagement of very senior staff who have many other demands on their time.

10. As indicated, the College supports the principles of transparency and accountability underlying the FOIA legislation. However, we believe that its application needs to take into account the cost burden on public authorities, and the reality that ‘public authorities’ are not all cut from the same cloth. Universities, which are charities expected to operate in a highly competitive international environment that will potentially include new private sector entrants, should be treated differently from wholly publicly funded bodies (such as local authorities) that provide public services on a monopoly basis. A more nuanced approach to the exemptions and the ‘appropriate limit’ which recognised these differences would be beneficial.

*February 2012*
Written evidence from the British Union for the Abolition of Vivisection

Post-Legislative Scrutiny of the Freedom of Information Act 2000

Introduction

1. The BUAV is an anti-vivisection organisation. It has made reasonably extensive use of the Freedom of Information Act 2000 (FOIA), with mixed results. Among the public authorities of which it has made requests are: the Home Office (the regulator of animal experiments), various universities, the Medicines and Healthcare products Regulatory Agency and the Veterinary Medicines Directorate.

2. The reasons the BUAV uses FOIA reflect the policy underpinning the Act identified by the Ministry of Justice Memorandum: to inform public debate (on a contentious issue); to increase the accountability of public authorities; and to improve decision-making. An important aspect of accountability is ensuring that the Home Office is regulating animal experiments in a lawful manner – particularly important given that animals in laboratories, self-evidently, cannot whistleblow.

3. Animal experiments are conducted in conditions of considerable secrecy. Section 24 Animal (Scientific Procedures) Act 1986 (ASPA) makes it an offence, punishable by two years’ imprisonment and/or an unlimited fine, for a minister or official to disclose, even to Parliament, information which a researcher prefers to be kept secret – even information about his or her wrongdoing. 1

4. There are some sources of publicly available information about animal experiments:

   • The Home Office publishes statistics each year, but although they are reasonably comprehensive they have been widely criticised, including by a House of Lords select

---

1 See the Court of Appeal decision in BUAV v the Home Office and the Information Commissioner [2008] EWCA Civ 870. The Court of Appeal ruled that it was entirely for the provider of information whether he gave it in confidence. The law of confidence – under which information about wrongdoing or other information which in the public interest needed to be made available – had no relevance
committee and the Home Secretary’s advisory body, and are no substitute for
detailed information about particular experiments.

- The Home Office encourages (but does not require) licence applicants to prepare a
  short abstract (summary) of their application; these are then published under the
  Home Office’s FOIA publication scheme. These, too, are no substitute for detailed
  information. They often read like PR documents, designed to persuade the public of
  the value of the research in question, and playing down animal suffering. The
  Information Tribunal, in a case brought by the BUAV (the abstracts case), described
  five abstracts it was able to compare with the licences they were purporting to
  summarise as ‘positive spin’, with little said about what was to happen to the
  animals. Successive opinion polls show that, unsurprisingly, it is the suffering of the
  animals with which the public is most concerned.

- Some animal research is published, but only a minority. Even when it is, researchers
  generally give no more information about what the animals experienced than is
  strictly necessary to understand the research. Little information is given about
  consideration given to the use of non-animal alternatives (a statutory requirement).

The litmus test for any transparency regime is whether it is able to shed light on areas of
public policy which are controversial. Animal experiments remain acutely controversial,
with public opinion divided and shifting according to the latest aspect to hit the headlines.
Controversy extends to scientific efficacy as well as to ethical considerations and there
are therefore vital human health issues at stake. Public surveys confirm that the public,
irrespective of their views about animal experiments, want to have more information. For
example, a survey by YouGov in 2009 on behalf of the BUAV in the UK, France,
Germany, the Czech Republic, Sweden and Italy asked whether the then proposed new
EU directive on animal experiments should require that all information about animal
experiments be publicly available, except information which is confidential and
information which would identify researchers or where they work. 80% of respondents
thought it should.

---

2 The Animal Procedures Committee
3 EA/2007/0059: see paragraph 8
4 Section 5(5) ASPA
5 Fieldwork was undertaken between 24th February - 4th March 2009
The exception for confidential and identifying information is important. There are, of course, exemptions in FOIA covering these. The BUAV always says that information it requests can be provided in anonymised form.

6. The Information Tribunal in another case brought by the BUAV recognised the importance of transparency in this area:

‘Substantially for the reasons relied on by BUAV, we consider there can be no doubt about the strong public interest in animal welfare and in transparency and accountability as regards animal experimentation conducted under the ASPA regime. The existence of the statutory controls operated by the Home Office does not annul this interest which extends to seeing how, and the extent to which, the statutory system is working in practice. Such private scrutiny as takes place inside the statutory system is not a substitute for well-informed public scrutiny. In the present case these interests are further underline by the fact that the research was supported by public funds’

Mr Justice Eady made similar comments on appeal in the abstracts case. He suggested there should be a presumption that licence applications should be open with confidential information separated out.

7. In addition to FOIA, the BUAV has made extensive use of EC Regulation 1049/2001. This is similar to FOIA, except that there are far fewer exemptions. The regulation covers documents held by any of the EU institutions. The BUAV’s experience is that it is far easier, and quicker, to get documents under this regulation that it is to get information under FOIA. This is despite the general perception that the EU is a secretive body.

8. This submission will address two issues only: the cost of compliance exemption; and aspects of internal reviews.

Cost of compliance

Background

6 Those in sections 38 (health and safety), 40 (data protection), 41 (information provided in confidence information) and 43 (trade secrets and commercial interests)
7 Now called the First-tier Tribunal (Information Rights)
8 BUAV v Information Commissioner and Newcastle of University EA/2010/0064 paragraph 52
9 Home Office v BUAV and Information Commissioner [2008] EWHC 892 (QB) at para 61
9. Section 12 of FOIA says that a public authority does not have to comply with a request for information where it estimates that the cost of compliance would exceed the ‘appropriate limit’. The Secretary of State is given regulation-making powers to determine the appropriate limit and the costs which can be taken into account. The current regulations are The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Fees Regulations). 10 The appropriate limit is currently £600 (or 24 hours) for central government and £450 (or 18 hours) for other public authorities.

10. The High Court in the recent case of The Chief Constable of South Yorkshire v Information Commissioner 11 decided that the reg 4(3) of the Fees Regulations, which lists the activities which can be taken into account when a public authority estimates whether the appropriate limit will be reached, does not allow the inclusion of time spent considering whether an exemption applies (including reading time), internal discussions and deciding on redactions. This might be termed ‘thinking time’. Only what might be termed ‘physical time’, such as that spent locating and retrieving the requested information, can be taken into account. This had indeed been the approach of the Information Tribunal in three cases, including the one under appeal.

The Ministry of Justice memorandum

11. The Memorandum discusses the cost of compliance in Section H. It says that public authorities largely favour reform, either by reducing the appropriate limits or including thinking time. It refers to the recommendation of the report by Frontier Economics in 2006 that thinking time should be taken account, although an agreed methodology would be needed. The Memorandum records that the Constitutional Affairs Committee (CAC) rejected the recommendation 12 and that the Government agreed with it.

12. The Memorandum also records that the total cost to public authorities of responding to FOIA requests is around £40m per annum. This excludes ‘opportunity costs’ caused by the need to divert (presumably non-FoI) staff from their ‘day job’. The MoJ has commissioned a comprehensive study into the time spent by a range of public authorities on FOIA requests. It hopes to provide the results to the Committee early in 2012.

---

10 SI 2004 No 3244
11 [2011] EWHC 44 (Admin)
**Analysis**

13. The BUAV believes it is of central importance that thinking time continues to be excluded from the cost of compliance. The exclusion is found in regulations, and the empowering provision - section 12 FOIA - is, linguistically at least, sufficiently broad to permit its removal. The Secretary of State could therefore remove it at the stroke of a pen with no meaningful parliamentary scrutiny. For this reason, it is, with respect, important that Committee addresses the issue and confirms the recommendation of its predecessor that the exclusion be maintained.

14. The arguments pointing to retention may be summarised as follows:

i. Removal would seriously circumscribe the right to information which FOIA creates. In the *Chief Constable of South Yorkshire* case, the Tribunal had cautioned:

   ‘It is also clear from the time limits in the Fees Regulations [18 hours and 24 hours depending on the public authority], that if it covered the time cost of redactions, in addition to the tasks listed in regulation 4(3), many, if not most, requests involving exemptions, particularly multiple exemptions, could be refused. This ..., in our view, could not have been the legislative intent’.

   In the High Court Mr Justice Keith agreed: 13

   ‘if the time spent redacting information which is exempt from disclosure is included in the calculation, I suspect that the appropriate limit would be exceeded very much sooner than anyone could have intended’

   In other words, removal of the exclusion would in practice result in a *substantive* change of legislative policy, not merely a change of detail about hours. Parliament chose to include as many as 24 exemptions in FOIA. Some, such as that relating to personal information (section 40: data protection), are extremely convoluted and require consideration of separate, complicated legislation. Others, such as information provided in confidence (section 41), appear straightforward on their face but incorporate other areas of law including a mass of recent and difficult caselaw.

---

13 Para 26
Parliament cannot have intended to give with one hand – the right to information – but then to take away with the other – because of the inevitable need to spend time considering whether one or more exemptions apply (irrespective of whether in fact they do).

For obvious reasons, detailed or complex information would be particularly vulnerable to such a *de facto* change in legislative policy.

The CAC recognised that, the more contentious a request, the more time is likely to be spent considering it: 14

> ‘We conclude that the proposed regime could result in public authorities avoiding answers to embarrassing, contentious or high-profile cases as the number of internal consultees rises in proportion to the sensitivity of particular requests’.

The result, inevitably, would be that requests in contentious areas – where the need for public scrutiny is likely to be strong - could easily be rejected.

ii. There is another important aspect to this. The focus in the Memorandum is on the time spent by employees of public authorities. But ‘cost’ in the Fees Regulations also extends to legal advice. Public authorities, quite properly, do take legal advice (including external advice) about the applicability of exemptions in difficult cases. It hardly needs pointing out that the appropriate limits of £450 or £600 would be reached very quickly were legal advice sought.

iii. It is very difficult to see how thinking time could be assessed in any objective, consistent way. Some people read quickly, some less quickly. Whether an exemption applies should not depend on the lottery of whether a request comes before a slow reader or a quick reader. Similarly, some FoI officers will be more conscientious than others in considering the exemptions. The more conscientious an officer is, the more likely the request would fail an expanded section 12 test. In some cases an almost limitless amount of time considering caselaw could be spent. The length of a document cannot be determinative – it may be much more difficult to decide whether

14 Para 37
an exemption applies with a short document than with a much longer one. Would time thinking about a request in the bath be allowed? If not, why not? The Frontier Economics report acknowledged the need for an agreed methodology, but devising one would be seriously problematical if not impossible.

iv. It would be too easy for a public authority which did not want to disclose particular information to invoke the cost of compliance if thinking time were included. Public authorities should, of course, approach their task in an objective manner, disinterested as to whether application of the FOIA tests leads to disclosure or non-disclosure. The reality, sadly, is different. Ministers may become involved with controversial requests and politics therefore enter the fray. There is a widespread belief that the Cabinet Office is determined not to release information about Cabinet discussions about the Iraq War, for example.

With animal experiments, the BUAV has had the very strong impression - necessarily not capable of proof - that some public authorities faced with requests for certain types of information start from the premise that the information will not be disclosed and then get their lawyers to come up with supporting arguments. Newcastle University, in the case referred to above, strongly resisted the BUAV’s request for information in two project licences – despite the fact that the researchers had voluntarily published the research. This is how the Information Tribunal described one of the University’s major arguments – that it did not (for technical legal reasons) hold any information relating to the very extensive animal research it conducted:

‘[The BUAV’s advocate] submitted that the result for which the University contended was an affront to common-sense. He submitted it would be remarkable if the University did not hold important information about extensive animal research carried out on its premises by its employees, for which it received the funds, for which it provided the facilities, the training, the ancillary staff, the drugs, the routine equipment and the necessary insurances, in respect of which the University owed duties of care to safeguard employees and the local community from biosecurity risks, in respect of which the University claimed intellectual property rights, and for which its Registrar acted as the certificate holder representing the governing body and protecting the interests of the University. We agree ..., and consider the common-sense answer to be the correct one on the facts of this case ....’
The Newcastle example shows the length to which some public authorities may go to hide behind legal arguments, however unmeritorious, so that they do not have to disclose information. Whether suspicions of bad faith are warranted in a particular case is not the point. The very fact that suspicion exists undermines confidence in the working of FOIA. Allowing thinking time to be included would increase suspicion that public authorities could easily dispose of any request that they did not want to meet.

Newcastle initially, in fact, relied on section 12, despite at the same time arguing that other exemptions applied to all the information requested – if it was confident that everything was exempt, how could it project that it would need to spend over 18 hours dealing with the request? The opportunity to misuse section 12 would be all the greater were thinking time to be included. Simply instructing external lawyers – as Newcastle did – would guarantee the appropriate limit being reached.

v. £40m pa – the annual average cost of meeting FOIA requests - seems a very small sum to pay for improved governance and accountability. Only a part of that sum, of course, is attributable to time-consuming requests.

**Conclusion**

15. Lord Bingham said in the House of Lords case of *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport*: 15

> ‘The fundamental rationale of the democratic process is that if competing views, opinions and policies were publicly debated and exposed to public scrutiny the good will, over time, drive out the bad and the true prevail of the false’.

Axiomatically, informed public debate and scrutiny cannot take place unless the public has access to relevant information. The more contentious the issue, the more important that there is access, so that the good can drive out the bad and the true prevail over the false.

---

15 [2008] UKHL 15 at 28
16. The MoJ Memorandum in its discussion of the section 12 issue betrays a disappointing reluctance to acknowledge the importance of transparency – the benefit side of a cost:benefit assessment. Everything is seen through the prism of burden on public authorities. Staff are diverted from their ‘day job’ – when in fact it should be part of the day job of any public sector employee to assist in meeting FOIA requests when called upon to do so.

17. The Coalition Agreement says: ‘The Government believes that we need to throw open the doors of public bodies, to enable the public to hold politicians and public bodies to account’. 16 Allowing thinking time to be taken into account would have the opposite effect.

18. If it were felt that some lessening of the burden on public authorities is needed, it should be limited to a small reduction in the 18 and 24 hour limits spent on physical activities.

**Internal Reviews**

19. Before a disappointed requester can make a complaint to the Commissioner, he must first ask for an internal review by the public authority. There is nothing objectionable in principle about this. However, reviews must be robust and conducted as quickly as possible.

   a) **Independence**

20. In the BUAV’s experience, reviews are generally not sufficiently robust. With the vast majority of our requests, the reviewer simply confirms the original decision. A corporate view appears to be taken. On one occasion the reviewer admitted to having had discussions with the original decision-maker (who was at a more senior rank than him). We note that the Memorandum says 17 that, with central government, only 9% of internal reviews resulted in the original decision being overturned. 16% of internal review decisions were overturned in full by the Commissioner. In broad terms that means 25% of

---


17 Para 146
original decisions were wrong (plus those identified as incorrect on a successful appeal by a requester to the Information Tribunal).

21. An aspect of independence is that the reviewer should not be involved with the policy area in question. In the BUAV Newcastle case, it emerged that the reviewer, the University Registrar, was also the certificate of designation holder under ASPA – the person in charge of all animal experiments at the establishment. It is obvious that he should not have been making FOIA decisions relating to animal experiments.

22. The select committee may wish to underline the importance of the reviewer being truly independent, both of the original decision-maker and of personnel in the policy area in question.

b) Double review

23. Some public authorities, such as Newcastle University and Imperial College, London, have a two-stage review. This adds to the delays which are already endemic in the process. A two-stage review would appear to be unlawful. There is no suggestion in the section on complaints procedures in the Code of Practice issued by the Secretary of State under section 45 FOIA \(^{18}\) that a two-stage review is contemplated – indeed, paragraphs 39 and 46 clearly contemplate a single stage only. There is no rationale for a public authority to consider a request no fewer than three times before a requester is able to obtain a truly independent adjudication. Newcastle’s complaints procedure could take at least 42 working days (2 months), over twice the 20 working days within which an initial request should be dealt with. That would be inimical to the requirement of the code that complaints should be dealt with promptly.

24. The select committee may wish to reiterate that internal reviews should be conducted as quickly as possible and involve no more than a single stage.

February 2012

\(^{18}\) http://www.foi.gov.uk/reference/imprep/codepafunc.htm#partVI
Written evidence from Chris Sims, Chief Constable, West Midlands

As Chief Constable and Chair of the National joint ACPO/Home Office Reducing Bureaucracy Programme Board, I am writing in response to the call for written evidence for the post-legislative scrutiny of the Freedom of Information Act 2000.

On balance, I want to make sure that our statutory duty and the need for transparency and openness (which we welcome) have to be tempered with the services’ broader workforce reductions especially in the ‘Back Office’ environment.

1. Does the Freedom of Information Act work effectively?

1.1 Making the FOI deadline 40 calendar days would bring together the timescales from FOI and Data Protection and would be more efficient, as it would allow for the same systems for the processing of requests. Making the FOI deadline calendar days would allow for easier calculation of deadlines and would allow it to be more easily automated.

1.2 For a significant number of requests the timescales are impossible to meet. Bringing the FOI Act into line with the DP Act would help to some extent, but an even longer timescale should be allowed for.

1.3 The cost of a single FOI request is set too high. Theoretically the Act is impossible to comply with, as anyone can make an endless number of requests, with no realistic judgement of what is possible to achieve.

1.4 The costs of each FOI should be reduced and there should be the option of aggregating the costs of requests on different subjects from the same requester.

1.5 There could be two-tiers of costs - with the lower threshold data being provided, regardless of the importance of the data in question. Where the costs are higher there should be a public interest test on the costs of locating and extracting the data (i.e. there would need to be some possible implication of the data for it to be located and extracted).

2. What are the strengths and weaknesses of the Freedom of Information Act?

2.1 A request should either be sent to a FOI address or mention the Act to be classed as a request under the Act. There is too much doubt about what constitutes a FOI request. This makes defining a request too complicated and allows for vexatious requesters to redefine a request as under the Act after they have received a response. As some ‘business as usual’ responses are to an individual and not disclosures to the world the system is unnecessarily complicated.

2.2 It is clear that the application of Section 40 of the Act is overly complicated and unnecessarily difficult to apply.

2.3 Section 38 is too weak. The importance of an individual’s health and safety should be of paramount importance. The level of proof required by the ICO to prove an impact on mental health is unrealistic and the approach is not pragmatic enough. For example, with the victims of murder, it is clear that publicity of the murder affects the mental health of victims’ friends and family. Even contact by a Force’s Family Liaison Officer can disrupt the grieving process and so to gather evidence of harm in release would cause that harm. This cannot have been the intention of those who constructed the legislation.
2.4 There is an issue with the Chief Constable’s duty of confidentiality to his staff and the fact that Section 41 cannot be applied in these circumstances.

3. Is the Freedom of Information Act operating in the way that it was intended to?

3.1 The level of proof required within a public interest test is too high and it is too time consuming to find and present. A case-by-case basis creates a lot of extra work for requests which do not merit it. The amount of effort required to ensure harmful information is not released can be onerous. A simplified, more rational approach to the application of the public interest test could make the process less time-consuming and less bureaucratic. The ICO does not take into account reasonable assumptions based on logic and previous experience, leading to the ‘reinvention of the wheel’ for requests with little public benefit.

3.2 The FOI Act provides a strong basic right and so there needs to be an equally strong emphasis on the obligations of the requester. It is clear that requesters are being allowed to abuse the privileges provided by the Act.

3.3 Public Authorities are not provided adequate protection against requesters who make frivolous requests and are clearly trying to tie up resources and make life awkward for public authorities. The ICO’s approach compels us to reply to requests which are little more than spam.

3.4 The ICO have allowed requests to contain racist, abusive and/or threatening language without the necessary protection for those answering those FOI requests.

3.5 Requesters should be prevented from using FOI to rake over the coals of issues that have been adequately investigated by the IPCC or the judicial system.

3.6 Applicant blind aspect of the Act does not work, either in theory or in practice.

3.7 The ICO should be responsible for any harm that comes from release of information that he has ordered to be released.

3.8 The Act should impel Public Authorities to have a FOI Officer role, in the same way as the DP Act requires an organisation to have a DP Officer.

3.9 There should be some protection for FOI officers provided by the Act. FOI Officers try their best under very difficult circumstances. Given the current severe financial constraints placed upon forces, FOI is putting an unreasonable and disproportionate amount of work on forces that are already under strain. Resources should be directed at frontline services.

3.10 The Publication Scheme is not ‘fit-for-purpose’ and in need of review. It does not contain the information that people want and is very bureaucratic.

I accept and welcome our public duty, however, the service should not be using scarce resources to subsidise journalistic material for the media. Resources should be utilised to help genuine citizens and possibly moving costs to the media or the multiple or single FOI champions who have a cause.

I have provided the following information that you may find helpful.
Number of FOI applications for 2011 (West Midlands Police)

Total requests 1,250
From Press 433
% from Press 35%

Number of FOI applications for 2012 (West Midlands Police) (up to 3rd Feb 2012)

Total requests made 126
From Press 45
% from Press 36%

February 2012
Written evidence from the BBC

Post-Legislative Scrutiny of the Freedom of Information Act

This short submission by the BBC is formed of two parts, reflecting that fact that the BBC is in an unusual position under the Freedom of Information Act, as both a media organisation whose journalists make freedom of information requests and as a public authority under the Act (in relation to some information) which receives FOI requests.

The BBC's use of FOI for journalism

BBC journalists have used the Freedom of Information Act as a research tool since it was brought into force in 2005. We believe it has proved itself to be a valuable piece of legislation, which has enabled us to discover and report material in a way which would otherwise have been impossible.

The topics where FOI has enabled us to give our audiences additional information vary widely, and cover all forms of public services from the central government level to the local. To quote just a few instances they include the following: regional variation in ambulance response times, the MOT failure rates for different makes of cars, the extensive cost of policing high profile football matches, the numbers of deaths from house fires despite the presence of smoke alarms, numbers of babies who missed their one-year health check due to staff shortages, details of which government phone helplines have the worst delays for answering calls, the amount of money raised by hospitals through parking charges, numbers of council homes which have been left unoccupied, and the increasing cost to councils of metal thefts.

These are only a few instances of the many stories since 2005 that the BBC has obtained through FOI at national, regional and local levels. Nevertheless they illustrate the range of issues covered and show how journalism can use FOI to assist the public become better informed on the performance and cost of public services and hold public authorities to account over their record.

The BBC believes that the journalistic use of freedom of information is a particularly valuable use, as the information we obtain in this way can be passed on to our sizeable audiences and become known to a significant proportion of the general public. This is a greater benefit to the public interest than those cases where individuals may make what are possibly perfectly valid FOI requests but are on matters of purely personal interest and the answers they obtain are not passed on to help inform others. This important point has to be kept in mind when considering the cost to public authorities of FOI requests made by journalists.

The use of FOI by our journalists also enables the BBC to make some comments on how the Act has worked from the perspective of requesters.
The efficiency and helpfulness of public authorities responding to requests naturally varies, but the most important practical problem for requesters during the existence of FOI has been delay.

The position at the Information Commissioner’s Office is now much improved, as the large backlog of cases has been effectively tackled.

**Regulatory recommendations**

However, we believe further action is necessary at the authority level, with regard to time periods for extending consideration of the public interest test and for internal reviews. Currently these are not subject to statutory limits. The ICO guidance however is that any extension for considering the public interest should not exceed 20 working days, and that an internal review should take a maximum of 40 working days. We believe these time frames should be converted into statutory limits.

**The BBC as a Public Authority**

Overall, our commitment to the spirit of the Act is evidenced in the structures we have adopted internally. We have an FOI compliance and advisory function within the BBC’s Legal department which is kept separate from the journalistic activity and BBC News.

Over the last 3 years the BBC has dealt with an average of 1,708 requests per year (2009 = 1,771, 2010 = 1,743, and 2011 = 1,610). For those requests that we consider to be held for Journalism, Art or Literature we regularly volunteer relevant information outside the scope of the Act. Each month, we also publish on the BBC’s FOIA website a wide selection of FOIA responses as part of our Publication Scheme.

**Openness & Accountability**

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

The BBC has pro-actively published information in a number of areas, for example the exact salaries and expenses of its most senior staff. Whilst the release is not made under FOIA, indeed it goes further than would be required under the Act, it is part of the Corporation’s commitment to openness and chimes with our belief in supporting the FOIA.

In other respects the BBC believes the Act is working reasonably well, in striking a balance between the interests of requesters and those of public authorities who receive requests. The BBC also believes that the current regulations on cost limits are a reasonable compromise and that these regulations should therefore not be amended.

*February 2012*
Written evidence from Peter Sharpe, Procurement related Consultant.

Executive Summary

This Memorandum is a response to the use of the Freedom of Information Act (FOIA) in scrutinising public procurement processes. In particular, this concerns the definition and interpretation of the term “commercially sensitive” in deciding whether or not to disclose or withhold information to the public.

Through my previous use of the FOIA, I have found that there is significant inconsistency with how public bodies interpret the term “commercially sensitive” and more so, the use of this as a reason to withhold information under the exemptions within the Act.

The purpose of this Memorandum is to present the evidence of this inconsistent use of the term “commercially sensitive” and request that the term is reviewed with clear and unequivocal guidance for disclosures regarding public procurement.

Background and purpose

I am an Employee of Tender Management Consultancy (TMC). TMC is a private sector consultancy business based in Liverpool and London specialising in public procurement and supporting business to secure more public contracts through competitive processes.

One of my responsibilities is to make FOIA requests regarding the outcomes of specific tender processes run by public bodies. This information is used to identify companies that may need the support of business improvement programmes often initiated by Chambers of Commerce.

My approach for these requests is as follows. Each request asks for the same information; the names and final scores of each bidder that tendered

- Browse the Contract Award Notices for completed and awarded tender processes
- Make an FOIA request for the names and final scores of the unsuccessful bidders

This information is used to assess the effectiveness of public sector procurement as well as highlighting under performing companies failing to confirm their credentials for public procurement evaluation. These objectives include:-

- Assessing the range and quality of tender applications
- Identifying the range of overall scores to ensure that the process has been carried out fairly and in line with the Public Contract Regulations 2006
- Ensuring that the process is open, transparent and achieves value for money and other sustainable goals.

Evidence
The following table shows the responses that I have had from public bodies regarding my requests for the names and scores of the unsuccessful bidders on specific tender processes. For ease of understanding, I have grouped the responses into three categories. These are:-

- **Full Disclosure** – The public body disclosed the full information after the first request and provided the full names and scores of the unsuccessful bidders
- **Partial Disclosure** – The public body disclosed some of the information but withheld some because of “Commercially Sensitive”
- **Non-Disclosure** – The public body disclosed none of the information requested because of the “Commercially Sensitive” exemption

NB – All of these requests were made in December 2011 and January 2012

<table>
<thead>
<tr>
<th>Public Body</th>
<th>Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>Shropshire Council</td>
<td>Non Disclosure leading to Partial Disclosure after appeal (Company Names and Anonymous Scores)</td>
</tr>
<tr>
<td>Knowsley Council</td>
<td>Partial Disclosure (Names only)</td>
</tr>
<tr>
<td>University of Huddersfield</td>
<td>Partial Disclosure (Names only)</td>
</tr>
<tr>
<td>University of Manchester</td>
<td>Full Disclosure</td>
</tr>
<tr>
<td>West Oxfordshire District Council</td>
<td>Full Disclosure</td>
</tr>
<tr>
<td>University of Liverpool</td>
<td>Full Disclosure</td>
</tr>
<tr>
<td>Lancashire County Council</td>
<td>Partial Disclosure (Names only)</td>
</tr>
<tr>
<td>Victoria and Albert Museum</td>
<td>Partial Disclosure (Names only)</td>
</tr>
<tr>
<td>NHS Institute for Innovation and Improvement</td>
<td>Full Disclosure</td>
</tr>
<tr>
<td>East Sussex County Council</td>
<td>Full Disclosure</td>
</tr>
<tr>
<td>Greater Manchester Police</td>
<td>Non Disclosure</td>
</tr>
<tr>
<td>Newcastle City Council</td>
<td>Full Disclosure</td>
</tr>
<tr>
<td>Cheshire East Council</td>
<td>Full Disclosure</td>
</tr>
<tr>
<td>University of Lancaster</td>
<td>Partial Disclosure (Names only)</td>
</tr>
<tr>
<td>Wirral Borough Council</td>
<td>Non-Disclosure (Currently under appeal)</td>
</tr>
<tr>
<td>Burnley Council</td>
<td>Full Disclosure</td>
</tr>
<tr>
<td>Nottingham Trent University</td>
<td>Non Disclosure</td>
</tr>
</tbody>
</table>

Full responses can be made available to committee on request.
The following is an example of the justifications for withholding information I have received during my requests.

### Public Interest Considerations

#### Factors favouring disclosure

To disclose the information relating to unsuccessful companies who tendered for 2011/S 225-364621 conveyance and treatment of injured and distressed animals and the conveyance of Dogs Seized under the Dangerous Dogs Act 1991, will enable and assist individuals by raising their awareness and provide them with a better understanding of the decision making process, and how public funds are spent in regards to contract awards.

#### Factors in maintaining the exemption

To disclose information relating to unsuccessful companies who tendered for 2011/S 225-364621 conveyance and treatment of injured and distressed animals and the conveyance of Dogs Seized under the Dangerous Dogs Act 1991, would prejudice the commercial interests of those companies who tendered and prejudice the interests of GMP in regards to future contracts. To disclose the information there is a potential harm to hinder GMP’s economical use of public funds for such said contracts in particular as GMP faces difficult financial times ahead due to the reductions of the amount of public monies afforded to public authorities as a result of the present coalition Government’s ‘Comprehensive Spending Review’. Furthermore to put this information in to the public domain those companies would be disadvantaged and affected upon by other potential companies in respect of future contracts relating to the said tender contract.

#### Balancing test

On balance, Commercial Interests outweighs the benefits of individuals having a better understanding of the decision making process as the interests of those companies may be disadvantaged and affected upon by other potential companies. Also disclosure would likely to disadvantage GMP in regards to future contracts.

### Current Guidance

There is guidance to suggest that the information I have requested should be disclosed under the FOIA. These are:

- The Ministry of Justice’s “Working Assumptions – Procurement Annexe A” Section 4 states that the scores of losing bidders should generally be disclosed.
**Recommendations to the Committee**

On consideration of the above evidence, I would like the following issues to be considered and ultimately resolved as part of the Select Committee’s activities. These issues requiring your consideration include:-

- Major inconsistencies (see Evidence Table) in how public bodies interpret the term “Commercially Sensitive” when choosing whether or not to disclose the names and scores of the unsuccessful bidders under the FOIA. There is therefore a clear need for specific guidance on what can and cannot be disclosed regarding public procurement under the FOIA.

- A definition of “Commercially Sensitive” information in regard to public procurement processes. I accept that FOIA requests cannot ask for cost information, technical content or any other trade secrets. However, we fail to recognise how the disclosure of an overall tender score even if anonomised, which in itself is an assessment against a single set of criteria; can possibly prejudice the future commercial interests of an organisation.

- Guidance on what can be disclosed about the public procurement assessment process. It is in the public interest to scrutinise how a public body arrives at its procurement decisions. This is to ensure openness, transparency and value for money.

*February 2012*
Written evidence from Teesside University

Post-Legislative Scrutiny of the Freedom of Information Act

1. Introduction

1.1 This written evidence is submitted by Teesside University in response to the Justice Select Committee’s call for evidence regarding its post-legislative scrutiny of the Freedom of Information Act. The University is able to provide clarification on any aspects of this response, if required.

1.2 Teesside University is ranked by the Higher Education Statistics Agency as the 14th largest university in the UK by student numbers1 and employs over 1800 staff. In 2009/10 the University became the first modern university to be awarded University of the Year by the Times Higher Education, in recognition of it being “an institution that has put itself firmly at the heart of its community, embracing with zeal its mission of working with both individuals and businesses to help them achieve their full potential” [Ann Mroz, Times Higher Education editor].

1.3 Teesside University has processed over 500 requests for information under the Freedom of Information Act since its implementation in January 2005. This submission is based upon that experience to date.

---

1 [Link](http://www.hesa.ac.uk/content/view/1897/239/), ‘2009/10 students by Institution’, accessed 17/01/2012.
2. Executive Summary

2.1 The University believes that the Freedom of Information Act effectively achieves its primary purpose of promoting openness and transparency in the operation of public bodies, as demonstrated by the >500 requests that the University has received since the implementation of that Act. However, there is neither qualitative, nor quantitative, evidence to suggest that the additional intentions of improving accountability and decision-making have been realised.

2.2 The University considers that the three main weaknesses of the Freedom of Information Act are:
   i. that it mandates the requirement of a Publication Scheme, although the statistical evidence indicates that the Scheme is of little value and its maintenance is an inefficient use of resources;
   ii. that the ‘appropriate limit’ afforded by the Act is not sufficiently comprehensive to prevent some requests from demanding a significant and disproportionate diversion of resources from other activities;
   iii. that the exemption provided by the Act to protect commercial interests does not properly recognise the competitive environment within which universities operate, and therefore does not offer satisfactory protection against the risk of harm to a university’s commercial interests.

2.3 The University is fully supportive of the spirit of the Freedom of Information Act, however there are some instances where it does not believe that the Act is utilised in the intended way. There are occasional instances where requests have required disproportionate resources to process, or have enquired into matters which are more targeted towards personal or commercial interests rather than being in the wider public interest. The overall effect of such requests is to harm the repute of the Freedom of Information legislation.
3. **Does the Freedom of Information Act work effectively?**

3.1 As the primary intention behind the Freedom of Information Act (FoIA) was to promote openness and transparency in the operation of public bodies, Teesside University would agree that the Act effectively achieves that aim. Since the implementation of the Act in January 2005 the University has processed more than 500 requests for information under the FoIA. Of requests where the University has held the requested information, 94% of our responses have disclosed all or part of the requested information.

3.2 The additional aims of the FoIA are cited in the Ministry of Justice's Memorandum to this Select Committee as being: to increase accountability, to support better decision-making, and to encourage public involvement in decision-making. Very few (<3%) of the requests to the University over the past five years would be considered as having a direct link to those aims, therefore it may be considered that the Act has had little apparent impact upon improving accountability or decision-making.

3.3 The practical effectiveness and consistent interpretation of the Freedom of Information Act has been greatly aided by the guidance and decisions published by the Information Commissioner's Office and the Information Rights Tribunal. The FOI practitioners within the University typically refer to the ICO's guidance material on a weekly basis and the Tribunal's decision notices on a monthly basis. The guidance material published by the Ministry of Justice is found, in comparison, to be of less practical value.

4. **What are the strengths and weaknesses of the Freedom of Information Act?**

4.1 The Act’s requirement to proactively publish information has been found, in the University’s experience, not to work effectively. Paragraph 3 of the Ministry of Justices’ memo to the Select Committee describes this requirement as being "a duty of proactive disclosure on public authorities by requiring them to adopt and maintain a publication scheme setting out the information and documents which they routinely release". The University’s Publication Scheme was accessed 50 times by 34 users during the 12 months ending 31 July 2011; those figures include internal staff access. Although the University recognises the intention behind such a proactive publication of information, the visitor statistics would indicate that the Publication Scheme is of
very limited practical value and that the requirement to maintain it is not an efficient use of resources.

4.2 The practical application of the ‘appropriate limit’, or cost limit, provided by section 12 of the Act has been found not to be consistently effective, particularly as it does not allow for the time involved in redacting exempt information. For example, the University received a request for the minutes of its Staff Monitoring Committee meetings over the previous 30 months. That Committee meets weekly or fortnightly to deal specifically with staffing issues, and its minutes include a substantial quantity of personal data which would be exempt from disclosure under s.40 of the Act. The redaction of that personal data from the minutes cannot be counted towards the appropriate limit, so, if the requestor had not voluntarily agreed to amending the request, the processing of that one request would have required the diversion of staff from other activities for more than a week and would have cost the University more than a thousand pounds to process in staff costs alone. If the intention of the appropriate limit is to prevent disproportionate resources being diverted to the processing of individual requests, it would seem to be a weakness of the Act that such time-consuming activities cannot be counted towards that appropriate limit.

4.3 The exemption afforded by section 43(2) of the Act for the protection of information that may damage an organisation’s commercial interests does not suitably recognise that universities operate in a highly competitive market for both private and public funding. The threshold for the application of that exemption is extremely high, requiring evidence of potential damage and a probability of harm which is more likely than not. It may not be possible for information such as budgets and strategic plans to meet the requirements of the exemption, but their disclosure can still expose a risk of substantial harm to the University’s interests. Any risk of harm to the University’s commercial interests, even if that risk is not high enough or sufficiently demonstrable to satisfy the technicalities of the Act’s requirements, could have potentially devastating consequences to the ongoing success of the University, which would surely not be in the public interest. This exemption is, therefore, considered to be weaker than necessary to satisfy its intention.
5. Is the Freedom of Information Act operating in the way that it was intended to?

5.1 The University is of the opinion that, on the whole, the Act is operating in the intended way. However there are some exceptions where the processing of requests necessitates a disproportionate diversion of resources for matters which have no apparent public interest. This has included individuals pursuing private campaigns where the exemption for vexatiousness could not be applied, and requests that use the University’s obligations under the Act as a means to access other organisations which are not subject to such legislation, such as the Students’ Union or private companies with whom the University has worked.

5.2 The University supports the view that data which is being used in current research activities should not be made publicly accessible until that research has been completed. It is recognised that there is an importance in facilitating transparency and probity in the quality of research, although such premature publication can significantly prejudice the University’s ability to successfully conduct and conclude research activities. The University supports the addition of an exemption to the Freedom of Information Act, similar to that which already exists in the Scottish variant of the Act as well as legislation of other countries, to provide qualified restrictions to the publication of research data. This issue is being progressed through other means, although it is considered relevant to this context in terms of the FoIA not operating in the way it was intended.

5.3 The University believes that the use of the Act as a tool for obtaining research data for student projects, dissertations and theses is not in the spirit of the legislation, even though it is used in this way. One of the core principles of research ethics is that participant involvement in such activities is voluntary, fully-informed, and can be withdrawn at any time. This conflicts with a public authority’s legal obligation to provide information under the FoIA. Such requests are not perceived to be in line with the original intentions of the Act, although they do create a significant, and increasing, volume of work for public authority employees.

February 2012
1. Executive summary

1.1 In this memorandum, we put forward three recommendations for consideration by the Committee:

- The Government should consider amending the FOI Act to apply it to all publicly funded services, regardless of status of the organisation that provides them.
- The extension of coverage should include a requirement that public authorities build freedom of information and open data into all contracts to deliver public services.
- Data that the public has the right to obtain under FOI should be published as open data.

1.2 These recommendations reflect the principle that public transparency should follow public money. Implementing them would remove current inconsistencies and give full effect to the Government’s stated commitment to a public right to data.

2. Introduction

2.1 The Local Public Data Panel welcomes the Committee’s post-legislative review, and the publication at the outset of the Ministry of Justice’s memorandum to the Committee.

2.2 The Local Public Data Panel [1] is an independent panel of experts appointed by the Secretary of State for Communities and Local Government to advise the Department on transparency and open data policy and practice.

3. Freedom of Information requirements should apply to publicly funded services regardless of who delivers them

3.1 Publicly funded services are often delivered by private companies, registered charities, voluntary organisations and others outside of the public sector. At present, when this happens, information relating to those services falls outside the FOI regime unless the bodies are, or are wholly owned by, bodies specifically listed in Schedule 1 to the FOI Act 2000.

3.2 When the management and delivery of public services is undertaken outside the traditional public sector, the default position is that data previously available under FOI is no longer available. As well as being wrong in principle, this also has the potential to undermine businesses using the data.
to build applications that help people to make smarter and more effective use of public services.

3.3 The list of bodies to be covered by FOI under Schedule 1 has been updated through secondary legislation and in some cases through primary legislation. However, change so far has proceeded in a piecemeal fashion, resulting in coverage that is patchy and incomplete. This means that it is unclear to the public why some organisations are accountable to them through Freedom of Information whilst others (such as Network Rail) are not.

3.4 The public’s access to data and information about public services largely depends on whether the service is being delivered directly by a ‘public sector’ organisation or by an external organisation. For example, bodies delivering public services funded by state-granted monopolies like Network Rail are not covered. As well as taking what should be publicly accessible information out of the FOI regime, this also creates an incentive for public bodies to outsource services to put them out of the reach of FOI legislation.

3.5 The Government should therefore consider how the FOI Act could be amended to apply FOI to all publicly funded services regardless of what organisation delivers them. This principle is important given the extent to which public services are already commissioned and procured through the private and voluntary sector, but also because this practice is expanding, with public service reforms further diversifying the scope of delivery arrangements. Current, traditional approaches to public accountability must adapt to ensure transparency and to help the public to understand how their money is spent, what they can expect from such investment, and to have a voice in this.

3.6 In seeking a workable way of defining the bodies that should be covered, and the extent to which they should be covered, there may be useful lessons to draw from the debate about the application and interpretation by the courts of the concept of a ‘functional public authority’ under the Human Rights Act. The concept is intended to be used to apply the provisions of the Act to public services delivered by organisations outside the public sector but not to those organisations’ other ‘private’ activities [2].

3.7 Whilst there will be some resistance from private companies serving public organisations to protect commercial interests, we do not believe that this will add to costs. Guidance is needed to avoid misuse of blanket exceptions, and public bodies should be required to build FOI and open data into all contracts to deliver public services using standard terms as far as possible.

4 Public authorities should be required to build freedom of information and open data into all contracts to deliver public services

4.1 Some local authorities already build openness into their contracts. For example, the London Borough of Redbridge, which is represented on our Panel. But this practice is not widespread.
4.2 Direction is necessary to require public bodies to build the public’s right to information into contracts to deliver public services. Making this a requirement rather than an option would strengthen public authorities’ ability to negotiate clear and comprehensive openness clauses with contractors, and would ensure consistency of practice across the country.

4.3 Overall, increased transparency will lead to more efficient and effective services. However, advice would be useful to help public authorities effectively manage any immediate cost or commercial implications of including openness clauses in contracts.

4.4 The Open Government License, developed in central government but applicable across all public authorities and in use in local government, provides a useful model for model clauses to build openness into public service contracts.

4.5 The guidance produced by the Local Government Association, in collaboration with the Local Public Data Panel and other experts, on openness in local public service contracts also provides a useful reference point for this work [3].

5 Data available to the public under FOI should be published as open data

5.1 If the public has the right to obtain datasets under the FOI Act, then those datasets should be published as open data, so that it is not necessary to specifically request it. Attention here should be focused on datasets where there is strong demand or public interest/benefit, or where it is cost-effective or possible to do so at minimal cost (again see the example of the London Borough of Redbridge).

5.2 This would move us away from the unsatisfactory situation of people being allowed access to datasets on a one off basis, and only if they happen to ask the right question of the right organisation at the right time. There are also potential savings for organisations publishing datasets frequently requested under FOI so that they do not have to respond to duplicate requests.

5.3 The Protection of Freedoms Bill will require authorities to publish datasets requested under FOI in a re-usable format, and to publish updates to those datasets. This is a welcome step in the developing relationship between FOI and open data.

5.4 However, the Bill includes broad and undefined caveats around the requirement to publish datasets that are requested under FOI. For example, it provides that authorities are only required to do so ‘unless the authority is satisfied that it is not appropriate for the dataset to be published’.

5.5 The Bill also only requires authorities to publish datasets that have been requested under FOI, whereas we would argue that if a dataset is potentially available on request under FOI then it should be proactively published. This
would enable people to see more easily what data is available. It also has the potential to reduce the costs of FOI for authorities, because they would be publishing datasets by default rather than having to trawl their archives for data in response to requests.

5.6 The Bill provides for the Secretary of State to issue a code of practice on the release of datasets requested under FOI. The code of practice will be crucial in determining the extent to which the provisions of the Bill are effective in opening up more public data. In particular, the code will need to specify clearly the essential criteria for what should be considered appropriate or inappropriate by authorities when deciding whether or not to release datasets and in what format. This should be developed in consultation with the full range of stakeholders so that any guidance is effective, appropriate and practicable for local public service providers.

5.7 Further guidance may also be required on licensing issues, beyond what already appears on the face of the Bill, to ensure that the Open Government License [4] is the default license for public data. Further consideration will also need to be given to the relationship between Freedom of Information and the Public Sector Information Regulations.

5.6 We would be pleased to offer further assistance to the Committee during the inquiry.

*February 2012*

[1] The Local Public Data Panel is an independent panel that advises Government on issues relating to the release and effective use of local public data. For more information about the Panel, see data.gov.uk


For regional journalists, the Freedom of Information Act has become an indispensable tool when trying to hold increasingly-secretive public bodies to account. At a time when most councils have adopted opaque 'cabinet style' structures, many health bodies have done away with public meetings when gaining 'Foundation Trust' status, and police forces are reluctant to release even basic details about their work, FOI has proved invaluable.

However, it is never a journalist's first tool of choice when seeking to gain information. It is a slow process and, depending on the authority being questioned, can prove to be a frustrating process. Many of our journalists have very good relationships with FOI officers, but their ability to make effective use of FOI is often determined by the attitude towards openness set by senior officers and political figures.

It is not uncommon for an organisation not known for its openness with the media to be a reluctant participant in Freedom of Information. NHS North West is a good example – it has regularly ignored FOI requests, and is the same authority which regularly refuses press requests for data, therefore pushing journalists to use FOI.

Of particular concern within the current legislation is:

1. The growing trend of complaining about the cost of FOI

No politician or senior officer should be afraid of FOI. They should welcome the public's use of the system. However, a growing number of politicians, particularly at local council level, seem determined to raise the rising cost of FOI as a reason to curtail it. It is common for councils to push press requests towards FOI officers, thus increasing that cost. We believe that better archiving of information within public bodies, plus a can do attitude from senior officers in some cases, would bring the cost down.

2. Political interference in FOI

We have been alarmed by a number of cases where councillors or other politicians have become involved in FOI decisions. It is well documented that the leader of Kirklees Council vets many FOI requests before they are published, and has in some cases tweaked the responses. This goes against the very spirit of FOI. A recent Welsh FOI decision was made by a first minister. The information sought – about problems at a Welsh hospital – would, we believe, have had the potential to cause a political issue. There need to be firmer rules detaching FOI from the political process.

3. Press Office interference in FOI requests

It is not uncommon for our reporters to submit an FOI request and then be asked about it by the press officer. Coventry City Council even told a reporter its press office had sign off on journalists' FOI request responses. This goes against the spirit of 'applicant blind' and could encourage a culture where reporters have to use fake names to get information. Press officers should have the same access to all FOI requests, and not treat press ones differently.
4. The use of cost limits

The use of cost limits causes us great concern. It is rare that an FOI officer will tell an applicant what information they could have within a cost limit. Likewise, a breakdown of how the cost limit breach was worked out should be mandatory. We are alarmed by suggestions that additional actions could be factored into the costing of an FOI request - this would reward those authorities which make information hard to find.

5. The use of disclosure logs

Disclosure logs have always been seen as ideal by the ICO, yet are very rare. If councils and public bodies wish to reduce requests, then operating effective disclosure logs would be a very effective start.

6. Active misunderstanding of questions

We have seen FOI requests where active misunderstanding of questions is clearly taking place. One example involves a reporter asking about bed blocking and being told the hospital trust in question did not suffer bed blocking. When asked under FOI about 'delayed discharges' a full breakdown followed. It is unfair to expect members of the public to be experts in terminology when submitting FOI requests.

7. The term vexatious

The definition of vexatious is far too vague and provides a catch-all for bodies which wish not to release information. While we understand the need to provide a mechanism to deal with those who harass public servants, we believe it must be more tightly defined. Nottingham City Council warned one blogger that if he put in frequent FOI requests he would be considered vexatious. Nottingham City Council is also the authority which resisted publishing spending data. Allowing the definition of vexatious to be open to interpretation empowers authorities who wish to keep information a secret.

8. Rewarding authorities which make information hard to find

We frequently hear of cases where reporters submit FOI requests to six similar bodies (e.g. a PCT) and get information back from five but be told by the sixth it is too hard to find. As it stands, FOI legislation rewards the obstructive. We would like to see a test applied which tells the sixth authority that if five others can find it, then so should they.

9. An empowered ICO with the resources to make things happen

The ICO works very hard to resolve problems, but is not resourced to meet demand. It needs to have resource to respond to complaints quickly and be able to resolve them quickly. The current situation allow authorities keen not to release information to kick the problem into the long grass.

10. A statutory requirement on public bodies to promote FOI and openness throughout their authorities

While FOI is enshrined in law, it is still seen as 'not part of the day job' by many, and in some councils, FOI officers tells us of a constant battle with senior management. While
resources remain under pressure in the public sector, there can be little hope of faith in the public sector if it is not seen to be actively transparent. Making it a legal duty of senior officials and politicians to support the principles of FOI, and be held accountable for blockages in the process, is the only way to ensure the right to know is not at the whim of the requesting body.

As I said, we have had many positive experiences of using FOI. We dispute the claims by some that FOI is a tool for lazy journalists – it isn't, it's a complicated tool to use. We would also dispute the claim by some that FOI is used mainly by journalists – the FOI officers we speak with suggest 35% of requests come from journalists and they tend to fairly easy to solve, so long as there isn't interference.

Journalists working within our organisation are encouraged to use FOI, but to exhaust other avenues first – such as seeking openly-available data, using the press office, or accessing public documents. However, the scope of these remains limited and our journalists often have little choice but to use FOI to get access to information which is in the public interest.

However, it is very important that FOI is strengthened, and made easier to use, even if those in power don't always find it an ideal tool at the public's disposal.

*February 2012*
**Frimley Park Hospital NHS Foundation Trust Response to Justice Committee Review into FOI Act 2000.**

<table>
<thead>
<tr>
<th>Question</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Does the Freedom of Information Act work effectively?</strong></td>
<td>No, the fact that an individual is able to request any information from an organisation has resulted in companies compiling spreadsheets (Examples below) and demanding that these are completed by the organisation under FOI. In all cases, the information being requested is held in numerous places and has to be pulled together and extracted in order to respond to the request. This feels as though we are creating information to respond to the request rather than providing information already held. The act should be more heavily focussed on providing copies of information already created/compiled rather than extraction and collation of information to respond to each request. It would also be of particular use to provide clear guidance to public authorities on exactly how far an organisation is required to go in relation to creating new documents from information held in relation to FOI requests.</td>
</tr>
<tr>
<td><strong>E-health Media, Netsi Plus, Kable Direct:</strong></td>
<td><img src="FOIQuestions.xls" alt="FOI Questions.xls" /> <img src="ICTsppend.xls" alt="ICT spend.xls" /> ![FOIAcuteFT ver97.xls](FOIAcuteFT ver97.xls)</td>
</tr>
<tr>
<td><strong>The FOIA does not work effectively for an organisation where it is expected to spend up to 18 hours responding to each request, particularly when up to 300 requests are received per year. This is a massive strain on resources. Not being able to confirm the identity of the individual prohibits the ability to correctly apply the public interest test.</strong></td>
<td></td>
</tr>
<tr>
<td><strong>What are the strengths and weaknesses of the Freedom of Information Act?</strong></td>
<td><strong>Weakness</strong></td>
</tr>
<tr>
<td>Strengths</td>
<td>Is the Freedom of Information Act operating in the way that it was intended to?</td>
</tr>
<tr>
<td>-----------</td>
<td>--------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>It does hold the organisation to account.</td>
<td>No, the act is being regularly used by private companies to obtain information about competitors, to tout for business, to contact organisations for direct marketing, used by journalists to find newsworthy stories, used by MP’s to obtain information to support election campaigns.</td>
</tr>
<tr>
<td>Makes an organisation respond to requests for information when in the past.</td>
<td>Example request: How many complaints has your organisation received from either your employees or members of the public about 'haunted' buildings, ghosts or other paranormal phenomena in your premises or in buildings managed by you? Please break down complaints by year.</td>
</tr>
<tr>
<td>Enables individuals to know how an organisation operates.</td>
<td>1. What action was taken to address these complaints?</td>
</tr>
<tr>
<td></td>
<td>2. How much did this action cost. Please provide the amount spent for each action.</td>
</tr>
</tbody>
</table>
Written evidence from the University of Sussex

About us
The University of Sussex was the first of the new wave of UK universities founded in the 1960s, receiving its Royal Charter in August 1961. As we celebrate our 50th anniversary, the University has become a leading teaching and research institution. The University has over 10,000 students, of which almost 3,000 are postgraduates. Creative thinking, pedagogic diversity, intellectual challenge and interdisciplinarity have always been fundamental to a Sussex education. Sussex is also a leading research university, as reflected in the 2008 Research Assessment Exercise. Over 90 per cent of Sussex research activity was rated as world leading, internationally excellent or internationally recognised, confirming the University among the leading 30 research universities in the UK, on a simple average across all scores.

Written evidence on the issues
Please find below the University’s responses:

1. Does the Freedom of Information Act work effectively?
   It is effective to the limited extent that it is used for encouraging transparency in publicly-funded organisations (e.g. how much is spent on expenses or hospitality by staff), but on the whole it is not used for these purposes.

2. What are the strengths and weaknesses of the Freedom of Information Act?
   Strengths
   i. It encourages accountability in spending of public funds.
   ii. It encourages organisations to make more information available to the public via publications schemes.

   Weaknesses
   i. It is mostly used by journalists/students/others wanting an economic and expedient way to undertake research.
   ii. As the enquirer is under no obligation to explain their enquiry, or to provide a public-benefit justification the Act is routinely used (particularly by journalists) to ‘fish’ for information around a particular topic, seeking anything of interest will emerge. Worse, it can be deliberately used for time-wasting or mischievous questions.
   iii. It is frequently used by potential commercial suppliers enquiring about competing contracts.
   iv. The Act itself, although apparently straightforward in comparison with other legislation such as the Data Protection Act, is still complex and difficult to navigate, and requires significant investment in staff training by organisations that are subject to it.

3. Is the Freedom of Information Act operating in the way that it was intended to?
   No. It takes up an inordinate amount of staff time for very little public benefit. The number of requests is increasing rapidly. The University currently receives two to three enquiries per week which each take around two hours of administration, and a currently unquantified amount of time for compilation of expert responses. Over the last six months around 4% of enquiries received concerned public funding accountability, whilst 13% were commercial enquiries and the remainder were the previously referred to ‘research’ enquiries.

Recommendations for the committee to consider including in its report
The committee should review the amount of time and resource invested by public sector organisations in responding to FOIA enquiries to gauge the level of real public benefit the Act
delivers. In particular, we suggest that the FOIA enquirer should be required to present a specific public-interest rationale for each request, which the receiving body should be able to challenge and seek adjudication on.

February 2012
The Freedom of Information Act is an invaluable tool to journalists on regional papers, helping to expose, for example, public spending excesses, highlight health issues and provide a deeper insight for our readers into reports by public bodies which often don’t go beyond the very basic bare minimum details they need to present.

It would obviously be much better if public bodies like local authorities, health trusts and police forces were more open with the information they make available but, as they often are not, the FOI Act provides a safeguard that allows us to acquire and publish information they might be reluctant to provide.

The political nature of local government in particular – although this can apply equally to all public bodies – means that information tends to be released with a degree of “spin” designed to shield unpleasant facts or difficult situations from the public glare.

So the FoI Act can help to highlight issues which have a genuine public interest by drawing out facts that public bodies often do not want brought to the fore.

Recently, the Telegraph & Argus highlighted the very important issue of the dangers to aircraft of widely-available laser pens being aimed from the ground into aircraft cockpits but it was only through the use of an FOI request that we were able to get figures demonstrating the extent of the problem, which allowed us to develop the story. The issue has subsequently been raised in the House of Commons.

The true cost of alcohol-related treatments in hospitals was also only made public after an FOI request. Showing the real extent of the damage alcohol is doing to the district in social and economic terms could act as a wake-up call for some people, but again, without an FOI request, those figures would not have been revealed.

A surge in the increase in attacks on parking wardens, and the type of abuse they have to endure, was again only revealed through an FOI request. It gave a human interest angle to the work of parking wardens and may even have made one or two people think twice before losing their temper in the future.

The issue of asbestos in schools was also highlighted thanks to an FOI request showing the number of schools known to have asbestos in them, exposing the extent to which teachers and pupils may have been exposed to the deadly substance and bringing a very important health issue into the public domain.

FOI requests have also allowed us to highlight instances where public money may have been spent wastefully, or where a particular issue has cost council tax payers a great deal of money.

For example, we were able to reveal that £2.5 million of the council’s maintenance bill was spent on paying out compensation for people who tripped on pavements, that Bradford
Council had paid out £3 million in overtime despite the ongoing financial cuts, and the fact that the council was paying out almost £500,000 on mobile phone bills – a figure they subsequently reduced by £100,000 as a result of the pressure generated by public exposure to the issue.

Highlighting these figures allows us to act as an unofficial auditor, making sure the public are aware exactly where their money is being spent and allowing them to have their say on it if they are unhappy about it.

Other stories the T&A has obtained via FOI requests recently, in no particular order, include the large number of drivers escaping bans despite being over the mandatory points level, the number of teenagers missing from home in the district, the roads with the worst accident rates, the cost of emergency cover for teachers taking days off, the number of CCTV cameras in the district, the bonuses provided to a private company that ran Bradford’s education services, the number of so-called shisha lounges in Bradford, and the outstanding amount of money (£174,000) owed in fines to the city’s libraries.

All of these stories are of a clear public interest and none of these requests could in any way be interpreted as frivolous.

It could be argued that all the information above should be readily available to the public without recourse to the FOI Act but it clearly is not, so an FOI request is the only way to get it.

The FOI Act provides a valuable safeguard to prevent public authorities hiding information which could prove embarrassing in some way or may portray them in a bad light, or which is simply something they don’t want to see in the public domain.

The T&A does not make an excessive amount of requests under the FOI, and as I have already said, none of them could be deemed to be frivolous and all have a public interest justification.

In terms of issues with the current legislation, one point that can cause us problems is when a public body which has been issued with an FOI request comes back to us very close to the 20-day deadline asking for clarification of a detail, often a very minor detail, in the request.

By replying within the 20 days, they have met their deadline but that then restarts the 20 day period in which they have to respond. In some cases this is a genuine attempt to seek clarity but it can be, and we believe is, also used as a delaying tactic. One suggested improvement would be a shorter deadline for any clarification requests to avoid any abuse of this.

In short, the Freedom of Information is, and has been since its inception, a force for good. We believe its remit should be extended and we would urge members of the Justice Committee to reject any and all attempts to reduce its scope.

*February 2012*
Written evidence from the University of Manchester

Committee Post-Legislative Assessment of the Freedom of Information Act 2000

1. It is the stated intent of the Government to lower the burden of regulatory requirements on the Higher Education sector. In August 2011 the Department for Business Innovation and Skills published its technical consultation on A New Fit-For-Purpose Regulatory Framework for the Higher Education Sector\(^1\). It argued for “a proportionate, risk-based approach to regulation which protects and promotes the interests of students and taxpayers while keeping bureaucracy to a minimum and looking to find areas of regulation that can be improved, reduced or removed”.

2. The University of Manchester appreciates that the Freedom of Information Act 2000 (the Act) has been a force for good, increasing openness and accountability in this sector and others included in its coverage. The aims of the Act also fit in well with many of the current priorities of the sector in terms of the increased publication and sharing of data, increased openness in relationships with students leading to increased student satisfaction and increased administrative efficiency.

3. The Act in its current state however is in some aspects very challenging for universities.

4. The first aspect of this is in the sheer amount of time that it is now taking to service requests under the Act. The number of FoI requests received by most universities has been increasing annually since the Act’s introduction in 2005. This can be illustrated by the figures in JISC’s annual survey of information legislation compliance in universities\(^2\). The University of Manchester received 316 FoI requests in 2011 as opposed to 230 in 2010 and 208 in 2009. Many of these requests are “round robins” from journalists and researchers which can be calculated to take hundreds of hours of staff time across the whole sector, often for disproportionately small reward in terms of actual information returned or used.

5. There is evidence also that those FoI requests being received are gradually becoming more complex and time consuming. This has led JISC to institute a research project to ascertain how long is spent responding to FoI requests within the sector\(^3\). The University of Manchester has gradually had to increase the number of times that it has had to invoke the Appropriate Limit Regulations\(^4\) associated with the Act over the last three years from a

---


\(^2\) [http://www.jiscinfonet.ac.uk/foi-survey](http://www.jiscinfonet.ac.uk/foi-survey)

\(^3\) [http://www.jiscinfonet.ac.uk/foi-survey/research-eoi](http://www.jiscinfonet.ac.uk/foi-survey/research-eoi)

position in 2009 where they were rarely used to a position now where they are used on a weekly basis.

6. The first submission that we would make therefore is that the Appropriate Limit Regulations should be revised. Currently a public authority is expected to undertake 18 person hours of work on each request under the Act before it can refuse to continue or start to charge. However, this limit only includes time incurred in relation to determining whether the information is held, locating it, retrieving it and extracting it from a document containing it.

7. When responding to a request under the Act there are, however, many more activities which take time but which are not currently included under the Regulations. As an example, several recent requests to universities have asked for significant amounts of financial data, down to the level of individual invoices or credit card statements. Whilst the information itself has been easy to locate and retrieve, the preparation of the information for release has necessitated the redaction of details such as credit card numbers from each individual statement. This has been an enormously time consuming task across the sector (these requests being “round robins”).

8. More activities associated with responding to FoI requests should be included within the Appropriate Limit Regulations, particularly “preparing information for release”.

9. The second aspect of the Act and of its implementation that is currently causing problems within the sector is the lack of applicability of many aspects of it to a university setting. The Act was clearly written with central and local government in mind, and its exemptions and the guidance associated with them clearly reflect this. There are 24 exemptions within the Act, but an analysis of the JISC surveys mentioned above will reveal that only 4 or 5 of them are routinely used by universities, the rest being rarely applicable.

10. The Act, and increasingly its enforcement, fails to take account of the environment within which HEIs operate. British universities are expected increasingly to operate within a commercial environment and to compete for both funding and students both with each other and with private and international institutions. Whilst it should be natural, and indeed desirable, for government departments and local authorities to share resources and information generated through tax funded processes, this is not necessarily the case with universities.

11. University funding comes increasingly from private sources for which those universities have to compete, and this leads to universities regarding some of the information which they hold in a completely different way to a government or council for example.

12. An illustration of this would be in the area of staff wages. It has long been accepted that wages of government and council officials should be by and large in the public domain, at least to the level of fairly narrow pay scales. Many university posts, however, are not funded through public money but through private research investment. Also, many university posts
13. This lack of coverage of the commercial aspects of university operation was reflected in the recent controversy around research data, which is currently being addressed through the proposed addition of the “Scottish” exemption covering research data to the English Act. Perhaps an argument could be made to take this further however. In much the same way that the BBC is subject to the Act only in terms of its management, rather than in terms of journalism and broadcasting, perhaps universities should be subject only in terms of management and teaching and learning (their “public” functions), but not research.

14. In addition to adopting the BBC “two tier” coverage by the Act, it would also be useful if universities could be subject to the same restrictions as schools, which are not expected to answer requests during school holidays. Universities, whilst not closed over the summer, often have very diminished levels of operation and staffing over this period. It is often extremely difficult to respond to FoI requests in August and September.

15. Another problem for the HE sector is that whilst the legislation itself potentially covers most situations faced by universities, the interpretation of exemptions by the Information Commissioner’s Office often does not take their distinctions into account. Whilst it has moved on from its position of a couple of years ago that universities do not have commercial interests, it still seems to be rare that case officers dealing with requestors’ complaints to the ICO are particularly familiar with the sector.

16. An example of this is an ongoing case relating to the wages of a member of staff at The University of Manchester in which the ICO case officer involved was very reluctant to accept the argument that there could be a commercial interest in a salary. Clearly in a government context there vary rarely is, but the position is very different in this sector. The impression when dealing with the ICO is often that they are far more familiar with other sectors (understandably, as the bulk of their work comes from central and local government), and that few of them appreciate the particular circumstances of universities. This is something to be addressed outwith the legislation, of course, but there is surely an argument for the ICO to have specialist case officers for such a distinct sector.

17. A related point to this concerns universities’ approach to communication with their stakeholders, and the interpretation of this by the ICO. Many requests under the legislation come from a university’s own students, or staff and students from other universities. Unlike a government department, universities tend to try to communicate with students and others within the sector on a fairly informal basis. This has been an issue in some recent cases within this university, where we have been criticised by the ICO for not quoting sections of
legislation to requestors. Again, ICO case officers who are more familiar with the sector would perhaps help to address this.

18. The Freedom of Information Act 2000 is a complex and bureaucratic piece of legislation which, whilst laudable in its aims, demands a large amount of resource investment from a sector which is currently being asked to reduce expenditure. Often this resource investment seems to have little purpose, as in the case of the publication schemes associated with the Act, which seem to be very rarely viewed or utilised by the public. There is much which could be done to reduce this burden within the sector without reducing the effectiveness of the Act in realising its core aim, openness and accountability in the setting of public policy, the undertaking of public functions and the expenditure of public money.

19. Executive Summary

Whilst agreeing with the aims of the Freedom of Information Act 2000 The University of Manchester believes that some elements of it should be modified to reduce what is a significant administrative burden on the sector. In summary; the Appropriate Limit Regulations should be modified to take account of all, or more, of the activities associated with responding to FoI requests and more account should be taken of the particular HE environment in the application of exemptions and in the approach of the ICO in enforcing the Act.

*February 2012*
1. Does the Freedom of Information Act work effectively?

1.1 Yes on the whole but there is much scope for improvement.

1.2 Since 2005, Kent County Council has become more proactive at publishing information, not only because changes to legislation have required this, but also at its own volition. However, despite putting more information “out there”, the number of requests for information falling under the scope of FOIA (and Environmental Information Regulations 2004) has increased dramatically year-on-year from 504 requests in 2005 to 1819 in 2011.

1.3 Sadly the resources to deal with these requests have not increased and there is concern that the pressure that FOIA puts on local authorities that are already under budgetary constraints is diverting valuable resources away from arguably more important council services such as social care, education and highways.

1.4 See KCC’s statistics which we voluntarily publish


1.5 The increase in requests despite making more information readily accessible leads us to three conclusions:

1. People are more aware of their rights
2. We are not publishing the “right” information (i.e.; what people want to see)
3. People are lazy and it is easier to ask than conduct research themselves

1.6 A good example of this is the mandatory publishing of transactions in excess of £500 which KCC has been doing since September 2010. Due to the constraints of KCC’s financial database which was not designed for this purpose (KCC hasn’t got the spare £millions to replace or update), it costs approximately £120 a month plus dozens of hours of officer time to redact and prepare data for publication. Given that in the 16 months since this information has been published on our website, there have only been 3000 visits to this webpage and this figure includes internal as well as external hits, it is questionable whether publishing this information is actually value for money as there clearly isn’t the demand that the Department for Communities anticipated.

2. What are the strengths and weaknesses of the Freedom of Information Act?

Strengths

2.1 The Act has definitely forced traditionally secretive cultures to become more transparent and public authorities have been forced to accept that they are going to
be subject to scrutiny and rightly so. Within KCC, there is certainly more awareness of the need for openness and accountability and there is an acceptance that no longer can business be conducted “behind closed doors”. The exposure of M.P.s’ expenses is a good example of the strength of the Act

2.2 The Act has also obliged public authorities to “clean up their act” and pay attention to their procedures and processes for example how records are managed, website design, basically improve their housekeeping.

Weaknesses

2.3 The Act is open to abuse in that commercial companies use it to glean information free of charge at the taxpayers’ expense which they will then use for their own profit.

2.4 Journalists and the Media also use the Act as a “fishing expedition” for potential stories, in effect utilising valuable council resources to do their research for them. Annoyingly, the information provided to the Media is often misrepresented or taken out of context to “sensationalise” and sell news.

2.5 The Act has become an additional weapon in the arsenal of the vexatious and repeat complainers who having exhausted the complaints process, then use FOIA as an alternative route of communications into the authority.

2.6 The Act does not facilitate being able to distinguish between the genuine requests and those that seemingly have no value, but can not be classed as vexatious. See example http://www.whatdotheyknow.com/request/red_pens#outgoing-175182

3. Is the Freedom of Information Act operating in the way that it was intended to?

3.1 Probably not as there was no way that legislation could anticipate demand, how the Act could be used and the strain it would put on resources in an already stretched public sector.

3.2 Proactive publication has also created problems for KCC. For example, voluntarily publishing FOI performance statistics (which Local Government is not currently obliged to do) highlighted to the Information Commissioner that KCC’s compliance with statutory timescales was less than 85%. The ICO subjected KCC to three-months’ monitoring and has obliged KCC to sign a formal undertaking, even though there had been no complaints from applicants about KCC’s (lack of) timeliness.

4. The Way Forward

4.1 Listed below are some changes to the Act that if implemented might circumvent some of the difficulties that certainly KCC experiences in trying to achieve compliance with the Act.

4.2 The Act should be more prescriptive about cost limits. The MoJ should review what can be included in the time limit when assessing whether complying with the request would exceed the appropriate limit or not.
4.3 Reading information to deliberate exemptions and redacting exempt information should be included in the £450/18 hours and if not (as is at present) the time limit should be reduced. I am sure the example quoted on pages 52 & 53 (187 – 188) of the report is not an isolated incident!

4.4 The Act should be more prescriptive about information that should be published by stipulating specific information that must be included in a publication scheme (or its replacement subject to the publication scheme review). This will make a certain level of transparency, such as that outlined in The Code of Recommended Practice for Local Authorities on Data Transparency, a statutory requirement and there can be no argument about what is expected of public authorities.

4.5 There should be some way of distinguishing between applicants who will profit from information collated at local authorities’ expense (commercial companies) and “genuine” requests.

4.6 There should also be a mechanism or test to identify and reject “time wasting requests” such as “What varieties/types of biscuits were bought by KCC between April 2010 - April 2011?” Perhaps the Act should include guidance to applicants on things to consider before submitting a request? If the information requested is to a degree of detail that they would not hold themselves on a household level?

4.7 The introduction of a (nominal?) fee (rather like subject access requests under section 7 of the Data Protection Act 1998) may deter “frivolous” requests or the “round robin” requests from commercial companies, journalists and the media.

4.8 If the Act is tightened and sharpened and less ambiguous, then the Information Commissioner should have greater enforcement powers. Perhaps the introduction of a system of fines, akin to those that can be deployed for Data Protection breaches, should be introduced?

February 2012
University of Bristol response to Post-Legislative Review of the Freedom of Information Act

The University of Bristol would like to offer some comments in relation to the above consultation regarding the Freedom of Information Act (FOIA). Universities UK (UUK) is submitting a comprehensive response on behalf of the sector but we would like to add our individual voice to the review. The University fully supports all submissions made by UUK in their response.

We should first state that the University does believe in being open and transparent about its activities and we proactively publish a great deal of information on our website in relation to the University’s business, its governance and finances.

Higher education institutions (HEIs) hold a different position to most bodies subject to FOIA as they do not provide a public service, unlike local councils and other public facing bodies, and receive often substantial amounts of their funding from private sources. These conflicting positions can cause difficulties for HEIs when FOI requests are received.

Cost of compliance

The cost of compliance with requests made under FOIA is of major concern. Requests received by the University have increased from 49 in 2007 to 142 in 2011 without any further resource dedicated to responding to requests. Requests are also becoming more complex and time consuming and often serve little public interest e.g. the use of FOIA by commercial organisations conducting their own customer research.

This increase adds an extra burden across the University and staff can be diverted away from their day jobs for up to two days when responding to a sizeable request. The reduction of the appropriate limit under section 12 of the Act from £450 (18 hours) to a more reasonable time period (perhaps seven or 12 hours) would be welcome. This would allow large requests to be refused more easily and therefore reduce the institutional burden. It would also reduce the resentment felt by staff towards FOIA.

At present, we are not able to take into account the time taken for considering FOIA exemptions, researching case law and redacting exempt information when making a calculation of the time estimate for a request. These can be the most time consuming parts of dealing with a request and it would be helpful if these were included in a calculation under section 12 of the Act.

A requester may also send a ‘round robin’ request to all UK HEIs at the touch of a button that can cause a huge amount of time and money being spent collectively across the sector as over 150 institutions attempt to provide information. The Higher Education Statistics Agency (HESA) is helpful when large scale round robins are made, but its profile could be raised so requesters know where they can obtain sector-wide information.

Research and private funders

As FOIA applies to all information ‘held’ by the University, research data in relation to a privately funded project is subject to requests made under the Act. FOIA is in place to provide transparency in
the spending of public money but our position under FOIA could lead us to release information that has had no public funding whatsoever. This can also cause tension in relationships between HEIs and private funders when negotiating contracts and during the research itself. This could lead to a reduction in the amount of private funding received at a time when the amount of public money being allocated to higher education has been reduced dramatically.

With this reduction in public funding, attracting private funding will become more important for HEIs and our ability to maintain relations with private funders is integral to that.

**Publication schemes**

Under FOIA, we are required to maintain a publication scheme that lists all the information we are committed to publish on a regular basis. While the principle is well intentioned, our website is essentially our publication scheme and users looking for information should (hopefully) be able to find the relevant information or person to contact relatively easily, leaving the publication scheme itself largely redundant.

As stated, we believe the UUK response will cover these areas in greater detail but we wish to have the University’s comments recorded and added to the consultation responses.

*February 2012*
Written evidence from the University of Lincoln

Executive Summary

1. The University of Lincoln supports the aims and objectives of the Freedom of Information Act (FOIA); however we submit that its effectiveness is undermined by the growing cost of compliance, exacerbated by the increasing use of public access requests to gain information that is not in the public interest. We recommend a number of ways that the cost of compliance could be reduced, including changes to the timeframe, cost limits and Fees Regulations for public access requests and an alternative to the publication scheme. We also call for parameters to be established for the reasonable use of public access requests based on the information being in the public interest and the request justifying the use of public resources.

Introduction to the Submitter

2. The University of Lincoln was established in 2001, having opened its first building in the city in 1996. The institution has a reputation as a university of innovation and enterprise with an emphasis on research and research-engaged teaching. It currently has 11722 students on campus and employs 1331 academic and service staff.

3. The University has experienced a continuous year-on-year increase in the number of public access requests received since the FOIA came into effect, with 25 requests in 2005 rising to 108 requests in 2011.

Issues

Does the Freedom of Information Act work effectively?

4. The University of Lincoln supports the objectives of the FOIA of openness, transparency, public accountability, effective decision-making and public involvement in decision-making. However, it is our view that in practice the FOIA does not work effectively in a number of ways and our concerns are detailed in paragraphs 6 to 12 below.

What are the strengths and weaknesses of the Freedom of Information Act?

5. We consider the main strength of the FOIA to be that it has, in a relatively short period of time, been successful in bring about a culture change in government and other public authorities. While there is still some way to go to before the key objectives of openness, transparency and accountability are fully realised everywhere, the legislative ambition to improve decision-making in those bodies that the public fund and rely on for services has begun to be realised. However, as noted in paragraph 207 of the Memorandum to the Justice Select Committee, the extent to which this has resulted in greater public trust of that decision-making is debateable, with levels of distrust perhaps fuelled by the dominance of negative news stories in the media.
6. In our view the main weaknesses of the FOIA is the cost of compliance. A recent report by the Universities UK Efficiency and Modernisation Task Group, entitled 'Efficiency and Effectiveness in Higher Education', suggested that the direct staff costs of managing public access requests alone costs the HE sector £10 million per annum. As private organisations in receipt of significantly reduced public funding, we would question whether universities should be expected to continue to divert this level of resource from their core activities. We would also ask whether the overall cost to the public purse of public authorities responding to public access requests is justified, particularly in the current financial climate and general reduction in public spending.

7. It is evident from our own experience, and from sources such as the annual Information Legislative and Management Survey conducted by JISC infonet, that the number and complexity of requests is increasing. This means that responding to requests is more expensive, more time consuming and more difficult to manage within 20 working days. We believe there are a number of different measures which would provide a fairer and more workable balance between the rights of requesters and the resource implications for public authorities. Our recommendations are listed below.

a) **Extend the 20 working days timeframe**
   It typically takes the collaboration of 4-5 members of staff to respond to a public access request. Those staff already have heavy workloads and competing priorities for their time and continually responding to growing numbers of requests within this timeframe is becoming increasingly difficult. Our recommendation is that the 20 working days timeframe be extended in recognition of the increasing administrative burden and reduced staff resources in public authorities.

b) **Change the time or cost limits**
   Universities are expected to incur costs of up to £450 based on £25 per person per hour (equating to 18 hours of staff time) when responding to a public access request. Although many requests take less than 18 hours to respond to, the expectation that public authorities should spend up to £450 on one request perhaps seems unreasonable given the number of requests now being received and the limited public resources available. Furthermore, the allowance of £25 per hour for staff time was set some time ago and has not been adjusted to account for increases in salary and on-costs. Our recommendation is that either the cost limit is reduced or the hourly rate increased.

c) **Extend the list of activities that can be counted within the cost limits**
   As noted in paragraphs 173 and 221 of the Memorandum to the Justice Select Committee, a public authority is only able to factor in certain costs when considering the cost limit. This means that many activities such as conducting the public interest test, considering exemptions, writing responses and redacting information cannot be included when they often constitute a significant part of the overall process of responding to requests. Our recommendation is that these activities are allowed to be included within the cost limits.

d) **Review the Fees Regulations**
Almost all of the public access requests received by the University are sent by email, with most requesters asking for a response in electronic format. Therefore we rarely incur costs for disbursements, or if we do, we do not charge a fee because it is not worth the administrative cost of processing it. Our recommendation is that consideration be given to other ways public authorities might recoup some of their costs incurred through responding to requests.

e) Review the use of the FOIA by journalists and commercial requesters

Our concerns about the use of public access requests by journalists and commercial requesters are explained in paragraphs 10 to 12 below. Our recommendation is that parameters be established for the reasonable use of public access requests based on the information being in the public interest and the request justifying the use of public resources.

Is the Freedom of Information Act operating in the way it was intended to?

8. We would agree with paragraph 170 of the Memorandum to the Justice Select Committee and argue that publication schemes are not fulfilling their intended function. In our experience the publication scheme is time consuming to create and maintain but used little by those seeking information. Furthermore it seems unnecessary to create a guide to information when websites already have effective search facilities. We would recommend that publication schemes be replaced with a simpler requirement for public authorities to make certain information available and easily searchable online.

9. In addition, if it was intended that publication schemes would reduce the administrative burden of public access requests by enabling public authorities to re-direct enquirers to information already published, in practice this is rarely possible. Many requests pose a series of such specific questions, often requiring information from various sources to be pulled together, that it is arguably impossible to try to anticipate requests and proactively publish information which would provide the answers. Even publishing previous request responses is not particularly helpful as requesters invariably require the most up-to-date information and no two requests are exactly alike.

10. In our view the FOIA is often not used by journalists in the way in which it was intended and this is compounded by the significant number of requests received from the media. While we agree that public bodies should be held to account by the public, and that in some cases the use of the FOIA by journalists is justified as part of their investigations (for example to corroborate a strong suspicion or existing evidence of significant wrong-doing), we would strongly support the concerns noted in paragraphs 203-205 of the Memorandum to the Justice Select Committee. In our opinion the amount of public resource used to provide information to journalists should be proportionate to the public interest in the issue. The use of the FOIA for speculative ‘fishing trips’ does not seem to justify the expense to the public purse, particularly when the resultant articles may not be in the public interest or promote accountability.
11. We are also of the view that the FOIA seems to unintentionally encourage so-called ‘lazy journalism’, whereby little research and analyses appears to take place either prior to requests being made or after responses are provided. For example, the University recently received a request asking for revenues from allowing tourists and the media to use its campuses. We provided the information requested but if the requester had really wanted to know about how universities use their campuses to derive income they would have received much better quality data if they had taken the time to engage with us directly as they would have discovered that there are many ways we derive economic value from the resources we manage.

12. We would also question whether it was the intention of the FOIA to provide commercial companies with information that might give them an advantage over their competitors, again at the expense of the public purse. Commercial requesters make up another large proportion of the requests received and ask about key staff contacts, current systems, current suppliers and contract values. While in theory all responses to public access requests are in the public domain, in reality it is unlikely that other companies in the same market will become aware of them. This potentially puts the requester at an advantage when tendering for work which seems unfair to other companies and an unjustified use of public resources.

February 2012
Written evidence from Universities UK

Executive summary

1. Higher education institutions recognise and strongly support the need for openness and transparency and are working proactively in many ways to support this across all of their activities. UK universities are, for example, at the forefront of developments to support open access to research findings and better, more accessible, information for students.

2. The Freedom of Information Act (FOIA) places additional requirements on universities, which are defined as ‘public authorities’ for the purposes of this legislation. Higher education institutions have worked to effectively comply with the FOIA but there are increasing concerns about the application of this legislation in a higher education environment. This is for a number of reasons:

   • Higher education institutions are mostly charities and autonomous bodies that operate in a highly competitive international environment. The nature of funding to the sector is changing significantly, with the largest proportion now coming from private sources on a competitive basis. The emergence of a market-based sector raises the question of whether FOI legislation, as currently applied, is the most effective and efficient mechanism to support openness and transparency in this new environment.

   • Current government policy for higher education is also encouraging greater competition and diversity of provision from new providers that are not currently subject to the FOIA. Competition can only be fair and effective if all institutions are operating on a level playing field, subject to the same regulations.

   • Evidence from individual institutions points to an increasing complexity of requests and substantial costs being borne in complying, especially where all costs cannot be claimed.

   • Universities undertake a significant amount of the UK’s research. Across a number
of measures this is second only to the United States in its quality. This research is currently subject to the FOIA, and early release of research findings and data can have potentially serious implications for the quality and reputation of UK research, universities’ competitive position nationally and internationally, and relationships with commercial partners.

- In a higher education environment the FOIA can come into direct conflict with other legislation, such as the Animals (Scientific Procedures) Act and the Data Protection Act. In the increasingly marketised higher education environment, we also have concerns regarding the application of the FOIA in relation to competition law.

3. While further advances in openness and transparency in higher education are to be encouraged, the changing nature of the sector means that the FOIA as it is applied in a university context is now in urgent need of review.

Recommendations

We seek the Committee’s support for the establishment of an independent review that would consider the application of the FOIA to a changing higher education sector. This will ensure that studies currently examining a number of the issues raised in this submission can inform decisions made in this area.

Notwithstanding the establishment of an independent review, we believe the following issues need to be addressed:

- The question of how the FOIA should be applied to a more diverse set of higher education providers needs resolving as a matter of urgency. We seek the advice of the Committee on how this should be dealt with as part of the new regulatory framework for higher education, currently being developed by the Department for Business, Innovation and Skills.

- Universities UK proposes that the Committee should reconsider the definition of activities that could be charged for and count towards the exemption where cost of compliance exceeds the appropriate limit.

- Further advice and guidance on how the FOIA interacts with other legislation in a higher education context is required.

- Universities UK seeks greater clarity on whether higher education institutions could be treated in the same way as other organisations under the FOIA that have strong commercial interests.
• We seek the Committee’s support for the introduction to the FOIA of a limited exemption for pre-publication research.

• Universities UK calls on the Information Commissioner’s Office to clarify existing guidance about the application of current exemptions to research.
The importance of transparency in higher education

Key messages:

• Higher education institutions support the need for openness and transparency of information.

• The higher education sector is already actively working to achieve greater transparency across all of its activities.

Transparency and openness in higher education

1. Higher education institutions recognise and support the need for openness and transparency – to inform students’ education choices; for accountability in the spending of public funds; and within the research community, to encourage greater use and application of research for the economic and social advantage of the UK.

2. The higher education sector is already leading and actively working towards greater openness and transparency. Higher education institutions are engaged in providing information through: individual institutions’ websites, including data repositories1; the Higher Education Statistics Authority; the Transparent Approach to Costing2; reporting on Office for Fair Access agreements; and new work that is being conducted to produce Key Information Sets. Further work on encouraging openness of data is being conducted by a working group led by Dame Janet Finch, and the Royal Society is also conducting research looking at improving the openness of data in science3.

3. Many of the key funders of UK research, including the research councils and medical research funders such as the Wellcome Trust, have policies in place to require any peer-reviewed research paper resulting from their funded projects to be deposited in an electronic archive. The Higher Education Funding Council for England (HEFCE) has a shared commitment with Research Councils UK to ensure that significant outputs from research activity are made available as widely as possible both within and beyond the research community. The vast majority of research conducted in UK universities is undertaken with a view to eventual publication and it is a requirement of the Charities Commission that research undertaken by educational establishments is only ‘charitable’ if its results are made available for the public benefit.

---

1 For example see the University of Southampton http://data.southampton.ac.uk/, the Open University http://data.open.ac.uk, and University College London http://eprints.ucl.ac.uk/

2 More information on TRAC is available at http://www.hefce.ac.uk/finance/fundinghe/trac/

3 Further information on the project ‘Science as a public enterprise: opening up scientific information’ can be found at http://royalsociety.org/policy/projects/science-public-enterprise/
4. It is well recognised across the academic community that improving access to publicly-funded research undertaken in UK higher education institutions not only benefits the general public as a whole but enhances the international reputation of UK research by making the results more accessible worldwide.

5. Publication schemes are in place for nearly all higher education institutions. However, most of this information, and much more, is already freely available on institution websites. We would question whether the publication scheme in its current form is the most efficient route to providing access to this information.

Implementation of the FOIA in higher education

Key messages:

- The costs of complying with the FOIA are not reflected in what can be charged.

- It is unclear how institutions will be able to comply with proposed requirements in the Protection of Freedoms Bill to make data reusable while maintaining confidentiality.

- In a higher education setting the FOIA can conflict with other legislation, making it impossible to comply with both.

- Several research projects are currently underway looking at the FOIA and universities which will report after the post-legislative scrutiny period.

6. The higher education sector has complied effectively with the FOIA and, according to Joint Information Systems Committee (JISC) InfoNet survey data, in 2011 94% of requests were dealt with within the required 20-day period. There are, however, examples of cases that have proved particularly problematic and we have increasing concerns about how the FOIA will be applied in a changing higher education environment. Whilst the Information Commissioner’s Office (ICO) has produced useful sector-specific guidance to help higher education institutions, Universities UK believes that these problems have arisen due to the fact that the original legislation was not written with higher education in mind. Indeed, a number of issues relating to the FOIA and higher education are not reflected in the Memorandum to the Justice Select Committee on Post-legislative Assessment of the FOIA.
The costs of compliance

7. While it is recognised that organisations can charge for some limited aspects of responding to requests under the FOIA, as the Justice Committee memorandum itself recognises, there are costs, such as time spent considering exemptions and redacting confidential information, which are not covered. The process of redacting data (due to sensitive personal or commercial content) can be very time consuming, and requires someone with suitable knowledge to ensure that all the necessary sensitive data is removed, and no more.

Universities UK proposes that the Committee should reconsider the definition of activities that could be charged for and count towards the exemption where cost of compliance exceeds the appropriate limit.

8. There remains an unanswered question about how institutions can ensure that data is suitably redacted so that when combined with other sources advanced data-matching technologies do not lead to the possibility of individuals being identified. This is particularly pertinent under the proposed amendment of the FOIA through the Protection of Freedoms Bill, which will require datasets to be made available in a reusable format.

9. Even where the request is ultimately withdrawn there can be significant repercussions in terms of the time and resource an institution may spend dealing with it rather than conducting business as usual. For example, the University of Oxford received a request for research data from a large nationwide health study, submitted by a company with a significant commercial interest in it. Although the request was not ultimately pursued the research group had a year of research time disrupted in attempting to rebut the request, and the institution incurred significant legal costs in the process.

10. Full research is underway to ascertain the costs of FOIA compliance in the higher education sector. JISC InfoNet is conducting research with seven higher education institutions to track requests, including determining all staff involved – including their grade and the amount of time spent actively working on the request – and any additional costs (for example photocopying, postage, and so on). The outcomes of this research will not, however, be available until March 2012.

11. In addition, research is being conducted by the University College London Constitution Unit on the impact of the FOIA on universities (particularly how well universities cope with the extra administrative and other burdens of the FOIA), and the use academic researchers have made of the FOIA. This project is due to finish in July 2012 so is also unavailable to inform the current post-legislative scrutiny process.
Data on FOIA compliance

12. JISC InfoNet has run an annual survey on FOIA compliance in higher education since 2005\(^4\). This survey (relating to requests received by the higher education sector under the FOIA, Environmental Information Regulations and the Data Protection Act) has sought to understand some of the factors driving current patterns of requests and to help predict and prepare for future ones.

13. The number of requests being made under the FOIA has continued on an upward trend, with an average monthly number of FoI requests per institution of 10.1 in 2011 compared to 8.6 in 2010, and just 2.8 in 2005. Although this number is not high compared to the volume of requests received by other public bodies, such as local authorities, the cost and complexity of requests appears to be increasing.

14. In terms of the exemptions being used by institutions to withhold information under FoI, for the first time section 12 (‘Exemption where cost of compliance exceeds appropriate limit’) has been the most applied, followed by section 40 (‘Personal Information’) and section 21 (‘Information accessible to the applicant by other means’). In 2010 22% of non disclosure relied on the section 12 exemption, increasing to 28% in 2011.

15. This increase in the use of the section 12 exemption is perhaps an indication of more complex requests being submitted. This is further supported by the increase in the length of time institutions took to fully process a request. Further information from the survey is available online.\(^5\)

Conflict with other legislation in higher education

16. Some requests have exposed conflicts between the FOIA and other legislation in a higher education setting, including related legislation such as the Environmental Information Regulations (2004), the Data Protection Act (1998) and the Animals (Scientific Procedures) Act (ASPA). This causes problems for institutions trying to comply with conflicting legislation.

Further advice and guidance on how the FOIA interacts with other legislation in a higher education context is required.

\(^4\) The Information Legislation and Management Survey conducted in association with Universities UK and GuildHE, available at http://www.jiscinfonet.ac.uk/foi-survey/index.html

\(^5\) Available at http://www.jiscinfonet.ac.uk/foi-survey/index.html
Case study: conflict between legislation
Newcastle University received an FoI request for project licences relating to specific projects where animals were being used for experimentation. The request was initially refused using three exemptions: health and safety (endangering the safety of individuals), commercial interests and prohibitions on disclosure. The prohibition on disclosure related to the licenses having been issued by the Home Office under ASPA. This was accepted by the information commissioner when Newcastle’s original decision was challenged, but overruled by the Information Tribunal on appeal. Newcastle University has now released the data under the FOIA but this is a breach of the terms of ASPA. In addition to the risk the university believed this exposed individual members of staff to, this decision also placed staff at the risk of prosecution for disclosing the data because in this instance the FOIA is in conflict with ASPA.

This case also demonstrates the cost implications to institutions of trying to refuse such requests; the university spent over £250,000 on legal fees alone in disputing this case (see http://www.independent.co.uk/news/science/universities-forced-to-come-clean-about-controversial-primate-experiments-6262805.html).

The university believes that should it receive a similar request it will be open to the same legal risk and might be required to take the case to the Information Tribunal again, as they understand that one of the reasons that prosecution was not pursued by the Home Office was that the university had been ordered to release the data. This would obviously have considerable cost and time implications.

Vexatious requests
17. Universities report that they do receive requests which they consider to be vexatious but that the definition of vexatious is so unclear that they are deterred from seeking to use this exemption. Further guidance, particularly around what constitutes a vexatious request and how frivolous, time-wasting requests should be handled, would be welcomed, as would a review of what should be included within a university’s publication scheme and the level to which project data plans demonstrate an intention to publish.
The FOIA and a changing higher education sector

Key messages:

- The higher education sector has changed significantly since the introduction of the FOIA. Universities UK recommends that an independent review is held which considers the position of universities within the FOIA.

- Unlike most other public authorities, higher education institutions face competition both nationally and internationally.

- There is a need for a level regulatory playing field between all types of providers.

18. Higher education institutions are different from all other organisations included under the FOIA in that they are the only organisations (excluding the BBC\(^6\)) that face competition between themselves within the sector as well as internationally, and are largely privately funded. Since the FOIA was introduced the higher education sector has also changed significantly. The balance of funding within public institutions in the UK has changed from 61% public funding in 2005–06 to 55.9% in 2009–10\(^7\), and this trend is expected to continue. David Willetts, Minister of State for Universities and Science, has recently confirmed that student fees will be treated as private income, potentially lowering this ratio significantly. Further evidence of the shift in funding can be seen in the reduction of the HEFCE teaching grant received by institutions\(^8\), which will be replaced by income from tuition fees. The grant is predicted to drop from 66% in 2010–11 to approximately 22% in 2014–15 as a proportion of overall teaching income.\(^9\)

19. The FOIA recognises that some organisations, such as the BBC and the Universities and Colleges Admissions Service, have public activities that are subject to the FOIA and commercial interests that are not covered. Recognition by the Ministry of Justice and the ICO that universities teaching and research activities have commercial value would be very welcome.

Universities UK seeks greater clarity on whether higher education institutions could be treated in the same way as other organisations under the FOIA that have strong commercial interests.

---

\(^6\) Note that some of the BBC’s activities are not subject to the FOIA, including its commercial subsidiaries.

\(^7\) HESA (2011) *Finance Plus* Cheltenham: HESA

\(^8\) Note that this relates to higher education institutions in England only.

20. The recent Department for Business, Innovation and Skills (BIS) Higher Education White Paper contained a stated intention to make the market more competitive, which included opening up higher education to a more diverse set of providers. As the higher education market opens up, however, an anomaly is created in terms of how different providers are treated for the purposes of the FOIA. Competition can only be fair and effective if all institutions are operating on a level playing field, subject to the same regulations. The question of how the FOIA should be applied to a more diverse set of higher education providers needs resolving as a matter of urgency.

We seek the advice of the Committee on how this should be dealt with as part of the new regulatory framework for higher education currently being developed by BIS.

21. This move to a more equitable market is supported by research conducted for the Higher Education Better Regulation Group (HEBRG)¹⁰ at the request of BIS¹¹. The HEBRG report includes specific recommendations in relation to FoI legislation which Universities UK urges the committee to consider.

22. Universities UK would welcome the Committee’s views on the issues raised in this submission; however, given the significant changes taking place in higher education and the issues this raises, Universities UK recommends that an independent review is held which considers the position of universities within the FOIA. This would also allow current research to be used to inform decisions.

The FOIA and research

Key messages:

- Universities UK calls for a qualified exemption for pre-publication research.
- ICO guidance on how existing exemptions apply to research should be clarified.
- Unless the UK acts, our competitive interests will be damaged.

Pre-publication research

23. Universities have become increasingly concerned about the position of pre-publication research data and information under the FOIA. Researchers can be asked to disclose research information before it is complete, before it has been subject to peer review, and before the originators have had an opportunity to benefit from their work by securing publication or protection of any intellectual property arising from the work, such as patents.

24. Universities UK strongly supports moves to increase access to data. Paragraph 2 of this submission describes important current developments in this area. However, we also believe there is a need to protect the manner and timing of the publication of research information and results, so as to:

a. **Uphold the quality and reputation of UK research.** There is a risk that misleading information may enter the public domain before it has been cleaned, checked, and subjected to analysis and peer review. Researchers may be challenged on their approach or findings before they have had a chance to address any flaws in their work. In relation to health-related research, individuals might misdiagnose or medicate themselves on the basis of misleading information gaining currency supported by incomplete research. This could damage the UK’s reputation for quality research.

b. **Support universities’ competitive position.** University research is fundamental to the UK’s global competitiveness, and is considered second only to the United States. It is also a highly competitive field. Premature disclosure of research information will enable international competitors to profit from work undertaken in UK universities before the originators have had a fair opportunity to protect their ideas or secure grants for future research. This will act as a disincentive to original research.

This risk is increased by provisions in the Protection of Freedoms Bill which require universities to permit reuse of datasets which are made available under new provisions.¹²

It may be difficult or impossible to secure publication opportunities in reputable journals if findings are already in the public domain. Publication record influences university income via the Research Excellence Framework, as well as universities’ ability to secure future grants and commercial contracts, and attract academic staff and students. This harms universities’ competitive interests, if not necessarily their

¹² Currently clause 102 of the Protection of Freedoms Bill.
c. **Encourage research partnerships with commercial and charitable bodies.**

Universities work with commercial and charitable bodies on research projects. We know that the potential for the results of such research to be released to competitors under the FOIA is a barrier to such contract arrangements, and believe that as the risk becomes increasingly clear to companies, they will take research contracts elsewhere – to international competitors, or non-university research partners. This is not in the best interests of the UK economy, or consistent with other government policy initiatives to encourage collaboration between universities and industry.

Research at an early stage may have *potential* but not actual commercial value – for example by identifying areas for further research which could yield commercially valuable results. Again, current guidance does not explain how the commercial interest exemption might be engaged by such cases.

**Case study: commercial relationships**

The University of Oxford was in negotiation with a big multinational company in relation to a studentship and £24,000 funding. The FOIA raised many concerns and significant resources were used in the negotiation involving research administrators, the Legal Office and the researchers. Ultimately the contract was not signed and a one-off compromise was agreed since the project was already underway, but future relationships were soured.

25. In Universities UK’s view it remains unclear how current exemptions apply to research in all circumstances, despite the efforts of the ICO through sector-specific guidance. The commissioner’s comments about the misapplication of exemptions in several recent cases involving university research demonstrate the problem in understanding how they might apply to circumstances for which they were not originally designed, since parliament did not envisage the research case during the passage of the FOIA. Further clarification of existing guidance would help, but we remain persuaded that there is a gap in current exemptions.

Universities UK has proposed a limited amendment to the FOIA which would provide specific protection from disclosure for pre-publication research.

26. This amendment would:

- be subject to the public interest test
• be used when some harm would result from disclosure
• be used when none of the existing exemptions are adequate

Universities UK calls on the ICO to clarify existing guidance about the applicability of current exemptions to research.

Wider tensions between the FOIA and research interests
27. Although specific protection for pre-publication research is a particular priority, there are wider concerns about the application of the FOIA to research. In particular, there is a concern that the potential for some information to be released under the FOIA could lead to participants becoming unwilling to participate in some types of research. Changes in data manipulation techniques, which allow the triangulation of data, potentially revealing individual identities, can make it impossible to guarantee anonymity.

28. New provisions in the Protection of Freedoms Bill will compel universities to permit the reuse of data. The FOIA is motive blind, so reuse will be possible even where the intentions are directly contrary to the purposes of the original study. Data protection legislation requires consent to be sought for reuse of information. It is not clear how universities could comply with that duty in these circumstances.

Case study: research data
The University of Stirling (under the Freedom of Information Act Scotland) received a request from Philip Morris International for data collected from underage smokers on their behaviours (including reasons for stating smoking), as part of a study funded by Cancer Research UK. Stirling considered the participants in this study to be a vulnerable group and was concerned that if it allowed information gathered for research purposes to be used by a commercial company with an interest in marketing tobacco to young people the consequence would have been to deter future participants in research. It might also have put research funders off funding future projects with the university, with huge financial implications for the research unit.

The university unsuccessfully attempted to apply the exemption relating to ‘vexatious requests’, but later successfully used cost limits to refuse the request. However, they note that the requester is at liberty to return with a more limited request which they will not have grounds to refuse. Although Scotland has an exemption for pre-publication research, it was not relevant in this case since Stirling does not intend to release the dataset in question.
Universities UK believes that this submission provides evidence of the unanticipated effects that the FOIA has had on higher education institutions. The higher education sector is proactively working to increase access to information. However, information should not be released in a manner that causes a detrimental effect on institutions’ ability to: compete in national and international markets for teaching and research, gain funding, or protect intellectual property rights. Given this, Universities UK welcomes the post-legislative scrutiny of the FOIA and urges the Committee to support the call for an independent review of the application of the FOIA in a changing higher education sector.

About Universities UK
Universities UK is the representative organisation for the UK’s universities. Founded in 1918, its mission is to be the definitive voice for all universities in the UK, providing high quality leadership and support to its members to promote a successful and diverse higher education sector. With 133 members and offices in London, Cardiff and Edinburgh, it promotes the strength and success of UK universities nationally and internationally.

Universities UK welcomes the opportunity to respond to the call for evidence for the post-legislative scrutiny of the Freedom of Information Act (2000) (FOIA).

February 2012
Written evidence from the Prison Reform Trust

The Prison Reform Trust is an independent charity working for a fair and decent prison system. We aim to improve prison regimes and conditions, defend and promote prisoners’ human rights, address the needs of prisoners’ families, and promote alternatives to custody. Our activities include applied research, advice and information, education, parliamentary lobbying and the provision of the secretariat to the All Party Parliamentary Penal Affairs Group.

The Prison Reform Trust is pleased to have the opportunity to respond to the Justice Select Committees call for written evidence on the post-legislative scrutiny of the Freedom of Information Act.

The Freedom of Information Act has become a vital tool in information disclosure about prison, the most hidden of our public services. The Ministry of Justice website shows that recently, information has been disclosed regarding questions of significant public interest including:

- Visiting speakers/dignitaries and the reason for their visit to prison
- Number of legal claims by prisoners and compensation paid
- Deaths under probation supervision
- Length of wait for those seeking transfer between prisons

Appropriate disclosure of information enhances public confidence in the system and reassurance that prisoners are held securely and safely. There is a public interest in keeping the public informed about how they are being protected from crime. The Freedom of Information Act helps to reassure the public and stakeholders that prisons are fulfilling their duty of care to people in prison.

Information disclosed under the FOIA also enables public engagement with and knowledge of the criminal justice system as well as supporting the government’s transparency agenda.

**Extension of the Freedom of Information Act**

Currently, private organisations providing public services are not liable to the same requirements to disclose under FOI. Private prisons are providing the same service as state run prisons. The rights to information about the regimes and establishment should be the same. Prisoners in the main have no choice in whether they are held in a private or state run prison and the rights of people held in these prisons should be equivalent.

The specifics of the custodial environment and the potential vulnerabilities of the population mean that transparency and accountability in the system are even more
essential than in other public services. Private contractors providing custodial services should be held to the same standards of responsibility as state providers.

We believe that extending the act will not have significant cost implications. Private contractors are already obliged to provide the Ministry of Justice, Her Majesty’s Chief Inspector of Prisons and Ministers and other regulatory bodies with large amounts of information for monitoring purposes. Much of the data that could be requested under FOI is already collated and held. Careful and effective managing of this information when requested under the FOI would not be a burden to private contractors. Public interest in the cost of public services and contracting processes is very high at the moment. Lack of accurate information and an obscure commissioning process can impede proper debate.

We note that the House of Commons’ Public Accounts Committee recently called on the government to extend the Freedom of Information Act.
http://www.parliament.uk/business/committees/committees-a-z/commons-select/public-accounts-committee/news/pfi-report-publication/  The Committee focused on the poor deal the taxpayer was getting in PFI contracts. They stated that the taxpayer’s position is made worse by poor transparency of investor and contract information alongside patchy public sector commercial skills. Currently, the Ministry of Justice is moving to a Payment by Results model in prison and probation service contracts and similar concerns have been raised about these contracts.

While Freedom of Information provisions do not apply to private providers of public services the public cannot hold the government to account or decide on whether taxpayers are receiving value for money for services. Public bodies often cite commercial sensitivities for not allowing freedom of information provisions to apply to the private sector. Although some details of negotiations and contracts are commercially sensitive, it is currently too easy for departments and investors to hide behind commercial confidentiality, rather than provide full disclosure of costs and benefits to inform value for money. These are publically funded investments and should be subject to public scrutiny.

We support the Public Accounts Committee’s recommendation that the freedom of information should be extended to private companies providing public services and that the Treasury should define commercial confidentiality and where exceptional circumstances can be applied. Extending the FOIA would increase public confidence in the workings of closed institutions by ensuring another level of accountability and visibility for companies whose contracts could be as long as twenty five years.

February 2012
1. It is important to state that organisations providing public services and including those working in the healthcare sector should be open and honest with the public about the way they conduct their business. However there are real concerns about the level of resources that are being taken up by having to comply with the legislative overheads imposed by the Freedom of Information Act (FoIA). It is interesting to note that prior to the introduction of FoIA the NHS operated under a Code of Openness which was overseen by an independent ombudsman. The code included this clause on information requests which could be refused:

*Requests for information which are manifestly unreasonable, far too general, or would require unreasonable resources to answer.*

2. It is clear from an analysis of the type of requests being received that the FoIA is not always being used in the way in which the government intended it to be. The two Primary Care Organisations in North Lincolnshire and North East Lincolnshire received almost 500 individual requests for information under FoIA in 2011 (with many of these containing multiple questions), a task that requires the almost full time attention of a member of staff simply to administer the system. We estimate that less than 5% of the requests received are from members of the public exercising their legitimate right to scrutinise the organisations business activities. Instead the overwhelming majority are from; businesses seeking commercial information; press agencies and journalists (particularly large areas of the Health Press who routinely ask the same questions month after month); and research students. The size and complexity of many of these requests pose an increasing burden upon organisations at a time when staff numbers and resources are reducing.

- It is the view of NHS NL and NEL CTP that the FoIA has a positive intent but is too open to misuse by entities such as businesses seeking commercial advantage and the press. Managing these requests diverts significant resource from supporting access to information for individual citizens.

- The strength of the FoIA has been putting into legislation the rights of individuals to be able to gain access to information held by public bodies. There are undoubtedly cases where individuals have been able to get access to data which they would not otherwise have been able to, and we would wish to see this continue through a more focussed process and right of access.

- The weakness of such a wide scale legal right is the overwhelming number of cases where the right of access is misused and the subsequent waste of public resources that is needed to be put in place to deal with these requests.

February 2012
Written evidence from the Constitution Unit

Since 2007, the Constitution Unit based at University College London has studied the impact of the Freedom of Information Act on British central government, English local government and Parliament. In all three cases we have looked at whether FOI has met six main objectives set for it by its supporters:

- increased openness and transparency
- increased accountability
- improved decision-making in government
- better public understanding of government decision-making
- increased participation
- increased public trust in government

We have also examined whether FOI has had an impact on the day-to-day operations of these bodies, either positively or negatively.

Research Methods

Our research used five main methods:

1. Interviews with 56 officials in eight British central government departments, 90 officials and others across 16 local authorities, 30 MPs, peers and officials at Westminster as well as journalists, requesters and campaigners
2. An online survey of FOI requesters
3. Analysis of press articles using FOI
4. An analysis of FOI case law
5. Analysis of disclosure logs

The different methods helped measure the different objectives, but each has limitations. For example the online survey of requesters’, while giving an insight, did not achieve a large number of responses. The media analysis similarly is only a ‘proxy’ for how people receive information through FOI.

What Impact Has FOI Had?

Central Government

- FOI has made British central government more transparent both in terms of the information it provides and the ‘culture’ within departments. This is despite the fact publication schemes were seen as rather antiquated and poorly used, having been superseded by the webpage and internet search engine.

- It has also led to increased accountability, particularly when FOI is used alongside other ‘traditional’ mechanisms of accountability such as the media.
It has not had an impact of any of the other objectives. This is not because FOI has failed. Complex issues such as public participation and public trust are influenced by many other factors. In this sense FOI, as with many policies, was ‘oversold’ by politicians.

If it hasn’t realised all supporters hopes it has not realised the fears of others. It has not had any significant impact on the decision-making process or some of the key constitutional conventions such as collective responsibility. Nor does it appear to have led to a chilling effect (see below).

**English Local Government**

- FOI has made local government more transparent, though to a lesser extent than at central level because local authorities have been opening up since the 1960s. Recent innovations in online publication are beginning to have some impact, particularly third party innovations.

- Accountability has also been improved, with FOI often used with other mechanisms (such as the local media or NGOs) to build a wider picture of an issue.

- FOI has only influenced decision-making and public understanding at low levels. It has not affected participation and has had no generalisable impact on trust.

- Authorities’ key functions have not been changed by FOI. It has had no impact on how authorities deliver services or work with others, though there is tension around private companies working for local authorities and national and local media requests.

**UK Parliament**

- FOI has helped to make the UK Parliament more transparent, and more accountable. It does not appear to have improved public understanding of Parliament, or public participation; nor has it increased public trust, simply because coverage of expenses has overwhelmed any other issue.

- Although it has led to the creation of IPSA and a new expenses system, it is not clear how much it has changed Parliamentary culture more generally. FOI has also led to smaller changes over, for example, how MPs pay restaurant bills and the tax status of Peers.

- We also looked at whether MPs have used FOI as an accountability tool. While only a small number of MPs, mostly the opposition, use FOI it has proved to be a powerful tool. It has helped to uncover information about a range of topics from visitors to Chequers to extraordinary rendition.

**Does FOI Have A Chilling Effect?**

- One possible unintended consequence of FOI may be a ‘chilling effect’, where decisions go unrecorded or are sanitised due to fear of future requests. Finding hard evidence for such an effect is very difficult as it requires proving a negative and asking interviewees to admit
unprofessional conduct. Studies are divided as to whether FOI leads to this. A survey of officials in Ireland found 30 per cent of officials claiming an effect and just fewer than 50 per cent denying it.

- The former head of the Swedish National Audit Office, Inga Britt Ahlenius, identified the ‘empty archives’ phenomena in Sweden, whereby ‘important issues are discussed orally [or] by telephone’. Tony Blair claimed FOI had led to more caution over recording decisions, as did former Cabinet Secretary Gus O’Donnell.

- Our central government study found little clear evidence. FOI was lost amid wider issues around resources, fear of leaks and changing decision-making styles. Many officials were concerned more by the consequences of not having a record than having one. Others felt factors such as leaks or recording style proved more significant. Many felt the ‘politics’ of a decision is ‘always off paper’.

- There was one very clear example, in one local authority, following a damaging FOI request, members no longer commented on drafts in writing. Interviewees elsewhere said care was taken in controversial decisions or negotiations. Most were keen to point out this was not a general tendency and said it had also led to more professionalism in some cases.

- It is difficult to draw a firm conclusion due to lack of evidence and the problem of disentangling causal factors. There appears to be no systematic evidence for alteration of records. However, FOI can and has caused a ‘negative’ chilling effect in specific instances, particularly with difficult or controversial topics and in problematic political situations.

**Who Is The Requester?**

- A key problem underlining all FOI analysis is the lack of knowledge about requesters and their motivations. The variable impact of FOI is also down to the variability of requester motivations. The table below is based on estimates of requester types to central and local government from FOI officers.

<table>
<thead>
<tr>
<th>Requester</th>
<th>Local Government (%)</th>
<th>Central Government (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public</td>
<td>37</td>
<td>39</td>
</tr>
<tr>
<td>Journalist</td>
<td>33</td>
<td>8</td>
</tr>
<tr>
<td>Business</td>
<td>22</td>
<td>8</td>
</tr>
<tr>
<td>Academic</td>
<td>1-2</td>
<td>13</td>
</tr>
</tbody>
</table>

- Contrary to the views of Tony Blair, FOI requesters are not predominately journalists. The largest group across central and local government appears to be members of the public, a trend reflected elsewhere. The public consists of a small group of politically engaged with a larger group pursuing issues of ‘micro-politics’ or of private importance.
• There was a clear rise and fall of public interest with the news agenda. However, ‘private’ interest requests or issues of ‘micro-politics’ far outweighed them. Many requests were focused, ‘quite niche’ or on ‘specialised’ issues such as a planning dispute or parking fine at local level or access to benefits at central government.

• Requesters’ motivations were also diverse. Even the small sample of requesters we found gave a huge variety of reasons for using FOI, from ‘concern about wasted money’ to ‘curiosity’, ‘general interest’ and personal campaigns against ‘corrupt’ local government. There were also non-political uses ‘to gather information to inform my decision about buying a property’ or a ‘festival licence’. The sheer variability of requester motivations and use underscores the variability of impact of the Act upon different public bodies.

The Overall Impact of FOI

• **FOI has met its core objectives at central and local level.** Government is more transparent in terms of the information it releases and how it works. FOI has also encouraged pro-active disclosure of a range of information, from salaries to road maintenance.

• **FOI has also made public bodies more accountable.** FOI works well with other mechanisms (such as the media, MPs or NGOs) as a tool to put together information for campaigns.

• **FOI has not improved the quality of decision-making.** FOI has not increased public understanding of decision-making at central government and has little impact on public participation except via ‘proxies’ either centrally or locally.

• At local level FOI has **increased public understanding of decision-making** at a low level, though it is mostly used to get information rather than learn about the decision-making process.

• **A chilling effect can be seen in a few politically sensitive cases but is not happening systematically.**

• **Superficially FOI does not appear to have increased trust** in central government but the data is sparse and points in different directions. However, the effect is very variable for local government. At local level use of FOI is diverse and trust in local government is more heavily influenced by performance and ‘community visibility’ than openness.

‘Iron laws’ of FOI

Some key points about FOI are:

• **The media has a key influence on the impact of FOI.** Not only is the media a key user of FOI (and defender when reforms threaten it) but, given so few people make a request, it is a key conduit for shaping wider perception of FOI. Though government and academics frequently highlight the role of the official and requester, our study demonstrated that the media is an extremely important player.
• **There is no going back.** The FOI Act cannot be repealed, however much the government may dislike it. Interviews and leaked ministerial correspondence showed how much some ministers resent FOI, but it is now part of the framework of government.

• **Government holds all the cards.** Despite its evident discomfort at the continuing pinpricks of FOI, the government remains in a very strong position. It holds the information. It can resist disclosure for years if it wants to play the system and fight appeals.

• **Both sides will game the system.** As in any field of legal regulation, there is scope to game the system. Officials and ministers will play things long if they want to delay disclosure, and they face few penalties for doing so. This was a constant refrain of requesters, especially journalists.

• **Government will always be seen as secretive.** However open the regime, and wherever government draws the line between what can be disclosed and what must remain secret, there will always be friction between government and requesters, especially the media.

• **FOI never settles down.** In terms of bureaucratic routine and a body of case law FOI does begin to settle down after the early years. But at a wider political level it never does and conflict is ongoing.

• **A few FOI requests cause most of the trouble** The Pareto principle operates in FOI, as in other fields of policy. In the UK and elsewhere (e.g. New Zealand), a few high profile cases cause disproportionate effort, media attention, public controversy and political pain. Most requests are for ‘non-political’ information.

• **Officials have nothing to fear from FOI,** save for the extra burden on resources, which is the more difficult to bear at a time of staffing and public expenditure restraint.

**What Makes FOI Work or Not?**

• **Leadership is crucial to FOI.** Senior support improves internal co-operation and mitigates internal resistance. By contrast, nervousness leads to defensiveness and a lack of internal cooperation.

• **Administrative culture is also important.** Resources are vital and are likely to be the Achilles’ heel of FOI. How much FOI ‘costs’ is a difficult issue, with competing methodologies offering competing answers with bias in measuring cost as the benefits are more difficult to measure.

• **The media are a further crucial influence** both in their use and reporting of stories. Pre-existing relations shape this dynamic. Some public bodies experienced heavy and aggressive use of FOI, others none. It seems that only a small proportion of journalists use the Act but they defend it, innovate with it and raise awareness.

• **Political factors can also have a strong influence.** Political balance can be crucial though ideology has little bearing. A secure administration can cope with a damaging FOI request in a way that a party with a small majority cannot. Some local areas or particular departments
have high levels of activism or long running controversial issues which often involves the use of FOI.

- **The final crucial factor is the requester.** FOI is built upon one very unpredictable variable: public use. Use varies hugely from the political to the ‘micro-political’ or personal.

**The Future**

So what does the future hold for FOI?

- **FOI requires use and political support to flourish** and it will be a combination of political support, technological development and use that will determine the future of FOI in the UK.

- **FOI is increasingly merging with online developments.** The new Open Data push is likely to drive increased transparency and provide support and impetus for FOI officers and transparency advocates within organisations. To date the impact of Open Data has been variable. There is no sign of an ‘army of auditors’, and is unlikely to appear given the reluctance of the public to look through raw data. However, the data has launched several interesting third party innovations.

- **Open Data advocates and officials feel online publication, FOI and new innovations will serve to mutually reinforce each other.** This can already be seen with sites run by MySociety (such as whatdotheyknow) or Openly Local that analyses local spending data. The Local Public Data Panel pointed out that online transparency will not work isolation.

- **The danger is that request numbers increase while resources are taken away.** Political changes (especially to local government) or cuts may mean an increase in the use of FOI, which have already nearly quadrupled to local government since 2005, from 60,000 a year to 197,000 in 2010 according to our surveys. However, FOI is not yet seen as a ‘frontline’ service and is likely to suffer financially in favour of ‘vital’ services, especially in bodies where support for FOI is ‘lukewarm’. The contracting out of service delivery may also create gaps in FOI coverage. FOI is already facing growing numbers with officers feeling they are at, if not over, capacity. A lack of resources may lead to a slowing down or, in the worst case scenario, a ‘stagnation’ of FOI operations.

February 2012
Written evidence from the University of Leicester

Executive Summary

• The University’s view is that the legislation is not meeting requirements and does little to support the stated aims of openness, transparency and accountability. Within the Higher Education sector, relatively little use is made of the rights to access information but it is nevertheless extremely expensive to administer. Far from supporting its aims, the complexity of the legislation and its application is generating a view by default that public authorities are not only being secretive but are also acting in an improper manner.

• The University is particularly concerned that the right of access to information is being used by journalists, commercial organisations and others in a manner that was not originally intended and at significant cost to institutions.

• No effective provision is made within the legislation for sectors such as higher education which operate within a competitive environment.

• There is only limited protection for research data although it is recognised this may be addressed to a certain extent by proposals in the Protection of Freedoms Bill.

• Lack of clarity and ambiguity in the application of the exemptions is damaging to the reputation of public authorities and unhelpful to the general public.

• Due to the exclusion of the costs of redaction, the fee charging mechanism is totally ineffective in protecting public authorities from incurring unreasonable costs of compliance.

• The University considers there is a need to review the legislation with respect to the higher education sector, both in terms of applicability given the reducing level of public funding, and with regard to private higher education providers, and the need for a ‘level playing field’.

• For the Higher Education sector the University would prefer to see a more prescribed approach to publication of information balanced by a restricted right of access, and greater protection of commercial interests, but with appropriate safeguards to prevent undermining of the basic aims of the legislation.
University of Leicester

Introduction

1. The University of Leicester welcomes the opportunity to submit evidence to the Justice Select Committee for its post-legislative scrutiny of the Freedom of Information (FOI) Act. Comments are organised with respect to the three key issues: effectiveness of the FOI Act; its strengths and weaknesses; and whether it is operating as originally intended.

Does the Freedom of Information Act work effectively?

Provision of access to information

2. The fundamental purpose of the legislation is to give the public the right to access information held by public authorities with a view to encouraging a culture of openness and accountability that will promote a better understanding of how public authorities operate, how decisions are made, and the use that is made of public funding. These are principles and objectives which are inherent in the University’s Charter and Statutes and are reflected in its governance structure. Within the higher education sector, the FOI legislation, in its present form and usage, adds very limited additional benefit to the public but imposes a significant overhead on institutions in responding to requests for information and in compliance generally.

3. A key concern is that in practice the legislation is virtually solely request-based, and in the University’s case this right is exercised by a small group of requestors. Currently the University receives between 130-140 requests for information per year. Nevertheless, this relatively limited demand requires: a minimum of two staff with a high level of legal expertise and knowledge in the requirements of the FOI Act; training of all University staff; significant time spent in the application of the FOI Act and other legislation; considerable effort in collating and redacting information; and review of complaints and addressing those which are referred to the Information Commissioner. The University estimates that for 2011, compliance with the legislation required staff time equivalent to 3.1 mid-range posts and at a total cost of £185,000 (calculated on a full economic cost basis) - a cost for which the public generally derived very little benefit.

4. It should be noted that these costs have increased considerably over time and are very much on an upwards trajectory. Scaled-up across the sector, these costs are not sustainable and are not in the public interest. The Joint Information Systems Committee (JISC) has provided a very rough estimate that the current cost of FOI compliance within the higher education is £10m but if all attributable costs are taken into account the actual cost is probably double this amount.

5. The FOI Act requires public authorities to maintain a Publication Scheme which largely contains information that universities already make available to the public through their websites. The Act, however, requires the presentation of the information in accordance with a pre-defined template. As a consequence, either two information sources or extensive cross-referencing from the publication scheme to the website have to be maintained, and from the University’s experience, little, if any use, is made of the Publication Scheme. It is therefore an expensive and unnecessary overhead.

6. A more proactive approach is necessary in order to provide the information that is needed by the public and, in the case of the higher education sector, by applicants, students, and industry. This view was reflected in the White Paper ‘Higher Education: Students at the Heart of the
Accountability

7. With respect to accountability, whilst this is clearly highly desirable the legislation is being perceived as an audit tool. Although it is the case that the abuse of expense claims by MPs would not have been fully uncovered without the FOI legislation, there should have been better controls in place to have prevented it happening. It is a totally unsatisfactory situation if the proper governance and management of public authorities is dependent on the random audit by the public and the Press. It would be much more appropriate and cost-effective to have better regulation in place where this is deemed necessary.

What are the strengths and weaknesses of the Freedom of Information Act?

Poorly defined exemptions

8. There is a lack of clarity in the definition of a number of the exemptions and significant scope for ambiguity in interpretation which results in frequent challenges by the general public and often the need for adjudication by the Information Commissioner. The problem is further compounded where it is necessary to apply a public interest test which will inevitably be, by its nature, a subjective judgement. This is unsatisfactory for public authorities which have to expend considerable time in assessing the appropriate application of the exemptions, which is not intended to avoid disclosure but is simply to ensure that not only are the University’s interests protected but also that national interests and individuals’ rights are protected. From the general public’s perspective, and particularly where there is limited knowledge or experience in this field, the nuances of the legislation can be difficult to understand and the public authorities’ position is often seen as evasive.

Limited provision for public authorities operating in a competitive environment

9. The FOI legislation makes little provision for those public authorities operating within a competitive environment. Universities are already operating in such an environment both within the UK and internationally. In the recent White Paper ‘Higher Education: Students at the Heart of the System’, the government has signalled its intention to open up the Higher Education market to a broader range of bodies including those in the private sector. Notwithstanding the FOI restrictions on access to commercially confidential information, higher education institutions within the public sector will be placed at a significant disadvantage in that for-profit organisations will have considerable access to marketing-related information, and also to teaching and research outputs, whilst being able to deny similar access to their information. Furthermore, such organisations will clearly not incur any compliance costs.

10. Related to the above point, as the higher education funding model is now changing and direct government funding is reducing significantly as a proportion of total income it is questionable to what extent the sector should now fall within the scope of the Freedom of Information legislation.

Access to commercially confidential information

11. With respect to the exemption applying to the provision of commercially confidential information, there has seemingly been a tendency in the past for the view to be taken that higher education institutions are not operating in a competitive environment giving a presumption for disclosure. If this is still the case, this view does need to change.
Inadequate protection of research data

12. The University fully supports the principle of making research data more widely accessible, and
indeed the sector as a whole pursues a policy of openness in this respect, but there are
circumstances where it is not appropriate to grant access to research data. The current FOI
legislation does make provision for exemption to the right of access in such circumstances but
the manner in which the legislation is applied gives little effective protection.

13. The underlying problem is that research considerations were not taken into account when the
legislation was drafted and as a consequence it is primarily aimed at the types of information
held by governmental bodies. As noted above, no recognition is given to organisations which
have strong commercial interests, as is the case for the higher education sector, and particularly
with respect to research staff who are working in a highly competitive international field.

14. A requirement to disclose research information before publication may substantially prejudice
that research giving competitors and those who wish to exploit research commercially a clear
advantage. Whilst there is an exemption relating to future publication, its engagement is
uncertain, depending on the length of time to publication and consideration of the public
interest. A proposed amendment to the Protection of Freedoms Bill to provide an exemption to
the right of access where the research is ongoing and where its disclosure, before the date of
publication, would substantially prejudice the research, would address this concern.

15. Similarly, for research data which is considered to be commercially sensitive, the application of
the exemption relating to Commercial Interests is uncertain and may be over-ridden if it is
considered to be in the public interest to disclose. Clearly this can severely inhibit universities’
ability to enter into commercial partnerships.

16. The legislation is also failing to protect research of a sensitive nature, and consequently
exposing staff working in these areas to risk, as has been seen in relation to the ruling requiring
the University of Newcastle to disclose details of Home Office licences relating to projects
where animals are used for experimentation.

17. The situation is now being further exacerbated with the provision within the Protection of
Freedoms Bill which will require universities to provide access to research datasets in an
electronic form which is capable of re-use. Again, there has been no apparent assessment of
the impact of the legislation on research data and on universities. There does not appear to be
a full understanding of the nature of research data, and in particular of:

a) The difference between quantitative and qualitative research data. Whilst the former lends
itself more to presentation in a database format for analysis, the latter is less structured
and much more difficult to provide access in a meaningful way.

b) The scale and complexity of research data where size may be measured in terabytes and
held in databases containing hundreds of datasets. Research data can rarely be held in
simple one dimensional datasets. Universities will incur significant costs both in translation
to accessible formats and in the provision of detailed explanatory notes.

c) The distinction between data that can usefully be put in the public domain (e.g. genomic
data) to support other research or technology transfer, data that is commercially sensitive
for which access needs to be restricted, and data of a confidential or sensitive nature that
even where the raw data is made accessible in an anonymised form may still permit
identification of individuals or other sensitive information through analysis of small groups
and deduction.
18. Under the new legislation, universities are not only likely to be required to provide access to data which will be damaging to their interests but also to incur significant costs in so doing.  

**Charging of fees for the provision of information**

19. Frequently in responding to a request for information, considerable time and expense will be incurred in determining whether certain exemptions are applicable and in seeking legal advice where appropriate, and in the redaction of information. With respect to the latter, most redaction is necessary to meet the requirements of the Data Protection legislation. The FOI legislation, however, makes no provision for charging for these activities which is often the major time component in responding to requests.  

20. Whilst the fee charging mechanism sets out to prevent public authorities from incurring unreasonable costs of compliance by imposing an 18 hour limit above which costs may be charged, in practice as the above costs are excluded responding to requests can take days or even weeks of effort. As a consequence there is no such protection.  

**Is the Freedom of Information Act operating in the way that it was intended to?**

**Requests not in keeping with the spirit of the legislation**

21. A significant proportion of the requests received by the University are not what the legislation was intended to address. These include requests received from journalists and commercial organisations. With respect to the former these are largely ‘fishing expeditions’ where journalists request the same information from the entire higher education sector, not because there is any real concern or evidence of wrong-doing but with the hope that it may unearth some inappropriate activity. An example of which was a request received last year for copies of all credit/purchasing card statements in original format for all staff for the previous financial year. The cost to the University of these requests is estimated to be around £50,000 per annum.  

22. Requests that are received from commercial organisations are generally for marketing purposes and clearly represent an abuse of the legislation with institutions, and indirectly the taxpayer, subsidising these organisations’ marketing operations. In Leicester’s case, this amounts to around £25,000 per annum. A request recently received by the University asked for detailed information relating to IT equipment and IT support arrangements. It is understood that the same request has also been sent to over 1,400 public authorities. On the basis of a conservative estimate that on average it will require one day’s effort by each authority to respond to the request, this amounts to around 6 years effort being paid for out of the public purse for a single request for presumably one marketing organisation.  

23. There are also examples of requests for which it is difficult to discern any benefit to the public or that could even be considered to be frivolous, which includes a request received for numbers and details of a particular group of students that was graduating to assist in the organisation of a ball.  

24. Nevertheless there are clearly a number which do fall within the spirit of the legislation and for which it is important that the right of access is maintained. However, given that the publication scheme is barely used, and that of the 356 requests received by the University over the past three years, a little over 200 may be considered to be in the spirit of the legislation, it is effectively costing the University £185,000 to satisfy the information requirements of an
average of 67 requestors each year. Clearly these needs could be addressed in a more cost-effective manner.

Conclusion

25. The University clearly fully supports the principles upon which the legislation is founded. However, in their implementation the University’s view is that the legislation is not meeting requirements. It is expensive to administer and the reactive nature of its application in practice is generating a view by default that public authorities are not only being secretive but are also acting in an improper manner. This is a great disservice and at times can be very offensive to the hard-working and committed staff working in public authorities.

26. The University considers that a more proactive approach is necessary in order to provide broader access to information and to give assurance regarding proper management and use of public funds, and to do so in a more cost-effective manner.

27. There is also a need to review the legislation with respect to the higher education sector, both public and private, in order to provide a 'level playing field’. Such review should also give broader consideration of the justification for higher education falling within the scope of the FOI legislation given the reducing level of government funding.

28. A revised approach to FOI could include the following elements:

a) A more prescriptive publication scheme applicable to the public and private higher education sectors.

b) Enhanced financial and other regulation where considered appropriate for the publicly-funded HE sector.

c) A more restricted right of access to information subject to appropriate safeguards.

d) Greater recognition of public authorities operating in a competitive environment and protection of information of commercial value.

e) Controls on the accessibility of teaching and research outputs where appropriate.

f) Greater clarity in the definition and application of exemptions.

g) Restrictions on who may request access to information and for what purpose linked to a charging method allowing greater cost recovery where appropriate.

29. From the higher education sector’s perspective this approach would place it on a more equal footing with both the private and international sectors, and reduce the cost of compliance, but more importantly it would align with the direction the sector is already taking with respect to the provision of service and information.

February 2012
About the KM Group.

The KM Group is an independent, family-owned business with over 150 years of history. It has developed from a newspaper publisher to a multimedia company that currently employs more than 330 people.

Using print, broadcasting and the Internet to satisfy the needs and wants of both consumer and advertisers, KM Group’s portfolio includes over 25 products across press, radio and online.

Journalists working for the KM Group are regular users of the Freedom of Information Act.

Its political editor Paul Francis is acknowledged as an expert on FOI and regularly comments and advises on FOI issues. Although many of our requests focus on councils, we routinely use the Act to ask for information from a range of other bodies.
1. **Does the FOI Act work effectively?**

There is no straight ‘yes’ or ‘no’ answer to this. In our view, the way in which public bodies respond and deal with requests made under the Act is variable.

Some have been enthusiastic about embracing the culture of transparency and openness. Others appear to remain suspicious and defensive of the motives of FOI requesters, especially those from the media. This is despite the ‘motive blind’ nature of the Act.

In general, most bodies have now well established procedures for dealing with requests and the process of making requests is well signposted on websites etc.

In a broad sense, the Act has improved transparency and accountability, particularly in the area of greater openness about how public money is being spent.

At the same time, authorities often fall back on qualified exemptions to withhold information. (Discussed in more detail in 2). There is extremely limited evidence that authorities are now routinely publishing more information as a result of FOI, as the Act intended.

If they are, they are not doing so in a way that makes it easily accessible and are not advertising the fact.
2. **Strengths and weaknesses of the Act.**

Strengths:

Placing public bodies under a statutory obligation to consider publication of information in a neutral fashion means, from a media perspective, less latitude for them to put ‘spin’ on information and give it a PR dressing.

Data and statistics are much more readily available.

Politicians and decision-makers can and are being held to account much more effectively, often directly through media FOI requests.

The public interest aspect of FOI is a powerful one – although this can in practice also prove a weakness.

There is evidence that FOI is and has affected policy making and led to greater citizen engagement and interest.

FOI has been particularly useful in holding local councils to account in the context of the introduction of cabinet government (LGA 2000) which many journalists believe has diminished the flow of information and allowed authorities much greater control over the flow of information about executive decisions.
Weaknesses

Delays in responding to requests are commonplace. There is a view – reinforced by evidence - that while the Act is motive blind, the reason for these delays can be because responses to requests made by journalists are not sent out until they have been ‘cleared’ or reviewed by politicians/councillors.

Our experience is that many requests either are not responded to within 20 days or if they are, the response comes on Day 20 – even relatively straightforward ones.

The weighing up of public interest arguments can be flawed. Many authorities appear not to start with the scales balanced equally but begin from a position that assumes there is a default position that the requester must prove through a greater weight of evidence that the information should be put into the public domain.

Authorities seem unaware of the guidance around time extensions when considering public interest exemptions, failing to comply with the recommended time frames (still 20 days unless the arguments are exceptionally complex).

The use of Section 36 exemption can seem to be a fallback position for refusals for many authorities when all else fails. In such cases, the evidence advanced is rarely specific or clear but there is a simple assertion that something would not be in the public interest.

Often, the argument revolves around the need for an authority to have ‘private space’ in which to debate or consider policy options.

There has not been more routine publication of information by bodies as envisaged by the Act.
Weaknesses, continued

The appeals process through the ICO is time consuming and often takes months to resolve. Our experience is that internal appeals often fail or if they succeed, the explanation will often bear out the suspicion that initial refusal was a holding position or made in the hope that the appeals process would not be pursued.

3. Is the Act operating in the way it was intended to?

In many ways, yes. However, our experience points to incredibly wide variations in approach by authorities, in terms of positive co-operation; a willingness to assist requesters and decisions around what is in the public interest.

4. Other issues

We would question whether authorities always consider requests neutrally (see comments in 2). There can be a feeling that media requests are ones that will always result in public disclosure – and are accordingly treated differently from the outset.

The proliferation of different bodies and groups such as private companies, social entrepeneurs and community groups becoming involved in providing public services through policies such as The Big Society and the emerging ‘Localism’ agenda raises important issues about access to information which appear not to have been recognised by the government.
4. Other issues. contd

For example, if a community group opts to take over the running of a local library, for example, as part of the Big Society initiative, where are the checks and balances in the system if they are not covered by FOI?

The same issue applies to arms-lengths commercial companies set up by authorities, particularly councils and the growing phenomenon of councils joining forces and merging functions to provide services over a wider area.

Costs

We would be concerned at any plans to extend the scope of the Act to allow more activities to be considered as ‘chargeable’. We note the consultation document mentions the possible inclusion of reading time as an option.

That would be extremely problematic and hard to measure and could be dangerously subjective. Our view is that the current charging regime broadly works and FOI should remain free.

We would oppose the introduction of any fees to make appeals. That in itself might act as an incentive to authorities to withhold information in the hope that requesters could be deterred from appealing because of the costs, even if the fees were to be refundable if the requester was successful.

The issue of costs appears to be of concern to authorities because of the volume of requests being received.

It might be argued that authorities who receive large numbers of requests are not being as pro-active in terms of publishing information routinely and a way of reducing requests would be to be more willing to do so.
5. Other issues, continued

An authority that faces large numbers of requests under FOI indicates to us that it is not as open as it could be.

We do not accept that FOI places a disproportionate burden on bodies, nor that the media are responsible for a greater number of requests than any others.

In fact, there is evidence the costs impact is in any case marginal.

In 2010, Kent County Council – the largest English county council - dealt with 1,539 separate requests - about three times as many as when the Act first came into force in 2005. It estimates that the hours spent dealing with these requests was 4,779 and the average cost of dealing with a request was £78 - compared to £71 the previous year.

The bulk of requests did not come from journalists. The media accounted for 16 per cent of all requests; private individuals accounted for 58 per cent and companies 18 per cent. The cost of dealing with 246 requests from the media was £19,188. In the context of KCC's annual £2.4billion budget, that represents 0.00007995 per cent of its total spend.

It's far less, for example, than the £1.7m KCC has to spend on members allowances and expenses each year which accounts for 0.07 per cent of its budget.

February 2012
1. Executive Summary

The following outlines NHS Bassetlaw’s and NHS Doncaster’s response to the Freedom of Information Act - Select Committee Review.

The organisations listed above support the principles behind the Freedom of Information Act, which ensures we are as open and transparent as possible. However, we have all identified areas that demonstrate how the Freedom of Information Act is not fully operating in the manner that it was intended, including:

- Media / Commercial Business requests
- Time limits
- No Differentiation of requestee

2. Introduction

In the current climate of NHS restructuring, NHS Bassetlaw and NHS Doncaster are working closely together, with integrated teams for Finance and Primary Care. To this effect, the following information has been submitted jointly by both PCT’s.

3. Factual Information

**NHS Bassetlaw**

**Does the Freedom of Information Act work effectively?**

Each organisation has on its website a copy of the Information Centre’s Publication scheme which outlines what information the organisation will publish. However, very few requests actually fall into this category where you can re-direct the requestee to the relevant section of the website.

The majority of the requests ask for very specific items, either before they get finalised for inclusion in website material or would not be intended for routine publication.

The act is effective in the sense that it ensures public sector organisations are open and transparent; however, there should be more “protection” for public sector organisations in terms of how requests can be made. Too many requests are very vague in nature which then entails extra work for the identified lead as they have to try to interpret the request, and by this very nature, if all PCTs were asked for the same thing, and all interpreted the request differently then the data captured would be useless for comparison purposes.

There should be a more structured way in which requests could be made, which would involve the requestee putting a bit of thought into what it is they require. We are not suggesting creating onerous bureaucracy as this defeats the principle of being open, but some form of structure into how requests are made could help to
improve the system. At the moment, this can be in any form of writing, and does not have to mention the Freedom of Information Act in the request.

Exemptions are also quite technical in nature, which we understand they have to be, but it would be useful to have a more user friendly exemption list and real life examples where they could be applied.

**What are the strengths and weaknesses of the Freedom of Information Act?**

**Strengths**
- Act ensures public sector organisations are open and accountable
- Publication Scheme ensures we publish some information on our web site
- Allows for research opportunities from public sector organisations that would have previously been unable to be carried out, i.e. local people can use the act to find out how a certain decision was derived etc.

**Weaknesses**
- Current protection for organisations on time limits and costs of answering the questions. The time taken to review the material and considering whether or not is exempt and then actually redacting the information cannot be included in the estimation of the time it would take to comply with the request.
- The Act can be used by private companies to “fish” for contacts and other information, where the only purpose appears to be to further their own business interest.
- Requestees do not have to disclose why this information is required. As part of an amended request process categories could be used so that the intended use is asked for, with a clear message about the Re-Use of public sector information.
- Each organisation has to have its own Re-use of Public Sector Information rules in place. If there was a standard policy and charges attached for re-using the information for commercial purposes, then it would help organisations.

**Is the Freedom of Information Act operating in the way that it was intended to?**

From the PCT’s perspective we would say no it isn’t fully operating in the way it was intended. Again we think it is fair and right that we are open and transparent, but the resource implications for dealing with requests are high. As mentioned in the first question, the publication scheme is in place and we publish information on our website, however the majority of requests that are received are not usually covered by the information already published.

Also journalists are able to send one email off to all NHS organisations without necessarily doing any of the ground work themselves. The FOI Act doesn’t differentiate between the senders of requests, which under the principles is fine, however journalists requests account for approximately a quarter of all requests, and if the same requests is sent to all NHS organisations then the resource required to answer these soon adds up.

Please note NHS Bassetlaw received approximately 80 journalist requests in 2011.
NHS Doncaster:
Does the Freedom of Information Act work effectively?

The intention of the Freedom of Information Act was to provide accessible information to the public. The requirement for a Publication Scheme has absolutely supported our public sector organisation to provide more information to the public in an accessible format and has encouraged us to put more information into the public domain.

However the opportunity to make very specific requests has not encouraged the high numbers of members of the public as intended. Instead, it is predominantly used by commercial organisations and journalists and managing the very specific requests made by these groups is a burden on our organisation in a climate of reducing staffing levels.

What are the strengths and weaknesses of the Freedom of Information Act?

Strengths
• more information available in the public domain, which supports us to better engage with our population on commissioning priorities etc.

Weaknesses
• it feels like the specific request system is being over-used by commercial organisations, journalists, and also by students for their dissertations. The number of requests from members of the public is low compared to these three groups. There is a cost attached to each request, and in 2011 alone we responded to 389 requests, several of which had further follow-up questions.

Is the Freedom of Information Act operating in the way that it was intended to?

No, for the reasons outlined above.

4. Recommendations

• Consider the time limits organisations have before the exemption applies
• For Health Organisations, consider differentiating between a member of the public requesting information as compared to a journalist or commercial company.

February 2012
Written evidence from the Northern Ireland Civil Service Departments

Introduction

1. The NI central government departments (see Appendix 1) are separate public authorities under the provisions of the Freedom of Information (FOI) Act 2000. By way of background, we would ask the Justice Select Committee to note the following brief summary of the operation of the FOI Act.

2. Freedom of Information Annual Reports (published for each calendar year since 2005) show that the departments which compose the NI Civil Service received 18,353 requests for information between 2005 and 2010 inclusive. Most of the requests were received from members of the public. The media and the business sector were the next most prominent sources of requests. Over the six years, the departments responded to 91% of requests within the statutory time limits, and in 74% of cases the information requested was disclosed in full. The exemption engaged most frequently was that for personal information (section 40 (2)). The next most prominent exemptions used by the Departments were commercial interests (section 43), and the formulation of government policy (section 35). 652 internal reviews were conducted, and 77 complaints were made to the Information Commissioner, who has issued 57 Decision Notices involving the departments. Only five cases have been escalated to the Information Tribunal.

3. The Justice Select Committee should note that while FOI is a ‘transferred matter’, in 2000 the then Executive Committee of the NI Assembly (‘the Executive’) decided not to introduce separate FOI legislation. Therefore, NI was covered by legislation passed by Westminster.

Executive Summary

4. The FOI Act has facilitated the disclosure of significant amounts of official information: proactively through Departmental Publication Schemes and in response to requests for information. Furthermore, the Codes of Practice and guidance produced by the Ministry of Justice (and its predecessors), and the Information Commissioner have been of practical assistance in the implementation of the provisions of the primary legislation. There is clear evidence that the Act is being used by a wide range of users: members of the public; the media; businesses; public representatives; and campaigning groups. The administration of the Act has – on the whole – been well handled by Departments and, indeed, there have been improvements in information and records management policies, procedures and practices in response to the statutory obligations placed on public authorities.
5. However, the Act suffers from a number of flaws. Section 12 and the associated Fees Regulations are difficult to administer, and do not provide sufficient protection for departments which are absorbing substantial costs (though no satisfactory cost measure has been available for calculating total costs). A significant amount of resources have been tied up dealing with vexatious and repeated requests as a result of insufficient clarity in the section 14 provisions, and the consequent need to produce substantial evidence of proof. The exemptions in sections 35 and 36 of the Act have not afforded Departments the protection for the ‘policy-making space’ that they feel is required. Strengthening the exemptions under sections 35 and 36 would speed up the task of considering and responding to requests for details of early policy discussions and the decision-making process. Finally, there is a need for clarity about whether requests for information fall under the FOI Act or under the Environmental Information Regulations (EIR) 2004.

What are the strengths of the FOI Act?

Public Service and Accountability

6. The FOI Act promotes accountability and transparency in general, and facilitates the disclosure of information both proactively and in response to requests, in particular. Indeed, departments are more open and accountable in that their FOI performance is measured regularly through the publication of quarterly and annual reports. Ordinary members of the public continue to be the biggest category of requester, which suggests that the process of submitting requests is sufficiently straightforward and comprehensible. This is in keeping with initial policy objectives. It should be noted that a significant - though unquantified - number of requests are submitted by members of staff. This is not always interpreted as a good trend, as the requests tend to focus narrowly on the interests of individuals and not on the more strategic or organisational issues.

Codes of Practice

7. The section 45 (discharge of public authorities’ functions under Part 1 the FOI Act), and section 46 (records management) Codes of Practice have been issued and revised since the FOI Act received the Royal Assent. They provide a sound framework which facilitates public authorities’ compliance with the provisions of the legislation. Public authorities have also benefited from the refinement of guidance issued by the Ministry of Justice (and its predecessors) and the Information Commissioner’s Office, and the emergence of case law. Overall, the quality of the content of responses from Departments has improved over the years.

Information and Records Management
8. Several departments comment that the FOI Act has proved to be a useful instrument for raising the profile of records and information management, for encouraging better record keeping, and for increasing awareness of the value in managing information as a key corporate asset.

What are the weaknesses of the FOI Act?

(i) Fees Regulations

9. All departments agree that FOI compliance is burdensome, and that the range of activities that can be taken into consideration in determining cost is very limited. Furthermore, there is general agreement that searching, identifying and retrieving information (which count towards the cost) is usually a straightforward process but that the reading of the documents and information, consulting third parties, considering the use of exemptions, composing public interest tests, and redacting (which do not count towards the cost) are all very labour intensive and time-consuming activities.

10. If requests are estimated to exceed the cost limit of £600, the policy of the Departments is to contact the requester (offering advice and assistance under the section 16 provisions), and seek to narrow the scope of the request so that the cost comes within the limit – between 2005 and 2010 only 88 requests have been refused outright on the grounds of cost. The process of providing advice and assistance and the often related activity of seeking clarification of a request is time-consuming and is not an activity that counts towards the cost limit; that process represents a significant burden on Departments. Furthermore, it is worth noting that the ability to aggregate requests under the Fees Regulations or to use section 14(2) for dealing with repeated requests is curtailed somewhat, as it is difficult to determine whether or not requesters are using pseudonyms.

11. Departments note that round-robin requests are particularly burdensome, and that the situation is not helped by the fact that each department is a separate legal entity under the FOI Act. Requesters – whether they are from the media or members of the public (including staff) – tend to seek information on a NI Civil Service basis, and it is relatively easy for them to send the same request to 12 different Departments. And, any time departments have mentioned the FOI burden on the NI Civil Service as a whole when corresponding with the Information Commissioner, he reminds them that the burden on the central government sector does not come into the reckoning. For example, the Office of the First Minister and deputy First Minister (OFMDFM) was advised recently (2011): 'I would remind you that each department is a separate public authority under the [FOI] Act, therefore OFMDFM should only be considering the effect of requests on its own efficiency.'
12. Since devolution (May 2007) the number of round-robin requests has increased. In 2011, 74 out of the 173 requests received by OFMDFM have been round-robins (43%). In most cases, the round-robins received by OFMDFM were received by the other Departments – the exact proportion of round-robins within the total number of requests received will vary slightly from department to department.

13. It is a point worth noting that the devolved administration in Northern Ireland is at a clear disadvantage compared to the administrations in Scotland and Wales: a round-robin request sent to the NI Departments generates twelve separate responses, whereas a request to either the Scottish government or the Welsh government generates one response.

**Departmental recommendations**

14. The recommendations on the fees issue listed below emerged from the considerations of individual Departments, and do not represent a composite (unified) view of all the NI Departments:

- Extend the range of activities that can be counted towards the cost limit of £600;
- Allow the NI Civil Service to aggregate the costs to individual Departments of responding to round-robin requests;
- The section 12 provisions in relation to the introduction of fees charged to applicants for complying with requests need revision. FOI legislation is within devolved competence but the way in which the power to introduce fees is framed suggests that only the Secretary of State may make the necessary regulations. Therefore, section 12 should be amended, so that the NI Departments can also make fees regulations; and
- Levy a reasonable nominal fee before a request is accepted; and strengthen the section 8(1) provisions, with a view to obtaining identity information from requesters.

**(ii) Vexatious Requests**

15. The burden of handling what appear to be vexatious requests has been a common complaint of the Departments. FOI legislation was intended to provide the public with greater access to information on the background to decisions made by public authorities impacting on their
lives. Unfortunately, the Act is often abused by individuals with an ‘axe to grind’. They use the legislation as a weapon against the public authority. There is a need to revisit the areas of clarity and validity of requests and vexatious requests. At present section 14 of the Act does not provide sufficient protection against abuse, whether the source is an aggrieved individual, who may be in dispute with the Department, or a journalist, many of whom submit very broad or multi-layered requests in the hope of uncovering a story (‘fishing expeditions’).

16. While guidance on the subject from the Ministry of Justice and the Information Commissioner has been refined over the years, as a consequence of the processing of complaints cases involving the issue of vexatiousness, the absence of a clear definition of what constitutes a vexatious request means that departments have to put a substantial amount of resources (e.g., compiling dossiers of relevant correspondence and researching relevant decisions of the Information Commissioner and Information Tribunal) into defending a decision to engage section 14(1) of the FOI Act. Because of the significant outlay on resources, Departments are coming to the conclusion that it is often more costly to refuse a request under section 14(1) than to respond to it.

**Recommendation of the NI Civil Service Departments**

- Section 14 should be amended to include a clear definition of what constitutes a vexatious request.

**17 (iii) Operation of exemptions**

Several Departments believe that ‘restrictions’ on the application of section 35 (formulation of government policy) are having a negative impact on the openness of officials in providing written advice to Ministers. While it is accepted that there is scope within the current legislation to withhold such advice, the decisions of the Information Commissioner and the Information Tribunal tend to limit or ‘restrict’ the attempts of public authorities to protect the ‘policy-making space’: the resultant ‘chilling’ effect therefore tends to undermine rather than promote better decision-making. Similar views have been expressed in relation to the application of section 36, particularly section 36 (2)(b), which concerns the provision of free and frank advice and the free and frank exchange of views for the purposes of deliberation.

18. It is also been suggested that the disclosure of more information to the citizen through the FOI Act may have a detrimental effect on the quality of official documents, particularly the level of detail recorded, for example, in minutes of meetings and of discussions about policy decisions. Consequently, there is a risk that information available to the citizen in future under the ‘30-year rule’ (‘20-year rule’ should the
FOI provisions in the Protection of Freedoms Bill receive the Royal Assent) will be less detailed than might otherwise have been the case, leading the public to question or mistrust the official record. Such an outcome would not be in keeping with the FOI legislative objectives.

**Recommendation of the NI Civil Service Departments**

- Strengthen the exemptions in section 35 and 36 of the FOI Act.

(iv) Boundary between Environmental Information Regulations (EIR) and FOI regimes

19. There is a need for greater clarity about whether requests for information fall under the FOI Act or should be dealt with under the EIR. NI Departments are of the view that the tests for determining whether information is ‘environmental’, as set out in Regulation 2(1), are not sufficiently clear enough to provide a legal dividing line between environmental and other information. For example, the Department of Agriculture and Rural Development (DARD) would regard a request for information about the effects of cattle and sheep grazing on the Mourne Mountains or the disposal of waste from a meat plant as falling under EIR. However, if the request focussed on who owned the grazing rights in the Mournes or on the throughput or product destination of the meat plant, then DARD would consider the request to fall under the FOI Act, as it would cover (third party) personal information and/or economic rather than environmental issues. DARD’s determining factor would be whether or not the core issue is environmental or wider. This is not the interpretation of the Information Commissioner and the Information Tribunal; they are directing that requests that relate to land use, fisheries, forestry, etc., – even where the nature of the enquiry is financial or economic rather than directly about the impact on the environment – should be dealt with under EIR.

**Recommendation of the NI Civil Service Departments**

- A re-wording of the FOI Act and EIR to make it clear what information falls within each regime.

A list of all recommendations is provided at Appendix 2.

**APPENDIX 1**

**List of the NI Departments**

Department of Agriculture and Rural Development (DARD)
Department of Culture, Arts and Leisure (DCAL)
Appendix 2

List of all recommendations

- Extend the range of activities that can be counted towards the cost limit of £600;
• Allow the NI Civil Service to aggregate the costs to individual Departments of responding to round-robin requests;

• The section 12 provisions in relation to the introduction of fees charged to applicants for complying with requests need revision. FOI legislation is within devolved competence but the way in which the power to introduce fees is framed suggests that only the Secretary of State may make the necessary regulations. Therefore, section 12 should be amended, so that the NI departments can also make fees regulations;

• Levy a reasonable nominal fee before a request is accepted; and, strengthen the section 8(1) provisions, with a view to obtaining identity information from requesters;

Note: The recommendations on the fees issue listed above emerged from the considerations of individual Departments, and do not represent a composite (unified) view of all the NI Departments.

• Section 14 should be amended to include a clear definition of what constitutes a vexatious request;

• Strengthen the exemptions in section 35 and 36 of the FOI Act; and

• A re-wording of the FOI Act and EIR to make it clear what information falls within each regime.

February 2012
Executive Summary

1. Telegraph Media Group (‘TMG’) welcomes this opportunity to make some broad comments about the operation of the Freedom of Information Act (‘FoIA’).

2. We understand that some of our journalists will be making personal responses about their own detailed experiences in making Freedom of Information (‘FoI’) requests.

3. The FoIA has allowed the public to learn more how public bodies operate. This is welcome. But it is also acknowledged that since the introduction of the FoIA, there has been a cultural shift within some public bodies – albeit not likely to be connected to the Act – publishing more information proactively. These moves are healthy for democracy but they do not go far enough.

4. TMG believes that there needs to be a fundamental cultural shift toward transparency and the release of information within many public bodies. Any changes to extend FoI must also be accompanied by further measures to address this culture, as legal changes alone will not go far enough in assisting this shift.

5. Some TMG journalists describe making an FoI request as a “tortuous” exercise. They know that obstacles will be erected with the purpose of preventing the release of information.

6. TMG have found that, where a request has been successful, FoI is often more useful in extracting low-level, statistical information rather than the release of whole documents.

---

1 Memorandum to the Justice Select Committee, MoJ, December 2011. Pg 45
7. Many public bodies are more concerned with protecting their own executives’ or corporate reputation than enhancing the public good in revealing information.

A cultural change

8. There is an important distinction between information that a body has chosen to make public, and information that has been extracted by other means such as successful FoI requests, both on and off-record briefings, or whistleblowing.

9. TMG are concerned to read in the Ministry of Justice’s (‘MoJ’) Memorandum that a key theme of public bodies’ responses to the IPSOS research is that requests from journalists have been perceived as a “drain” on resources, with the thought that responding to requests is not a good use of public money.

10. Obviously, there is a cost to the operation of the FoIA across public bodies. But public bodies should not be given new powers to reject requests nor allowed to make subjective judgements about which sorts of requests are worthy of answering, or given the power to inquire into the reasons why the information is wanted.

11. We also note that examples of spurious requests have been cited as a reason for increased costs in administering FoIA. We would have thought that any ‘spurious’ requests for information, if properly administered, could still be responded to both very quickly and cheaply, and the existing exemptions of the Act are sufficient.

12. The Committee may find of use just a few example headlines of how the FoIA is essential in allowing the public to be told about how public authorities operate. The Committee will agree that these stories are undoubtedly in the

---

2 Memorandum to the Justice Select Committee, MoJ, December 2011. Pg 110
public interest, and should note that the information was not proactively released by any of the public authorities:

a) Secret correspondence shows British helped Libya secure Megrahi release

b) Taxpayers pick up £68m bill for thousands of union reps

c) Hospitals attacked over 'outrageous' £32m car park profit

d) Lawyers paid £11 million for immigration cases

e) Hundreds of police officers caught illegally accessing criminal records computer

f) Councils pay for prostitutes for the disabled

Operation of the Act

13. The FoIA, as it currently operates, should be considered as a mere hand chisel picking away at a rock of secrecy. Cultural change is required.

14. Whilst it is difficult to generalise, in Sweden and New Zealand freedom of information is more ingrained in public bodies.

15. We believe that a view 'is there any reason why this document or information should not be published?' is more conducive to a transparent democracy than

---

4 http://www.telegraph.co.uk/news/politics/8815280/Taxpayers-pick-up-68m-bill-for-thousands-of-union-reps.html
5 http://www.telegraph.co.uk/health/healthnews/8556490/Hospitals-attacked-over-outrageous-32m-car-park-profit.html
6 http://www.telegraph.co.uk/news/uknews/immigration/8455704/Lawyers-paid-11-million-for-immigration-cases.html
8 http://www.telegraph.co.uk/health/7945785/Councils-pay-for-prostitutes-for-the-disabled.html
the culture within many UK public bodies. This change would also help assist the move to a twenty year release of information, which we fully support.

16. Some of our journalists feel that FoIA is being abused to worsen the amount of information available to the public. Before the FoIA a phone call to a press office would be sufficient to clarify or obtain information. Today a practice has developed whereby many press offices ‘brush off’ requests from journalists. Nowadays journalists are often informed that they should make an FoI request for that information. This is an unwelcome development, and does nothing to enhance transparency.

17. We advise the Committee to look at the Iraq Inquiry website\(^9\). Hundreds of documents that have been declassified and released. Without the Chilcot Iraq Inquiry, we feel that it would have been impossible for the public to have ever seen all of these documents through making an FoI request.

‘Playing the game’

18. Some journalists consider that by making FoI requests they are beginning a ‘war of attrition’. They know it is likely they will be unsuccessful in obtaining the information quickly. It would be clear what information is being sought, but it is also well know that many public bodies will erect obstacles to prevent the disclosure. Examples of these barriers would include a lengthy internal review, or invoking a ‘public interest test’ well after the initial request has been made.

19. In an attempt to counter this development, some journalists have now built relationships with FoI staff within organisations. They will often put in an unofficial call before submitting a request to seek guidance on how best to word their formal requests to counter any potential barriers imposed by that organisation. These relationships would have only once existed with press officers.

20. We also know that some Ministers and Special Advisers are aware of information that they know their civil servants would not want to be made public. On a number of occasions our journalists have been advised to submit FoI requests by Ministers or Special Advisers, with the hope that civil servants will be forced to release information they were resistant to release.

21. We are also aware of a culture of conversations being taken 'offline' (ie not on email or paper memorandum) so that there is no record of a conversation, discussion or debate, for fear that information within emails could, at some point, have to be released.

**Transparency**

22. The Committee should consider whether increasing the current time and cost limitations would enhance transparency and democracy.

23. Calls to include “consideration” and “redaction time” of FoI requests should be resisted. This could be open to further abuse, and would only serve to slow down the release of information.

24. There should be a statutory time limit on the time allowed for an internal review. Internal reviews can often take too long.

25. We expect the Committee will be presented with lots of evidence of the challenges presented in attempting to obtain information by individuals and journalists. The Committee may like to consider the inclusion of a new clause within the Act that makes it an offence for any individual or organisation to take steps that unnecessarily frustrates the release of information.

**Imposing costs on transparency**

26. We believe that ever imposing costs on those making FoI requests is both unjust and unacceptable.
27. Newspapers and journalists exist to ask questions of those in power on behalf of the public. Any impediment to this, financial or otherwise, would be unacceptable.

28. Cultural shifts, discussed earlier would see costs reduced.

**Chilling effects**

29. It has been suggested that ‘identity checks’ could be made on those making FoI requests.\(^{10}\) This is worrying, and we fundamentally oppose it.

30. We believe identity checks are intimidating, but they would disproportionately affect individuals rather than newspapers.

31. If the information is available, it should be of no significance who the requestor of the information is, or why they want to know that information.

32. Notwithstanding the fundamental argument, implementing such a system would only serve to increase both the costs and time in responding to requests.

33. The website [www.whatdotheyknow.com](http://www.whatdotheyknow.com) provides a valuable free service, and allows FoI requests to be submitted to a public authority without the requestor giving their personal details. Importantly, this service is run without any funding from government. As some public authorities do not publish each and every FoI request they receive, it assists with transparency.

**Government agenda**

34. The Deputy Prime Minister said in a speech last year that in relation to information that “our starting point is always maximising transparency in the public interest – moving from a closed society to an open society.” We also

---

\(^{10}\) Memorandum to the Justice Select Committee, MoJ, December 2011. Pg 106
welcome within that speech plans to extend the scope of the Act to other bodies.¹¹

35. However, despite these welcome announcements from government, it is unfortunate that a view has emerged that responding to FoI requests are considered a “drain” on resources¹².

36. We believe that all private sector contractors who enter into contracts with public authorities to fulfil their public functions should be designated for the purposes of the FOIA Act, as the Act permits under section 5(1) (b). This is important for the public to continue to have access to important information.

Conclusion

37. Whilst public bodies may now publish more information, the crucial difference is that FoI allows information to be extracted that the body itself has chosen not to publish.

38. There needs to be a cultural shift within public bodies, all documents and information should be approached with the mentality ‘is there any reason why this information should be made public?’

39. TMG oppose any form of introduction of fees, and believe that any moves to further impede access to information, such as reducing time limits is unacceptable.

40. Conversely, the Committee should consider whether any increase in the time and cost limitations would enhance transparency and democracy.

41. There should be a statutory time limit on the time allowed for an internal review. Internal reviews can often take too long.

¹¹ http://www.dpm.cabinetoffice.gov.uk/news/civil-liberties-speech 7 Jan 2011
¹² Memorandum to the Justice Select Committee, MoJ, December 2011. Pg 112
42. Costs of FoIA could be reduced if public bodies did not serve attempt to create barriers in preventing the release of information.

February 2012
Written evidence from Packet Newspapers

Executive Summary

1) The FOI is an effective tool
2) With it we have become a much more open society.
3) Authorities and public bodies should honour bound to respond to FOI requests.
4) The act has forced public bodies to be more open and honest since its introduction but there is still room for improvement.
5) Councils need to be more open and not obstructive.
6) The FOI act should be extended to other private sector contractors who submit for Government contracts.
7) There should be strict adherence to the rules by public bodies over FOI
8) The Information Commissioner is under-resourced and ineffectual.

Submission

1) The FOI act is an incredibly effective tool to hold authorities and other public bodies to account and to facilitate stories in the genuine public interest.

2) Since the act was introduced in 2005 we have become a much more open society with issues in the public interest exposed which would previously have been swept under the carpet.

3) Authorities or bodies should be honour-bound to provide information and should be up to them to prove why newspapers shouldn't have it rather than reporters having to prove why they should.

4) The act has forced authorities to be more open and honest. One example of this has been the appointment of a transparency and honesty officer at Cornwall Council. However this does not always make a reporters life easier.

5) An example of this at the Packet newspaper:
   An FOI request by this paper to uncover the number of councillors at Cornwall Council who had not paid their council tax since its formation and the dates and venues where the hearings were held was submitted by this paper. Under the terms of the local government finance act of 1992, any councillor who votes to set budgets while behind on their council tax faces prosecution and a maximum fine of £1,000. Initially the request was refused under the data protection act. This was challenged and it was eventually revealed that four councillors had not paid their tax, although the venues and dates of the hearings were not revealed.
   Every single councillor in the council was then asked if they had paid the tax but only one came forward (It later turned out he was not one of the four).
   After five months of successive FOI requests and a trawl through magistrates court records the councillors were exposed by the Packet, along with the local BBC news which had also taken up the story. They included the deputy leader of the Lib Dems who had been taken to court three times over non-payment of council tax and had lied about it.
   Throughout this process journalists met with nothing but obstruction by the county
council and if it hadn’t been for their determination and doggedness of the reporters, this would never been revealed.

6) Currently the FOI act only applies to public bodies. It should be extended to other bodies as some organisations are finding ways to opt out.
   For example schools moving to become academies are no longer covered by the act.
   Examples of FOI request to schools in the public interest could include:
   - Number of exclusions and why
   - Number of children receiving free school meals
   - Costs to the taxpayer in defence of actions by the school, such as exclusions.

   It should also be extended to private sector contractors who secure government contracts to ensure transparency.

7) Currently the relevant body is able to refuse an FOI requests on the basis of cost. The onus should be on the authority or body to break down the costs to prove why it is too expensive rather than the other way round. There should be strict adherence to the rules as not doing so increases costs.

8) Relevant departments in bodies can delay and make promises they don’t keep with seemingly no censure.
   A simple FOI request to find out the most viewed websites by council staff at the county council took around five months rather than 20 days, despite constant pressure from Packet reporters and apologies and false promises made by the council. The Information Commissioner while knowledgeable and extremely helpful is under-resourced and took too long to sort the situation out. Changes to the legislation needed to ensure this does not happen

February 2012
Written evidence from the University of the Arts, London

Executive Summary

University of the Arts, London is a public body for purposes of the FOIA. Like other UK universities it has commercial activities in competition with private enterprises, which activities if undertaken by other non-public organisations would not be subject to the FOIA regime.

The University submits that as a starting point consideration should be given to the reclassification of universities so that the Freedom of Information Act only applies to the public aspects of their activities.

The University has an extensive publication scheme and employs a dedicated Information Officer. It submits that the proactive extensive publication allied with the existing checks and balances upon its activities by independent external bodies more than sufficiently provides a framework within which the legislative’s objectives in enacting the Freedom of Information Act are met. Accordingly it would be not unreasonable to dispense with the requirement for universities to deal with FOIA requests that provide reactive information provision compliance.

The University submits that its publication scheme provides openness and transparency in its affairs. It also submits that accountability is more relevant to central and local governmental bodies or public bodies not so closely monitored and scrutinised independently as universities.

The burden of FOIA disclosure presently placed upon universities is a disproportionate way of achieving the legitimate aim of accountability, costing time and money better utilised elsewhere without compromising the wider public interest in universities’ affairs.

The University submits that it has appropriate governance in place and need not be subject to the same degree of external scrutiny as other public bodies without such comprehensive judicially approved governance.

The University further submits that at a time of universities seeking to be more efficient and less wasteful of their precious resources it is not a useful expense of public money to have to deal with requests under FOIA that are frequently wasteful of time and effort for no general wider public benefit, particularly when those requests are by multiple requestors, journalists and lawyers who could obtain the information sought by other legitimate and available means.

The Act has significantly increased the data that UAL routinely makes available by publication as well as in direct response to FOIA requests. The most useful and comprehensive information is however that which is now routinely published and readily available to the public. To that end the objectives of the legislators in enacting FOIA has been successfully achieved.

1. [Memorandum to the Justice Select Committee Post-Legislative Assessment of the Freedom of Information Act 2000]
2. [Your Right to Know: Freedom of Information (1997) [CM 3818]].
3. david.matthews@tseducation.com."
1. Introduction

University of the Arts, London, (UAL), is Europe’s largest provider of education in art, design, fashion, communication and the performing arts. It has roughly 4,000 staff and 20,000 students.

The University is a public body for purposes of the FOIA. Like other universities it has commercial activities in competition with private enterprises and anticipates greater competition from private enterprises and from other universities at home and overseas in the future.

The University has an extensive publication scheme and employs a dedicated Information Officer. In the first year of the Freedom of Information Act, (FOIA), coming into force it received 5 requests under the Act; this number has increased tenfold since commencement.

2. Transparency and Openness

FOIA was intended to introduce openness, transparency in the affairs of public bodies.

The Act sought openness and transparency, which UAL has achieved through its publication schemes. Information is proactively released by UAL without the expensive and time consuming need for requests to be addressed.

There is no cloak of secrecy covering UAL’s activities, which are monitored by a number of independent external bodies, in addition to which its activities, in so far as they affect staff, are monitored by the Trade Unions’ and in relation to students’ interests the Students’ Union.

3. Accountability

The White Paper preceding FOIA specified the purpose of its proposals was “to encourage more open and accountable government”. The Public Administration Select Committee, in its response to the White Paper considered that one of the purposes of FOI was to “Make it easier for politicians, journalists and members of the public to hold the government to account by making government cover-ups more difficult.”

Direct public accountability is a not unreasonable aim for public bodies, but clearly more so for government making decision bodies whose decisions more directly impact upon and affect the public. Universities do not naturally fall within such decision making category, with there also already being in place a comprehensive

---

1. [Memorandum to the Justice Select Committee Post-Legislative Assessment of the Freedom of Information Act 2000]
2. [Your Right to Know: Freedom of Information (1997) [CM 3818]]
3. david.matthews@tsleducation.com.
system of accountability. Thus the burden of FOIA disclosure presently placed upon universities is a disproportionate way of achieving the legitimate aim of accountability: an aim that is reasonably secured and achieved with the publication scheme requirement and the existing framework for the independent scrutiny of universities.

UAL has accountabilities in place; it is subject to the regular scrutiny of independent external bodies such as the OIA, HEFCE, QAA, OFSTED and even the OFT, so that the argument proposed by government that FOIA brings about proper and appropriate accountability simply does not apply to an already well regulated sector.

UAL’s publication scheme contained sufficient information to address the majority of FOIA requests it has received since 2005. Information has been requested about senior manager’s contract details and titles, salaries as well as honorary awards granted by UAL. Where not compromising a person’s Data Protection Act rights this has been supplied although more frequently than not the information required was already published by UAL. Information on staffing policies, organisational structure, corporate plans, financial and capital strategy has also been requested together with information on intellectual property policy and knowledge transfer partnerships and technology transfer details. Information was also requested on research funding, university expenditure and procurement. All of this information was already publicly available so that precious time and resources have been wasted processing unnecessary requests.

4. Better Decision Making

“Jack Straw in the Commons Second reading debate made clear that an anticipated result of greater openness was that FOIA would “enhance the quality of decision making by the Government.” Lord Falconer, speaking in 2004, made clear the Government’s view that “It is in our interests as Government to show people how government reaches decisions in their names. Freedom of Information, done properly, will mean better Government.”

UAL already has appropriate governance in place that has already been reviewed and approved by the Privy Council, so it is not accepted that being subject to the same degree of external scrutiny by the public achieves anything more than an unnecessary expense of time and money by the University. It is not accepted that the added level of scrutiny achieved by allowing FOIA requests improves a university’s decision making. Far more effective is the routine and regular scrutiny of the university’s governors, in line with national requirements through the Committee of University Chairs, (CUC) and the Higher Education Funding Council (HEFCE).

5. Public Involvement in Decision Making

1. [Memorandum to the Justice Select Committee Post-Legislative Assessment of the Freedom of Information Act 2000]
2. [Your Right to Know: Freedom of Information (1997) [CM 3818]]
3. david.matthews@tsleducation.com"
“In relation to the objective of greater public participation in the decision-making process, Lord Falconer argued in 2004 that “without openness we cannot hope to encourage greater participation in our democratic life”. 17 MPs in the Commons debate highlighted increased public participation as an objective, stating that wide access “will assist strong, informed democratic participation in the life of this country… Information is the oxygen of democracy.” \(^1\)

Again this proposed benefit was particularly directed towards increasing public involvement in central and local government decision making. UAL, whilst reasonably large in organisational terms, does not compare in size and complexity of operation with either local or central government. Furthermore the accountability and participation of the public in relation to government is restricted to periodic electoral approval or veto. The University with its routinely regular governors’ committee structure of governance already provides for the public’s involvement with the running of the university.

6. Wasteful requests

UAL is concerned that FOIA is used for requests that put simply are a waste of time serving no greater purpose than titillation or mischief making. Indeed this was picked up by the Times Higher:

“Bizarre FOI requests waste university resources, say fatigued staff. David Matthews writes
The Freedom of Information Act strove to advance democracy by committing public institutions to exacting standards of transparency and openness. You can also use it to ask universities about duck poo, hauntings and bans on masturbation in the library toilets. Those burning issues are among the bizarre FOI requests that universities had to process last year, with institutions warning that issuing responses is a drain on resources.
Highlights from last year include the member of the public concerned by a “Masturbation Notice” that appeared at the University of St Andrews stating that self-gratification was banned in the library toilets........
The St Andrews request came from prolific FOI Act user Steve Elibank, who also asked the University of Oxford for the "branding and/or style guidelines" for the Oxford Reading Tree series of children’s books featuring the Biff and Chip characters, published by Oxford University Press......
The universities of York and Brighton were both asked how many complaints they had received about haunted buildings, ghosts or “other paranormal phenomena” on their premises, what action they took and how much it cost.
York, famous for its on-campus wildfowl, was also asked to state how much money was "dedicated to the clean-up of duck excrement on a year-by-year basis for 2008, 2009, 2010", plus its forecasts for spending on clean-up operations in 2011......
One press officer at a Russell Group university said: “Of course it is a perfectly valid argument that this diversion of teaching and research resources is worth it for the transparency the Act attempts to provide. But it’s worth mentioning how much time it takes up.”
She added that the university was “churning out” Excel spreadsheets every day to answer FOI requests and that this had to be done by “people whose job is to do something else (e.g., admit students)”. \(^3\)

7. Fishing Expedition Requests

---

1. [Memorandum to the Justice Select Committee Post-Legislative Assessment of the Freedom of Information Act 2000]
2. [Your Right to Know: Freedom of Information (1997) [CM 3818]]
3. david.matthews@tsleducation.com.”
Each year UAL has received requests for information that are not designed to ensure transparency and openness in relation to significant decisions or UAL policy, requests that do not seek to ensure general accountability or better decision making and which do not seek to involve the public more closely in UAL’s decision making. These requests are not looking for confirmation of information held and disclosure of it for the public benefit, but rather are requests aimed to “fish” for information for motives entirely personal to the requestor and which are arguably not for the public’s benefit. These include requests from:

(i) Researchers engaged in individual research. These requests are arguably for the personal and even sometimes financial benefit of the requestor. UAL considers the Act’s existing exemptions are not sufficient to adequately protect ongoing academic research. FOIA requests indeed have the potential on occasion to be dangerously intrusive. UAL concurs with Chris Rusbridge who opined succinctly in relation to the application of FOIA exemptions: “Where, for example, an academic researcher has gathered data which will inform published work, but which will not actually be published itself, section 22 however can’t apply. Section 43 might, depending on the facts (as might section 41). But there is a slight possibility that this data would not attract a specific exemption. In those circumstances it’s possible section 36(2)(c) could come into play, but not guaranteed.” Andrew Charlesworth and Chris Rusbridge investigated this area for JISC (see http://www.jisc.ac.uk/foiresearchdata). They concluded the Scottish exemptions provide better protection for research in progress than the RotUK exemptions. “The Scottish exemption protects data gathered during a research project in progress where the research is to produce a report. The RotUK publication exemption only protects data where there is a plan to publish the data requested. Generally only a small proportion of data will be published, and the rest of the data (for which there is no plan to publish) will not be protected.” UAL concurs with such view.

(ii) Journalists. UAL has regularly received FOIA requests from journalists; again where the information sought has been published by UAL. These requests can thus fairly be regarded as being from journalists who could ascertain the information from university publications or by using previous historic “sources”, not to mention Google. FOIA was not enacted to make the life of lazy journalists easier and to discourage them from thoroughly researching original source materials and evidence. Universities should not have to pay for this “research engine” that such FOIA enquiries have become. The requests received at UAL have requested details on student fees, senior managers expenses, course costs and details on take up by international students relating to fees and home students; all of which can be found from UAL’s publications without UAL staff having to do the research work for them.

1. [Memorandum to the Justice Select Committee Post-Legislative Assessment of the Freedom of Information Act 2000]
2. [Your Right to Know: Freedom of Information (1997) [CM 3818]]
3. david.matthews@tsleducation.com.”
(iii) **Lawyers.** The courts civil procedure rules were expressly set up to deal with fair and reasonable disclosure after Lord Woolf's review of civil litigation procedure a little over a decade ago. The Civil Procedure Rules provide a fair compromise between justice, openness and the interests of the competing parties. The Civil Procedure Rules Practice Direction Pre-Action Conduct provides: ‘*Unless the circumstances make it inappropriate, before starting proceedings the parties should: (i) exchange sufficient information about the matter to allow them to understand each other's position and make informed decisions about settlement and how to proceed; and (ii) make appropriate attempts to resolve the matter without starting proceedings and in particular consider the use of an appropriate form of ADR’.* The FOIA was not established to help lazy lawyers to circumvent the pre action protocol procedures of civil litigation. Yet this is what is happening when students, and to a lesser extent staff, wish to bring proceedings against a university. UAL has received such requests since FOIA was introduced and with some lawyers it seems it has become usual practice and is used as simply another litigation weapon in their armoury. Notwithstanding the civil procedure rules and its objective to narrow the issues between the parties, claimants' lawyers are using FOIA requests to “find” causes of action and broaden the scope of their clients’ claims. FOIA requests are apparently routinely used as a weapon, looking for not only evidence to support an existing claim but to look for additional fresh causes of action. This is particularly evident in cases of student claims. The Office of the Independent Adjudicator, (OIA), was established to address student complaints that had already been through the processes of a university. The OIA process is by enquiry, frequently exhaustive, that whilst demanding for universities is restricted to enquiry about existing or pre-existing grounds of complaint, whereas lawyers representing student claimants are using FOIA to “fish” for fresh grounds of complaint;

(iv) **Trades Unions** Universities are keen to work with their trades unions in a spirit of openness and frank co-operation. Individual requests by TU activists have been received by UAL, which invariably have sought information more properly disclosed within the usual transactions between UAL and its unions. Universities, engaged in what has at times been a painful process for change have been usefully and productively engaged with its employee’s trades unions working through existing well established protocols and processes. Circumventing these processes is not what Parliament intended when introducing FOIA.

8. Conclusion

The Act has significantly increased the data that UAL routinely makes available by publication as well as in direct response to FOIA requests. The most useful and comprehensive information is however that which is now routinely published and

1. [Memorandum to the Justice Select Committee Post-Legislative Assessment of the Freedom of Information Act 2000]
2. [Your Right to Know: Freedom of Information (1997) [CM 3818]].
3. david.matthews@tseducation.com."
readily available to the public. To that end the objectives of the legislators in enacting FOIA has been successfully achieved.

Universities are however increasingly being regarded as “quasi public bodies”. They are in 2012 stretching resources to deliver more on more fronts, including commercial and research benefits as well as delivering a traditional higher education. In so doing they face greater competition than ever before and UAL has become more efficient and more innovative than ever. Imposing greater obligations at this juncture would be imposing an unfair economic burden rather than setting universities free to compete more effectively at home and worldwide. It is arguably as well as being unfair and unreasonable swimming against an economic and political current.

It is more reasonable to seek to achieve the original FOIA objectives through publication schemes, with extended obligations if necessary, rather than with a reactive process addressing requests that are all too frequently self-centred and not for the wider public benefit.

It is sensible to lessen the cost of compliance to cash strapped universities and relieve them of an unreasonable burden in terms of time spent in dealing with, if not vexatious, often unnecessary or redundant requests. Even greater is the need to relieve universities of the burden of addressing the fishing expeditions by lazy or self centric requestors, which fishing expeditions the Act was not enacted to facilitate and for which there are other already existing processes for such requestors to use.

The FOIA has brought with it the freedom to waste universities’ time and money when their scant resources are already stretched. Universities face what many in the press have described over the last few years as a funding crisis; so it is more important than ever to steward resources fairly and appropriately.

Requests such as the zombie request received by Leicester Council are of course addressed with a degree of good humour when received by any organisation; nevertheless it remains a waste of time and public money. It is irresponsible use of FOIA and wasting resources.

Dealing with FOIA requests is a process, one that can quite easily become a very costly process. In order for the process to work fairly as well as effectively as the legislature originally intended when enacting the Act, it is now necessary in the era of limited public finance resourcing to simply be able to refuse requests made under FOIA that will cost too much or which are patently made for individual gain rather than the public good.

There are “regular” as well as “wasteful” requestors who submit repeated requests without any consideration of the public money that will have to be spent, and invariably for their personal and not the public good. Universities should be able to decide to refuse requests from persons using FOIA wastefully or as a weapon with

1. [Memorandum to the Justice Select Committee Post-Legislative Assessment of the Freedom of Information Act 2000]
2. [Your Right to Know: Freedom of Information (1997) [CM 3818]].
3. david.matthews@tsleducation.com.”
which to attack a public body, where the regulatory system provides fair and appropriate other forums for review ought properly to be discouraged.

The possibility of requesting that universities be reclassified so that the Freedom of Information Act only applies to the public aspects of HEI has considerable merit, in a way similar to the treatment of UCAS and the BBC

In order to protect the rights and privileges of the responsible majority of well founded requestors some requests should be allowed to be declined. It is undeniable that some requestors abuse the FOIA; rejecting their requests is not a denial of their rights but should be more properly regarded as safeguarding the valid requestors’ rights to request information under FOIA.

The Act should be amended in relation to universities so that the benefits of openness, transparency and accountability are abundantly clear, advantages that go beyond satisfying requestor’s curiosity. It needs to be seen to help drive efficiency and assist universities in making the savings expected of them as well as improving the student experience. As it is at the moment the benefits are vague and intangible as well as having an expensive price tag.

Submitted by the University of the Arts, London
3 February 2012

1. [Memorandum to the Justice Select Committee Post-Legislative Assessment of the Freedom of Information Act 2000]
2. [Your Right to Know: Freedom of Information (1997) [CM 3818]].
3. david.matthews@tsleducation.com."
Written evidence from the Royal Liverpool and Broadgreen University Hospitals NHS Trust

Security markings: None

1. Purpose
To update the Deputy Director of Informatics of the issues associated with the Freedom of Information Act (FoIA) 2000.

2. Executive Summary
The Royal Liverpool and Broadgreen NHS Trust agree that the FoIA, on the whole, works effectively with processes implemented to support the Act. The Act does promote openness, accountability and transparency but this is at a high cost to the Trust. The Act is abused by requests submitted by individuals/organisations wishing to have a competitive advantage in business; Students requesting information which they would ordinarily have researched themselves, and the press looking for information to create storylines.

3. Background
The Justice Select Committee has launched a call for written evidence for its scrutiny review of the Information Act 2000.

The Committee invites evidence on (although respondents are welcome to address additional issues):

- Does the Freedom of Information Act work effectively?
- What are the strengths and weaknesses of the Freedom of Information Act?
- Is the Freedom of Information Act operating in the way that it was intended to?

The Trust would like to contribute to this evidence and has the following comments with this regard:

- Does the Freedom of Information Act work effectively?

On the whole the Act works effectively due to the processes put in place by the Trust. The registration and management of each request is known throughout the team, but there continues to be constant pressure on Trust staff due to the tight timescales involved in the act, and the pressures of other day-to-day business.

The Trust has seen a year on year increase of requests since 2007 and indeed it is anticipated that there will be an estimated 23% increase for this financial year alone. In addition, the questions raised in many of the requests are numerous and are often quite difficult to locate the answers. There was no additional resource to fund the extra work and although charges can be levied, the Trust has never done so.
The Trust has received 271 requests from 1st April 2011 to 31st December 2011 that contain 1,812 separate points to address. Requests are received via the FoI Email account that is linked to the publication scheme or by letter. There are some requests received elsewhere in the Trust that have been redirected to the FOI team, for example where a request for information may form part of a Complaint.

The FoIA requests to the Trust since 2005 have increased considerably.

The chart below shows number of requests made to the Trust between 2005 to April - December 2011

![Bar chart showing number of requests per year]

The chart below shows points raised 2005 and April to December 2011

![Bar chart showing points raised per year]
The request themselves come from all types of people/organisations, including from members of public (105), Journalist/Media (44), Private companies (56) and Government officials/MP’s (6) to name a few.

Types of requestors from April to December 2011

![Bar chart showing types of requestors]

Key:
- CB – Charitable Body
- GO – Government Official/MP
- HP – Health Professional
- HG – Help Group
- JM – Journalist/Media
- MP – Member of the Public
- MS – Member of Staff
- PT – Patient
- PC – Private Company
- PA – Public Authority
- SL – Solicitor
- SU – Student/Education

Between 1\textsuperscript{st} April 2011 and 31\textsuperscript{st} December 2011 we have received 3 requests for reviews under the Freedom of Information Act placing a further burden on resources. All of the decisions have been upheld.

- What are the strengths and weaknesses of the Freedom of Information Act?
Strengths | Weaknesses
---|---
Supports openness, accountability and transparency | No resource is available as no charges are made. Exemption used if a large request over 18hrs worth of effort.
| Time period of 20 days is often unrealistic.
| Overlap between FoI and Data Protection Act is not always understood by the requestor.
| The impact on services around the Trust can be significant as some departments are constantly required to submit information.
| Difficult to plan what can be published as similar requests are often not quite the same as published material.
| One request can involve multiple departments around the Trust because it contains multiple questions within.

- Is the Freedom of Information Act operating in the way that it was intended to?

In the opinion of this Trust, the Act does not operate in the way it was intended to. We believe the Act is misused, illustrated by the following examples:

- Requests made by companies in order to receive information which would give them a competitive advantage.
- Completing research work on behalf of the requestor.
- Identify staff details in order to market them for specific products.
- Used by Journalists (sometimes using non-press email accounts) to gather information,' just in case' they can create a storyline.
- Used by staff to answer issues that should ordinarily be addressed within the staff/management role, so negating the openness culture it was written for.

4. Other issues to raise
The Act has been misused when some of the requests are clearly very obscure or resource intensive. For instance:

- Request received for details of any information about ghosts around the Trust buildings.
- Request received for details of how many feng shui consultants were employed by the Trust or any staff who had had feng shui training.
- More frequent requests are very labour intensive and have involved many different departments and specialties involving in some instances up to 15 different staff members.
- Some requestors put in requests every month around different subjects therefore avoiding the ‘vexatious’ status.
- Many requests are sent to numerous NHS organisations (round robin) and the issues raised and work completed is therefore multiplied across this part of the public sector.
The Trust looks forward to the outcome of the review.

February 2012
Written evidence from the Campaign Against Arms Trade

1. The Campaign Against Arms Trade (CAAT) in the UK works to end the international arms trade, which has a devastating impact on human rights and security, and damages economic development. Established in 1974, CAAT receives around 80% of its funding from its individual supporters.

2. CAAT welcomes your Committee’s Inquiry. While appreciating the pressure to reduce the burden placed on civil servants and other officials, the Freedom of Information Act (FoIA) has helped shed light on the arms trade, a controversial area of Government activity with major consequences both in the UK and overseas. CAAT, having taken into account the costs and time it has incurred in using the FoIA, believes it has brought great benefits to the organisation's work and the wider public.

3. Without the FoIA, much information about corruption and arms sales to Saudi Arabia, as well as the arming of the Libyan government prior to the Arab Spring, would not have come to light. The information shows the extent of previous misjudgements and, when comparatively recent, it helps to hold decision-makers to account and, hopefully, assists with the change of government practice.

The use CAAT has made of the Freedom of Information Act

4. The arms trade is generally secretive so the collection, collation and cataloguing of information about it has always been an important part of CAAT’s work. The information resources at CAAT are consulted by, or on behalf of, MPs, journalists and academics, as well as by those campaigning to end the arms trade. It was hoped that the FoIA would herald a cultural change in Government departments with much greater openness about the arms trade than previously.

5. CAAT’s first request was made in January 2005 when the FoIA came into force. Since then, CAAT has made FoI requests to a broad range of public authorities. CAAT has taken cases as far as the Information Tribunal, latterly the First-Tier Tribunal (Information Rights), referred to hereinafter as the Tribunal, including one where, for the first and so far only time, a Special Advocate was used.
6. In consequence, CAAT has an exceptionally deep knowledge of the operation of the FoIA. A sample of some of the FoI requests follow.

Local authority and university investments
7. For some years CAAT ran campaigns around local authority and university investments in arms companies. Prior to the FoIA, some of these bodies provided information about their investments, but after the FoIA, and the assistance of the Information Commissioner (hereinafter the Commissioner) who made it clear that such investment information should be made public, a UK-wide picture was possible.

8. Many of CAAT's FoI requests have concerned UK arms sales to Saudi Arabia, which were controversial from the start and even less transparent than the trade as a whole. The sales began in the 1960's, but the really big deals were Al Yamamah in the mid-1980's and the Eurofighter Typhoon in 2007. The contracts and UK government support for them have elements of continuation from one deal to another meaning even information from the 1960's has relevance now.

9. CAAT liaised on these requests with Nicholas Gilby, who was researching the history of corruption in UK-Saudi arms deals. The requests were made to several authorities, including the Ministry of Defence (MoD), the Foreign and Commonwealth Office (FCO), the then Department of Trade and Industry (DTI) and the then Export Credits Guarantee Department (ECGD).

10. Some requests resulted in prompt disclosure. For instance, the Ministry of Defence Saudi Armed Forces Project (MODSAP) has responded each year, within days of the request being made, with information about staff numbers, locations and costs.

11. More were refused. In the latter cases, applications for internal review were made. The original decision was always upheld at this stage. The exemptions cited have usually been a combination of 27-Foreign Relations, 41-Information provided in confidence, and 43-Commercial interests.

12. In August 2005, CAAT took two cases - one where the MoD was asked for the Al Yamamah Memoranda of Understanding (MoU) and the other the ECGD for details of outstanding liabilities on the Saudi arms deals - to the Commissioner. CAAT
then waited for a security-cleared case officer. The first Commissioner ruling came in April 2007. It rejected CAAT's complaints and appeals were made to the Tribunal.

13. The request to the ECGD was then immediately settled. The involvement of the Government's lawyers, the Treasury solicitors, seemed to change the ECGD's position and CAAT received the information requested.

14. The MoD case proceeded to an oral Tribunal hearing in March 2008 which lasted a week, much of it in closed sessions. The Tribunal joined three cases, in which Nicholas Gilby had made requests to the FCO, to CAAT's. The MoD/FCO witnesses included the then UK ambassador to Saudi Arabia William Patey, while the then Liberal Democrat Treasury shadow Vince Cable MP was a witness for CAAT. The Tribunal ruled against CAAT on the MoD case, but found in Nicholas Gilby's favour to the extent that it ordered the disclosure of much of the material requested.

15. CAAT took another case to an Tribunal in 2009 when the ECGD was ordered to release some Saudi arms deal risk assessment papers. More recently, in 2011, CAAT went to an "on the papers" Tribunal hearing in a vain attempt to get the MoD to adhere to the precedent thought to have been established in Nicholas Gilby's case with the FCO.

UK Trade & Investment Defence and Security Organisation

16. An understanding of the Government's arms promotion agency, since April 2008 the UK Trade & Investment Defence and Security Organisation (UKTI DSO), has always been a focus of CAAT's work. CAAT has requested information including speeches of senior personnel, attendance at overseas and invitations to UK arms fairs, lists of meetings with representatives of specific countries, and ministerial arms promotion interventions.

17. The responses have been mixed. Some documents have been provided in a reasonably timely fashion. More substantive requests, such as for correspondence, lists of meetings and delegates to arms fairs, have taken much longer, over 80 working days on a number of occasions. Almost invariably limited information has
been provided. In addition to the delays to many requests, responses to internal reviews have usually taken over 60 working days.

Jobs, the economy and the arms trade
18. CAAT also used the FoIA to discover the basis for the frequently-made claims, vital for justifying the arms trade, that it is good for jobs and the economy. In 2005, requests to the MoD and the DTI revealed that neither had conducted any studies into the economic impact of the Al Yamamah deals.

19. A parliamentary answer (Hansard, 26.10.09, Col 117/8W) referred to the Department for Business, Innovation and Skills' (BIS) "analysis" of the number of jobs sustained in the UK by Eurofighters ordered by the MoD. FoI requests revealed that the figures given had been calculated by asking three companies the number of jobs they and their supply chains believed they would lose if the order was cancelled. No independent analysis had been undertaken by BIS or external researchers.

The benefits of Freedom of Information
20. The FoIA has, as paragraph 219 of the Ministry of Justice memorandum acknowledges, "been instrumental in the release of a great deal of information which might otherwise have remained closed". Some of the benefits of the information disclosed are described below.

The information obtained
21. Nicholas Gilby had originally requested 243 pages of historical FCO documents. As a result of the Tribunal ruling he received around 95% of this - every page, but with minor redactions. Over the following months a further 723 pages were declassified with little redaction by the FCO in connection with a backlog of five similar FoI requests. In 2011 the MoD declassified another 41 pages in the preparations for the "on the papers" Tribunal hearing.

22. The disclosed information has transformed understanding of the history of the UK’s arms deals with Saudi Arabia, and the role of corruption in them. This complemented the public debate and judicial processes taking place at the time as a result of the ending of the Serious Fraud Office inquiry into corruption allegations regarding BAE Systems and Saudi Arabia. The released documents showed the SFO investigation
covered just one small part of a long-standing pattern of misdeemeanour in Anglo-
Saudi arms deals.

23. On the financing of the Saudi arms deals the FoIA led to it becoming public
knowledge that for many years UK taxpayers could have lost £1 billion if Saudi
Arabia failed to pay for the arms. Risk assessment documents showed that members
of the Government were worried about this, even as late as 2005 when the FoIA was
coming into force.

24. From UKTI DSO, CAAT has received some information from a department that is
clearly unwilling to place information about its activities in the public domain.—

25. As well as the actual released documents, the hearings in Tribunal cases can
themselves provide information. The cross-examination of Stephen Pollard of
MODSAP in March 2008 threw light on a little-known MoD body employing over 200
civil and military personnel with a budget of just under £60 million paid for by Saudi
Arabia.—

26. Sometimes information received as a result of a FoI request informs debate years
later. In 2011 the Bahrain government suppressed protest and committed
widespread human rights violations. Saudi Arabian National Guard (SANG) troops
entered Bahrain to guard critical infrastructure, freeing up the Bahraini security forces
to intensify their repression. The MoD's answer to a FoI request made by Nicholas
Gilby in 2006 about the British Military Mission to the SANG formed the basis of a
front page article in The Observer on 28th May 2011 headlined “Saudi forces used to
 crush Arab spring trained by UK.”

Establishing principles

27. FoIA can also establish worthwhile points of principle. Nicholas Gilby's case was
important because it established the precedent that where Government officials were
involved in corruption, or turned a blind eye to it (as was the case with the Saudi
arms deals in the 1960's and 1970's), there is a clear public interest in disclosure,
even at risk of prejudice to foreign relations.
28. In the risk assessment Tribunal case the ECGD argued that to disclose the disputed information would prejudice the effective conduct of public affairs - exemption 36. In his evidence, Paul Radford, the head of ECGD's Credit Risk Analysis Division, claimed there would be a “catastrophic...freezing effect” and said “he did not know how the ECGD would manage, how it would conduct its affairs”. The Tribunal rightly dismissed this argument. This ought to make it much more difficult for public authorities to withhold information relating to how policy decisions are made.

Problems and weaknesses

Attitude of officials
29. Attitudes to officials charged with implementing the FoIA can be at odds with its spirit of openness. In addition to examples cited elsewhere, the March 2008 Tribunal heard a former UK diplomat suggest how the Saudis' opinion might have been sought: "In my experience what tends to happen is that the UK civil servants will say something like: 'There is this awful Tribunal in London that is threatening to release these documents, don't you think this will be a very bad idea?' to which the foreign government is likely to respond: 'Yes, that would be a bad idea, please report that to London.'" Earlier in the day, and unbeknownst to him, the Tribunal had been told that this was indeed what had happened.

30. Journalist Colin Freeman, searching through the ruined UK embassy in Tripoli, found a letter from the UK defence attaché warning the Libyans that CAAT had requested the names of overseas delegates to the 2009 DSEi arms fair. The letter asked if Khamis Gaddafi was “content for this information to be disclosed”, adding: “If you are not content, I would ask that you provide me with a formal statement with the reasons, as this will help strengthen the case against release.” (Sunday Telegraph, 25.9.11)

31. In a speech in May 2009, Richard Paniguian, the head of UKTI DSO, mentioned “high-level political interventions” made in connection with arms deals.. When journalist Tom Baldwin asked UKTI DSO about this, with reference to Libya, “a
spokesman for UKTI DSO initially denied that Mr Paniguian had made a formal speech at the event on 21st May and that the remarks attributed to him had been made up.” When the journalist revealed that CAAT had obtained a copy of the speech from UKTI DSO, through FoI, the official was forced to backtrack. (Times, 5.9.09)

Delay

32. Information is usually more useful, and sometimes only useful, if it is produced in a timely manner. If the public authority takes a long time, it is less likely that the information will be able to inform public debate.

33. CAAT understands that the lengthy delays at Commissioner stage are being reduced, but the waiting at the internal review stage is often still excessive and foot-dragging by the authorities seems to account for some of it. UKTI DSO is one department which appears to frustrate the provision of information through routine delays.

34. For example, a request was made on 4th August 2009 regarding “high-level political interventions” that the UKTI DSO stated that it had delivered in pursuit of arms deals to particular countries, including Libya. After one month with no response, CAAT had to email and telephone several times over the course of a week before the request was even acknowledged. It then took further emails, telephone calls and a request for an internal review before a reason for delay was given, 49 working days after the request had been submitted. After further delays CAAT made a complaint to the Commissioner, and the Commissioner instructed UKTI DSO to reply within 20 working days. A response was finally given 100 working days after the original request and 23 working days after the date of the Commissioner’s letter.

35. Soon after the initial request, the release of al-Megrahi and allegations of possible trade deal links had become a matter of significant controversy. The final response detailed two meetings between Libyan and UK ministers in May 2009 where arms exports had been discussed.

36. Similarly, following a September 2010 request, information about Farnborough International was released in batches with holding emails sent in between. The first
batch was received after 61 working days, the second after 80, the third after 140. The final batch arrived in January 2012, 351 working days after the request was made. This last response contained what seems to be the most sensitive information as it related to “Ministerial support for our major [arms selling] campaigns in Libya” and the invitation of a Libyan General to Farnborough International 2010, including meetings with Defence Minister Gerald Howarth and the Duke of York. The greater embarrassment of releasing this in the first half of 2011 is apparent.

Resistance to redaction
37. UKTI DSO has also made blanket refusals when only part of the information requested merited exemption. In one case, relating to meetings with Algerian officials about arms sales, the initial request was refused using sections 24, 26, 27 and 43. When an internal review requested that information that was not considered exempt should be supplied, UKTI DSO upheld the original decision but, “to be helpful”, decided to provide some of the previously withheld information. There appears to be no reason why this should not have been provided in the first instance rather than after a total of 136 working days and setting a bar of an initial refusal.

Lack of adherence to precedent
38. Precedents are important to prevent old battles being fought again. Establishing a precedent at the Tribunal is a time-consuming process. If previous decisions are ignored, it wastes resources for all concerned.

39. CAAT made a request to the MoD for material similar to that the Tribunal ordered the FCO to release to Nicholas Gilby. Much of the material was withheld, including at least one document obtained from the FCO. CAAT argued at the internal review stage and later to the Commissioner that the precedent set in the Tribunal case should be followed.

40. The Commissioner sided with the MoD. CAAT and Nicholas Gilby decided, despite the amount of work involved, to the appeal to the Tribunal to preserve the precedent. The case was considered "on the papers" in 2011 and the Tribunal ruled in favour of the MoD. The judgment said that a reason for this was that the projected cost for the Tribunal did not permit it to examine the documents in the detailed way done in the FCO case.
Legal imbalance
41. Until the appeal to the Tribunal, the process is relatively simple for the requester and the cost, except in time, minimal. However, an oral hearing before a Tribunal brings the requester into a legal process where both the public authority and the Commissioner will have lawyers, even if on the same side of the case. At the Tribunal hearing in 2008 the FCO and MoD were represented by a leading QC plus a second barrister, who himself became a QC the next year. CAAT’s resources limited it to a junior barrister.

42. Any requester without legal assistance at the Tribunal will be at a definite disadvantage. This has huge cost implications for individual applicants or those from bodies without the resources to pay for lawyers. Qualified legal assistance is invaluable in reviewing and improving the requester’s case, fighting for the requester’s interests prior to the hearing (not least because they have a far better understanding of legal procedure and what is and is not possible), and, in the case of barristers, questioning witnesses in the hearings.

43. The requester is also at a major disadvantage if much of the Tribunal hearing takes place in closed sessions. CAAT and Nicholas Gilby were immensely fortunate when the Tribunal agreed to the appointment of Special Advocate Khawar Qureshi QC to represent their interests in the closed sessions of the March 2008 hearings.

The costs
44. It is argued that the FoIA costs the public sector too much, particularly through its use of employees’ time. However, these public employees are accountable to UK citizens and greater transparency should help discourage the abuse of power.

45. It is hardly surprising that a small number of requests have disproportionately high costs for the authorities. Those requests going to Tribunal level, and using legal professionals, undoubtedly cost more. However, the FoI process is not without cost for the requester. To obtain information where there is resistance takes considerable time, stamina and skill.
46. At Tribunal level it can also take money as it may not be possible to find lawyers willing to act without charge, given the amount of work involved. Resources are always a consideration for CAAT before pursuing a case beyond the initial stages. In 2011 CAAT's decision to go to the Tribunal "on the papers" was made as the resources were not available to pursue a full oral hearing.

47. One problem with costs is that it is sometimes impossible to gauge the authority's approach to a request in advance. For example, CAAT thought a request to the ECGD for a list of countries on which it had exposure for a) civil and b) military projects at 31st December 2009 would be simple to answer. However, one or more countries were omitted from the list, with exemptions 27 and 43 cited, prompting an unanticipated internal review. The ECGD did not change its mind and CAAT remains perplexed by this.

48. Costs, on both sides, can rise unnecessarily where the authority is unhelpful. Not anticipating anything other than a quick response, in 2008 CAAT asked UKTI DSO for lists of the members of its Defence and Security Advisory Panels. However, the information was not forthcoming until the internal review stage and then only released after UKTI DSO, citing Section 40(2) had received permission to do so from each of the individuals concerned. However, the panel members all came from companies, trade associations and the like and CAAT had discovered the names of several from information given without hesitation to parliamentary committees or the media before the lists were released. It would be most surprising if any of them had expected their membership of the Panels to remain a secret.

49. Conversely, costs can be reduced if the authority is helpful. In 2006 the National Audit Office's Head of Corporate Affairs, Rob Prideaux, explained the NAO's report terminology which enabled CAAT to frame an FoI request which elicited the information wanted with little cost to either party.

Looking forward
50. Although the FoIA has been in force for seven years, it is only three since the Tribunal ruled on the CAAT and Nicholas Gilby Saudi Arabia cases. These rulings informed subsequent requests. Commissioner and Tribunal judgments are also checked regularly, both for the information contained in them and as an indication of
the two bodies' thinking on cases. There is, however, the disappointment mentioned above that precedents are not always being followed.

51. The FoIA was a vital step towards increased accountability and allowing citizens, either directly or via pressure groups or the media, to question and sometimes end official activities considered undesirable.

52. CAAT thinks that the structure of the FoIA should be left unchanged while a culture of greater openness continues to embed itself, or, in some cases, enter into the thinking of officials. It has taken requesters such as CAAT much perseverance to get the information it has done. Any dilution of the FoIA would mean a substantial step back in terms of information provision, providing more loopholes and allowing more tactics which might assist obstructive departments. In particular, CAAT does not think any additional charges should be introduced.

53. There is a general trend towards openness and accountability. The FoIA has played its part in this, providing much needed information to assist rational and informed debate. It must not be watered down.

February 2012
1. This submission is a response from Cranfield University to the call for evidence on the Freedom of Information Act by the Justice Select Committee.

2. Cranfield recognises the importance of the Freedom of Information (FOI) Act in ensuring that the operations of public bodies are transparent and that such bodies can be held publically to account for their actions. However, we have concerns that the Act is not working effectively and that in some areas it is not operating in the manner in which it was originally intended. We recognise the strengths of the Act in providing citizens with the opportunity to scrutinise the operations of public bodies within a well-regulated framework, requiring them to respond transparently, within clearly defined timescales and with a clear right of appeal should a body refuse requests for disclosure. However, we have identified areas of concern which we believe relate to weaknesses in both the Act itself and its post-legislative implementation. These relate principally to:-

- Use of the Act beyond the scope originally intended, including for commercial gain rather than public scrutiny.
- The use of the Act in disputes to frustrate the legitimate operations of an organisation.
- The breadth of the definition of ‘public-bodies’ and impact of the Act on legitimately confidential operations.

Use of the Act beyond its originally intended scope

3. We understand that Universities UK will be making a detailed submission to the Justice Committee and believe that many of the issues we identify in this submission are similar to those across the UK Sector. Cranfield has observed a seven times increase in FOI requests
over the past five years with many requiring information which we believe are beyond the original intent of the Act. Examples include:

- The use of ‘global’ fishing requests by journalists to short-cut traditional news gathering.
- Requests from university staff and students for the purpose of their own personal research.

4. In such cases these place significant burden on HEIs, but often result in little output of legitimate public interest. In our view the Act is therefore being exploited to carry out data gathering which should be conducted by researchers themselves using well established research tools. Such activities are unfairly transferring the burden of research from researchers themselves to public bodies.

5. In addition, similar ‘round-robin’ requests are often exploited for purely commercial gain rather than public transparency. Requests for information on matters such as investment strategies and spend, named decision makers and related information are frequently used by commercial companies simply to target their own marketing, or through the creation of databases for commercial gain.

6. We believe such requests fall outside of the original intent of the Act.

**Use of the Act to frustrate legitimate operations**

7. Many bodies, including Cranfield, recognise that an increasing number of the most complicated and time consuming requests under the Act are associated with disputes with outside parties or with disgruntled employees or former employees. We recognise the legitimate right of individuals to request information of public interest. However our view is that in many of these cases significant numbers of requests are made to simply frustrate the legitimate operations of organisations. This arises from the workload and senior executive and legal time required
to service such requests. Whilst organisations have the right to turn-down vexatious requests under the Act, sophisticated use of FOI in such disputes is often frustrating operations without crossing the line to vexatious behaviour. One of the principal issues here is the statutory requirement to respond to each request as a separate entity, with few rights to resist a number of consecutive and related requests from single individuals.

8. We believe that the frustration of the legitimate operations of an organisation through use of FOI was never an intent of the Act.

Legitimate Commercial Confidentiality

9. Universities are classified as public bodies as a consequence of their receipt of a block grant from their relevant funding bodies. This classification requires not only that universities themselves conform to the FOI Act, but also their subsidiaries, such as trading or commercialisation arms. The direction of travel of the sector is towards less direct block funding and a drive to more commercial activities, and Cranfield is already an exemplar of this position with only approximately 15% of its turnover derived from direct public block grant. Our experience is that this creates a significant tension in relation to the Act – namely at what percentage of turnover should a University legitimately become a commercial rather than a public body – with implications for operation of the FOI Act. Whilst superficially appearing an ‘academic’ point, this is far from the case in reality and we believe will challenge the whole UK HE sector as it is required by government to seek increasing amounts of third-party income on a commercial basis.

10. Cranfield has already faced such tensions over an extended period of time in its educational, and research and innovation activities. It has been challenged through the FOI Act to reveal commercially sensitive information core to the operations of the institution. This has included information such as financial modelling and costing, as well as
intellectual property including course materials which provide the University with significant competitive commercial advantage. No commercial organisation is required to reveal such information, and in our view no university should, except where it relates to direct public investment.

11. Exclusions exist under the Act for commercially sensitive information, however in our experience from ongoing engagements with the Office of the Information Commissioner, including a legal appeal against a ruling in this area, a commercially active university such as Cranfield has to argue for commercial confidentiality against a strong starting position of public disclosure. This is clearly iniquitous where an institution is predominately winning turnover on a commercial basis and will become a greater issue for the HE Sector as it embarks further on the change agenda driven by the Department of Business Innovation and Skills. The answer to this is clear to us; either free the commercial activities of the University Sector from the FOI Act and / or at an appropriately low level of direct public funding, remove the classification of a university as a ‘public body’.

**Executive Summary**

12. Cranfield has highlighted in this submission its broad support for the operation of a Freedom of Information Act in our mature democratic society.

13. However we have also identified that post-legislative operation of the Act has thrown up issues for the University Sector. In our opinion these have generally arisen as un-intended consequences of the Act.

14. We have identified areas of concern which we believe relate to weaknesses in both the Act itself and its post-legislative implementation. These relate principally to:-
• Use of the Act beyond the scope originally intended, including for commercial gain rather than public scrutiny.
• The use of the Act in disputes to frustrate the legitimate operations of an organisation.
• The breadth of the definition of ‘public-bodies’ and impact of the Act on legitimately confidential operations.

15. We welcome the Justice Select Committee’s post-legislative scrutiny of the Act and the opportunity it offers to correct some of these consequences for our Sector.

February 2012
Executive summary

1. WhatDoTheyKnow.com is a public web-based service that has helped people make over 100,000 Freedom of Information (FOI) requests to over 5,000 public authorities since 2008. We estimate that over 10% of all FOI requests nationally are made and published via the site.

2. As operators of the site, we believe that we have a unique and valuable vantage point from which to comment on how the Freedom of Information Act has been working in practice and provide practical recommendations for improvements.

3. We believe that the Act has been very effective at releasing previously unpublished public information, at promoting transparency at all levels of the public sector, and at embedding itself in the public culture.

4. Not all authorities apply the Act consistently, meaning that it is not as effective as it should be - many don’t pro-actively publish information, raw data or disclosure logs.

5. The lack of “hard” time limits for consideration of the Public Interest Test or for Internal Reviews allows authorities to delay replies or appeals for many months.

6. Whilst the scope of the Act has been extended to cover a small number of additional authorities, which is welcomed, we believe there are many more bodies carrying out public functions that should be subject to FOI laws, especially as more public services are contracted out to the private sector.

7. Our principal recommendations are:
   a. Fixed time limits for conducting public interest tests and internal reviews
   b. More bodies should be covered by the Act, and the process for doing so should be made simpler and quicker.
   c. Public authorities finding the cost of complying with FOI relatively high should take more steps to reduce the cost, though automation and proactive publication.
WhatDoTheyKnow.com: A view of FOI from a high vantage point

8. WhatDoTheyKnow.com is a website which allows people to make requests for information in public and ensures the request, all email correspondence and responses are automatically published on the Internet.

10. From the requester’s point of view, our service:
   a. Makes it easy for them to find public authorities, and provides a simple interface for them to make their requests for information.
   b. Has already done the hard work in searching obscure corners of authorities’ websites for the relevant email address.
   c. Alerts them when authorities are late replying, and prompts them to chase up delayed requests.
   d. Provides helpful guidance in plain English on technical aspects of the Act.

11. From the public authority’s point of view, our service:
   a. Helps reduce their burden of responding to duplicate requests for information.
   b. Allows them to see how other authorities reply to FOI requests improving knowledge of the Act.
   c. Demonstrates how easily it can be to maintain a disclosure log.

12. From the point of view of the general public, our service:
   a. Increases the amount of information from public bodies easily available by simply searching the Internet.
   b. Allows them to comment on information released, or provide assistance to the original requester.

13. WhatDoTheyKnow was created and is run by mySociety. It was initially funded by the JRSST Charitable Trust. mySociety is a project of UK Citizens Online Democracy (or UKCOD), a registered charity in England and Wales (no. 1076346).

14. Projecting from Central Government request statistics\(^1\) suggests that 14% of requests are made through WhatDoTheyKnow.

15. Like many charities, UKCOD utilises a mix of volunteers and staff in achieving its charitable objectives. A group of about seven volunteers deal with the day to day administration of WhatDoTheyKnow.com\(^2\).

\(^1\)http://www.mysociety.org/2011/07/01/whatdotheyknow%e2%80%99s-share-of-central-government-foi-requests-%e2%80%93-q2-2011/

\(^2\)
16. The main benefit of publishing requests and responses online is that the responses can be viewed not only by the person who made the original request but also by others who are interested in the same topic. In this way the site aims to reduce the number of duplicate requests public authorities receive and facilitate the free flow of knowledge.

17. Our statistics show that on average each FOI request made through the site is read by **20 visitors**. This strongly suggests that the material on the site is of interest to a large number of people beyond just those who make requests.

18. We note the memorandum to the committee from the Ministry of Justice states, in paragraph, 67: “Very little research has been published detailing the views of requesters of information”. We believe that we are in a unique position to provide insight into the views of requesters, and note that our site is in itself a body of evidence documenting the practical experiences of FOI requesters in their efforts to obtain information from the public sector.

19. We are aware that our site carries only a subset of requests and that many people decide to make FOI requests in private for various reasons. We encourage members of the Justice Committee to browse our website to see examples of requests made.

---

2 http://www.mysociety.org/2009/10/13/behind-whatdotheyknow/
Does the Freedom of Information Act Work Effectively?

20. The answer to this question is “mostly yes”:
   a. More public authorities are using disclosure logs to openly publish requested information in addition to supplying it directly to the requester.
   b. Many people are aware of their rights to information and expect to receive requested information promptly.
   c. WhatDoTheyKnow has helped prove that public information can be released cheaply and disseminated easily to a wider audience.

21. At the time of writing 63% of the requests made via WhatDoTheyKnow have been marked “successful” or “partially successful”, meaning that the requesters obtained at least some of the information they were seeking.

22. It is also now routine to hear MPs in Parliament asking questions based on information obtained using FOI, and almost every newspaper or online news site carries stories based on FOI releases on a daily basis. Freedom of Information has become part of our national culture and now forms a key part of our democratic system.

23. The effectiveness of the Act can be shown by information released being used to identify questionable public sector spending. One recent example of a request made through WhatDoTheyKnow revealed that Wirral Council had spent £250,000 on consultants for an abandoned privatisation proposal.

24. Perhaps more importantly, the Act gives access to background and contextual material that helps in understanding the purpose of spending, and the associated decision-making process.

---

What are the strengths and weaknesses of the Freedom of Information Act?

The strengths of the Freedom of Information Act

25. The Act has undoubtedly empowered people and given them rights they did not previously have to access information held by public bodies.

26. The definition of a “request” is non-prescriptive and informal, with no need to cite the Act or use any particular wording. This makes it very accessible - requesters don’t need to know the law in detail when making a request.

27. The fact that no fees are usually charged removes a significant barrier to people seeking public information. We believe that charging would introduce a severe “chilling effect” on transparency, and would be a retrograde step.

The weaknesses of the Freedom of Information Act

Bodies not covered by Freedom of Information

28. We often receive queries from our users who are hoping to request information from bodies with a public role but which are not currently covered by the Act.

29. We support the Government’s plans to extend the coverage of the Act to more bodies carrying out public functions.

30. The bodies not covered by the Act that are most frequently requested by our users are:
   a. Housing Associations
   b. Network Rail, Train Operating Companies and ATOC
   c. Water and Sewerage Companies
   d. Representative bodies of public authorities, e.g. Local Government Association; Association of London Government
   e. Duchies of Cornwall and Lancaster
   f. Local Safeguarding Children Boards
   g. London Organising Committee of the Olympic Games and Paralympic Games Limited (LOCOG)
   h. Nominet & JANET
   i. Corporate Officers of the House of Commons and House of Lords

   4 This is an issue for when the Commons and Lords cease to exist during dissolutions
j. Press Complaints Commission

31. Other significant requests for coverage (which we support) are for **outsourced providers** (such as Serco PLC running private prisons). Although the Act makes provision for information “held on behalf of” a public authority to be covered by the Act, this has been interpreted quite strictly by the Commissioner and the Tribunal which has often made it difficult to get information about how outsourced services are being operated.

32. In addition, many **shared service providers** are often set up as joint ventures with minority stakes held by private companies (e.g. Southwest One Ltd, Liverpool Direct Ltd). This means they are not wholly owned private companies, so would not come under the new definition of public authority introduced with the Protection of Freedoms Bill.

**Time limits**

33. The Act includes two significant loopholes that can lead to substantial and unbounded delays in responding to requests.

34. Firstly, the **public interest test extension** allows public authorities to delay final responses 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.

35. Secondly, the **internal review** process that is required before complaining to the Commissioner also has no statutory limit.

36. 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.

37. **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.
Is the Freedom of Information Act operating in the way that it was intended to?

Publication schemes
38. We do not believe that publication schemes have been very successful. Typically only the minimum of information required by the Commissioner’s model publication schemes are included, and it is often hard to actually locate the promised information on authorities’ websites.

39. WhatDoTheyKnow demonstrates that it is possible to engineer publication systems to facilitate disclosure of public sector information to a wide audience at minimal cost. We expect this to reduce the need for requests to be made, and therefore the cost to the public purse.

40. We believe that every authority should maintain an up-to-date disclosure log of requests and responses including refused or “not held” requests. This would help to bring some of the benefits of the WhatDoTheyKnow publication model to the full range of FOI requests they receive.

41. We believe that proactive publication of a much wider range of information would forestall significant numbers of requests, particularly many of the “round-robin” requests that are sent to large numbers of public authorities. For example registers of assets and of contracts would go a long way towards satisfying many of the requests we see from commercial organisations.

Adding new bodies
42. Section 5 of the Act explicitly provides a straightforward mechanism for the government to bring a wide range of bodies fulfilling functions of a public nature or providing contracted out services under the FOI regime. However only a very few bodies have been added in this way. We believe that this power should be used much more extensively.

The effect of WhatDoTheyKnow
43. The memorandum to the committee from the Ministry of Justice specifically mentions WhatDoTheyKnow, in Annex E:
‘A few respondents also speculated that individuals now realise just how easy it is to submit an FOI request, citing the website “WhatDoTheyKnow.com”:

44. They go on to note that not only does WhatDoTheyKnow make it much easier for people to make requests, it has also made it easier for people to follow them up, for example by requesting an internal review.
45. We believe that by simplifying the process of making a request, WhatDoTheyKnow increases the effectiveness of the Act.

46. By publishing responses we also make it easy for others to find the same information without needing to make a fresh request. The average (mean) number of requests made by a user of our site is about four. The average number of times a single request is viewed is around 20.

47. The site has been carefully designed to advise and guide users on their rights and responsibilities under the Act. In particular we prompt our users to search our site, public bodies’ websites, and the wider Internet, for information before making a request for it. At the internal review stage we require them to explain the reasons why they are seeking an internal review.

48. By making requests and responses public, we also make it easier for people to judge for themselves whether the Act is being abused. For example in a small number of cases before the Information Commissioner, the totality of requests by an individual or to a particular body on WhatDoTheyKnow has been cited as supporting evidence for a claim of vexatiousness.

**Vexatiousness**

49. We support the general concept of being able to refuse vexatious requests and we note that the Commissioner and the Tribunal are generally very supportive of authorities that reject genuinely vexatious requests.

50. A balance needs to be struck between protecting public authorities and recognising that some requests will be entirely valid even if they do cause annoyance to the authority.
Other difficulties with the Act

51. In the course of operating the WhatDoTheyKnow website we have encountered various other problems with how the Act has been applied.

Finding the right public authority
52. Requesters often have difficulties identifying the correct public authority to send their request to. For example, confusion exists around the functions of police authorities and police forces. Requesters also struggle selecting the appropriate tier of local government (county, district, town, parish etc.) responsible for a certain function.

53. This has the undesirable effect of public authorities often receiving requests for information that they don't hold, which can be seen by some as a drain on public resources. Our experience is that FOI Officers are usually very helpful (in line with their duties under Section 16 of the Act to provide advice and assistance), and are easily able to quickly point requesters to the more appropriate public body.

54. Some authorities have unnecessary complex and costly procedures for logging correspondence like this for monitoring their compliance to the FOI regime - we believe this is not what was originally intended, and should be dealt with under a simpler “business as usual” regime.

Contacting public authorities
55. Requesters nowadays expect to be able to correspond electronically with public authorities, therefore the provision in s8(2) of the Act for requests to be transmitted by electronic means is very important. One of the biggest challenges they face is finding correct email addresses for authorities’ FOI Officers.

56. We suggest that it should be a requirement of the Act that authorities publish contact details, including an email address, for FOI requests in an easy to find way. One suggestion that works well in Scotland, is for the Information Commissioner to be responsible for maintaining a register of public authorities.

Format of responses
57. Authorities frequently insist on sending responses by post. Given that digitisation technology should be easily available to all but the smallest authority, we would like to see strengthened provisions in s11 of the Act for requesters to specify a preference for electronic delivery, including a preference for specific file formats.

58. Many authorities - including the ICO itself - release documents originally held in electronic format by printing them out and then scanning the results. This is wasteful and makes it very hard for further use of the documents without retyping the contents.
59. There are provisions under consideration in the Protection of Freedom Bill for mandating the release of information in reusable form, but these will only apply to “datasets”, which is a very limited subset of all the information covered by the Act. We believe that the Act should be clarified to make this a requirement (where feasible) for all releases under the Act.

Defamation
59. 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.

Section 44
61. Section 44 of the Freedom of Information Act exempts information from disclosure if other legislation would prevent its release. Unlike many of the other exemptions in the FOI act, it can be applied even where there is an overriding public interest in making information available.

62. Information in the following areas has been requested via WhatDoTheyKnow, and not made available: tax affairs, local government maladministration complaints, animal experimentation, investigations or regulatory dealings with communications companies or financial firms, investigations into companies, police investigations, product safety and many other fields.

63. Our recommendations to improve the level of transparency in this area are:

   a. Make s44 a conditional exemption, requiring a public interest test to be carried out when invoking it.
   b. Existing powers under s75 of the Act should be used to review and repeal unnecessary restrictions on information publication.
   c. The legislation “Impact Assessment” process should include the effects of the new law on FOI and transparency.
   d. Parliamentary legislation scrutiny committees should draw MPs’ attention to any FOI restrictions Ministers are seeking to introduce.
Conclusions and recommendations

64. In summary, we believe that the FOI Act has strongly improved the transparency of public authorities, and has been broadly welcomed by the general public. Requesters have become more aware of their rights under the Act, and are putting released information to good use, whether by reporting it as news, holding their elected representatives to account, or campaigning for improvements in public services.

65. WhatDoTheyKnow is increasingly playing a significant role in this process, by educating the public in practical use of the Act, and by making information available and easily searchable in a single place.

66. We recommend that fixed time limits be introduced for Public Interest Test and Internal Reviews.

67. We would like the coverage of the Act to be significantly extended to cover a wider range of bodies with public responsibilities.

68. We believe that authorities should do more to pro-actively publish information.

February 2012
Written evidence from Liverpool Heart and Chest Hospital NHS Foundation Trust

1. Executive Summary

1.1 Liverpool Heart and Chest Hospital NHS Foundation Trust support openness and transparency in the NHS and believe this is an important factor in delivering and achieving the Trusts Patient Experience Vision. Since implementation of the act in January 2005, the Trust has fully adopted and supported compliance with the legislation.

1.2 The NHS is currently impacted by cuts to finances and resources whilst continuing to deliver quality of service to our patients. For many senior managers, both clinical and administrative, FOI becomes an additional task which adds extra pressure on top of everyday business as usual requirements.

1.3 In the 2010/11 financial year the Trust received a total of 146 requests under the Act, with 121 requests received during the first 10 months of 2011/12. It is envisaged that a similar amount of requests will be received this full financial year in comparison with last year.

1.4 Although a significant increase in the total amount of requests received is not expected, the Trust has had to invest in additional resource and expertise to facilitate the process, as requests themselves continue to increase in complexity and detail, with the cost, time and resource element of complying with requests also increasing.

1.5 The following are key suggestions which could help reduce the resource intensiveness and cost of complying with the Act and thus ensure the Act is ‘fair to all’ in order to maintain openness and transparency in the public sector, whilst ensuring requests, responses and facilitation of requests is delivered within the ‘spirit’ of the Act.

- Reduce the appropriate fees limit from £450 as this is too high
- Include redaction and reading of documentation in the calculation of the appropriate fees limit
- Application of a charge to the applicant for conducting internal reviews if the original decision is upheld
- Application of a fee or limit regarding amount of requests submitted by the media, commercial and repeat requestors
- Applicants to specify if applying on behalf of a commercial or media organisation
- Applicants permitted to only have one request ‘open’ at any one time and a defined ‘reasonable’ time period before next request can be submitted
- Remove the requirement to acknowledge receipt of requests and to confirm or deny if information is held when requests are completely inappropriate for the type of organisation they are submitted to
- Make applicants more accountable for requests they submit and that their details are made available via disclosure logs with the final responses. This will hold individuals to account and could possibly limit what is being requested saving resources and cost
- Increase timeframe for compliance to 30 working days to reduce burden on retrieval, debate and approval process

1.6 Through experience and application of the Act, the following brief points highlight opinion from the Trust’s perspective:

1.7 Does the Freedom of Information Act work effectively?
The Act works well in principle and widely supports the openness and transparency agenda which was one of the key aims of the Act. This can only be beneficial for public accountability and an assessment of efficient use of public resources, services and finances; however the irony is that the Act has increased resource and cost requirements in order to ensure compliance with the legislation.

1.8  **What are the strengths and weaknesses of the Freedom of Information Act?**  
The Act has set out to do what it intended and place further accountability on public authorities for decisions made with regard to the public purse. Access to information allows members of the public to make informed decisions about services they potentially wish to receive and also how those services have been developed.

1.9  The weakness is that the Act is not always used as it was intended by a large volume of applicants. As the Act is ‘applicant blind’ each request must be treated uniquely and some requests could be viewed as vexatious, however although the applicant could be deemed as vexatious, the request could not be so it is hard apply.

1.10  **Is the Freedom of Information Act operating in a way that it was intended to?**  
The Act is increasingly being used for commercial gain and attempts to make money from work undertaken by public authorities, as opposed to the public accountability view. The Trust complies with the Act fully and has implemented the Act as required, often ‘going the extra mile’ to provide advice and assistance to requestors, it is the applicants that take advantage of the Act. Applicants have become much more ‘savvy’ in terms of what information they can actually request, and often push the boundaries in terms of knowing their request is complex, but refined enough to remain within the 18 hour appropriate fees limit.

2.0  **Introduction**

2.1  This memorandum is submitted on behalf of Liverpool Heart and Chest Hospital NHS Foundation Trust who are a specialist tertiary hospital providing heart and chest services for the North West of England, including North Wales and the Isle of Man. The Freedom of Information Act is managed by the Information Governance & Health Records Manager who holds an Information Systems Examination Board (ISEB) certification in Freedom of Information and has been involved with the FOI agenda in two NHS organisations since the Act came in to force, and currently within the role of Information Governance is a Freedom of Information practitioner with responsibility to ensure corporate compliance with the Freedom of Information Act 2000.

3.0  **Resources**

3.1  In order to maintain compliance with the legislation, the Trust has had to increase its resource base during 2011/12 to manage the FOIA process. In an already a tough financial climate for NHS organisations, additional resource to support the process has been required to ensure disclosure of information meets the statutory 20 day timeframe. As noted in the executive summary, there has not been a significant increase in the amount of requests received, but notably more significant, an increase in the complexity of requests received requiring more time, resource and cost element to comply with request. The process involves multiple senior managers and Directors resulting in significant cost. The cost to comply with FOI requests is increasing but resources are decreasing or remain the same.
which adds huge pressures to current individual workload, particularly in areas such as finance, nursing, human resources, IT and estates.

4.0 Appropriate Fees Limit and Charges

4.1 As the appropriate fees limit is currently set to £450, a reduction in this limit would reduce the amount of time spent collating information for requests and would significantly reduce the burden associated with the more complex requests. It would not be envisaged that the Trust would look to use a reduced limit to apply an overarching exemption to disclosure as often even when an 18 hour limit is perceived, the Trust routinely discloses any information it can to maintain openness and transparency.

4.2 It could be beneficial to apply a charge for the undertaking of an internal review. The Trust has completed two internal reviews since implementation of the Act and both decisions were upheld and not challenged further. This process is extremely resource intensive, and if the correct decision has originally been made it is a waste of internal resource, often at Director or senior management level to review the whole process to arrive at the same decision.

4.3 As public authorities, we are accountable and must comply with all requests received, however with cost and resource pressures applicants should be accountable for placing strain on public authorities for the amount and complexity of requests. Therefore, it could be beneficial that the Act allows public authorities to publish certain details of the applicant via disclosure logs along with the final published response. This would hold individuals, in particular commercial organisations to account and could possibly limit the amount of requests submitted saving resource and cost.

5.0 Redaction and Reading

5.1 Currently within the appropriate fees limit, the Act does not allow reading time and redaction time to be included within the calculation. Reading and redaction is a key component in all requests, in particular where commercial interests of the Trust or other third parties could be compromised. The Trust often receives requests for the most recent set of Board minutes and ‘all supporting paperwork or papers submitted to the Board for discussion, approval, information etc’. It is of complete necessity that all papers are reviewed for disclosure and redaction applied as required where legitimate exemptions apply. Although the appropriate fees limit was not reached, it is estimated that due to the reading and redaction applied, the total time spent on individual requests involving senior managers and Directors equated well over 25 hours. The Trust does routinely publish redacted versions of its Board minutes on the Trust website, however if any further information is requested and is held, then the lengthy process must begin. It would therefore be beneficial to allow reading and redaction time in to the appropriate fees limit calculation.

6.0 Disclosure Timeframes

6.1 In terms of performance of timeframes for compliance, the Trust in general discloses fully within the prescribed 20 working day timeframe, however on occasion there is a requirement to apply for an informal extension with the applicant if the request is particularly complex. In all instances when this has been requested by the Trust the
applicant has agreed the Trust continues with its duty to provide advice and assistance. The Trust aims to achieve an internal timeframe of 15 working days for disclosure and currently works to a 72% success rate of this target, with the remainder disclosed within 20 working days. Figure 1 below indicates disclosure timeframes for September 2011 to October 2011.

**Figure 1 – LHCH Disclosure Timeframes September to November 2011**

<table>
<thead>
<tr>
<th>Month Completed</th>
<th>Number Completed</th>
<th>0-5 Days</th>
<th>6-10 Days</th>
<th>11-15 Days</th>
<th>16-20 Days</th>
<th>20+</th>
</tr>
</thead>
<tbody>
<tr>
<td>September</td>
<td>17</td>
<td>0</td>
<td>2</td>
<td>7</td>
<td>7</td>
<td>1</td>
</tr>
<tr>
<td>October</td>
<td>16</td>
<td>7</td>
<td>4</td>
<td>3</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>November</td>
<td>13</td>
<td>3</td>
<td>4</td>
<td>3</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>46</strong></td>
<td><strong>10</strong></td>
<td><strong>10</strong></td>
<td><strong>13</strong></td>
<td><strong>11</strong></td>
<td><strong>2</strong></td>
</tr>
</tbody>
</table>

6.2 With regard to the 2 requests exceeding the 20 day limit in figure 1 above, one was an informal extension agreed with the applicant as the request was complex and detailed. The second was due to the complexity of the request which took longer than expected to collate the information and agree the response. Both of these requests were examples of extra cost and resource applied in order to attempt to comply with the 20 working day disclosure timeframe.

6.3 Driven by the complexities of some requests, an increase in the timeframe for compliance to 30 working days could significantly reduce the burden on retrieval, internal debate regarding exemptions and approval of the disclosure. Often, complex requests involve lengthy correspondence and debate, particularly in instances when the public interest test is required to be assessed. The Trust has robust processes in place to manage requests for information, however the resource and cost requirements to follow for each request to ensure adequacy of response can be a drawn out affair, particularly when information is known to be made available in the media.

7.0 Source of Requests

7.1 On average based on figures from June to November 2011 the Trust has 3 main sources of applicants. Approximately 40% of requests received are from commercial organisations, 35% from ‘private sources’ which include a proportion of the general public, and 18% from press and media. Following correspondence with applicants, it has become clear that a large portion of the ‘private sources’ are in fact from commercial, press and media sources, however as the Act is ‘applicant blind’ there is no reason to refuse such request.

7.2 It also transpires on many occasions that the same organisation has multiple requests submitted to the Trust at any one time from multiple representatives of that organisation, therefore cost and resource is apportioned to one organisation rather than multiple requestors. Many of these applicants are repeat requestors also.

7.3 In order to ensure requests are submitted and dealt within the ‘spirit’ of the Act, it may be of benefit to public authorities to have the right to be notified if an application is being made on behalf of a commercial or press organisation, particularly if the information is intended to be published. Application of a fee or limit regarding amount of requests submitted by the media, commercial and repeat requestors could also reduce the burden, even at least to
ensure that applicants are permitted to only have one request ‘open’ at any one time and a defined ‘reasonable’ time period before next request can be submitted.

7.4 A large amount of requests received are completely inappropriate for our organisation as a Heart and Chest Hospital. Often requests are received by ‘round robin’ emails which relate to services obviously not provided by the Trust e.g. obstetrics, gynaecology and maternity. It would be beneficial to remove the requirement to acknowledge receipt of such inappropriate requests and the requirement to confirm or deny if information is held. Applicants should take steps to ensure information being requested is likely to be held and not submit inappropriate requests.

8.0 Exemptions

8.1 The majority of exemptions can be applied easily if justified, however the requirement to undertake a public interest test for all qualified exemptions is resource intensive and accrues cost. This is again driven in the main by the complexity and length of some requests, often with multiple questions not directly related. This involves input from senior managers and directors to debate the public interest factors. If the Act could be changed to allow an informed decision from an appropriate officer to arrive at the decision without formally having to document a full public interest test, this would save time and resource, yet still ensure someone is accountable for the decision.

9.0 Summary and Recommendation

9.1 It is recommended the Committee note the cost, time and resource issues experienced by the Trust in fulfilling its requirements to be compliant with the Act. The Trust is committed to openness and transparency and will continue to support this agenda, however if public authorities are to continue to deliver the services they are required to do so for members of the public, then significant burden imposed by the Freedom of Information Act needs to be reduced in order that business as usual is not directly affected. It is recommended the Committee consider possible changes to the Act as outlined in below:

- Reduce the appropriate fees limit from £450 as this is too high
- Include redaction and reading of documentation in the calculation of the appropriate fees limit
- Application of a charge to the applicant for conducting internal reviews if the original decision is upheld
- Application of a fee or limit regarding amount of requests submitted by the media, commercial and repeat requestors
- Applicants to specify if applying on behalf of a commercial or media organisation
- Applicants permitted to only have one request ‘open’ at any one time and a defined ‘reasonable’ time period before next request can be submitted
- Remove the requirement to acknowledge receipt of requests and to confirm or deny if information is held when requests are completely inappropriate for the type of organisation they are submitted to
- Make applicants more accountable for requests they submit and that their details are made available via disclosure logs with the final responses. This will hold individuals to account and could possibly limit what is being requested saving resources and cost
- Increase timeframe for compliance to 30 working days to reduce burden on retrieval, debate and approval process

February 2012
Executive Summary

1. Despite bearing characteristics more akin to a private organisation than a public body, the University of Reading falls within the definition of a public authority under Schedule 1 of Freedom of Information Act 2000 (FOI) and is required to comply fully with the Act. Given that the University receives only about a third of its income from the public purse and that this share will decrease significantly over the next two years with the introduction of the new fee regime, we believe that the case for including universities within the scope of FOI should be reviewed. We have recommended changes to the FOI below that we believe are vital for the regime to be effective. Indeed without these reforms we believe the case for keeping universities in scope of FOI becomes much less credible.

2. The University has the made recommendations on the following areas of FOI which it would like the Justice Select Committee to consider:

- Interface with other legislation
- Intellectual Property Rights
- Publication schemes
- Vexatious and repeated requests
- Appropriate limit
- Universities as public authorities
- Round robin requests and commercial surveys
- Clear statement of intention to treat requests under FOI
- Level the playing field
- Research
3. Does the Freedom of Information Act work effectively?

3.1 Interface with other legislation
3.1.1 Environmental Information Regulations (EIR) 2004

There is an unnecessary, complicated, and at times impenetrable, interface between the EIR and FOI as imposed by section 39 exemption; this includes a cumbersome double public interest test. The two key authorities on FOI, the Information Commissioner’s and the Information Tribunal, hold conflicting views on how the interface between the regimes works in practice, as showed by the Rhondda Cynon Taft Borough Council v the ICO case, and clarity would be welcome.

RECOMMENDATION: that the interface between EIR and FOI be made clearer and easier to administer.

3.1.2 Data Protection Act (DPA) 1998

Requesters using the subject access request provisions under section 7 of the DPA often ask for information that is not personal data, which has to be handled under FOI or EIR. Currently, the differing timescales for response permitted under DPA (40 calendar days) and FOI/EIR (20 working days) and the different requirements for internal review are difficult to administer and confusing for requesters; these differences should be reviewed and, ideally, harmonised.

RECOMMENDATION: that the different timescales for response and requirements for internal review should be reviewed and harmonised across both DPA and FOI.

3.1.3 Data Protection Act (DPA) 1998

The interface between DPA and FOI as set out in FOI section 40 is unnecessarily complex, difficult to administer and needs simplification. For public authorities, handling requests that involve category 'e' data, which affords special treatment to unstructured personal data under section 9 and provides convoluted exemptions in section 33 A, has complicated matters further.

RECOMMENDATION: that the interface between DPA and FOI is reviewed and simplified.

3.2 Intellectual Property Rights
3.2.1 Universities invest heavily in research and teaching and learning which generate significant amounts of Intellectual Property (IP) for both commercial and non-commercial uses. While we recognise that FOI is a useful and effective tool for the disclosure of public sector information, it is difficult to exempt valuable IP content using the exemptions provided in FOI.
Equally, the current copyright law does not provide universities with adequate protection. We recommend that a specific exemption for IP rights, as there is under the EIR, be introduced.

3.2.2 A significant and relevant IP right is copyright, which in the UK is subject to the Copyright, Designs and Patents Act 1988 (CDPA). Copyright provides rightholders with a set of exclusive rights by which they can control how work is used. These rights specifically distinguish the individual acts of copying, disclosing and publication; FOI, on the other hand, does not, which invariably leads to difficulties.

3.2.3 There is a provision in the CDPA to permit actions specifically authorised by an Act of Parliament which would otherwise infringe copyright. Current FOI legislation specifically authorises that a copy of the information can be made and disclosed to the applicant. The provision in the CDPA would allow an organisation to make and issue the copy to the applicant without infringing copyright. However, the problem arises when requests for information are made through websites such as www.whatdotheyknow.com which automatically publishes responses and therefore may infringe copyright. This is significant because the automatic publication of valuable IP content, such as teaching and research materials, would significantly disadvantage universities who invest heavily in its creation and would potentially be detrimental to the quality of their teaching and research.

3.2.4 The current exemption under FOI relates to trade secrets and commercial interests, yet not all content protected by copyright can justifiably be withheld under this exemption. As a result, valuable content may be disclosed which, although may not prejudice to any commercial interests, will prejudice legitimate interests of rightholders as they may not be directly commercial. Given the harmonisation of copyright laws with Europe and the requirement that all exceptions and defences under the CDPA are subject to the Berne three-step test as outlined in Article 5(5) of the Information Society Directive, there is little FOI protection for limb 3: ‘must not unreasonably prejudice the legitimate interests of the rightsholder.’

3.2.5 Broadly speaking, FOI blurs the distinction between access to information and subsequent re-use of that information. Re-use of public sector information is sufficiently addressed by a separate piece of legislation and the two actions are clearly distinct from one another. It is unlikely that Parliament envisaged that under FOI valid email addresses would immediately and automatically publish information to websites, which is why little attention has been given to IP rights in disclosed information. This however is in direct contradiction of the EU legislation on copyright and related rights and FOI should recognise the strength and weight afforded to IP as a result of the harmonisation of the legislation and the body of case law that supports it.

RECOMMENDATION: that a new IP exemption is introduced into FOI.

3.3 Publication schemes

3.3.1 While proactive publication serves the purposes of openness and transparency, publication schemes are not an effective delivery mechanism. The University’s website statistics
reveal that they are not widely used by visitors looking for information and they are not well known by the public in general. In practice internet search engines, such as Google, with highly sophisticated and powerful search tools provide the best mechanism for navigating to University information and these searches are better drivers of publication. Indeed, publication schemes are only partial repositories of information and often simply duplicate information already available. Furthermore, the maintenance of publication schemes, including the requirement to hold regular reviews, wastes resources and acts as an administrative drag on website development. In short, the University agrees with the Ministry of Justice’s view that ‘…technological advances since the enactment of FOIA might have rendered publication schemes somewhat obsolete.’

3.3.2 Evidence that the publication scheme serves as a proactive mechanism for disclosure that reduces the number of requests is lacking. Taking the subject of the Vice-Chancellor’s expenses, a subject which receives considerable attention under FOI from journalists (in 2011 seven such requests were received), the University found that proactive disclosure via disclosure logs or the publication scheme does not, unfortunately, help meet these requests as no two requests are identical and therefore each request has to be considered separately to ensure our obligations under section 1 FOI is discharged. While undoubtedly serving the interests of transparency and public accountability, the time involved with disclosing this information means a significant diversion of resources away from the University’s core activities. On balance the University believes that the requirement to develop and maintain a publication scheme should be dropped from FOI.

RECOMMENDATION: that the requirement for publication schemes be removed from FOI.

3.3.3 The requirement for a publication schemes is explicitly stated in the FOI, but not in the EIR which only recommends ‘active and systematic dissemination’ of environmental information. The different regimes for proactive dissemination leads to confusion and implementation would be improved if the requirements were standardised.

RECOMMENDATION: that the provisions of proactive dissemination of information in EIR and FOI be reviewed and standardised.

3.4 Vexatious and repeated requests

3.4.1 The threshold for establishing that a request is vexatious or repeated under FOI section 14 is set too high and the guidance provided from the ICO around the issue of vexatiousness focuses on the request rather than the requester. However, the reality of handling FOI on a day to day basis shows that it is a small number of requesters who place disproportionately large resource burdens on the University, rather than numbers of requests themselves. While these requesters stop short of being vexatious as defined according to the guidance issued by the FOI, their frequent requests for information do have significant resource implications for the University. One requester made nine FOI requests within 24 hours, another requester made ten requests within a month. Neither could be regarded as vexatious under the current guidance issued by the ICO.
4. **What are the strengths and weaknesses of the Freedom of Information Act?**

4.1 **The appropriate limit**

4.1.1 FOI section 12 provides a mechanism for public authorities to legitimately refuse requests that exceed a certain limit, two and a half working days (18 hours) or £450 for universities. This mechanism is in principle a strength of FOI striking a balance as it does between a public authority’s obligation to disclose information on the one hand with consideration of the costs of doing so on the other.

4.1.2 However the activities permitted to be considered under The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 are too restrictive and, crucially, do not include the time taken to redact the information; this is a weakness.

4.1.3 In practice, the time taken to redact information is often the most labour intensive part of processing FOI requests. This is particularly so for requests that fall into the ‘provide all correspondence relating to…’ category. Such requests can cover thousands of emails, which are very likely to contain information that often engage several exemptions, most commonly personal data, and will require significant redaction before disclosure. The process of redaction can be done manually with a black marker or electronically using dedicated software, but it is invariably slow, non-automated and necessarily painstaking and methodical. In information rights case law redaction has not been allowed to be included in as part of the ‘extraction’ limb of the Regulations.

RECOMMENDATION: that The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 be amended to make explicit allow for redaction to be considered in any appropriate limit calculation.

5. **Is the Freedom of Information Act operating in the way that it was intended to?**

5.1 **Universities as public authorities**

5.1.1 The University currently receives just over a third of its income from the public purse. Following the introduction of the new fee regime, the share of the public money that the University receives will decline even further over the next two years. Given the decline in the percentage of
money drawn from the public purse, the University appears more like a private organisation than a public body and the case for including universities within the scope of FOI should be reviewed.

RECOMMENDATION: that the case for including universities within the scope of FOI should be reviewed

5.2 Round robin requests and commercial surveys

5.2.1 It is unclear whether FOI is operating in the way it was intended to. The original objectives of FOI were to provide openness and transparency, accountability, better decision-making and public involvement in decision-making.

5.2.2 Due to the unique position of universities as quasi-public bodies FOI has not fulfilled the above objectives and there have even been some peculiar effects. One of these is the number of round robins and requests it has to deal with from commercial organisations that are simply fishing for information to enable them to bid or compete for work. These are time consuming to deal with and it is questionable what public interest they serve.

5.2.3 These commercial surveys are not made for any of the purposes above for which the FOI was enacted and are being used by commercial organisations as a free mechanism to obtain commercially useful information at the expense of the public purse.

RECOMMENDATION: that round robin commercial survey/fishing requests are no longer deemed to be valid requests made under the Act or that a charge for time taken to respond can be levied prior to the disclosure of the requested information.

6.3 Clear statement of intention to treat requests under FOI

6.3.1 We are concerned that there is no obligation for a requester to state clearly that they wish their request to be processed under FOI. While we understand that the rationale that the public’s right to access to information should not depend on detailed knowledge of the law, the unintended consequence of this is that it leads to confusion over whether requests should be death with under FOI or treated as routine correspondence, which in turn leads to requests not being handled correctly. The point is best illustrated with an example drawn from recent experience. A member of the public recently asked for information from a University Professor and did not refer to the legislation. The Professor treated the request as a routine piece of correspondence and in doing so breached of many of the procedural provisions of FOI, including the obligation to state whether or not the information is held, the duty to provide advice and assistance and failure to provide a refusal notice. These were unintended and unfortunate breaches that occurred because of the confusion over how to identify a request rather than any attempt to thwart the right of access to official information.
6.3.2 Further, staff resource is wasted on treating requests under the heavy hand of FOI when it later transpires that there was no need to do so. These requesters, particularly those requesters from overseas for whom English is not their first language, often appear baffled by the necessary formality of the response they receive under FOI and the procedures appear to detract from the real information they sought and may generate pointless internal reviews.

6.3.3 The absence of any requirement to state the legislation also leads to inconsistency and inaccuracy in reporting FOI statistics. The criteria for a valid FOI request – provision of a name, an address for contact and a description of the information sought - is easily met and could apply to the many thousands of requests for information that the University deals with every year. Indeed under such criteria, a simple request for a prospectus for instance could be deemed a valid request. However it serves neither the public’s nor the University’s interests to treat routine requests in this way and count them as legitimate FOI requests.

6.3.4 Such confusion would be remedied by the simple requirement that requests should state whether they wish to be dealt with under FOI. FOI has been in operation for 12 years and is now widely known among the public so it is difficult to see how such a simple measure, which would bring considerable clarity and consistency to the process, would hinder the public’s right to access official information.

RECOMMENDATION: that a new requirement to state that requests should be dealt with under FOI be introduced.

6.4 Level the playing field

6.4.1 We are concerned that private universities are not covered by FOI and this disadvantages universities that fall within the definition of public authorities under Schedule 1 of FOI. Universities as public authorities are compelled to divert considerable resources, including for instance employing dedicated staff to work on requests, away from its core business functions of teaching, learning and research to ensure compliance; this is not something that private HE institutions are required to do.

6.4.2 Moreover FOI obliges public authorities to disclose information that may be commercially sensitive which gives a distinct advantage to private universities as they fall outside the scope of Schedule 1. In particular, teaching and research materials, and the IP rights within them, are difficult to protect from disclosure under FOI (see 1.2 above). The only real protection afforded under FOI is the section 43 prejudice to commercial interests exemption, which being qualified and therefore subject to the public interest test and defined very narrowly by the Information Commissioner who tends to make a hard distinction between what is ‘commercial’ and ‘financial’ that effectively limits the application of the exemption considerably, offers little real protection.

6.4.3 Given the limited protection offered by copyright law UK universities are at a disadvantage when competing with worldwide institutions that do not have to deal with FOI type
legislation and this in turn undermines their competitive edge. Given government commitment to introducing competition into the HE Sector, the University feels that it is not playing on a level field.

**RECOMMENDATION:** either that universities no longer treated as public authorities and removed from Schedule 1 altogether or that private universities are included in Schedule 1 and are treated as public authorities.

### 6.5 Research

6.5.1 The University believes the lack of an equivalent ‘research exemption’ that is available to Scottish universities, which protects university research information from premature disclosure in specific instances, puts UK universities at a distinct competitive disadvantage and undermines existing review processes, such as peer review, that are designed specifically to ensure quality assurance. In particular there is a need to protect the manner and timing of publication of research information and results to ensure that the quality and reputation of UK research is upheld and that its competitive position is not undermined. A research exemption will also encourage research partnerships with commercial and charitable bodies; and mitigate the risk of a ‘chilling effect’ on research, whereby researchers become unwilling to engage in controversial areas, or that subjects will be unwilling to participate, because such information may be disclosed under FOI.

6.5.2 The University endorses Universities UK view that peer review is fundamentally important in ensuring the strength of the UK research base: ‘Peer review improves research quality, by scrutinising research to ensure that verification and reproducibility are possible. [It has] an important policing role, ensuring adequate acknowledgement and reference to previous research, and helping to identify fraud and plagiarism…. [and] in medicine, the value of peer review has been emphasised as a means of protecting the public against the threat that poorly designed and executed research, with dubious findings, will enter the public domain.’

6.2.7 Unlike the EIR, which includes a protection for ‘material which is still in the course of completion, to unfinished documents or to incomplete data; or… the request involves the disclosure of internal communications’, there is little protection offered to research materials under FOI.

**RECOMMENDATION:** that research information should be exempt from FOI requests under certain, limited circumstances: where information is part of an on-going programme of research; where there is an intention to publish a report of the research and disclosure would substantially prejudice the programme; and the interests of the participants, the public authority or the publisher are harmed.

February 2012
Written evidence from the Information Commissioner

1. Executive Summary

1.1 FOIA is working well on the whole and its objectives are largely being achieved. Major amendments to the core principles and scheme of the Act are not necessary.

1.2 The rights of requesters would be strengthened by making internal reviews mandatory and subject to a time limit. Extended compliance times for consideration of the public interest should be subject to a statutory maximum.

1.3 Limited amendments in respect of frivolous requests, Cabinet minutes and the qualified person’s opinion are worthy of consideration.

1.4 The criminal offence created by section 77 of FOIA should be triable either way in order to make it of practical use.

1.5 The ICO is keeping pace with the increasing volume of complaints and appeals despite diminishing resources from grant-in-aid.

2. Introduction

2.1 The Information Commissioner (“the Commissioner”) welcomes the Justice Committee’s exercise in post-legislative scrutiny of the Freedom of Information Act 2000 (FOIA). The Act has now been fully in force for seven years, during which time considerable advances have been made. A considerable amount of information, of greater or lesser significance to the public or to individuals, has been published as a result of FOIA. In addition, valuable experience has been gained by public authorities, requesters, the Commissioner and the Information Rights Tribunal. A body of jurisprudence in information rights law is emerging, which adds clarity and authority to the statutory framework by demonstrating how it should be applied in practice.

2.2 The Commissioner is in broad agreement with the Ministry of Justice’s assessment of the key issues which have emerged through implementation, as set out in its Memorandum to the Committee in December 2011. This submission will address many of the points raised in Part 4 of that Memorandum.
(Operation of the Act) and will then go on to comment on other issues which have arisen in the first seven years of FOIA’s operation.

2.3 Overall, the Commissioner considers that FOIA is working well. Although the FOIA has not been universally welcomed and still has its vocal critics, the successful operation of the legislation has proved its fitness for purpose.

2.4 The Commissioner does not consider that significant changes to the core principles of the legislation are needed. Those core principles mark out the UK FOIA as a good model for public access to information, with a largely free and universal right of access subject to legitimate exemptions, many of which are qualified by a public interest test. Enforcement mechanisms are strong, with an independent commissioner with order-making powers, subject to a right of appeal to the Tribunal.

3. The Role of the Commissioner

3.1 Parliament has given to the Commissioner specific functions in relation to FOIA. Primarily these are:

- to adjudicate on complaints by requesters that public authorities have not dealt with their requests in accordance with FOIA
- to approve publication schemes requiring active, routine publication of information by public authorities
- to promote good practice by public authorities.

3.2 In relation to the first of these, complaints may be concluded with a Decision Notice specifying any steps which a public authority must take to comply with its obligations in relation to the request. If a complaint is upheld, the public authority will usually be required to disclose to the complainant some or all of the requested information. A Decision Notice is binding by law.

3.3 Either party (the complainant or the public authority) may appeal against a Decision Notice to the First-tier Tribunal (Information Rights), formerly known as the Information Tribunal. Thereafter, further appeal lies to the Upper Tribunal on a point of law only.

4. Proactive disclosure and Open Data
4.1 The Commissioner welcomes the policy initiatives by the current government to improve transparency by promoting open data - the availability of datasets in reusable formats and open licensing conditions. The proposed amendments to sections 11 and 19 of FOIA in the Protection of Freedoms of Bill are welcome and allow FOI to keep pace with new ways of using information that weren’t envisaged when the legislation was first drafted. It is important that the relationship between FOIA and open data policy is clearly defined and parallel systems do not emerge. The Commissioner responded to the recent Cabinet Office consultation on open data. It is also important that FOIA is not regarded as the same as open data; the two do, and should, overlap but they are different concepts. FOIA offers a much broader concept of information, covering structured and unstructured data (e.g. memos, emails, notes) whereas open data covers access to information and re-use.

4.2 Proactive disclosure should be maintained as an important obligation in FOIA but the Commissioner agrees with the suggestion in the Ministry of Justice (MoJ) Memorandum that the concept of publication schemes requires review and possible replacement with a different approach to proactive disclosure.

5. Scope of FOIA

5.1 The Commissioner has consistently maintained that the scope of FOIA is a matter for Parliament and the Government. While the Commissioner may welcome any extension of the scope of FOIA, his primary concern is that there should be certainty as to whether a body is or is not covered by the Act. This was the key message of his response to the original MoJ consultation on extending the scope of FOIA back in 2008. Clearly this does not arise when a body is specifically named in the relevant legislation, but it can arise where classes of public body are subject to FOIA. For example companies wholly owned by public authorities, covered by virtue of section 6(1), are not easily identified.

5.2 The Commissioner is concerned that there may be further confusion where new arrangements are made for the provision of services currently or previously delivered by public authorities. A key benefit of FOIA from the outset, in terms of transparency and accountability, has been its use to
demonstrate how public money is spent. The presumption of
transparency should always follow the public pound.

5.3 The Commissioner understands the concern expressed in
some quarters that activities which are or have been regarded
as public services provided by bodies which the public would
expect to be covered by FOIA, may not be in the future as a
result of government reforms. Examples which have already
arisen concern Network Rail and the privatised utility
companies. These are not public authorities under FOIA, but
this surprises some who seek information from them. The
Commissioner has been required to consider whether these
bodies are public authorities under the Environmental
Information Regulations, the parallel access regime for
environmental information. Appeals to the Tribunal have
been made. This is time consuming and costly litigation which
can be avoided if there is certainty as to the bodies which are
covered by the legislation.

6. Vexatious Requests

6.1 The Commissioner has been concerned from the outset that
some requests might place an excessive or disproportionate
burden on public authorities. Section 14 of FOIA discharges
the public authority from its obligation to comply with a
request that is vexatious. “Vexatious” is not defined by the
Act, so the Commissioner applies the normal meaning and has
developed guidance which sets out a number of factors to be
considered in determining whether a request is vexatious.

6.2 The Commissioner also published a charter for the responsible
use of FOI rights in 2007 to advise requesters how to frame
effective requests and avoid making requests which might
legitimately be regarded as vexatious.

6.3 The Commissioner agrees with the statement in the MoJ’s
Memorandum that public authorities make less use of the
vexatious request provision than they might. He notes the
concern expressed by public authorities that the section is
difficult and confusing to use. Often it is the individual
requester who is perceived as vexatious, whereas FOIA
requires the judgement to be made of the request, not the
requester.

6.4 The Commissioner recognises that public authorities may
consider that it is easier or cheaper to deal with the request
than it is to treat it as vexatious. However, in doing so they
do not help themselves in the long run, as vexatious requests
are often generated by one individual or a group exhibiting
repeat behaviour which causes a nuisance and
disproportionate burden on the public authority.

6.5 The Commissioner welcomes the acknowledgement that his
decisions generally demonstrate support for public authorities’
reliance on section 14(1). He is in the course of revising his
guidance on this provision in the light of recent Tribunal
decisions. However, in the light of experience, he suggests
that it may be appropriate to extend section 14(1) to
discharge public authorities from their obligation to comply
with frivolous requests as well as vexatious requests. This
would reduce the burden of compliance with obviously trivial
or light-hearted requests, without a serious purpose, even if
they did not have the effect of annoying or harassing the
public authority. The Republic of Ireland’s FOIA takes this
approach.

6.6 Section 50(2)(c) of the UK FOIA discharges the Commissioner
from his complaint-handling obligations if the application to
him is “frivolous or vexatious”. For some reason Parliament
made a distinction between this provision and that in section
14(1) applying to requests to public authorities. The
Commissioner considers that bringing frivolous requests
within section 14(1) might give public authorities clear ability
and greater confidence to relieve themselves of their FOIA
obligations where requests are clearly without merit. In the
event of such an amendment, the ICO would issue
appropriate guidance for public authorities and requesters.
Requesters would, of course, continue to have the right to
complain to the Commissioner, who would be able to overturn
a finding that a request is frivolous and order the public
authority to comply with it.

Exemptions

7. Section 35

7.1 The Commissioner broadly agrees with the comments in the
MoJ Memorandum regarding the use of exemptions when
responding to FOI requests. He acknowledges the concern
expressed in some quarters about the section 35 exemption
for information which relates to the formulation and
development of government policy. However, he considers
that this is largely overstated and is often based on a misunderstanding of the law and of the Commissioner's approach in difficult cases.

7.2 The most important thing to note is that the government policy exemption is qualified, not absolute. The exemption is expressed in broad terms so is easily engaged in appropriate cases. Most cases turn on the application of the public interest test. The qualification of broadly drafted exemptions by the public interest test is one of the core principles and key strengths of FOIA.

7.3 The need to protect “the policy making space” is fully recognised by the Commissioner, particularly when the policy in question continues to be the subject of live debate. The Commissioner also recognises what is often referred to as a “chilling effect”, namely that policy discussions will be less full and frank, with less honest advice given and fewer imaginative policy options put forward, for fear that information about what was said will be disclosed prematurely through FOI.

7.4 The Commissioner rejects any blanket assertions that his decisions fail to have proper regard for these concerns. However, the public interest test must be conscientiously applied in all the circumstances of the particular case. Very often the balance of the public interest is in favour of maintaining the exemption and withholding the information. However on occasions, factors such as the significance of the matters discussed or the limited impact of disclosure after a period of time weigh more heavily, requiring disclosure in the public interest.

7.5 Likewise with Cabinet material. The Commissioner has consistently given considerable weight in his decisions to the convention of collective Cabinet responsibility and the importance of maintaining the confidentiality of policy discussions at the highest level of government. However, the exemption in FOIA for communications between Ministers is again not absolute, but subject to the public interest test. The MoJ Memorandum accurately recites the occasions on which the Commissioner has ordered the disclosure of Cabinet minutes and the occasions, to date, on which the ministerial veto has been exercised to overturn the decision of the Commissioner and the Tribunal.
7.6 There is one further case where the Commissioner has ordered the disclosure of Cabinet material, but has agreed that disclosure should be delayed for some months. This information relates to the Hillsborough football stadium disaster. It has been agreed that the independent Hillsborough panel should first complete its work.

7.7 Finally, the Commissioner would point out that a number of his decisions following complaints about withheld Cabinet papers have upheld the government’s refusal to disclose the information. Examples include the minutes of the Falklands War Cabinet and the minutes of the decision to support the bid to host the Olympic Games in 2012. These decisions tend not to be recognised, remembered or referred to by FOIA’s critics.

7.8 The Commissioner considers that the exemptions for the formulation and development of Government policy and Ministerial communications are workable as currently enacted. It is inevitable that decisions as to whether information about sensitive political issues will attract media attention and may raise concerns for politicians and senior civil servants. The Commissioner does not consider that experience to date indicates a need for change to this exemption.

7.9 However, he notes the concern about the disclosure of Cabinet minutes themselves and acknowledges that to date this is the one class of information in respect of which the Ministerial veto has been exercised. On the occasions when the veto has been exercised the Commissioner has made a special report to Parliament explaining his position. He would question the extent to which genuine “exceptional circumstances” applied. Rather there appears to be a point of principle over the status of Cabinet minutes.

7.10 Therefore, if Parliament is of the view that Cabinet minutes should never be disclosed under FOIA, then the appropriate course of action would be to amend the exemption so as to make Cabinet minutes themselves subject to an absolute exemption, excluding the consideration of the public interest test. The Commissioner is not recommending this. It is a matter for Government and for Parliament. However, it is not in the public interest for requesters of information to believe that Cabinet minutes may be accessible under FOIA if in reality they are not and Parliament never intended that they should be. Not inconsiderable amounts of public money have
been spent on those cases where ultimately the Ministerial veto has been used to block disclosure.

7.11 In all other respects the Commissioner’s view is that the exemption provided by section 35 should continue to be subject to the public interest test. Extending an absolute exemption to all material relating to the formulation and development of public policy would seriously curtail the reach of FOIA, which itself would be contrary to the public interest.

8. **Section 36**

8.1 The MoJ Memorandum explains how reliance on this exemption is dependent on the reasonable opinion of a qualified person. While this procedural hurdle might mean that the exemption cannot be invoked lightly, it is questionable whether it is strictly necessary now that FOIA has become firmly established in public sector administration.

8.2 Without the requirement to obtain a qualified person’s opinion, the exemption would operate as others which require the demonstration of a likelihood of prejudice to a particular interest (in this case the effective conduct of public affairs). It would remain subject to the public interest test. In the Commissioner’s opinion this would simplify both the use of this exemption in practice and the investigation by the Commissioner of subsequent complaints, resulting in greater efficiency and speedier outcomes, which would be to everyone’s benefit.

8.3 In the meantime the Commissioner has recently issued fresh guidance on the use of this exemption, including the need to demonstrate how the qualified person’s reasonable opinion was reached.

9. **Section 40**

9.1 Personal information is protected from disclosure under FOIA by reference to the data protection principles. This does not mean that personal information cannot be disclosed. The data protection principles require a fairness test which recognises the legitimate interest in disclosure as well as the rights of individuals to respect for their privacy. Cases often turn on whether information concerns public life, official business or the use of public money. The reasonable expectations of the
person concerned (the “data subject”) as to whether the information might legitimately become public is often a relevant factor.

9.2 This is an area where jurisprudence has developed significantly since 2005. Information which would previously have been considered personal and inappropriate to disclose, such as salary, expenses and discretionary payments or terms of severance may now be released under FOI, sometimes after the Commissioner or Tribunal has ordered disclosure.

9.3 The Commissioner’s expectation is that this is an area where the trend towards greater transparency is likely to continue. Emerging developments at European level, with the proposed revision of the Data Protection Directive, are likely to have an impact in years to come.

10. Environmental Information Regulations (EIR)

10.1 The Commissioner is conscious that the policy responsibility for this access regime does not lie with the MoJ, but with Defra. He agrees with the comments in the Memorandum that the operation of the parallel regimes can be confusing for public authorities and particularly for requesters. The Commissioner’s comments regarding the need for clarity in identifying which bodies are covered by FOIA apply to a much greater extent in relation to the EIR. Particularly unhelpful is regulation 2(2) which excludes from the definition of public authority any body designated as a FOIA public authority under a section 5 order, thus excluding ACPO, UCAS and the Financial Ombudsman Service.

11. Timeliness of Response

11.1 As the MoJ Memorandum indicates, the ICO now monitors public authorities which come to its attention for unacceptably poor response times to FOI requests. Formal ICO interventions with 52 public authorities have been made, resulting in significant improvements. Key to this success has been the engagement of top managers at the public authority. Sometimes this has been by way of a personal undertaking to improve performance, as with the Ministry of Defence, Cabinet Office, Birmingham and Wolverhampton City Councils. The Commissioner regards the timely fulfilment of FOI obligations as a key challenge for public authorities when
there is such pressure on resources. However, better tracking systems, a more positive approach to disclosure and active communication with requesters have all been shown to produce positive results. The ICO continues to take forward its work in this area. A further list of authorities to be monitored will be announced shortly.

11.2 FOIA permits an extension of the 20 working day response time where a qualified exemption is applied by the public authority but it requires more time to consider the public interest test. Section 10(3) extends the time for compliance “until such time as is reasonable in the circumstances”. The Commissioner considers that an extension of more than 40 working days (giving 60 in total) should never be required. An amendment to provide for this as a statutory limit would strengthen the rights of requesters in this regard.

Sanctions, Complaints and Appeals

12. Internal Reviews

12.1 One area of weakness in the current FOI regime identified by the Commissioner is the lack of provision for a mandatory internal review with a statutory time limit. Currently, provision for internal reviews is made only in the Code of Practice issued by the Secretary of State under section 45 of FOIA. This means that time limits for internal reviews cannot be effectively enforced, which undermines efforts to secure timely compliance. The position under FOIA contrasts with that under the Freedom of Information (Scotland) Act 2002 and under the EIR, both of which provide for mandatory internal reviews with enforceable time limits. The Commissioner would welcome an amendment to FOIA along the same lines to strengthen the current regime.

13. Complaints to the ICO

13.1 The MoJ Memorandum refers to concerns expressed in earlier years regarding the delays in complaint handling at the ICO. This is an area where significant improvement has been achieved in recent years. Table A below shows the annual figures for complaints received and closed, Decision Notices issued, and Tribunal appeals raised from 2005 to 2012. Figures to 31 March 2012 are estimates only at this stage, projected from actuals as at 31 January 2012.
Table A

<table>
<thead>
<tr>
<th>Financial Year</th>
<th>FoI Casework Received</th>
<th>FoI Casework Closed</th>
<th>Decision Noticed Served</th>
<th>Legal Appeals Raised</th>
</tr>
</thead>
<tbody>
<tr>
<td>2005/06</td>
<td>2713</td>
<td>1666</td>
<td>186</td>
<td>47</td>
</tr>
<tr>
<td>2006/07</td>
<td>2592</td>
<td>2601</td>
<td>339</td>
<td>92</td>
</tr>
<tr>
<td>2007/08</td>
<td>2646</td>
<td>2658</td>
<td>395</td>
<td>96</td>
</tr>
<tr>
<td>2008/09</td>
<td>3100</td>
<td>3019</td>
<td>296</td>
<td>87</td>
</tr>
<tr>
<td>2009/10</td>
<td>3734</td>
<td>4196</td>
<td>628</td>
<td>161</td>
</tr>
<tr>
<td>2010/11</td>
<td>4374</td>
<td>4369</td>
<td>817</td>
<td>202</td>
</tr>
<tr>
<td>2011/12</td>
<td>4384</td>
<td>4606</td>
<td>1098</td>
<td>287</td>
</tr>
</tbody>
</table>

13.2 The increasing number of complaints received continues to present a significant challenge to the ICO. Improvements have been achieved through a focus on efficient throughput, maintaining a stable and thus more experienced workforce, revised and more streamlined systems and greater delegation of decision-making. The ICO continues to make improvements, building on experience and seeking efficiencies in all areas. This is a particular challenge in the face of severe reductions in grant-in-aid. The ICO’s funding streams for its data protection activity and its FOI/EIR activity are completely separate. The former is dependent on income from notification fees, but FOI is funded exclusively from grant-in-aid, via the MoJ. No cross-funding is permissible.

13.3 The forthcoming year’s grant-in-aid to the ICO for its FOI/EIR work shows a reduction of 23% from 2009/10. For 2012/13 it is set at £4.25m with further reductions projected until 2014/15. The funding profile from 2005/06 to 2014/15 is shown in Table B below.

Table B

<table>
<thead>
<tr>
<th></th>
<th>£m</th>
</tr>
</thead>
<tbody>
<tr>
<td>2005-06</td>
<td>5.10</td>
</tr>
<tr>
<td>2006-07</td>
<td>5.55</td>
</tr>
<tr>
<td>2007-08</td>
<td>5.05</td>
</tr>
<tr>
<td>2008-09</td>
<td>5.50</td>
</tr>
<tr>
<td>2009-10</td>
<td>5.50</td>
</tr>
<tr>
<td>2010-11</td>
<td>5.20</td>
</tr>
<tr>
<td>2011-12</td>
<td>4.50</td>
</tr>
<tr>
<td>2012-13</td>
<td>4.25</td>
</tr>
<tr>
<td>2013-14</td>
<td>4.00</td>
</tr>
<tr>
<td>2014-15</td>
<td>3.75</td>
</tr>
</tbody>
</table>
13.4 The Commissioner clearly recognises that such reductions are inevitable in the current economic climate. However, he must point out that this has an impact. Significantly improved performance through efficiency has been demonstrated despite these reductions in funding, but there are limits as to what more can be achieved.

13.5 In particular, the Commissioner points out that any additional responsibilities on his office arising from the transparency agenda or, for example, revisions to the statutory regime for the re-use of public sector information would require commensurate funding. The Commissioner welcomes the steps which are being taken to enhance his independence, but these are of little value if they are not underpinned by adequate funding for the discharge of his responsibilities.

14. Appeals to the First-Tier Tribunal (Information Rights) and Beyond

14.1 This is one area where expenditure incurred by the ICO is significant and unpredictable. Again the ICO has successfully kept costs down despite an ever-increasing number of appeals. It has done this by increasing its team of in-house lawyers, thus reducing reliance on external counsel, and by declining to attend oral hearings in appropriate cases when written ICO representations are sufficient.

14.2 Because the Commissioner is the respondent in every FOIA appeal before the Tribunal, his input is always required. This is kept to written representations as far as possible. However, recent changes to the Tribunal rules, referred to in the MoJ Memorandum, include the right of any party to insist on an oral hearing. Although the Commissioner in these circumstances may decline to be represented, that will not always be in the interests of justice. Again, this increases the resource burden on the ICO.

14.3 Under the Freedom of Information (Scotland) Act 2002, an appeal against the Scottish Information Commissioner’s decisions may only be made on a point of law to the Court of Session. This contrasts with the UK FOIA which requires the Tribunal to consider whether the Commissioner’s decision is in accordance with the law and whether any discretion should have been exercised differently. The Tribunal may review any finding of facts, allowing a full merits review. While the
Commissioner considers that the appeals system under FOIA has helped with the development of the law and its practical application in the early years, there may be a case for considering whether the time and cost involved in operating the current appeals system is warranted.

15. **Section 77 Offence**

15.1 One particular provision of FOIA which, in the Commissioner’s opinion, is not working as intended is section 77. This is the criminal offence of altering, deleting or concealing disclosable information after a request has been made for it, with the intention of preventing disclosure. Given the inevitable time lapse between a request being made to public authorities and a subsequent complaint being referred to the Commissioner, the six month time limit, running from the commission of the offence, is very problematic.

15.2 The Commissioner’s preferred option is for the offence to be triable either way, rather than summary only. This would better reflect the seriousness of the offence and would overcome any difficulties with time limits as none would apply. An alternative would be to amend the law to the effect that the six month time limit only starts to run when the allegation that the offence has been committed is first referred to the Commissioner. This would be an improvement on the current situation, although it is foreseeable that there might still be room for argument over the relevant date.

February 2012
Written evidence from the Colleges in the University of Cambridge

This submission

1. This submission is made on behalf of the 31 Colleges in the University of Cambridge, all of whom are defined to be public authorities for the purposes of the Freedom of Information Act.

The inclusion of the Colleges as public authorities

2. The inclusion of the Colleges (on which they were not consulted before the passage of the Act) is anomalous. They are registered charities not in receipt of public funding. They are not higher educational institutions as defined in the Further and Higher Education Act 1995. They are subject to the regulatory jurisdiction of the Charity Commission, and are not within the remit of the Higher Education Funding Council for England.

3. To the extent that charities have a public purpose and it might be argued that information held by all charities should (subject to appropriate exemptions) be in the public domain, the Colleges would accept that principle. But that is not the principle on which the Act is based.

4. To the extent that bodies providing education have a public purpose and it might be argued that information held by all such bodies should (subject to appropriate exemptions) be in the public domain, the Colleges would accept that principle. But that is not the principle on which the Act is based. There are substantial educational bodies with degree-awarding powers (such as The College of Law) not within the scope of the Act.

5. The Act throws expenditure onto the charitable resources of the Colleges without any support from public funds for that (or any other) purpose. The Colleges’ point would be simply addressed by the amendment of paragraph 53(1) of Schedule 1 to the Act, which currently includes as a public authority:

   The governing body of

   (a) an institution within the further education sector,

   (b) a university receiving financial support under section 65 of the Further and Higher Education Act 1992,

   (c) an institution conducted by a higher education corporation,

   (d) a designated institution for the purposes of Part II of the Further and Higher Education Act 1992 as defined by section 72(3) of that Act, or

   (e) any college, school, hall or other institution of a university which falls within paragraph (b).

The removal of (e) would leave the position that a college, school, hall or other institution that is in receipt of public funding, of a university which falls within paragraph (b), would continue to be classified as a public authority under paragraph (b)—see section 90(3) of
the Further and Higher Education Act 1992; but the Cambridge Colleges would not. (A consequential removal of paragraph 53(2)(d) would be desirable.)

**Does the Freedom of Information Act work effectively?**

6. The principle of the Act itself (as opposed to its application to the Colleges) is not questioned by the Colleges. However, many requests are from journalists and are in the nature of speculative enquiries seeking a story by using the public authority concerned as a free research resource. That is inappropriate and it should be open to public authorities to levy a sufficient charge to cover its costs in responding to information requests.

**What are the strengths and weaknesses of the Freedom of Information Act?**

7. The suggested improvements listed below arise from the experience of the Colleges in relation to the operation of the Act:

(a) The cost of redacting information in order to respond to a request should be included within the scope of section 12 of the Act. Its exclusion is irrational and appears to be unintentional.

(b) An absolute exemption should be provided explicitly to cover information submitted to the Information Commissioner by a public authority in connection with an application made to him under section 50 of the Act.

(c) The operative time at which an exemption is to apply should be defined in the Act, just as the time at which information is considered to be held is defined.

(d) The decision dated 31 May 2006 of the Information Commissioner in Case FS50099755 (Cabinet Office) should be confirmed by legislative amendment, namely that the decision of a public authority to apply the section 14 exemption can properly have regard to requests made to other public authorities.

**Is the Freedom of Information Act operating in the way that it was intended to?**

8. Having regard to what is said in *Memorandum to the Justice Select Committee Post-Legislative Assessment of the Freedom of Information Act 2000*, the Colleges do not believe that their inclusion as public authorities was within the stated objectives of the Act.

February 2012
Written evidence from Index on Censorship

At Index on Censorship we strongly support the principle of an open society, and believe that access to information is part of the Article 10 right to freedom of expression. There is no doubt that the Freedom of Information Act 2000 has been hugely positive in opening up government and public authorities in the United Kingdom to scrutiny by its citizens and helped curb a culture of secrecy.

It is believed that there were in total nearly a million information requests made to public bodies from 2005–2010; but this has to be placed in the context of the 100,000 public authorities that the FOI Act covers.

Freedom of information helps promote efficient government. The total cost of FOI requests is estimated at around £40 million per annum,1 about the same as central government departments alone spend on external PR consultants.2 The Daily Telegraph identified £25 million worth of questionable spending by civil servants on credit cards with just a few FOI requests,3 and spending on freedom of information pales into insignificance in comparison to total government spending this financial year of £710 billion.

In this submission, we identify a number of areas where we disagree with the Ministry of Justice’s Memorandum to your committee on ‘Post-legislative assessment of the Freedom of Information Act 2000’. Our headings link with the numbered bullet points in the Memorandum in brackets. We hope your committee will support the principle that open access to information is a fundamental right, and also helps steer government in a more equitable and efficient direction.

3 http://www.telegraph.co.uk/news/politics/8555445/Civil-servants-spend-25m-on-credit-cards-including-luxury-hotels-fine-dining-and-golf-trips.html
MPs privilege in regards to constituent’s correspondence (88)

1. Correspondence with a Member of Parliament could, in specific instances, be granted the same protection afforded to journalists’ sources under the Common Law and under Article 10 of the Human Rights Act (see *FT vs. United Kingdom*) based on a public interest test.

2. However, a full exemption for MPs’ correspondence could have a negative impact on freedom of expression and access to information. To give one example, an MP could prevent publication of leaked correspondence that relayed attempts by lobbyists to alter legislation.

‘Vexatious’ requests (96)

3. Public authorities have expressed concern that section 14(1) on vexatious requests is hard to use. *Index on Censorship* supports the principle that the section should only be used as a last resort against those filing multiple FOI requests where no public interest can be demonstrated. As it stands we believe that section 14(1) is an adequate provision, as proven in practice (with the ICO tribunal upholding 14 of 19 decisions), and that any attempt to make it easier to rule out FOI requests could be misused by public authorities.

4. According to University College London’s Constitution Unit, of 693,650 requests made to local government only 1.6% (11,336) were subject to internal review by the requesters, suggesting that the vast majority of requests are viewed as satisfactory by those requesting the data, and that very few people indeed tie up local authorities with vexatious internal reviews.

Exemptions to the FOI Act (102)

5. *Index on Censorship* is critical of the recent addition relating to members of the Royal Family within schedule 7, section 46 of the FOI Act. In a joint statement alongside Republic, Right to Know, Professor Roy Greenslade, the Reform Foundation and Professor John Millar we argued:

> This is not simply about the royal household’s use of public funds - it is a serious issue of accountability and transparency that goes to the heart of government. It is well documented, and admitted by Clarence House, that the Prince of Wales routinely lobbies government ministers on a wide range of controversial and deeply political matters such as the environment, education and health. The current lack of scrutiny over such actions means that citizens have no means by which to judge if ministers are taking decisions according to the public interest or to suit the interests and agenda of the heir to the throne.

> [The] government has previously justified royal secrecy by asserting the importance of maintaining the appearance of impartiality on the part of the monarch and heir to the throne. But the monarch and heir are required to be impartial in fact and not just in appearance.

---


We believe that neither the last government who initiated the change, nor the current
government who implemented the change, has justified allowing the Heir to the Throne a
level of official state secrecy that Ministers of the Crown do not enjoy. This presents us with
a constitutional anomaly.

6. The Committee may also wish to consider whether there is too broad a range of
exemptions which reduces clarity. Whilst 23 sections of the UK FOI Act can be invoked as
exemptions (some absolute, some contingent on a public interest test), the US Freedom of
Information Act has streamlined this into nine clear categories:

1) properly classified information; 2) agency management records; 3) information barred
from disclosure by another law; 4) trade secrets or other confidential business information;
5) inter- and intra- agency information protected by legal privileges; 6) information that, if
disclosed, would invade another individual’s privacy ; 7) information compiled for law
enforcement; 8) federal government records of banks and other regulated financial
institutions; and 9) information about the location of oil and gas wells of private
companies.7

Information Commissioner’s Office caseloads (153)

7. We note that the predicted peak in ICO caseloads has not materialised, and that after initial
teething problems the case closure rate in 2010/11 reached 99%. Often news is time-
sensitive, so dealing with FOI requests and disputes in an effective manner is important.

8. Index believes that the Committee should investigate whether the ICO should be given
additional powers including the power to levy significant fines to deal with public bodies
who are consistently slow in responding to FOI requests, or who use a disproportionate
number of exemptions. The ICO can already fine up to £500,000 for breaches of the Data
Protection Act, but at present can only use the threat of criminal sanctions (with an unduly
high threshold) against authorities breaching FOI guidelines.

Science researcher Les Rose told Index that public bodies will allow cases to be referred to
the ICO tribunal if they wish to delay publication of embarrassing information as there is
no disincentive to do so. Fines for constituent breaches of the 20-day guideline would act as
a powerful disincentive.

Cabinet papers

9. We agree with the analysis in the Memorandum based on the UCL Constitution Unit
interviews with civil servants in 2009, that there is no evidence of a ‘chilling effect’ on
central government and that claims that FOIA would undermine civil service neutrality or
ministerial accountability have proved unfounded.8

---

7 Information provided by Amy Bennett from OpenTheGovernment.org
8 Memorandum, p.87.
Local authorities (172)

10. In the Memorandum, it is stated:

At a time when all public authorities are required to do more with less, this consideration of the financial impact of FOIA on public authorities is pertinent.

Local authorities receive the majority of FOI requests, which is perhaps indicative of the greater contact citizens have with their council in contrast with central government departments. The Local Government Association is lobbying to reduce the cost of FOI requests, which Index believes will have a chilling effect on access to information and public discussion about the activities of local government.

Whilst the number of FOI requests to local authorities has risen, UCL research suggests that the cost of processing FOI enquires has fallen by over half from £410 per request in 2005 to just £160 per request in 2010.\(^9\)

The Local Government Association in a press release at the end of 2011,\(^10\) “Councils quizzed on Santa, Napoleon and Aliens in 2011’s most wacky FOI’s” stated that FOI requests were costing the taxpayer £31.7 million per year. Whilst this is a significant amount, in contrast Councils paid out £427 million in mileage allowances for councillors and staff in 2009 / 2010, and this represents a statistically insignificant amount compared to the total local government budget of £118.1 billion for the financial year 2011 / 2012.\(^11\)

Research from UCL\(^12\) shows that only 5% of FOI requests to Councils are from commercial businesses, whilst 52% are from individual citizens, 5% from journalists and 5% from political parties - all important stakeholders for whom access to information is an essential right.

We strongly disagree with any attempt to lower the cost limit of £600 per request for central government departments and £450 for all other public authorities as set by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004.

Cast study – local authorities and defamation actions

The Derbyshire principle prevents public bodies from pursuing a defamation action in the High Court, with the rationale that the state should not sue its citizens for speaking out. Index on Censorship found evidence last year that public authorities were continuing to use public funds to pursue defamation actions against UK citizens. Using the FOI Act, we were able to obtain evidence that South Tyneside Council has spent $64,370 of taxpayer’s money pursuing one of its councillors, Ahmed Khan, in the Californian courts in a defamation action.\(^13\)

---

\(^9\) UCL, ibid.
\(^10\) http://www.local.gov.uk/web/guest/media-releases/-/journal_content/56/10161/3260888/NEWS-TEMPLATE
\(^12\) http://www.ucl.ac.uk/constitution-unit/research/foi/foi-and-local-government/2010-foi-officers-survey.pdf
Fees for FOI requests

11. We strongly disagree with the proposal in the report by Frontier Economics commissioned by the Department for Constitutional Affairs (2006) for a targeted fee for commercial, media or repeat requesters. In Index on Censorship magazine journalist David Leigh outlines the background to the commissioning of this report. Former Lord Chancellor Charles Falconer circulated a private paper to cabinet colleagues in July 2006 which would have restricted “serial requesters” (NGOs, civil society groups and the media) to just four FOI requests a year per department. Frontier Economics, a small consultancy with former cabinet secretary Andrew Turnbull on the board, was commissioned at short notice at a cost of £75,000 to develop Falconer’s position. As Leigh points outs:

[Frontier Economics] produced a sheaf of dubious statistics... The small print revealed that time of ministers had been costs at £300 an hour. The time taken in consultations had been arrived at by taking the numbers of hours logged by officials – and then blithely doubling the figures. The figures for newspaper use were extrapolated from a single week. Nowhere was it pointed out that the initial years of the Act would be far more expensive than subsequently, because every issue was a precedent. Nor was it explained that the government spends far more - £300 million a year – on hundreds of press officers.

The rationale for targeted fees, or limiting requests per organisation, in the name of cost reduction, is not justifiable. Such proposals would serious affect important scrutiny groups such as the Taxpayer’s Alliance whose research into government spending often involves multiple FOI requests.

As John O’Connell, the Research Director of the Taxpayers’ Alliance, told Index:

The Freedom of Information Act was one of the most important pieces of legislation enacted by the last Government. For too long taxpayers did not have the tools necessary to hold politicians properly accountable but FOI helped shift the power back to those who pay, and away from those who spend. It’s crucial that this principle is preserved and that means not allowing the Act to be watered down. If anything it should apply to more bodies that receive taxpayers’ money, as Nick Clegg proposed last year. It would be wrong to impose limits or caps on how much information taxpayers can request, and if public bodies wish to cut down on the work they do responding to FOI requests then they should simply publish more information proactively. Any changes that weaken FOI law would be a huge step backwards for transparency and a slap in the face for the taxpayers who spent so long in the dark, unaware of how politicians spent their hard-earned cash.

It would also affect the media’s ability to hold government to account through open access to information, which, in turn, would have an adverse effect on Article 10 rights to freedom of expression.

The Guardian’s security correspondence Richard Norton-Taylor told Index:

Limiting the number of FOI requests per organisation is neither fair nor logical. There are more than enough hurdles as it is in the way of disclosure, as well as measures to prevent vexatious demands.

15 Email to Mike Harris, Head of Advocacy, Index on Censorship, 3 February 2012.
We know that government is imbued with unnecessary secrecy. It spends a great deal of resources - in time as well as well as money - suppressing information which should be out in the public domain.

*Openness is cheap, transparency saves money all round.*

12. The Frontier Economics report contends that 5% of FOI requests in central government are responsible for 45% of the total cost of FOI. *Index* asks the committee to consider the nature of FOI requests and that complex data may in fact be of the most use. Without further analysis beyond this striking fact, it is impossible to know whether it was those 5% of FOI requests that truly touched upon significant matters of public interest, and hence are the requests it is most crucial to protect.

### Science and FOI

**Case study – public bodies and alternative medicine**

Professor David Colquhoun is an outspoken critic of alternative medicine, arguing that universities ought to be cautious not to teach its supposed benefits as being scientifically proven. Using the FOI Act, Colquhoun requested course materials from universities teaching homeopathy and acupuncture to see the claims made for these alternative therapies. It took three years for him to obtain details of the University of Central Lancashire’s BSc course in homeopathy through an FOI request, which he won at the ICO tribunal in December 2009. Les Rose, a science researcher, told *Index* that the FOI Act is ‘one of the most important pieces of legislation for scientists’ and key to ‘the translation of scientific knowledge into public policy – and highlighting abuses of science to justify certain government policies.’ Rose has used FOI requests to obtain the volume of referrals from NHS primary trusts to providers of homeopathy. He believes without the FOI Act, primary care trusts would have cited resource concerns over providing the data, and it simply would not be publicly available.

13. Some publicly funded university science laboratories have aired objections to current FOI legislation. The most notable recent case was that of the University of East Anglia’s Climate Research Unit, which for several years resisted the requests for data from amateur climatologist Steven McIntyre.

The CRU claimed at various points that the requested data was commercially sensitive, or could damage international relations, and acceded to less than 10% of requests.

The perceived secrecy and subsequent hacking of the Unit’s system severely dented the credibility of the organisation and set back climate research in the public eye.

Environmental journalist George Monbiot commented:

> [T]hose of us who seek to explain [climate change’s] implications and call for action must demand the highest possible standards from the people whose work we promote, and condemn any failures to

---

16 Ibid, 2 February 2012.
18 Conversation with Mike Harris, ibid, 3 February 2012.
release data or admit and rectify mistakes.\textsuperscript{19}

In a ruling against the CRU, Information Commissioner Christopher Graham ruled that the university had not demonstrated a good reason to withhold its data. As author Fred Pearce has pointed in \textit{Index on Censorship} magazine:

\textit{Much of science has “closed ranks” behind the idea that those demanding access to their data are troublemakers. Nobel laureate and Royal Society president Sir Paul Nurse says “some researchers … are getting lots of requests for, among other things, all drafts of scientific papers prior to their publication in journals, with annotations, explaining why changes were made between successive versions. If it is true, it will consume a huge amount of time. And it’s intimidating.” Maybe, but the current law allows vexatious requests to be rejected. So that is a straw man.}\textsuperscript{20}

14. It is in the interest of scientists, particularly those who are publicly funded, that the broader population has a greater understanding and enthusiasm for their subjects. Better access for lay people to open data and resources surely aids this aim, and will make science less daunting for young people considering careers in this ever more important field.

\textbf{Broader context}

It took decades to establish the right to information through the Act, with campaigning by many. Since its implementation, FOI has been used to expose rampant expenditure on luxury hotels by civil servants, the misuse of public money on vexatious legal cases by public bodies against member of the public, and helped bring about the revelations in the MPs’ expenses scandal.

It is also important that your committee views arguments around access to information in its broader international context. The publication of US State Department cables by WikiLeaks has demonstrated how the urge to over-classify documents is present even in established democracies. We are also concerned over the UK government’s Green Paper on Justice and Security currently being scrutinised by the Joint Select Committee on Human Rights which has created a highly broad term for ”sensitive material”. This could be used as a precedent in other areas such as the Freedom of Information Act.

\textit{Index on Censorship} hopes the Justice Select Committee recognises the importance of the Freedom of Information Act in opening up access to information for British citizens. Any reduction in the scope of the Act; to limit the cost of the act, or cap the number of requests organisations can make will have an impact on Article 10 rights to freedom of expression.

February 2012

\textsuperscript{19} http://www.guardian.co.uk/environment/georgemonbiot/2010/feb/02/climate-change-hacked-emails
\textsuperscript{20} http://www.indexoncensorship.org/2011/11/climate-change-secrecy-freedom-information/
Written evidence from the Newspaper Society

1. The Newspaper Society represents regional media companies which publish around 1,200 local and regional daily and weekly newspaper titles with a readership of 32 million each week and 1,600 associated websites attracting 42 million unique users every month.

2. The Newspaper Society and its members campaigned strongly for the introduction of freedom of information legislation. They believe that the Freedom of Information Act 2000 has not dispelled the UK’s culture of official secrecy, but is a helpful tool in extracting information from national, regional and local public bodies which would otherwise not be made public. However, improvements are still needed to the effectiveness, scope and operation of the Act and to encourage best practice by public bodies in its day to day implementation.

3. An NS survey carried out in 2004, the year before the Act came into force, suggested that over 80% of regional daily newspaper editors and over 60% of local weekly newspaper editors ranked secrecy amongst public bodies of high or very high significance. They were sceptical about public bodies’ preparations for the Act, but reported that some had indeed commenced discussions with editors in pursuance of a joint initiative by the then Lord Chancellor and the Newspaper Society.

4. Five years on, another NS survey in 2010 of 63 local daily and weekly newspaper editors suggested that the culture of secrecy had yet to be displaced – 80% felt that local councils, police and health authorities were becoming more secretive, with just 10% suggesting that it was becoming easier to obtain information from them and 13% perceiving no change.

5. More public authorities and public services now employ more press officers, but editors feel that their proliferation has tended to obstruct rather than facilitate the flow of information to the public, especially where their priorities are reputation management. They can reduce direct contact between reporters and those actually responsible for policy areas or decision-taking or operational activities, detrimental to constructive discussion and provision of information. FOI rights therefore become more important- and some members say that press officers sometimes ask journalists to submit FOI requests rather than seek the information via the press office.

6. Legislative changes affecting the operation of public authorities and services and their practical consequences have also contributed to official secrecy, in addition to the development of data protection and related areas of law. For example, the changes in the way that local government is conducted, in cabinet rather than committee, the growth of contracting out, formation of companies and devolvement of public functions to others have effectively reduced public access to information rights, or opportunities for legally enforceable public scrutiny conferred by more specialized legislation. If the public body continues to perform the public functions, then FOIA can be helpful in providing
alternative rights to information and thereby assisting local newspapers’ coverage of issues of relevance and importance to their local readership. However, a high proportion of requests can be unsuccessful - the 2010 survey respondents suggested that on average, the information requested was not obtained in just under a fifth of cases.

7. FOIA requests by the regional and local press in the course of investigation of, or for the purpose of reporting upon, the activities of public authorities should not be lightly dismissed as an excessive or illegitimate use of the Act, or the costs of response as an unjustified drain upon the latters’ resources.

8. We refer you to any regional and local newspaper companies’ submissions made directly to the Committee, which may explain their use of the Act in investigation and reporting, perhaps illustrated by examples of the information which has been released to the public through articles that they have published as a result. It is possible that some local authorities information now make information routinely available, as part of publication schemes or otherwise, as a result of regional press FOI requests and stories which resonated with the public.

9. We hope that the Committee might look at some of the easily accessible sources for examples of the information uncovered and the important, interesting and wide variety of subjects and issues raised in regional and local press stories as a result of FOI requests from a variety of sources. For an up to date round up of a range of such regional media FOI stories each week, the Committee might find very helpful the blog of David Higgerson, Digital Publishing Director, Trinity Mirror Regionals, including his “Friday FOI round up”

http://en.wordpress.com/tag/foi-friday/ and
http://davidhiggerson.wordpress.com/
http://www.newspapersoc.org.uk/11/mar/10/blog-tracks-local-medias-use-of-foi-each-week

10. In the early years of the Act’s operation, the CFOI published a report summarising 500 FOI stories published in 2005, followed by a 250 page report in 2008 summarising more than a thousand stories published in national and regional newspapers in 2006 and 2007 as a result of disclosures under the FOI legislation of the UK and Scotland.


11. The 2008 report’s introduction gave a good description of the benefits of the Act, providing information and informing debate on a wide range of issues:

The stories demonstrate the enormous range of information being released under FOI. They include significant disclosures about the Iraq conflict, the possible cause of gulf war syndrome, assaults on public service staff, the state of civil service morale, compensation paid to victims of medical accidents, schools’ efforts to inflate their exam results, hospital techniques for deflating waiting lists, the universities teetering on the edge of financial collapse, police officers with criminal records, government efforts to encourage gambling, lobbying by multinational oil, pharmaceutical and food companies, nuclear safety and other hazards, crimes committed by
offenders on parole, unpublicised prison escapes, the expansion of the national DNA database and innumerable reports about high expenses claims and dubious public spending. These disclosures throw new light on the government's approach to many issues, identify shortcomings in public service delivery, highlight other problems which have not been addressed and show where policies have succeeded. They reveal the substantial contribution to accountability made by the FOI Act. Most of these stories are based on FOI requests made by journalists, though some may be reporting on FOI requests made by other requesters.’

12. The FOIA has therefore helped to improve access rights and achieve wider disclosure of information. However, a culture of openness is not yet universal and both the Act itself and manner of observation require improvement.

13. Whatever the circulation areas of our members’ title, their journalists and editors have informed us of frustration in respect of the Act’s operation.

14. They typically cite a wide variation in their local public bodies’ and public services’ practice and culture. Some authorities within their areas are helpful and co-operative. Others appear more obstructive, albeit some of those might have helpful FOI officials battling against the less helpful prevailing culture of their organisation.

15. Despite the intention that all FOI requests should be treated in the same way, whatever their origin, our members report that journalists’ requests may well be accorded different treatment by some public bodies, possibly because of the perceived likelihood of public disclosure.

16. There are concerns about delay in responding to requests, including failure to comply with recommended time frames when considering the application of exemptions.

17. Journalists feel that there is an over-readiness to apply and rely upon exemptions to refuse FOI requests. Exemptions are misunderstood, misinterpreted or misapplied. The requestors will persist and such problems will sometimes be overcome as a result of internal review or recourse to the ICO. However, this entails further delay.

18. The NS and its members would therefore firmly oppose any changes to the Act which could deter requests or allow more requests to be refused.

19. The NS would oppose any changes to the legislation that would widen public bodies’ grounds to dismiss FOI requests on the grounds of triviality or irritation. The Act’s provision for refusal of vexatious requests is quite sufficient - and some of our members suggest that it might be too capable of misinterpretation or inappropriate application.

20. The Committee may be aware of the strength of regional press opposition to past proposals put forward by previous governments to curb use of the Freedom of Information Act and thereby the costs incurred in responding to them (after their economic analysis had identified that the curbs proposed would impact particularly upon the type of requests which might take more time to answer, such as those put forward by MPs’ researchers and the media).
21. We maintain that introduction of charges and fees for requests or reviews or appeals would deter the public from exercising their access to information rights. Alteration of costs and associated time limits and the calculation of either or both for the purpose of enabling requests to be refused under the Act – (e.g. allowing ‘consideration’ or redaction time to be taken into account or aggregation of the number or costs or time taken to answer requests from an organisation or person, with accompanying identification checks) - would all too easily be exploited to enable blanket refusal of requests. The release of important information or embarrassing information could all too easily be blocked on submission of the request, simply because it could be said that the public body anticipated some exemption or other provision of the Act might have to be considered in order to answer the request, which would inevitably take it over the relevant limits. Any such request could be difficult to challenge.

22. We would also certainly oppose the introduction of any exemptions or widening of existing exemptions to make refusal easier. Cabinet papers, material relating to cabinet discussions and information relating to policy formulation are already well protected by the Act. Conversely, we would welcome the abolition of Ministerial veto and removal or narrowing of exemptions.

23. The NS would welcome any proposals to strengthen the FOIA and thereby further encourage a prevailing culture of openness, rather than official secrecy. There needs to be even greater emphasis upon an enforceable presumption of provision of information in response to a FOIA request, even if it might fall under an exemption.

24. The NS would support further extension of the FOIA, not only by designation of other public bodies but also by designation of contractors and others performing public functions on behalf of public bodies. We welcome the steps that the Government has already taken to address some loopholes or lacuna. In addition, we refer you to submissions made by the Campaign for Freedom of Information on further improvements needed.

25. In order to improve public access to information at local level, we would ask the Government to consider using its powers under section 5 of the Act not only to designate other bodies which considered to be exercising public functions, but also to designate any contractors which are providing, under contracts made with public authorities, ‘any service whose provision is a function of that authority’.

26. We also fear that Government initiatives, on Localism and the Big Society, could actually lead to changes in application and loss of more specialist public access to information rights, and hope that the Committee considers whether it would be better to maintain these as well as ensure FOIA rights apply. For example, the Localism Act 2011 for instance does not automatically extend existing local government legislation on public rights of access to meetings and documentation to authorities operating under new arrangements permitted by the Act. In the default of regulations being drawn up by the Minister, in certain circumstances, local authorities, whether elected representatives or the
officials/official to whom they have delegated their (widened) functions, could choose to carry out their functions, meet and take decisions in secret, with no public rights of access to relevant meetings, discussion, decision-taking or documentation. There is further lacuna in the remit of their scrutiny and oversight committees, especially where issues affecting more than one local authority are under consideration. In such cases, the public would no longer have their previous statutory local government access to meetings rights but may be able to fall back upon FOIA rights to obtain information. We hope that the Committee’s post legislative scrutiny will check whether there are such areas of overlap and perhaps try to ensure that specialist access to meetings rights and access to information rights are not unnecessarily lost, merely because the public may have ‘residual’ rights under FOIA, but appropriate statutory alternatives are drawn up and implemented.

27. In addition, current proposed reforms to local government, health service and the ‘Big Society’ initiative could all shift the performance of public functions to contractors and private undertakings, but there will be no automatic corresponding extension of the statutory provisions on public access to information rights, public rights of inspection and challenge relating to independent audits, or other rights of public scrutiny to maintain proper public oversight of the service, service provider or deployment of any public funds. When announcing the introduction of FOIA post-legislative scrutiny by the Justice Committee, the Deputy Prime Minister recognised that such changes could result in such loss of statutory rights (as the line between public and private changed) and that the Justice Committee’s post-legislative scrutiny would help ensure that the public’s FOI rights were maintained as any such changes took place. Extension of FOIA would at least help to maintain some public rights of access to relevant information and provide a degree of potential public oversight. However, we also suggest that where the ‘old’ regime gave stronger rights to the public than FOIA alone, creation of equivalent specific access rights may be necessary in addition to FOIA rights. The Government’s transparency agenda ought to be translated into strong statutory disclosure and publication obligations wherever possible, inorder to facilitate public access and public scrutiny. Different Government agenda-localism, deregulation- should not be used to justify loss of public rights to information about the activities of public bodies and provision of public services, or other public rights of scrutiny.

28. There should be regular periodic review of FOIA and provision for swift implementation of any recommendations for its extension and for improvement of public access to information rights. This has to continue alongside practical measures to ensure that public bodies designated under the Act actually operate within the spirit of the Act and a culture of openness.

February 2012
FOI 88

Written evidence from Liberty

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK’s leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.


Introduction

1. Liberty welcomes the opportunity to submit evidence to assist the Justice Committee’s post-legislative scrutiny of the Freedom of Information Act (FOIA), informed by the Ministry of Justice’s Memorandum published in December 2011.¹ The FOIA was designed to encourage public trust in authorities and to create a culture of open and transparent Government. The Act gave, for the first time, a general statutory right of access to official records and information. As noted in the Memorandum, the Act was, and continues to be, an extremely important initiative which shores up the pillars of good democracy: transparency and accountability.

2. As a human rights campaigning organisation, Liberty has – for nearly 80 years – sought to ensure that Government makes decisions which are just, fair and which do not infringe on fundamental rights and freedoms. The FOIA has been a key step forward in assisting our work. Without information about how and why decisions

are made by public authorities it can be difficult to challenge bad practice on a systemic level. The FOI Act is not perfect, and there are significant weaknesses and gaps in the information it covers resulting primarily from the broad exemption categories in Part 2 of the Act. Yet even with these weaknesses the FOIA has become a beacon of public accountability.

**Operation of the FOI Act**

3. The FOIA provides a general right to be informed if a public authority holds requested information, and, if so, the ability to access it. This right is subject to practical considerations - for example, repeated or vexatious requests need not be fulfilled, and information will be considered exempt where the cost of compliance will exceed the ‘appropriate limit’. Some categories of information are exempt – as outlined below. Part 3 of the Act sets out the role of the Information Commissioner’s Office; Part 4 sets out how the Act is enforced; and Part 5 sets out the appeals mechanism where requests are refused.

4. Part 2 of the Act sets out information which will be exempt from the general right of access contained in Part 1. Information in a Part 2 category will either be absolutely exempt from disclosure, or the authority may claim that the public interest in maintaining the exclusion of the duty to confirm or deny whether the information is held, or to release it if it is held, outweighs the public interest in disclosure. The exemption categories in Part 2 are broad. Section 23 provides that information held by a public authority is exempt information if it was directly or indirectly supplied to the public or authority by, or relates to, a listed body dealing with security matters. These bodies range from the Security Service to a number of related statutory tribunals. Information will also be exempt from disclosure obligations under Part 2: in order to safeguard national security; if it prejudices the UK’s defence forces or Britain’s international relations; if it relates to any relations with any UK

---

2 A list of public authorities subject to the Act are listed in Schedule 1 to the Act, which can be amended by statutory instrument: sections 3 to 5 FOIA.
3 Section 1(1) FOIA.
4 Section 14 FOIA.
5 Section 12 FOIA.
6 Section 2 FOIA.
7 See section 23(3) of the Freedom of Information Act 2000.
8 Section 24 FOI Act.
9 Section 26 FOI Act.
10 Section 27 FOI Act.
administration;\textsuperscript{11} or in order to protect the UK’s economic interests.\textsuperscript{12} Section 30 of the Act exempts information held by a public authority “if it has at any time been held by the authority for the purposes of” investigating criminal offences. Section 31 lists a wide number of areas where information is exempt if it would prejudice, or be likely to prejudice, law enforcement as well as certain civil proceedings or inquiries etc.

### The importance of the FOIA

5. A key aspect of Liberty’s campaigning work involves test case litigation. As a small organisation, we tend to take on cases which have broader ramifications for public policy and practice. The use of information disclosed under FOIA procedures has been essential to some of our most successful legal challenges. In some cases, being unable to access information can have a detrimental impact on achieving the best result for our client, as well as limiting the opportunity to achieve positive systemic change. Below we document some key cases where we have used information provided by public authorities under the FOIA to challenge breaches of human rights; put an end to discriminatory policy and advocate for some of the most vulnerable members of our community.

#### Case study 1: challenging detention without suspicion at our borders

Under Schedule 7 of the \textit{Terrorism Act 2000} a constable, immigration officer or customs officer at a port or border can question anyone entering or leaving to determine whether the person is involved in some way in terrorism, “\textit{whether or not he has grounds for suspecting}” that a person has had such involvement.\textsuperscript{13} In order to exercise this power an officer can detain the person and question them for up to nine hours,\textsuperscript{14} search their person or any of their belongings and retain any of those belongings for up to seven days.\textsuperscript{15} It is an offence if the person fails to answer questions or obstructs the exercise of the functions under the Act.\textsuperscript{16} If detained in a police station the police can also take that person’s fingerprints and DNA, which under current law can be retained indefinitely.\textsuperscript{17}

Liberty is concerned that the operation of Schedule 7 is in breach of the \textit{Human Rights Act 1998} and impacts in a discriminatory way. Our concerns are supported by statistical evidence

\textsuperscript{11} Clause 28.
\textsuperscript{12} Clause 29.
\textsuperscript{13} Para 2(4) of Schedule 7 \textit{Terrorism Act 2000}.
\textsuperscript{14} Para 6(4) of Schedule 7.
\textsuperscript{15} Para’s 2 to 8 and para 11 of Schedule 7.
\textsuperscript{16} Para 18 of Schedule 7.
\textsuperscript{17} Para 10 of Schedule 8 \textit{Terrorism Act 2000}. 

- people from ethnic minorities are reportedly 42 more times likely than White people to be stopped using the Schedule 7 power.\textsuperscript{18} Qualitative research has also indicated the negative impact of the use of these over-broad counter-terror powers.\textsuperscript{19} Many in minority communities believe they are repeatedly targeted solely because of their ethnicity and/or religion. The police have also recognised that their relationship with their communities is being destabilised on account of the operation of these powers.\textsuperscript{20}

Liberty is currently representing a young British man stopped and questioned at Heathrow airport under Schedule 7. We are seeking a review of the power in the European Court of Human Rights (ECtHR), challenging the compatibility of the power with Articles 5 and 8 of the European Convention on Human Rights (ECHR).\textsuperscript{21} Key evidence to support our legal action has been obtained through the fulfilment of FOI requests. As the Home Office has only recently begun publishing statistics on the use of Schedule 7,\textsuperscript{22} FOI requests by us and others have enabled us to obtain a lot of information about how the power has been used before statistics began to be published, including statistics on the ethnicity of those detained.

**Case study 2: challenging discriminatory stop and search**

Section 60 of the Criminal Justice and Public Order Act 1994 is a broad power which allows for a police officer to stop and search individuals, without any suspicion, in anticipation of, or after, violence in a specified area. The power can be exercised after authorisation is given, on the basis of an easily reached subjective threshold. Once an authorisation has been given any police officer can stop and search any pedestrian for an offensive weapon or dangerous instrument, or stop and search any vehicle and its driver and passenger for the same. In conducting such a stop and search, the officer need not have any grounds for suspecting that they are carrying an offensive weapon or article. Anyone who refuses to be stopped and searched commits a criminal offence and is subject to up to one months’ imprisonment or a fine or both. Reports of the use of section 60 have indicated widespread rolling use across many different areas.

---

\textsuperscript{18} See \url{http://www.guardian.co.uk/uk/2011/may/23/counter-terror-stop-search-minorities}.


\textsuperscript{20} ibid, at page 22, 27.

\textsuperscript{21} Article 5 of the ECHR, as incorporated into UK law by the Human Rights Act 1998, protects the right to liberty and security; Article 8 protects the right to respect for private and family life.

\textsuperscript{22} Disaggregated data on how many stops were made under the Schedule and their ethnic origin only started being released by the Home Office in 2010. It is unclear from the data available what searches took place, how many arrests and convictions arose as a result of being stopped under Schedule 7, etc. See p 21 in Choudhury, T and Fenwick, H (Durham University) *The impact of counter-terrorism measures in Muslim communities; Equality and Human Rights Commission Research Report 72* (Spring 2011), available at \url{http://www.euro-islam.info/wp-content/uploads/pdfs/counter-terrorism_research_report_72.pdf}. 
While there may be a place for stop and search without suspicion on a tightly limited basis, these kinds of powers have been found to be hugely problematic in communities where those from minority groups have been repeatedly stopped, with significant ramifications for the relationship between them and the police. The continued alienation of young people and people of particular ethnicity or appearance is a clear source of social tension. Liberty has already successfully challenged stop and search without suspicion powers under section 44 of the *Terrorism Act 2000*. The power was declared to be unlawful and in breach of Article 8 of the Convention by the ECtHR; the Court concluded the powers had been widely deployed against young Black and Asian men and used against peaceful protesters.

Section 60 suffers from many of the same hallmarks by which section 44 fell foul of Article 8 of the ECHR - recent data shows that under section 60, Black people are 26 times more likely to be stopped than White people. We are currently acting as intervener in the case of an allegedly unlawful section 60 search, Roberts *v* Metropolitan Police Service. We have obtained information from all police forces in England and Wales about the number of authorisations made under section 60 and the reasons for them. None of this information was previously available, so not only will it inform our submissions to the court, it will improve transparency in policing. The response from one force revealed that the power had been used in a way which we consider to be unlawful under the *Equality Act 2010* and we are now pursuing this.

**Case study 3: challenging discriminatory Government counter-terrorism policy**

We recently acted for an academic who had made FOI requests to a number of police forces requesting statistics on the “Channel” project, an aspect of the counter-terror Prevent programme whereby children were identified as potential extremists.

The academic’s requests were refused on grounds of national security and the prevention and detection of crime. Following an appeal to the First Tier Tribunal, the police agreed to disclose the information which revealed that 67% of those referred to the project were Muslim and 55 were under 12 years old. The Prevent programme has recently been reviewed by the Home Office.

---

23 *Gillian and Quinton v UK* (App no 4158/05) (12<sup>th</sup> January 2010).
Case study 4: exposing dangerous practices in deportation

Recent deaths and serious injury caused to individuals being deported by private security guards (contracted by the UKBA) are of serious concern. In early October 2010 Jimmy Mubenga, an Angolan refugee being deported by private security firm GS4, collapsed and died while a British plane prepared for takeoff after being heavily restrained by the security officers accompanying him.26 His death shone a light on what appears to be a systemic problem within this part of our immigration system; a recent report from the Home Affairs Select Committee concluded there is an urgent need for the Home Office to put a stop to restraint techniques which risk the lives of people within their care.27

As a result of these cases Liberty requested from the Home Office a copy of the full Use of Force policy, which it refused to disclose. We have since been granted permission for a judicial review of that refusal, as well as a review of the lawfulness of these cruel techniques against vulnerable detainees which place them at high risk of being subjected to unlawful use of force in breach of Article 3 of the ECHR. We have made a number of FOI requests which are vital to inform our case and the court’s judgment. Accordingly we have requested the Use of Force guidance made available from UKBA to private security companies; the number of complaints lodged against private security firms (G4S, Serco etc) and in-country staff; and whether there is a fine or other penalty for a failure to remove a person from the UK.

Case study 5: challenging degrading treatment for detained immigrants

Liberty has increasingly become concerned about the treatment of individuals held in immigration detention. The obstacles faced by this group in our society can often be insurmountable, caused by lack of language and knowledge about what rights they have while in detention, fear and an inability to access impartial advice. Liberty has taken on the case of a failed asylum seeker who, while being held in immigration detention, required hospital treatment. For the nine days of his treatment in hospital, and on further occasions for outpatient treatment, our client was handcuffed to a security officer - including while sleeping, showering and using the toilet. We are challenging, by way of judicial review, both the Government’s policy and the private contractor’s policy on handcuffing of immigration detainees during medical treatment. In support of our claim we have used FOI requests to obtain information about the number of people in immigration detention who need treatment outside the detention centre itself, and the number of those who were assessed as needing to be handcuffed.

Challenges to the FOI Act’s successful operation

6. The laudable aims of the FOI Act to promote openness, transparency and accountability across the public sector are somewhat undermined by certain provisions in the Act and how it can operate in practice. Delay in responding to our requests and having to chase public authorities to fulfil their duties can be an issue, as can reluctance to release information, as outlined in some of the case studies above. Requesters are also often in a difficult position to challenge certain decisions made in response to a FOIA request. If we suspect some information may be missing from what has been made available it is difficult to pursue this suspicion without more detailed insider knowledge of the records being kept, or which should be being kept. Similarly being told that the requested information is exempt by reasons of costs under section 12(1) of the Act can be very difficult to challenge as it is near impossible to guess how much paperwork a public authority will have to go through in order to provide the information requested. Instead of invoking cost and time to resist FOIA requests, more detailed responses explaining why the material requested isn’t readily available, or why it is too costly to produce, would assist requesters in modifying and tailoring requests.

7. The aim of the FOIA is also seriously undermined by the number of broad exemption categories contained in Part 2, as outlined above. In all our work on the Act Liberty has consistently called for an end to blanket exemption and stronger tests for disclosure refusal. Section 31, for example, lists a wide number of areas where information will be considered exempt if it would prejudice, or be likely to prejudice, law enforcement as well as certain civil proceedings or inquiries etc. ‘Prejudice’ is an incredibly weak threshold. Our concern is exacerbated given transparency is particularly important in this context; indeed one of the recommendations of the Inquiry into the death of Stephen Lawrence was that any FOI legislation “should apply to all areas of policing, both operational and administrative, subject only to the ‘substantial harm’ test for withholding disclosure.”28 As Sir William McPherson stated in his Report

> Essentially we consider that the principle which should govern the Police Services, and indeed the criminal justice system, is that they should be accountable under all relevant legislative provisions unless a clear and

---

specific case can be demonstrated that such accountability would be harmful to the public interest… we consider it an important matter of principle that the Police Services should be open to the full provisions of a Freedom of Information Act. We see no logical grounds for a class exemption for the police in any area.  

Similarly, section 35 exempts all information held by a Government department if it relates to the formulation of Government policy, ministerial communications, advice by Law Officers or the operations of any Ministerial private office. This potentially excludes a vast amount of information of use not only to members of the public but also to Parliamentarians making determinations about proposed legislation – as recently argued in relation to the departmental risk register for the Health and Social Welfare Bill.

8. While Liberty certainly appreciates that certain information will need to be withheld – for reasons, for example, of public safety – we believe that broad blanket exemption from disclosure which is absolute or based on a very weak test of ‘prejudice’ goes against the essence of the Act. The current wording of the Part 2 provisions leaves an individual seeking access to the information covered having to rely on the discretion of the authority that controls the information in order to gain access – a situation FOI legislation was expressly intended to change. We believe that Part 2 of the Act would be vastly improved if it was amended to provide for a presumption that information will be released unless it would cause “substantial harm” to the public interest, in which case it could be redacted or withheld.

9. Finally, a significant obstacle that Liberty has encountered is the refusal by private companies who have been contracted by public authorities to undertake public services to release information because they do not consider themselves subject to FOIA. The current trend to contract out Government functions – including its core functions – means that this is increasingly going to become an issue. It will mean not only that important information is not made publicly available, but accountability will be significantly reduced. It ought to be made clear – by amending the Act – that private companies carrying out public functions are bound by the FOIA

29 Ibid.
and must both keep proper records and make those records available to the public under the Act both proactively and where it is requested.

Conclusion

10. The Ministry of Justice’s Memorandum importantly recognises that freedom of information “remains a vital element of the transparency agenda and has been instrumental in the release of a great deal of information which might otherwise have remained closed”.31 As demonstrated above, the FOIA has become a vital cog in the work that Liberty does. The Act and its implementation however still suffer significant weaknesses. Our main concern is that the aim and purpose of the Act is often thwarted by the broad exemptions and increasing risk of obscuring public decision-making by contracting out public services. Clarifying that the Act applies to private companies who carry out public services; narrowing and eliminating broad and absolute exemptions; and lowering the threshold for disclosures would all be welcome reforms.

February 2012

31 See the MoJ Memorandum, ibid, at para 219.
Does the Freedom of Information Act work effectively?
Broadly speaking we are satisfied with the way the Act works. To avoid calling the Act unnecessarily into play, reporting staff are advised to check with the relevant press office whether the information they seek can be obtained more simply – for example by a normal press query or if the information is already available on the authority’s website. We also encourage a constructive working relationship between journalists and FOI Officers at local authorities to minimise time wasted by both parties. If similar relationships were encouraged and fostered as a matter of course around the country the perception that journalists use them as a fishing exercise could be countered.

In some cases journalists have reported that the designated time period for responding has not been met but in general, our local authorities are effective in replying to FOIA requests.

What are the strengths and weaknesses of the Freedom of Information Act?
The Act has been an invaluable tool in helping us fulfil our watchdog role, a duty that has been increasingly hard to fulfil in an age when more and more decisions being made behind closed doors under delegated powers. With more services outsourced by local authorities, the FOIA has been a way of holding them to account - but an extension of its scope to include companies contracted to local authorities would be welcome. We would view extending its scope to schools which have become Academies as an essential way of keeping them accountable to the public that funds them - especially as head teachers/principals are given more freedom to run the schools as they wish.

Is the Freedom of Information Act operating in the way that it was intended to?
There is an impression that many local authorities’ starting position is to try to find a reason for not carrying out an FOIA request when they receive one. This has led to journalists having to be specific and careful in the wording of a request to ensure it is reasonable and that exemptions do not apply. In this way, broadly speaking, we would agree that it is operating as it should.

Other comments
We have published a number of stories following FOIA requests which have been in the public interest.

An FOI request by the *Somerset County Gazette* to uncover the number of councillors on a district council who had been chased for not paying their council tax on time revealed that the figure was eight over five years. Understandably, readers were shocked at the situation as they expect the highest standards from their representatives.

However, the council refused to name those concerned claiming doing so would breach the Data Protection Act. Our legal advice is that this argument is not valid and therefore stands as an example of how we would have had to have used the appeal process to get the information we believe we were entitled to. Interestingly, a
neighbouring authority was happy to deal with a request for the same information as a straightforward press enquiry, although they too declined to name the individuals.

Another example of a successful FOIA request was made to Avon and Somerset Probation Trust. It revealed that nearly two out of five community sentences handed out in one district go uncompleted. The disclosure led to a healthy debate about the validity of such sentences.

The Act has also been used effectively by our readers who have taken it upon themselves to request information and then send us it – this would indicate that it is working effectively.

We have encouraged reporters to submit a FOIA request once every six months – this is to strike a balance between obtaining agenda-setting information and not being seen as time-wasting by the relevant authorities.

The Act is, broadly speaking, right for the age in which we live and any attempt to limit its scope or make requests for information more difficult goes against the principle of open government in a modern democracy.

February 2012.
Written evidence from Request Initiative

Executive summary

The Coalition government came to power promising “the extension of the scope of the Freedom of Information Act to provide greater transparency.” David Cameron when becoming prime minister personally committed himself to “open and accountable government”\(^1\). The government has launched the Transparency Initiative which has resulted in large amounts of information held by public bodies being published, which is commendable. However, some of the proposals in the Ministry of Justice (MoJ) memorandum on FoIA threaten to undermine the coalition’s commitment to transparency and interfere with on the public’s right to access information.

This submission will present evidence that the cost of implementing the Freedom of Information Act are now falling while the number of requests is increasing to suggest that public departments are delivering greater value for money. The submission will then discuss the quality and quantity of public-interest information disclosures. The use of the act has demonstrably supported transparency and increasing public awareness of public functions. The use of public money is both more transparent and accountable. It is therefore argued that the costs associated with FoIA are a sound investment and that the ‘public interest’ must continue to be served and protected.

Request Initiative is a not-for-profit community interest company which makes requests on behalf of charities and NGOs acting in the public interest. We argue that there needs to be a stronger legal definition of the public interest and that the test should be applied to all exemptions, removing absolute exemptions from the legislation. Request makes the case that fees should not be introduced for making FOIA requests. However, if the Committee is determined to introduce fees then this submission argues that the public interest test should again be incorporated. It is also recommended that the Committee reconsider how the Data Protection Act fits with the FoIA with the suggested solution again being the application of the public interest test. Finally, this submission asks that the Commission consider in detail the potential benefits of expanding the scope of the act to cover more public authorities and private companies undertaking public work.

About Request Initiative

Request Initiative is a non-profit community interest company that makes Freedom of Information Act (FoIA), Environmental Information Regulations (EIR) and Data Protection Act (DPA) requests for charities and non-

governmental organisations (NGOs) within the context of investigative research. Request Initiative also conducts its own investigations into areas of public interest.

**Costs**

The implementation of the FoIA has resulted in significant costs for public bodies. Requests to local authorities have risen by more than 300 percent, [OVER WHAT PERIOD]. However, the costs associated with processing requests is falling. Research by the Constitution Unit, University College London estimates that in 2009 local authorities spent a total of £37 million responding to 165,000 requests. In 2010 this cost dropped to £32 million despite the higher number of requests received, 198,000². The UCL research is significant in scope as they received “substantive responses” from 104 FoIA officers working in local authorities.

The research shows that the time, and therefore cost, of responding to requests has steadily declined since the legislation was enacted. In 2005 an FoIA request took an average of 16.4 hours to answer but in 2010 it took just 6.4. Costed at £25 per hour this represents a drop from £410 to £160 per request, on average.

<table>
<thead>
<tr>
<th>Year</th>
<th>Estimated number of Requests</th>
<th>Average hours per request</th>
<th>Total estimated cost of FOI to English local authorities (in £millions)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2005</td>
<td>60,361</td>
<td>16.4</td>
<td>24.7</td>
</tr>
<tr>
<td>2006</td>
<td>72,361</td>
<td>13.1</td>
<td>23.6</td>
</tr>
<tr>
<td>2007</td>
<td>80,114</td>
<td>15.3</td>
<td>30.6</td>
</tr>
<tr>
<td>2008</td>
<td>118,569</td>
<td>11.6</td>
<td>34.3</td>
</tr>
<tr>
<td>2009</td>
<td>164,508</td>
<td>8.9</td>
<td>36.6</td>
</tr>
<tr>
<td>2010</td>
<td>197,737</td>
<td>6.4</td>
<td>31.6</td>
</tr>
</tbody>
</table>

Reasons for the reduction in costs might include the increasing expertise and experience of information officers and better information management on the part of public bodies. It can be reasonably assumed that costs will continue to be reduced, as the rate of fall has remained significant (see table 1).

The UCL research does not cover departments of state. Helpfully, this data is collected by the MoJ, along with data on “other monitored bodies”. There has not been a significant increase in the number of FoIA requests to departments of state. requests to departments of state and other monitored bodies have increased by just 15 percent over the first five years of the act being in place, from 38,108 in 2005 to 43,921 in 2010³.

---

² FOIA 2000 and local government in 2010: The experience of local authorities in England: Constitution Unit, University College London; Gabrielle Bourlie, Jim Amos, Ben Worthy, Jennifer Katzars

The requests made to departments of state and other monitored bodies in 2010 represented only 22 percent of the total requests submitted across the country. Moreover, departments of state and other monitored bodies will have likely benefitted from some of the advantages local authorities used to drive down costs, such as experience and better information management. However, there is no estimated response time (and therefore cost) figures.

Table 2 (source: see footnote 2 and 3)

<table>
<thead>
<tr>
<th>Year</th>
<th>Requests to departments of state and other monitored bodies. * taken from MoJ annual reports on FoIA</th>
<th>Requests to local authorities. * taken from UCL Constitution unit</th>
</tr>
</thead>
<tbody>
<tr>
<td>2005</td>
<td>38,108</td>
<td>60,361</td>
</tr>
<tr>
<td>2006</td>
<td>33,688</td>
<td>72,361</td>
</tr>
<tr>
<td>2007</td>
<td>32,978</td>
<td>80,114</td>
</tr>
<tr>
<td>2008</td>
<td>34,950</td>
<td>118,569</td>
</tr>
<tr>
<td>2009</td>
<td>40,548</td>
<td>164,508</td>
</tr>
<tr>
<td>2010</td>
<td>43,921</td>
<td>197,737</td>
</tr>
</tbody>
</table>

The evidence suggests that the costs of implementing the FoIA have been borne largely by local authorities, where the number of requests has increased year on year. However, the processing costs of each individual request has fallen consistently since 2005 meaning that the total cost to the taxpayer has not run out of control. There is evidence that administrators of FoIA are significantly driving down costs, meaning changes to the fees regulations would be unnecessary in terms of reducing costs while being detrimental to the public interest in ensuring transparency.

Request Initiative would also suggest that better information management in public bodies is in itself a positive outcome and could have led to savings in staff time in processes not related to FoIA, although we are not in a position to offer any evidence for this argument. It is also highly likely that many requests for information, for example from regional media, would have been processed before the implementation of the act and that these costs would have been borne by public bodies if invisibly as part of its every day functions.

**The public interest**

Request Initiative argues that the public interest test should be incorporated more widely and defined more clearly in the FoIA. There should be a public interest test in each of the exemptions, including those relating to national security, personal data and cost limitations. There should not be any total exemptions and all exemptions should be qualified by a public interest test. This

---

*on implementation in central government 2010 Annual and Q4: October - December 2010: The Ministry of Justice*
argument is perhaps most contentious when applied to the secret services but even in this case the public authority should be able to give a clear and convincing case as to why information should not be disclosed. This could, at the very least, be conducted in camera. It seems a circular argument to argue that it is in the national interest not to disclose any information about the security services and therefore a total exemption should apply. There will be many instances where the possibility of disclosure will ensure probity and efficiency even within these departments.

The public interest test is vital to qualified exceptions and is a term often relied upon in the act. However, it is very poorly defined. The Committee should take this opportunity to give a clear, accessible and unambiguous definition of the public interest including key tests which need to be met and some mechanism by which the legitimate interests of the public can be weighed against conflicting interests, including those of the right to privacy. Request Initiative believes this measure alone would seriously reduce the amount of requests that are contested, and the number which are taken to the Information Commissioner’s Office, to tribunal and to the supreme court. This would reduce costs for public bodies and perhaps more importantly significantly reduce the delay in disclosing information.

The great virtue of the FoIA is that it serves the public interest. Notable examples of the public interest being served by disclosures under the FoIA include the examination of MPs’ expenses and the revelation that the Department of Trade and Industry lobbied the US on behalf of BP for drilling rights of Iraq’s oil reserves in 2002, six months before the war began. We have seen that disclosures made under the FoIA have the capacity to change law and policy while also informing the documentation of history at a profound level. However, not all FoIA disclosures as momentous as the examples given above.

Research by Request Initiative indicates there are more than 200 FoIA news articles published in the UK national press each month. The majority of these disclosures serve the public interest. For example, let us examine the FoIA disclosures in the week this submission was written (January 22 to January 29, 2012). In that time period the following disclosures were reported:

- More than a third of the 32 serving police and support officers in Wales who broke the law in the past five years kept their jobs
- London hospitals write off up to 96 percent of bills owed by foreign patients
- Companies including BP and Google pay £1,800 a time to dine with ministers and civil servants

---

4 http://www.telegraph.co.uk/news/newstopics/mps‐expenses/
6 http://www.bbc.co.uk/news/uk‐wales‐16508670
7 http://www.bbc.co.uk/news/uk‐england‐london‐16711783
8 http://www.dailymail.co.uk/news/article-2091461/Cash-access-row-reignites-companies-pay-1-800-time-dine-ministers-civil-servants-exclusive-Chemistry-Club-events.html#ixzz1kYd6hIWT
Each of these ten stories contributes to debate on matters of key public interest including policing, healthcare, government lobbying, international aid, further education, road safety, the royal family, copyright infringement, compensation payouts and Olympic expenditure. It is reasonable to surmise that FoIA has resulted in a significant increase in information which has been disclosed in the public-interest.

The above disclosures are diverse in nature and in terms of the people who had the original request. It does not appear from this evidence that the FoIA is exploited by special interests or groups of a particular political persuasion, nor do the disclosures reflect any particular regional bias. The information above reflects local and international issues and concerns on the political left and right.

In the MoJ’s memorandum, FoIA officers expressed some resentment at journalists’ use of FoIA. This raises the question: why is the media being attacked over its use of FoIA? The stories listed above appeared on the BBC, the Daily Mail, the Daily Mirror, the Daily Telegraph, the Guardian and the Scottish Herald. Journalists, when working on stories in the public interest, speak on behalf of the public including on occasion marginalised communities who do not have the resources to represent themselves or conduct their own research. Moreover, journalists enjoy a platform on which to raise public awareness of information disclosures. It could be argued that the public interest is served by journalists making FoIA requests since they have the resources to make the information available to broader sections of the public.

---

9 http://www.guardian.co.uk/world/2012/jan/22/poor‐countries‐debt‐uk‐interest?newsfeed=true
10 http://www.heraldscotland.com/news/education/college‐cash‐for‐bursaries‐running‐out.16541427
11 http://www.mirror.co.uk/mobile/topnews/2012/01/23/more‐than‐600‐convicted‐killer‐drivers‐allowed‐back‐on‐the‐road‐115875‐23713164/#ixzz1kYddxbDh
12 http://www.telegraph.co.uk/news/uknews/honours‐list/9039608/Official‐JB‐Priestley‐Roald‐Dahl‐Lucian‐Freud‐and‐LS‐Lowry‐among‐277‐others‐turned‐down‐honours‐from‐the‐Queen.html
13 http://www.guardian.co.uk/technology/2012/jan/26/google‐bing‐illegal‐music?newsfeed=true
14 http://www.dailymail.co.uk/news/article‐2092578/Police‐compensation‐payouts‐12m‐including‐120‐000‐bruise.html#ixzz1l29w8d72
15 http://www.dailymail.co.uk/news/article‐2092558/London‐2012‐Olympics‐335k‐taxpayers‐money‐spent‐toadstools‐sculpture‐Dorset.html#ixzz1l2A4dNgY
If the object of FoIA is to enhance civic engagement and inspire new relationships between the citizen and public bodies through greater accountability, then it is to some extent working. The increasing number of requests and the diverse and frequent public-interest information disclosures are testimony to this. Rising numbers of requests should also be understood as the result of successful policy and to legislate to mitigate further increases would be counterintuitive.

The FoIA is an important part of our democracy and requests have lead to some of the most important political revelations of the decade. But the public's interests are also served on a daily basis by the Act, enriching public life and fostering civic engagement. The media have proven capable of using the FoIA responsibly to publish information in the public interest on a daily basis.

**Fees regulations**

The Committee has heard evidence from FoIA officers that the act can be a burden on public authorities and some have suggested that the cost limit for requests be reduced. It has been suggested that the fees regulations should be modified to include the time taken to consider requests and redact information.

Request Initiative argues that the costs of Freedom of Information requests are justified because of the social and economic benefits that public-interest information disclosures provide by way of informing debate and ensuring accountability. There is serious concern that enabling public bodies to include the cost of redacting documents when considering whether an exemption should be applied on costs grounds would lead to a significant reduction of the amount of information disclosed. The most important information in terms of the public interest is often the most contentious. Making redactions to documents is cost intensive and such a measure is likely to result in swathes of information no longer being made available. It will also be difficult to cost the process of redactions accurately and there will be a temptation for officers to err habitually in favour of non-disclosure. A public body which is reluctant to release any information will be given significantly increased powers of discretion over which information should be released and this may on many occasions not best serve the public interest. There is a serious concern that raising fees would be discriminatory on the basis that some members of the public would be unable to access information because of limited incomes. It seems wholly unfair that a tobacco company, for example, would have greater access to publicly funded and publicly held information than deprived communities – perhaps those suffering from cancer – based purely on their financial situation.

However, if the Committee is intent on making changes to the fees regulations then measures should be introduced in ensure that the public’s right to access information on matters of public interest should be safeguarded. This submission states why the public interest test should be used to greater effect within the FoIA. Specifically, the public interest test should be used in balance with the consideration of costs. This would mean that public authorities would
only be compelled to meet the costs of redacting and then disclosing information when it had been judged that the release of information was in the public interest. This would reduce the cost of “frivolous” requests while ensuring that the public interest in ensuring accountability and transparency was not negatively impacted. Research by UCL’s Constitution Unit shows that FoI officers believe businesses are responsible for 25 percent of all requests submitted to local authorities. If it could be shown that replying to these requests was in the interests of the company but not of the public more generally then they could be refused on costs grounds or could result in a cost-only fee. This could result charges being levied for around 50,000 requests.

There are alternatives to implementing fees. Research conducted by the ICO suggests that although overall compliance is good, there is still not a culture of openness in many public bodies. This can result in the mishandling of requests by public bodies, evidenced by the 55% of complaints that are upheld or partially upheld at the ICO in 2011. One solution to this would be to endow the ICO with the power to monetarily penalise authorities that are deemed to be ‘repeat offenders’. Here, the threat of a fine could incentivise authorities who operate poor information management and FoIA administration systems to improve their efforts.

**Data Protection and public interest**

The FoIA is perhaps weakest where it interplays with the Data Protection Act, exemptions under Section 40 (2) of the act. Public bodies routinely redact information which it considers to be personal data. The guidance and rulings of the Information Commissioner’s Office have shown that public figures of seniority should be named under the act. However, there remains significant scope for further legal definition and guidance as to what personal data should be disclosed. It is also notable that members of the public have often had to resort to the highest courts to ensure that personal data is released. Request Initiative has experience in its work personal data of the people actually making the requests has been withheld despite the fact they have explicitly stated that they are entirely happy for that information to be released. The Charity Commission had redacted the names of MPs who have been named by their constituents as having received correspondence. This was overturned at the internal review level but shows that at this public body there is a presumption that data protection means almost all names should be redacted.

The Data Protection Act states that personal data must be processed “fairly and lawfully”. There is little in law or in cases at the Information Rights Tribunal to define what is “fair”. It has been argued that “fairness” applies to the public generally and not just to the individual who is the data subject. However, it would be hugely beneficial if the data principal could be replaced with a public interest test. This could be achieved by the FoIA being revised so that it takes precedence over the Data Protection Act and contains within it the legal protections needed to ensure the individual's right to privacy rather than

---

Information is the currency of democracy - annual report: 2011; Information Commissioner’s Office
deferring the matter to another, older, piece of legislation. The case for a broader, more powerful and better-defined public interest test has already been made but is clearly relevant in this case.

Private companies and public interest

The FoIA has been a success on a number of grounds, however, there is considerable scope for its improvement by way of extending the Act’s schedule to a far greater number of public bodies and private companies who are contracted to do public work.

The argument to include private companies contracted to do public work is particularly strong. The companies are providing a public service and are funded with public money. Therefore they should be accountable to the public. As the UK faces increasing privatisation the general transparency of institutions is diminishing. Barnet Council, for instance, has been wholly privatised. But, as taxpayers, citizens have a right to know how the public services they fund are managed and delivered, regardless of the legal form of the provider.

Request Initiative is particularly concerned about the application of the FoIA to private education institutions. We note that almost all universities in the UK currently come under the FoIA with the exception of two privately run institutions including the University of Buckingham. This current situation is in itself inherently unfair as it creates an uneven playing field within the education sector. In particular, you have a situation where Lord Lawson has been given an honorary doctor of science from the University of Buckingham, not covered by FOIA, less than a year after criticising the University of East Anglia for not releasing information under the FOIA.

There is considerable concern about the future. The coalition government’s proposed changes to the funding of universities have extremely wide implications and within the broader public debate the impact on the transparency of information held by further and higher education institutions has received little attention.

Under the government’s plans, a great number of new private providers of higher education are entering the market while the budget for public universities continues to shrink. Many of these new universities will be private companies and, under the current legislation, not subject to FoIA. These new universities are being 'designated' access to the Student Loan Company, meaning their students can access taxpayer funded loans and grants for their fees and maintenance costs. Thousands of students at over 150 private universities are now accessing public funds to pay for their private educations and this figure is projected to grow rapidly. But private universities will be exempt from FoIA under current legislation, despite their reliance on public money.

As institutions conducing research and education this means that a significant and important area of knowledge creation will no longer be transparent and open to public scrutiny. While it is understood that many universities may in fact
be in favour of not having to respond to requests it seems self evident that this is not the best course to ensure that the public interest is guaranteed in the delivery of research and education.

**Conclusion**

The coalition government when coming to power promised to extend the FoIA and has implemented the Transparency Initiative to make more information available for the public. However, public bodies have expressed considerable concerns about the impact of implementing the act especially in terms of costs to the taxpayer. Request Initiative has argued, based on the evidence provided, that the costs both to central and local government are no longer rising. We suggest that considerations of costs have to be weighed against the benefit in ensuring the public interest is served, including the obvious and common sense advantages of transparency and accountability.

Request Initiative also suggests that a new clear and unambiguous definition of the public interest needs to be introduced to the act. We believe that many of the contested requests including the complaints to the ICO, appeals to the information rights tribunal and cases before the supreme court turn on disputes about the balance of public interest against other considerations including confidentiality and privacy. A clearer definition of the public interest would reduce such conflicts and greatly reduce costs. A public interest test could also be introduced to any fees regime to ensure public money is not spent on “frivolous” requests while important public interest requests still result in disclosure. We also believe that a public interest test should be included within exemptions under Section 40 (2) of the act, relating to personal data. Finally, we argue that the public interest is best served where private intuitions conducting public services and roles with public money should be covered by the act by a much greater degree than is currently the case, including within the education sector.
Executive Summary

The Council believes that overall the Act does work effectively, but that it has a number of significant weaknesses. The Council believes that in the main the Act is working in the way that it was intended to, and that it has led to more information being put into the public domain.

Evidence on

- Does the Freedom of Information Act work effectively?
- What are the strengths and weaknesses of the Freedom of Information Act?
- Is the Freedom of Information Act operating in the way that it was intended to?

1. The Council believes that overall the Act does work effectively, as between the Council and FOI applicants, and helps the Council fulfil its value of being open and honest. It is well-used by citizens, the press and media with the Council receiving over 1200 requests in financial year 2010-2011, and with an increase of approximately 60% in request numbers in the current financial year. The Act contains key exemptions designed to protect private information, and commercially valuable information, so that information in the Council’s hands is protected where this is necessary. In the vast majority of cases - approximately 90% - the Council discloses the information requested or directs the applicant to the source of that information if it is already in the public domain. The key exemptions appear to be well understood and accepted by applicants. The Council receives complaints/appeals in only a very small proportion of cases – approximately 1%, and applications are made to the Information Commissioner’s Office (ICO) in only about 0.5% of cases.

2. We believe the Act has the following strengths and weaknesses

   1. The Act provides an applicant with the right to have “information” communicated to him (Section 1(1)(b)), and provides that a request for information is one which “describes the information requested”. However, the ICO has interpreted these provisions so broadly that a request for all the information in a specific file, or database would be a valid request. Likewise a request for “all the information in X’s e-mails between 1 January and 31 December” would be regarded by the ICO as a valid request. Please see Decision Notice Reference FS50298572, dated 2 December 2010. This places a very significant resource burden on public authorities. Under the Freedom of Information and Data Protection (Appropriate Limits and Fees) Regulations 2004, authorities are only able to put the cost of certain defined activities towards the “appropriate limit”, such as locating, retrieving and extracting information. They cannot include the cost of time spent considering exemptions. If a request for “all the information” in a file, or database or e-mail account is a valid one, authorities are obliged to consider potentially thousands of items of information to see whether an
exemption could, or should be applied, and are not be able to count any of the cost of so doing towards the appropriate limit. We do not consider it was intended to place such a burden on public authorities. In addition, we consider it must be appropriate that an applicant has a particular subject or issue in mind when they seek information, and that this must be described sufficiently in the request. In our view, it should not be sufficient for an applicant to describe the particular medium in which information might be held, such as a file or e-mail account, but rather a valid request should be a request for information about a particular subject or issue.

2. We believe the Act does not enable authorities to reject what are patently frivolous requests. For example, the Council has received a number of requests about ghost sightings and paranormal activity in its buildings. In this respect we believe that in addition to a public authority not being obliged to comply with a “vexatious” request, Section 14(1) should be extended to provide that an authority is not obliged to comply with an obviously frivolous request, in the same way that the Commissioner is entitled not to make a decision on an application which is “frivolous or vexatious” under Section 50(2)(c). In addition, we believe that the threshold set by the ICO and by the First-tier Tribunal for what amounts to a “vexatious” request is too high, and that the guidance issued by the ICO in this respect should be revised.

3. We believe that the appropriate limit of £450 specified by the Regulations mentioned above should not stand in isolation from the number of requests a public authority receives, and that this limit should be linked in some way to the volume of requests received, possibly with a limit by individual applicant or by subject matter.

4. We believe that insofar as the appropriate limit is calculated by reference to staff time, the upper limit of £25 per hour is wholly unrealistic and outdated and should be revised so that authorities can make this calculation by reference to the actual cost of staff time.

5. We consider that the time for compliance with requests, “promptly and in any event not later than the twentieth working day following the date of receipt”, in Section 10(1) takes no account of the volume of requests a public authority might receive at any particular time, or the resources available to it. We think this time limit should be more flexible and should be linked to numbers of requests in some way, or should be revised to extend the time available.

6. We consider the exemptions in Section 41 (information provided in confidence), and Section 43 (commercial interests) have not been applied in a way which acknowledges the potential prejudice to authorities and to bidders for public contracts. In particular, we would refer to Decision Notice Reference FS50265157 dated 27 May 2010 where the Commissioner took the view that disclosing an administration fee payable under a contract “may increase competition and drive
prices down”, and rejected the argument that there was a strong public interest in prospective bidders not being discouraged by the fear they would not be on a level playing field with their competitors by reason of disclosures made in response to information requests. We would respectfully suggest that the Information Commissioner lacks the necessary expertise and experience to form a view as to effects of particular disclosures on public procurement exercises, and that greater weight should be place on the views of the public authority concerned.

7. Generally, we believe the Act prevents authorities and the ICO from distinguishing those requests where there is a clear public interest in disclosure from those requests which serve the private interests of the applicant either entirely or primarily. Authorities and the ICO are bound to give weight to a number of general public interests in disclosure such as openness, transparency, and accountability for the spending of public money, even where applicant’s request is patently self-interested and cites none of those interests, and where there is no actual evidence that those purposes will be served by the particular disclosure. In our view, the Act should make it clear that where the public interest test is applied, the requirement to apply the test taking account of “all the circumstances of the case”, means that an authority is entitled to take account of such factors as the number of similar requests for the same information, the number of individuals likely to benefit from disclosure, and whether the applicant or other individuals will derive some personal financial or other benefit from the disclosure. By way of evidence we would refer to the Decision Notice specified in paragraph 6 above.

8. We believe that the ICO’s investigation and decision-making process places an unnecessary burden on public authorities. In our view, the ICO’s screening process for rejecting applications which are “frivolous or vexatious” under Section 50(2) is inadequate. In addition, although the ICO places strict time limits on authorities for responses to the ICO’s investigations about how an FOI request has been handled, authorities are given no overall indication of how long an investigation will take or how long it will take the ICO to issue a Decision Notice.

9. We believe that most of the exemptions contained in the Act are clear, and are well understood by public authorities and FOI applicants. However, one or two exemptions are overly complex and technical, and difficult to apply – in particular, the exemption in Section 30 (investigations and proceedings conducted by public authorities), and the exemption in Section 40 (personal information).

3. We believe that overall, the Act is operating in the way it was intended to. Although local authorities have long been required to publish significant amounts of information relating to their formal decisions, the Act has increased the amount of information published both routinely by the Council, and in response to individual requests. However, we do not believe it was intended that the Act should enable information with a commercial value to be exploited by an applicant. At present, it is unclear to what extent an authority can charge
for information in accordance with its publication scheme, before that information is no longer “reasonably accessible” to an applicant under Section 21. In our view, where an authority has reasonable grounds for believing an applicant intends to exploit information commercially, there should be an exemption which requires their request to be dealt with under the Re-use of Public Sector Information Regulations 2005 which permit charges covering certain costs and a reasonable return on investment.

February 2012
The Society of Editors has more than 400 members in national, regional and local newspapers, magazines, broadcasting and digital media. It has always supported the principles that underpin the Freedom of Information Act.

The Act has become an essential journalistic tool which has helped create a climate of genuine openness and transparency in British public life.

It is, therefore, vital that any subsequent refinements do not compromise these very real gains.

Any new constraints placed on those making formal requests under the Act will not serve the public interest, playing instead into the hands of organisations wishing to manage the media at the expense of transparency.

The experience of our members and their journalists in using the Act has revealed a number of operational weaknesses.

For example, it has proved to be feeble when applied to requests aimed at finding out specifically why certain decisions were taken. This is a fundamental element of bread-and-butter reporting – addressing the public’s right to know how its money is being spent, and the reasons behind those decisions.

Some local authorities have complained about what they see as the sheer volume of FOI requests submitted to them. That represents a fundamental misunderstanding of the need for and value of the Act. When the public is accused of apathy and the media of trivialisation, they should be pleased rather than critical of such attention. Use of the Act was always going to mean requests, and I must stress that no media organisation makes FOI requests lightly.

Sometimes a journalist may make a number of similar requests for information from local authorities in a given area in order to carry out a comparative analysis.

It has been suggested that the lack of a ‘motive clause’ should be redressed and that in future, people making requests should be forced to explain why they want the information.

We would not wish to see the Act weakened in this way. Important stories in the public interest are more often than not the sum of their parts, turning on micro-details, or a string of them. The effectiveness of the Act as a means of uncovering the truth would be dramatically reduced should journalists be forced to disclose the purpose of their enquiries.

The Freedom of Information Act was introduced partly to combat the creeping secrecy which was spreading through government, local authorities and other agencies. Unfortunately, there is still the very real threat of a return to those darker days if the progress already achieved is not consolidated.

For that reason, we would be concerned to see steps taken towards introduction of any system which introduces categories of documents within departments which would enjoy absolute exemptions. This would merely be an encouragement to retain information under those headings.

Some of our feedback indicates it is by no means unusual for officials to circulate memos marked as ‘restricted’ and ‘policy’ documents which are nothing of the sort, in order to evade the provisions of the Act.

At present, cost limits only apply to the expense of locating and extracting information but does not extend to redaction or any other kind of processing in a response to an FOI request. The rules should stay as they are.

Journalists and campaigners should be free to ask questions in precisely the same way as anyone else. To introduce different categories of information requester would be undemocratic, to say
nothing of the attendant difficulties in defining a ‘journalist’ in the first place. The FOI Act is for everyone. Access to information by the press is both necessary and desirable in a healthy society, and more than average use of the FOI Act is an obvious consequence.

It is no exaggeration to say that a central problem for the press in using the FOI Act stems from the fact journalists are already treated differently to others applying for information.

Operational experience of working with it also suggests delays in responding to legitimate requests for information are still cause for concern. The current 20-day limit on replies would be sufficient, if it were adhered to.

Equally, there are too many instances of the deliberate misuse of exemptions, and there should be stiffer and clearly-defined penalties available. Under the current arrangements it is possible for officials to keep information hidden for more than a year. Failing to keep appropriately full records should also be an offence under the Act.

The service offered by press offices is often cited as a reason for making changes to the current the Act. It must, however, be remembered that press offices are working to their organisation’s own remit and are often under pressure. As a result, questions are not always answered fully nor with the precise detail required in response to formal FOI requests.

Without the FOI Act it would frequently be impossible to obtain information which is otherwise unavailable. It would not be possible to double-check whether that information provided by press offices in response to non-FOI requests was accurate and complete.

Finally, the Act suffers from inconsistency, with a wide spectrum of approaches applied by information controllers. In practice this highlights the intransigence of some set against the good example of others.

Encouragement and incentives aimed at ensuring the spirit of the Act is followed to the benefit of all would be valuable. The underlying problem remains in the lack of a clear purpose clause. Without one the Act, with its long lists of exemptions, appears more like legislation aimed at restricting information than what was intended. The idea should be to transform the culture in government and other public bodies from one that restricts the flow of information to one that encourages the release of all information unless there is a good and positive reason not so to do.

February 2012
Written evidence from The Press newspaper in York,


We are aware that the committee is scrutinising the Freedom of Information Act (FOIA). As a local newspaper that has long prided itself on its investigative and campaigning role within our community, we feel it is appropriate for us to highlight our experiences of the legislation.

Since the FOIA came into force in 2005, it has allowed our journalists to uncover stories of significant public interest that would otherwise have remained hidden. We believe that the Act has been a great force for good, in holding public authorities to greater account and allowing the public unprecedented access to information of public interest.

We have read with interest the memorandum by the Ministry of Justice, which has been presented to the committee. We are concerned with the suggestions that FOIA requests from journalists may be perceived as a “drain” on resources, and that it is perhaps not “fair” for public money to be spend answering such questions. (p104 of the memorandum). We are concerned also by the suggestion that requests are submitted with the overarching aim of obtaining “a ‘good’ media story or to irritate organisations”. (p127 of the memorandum). It is our view that the FOIA was a long-overdue recognition of the public’s inherent ownership of public information, and of its right to see that information free of charge (certain exemptions notwithstanding).

It is correct that any news organisation is always keen to source ‘good’ news stories. However we believe it would be a mistake to believe that FOIA requests by the media are, by and large, speculative or frivolous.

Within our newsroom, the FOIA has been used pointedly and with consideration, to unearth information that we believe to be in the public interest, and which would otherwise not have been made available to our readers. Most of our reporters have undertaken dedicated training in the FOIA and use it carefully and as a means of trying to corroborate and verify stories on which they are already working.

Public organisations are increasingly keen to manage their reputations, meaning that official statements in response to media inquiries are invariably polished responses by professional communications experts. They are routinely loath to provide information that reflects poorly on their organisation. The FOIA has been invaluable in ensuring that a press officer’s reluctance to divulge such information does not prove decisive. Used well, the FOIA is a way to prove, or disprove, an existing line of journalistic inquiry.

It is perhaps useful to detail some examples of where the Act has proved beneficial, to us and to our community:

1) In 2005, City of York Council considered, before ultimately shelving, proposals to move a homeless hostel known as Arc Light to a new location, in a busy residential area. Many local residents were unhappy about what they perceived as a lack of openness. In December 2005, through the FOIA, we obtained council minutes and correspondence showing that the proposal was being discussed five months before
local people were told, and were able to show the level of concern within the council itself, about the lack of consultation.

2) In 2006, a woman was killed crossing the A64 in North Yorkshire, after alighting from a bus. Documents released under the FOIA allowed us to reveal that a safety audit carried out previously had already identified the dangers to pedestrians at the site.

3) In November 2006, before the Home Office policing website was enabling detailed crime-data to be easily accessed by the public, we ran a three-day investigation based on FOIA requests, showing the varying crime patterns across every council ward in York.

4) In late 2006, we were told that fingerprint scanners were in use in York schools. In January 2007, using information obtained under the FOIA, we revealed that 12 York secondary schools were using such scanners in their libraries or canteens, including two without parents’ knowledge. Privacy campaigners and local politicians raised concerns over the practice. As a result of our story, one of the schools suspended use of the scanners, the two schools that had not informed parents wrote to all parents to explain the system, and local politicians lobbied the Government for clear guidance on the propriety of the practice. Such guidance was issued later that year.

5) In 2008, City of York Council was planning a move to new headquarters at a site known as Hungate. The move caused great controversy, including due to the unpopular design of the proposed building and the cost involved. In July 2008, after English Heritage objected to the council’s planning application, the council abandoned the proposal. Using the FOIA, The Press was able to obtain an internal memo from the council’s conservation architect, which warned the planning department even before the proposals were tabled that the building was inappropriate. We also used the FOIA to obtain correspondence between English Heritage and the council, showing that the former had indicated support for the scheme before performing a late U-turn. In essence, the Act allowed us to give crucial detail to our readers about how the project had collapsed.

6) In 2008, City of York Council hired external consultants to advise them on a cost-cutting programme, but a dispute meant the consultants walked off the job before it was finished. The council leader had declared that they would be paid only if they achieved savings but we discovered they had been paid £600,000. In 2011, using the FOIA, we were able to prove that they had then been paid a further £211,000 of public money to settle a legal dispute. Council expenditure on external consultants is now considerably lower than in past years.

7) In 2008, we were informed by a source that several council laptops had been stolen. The FOIA enabled us to ascertain that 12 had been stolen and to reveal that confidential data was on some of the machines. A few weeks later, the council announced it was to improve security on its computers.

8) In 2010, we were made aware of concerns over data management at North Yorkshire Police, particularly over suggestions that the force was effectively harvesting callers’ information for its database as an end in itself. We had a lengthy FOIA wrangle with the force, which initially refused to answer many of our questions. Eventually, after we appealed, we were given enough information to reveal that tens of thousands of people who had never been accused, nor suspected, or an offence were being kept on the force’s ‘niche’ database; that police staff had been told to routinely ask callers for their ethnicity and date of birth, as well as their contact details, so they could be added to the database.
9) We were informed that, in 2010/11, City of York Council had paid a PR consultant, Jim Knight, to help present the case for its “community stadium” project. Such expenditure was criticised by opposition councillors but the council would not detail the consultant’s involvement. Through information released under the FOIA, we were able to show how many days’ work he had done for the council, and what his remit was. We are in the process of trying to ascertain how much he was paid. The council has since confirmed that it will not spend public money on Mr Knight’s services again.

10) In 2011, North Yorkshire Police merged its two control rooms into one. We were informed that the move had not gone smoothly. The force would not voluntarily give any detail about the problems, but under the FOIA, we were able to reveal that the force was taking twice as long to answer 999 calls as it was 12 months earlier. Response times have since improved.

In our experiences, the Act generally works well. Most public authorities are aware of the legislation and, with rare but notable exceptions, they usually meet the time limits.

Our most consistent concern with the legislation is that many public authorities, when not disclosing information, rarely adhere to the obligations in Section 16 of the Act, namely the duty to advise and assist the applicant. Our local police force is particularly poor in this regard, consistently failing to offer assistance on how a request could be amended, or on which information similar to that requested could be released. More often that not, we receive a response far later than the 20th working day and with a straight refusal, devoid of any assistance.

Many public authorities have embraced the FOIA by publishing online all information they disclosed under the Act. We regard this as good practice, and believe it may be beneficial if more authorities were encouraged to follow suit.

We do believe that the imposition of charges to any applicant would be a retrograde step, in that it would deter applicants and therefore potentially prevent information that should be made public from being disclosed. Similarly, we believe that the reduction of the cost threshold for public authorities, without a corresponding duty on them to provide a cost breakdown, would enable authorities to withhold information without first giving adequate consideration and deliberation to the case.

*February 2012*
Written evidence from GM Freeze

1. GM Freeze
1.1 The GM Freeze alliance
GM Freeze is an alliance of 36 UK-based organisations calling for a moratorium on genetically modified (GM) foods, cultivation of GM crops for any purpose and patents on genetic resources in agriculture, food production and forestry until the need for and safety of GM technology has been established and alternative approaches have been fully evaluated.

1.2 GM Freeze membership
Our members include consumer groups, farming organisations, environmental groups, development agencies, religious groups, animal welfare groups and private companies.

2. Summary of evidence
2.1 GM Freeze has used the right to access information provided by the Freedom of Information Act (FOI ACT) when we felt it was important to do so.

2.2 Access to information has helped improve the enforcement of regulations and monitoring in some areas but not in others.

2.3 The use of exemptions for data protection, national interest and commercial confidentiality restricts the effectiveness of the FOI Act and prevent it fully achieving its objectives.

2.4 The presumption should be to publicly release information, and the onus should be on those seeking to restrict access on grounds of commercial confidentiality and national interest to prove their case.

2.5 Charging should not be used as a means to restrict access to information.

2.6 Bodies holding information should post as much information on the web as possible to reduce the need for information requests.

2.7 Core costs of providing information (collation, redaction and assessment of public interest) should be borne by central government.

2.8 Copying charges should be at cost.

2.9 Information should be provided electronically if requested.

2.10 Redaction should not be used to render released documents meaningless.

2.11 Data should be made available in a form that allows them to be analysed statistically.

2.12 The FOI Act has only partially achieved its objectives, but there is some way to go before openness and transparency is universally adopted by all public bodies.

2.13 The FOI Act has the potential to improve decision making and democracy.

3. Background
3.1 GM Freeze uses the Freedom of Information Act and Environmental Information Regulations
GM Freeze has used the FOI Act and Environmental Information Regulations 2005 (EI Regulations) to request information related to GM policy, regulation, monitoring and enforcement of
GM legislation on a number of occasions. GM Freeze staff also have experience dating back to the 2005 of making requests for information which pre-date the legislation, in particular for data held on the "Public Pollution Register". The memorandum to the Committee from the Department of Justice largely reviews the Act from the perspective of official bodies receiving FOI requests, rather than of those making the requests. As the FOI Act was primarily aimed at assisting the electorate, not the executive or government, we are surprised more effort has not be made by the Department of Justice to survey the views of those making requests for information.

3.2 Types of request made under the FOI Act and EI Regulation
3.2.1 Our requests for information have related to the presence of GM contamination in the food/feed chain, the enforcement of legislation, the development of GM policy in the UK and the relationship between central government, statutory bodies and the private sector (eg, biotechnology companies). On several occasions we have appealed to the Information Commissioner’s Office (ICO) against decisions or proposed charges. On one occasion we appealed as far as an Information Tribunal. We have made requests to local government in all parts of the UK, the Food Standards Agency (FSA) and the GM Inspectorate.

3.2.2 To assist the Committee we list the majority of requests we have made, to whom and the reason behind the request in the Annex 1 to this evidence.

3.2.3 We will now address the questions posed by the Committee.

4. Does the FOI Act work effectively?
4.1 Framing of our reply
Our response to this question is framed by the objectives of the FOI Act as set out by the Memorandum to the Justice Committee by the Department of Justice and is based on our experience of making information requests between 2005 and 2011.

4.2 The objectives of the FOI Act are:
- To increase openness and transparency.
- To improve accountability.
- To improve decision making.
- To increase public involvement in decision making.

4.3 Openness and transparency
4.3.1 In our experience implementation of the FOI Act is very patchy across all the public bodies it covers, so the objective to improve openness and transparency is not always achieved. If those seeking information are persistent, useful information can be brought into the public domain which otherwise would not have been public. Sometimes this can be beneficial to the public bodies releasing the information because it shows them in good light and that they perform their duties and responsibilities in a lawful, responsible and inefficient manner. Sometimes the reverse is true. Sometimes it may lead to improvements in the way legislation is implemented.

4.3.2 We also recognise that release of information has the potential to produce better legislation and policies, but in our experience this has so far not applied to GM crops.

4.3.3 Below we provide details of cases in which we have been involved where the existence of the FOI Act has shed light on how different parts of national and local government implement regulations.

GM LL601 rice contamination
4.3.4 In the contamination incident involving the GM trait LL601 (see Annex 1) the information released to us suggested the FSA was not acting entirely in the public interest in the way it handled the recall of products and in its relations with the food industry. Documents revealed confused
messages regarding the need to recall contaminated products despite the fact that marketing an unapproved GM organisms (GMOs) in the EU is illegal. The FSA only took appropriate action it received notice that a Judicial Review of its handling of the case would be sought after FOI requests were made. Although the Judicial Review (brought by Friends of the Earth) found that the FSAs actions had been lawful, the written judgment made several criticisms of the Agency’s conduct clearly aimed at improving its response to similar incidents in the future. These criticisms included the FSAs:

- Failure to issue any Food Alerts to local authorities.
- Failure to notify the public of which batches of rice were contaminated.
- Failure to provide legal guidance to local authorities at the start of the incident.

4.3.5 The judgment also recommended an internal review of the LL602 case by the FSA.

4.3.6 One positive outcome of the release of information related to the LL601 case was that it cast light on the risk of GM contamination from unforeseen sources and how ill prepared the authorities were to deal with such incidents. It was clear to us that minimal forward planning had been carried out and that the FSA had little idea which food/feed imports were at risk from GM contamination and so might merit routine monitoring to prevent contaminated cargoes entering supply chains and avoid the potentially huge cost of withdrawing products from sale. GM Freeze used these insights to produce a report identifying as many “at risk” food/feed imports as possible given the information available globally. The report recommended to the EU and UK a number of measures that should be taken to minimise the risk of future contamination incidents occurring.

Contamination incidents since LL601

4.3.7 GM contamination incidents since the LL601 case include the contamination of Chinese rice imports in 2008 with the unapproved trait Bt63 and the contamination of Canadian flax imports with the unapproved GM trait CDC Triffid in 2009. In both cases the UK response has been more urgent and effective than for LL601 rice, possibly as a result of the use of the FOI Act to obtain documents showing the lack of coherence and urgency of the FSA’s initial response to LL601.

4.3.8 We have made further requests to the GM Inspectorate (GMI) regarding the possible import of flax seed from Canada potentially contaminated with CDC Triffid (having first checked the GMI’s website for relevant information and found none). The GMI’s initial response was reassuring but lacked any detail to back up its position. We had to make a second request to obtain the risk assessment documents showing in detail the measures taken to ensure that seed lots from Canada were free from GM contamination. We concluded that the GMI measures would probably have prevented contaminated seed being sown in the UK. This begs the question why the GMI had not posted its risk assessment on its website as soon as it was available, as it would certainly have helped farmers and other interested parties to make judgements about the risk of GM contamination and saved the costs of dealing with two information requests from GM Freeze.

4.3.9 From our own experiences, we have concluded that the FOI Act has gone some way to make the monitoring and enforcement of the GMO regulations more open and transparent, but there is still a reticence to be fully transparent about what has happened, where, why and what remedial measures were taken in cases involving contamination.

Somerset GM oilseed rape contamination

4.3.10 Reluctance to release all relevant information is illustrated by the case of the 2008 Somerset oilseed rape (OSR) field contaminated with Monsanto’s unauthorised GM trait GT73. Our interest was to ensure that the local environment and farmers/beekeepers were protected from a prolonged contamination, as we were aware that OSR seeds are persistent in the soil, that the plant can cross out into other crops and wild relatives of the crop and that GM pollen could be transported over several kilometres by wind or pollinating insects including honey bees. Our concerns grew when Defra revealed in its initial notification of the incident that the trait had already
crossed into a neighbouring OSR field. In addition we felt the case may also throw useful light upon the issue of the coexistence of GM and non-GM crops, suitable separations distances between them and liability for any harm caused by GM contamination.

4.3.11 However in response to our request for basic information about the incident, Defra did not provide the full picture. It withheld the precise location of the contaminated field and the distance between the contaminated crop and the contaminated neighbouring field, on the grounds that this information was the landowner’s personal data under the Data Protection Act and the case was not of sufficient public interest to merit the Data Protection Act being waived to reveal it. We appealed against this decision to Defra and then to the ICO and finally requested an Information Tribunal. The judgment of the Tribunal upheld Defra’s position because the level of contamination was felt to be too low to bring public interest into play. We do not consider that using the level of contamination or pollution to decide whether the Data protection exemption should apply is in the spirit of the FOI Act.

4.3.12 Using what information Defra did provide, along with more (provided by a host of sources including Ministers’ letters to Somerset MPs, Parliamentary Answers, answers in the Scottish Parliament – the seed was also sown in Scotland but destroyed before it flowered, the GM Inspectorate’s annual report and information available on the internet) we were able to identify the company that owned the contaminated seed and the Parliamentary constituency where the field was located. The company, Aardvark Investments, went into liquidation in 2010 following this incident, but it is not certain if the two events are connected because of the lack of openness and transparency throughout this case.

4.3.13 We still believe that it is in the public interest for the full facts of this case to be made public because they may have some bearing on future policies relating to GM crops coexistence, seed and honey purity, separation distances between GM and non-GM crops and liability for health, environmental and economic harm.

4.3.14 All these are contentious areas of GM policy where Defra is in dispute with the administrations in Wales and Scotland as to what UK policy should be, including at EU level. As we indicate in Annex 1, we have tried to obtain information on the nature of the discussions between the four UK administrations by requesting copies of the minutes of the UK’s GM Policy Coordination Group, which Defra refused to provide. We eventually obtained these from the Scottish Executive (via a request from a Scottish member of GM Freeze), however they were heavily redacted (see Annex 2 for some examples) in all aspects including the complete agendas of some meetings. The value of these documents is therefore very limited. As a result of the lack of openness about the GM contamination in Somerset and the heavy redaction of the GM Policy Coordination group documents, GM Freeze was left wondering whether an open and transparent discussion on the issues of GM coexistence, contamination and liability was in fact the last thing in which Defra was prepared to engage.

**The use of redaction**

4.3.15 GM Freeze fully accepts the need sometimes to protect the identities of employees and individuals when releasing materials under the FOI Act, although in cases of serious maladministration by individuals we believe releasing this information could be justified. We cannot accept that redaction should be used to render released documents meaningless. The recipients of heavily redacted documents are not in a position to judge whether or not the redactions are justified in the public or national interest or for reasons of commercial confidentiality. It is also very uncertain whether or not going to the expense of an Information Tribunal would resolve the matter because it is unclear whether those appealing would see be able to see the original unredacted documents as part of the case (which would render the initial redaction pointless). The extent to which redaction is sometimes used is illustrated by the examples we have seen in Annex 2.

**Pricing groups and individuals out of accessing information under the FOI Act**
4.3.16 Civil society groups and individuals pursuing information request under the FOI Act may require a large number of documents to establish the facts of the case in which they are involved. This may require the organisation to which the request has been sent expending a considerable amount of staff time in collating the information, undertaking an assessment of public/national interest, data protection and commercial confidentiality tests for each document and then redacting sensitive information. Some of the time needed to carry out these tasks may result from the way in which information and data are held by the authority concerned and are not the fault of those seeking release of the information. Poor record keeping and filing which could make collation a longer job than should be necessary, yet the cost burden of releasing the information can be used as grounds for refusal.

4.3.17 Members of the public making information request should not be expected to pay costs stemming from poor recordkeeping (eg, of enforcement procedures) or data management. A basic requirement of all recordkeeping by public authorities should be to ease (for everyone) dealing with information and data requests by the public, other departments and elected representatives.

4.3.18 GM Freeze believes that charging staff time for FOI requests breaches the spirit of the FOI Act (especially if the hourly rate is £36, as indicated by the Department of Justice Memorandum to the Committee). It is wrong because it uses price as a means to limit access to information. GM Freeze has on two occasions been asked to pay unacceptable amounts to obtain basic information about the enforcement of the GMO Traceability and Labelling Regulations 2005. Both cases were resolved in our favour following the intervention of the CIO. However for an individual or local community group the possibility of very high charges may deter them from making requests and so result in vital facts remaining secret. For example in the case of diffuse pollution of air and water a large amount of data may be required to pinpoint sources resulting in very high collation and copying charges for the authority holding the data. Such high charges could be enough to deter individuals or community groups from pursuing their request or getting to the truth.

4.3.19 In our view the costs of staff time for collating information to answer FOI requests should not be passed on to those making the request. Such a policy may encourage bodies holding information to post more information on websites to avoid receiving so many requests as well as to improve their recordkeeping and filing systems so that information can be accessed more efficiently. In paragraph 4.3.8 above we provide an example an information request that could have been avoided altogether if the relevant report had been posted on the GMI website in the first place.

4.3.20 We would recommend that charges for FOI requests are kept to a minimum to cover copying (ie, cost price per sheet). Where possible documents should be provided free of charge in an electronic format if requested (not all petitioners can use electronic information). Given the potential for the FOI Act to create more open and democratic systems of government, we believe that the costs of administration of FOI requests should be borne by central government so that price is not a barrier to obtaining information for either the requester or those responding to the request.

**Improving accountability**

4.3.21 GM Freeze believes the FOI Act has made a small contribution to making politicians and public servants more accountable for their actions and policies, but there is still some way to go. There is still a risk that those seeking to hide their failures to carry out their duties in a lawful and efficient manner may also be able to influence national/public interest, data protection and commercial confidentiality tests or decisions. Using political reasons to justify not releasing information under the guise of national or public interest or data protection cannot be ruled out. It is therefore very important that decisions relating to release of information by public bodies can easily be challenged and reviewed by qualified persons with no involvement in the topic/issue covered by that request. At present the ICO perform this role based on their own guidance documents and some case law. The public interest test is applied on a case-by-case basis, and the explanations
for refusal tend to be in legal language, which may not assist in providing a fully transparent answer or understanding.

4.3.22 In our view the public interest, national interest and commercial confidentiality tests should favour disclosure. In our experience do not. Those wishing to prevent the release of information should make the case for not releasing the information rather than vice versa.

**Better decision making**

4.3.23 From our perspective the existence of the FOI Act has made no difference to the quality of overall decision making on GMOs. We fear the public will become extremely sceptical about their ability to influence decisions, even when armed with the information that undermines or should change the current political thinking. Take, for example, the outstanding work on buffer zones near residential properties to protect residents from pesticide spray drift by Georgina Downs, which was backed by the Royal Commission on Environmental Pollution only to be rejected by Defra. This illustrates very clearly that even with a very strong case a member of the public can find it impossible to change government policy because of the role of companies and other bodies with a vested interest in maintaining the status quo or protecting reputations. In the case of Georgina Downs the views of the pesticides companies and the Advisory Committee on Pesticides prevailed.

**Public involvement in decision making**

4.3.24 There is no indication that the FOI Act has encouraged participation in decision making by the public in a dramatic or meaningful way. In the time since the Act came into force there are very few examples of policies changed because the public reacted to new information becoming available via FOI Act requests alone. The obvious exception is MP's expenses, which generated some significant changes because of the huge public outcry generated by unprecedented media coverage. In other areas of policy the impact of the FOI Act has been less dramatic. Above we have detailed several cases in which we have been involved where the FOI Act may have improved decision making as well as cases where it appears to have no impact at all.

4.3.25 In the regulations for approval and enforcement of GM food and crops there is little sign that access to information has allowed the public to influence decisions any more than before because of the political nature of decisions. Government ministers choose to hide behind "science" in order to make political decisions even when the science shows a great deal of uncertainty and gaps in data. GM approvals are claimed to be "science based" but often long-term health and environmental safety studies are lacking so cannot be the basis for such a claim. Recently we looked at two scientific opinions for GM maize by the GM Panel of the European Food Safety Authority (EFSA), which the UK Government will use for the basis of its decisions to approve (or not) new GM authorisation applications. Both opinions and admit to data or knowledge gaps, yet if past performance is followed the UK will approve them when it comes to voting at EU level. The raw data used to justify approvals is generated by the applicants themselves – all the more reason for it to be in the public domain.

4.3.26 However obtaining raw data to allow independent scientists to re-examine the conclusions of companies and/or scientific advisors has proved difficult. Flowing legal action in 2005 some data were released in Germany relating to an application to grow GM maize MON863. This allowed a team of independent scientists from outside EFSA to scrutinise them. However the data were not supplied in a form that could be loaded into statistical software so had to be retyped to allow this to take place. The group that did this found significant factors that could impact on the conclusion of the risk assessment including poor use of statistics, different reactions between the sexes to feeding GM maize, differences in kidney weights and conditions which could impact on health.

4.3.27 This case demonstrates the potential value of access to information in improving decisions. However access to raw data is likely to be subject to the commercial confidentiality test and is therefore difficult to obtain in a form that allows straight-forward statistical analysis. This makes it far more likely such cases will result in appeals and legal cases by companies who supplied the data to regulators in the first place. This was the case in Bayer CropScience v Defra in 2001 in
which the company sought to prevent Defra releasing data to Friends of the Earth which they had submitted in support of an application to approve their herbicide glufosinate ammonium for use on GM crops. In this case Friends of the Earth found that it was possible to obtain much of the information being blocked in the UK in other EU countries (eg, Sweden and Denmark). Bayer embarked on legal action against Friends of the Earth to prevent it from informing people how to obtain this information via other EU governments but eventually withdrew the case. vi

4.3.28 As these cases illustrate, public involvement in decision making (eg, the approval of a GMO or pesticide) has not automatically followed the introduction of the FOI Act. Barriers are still being erected by industry and bodies holding information, which prevents the level of access needed to ensure the members of the public who wish to engage have the information they need to fully participate.

5. Is the Freedom of Information Act operating as intended?
5.1 GM Freeze believes that the answer to this question is “partially” 
Fulfilment of the intentions of the Act requires complete support from those holding information and administer the Act within the bodies it covers. This requires a sea change in attitudes of some bodies and staff to presume information should be released instead of the reverse.

5.2 Burden on Government
The notion that government will grind to a halt if information is fully available has to be challenged and replaced by the view that ultimately FOI is good for democracy and makes for better decision making.

5.3 Justifying refusal to release
To address this issue fully the Justice Committee may have to examine a significant number of cases where exemptions have been used to refuse the release of information and decide whether release would have caused any lasting harm to a public body or person. We hope our evidence has provided the Committee with some small insight.

6. What are the strengths and weaknesses of the Freedom of Information Act?
6.1 GM Freeze believes that the strengths of the FOI Act are:

• It opens up the possibility that important information will enter the public domain and lead to wrongs being righted, better enforcement of regulations and ultimately better policies and governance.
• It is open to anyone to obtain information.
• It could improve trust in government if there is a further significant step towards openness.

6.2 We believe the weaknesses are:

• The exemptions to releasing information are employed too readily.
• Exemptions can be used for political reasons to hide maladministration or protect vested interests.
• There is a lack of clarity about charging for information.
• Information requests could be avoided altogether if bodies used their websites to make information and data more accessible.
• So far it has only partially succeeded in achieving its objectives.

February 2011
Notes

1. GM Freeze, May 2007. **GM Contamination – imports of food and feed at Risk. Measures needed to reduce the threat**

2. Georgina Downs Pesticide Campaign. **Pesticide Exposures for People in Agricultural Areas**

3. GM Freeze, December 2011. **Papering Over the Cracks EFSA's opinion on cultivating GM MON88017 maize in Europe – Mitigation is not enough**

4. GM Freeze, December 2011. **In Two Minds EFSA GMO Panel concedes Bt crop risks to non-target moths and butterflies, but hangs hopes on unproven mitigation**

5. Seralini G-E, 2007. **Controversial Effects on Health Reported after Subchronic Toxicity Test: A confidential rat 90 day feeding study**

### ANNEX 1 Examples of Information request made by GM Freeze 2005-2011

<table>
<thead>
<tr>
<th>Date of request</th>
<th>To whom</th>
<th>Nature of request</th>
<th>Reason for request</th>
<th>Outcome</th>
<th>Comments</th>
<th>Result</th>
</tr>
</thead>
<tbody>
<tr>
<td>2005</td>
<td>Randomly selected LAs and Port Health Authorities</td>
<td>Information on the enforcement of the GMO Traceability and Labelling Regulations</td>
<td>To test that these regulations were being enforced and on the quality of the enforcement</td>
<td>Mixed response to our questions to start with. To obtain a reasonable sample we had to ask more specific questions</td>
<td>Some authorities replied very quickly. Some tried to make very high charges which was successfully challenged through the ICO. Some LAs were clearly unaware of the legislation.</td>
<td>GM Freeze Published the first report on the enforcement of these regulations including information on costs of sampling and monitoring¹.</td>
</tr>
<tr>
<td>2005</td>
<td>Food Standards Agency</td>
<td>Information about the contamination of maize imports with an unauthorised GM trait Bt10.</td>
<td>To ensure that the response by the UK regulators was effective in preventing further contamination</td>
<td>Some information was provided – but lot was withheld for public interest and international relations reasons – including comments on a press release we issued.</td>
<td>Too many documents were withheld to enable us to fully understand the approach adopted to deal with a significant GM contamination incident.</td>
<td>We gained some information which enable us to make constructive criticism of the FSA’s approach and actions.</td>
</tr>
<tr>
<td>2006</td>
<td>Food Standards Agency</td>
<td>Information the contamination of long grain rice imports with the unauthorised GM trait LL601</td>
<td>To ensure that the response by the UK regulators was effective in preventing further contamination – we were concerned that contaminated stocks were not being removed from sale.</td>
<td>Information was released on communication s between Defra, and FSA and FSA and industry. The case became the subject of the Judicial Review taken by Friends of the Earth.</td>
<td>The JR found in favour of the FSA’s handling of the incident but the judgement made a series of criticisms about how future incident should be handled</td>
<td>Our concerns about the delays in removing contaminated stocks from retail shelves were justified as it was clear that the FSA advice was unclear if lawful.</td>
</tr>
<tr>
<td>2006</td>
<td>Scottish Executive (by Members in Scotland)</td>
<td>Information on the discussions between UK administrations on the coexistence of GM and other crops</td>
<td>Major area of policy where disagreement between UK administration s existed. We wished to find out what issues were subject to disagreement</td>
<td>Minutes and agendas for the GM Policy Co-ordination group released with large amounts of redaction based on public/national interest tests.</td>
<td>Very little useful information on the nature of disagreement s released</td>
<td>Nothing of value gained due to redactions.</td>
</tr>
<tr>
<td>2009</td>
<td>Defra/DTI</td>
<td>Information regarding correspondenc e between Defra and BASF regarding GM potato trials</td>
<td>To establish whether there had been any discussions regarding the siting of the test sites in the</td>
<td>Most correspondence released and information apparently released except that deemed</td>
<td>No information released on whether there was an invite to site the test site in England.</td>
<td>Cast some light upon the relationship between Defra GM unit and BASF.</td>
</tr>
<tr>
<td>Year</td>
<td>Requestor</td>
<td>Request Description</td>
<td>Relevance</td>
<td>UK Comment</td>
<td>EU Comment</td>
<td></td>
</tr>
<tr>
<td>------</td>
<td>-----------</td>
<td>---------------------</td>
<td>-----------</td>
<td>------------</td>
<td>------------</td>
<td></td>
</tr>
<tr>
<td>2009</td>
<td>Food Standards Agency</td>
<td>Information on the handling of the contamination of flax imports with an unauthorised GM trait CDC Triffid.</td>
<td>To ensure the response by the UK regulators was effective in preventing further contamination.</td>
<td>Most documents appeared to be released although some lacked clarity on exactly what measures had been taken eg seed imports</td>
<td>Approach appeared to be an improvement on response to LL601 rice (see above)</td>
<td></td>
</tr>
<tr>
<td>2009</td>
<td>Defra</td>
<td>Request for information regarding the contamination of an oilseed rape crop in Somerset with a GM trait including the location of the field</td>
<td>To ensure the response of the regulators was effective and the interests of farmers and the environment were being protected.</td>
<td>Defra withheld the 6 figure map reference of the field on grounds of data protection /personal information. Other information was provided. Defra failed to meet statutory deadlines for responding to our requests on a number of occasions.</td>
<td>GM Freeze appealed against the withholding of the map reference because we thought that it was in the public interest to do so to ensure the risk of contamination was known to farmers and beekeepers nearby. ICO refused the appeal and we requested a Tribunal. The Tribunal decide there was insufficient public interest to release the location. Release of the location of future cases with higher levels of contamination have not been excluded by the decision.</td>
<td></td>
</tr>
<tr>
<td>2011</td>
<td>GM Inspectorate</td>
<td>To request information on the measures taken to prevent contaminated flax seed</td>
<td>To ensure that seed lots imported from Canada had been adequately checked to</td>
<td>The initial response merely provided reassurance without any detail. Details were provided</td>
<td>The measures detailed following are second letter provided a clear picture of the actions.</td>
<td></td>
</tr>
</tbody>
</table>

UK "commercially confidential. Emails suggested that BASF were consulted about the acceptability of the conditions placed on the release consent. 2009 Food Standards Agency Information on the handling of the contamination of flax imports with an unauthorised GM trait CDC Triffid. To ensure that the response by the UK regulators was effective in preventing further contamination. Most documents appeared to be released although some lacked clarity on exactly what measures had been taken eg seed imports Approach appeared to be an improvement on response to LL601 rice (see above) 2009 Defra Request for information regarding the contamination of an oilseed rape crop in Somerset with a GM trait including the location of the field To ensure the response of the regulators was effective and the interests of farmers and the environment were being protected. Defra withheld the 6 figure map reference of the field on grounds of data protection /personal information. Other information was provided. Defra failed to meet statutory deadlines for responding to our requests on a number of occasions. GM Freeze appealed against the withholding of the map reference because we thought that it was in the public interest to do so to ensure the risk of contamination was known to farmers and beekeepers nearby. ICO refused the appeal and we requested a Tribunal. The Tribunal decide there was insufficient public interest to release the location. Release of the location of future cases with higher levels of contamination have not been excluded by the decision. We felt it was important to test personal information v public interest in this case and accept the Tribunal’s decision. However as a result of information released as a result of the hearing and before we were able to confirm the name of the company which imported the contaminate seed, and the fact that they had gone into liquidation soon after the incident. The name (Aardvark Investments was later confirmed by a Parliamentar y Answer. 2011 GM Inspectorate To request information on the measures taken to prevent contaminated flax seed To ensure that seed lots imported from Canada had been adequately checked to |
| Entering the UK following the CDC Triffid incident (see above) having first checked that the information was not on the GMI website. | Prevent ongoing contamination of UK flax crops after we wrote a second time. | taken. | To provide evidence of the measures taken and provide guidance for seed companies. We see no reason why this was not done and had it been so would have saved time and money. |
FOI 95

Written evidence from Centre for Public Scrutiny

Introduction

1. The Centre for Public Scrutiny is a charity devoted to enhancing transparency and accountability in public services. We produce research and work closely with practitioners to identify problems and practical solutions in the way the decisions are made and held to account.

2. Over the last few years, we have worked in the local government, charity, health, education and housing sectors to identify ways in which transparency and accountability can be enhanced – principally, by building links between different organisations at local level, and identifying how and in what context accountability can lead to improvements in the effectiveness of service delivery.

3. Because the focus of our research is on accountability in its broadest sense, exploring how decision-makers respond to those who are holding them to account, and the cultural barriers that can often be experienced in securing effective governance, our response will focus on these cultural issues rather than on specific, process-led issues relating to the volume or nature of information requests, and responses to those requests. Our interests lie in proactive rather than reactive provision of data.

Cultural challenges around transparency and accountability in the public sector

4. We have carried out significant amounts of research over the last several years on cultural, behavioural and attitudinal issues relating to transparency and accountability in the delivery of public services.

5. Our research “Accountability Works” (2010)¹ highlights the existence of a “web of accountability” that cuts across a range of different public bodies, and where different forms of accountability intersect. Transparency, and the publication of official information, helps this accountability to be exerted – but transparency and accountability are not the same thing, and the publication of information does not automatically make for a more transparent organisation. Nor will the publication of information (particularly not reactive publication) automatically bring about any of the objectives of FOIA, as set out in the context of the memorandum’s assessment of those objectives. We consider the approach that the MoJ has set out in its memorandum – based on the assumption that adherence to the process of the FOIA naturally means that these objectives has, to a greater or lesser extent, been met – is flawed.

6. Further research, such as current work we are carrying out on assessing “return on investment”, and research carried out in 2011 on value for money, cost-benefit analysis and social return (“Counting the cost, measuring the value” (2011)², “Measuring what matters” (2011)³) demonstrates the direct benefits of transparency in terms of economy, efficiency and effectiveness.

¹ http://www.cfps.org.uk/publications?item=91&offset=75
² http://www.cfps.org.uk/publications?item=112&offset=50
³ http://www.cfps.org.uk/publications?item=106&offset=50
In our research on performance management, and the use of performance information to drive improvement, ("Green Light" (2010)\(^4\)) we highlight and explored the cultural issues prevalent around transparency. We found that the production and dissemination of information is often seen as a process issue – an additional and unwelcome burden, entirely distinct either from service delivery or from meaningful improvement. A reactive approach to transparency has led to the increased publication of data and information\(^5\), but data and information made available in an ad hoc way not easily digestible to the average layperson, and devoid of meaningful context\(^6\). We do not think that this culturally defensive approach on the part of public bodies bodes well for the “army of armchair auditors”\(^7\) that Ministers believe and expect will take on responsibility for exerting accountability in the new structural landscape of the public sector post-2012.

A true cultural understanding about the benefits of transparency would lead to a situation where the publication of information was seen as a natural byproduct of its original production. Discussions around the minutiae of time and cost limits and the public interest test, and “frustration” at serial requesters, all suggest a lack of understanding about what FOI is for, and what transparency can achieve in terms of improved decision-making. In particular, a preoccupation with the “cost of compliance”\(^8\) presents a gloomy view of a world in which responding to requests is a process-driven approach entirely decoupled from corporate improvement processes.

The MoJ memorandum reflects this mechanistic emphasis on process – on form, rather than impact and outcome. Even the section on accountability\(^9\) assumes that accountability is always about holding to account for past actions, rather than exploring policy development and improvement opportunities\(^10\). Importantly, this section also does not mention a key source of accountability for the new Government – accountability through choice and the market, which relies on the provision of timely, relevant and accurate information about public services.

Cultural change was the prevailing theme of the 1998 White Paper – the Government’s message has now degenerated to leave us in a position where “compliance” is the key marker of success. The fact that Government feels it may be necessary to legislate to require public bodies to release datasets – when a culturally open approach towards transparency and accountable would mean that those bodies would already publish such data – suggests that the process of culturally embedding the principles of freedom of information, and of open data, has a long way to go. Of additional concern in this context is the apparently growing body of evidence from information managers (set out in the

---

\(^4\) [http://www.cfps.org.uk/publications?item=6965&offset=0](http://www.cfps.org.uk/publications?item=6965&offset=0)

\(^5\) As outlined in para 169 of the memorandum

\(^6\) An issue on which we commented on our formal response to the DCLG “Recommended Code of Practice on Data Transparency” (2010). We are surprised that the MoJ memorandum does not attempt to address context-related issues in its examination of responses to data requests.

\(^7\) See, for example, DCLG press release, October 2010: [http://www.communities.gov.uk/news/newsroom/1730482](http://www.communities.gov.uk/news/newsroom/1730482)

\(^8\) Para 172, see also discussion of the “additional burden of compliance” complained about by public bodies engaged in commercial operations.

\(^9\) Section 5B, paragraph 200 onwards

\(^10\) This is a principle which we explore more fully in “Accountability Works”, supra
memorandum appendices) that the regime should be “tightened up” to prevent any inconvenience and irritation these managers may experience as a result of answering complex requests, and (for example) the assertions set out in paragraph 205 around use of the regime by journalists, which contradicts a strong founding principle of FOI that decisions on responses should be made neutrally, and irrespective of the intention or end objective of the requester in asking for the information. Collectively, this presents a one-sided picture that takes no account of the wider benefits of transparency, or the aspirations and democratic rights of citizens making requests in the first place.

Local government

11. The Government has taken a number of steps to open up decision-making in local government in recent months and years, and to bring local people closer to decision makers. The Freedom of Information Act should be seen in the context of these other measures, which include legislative provisions on petitions11, the so-called “Councillor Call for Action”12, and the requirement for councils to publish expenditure information above £50013.

12. The previous Government sought to enhance the proactive availability of public information through such means as the “oneplace” website, which aggregated National Indicator Set (NIS) data across the country14; the current Government has also, as the MoJ memorandum notes, imposed a number of requirements on local authorities around proactive provision of a range of datasets. The local government sector itself has long recognised the value in sharing high-level performance data amongst professionals15, although this has not always been easily translated into a willingness to share such information more broadly with the public.

13. The Localism Act involves a number of changes, including the community right to challenge and the community right to bid, which rely on the proactive provision of information by local authorities and their partners; other structural reforms introduce market-led approaches to service provision in areas such as health, social care and education, which are predicated on the availability of significantly more, and more accurate, information about provider performance to allow consumers to make intelligent choices about who provides them with public services. In this context, the Freedom of Information Act is but one element in a rapidly widening spectrum of transparency provisions, being led by a range of different Government departments, largely in isolation.

14. We will focus on three areas within local government where research we have carried out suggests that practice demonstrates some important wider lessons about the operation of the UK’s freedom of information regime.

---

11 Introduced in the Local Democracy, Economic Development and Construction Act 2009
12 Ibid
13 Cited in the memorandum and also see http://www.communities.gov.uk/localgovernment/transparency/localgovernmentexpenditure/
14 Now abolished
15 Most recently through the Local Government Association’s “LG Inform” web-based tool
a. Transparency in public service partnerships

15. Government is encouraging public bodies, and organisations delivering public services which may not be “public bodies” for the purposes of FOIA, to work together to deliver services – particularly in local areas.

16. This is a trend that began in earnest with the Total Place pilots of 2009/10, and which has continued with the present Government’s approach towards community budgeting. The Government has also encouraged councils to adopt innovative, partnership-focused service models in order to save money. Councils and other public bodies are beginning to share staff and offices, develop policies and procedures jointly, and make decisions in “partnership boards” which sit above the level of individual organisations, such as Local Strategic Partnerships (LSPs), Community Safety Partnerships (CSPs) and Health and Well-Being Boards (HWBs). With this comes the sharing of data, and the creation of governance structures that are often not subject to formal scrutiny.

17. While requesters can still approach individual organisations to acquire partnership information, the fact that partnership bodies are not “public bodies” for the purposes of the Act (and, in many instances, lack legal personality) creates significant problems in terms of transparency, accountability and the probity of decision-making. Parties to such partnerships are under no obligation to release information about regular meetings or decisions made in partnership, and their work tends not to be publicised or held to account in a coherent way.

18. The FOI regime as it exists now reflects individual organisational boundaries – in the developing landscape of more innovative means of decision-making, it will become increasingly separated from reality. This will particularly be the case as more services of a public nature are provided by private organisations, exempt from the Act. In order to extract information relating to these services, requesters will have to negotiate contracts and understand which public body has commissioned the service initially – and hope that this public body has access to the information sought. Requesters will also need to expect to be frequently rebuffed under the “commercial confidentiality” exemption. We advocate more than an expansion of the list of organisations to encompass other bodies – it could be that a more expansive general class description of “public body”, or amendments to the regime to take account of partnership working, will be necessary to avoid this problem from being compounded in the future. In this context, the complex nature of the Order-based process set out in ss4 and 5 of the Act for the imposition of FOI obligations on other bodies is inflexible and unresponsive.

16 Abolished in statutory terms in the Localism Act 2011, but expected to continue in most places because of the practical benefits they bring in terms of more joined-up decision-making.

17 Insofar as it requires individual, specific public bodies to draft publications, respond to requests, and so on.

18 For example under shared services or commissioning arrangements. We explore the implications of these issues in our policy briefing on this subject at http://www.cfps.org.uk/publications?item=6982&offset=25
19. It is disappointing that the memorandum makes no attempt to engage either in the
development of public service partnerships or the increasing delivery of public services
by private organisations.

b. Use of FOIA by overview and scrutiny committees

20. Overview and scrutiny committees in local authorities have specific rights under the Local
Government and Public Involvement in Health Act 2007 to “request information” from
 certain public service partners (listed in s104 of the Act). These powers are intended to
complement those in the Freedom of Information Act and will be restated in the Localism
Act 2011, once that Act has commenced.

21. In local government, there is not a widespread use of the Act by overview and scrutiny
members or committees. We are aware of only a few examples of councils which have
used the FOI regime to extract information from public bodies in the local area. Such use
of the Act is regarded by many as a “nuclear option” which, if exercised, would probably
have wide ranging political and organisational impacts.

Case study.

22. In one unitary authority (Borough A), there was a particular instance where the Freedom
of Information Act was used by the chair of a scrutiny committee to try to obtain council
performance information.

23. In 2009, the council moved from a system of quarterly performance reporting to reporting
high-level information six-monthly. Scrutiny committees received this information as a
matter of course. However, the chair of one committee noted that her committee had not
received relevant data for more than a year, notwithstanding repeated requests. The
chair decided to submit a formal Freedom of Information request on the committee’s
behalf. The request was rejected on the grounds that the material was intended for future
publication (and it was published subsequently, although earlier that would have been
the case but for scrutiny’s involvement).

24. There was an immediate understanding within senior management at Borough A that the
fact that this was necessary said a lot about the organisation. The chair felt that
performance data had become the “possession” of the council’s Cabinet, but without any
feeling of corporate ownership – this was a systemic issue, rather than a “cover up” of
particular data.

25. Resistance to publication was political in nature, and derived in part from a lack of
ownership on the part of Cabinet of this information. Hence, there was an unwillingness
to release and discuss information which was not properly understood, or engaged with,
by the council’s leadership. This reveals a tension about who should be engaging with
performance data – officers or politicians, scrutiny or the executive – not to mention, the
council corporately, or local people.
26. The council’s more recent approach to performance management and monitoring has demonstrated a sea change. A change in political control in 2010 did not automatically lead to better practice, but contributed to a process of change that has led, as a direct result of the FOI request, to a more open and engaged approach with performance information.

27. Evidence of this can be found in more recent scrutiny work that Borough A has been carrying out which has looked at the use of KPIs and other performance measures in a public-faced service. Here, members examined performance information in detail, examining whether key performance indicators (KPIs) in the service concerned had meaning. This demonstrates a more open, accountable and sophisticated approach to performance information, both by the executive and by scrutiny, than was apparent in 2009, and in consequence a renewed focus on performance information as a source of accountability and as a means for bringing about improvements.

28. Borough A’s example demonstrates that use of FOIA under these circumstances can yield significant results, but these are results that go far beyond process and compliance objectives for the Act, and transparency in general. Borough A’s experience with the FOIA in this context provoked significant organisational change.

29. While the use of formal measures such as FOIA could be corrosive to a positive working relationship between scrutiny and the executive, in this instance it kick-started a more productive approach. Given that this connects strongly to the cultural issues discussed in the earlier section, it is difficult to say whether this positive result would be replicated elsewhere were the circumstances to be repeated.

30. It remains the case, however, that from time to time disputes may occur and, as we have demonstrated, the existence of such formal powers – even if (in fact, especially if) very infrequently used can be an extremely powerful tool in councillors’ arsenals.

31. We cannot comment on the use of FOIA by individual councillors in the conduct of their ward work (whether requests are made of the council or of other public bodies in the area).

32. Schedule 12A of the Local Government Act 1972 (as amended)

33. Anecdotally we are aware that many councils continue to take an approach in their use of Schedule 12A that may not accord with the spirit of the FOI regime. While this is not true of all authorities, there can be a tendency to apply exemptions in a broad brush manner, rather necessarily than to focus on the redaction of specific pieces of data, subject
(where applicable) to the public interest test. For example, we are not aware, across the spread of local authorities, of the public interest qualification, where it does apply, being applied consistently to decisions on exemption – although most authorities have internal paper guidance on this issue prepared at the time of the FOIA’s commencement.

34. For example, we are aware of examples of the exemption around finance and business affairs being used to exclude entire reports on council contracts, shared services and commissioning arrangements, and for this to cause problems for scrutiny committees who wish to investigate such issues further (and, in a broader sense, the general public). In the context of Government plans to open out procurement and commissioning in the public sector (and echoing the concerns we expressed earlier in this response about partnership working), we do not find the wording of Schedule 12A, as amended, particularly helpful on this point. We also note that, in excluding entire reports, authorities may in some instances unwittingly be excluding some evidence which should technically be published under the terms of the FOIA.

35. In the context of achieving the policy objectives both of the FOIA, of providing additional certainty around where whole documents should, and should not, be excluded, and of transparency in local decision-making (in line with the principles of localism) we would suggest that a complete overhaul of Schedule 12A and its associated provisions is necessary.

36. Although Schedule 12A is not a part of the formal “freedom of information regime”, it is fundamental to the way that local authorities proactively publish information and needs to be considered as an adjunct to any study of the FOIA. The paragraphs of the Schedule were amended significantly to comply with the provisions of the FOIA.

Conclusion

37. In our view Governments of all political hues have taken a piecemeal approach towards freedom of information in the recent past. The Freedom of Information Act has been only one element of a raft of unconnected policy provisions which have collectively promised much, but delivered little in the way of real change to the way that decision-makers think and act – as the MoJ memorandum makes clear. In an environment where adherence to procedure is deemed more important than substantive, meaningful transparency, it has proven difficult for anyone with a stake in this debate to focus on the fact that transparency can help to improve the way that services are delivered. Instead, disagreements about the way in which the resource implications of FOIA are calculated, and the intricacies of the public interest test, have predominated.

38. A review exclusively of the Act itself reasserts this ad hoc approach, and we strongly urge the Committee to take this opportunity to carry out a more general investigation into freedom of information and transparency across Government, with the assistance of other Committees.

February 2012
Ofcom is the independent regulator and competition authority for the UK communications industries, with responsibilities across television, radio, telecommunications, wireless communications and postal services. Our primary duty is to further the interests of citizens and consumers.

Question 1: does the Freedom of Information Act work effectively?

We are a strong supporter of the Freedom of Information Act and the release of information. We are committed to being as open and transparent as possible and have always endeavoured to make the maximum amount of material available to the public. Our website contains substantial amounts of information and data, including freedom-of-information requests and responses so requesters can see what material has been provided as often different requesters will ask for the same material.

Since the Act came into effect, we have received approximately 3,800 requests (750 a year on average) for information. We supply, on average, 75-80% of what is requested. Our retention of material, using the permitted exemptions, is rarely challenged by requesters. We have a relatively small number of internal reviews annually and an even smaller number of cases (approximately six a year) escalated to the Information Commissioner. We have only had two cases referred to the Information Tribunal, both of which related to the interpretation of the Tribunal’s powers rather than to our legitimate use of an exemption to withhold information. In both instances, the Tribunal found in our favour. In 2011, we spent a total of 6,723.35 hours (960 working days) on freedom-of-information requests. This equates to approximately four full-time-equivalent staff.

We believe all the exemptions in the legislation work well and are appropriate. The one provision about which we have some concerns is the 18-hour rule. In practice, we have only applied this rule to 70 cases (i.e. 2% of the total we have received). However, the fact the rule can only be applied to the retrieval of information and not to its redaction once found does create a burden for us.

Although it is often relatively straightforward to retrieve information, searching through it to remove names (for data-protection purposes, specifically in emails) or to apply exemptions is very time-consuming. We would therefore welcome consideration being given to enabling redaction time to be included in the time-restriction rule to reflect the extra time pressure this adds and would be content to see the time limit for handling requests increased as a consequence.

Question 2: what are the strengths and weaknesses of the Freedom of Information Act?

The legislation has enabled information genuinely helpful to the public at large to be made available when previously it was not. The Act provides a number of exemptions that are appropriate and work well.

In terms of weaknesses, complying with the legislation has increased our costs. We have a central team of three colleagues that coordinates all freedom-of-information requests and then supervises colleagues elsewhere in the organisation who gather the requested information. Legal resource is also required to ensure any exemptions are correctly applied. The costs associated with complying with the Act are substantial and, particularly in a time of substantial cost-cutting across the public sector, should be taken into account in considering any expansion of its scope or reduction in the use of exemptions. The 18-hour rule is a specific concern as noted above.
For a requester to make an application under the legislation costs nothing. Arguably, that is as it should be. However, allowing such unfettered access to public bodies enables requests to be made for what are sometimes frivolous or vexatious reasons rather than to benefit the greater public. While the majority of requests are well intended and helpful to the recipient, our resources are put under particular pressure in dealing with detailed requests where it is questionable the legislation is being used as was originally intended.

Examples of this can include requests from individuals participating in a campaign. Often these are the result of a decision we have made with which the campaigners disagree. In the last 12 months, we have dealt with two extensive campaigns that resulted in over 50 individual requests for information. In these cases, the time and resource cost to us in dealing with each request was substantial. However, we were unable to treat the requests as vexatious as the individuals concerned did not each put in excessive requests themselves, notwithstanding the high overall number of requests.

**Question 3: is the Freedom of Information Act operating in the way it was intended to?**

The Act has allowed the general public to source information and acts as an arbiter for transparency and accountability in the public sector. However, it is questionable whether all requests made comply with the original intention of the legislation: to make available information that is genuinely in the public benefit. We refer above to frivolous and vexatious requests. We are concerned these types of request, where the wider public benefit of releasing information is not apparent, are not an effective use of the public monies and licence fees that fund our activities.

The Ministry of Justice’s Memorandum on the Act refers to a “chilling effect” on the recording of information. There is no doubt this is a consequence of the legislation. Public bodies are now much more careful about what is recorded in email or document form. From a public-records perspective, we are concerned future records are being minimised as a result of the impact of the legislation. We have looked at, for example, board minutes of other organisations and note, like ours, they are now less detailed than before the legislation.

We are aware consideration is being given to an enhanced right to data. The Committee should be aware such an enhanced right will not just have an impact on resourcing but also has the potential to inhibit free and frank discussion, which is a vital part of effective policy development. For this reason, we are not convinced the burdens imposed by an enhanced right to data would be proportionate to the Government’s intended aims.

The Memorandum published by the Ministry of Justice also asks about the effectiveness of using publication schemes. The legislation requires all public bodies to prepare and publish a publication scheme setting out what information the organisation will publish on a regular basis. We do not believe such a scheme adds value to the disclosure of information due to the ease with which information can be searched for via search engines and other web technology. From our experience, we are not aware much use is made of our publication scheme. Individuals who seek information on our website tend to use our website search engine to find the material they require.

February 2012
Written evidence from the University of Sheffield

I am a senior lecturer in the Journalism Studies Department at the University of Sheffield. Since the Freedom of Information Act came into force, I have taught journalism students to use it. Our Department was the first to require students make requests as part of their degree assessment. As a consequence, I have supervised the making of more than 300 FOI requests, which includes helping students to choose the subject of the requests, and to draft them. I have seen the responses and information gained from public authorities, and read students’ analyses of their experiences in making the requests – for example, notes of contact with the relevant authorities before and after the requests were made. I would add that the students make FOI requests for reasons other than to gain experience of using the Act. Information gained has been used in their coursework in other modules, and in a few instances has led to news stories being published in the media. Also, students need to have experience of using the Act to help them gain employment in the media, because employers value this. The experience students gain of using the Act is also of value to public authorities, in that students – many of whom become journalists – learn to word and frame requests in ways which save authorities time in the response process.

Before joining the department, I was a journalist for 18 years, and for most of that time was a crime or investigations reporter in the regional press, and spent a year as the Observer’s Northern Reporter. I have also used the Act myself on occasion, as an academic.

Since 2009 I have been co-author of McNae’s Essential Law for Journalists. Among UK journalists this is the best known legal and ethical handbook, and is kept in many newsrooms. It was first published in 1954. The 21st edition is being published in 2012. It is also a leading textbook for university journalism departments. Mike Dodd, legal editor of the Press Association national news organisation, is co-author. It contains a chapter on the FOI Act.

Since June 2006 I have been chair of the media law examination board of the National Council for the Training of Journalists, having served on the board since 2002. For most of this time I have been the NCTJ’s chief examiner in media law.

The points I want to make are:

1) The major weakness of the Act is that there is no effective sanction against a public authority which frequently fails to respond to requests in the 20-day period. In my experience, the worst offenders in this respect are central government ministries. For example, I have made several requests to the Ministry of Justice to which there was no response at all.

2) The fact that there is no statutory time limit for application of the public interest test is also a weakness.

3) The obligation in section 16 of the Act to provide advice and assistance is not always met. It has been made clear by the Information Tribunal – for example, in Christopher Lamb v Information Commissioner, EA/2006/0046 – and by the Information Commissioner that the duty includes giving advice and assistance to a person considering making a request – for example, to help them frame and word it. On occasions my students when seeking such help have been told by the relevant personnel of a public authority that it has no obligation to provide assistance until a request is received. On occasions the message given is to the effect
of ‘Send it in and we will take a look at it’. On such occasions the student may send in a draft request only for this to be treated as a formal request, with no advice or assistance offered. The student may then have to wait for much of the 20-day period to elapse to get a response. The student may get no information because the request breaches the cost limit for the provision of free information, or because there is, it turns out, no such information held. This wastes the student’s time (and probably in some instances also the authority’s time) in that the student could, had advice and assistance been given, amended the request in draft form, or realised it should be directed elsewhere. There is currently no effective sanction against failure to provide section 16 advice and assistance.

4) There seems among some public authorities to be a lobby that requesters’ rights under the Act should be diluted. The argument may be that too many requests are being made, and that public resources are being wasted. The counter-argument is that transparency and public accountability are likely to save more money than is ‘wasted’ in the FOI regime. The UK’s FOI legislation is already weaker, as regards requesters’ rights, than law in other democracies.

5) The decline in the size of the UK’s journalism workforce, because of the recession causing redundancies, but also structural change in how consumers want or access news, means it is even more important now that the UK has an effective FOI Act, because it is probably the case that regional and local news, provided by newspapers, has declined in scope and depth because there are fewer journalists employed. The Act, for all its faults, is a method of gaining information not normally published. To weaken the rights of requesters would risk decreasing the information available to the public.

6) It is logical, bearing in mind inflation since 2005, that the cost limits which govern the provision of free information should be raised

7) There needs to be more research on what requesters’ experience in their use of the Act.

February 2012
Written evidence from Andrew Watson

About the Author: This submission is being made in a personal capacity, not as a representative of any organisation. The author has over 30 years’ experience in the IT industry, and has made approximately 35 FOI requests of various public bodies over the past 5 years while investigating public policy on privacy issues.

Summary: Broadly speaking, the Act does work effectively. For the private citizen, the best way to use the Act is undoubtedly via the independent What Do They Know web site, which makes the submission process straightforward and automatically publishes the results on the Internet. Many Whitehall departments and national authorities systematically delay FOI responses until the 20th day after the original submission, which doesn't help their reputation for openness. Several authorities also seem to arbitrarily pick and choose which FOI responses they publish on their own web sites. In my experience, when an authority has unjustifiably rejected a request or redacted a response, the Information Commissioner’s Office (ICO) has always forced it to release the requested information, although at the cost of considerable delay. Two ways to improve the operation of the Act would be to fund the What Do They Know web site, and provide more funding to the ICO.

1. The committee asks three questions:

   Does the Freedom of Information Act work effectively?

   What are the strengths and weaknesses of the Freedom of Information Act?

   Is the Act operating in the way that it was intended to?

2. Broadly speaking, the Act does work effectively. Almost all the public authorities to which I have sent FOI requests have supplied the information that I have requested. As far as I can tell, the Act is operating in the way that it was intended to. My research into public policy on privacy issues would have been impossible without the Act.

3. Almost all my FOI requests have been submitted via the independently-run What Do They Know web site (http://www.whatdotheyknow.com). I cannot speak too highly of this facility, which makes submitting requests and publishing the results very straightforward for the requester. In an ideal world, government itself would have provided a cheap, simple, effective front-end to FOIA just like this one. However, since What Do They Know is now well-established, central government should not waste public money duplicating its functions. Instead, a grant to the charity that runs it would underline government's commitment to openness at low cost.
4. Although almost all public authorities do respond to FOIA requests, I have found a general air of foot-dragging at Whitehall departments and national government agencies. The Act says that "A public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt. However, most Whitehall departments apparently re-interpret this as "A public authority shall respond on precisely the 20th working day after receipt of the request". While it would be understandable if some requests took the full 20 days, it's clear that some departments automatically delay every response until the 20th day. The committee could usefully gather statistics on response times from individual departments to ensure that they are complying with the spirit of the Act.

5. By contrast, several local councils have responded to my FOI requests within a few days. I commend them for complying with the spirit of the Act.

6. Most public authorities maintain logs of FOI disclosures on their web sites, although the Act does not require them to do so. However, these logs are not comprehensive. I have noticed that several authorities have not published their responses to my FOI requests on their logs, even when those logs do contain large numbers of other responses. The committee might be interested to ask public authorities how they choose which responses to publish on their web sites.

7. I've had to request internal reviews of several FOIA responses. It is a weakness of the Act that there is no statutory time-limit for this review. The Information Commissioner publishes guidelines to public authorities specifying that "the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review ... In our view, in no case should the total time taken exceed 40 working days." In my view, these limits should be enshrined in legislation.

8. In two or three cases I have had to appeal a refused or excessively-redacted FOI request to the Information Commissioner's Office (ICO). While the ICO does an excellent job, and provides a truly independent review of the authorities' decision to withhold information, because the ICO is chronically under-funded, those reviews can take months. In my view, the ICO should be allocated more resources for handling FOI appeals.

February 2012
Executive summary

- It is clear that s77 breaches of the Act cannot be prosecuted. An amendment to the legislation is required to make such breaches possible.
- Concerted attempts have been made by some civil servants to avoid compliance by using private email accounts and other media. This must be prevented.
- Attempts by prominent scientists to make certain scientific information exempt are misguided and against the public interest.
- The scope of the BBC’s journalistic purposes derogation needs to be clarified so that it protects sources but allows public oversight of the BBC’s internal processes.
- The appeal process works well, but is hampered by delays at the ICO’s office. Funding of the ICO should therefore be addressed.

About the author

Andrew Montford is the author of The Hockey Stick Illusion, a history of some of the events leading up to Climategate. He is currently writing a history of the Climategate affair itself and the inquiries that followed. He is a regular user of the Freedom of Information Act and the Environmental Information Regulations. He has no conflicts of interest to disclose.

Introduction

1. I write as a regular user of FOI legislation. I believe that the Act is in general working well and in the public interest. It has made many civil servants very uncomfortable and there have been many documented attempts to resist the requirements of the Act. I believe that the committee should resist the inevitable attempts to push back and restrict the scope of the Act or to make it more costly to submit requests.

2. There are, however, several flaws in the legislation, which I will cover in more detail.

Section 77 and the statute of limitations

3. I am currently writing a history of the Climategate affair. As the ICO made clear at the time of his investigation of the events at the University of East Anglia (UEA), there is compelling prima facie evidence that FOI offences took place at UEA during 2008. Since that time a further release of UEA emails has provided evidence that is incontrovertible.

4. The ICO was unable to prosecute because of the six-month statute of limitations in magistrate’s courts. With time inevitably elapsing between an offence and its discovery and with ICO investigations taking up to a year to complete, prosecutions under the FOI Act are in essence impossible.

5. This failing in the legislation was raised as a potential problem during the original passage of the FOI Bill through Parliament and an amendment was tabled to extend the period for prosecution. This, however, was blocked by ministers, who
claimed that there was no evidence that it was ‘a systemic problem for the Information Commissioner or any other prosecutor’. It is now clear that this is not the case.

6. The inability to prosecute breaches of the Act has had a deleterious effect on civil servants’ attitudes to FOI compliance. I was told by an official in the ICO’s office that some public authorities do not take the Act very seriously.

7. The Act should be amended to extend the period for prosecutions to take place.

Attempts to avoid compliance

8. The Climategate emails reveal considerable evidence of scientists using private email accounts for public business. In particular, the correspondence of Professor Martin Parry and Sir John Houghton on the reports of the Intergovernmental Panel on Climate Change (IPCC) was conducted on private emails. Although the ICO has advised that such emails still remain subject to FOI, there will inevitably be difficulties in obtaining them. I recently requested Sir John Houghton’s IPCC emails and was told that neither he nor the Met Office still had these. In other words important – in fact historic – public records have been lost.

9. It was recently reported that for the IPCC’s Fifth Assessment Report private discussion forums have been set up to enable scientists to discuss the report without being subject to national FOI legislation. If true, it represents a deliberate attempt by an international organisation to thwart the will of Parliament.1

10. Legislation is required to make it a criminal offence for public servants to conduct public business through any medium that is not public or subject to FOI.

Duty to hold information

11. The UK’s obligations under the Aarhus Convention appear to require public bodies to hold information relevant to their functions. Despite this, public bodies involved in environmental matters routinely delete their correspondence as part of their regular maintenance of systems. The Environmental Information Regulations do not appear to outlaw such actions, but the committee may wish to examine whether this means that the UK is in breach of its convention obligations and of the related EU directive.

Scientific information

12. As a result of the attempts to uncover malfeasance at the University of East Anglia, there has been a concerted campaign of misinformation about what happened:

- it was said that there was a deluge of requests to the university, a claim that the former ICO, Richard Thomas, said was false
- it has been claimed that attempts have been made to obtain draft materials from scientists – there is no evidence that this has ever actually happened.

13. Recently in the House of Lords, an amendment was recently tabled that claimed to seek to bring the FOI Act into line with its equivalent in Scotland. In Scotland, information that is part of a research project is exempt if the findings will be published in future, and if disclosure under FOI would damage the interests of the

1 http://cei.org/sites/default/files/Christopher%20Horner%20-%20OSTP%20FOIA%20Request.pdf
researcher or their institution. The wording of the Scottish Act appears to put the interests of the researcher ahead of those of the public. Publicly funded researchers must accept public oversight in return for the funding they receive. There is little evidence that the Westminster Act as currently worded is deficient in this area.

The BBC

14. Considerable difficulties are encountered in obtaining information from the BBC under FOI because the derogation from the Act for information held for artistic and journalistic purposes. The derogation is worded very vaguely and its scope is currently the subject of a protracted appeal, which is currently being considered by the Supreme Court.

15. While there would no doubt be wide support for the idea that there is a need for journalists to protect their sources, the BBC’s attempts to put a very broad interpretation on the derogation are against the public interest. In particular, the editorial standards and policies adopted by the BBC should be open to scrutiny.

16. In addition, the BBC appears to be exempt from the Environmental Information Regulations, to the extent that information is held for artistic and journalistic purposes. Since EIR is a response to a EU directive, the scope of the BBC’s exemption may put the UK in breach of the directive and the committee may wish to consider this possibility.

The Information Commissioner

17. I think it is fair to say that the Information Commissioner’s office is held in high esteem by users of FOI legislation. There are, however, frustrations in the delays that are encountered in getting rulings. This is seen as a function of a lack of funding, and the committee should consider calling funding to be increased.

The Information Tribunal

18. I have only limited experience of the Information Tribunal – I have a single case ongoing at the moment. My experience has however, been good so far, with the process simple and readily accessible. It is perhaps notable that the situation in Scotland is said to be considerably worse, with a highly bureaucratic process and applications actively discouraged by the Court of Session.

February 2012
Written evidence from Gary Shipsey

Executive summary

1. The cost of responding to requests will be greater if records are poorly managed and data of poor quality. The inclusion of the Section 46 Code of Practice on records management recognises this; however, the relative lack of investigation into, and enforcement of, compliance with the Section 46 Code, and the fact that it is not directly legally binding on public authorities, is a major area of weakness in the FoI Act.

2. Any debate about the cost of complying with FoI must therefore be viewed alongside a debate about whether sufficient regard has been had to complying with the Section 46 Code and, more so, when resource has been allocated, has it successful embedding records management in the organisation. A failure to comply with the Code, a failure of records management should not enable the ‘cost of complying’ to deny access to information.

3. Published details purporting to state the cost of compliance with FoI must be scrutinised – included in this submission is a factual example of where the published figures are not supported by any actual data, but instead by approximations that happen to match the maximum cost limit defined by the Fee Regulations, with the likely impact of exaggerating the cost of compliance.

Submission

4. One area of weakness is the Section 46 Code of Practice on records management not being directly legally binding. The impact of not following the Code is recognised by the ICO; it is ‘likely to lead to breaches of the Act.’

5. This issue directly affects compliance with Section 10 (time for compliance); the Foreword to the Code notes this:  
   Access rights are of limited value if information cannot be found when requested or, when found, cannot be relied upon as authoritative. Good records and information management benefits those requesting information because it provides some assurance that the information provided will be complete and reliable. It benefits those holding the requested information because it enables them to locate and retrieve it easily within the statutory timescales or to explain why it is not held.

6. Poor records management also affects an issue highlighted by the Ministry of Justice’s memorandum: the cost of compliance. The cost of responding to requests will be greater if records are poorly managed - the Section 46 Code highlights some key risks:  
   Unnecessary costs caused by storing records and other information for longer than they are needed; Staff time wasted searching for records; Staff time wasted considering issues that have previously been addressed and resolved

7. Yes, the inability to include reading time and redaction time in the cost estimate can mean that tasks necessary to ensure compliance with the FoI Act are not included in the estimate of the time taken to comply, but the resources required to undertake these tasks should be minimised if records are being managed: the need to review documents would be reduced if they were appropriately protectively marked and stored in the first place; the amount of redaction would be reduced if the volume of records held was only that which was necessary to meet legal and business requirements.
8. The few Practice Recommendations made in relation to public authority failure to comply with the Section 46 Code demonstrate two key issues; I outline them below.

9. Some organisation just did not prepare their records keeping for Freedom of Information. Practice Recommendation reference FPR 0150 638, Nottingham City Council, 23 October 2007, highlights that, seven years after the passage of the FoI Act, a large unitary authority had ‘no culture of corporate information or records management’ and did not allocate specific funding to the subject.¹² The Practice Recommendation outlines a number of failings; I quote a few below for emphasis:

   There are no corporate or service wide filing systems for either electronic or paper-based information

   The lack of a strategic corporate approach to records management... complicates and slows the process of responding to FoI requests.

   Paper information is often stored both locally and in group filing systems with a significant amount of duplication between the two. Management of older paper records is often poor or non-existent and is largely dictated by storage space. In several cases only one or two people know the system well enough to retrieve documents when required, and there are significant volumes whose content, sensitivity and retention requirements are effectively unknown.

   Electronic information is created and kept in personal drives, shared drives or email accounts. Emails are generally kept within the email system or printed if they are important. There is some evidence of poor practice in the management of personal and shared drives, including inappropriate storage of information with departmental or corporate value in personal drives, rendering it invisible and inaccessible to colleagues who may need it.

   Generally, older information is only destroyed when more space is required.... There is no systematic or organised disposal of records once they cease to be in active use. ¹³

10. It is little wonder that Nottingham failed to locate information when an FoI request was submitted. The cost of complying with FoI would clearly be high – in order to overcome the records management failings.

11. Yet allocating resource alone is not sufficient to ensure the necessary culture and practices are adopted. Practice Recommendation reference FPR 0224 884, Department of Health, 3 March 2009, highlights this:

    The Information Management and Governance Team has specific responsibility for records management. The team is well organised, reasonably resourced in relation to its current activities and is considered both professional and supportive by colleagues elsewhere in the organisation. However, due to the devolved nature of corporate processes in the Department, it is not clear whether this team has the necessary levels of organisational support to be fully effective. Furthermore, the work of the Information Management and Governance Team is adversely affected by the prevailing culture which allows business units to choose alternatives to recommended corporate systems where they wish to... the Information Management and Governance Team do not possess a formal mandate to monitor, police and enforce official policies.¹⁴
12. There is public money being spent on records management. It can be well resourced in terms of people and money – but if the organisational culture does not embrace their message, if records management practice and custom does not change, then the cost of compliance with FoI requests will remain high. The sections ‘record creation’ (paragraphs 35-40) and ‘record keeping’ (paragraphs 41-55) of the Practice Recommendation outline the impact of the failure to embed a culture of records management.

13. These two Recommendations are a few years old – but the questions raised recently about Michael Gove MP and the use of private emails highlighted the issue of records keeping once again; the use of private email accounts, outside of government systems, to store records of government business again demonstrates how a poor adherence to a culture of records management will increase the resource required to comply with FoI requests. In July 2011, the Parliamentary Under Secretary of State replied to a question about the guidance provided to Ministers about the use of private email accounts for official duties as follows:

Ministers and special advisers: “DON ’ T use unofficial devices (such as your own/constituency PC/Laptop/PDA) or unofficial services (such as internet email accounts like Hotmail or Gmail) to access or hold DfE information. Only official devices and services have been tested and risk assessed to ensure they are secure enough for routine HMG business.”

14. Yet the story that broke in September 2011 suggests that, like the Department of Health, there is a gap between the existence of records management policy and guidance and the actions of officials.

15. The costs of responding to requests will also be greater if the quality of data created and held by organisations is similarly poor. The Audit Commission National Report Is There Something I Should Know? found that less than 5 per cent of councils have excellent data quality and ‘many acknowledge that their data quality problems are fundamental in nature.’

16. Table 7 of the Report provides four examples of poor data quality. They are almost comic, but they sadly provide examples of where, should an FoI request be made for the data involved, the cost of complying would undoubtedly be high – because the public authority have to (and would want to, to ensure accuracy) try and address the longstanding issues about data quality before responding. Either that, or they provide a set of data that is clearly of poor quality – exposing the longstanding data quality issue – or they state they cannot provide the figure or statistic being requested within the appropriate limit – a possibly damning response if the figure or statistic has importance. Addressing data quality issues can take time; that this time and resource was not previously allocated is not the fault of the FoI requester or the FoI Act.

17. FoI requests often only expose the longstanding data quality issues; they are not the cause of the issues and the cost of sorting them should not be placed at the door of ‘complying with FoI.’

18. With these issues in mind, I provide below an example of a public authority claiming to articulate the cost of complying with FoI, and how this is, in fact, based on no hard data.

19. The Avon and Somerset Constabulary FoI pages tell you, immediately and with no uncertainty, how much FoI costs the Constabulary; they provide the calculation they use to reach the figures: ‘Requests x £30 per hour x 18 hours (average time spent per FOI request, some requests take significantly more time)’
20. They are therefore claiming that the maximum 18 hour cost limit prescribed by the Fees Regulations does, in their case, also amount to the average time the Constabulary spends per FoI request. Knowing that they must (surely?) handle at least some requests quicker than 18 hours, I was interested to see the data behind the calculation – I mean, how long must some of the request take to get to the average of 18 hours?

21. I submitted an FoI request for ‘the data showing how the £30 cost and the 18 hour average time spent per request were arrived at.’

22. I received the following response: ‘no data is held. The figures were derived from approximations of staff time spent on the Freedom of Information process and an approximate hourly rate.’

23. Publicising these figures so prominently at the front of the Constabulary’s FoI page therefore seems disingenuous and, frankly, a deliberate attempt to make compliance with FoI appear a costly burden when in fact it is based on nothing more than ‘approximations.’

24. None of the other 42 forces in England and Wales have adopted this approach to publish FoI cost figures on their website. I worry about the records keeping and data quality at the Avon and Somerset Constabulary if they genuinely take an average of 18 hours to answer their FoI requests; if the average is in fact lower, I worry about the message the Constabulary is seeking to send to the public about the cost of FoI.

25. There has been an Information and Records Management Society since 1983. The public sector has known about FoI since 2000. Good records keeping underpins good governance and good decision making; there should be no excuses for poor records keeping or poor data quality. Where they remain an issue, where there is still failure to comply with the Section 46 Code, I expect the cost of complying with FoI requests will remain high – but this cost is only addressing those records keeping and data quality failings, and these should not be an excuse for denying access to information.

Recommendations

26. Make compliance with Section 46 Code of Practice legally binding.

27. The activities that can be included in the estimate of the cost of complying with requests for information created on or before the Freedom of Information Act 2000 came fully into force on 1 January 2005 should be expanded to include the time taken to read the information once and the redacting time. However, the activities that can be included in the estimate of the cost of complying with requests for information created after 1 January 2000 should remain unchanged.

28. This distinction would recognise that the standard of records keeping and the expectations prior to the full implementation of the FoI Act were not necessarily geared to full public access to information. Information was not created, stored or managed with the expectation that anyone might seek to access that information at any time; this can result in the need to thoroughly review such information in the event of a request and redact large amounts of information in order to comply.
29. However, public authorities were fully aware of the changes that FoI would bring, and had five years to prepare for those changes. Therefore those complying with the Section 46 Code of Practice, those that recognised the business benefits of good quality data, would have been creating, storing and managing information after 1 January 2005 with the expectation that there could be requests to access that information. Their use of file plans, retention schedules, Electronic Document and Record Management systems, protective marking scheme (and other records management tools) mean that they only hold the information they need to hold, that they have a structured and managed approach to handling information, and take practical measures to enable routine access to information.

30. Extending the activities that can be included in the estimate for requests for all information would therefore penalise organisations who invest in managing their records and data and enable those who do not pay sufficient regard to such matters to deny access to information purely on the grounds of their poor record keeping.

February 2012

---

iii Ibid., page 5.
iv FPR 0150 638, Nottingham City Council, 23 October 2007, Paragraph 14
v Ibid., Paragraphs 18-20
vi FPR 0224 884, Department of Health, 3 March 2009, Paragraphs 23-24
vii Tim Loughton (Parliamentary Under Secretary of State, Education; East Worthing and Shoreham, Conservative) responding to Kevin Brennan (Cardiff West, Labour); Hansard source Citation: HC Deb, 19 July 2011, c905W: see http://www.theyworkforyou.com/wrans/?id=2011-07-19b.66782.h&s=email+speaker%3A10753#g66782.q0
viii Is There Something I Should Know? Making the most of your information to improve services, Audit Commission, July 2009, page 6
ix http://www.avonandsomerset.police.uk/information/FOI/
Strengths
- Act provides apparent transparency to the public on the operation of public services.

Weaknesses
- In a climate of competition and tendering for business, the Act puts the public sector at a disadvantage because it is easier to obtain information about the public sector body (including business intelligence / commercial information)
- The Act allows anybody to request anything which, even if they subsequently cannot have the information (or it does not exist), takes up a lot of time to consider and process. As no additional funding has been provided to administer the operation of the Act, funds have needed to be taken away from front-line services in order to manage the requests.
- People (especially journalists / researchers) seem to have become lazy and rather than looking for the information themselves on websites / in reports etc, simply put in a request (which then takes time to respond to).
- The publication scheme seems to not be used by the public – it seems like a waste of time/resources to develop and maintain it
- The split between the FOIA and DPA is silly and confusing to the public (and often to public bodies who need to respond to requests).

February 2012
Written evidence from Richard Taylor

1. I have made over 150 Freedom of Information requests. All my requests have been made via the website WhatDoTheyKnow.com, to ensure the request, correspondence and response are made public.

2. While this is a personal submission I am also one of the volunteers who administer the website WhatDoTheyKnow.com. That role includes advising requesters, and helping deal with the large number of requests to take material down from the website which WhatDoTheyKnow.com receives.

3. The committee have requested views on the question of: Does the Freedom of Information Act work effectively? To an extent the act clearly does work; it has created a right to information which was not present before and has empowered those seeking information from public bodies.

4. Information released via Freedom of Information is now regularly raised and discussed during my local council's "area committees" where the public are invited to speak during "open forum" sessions. Information cited at a recent meeting included minutes from other public sector bodies, material obtained by the public from the council, and data, such as speeding survey results, relevant to decisions before councillors.

5. Media reports are now routinely based on, or supported by, material released under the Act and MP’s contributions in Parliament are often based on information from such disclosures. Freedom of Information has become a core part of our democratic system, I do not think it would function as effectively without it. The impact of the Act is seen at all levels of government.

6. The Act has not though been as effective as it could have been in changing the culture of public bodies towards routinely operating in a more open and transparent manner.
7. The Act only enables access to information held by a public body, there is no provision requiring the consideration of routine proactive publication of the information following a request.

8. For example I have obtained some board papers for my local Probation Trust via a Freedom of Information request but to seek to prompt proactive ongoing publication of future board papers I am having to pursue other routes, where unlike when using the Freedom of Information route, I am merely lobbying rather than exercising a legal right.

9. While one might have expected the Freedom of Information Act to prompt public bodies to proactively publish as much information as possible to avoid the time and expense involved in responding to requests for information, this does not appear to have happened on a large scale.

10. The committee asked: **What are the strengths and weaknesses of the Freedom of Information Act?** One of the biggest strengths of the UK Act is that there is no application fee and the definition of a request is not overly prescriptive. This means the benefits of the Act are very accessible; there is no need for people to have knowledge of the act to use it.

11. The existence of a powerful, independent, Information Commissioner, capable of ordering public bodies to release information is potentially a major strength of the act, however the impact is reduced by the slow speed at which the commissioner operates in respect of Freedom of Information casework.

12. Many bodies with significant public roles are not covered by the act. Locally to me for example the body which is responsible for my local river (the Cam Conservators) and the local City Centre Management organisation (Love Cambridge) are outside the current scope of the act. The latter has responsibility for elements of city centre signage, and is even,
through its role in relation to a proposed Business Improvement District” considering a role in collecting, and spending taxes.

13. More broadly organisations such as Housing Associations, which many people see as having a public role, are not covered by the act.

14. Hopefully the Protections of Freedoms Bill will see more of the many organisations owned by multiple public bodies brought under the Act.

15. I would like to see more use of the provisions for adding additional bodies to the act.

16. The provisions relating to datasets in the Protection of Freedom bill require public bodies to consider proactive publication of up-to-date copies of requested datasets. I would like to see this concept extended more broadly to other classes of information accessible via Freedom of Information. eg. Papers for a particular meeting. The omission of such a provision is in my view a weakness of the current Act.

17. The Freedom of Information Act did not overturn prior legislation which prevents the release of information. Provisions in the act for the review and repeal of such legislation (s75) do not appear to have been used.

18. I have been seeking to get more information released by my local Coroners service (information on upcoming inquests) and my local courts. Here too I have had to resort to traditional lobbying as I generally do not have the Freedom of Information Act on my side when I am pushing for more openness and transparency.

19. Not even major public bodies such as central government departments, police forces, and major councils, are required by the Act to maintain comprehensive public disclosure logs. Large amounts of information released via the Act is provided to the requestor only and not the public at large. While some requesters, eg, journalists and campaign groups do
disseminate their findings, they rarely enable the public to obtain the actual information released.

20. Requests need to be made using a requestor’s real name, especially if an appeal to the Information Commissioner or beyond is to be permitted. This limits the use of the Act which can be made by those seeking to whistleblow on corrupt practices, crime, etc. from within public bodies.

21. While the act required the adoption of publication schemes by public bodies and the Information Commissioner expended significant efforts enforcing this aspect of the Act publication schemes did not generally lead to the proactive, ongoing, publication of significant amounts of information held by public bodies.

22. On the question of: Is the Freedom of Information Act operating in the way that it was intended to? I think the answer is yes, to some extent, but the anticipated culture change still has a long way to go. Sometimes bodies can appear to be evasive when dealing with requests for information.

23. I recently made a request for information to the Metropolitan Police for information on authorisations for deployment of baton rounds in public order and protest situations. Rather than conducting a search for the information in the office handling applications for such authorisations they rejected the request on cost grounds saying they would need to search all the individual boroughs and departments from which applications may have originated.

24. Other examples of seeking to evade the Act include claims individuals, rather than the organisation, hold the information. Another request I made to the Metropolitan Police was rejected on the basis that the information was held by a senior officer, as an individual, in his Association of Chief Police Officers (ACPO) role rather than his Metropolitan Police role. (This was prior to ACPO being made subject to the Act).
25. Similarly the University of Cambridge tried to evade a Freedom of Information Act request in respect of papers of its Bursars Committee stating: “The Bursars’ Committee is an inter-Collegiate body, and legally in the nature of an unincorporated association or members’ club”. While the Information commissioner rejected this nonsense on appeal (Decision notice FS50124622). This is an example of the kind of shenanigans faced by those seeking information under the Act.

26. Often correspondence in relation to a Freedom of Information request is both extensive, and slow often carrying on over many months. It takes a great deal of perseverance to obtain information from some bodies. Not all requesters will persist in arguing their case, and fewer will appeal to the commissioner, or beyond. What is critical is the way requests are handled in the first instance.

27. One area where the law could be improved, is with the introduction of statutory time limits for conducting internal reviews and public interest tests. At the moment, while the Information Commissioner has issued guidance on these matters they appear to be areas where public bodies can unduly delay responses.

28. While in principle the provision in the Act requiring the disclosure of information “promptly” is fantastic and potentially powerful, in practice few public authorities appear to take it seriously and the Information Commissioner’s does not appear capable of taking enforcement action on this point.

29. There are a number of aspects of the operation of the Act which regularly worry, confuse, and perhaps, put off requestors. One is the fees and costs regime. The vast majority of requests are dealt with free of charge, yet public bodies tend to draw attention to the fees and costs provisions when acknowledging requests. More emphasises ought be put on the fact that usually there is no cost involved.
30. Copyright claims are often made by public bodies on their responses, even if the information has been generated by the public body itself. This often leads to requesters being unsure about how, if at all, their use of the information released is being restricted. Sometimes, often apparently inappropriately, public bodies refer to the Re-use of Public Sector Information Regulations 2005 which also confuses requesters about what they can do with information they have obtained.

31. On the subject of using information released via the Act, I would like to see information released from public bodies under the act added to the types of material which can be published without fear of being sued for defamation. I would suggest this ought cover a “fair and accurate report or summary of, copy of or extract from released material. Such a provision would clearly be of value to services such as WhatDoTheyKnow.com. It would also allow campaigners, journalists and others working with such material more freedom from legal threats and uncertainty.

32. Sometimes a public body accidentally releases information which it would have been able to withhold under one of the Act’s exemptions. Often this takes the form of an ineffectively, or incompletely redacted document. There is currently no provision requiring the body to provide a properly redacted version of the material, which again causes problems for those seeking to reuse the information as the onus for the removal or problematic elements, such as defamatory or personal information, falls on the person wishing to re-use the information.

February 2012
Executive summary

1. The Freedom of Information Act 2000 (FOIA) has become an important element of our democracy, and is working well in making government more accountable.

2. However there are four respects in which FOIA is not working effectively:
   - I have experienced considerable delays, primarily in the conduct of public interest balancing tests and internal reviews. There is a case for amending FOIA to introduce time limits in these areas.
   - There remains a culture of secrecy within public authorities, manifested in foot-dragging or evasion with many requests. The Information Commissioner’s Office (ICO) and Information Rights Tribunal (IRT) therefore play a vital role in delivering the public’s rights to information.
   - There is an inherent structural flaw in FOIA, in that a reticent public authority has no incentive to release information, and every incentive to refuse, as it can always release at a later date if forced to do so. The biggest potential shift to the culture and practice of government openness would be brought about by meaningful penalties for public authorities that violate FOIA.
   - Public authorities routinely fail or refuse to give meaningful advice or assistance under §16 of FOIA, offering instead unhelpful generalisations.

3. The UK’s FOIA has two particular strengths:
   - That complaints and appeals are heard by the ICO and IRT rather than by courts makes the process accessible to those who do not have access to lawyers.
   - The consideration of the balance of public interest in relation to exemptions emphasises the release of information which is of value to the public.

4. There are two inherent weaknesses in FOIA:
   - The class-based exemptions of security-related information and the exclusion of security bodies from the Act’s scope.
   - The §53 veto.

5. There are four further weakness in how FOIA is applied in practice:
   - Public authorities often apply unintelligent methods of searching, resulting in information not being found or conversely in requests being unnecessarily pushed beyond the §12 limit.
Public authorities do not give specific reasoning for rejecting requests, resulting in unnecessary complaints to the ICO.

The concept of public interest is often interpreted in an unbalanced way, as broad reasons for maintaining an exemption are compared with narrow reasons for releasing information.

It is unhelpful and unnecessary under §40 to exempt the names of those acting in a purely professional capacity.

6. The calls by certain public authorities for reducing the §12 cost limit are misplaced, as other solutions could better align minimising public costs with the public interest in government accountability, which is indeed the original purpose of the Act.

7. It would also be unfair, and would hamper FOIA, to include reviewing and redaction in the §12 cost assessment, since the amount of time spent on those activities is decided by the public authority rather than the requester. A better solution would be to charge requesters per page for copying and sending information, preferably with clear information as to what information is held.

Introduction

8. I am an experienced requester. Since FOIA came into force in 2005, I have made over 70 requests, mainly to central government departments. I have also made around 50 requests under the US Freedom of Information Act, which gives me a comparative perspective.

9. Many of my requests were made in the course of researching my book, Fuel on the Fire – Oil and Politics in Occupied Iraq, which was published by Random House in April 2011. I am also Director of Campaigns and Policy at the charity War on Want. In this submission I draw on experience from both roles.

Does the Freedom of Information Act (FOIA) work effectively?

10. Broadly, the Act works effectively. For example, through FOIA I have obtained and published significant information revealing government mistakes and misleading statements in respect of the Iraq War. FOIA has served a profound public interest in helping the public to learn the lessons of that War, and in disclosing government actions.

11. Information I have obtained through FOIA has generated many press stories, including on the front page (Independent, ‘Secret memos expose link between oil firms and invasion of Iraq’, 19/4/11).
12. At War on Want, information obtained through FOIA has enabled the charity to strengthen its arguments and target its campaigns, enhancing its ability to achieve its charitable aim of relieving poverty. For example, in respect of our campaign to protect the livelihoods of crop growers, we obtained records of the supermarkets’ lobbying of the government against regulation, allowing us to hone our arguments.

Delays

13. A key aspect in which FOIA’s effectiveness is limited is in excessive delays by public authorities, especially in conducting internal reviews. For example, one Cabinet Office review of my request took a whole year; a Department for Business, Innovation and Skills (BIS) review took 21 months – even after repeated interventions by myself and by the ICO. Whilst these are extreme cases, I have frequently found internal reviews to take more than the ICO’s recommended maximum 40 days, and usually for no good reason: internal reviews have mostly failed to show any serious reconsideration of the issues.

14. RECOMMENDATION: The Code of Practice and/or FOIA should be amended to set a time limit of twenty working days, or forty days in exceptional cases, for the conduct of internal reviews.

Lingering culture of secrecy

15. Comments in the press – most notably by former Prime Minister Tony Blair and former Cabinet Secretary Gus O’Donnell – suggest that some want to return to the days when government had no accountability to the citizenry. My experience of using FOIA has often found recalcitrance by public officials, including a default position of rejecting requests, failure to substantively consider arguments and holding back information until the last minute when forced to release it by the ICO or IRT.

Lack of incentive to comply

16. A major impairment to FOIA’s effectiveness, in the context of civil servants’ frequent reluctance to release information, is that a public authority faces no penalty for wrongfully refusing requests. An authority can routinely refuse all requests, on the assumption that the majority of requesters will eventually give up. In the small percentage of cases that are pursued, the authority can release information at the later stage. From the perspective of a recalcitrant civil servant, such a strategy would have every advantage and no disadvantage.

17. Indeed, my experience is that authorities frequently seem to reject requests as a default position, and only to provide information when made to do so by the ICO or IRT. To illustrate, during 2009 and 2010 I made 38 requests. Of the 27 cases where the information was held, in only nine cases was the information released
at the first stage and in one case after internal review. In 12 cases the information was released only after the ICO either issued a Decision Notice or intervened informally and in one case after an IRT ruling (4 cases were exempt).

18. This suspicion of default rejection is reinforced by events on the two occasions I have had cases at the IRT. In both cases the public authorities (respectively BIS and the Cabinet Office) insisted information was exempt right up to the point where the IRT process was under way, at which stage they started releasing information, apparently in order to avoid an adverse ruling.

19. If the government is genuinely concerned about the burden of FOIA on its resources, a sensible route to reducing the costs would be to properly consider and respond to requests in the first place, rather than rejecting requests and so having to put greater resources into an ICO investigation or an IRT hearing (including the high costs of lawyers).

20. **RECOMMENDATION:** public authorities should be fined by the ICO and IRT when they have handled a request incorrectly, with the level of fine set so as to have a deterrent effect, and varied according to the degree of negligence or bad faith shown by the public authority.

**Failure to give advice and assistance – §16**

21. In almost all cases when I have requested advice under §16, I have been given a non-specific, largely meaningless response based on generalities. As a result, my requests have not been as well honed as they might have been, wasting my time and that of the public authority. **RECOMMENDATION:** Again, the ICO and/or IRT should have a power to fine public authorities.

22. A further problem is long delays in the provision of advice: for example one of my §16 requests finally received the advice four months later, after I had chased it five times. **RECOMMENDATION:** §16 should be amended to set a time limit of ten working days for the provision of advice.

**The strengths of FOIA**

**Non-judicial mechanism**

23. One of the strengths of the UK’s FOIA compared to the US equivalent is that the appeal and complaint are heard by non-judicial bodies, namely the ICO and IRT. This allows information to be obtained by those without the resources to hire lawyers. For example, I recently represented myself in a case at the IRT and won.

24. Both the ICO and IRT are functioning well. The ICO’s guidance notes are especially appreciated.
Concept of public interest – sections 2(1)(b) and 2(2)(b)

25. Another strength is that most of the exemptions are qualified by the public interest test. This introduces a discretionary aspect, which is important because legislation is not capable of anticipating all circumstances that may arise. It also places the Act clearly in the service of the public interest.

The inherent weaknesses of FOIA

National security – sections 23 and 24

26. The exclusion of certain security bodies from the scope of the Act and the exemption of information obtained from them are unwelcome departures from the general principle of discretion based on the balance of public interest. The same is true of the criterion of ministerial certificate in exempting information whose release might damage national security. “National security” is a concept overused by governments to justify secrecy, and must always be balanced against the public interest.

27. While the public interest threshold would be set high for security-related information, recent revelations of security services’ involvement in torture and extraordinary rendition demonstrate the importance of also those services’ accountability. For comparison, in the USA’s FOIA does not exempt the CIA.

§53 veto

28. Although the §53 veto has only been used twice, there seems no justification for giving the ultimate say to the government itself. This provision undermines the credibility of and confidence in FOIA.

Weaknesses in how FOIA is applied in practice

Unintelligent searching

29. Public authorities often search for requested information in a manner that defies common sense. The effect is either to fail to find relevant information or conversely to find so much that it cannot be processed within the §12 limit. Many of my requests have been for information that would be routinely required in the course of the authority’s usual business, yet have been met with a response that the search is impossible to conduct.

30. For example, a recent request by War on Want to UK Trade and Investment for records of UKTI’s recent communications with four named companies was
rejected under §12, on grounds that to find the information “we would need to consult every member of UKTI throughout the world”.

**Failure of public authorities to give reasoning, even at internal review**

31. When information I have requested has been considered exempt, public authorities have invariably given generic descriptions of the relevant exemption, rather than any reasons why they apply in the particular case.

32. In some cases, clear reasoning, especially at internal review stage, might have shown me that the authority was correct, in which case I would not have complained. More often though, I have ultimately found that the authority has no reason for applying exemptions, and only even considered the request specifically when contacted by the ICO. This has led to considerable wasted resources: mine, the ICO’s and the government’s.

**Public interest interpreted in unbalanced way**

33. A general problem with the public interest balancing exercise has been that authorities have not compared like with like. The public interest in maintaining an exemption has been taken to be broad, in that release would affect a whole class of information, but the public interest in release has been taken to be narrow, relating only to the specific case. The ICO has also committed this error on several occasions.

34. The exemptions that have come up most commonly in response to my requests are those under §§27, 40 and 43. In relation to §§27 and 43, it has been argued that release of information would discourage foreign states or companies (respectively) from sharing information with the government in future – a general public interest. Conversely, it has been argued that releasing the information would serve the public interest in respect only of its specific contents, not in terms of a broader public interest in transparency and accountability. For an example of this, see ICO Decision Notice FS50286465, 15 December 2010.

**Names of individuals – §40**

35. The redaction of people’s names often diminishes the value of information. The release of what someone has said or done in a professional capacity should not in general be considered unfair. Case law has however established an approach where names are redacted of all officials below Senior Civil Servant grade. There should be no reasonable expectation of privacy of a person’s actions carried out in a professional capacity, as such information is routinely available within professional circles, such as through industry conferences.

**RECOMMENDATION:** §40 should be amended to such that names of individuals acting in a purely professional capacity are not treated as “personal data”.
Costs and the burden on FOIA on public authorities’ resources – §12

36. Some public authorities have complained about the cost of responding to information requests. Sometimes these calls have drawn attention to specific examples of frivolous use of FOIA: such as requests for the number of toilet rolls or teabags purchased by an authority, or requests for information on alien abductions. It would make sense to charge commercial organisations who use the Act to help them sell goods or services to public authorities. However the cost limit of public interest cases should not be reduced, as that would undermine FOIA’s ability to deliver the government accountability it was intended for.

37. In particular, media requests – interpreted broadly to include bloggers, authors and campaigners – should not be restricted, given the important role media play in holding government to account.

38. Statistics from Frontier Economics suggesting that 5% of requests account for 45% of costs may create a temptation to exclude the most complex and costly requests from the Act by lowering the §12 limit. This would be unwise as often it is the more complex requests that give us the greatest insight into public authorities, and which best expose bad practice.

39. It would also be wrong to include the time spent reviewing and redacting in the assessment of whether a request exceeds the limit – because the time spent on those activities is chosen by the public authority not the requester. If the Fees Regulations were changed to include review and redaction costs in respect of §12, reticent public authorities would have an incentive to be excessively rigorous in their reviews, thereby automatically pushing many requests unjustly above the cost limit.

40. On the other hand, the current arrangement does create perverse incentives for requesters, whereby a request is less likely to be rejected under §12 if it is framed more broadly – as that will reduce the time spent locating and extracting the requested information – at the expense of requiring more time to read, review and redact. The result is that sometimes an authority will spend time processing information that is in fact of little interest to the requester.

41. A good solution to this problem would be to add another stage to the FOIA process, wherein an authority would first provide a requester with a list of documents in scope of the request, including title, date, metadata and number of pages. Charging copying costs (as provided in the Fees Regulations) would discourage requesters from asking for irrelevant information, without excessively deterring requests as a whole. The list of in-scope documents would then effectively serve as a price list. A selection and payment process could be
managed online, leading to a second stage of processing which included review and redaction, focused only on the documents the requester actually wants.

42. In general, the cost to public authorities should be better aligned with the purpose of FOIA: by rejecting or charging for requests that do not improve government accountability. Such decisions should still be subject to complaint and appeal to prevent abuse.

43. The USA’s FOIA has a sensible approach to this problem. Requesters are divided into categories, and charges levied accordingly:

- Commercial requesters are charged the full costs of search and review (ie staff costs) as well as of copying and sending.
- Individual requesters are charged for copying and sending costs, and for any search and review time beyond two hours.
- Media, educational and non-commercial scientific requesters are charged for copying and sending costs but not search and review time.

44. There is then a waiver of charges for requests in the public interest, defined as those where the information is likely to contribute to public understanding of government activities and is not in the commercial interest of the requester.

Conclusion

45. In conclusion, the passing of FOIA has been a major achievement in enhancing the accountability of government. Post-legislative scrutiny of FOIA creates an important opportunity to correct some of the specific weaknesses of the Act. However, calls to restrict the application of FOIA – whether on cost or other grounds – should be resisted, as they would undermine that great achievement.

February 2012
Written evidence from Ganesh Sittampalam

Executive summary
1. I am an individual requester with significant experience of using the Act.
2. I believe that the Act has been very successful in opening up access to public authorities.
3. In this submission I mainly focus on aspects of the Act that could be improved.
4. **Houses of Parliament**: it should be made clear that the Act is intended to apply to the Houses of Parliament during the period of a general election.
5. **BBC**: the BBC’s “derogation” from the Act for journalistic material should be replaced by a properly drafted exemption.
6. **Promptness**: It should be made clear that the existing requirement in the Act for a prompt response is important and enforceable.
7. **Time limits**: Time limits should be introduced for public interest tests and for internal reviews.
8. **Enforcement**: The Commissioner has adequate enforcement powers and should be encouraged to use them more effectively.
9. **Costs limit**: the current framework for estimating costs is working adequately and tampering with it would bring significant complications.

About the submitter
10. I have made FOI requests to a range of public authorities to obtain background material on a range of aspects of public policy and public administration that interest me.
11. I have made a number of complaints to the Commissioner and also successfully brought a small number of cases to the Information Tribunal, so I have a good understanding of all stages of the FOI process from the perspective of a requester.
12. I am also a volunteer administrator for the WhatDoTheyKnow.com website and have contributed to a separate joint submission made on behalf of that website. This submission is made in my personal capacity based on my own individual experiences of using the Act.

The benefits of the Act
13. I believe that the Act has brought about a substantial shift in the relationship between interested citizens and public authorities. It is no longer necessary to rely on the information an authority chooses to put out, or on the press, to gain an understanding of the behaviour of the public sector.
14. The Act provides access to internal guidance that can be very helpful in explaining practical aspects of daily life. In one recent request, I was able to get Transport for London’s definitions of what is meant by “good service” and “minor delays” on the Tube¹, which provides a valuable perspective on problems I see in my daily commute!

15. Access to internal information can often show authorities in a good light, correcting misleading impressions from press stories. For example after an article in the press that Kent Police had confiscated a board game during a raid on a “Climate Camp”, a FOI request established that this had been done because the game was known to contain a balaclava which could be used to conceal identities.  

Problems with the Act

Houses of Parliament during dissolution

16. The House of Commons has a somewhat unique legal position because of its history. During a dissolution for a general election, it technically does not exist at all.

17. The Commons authorities have chosen to use this as a reason to delay answering requests during a period of a dissolution, even though the staff who would answer these requests continue to be employed throughout this period.

18. This is despite the fact that in a previous case before the Information Tribunal, the Commons authorities explicitly acknowledged that they did not think this was the intention of Parliament:

“For example, the House assumes that Parliament did not intend that the public’s right to information from the House is suspended during periods when the House is dissolved even though, as mentioned above, the House of Commons does not exist during such periods.”

19. The period of a general election is one in which the public has a particular interest in the work of the Commons, and it is therefore regrettable that the authorities have chosen to be obstructive in this regard.

20. The position of the House of Lords is even more ambiguous as Lords do not lose their status during a dissolution.

21. I believe a straightforward fix to the Act to remedy this would be to list the Corporate Officer of each House as public authorities.

BBC derogation

22. The BBC has a “derogation” which means they are only subject to the Act “in respect of information held for purposes other than those of journalism, art or literature” – the “special purposes”.

23. It is right that the BBC be exempted from releasing information that is directly part of its journalistic and creative activities. But the law is badly drafted in this area and is being abused by the BBC to obstruct scrutiny of its spending.

24. For example the BBC has tried to use the derogation to refuse me information about the money spent on marketing, press and publicity. Requests made by others about how many staff were sent to the Beijing Olympics have also been refused.

25. These kinds of requests focus much more on the general use of public money rather than the details of the BBC’s creative output, and I believe this should be properly open to scrutiny.

---

2 http://www.whatdotheyknow.com/request/confiscation_of_property

3 http://www.whatdotheyknow.com/request/new_members_guidebook#incoming-86639

26. The drafting of the derogation has led to two successive House of Lords/Supreme Court appeals in respect of a single request made by the late Steven Sugar, the first to establish the right route of appeal when the Commissioner decides that requested information is not subject to the Act, and the second to clarify how information held both for the special purposes and for other purposes should be treated.

27. The current situation, pending the final Supreme Court ruling, is that if information is held to any extent for the special purposes, then it is not covered.

28. I suggest that the derogation be replaced by a normal exemption and the ambiguity resolved to make it clear that information is only exempt if held just for the special purposes. Failing that the test the Commissioner originally formulated of a “dominant purpose” should be restored.

**Promptness**

29. Section 10 of the Act states that authorities must respond to requests “promptly and in any event not later than the twentieth working day following the date of receipt.”

30. During Parliamentary debates before the Act was passed, it was explicit that this was intended to be an enforceable right:

   “the Commissioner may serve a decision notice or an enforcement notice on an authority which failed to deal with a request for information promptly, even though it dealt with it within 40 days”

   [the 40 days was subsequently reduced to 20]

31. It has unfortunately proved almost impossible to rely on this part of the Act.

32. In one request to the Department of Culture, Media and Sport when I complained about promptness, they responded that:

   “Under the Freedom of Information Act we are required to respond within 20 working days, which you accept we did. Previous cases which have been to the Information Commissioner with a similar argument to the one you outline have been rejected as it is understood that we do have 20 working days to respond”

33. This attitude does indeed extend to the Commissioner. In response to a complaint about the Cabinet Office’s promptness, the ICO’s case officer claimed

   “The Act provides an explicit timetable in which public authorities must respond to a request. I understand your frustration in not receiving an earlier response without delay, however, the response was provided in accordance with the timetable provided by the Act.”

34. I believe that this is a clear example where the Act is not operating as intended. Failure to enforce this requirement means that many authorities routinely wait the full 20 working days to respond even to trivial requests.

35. This is particularly damaging in cases where the authority’s response is to simply refer the requester to another authority, as was the case with my request to the Cabinet Office. In this

---

5. [http://www.publications.parliament.uk/pa/cm199899/cmselect/cmpubadm/570/57015.htm](http://www.publications.parliament.uk/pa/cm199899/cmselect/cmpubadm/570/57015.htm)

instance they referred me to the Treasury who also did not hold the information and after yet more days waiting, sent me on to HMRC who actually did hold it.

36. The failure to be prompt actually has a knock-on effect on authorities as well as requesters: because responses will probably be slow, there is an incentive to frame broader requests than strictly necessary rather than making a small initial request and following up as necessary.

37. Similarly if multiple public bodies might hold information, it currently seems better to ask all of them for it in the first instance, rather than to try the most likely first.

38. As the requirement for promptness is already enshrined in the Act, and the main problem is that it is not being taken seriously by either authorities or the Commissioner, I believe the situation could be improved by a clear statement from legislators that they believe that the requirement for promptness is important and should be enforced.

**Time limits**

39. The lack of time limits in the Act for public interest tests and for internal reviews is a frequent point of friction with authorities.

40. There is little or no evidence that authorities genuinely need this flexibility.

41. The position in Scotland, with no extension for the public interest test and a 40 working day limit for internal reviews, provides an alternative model for the UK to follow.

**Poorly organised authorities**

42. Some authorities seem to consistently have difficulty meeting their obligations under the Act. In my personal experience these include the Cabinet Office and the Home Office.

43. “Meta-requests” – requests for information about how a previous FOI request was handled – suggest that for the most part long-delayed requests receive little attention for weeks at a time. ⁷,⁸

44. Often these authorities seem to spend substantially more time on looking for reasons to refuse or delay a request than on actually providing an answer.

45. For example, in ruling against an attempt by the Home Office to declare a request from me vexatious, the Commissioner observed⁹:

> “While the Home Office has made considerable representations about the additional work it has undertaken following the complainant’s requests, most of this work was incurred as a result of the way the Home Office handled the requests.”

46. Difficulties answering requests sometimes also appear to originate from extraordinarily poor records management. The Home Office is apparently unable to provide copies of 16 contracts they signed with the ACPO in 2009/10 within the costs limit⁹:

---


“Locating and collating this information would involve retrieving documentation from various other units in the Home Office Crime and Policing Group (CPG), due to the fact that the total funding amount is not centrally held. CPG consists of over 23 units amounting to over 100 individuals. This work would mean collating information through searching different information sources (namely 23 shared electronic drives, personal drives and separate paper records) held by each unit.”

47. Given that these are legal documents and also that the Government stated in 2010 that all contracts with values of more than £25,000 should be routinely published, I find it very hard to understand why these are not kept in a central location.

**The Information Commissioner**

48. Substantial delays in investigating complaints by the Information Commissioner have been well-documented in the past.

49. These delays have now been reduced but are still significant: it still typically takes 6-12 months to get a decision about any substantive complaint.

50. This again contrasts with the position in Scotland where the legislation sets a target of 4 months for the Scottish Commissioner.\(^1\)

51. One consequence is that any authority that wants to delay the release of time-sensitive information can easily do so.

52. The Commissioner already has substantial powers to take action against persistently poorly performing authorities.

53. His current approach only focuses on the absolute worst performers and is rather protracted; authorities which are already demonstrably failing are first monitored for many more months, then if still failing are persuaded to sign undertakings and monitored for a further substantial period. No new authorities have been placed under monitoring since April 2011.

54. I believe the Commissioner should use his powers much more aggressively, and issue enforcement notices whenever a pattern of poor performance emerges.

**The costs limit**

55. The MoJ’s memorandum highlights that a number of public authorities would like to see changes to the operation of the costs limit, in particular to include “redaction, consultation and reading time”.

56. Currently, the measure of time for the costs limit is fairly objective in that it only comprises the time required for well-defined and limited activities - locating, retrieving and extracting information. Even so there are often disputes before the Commissioner about the reasonableness of such estimates.

57. Adding more activities – particularly consultation and reading - would introduce a much more subjective element which would likely lead to a significant increase in such disputes.

58. Including redaction time would create an incentive for authorities to maintain information in forms where releasable information is intermingled with exempt information.

---


59. Measuring the required redaction time is also problematic because it presupposes that an exemption really does apply – but that may be a matter of dispute.

60. In the current regime, the first step in handling a request is to test the costs limit, and only if the information can be extracted, to consider other more substantive exemptions.

61. This simple two stage process would be enormously complicated if the application of substantive exemptions had to be considered in tandem with the application of the costs limit.

62. For example, I have obtained the release of the BBC’s contract with Capita to operate TV licensing.\(^{12}\) This contract runs to several hundred pages and the BBC initially sought to withhold significant parts of it, with many small redactions. Eventually the Information Commissioner ordered release of the whole document without any redactions at all.

63. I believe that changes to the calculation of the cost limit would make obtaining documents of this nature harder or impossible. Particularly given the current trends towards outsourcing, access to such contracts is in my view vital to understanding how public services are run.

February 2012

\(^{12}\) [http://www.whatdotheyknow.com/request/tv_licensing_contracts_with_capi#incoming-171072](http://www.whatdotheyknow.com/request/tv_licensing_contracts_with_capi#incoming-171072)
EXECUTIVE SUMMARY AND INTRODUCTION

1. The Justice Committee has invited written evidence on a number of areas in relation to the operation of the Freedom of Information Act 2000. I am writing in a personal capacity and as editor of addtofoi.co.uk to give evidence relating to situations where I would have liked to have the option to use the Act but was not able to due to gaps in coverage. I am the editor of addtofoi.co.uk which campaigns for more bodies exercising public functions and/or receiving public funding to be made subject to the Act.

2. I would like to comment on just one of the questions raised in the invitation to provide evidence: What are the strengths and weaknesses of the Freedom of Information Act? more specifically, I wish to comment on one of the main weaknesses of the Act.

3. In my experience one of the main weaknesses of the Act is the gaps in coverage, the Act should be extended to cover many more organisations and officials exercising public functions and/or receiving public funding

MAIN BODY OF RESPONSE

4. Examples of bodies that should be considered when extending the coverage of the Act include:

- ACAS
- Advertising Standards Authority (ASA)
- Air Travel Trust (the Trust manages the Trust Fund for the benefit of customers of failed tour operators)
- Association for Public Service Excellence (APSE)
- Association of Chief Police Officers (ACPO)
- Association of Drainage Authorities (ADA)
- Association of Port Health Authorities (APHA)
- Bar Council (including Bar Standards Board)
- BBC Worldwide Americas Inc.
- BBC Worldwide Limited
- British Academy (mainly funded by grants from Central Government)
- British Board of Film Classification (BBFC)
- British Film Institute
- British Standards Institution (BSI)(UK’s National Standards Body)
- Chamberlain of London
- Chequers Trust
- Churches Conservation Trust (sponsored by the Department of Culture, Media and Sport)
- College of Arms (official repository of coats of arms and pedigrees)
• Commissioners of Irish Lights (General Lighthouse Authority)
• Companies owned two thirds or more by any number of public authorities.
• Consumer Financial Education Body (CFEB)
• Contractors performing covert investigations in connection with RIPA (Regulation of Investigatory Powers Act 2000)
• Corporate Officer of the House of Commons (established by the Parliamentary Corporate Bodies Act 1992)
• Corporate Officer of the House of Lords (established by the Parliamentary Corporate Bodies Act 1992)
• Counting Officers for public referenda
• Court Funds Office (CFO)
• Crown Estate Paving Commission
• Dartmoor Commoners' Council
• District Auditors (see also ICO lines to take LTT11)
• Dorneywood Trust
• Duchy of Cornwall
• Duchy of Lancaster
• Electoral Registration Officers for public elections
• Exam boards (in respect of the administration of public examinations)
• Farriers Registration Council (maintains the statutory register of register persons engaged in farriery and the shoeing of horses under Farriers (Registration) Act 1975)
• Financial Ombudsman Service
• Financial Reporting Council (the independent regulator responsible for promoting confidence in corporate governance and reporting)
• Financial Services Compensation Scheme Limited (FSCS) (the statutory fund of last resort for customers of authorised financial services firms, set up under the Financial Services and Markets Act 2000)
• Her Majesty's Inspectorate of Prisons
• Higher Education Statistics Agency (HESA)
• House of Commons Commission (established by the House of Commons (Administration) Act 1978, claims not to be subject to FOI)
• Housing Associations (also called Registered Social Landlords) (those wholly owned by one local authority are already subject to the Act)
• Housing Ombudsman Service
• Improvement and Development Agency for local government (IDeA)
• Independent Custody Visiting Association (ICVA)(Home Office funded body that sets 'best practice' for custody visiting processes)
• Independent Safeguarding Authority (ISA)
• Inns of Court
• Inspection services for private schools
• Institute for Learning (IfL)
• Institute of Legal Executives (ILEX) (plus ILEX Professional Standards Limited - IPS)
• JANET (UK)
• Law Society (including Legal Complaints Service - LCS and Solicitors Regulation Authority SRA)
• LGcommunications
• Local Authority Leaders' Boards (regional planning bodies)
• Local Authority leisure and recreation trusts
• Local Government Association (LGA)
• Local Government Employers (LGE) (the business name of Employers' Organisation for Local Government)
• Local Medical Committees (Statutory body representing GPs)
• Local Safeguarding Children Boards
• London Organising Committee of the Olympic Games and Paralympic Games Limited (LOCOG)
• Manchester Airport Group (MAG is publicly owned by the ten local authorities of Greater Manchester)
• Master of the Rolls (see also: EA/2010/0119)
• National Anti-Fraud Network
• National Association of Local Councillors (NALC)
• National Exhibition Centre Limited
• National Screen Agencies (funded by UK film council - see also list of agencies)
• Nationalised banks
• Navigation authorities for inland waterways (some are already subject to the Act others are not)
• Network Rail Infrastructure Limited/Network Rail Limited
• NHS Confederation
• Nominet UK
• Non-judicial Inquiries
• Northern Housing Consortium
• Not for dividend companies receiving funding from public bodies (in respect of information which relates to the receipt/expenditure of public funds or work undertaken on behalf of a public body)
• Office of the Complaints Commissioner (investigates complaints against FSA)
• Office of the Independent Adjudicator (OIA) (the designated operator of the student complaints scheme in England and Wales under the Higher Education Act 2004)
• Official Receivers (see also ICO lines to take: LTT12)
• Official Solicitor
- Panel on Takeovers and Mergers
- Parking and Traffic Appeals Service
- Permanent Committee on Geographical Names (PCGN)
- PhonepayPlus Limited (regulator for premium rate charged telecommunications services)
- Port Authorities
- Press Complaints Commission
- Private Operators of prisons and detention centres
- Privy Council (see also ICO decision notice: FS50125731001)
- Providers of prisoner escort services
- Public Trustee
- Quality Assurance Agency (QAA)
- Regional Fire Control Companies
- Regional Screen Agencies (funded by UK film council - see also list of agencies)
- Regional Technical Advisory Bodies (RTAB)
- Returning Officers for public elections
- Royal Collection
- Royal Household
- Royal Marines Museum
- Royal Naval Museum
- Royal Navy Submarine Museum
- Royal Trustees
- School Food Trust
- Service Complaints Commissioner for the Armed Forces
- The Carbon Trust
- The Energy Saving Trust
- Traffic Penalty Tribunal
- Trinity House (The Corporation of Trinity House of Deptford Strond is the General Lighthouse Authority for England, Wales, the Channel Islands and Gibraltar and it is also a Deep Sea Pilotage Authority)
- Trustees of House of Commons Pension Scheme
- Trustees of Parliamentary Contributory Pensions Fund
- UCAS
- UK Association of National Park Authorities (UKANPA)
- Universities UK
- Urban Regeneration Companies (companies established by the relevant Local Authority and Regional Development Agency to co-ordinate redevelopment and regeneration)
- V (also called Russell Commission Implementation body receives majority of its income from Government grants)
● Video Standards Council (VSC) (designated body responsible for the age rating of video games supplied in the UK)
● Welsh Local Government Association (WLGA)

4. I recommend that the Justice Committee compiles a list of the bodies/officials not subject to the Act that it believes ought to be seriously considered for inclusion.

February 2012
Written evidence from Helen Cross

Summary

1. My evidence addresses the questions of whether the Freedom of Information act (the Act) is working as intended and what are the strengths and the weaknesses of the act, This is based on my own experience of making FOI requests.

2. Generally, the Freedom of Information Act is working as intended, but there are still a few areas of weakness and problems with compliance amongst smaller authorities.

3. The lack of a fixed time limit for conducting an internal review or a public interest test when applying an exemption leads to unnecessary delays for the requester.

4. There should be less focus on publication schemes, and more on disclosure logs to ensure released data is available to all.

5. The time limit for taking action under section 77 of the act is too short.

Is the Freedom of Information Act operating in the way that it was intended to?

6. In my experience, the Freedom of information act is operating as intended. Most public authorities are now well practised in answering Freedom of Information requests, so the level of compliance with the requirements of the act is generally quite high.

7. Unfortunately, there are still some authorities who have failed to comply with their responsibilities under the Act, including by doing the following:

   ● Demanding that FOI requesters pay a fixed fee for access to information. eg Sussex Coast College who tried to charge a flat £75 fee to requesters¹
   ● Refusing to respond to valid requests submitted via email. eg South Ribble Borough Council, who tried to force requesters to use their web form instead ²
   ● Taking unreasonable steps to establish the identity of requesters eg the Department for Communities and Local Government who asked one requester to present their passport to the British embassy in Baku³ This is an issue that particularly effects people with less common names.
   ● Refusing to answer requests from companies made in the legal name of the company.
   ● Demanding a postal address be provided for requests made electronically eg Bury Parish Council⁴

¹ [http://www.whatdotheyknow.com/request/ore_valley#incoming-183785](http://www.whatdotheyknow.com/request/ore_valley#incoming-183785)
³ [http://www.whatdotheyknow.com/request/barrier_busting_website_follow_0#incoming-203514](http://www.whatdotheyknow.com/request/barrier_busting_website_follow_0#incoming-203514)
8. These problems occur most frequently amongst smaller authorities who may not have a full time Freedom of Information officer or who have not had to answer requests before.

9. Whilst I recognise that some councils are concerned about the cost of responding to FOI requests at a time of of budgetary constraint, I believe that section 12 of the Act is working as intended and the current limits strike the right balance between limiting the cost burden on a public authority in responding to a request with the information rights of the requesters.

10. There is however, a problem with authorities who do not respond “promptly” to requests, but who consistently providing a response on the 20th working day regardless of the nature or the complexity of the request. The Information Commissioner’s Office has a policy whereby it does not issue formal decision notices in these cases. I believe that this is unfortunate, as the 20 working day limit is meant to be the maximum time allowable by law, not the standard response time.

What are the strengths and weaknesses of the Freedom of Information Act?

11. One of the main strengths of the Freedom of Information act is that it makes it simple for all sections of society to access public sector information that is relevant to them. This is largely due to the fact that requesters are not charged for making requests and there is no prescribed form of words that requesters have to use in order to get a response. I would strongly urge the committee to resist any calls to introduce charges for making requests as the information rights of the public should not depend on personal wealth. I would ask the committee to examine evidence from Ireland where the introduction of a charge for information requests lead to a steep drop in the number of requests that were made.

12. A further strength of the Act is that it is “applicant blind” so that all requests for information are supposed to be treated in the same manner regardless of who has made the request. Sadly this principle is not always adhered to by some public authorities who regularly route requests from journalists via their press office, who pre-approve any responses. This can lead to responses to requests from members of the press being delayed. The Metropolitan Police revealed late in 2011 that it treats requests from “high profile” requesters differently to those received from other members of the public, with those responses requiring sign off from higher ranking members of the force. This is a trend which I find quite worrying and one which I feel goes against the spirit of the act.

13. The main weakness of the Freedom of information act as currently drafted, is the lack of a limit on the amount of time that a public authority can take to conduct a public interest test when decided whether certain exemptions should apply. This can lead to frustrating delays, with requesters sometimes left waiting for months before being provided with a response from the authority.

14. A good example of this is a request made to the Metropolitan Police on 22 August 2011 asking for information on their monitoring of Social Networking. The Metropolitan Police wrote repeatedly to the requester explaining that they were unable to respond to the request as they were considering public interest factors, and they did not issue a refusal notice until 15 November 2011, which was almost three months after the initial request was made.

---

5 http://www.whatdotheyknow.com/request/social_media_monitoring_policies
15. As that request was refused on cost grounds, the requester refined their request on 16 November 2011 in an attempt to see if the request could be answered within the current cost limit. The Metropolitan Police again repeatedly delayed their responding to this request on the grounds that they were considering the public interest in disclosing the information. The Metropolitan Police finally issued a second refusal notice on 2 February 2011, over 5 months since the original request was submitted.

16. Such long delays are in keeping with the spirit of the Freedom of Information Act and I have observed that they can be very frustrating to requesters when they occur. I would like to see the Freedom of information act amended to introduce a limit to the amount of time that an authority can take to consider whether releasing information is in the public interest. I think this would help to reinforce the message that Information is meant to be provided promptly to the public when requested and would reduce the level of frustration felt by requesters who can see a request for information drag on for months.

17. I would also like to see a statutory time limit introduced for the amount of time that an authority can take at the internal review stage of a request. The Information Commissioner has already issued guidance that an internal review should be concluded within 40 working days of a request having been made, but without the full force of statute behind it, in practice the review stage can take much longer.

18. A further weakness of the Act is that Public Authorities are not required to maintain a disclosure log, which means that information is not automatically made publicly available one it has been released under the act. This can lead to repeat requests being made to public authorities, placing an unnecessary administrative burden on them.

19. The Act instead requires authorities to maintain an adequate publication scheme. I have found these to be of little use when making FOI requests as they are often out of date or incomplete. I have also been unable to access a copy of the register of interests of my local councillors because the fact it is listed in the authorities publication scheme means I am unable to specifically request a copy and the council were insistent that the document should only be available for inspection. Here the existence of the publication scheme actually made it harder for me to access the information that I required.

20. The final weakness that I would like to highlight is the short time frame for taking action, under Section 77 of the Act, against those who have deliberately acted to conceal or destroy information that otherwise would have been released. As the time limit for launching proceedings under s77 begins when the original offence took place, I believe that there is little prospect of a successful prosecution being brought. Although the ICO have significantly reduced the average time taken to handle complaints in recent years, it still can still take them several months to hear a case and, owing to delays at the internal review stage, several months for a complaint to reach the commissioner in the first place. I would ask to Committee to consider whether an amendment is necessary to give the ICO greater time to act in the event of a breach.

February 2012
Written evidence from Tom Boyd

About the author:

- FOI Officer to the British Council (June 2002 – November 2003)
- FOI Officer to Bristol City Council (December 2003 – July 2004)

Subsequently and currently an occasional user of the Act, and provider of pro bono advice to other enquirers

Summary

Public Authorities (PAs) remain extremely hostile to the FOI Act and frequently breach the Act without suffering any adverse consequences.

There is almost universal misunderstanding of the Act, e.g. regarding the rights it grants and the definition of a so-called ‘FOI enquiry’. PAs and the Information Commissioner’s Office are partly responsible for this situation.

PAs have consistently taken a minimalist and evasive approach to implementation, resulting in the establishment of FOI-related practices that are often ineffective, grossly inefficient and unnecessarily expensive. An example of a more efficient approach is offered.

Existing methods of monitoring the impact of the Act provide a distorted picture that exaggerates the burden of compliance and obscures the benefits of good practice (where such can be found).

Hostility to the Act from PAs – anecdotal evidence from personal experience

1) As FOI Officer to the British Council, I secured senior managers’ agreement that suitably-redacted versions of the annual ‘Country Reports’ submitted to HQ by each Country Director should be included in the Council’s Publication Scheme (PS). Thus these reports were included in the PS that was approved by the ICO and launched in November 2002, giving the Council a legal obligation to publish redacted versions proactively. I produced procedures for redaction, which were approved by my own managers, and distributed these to Country Directors, along with a standing offer of assistance with any transparency-related matters. In the event, not one of the Council’s hundred-plus Country Directors either submitted a Country Report for inclusion in the PS or alerted me to any difficulties, though at least one did email senior managers to complain that it was unreasonable of HQ to expect compliance with the Act. When I raised the matter of Country Directors’ failure to supply these records with my line manager, he refused to take the issue up and accused me of endangering his ability to feed and clothe his child, on the grounds that my ‘troublemaking’ might impact upon his annual performance assessment. To the best of my knowledge, the Council’s commitment to publish these reports was never met, and not a single example was ever released. This was typical of my experience as FOI Officer to the British Council, so I eventually resigned out of frustration.

2) I met even more hostility to the Act in my next job of FOI Officer to Bristol City Council. I recall one of my own managers literally shouting at me ‘This is bad law!’ and another telling me that the Council would rather accept a fine for non-compliance than adjust any existing practices. In order to comply with the Act it was absolutely necessary to undertake a full information audit, but only 40% of record-holding teams responded to the resultant attempt to survey the Council’s information assets. When I ‘flagged up’ this problem, I was summoned to the Monitoring Officer’s office for a dressing down, and told
that I must choose between dropping the issue and making formal accusations of misconduct against each of those team leaders who had ignored the information audit. Being in my first six months of employment at the Council at this point, I was ‘on probation’, with confirmation of my position subject to satisfactory, monthly progress reports. I had previously received positive reports, but, in the wake of my aforementioned encounter with the Monitoring Officer, my next report described me as disruptive and my performance as unsatisfactory. I concluded that the Council was most unlikely to confirm me in post, so I resigned.

3) I made one more attempt to find work in the FOI field, and, in 2005, applied for an FOI Officer post at a university. In interview, I observed that, as always seems to be the case, corporate compliance with the Act was listed as a responsibility of the FOI Officer alone, and FOI-related responsibilities didn’t appear on anyone else’s job description. I suggested that this was unreasonable unless the FOI Officer also had power to instigate disciplinary proceedings against any other employee who deliberately chose to flout the Act. As a solution, I proposed that the FOI Officer’s job description be amended such that he/she had responsibility for providing colleagues with whatever advice or assistance was necessary to enable them to comply with the Act, and the interview panel agreed with me. They subsequently offered me the job, but when I reminded them of the above point, and asked them to make the proposed adjustment to the job description before I signed a contract, they withdrew the job offer. This left me even more convinced that, as far as PAs are concerned, an FOI Officer is there to ‘carry the can’ for others’ non-compliance, and that such posts were, essentially, only created as a smokescreen, so that PAs could claim that they were making an effort to comply without actually adjusting existing practices.

4) In 2007, I twice attempted to submit a written request for access to CCTV footage to a Job Centre. The first Department for Work and Pensions officer I spoke to simply refused point blank to accept the request. On my second attempt to submit this request, I was directed to the security guard in charge of CCTV. I first asked him how long he kept such footage before deleting it, and was told he just deleted the footage ‘whenever’, i.e. that there was no retention schedule (an absolute requirement for compliance with the Act) for this recorded information. When I attempted to submit my written request, he grew extremely hostile and told me that if I wished to request, let alone receive, the information, then I would have to ‘go away and come back with a legal representative’. This was a gross breach of Section 16 of the Act: rather than provide advice and assistance, as he was legally obliged to do, this public employee attempted to intimidate me out of submitting my request by proffering misinformation regarding my legal rights.

5) Since turning my back on work in the FOI field, as a direct result of the refusal of PAs to make a sincere attempt to comply with the Act, I have assisted several others with their own enquiries. In each case, they had made a valid request to a PA, but disclosure had been refused, without any reference to the Act (eg, exemptions or the right to appeal) being made. In each case, I then drafted a ‘scary’ email, demonstrating knowledge of the Act, whose submission to the relevant PA’s FOI Officer resulted in disclosure of the data. This suggests that, with the exception of ‘FOI professionals’, public sector employees are either unaware of their legal obligations to enquirers, or habitually choose to disregard the Act entirely where it appears to them that an enquirer is unaware of their rights, i.e. whenever said public sector employees seem likely to get away with a breach of the Act.

6) Senior public sector employees frequently make misleading claims about the Act, and the burden it places on PAs, when commenting in public fora. Prime examples include the complaints of Ken Thornber, Leader of Hampshire County Council (Guardian Comment, 20 January 2010), who claimed, eg, that council staff had been ‘tasked with identifying … the number of biscuits … supplied at council meetings’. This could only have happened if it was already council practice actually to count out the number of biscuits supplied at meetings,
and to keep a record of this information. Personally, I think this most improbable – far more likely that the council merely records, eg, the amount spent whenever it purchases a batch of biscuits. If I am correct on this point, then the council could simply have told the enquirer that it does not hold the information requested, for the Act does not require PAs to start collecting new kinds of information in response to enquiries. If I am wrong, and Hampshire County Council does actually count each biscuit as it is handed out, then it is surely a matter of public interest that resources are being devoted to that task...

Misunderstanding of the Act

7) There is an almost universal assumption that an ‘FOI request’ is a particular type of written or emailed enquiry, e.g. one that mentions the Act or is submitted to an FOI Officer, with others being ‘business as usual’ enquiries. Journalists and public sector employees, including FOI professionals, exhibit this misapprehension almost every time they discuss the Act, e.g. in the press and during discussions on the JISCMAIL FOI email list. Under the Act, of course, every single request for information that is both made in a permanent form and contains an enquirer’s name and contact details is actually an ‘FOI request’, even if it is for non-controversial information that was routinely published prior to the Act’s implementation. The great problem this causes is that the Act is frequently ignored by public sector employees dealing with enquiries that are sent directly to the teams holding the relevant information, and that do not refer to the Act, because said public sector employees do not regard FOI as any part of their jobs.

8) The Act has often been described as granting members of the public ‘the right to request’ information [my italics], with this suggestion appearing not only on numerous PAs’ websites, but also in supposedly explanatory leaflets issued by the ICO. This is grossly misleading, for we have always enjoyed ‘the right to request’ information. What summaries of the Act ought to state most prominently is that it grants us the right to receive any non-exempt information we request. The difference is hugely important, for our having the right merely to request information does not imply any obligation at all on the part of PAs even to read or acknowledge enquiries, let alone respond to them by releasing data. This misrepresentation of the Act has no doubt hampered efforts to get PAs to comply, and it is particularly disappointing that such misinformation regarding the Act should emanate from the ICO.

Minimalist and evasive responses to the Act on the part of PAs

9) In absolutely every case of which I am aware, PAs have chosen to treat efforts to comply with the Act as discreet areas of activity, undertaken separately to existing activities relating to records management and the provision of information to the public. Rather than adjust existing information management and publication practices to take account of the Act, and distribute responsibility for compliance throughout their teams, PAs typically employ one or a handful of FOI specialists, who are treated as responsible for corporate compliance, while the rest of the organisation carries on creating and managing information as though the Act had never been passed. As a result, the following scenario is typical:

9.1) PA Employee A, who is not an FOI specialist, creates an electronic record, stores it internally (eg on an intranet or internal database), and moves on to their next task, without ever thinking of the Act.

9.2) In the event that a member of the public seeks non-exempt information contained within said record, they follow the PA’s published advice and submit an enquiry to the PA’s FOI Officer.
9.3) The FOI Officer then identifies Employee A as the person who holds the information, and forwards the request to them.

9.4) Employee A receives the request, but has ‘moved on’ from the task at hand when they created the record, so has to interrupt their workflow in order to recall/establish which particular record contains the information requested and retrieve that record.

9.5) If the record contains potentially exempt information, in addition to the non-exempt data that have been requested, Employee A must recall or re-establish in his/her mind the factors that determine whether or not any information in the record is actually exempt. **Crucially**, this is more difficult and time-consuming for Employee A than would have been the case had the question of the information’s sensitivity been addressed at the time of the record’s creation, when said factors were fresh in their mind.

9.6) Employee A then either redacts the record or extracts the non-exempt information requested, and sends the FOI Officer either the redacted record or just the information requested.

9.7) The FOI Officer then sends the enquirer the data they sought.

Clearly, such a process is hugely inefficient, and therefore expensive, and particularly difficult for Employee A. Moreover, it must be noted that the example outlined above is very much a ‘best case scenario’, in which, eg, neither the FOI Officer nor Employee A is absent from work, and there is no disagreement between the two as to whether or not any relevant information is actually exempt.

10) Herewith an example of an alternative system, of the sort that PAs might have established over the course of the **five years** that passed between 2000, when the Act was passed, and 2005, when the general right of access came into being, let alone the **further seven years** that have passed since.

10.1) Employee A creates an electronic record, and considers the question of whether or not any of the data contained therein are exempt while all relevant factors are fresh in their mind, ie when it is **easiest for them** to address said question. If necessary, they seek advice from an FOI Officer or other expert.

10.2) If **all** the information in the record is exempt, Employee A adds a short note to the record to this effect, stores the record internally, and moves on to their next task. In the event that the exempt data are ever requested by an enquirer, an appropriate refusal to disclose can be produced quickly and easily.

10.3) If the record contains no exempt data, Employee A then stores it on a public web page, where the PA’s employees can access it (for professional purposes) just as easily as if it had been stored internally. Immediately, the information becomes absolutely exempt under S.21 of the Act. Thereafter, the FOI Officer, Employee A, or any of their colleagues at all can deal with a request for data contained within the record in a matter of moments, at virtually no cost, by referring the enquirer to the PA’s website, thereby fulfilling their duty to provide advice and assistance. If an enquirer really has no web access, eg because they really can’t visit a public library, then any employee of the PA can offer to print off and supply a hard copy. Moreover, the burden of extracting whatever information is actually sought from the range of records published falls on the **enquirer**, rather than on any employee of the PA.
10.4) If the record does contain some exempt data, but there is no apparent public demand for the non-exempt remainder, Employee A adds a short note to the record (eg ‘Sensitive Personal Data’) and stores the record internally. Should any request for the record’s non-exempt content be received subsequently, when Employee A has moved on to other tasks, the aforementioned note should make redaction of the record much easier for them or any of their colleagues than would be the case if the information’s sensitivity was only considered at a later date, in response to said enquiry.

10.5) If the record contains a mixture of:

   a) exempt data

   and...

   b) non-exempt data for which there is an apparent public demand,

...then Employee A stores the full record internally, but also produces a redacted version (with a note outlining the legal reasons for redaction) and stores this on a public web page. The non-exempt data thereby become absolutely exempt, as described at (10.3), while requests for the exempt data can be refused quickly and easily, as described at (10.2).

10.6) Where a record contains a mixture of exempt and non-exempt information, Employee A could be left to choose whether to follow the procedures outlined at (10.4), or those outlined at (10.5), according to their own judgement as to which would make their own life easier in the future.

A further advantage of the system outlined above would be that difficult and time-consuming aspects of compliance, such as discussions between Employee A and a true FOI expert, or consideration of the Public Interest, could be undertaken when it was easier and more convenient to do so than when the ‘twenty day clock’ had started ticking.

11) The approach proposed above would not, of course, help PAs deal with requests for information that is only held in hard copy, but the proportion of data held by PAs that does exist in electronic form is already very significant, and is only going to increase in the future.

12) Moving from the sort of system outlined as (9) to the sort recommended at (10) would be neither difficult nor expensive. It would, however, require the sort of sincere intention to comply with the Act that has proved singularly lacking amongst PAs to date.

Monitoring the impact of the Act

13) PAs’ failure to treat so-called ‘business as usual’ enquiries as the FOI enquiries that they actually are in law means that only problematic/expensive enquiries are considered when the costs of compliance are calculated. This drastically increases the reported average cost of dealing with an enquiry covered by the Act.

14) Current methods of monitoring the Act’s impact do not take into account the advantages of pro-active publication, and should be adjusted accordingly. Eg, if a PA puts a suitably-redacted version of an internal meeting’s minutes on its website as a downloadable document, and ten people subsequently download that document, then that PA should be given the same credit for compliance as if it had satisfactorily answered an additional ten enquiries.

February 2012
Written evidence from Chaminda Jayanetti

Executive summary:

1. I am a regular user of the Freedom of Information Act, presently to monitor the impact of public funding cuts. I would probably be considered a ‘serial requester’ to local councils and NHS trusts, but I only send requests where I believe the information is in the public interest. I do not send frivolous requests and have little patience for those who do.

2. I want to see the Freedom of Information Act work in a manner that meets its core objectives without over-burdening public bodies; at the same time, any measures to mitigate its impact on public bodies should not restrict its application. The Act is an all-too-rare example of legislation that broadly serves its purpose.

3. My recommendations are based on the following underlying principles:
   
   • any tightening of the exemptions should only affect the most egregious misuses of the Act
   • some measures can be taken to reduce the administrative burden on public bodies without tightening exemptions
   • work must be done to prepare the Act for extension to private providers of public services

4. Here are my specific recommendations:
   
   • a separate, second cost/time limit should be introduced – a limit on the cost/time required to read material for the purpose of redacting and to physically apply redactions (para 10)
   • public bodies should be given the power to immediately reject – without any further consideration – any request for an internal review that does not provide any rationale or argument against the original decision (para 16)
   • public bodies should focus on integrating their published data – on spending above a certain level, or executive pay and expenses, for example – with their Freedom of Information web pages (para 18)
   • the role of Freedom of Information officers should be reconsidered (para 19)
   • public bodies should be required by the Information Commissioner’s official guidance to direct the requester to the precise location of the information (at least, if it is online) if the ordinary person could not reasonably be expected to locate it themselves (para 23)
   • in terms of prejudice to commercial interests there should be a clearly stated presumption in favour of disclosure where the requested information concerns the expenditure of public money (para 25)
• the Act should be extended to cover the delivery of services provided by the private or third sector where these are funded by government (para 27)

**Administrative burden:**

5. Funding cuts are having a severe impact on ‘back office’ functions such as information governance. It is also likely that these cuts are the focus of increasing numbers of requests as citizens and journalists try and establish their impact.

6. The fact that more people are using the Act is not a weakness; it shows the strength of the Act and its success as a means of opening up government. Nor is the increasing complexity of requests necessarily a bad thing – many of my requests are complex so as to ensure the accuracy and context of the information.

7. To give an example – last year I asked local councils for details of funding cuts to charities. A simple request would ask what charities had had their funding reduced and by how much. However, that might include charities that had voluntarily withdrawn from funding arrangements; charities whose funding contracts had been re-tendered to other charities; and charities that had received a one-off capital grant. None of these could really be considered a ‘funding cut’. So I extended my request to take account of these factors. That made it a far more complex request, but meant that the information that came back did not misrepresent the position of local councils. It was telling that when the data was published, despite its high profile, practically nobody challenged its accuracy.

8. Public bodies’ concerns regarding the administrative costs of the Act seem to revolve around the section 12 cost limit, vexatious requests, appeals, and volume of requests. I shall address each of these in turn.

**Section 12:**

9. Any move to bring the time required to consider exemptions and apply redactions into the existing section 12 cost/time limit would be catastrophic and open to serious abuse. Given that judging an exemption is essentially a mental process, there is no way of ensuring that public bodies are not deliberately inflating the time taken to do so in order to trigger the cost limit. In addition, a request to a local council may require sign-off from three members of staff due to internal procedures. If each member of staff spends three hours judging exemptions, that is collectively nine hours. This is half the current time limit. A request for information that takes 10 hours to retrieve – well below the existing time limit – would be rendered unenforceable.

10. The MoJ memorandum outlines egregious cases where PhD students request large volumes of research that are easy to retrieve but exceptionally time-consuming to redact. This kind of request is not within the core aims of the Act. Therefore, in order to protect public bodies from these most egregious cases, a separate, second cost/time limit should be introduced – a limit on the cost/time required to read material for the purpose of redacting and to physically apply redactions. If a public body can demonstrate that reading and physically redacting requested information would exceed, say, 15 hours, the request can be refused.
11. This cost limit would be entirely separate to the existing, retrieval cost limit. It is crucial that it must not be applied to the time required to consider the application of exemptions, nor to the time required to set out the principles of what should be redacted – merely the time required to actually read the material and physically redact the information. As a protection against abuse by public bodies, the time required for only one person to read the material could count towards the second cost/time limit – a public body could not require three different members of staff to read the material so as to trigger the time limit.

12. In addition, the application should be subject to appeal where there is an exceptional public interest in disclosure. This would protect the most important disclosures, such as MPs’ expenses, which incurred lengthy redactions but clearly met an exceptional public interest. I will discuss the administrative burden of appeals later.

13. Some public bodies would like to alter the rules around aggregation, so that all requests from the same source could be aggregated for section 12 purposes, rather than merely those on the same subject. This would not work. First, anyone could create a false email account and identity from which to send additional requests. Second, newspapers and businesses would simply get a variety of employees to submit different requests, each time using personal email accounts to hide their shared workplace.

14. Nor would introducing more charging solve the issue. National newspapers, think tanks and businesses would all stomach the costs. Freelance journalists and local newspapers would be hit. Private individuals would be discouraged altogether – the government’s much vaunted ‘armchair auditors’ would go to seed. As I stated earlier, any reform should be based on weeding out the most egregious examples, not wrecking the core of what has been a successfully implemented piece of legislation.

Vexatious requests:

15. Having never had a request refused as vexatious, my only concern here is that the provision is not extended beyond an egregious fringe of requests. It would appear from the Ministry of Justice memorandum that public bodies are wary of refusing vexatious requests because of the cost of appeals. Thus it may be more effective to address the question of appeals rather than widening the definition of ‘vexatious’. It is fundamental that public bodies cannot refuse requests solely because they do not understand the purpose of it, unless the information requested is genuinely trivial – the Act would be corrupted if it allowed public bodies to act as sole arbiters of what information is important and what isn’t.

Appeals:

16. Public bodies should be given the power to immediately reject – without any further consideration – any request for an internal review that does not provide any rationale or argument against the original decision. Such a power would have to be worded carefully, but essentially it would mean that an applicant could not just fire off a request for internal review on a whim – they would have to provide some kind of argument, however weak or thin, as to why the original decision was wrong. At present – if I understand correctly – an appeal lodged without any such argument
would have little chance of success, but would still have to be fully considered by the public body. With the new power, they could reject such ‘hit and hope’ appeals on the spot. However, if an argument is advanced it must be given full consideration via the internal review process, regardless of how poor an argument it may seem.

Volume of requests:

17. As I stated at the outset, the increasing usage of the Act is evidence of its success. However, clearly public bodies are concerned about the rising number of requests. The reality is that Publication Schemes are generally ignored. They are hard to navigate, often refer to information that has to be requested in order to access anyway, and contain large amounts of information – around governance, for example – that few people would be interested in.

18. **Public bodies should instead focus on integrating their published data – on spending above a certain level, or executive pay and expenses, for example – with their Freedom of Information web pages.** If someone searching for the public body’s FOI contact details was first confronted with links and explanations of readily-published data around spending, tenders, pay and expenses, this may provide them with the information before a request is submitted.

19. In addition, **the role of Freedom of Information officers should be reconsidered.** Currently, FOI officers are gatekeepers who forward requests on to relevant departments. Generally, they don’t have much personal knowledge of what information is stored and how. I would suggest that public bodies would benefit if the role of FOI officers was reconfigured so that they became more knowledgeable about the way key information – around staffing, expenditure, and other common subjects of FOI requests – is categorised and stored, so they could then give quick steers to prospective requesters prior to requests being sent.

20. To clarify, I’m not suggesting with this latter recommendation that FOI officers should just dole out FOI responses on demand over the phone. Instead, I am suggesting that if a public body’s Freedom of Information web page had a phone contact for the FOI officers (many do not), and a suggestion that people call this number if they want advice on how the public body holds certain information, then the FOI officer could quickly guide the requester on how this information is categorised and stored, so as to enable the request to then be phrased in a way that makes it easier for the information to be located.

21. Together, these measures could both reduce the volume of requests, and improve the phrasing and structuring of requests for the benefit of both requesters and public bodies alike.

Widening the Act:

22. Having addressed some of the concerns of public bodies, I now want to discuss areas where the Act could be improved from the perspective of a requester such as myself.

Section 21 – information already reasonably accessible:
23. This section needs to be defined more clearly. I would suggest that public bodies should be required by the Information Commissioner’s official guidance to direct the requester to the precise location of the information (at least, if it is online) if the ordinary person could not reasonably be expected to locate it themselves – for to fail to do so would render the information not reasonably accessible.

24. I shall explain with the example of NHS Trusts. Here is a link to a randomly selected NHS Trust’s Board papers for one Board meeting:


There is a long list of different papers – collectively running to hundreds if not thousands of pages – often full of technical or management language. It is clearly absurd to consider information buried deep within one of these papers at one of these meetings to be reasonably accessible to anyone without an inside knowledge of the NHS Trust Board in question. Yet at present, NHS Trusts can and often do apply section 21 to any information that might be within one of these Board papers, and merely direct the requester to the Trust Board homepage; in this case, here - http://www.medwaypct.nhs.uk/explore-nhs-medway/about/board-meetings/. Unless the requester is able to spend a week going through every Board paper for every Board meeting, s/he must simply give up. It would make far more sense for the Trust, in its response to the request, to apply section 21 and direct the requester to the specific Board paper, or indeed the specific page. There is no need to change the law here – merely for the Information Commissioner’s guidance to state this so it can be applied by requesters and public bodies.

Section 43 – prejudice to commercial interests:

25. In terms of prejudice to commercial interests there should be a clearly stated presumption in favour of disclosure where the requested information concerns the expenditure of public money. In essence, it should not be possible for public bodies to hide how much they have spent (or ceased to spend) on a service or a contract by using section 43, other than in exceptional circumstances. This could be achieved through clear direction within the Information Commissioner’s guidance on this section.

Private contractors:

26. In recent years, there has been increasing recognition that sections 41 (in particular) and 43 cannot be used to hide details of private sector contracts tendered by public bodies. However, the current trend towards transferring public service delivery to the independent and third sector – be it through asset transfer, ‘Big Society’ funds, or outright tendering – opens up new and pertinent questions about the application of the Act.

27. The Select Committee should, I believe, take the opportunity to unequivocally state that the Act should be extended to cover the delivery of services provided by
the private or third sector where these are funded by government. This does not include contracts to supply goods. The details of how this would work should be examined in more detail, but as an underlying principle this is unarguable. First, delivery of frontline local government and NHS services are of sufficient importance to warrant the application of the Act so that they can be scrutinised. Second, in the open marketplace that is being considered for swathes of the public sector, to include public sector entities (e.g. NHS Acute Trusts) within the scope of the Act while excluding private sector contractors (e.g. private health providers that win NHS contracts from clinical commissioning groups under the putative Health and Social Care Bill) would place the public sector entities at a disadvantage to their private sector rivals. Since creating a level footing by excluding the public sector from the Act would simply remove public services from the transparency of the Act, the only solution is to extend the Act to private sector providers.

28. Full discussion and consideration would have to be given to how this would work in practice. It would presumably not be the aim to bring entire private companies within the scope of the Act when only small subsets of those companies are actually providing services under public sector contracts. Instead, the public sector tendering body could be required to include a Publication Scheme clause as part of the tender, setting out a Publication Scheme that the winning bidder – be it private, public or third sector – would have to abide by in delivering the tendered service. The Publication Scheme would be different to current schemes (which, as I said earlier, are largely ignored) – it would have to state clearly that information relating to the service in question would have to be made public under the Freedom of Information Act, unless covered by an existing exemption. The public sector tendering body would have to give prior approval to the application of any exemption by the private/voluntary provider, to avoid private companies deliberately discouraging requests by refusing as many as possible and hoping few applicants will appeal to the Information Commission – after all, freedom of information is not at present part of the private sector culture.

**Conclusion:**

29. The Select Committee should see the rising usage of the Freedom of Information Act as a good thing, not a problem to be tackled or a worrying trend to be curtailed. Public bodies covered by the Act are inevitably inclined to see things from their own perspective, rather than considering the broader benefits that transparency brings. However, there are legitimate concerns around a small number of egregious cases that impose a heavy burden, and I hope that the Committee will consider the pragmatic steps I have suggested that could tackle these without obstructing the majority of users of the Act.

February 2012
Written evidence from Chris Boocock

1) Does the Freedom of Information Act work effectively?
2) What are the strengths and weaknesses of the Freedom of Information Act?
3) Is the Freedom of Information Act operating in the way that it was intended to?

I write having personally used FOI requests in two specific cases and having played a small part in a successful campaign which relied on FOI requests. These were

i) objecting to a local authority promoted SEN school development and
ii) a local authority proposal to remove a high quality cycle facility.
iii) supporting a campaign group resisting PCT proposals to downgrade our local hospital.

In the first case the Local Authority pushed their proposal through against significant local opinion (127 written objections) and I believe the only way this could have been challenged would have been by using the Judicial Review process. However the timetable that the LA were working to meant that the window of opportunity for this was very small. The FOI responses were not delivered within the legally required timescales and this played a significant part in the opportunity for Judicial Review being missed.

Similarly in the second case the FOI responses were not delivered within the required timescales, nor was the Internal Review that I requested. The FOI requests did show that public statements made on the matter were inaccurate and misleading. In the event the proposals were not supported by the majority of the Council so this additional information was not pivotal.

In the third case the campaign group put together a comprehensive and fully referenced rebuttal of the PCT’s case which, in my opinion, showed that the proposals were fundamentally flawed and unworkable. This campaign resulted in a very significant change of heart by the PCT, securing the future of our hospital.

As a result of the above experiences I wish to make the following points:

1) FOI is an essential part of a functioning democracy. Without access to information one cannot engage in decision making or policy formulation.

2) I do not understand why FOI requests are not met in a responsive and timely manner. In the digital age sending documents is a simple click of a button. IMO there is no excuse for missing deadlines for responses,

3) I think that the Act should be strengthened such that Public Bodies are obliged to treat information as normally and immediately available to the public.

4) I think that there should be clarity over penalties for breaching the Act and that the Statute of Limitations of six months is totally inadequate. In the timescales of these matters, and some of the decisions at stake, I think seven years would be more appropriate.

February 2012
Written evidence from Equanomics UK

Introduction and overview

1. This submission is made in response to the Justice Select Committee’s request for evidence for its post-legislative scrutiny of the Freedom of Information Act 2000 (FOIA).
2. This submission, from Equanomics UK¹, is supported by leading organisations involved in the promotion of race equality - the Afiya Trust, Black Training Enterprise Group (BTEG), Coalition Of Racial Justice (UK), Friends, Families and Travellers, Just West Yorkshire, MENTER, Operation Black Vote (OBV), the Race Equality Foundation, Race on the Agenda (ROTA), the Runnymede Trust and Voice4Change England. Equanomics-UK and our colleagues are members of a BME VCS Coalition².
3. Evidence-based policy making is crucial; therefore in our main submission we have:
   a. summarised key ways in which our organisations and members have been involved with the FOIA and briefly reflected on key recommendations from the Stephen Lawrence Inquiry which have informed our evidence;
   b. commented on the conclusions set out on pages 62 and 63 at paragraphs 219 – 224 of the Memorandum to the Justice Select Committee³;
   c. concluded our submission with summary comments on the three overarching planks of this review - the effectiveness of the FOIA, its strengths and weaknesses and whether the Act is operating as intended.

Executive summary

4. As race equality focused Voluntary and Community Sector (VCS) organisations, we share the Government’s belief that accountability and transparency are at the heart of effective government. We also draw on, and recognise the continuing importance of, our collective experiences of racial discrimination, racial inequalities and the recommendations of the Stephen Lawrence Inquiry on the importance of freedom of information legislation, openness, trust, accountability and access to information.
5. As organisations, we have considered, advised on and used a range of tools to ensure that public accountability and transparency are a reality rather than simply rhetoric. We view the FOIA as an essential, although not perfect, tool for those interested in shining a light on public bodies and holding them to account. We would therefore be concerned about the introduction of any steps that might further restrict or limit the ability of individuals or organisations to use the FOIA’s provisions.

---
¹ Equanomics-UK addresses race equality in the UK from an economic perspective. It is a broad based coalition of individual activists and voluntary and community based organisations. It seeks to build awareness of the impact of poverty on BAME communities and develop appropriate action.
² The BME VCS Coalition brings together existing national, regional organisations and other founder members to fulfil our shared objectives to challenge racism by strengthening and supporting what we already do to influence public policy, the media and key decision makers.
³ Cm 8236 presented to Parliament by the Lord Chancellor and the Secretary of State for Justice: December 2011
6. We believe that introducing new fees or extending the ability of public bodies to issue fees would: a) reduce the opportunity for individuals and VCS organisations to use the provisions of the FOIA to secure information; b) have a chilling effect on the ability of individuals and organisations to use FOIA; and c) undermine public accountability. If a balance must be struck, the balance should favour promoting public accountability, confidence and trust by facilitating access to information.

7. We welcome the Government’s proposals in relation to making information routinely available and providing information in formats that are reusable\(^4\).

8. We welcome proposals, by FOIWiki, for improving the FOIA and would hope that the Committee will give due consideration to these detailed recommendations (see http://foiwiki.com/foiwiki/index.php/Changes_we_would_like_made_to_FOI_law).

The Government’s commitment to greater transparency and openness throughout the public sector, our collective experience of FOIA and the importance of the recommendations of the Stephen Lawrence Inquiry

9. We support the assertion by the Prime Minister\(^5\) that ‘Greater transparency across Government is at the heart of our shared commitment to enable the public to hold politicians and public bodies to account.’ We also welcome the assertion in the Memorandum that: ‘the Government is committed to greater transparency and openness throughout the public sector’ and that ‘Freedom of information remains a vital element of the transparency agenda and has been instrumental in the release of a great deal of information which might otherwise have remained closed (para 219).’

10. As BME VCS organisations, committed to the promotion of equality, we have considered, advised on and used a range of opportunities available to ensure that accountability and transparency in public affairs and we consider the FOIA to be a key tool.

11. In addition to using the FOIA to make direct requests to public bodies including government departments, local authorities and universities, other FOIA related activities include:
   a. reviewing and drawing on the recommendations of the Stephen Lawrence Inquiry in relation to trust, information and freedom of information;
   b. providing advice and information on how to use the FOIA in conjunction with other legislation including the Equality Act 2010 and the public sector equality duties (e.g. Equanomics-UK, ROTA, Voice4Change England);
   c. providing training to staff and/or other organisations on how to use the provisions of the FOIA to promote race equality (e.g. the Afiya Trust, ROTA\(^6\), Voice4Change England\(^7\)).

12. The recent high profile court case of two of the murderers of Stephen Lawrence has caused many to reflect back on the analysis and recommendations of the Stephen Lawrence Inquiry.

---

\(^4\) Protection of Freedoms Bill (HL Bill 121) clauses 102 and 103
\(^6\) Training programmes for VCS organisations on the public sector equality duties and the FOIA.
\(^7\) Public law and Compact training workshops for the VCS.
Inquiry. We believe that the Inquiry’s recommendations on ‘openness, accountability and the restoration of confidence’ are no less relevant now than they were in 1999.

13. The Stephen Lawrence Inquiry highlighted the need to “increase trust and confidence in policing amongst minority ethnic communities” and specifically recommended that ‘a freedom of information act should apply to all areas of policing, both operational and administrative, subject only to the “substantial harm” test for withholding disclosure’.

14. Although the Inquiry’s recommendations were made in relation to policing, we believe that openness, accountability and maintaining and/or restoring confidence of BME communities in public bodies is important across the board; improving access to information and the operation of the FOIA can make key contributions to promoting trust and accountability.

15. We would ask the Committee to explore whether any amendments should be made to the existing FOIA exemptions to better address the recommendations made by Sir William Macpherson in 1999.

The increasing use of FOIA by campaigners, individuals and organisations, particularly voluntary and community organisations

16. Our experience is that whilst some VCS organisations are making increasing use of the FOIA many others have a limited understanding of the FOIA and how to make FOIA requests. Our training and associated work, suggest that in the future increasing numbers of VCS organisations can be expected to make growing use of the FOIA request process.

17. We would argue that the increasing costs for public bodies associated with complying with FOIA, referred to in paras 220 and 221 of the Memorandum’s conclusions: a) are in part a natural consequence of greater use by individuals and organisations of the FOIA; and b) may in part reflect a failure by some public bodies to properly consider how best to really embrace a commitment to openness, public accountability and transparency and adapt their systems to address this commitment.

18. The Memorandum reflects on a MoJ study (para. 216) and suggests that the study found that in some limited cases ‘some people were recording less information and that internal communications had become less detailed and informative than before FOIA.’ The report also comments that ‘there is an important balance to be struck in enhancing transparency while protecting the necessary space in which policy options need to be discussed and decisions taken. The difficulty in appropriately striking that balance remains a concern and is worthy of consideration (para. 218).’ Since there are clear FOIA public interest exemptions and a wide range of other FOIA exemptions, there is no reason why the FOIA provisions should limit the information that should be minuted. Perhaps the flaw in the Memorandum’s analysis, is the failure to recognise that some public bodies may be concerned that FOIA requests may uncover flaws/failures in decision-making. The suggestion that some public bodies may simply fail to record information/trial-making

---


9 The recommendations (chapter 47), especially recommendations 9, 10 and 17: The Stephen Lawrence Inquiry, report of an Inquiry by Sir William Macpherson of Cluny.

10 The FOIA 2000, Part II section 21 – section 44
in any detail because of the FOIA is therefore lamentable. We believe that inadequate recording of decisions is inconsistent with proper decision-making, the public interest and promoting public accountability and trust. We would ask the Committee to consider this issue, as well as the examples of good or best practice highlighted in Memorandum.

19. We have concerns about the range of public bodies covered by the FOIA and the impact of the Health and Social Care (H&SC) Bill and other legislative reforms that may result in services being ‘contracted out’ for want of a better term. We welcome the provisions in the Protection of Freedoms Bill, in relation to providing a wider definition of publicly owned companies, however we hope that the Committee will consider:

a. does this definition of publicly owned companies go far enough?

b. amendments to ensure that where services, activities or functions are contracted out under the H&SC Bill or other similar legislation, that public bodies responsible for monitoring such contracts and contractors:
   i. should secure a suitable range of information on the performance of those bodies in relation to the public contract where the contractor is not directly subject to the Freedom of Information Act 2000\(^\text{11}\);
   ii. should ensure that contractors maintain relevant information;

c. amendments to ensure that where services, activities or functions are contracted out under the H&SC Bill or other similar legislation, that the ICO and the relevant Tribunal:
   i. can consider complaints about a public body not holding or requiring a relevant contractor or organisation to hold relevant information about the performance of the contract, service or activity where the public body would have been expected to hold such information and holding and/or disclosing such information would be in the public interest;
   ii. can require a public body to start to secure such information as is in the public interest.

Key issues time-limits and public interest tests and internal reviews\(^\text{12}\)

20. The current time limit for responding to requests for information is 20 working days; we support the proposal that the time limit for internal reviews should also be set at 20 working days. We also support the proposal that the time limit for dealing with FOIA requests including a public interest test\(^\text{13}\) should also be set at 20 days as we believe is already the case under equivalent legislation in Scotland.

Costs associated with the FOIA and striking the right balance between transparency and reducing regulatory burdens

---

\(^{11}\) For example by virtue of the fact that it is not a public body or a publicly owned company.

\(^{12}\) [http://foiwiki.com/foiwiki/index.php/Changes_we_would_like_made_to_FOI_law](http://foiwiki.com/foiwiki/index.php/Changes_we_would_like_made_to_FOI_law)

\(^{13}\) At present there is no fixed time limit in law for carrying out public interest tests. This means that in practice a public authority must respond in full to an FOI request within twenty days except where a public interest test is being considered in which case we understand that there is no fixed time limit for responding to the request.
21. We would be profoundly concerned about the introduction of any further fees. A practical example of our concerns is provided by the recent work by the Afiya Trust. In November 2011, the Afiya Trust wrote to all directors Adult Social Care Services in England. The aim was to seek information, using the FOIA, to establish the impact of the cuts over 2010/2011 and 2011/12 on BME led organisations, other providers of services to BME communities and BME communities.¹⁴

22. To their credit none of the 155 local authorities concerned sought to charge. However if a modest charge had been made by each local authority, of even £100, the cost to Afiya would have been £15, 500, a bill that a small charity simply could not afford.

23. We believe that extending the use of fees or increasing fees is inconsistent with provisions that are designed to promote greater access to information and transparency. If there is a decision to introduce fees, we believe that there should be a general waiver of any fees for charities, individuals and VCS organisations. We also believe that newspapers have often shone a light on public affairs and should not, as a matter of principle, be charged where there is a public interest.

Specific concerns about the FOIA’s operation including the complaints and appeals process and the role of the ICO

24. We have very little direct experience of using the ICO complaints and appeals process. The Runnymede Trust has complained, once, to the ICO about a leading university’s refusal to provide the full data on the number of applications from, and offers to, British Black students. The grounds for refusal, upheld by the ICO, were that the numbers are small that individuals could possibly be identified by disclosing the information. The Trust accepted that the numbers are small and although it disagreed with outcome, it felt that the process was fair and worked efficiently.

Final comments – the effectiveness, strengths and weaknesses of the FOIA and whether it is operating as intended

25. We have drawn on Blackstone’s 4th Guide to the Freedom of Information Act published in 2011. This Guide identifies that the rationale for introducing freedom of information legislation included:
   a. improvement of democratic processes;
   b. avoiding the need for whistleblowing and leaks;
   c. improving the efficiency of government and the effective use of public money;
   d. commercial use of relevant information.

26. For the BME VCS Coalition, our primary concern is in relation to the first three areas - improving democratic processes, reducing the need for whistleblowing and leaks and improving the efficiency of government and the effective use of public money. We note the analysis provided by the University College London, reported in the Blackstone’s Guide, that

¹⁴ The Afiya Trust designed the FOIA questions to elicit information that it believed that local authorities, complying with their public sector equality duties, should hold.
in: ‘the United Kingdom, freedom of information has met its core objective of transparency and, in the correct circumstances, accountability. Yet it has not achieved the secondary objectives, the ‘wider transformative’ aims, that flow from them (page 10)\textsuperscript{15}.’

27. A practical example of this transformative failure to really embrace public accountability can be seen in the exchange between the DfE and the Whatdotheyknow website on 21/2/11 (http://www.whatdotheyknow.com/blog). The DfE wrote in the following terms:

a. ‘We changed the way that people contact our department last year, encouraging customers to go to our website to find what they are looking for and submit an enquiry via our contact us page (www.education.gov.uk/contactus) if they could not locate information.’

b. The [main FOI] mailbox that your system points to ([email]) will eventually be phased out and I would be grateful if you could advise customers using your website to refer to www.education.gov.uk/contactus if they need to contact the Department.”

28. Whilst it is fine to offer people the option of using the DfE website, it is unacceptable to limit people to using the website to submit FOI requests. We share the views and concerns expressed by Whatdotheyknow in response to the DfE and hope that the Committee will note the comments and the importance of transparency in the FOI process:

a. ‘We certainly agree that people should check whether the information they are looking for is already available before submitting a FOI request — and indeed we already prompt all users of WhatDoTheyKnow to do so, not just for the Department of Education, but for every public authority we list. When requests are submitted through WhatDoTheyKnow responses are automatically published ensuring a lot more information ends up online and publicly accessible than when submitted privately.

b. If the Department for Education wants to reduce the amount of correspondence it gets in relation to already published material it should be encouraging people to make their FOI requests via WhatDoTheyKnow. Already, based on Ministry of Justice statistics, we calculate around 10\% of all Freedom of Information requests to the Department of Education are made via our service.

c. \textit{We have asked the department to let us know which alternative email address they would prefer us to forward FOI requests to, and we await their reply. We are happy to use whichever email address is easiest for a public body.}

d. We have also made clear that we will continue to offer our users the ability to make requests to the Department of Education via our site and will not be removing that facility and directing people to the department’s contact form as we were asked. \textit{Forms often include unnecessary mandatory fields that the FOI legislation does not require (in the DfE’s case they ask what kind of a requester you are, making you specifically type in “prefer not to say” into an “Other” box if you want to opt out).}


Page 6 of 7
e. The law rejects the idea that public bodies are allowed to erect artificial barriers like this, and we have noted that a FOI request is valid regardless of which email address or member of staff within an organisation it is sent to.

February 2012
Key Points

1. We welcome the opportunity to respond to the Committee’s inquiry on the post-legislative scrutiny of the Freedom of Information Act (FOIA). While we fully support the importance of openness and transparency, we would like to highlight a number of specific concerns about the implementation of the Act in relation to university researchers:
   - pre-publication requests for research data;
   - limitations with the current cost threshold;
   - the impact of FOI requests on research involving animals; and
   - the impact of the FOIA on the competitiveness of UK universities.

2. While we welcome the sector-specific guidance issued by the Information Commissioner, we argue that further guidance and greater clarification is needed to provide universities and researchers with the reassurance to operate effectively within the requirements of the Act.

INTRODUCTION

3. We welcome the opportunity to respond to the Committee’s inquiry on the post-legislative scrutiny of the Freedom of Information Act (FOIA). While the Wellcome Trust itself, as a charity, is not subject to FOIA, the majority of researchers that we fund are captured by it because they are based in UK universities which are defined as ‘public authorities’ under the Act. The implementation of the FOIA, and its impact on researchers, is therefore of direct relevance to the Trust. UK universities are facing an increasing number of FOI requests and are becoming increasingly concerned about the burden this creates.

4. We strongly support the importance of making research data widely available to maximise public benefit, and the Wellcome Trust has taken a leadership role to promote the importance of data sharing. However, data sharing must be done in a timely and responsible manner to ensure that data can be verified, built upon and used to advance knowledge and its application to generate improvements in health. We share the concerns of Universities UK and others as to whether the FOIA is the most effective way to achieve appropriate openness.

5. The FOIA was designed with the primary intention of increasing transparency and accountability in central and local government authorities. We note that the issues universities face will often differ from those found by other public authorities and we argue that it is important to be aware of these differences. We welcome the sector-specific guidance issued by the Information Commissioner in September 2011 in an attempt to address these differences. However, while the guidelines have been a helpful starting-point, there are still many ambiguities and researchers remain concerned.

6. The proposals to extend the FOIA to include research datasets, currently under debate in the Protection of Freedoms Bill, also exacerbate the concerns. In particular, the
requirement that datasets be provided in a ‘re-usable’ form to a non-specialist user may not be practicable. Scientific datasets are often extremely large and complex, and require specialist software and additional metadata to access and interpret. The cost and time required to make such datasets accessible and meaningful would be prohibitive, and detract from research efforts.

7. A number of research projects are currently underway to assess the impact of FOIA on universities, as highlighted by Universities UK. Unfortunately these will not report until after the post-legislative scrutiny period, but it will be important to take their findings into account at the earliest possible opportunity.

CONCERNS WITH THE IMPLEMENTATION OF FOIA

Pre-publication research

8. With much research, data collection and analysis is an ongoing process. We support the calls by Universities UK to introduce a limited exemption for pre-publication research, modelled on the Scottish exemption. This would make it clear that the exemption should only apply if disclosure would result in substantial prejudice to the research, those conducting it, or the university.

9. The Wellcome Trust, and other research funders, already requires applicants to submit a data management and sharing plan prior to an award being made, in cases where the proposed research is likely to generate data outputs that will hold significant value as a resource for the wider research community. Data sharing plans set out what data will be made available and how, and provide an indicative timeframe. We would argue that, where such a data sharing plan exists, Section 22 of the FOIA (which provides a qualified exemption for information held with a view to publication ‘at some future date’) should be engaged if an FOI request is made for data covered by the data sharing plan.

10. We also argue that it is not in the public interest for data to be published before the time specified in the data management plan. Without appropriate curation, it may not be possible to interpret data appropriately and accurately. There is also the risk that if the process of validation and analysis is not complete, misleading information will get into the public domain which could be a particular concern with medical research.

Costs of compliance

11. The Ministry of Justice memorandum to the Committee notes the importance of considering the financial impact of FOIA on public authorities, given the current economic constraints. Currently, the costs of redaction to comply with other requirements, for example the removal of personal information, are not included in the cost threshold. This can place a significant time and resource burden on universities.

12. The University of Newcastle, for example, has recently spent more than £250,000 on legal fees disputing a case relating to an FOI request for project licences for primate research. It is important to take into account the full costs of meeting FOI requests, and whether diverting these resources away from research is always in the public interest.

13. The proposal to extend disclosure requirements to datasets which must be available in ‘re-useable’ format would add significantly to costs, particularly where personal information is included in the dataset. Additional guidance will be needed to clarify what costs can be charged for these requests, and particularly to explain what is meant by the phrase ‘reasonably practicable’.
Use of animals in research

14. The submission from Understanding Animal Research sets out the concerns that FOI requests are increasingly being used by animal rights extremists to obtain information which can be used to target and threaten individuals and institutions involved in animal research. The recent decision by the University of Newcastle, following a ruling by the Information Tribunal, to make information about project licences relating to the use of primates in research available has triggered a significant increase in the number of requests of this type to universities.

15. While some of these requests should be exempt under the existing provisions of FOIA, universities have not been given enough support to enable them to deal effectively with this type of request. Robust guidance is needed to help universities have the confidence to recognise and deal with vexatious requests.

16. There are also specific concerns about the way the FOIA interacts with the Animals (Scientific Procedures) Act 1986 (ASPA). Section 24 of ASPA makes it an offence for those with responsibilities under the Act to disclose information given in confidence. We recognise the need to make information available to build public confidence about the use of animals in research. However, it is also in the public interest for researchers to know that when confidential information is sent to the Home Office it will not become discloseable under the FOIA. An appropriate balance must be found to encourage openness while also protecting researchers. Animal research is an integral part of the UK’s research base and has made an important contribution to advances in medicine and surgery.

Competitive position

17. We are also concerned that the FOIA could seriously threaten the competitiveness of UK universities. Researchers and universities are competing both between themselves and internationally, making them significantly different from most other public authorities. It is not clear what protections exist to prevent a competitor academic requesting research data as it emerges. There are also examples where businesses have felt unable to partner with universities because of the threat that intellectual property may have to be disclosed under FOIA. Stronger guidance is needed to provide clarity that universities can rely on the commercially sensitive information exemption to maintain their competitive position.

February 2012
Written evidence from the University of Essex

1. **Executive Summary.** The University of Essex broadly supports the principles of the Freedom of Information Act. In general the Act works well. There are some areas of concern and these are the usefulness and applicability of publication schemes in the age of websites, the cost of compliance, appropriateness of use of the Act by journalists, the changing nature of the sector, and adequate protection for research data.

2. **Openness, transparency and accountability.** The University of Essex is an open and transparent organisation. It makes a large amount of information freely available to stakeholders through its websites and other publications. As a charity the University is required to publish a wide range of information.

3. Knowledge transfer is a key part of the University’s vision and values. We are rated 9th nationally for the quality of our research and sharing and disseminating research is an important part of University activity.

4. The University is home to the UKDA which is the curator of the largest collection of digital data in the social sciences and humanities, forming a vital resource for teachers, researchers and students worldwide.

5. The University currently receives around 90 FOI requests each year. In 2010 we responded in full or in part to all but three of those requests.

6. **Publication schemes.** The publication schemes were useful as an initial guide to the types of information that the ICO considered universities should make available. However, some parts of the definition document are not clear and do not always seem to relate directly to the way in which universities work and the classes of information they are likely to hold.

7. The publication schemes need to be revised, with input from the sector, to better reflect the types of information that Universities hold.

8. Since the implementation of the Act the University, in common with others, has grown its web presence, making more and more information freely available through its website. Information on the website is organised in a way that reflects our stakeholder groups and their particular interests and requirements for information.

9. It is no longer helpful to be required to pull together certain areas of information and present them as a separate publication scheme. This tends to duplicate work as the scheme needs to be kept up to date alongside other web pages that hold the same information.

10. We suggest that the publication scheme should be reduced to a minimum set of information that the ICO considers it necessary for us to publish. Universities should be free to present and publish this information in a way that best serves the interest of stakeholders, rather than being required to maintain it as a separate document.

11. **Cost of compliance.** While it is reasonable that universities should create and support posts to deal with compliance with a range of legislation, the burden of FOI often falls not on the individual appointed to be responsible for compliance, but with staff across the organisation whose primary function is providing or supporting services that affect students. It is not unusual for one part of the University to be called upon to pull together information to respond to several FOI requests at once, taking staff away from core business. Many teams are small and taking one person away to focus on gathering information for an FOI request can have an impact on service.
12. It should be possible for organisations to negotiate with enquirers over the deadline. Although the 20 days prevents organisations from unnecessary prevarication, it can impose an unnecessary burden. In some instances, were there more time, it would be possible that the amount and quality of information received by enquirers would be improved as the organisation would have more time to identify, retrieve and present data.

13. Section 12 gives an exemption where the cost of complying would exceed the appropriate limit. This limit has not been changed for some time. The exemption could be improved by allowing the costs of considering exemptions or redacting material to be included. These tasks can form a considerable part of responding to FOI requests.

14. **Use by journalists.** Reflecting national trends¹ around 30% of all FOI requests received at Essex are sent by journalists. Where there is bad practice it is right that journalists are able to expose that. However, we share the concern of other practitioners, noted in the MoJ memorandum addenda on the IPSOS MORI poll, that journalists use FOI to “fish” for stories. Large numbers of institutions are targeted by “round robin” requests, which often do not appear to be used in any media item. It would be helpful if the Act allowed us to refer the enquiries to press offices and agree that a request is not to be handled under the Act.

15. **The changing nature of Higher Education funding.** The FOI Act applies to public authorities. As funding of the sector changes, and a greater proportion of university incomes comes from non-governmental sources, it is even more arguable whether Universities are truly public authorities and whether the Act should therefore apply to them. This concern does not arise from a wish to become opaque and secretive, but from a concern that as Universities move into an even more open market place some of the requirements of FOI could constitute a competitive disadvantage.

16. The higher education sector is expanding to include private providers. Such providers would be able to use FOI to discover information about their competitors in the market. If public sector universities were unable to rely on section 43 to protect assets including course materials, they could have to release them to competitors, but be unable to make similar request of those competitors.

17. There are three ways in which a level playing field could be provided here. Section 43 already exists to protect commercial interests. However, the Information Commissioner has in the past been seemingly reluctant to recognise that universities have commercial interests. The forcing of UCLAN² to release course materials is a prime example of a case in which the private sector would be able to benefit with the public sector unable to protect itself. Section 43 should be amended to encompass a wider understanding, or clearer definition of what constitutes commercial interests.

18. The second option is to keep Universities within the scope of FOI but to exempt those areas which are primarily commercial or operating in an open market place. This model already exists for organisations including UCAS, which is subject to the Act only in relation to some of its functions.

19. The final option, is to bring private providers within the scope of the Act. This is already being considered for MacDonald’s with regard to their educational provision. If private

² ICO decision notice FS50140374, 30 March 2009
providers of higher education were similarly covered by the Act then this would create a more level playing field.

20. The other area of commercial interest for Universities is wholly owned companies. These do fall within the Act, despite some of them being commercial organisations with a profit making remit. It is difficult for them to operate in an open market when, simply by virtue of the nature of their parent organisation, they are subject to a law that does not apply to their private sector competitors.

21. **Research.** Colleagues in the research community have long voiced concerns that FOI could pose a threat to their work. In general researchers are keen to share and disseminate their findings: that is the very purpose of research. Many funders of research now require quite rightly, that research findings and data should be released as part of the research, but this is something that should happen at the right points in the research project, under the control of the researchers.

22. There are times during the lifetime of a research project when it would be harmful to share the information. The harm could be commercial, with journals potentially refusing to take and pay for papers based on information that had already been released into the public domain. There is also potential reputational harm if there cannot be a period during which work can be fully peer reviewed and checked for errors which can be challenged. Premature release of research, before it has been checked and validated, could potentially cause public harm, especially in the field of health research.

23. Our research colleagues are also concerned that research partners from the private sector will increasingly be wary of working with Universities in the UK if they feel they are unable to protect and control the data created by the research project. Research is a global market, benefitting the UK economy, and Universities are a key part of this. We should not allow UK legislation to prevent UK researchers from engaging fully in research with partners worldwide.

24. We acknowledge that exemptions exist that might, prima facie, appear to protect research from premature release. As we have already noted the ICO does not always appear to be inclined to support the view that Universities have commercial interests, making section 43 difficult to apply. Section 43 is also problematic as it is not always clear in the early stages of research what commercial value it might have.

25. Section 22 would also appear to be useful as the normal intention of researchers is to publish their research. Funding councils often require research projects to create a data management plan which will include publication of data. However, the Information Commissioner has made it clear that Section 22 applies only to information that is to be published in the near future. Research projects can have very long life spans, especially longitudinal studies. The time between the data collection phase and final publication of the last paper could potentially run into years. Even where a paper has been accepted by a journal, peer review and other preparation can delay publication by many months.

26. It is clear, then that the existing exemptions do not offer adequate protection. We therefore support the proposed UUK amendment to FOI.

27. **Office of the Information Commissioner.** We welcome the work that the ICO has done to better understand the HE sector. The ICO website and helpline are welcome resources. However, guidance could be clearer and demonstrate a better understanding of the sector.
Guidance from the helpline can be vague and occasionally contradictory. Some ICO decisions would appear to show a lack of understanding of the way in which the HE sector works.

February 2012