



House of Commons  
Justice Committee

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# Post-legislative scrutiny of the Freedom of Information Act 2000

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**First Report of Session 2012–13**

## ***Volume I***

*Volume I: Report, together with formal minutes*

*Volume II: Oral and written evidence*

*Additional written evidence is contained in Volume III, available on the Committee website at [www.parliament.uk/justicecom](http://www.parliament.uk/justicecom)*

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## The Justice Committee

The Justice Committee is appointed by the House of Commons to examine the expenditure, administration and policy of the Ministry of Justice and its associated public bodies (including the work of staff provided for the administrative work of courts and tribunals, but excluding consideration of individual cases and appointments, and excluding the work of the Scotland and Wales Offices and of the Advocate General for Scotland); and administration and expenditure of the Attorney General's Office, the Treasury Solicitor's Department, the Crown Prosecution Service and the Serious Fraud Office (but excluding individual cases and appointments and advice given within government by Law Officers).

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The Reports of the Committee, the formal minutes relating to that report, oral evidence taken and some or all written evidence are available in a printed volume. Additional written evidence may be published on the internet only.

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The current staff of the Committee are Tom Goldsmith (Clerk), Sarah Petit (Second Clerk), Hannah Stewart (Committee Legal Specialist), Helen Kinghorn (Committee Legal Specialist), Gemma Buckland (Committee Specialist), John-Paul Flaherty (Committee Specialist), Ana Ferreira (Senior Committee Assistant), Miguel Boo Fraga (Committee Assistant), Greta Piacquadio (Committee Support Assistant), and Nick Davies (Committee Media Officer).

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## Summary

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The Freedom of Information Act has been a significant enhancement of our democracy. Overall our witnesses agreed the Act was working well. The Freedom of Information Act has achieved its three principal objectives, but its secondary objective of enhancing public confidence in Government has not been achieved, and was unlikely to be achieved. It should be emphasised that the right to access public sector information is an important constitutional right, a fact that can get lost in complaints about the operation of the freedom of information regime. We do not believe that there has been any general harmful effect at all on the ability to conduct business in the public service, and in our view the additional burdens are outweighed by the benefits.

The cost of administering the Act has been described as its “Achilles heel”. However, the cost to public authorities must be weighed against the greater accountability the right to access information brings. In addition, there is evidence of both direct cost savings, where a freedom of information request has revealed erroneous public spending, and an indirect impact whereby public authorities know that they will be exposed to scrutiny as a result of the Act and use resources accordingly. We have recommended a limited reduction in the amount of time an organisation has to spend on each request to reduce the burden on hard-pressed public bodies to allow them to take greater advantage of the exemption in section 12, although we expect a rigorous cost-benefit analysis to be carried out by the Government before the exact time limit is determined. We would also encourage proactive publication by public bodies, while acknowledging that the diverse subject matter of requests means this is unlikely significantly to reduce the number of applications made.

We do not recommend changing the system of ‘requestor blindness’ on which the Act operates. Requiring requestors to identify themselves could be circumvented by the use of another’s name and policing such a system would be expensive and likely to have a limited effect. Equally, the focus of the Act is whether the disclosure of information is justified; if data should be released under the Act then it is irrelevant who is asking for publication. However, requestors must expect that the fact they have requested information to be in the public domain when authorities publish a disclosure log.

We recommend that the time limits for consideration of the public interest test and internal reviews become statutory. As such limits have already been set out in guidance we do not expect this recommendation to have a significant effect on public authorities, but it underlines the importance of prompt attention to requests while making it clear to those who routinely delay responses that their approach will not be tolerated. We also recommend changing the time limit on charging someone with the offence of destroying or altering information under section 77 because of the difficulty of charging within six months of the offence being committed; a difficulty evidenced by the fact no prosecutions have taken place to date.

We acknowledge the irritation experienced by public authorities which receive frivolous or trivial requests but, since these can normally be dealt with quickly at minimal cost, we do not recommend any change in the law in this area.

We have considered the evidence of witnesses, particularly former senior civil servants and ministers, suggesting that policy discussions at senior levels and the recording of such discussions may have been inhibited by the Freedom of Information Act. Evidence of such an effect is difficult to find by its very nature, but there is clearly a perception in some quarters that there is no longer a sufficiently 'safe space' for policy discussions. Parliament clearly intended that there should be a safe space for policy formation and Cabinet discussion, and we remind everyone involved that section 35 was intended to protect high-level policy discussions. We recognise that the ministerial veto may need to be used from time to time to maintain that safe space. We believe that civil servants and others in public authorities should be aware of the significance of these provisions and the protection they afford.

To ensure the continuing competitiveness of the university sector in England and Wales, we recommend the pre-publication exemption be amended to bring it in line with the similar provision in the Freedom of Information (Scotland) Act 2002. We have concluded, however, that the importance of universities in the public realm means they should remain subject to the Act.

We believe the public sector is generally maintaining the right of access to information when public functions are out-sourced by judicious use of contractual terms. Such contracts should clearly safeguard Freedom of Information rights. With the changing commissioning landscape, however, this is a matter which must be kept under review to ensure that there is no diminution of the reach of the Act, or the accountability it brings with it.

# 1 Introduction

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1. On 20 December 2011 the Ministry of Justice submitted its Memorandum on Post-Legislative Scrutiny of the Freedom of Information Act 2000 to us.<sup>1</sup>

## Process of the inquiry

2. On 20 December 2011 we published the following terms of reference asking those making submissions to the inquiry to consider:

- 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. We received 140 pieces of written evidence and took oral evidence from 37 witnesses in 7 evidence sessions. We are grateful to all those who took part in the inquiry.

4. A number of sections of the Freedom of Information Act (the Act) appear to be working well and we received little or no evidence on them. In making recommendations, we therefore focused on the provisions of the Act that have come in for the most criticism.

## Access to information before 2005

5. Central Government in the UK has traditionally been regarded as secretive. Before 2005, information was released through official documents, press bulletins and leaks from politicians and civil servants. In April 1994, the then administration introduced a Code of Practice on Access to Government Information. It was intended as an alternative to a statutory right to access information.<sup>2</sup> While the Code covered only “reasonable”<sup>3</sup> requests for information, rather than documents, and contained some broad exemptions<sup>4</sup> it was, like the Act, both retrospective and intended “to improve policy-making and the democratic process by extending access to the facts and analyses which provide the basis for the consideration of proposed policy.”<sup>5</sup> In 2001, the then Parliamentary Ombudsman, Michael Buckley, found that while some departments followed the Code in a “clear and efficient” way others failed to abide by either the letter or the spirit.<sup>6</sup> The Code was superseded by the coming into force of the Freedom of Information Act 2000.

6. Local government was subject to several different information access regimes from the 1960s onwards.<sup>7</sup> As we heard from the Assistant Chief Executive of Leeds City Council,

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<sup>1</sup> Memorandum to the Justice Select Committee, *Post-Legislative Assessment of the Freedom of Information Act 2000*, Cm 8236 (from here on referred to as Memo)

<sup>2</sup> *Open Government* (1993) Cm 2290 para. 1.8

<sup>3</sup> *Code of Practice on Open Government* (1994) Part I, para 1

<sup>4</sup> *Ibid*, Part II

<sup>5</sup> *Ibid*.

<sup>6</sup> Office of the Parliamentary Ombudsman, First Report of Session 2000–2001, *Access to Official Information*, HC 126

<sup>7</sup> Ev 150

some also had voluntary freedom of information regimes.<sup>8</sup> Bodies coming under the aegis of the Health Commissioner were subject to the Code of Practice on Openness in the NHS from July 1995.<sup>9</sup> Other organisations had local policies on accessing information.<sup>10</sup>

7. The Labour Party pledged to introduce freedom of information legislation in its 1997 manifesto, echoing a commitment in earlier manifestos.<sup>11</sup> The White Paper, *Your Right to Know*, described the position on access to public information in 1997 as “[...] haphazard [...] based largely on non-statutory best practice arrangements (in particular the central government Code of Practice on Access to Government Information) with statutory requirements for openness applying only in certain areas such as environmental information, or limited to particular sectors of the public service, notably local authorities.”<sup>12</sup> A Bill was presented to Parliament on 18th November 1999.<sup>13</sup> The Act received Royal Assent on 30 November 2000. The provisions of the Act came into force on 1 January 2005.

8. The Rt Hon Jack Straw MP, who was Home Secretary at the time the Act was passed, told us that the Act was the then Prime Minister, the Rt Hon Tony Blair’s, idea.<sup>14</sup> We noted, however, that Mr Blair has described the right to access information as “antithetical to sensible government” and that he said he had been a “nincomp oop” for his role in the legislation.<sup>15</sup> We sought to question Mr Blair on his opinions but he refused to defend his views before us in person and did not submit answers to our written questions by the time this report was prepared. We deplore Mr Blair’s failure to co-operate with a Committee of the House, despite being given every opportunity to attend at a time convenient to him.

9. In the 12 years since the Act was passed the world of information recording, supply and storage has been revolutionised. As the Rt Hon Jack Straw MP, who was Home Secretary at the time the Act was passed, observed: “When we drafted the Freedom of Information Act, we had no serious conception about the internet, which was in its infancy.”<sup>16</sup> Throughout this inquiry we have borne in mind the fact the Act has not operated in isolation but in a complex and rapidly changing technological world. While in some areas the effects of the Act can be disaggregated from other influences, in the main the Act is only one of a number of factors. We have therefore sought to focus on practical solutions to the challenges posed by and to the Act in a new information age.

10. In evidence to us, Lord Hennessy of Nympsfield described the changes he had seen in record and archive-keeping over the years:

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<sup>8</sup> Q 389

<sup>9</sup> The text of the Code can be found at <http://www.cfoi.org.uk/nhscoptext.html>

<sup>10</sup> Ev 170

<sup>11</sup> *New Labour, New Britain* (1996), <http://www.labour-party.org.uk/manifestos/1997/1997-labour-manifesto.shtml/>

<sup>12</sup> Cabinet Office, *Your Right to Know: The Government’s Proposals for a Freedom of Information Act*, Cm 3818, December 1997

<sup>13</sup> <http://www.publications.parliament.uk/pa/cm199900/cmbills/005/2000005.htm>

<sup>14</sup> Q 333

<sup>15</sup> Tony Blair, *A Journey*, (London 2010), p516

<sup>16</sup> Q 327



If you look at the archives that were created before there was even a 50-year rule, in 1958, they are very full. The 30-year rule is still very full indeed. I do fear that historians [in future] are going to have a much tougher time for two reasons. One is [freedom of information], but there is also the digital revolution. It ceases to be a paper culture.<sup>17</sup>

Lord O'Donnell also observed that “the National Archives people told me that digital records deteriorate faster than paper records.”<sup>18</sup> The impact of digital culture and technological change on the quality of the national archives is not an issue we have explored in this inquiry but we intend to return to this matter in the future.

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<sup>17</sup> Q 255

<sup>18</sup> Q 287

## 2 The objectives of the Act

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11. Drawing on the White Paper which preceded the Freedom of Information Act as well as debates and speeches in Parliament, the Ministry of Justice's Memorandum on Post-Legislative Scrutiny of the Freedom of Information Act 2000 (the Memorandum) identified four objectives for the Act: openness and transparency; accountability; better decision making; and public involvement in decision making, including increased public trust in decision making by government.<sup>19</sup> In research examining the impact of the Act, the University College Constitution Unit teased out a further aspect of this final objective: better public understanding of government decision-making.<sup>20</sup> The Constitution Unit also divided the objectives into primary and secondary aims, as Dr Ben Worthy, from the Unit, told us:

The two core aims were to increase the transparency of Government and to increase accountability. Flowing from them were another four secondary objectives, which were to increase public understanding, to improve the quality of decision making, to improve public participation and to improve public trust.<sup>21</sup>

### The expectation of a new culture of openness and transparency

12. Reactive openness, where a public body responds to a request for information, and proactive transparency were two avowed aims of those bringing in the freedom of information legislation. During the Second Reading of the Freedom of Information Bill in December 1999, Jack Straw MP, told the House that the Government anticipated a widespread culture change as a result of the new statutory right to access information:

Unnecessary secrecy in Government and our public services has long been held to undermine good governance and public administration [...] the Bill will [...] help to transform the culture of Government from one of secrecy to one of openness. It will transform the default setting from "this should be kept quiet unless" to "this should be published unless". By doing so, it should raise public confidence in the processes of government, and enhance the quality of decision making by the Government.<sup>22</sup>

13. The Act sought to create the new culture by providing both the statutory right to access information held by public authorities contained in section 1 and imposing a duty on every public authority to develop and publish a proactive publication scheme, subject to approval by the Information Commissioner.<sup>23</sup> We will consider the impact of these two approaches in turn.

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<sup>19</sup> Memo, pp 5-7

<sup>20</sup> Ev 126

<sup>21</sup> Q 57

<sup>22</sup> HC Deb, 7 December 1999, col 714

<sup>23</sup> Section 19

## Openness

14. The Act covers a very wide variety of public authorities, including central and local government, NHS organisations, publicly-funded universities, regulators and organisations with unique public functions such as the Association of Chief Police Officers. Unsurprisingly, the Act appears to have varying degrees of success in encouraging a culture of greater openness and transparency in different types of public body. There was agreement from both those using the Act and those responding to requests that central Government was now more open. Alexandra Runswick of Unlock Democracy told the Committee: “the Government are certainly considerably more open and transparent than they were before the Freedom of Information Act.”<sup>24</sup> David Hencke, Senior Investigative Journalist for ExaroNEWS who appeared before us on behalf of the National Union of Journalists, told us there had been an enormous change, evidenced by the now routine publication of information that previously was a closely-guarded secret, such as releasing information on the gifts given to the Prime Minister.<sup>25</sup> “Things that were secret at the beginning of the 21st century are now routine and available for the public to find out.”<sup>26</sup> The Rt Hon Lord McNally, Minister of State, Ministry of Justice and Deputy Leader of the House of Lords, observed: “When I started working in Whitehall and Westminster over 40 years ago, there was still a culture of the man in Whitehall knows best. I do not think that is true anymore.”<sup>27</sup> Lord Hennessy of Nympsfield agreed: “I am pretty Pollyanna-ish about the world that you are examining. Compared with the one when I was a young journalist on *The Times*, it is almost cornucopic in its openness for all the problems and the bumping and grinding. It is a different world.”<sup>28</sup> The Society of Editors told us: “The Act has become an essential journalistic tool which has helped create a climate of genuine openness and transparency in British public life.”<sup>29</sup> The London Evening Standard agreed: “there is no doubt that the advent of the Freedom of Information Act has significantly improved transparency, accountability and good governance in British public life.”<sup>30</sup> Our witnesses suggested that the change was not wholesale, however. Martin Rosenbaum of BBC News, among others, said: “There has been a change in culture, but I think that that change is still partial and inconsistent and has a long way to go.”<sup>31</sup> Mr Rosenbaum suggested that this partial openness related to the type of information being sought:

Characterising the sort of information that the Act now enables us to obtain on a very crude level, you will now find that it is much easier to get facts and figures—how much was spent on this, statistics about the performance of public services and so on. The sorts of things that were harder to get previously now tend to be very easy to get,

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<sup>24</sup> Q 2

<sup>25</sup> Q 137

<sup>26</sup> Q 138

<sup>27</sup> Q 513

<sup>28</sup> Q 244

<sup>29</sup> Ev w165 [Note: references to ‘Ev wXX’ are references to written evidence published in the volume of additional written evidence published on the Committee’s website]

<sup>30</sup> Ev 143

<sup>31</sup> Q 138

but what it has not produced, and the civil service is certainly very resistant to this, is internal discussion, documents, policy discussion, minutes of meetings and so on.<sup>32</sup>

We discuss the complex issues surrounding the publication of policy documents in Chapter 6.

15. At local government level, Kent County Council said: “The Act has definitely forced traditionally secretive cultures to become more transparent [...] Within KCC, there [...] is an acceptance that no longer can business be conducted “behind closed doors”.<sup>33</sup> Dr Ben Worthy, of the UCL Constitution Unit, agreed the Unit’s research showed greater openness in providing information at local government level, although this inevitably varied between different councils, a fact reflected in the evidence given by some of the individual contributors to the inquiry.<sup>34</sup> Witnesses from the media were less inclined to identify a greater culture of openness among councils than the councils and academics. Ben Leapman, of the Sunday Telegraph, thought change had been partial at local as well as central Government level: “FOIA has brought important benefits for the public, by lifting, in part, the veil of secrecy over the affairs of central and local Government.”<sup>35</sup> The Kent Messenger Group among others suggested that changes to governing structures in local government meant that, despite the Act, councils were becoming “more secretive”<sup>36</sup> overall:

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.<sup>37</sup>

David Higgerson, Digital Publishing Director of Trinity Mirror Regionals, who appeared before us on behalf of the Newspaper Society, agreed that structural changes in a variety of public bodies made the Act a valuable tool:

[...] 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.<sup>38</sup>

16. Public authorities in other sectors thought the Act had increased openness. Liverpool Heart and Chest Hospital NHS Foundation Trust believed: “The Act works well in principle and widely supports the openness and transparency agenda [...]. This can only be beneficial for public accountability and an assessment of efficient use of public resources,

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<sup>32</sup> Q 139

<sup>33</sup> Ev 192

<sup>34</sup> For example, Sophie Barnes, Ev w1; Colin Peek, Ev w56; Derek Dishman, Ev w69; and Chris Boocock, Ev w205 among others.

<sup>35</sup> Ev w65

<sup>36</sup> Ev w103

<sup>37</sup> Ev w121

<sup>38</sup> Ev w103

services and finances.”<sup>39</sup> Portsmouth Hospitals NHS Trust said that the Act “has facilitated a much more open public sector culture.”<sup>40</sup> Of the many submissions from the higher education sector none addressed the issue of whether the Act had encouraged openness within the sector; however, Professor Ian Diamond, Vice-Chancellor of the University of Aberdeen, Chair of Research Policy Network, Universities UK, told us that, while he emphasised universities had already had a culture of openness, the Act had had the effect of improving record keeping.<sup>41</sup>

17. The Memorandum concluded that “the Act has become a vital element in opening up Government [...] [and] has resulted in disclosure of significant amounts of information which might otherwise have gone unreleased.”<sup>42</sup> **We agree with the Ministry of Justice that the Act has contributed to a culture of greater openness across public authorities, particularly at central Government level which was previously highly secretive. We welcome the efforts made by many public officials not only to implement the Act but to work with the spirit of FOI to achieve greater openness. Our evidence shows that the strength of the new culture of openness is, however, variable and depends on both the type of organisation and the approach to freedom of information of the individual public authority.**

## Transparency

18. While closely related there is a clear distinction between reactive responses to requests for information and the proactive publication of data, commonly referred to as transparency. The first puts the power in the hands of the individual seeking to be informed: he dictates the parameters of the information he is seeking and, subject to exemptions and cost, the public authority will provide him with what he asks for. Proactive transparency means that the body publishing the data controls what is published and the format in which it is released.

## Publication schemes

19. The duty to produce proactive publication schemes in section 19 of the Act is supplemented by extensive guidance from the Information Commissioner’s Office on model publication schemes.<sup>43</sup> It was generally agreed that proactive publication had the potential to reduce the need for freedom of information requests and WhatDoTheyKnow told us it could “forestall significant numbers of requests”,<sup>44</sup> however, there was some debate about whether the publication scheme approach was the right one, and how extensive the benefits of proactive publication could ever be.

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<sup>39</sup> Ev 134

<sup>40</sup> Ev w67

<sup>41</sup> Q 95

<sup>42</sup> Memo, p55

<sup>43</sup> The ICO has a duty to provide such information under section 20 of the Act.  
[http://www.ico.gov.uk/for\\_organisations/freedom\\_of\\_information/guide/publication\\_scheme.aspx](http://www.ico.gov.uk/for_organisations/freedom_of_information/guide/publication_scheme.aspx)

<sup>44</sup> Ev 129

20. Dr Ben Worthy told us that the primary reason why publication schemes were under-used was technological change:

[...] one of the reasons why publication schemes have not taken off in the way that many had hoped is that it has been superseded by the internet search engine and the fact that people can find a way of asking a question rather than looking for the information. I do that myself in all sorts of circumstances, and I am not sure that much can be done about it except to ask people to flag up the information.<sup>45</sup>

Professor Trevor McMillan, Pro-Vice Chancellor for Research, Lancaster University and Chair of the 1994 Group Research and Enterprise Policy Group, agreed: “things like the publication scheme have been slightly bypassed by search engines on the web. It is probably easier to put a request into a search engine than it is to go through formal documents.”<sup>46</sup> Roger Gough, Cabinet Member for Business Strategy and Support at Kent County Council, described the publication scheme approach as “fairly antiquated.”<sup>47</sup>

21. The Information Commissioner told us that publication schemes had the potential to save public bodies time and money but were not necessarily done well:

We have done a lot of work on the model publication scheme that public authorities should be running for proactive disclosure and for making clear on their websites where information can be found. It is a bit rich to have public authorities saying, “We are assailed by unreasonable freedom of information requests”, when they do not have an adequate publication scheme, they have not got their act together in terms of records management and have a rotten website and so on.<sup>48</sup>

The Commissioner also emphasised the importance of his enforcement powers in the area of publication schemes:

If you have a recalcitrant local authority [...] the Information Commissioner has the power to enforce the publication scheme, which goes beyond the exhortation of Whitehall to be open.<sup>49</sup>

Mr Graham told us that the ICO is currently carrying out a consultation on the publication scheme approach.<sup>50</sup>

22. Witnesses representing the media agreed that good publication schemes were useful because information could be accessed without the expense and delay of a FOI request. David Hencke gave us an example: “I was checking a salary with the Cabinet Office. It just said that it was in the public domain and I did not need an FOI. It saves a lot of money. It points you to the press office. If they provide a good publication scheme, in some ways it reduces the need for FOI.”<sup>51</sup> Mr Hencke agreed publication schemes could cut down on

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<sup>45</sup> Q 84

<sup>46</sup> Q 124

<sup>47</sup> Q 393

<sup>48</sup> Q 227

<sup>49</sup> Q 231

<sup>50</sup> *Ibid.*

<sup>51</sup> Q 181

journalistic ‘fishing exercises’ where large numbers of public bodies are contacted for the same piece of information but could not think of a good example of a publication scheme for us to consider.<sup>52</sup> WhatDoTheyKnow noted along with other witnesses that publication of information may also produce limited benefits as it can “often [be] hard to actually locate” it on public authorities’ websites.<sup>53</sup> Doug Wills, Managing Editor of the Evening Standard, i, Independent and Independent on Sunday, agreed that publication schemes could provide inadequate data:

If you use Birmingham City Council as an example, we could probably go through the press office to ask a question. If you are a member of the public looking through the city council’s spending, it will tell you the name of the vendor and the amount spent, and it will give you the incredibly helpful invoice number, but it will not tell you what it was for. If you wanted to know how much the council was spending on grit, you would have to know who supplied grit out of all the firms across 200 pages on a spreadsheet. In Birmingham City Council’s case, it says that, if you want to ask any questions about this data, you have to put in a freedom of information request.<sup>54</sup>

23. Tracey Phillips, a solicitor advising on freedom of information at Lambeth Council, was positive about the likelihood that greater transparency would lead to more rather than fewer FOI requests:

[...] publishing more information on our websites takes extra resource internally within service areas to decide what information they are going to publicise and also why that information might be useful. We have the agenda going forward to publicise more open data—raw data—so that it can be interrogated. That is going to take some resource internally but it will be for the better. I do envisage FOI requests coming on the back of that.<sup>55</sup>

Ms Phillips suggested that the publication scheme approach would be enhanced if the Information Commissioner’s Office could provide more guidance as “it is quite broad ranging in terms of what they say should go in the publication scheme, but if they could be a bit more prescriptive on defining specific information, that would help us somewhat.”<sup>56</sup> Paul Gibbons thought the publication scheme approach was “outdated” and suggested: “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.”<sup>57</sup>

24. Professor Hazell told us that the findings of the UCL Constitution Unit showed that the type of information requested by individuals often focused on “micro-politics”<sup>58</sup> and

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<sup>52</sup> Q 179

<sup>53</sup> Ev 129

<sup>54</sup> Q 182

<sup>55</sup> Q 394

<sup>56</sup> Q 395

<sup>57</sup> Ev w47

<sup>58</sup> Q 77

matters such as “allotments, parking and the quality of the roads”<sup>59</sup> which meant that proactive publication only had a limited impact on the volume of requests:

[...] you asked whether it would help reduce the volume of FOI requests if public authorities proactively published more information. That is intuitively plausible, but I think it is unlikely to help significantly to reduce the burden because [...] the extraordinary variety of FOI requests and the variety of motives make it terribly difficult for authorities to guess the sort of things that requesters might want.

25. Professor Hazell suggested that disclosure logs were one of the best ways for public authorities to maximise the benefits from proactive publication:

The most that they can do, and some of them do this, is to publish on their websites what are called disclosure logs. They publish lists of all previous requests, and you can click on them and find out what the request was and what information was disclosed; it is, as it were, a back record of things that people have asked us.<sup>60</sup>

This avoids the difficulty identified by Helen Cross, an individual user of the Act, where the passage of time leads to repeat requests for updated information on the same topic.<sup>61</sup> Julian Brookes, of NHS South of England, told us that his organisation used the detail of FOI requests not only to proactively publish information which was the subject of interest but also to consider how it was presented:

There are lots of things now where we can judge, from the basis of regular freedom of information requests and so on, where it is really important for us to be consistent and accurate in the way in which that information is portrayed. Wherever possible, we also apply the test that, if this is something that is consistently being asked for, we will put that into the public domain. We will extend around the scheme of publication that we would have and standards that we expected.<sup>62</sup>

26. The relationship between publication schemes and the wider transparency agenda is somewhat unclear. The Government has made increasing transparency a priority. In the Foreword to the Coalition Agreement, the Prime Minister and the Deputy Prime Minister declared: “we will extend transparency to every area of public life.”<sup>63</sup> Lord McNally told the House of Lords that:

The transparency agenda is about much more than historical information; it is about much more than government records in the traditional meaning of the phrase. It is about the information and data that we deal with day to day to inform our decisions and provide our public services. Making that information available is what makes the transparency agenda truly revolutionary. More information than ever is being published proactively by this Government. In excess of 7,500 datasets have been

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<sup>59</sup> Q 77

<sup>60</sup> Q 91

<sup>61</sup> Ev w197

<sup>62</sup> Q 289

<sup>63</sup> The Coalition: our programme for government , 2010, p7  
[http://www.direct.gov.uk/prod\\_consum\\_dg/groups/dg\\_digitalassets/@dg/@en/documents/digitalasset/dg\\_187876.pdf](http://www.direct.gov.uk/prod_consum_dg/groups/dg_digitalassets/@dg/@en/documents/digitalasset/dg_187876.pdf)



made available to increase accountability, empower the public and foster innovation and economic growth [...]<sup>64</sup>

27. Local government, in particular, has been subject to a number of measures involving the release of information since the Act was passed. Some witnesses questioned the efficacy of certain measures. Kent County Council told the Committee that publishing the cost of every item of expenditure over £500 was resource-intensive:

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 [...] in the 16 months since this information has been published on our website, there have only been 3000 visits to this webpage [including] internal [...] hits, it is questionable whether publishing this information is actually value for money [...]<sup>65</sup>

28. Edward Hammond, of the Centre for Public Scrutiny, told us that complaints like that of Kent County Council arose from the lack of a truly joined-up approach between the freedom of information regime and the transparency agenda: "Although there is an increased drive for transparency coming from central Government, it is not [...] a particularly coherent drive. There are different drivers coming from different directions. It makes it very difficult for local authorities to respond in anything other than a reactive way."<sup>66</sup>

29. Two of the Ministers from whom we heard accepted that the relationship between the freedom of information regime and the transparency agenda was important to both. Lord McNally emphasised the complementary effect of the two approaches: "The transparency agenda, by its very nature, is what we want to tell you; the FOI Act is what you want us to tell you. They are not totally overlapping in that respect, but they can exist side by side."<sup>67</sup>

30. The Rt Hon Francis Maude MP, Minister for the Cabinet Office, told us that Government was aware of the need to 'join-up' the two policy streams:

[...] the agendas are very closely linked. Are we perfectly joined up? No. Are the Government ever perfectly joined up? No; nor will they ever be, but we work pretty closely together. Tom and I are giving evidence together. Tom sits on the transparency board, which I chair, which is driving forward the transparency agenda. The two agendas probably originate in different places, but they need to be seen very much as a single range of issues.<sup>68</sup>

**31. While proactive transparency clearly has the potential to reduce the burden of responding to information requests on hard-pressed public authorities, the proactive publication of data cannot substitute for a right to access data because it is impossible**

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<sup>64</sup> HL Deb, 17 January 2012, col 545

<sup>65</sup> Ev 192

<sup>66</sup> Q 395

<sup>67</sup> Q 515

<sup>68</sup> *Ibid.*

for public bodies to anticipate the information that will be required. Nevertheless, proactive publication is important in achieving the primary objectives of the Act of openness and transparency.

32. Government must ensure that the freedom of information regime and the transparency agenda work together to ensure best value for money. Individual initiatives in different departments must be examined before implementation in the light of existing policy to see whether they constitute the most effective approach. Equally, existing initiatives should also be assessed after a period of time to ensure they both offer value for money and have not produced unintended consequences.

### Has the increase in openness and transparency increased accountability?

33. The evidence we heard suggested that greater access to public information has led to an increase in accountability. Dr Ben Worthy told us that the Constitution Unit had found that the Act “has made local and central Government more transparent and more accountable—transparent not only in terms of the information provided but in fostering a more open culture and it has improved accountability.”<sup>69</sup> Professor Hazell agreed that Government accountability had been increased.<sup>70</sup> The National Union of Journalists thought the Act made public bodies more accountable and the Society of Editors agreed.<sup>71</sup> Representatives from NHS organisations also thought accountability had been improved.<sup>72</sup>

34. The Information Commissioner noted that the increase in accountability through the Act had the potential to be undermined if the freedom of information regime did not apply to private providers of public services.<sup>73</sup> We consider this issue in depth in Chapter 8.

## Secondary objectives

### *Increasing public confidence in public authorities*

35. The Memorandum found that the objective of increasing public trust and confidence in Government, Parliament and other public authorities may have been unrealistic because, as found following research by the Constitution Unit, the vast majority of people experience freedom of information through news stories and these are more likely to be negative in tone than otherwise.<sup>74</sup> However, the Memorandum also noted that “the very existence of the legislation gives [the public] some confidence that public authorities have little to hide behind. They know they can be scrutinised and this of itself tends towards a different relationship between public authorities and the public.”<sup>75</sup> These conclusions reflected the evidence we heard on this issue. The Constitution Unit told us that its

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<sup>69</sup> Q 57

<sup>70</sup> *Ibid.*

<sup>71</sup> Ev w215, w165

<sup>72</sup> Q 289

<sup>73</sup> Q 238

<sup>74</sup> Memo, p58

<sup>75</sup> *Ibid.*

research showed the Act had had “no generalisable impact on trust.”<sup>76</sup> Maurice Frankel, of the Campaign for Freedom of Information, told us he saw an increase in trust among those who directly sought information from public bodies rather than the majority who experienced the fruits of the freedom of information regime through the media.<sup>77</sup> Doug Wills noted that the existence of the Act meant distrust arising from the inability to obtain data was less likely to arise: “If the information was not available, then there would be distrust. That is positive in itself.”<sup>78</sup> Martin Rosenbaum thought that it was not reasonable to expect the Act to increase trust in itself; greater trust and confidence was always going to be dependent on the information uncovered:

The Act enables people to know more, and what they discover as a result may or may not increase their trust. There are obvious reasons why it has not increased their trust in Parliament. There are very clear reasons for that. It is not the fault of the Act that there has been a failure to increase trust. The point of the Act is to give people more information. Whether it improves their trust levels or not is not something to hold at the door of the Act.<sup>79</sup>

David Hencke agreed that the information uncovered by a freedom of information request was a substantial factor in whether the Act contributed toward greater public trust noting: “Parliament did not do itself any favours over the expenses business when, in the preamble to it, someone put up a Private Member’s Bill that was trying to exempt Parliament from freedom of information [...]”<sup>80</sup>

36. As the Memorandum notes, however, the information published following a freedom of information request and reported in the media is more likely to “identify deficiencies in decision-making or inefficiencies in spending decisions” than it is to be positive. This reflects the evidence we heard from a number of public authorities that they frequently respond to requests from journalists that do not result in news stories.<sup>81</sup> Scrutiny and criticism of those in power is part of the constitutional role of a free press. The fact that irregularities, errors and deficiencies will usually be more newsworthy than the revelation a public body is operating appropriately and efficiently is inevitable. It can, however, have the unfortunate consequence of encouraging secrecy rather than fostering a culture of openness. Lord O’Donnell, former Cabinet Secretary, told us:

If you are open, you get criticised for the things that you are open about. I had an interesting example myself [...] I decided to release, since I am not paid by anybody at the minute but I am a Member of the Lords, some hospitality information. I do

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<sup>76</sup> Ev 126

<sup>77</sup> Q 42

<sup>78</sup> Q 142

<sup>79</sup> *Ibid.*

<sup>80</sup> Q 142 While the initial reports of Parliamentary expenses in 2009 were the result of a leak, the information was being pursued by a number of journalists under the Freedom of Information Act. It is now routinely published subject to the limited redaction of personal details such as private addresses.

<sup>81</sup> For example see Ev w136.

not think anybody else does that. Surprise, surprise, you get a snidey press story in *Private Eye* as a result of this.<sup>82</sup>

Such outcomes, Lord O'Donnell concluded, constituted a “perverse incentive” to keep information secret, a conclusion he noted had also been reached by former Prime Minister Tony Blair in his autobiography.<sup>83</sup> Francis Maude MP agreed that the relationship between openness and trust was not straightforward but said, “Can [openness] lead to embarrassment? Yes. Do we have to be a bit grown up about that? Yes, we do.”<sup>84</sup>

**37. Our evidence on the impact of the Act on trust generally agreed with the findings of the Memorandum. Whether the Act will contribute to an increase in public confidence in the Government, Parliament and other bodies is primarily dependent on the type of information which is published following a request. The majority of people will receive information published under the Act through the media. Evidence of irregularities, deficiencies and errors is always likely to prove more newsworthy than evidence that everything is being done by the book and the public authority is operating well. In these circumstances, the expectation of a substantial increase in public trust following the introduction of the Act was always going to prove unrealistic.**

**38. Greater release of data is invariably going to lead to greater criticism of public bodies and individuals, which may sometimes be unfair or partial. In our view, however this, while regrettable, is a price well worth paying for the benefits greater openness brings to our democracy.**

### ***Improving the quality of decision making***

39. Our evidence showed that assessing the impact of the Act on improving the quality of decision-making is highly complex. We will consider the achievement of this objective in Chapter 6.

### ***Increasing public understanding of decision making and the operation of authorities***

40. The Memorandum noted that the Information Commissioner's Office tracker survey found a 54% to 87% increase in the proportion of people agreeing that “being able to access information held by public authorities increases your knowledge of what they do” between 2004 and 2010.<sup>85</sup> The question whether the Act had actually had an effect on public understanding of Government decision making was explored by the Constitution Unit in its major piece of research on whether the Act had achieved its objectives.

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<sup>82</sup> Q 250

<sup>83</sup> *Ibid.*

<sup>84</sup> Q 514

<sup>85</sup> Memo, p58

### **Improving public participation in decision making**

41. As the Memorandum notes, Lord Falconer told the House of Lords that one objective of the Act was “to show citizens how government works—and to show them how decisions are taken.”<sup>86</sup> The Constitution Unit, while noting this objective had the fewest mentions in the documents surrounding the Act,<sup>87</sup> found that public participation in decision-making had not been greatly improved in central Government because:

First, many requesters are using FOI in a professional capacity, as journalists or campaigners, rather than as ordinary citizens. Second, a number also use it to non-political ends or private purposes. Finally, FOI is used by people already engaged in the political process, rather than bringing new participants into it.<sup>88</sup>

Moreover, FOI faces the same obstacles of lack of interest, apathy and disengagement that face all the varying attempts to promote wider engagement. Rather than FOI shaping political engagement, pre-existing conditions towards disengagement hinder the impact of FOI.<sup>89</sup>

42. We received limited evidence on the achievement of this objective. Paul Gibbons, author of the FOIMan blog, also thought that the use of the Act by campaigners showed improved public participation in decision-making:

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.<sup>90</sup>

One of our witnesses described a cultural change in his sector which was influenced by rather than a direct consequence of the Act. As noted above, Julian Brookes told us:

We have certainly seen improvements in the way in which our records are kept and accountability and decision making. It is partly to do with the Freedom of Information Act but also partly to do with what I would describe as a change in culture in terms of how we operate in the NHS in regard to our decision making. There is increased engagement of key stakeholders in decisions we make, particularly, for example, on service change. The greater awareness that the Freedom of Information Act has brought to those discussions has led to a good and accurate recording of the issues.<sup>91</sup>

**43. Having received limited evidence on the impact of the Act on increased public participation in decision making, we would not seek to disagree with the findings of the**

<sup>86</sup> Memo, p7

<sup>87</sup> Robert Hazell, Ben Worthy and Mark Glover, *The impact of the Freedom of Information Act on Central Government in the UK, Does FOI Work*, (London, 2010), p27

<sup>88</sup> *Ibid*, p230

<sup>89</sup> *Ibid*.

<sup>90</sup> Ev w47

<sup>91</sup> Q 298

**Constitution Unit that this objective has not been achieved, at least in central Government. We welcome, however, the suggestion that, while the Act may not have had a direct impact on increasing public participation in decisions made in the NHS it has assisted in a move towards a culture of greater public involvement.**

## Understanding of the Act

### *Requestors*

44. The primary aim of the Act was to create a statutory right to access information. The Rt Hon Jack Straw MP told the House of Commons:

The Bill [...] lays down for the first time in our constitutional history that the public have a right to know about the work of Government and all other public authorities.<sup>92</sup>

45. Lord Hennessy put it another way: “Even the most difficult fruit cakes in the United Kingdom have rights when it comes to FOI, which is as it should be.”<sup>93</sup> The then Government’s intention that the Act should create a universal right to access public information was not, however, appreciated by many of our witnesses. We heard a large number of complaints that the Act was being used by people for whom it was not intended. Complaints focused on journalists,<sup>94</sup> commercial enterprises,<sup>95</sup> individuals pursuing purely private agendas<sup>96</sup> and individuals with frivolous requests.<sup>97</sup> These complaints misunderstand the intention behind the Act. While we examine whether the Act should continue to be used in all these ways in Chapters 3 and 5 below, the use of the Act by many different groups of people should be regarded as a facet of the universality of the right to access information, not a failure of the Act.

### *Misunderstanding the Act*

46. The NHS Business Service Authority recognised that misunderstanding of the Act had an impact on how it was viewed:

The benefits have taken time to be realised as requestors 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.<sup>98</sup>

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<sup>92</sup> HC Deb, 7 December 1999, col 714

<sup>93</sup> Q 250

<sup>94</sup> For example see Ev w214

<sup>95</sup> For example see Ev 106

<sup>96</sup> For example see Ev w144

<sup>97</sup> For example see Ev 146

<sup>98</sup> Ev 105

Throughout this inquiry we have borne in mind the potential for misunderstanding of the Act being behind some of the criticisms we have heard rather than genuine flaws in the current regime.

### 3 Costs and fees

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#### How much does the freedom of information regime cost?

47. Before considering the details of the costs exemption contained in section 12 of the Act, we wanted to find an approximate figure for the overall cost. We discovered that establishing such a figure for the freedom of information regime as a whole is difficult for a number of reasons. The Act applies to a wide variety of public authorities, some of which record numbers of requests, others which do not.<sup>99</sup> Public authorities also have different criteria for treating a request for information as coming under the Act or as an informal inquiry. Actual costs are even more rarely recorded than the number of requests, and methods of recording them also vary widely.<sup>100</sup> By their nature, individual freedom of information requests will require different amounts of staff time, from ones that can be simply answered or rejected to requests requiring time-consuming redaction or extensive consideration by very senior members of staff. The Constitution Unit found that a widespread difference in methodologies made international comparisons of the costs of the right to access information in other countries almost impossible.<sup>101</sup>

48. Despite the difficulties attempts have been made to assess the financial impact of the Act on public authorities. The 2006 Frontier Economics report for the Department of Constitutional Affairs estimated the cost of freedom of information requests to central Government in 2005 at £35.5 million,<sup>102</sup> although its methodology has been heavily criticised by the Constitution Unit among others.<sup>103</sup> The Constitution Unit itself estimated the cost of freedom of information to local government at £31.6 million in 2010.<sup>104</sup>

49. Assessing the true cost of the freedom of information regime is also difficult given that the benefits that arise from the right to access information cannot usually be costed. Dr Ben Worthy, of the Constitution Unit, told us:

The difficulty is that people, particularly those at the top of organisations, see transparency as something with concentrated costs and dispersed benefits [...] one of the difficulties is seeing the benefits in concrete terms in the same way that you can easily and quickly see the financial costs and, in some cases, the political costs of openness. There may be a bias in the discussion about how much FOI costs [...]<sup>105</sup>

50. Several witnesses gave us examples of where money had been directly saved by the exposure of inefficiency or poor practice. David Hencke, Senior Investigative Journalist for

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<sup>99</sup> Ev 126

<sup>100</sup> Anna Colquhoun, *The Cost of Freedom of Information*, Constitution Unit, University College London, December 2010, <http://www.ucl.ac.uk/constitution-unit/research/foi/countries/cost-of-foi.pdf>

<sup>101</sup> *Ibid*, p3

<sup>102</sup> Frontier Economics, *Independent Review of the impact of the Freedom of Information Act*, a report prepared for the Department for Constitutional Affairs, October 2006 <http://webarchive.nationalarchives.gov.uk/%2B/http://www.dca.gov.uk/foi/reference/foi-independent-review.pdf>

<sup>103</sup> Anna Colquhoun, *The Cost of Freedom of Information*, Constitution Unit, University College London, December 2010

<sup>104</sup> Ev 169

<sup>105</sup> Q 75



ExaroNEWS who appeared before us on behalf of the National Union of Journalists, told us about a recent story he had broken which arose from a freedom of information request which revealed that the head of the Student Loans Company was being paid through a company rather than by his employer and was therefore paying a lower rate of tax: “The general feeling is that the Lester case, frankly, was a complete fiddle. It was the only known case of someone getting paid holidays and a pension who was actually a company.”<sup>106</sup> Mr Hencke calculated that the revelations “saved the taxpayer at least £26,000, if not £40,000” as Mr Lester’s contract had been varied as a result of the publicity, but that the consequent savings of the Government’s decision to cease payment of civil servants through companies saved much more.<sup>107</sup> Maurice Frankel of the Campaign for Freedom of Information, also highlighted the deterrent effect of the greater level of transparency introduced by the Act:

One of the early freedom of information requests in Scotland revealed that councillors in a particular authority were flying all over the world to go to flower shows— spending £6,000 a trip to go to Tokyo for a flower show. That stopped the moment FOI exposed it. There is a lot of that happening. Indeed, the Government are encouraging the use of freedom of information precisely for that purpose. If you simply count the cost of answering requests and not the savings that result from them and from the anticipation of requests, you will miscalculate their overall impact.<sup>108</sup>

Mr Frankel emphasised that the deterrent effect of the right to access specific information could not simply be substituted by imposing proactive publication requirements on public authorities because, when considering the mandatory publication of expenditure over £500 for local authorities for example, “if you look at the way some of them publish them, [they are] incomprehensible without making an FOI request to find out what the money is being spent on.”<sup>109</sup> Other witnesses, including The Press newspaper in York,<sup>110</sup> Packet Newspapers<sup>111</sup> and Newsquest Midlands South,<sup>112</sup> provided a number of individual examples where increased transparency had led to direct and indirect savings to the public purse.

51. Beyond the direct and indirect financial impact of the Act other benefits, such as greater openness and accountability as well as a better informed citizenry, are incalculable in monetary terms. The role of access to information in a democracy was highlighted by Lord Hennessy of Nympsfield:

[...] the Freedom of Information Act [...] was the completion of the circle that began with the extension of the franchise. It took from 1832 to 1948 to get to one person one vote, but the remaining arc was the knowledge bit, the test being whether an elector could cast an informed vote if he or she wanted to and really tried hard to

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<sup>106</sup> Q 139

<sup>107</sup> Qq 156, 155

<sup>108</sup> Q 21

<sup>109</sup> Q 22

<sup>110</sup> See Ev w166

<sup>111</sup> See Ev w131

<sup>112</sup> See Ev w80

find the stuff. The answer was that until the Freedom of Information Act very probably not. It has to be seen as part of completing the virtues of the franchise in an open society.<sup>113</sup>

52. David Higgerson, Digital Publishing Director of Trinity Mirror Regionals and appearing before us on behalf of the Newspaper Society, told us that the costs argument made by public authorities could be viewed as a “Trojan horse” for organisations whose real concern was the embarrassment that can arise from revelations following a freedom of information request:

[...] if the cost argument carried sway at a time when the public sector was under a lot of strain, we would end up with a Freedom of Information Act that was massively watered down, whether through trying to impose costs at point of entry, reducing the hours available per request or the loading up of duties that could fall within those hours. Basically, we are saying that the cost argument feels a bit like a Trojan horse for authorities that do not like members of the public being able to ask the questions that they want to ask.<sup>114</sup>

The Constitution Unit agreed that the “Achilles’ heel” of the right to access information was likely to be cost: “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.”<sup>115</sup>

**53. The Freedom of Information Act is a significant enhancement of our democracy. It gives the public, the media and other parties a right to access information about the way public institutions in England and Wales are governed, and the way taxpayers’ money is spent. Governments and public authorities can promote greater transparency but, without FOI requests, decisions on what to publish will always lie with those in positions of power. FOI has costs, but it also creates savings which accrue from the disclosure of inappropriate use of public funds or, more importantly, fear of such disclosure.**

## The Fees Regulations

54. Section 12 of the Freedom of Information Act provides that a public authority is not obliged to comply with the duty to publish information if the cost of compliance exceeds “the appropriate limit”.<sup>116</sup> The appropriate limit is governed by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 which sets the cost at £600 for central Government and £450 for other public bodies.<sup>117</sup> This translates as 24 and 18 hours respectively based on a standard charge of £25 per hour, regardless of the actual cost of the staff time taken.<sup>118</sup> Public authorities can charge if the

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<sup>113</sup> Q 250

<sup>114</sup> Q 145

<sup>115</sup> Ev 126

<sup>116</sup> Section 12(1) FOIA

<sup>117</sup> Regulation 3(2) and 3(3)

<sup>118</sup> Regulation 4(4)

limit is breached.<sup>119</sup> When calculating the time taken to respond to a request authorities can include searching for the information and drawing it together<sup>120</sup> but not reading it to see if exemptions apply, redacting data<sup>121</sup> or deciding whether it can be released. Few public authorities use the charging mechanism:

UCL research relating to local authorities indicates that a high proportion state that they never charge for information with between 62% and 72% stating that they never charged for information in the period 2005 to 2009. Of the remaining 28% to 38%, the clear majority indicated that they charged in less than 5% of requests. A small minority (peaking at 7% of respondents in 2007) indicated that they charged in 6% of requests or more.<sup>122</sup>

55. Durham University summarised the view of many public authorities:

The Fees Regulations do not appropriately take in to consideration the true cost of dealing with many FOI [...] 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.<sup>123</sup>

Despite this evidence JISC InfoNet found the most commonly used exemption in the university sector was section 12: 22% of disclosure refusals relied on the section 12 exemption in 2010, increasing to 28% in 2011.<sup>124</sup> In contrast, Ministry of Justice statistics show that section 12 was not one of the eight most used exemptions by central Government departments in 2011.<sup>125</sup> Overall, our evidence from public authorities reflected the finding of the Memorandum that:

The appropriate cost limit is largely viewed as inappropriate by public authorities who feel either that the limit is too high or that the range of activities which can be included in its calculation are not comprehensive enough.<sup>126</sup>

56. Alex Skene, from the website WhatDoTheyKnow which helps people seeking to make a request under the Act, told us: “The cost limits are broadly about right, because, although many of them tend to go over the limit, those requests are very much on the lines of, “Give

<sup>119</sup> Section 9 FOIA and Regulation 6 of the Fees Regulations

<sup>120</sup> Regulation 4(3)

<sup>121</sup> Chief Constable of South Yorkshire v Information Commissioner [2011] EWHC 44 (Admin)

<sup>122</sup> Memo, p50

<sup>123</sup> Ev w39

<sup>124</sup> <http://www.jiscinfonet.ac.uk/foi-survey/2010/survey-results-2010.pdf>, p3  
<http://www.jiscinfonet.ac.uk/foi-survey/2011/survey-results-2011.pdf>, p2

<sup>125</sup> Ministry of Justice, *Freedom of Information Act 2000 – Statistics on implementation in central government 2011 Annual and Q4: October - December 2011*, p43, (April 2012). Figures included requests under the Environmental Information Regulations.

<sup>126</sup> Memo, p48

me everything you've got on this subject."<sup>127</sup> Maurice Frankel, of the Campaign for Freedom of Information, gave us the view of requestors:

[the scheme] is a compromise. The UK has an unusual arrangement, which other countries generally do not have. They generally have a provision that allows authorities to refuse if it would result in an unreasonable diversion of their resources, and you have to work that out each time. We have an absolute limit of £600 or £450, which cannot be exceeded even when there is a substantial public interest in gaining access to the information. It is a compromise, with a requirement that people moderate their requests to keep within that limit, and on the whole they do not pay for the information. It gives people a reasonably good chance, but you also see that very large numbers of requests are refused because they exceed the cost limit. It is quite a tricky matter for people to bring a request within the cost limit if they do not get good advice from the public authority on how to do it and what information they hold.<sup>128</sup>

57. Paul Gibbons, who runs the blog FOIMan and has had responsibility for freedom of information while working with a number of public authorities, was concerned that altering the current regime “could disproportionately affect legitimate research and scrutiny of the public sector [...]”<sup>129</sup>

58. In 2006, a report by Frontier Economics for the Department of Constitutional Affairs recommended that what have been termed ‘thinking’ activities (reading, considering whether exemptions apply, redaction) be included in the 18 hour limit if an appropriate methodology for calculation could be found.<sup>130</sup> The Memorandum notes that this suggestion was rejected by the Constitutional Affairs Select Committee on the grounds the Frontier Economics report had failed to give sufficient weight to the public interest in access to information or to the wider benefits of the right to access information and that a change to the appropriate limit regime would require a most rigorous cost-benefit analysis.<sup>131</sup> This argument was accepted by the Government which abandoned plans to change the Fees Regulations. The central difficulty with broadening the types of activity included in the 18 hour limit was summarised by the British Union for the Abolition of Vivisection:

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 case law could be spent. The length of a

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<sup>127</sup> Q 10

<sup>128</sup> Q 7

<sup>129</sup> Ev w47

<sup>130</sup> *Frontier Economics, Independent Review of the impact of the Freedom of Information Act, a report prepared for the Department for Constitutional Affairs, October 2006*

<sup>131</sup> Memo, pp 51–52

document cannot be determinative—it may be much more difficult to decide whether 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?<sup>132</sup>

59. Leeds City Council suggested that the appropriate limit was “wholly unrealistic and outdated” and should be calculated by reference to the “actual cost of staff time” rather than the standard £25 an hour.<sup>133</sup> One difficulty with this suggestion is that it would produce uneven results; an important issue with a strong public interest which had to be considered by a senior member of staff, even briefly, would be more easily refused than a trivial request which could be answered in full by a junior official. Matters most worthy of scrutiny, therefore, would often be the ones which a public authority could refuse to release information on. As the Campaign for Freedom of Information noted, such a system would also be open to abuse:

Authorities could propose to involve a lawyer, talk the matter over with one or two extra officials, or consult additional third parties, where it was not strictly necessary, simply to increase the chances of refusing the request on cost grounds.<sup>134</sup>

Finally, the process of determining the actual cost of a request would be expensive and time-consuming in itself, whether the cost was calculated when the request was received or whether the process was pursued until the financial cut-off point.

**60. Developing a methodology whereby subjective activities such as reading and consideration time could be included in the 18 hour time limit does not seem to us to be a feasible proposition. Such activities are overly dependent on the individual FOI officer’s abilities, introducing an element of inconsistency into the process that undermines the fundamental objective of the Act, that everyone has an equal right to access information.**

**61. We recognise, however, that complying with its duties under the Act can be a significant cost to a public body. A standard marginal decrease in the 18 hour limit may be justifiable to alleviate the pressure on hard-pressed authorities, particularly in the context of increasing numbers of requests. We would suggest something in the region of two hours, taking the limit to 16 hours rather than 18, but anticipate the Government would want to carry out further work on how this would affect the number of requests rejected under section 12, and the corresponding weakening of the right to access information.**

## Potential cost drivers

### *Numbers of requests*

62. The available data suggests that the number of freedom of information requests is growing. Ministry of Justice figures for requests made to central Government departments

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<sup>132</sup> Ev 115

<sup>133</sup> Ev 146

<sup>134</sup> Ev w217

suggest “the number of requests has grown rapidly between 2005 to 2011—an average of 4% per year”,<sup>135</sup> although the other central Government bodies monitored by the Ministry of Justice, such as the Health and Safety Executive, remained relatively stable.<sup>136</sup> The Constitution Unit estimated that the number of freedom of information requests to local government had risen from 60,361 to 197,737 between 2005 and 2010, a rise of over 200%.<sup>137</sup> An annual review of the number of requests received by universities has been carried out by JISC InfoNet since 2005. It found that there was an average monthly number of requests under the Act per institution of 10.1 in 2011 compared to 8.6 in 2010, and 2.8 in 2005. The Foundation Trust told us its members had concerns that “the number of requests [is] growing rapidly to the point of being overwhelming [...]”<sup>138</sup>

63. Research suggests that the reason for the growth in freedom of information requests is better awareness of the legislation. Dr Ben Worthy told us that high profile media stories related to freedom of information requests, such as MPs’ expenses, together with revelations about local matters, led to more people becoming aware of and using the Act. This was reflected by the appearance of “clusters” of inquiries about the same issue: “many officers told us [...] that FOI requests come in waves. They cluster around particular issues. For example, when it snows there will be a spate of requests about gritting or holes in the road; there will be a spate of requests about RIPA and surveillance legislation when those stories come up. It is not one group making requests. Lots of people are quite interested in these subjects.”<sup>139</sup> Professor Robert Hazell told us that this relationship between greater awareness of the Act and greater use of the Act was seen in other countries:

All countries see an increase in the volume of requests in the early years of FOI. I first started studying FOI over 25 years ago, when I was a civil servant. I had a travelling fellowship for a year, and I went to Australia, Canada and New Zealand about three or four years after they had first introduced FOI. In Australia and Canada, where they kept statistics, they saw quite dramatic increases in the first three years or so. The UK is no exception. People gradually learn about the existence of the Act and read about it through the media, and so it builds up in that way.<sup>140</sup>

Professor Hazell noted that the international picture did not reveal a consistent pattern as to when the volume of requests might plateau.<sup>141</sup> The Nuclear Information Service noted that a greater volume of requests can be considered “an indicator of the success of the Freedom of Information Act [...]”<sup>142</sup>

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<sup>135</sup> Ministry of Justice, *Freedom of Information Act 2000 – Statistics on implementation in central government 2011 Annual and Q4: October–December 2011* (April 2012) p43. Figures included requests under the Environmental Information Regulations.

<sup>136</sup> *Ibid.*, p23 (Table 3)

<sup>137</sup> The Constitution Unit, *FOIA 2000 and local government in 2010: The experience of local authorities in England*, (November 2011)

<sup>138</sup> Ev 110

<sup>139</sup> Q 77

<sup>140</sup> *Ibid.*

<sup>141</sup> Q 78

<sup>142</sup> Ev w34

### **Greater complexity of requests**

64. The NHS and university sectors told us that the requests they received were growing in complexity. Wyn Taylor, of the Liverpool Heart and Chest Hospital, reflected the views of several NHS organisations from whom we received evidence when he told us:

The requests themselves have increased greatly in complexity [...] since the Act was introduced. In 2005, there would be one very straightforward question asking for one very specific document, whereas now one request can include up to 20 or 30 individual questions. Those questions are not confined to one specific area within the organisation. They are directed to a number of areas such as nursing, IT, estates, contracts and performance. [This means that] the cost of complying with the requests has increased significantly since the Act was introduced.<sup>143</sup>

We heard similar evidence from Universities UK that “the cost and complexity of requests appears to be increasing” which it said was demonstrated by the increasing amount of time taken for each request to be processed.<sup>144</sup> However, we were also told that simple but broad requests, for a whole dataset or a large document, also had the potential to be very time-consuming and so costly because the information had to be read to see if exemptions applied and, if appropriate, redacted, neither activities which are included in the 18 hour time limit.<sup>145</sup>

### **Small number of high cost requests**

65. In a review of the international literature on the cost of freedom of information requests, the Constitution Unit found:

Despite the differences in methodologies, a common finding in each report was the financial impact of administering a small number of disproportionately expensive requests. For example in the UK, although only 5% of requests cost more than £1,000 of officials’ time, they tended to take 7 times longer to process than average requests and accounted for 45% of total costs. Such requests have undoubtedly bolstered final figures and, in some respects, skewed final costing data as they exceed the statutory price limit each country has in place in order to avoid these costly processes.<sup>146</sup>

### **Internal reviews**

66. Estimates of the relative cost of the freedom of information regime in central and local government suggest that the cost to central Government per request is considerably higher.<sup>147</sup> The Constitution Unit found that much of the additional financial cost came from the high number of internal reviews: “Internal reviews are particularly expensive for government departments. Annually, requests to central Government generate

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<sup>143</sup> Q 309

<sup>144</sup> Ev 120

<sup>145</sup> Q 406

<sup>146</sup> Anna Colquhoun, *The Cost of Freedom of Information*, Constitution Unit, University College London, December 2010, p3

<sup>147</sup> *Ibid*, p4

approximately 2,700 internal reviews. On average, central [Government] reviews cost £1,208—more than 5 times the amount of an initial request.” Consulting ministers was, unsurprisingly, particularly expensive.<sup>148</sup>

67. Evidence from central Government officials suggested to us that the relatively high numbers of internal reviews were due, at least in part, to the type of information held by central Government which will inevitably be subject to more exemptions and therefore more likely to be argued over. Roger Smethurst of the Cabinet Office described the difficulties encountered by his Department, which could make internal reviews more likely:

[...] the Cabinet Office holds a lot of sensitive information. In order to conduct the public interest test, we need to consult very senior stakeholders, both in Government and beyond, and that takes time. It is burdensome. Sometimes, if there are large volumes of information, it can be very difficult indeed.<sup>149</sup>

68. While individual requests vary enormously in how much they cost it should be noted that the requests which are cheapest to process may be the applications which can best be described as frivolous. We heard from witnesses who have fielded inquiries about paranormal activities in council owned properties,<sup>150</sup> whether the Cabinet Office has contingency plans in case of an attack by zombies<sup>151</sup> and similar. While we consider whether these are legitimate inquiries in Chapter 5 below, witnesses told us they can usually be disposed of following a brief telephone call or email, which means they are inexpensive.<sup>152</sup> Requests where disclosure of the information is in the public interest, however, may require significantly more resource. Focusing on the cost of individual inquires can obscure this important point.

## What would be the impact of introducing fees for requests?

69. As outlined above, a request under the Freedom of Information Act is usually free for the requestor.<sup>153</sup> It has been suggested to us by some public authorities that we should investigate the feasibility of charging fees for some or all requests. We canvassed a number of options with our witnesses.

### *Fees for all requests- the views of our witnesses*

#### *The impact of fee charging*

70. Our witnesses held divergent views on the desirability of introducing fees for all freedom of information requests. The Rt Hon Jack Straw MP was in favour of introducing a fee “parallel to that for data protection requests. It would be about £10.”<sup>154</sup> Michelle

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<sup>148</sup> Anna Colquhoun, *The Cost of Freedom of Information*, Constitution Unit, University College London, December 2010, p5

<sup>149</sup> Q 447

<sup>150</sup> Ev 146

<sup>151</sup> Q 461

<sup>152</sup> Q 462

<sup>153</sup> For example the majority of local authorities never charge a fee, see Memo, p 93.

<sup>154</sup> Q 363



Thew, Chief Executive of the British Association for the Abolition of Vivisection, while noting “there may be broader principles for individuals about the Act and charging”, suggested that campaigning groups were not likely to reduce the volume of their requests: “we would not oppose the introduction of a small fee. The £10 level has been discussed; that would not be a problem for us.”<sup>155</sup> The media, in contrast, told us that the introduction of fees would reduce their use of the Act. David Higgerson said charging would “certainly” result in reduced use of the Act for regional newspapers<sup>156</sup> “because we would not be guaranteed a result from FOI requests, they would probably stop using it altogether.”<sup>157</sup> Doug Wills, Managing Editor of the *Evening Standard*, *i, Independent* and *Independent on Sunday*, agreed that charging would reduce the use of the Act by the large daily newspapers as well: “It would reduce the volume of questions, unquestionably, even at the *Evening Standard* [...] It would reduce the number of questions that we were putting for budgetary reasons.”<sup>158</sup>

#### 71. Birmingham City Council supported the introduction of a standard fee:

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.<sup>159</sup>

While some witnesses from public authorities expressed support for charging this was usually directed at specific types of requestors, such as journalists or applicants who would benefit commercially from the information. We consider possible models for targeting fees at certain categories of requestors below.

72. Mr Straw’s motivation for introducing a charge was to reduce the volume of requests. He told us that a £10 fee “would not stop important requests, but it would act as a check.”<sup>160</sup> The Campaign for Freedom of Information (CFOI) suggested, however, that the impact of a small charge was most likely to deter those of limited means regardless of the importance of the request: “Larger media organisations, well funded charities and businesses might continue to make frequent use of the Act, while small scale users might ration or forego their use of it.”<sup>161</sup> The CFOI gave the example of a mother in dispute with social services over whether her child should be taken into care as one example where a person of limited means would benefit from, for example, making an FOI request for the protocol that midwives and health visitors at her local maternity unit were required to follow in order to put a child on the ‘at risk’ register. Equally, others in dispute with a public authority “might need to make a series of requests to it; some issues may require

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<sup>155</sup> Q 384

<sup>156</sup> Q 167

<sup>157</sup> Q 168

<sup>158</sup> Q 176

<sup>159</sup> Ev w56

<sup>160</sup> *Ibid.*

<sup>161</sup> Ev 156

that requests be made to a variety of involved agencies; and some research may be carried out by making the same request to comparable authorities.”<sup>162</sup>

73. The CFOI also noted that the effect of a standard charge would introduce an element of inconsistency into the operation of the Act:

The introduction of application fees would mean that those who explicitly relied on their statutory rights would pay, whereas those who sought information without invoking, or in ignorance of, their rights would not. This would create a two-tier system in which those who could not pay, or were unaware of the access right, might have information unjustifiably withheld, even if it was clear that this could not be done under the legislation.<sup>163</sup>

74. Witnesses also raised concerns over the cost of administering charges. James Rogers, Assistant Chief Executive of Leeds City Council, told us that his authority, as well as many others, did not charge the £10 fee for Data Protection Act requests because “the administrative burden of administering the charge outweighs the issues in terms of putting it in place.” Mr Rogers went on: “That logic would then apply to any question of whether we should charge for FOI requests, in the level of charge we would adopt and then how you would administer that.”<sup>164</sup> Edward Hammond, of the Centre for Public Scrutiny, was concerned that a “bureaucratic superstructure” could arise to deal with fees.<sup>165</sup> The Information Commissioner agreed that charging schemes in each public authority would “cost a lot to administer.”<sup>166</sup> Jim Amos, of the Constitution Unit, told us that a study of the use of fees for requests in Canada found that the public authorities themselves sought to circumvent the legislation:

[...] if you paid a fee it was formally an FOI request. However, many said, “Look, if you really want this as a formal process, give us the fee; otherwise just ask us and we will give it to you informally”, because there was so much administrative work to handle the payment.<sup>167</sup>

75. The Information Commissioner told us that other action should be taken by public authorities to increase their transparency and reduce the costs of freedom of information before charging should be considered:

[...] before you ever get to the question of charging, there is an issue for the ICO about publication schemes. We have done a lot of work on the model publication scheme that public authorities should be running for proactive disclosure and for making clear on their websites where information can be found. It is a bit rich to have public authorities saying, “We are assailed by unreasonable freedom of information requests”, when they do not have an adequate publication scheme, they have not got their act together in terms of records management and have a rotten

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<sup>162</sup> Ev 156

<sup>163</sup> Ev w217

<sup>164</sup> Q 420

<sup>165</sup> Q 425

<sup>166</sup> Q 227

<sup>167</sup> Q 75

website and so on. There are things that you can do before you ever get to charging.<sup>168</sup>

The Commissioner also noted it was “part of a public authority’s job to be accountable and to be answerable, and the Freedom of Information Act is the way they do it.”<sup>169</sup> Edward Hammond said:

[...] with wider public information, if decisions are being made in your name and public money is being spent in your name and on your behalf, surely you should have a right to understand how those decisions are being made. There is a cost involved—of course there is—but that is the cost of democracy. That is inherent in the fact that, hopefully, we have a system where informed citizens are able to make choices—certainly in the future as public services arguably become more marketised—about the way that services are provided to them through having access to a freedom of information inquiry.<sup>170</sup>

Alex Skene, of the website WhatDoTheyKnow, also had concerns about the impact of fees on transparency:

You will have to rely on people such as the regular scrutineers of public bodies to ensure that money is being spent in the right way. There may be less transparency. Wirral Borough Council said today that it does not want charges because it will not stop cover-ups but will stop them being made public; when something has gone wrong, the council will be able to stop the local populace finding out what is going on.<sup>171</sup>

The York Newspaper agreed: “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 [...]”<sup>172</sup>

### ***Fees for requests from which the requestor will commercially benefit***

76. Other witnesses suggested that fees which targeted certain types of requestor such as journalists and businesses looking to benefit commercially from the information they receive would tackle the issue of volume while preserving the right to access information for the general public. Roger Gough, Councillor for Kent County Council, expressed limited support for a “nominal” charge for requests, as long as it was “hand in hand with the wider transparency agenda” but was more strongly in favour of charging specific users of the Act who expected to benefit commercially from the information they were given.<sup>173</sup> Sue Slipman told us that while “there are some strong arguments for charging [...] I do not think we would want genuine individuals and members of the public getting caught up in

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<sup>168</sup> Q 227

<sup>169</sup> Q 230

<sup>170</sup> Q 424

<sup>171</sup> Q 18

<sup>172</sup> Ev w166

<sup>173</sup> Q 417

it if there is a way to avoid that.”<sup>174</sup> While it did not support the introduction of fees, Equanomics suggested that “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.”<sup>175</sup>

77. The difficulty with charging certain types of requestor is that the freedom of information regime is based on ‘requestor blindness’; all applicants have the same rights to receive information, regardless of who they are or the purposes for which they want it.<sup>176</sup> The Information Commissioner summarised the difficulties as follows:

The imposition of charges does not really get us anywhere. The experience in the Republic of Ireland was that it had a devastating effect initially because of the number of requests being made, both good and bad. You may want to dissuade cranks, but there are lots of rich cranks.<sup>177</sup>

Policing a system in which requestors are required to provide some form of identification would therefore be both difficult and expensive.

78. An alternative mechanism, suggested by Leeds City Council, was 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.<sup>178</sup>

The Campaign for Freedom of Information noted that this suggestion was investigated as a possibility by the then Government in 2006:

For example, one of the proposals was to allow the aggregation of all requests to an authority by the same individual or organisation within a 60 day period, regardless of their nature. (Currently, only requests which relate to the same or similar information can be aggregated). The proposal would have meant that a local newspaper might be able to make just one or two requests a quarter to a local authority, and having used its quota up on, say, a child abuse issue would be unable to seek information about other questions relating to education, road safety or housing until the next quarter. A national newspaper or broadcasting organisation might reach the cost limit with a single request to the Home Office about immigration and then be unable to submit further requests to it even on an entirely different issue such as passport controls, drugs policy, policing or animal experimentation.

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<sup>174</sup> Q 296

<sup>175</sup> Ev w206

<sup>176</sup> Lord Falconer, HL Deb, 17 Oct 2000, col 921

<sup>177</sup> Q 227

<sup>178</sup> Ev 146

The government later published more details of how the new aggregation provision might work, proposing that authorities should be more ready to aggregate requests made by an individual for commercial “or professional purposes” than for other reasons. We assume that requests by doctors’ organisations concerned at the impact of NHS reforms, or campaign groups concerned with issues of public interest, would thus have been particular targets for the new measures.<sup>179</sup>

79. The question of who Parliament envisaged the Act being used by is considered above at paragraphs 44 and 45.

### ***Charging media companies***

80. We asked witnesses whether a fee ‘at source’, for example on all media companies, to be collected and distributed by the Information Commissioner to assist public authorities in funding their FOI regimes, would be feasible. The Commissioner noted that such a system would be akin to a “stamp tax.”<sup>180</sup> As well as being politically unpopular this proposal might create a perverse incentive for media companies to maximise the number of requests made in order to feel they had their ‘money’s worth’.

**81. The Act operates on the basis of requester blindness. As a result developing a way to charge requesters who commercially benefit from the information they receive from public authorities is difficult, if not impossible. Any requirement that requestors identify themselves could easily be circumvented by requestors using the name of a friend, family member or other person. Attempts to police such a system, either by public authorities or the Information Commissioner, would be expensive and likely to have a limited effect.**

**82. It must also be recognised that the focus of the Act is whether the disclosure of information is justified, not who is asking for that information. If the statutory scheme deems it right that data should be released then it is irrelevant who is asking for publication; release of such information is to all, not just the individual requestor. Nevertheless it can be argued that someone seeking to exercise freedom of information rights should be willing for the fact they have requested such information to be in the public domain; we therefore recommend that where the information released from FOI requests is published in a disclosure log, the name of the requestor should be published alongside it.**

### ***Fees for all requests - the Irish experience***

83. When implemented in 1998, the Irish freedom of information regime did not charge for requests.<sup>181</sup> In 2003, the regime was amended to allow public authorities to refuse a request unless a fee was paid.<sup>182</sup> Fees are currently set<sup>183</sup> at €10 for a request for

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179 Ev w21

180 Q 227

181 See generally Freedom of Information Act 1997

182 Freedom of Information (Amendment) Act 2003, s30, now section 47(6A) Freedom of Information Act 1997

183 Originally €15, €75 and €150 respectively.

information, €25 for an internal review and €50 for an appeal to the Irish Information Commissioner.<sup>184</sup> The 2004 Annual Report of the Irish Information Commissioner's Office showed a 32% drop in requests for information.<sup>185</sup> The actual drop in requests equivalent to the English freedom of information request was, however, around 50%, because the number of requests overall included those for personal information, equivalent to Data Protection Act requests in England and Wales, for which a fee was not introduced. The number of requests was relatively static in 2006 and 2007,<sup>186</sup> the year in which the Irish Information Commissioner concluded in her Annual Report that "the introduction of fees has acted as a major obstacle to the use of the Freedom of Information Act."<sup>187</sup> Since 2007 the number of requests climbed to a peak of 4,905 in 2009, compared to 7,601 in 2003,<sup>188</sup> but fell back to 3,936 in 2011.<sup>189</sup> The Irish Information Commissioner, who was not consulted on the introduction of fees, said in a speech that fees were "a major obstacle to the use of the FOI Act" which "seems to suggest that the people are seen as adversaries and nothing more than lip-service is being paid to the principles of open, fair and accountable government."<sup>190</sup>

84. The numbers of requests made recorded by the Irish Information Commissioner contain underlying trends. Dr Ben Worthy, of the UCL Constitution Unit, told us, perhaps surprisingly, that media and commercial requestors in Ireland were the groups most dissuaded from putting in requests by the introduction of fees: "officials seemed to believe that fees had an effect on two particular groups—the media and businesses."<sup>191</sup> The Irish Information Commissioner has made similar findings in her annual reports.<sup>192</sup> It is unclear why this might be, however, a better understanding of the system by those classes of requestors may have been a significant factor as Dr Worthy found that:

after only a few interviews that one of the difficulties with fees in any FOI system [...] is that there are ways round it. A number of Irish FOI officials to whom I spoke found that when fees were introduced they would get 10 questions in one request, so the statistics may not tell the whole story.<sup>193</sup>

**85. While we recognise that there is an economic argument in favour of the freedom of information regime being significantly or wholly self-funding, fees at a level high enough to recoup costs would deter requests with a strong public interest and would defeat the purposes of the Act, while fees introduced for commercial and media organisations could be circumvented.**

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<sup>184</sup> See <http://www.oic.gov.ie/en/MakeanFOIRequest/Fees/>

<sup>185</sup> Office of the Information Commissioner, *Annual Report 2004*, p 5  
<http://www.oic.gov.ie/en/Publications/AnnualReports/2004/File,519,en.pdf>

<sup>186</sup> 2005 was an anomalous year because of the high number of personal requests made following the revelation of ill-treatment in Ireland's industrial schools. See IOICO's Annual Reports pg 9 and 11 respectively.

<sup>187</sup> *Ibid*, p11

<sup>188</sup> See Irish Information Commissioner's Office annual reports for the relevant years  
<http://www.oic.gov.ie/en/Publications/AnnualReports/>.

<sup>189</sup> Irish Information Commissioner's Annual Report (2011)

<sup>190</sup> Ev w217

<sup>191</sup> *Ibid*.

<sup>192</sup> *Ibid*.

<sup>193</sup> Q 75

86. Any future reconsideration of the economic argument for charging would need significantly better data on the number of requests made under the Act and the costs incurred in responding to them.

### Lessons to be learnt from local government

87. Research by the Constitution Unit on the freedom of information regime in local government found that an increase in the number of requests had not led to an equivalent increase in costs, in fact the overall price of the regime had decreased. The Unit's findings were as follows:

Table 1: Time and cost of FOI from 2007 to 2010<sup>194</sup>

Year	Estimated number of requests	Average hours per request	Total estimated cost of FOI to English local authorities (millions)
2005	60,361	16.4	£24.7
2006	72,361	13.1	£23.6
2007	80,114	15.3	£30.6
2008	118,569	11.6	£34.3
2009	164,508	8.9	£36.6
2010	197,737	6.4	£31.6

Data source: University College London, Department of Political Science, The Constitution Unit

The table relates specifically to local authorities in England and summarises request numbers, average hours spent per request and cost, using £25/hour, as in the Fees Regulations.<sup>195</sup>

88. Dr Jim Amos of the Constitution Unit, who led on the research, told us that a significant cost driver for public authorities (specifically local government) was the “burden” of requests, in other words their complexity, rather than the actual numbers. The best-performing local authorities took between one and six hours for each request whereas others took over 10 hours.<sup>196</sup> Dr Amos told us that, when collating the research for the study, he noted two councils estimated their average response time as 2 hours and 50 hours respectively. He said he:

[...]thought that was ridiculous, so I rang the FOI officer in both cases. I can comprehend why the two hours was only two hours; it was an experienced person

<sup>194</sup> Gabrielle Bourke, Jim Amos, Ben Worthy, Jennifer Katzaros, *FOIA 2000 and local government in 2010: The experience of local authorities in England*, November 2011, The Constitution Unit, table 21, <http://www.ucl.ac.uk/constitution-unit/research/foi/foi-and-local-government/2010-foi-officers-survey.pdf>

<sup>195</sup> Ev 169

<sup>196</sup> Q 75

who obviously had the confidence of the senior people, who would look at the request, go and see the appropriate senior officer and, yes or no, decide quickly. The other was in a very large council, with a junior person dealing with it, who would have to send it with an advice note to someone above; it would have to go up two levels before it could go across to another organisation, and I could well understand how that would be 50 hours. Bureaucracy and the cost-effectiveness with which the exercise is managed matters a tremendous amount.<sup>197</sup>

89. Dr Amos concluded that an efficient cost-effective freedom of information regime was one where “positive leadership [was] combined with good systems, staff and organisation”.<sup>198</sup> Edward Hammond thought that:

Corporate ownership of the process is absolutely crucial. Corporate ownership is the first step towards developing a genuine cultural understanding about the benefits of transparency. The more that senior officers and senior members are involved directly in understanding the general spread of requests and how they work—and sometimes being actively involved in the process itself—the better the regime has the potential to work. If it is parcelled off to junior officers who are sitting apart from the council, it is more likely that the council will perceive it as a compliance issue and therefore as a burden.<sup>199</sup>

Roger Gough agreed, observing that the involvement of both senior officers and senior members in a freedom of information scheme “gives it the right degree of impetus and doesn’t make it an odd little area off on its own.”<sup>200</sup> He told us Kent County Council had sought to: “encourage our senior directors at least to take responsibility for the timing of getting stuff back to the central Freedom of Information Unit. We think there should be ownership of that by the most senior officers to ensure that it happens. Inevitably, you will have people of varying rank dealing with the actual mechanics of the request, but often it cannot be more junior staff because you need somebody who has the right picture of what is needed.”<sup>201</sup> More broadly, other witnesses agreed that leadership was crucial. Paul Gibbons identified “a lack of leadership in the public sector championing FOI.”<sup>202</sup> Mr Gibbons told us that “cynicism” about the value of openness and transparency was a “significant limit” on the benefits and effectiveness of the Act.<sup>203</sup>

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

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<sup>197</sup> Q 90

<sup>198</sup> Ev 169

<sup>199</sup> Q 413

<sup>200</sup> *Ibid.*

<sup>201</sup> Q 413

<sup>202</sup> Ev w47

<sup>203</sup> *Ibid.*



## 4 Delays (section 10) and enforcement (section 77)

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### Time limits

91. Section 10(1) requires that a response is made to requests “promptly and in any event” within 20 working days. There are no immediate penalties for non-compliance. Section 10(3) allows for an extension of time “as is reasonable in the circumstances.”<sup>204</sup> This is generally referred to as the ‘public interest’ extension as it is used when qualified exemptions are being considered. The Information Commissioner’s Office guidance states that this should only apply where the inquiry is “exceptionally complex” and should not be longer than an additional 20 working days.<sup>205</sup> Under section 50, a requester whose application is refused has to wait for the public body to carry out an internal review before the refusal can be appealed to the Information Commissioner.<sup>206</sup> There is no statutory time limit on internal reviews. Guidance in the Code of Practice issued by the Secretary of State under section 45 of the Act states that 20 days is a reasonable time for an internal review.<sup>207</sup> Graham Smith, Deputy Information Commissioner, told that: “We would expect internal reviews to be done within 20 working days; there might be exceptional grounds for extension, but never more than 40 days.”<sup>208</sup>

### Compliance with time limits

92. Overall users of the Act thought that the 20 day response time was about right “if it were adhered to”<sup>209</sup> although it was somewhat slow for journalism purposes.<sup>210</sup> Sophie Barnes, a journalism student and user of the Act, thought that the 20 day limit was being treated as a “minimum” rather than requests being responded to ‘promptly’ as the Act requires.<sup>211</sup> Complaints about delays generally occurred in connection with extensions to the 20 day limit and when internal reviews were undertaken. Alex Skene, of WhatDoTheyKnow, told us “one of the biggest complaints that we get from users of our website is about delays to requests.”<sup>212</sup> The British Union for the Abolition of Vivisection described delays as “endemic”.<sup>213</sup> Media witnesses agreed. The Society of Editors, however, also highlighted the wide variation in responses from different public authorities: “the Act

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<sup>204</sup> Section 10(3)

<sup>205</sup> Information Commissioner’s Office, *Freedom of Information Good Practice Guidance No. 4. Time limits on considering the public interest following requests for information under the Freedom of Information Act 2000*, February 2007.

<sup>206</sup> Section 50

<sup>207</sup> Information Commissioner’s Office, *Freedom of Information Good Practice Guidance No. 5 Time limits on carrying out internal reviews following requests for information under the Freedom of Information Act 2000*, February 2007

<sup>208</sup> Q 218

<sup>209</sup> Ev w165

<sup>210</sup> Q 192

<sup>211</sup> Ev w1 See also David Holland’s experience at Ev w3.

<sup>212</sup> Q 25

<sup>213</sup> Ev 115

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.”<sup>214</sup>

93. Public authorities are not required to keep statistics on compliance but they are available for certain sectors. Ministry of Justice statistics show that in 2010 17% of requests to Government departments (4,696 out of 27,290) took more than 20 working days. 12% notified the requester there were grounds for an extension of time, 5% did not.<sup>215</sup> Of the cases to which an extension was applied, 53% were resolved within the ICO 20 day time limit.<sup>216</sup> The remaining 47% took up to 6 months. A few requests appear to have taken longer but records are not kept of requests that take longer than 6 months. The Campaign for Freedom of Information noted that the MoJ described these requests as being answered “in time” simply because the requester was told the request would take longer than 20 days, not because the delay was judged “reasonable in the circumstances”.<sup>217</sup>

**94. We were pleased to hear relatively few complaints about compliance with the 20 day response time. We believe that the 20 day response time is reasonable and should be maintained.**

### ***The 20 day ‘public interest extension’***

95. Maurice Frankel, of the Campaign for Freedom of Information, told us:

From the start, the public interest extension was misguided. We said so to the Government at the time. I remember an official saying to me, “We have had such a job getting agreement from the Cabinet Committee that we don’t dare go back, however good the case for changing anything, because the whole thing will be unstitched. Every agreement we have will be unstitched.” That is how it was put in place, and that is how the final Act took its form.<sup>218</sup>

Mr Frankel thought the power to extend the 20 day response time should be limited to “permitting extensions where the request is voluminous and complex, and in particular where the authority has to consult a third party outside—not another public authority but an individual or business that has provided the information—in order to know whether an exemption applies.”<sup>219</sup> Graham Smith, Deputy Information Commissioner, told us:

In the original proposals for the Bill there was no suggestion of public interest extensions. They were introduced in debate, primarily because of concerns about the need for third-party consultation in some cases. Reading between the lines, as far as I can judge it, the fact that you were dependent on the responses of the consultees would make it difficult to put a time limit on it. It was recognised that the backstop—

<sup>214</sup> Ev w165

<sup>215</sup> Ministry of Justice, *Freedom of Information Act 2000, Statistics on implementation in central government, 2010 Annual and Q 4: October– December 2010*, April 2011

<sup>216</sup> *Ibid.*

<sup>217</sup> Ev 156

<sup>218</sup> Q 29

<sup>219</sup> *Ibid.*

this does happen in practice—is that somebody can make a complaint to the Commissioner, saying, “This is all taking too long. Can you hurry it along, please?” If needs be, we can then issue a decision notice; a phone call and a fairly stiff letter to the public authority is usually sufficient, saying, “This is not good enough; please turn this round in the next 20 working days.”<sup>220</sup>

96. Mr Smith told us that when the ICO investigated failures to respond it took into account all the circumstances of the case and would hold that a delay was reasonable where, for example, there had been difficulties contacting the third party. He gave the example of a “Government Department where there needed to be consultation with an overseas Government, and they just did not respond. It was a highly sensitive international issue, and the consequence was that the request just did not get dealt with for about a year and a half.” Mr Smith thought a framework on the use of the 20 day extension would be helpful because “public authorities were clear as to their obligations [...] [and] [...] requesters would have a clear expectation of the time that would be taken.” Alex Skene noted that there was no power to extend the response time in Scotland which appeared to cause few problems, although fewer public authorities are subject to the Scottish equivalent of the Act.<sup>221</sup>

97. In February 2012, Lord Wills moved an amendment to the Protection of Freedoms Bill which would have permitted one 20 day extension.<sup>222</sup> Lord Wills told the House of Lords that the proposal:

[...] aims to cut down on delays in responding to freedom of information requests, which can often defeat the intent of the legislation. Such delays can be of more than a year. It is in line with the Information Commissioner's guidance that normally an extension should not be needed but where it is, it should not exceed a further 20 working days. Too often, the guidance is ignored. The amendment will make it more difficult to do so.<sup>223</sup>

98. Central Government officials were all opposed to amending the Act by controlling the use of the 20 day time limit. Roger Smethurst, of the Cabinet Office, told us:

Everybody who works on freedom of information in the Cabinet Office—both in my team and across the Department where they are processing the information and doing the public interest test—works on the basis of trying to release what they can and protecting only what needs to be protected. My fear is that, in certain circumstances, if we were to put a time limit on this, then they might err on the side of caution rather than do the job properly.<sup>224</sup>

99. Glenn Preston, of the Ministry of Justice, said that the public interest extension was only used in around 5% of cases: “Of that 5%, I think you are looking at about half that are always dealt with in the additional 20 working days that we apply, which is the good

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<sup>220</sup> Q 217

<sup>221</sup> See Schedule 1 Freedom of Information Act (Scotland) 2002 and Schedule 1 Freedom of Information Act 2000.

<sup>222</sup> HL Deb, 15 February 2012, col 813

<sup>223</sup> *Ibid.*

<sup>224</sup> Q 459

practice guidance that the Ministry of Justice and the ICO publish. If you were to apply a time limit to public interest tests like you describe, then you are talking about that affecting only a really quite small proportion of the total number of requests that Government receive.”<sup>225</sup> Marion Furr, of the Department of Health, suggested that changing the regime might mean requests took longer: “Human beings being what human beings are, putting a deadline of 20, 30 or 40 days on something could lead some people to think, “Oh, I’ve got 40 days to do it”, whereas at the moment we say, “You have to do it as quickly as possible.” It could become a target rather than a limit.”<sup>226</sup>

100. Tracey Phillips, of Lambeth Council, told us that applying the public interest test was rarely problematic: “applying the public interest test is quite bog standard. You use a templated response [...]. It is not used very often, but when it is used, it is the same response.”<sup>227</sup>

### **Internal reviews**

101. Mr Frankel supported the introduction of a statutory time limit on internal reviews, as in the Environmental Information Regulations.<sup>228</sup> The Telegraph Media Group told us that the use of internal reviews as an obstacle to delay the publication of information made some journalists feel that they were entering “a war of attrition” with the public body concerned.<sup>229</sup> It also supported the introduction of time limits for internal reviews. The Information Commissioner said that the lack of a statutory time limit for internal reviews was a “weakness” of the Act and made effective enforcement difficult. Noting that “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 said he would “welcome an amendment to FOIA along the same lines to strengthen the current regime.”<sup>230</sup>

102. Concerns regarding the imposition of a mandatory time limit for internal reviews were similar to those regarding the public interest extension.<sup>231</sup>

**103. It is not acceptable that public authorities are able to kick requests into the long grass by holding interminable internal reviews. Such reviews should not generally require information to be sought from third parties, and so we see no reason why there should not be a statutory time limit—20 days would seem reasonable—in which they must take place. An extension could be acceptable where there is a need to consult a third party.**

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<sup>225</sup> Q 459

<sup>226</sup> *Ibid.*

<sup>227</sup> Q 398

<sup>228</sup> Ev 156

<sup>229</sup> Ev w136

<sup>230</sup> Ev 137

<sup>231</sup> Q 459

### **The impact of non-statutory time limits**

104. On compliance with the different time limits, Mr Smith told us that performance by authorities was poorer when there was no statutory provision:

When there are quite challenging time limits under the Act, we have found that public authorities will put their efforts into meeting those, and their performance might slip somewhat when it comes to issues that do not have the same direct repercussions because there are no statutory time limits.<sup>232</sup>

105. The Constitution Unit told us its research on central Government suggested that the power to delay together with the fact it holds the information means that: “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.” Equally, “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.”<sup>233</sup>

### **Other remedies for non-compliance with time limits**

106. The Information Commissioner told us in his written submission that:

[...] 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.<sup>234</sup>

107. We heard from three of the monitored bodies in evidence. It was clear all three had taken the Information Commissioner’s intervention seriously and had spent time and resources in trying to improve their compliance rates. Birmingham City Council told us that it “required more rather than less resource” to maintain the 85–90% compliance rate the council was now achieving.<sup>235</sup> Roger Smethurst, representing the Cabinet Office, which had the worst record of responding to requests in time of the central Government departments, thought the success of monitoring the Department by the Information Commissioner’s Office meant that making the 20 day extension statutory was unnecessary.<sup>236</sup> In evidence, Martin Rosenbaum of BBC News suggested that the Cabinet Office had shown some improvement in response times under monitoring but had then

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<sup>232</sup> Q 219

<sup>233</sup> Ev 126

<sup>234</sup> Ev 137

<sup>235</sup> Ev w56

<sup>236</sup> Q 459

regressed.<sup>237</sup> He also noted that monitoring and enforcement required resources to be spent by the Information Commissioner:

[...] it is important that the Commissioner has a level of resources that enables him to process the complaints that he receives sufficiently quickly, efficiently and effectively so that he can then turn round with confidence and address the public authorities that have been slow. Previously, a lot of them would have been very dismissive of any complaint from the Commissioner, saying, “You are worse than us.” As well as the law, there is also the question of the resources that the Commissioner has in order to use his powers and to use them with confidence.<sup>238</sup>

Our predecessor Committee expressed concerns about the limited resources available to the Information Commissioner at the time of the appointment of the present incumbent.<sup>239</sup>

108. Kent County Council was concerned that patchy publication of compliance rates meant the public authorities which released them in the interests of openness and transparency were the ones most likely to be monitored while other “less open and honest” authorities could hide their poor response rates by refusing to put such information in the public domain.<sup>240</sup> Paul Gibbons agreed this was unfair:

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.<sup>241</sup>

**109. We recommend that all public bodies subject to the Act should be required to publish data on the timeliness of their response to freedom of information requests. This should include data on extensions and time taken for internal reviews. This will not only inform the wider public of the authority’s compliance with its duties under the Act but will allow the Information Commissioner to monitor those organisations with the lowest rate of compliance.**

110. While monitoring of poor-performing public authorities by the Information Commissioner appears to work reasonably well, it requires resources from the Information Commissioner’s Office. Greater clarity on time limits and the publication of compliance statistics will allow the Commissioner to target the worst performing authorities and make the best use of limited resources.

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<sup>237</sup> Qq164–165

<sup>238</sup> Q 163

<sup>239</sup> Third Report from the Justice Committee, Session 2008–09, *The work of the Information Commissioner: appointment of a new Commissioner*, HC 146

<sup>240</sup> Ev 192

<sup>241</sup> Ev w47

111. We recommend the 20 day extension be put into statute. A further extension should only be permitted when a third party external to the organisation responding to the request has to be consulted.

112. We recommend that a time limit for internal reviews should be put into statute. The time limit should be 20 days, as at present under the Code of Practice, with a permitted extension of an additional 20 days for exceptionally complex or voluminous requests.

113. We heard arguments that placing limits on the 20 day extension and making the internal review time statutory might mean that officials working on freedom of information might become more cautious in releasing information or work more slowly. It would be highly regrettable if employees working for public authorities failed to take their duties under the Act sufficiently seriously that they would behave in this way and we expect the leaders of bodies subject to the Act to ensure this does not occur.

114. Resources are always problematic for public bodies, and are particularly so in the current economic climate. We will make recommendations in this report that will bring some measure of relief to organisations. The time frames under the Act are not, however, unreasonable and public authorities have been aware that they must comply with them since the right to access information came into force. Enshrining the time limits in statute merely clarifies the position for both requestors and responders and should make little difference to those bodies operating an efficient freedom of information regime.

### **Information Commissioner's Office appeals**

115. The Information Commissioner's Office previously had a poor record for responding in a timely fashion to appeals. Martin Rosenbaum, of BBC News, told us:

[The Commissioner's] own record in dealing with complaints [...] used to be absolutely terrible; the delays were worse than anything you would experience from a local authority. In one of my cases, the Commissioner was considering the matter for more than four years before I got a decision.<sup>242</sup>

This had, however, "dramatically improved". Mr Rosenbaum said the effect of the improvement was that public authorities could no longer be "dismissive" of any complaint from the Commissioner on the grounds his office had a worse performance than theirs.<sup>243</sup>

116. The Information Commissioner told us that improving response times to complaints had been a recent focus of the Office and agreed that this had a knock-on effect on public bodies.

We have been able to make the system work much better by reorganising our own systems and being much more efficient, and therefore putting a bit of ginger into the system to make sure that public authorities respond in a more timely way.<sup>244</sup>

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<sup>242</sup> Q 163

<sup>243</sup> *Ibid.*

<sup>244</sup> Q 219

The Commissioner told us: “With the case load that we have at the moment [...] we can turn round about 47%—that is the last figure that I saw—of the section 50 business that we get within a month, because it is sometimes simply misconceived or has come to the wrong place; and we can get rid of 75% within three months. We have no cases over a year old, despite the fact that we issued 24% more decision notices this year than last.”<sup>245</sup>

## Destroying records-enforcement of section 77

117. Section 77 makes the destruction or altering of records with intent to prevent disclosure a criminal offence, punishable by a fine of up to £5000. The offence is summary only which means a charge must be laid within six months of the offence being committed.<sup>246</sup> The NHS Business Service Authority told us that “the ICO does not have sufficient powers to enforce public authority compliance with the act” and that powers similar to those under the Data Protection Act would aid this.<sup>247</sup>

118. The Information Commissioner told us that no one had ever been prosecuted under section 77 of the Act.<sup>248</sup> He explained why:

The reason is because you have to get it to prosecution stage within six months. The matter may not get to the Information Commissioner for some time, and it takes time to investigate the circumstances of the case; and you then have to come up with a case that will survive court action. That is the reason. It is not that we have not seen evidence of obstruction or the destruction of material after requests have been made, but we simply cannot get them to court in time.<sup>249</sup>

The Campaign for Freedom of Information agreed: “The delays which often occur in responding to requests and carrying out internal reviews mean that more than 6 months may have passed before the applicant is in a position to complain to the ICO.”<sup>250</sup>

119. The time limits for the offence could be extended in two ways. First, section 77 could be made an ‘either way’ offence, which means the offender is liable in perpetuity. The Information Commissioner supported this approach:

[...] we believe that that would send a very clear signal that obstructing the operation of the Act or simply responding to a freedom of information request by deleting material is a criminal offence and that there is a credible deterrent penalty for dealing with it.<sup>251</sup>

A summary offence is triable only in the Magistrates’ Court which means the maximum sentence that can be imposed is £5000. The Information Commissioner noted that making

<sup>245</sup> Q 219

<sup>246</sup> Section 127(1) of the Magistrates Court Act provides that “a magistrates’ court shall not try an information or hear a complaint unless the information was laid, or the complaint made, within 6 months from the time when the offence was committed, or the matter of complaint arose.”

<sup>247</sup> Ev 105

<sup>248</sup> Q 220

<sup>249</sup> *Ibid.*

<sup>250</sup> Ev 156

<sup>251</sup> Q 220



section 77 an either way offence meant that it could be tried in the Crown Court where an unlimited fine could be imposed:

[...] if you want a fine that will stick—to be dissuasive—you really need to go to the Crown Court. That is why it needs to be triable either way. You get the benefit of the extended time but also the ability to levy a [higher] fine. This is one area where I am not seeking to lock people up; a fine would be appropriate, but the Crown Court could impose an unlimited fine.<sup>252</sup>

120. It was also suggested that section 77 remain a summary offence but the limitation period either be extended or start from the discovery of the offence rather than its commission. The Campaign for Freedom of Information said:

We think it should be possible to prosecute for this offence provided proceedings are brought within 6 months of sufficient evidence of it coming to the prosecutor's knowledge - rather than within 6 months of the offence being committed, provided this is done within 3 years of the offence occurring. The time limit for prosecuting a number of other offences has been extended in this way.<sup>253</sup>

It gave the examples of section 31 of the Animal Welfare Act 2006; section 11A of the Employment Agencies Act 1973 (inserted by paragraph 5 of Schedule 7 of the Employment Relations Act 1999); and section 64A of the Public Health (Control of Disease) Act 1984 (inserted by paragraph 22 of Schedule 11 of the Health and Social Care Act 2008) among others.

**121. The summary only nature of the section 77 offence means that no one has been prosecuted for destroying or altering disclosable data, despite the Information Commissioner's Office seeing evidence that such an offence has occurred. We recommend that section 77 be made an either way offence which will remove the limitation period from charging. We also recommend that, where such a charge is heard in the Crown Court, a higher fine than the current £5000 be available to the court. We believe these amendments to the Act will send a clear message to public bodies and individuals contemplating criminal action.**

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<sup>252</sup> Q 221

<sup>253</sup> Ev 156

## 5 Vexatious requests (section 14) and types of requestors

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122. Two complaints were made about the operation of the Act in relation to requestors. The first was that the test in section 14 which allows a public authority to refuse vexatious or repeated requests for information was too high, and, in addition, did not allow the refusal of frivolous requests. The second was that right to access information under the Act was being ‘abused’ because it was used by journalists, businesses seeking a commercial advantage and individuals seeking purely private advantage. We will consider these complaints in turn.

### Vexatious requests

123. Section 14 allows public authorities to refuse a request where it is “vexatious”. The Information Commissioner’s guidance states that “there is no rigid test or definition” of vexatious, the key question being whether “the request is likely to cause distress, disruption or irritation, without any proper or justified cause.”<sup>254</sup> This is an objective test and does not include a public interest element.<sup>255</sup> The ICO’s guidance notes that the Information Tribunal held that the context of the request may be relevant to whether it is vexatious or not; while the request may be innocuous in itself, previous experience of the requestor may mean that the request constitutes:

[...] a continuation of a pattern of behaviour and part of an ongoing campaign to pressure the council. The request on its own may have been simple, but experience showed it was very likely to lead to further correspondence, requests and complaints. Given the wider context and history, the request was harassing, likely to impose a significant burden, and obsessive.<sup>256</sup>

124. Section 14(2) provides that public authorities may refuse repeated requests for the same information or substantially similar information “unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.”<sup>257</sup>

### Vexatious requests-evidence from our witnesses

125. A number of witnesses from public authorities said that vexatious requests presented a problem for them. The Lancashire Care NHS Trust told us it had had 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 requestors become openly aggressive in their requests and seek to harass individual members of staff.”<sup>258</sup> Kent

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<sup>254</sup> Information Commissioner’s Office, *When can a request be considered vexatious or repeated?* December 2008, p2–3

<sup>255</sup> *Ibid*, p6

<sup>256</sup> *Ibid*. The case was *Betts v Information Commissioner EA/2007/0109* (19 May 2008).

<sup>257</sup> Section 14(2)

<sup>258</sup> Ev w53

County Council had found that “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.”<sup>259</sup> Oxford University said the overall number of FOI requests it received obscured 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 [...]<sup>260</sup>

126. From the evidence submitted to us it appears that universities may have a particular problem with a series of requests designed to disrupt or intimidate researchers. Dr Eastwood, appearing before us on behalf of the Russell Group, told us that a researcher who had published results which queried the findings of a study carried out in the USA was then the target of a series of FOI requests, among other harassment, which led to her declining “to accept membership of a US peer review group that was being set up by the US Government to look at funding for this work” to avoid further harassment.<sup>261</sup>

127. Glenn Preston, of the Ministry of Justice, said that 3% of requests refused under the exemptions in the Act were denied because they were vexatious. He told us:

In some of the evidence that was gathered for us to supplement the memorandum that we submitted there was some indication that people found it quite a hard exemption to apply. That is because, despite the fact that the Act provides for us to be able to do this, it does not define what we mean by “vexatious”. That relies on guidance or decisions that are made by the Commissioner or the tribunal. There has been some quite helpful guidance that has been produced by the Commissioner in particular on this.<sup>262</sup>

Mr Preston suggested clearer guidance may assist those authorities struggling to apply the exemption rather than an amendment to the legislative scheme.<sup>263</sup> Universities UK agreed: “the definition of vexatious is so unclear that [universities] 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 [...]”<sup>264</sup> Dr Eastwood said: “The reports that we receive from universities are that the system of proving that something is a vexatious claim is almost more arduous than responding to it in the first place. There are elements that need modernising and looking at, and clarification is the key.”<sup>265</sup> The Memorandum notes that complying with a vexatious

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<sup>259</sup> Ev 192

<sup>260</sup> Ev w76

<sup>261</sup> Q 133

<sup>262</sup> Q 463

<sup>263</sup> *Ibid.*

<sup>264</sup> Ev 120

<sup>265</sup> Q 131

request can prove cheaper than refusing it under section 14 because the requestor will almost inevitably apply for an internal review.<sup>266</sup>

128. Deputy Information Commissioner, Graham Smith, urged authorities to use the vexatious exemption rather than simply answer a request which falls into that category because it is straightforward and they perceive it as a “quick win [...]”. That will stop them building up a convincing case of vexatious behaviour, which is why I say they do not necessarily help themselves in that respect.”<sup>267</sup>

129. Graham Smith thought it unlikely that a requirement that requestors identify themselves would make much difference to public authorities trying to cope with a person who repeatedly made vexatious requests:

[...] there is not a lot of evidence that vexatious requests are being made by people using pseudonyms or disguising their true identity. If they are, it is often fairly obvious. Public authorities who believe that they are experiencing this sort of behaviour go to some lengths to identify whether there is a pattern of behaviour or whether people are working in concert in a way that they feel is disrupting their business.<sup>268</sup>

Julian Brookes, of NHS South of England said: “we have a number of individuals who are persistent FOI-ers. Quite often they will change their email address. They will change the name of the organisation that they have created to ask their question.”<sup>269</sup>

130. One suggestion made to us was that public authorities should be able to deem the requestor vexatious rather than simply the individual request.<sup>270</sup> Inevitably such an approach runs into the problem highlighted above in our examination of the costs of the freedom of information regime, that there appears to be no straightforward way to ensure requestors use their own identities when making requests. Maurice Frankel explained to us another difficulty with this approach, and the rationale behind making the request not the requestor vexatious in the first place:

[...] you sometimes find that someone goes off on a very time-consuming repeated tangent but then makes an entirely different request, sometimes about something that directly affects them and that has validity. You will then see the Information Commissioner saying about those requests, “I uphold the authority in finding most of them vexatious, but this request is entirely different. The person has a serious purpose, and it is not going to take up a massive amount of time, so you should deal with it.”<sup>271</sup>

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<sup>266</sup> Memo, p25

<sup>267</sup> Q 214

<sup>268</sup> *Ibid.*

<sup>269</sup> Q 294

<sup>270</sup> Ev w233

<sup>271</sup> Q 15

### *Frivolous requests*

131. Witnesses representing public authorities said they had received requests relating to supernatural matters. Leeds City Council said it had received “a number of requests about ghost sightings and paranormal activity in its buildings.”<sup>272</sup> Roger Smethurst, of the Cabinet Office, said the Department had received a question about zombies, which, while it managed to deal with it quickly, still required the official concerned to “make sure that the part of the Cabinet Office that deals with contingencies does not actually have anything.”<sup>273</sup> The Department had also to respond to a request about a number on a piece of paper which the requestor refused to believe was simply part of a stationery order:

This was something that appeared on a number of things he had seen released previously, which is something printed on the bottom of a page. He wanted to know what this meant. Again, it went to internal review because he did not believe us to start with. We had to find some examples of clear ones at the bottom of the stationery cupboard to clear that one up.<sup>274</sup>

132. Alex Skene, of WhatDoTheyKnow, suggested that even questions referring to paranormal matters could have a public interest element by revealing areas of public spending some may consider inappropriate:

[...] there are cases where such requests have exposed public spending. For instance, the MoD spent a lot of time collecting information about UFOs. It could be very hard to draw the line on what is frivolous and what is not. Some local authorities have even paid for exorcisms [...]. You could almost extend it to things like homeopathy, which is believed by many people to work.<sup>275</sup>

133. Maurice Frankel described questions about the paranormal as “idiotic” but agreed with Roger Smethurst that they were generally quick to answer and presented limited problems for public authorities.<sup>276</sup> Glenn Preston, of the Ministry of Justice, said:

[...] it will be interesting for us to know whether the Committee thinks we could do better at defining what is meant by a vexatious request or a frivolous request. That need not necessarily be in legislation; it may well be that the guidance can just be clearer than it is at the moment. That is something on which we would welcome the Committee’s opinion. I do not think we should overstate the problem here. It is pretty minor in the grand scheme of things.<sup>277</sup>

Alexandra Runswick of Unlock Democracy thought that the wording of a new exemption for frivolous requests would be difficult to formulate sufficiently tightly that legitimate requests would not be affected:

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<sup>272</sup> Ev 146

<sup>273</sup> Q 463

<sup>274</sup> *Ibid.*

<sup>275</sup> Qq 16–17

<sup>276</sup> Q 15

<sup>277</sup> Q 463

What may seem frivolous could be part of a genuine research project. For example, the Local Government Association recently published a list of what it considered to be unusual FOI requests, one of which was to Scarborough Borough Council about the number of cheques that it had received and issued. I can see that that could be a difficult question for the authority to answer, but, at the same time when banks are talking about stopping issuing cheques, I can also see that it would be a legitimate question for a variety of campaigning organisations.<sup>278</sup>

134. The Information Commissioner suggested to us that:

I, as Commissioner, am able to turn away business because it is either vexatious or frivolous, but a public authority does not have that power; it is only able to deal with vexatious. I think you could add frivolous. The requester might then appeal to the Commissioner, saying, “But that wasn’t frivolous at all.” Most of the time, they would not do that, because there is a fair amount of frivolity; if you turn it away at the first point, then probably it will go away.<sup>279</sup>

**135. It is apparent from witnesses that frivolous requests are a very small problem, but can be frustrating. There is a case for adding frivolous requests to the existing category of vexatious requests which can be refused, but such requests can usually be dealt with relatively easily, making it hard to justify a change in the law.**

### *Inappropriate requests*

136. The Liverpool Heart and Chest Hospital told us that it frequently received requests for information that were inappropriate for the organisation.

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, gynae 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.<sup>280</sup>

### **The attitude of requestors**

137. The frivolous or “irresponsible”<sup>281</sup> use of the Act may be connected to limited knowledge of the cost of responding to requests. We heard evidence that requestors had little or no knowledge as to the cost of responding to their applications. Maurice Frankel explained to us that, for a request or to understand why an application may be turned down on cost grounds meant that:

[...] the requester has, in a sense, to try to understand how the records are kept and in what form, and how easy it is for the authority to obtain the information they have

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<sup>278</sup> Q 16

<sup>279</sup> Q 213

<sup>280</sup> Ev 134

<sup>281</sup> Ev w47

asked for. It is quite easy to make what you think is a very simple request, but if it involves a lot of people in different offices going through different files, some of which are not indexed, it will mean that you will not get any information at all; but there is no way for you to know that before you make your request.<sup>282</sup>

**138. We believe it would be helpful for public authorities to indicate in a response letter how much responding to the request has cost, in approximate terms. We recommend the Information Commissioner consider the easiest way for authorities to arrive at such a figure. We think this unlikely to deter genuine inquiries but it will at least highlight to irresponsible users of the Act the impact of their actions.**

139. One witness suggested that a well-publicised Code of Practice for requestors, which could be taken into account if the Information Commissioner had to decide if an application was vexatious, could assist in educating users of the Act.<sup>283</sup> Such a Code could also inform requestors how to limit their inquiry to the information desired, meaning the numbers of requests consisting of “19 page questionnaires [usually from students] [...]” from which public authorities have the task of “trying to isolate what they are asking for”<sup>284</sup> would be reduced.

140. Tracey Phillips told us that trying to focus requests which would otherwise breach the fees limit could be difficult. While Lambeth Council:

[...] go back to the requester and ask if they can narrow their request or specify what they are asking for to help us facilitate the search [...]. We [then] get responses from the requester saying, “I have asked for x. Just give me x.” They specifically ask for a dataset or a file on this and we say, “Can you narrow that down to help facilitate our search?” Especially to envisage reading it, they are quite unhelpful.<sup>285</sup>

Reference to an official Code of Practice would assist public authorities in these circumstances.

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<sup>282</sup> Q 8

<sup>283</sup> Ev w47

<sup>284</sup> Q 463

<sup>285</sup> Qq 415–416

## 6 Policy formulation, safe spaces and the chilling effect

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### Introduction

141. Good government requires: Ministers to be provided with full, frank advice from officials about the possible impact of proposed policy, even—or especially—where that advice acknowledges risks; Ministers and officials to be able to discuss and test those proposed policies in a comprehensive and honest way; and the records of those discussions and the decisions which flow from them to be accurate and sufficiently full.

142. Various impediments threaten such good government. For example, leaks of discussions or correspondence between Ministers corrode their confidence that they can have honest disagreements about policy without these appearing in the media, often viewed through the prism of personal clashes between individual Ministers, with consequential political damage. There may be a ‘chilling effect’ if politicians or civil servants attempt to avoid political embarrassment or other adverse consequences of disclosure by seeking to avoid holding formal discussions, based on written advice, with proper records. For these and other reasons, it is generally accepted that a ‘safe space’ is needed within which policy can be formulated and recorded with a degree of confidentiality.

143. For that reason the Act contains safeguards, namely exemptions to the right of access in certain circumstances and the ministerial veto. (Exemptions are also designed for other purposes, but our concern here is with the policy-making process at the highest echelons of central Government.) In this chapter we consider: why a safe space is needed and what impact a chilling effect would have; how the safeguards in the Act operate; what impact the Act has had on the policy making process; and whether the Act needs amending.

144. It must be acknowledged in this context that public authorities do not always welcome the release of information following a freedom of information request. Data may prove to be politically embarrassing and lead to bad publicity for the public body concerned. One of the principal benefits of openness and transparency is that it encourages public authorities to act in manner that would not embarrass them should it enter the public domain. However, inevitably this is not necessarily convenient for the body concerned. The Rt Hon Francis Maude MP acknowledged this when he told us:

One of my constant mantras on transparency is that all Oppositions favour maximum transparency but that Governments tend to favour it for the first 12 months while all they are exposing are their predecessors’ mistakes. It gets more uncomfortable after the first 12 months [...]<sup>286</sup>

Evidence of a ‘chilling effect’ must be carefully interrogated, therefore, as creating new exemptions to compensate for such an impact on public life weakens the right of access to information, and consequently the benefits of transparency.



## The ‘chilling effect’

145. The Constitution Unit—which, as we note below, is sceptical about the existence of a chilling effect—has defined it as “a shift towards keeping things off paper where they cannot be disclosed” and notes that those who fear the effect say it can take three forms: a reduction in the frankness of advice to ministers; weakening of the quality of the official record; and a diminution in the supply of information to government from third parties.<sup>287</sup>

146. The requirement for frank advice to Ministers was highlighted in the debate about disclosure of the NHS risk register (see below), although it applies more widely. The argument is predicated on the incontrovertible assertion that effective decision making requires an acknowledgement of the risks and downsides of any potential policy, as well as its putative benefits; but in the media context where bad news will always crowd out good, risks presented out of context, and without consideration of the steps which might be taken to mitigate them, can appear sufficiently alarming to encourage Government to be overly risk averse. This may lead to the exclusion of policy options. Speaking about risk registers generally, rather than the NHS risk register in particular, Rt Hon Jack Straw MP told us that “it has to be possible for officials to say to Ministers that there are these risks without these going public. Given the assiduity of the British press, if you publish a raw risk register without any more information, you will set all sorts of hares running, but the document was not designed or prepared in that way. You have to say ‘We think that we could be at risk here. We think we could be at risk there. Have you thought about this?’ In my view, that sort of information must be protected.”<sup>288</sup>

147. The dangers of weakening the quality of the official record are obvious. Lord Armstrong of Ilminster, a former Cabinet Secretary, told the House of Lords, in relation to Cabinet minutes, that “Those minutes are not a verbatim record; they are none the less a comprehensive and accurate account of what the Cabinet decides and why. They are a valuable tool of administration. Their value depends upon their comprehensiveness and their accuracy. Their value would be diminished—they could even be misleading—if they had to be edited or bowdlerised to minimise risks of unacceptable disclosure under the Freedom of Information Act”.<sup>289</sup> Not only are the minutes a “valuable tool of administration”, they also serve, on eventual disclosure, as important historical records.

148. The potential risks of a chilling effect—if it is a reality—go beyond a bowdlerising or editing of the records; it is that no record exists, because Ministers may avoid holding formal meetings entirely. As Lord O’Donnell, the recently retired Cabinet Secretary, put it to us: “Tony Blair thought it was a problem. Therefore, how do you avoid this problem arising? You basically find a medium which is not covered by FOI. The cost of mobile phone bills goes up between Ministers. They are going to find ways around it. Things are not going to be written down. That, to me, makes for worse government and it makes it

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<sup>287</sup> Robert Hazell, Ben Worthy and Mark Glover, *The impact of the Freedom of Information Act on Central Government in the UK, Does FOI Work?*, (London 2010), p162

<sup>288</sup> Q 352

<sup>289</sup> HL Deb, 17 January 2012, col 538

impossible for [historians] to try to recreate accurately what has gone on when there are no records.<sup>290</sup>

149. The dangers of formulating policy other than by the recognised one of the collective cabinet process (where policies are agreed in Cabinet, or in cabinet committees, or via formal correspondence between Ministers on such committees, based on policy papers prepared to that end) were highlighted in the ‘Butler Report’. While the Report was looking at specific issues relating to weapons of mass destruction in Iraq, its conclusions might be said to have more general application:

[...] we are concerned that the informality and circumscribed character of the Government’s procedures which we saw in the context of policy-making towards Iraq risks reducing the scope for informed collective political judgement.<sup>291</sup>

150. That Report also commented that, where Cabinet did discuss the relevant issues, it did so on the basis of oral briefings, rather than papers:

Excellent quality papers were written by officials, but these were not discussed in Cabinet or in Cabinet Committee. Without papers circulated in advance, it remains possible but is obviously much more difficult for members of the Cabinet outside the small circle directly involved to bring their political judgement and experience to bear on the major decisions for which the Cabinet as a whole must carry responsibility.<sup>292</sup>

The deficiencies described in the Butler Report had complex causes and cannot be ascribed to the Freedom of Information Act. However, if critics of that Act are correct, the impact of the chilling effect might well be similar to that described by Butler.

151. The Constitution Unit described the third facet of any chilling effect as “a reduction in the willingness of third parties to supply information to Government. This could be pernicious if true, given the extent to which Government must work with stakeholders in an increasingly variegated and fragmented policy process. Although this point of view was not put forward forcefully during the passage of the Act, it has been argued strongly since (see *Department for Business, Enterprise, and Regulatory Reform v Information Commissioner and Friends of the Earth*)”. In the case referred to, the Tribunal found that “Senior officials of both the government departments and lobbyists attending meetings and communicating with each other can have no expectation of privacy” and that “Recorded comments attributed to such officials at meetings should similarly have no expectation of privacy or secrecy”.<sup>293</sup>

152. A related aspect of any chilling effect might be damage to the Government’s relationship with other governments. The Rt Hon Francis Maude MP, the Cabinet Office Minister, told the Committee that “we must also protect communications particularly

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<sup>290</sup> Q 252

<sup>291</sup> Report of a Committee of Privy Counsellors, Session 2003–04, *Review of Intelligence on Weapons of Mass Destruction*, HC 898, para 611.

<sup>292</sup> *Ibid.*

<sup>293</sup> Right to privacy vs the public’s right to know, *Law Society Gazette*, 3 July 2008. EA/2007/0072, case summary.

between different Governments, because those need to be conducted in a way where both sides have absolute confidence that they can be very candid with each other, otherwise the process of fast informal diplomacy becomes much more difficult to conduct.<sup>294</sup> Therefore, for those who fear the impact of a chilling effect caused by the Act, that chill extends not just to Ministers and civil servants, but to the reluctance of British stakeholders and overseas governments to share information which they might not want to see in the public domain.

153. A factor related to the chilling effect, for those concerned about the impact of FOI on good government, is that it could weaken the system of collective Cabinet responsibility, by making publicly available details of disagreements between Ministers when formulating policy. The importance of collective responsibility is set out in the Government's statement of policy of how it will use the Ministerial veto:

The Cabinet is the supreme decision-making body of Government. Cabinet Government is designed to reconcile Ministers' individual interests with their collective responsibilities. The fact that any Minister requires the collective consent of other Ministers to speak on behalf of Government is an essential safeguard of the legitimacy of Government decisions. This constitutional convention serves very strong public interests connected with the effective governance of the country. Our constitutional arrangements help to ensure that the differing views from Ministers—which may arise as a result of departmental priorities, their own personal opinions, or other factors—are reconciled in a coherent set of Government decisions which all Ministers have a duty to support in Parliament and beyond. Cabinet Committee business, sub-Committee business, and Ministerial correspondence are all subject to the same principles of collective responsibility.

The risk from premature disclosure of this type of information is that it could ultimately destroy the principle and practice whereby Ministers are free to dissent, put their competing views, and reach a collective decision. It is therefore a risk to effective Government and good decision-making regardless of the political colour of an administration.<sup>295</sup>

Such a 'risk of premature disclosure' arises, for some, from the application of the FOI Act.

**154. Freedom of Information brings many benefits, but it also entails risks. The ability for officials to provide frank advice to Ministers, the opportunity for Ministers and officials to discuss policy honestly and comprehensively, the requirement for full and accurate records to be kept and the convention of collective Cabinet responsibility, at the heart of our system of Government, might all be threatened if an FOI regime allowed premature or inappropriate disclosure of information. One of the difficulties we have faced in this inquiry is assessing how real those threats are given the safeguards provided under the current FOI legislation and what, if any, amendments are required to ensure the existence of a 'safe space' for policy making.**

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<sup>294</sup> Q 525

<sup>295</sup> Statement of HMG Policy: Use of the Executive Override under the Freedom of Information Act 2000 as it relates to information falling within the scope of section 35 (1), annexed to Ministerial veto on disclosure of the Department of Health's Transition Risk Register: Information Commissioner's Report to Parliament, HC 77, May 2012

## The safe space, exemptions and the ministerial veto

155. Fear of the chilling effect has led to calls for a ‘safe space’ to be delineated in which policy can be formulated without fear that the discussions, papers or minutes involved will be made public in the short to medium term. The Act already describes a safe space, through its provisions for exemptions and the ministerial veto. The question is whether that safe space is adequate.

### *Exemptions*

156. Section 1(1) of the Act states that any person making a request for information to a public authority is entitled to be informed whether the authority holds that information; and, if so, to have that information communicated to him. However, the Act contains a range of exemptions, which set out the circumstances in which authorities do not have a duty to confirm or deny that they hold the information sought, or to supply that information. Some of those exemptions, in whole or in part, are absolute—i.e., they can be invoked without the public authority having to consider arguments about the public interest—namely:

- Section 21 (information accessible by other means);
- Section 23 (information provided by or related to specified public bodies);
- Section 32 (information held as part of a court record);
- Section 34 (information exempt due to parliamentary privilege);
- Section 36 (information prejudicial to the effective conduct of public affairs – but only so far as relating to information held by the House of Commons or the House of Lords);
- Section 37 (1)(a)–(ab) (information relating to communications with certain members of the Royal Family);
- Section 41 (where disclosure would involve an actionable breach of confidence);
- Section 44 (disclosure prohibited by other enactments, EU obligations or rules on contempt of court).

Section 40 (personal data) serves as an absolute exemption where someone asks for their own personal data or where disclosure to a third party would breach the data protection principles enunciated in the Data Protection Act.

157. The other exemptions in the Act are qualified; i.e., they may only be used where the public authority has conducted a public interest test and has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosure. The MoJ’s memorandum explains that “qualified exemptions fall into two categories: those which are class based, and those which are subject to a prejudice test. Class based exemptions exempt from disclosure, subject to the application of the public interest test, information falling within particular categories, without any need to show that disclosure would cause any particular type of harm.” The class based exemptions are:

- Section 22 (information intended for future publication);
- Section 24 (national security);
- Section 30 (investigations and proceedings);
- Section 35 (formulation and development of government policy);
- Section 37 (communications with the Royal Family and Household, and honours);
- Section 39 (environmental information);
- Section 42 (legal professional privilege); and
- Section 43(1) (trade secrets).<sup>296</sup>

158. Prejudice based exemptions, the MoJ's memorandum states, "can only apply, subject to the public interest test, where it is first demonstrated that disclosure of information would be likely to be, or would be, prejudicial to the purposes which the exemption is designed to protect." The prejudice based exemptions are:

- Section 26 (defence);
- Section 27 (international relations);
- Section 28 (relations within the UK);
- Section 29 (the economy);
- Section 31 (law enforcement);
- Section 33 (audit functions);
- Section 36 (prejudice to the effective conduct of public affairs);
- Section 38 (health and safety); and
- Section 43(2) (commercial interests).<sup>297</sup>

159. The exemptions designed to protect the safe space of policy formulation—sections 35 and 36—are therefore qualified, meaning that a judgment has to be made as to whether it is in the public interest for the information requested to be released. Jack Straw, one of the architects of the Act, told us that "the way that sections 35 and 36 have been interpreted [is] not what was intended. It is unsatisfactory and produces consequences that tend towards less openness rather than more", and that "some people in other Government Departments went in for unminuted meetings because they were anxious that there should not be a trail of accountability",<sup>298</sup> presumably because of fears that if the information was requested, the Information Commissioner or the Tribunal might consider the public interest to be on the side of disclosure. Mr Straw also said that he and Ministers "sort of believed that in section

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<sup>296</sup> Memo, p29

<sup>297</sup> *Ibid.*

<sup>298</sup> Q 329

35 we were establishing a class exemption, but that has not turned out to be the case because of the way it has been interpreted by the courts. It has also led to, frankly, some rather extraordinary decisions by the Freedom of Information Tribunal, in which they suggested that it can apply only while policy was in the process of development but not at any time thereafter. That is crazy and it is not remotely what was intended.<sup>299</sup>

160. The Campaign for Freedom of Information queried Mr Straw's recollection of events. It told us that the Government was responsible for the shape of section 35 and it had not been altered by the Tribunal or the Information Commissioner:

When the FOI Bill was introduced into Parliament, the public interest test was purely voluntary: the Information Commissioner would have been able to recommend but not order disclosure on public interest grounds. This attracted particular criticism. It meant that an authority which had made serious errors would be the final judge as to whether it was in the public interest to reveal those errors. As a result of this criticism the government amended the bill to make the public interest test binding – but subject to a ministerial veto. Mr Straw himself set out the rationale for this change during the bill's Commons report stage:

Originally under [clause 2] we proposed that the commissioner would have a power to make a recommendation for disclosure, but not an ability to order it [...]. As a result of many representations...I recognised the concern in the House about the fact that in the scheme of a statutory right to know it looked slightly odd that there should be provision only for the commissioner to make a recommendation. It was up to the public authority whether to accept it [...]

As a result of the representations, we have in many ways fundamentally changed the structure of [clause 2], except in one respect. We have strengthened the tests—that is a matter for another debate in respect of factual information—but we have made it a duty, not a discretion, on the public authority to consider whether the public interest in disclosure outweighs the public interest in the matter not being disclosed. Where the public authority decides that the balance of public interest is in favour of disclosure, it is under a duty to disclose. If it comes to a contrary view, the matter can go to the commissioner and he can order disclosure. That is the scheme of the Bill. (emphasis added)

At Lords report stage the public interest test itself was amended so that instead of applying where the public interest in disclosure outweighed the public interest in maintaining the exemption, the onus was reversed. Information must be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure. Lord Falconer explained that these amendments:

[...] will put beyond doubt the Government's resolve that information must be disclosed except where there is an overriding public interest in keeping specific information confidential. Perhaps I may repeat that: information

must be disclosed except where there is an overriding public interest in keeping specific information confidential.

It is clear that the government intended, as a result of its own amendments, that information about the formulation of policy should be disclosed unless there was an overriding public interest in withholding it.<sup>300</sup>

161. However, in his account of the campaign to introduce the Act, Des Wilson quotes from a campaign document of 1983 which stated: “The Campaign accepts that an element of confidentiality remains necessary, and that in particular this campaign will not seek the disclosure of information that would [...] (g) breach the confidentiality of advice, opinion or recommendations tendered for the purpose of policy-making (this does not include expert scientific or technical advice or background factual information.)”<sup>301</sup>

162. The Commissioner was at pains to tell us, however, that he was alert to the need for policy makers to have a safe space:

[...] the evidence shows time and time again that the Information Commissioner and the Information Tribunal have supported the principle that there should be a safe space for the development of policy. Cabinet minutes are not routinely outed. The only ones you get to hear about are the ones where the Information Commissioner or the Information Tribunal have ruled in favour of publication. Nobody is interested in the vast majority of cases, when we look at the balance of interests and say, “No; we think that the principle of collective Cabinet responsibility trumps any other argument.”<sup>302</sup>

163. As the case law relating to FOI has developed, it is possible to identify a number of decisions by the Commissioner which have protected Cabinet papers – advice to ministers, or the record of discussions – from disclosure. For example, the Commissioner decided that: minutes of a Cabinet Committee on data sharing within the public sector should be withheld, as the policy was still live and the public interest in maintaining collective responsibility outweighed the benefits of disclosure;<sup>303</sup> and minutes of Cabinet meetings since 1997 on reform of mental health legislation should be withheld, because it was necessary to protect the ability of ministers to have frank discussions.<sup>304</sup> The Constitution Unit has given further examples relating to minutes of meeting which were not Cabinet meetings, but which involved policy formulation and where the Commissioner upheld decisions which protected the safe space, namely:

The Cabinet Office’s decision not to release minutes of meetings between the Prime Minister and Lord Birt because the greater public interest lay in the PM being able to receive advice and exercise judgement freely (FS50088745, 29 June 2008);

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<sup>300</sup> Ev 156

<sup>301</sup> Des Wilson, *Memoirs of a Minor Public Figure*, (London 2011), pp165–6

<sup>302</sup> Q 210

<sup>303</sup> ICO: F550177136, 14 October 2008

<sup>304</sup> ICO: F550152189, 15 December 2008

The MOJ's decision not to release minutes of the Cross-party Group on House of Lords reform because of the nature of the group and the unresolved state of the policy (FS50196977, 30 September 2008)<sup>305</sup>

164. However, decisions are taken on a case by case basis and there are numerous instances where the Commissioner and the Tribunal have ordered the disclosure of certain documents which are related to policy formulation, once the policy in question is no longer under "formulation and development". For example, the Constitution Unit lists some examples of policy submissions to Ministers where disclosure has been ordered:

DFES policy (but not legal) advice dating from the 1980s on corporal punishment in schools and the Society of Teachers Opposed to Physical Punishment (FS50085945, 22 May 2007);

Scotland Office submissions relating to the 1999 Scottish Adjacent Water Boundaries Order, a decision which was overturned by the Tribunal (FS50091442, 28 June 2007; EA/2007/0070);

MoD advice from 2004 on powers to stop up and create replacement rights of way (FS50107135, 25 February 2008);

DCMS submissions to ministers on their role in commercial transactions in the sports sector, in the context of the acquisition of Manchester United Football club (FS50121684, 3 December 2007).<sup>306</sup>

Examples are also given of orders to disclose minutes of meetings between officials, or with outside bodies:

Minutes of DFES senior management board meetings from 2002–05, ordered to be disclosed by the ICO and IT (FS50074589, 4 January 2006; EA/2006/0006, 19 February 2007);

Minutes of 2004–2005 meetings between DEFRA, Tesco and Asda, ordered to be partially disclosed by the ICO, mainly under the EIRs (FER0098306/7, 24 August 2006);

165. The Government itself acknowledges that there are circumstances in which the public interest in disclosing information about policy formulation outweighs the public interest in withholding it, pointing out that "Cabinet committee correspondence from the mid-1980s was released in 2006 when the Department for Children, Schools and Families withdrew an appeal to the Tribunal in relation to information relating to corporal punishment. The Cabinet Office also released Cabinet minutes from 1986 relating to the Westland Affair following a decision by the Information Tribunal in 2010."<sup>307</sup>

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<sup>305</sup> Robert Hazell, Ben Worthy and Mark Glover, *The impact of the Freedom of Information Act on Central Government in the UK, Does FOI Work?*, (London 2010), p167.

<sup>306</sup> *Ibid*, p165.

<sup>307</sup> Statement of HMG Policy: Use of the Executive Override under the Freedom of Information Act 2000 as it relates to information falling within the scope of section 35 (1), annexed to Ministerial veto on disclosure of the Department of Health's Transition Risk Register: Information Commissioner's Report to Parliament, HC 77, May 2012



166. It is evident that numerous decisions of the Commissioner and the Tribunal have recognised the need for a ‘safe space’. However, equally evident is the fact that in some cases their decision that information should be disclosed has challenged the extent of that safe space. We accept that for the ‘chilling effect’ of FOI to be a reality, the mere risk that information might be disclosed could be enough to create unwelcome behavioural change by policy makers. We accept that case law is not sufficiently developed for policy makers to be sure of what space is safe and what is not.

167. More controversial than these decisions however, have been the decisions of the Commissioner and Tribunal that certain Cabinet minutes and the NHS Transition Risk Register should be disclosed. Those decisions led to the use of the ministerial veto which we will now consider.

### *The ministerial veto*

168. Section 53 of the Act provides for a ministerial veto, whereby a decision notice by the ICO or a court requiring the release of information can cease to be effective following the presentation of a certificate to the Information Commissioner to that effect by a Minister attending Cabinet, the First Minister and Deputy First Minister of Northern Ireland acting jointly, the Welsh Assembly First Minister or the Attorney General, Advocate General for Scotland or the Attorney General for Northern Ireland.

169. Jack Straw, who as Home Secretary was responsible for the Freedom of Information Bill during its passage through the House, told us about the then Government’s intentions about the use of the veto:

The inclusion of the veto was something that I pursued vigorously, with the full support of Mr Blair. Without the veto, we would have dropped the Bill. We had to have some backstop to protect Government.

During the course of the Bill, when we got round to redrafting it to meet the concerns of all sides and secure some sort of majority for it, a deal was struck: basically, it was going to be a strong Act, but you had to have the veto. However, while it was going through Parliament, undertakings were given in the Commons, and also by Lord Falconer in the Lords, about the way in which the veto would be used. It was to be used sparingly and it would not be done simply on the fiat of an individual Minister; instead, these decisions would be subject to proper discussion in Cabinet. There was a political reluctance to use it.<sup>308</sup>

170. To date, the veto has been used four times: in February 2009, when Jack Straw, as Lord Chancellor, vetoed the disclosure of Cabinet minutes and records relating to meetings held in March 2003, concerning the Attorney-General’s legal advice about military action against Iraq; in December 2009, when Jack Straw vetoed disclosure of minutes of the Cabinet Sub-Committee on Devolution, Scotland, Wales and the Regions; in February 2012, when the Attorney General, Dominic Grieve, vetoed the disclosure of minutes of the same Sub-Committee; and in May 2012, when the Health Secretary, Andrew Lansley, vetoed disclosure of the NHS transitional risk register.

171. The Government's statement of policy on the use of the veto as it relates to information falling within the scope of section 35 (1) (formulation and development of Government policy) says that:

- The 'accountable person' exercising the veto will, where possible, be the Cabinet Minister with responsibility for the policy area in question or, in cases involving papers of a previous administration, the Attorney General;
- The veto should only be used in exceptional circumstances and only following a collective decision of the Cabinet;
- In cases involving a previous administration only the Attorney General will have access to the information being considered and he will consult former ministers and the opposition;
- Each section 35 case must be considered on its individual merits;
- The Government will not routinely use the power under section 53 simply because it considers the public interest in withholding the information outweighs that in disclosure;
- The Government is minded to consider the use of the veto if: release of the information would damage Cabinet Government and/or the constitutional doctrine of collective responsibility; and the public interest in release is outweighed by the public interest in good Cabinet Government and/or the maintenance of collective responsibility;
- The relevant matters to be considered include: whether the information reveals the substance of policy discussion or merely the process for such discussion; whether the issue was at the time a significant matter and whether it remains significant; the extent to which views of different ministers are identifiable; whether the ministers concerned are still active in public life; the views of ministers and former ministers (or the Opposition) engaged at the time; and whether any other exemptions apply.<sup>309</sup>

172. On each occasion when the veto has been used, the Information Commissioner has exercised his right to report to Parliament, reacting to the use of the section 53 provisions. One of the main themes which emerges from the first three cases, relating to minutes, is the tension between the benefits of openness in disclosing the minutes, and the damage which might be caused to the principle of collective Cabinet responsibility which might be caused as a result of disclosure. In his reports to Parliament the Commissioner re-iterates his approach to this issue when making his decision about disclosure:

- In his first such report, relating to the decision to use the veto with respect to the request for information about the Cabinet discussion about the Attorney-General's

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<sup>309</sup> Statement of HMG Policy: Use of the Executive Override under the Freedom of Information Act 2000 as it relates to information falling within the scope of section 35 (1), annexed to Ministerial veto on disclosure of the Department of Health's Transition Risk Register: Information Commissioner's Report to Parliament, (HC 77), May 2012

advice with regard to Iraq, the Commissioner says that “whilst the Commissioner accepted that the protection of the convention of collective Cabinet responsibility was in general terms a strong factor favouring the withholding of Cabinet minutes, he did not consider the disclosure of these particular Minutes would in itself be likely to significantly undermine that convention”;<sup>310</sup>

- The Commissioner used identical wording in his second such report, relating to Cabinet consideration of devolution issues;<sup>311</sup>
- In the third such report, also relating to minutes about devolution, the Commissioner “recognised the validity and weight of the argument against disclosure on the grounds of preserving the convention of collective Cabinet responsibility” and concluded that “this factor tipped the balance of the public interest in favour of maintaining the exemptions in relation to the specific content which either identified individual Ministers or which could be fairly characterised as dealing with the more sensitive areas of policy” discussed in the minutes. The Commissioner specified in a confidential annex to the Cabinet Office the material he considered to come into these two categories, where he considered it was proper to withhold the information. With regard to the remainder of the minutes, the Commissioner “considered that its disclosure would not be likely to result in harm to the convention of collective Cabinet responsibility, particularly given the passage of time. The Commissioner further considered that there was a specific public interest in disclosure in order to inform current and future debate about devolution, together with the public interest in transparency and openness in decision-making”.<sup>312</sup>

173. The main issue at stake in the case which led to the fourth and most recent use of the veto was not primarily the maintenance of collective Cabinet responsibility, but the protection of a safe space for decision-making, within which officials can proffer frank advice, the public disclosure of which might, arguably, inhibit Government’s ability to pursue its policies and, in the longer term, result in a move away from putting such advice on paper (one aspect of the “chilling effect”). In his Statement of Reasons for using the veto, the Health Secretary noted that:

- Risk registers are designed to identify all the main risks, however serious and however unlikely, and should be expressed in clear, and if necessary trenchant, language;
- They are developing documents and, particularly at an early stage, might not have had mitigating steps developed alongside serious risks;

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<sup>310</sup> *Freedom of Information Act 2000: ministerial veto on disclosure of Cabinet minutes concerning military action against Iraq*, Information Commissioner’s Report to Parliament, HC 622, Session 2008–09, para 4.4

<sup>311</sup> *Freedom of Information Act 2000: ministerial veto on disclosure of the minutes of the Cabinet Sub-Committee on Devolution for Scotland, Wales and the Regions*, Information Commissioner’s report to Parliament, HC 218, Session 2009–10, para 4.7

<sup>312</sup> *Freedom of Information Act 2000: the Attorney General’s veto on disclosure of the minutes of the Cabinet Sub-Committee on Devolution for Scotland, Wales and the Regions*, Information Commissioner’s report to Parliament, HC 1860, Session 2010–12, paras 4.10–4.12

- A safe space is needed so officials can prepare frank risk registers. If registers are regularly disclosed, it is likely that the form and content will change, to make them more anodyne and strip out or downplay controversial issues and “they would be drafted as public facing documents designed to manage the public perception of risk; not as frank internal working tools”. This would be to the detriment of good government;
- These general arguments are supplemented by specific arguments about the transition risk register (TRR): the timing was acutely sensitive; the TRR was frank and not designed for publication; its publication would have resulted in sensationalised reporting and debate; the need to respond to and deal with the reaction to disclosure of the TRR could have distracted from progressing the proposals; disclosure of the TRR carried the risk of increasing the likelihood of some of the risks identified being realised.<sup>313</sup>

174. In his response to the Secretary of State’s Statement of Reasons, the Information Commissioner said that, in reaching their decisions that the TRR should be disclosed, both he and the Tribunal had recognised and considered the importance of a safe space for policy formulation. He also did not accept that disclosure of the TRR would affect the “frankness and candour” of future risk registers and, while noting Lord O’Donnell’s views about a likely chilling effect, found that there was no actual evidence of such an effect. Further, the Commissioner did not accept his decisions and those of the Tribunal set a precedent for the general disclosure of future risk registers, noted that there would be circumstances in which it would be proper to withhold risk registers, and said that the disclosure of earlier risk registers, such as that relating to the proposed expansion of Heathrow Airport, had not caused the damage identified by the Secretary of State. The Commissioner also stated that the Tribunal found the Secretary of State’s reason that disclosure would increase the likelihood of the risks identified in the register materialising and that policy makers would be distracted from their task as a result of the debate to be merely “conjecture”; and that it did not accept his arguments that disclosure would lead to sensationalised reporting and debate.<sup>314</sup>

175. A more general concern expressed by the Information Commissioner about the TRR veto, as well as the earlier use of the veto regarding minutes, was that the cases in question were not genuinely exceptional, as the Government’s own policy statement requires. He argued, in the case of the TRR veto, that “none of the criteria for ‘exceptional cases’ in the Statement of Policy are met in the present case. Furthermore, the Commissioner does not consider that sufficient reasons have been given as to why this case is considered to be exceptional, particularly in light of the Tribunal’s decisions dismissing the Department’s appeal”.<sup>315</sup> Indeed, rather than being exceptional, the Commissioner’s contention is that the Secretary of State’s “arguments are deployed in support of what is in fact the direct

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<sup>313</sup> Statement of HMG Policy: Use of the Executive Override under the Freedom of Information Act 2000 as it relates to information falling within the scope of section 35 (1), annexed to Ministerial veto on disclosure of the Department of Health’s Transition Risk Register: Information Commissioner’s Report to Parliament, HC 77, May 2012

<sup>314</sup> *Freedom of Information Act 2000: Ministerial veto on disclosure of the Department of Health’s Transition Risk Register*, Information Commissioner’s Report to Parliament, HC 77, Session 2012–13, paras 7.5–7.9

<sup>315</sup> *Freedom of Information Act 2000: Ministerial veto on disclosure of the Department of Health’s Transition Risk Register*, Information Commissioner’s Report to Parliament HC 77, Session 2012–13, paras 7.15–7.16

opposite of the exceptional – a generally less qualified, and therefore more predictable, ‘safe space’. As such, the Government’s approach in this matter appears to have most to do with how the law might be changed to apply differently in future” and he observes that such a policy change falls to us to consider as part of this exercise in post-legislative scrutiny.<sup>316</sup>

176. The Commissioner has made a similar point about the use of the veto in the case of Cabinet minutes. He told us in evidence that 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 [...].

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.<sup>317</sup>

While he says that a decision to apply an absolute exemption to Cabinet minutes is a matter for Government and Parliament, the Commissioner does argue that “in all other respects [...] 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”.<sup>318</sup>

177. Professor Robert Hazell, of the UCL Constitution Unit, agreed with the Commissioner that the appropriate course of action, if the Government was minded to use the ministerial veto whenever an application was made for Cabinet minutes, was to create a new exemption. Otherwise such a regular deployment of the veto, which the Government is committed to using only in “exceptional circumstances”<sup>319</sup> would be in effect an “abuse”, leading to the executive “playing cat and mouse with requestors [...] and the Information Commissioner.”<sup>320</sup> It should also be noted that such an approach would not have been scrutinised by Parliament. Professor Hazell submitted that the approach in Australia, where ‘Cabinet documents’ are subject to an absolute exemption, was one model which could be followed. It is noteworthy that guidance on the use of the Australian exemption

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<sup>316</sup> *Ibid*, para 8.4

<sup>317</sup> Ev 137

<sup>318</sup> *Ibid*.

<sup>319</sup> Statement of HMG Policy: Use of the Executive Override under the Freedom of Information Act 2000 as it relates to information falling within the scope of section 35 (1), annexed to Ministerial veto on disclosure of the Department of Health’s Transition Risk Register: Information Commissioner’s Report to Parliament, HC 77, May 2012

<sup>320</sup> Ev 194

has been the subject of a number of legal challenges on what is included within the term ‘Cabinet documents.’<sup>321</sup>

178. It should be noted in the context of discussion about the ministerial veto that the legislative framework requires that the veto may be used where the “accountable person” “has on reasonable grounds formed the opinion that, in respect of the request or requests concerned” the public authority has not failed to comply with its duty to disclose, in other words, the public interest in publication is outweighed by other factors.<sup>322</sup> The confining of the use of the veto to “exceptional circumstances” arises from the Statement of Policy and is not contained in the Act, which only requires that the accountable person identifies “reasonable grounds” and gives reasons for the decision to exercise the veto.<sup>323</sup>

**179. While we believe the power to exercise the ministerial veto is a necessary backstop to protect highly sensitive material, the use of the word exceptional when applying section 53 is confusing in this context. If the veto is to be used to maintain protection for cabinet discussions or other high-level policy discussions rather than to deal with genuinely exceptional circumstances then it would be better for the Statement of Policy on the use of the ministerial veto to be revised to provide clarity for all concerned. We have considered other solutions to this problem but, given that the Act has provided one of the most open regimes in the world for access to information at the top of Government, we believe that the veto is an appropriate mechanism, where necessary, to protect policy development at the highest levels.**

### ***How chilling is the chilling effect? Does the safe space need to be safer?***

180. In considering whether the law should be amended so as to introduce a class exemption for certain documents relating to policy formulation, or otherwise raise the bar for disclosure, we need first to assess whether the chilling effect is in reality a problem and whether the current safe space, as delineated by the exemptions in the Act and the section 53 veto, is adequate.

181. One of the difficulties we have encountered during this inquiry has been amassing evidence about the chilling effect. If the chilling effect is a real phenomenon, current policy-makers—politicians and officials—are unlikely to want to say in evidence that they commission and produce anodyne policy submissions, avoid frank discussions in formal meetings and fudge records. Those would be career-limiting admissions. As the Information Commissioner put it to us, “it is in the nature of a chilling effect that we would not get to know about it; we only get to see what is in the evidence trail”.<sup>324</sup> As we shall see, there is to some degree a tension between the research-based evidence, and the practical experience and fears of those who have recently served in the highest echelons of Government, whether as Ministers or officials.

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<sup>321</sup> Ev 194, Annex A

<sup>322</sup> Section 53(2)

<sup>323</sup> Statement of HMG Policy: Use of the Executive Override under the Freedom of Information Act 2000 as it relates to information falling within the scope of section 35 (1), annexed to Ministerial veto on disclosure of the Department of Health’s Transition Risk Register: Information Commissioner’s Report to Parliament, HC 77, May 2012

<sup>324</sup> Q 198

182. The largest body of research on the impact of FOI is the work carried out by the Constitution Unit between 2007 and 2009, looking at its effect on central Government, local government and Parliament. As the most important research-based source of evidence on FOI, it is worth considering in some detail. The Unit's research methods included: interviews with 56 officials in eight 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; an online survey of FOI requesters; analysis of press articles using FOI; analysis of FOI case law; and analysis of disclosure logs. The Unit's written evidence to us notes that "finding hard evidence for such an effect [the chilling effect] is very difficult as it requires proving a negative and asking interviewees to admit unprofessional conduct".<sup>325</sup> The Unit's work looks at the potential for the chilling effect to be felt in three ways: in the quality of advice to Ministers; in the quality of the record; and in the provision of information by third parties.

183. In terms of the quality of advice, the Unit's overall conclusion was that FOI had not affected submissions and advice to Ministers. Officials interviewed by the Unit were quoted as saying, for example, "the principles of good submissions are the same [...] you still have to use all the information necessary to make your case".<sup>326</sup> However, some of the interviewees quoted by the Unit do suggest that there has been a move away from putting some advice on paper. The Unit noted that "those few officials who admitted 'hand on heart' to not being as frank in submissions since FOI did not think that the transmission of information was hampered, despite finite ministerial time, because ministers could be briefed orally, or their private office could be telephoned: 'the same factors end up getting taken into account, it's just they're not on the paper'".<sup>327</sup> The Unit also notes that care about the information put into submissions was "linked as much to leaking as FOI", quoting one official as saying, "I consciously think 'do I really want to write to the Minister saying that' because either it's going to be leaked, which we're bad at in this department, or it's open to freedom of information".<sup>328</sup>

184. Overall, on the quality of advice, the Unit's conclusion was "that there has been no negative impact of FOI on the quality of advice. No official told us that the advice for the minister to base his or her decision on had been reduced. Even those who confessed to changing their own submissions emphasised that the relevant information was still getting through. However, as so few officials did admit to this change in their behaviour, the overwhelming impression is of submissions continuing more or less as before, with changes at the margins due both to FOI and other factors, notably leaks." The one caveat to this conclusion related to the comment of one civil servant that, "as long as you have advice to ministers 100 per cent protected, nothing is going to have changed."<sup>329</sup> As such advice is not 100 per cent protected, this leaves open the possibility (although the Constitution Unit evidently does not believe this to be the case) that things have changed. Another point to make about the Unit's conclusion is that while an individual minister might still receive

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<sup>325</sup> Ev 126

<sup>326</sup> Robert Hazell, Ben Worthy and Mark Glover, *The impact of the Freedom of Information Act on Central Government in the UK, Does FOI Work?*, (London 2010), p165

<sup>327</sup> *Ibid*, p165

<sup>328</sup> *Ibid*.

<sup>329</sup> *Ibid*, p166

sensitive briefing orally, in the absence of it being put on paper, if groups of ministers are taking decisions without the arguments fully set out in writing, the type of deleterious effects noted by the Butler Report can materialise.

185. In assessing the effect of FOI on the quality of the record, the Unit considered: meetings and their minutes, emails and “a more catch-all category of the ‘audit trail’.”<sup>330</sup> Here they found that minutes had become shorter (although that was not necessarily a bad thing and was not, in any event, evidently because of FOI). They found also that while there was an awareness of FOI at meetings, with civil servants admitting to hearing comments like “we’ll have to be careful what we write”, such references were often taken to be tongue-in-cheek. The Unit did speak to interviewees, however, who “could point to specific attenuation of minutes as a result of FOI. This was in areas where fingers had been burnt, such as high-profile Information Commissioner or Tribunal cases”, with one interviewee saying:

In that instance it is FOI. I spoke to a private secretary who said they had a discursive note, then a senior private secretary said shorten it. Absolute reaction to FOI.<sup>331</sup>

186. The Unit also found some evidence that meetings were taking place in informal settings, and this was thought “inevitable” as a result of FOI by one civil servant. Another civil servant also referred to face-to-face conversations, rather than committing material to paper, but the Unit said that this concern was rarely raised and where it was there was no consensus it was caused by FOI. The Unit concluded that “although the jokes about FOI indicate nervousness, and there are isolated cases of changes in notes of meetings due to burnt fingers, the interview evidence suggests that notes of meeting and their formality or otherwise have been subject to changes which predate FOI, and which, in the case of the style of minutes in particular, is perceived overall as positive.”<sup>332</sup> In relation to email use, the Unit found that “there is a roughly even divide between those who see no change in the use of email, and those who see a definite change due to the fear of disclosure. But of those who do see a definite change, very few see it as due to FOI.”<sup>333</sup> In terms of the audit trail more generally, the Unit concluded that “the impact of FOI on the audit trail seem slight [...]. A very small number of officials could trace a direct and negative change back to FOI. Others dismissed the argument or the extent of change, and a small number thought any change that had come about was mainly positive”.<sup>334</sup>

187. In considering the impact of FOI on the provision of information by third parties, the Constitution Unit looked at: relationships between departments; intergovernmental and international relations; and the input of interest groups, trade bodies, and suppliers. Some of its key findings were that:

- FOI has had no impact on the way Government departments work together;

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<sup>330</sup> Robert Hazell, Ben Worthy and Mark Glover, *The impact of the Freedom of Information Act on Central Government in the UK, Does FOI Work?*, (London 2010), p168

<sup>331</sup> *Ibid*, p168

<sup>332</sup> *Ibid*.

<sup>333</sup> *Ibid*, p170

<sup>334</sup> *Ibid*, p172



- Some officials sensed ‘nervousness’ on the part of overseas allies or a marginal tendency to telephone rather than email, but this was the exception rather than the rule;
- Suppliers had been nervous at the onset of FOI, and officials felt that stakeholders were now less willing to give out information because guarantees about non-disclosure could no longer be given; however, interviews with a small number of stakeholders and suppliers did not turn up evidence of significant levels of concern and provision of information was thought to continue as before;
- Overall, interviewees seemed unperturbed by the advent of FOI.<sup>335</sup>

188. The Constitution Unit did find that there had been a degree of altered behaviour as a result of FOI and that this was particularly discernible in “areas where officials had had their fingers burnt as a result of a particularly high-profile case”.<sup>336</sup> However, they cautioned against overstating this and pointed out that a larger number of officials either noted no substantive change, or no overwhelming influence of FOI. They also pointed out that some of the change ascribed to FOI is actually influenced by a range of other drivers, including: time and resource pressure; technology, news media and electronic communication; increasing numbers of civil servants from private sector backgrounds; leaks; the longstanding front-page test [caution about expressing something on paper which would be embarrassing to read in a newspaper, which pre-dated FOI]; more informal workspace; and other accountability and access mechanisms, such as select committee inquiries or judge-led inquiries.<sup>337</sup>

189. In terms of the chilling effect overall, the Unit concluded that “government decision making and effectiveness has not been significantly affected either positively or negatively. The adverse impact of FOI seems negligible to marginal. The dominant view was that nothing has changed, with a minority describing a slight positive alteration.” The Unit contrasts this conclusion with the “received wisdom about FOI” and “anecdotal evidence”, also noting that there is “significant anti-FOI feeling in the upper reaches of Whitehall”.<sup>338</sup>

**190. The Constitution Unit’s research on FOI is the first major piece of research of its kind and is a valuable contribution to the debate around FOI. In its consideration of the chilling effect, the Unit broadly concluded that the effect of FOI appeared negligible to marginal. We note this finding and have taken it into account in our deliberations. However, we have also been cognisant of two related points: while respecting the overall conclusions, we note that the research did feature a number of interviews with participants which suggested behaviour had changed, at least in part because of FOI; secondly, as the Unit itself notes, if the chilling effect does exist it would, by its nature, be very difficult to find hard, objective evidence of it. That is why, on this subject, it is necessary at least to consider anecdotes and impressions, albeit they might lack the academic rigour on which we would ideally like to base conclusions.**

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<sup>335</sup> Robert Hazell, Ben Worthy and Mark Glover, *The impact of the Freedom of Information Act on Central Government in the UK, Does FOI Work?*, (London 2010), p176

<sup>336</sup> *Ibid.*

<sup>337</sup> *Ibid.*, p177

<sup>338</sup> *Ibid.*, p180

191. The Constitution Unit's conclusions are certainly not shared by some of those who have been at the heart of policy formulation as ministers or officials. Lord O'Donnell, Cabinet Secretary between 2005 and 2011, said that the problem with FOI was the uncertainty caused by qualified exemptions. He told us that:

The problem about these things is that we need some principles. At the moment the great cost from FOI is uncertainty. Nobody knows whether a piece of paper—something that is going to be written down—is going to be public or not. There will be a panel of people who may never have worked closely with Ministers or in central Government who make this decision. That is what worries me. It is the uncertainty element. We need to have clarity. Get rid of the grey areas. This is either exempt or it is not. You can decide where you want to put the line, but, for goodness sake, that is where all the cost comes from and that is where all the judgment and senior time come up.<sup>339</sup>

192. Lord O'Donnell gave examples (one real-life, two hypothetical) of where FOI might have an impact, both in terms of the quality of the record, the avoidance of official meetings and the provision of frank advice:

I have a real anecdote about the coalition. The Conservatives and the Lib Dems coming together to meet in the Cabinet Office during those five days in May had to decide whether to have a civil servant in the room to record the negotiations. One of the members of the negotiating team said to me, "So, if we did this and the civil servant wrote something down, would it be FOI-able?" My answer was, "We haven't got a clue because there is a public interest test to everything and you just don't know." The net result was that there was no civil servant in the room.<sup>340</sup>

[...] with regard to some conversations that might well have taken place in a more formal setting with Ministers and officials, Ministers might well decide to have those conversations on their own, on their mobile phones. By definition, there are no officials at those sorts of things.<sup>341</sup>

I have encouraged civil servants to be very explicit about risk registers, to think the unthinkable, to put it in very vivid language and to think about the unusual outcome that might happen. We have been too narrow. If you look at the financial crisis, we just did not think about what might happen if liquidity dried up. We did not think enough about what would be thought of as quite unlikely outcomes before the event. Will future risk registers be as open? There is going to be a real chilling effect there on risk registers. Ministers are going to say, "Okay, I am very aware that a risk register is now a potentially public document. I do not want you to go into these extreme things. If necessary, we can have a conversation about that, but could you kindly just stick to the more likely outcomes?"<sup>342</sup>

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<sup>339</sup> Q 251

<sup>340</sup> *Ibid.*

<sup>341</sup> Q 254

<sup>342</sup> Q 270

193. The Rt Hon Jack Straw MP made a related point. Noting that he preferred to make decisions through the process of the written word, he said however that “I know that people in other Government Departments went in for unminuted meetings because they were anxious that there should not be a trail of accountability”.<sup>343</sup> The Attorney General also believed that there was evidence that the chilling effect had been felt:

[...] the minutes ought to be a fairly authoritative record of what was said and done, and people who participate in collective decision making are entitled to enjoy that protection. As I said, the real risk—this is not just a hypothetical risk because I hear it suggested that it has become a real risk; it is actually happening, or happened certainly under the last Administration—is that you end up getting decisions made that are not recorded. People are so worried that everything that is said will go out into the public domain at an early stage that they may not express their views.<sup>344</sup>

On the other hand, a civil servant who was concerned to make sure that important advice was considered might well wish to ensure that the record made clear such advice had been given.

194. Concerns about the behavioural effects of the legislation led Lord O’Donnell and Jack Straw to call for the removal of the grey areas caused by the public interest test by covering information relating to policy formulation or information relating to the retention of collective cabinet responsibility with an absolute exemption. Jack Straw told us that:

The law certainly needs to be clarified and we need to change the public interest here. My view is that we need a class exemption, full stop, that exempts information if it relates to the formulation or development of Government policy, ministerial communications and so on. However, we also need a class exemption in respect of matters covering section 36—the maintenance of conventional collective responsibility of the Crown and the provision of free and frank advice.<sup>345</sup>

195. Lord O’Donnell advocated a route guided by two principles: the maintenance of collective Cabinet responsibility; and the protection of the ability of the civil service to give frank advice without fear or favour.<sup>346</sup> This led him to argue that the grey areas produced by the application of the public interest test were damaging and that greater clarity was required by having more clear-cut areas which were either absolutely exempt or not. When questioned, he supported the concept of being able to label a meeting as a policy discussion, which would then attract an absolute exemption, so that participants would know they were operating within a safe space.<sup>347</sup>

196. The Rt Hon Francis Maude MP, comparing the situation now to his experience of Government “around 20 years and more ago” considered whether frank advice was put on paper to the same extent now as then, and concluded:

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<sup>343</sup> Q 329

<sup>344</sup> Q 497

<sup>345</sup> Q 344

<sup>346</sup> Q 258

<sup>347</sup> Qq 277–9

It is hard to calibrate or measure. My feeling is that it is less so because of exactly this [i.e. FOI] concern. It is not that there is obviously a certainty; you know that under the Act as it is nearly all of the stuff will not be public, but it is the question mark that hangs over it—whether things are FOI-able. The Information Commissioner and the Tribunal might make a decision that the public interest in disclosure outweighs the public interest in them being private and protected. It is just flying in the face of certainly my experience and common sense to maintain that it has made absolutely no difference.<sup>348</sup>

197. In considering the potential danger FOI poses to the safe space, it is necessary not just to consider the direct impact to it of disclosure of one piece of information, but (more importantly) the message such individual decisions about disclosure send to officials and ministers about future decisions of the Commissioner or the Tribunal. This point was made by Lord Turnbull, Cabinet Secretary from 2002 to 2005, in the House of Lords:

Section 35 does not confer an absolute exemption but requires a balancing public interest test. In applying that test, however, the commissioners and the tribunal have tended to focus narrowly on the information sought in the request, not the wider signal that the disclosure produces. Any release contains two forms of information: that inherent in the document, and that which provides signals about how the commissioner/tribunal are expected to respond in future cases. There will be cases where the information itself may cause little harm but where releases of similar documents could have a big effect on the behaviour of Ministers and officials. The commissioners and the tribunal appear to place little weight on this wider impact despite the advice of many distinguished people.<sup>349</sup>

**198. If the most senior officials in Government are concerned about the effect of the Act on the ability to provide frank advice they should state explicitly that the Act already provides a safe space, and that the Government is prepared to use the ministerial veto to protect that space if necessary.**

**199. Since the passing of the Act other ways in which minutes and records are likely to be made public have developed which are likely to lead to greater publicity for the information disclosed than if it had been published under the right to access information.** The establishment of public inquiries into matters of public concern used to be relatively infrequent; between 1921 and 1978 there were twenty investigations which could be described as public inquiries after which the use of such inquiries “virtually fell into abeyance” until the late 1990s.<sup>350</sup> Since 1996, however, there have been at least twenty-four inquiries, under the Tribunals of Inquiry (Evidence) Act 1921, its successor, the Inquiries Act 2005, other legislative provisions, such as the investigation into the death of Rosemary Nelson which was held under the Police (Northern Ireland) Act 1998 as well as non-statutory inquiries. Several of these inquiries have been very high-profile, in particular the ‘Bloody Sunday’ inquiry,<sup>351</sup> the Chilcot inquiry into the Iraq war<sup>352</sup> and the ongoing

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<sup>348</sup> Q 523

<sup>349</sup> HL Deb, 17 January 2012, col 542

<sup>350</sup> HOC Library Standard Note(SN/PC/02599), Chris Sear and Oonagh Gay, *Investigatory inquiries and the Inquiries Act 2005*, November 2011, p17

<sup>351</sup> Under the Tribunals of Inquiry (Evidence) Act 1921 Act.

inquiry into press standards chaired by Lord Leveson.<sup>353</sup> Such inquiries can lead to the disclosure of documents which might not otherwise have entered the public domain as Lord Hennessy told us:

[...] if you look back to the Hutton inquiry into Dr David Kelly's death, if it had not been done quickly, those e-mails that were so crucial to reconstructing it would not have been there. I do not think they would have been retrievable.<sup>354</sup>

It is unclear whether those emails would have been released under the Act. Any analysis of the chilling effect must therefore acknowledge that the release of documents is not necessarily a consequence, or even most frequently the result of, a freedom of information request.

**200. We are not able to conclude, with any certainty, that a chilling effect has resulted from the FOI Act. On the one hand, the Constitution Unit's research—the most in-depth available—suggests it has only a marginal effect. On the other hand, a range of distinguished participants who are, or who have been recently, at the heart of the policy-making process attest that it is a problem. We see no reason why former senior ministers and officials in particular would flag this up as a concern if they did not genuinely believe it to be so, and we think their views are of value. However, so too of value is the increased openness introduced by the Act and, especially, the power of individuals to exercise their right to information proactively, rather than having public authorities decide what they will disclose, when and to whom, even when acting with the best intentions. Equally, there are other reasons why some officials and politicians may be increasingly reluctant to create paper records, not least the increasing possibility that some form of public inquiry may lead to the subsequent publication of minutes and records. That is why we are cautious about restricting the rights conferred in the Act in the absence of more substantial evidence.**

**201. Given the uncertainty of the evidence we do not recommend any major diminution of the openness created by the Freedom of Information Act, but, given the clear intention of Parliament in passing the legislation that it should allow a "safe space" for policy formation and Cabinet discussion, we remind everyone involved in both using and determining that space that the Act was intended to protect high-level policy discussions. We also recognise that the realities of Government mean that the ministerial veto will have to be used from time to time to protect that space.**

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<sup>352</sup> A non-statutory inquiry.

<sup>353</sup> Under the 2005 Act.

<sup>354</sup> Q 285

## 7 The pre-publication exemption (section 22) and health and safety exemption (section 38)

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202. Section 22 provides that public bodies may exempt from publication information which they intend to publish at a future date, whether or not determined, if “the information was already held with a view to such publication at the time when the request for information was made” and “it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to [...]”<sup>355</sup> This time scale is not defined. The public body is not required to confirm or deny the existence of any information if that would amount to disclosure of the information.<sup>356</sup>

### Problems with pre-publication under the 2000 Act

203. We heard from universities that the pre-publication exemption does not sufficiently protect their research work. Universities UK told us: “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.”<sup>357</sup> The 1994 Group agreed:

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.<sup>358</sup>

The Russell Group said it “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.”<sup>359</sup>

204. Dr Rodney Eastwood, Registrar of Imperial College London who appeared before us on behalf of the Russell Group, said the current pre-publication exemption:

[...] does not work for research, which is a complex activity that involves a lot of people, a lot of data and information and many inputs. The university will clearly publish the research—the whole point of a university is to publish its research and to make it available—but only after all that has been done and it has been peer-

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<sup>355</sup> Section 22

<sup>356</sup> Section 22(2)

<sup>357</sup> Ev 120

<sup>358</sup> Ev w89

<sup>359</sup> Ev 106

reviewed. Publishing bits of it prematurely runs the big risk of the recipient, the public, drawing the wrong conclusions.<sup>360</sup>

205. Professor Ian Diamond emphasised the length of time research may take:

[...] research follows a course, and one's ideas about the final results can change over time as one does the analysis and one looks at different variables in different ways and with different experiments. Some projects can take years, and saying that, if you have some data, they must therefore be made public and your conclusions must be ready in six months does not allow for the proper conduct of research and could lead, in my opinion, to poor results being propagated.<sup>361</sup>

Professor Diamond highlighted social research relying on longitudinal data as an area where information may be gathered over many years,<sup>362</sup> or even decades.<sup>363</sup> Universities UK told us that there was no case law establishing how far in the future a publication date may be for the purposes of section 22:

However, when this issue was raised in a workshop hosted by the Research Information Network, representatives of the ICO said timescales of months or years might not be considered favourably. This makes it appear less likely that the exemption could be effectively used where the period was (i) likely to be several years in the future, and (ii) where the precise point of publication could not yet be determined.<sup>364</sup>

A further problem with releasing longitudinal data is that the time taken to 'clean' it means incomplete or under-analysed data may be published.<sup>365</sup>

206. Professor Diamond told us the issue was not one of intellectual property: "Under the Economic and Social Research Council, all data collected using public funds—certainly in the social sciences—have to be lodged at the data archive, where the information is available for re-analysis by bona fide researchers from anywhere in the world. That kind of open access exists at the moment, so it is not about IP. It is simply about the development of research and premature findings being available."<sup>366</sup>

207. Witnesses also expressed concerns that the risk of publication they perceived coming from the Act put the domestic university sector at a disadvantage when competing for research work. The University of Oxford said it had encountered the following problems:

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

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<sup>360</sup> Q 104

<sup>361</sup> *Ibid.*

<sup>362</sup> *Ibid.*

<sup>363</sup> Ev 170

<sup>364</sup> *Ibid.*

<sup>365</sup> *Ibid.*

<sup>366</sup> Ev w199

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 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.<sup>367</sup>

208. Professor Diamond told us he did not think there was an “enormous” amount of evidence of funding going to other countries because of the fear of disclosure but “the Act is still in its infancy” and: “We are in immense global competition to undertake research, and it is the top research that is absolutely essential given the competitive nature of the UK over the next few years. We need to ensure that we are able to undertake research absolutely properly, and anything that had that impact should be thought about very carefully.”<sup>368</sup> Universities UK observed that proving a negative, that funding was not awarded to domestic universities, was difficult:

[...] evidence of commercial partners being put off working with UK institutions is largely anecdotal. However, in a case involving the Environmental Information Regulations (EIR) recently settled by the Information Commissioner for drafts of a published paper, the University of East Anglia highlighted that:

In another matter, we recently received exactly such representations from the IPCC TSU [Intergovernmental Panel on Climate Change Technical Support Unit] based in Geneva, Switzerland in which they explicitly noted that release of such material would “[...] force us to reconsider our working arrangements with those experts who have been selected for an active role in WG1 AR5 [Working Group One, Fifth Assessment Report] from your institution and others within the United Kingdom.”<sup>369</sup>

## The pre-publication exemption in Scotland

209. Section 27 of the Freedom of Information (Scotland) Act 2002 provides an exemption for information for future publication. Section 27(1) is stricter than the similar provision in section 22 of the 2000 Act in that it requires the publication date be no more than 12 weeks after the date of the request. Section 27(2), however, provides an exemption for ongoing research: “Information obtained in the course of, or derived from, a programme of research is exempt information if:

(a) the programme is continuing with a view to a report of the research (whether or not including a statement of that information) being published by—

(i) a Scottish public authority; or

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<sup>367</sup> Ev w76

<sup>368</sup> Q 108

<sup>369</sup> Ev 170



(ii) any other person; and

(b) disclosure of the information before the date of publication would, or would be likely to, prejudice substantially—

(i) the programme;

(ii) the interests of any individual participating in the programme;

(iii) the interests of the authority which holds the information; or

(iv) the interests of the authority mentioned in sub-paragraph (i) of paragraph (a) (if it is a different authority from that which holds the information).<sup>370</sup>

210. The Russell Group told us that “Universities in Scotland have confirmed that the research exemption has been used effectively.”<sup>371</sup> The University of Salford told us that the Scottish approach would bring “clarity” to the pre-publication exemption.<sup>372</sup> The University of Bath said it would “strongly support” an amendment to the Act which would bring the publication exemption in line with the position in Scotland.<sup>373</sup> The University of Oxford emphasised that such an exemption applies to pre-publication material only: “Once the results of a study have been published, we recognise there may be a public interest in the disclosure of the underlying data.”<sup>374</sup> It was noted in the House of Lords that similar exemptions exist in USA and Irish legislation.<sup>375</sup> The University of Surrey went further and called for a blanket exemption without a prejudice test: “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.”<sup>376</sup>

211. However, the University of Stirling recently had difficulties rejecting a request from Philip Morris, the tobacco company, for data on underage smokers collected in a study sponsored by Cancer Research. The University was concerned that the data would be used to market tobacco to young people, which could also have the effect of deterring sponsors. The pre-publication exemption did not apply because the University was not intending to publish that dataset. The request was finally refused on the grounds of the cost of compliance.<sup>377</sup>

212. Section 102 of the Protection of Freedoms Bill 2012 provides that:

Where—

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<sup>370</sup> Section 27(2)

<sup>371</sup> Ev 106

<sup>372</sup> Ev w62

<sup>373</sup> Ev w33

<sup>374</sup> Ev w76

<sup>375</sup> HL Deb, 12 Jan 2012, col GC14

<sup>376</sup> Ev 113

<sup>377</sup> Brief 2

(a)an applicant makes a request for information to a public authority in respect of information that is, or forms part of, a dataset held by the public authority, and

(b)on making the request for information, the applicant expresses a preference for communication by means of the provision to the applicant of a copy of the information in electronic form,

the public authority must, so far as reasonably practicable, provide the information to the applicant in an electronic form which is capable of re-use.

213. Amending section 22 in line with the Scottish exemption on pre-publication was discussed by the House of Lords Grand Committee during its deliberation on section 102 of the 2012 Act. Lord Henley told the Committee: “As a coalition Government, we are committed to greater transparency. I want to make it clear that we will not introduce exemptions into the Freedom of Information Act unless we can have that clearly demonstrated.”<sup>378</sup> Appearing before us, Lord McNally said:

It is quite legitimate of the universities and other research institutes to want to protect intellectual property, and I very strongly support that, but some of the lobbying that I have received paints a more lurid picture than when I am told what the Act already protects.<sup>379</sup>

We note that it was no part of the original campaign for freedom of information to seek the premature disclosure of university research.

**214. We recommend section 22 of the Act should be amended to give research carried out in England and Wales the same protection as in Scotland. While the extension of section 22 will not solve all the difficulties experienced by the universities in this area, we believe it is required to ensure parity with other similar jurisdictions, as well as to protect ongoing research, and therefore constitutes a proportionate response to their concerns. Whether this solution is sufficient and works satisfactorily should be reviewed at a reasonable point after its introduction.** We address concerns over commercial competitiveness under section 43 below.

215. A number of universities, including Manchester, Essex and Durham, suggested that universities should only be subject to the Act in terms of management functions, like the BBC and the division between its journalism and broadcasting and management sectors.<sup>380</sup> Other submissions from universities suggested that the university sector should be taken out of the jurisdiction of the Act altogether. We explore these issues in the following Chapter.

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<sup>378</sup> HL Deb, 12 Jan 2012, col GC26

<sup>379</sup> Q 549

<sup>380</sup> Ev w111

## The Act and the Animal (Scientific Procedures) Act 1986

216. Understanding Animal Research noted that testing on animals for the purposes of medical research into disease and injury was:

[...] 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.<sup>381</sup>

217. Section 24 of the Animal (Scientific Procedures) Act 1986 (ASPA) makes the disclosure of details of licences involving animal testing a criminal offence punishable by up to two years in jail. Section 44 of the Freedom of Information Act exempts information from disclosure when there is a statutory bar preventing it. Understanding Animal research noted that under European law disclosure of information “should not violate proprietary rights or expose confidential information” and “published details should not breach the anonymity of the users”.<sup>382</sup> The relationship between the two was explored by the Upper Tribunal following an application to Newcastle University by the British Union for the Abolition of Vivisection (BUAV) for information contained in project licences for primate research.<sup>383</sup> It should be emphasised in this context that both the Upper Tribunal and Newcastle University agreed that BUAV campaigned peacefully and were not connected with any group which advocated violence.<sup>384</sup>

218. The Upper Tribunal held that “section 24 of ASPA was not a statutory bar to disclosure” but that some information could be redacted from the copies of the licences disclosed under section 38 (where disclosure would endanger the mental or physical health or safety of University staff and students) and 43 (the commercial exemption). Newcastle University did not appeal and redacted information was passed to BUAV. The University described the case to us as a “legal ‘Catch 22’ situation” and added that “it is deeply regrettable that conflicts in legislation are left to such test cases to resolve.”<sup>385</sup> Dr Rodney Eastwood told us:

[...] the Home Office declined to prosecute [the University of Newcastle] for doing so, but, on the basis that if any future case came up it would have to be directed by a tribunal to find in favour of the university, the universities are now in the position that, in order to follow the case, they may have to undergo expenditure of a substantial amount in legal fees to go through the tribunal process each time in order to prove to the Home Office that the information was properly released. The conflict between the two is quite difficult to resolve.<sup>386</sup>

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<sup>381</sup> Ev w3

<sup>382</sup> *Ibid.*

<sup>383</sup> BUAV v Information Commissioner and Newcastle of University EA/2010/0064

<sup>384</sup> *Ibid.*

<sup>385</sup> Ev w202

<sup>386</sup> Q 114

219. David Thomas, Legal Consultant for BUAV, agreed that there was “partial” conflict between the Animal Scientific Procedures Act and the Act but identified it as being within the Home Office:

The Court of Appeal in a BUAV case interpreted section 24 in a way that effectively said that researchers, in terms of what they gave to the Home Office, had a veto over what the Home Office could subsequently disclose. The Home Office was then taking it a stage further—we think quite wrongly—by saying that under section 24 it cannot disclose even information that it has generated itself—for example, action that it has taken following breaches of licence conditions. It says that it cannot even tell Parliament what action it takes. There is a real problem as far as the Home Office is concerned. That is why the BUAV and many others believe that section 24 should go and leave things to the exemptions under the FOI Act to strike the balance that needs to be struck between accountability and transparency on the one hand and legitimate concerns on the other.<sup>387</sup>

220. Dr Nick Palmer, Director of Policy for BUAV, told us that “the new European Union directive on animal experiments is recognised by the Home Office to be incompatible with section 24 as it stands.”<sup>388</sup> On 17 May 2012, Lynne Featherstone MP, Parliamentary Under Secretary of State for Equalities and Criminal Information, told the House of Commons:

We also propose to retain the current requirement that individuals carrying out regulated procedures on animals must hold a personal licence authorising them to do so. We will, however, explore the opportunities to simplify the detail of personal licence authorities and to remove current requirements which increase regulation without adding to the effectiveness of the licensing process. We will ensure any changes avoid detrimental impacts on levels of compliance or animal welfare and protection.<sup>389</sup>

**221. As section 24 of the Animal (Scientific Procedures) Act 1986 remains under review by the Home Office following changes in European law we make no recommendation as to how the Government should act but will consider the outcome of the review when it is received. It should not be necessary to amend the Freedom of Information Act to meet the concerns of universities in this area.**

**222. We strongly urge universities to use to the full the protection that exists for the health and safety of researchers in section 38 of the Act, and expect that the Information Commissioner will recognise legitimate concerns. No institution should be deterred from carrying out properly regulated and monitored research as the result of threats; this was not Parliament’s intention in passing the Act and we are happy to reiterate that that remains the position.**

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<sup>387</sup> Q 377

<sup>388</sup> *Ibid.*

<sup>389</sup> HC Deb, 17 May 2012, col 39WS

## 8 The commercial exemption (section 43) and the application of FOI to outsourced public services

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### Competitiveness and the commercial exemption

223. Section 43 exempts information from the Act if it is a trade secret (subject to a public interest test) or if its release would, or would be likely to, prejudice the commercial interests of “any person”, including the public body holding the data.<sup>390</sup>

224. Witnesses told us that local authorities, universities, NHS organisations and other public bodies are working in increasingly competitive environments. Some witnesses believe that being subject to FOI makes it more difficult for public bodies to compete with their private competitors who can access information through the Act while maintaining the confidentiality of their similar information. Leeds City Council told us: “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.”<sup>391</sup> The University of Bath said: “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.”<sup>392</sup> The Foundation Trust Network told us:

As some of these commercial interests [making requests] 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.<sup>393</sup>

The Centre for Public Scrutiny observed that the application of the Act solely to local authorities in the context of greater private sector delivery of public services meant the FOI regime would “become increasingly separated from reality” but notes this issue is not considered by the Memorandum.<sup>394</sup>

225. Some concerns over the operation of the commercial exemption focused on its interpretation by the Information Commissioner’s Office rather than the legislation itself. The University of Oxford noted that a recent case involving the application of section 43 to fund-raising by universities appeared to conclude that it did apply to such activities but the ICO had not yet revised its guidance. The 1994 Group describes the operation of this clause

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<sup>390</sup> Section 43

<sup>391</sup> Ev 146

<sup>392</sup> Ev w33

<sup>393</sup> Ev 110

<sup>394</sup> Ev 150

as “complex” and said that: “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.”<sup>395</sup> The Russell Group gave the following example where a university might be disadvantaged by the Act: “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.”<sup>396</sup> Professor Trevor McMillan told us that “my understanding is that one university has already been obliged by a decision to release some of its teaching materials. If I remember rightly, it was the university of Central Lancashire.” Professor McMillan noted that requestor blindness meant the university did not know what had happened to the material after publication.<sup>397</sup>

### Publicly and privately-funded functions

226. Universities receiving financial support under section 65 of the Further and Higher Education Act 1992 are subject to the Act. Several of our witnesses from the university sector suggested that those activities carried out by universities which receive public funding should be subject to the right to access information. Figures on the proportion of universities’ activities that are publicly-funded varied. Universities UK told us that:

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, 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, 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.<sup>398</sup> (sources: HESA (2011) Finance Plus Cheltenham: HESA; Universities UK (2012) Futures for higher education: analysing trends London: UUK p. 7).

227. The University of London commented that the European Union defined a public body as one which receives more than 50% of its funding from the state. It commented: “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.”<sup>399</sup>

228. Some witnesses from the university sector suggested that the Act was inappropriate for their institutions. Durham University said:

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<sup>395</sup> Ev w89

<sup>396</sup> Ev 106

<sup>397</sup> Q 110

<sup>398</sup> Ev w76

<sup>399</sup> Ev w60

[...] 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.<sup>400</sup>

229. Other submissions suggested that a more proportionate use of the Act would be to limit it to functions funded by public money or the management and administration of the institution. The University of Bath observed: "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."<sup>401</sup> Universities UK also cited the example of the BBC together with the Universities and Colleges Admissions Service.<sup>402</sup> Representatives from the university sector accepted, however, that the distinction between publicly and privately-funded aspects of a university's activities was not straightforward. Dr Rodney Eastwood told us: "Should [right to access information] in future be related to activity that is funded from the public purse, whether by a public or a private organisation, it is clearly much more difficult to apply. Everything that we do is partly privately funded. Some things that we do are entirely privately funded, but everything else is partly privately funded."<sup>403</sup> Professor Ian Diamond agreed that there was a "grey area" in ascertaining requests relating to publicly or privately funded functions: "the odd [request] would be absolutely clear, but the great majority would be in the middle grey area."<sup>404</sup>

230. The Information Commissioner did not agree that universities should be removed from the jurisdiction of the Act:

[...] just because universities get a lot of money from the private sector, it does not mean that they are not a very important part of the public realm. Students, parents and schools will expect universities to be publicly accountable, and they are public authorities.

The Commissioner also suggested that universities "sometimes need to conduct their case a bit better than they have in some celebrated cases." As a result, Mr Graham told us: "We want to work very closely with the higher education sector—I will be talking to vice-chancellors shortly—and we would be delighted if Universities UK would give some helpful guidance to the sector in co-operation with the Information Commissioner's Office."<sup>405</sup>

**231. We do not have sufficient evidence to come to a conclusion on whether section 43 operates effectively to protect the competitiveness of public bodies when competing for public sector contracts. However, there is a strong public interest in competition**

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<sup>400</sup> Ev w39

<sup>401</sup> Ev w33

<sup>402</sup> Ev w76

<sup>403</sup> Q 111

<sup>404</sup> Q 112

<sup>405</sup> Q 238

between public and private sector bodies being conducted on a level playing field to ensure the best outcome for the taxpayer. With the increasing contracting out of public services we recommend the Government keeps this issue under review, and if public sector bodies are found to be at a disadvantage we expect either that section 43 will be amended or another model found to protect such commercial interests.

232. We agree with the Information Commissioner that universities are an important part of the public realm and we believe that they are generally regarded by the public and by those working in universities as important public institutions. We do not therefore recommend that universities should be removed from the jurisdiction of the Act. We make separate recommendations in paragraph 214 to deal with potential problems the Act may create for university research.

### Private companies and public funding

233. Section 3(2)(b) provides that material held by a private company “on behalf of” a public authority with which it has a contract is subject to the Act but other information is not. The Memorandum notes that “the question of whether information is held on behalf of a public authority can be complex.”<sup>406</sup>

234. We heard some evidence that requestors may find it difficult to access information arising from functions funded by the public sector but exercised by private companies. The Information Commissioner was strongly of the opinion that the right to access information must follow public money:

[...] if more and more services are delivered by alternative providers who are not public authorities, how do we get accountability? The Prime Minister dealt with that the other day in one respect, by saying that it is about accountability, through tracking expenditure and outcomes. That is certainly part of it, but we nevertheless need to find ways of holding the alternative providers to account if they are trousering very large sums of public money and carrying out public purposes contracted by authorities.<sup>407</sup>

235. The Deputy Information Commissioner, Graham Smith, explained to us the two ways in which the right to access information could be preserved:

If information is held on behalf of the public authority, then it is still covered by the Freedom of Information Act. The Secretary of State for Justice has the power to designate bodies for the purposes of the Act, but they can be designated only to a certain extent. If you have a body that is created specifically for this purpose, or it has a large number of definable relationships with public authorities, then I think it will be possible to cover those issues with a section 5 order under the Freedom of Information Act [...]. The other way that you can do it, which is less clear, is to have something in the contracting arrangements that imposes requirements on the new contracting body to disclose information to the commissioning body, but probably backed up with an obligation to co-operate, with access to information law.

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<sup>406</sup> Memo, p23

<sup>407</sup> Q 238



Something similar was done under the code of practice when the Act was first brought into force, and I think that it has been reasonably effective.<sup>408</sup>

236. Dr Ben Worthy of the UCL Constitution Unit, told us that the Unit's research amongst local government officials on the use of contract terms to protect the right to access information had found "two responses were given about private companies on requests that covered things done by private companies rather than the authority. The first thing that a lot of people said is that most companies are very co-operative, particularly the public-facing ones. It was only in a small percentage of cases that they caused trouble, but I got the sense that, when they did cause trouble, they caused real trouble."<sup>409</sup> The problem, Dr Worthy explained, was that, in a large contract, a public authority would be reluctant to "imperil" that contract if the company refused to "play ball on this one issue."<sup>410</sup>

237. We asked local government representatives how they ensured the right to access information was protected when services were contracted out, and how those relationships worked. The answers we received were reassuring. Edward Hammond of the Centre for Public Scrutiny confirmed that "a lot of councils will, as a matter of course, include a section on transparency and access to data, certainly in major contracts."<sup>411</sup> Local government officials giving evidence to us confirmed that was their practice. James Rogers of Leeds City Council told us: "Our view on that in Leeds would be that the provider is holding the information on our behalf. It is effectively still Leeds City Council public information. Therefore we would still be responsible for providing that from the request. That request may need to come to us direct to retrieve and provide that information, but we would provide it as ours."<sup>412</sup> Mr Rogers confirmed that Leeds Council would require the contractor to keep adequate records. Roger Gough of Kent County Council told us his local authority took the same approach.<sup>413</sup> He also noted that there was a potential problem with the burden that could be placed as a result on smaller contractors, particularly as local authorities sought to use smaller, local organisations to deliver services. Tracey Phillips, of Lambeth Council, agreed this could present a problem but her authority was taking the view that "it is a case of forwarding the burden on to them, but with our help and assistance on how to do that."<sup>414</sup>

238. The Campaign for Freedom of Information, among others, suggests that: "The FOI Act envisages that [a] contractor who provides a service on behalf of a public authority, which it is the authority's function to provide, can be designated as a public authority subject to the Act in its own right. We think the use of this provision to make contractors directly subject to FOI should now be considered [...]. Failing that, the Act should be reassessed in light of contracting out and amended to ensure that the public's rights to

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<sup>408</sup> Q 240

<sup>409</sup> Q 85

<sup>410</sup> Q 86

<sup>411</sup> *Ibid.*

<sup>412</sup> Q 436

<sup>413</sup> *Ibid.*

<sup>414</sup> Q 437

information about public authority services and functions are fully preserved when these are provided by contractors.”<sup>415</sup>

**239. The right to access information must not be undermined by the increased use of private providers in delivering public services. The evidence we have received suggests that the use of contractual terms to protect the right to access information is currently working relatively well. We note the indication that some public bodies may be reluctant to take action if a private provider compliant with all other contractual terms fails to honour its obligations in this area. In a rapidly changing commissioning landscape this has the potential fundamentally to undermine the Act. We remind all concerned that the right to access information is crucial to ensuring accountability and transparency for the spending of taxpayers’ money, and that contracts for private or voluntary sector provision of public services should always contain clear and enforceable obligations which enable the commissioning authority to meet FOI requirements.**

**240. We believe that contracts provide a more practical basis for applying FOI to outsourced services than partial designation of commercial companies under section 5 of the Act, although it may be necessary to use designation powers if contract provisions are not put in place and enforced. We recommend that the Information Commissioner monitors complaints and applications for guidance in this area to him from public authorities.**

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<sup>415</sup> Ev 156

## 9 Conclusion

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241. The Freedom of Information Act has been a significant enhancement of our democracy. Overall our witnesses agreed that the Act was working well. The right to access information has improved openness, transparency and accountability. The principal objectives of the Act have therefore been met, but we are not surprised that the unrealistic secondary expectation that the Act would increase public confidence in Government and Parliament has not been met. We do not believe that there has been any general harmful effect at all on the ability to conduct business in the public service, and in our view the additional burdens are outweighed by the benefits. There is some risk—based on perception as much as reality—that policy discussions at the highest levels may be inhibited or not properly recorded because of fear of early disclosure under the Act. This was never intended to be the effect of the Act, and we believe that it can be dealt with by the proper application of the protection provided in section 35 of the Act, firm guidance to senior civil servants about the extent of the protections provided and, where necessary and appropriate, by the use of the ministerial veto to protect the “safe space” for such discussions. We also note that disclosure of such discussions is as likely to occur through major public inquiries or court proceedings as it is under the Freedom of Information Act.

242. We believe that openness should follow public money when public services are outsourced, and in our view this can best be achieved through clear and enforceable contract provisions rather than by designating commercial companies under the Act, which should be retained as a last resort.

243. We believe that there is a specific problem for ongoing research in universities which needs to be addressed by provisions on the lines of those operating in Scotland under the Freedom of Information (Scotland) Act 2002, and we call for the time limits in the Act to be put into statute, but with these exceptions we see no pressing need for legislative change to an Act which is serving the nation well.

## Conclusions and recommendations

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### Openness

1. We agree with the Ministry of Justice that the Act has contributed to a culture of greater openness across public authorities, particularly at central Government level which was previously highly secretive. We welcome the efforts made by many public officials not only to implement the Act but to work with the spirit of FOI to achieve greater openness. Our evidence shows that the strength of the new culture of openness is, however, variable and depends on both the type of organisation and the approach to freedom of information of the individual public authority. (Paragraph 17)

### Transparency

2. While proactive transparency clearly has the potential to reduce the burden of responding to information requests on hard-pressed public authorities, the proactive publication of data cannot substitute for a right to access data because it is impossible for public bodies to anticipate the information that will be required. Nevertheless, proactive publication is important in achieving the primary objectives of the Act of openness and transparency. (Paragraph 31)
3. Government must ensure that the freedom of information regime and the transparency agenda work together to ensure best value for money. Individual initiatives in different departments must be examined before implementation in the light of existing policy to see whether they constitute the most effective approach. Equally, existing initiatives should also be assessed after a period of time to ensure they both offer value for money and have not produced unintended consequences. (Paragraph 32)

### Increasing public confidence in public authorities

4. Our evidence on the impact of the Act on trust generally agreed with the findings of the Memorandum. Whether the Act will contribute to an increase in public confidence in the Government, Parliament and other bodies is primarily dependent on the type of information which is published following a request. The majority of people will receive information published under the Act through the media. Evidence of irregularities, deficiencies and errors is always likely to prove more newsworthy than evidence that everything is being done by the book and the public authority is operating well. In these circumstances, the expectation of a substantial increase in public trust following the introduction of the Act was always going to prove unrealistic. (Paragraph 37)
5. Greater release of data is invariably going to lead to greater criticism of public bodies and individuals, which may sometimes be unfair or partial. In our view, however this, while regrettable, is a price well worth paying for the benefits greater openness brings to our democracy. (Paragraph 38)

## Improving public participation in decision making

6. Having received limited evidence on the impact of the Act on increased public participation in decision making, we would not seek to disagree with the findings of the Constitution Unit that this objective has not been achieved, at least in central Government. We welcome, however, the suggestion that, while the Act may not have had a direct impact on increasing public participation in decisions made in the NHS it has assisted in a move towards a culture of greater public involvement. (Paragraph 43)

## Costs and fees

7. The Freedom of Information Act is a significant enhancement of our democracy. It gives the public, the media and other parties a right to access information about the way public institutions in England and Wales are governed, and the way taxpayers' money is spent. Governments and public authorities can promote greater transparency but, without FOI requests, decisions on what to publish will always lie with those in positions of power. FOI has costs, but it also creates savings which accrue from the disclosure of inappropriate use of public funds or, more importantly, fear of such disclosure. (Paragraph 53)
8. Developing a methodology whereby subjective activities such as reading and consideration time could be included in the 18 hour time limit does not seem to us to be a feasible proposition. Such activities are overly dependent on the individual FOI officer's abilities, introducing an element of inconsistency into the process that undermines the fundamental objective of the Act, that everyone has an equal right to access information. (Paragraph 60)
9. We recognise, however, that complying with its duties under the Act can be a significant cost to a public body. A standard marginal decrease in the 18 hour limit may be justifiable to alleviate the pressure on hard-pressed authorities, particularly in the context of increasing numbers of requests. We would suggest something in the region of two hours, taking the limit to 16 hours rather than 18, but anticipate the Government would want to carry out further work on how this would affect the number of requests rejected under section 12, and the corresponding weakening of the right to access information. (Paragraph 61)
10. The Act operates on the basis of requester blindness. As a result developing a way to charge requesters who commercially benefit from the information they receive from public authorities is difficult, if not impossible. Any requirement that requestors identify themselves could easily be circumvented by requestors using the name of a friend, family member or other person. Attempts to police such a system, either by public authorities or the Information Commissioner, would be expensive and likely to have a limited effect. (Paragraph 81)
11. It must also be recognised that the focus of the Act is whether the disclosure of information is justified, not who is asking for that information. If the statutory scheme deems it right that data should be released then it is irrelevant who is asking for publication; release of such information is to all, not just the individual requestor.

Nevertheless it can be argued that someone seeking to exercise freedom of information rights should be willing for the fact they have requested such information to be in the public domain; we therefore recommend that where the information released from FOI requests is published in a disclosure log, the name of the requestor should be published alongside it. (Paragraph 82)

12. While we recognise that there is an economic argument in favour of the freedom of information regime being significantly or wholly self-funding, fees at a level high enough to recoup costs would deter requests with a strong public interest and would defeat the purposes of the Act, while fees introduced for commercial and media organisations could be circumvented. (Paragraph 85)
13. Any future reconsideration of the economic argument for charging would need significantly better data on the number of requests made under the Act and the costs incurred in responding to them. (Paragraph 86)

### **Lessons to be learned from local government**

14. Evidence from our witnesses suggests that reducing the cost of freedom of information can be achieved if the way public authorities deal with requests is well-thought through. This requires leadership and focus by senior members of public organisations. Complaints about the cost of freedom of information will ring hollow when made by public authorities which have failed to invest the time and effort needed to create an efficient freedom of information scheme. (Paragraph 90)

### **Compliance with time limits**

15. We were pleased to hear relatively few complaints about compliance with the 20 day response time. We believe that the 20 day response time is reasonable and should be maintained. (Paragraph 94)

### **Internal reviews**

16. It is not acceptable that public authorities are able to kick requests into the long grass by holding interminable internal reviews. Such reviews should not generally require information to be sought from third parties, and so we see no reason why there should not be a statutory time limit—20 days would seem reasonable—in which they must take place. An extension could be acceptable where there is a need to consult a third party. (Paragraph 103)

### **Other remedies for non-compliance with time limits**

17. We recommend that all public bodies subject to the Act should be required to publish data on the timeliness of their response to freedom of information requests. This should include data on extensions and time taken for internal reviews. This will not only inform the wider public of the authority's compliance with its duties under the Act but will allow the Information Commissioner to monitor those organisations with the lowest rate of compliance. (Paragraph 109)

18. We recommend the 20 day extension be put into statute. A further extension should only be permitted when a third party external to the organisation responding to the request has to be consulted. (Paragraph 111)
19. We recommend that a time limit for internal reviews should be put into statute. The time limit should be 20 days, as at present under the Code of Practice, with a permitted extension of an additional 20 days for exceptionally complex or voluminous requests. (Paragraph 112)

### **Destroying records-enforcement of section 77**

20. The summary only nature of the section 77 offence means that no one has been prosecuted for destroying or altering disclosable data, despite the Information Commissioner's Office seeing evidence that such an offence has occurred. We recommend that section 77 be made an either way offence which will remove the limitation period from charging. We also recommend that, where such a charge is heard in the Crown Court, a higher fine than the current £5000 be available to the court. We believe these amendments to the Act will send a clear message to public bodies and individuals contemplating criminal action.(Paragraph 121)

### **Frivolous requests**

21. It is apparent from witnesses that frivolous requests are a very small problem, but can be frustrating. There is a case for adding frivolous requests to the existing category of vexatious requests which can be refused, but such requests can usually be dealt with relatively easily, making it hard to justify a change in the law. (Paragraph 135)

### **The attitude of requestors**

22. We believe it would be helpful for public authorities to indicate in a response letter how much responding to the request has cost, in approximate terms. We recommend the Information Commissioner consider the easiest way for authorities to arrive at such a figure. We think this unlikely to deter genuine inquiries but it will at least highlight to irresponsible users of the Act the impact of their actions. (Paragraph 138)

### **The safe space, exemptions and the ministerial veto**

23. Freedom of Information brings many benefits, but it also entails risks. The ability for officials to provide frank advice to Ministers, the opportunity for Ministers and officials to discuss policy honestly and comprehensively, the requirement for full and accurate records to be kept and the convention of collective Cabinet responsibility, at the heart of our system of Government, might all be threatened if an FOI regime allowed premature or inappropriate disclosure of information. One of the difficulties we have faced in this inquiry is assessing how real those threats are given the safeguards provided under the current FOI legislation and what, if any, amendments are required to ensure the existence of a 'safe space' for policy making. (Paragraph 154)

24. It is evident that numerous decisions of the Commissioner and the Tribunal have recognised the need for a 'safe space'. However, equally evident is the fact that in some cases their decision that information should be disclosed has challenged the extent of that safe space. We accept that for the 'chilling effect' of FOI to be a reality, the mere risk that information might be disclosed could be enough to create unwelcome behavioural change by policy makers. We accept that case law is not sufficiently developed for policy makers to be sure of what space is safe and what is not. (Paragraph 166)
25. While we believe the power to exercise the ministerial veto is a necessary backstop to protect highly sensitive material, the use of the word exceptional when applying section 53 is confusing in this context. If the veto is to be used to maintain protection for cabinet discussions or other high-level policy discussions rather than to deal with genuinely exceptional circumstances then it would be better for the Statement of Policy on the use of the ministerial veto to be revised to provide clarity for all concerned. We have considered other solutions to this problem but, given that the Act has provided one of the most open regimes in the world for access to information at the top of Government, we believe that the veto is an appropriate mechanism, where necessary, to protect policy development at the highest levels. (Paragraph 179)
26. The Constitution Unit's research on FOI is the first major piece of research of its kind and is a valuable contribution to the debate around FOI. In its consideration of the chilling effect, the Unit broadly concluded that the effect of FOI appeared negligible to marginal. We note this finding and have taken it into account in our deliberations. However, we have also been cognisant of two related points: while respecting the overall conclusions, we note that the research did feature a number of interviews with participants which suggested behaviour had changed, at least in part because of FOI; secondly, as the Unit itself notes, if the chilling effect does exist it would, by its nature, be very difficult to find hard, objective evidence of it. That is why, on this subject, it is necessary at least to consider anecdotes and impressions, albeit they might lack the academic rigour on which we would ideally like to base conclusions. (Paragraph 190)
27. If the most senior officials in Government are concerned about the effect of the Act on the ability to provide frank advice they should state explicitly that the Act already provides a safe space, and that the Government is prepared to use the ministerial veto to protect that space if necessary. (Paragraph 198)
28. Since the passing of the Act other ways in which minutes and records are likely to be made public have developed which are likely to lead to greater publicity for the information disclosed than if it had been published under the right to access information. (Paragraph 199)
29. We are not able to conclude, with any certainty, that a chilling effect has resulted from the FOI Act. On the one hand, the Constitution Unit's research—the most in-depth available—suggests it has only a marginal effect. On the other hand, a range of distinguished participants who are, or who have been recently, at the heart of the policy-making process attest that it is a problem. We see no reason why former



senior ministers and officials in particular would flag this up as a concern if they did not genuinely believe it to be so, and we think their views are of value. However, so too of value is the increased openness introduced by the Act and, especially, the power of individuals to exercise their right to information proactively, rather than having public authorities decide what they will disclose, when and to whom, even when acting with the best intentions. Equally, there are other reasons why some officials and politicians may be increasingly reluctant to create paper records, not least the increasing possibility that some form of public inquiry may lead to the subsequent publication of minutes and records. That is why we are cautious about restricting the rights conferred in the Act in the absence of more substantial evidence. (Paragraph 200)

30. Given the uncertainty of the evidence we do not recommend any major diminution of the openness created by the Freedom of Information Act, but, given the clear intention of Parliament in passing the legislation that it should allow a “safe space” for policy formation and Cabinet discussion, we remind everyone involved in both using and determining that space that the Act was intended to protect high-level policy discussions. We also recognise that the realities of Government mean that the ministerial veto will have to be used from time to time to protect that space. (Paragraph 201)

### The pre-publication exemption in Scotland

31. We recommend section 22 of the Act should be amended to give research carried out in England and Wales the same protection as in Scotland. While the extension of section 22 will not solve all the difficulties experienced by the universities in this area, we believe it is required to ensure parity with other similar jurisdictions, as well as to protect ongoing research, and therefore constitutes a proportionate response to their concerns. Whether this solution is sufficient and works satisfactorily should be reviewed at a reasonable point after its introduction. (Paragraph 214)

### The Act and the Animal (Scientific Procedures) Act 1986

32. As section 24 of the Animal (Scientific Procedures) Act 1986 remains under review by the Home Office following changes in European law we make no recommendation as to how the Government should act but will consider the outcome of the review when it is received. It should not be necessary to amend the Freedom of Information Act to meet the concerns of universities in this area. (Paragraph 221)
33. We strongly urge universities to use to the full the protection that exists for the health and safety of researchers in section 38 of the Act, and expect that the Information Commissioner will recognise legitimate concerns. No institution should be deterred from carrying out properly regulated and monitored research as the result of threats; this was not Parliament’s intention in passing the Act and we are happy to reiterate that that remains the position. (Paragraph 222)

### Publicly and privately-funded functions

34. We do not have sufficient evidence to come to a conclusion on whether section 43 operates effectively to protect the competitiveness of public bodies when competing for public sector contracts. However, there is a strong public interest in competition between public and private sector bodies being conducted on a level playing field to ensure the best outcome for the taxpayer. With the increasing contracting out of public services we recommend the Government keeps this issue under review, and if public sector bodies are found to be at a disadvantage we expect either that section 43 will be amended or another model found to protect such commercial interests. (Paragraph 231)
35. We agree with the Information Commissioner that universities are an important part of the public realm and we believe that they are generally regarded by the public and by those working in universities as important public institutions. We do not therefore recommend that universities should be removed from the jurisdiction of the Act. We make separate recommendations in paragraph 214 to deal with potential problems the Act may create for university research. (Paragraph 232)

### Private companies and public funding

36. The right to access information must not be undermined by the increased use of private providers in delivering public services. The evidence we have received suggests that the use of contractual terms to protect the right to access information is currently working relatively well. We note the indication that some public bodies may be reluctant to take action if a private provider compliant with all other contractual terms fails to honour its obligations in this area. In a rapidly changing commissioning landscape this has the potential fundamentally to undermine the Act. We remind all concerned that the right to access information is crucial to ensuring accountability and transparency for the spending of taxpayers' money, and that contracts for private or voluntary sector provision of public services should always contain clear and enforceable obligations which enable the commissioning authority to meet FOI requirements. (Paragraph 239)
37. We believe that contracts provide a more practical basis for applying FOI to outsourced services than partial designation of commercial companies under section 5 of the Act, although it may be necessary to use designation powers if contract provisions are not put in place and enforced. We recommend that the Information Commissioner monitors complaints and applications for guidance in this area to him from public authorities. (Paragraph 240)

# Formal Minutes

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**Tuesday 3 July 2012**

Members present:

Sir Alan Beith, in the Chair

Steve Brine	Mr Elfyn Llwyd
Mr Robert Buckland	Seema Malhotra
Jeremy Corbyn	Yasmin Qureshi
Chris Evans	Elizabeth Truss
Ben Gummer	Karl Turner

Draft Report (*Post-legislative scrutiny of the Freedom of Information Act 2000*), proposed by the Chair, brought up and read.

*Ordered*, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 243 read and agreed to.

Summary agreed to.

*Resolved*, That the Report be the First Report of the Committee to the House.

*Ordered*, That the Chair make the Report to the House.

*Ordered*, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

Written evidence was ordered to be reported to the House for printing with the Report, together with written evidence reported and ordered to be published on 7, 21, 28 February and 27 March in the previous Session of Parliament and 15 and 22 May 2012.

[Adjourned till Tuesday 10 July at 10.15am.]

## Witnesses

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### Tuesday 21 February 2012

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**Maurice Frankel**, Director, Campaign for Freedom of Information, **Alexandra Runswick**, Deputy Director, Unlock Democracy, and **Alex Skene**, Volunteer, WhatDoTheyKnow Ev 1

**Professor Robert Hazell CBE**, Director, **Dr Ben Worthy**, Senior Researcher, and **Jim Amos**, Honorary Senior Research Associate, UCL Constitution Unit Ev 9

### Tuesday 28 February 2012

**Professor Ian Diamond**, Vice-Chancellor, University of Aberdeen and Chair of Research Policy Network, Universities UK, **Dr Rodney Eastwood**, Registrar, Imperial College London (on behalf of the Russell Group), and **Professor Trevor J McMillan**, Pro-Vice-Chancellor for Research, Lancaster University and Chair of the 1994 Group Research and Enterprise Policy Group Ev 18

**Martin Rosenbaum**, BBC News, **Doug Wills**, Group Managing Editor of Evening Standard Ltd and Independent Print Ltd, **David Higgerson**, Digital Publishing Director of Trinity Mirror Regionals (on behalf of the Newspaper Society), and **David Henke**, Senior Investigative Journalist for ExaroNews (on behalf of the National Union of Journalists) Ev 24

### Wednesday 14 March 2012

**Christopher Graham**, Information Commissioner, and **Graham Smith**, Deputy Information Commissioner and Director of Freedom of Information, Information Commissioner's Office Ev 35

### Tuesday 27 March 2012

**Lord Hennessy of Nympsfield** and **Lord O'Donnell of Clapham GCB** Ev 45

**Gordon Wanless**, NHS Business Service Authority, **Sue Slipman**, Foundation Trust Network, **Wyn Taylor**, Liverpool Heart and Chest Hospital, and **Julian Brookes**, NHS South of England Ev 54

### Tuesday 17 April 2012

**Rt Hon Jack Straw MP** Ev 62

**Dr Nick Palmer**, Director of Policy, **Michelle Thew**, Chief Executive, and **David Thomas**, Legal Consultant, British Union for the Abolition of Vivisection Ev 69

## Tuesday 15 May 2012

**Roger Gough**, Cabinet Member for Business Strategy and Support, Kent County Council, **Edward Hammond**, Research and Information Manager, Centre for Public Scrutiny, **Tracy Phillips**, Information Compliance Advisor (Solicitor), Lambeth Council, and **James Rogers**, Assistant Chief Executive, Leeds City Council Ev 74

**Glenn Preston**, Deputy Director, Information and Devolution and **Pam Teare**, Director, Communication and Information, Ministry of Justice, **Marion Furr**, Director, Ministerial Business and Parliamentary Accountability, Department of Health, **Brendan Walsh**, Head, Information Rights, Department for Environment, Food and Rural Affairs, and **Roger Smethurst**, Deputy Director, Knowledge and Information Management, Cabinet Office Ev 81

## Wednesday 16 May 2012

**Rt Hon Dominic Grieve QC MP**, Attorney-General Ev 90

**Rt Hon Lord McNally**, Minister of State, Ministry of Justice, and **Rt Hon Francis Maude MP**, Minister for the Cabinet Office and Paymaster General Ev 95

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2	Russell Group	Ev 106
3	NHS South of England	Ev 109
4	Foundation Trust Network	Ev 110
5	1994 Group	Ev 113
6	British Union for the Abolition of Vivisection	Ev 115, Ev 175, Ev 178
7	Universities UK	Ev 120, Ev 170
8	The Constitution Unit, University College London	Ev 126, Ev 169, Ev 194
9	WhatDoTheyKnow.com	Ev 129
10	Liverpool Heart and Chest Hospital NHS Foundation Trust	Ev 134
11	Information Commissioner	Ev 137
12	Newspaper Society	Ev 143
13	Leeds City Council	Ev 146
14	British Broadcast Corporation (BBC)	Ev 147
15	Managing Editor, Evening Standard, The Independent and the Independent on Sunday	Ev 149
16	Centre for Public Scrutiny	Ev 150
17	National Union of Journalists	Ev 154
18	Campaign for Freedom of Information	Ev 156, Ev 181
19	Kent County Council	Ev 192
20	Ministry of Justice	Ev 203

## List of additional written evidence

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(published in Volume III on the Committee's website [www.parliament.uk/justicecom](http://www.parliament.uk/justicecom))

1	Sophie Barnes	Ev w1
2	Neil Craig	Ev w1
3	Debbie Pugh-Jones	Ev w2
4	David Holland	Ev w3
5	David Smith	Ev w7
6	Adrian Kerton	Ev w9
7	Newcastle University	Ev w9
8	Dr Julia Hines	Ev w12
9	Lord Lucas	Ev w14
10	Dr. Rodger Patrick	Ev w16
11	Association of Chief Police Officers	Ev w21
12	Nottingham Trent University	Ev w26
13	Alistair Sloan	Ev w27
14	Trevor Craig	Ev w30
15	Robert Wyllie	Ev w30

16	University of Bath	Ev w33
17	Nuclear Information Service	Ev w34
18	Durham University	Ev w39
19	John Campbell	Ev w41
20	Peter Silverman	Ev w42
21	Understanding Animal Research	Ev w43
22	Paul Gibbons	Ev w47
23	Lancashire Care NHS Foundation Trust (LCFT)	Ev w53
24	Ron Aroskin	Ev w55
25	Colin Peek	Ev w56
26	Birmingham City Council	Ev w56
27	University of London	Ev w60
28	University of Salford	Ev w62
29	Ben Leapman, Deputy News Editor, Sunday Telegraph	Ev w65
30	Portsmouth Hospitals NHS Trust	Ev w67
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32	Derek Dishman	Ev w69
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45	Chris Sims, Chief Constable, West Midlands	Ev w95
46	Peter Sharpe, Procurement related Consultant	Ev w97
47	Teesside University	Ev w99
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49	David Higgerson, Digital Publishing Director, Trinity Mirror Regionals	Ev w103
50	Frimley Park Hospital NHS Foundation Trust	Ev w104
51	University of Sussex	Ev w109
52	Perry Austin-Clarke, Group Editor, Newsquest Bradford and Editor of the Telegraph & Argus	Ev w110
53	University of Manchester	Ev w111
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56	The Prison Reform Trust	Ev w116
57	NHS North Lincolnshire and North East Lincolnshire Care Trust Plus	Ev w117
58	University of Leicester	Ev w117
59	The Kent Messenger Group	Ev w121

60	NHS Bassetlaw and NHS Doncaster	Ev w123
61	The Northern Ireland Civil Service Departments	Ev w125
62	The Telegraph Media Group	Ev w128
63	Packet Newspapers	Ev w131
64	University of the Arts, London	Ev w132
65	The Royal Liverpool and Broadgreen University Hospitals NHS Trust	Ev w136
66	Campaign Against Arms Trade	Ev w140
67	Cranfield University	Ev w144
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69	31 Colleges in the University of Cambridge	Ev w150
70	Index on Censorship	Ev w151
71	Liberty	Ev w155
72	Newsquest Somerset	Ev w159
73	Request Initiative	Ev w160
74	The Society of Editors	Ev w165
75	The Press newspaper in York	Ev w166
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78	University of Sheffield	Ev w177
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80	Andrew Montford	Ev w179
81	Gary Shipsey	Ev w181
82	Oxford Health NHS Foundation Trust	Ev w184
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84	Greg Muttitt	Ev w186
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86	John Cross	Ev w194
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96	Public and Commercial Services Union (PCS)	Ev w215
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98	Patricia David	Ev w222
99	John Davies	Ev w222
100	Ron Hughes	Ev w222
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102	Avril T Jackson	Ev w223
103	Ian Benson	Ev w223
104	Paul Conroy, Practice Manager, Mersea Island Medical Practice	Ev w229



105	Tristan Lane	Ev w229
106	Michael Clarkson and Pam Clarkson	Ev w229
107	The Association of Colleges	Ev w230
108	Joe and Celia Kelly	Ev w230
109	Susanna Rees	Ev w230
110	Public Concern at Work	Ev w232
111	Jan Savage	Ev w232
112	Alistair P Sloan	Ev w232
113	Rt Hon Tony Blair	Ev w233
114	Colchester Borough Council	Ev w233

## List of unprinted evidence

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The following written evidence has been reported to the House, but to save printing costs has not been printed and copies have been placed in the House of Commons Library, where they may be inspected by Members. Other copies are in the Parliamentary Archives ([www.parliament.uk/archives](http://www.parliament.uk/archives)), and are available to the public for inspection. Requests for inspection should be addressed to The Parliamentary Archives, Houses of Parliament, London SW1A 0PW (tel. 020 7219 3074; email [archives@parliament.uk](mailto:archives@parliament.uk)). Opening hours are from 9.30 am to 5.00 pm on Mondays to Fridays.

Jonathan Alltimes

## List of Reports from the Committee during the current Parliament

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The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

### Session 2010–12

First Report	Revised Sentencing Guideline: Assault	HC 637
Second Report	Appointment of the Chair of the Judicial Appointments Commission	HC 770
Third Report	Government's proposed reform of legal aid	HC 681-I (Cm 8111)
Fourth Report	Appointment of the Prisons and Probation Ombudsman for England and Wales	HC 1022
Fifth Report	Appointment of HM Chief Inspector of Probation	HC 1021
Sixth Report	Operation of the Family Courts	HC 518-I (Cm 8189)
Seventh Report	Draft sentencing guidelines: drugs and burglary	HC 1211
Eighth Report	The role of the Probation Service	HC 519-I (Cm 8176)
Ninth Report	Referral fees and the theft of personal data: evidence from the Information Commissioner	HC 1473 (Cm 8240)
Tenth Report	The proposed abolition of the Youth Justice Board	HC 1547 (Cm 8257)
Eleventh Report	Joint Enterprise	HC 1597 (HC 1901)
Twelfth Report	Presumption of Death	HC 1663 (Cm 8377)
First Special Report	Joint Enterprise: Government Response to the Committee's Eleventh Report of Session 2010–12	HC 1901