Post–legislative scrutiny of the Freedom of Information Act 2000

First Report of Session 2012–13

Volume II

Oral and written evidence

Additional written evidence is contained in Volume III, available on the Committee website at www.parliament.uk/justicecttee

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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 Committee is one of the departmental select committees, the powers of which are set out in House of Commons Standing Orders, principally in SO No 152. These are available on the internet via www.parliament.uk.

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The Reports and evidence of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee (including press notices) are on the internet at www.parliament.uk/justicctee. A list of Reports of the Committee in the present Parliament is at the back of this volume.

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.

Committee staff

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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## Witnesses

### Tuesday 21 February 2012

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

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

### 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

**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)

### Wednesday 14 March 2012

**Christopher Graham**, Information Commissioner, and **Graham Smith**, Deputy Information Commissioner and Director of Freedom of Information, Information Commissioner’s Office

### Tuesday 27 March 2012

**Lord Hennessy of Nympsfield** and **Lord O’Donnell of Clapham GCB**

**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

### Tuesday 17 April 2012

**Rt Hon Jack Straw MP**

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

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

Wednesday 16 May 2012

Rt Hon Dominic Grieve QC MP, Attorney-General

Rt Hon Lord McNally, Minister of State, Ministry of Justice, and Rt Hon Francis Maude MP, Minister for the Cabinet Office and Paymaster General
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Jonathan Alltimes
Chair: A very warm welcome to you, Mr Frankel, Ms Runswick and Mr Skene. Mr Frankel, you and I have been exchanging evidence across tables on this issue for a very long time — virtually from the beginning — and we are very glad to see you again today as we begin our review of how the Freedom of Information Act 2000 has worked, partly in the light of the Government’s own post-legislative assessment. It is obviously our task to see not only whether it has worked but whether the Government are right in their assessment. I ask Mr Brine to open our questions.

Q1 Steve Brine: Good morning. Thank you for coming here today. I start with Mr Frankel, but by all means others may answer. Mr Frankel, your organisation was set up in 1984, so you have been campaigning for this for a long time; it is some 20 years since its implementation, and you must have been very pleased when it happened. In your view, were the objectives of the Freedom of Information Act realistic, and to what extent have they been met?

Maurice Frankel: They were realistic, and we are on the way to meeting them. Even though we have been here for five years, these are still relatively early days. We have got to the point at which public authorities know that they can no longer refuse at whim, simply because it is inconvenient for them, to release the information and disclose what they want to. They know that they have to go through particular tests. The public interest test in the Act, which bites on about two thirds of the exemptions, actually works in quite an effective way, but it is slow. The slowness and the time lag is a problem, but the Act has been very helpful. It has provided a lot of important information to people who would not have had that information before.

Q2 Steve Brine: Is it a key question to start off with, so could I ask the other two witnesses to comment? Alexandra Runswick: I broadly agree with Maurice that the Government are certainly considerably more open and transparent than they were before the Freedom of Information Act. As he said, it has released important information.

Alex Skene: I would agree with what everyone has said so far.

Chair: May I say that it is necessary to speak up quite a lot in this room because of the acoustics?

Alexandra Runswick: There are still challenges in implementing the culture of freedom of information rather than only the Freedom of Information Act. It is something that will take a considerable time. It is about changing the mindset from it being something where information should be kept “private unless” to a culture where it should be made “public unless”. It is a difficult journey, and we have not yet completed it, but it is one with which other countries that have freedom of information regimes for considerably longer are also struggling.

Alex Skene: Very helpful. I would agree with what everyone has said so far.

Chair: To bring you back to what the Home Secretary said in the House when introducing the Bill at Second Reading, he said: “It is possible to make parts of a freedom of information regime self-defeating. We want to ensure that that does not happen here...I think that my hon. Friend the Member for Blyth Valley”, to whom he referred at the time, “said that when he went to Australia he was told rather cynically by officials there that they had two devices for getting round what they thought was over-elaborate freedom of information legislation. One was to put documents on a trolley and wheel it into the Cabinet room... as though they had been sprinkled with holy water. The second device was to make extensive use of post-it notes. That is a way of undermining the accountability of Ministers and I do not want it repeated here.”

Has it been repeated here or would we know? Maurice Frankel: I think that Jack Straw was being more sophisticated in his analysis of how the Act could be circumvented than was necessary. It is much easier than that to cause requesters unnecessary problems. It is much easier to cite exemptions that do not stand up — and that the authorities’ own FOI practitioners tell the authorities do not stand up — in the knowledge that it will be months or perhaps years before they are finally overturned if people persist. It is not necessary to go down the post-it note route. We have our own version of post-it notes. Whitehall introduced a policy of destroying e-mails after three
months unless they have been specifically selected for permanent preservation. That was introduced a few months before the FOI Act came into force, and it is Whitehall’s more sophisticated version of a post-it note policy. Jack Straw was possibly looking at the pre-electronic version of those techniques.

**Q4 Steve Brine:** There has been a lot of talk about the start of this inquiry, about which there is understandable public interest. Tomorrow, for instance, there will be a debate in Parliament on risk registers, which is very relevant. There is a lot of talk about whether this has led to sensible, good government or not.

I shall give another quote, which I cannot resist, from Tony Blair’s autobiography. He was the Prime Minister who ultimately put this Act through Parliament. He wrote: “Freedom of Information. Three harmless words. I look at those words as I write them, and feel like shaking my head till it drops off my shoulders. You idiot. You naive, foolish, irresponsible nincompoop.” *Hansard* will enjoy that one. He continued: “There is really no description of stupidity, no matter how vivid, that is adequate. I quake at the imbecility of it.”

This is the Prime Minister who put that piece of legislation on the statute book. Honestly, as someone who campaigned for it, what did you think when you read that?

**Maurice Frankel:** I was dismayed; I was utterly dismayed at that comment, but there is a history to Tony Blair’s lack of enthusiasm for freedom of information. He was extremely enthusiastic before he became Prime Minister. He gave a very impressive talk on the subject at our annual awards, and he impressed everybody.

There are three sections in his memoirs on freedom of information. Two of them appear to describe his realisation of the practical impact of freedom of information and appear to have been written in the light of experience, but one was written before the Act came into force. In that, he said that he regrets attacking the Conservatives for what he calls Tory sleaze before the election; little did he realise, he said, that Labour would have its own skeletons in the cupboard and that they would be just as “repulsive”—his word. He then went on to say what the skeletons were. One of them was the Ecclestone affair in which it was alleged that Labour had talked to Bernie Ecclestone about accepting another donation in return for exempting Formula 1 motor racing from the tobacco ban. What happened is that the late introduction of FOI meant that the papers on that did not come out until after Tony Blair had left office, but it is clear from that passage in his memoirs that he was anticipating the effect of FOI in making it more difficult for him or perhaps any Government to conceal things when they went wrong or when they had their own skeletons in the cupboard. That conditions what he says about reproaching himself for introducing the Act.

**Q5 Steve Brine:** Finally, do the other witnesses think that the Act has improved the quality of public debate?

**Alexandra Runswick:** It depends what you mean by that. I would say that it has improved the quality on the basis that the public have more access to information and therefore can debate things more equally and more meaningfully. However, that does not mean that it does not make things difficult for the public authority concerned; of course it does. Freedom of information is difficult for public authorities, because some information that they would rather was kept private cannot be. I know from my own experience in the area of London where I live that a lot has come out about the local authority as a result of FOI requests, and there are public debates that we would not have had if it had not been for FOI. So I would say, yes, it has improved the quality of public debate.

**Alex Skene:** FOI is about getting facts out of public authorities. If you have the facts, you can have evidence-based policy making rather than politics-based policy making. Having the facts to hand means that you can also challenge the public authorities about why they have gone down a certain route. The Act is very effective in allowing the local populous to have a say and to influence local government in the areas in which they live, and also central Government.

**Q6 Chair:** To clarify things, is it the role of your organisation to provide a facility for people who want to use freedom of information to pursue a specific issue—perhaps a local one or one that affects a particular group of people? Is that right?

**Alex Skene:** Yes, that is right. WhatDoTheyKnow allows people to make FOI requests easily. It has almost turbocharged the Act. The Act was pretty much restricted to journalists who used it in its first days. Research done by the UCL Constitution Unit shows that members of the public are now more aware of it. They come to our website because we make it easy for them to find the public authority that is applicable to where they live, or central Government, and we help them to phrase the questions in an easy way so that they can get the information that they are after.

**Q7 Mr Llwyd:** Good morning. Do you believe that the appropriate limits on time and costs spent on an FOI request are too long, too short or somewhere near the right level?

**Maurice Frankel:** It 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.

Q8 Mr Llwyd: We have a similar example in Westminster. Members of Parliament are sometimes told that they will not get a response because it would be at a disproportionate cost. Would your expert advice, in terms of keeping it short and simple, be to put in two or three requests rather than one? I guess that is probably the way forward, is it not?

Maurice Frankel: 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 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. Unless the authority is helpful in responding and guiding you through the problems, you may come up against one obstacle after another.

Q9 Mr Llwyd: There are not many local authorities who are willing to guide requesters, are there?

Maurice Frankel: They are under a statutory obligation to provide advice and assistance, but too often they just say, “If you narrow your request, you might have a better chance.” The statutory code of practice says that they should suggest what information would be available within the cost limit or suggest how they might go about narrowing the request so that they get at least part of what they are asking for.

Q10 Mr Llwyd: Do your colleagues have anything to add?

Alex Skene: 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 me everything you’ve got on this subject.” Much of that kind of cost could be defrayed if the documents were proactively published on the website to begin with rather than keeping them locked in a cupboard. There is especially so for those authorities that have really good document management systems and good websites. The more they publish, the less they have to spend on responding to FOI requests, and the less likely people are to hit the £450 or £600 limit.

Q11 Mr Llwyd: On the other side of the coin are specious or vexatious requests. Leeds city council told us that it has received a number of requests about ghost sightings and paranormal activity in its buildings. Should that kind of thing be dealt with so that authorities are not wasting their time?

Maurice Frankel: I have no problem with trying to prevent such requests being made. The people asking those questions are idiotic, really. I hesitate to say that they are made by idiots, but they are idiotic requests.

Q12 Chair: There is not a category of idiotic.

Maurice Frankel: There is no such category. The problem is that, once you create such a category, lots of people who are not idiots may be considered to be idiots by the public authorities, and it is the same with frivolous requests. That is the reason for my hesitation. At the end of the day, although I regret each time that I see such requests being made, it is not those requests that are causing the authorities a problem. As for requests about zombies and ghosts—

Q13 Mr Llwyd: Alien sightings and so on.

Maurice Frankel: Yes. On the whole, I doubt that it is taking public authorities any time at all to answer those requests. They are silly requests, but I doubt whether they are time-consuming.

Mr Llwyd: That does not surprise me.

Q14 Chair: Are they not rather easy to answer? “There are no documents on this matter.”

Maurice Frankel: Exactly. If you want, you may first send an e-mail just to the ghost investigation officer, if you have one, but the whole process will take only a couple of minutes, I would have thought.

Q15 Mr Llwyd: I do not know, but I presume that the people who make such requests are serial requesters on nonsense subjects. Should they be identified so that people can then say, “Here we go again. We’ve got AB asking a silly question again”? You will know that in court there is such a thing as a vexatious litigant, and after so many attempts at wasting court time he or she will effectively be outlawed from coming to court without the leave of the court to do so. I am considering something of that sort, by analogy.

Maurice Frankel: At the moment, the authority can refuse a vexatious request but not a vexatious requester. I believe that that is the right approach, because 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.” I am not at all sure that the people who make requests about ghosts are making hundreds of requests; they may be entertaining themselves at public expense once, and not being persistent.

Alex Skene: The ghost story came from Haunted magazine. It was made up by members of the press.

Q16 Chair: Does that add to its validity in any way?

Alex Skene: Maybe not, but 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 say, “Do you want to”—

Q17 Chair: To use taxpayers’ money on it.

Alex Skene: It is something like that. You could almost extend it to things like homeopathy, which is believed by many people to work. You could also ask...
whether that is a valuable use of public money. I agree that vexatious requests—the ones that cause most problems—are made by people who are trying to pursue a complaint or a vendetta with a particular council that has not been resolved through other means. It is those requests that should be ignored and they are allowed to be ignored under section 14 if they are vexatious. I think authorities should ignore more of those types of requests.

Alex Skene: FOI requests too, would be very wary about creating a new category of frivolous requests. 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. We need to be wary of creating new categories of exemptions, yet we should obviously be supporting the existing ones for vexatious requests.

Q18 Mr Llwyd: I know that my next question probably will not affect the authoritative tone of seekers after truth such as Haunted, but what would be the effect of routine fee charging on this issue?

Alex Skene: I think it would be devastating. It will prevent some of FOI requests from being made at all. 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.

Q19 Nick de Bois: Do you know what the total cost of FOI requests is for typical boroughs or Government Departments? Do you think that it might change the public’s opinion if they knew what the taxpayer was funding?

Alex Skene: There has not been that much research on that.

Q20 Nick de Bois: Do we need an FOI request to find out?

Alex Skene: You would have to ask, yes. There have been various estimates. For instance, NHS foundation trusts say that FOI requests cost them £40 million a year. At the same time, the budget is about £700 billion a year, so it is about 0.1% of the total spend. ¹

Q21 Nick de Bois: Mr Franklin, is there a danger that it could change the public’s perception?

¹ Note by witness: “£259bn” rather than “£700bn” for total spending of NHS Foundation Trusts “£30m” rather than £40m” for their estimated FOI costs. The overall statement relating to FOI being around 0.1% of the total NHSFT spending was correctly calculated and quoted, thus the main point of my answer remains accurate.

Maurice Frankel: It might, but you would also need to factor in the savings of FOI requests in deterring authorities from spending of the kind that they used to undertake previously. 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.

Q22 Nick de Bois: In fairness to boroughs, they now have to publish—regardless—expenditure of more than £500, which I think is an excellent move that encourages that as well.

Maurice Frankel: I agree, but, if you look at the way some of them publish them, it is incomprehensible without making an FOI request to find out what the money is being spent on.

Nick de Bois: It is tricky. I agree. That is a fair point.

Q23 Mr Buckland: I return to the point made by Mr Skene about proactive publication; in fact it develops what Maurice Frankel said about the impenetrability of some of these documents. Some of them emerge in tiny type and are very difficult to read, even for people without spectacles. What needs to be done, if anything, to improve proactive publication? Does there need to be regulation, do we need more intervention, or should there be a growth of good practice?

Alex Skene: There has to be the right culture. Some of the written responses, such as those from the NHS Business Services Authority, say they do not have a problem with it; they like it and think that proactive publication is the way forward as it saves them money. They do not have to spend money on responding to FOI requests; they can say, “Look on our website and use the tools to download the data that you want.” This culture is built into those public authorities. It needs to be extended to other public authorities to ensure that the transparency agenda is embedded in their culture, but I do not know how that can be done.

Q24 Mr Buckland: Do you think that the Government’s transparency agenda is helping this process?

Alex Skene: I think that it is setting it on its way and lots of good data has been released, which is starting to create economic benefit for those who are using it and making people aware of such things as spending. That is a start; it will need to be pushed out to everybody else, but it is setting a good example.

Q25 Mr Buckland: Can I turn to the practicalities of the 20-day limit? Looking at the 2010 figures issued by the Government, it seems that, although the guidelines suggest that that limit should be exceeded only if there are exceptionally complex cases, 17% of all requests were extended beyond that limit, and for
5% of those no reason was given. Do you think that the 20-day limit is appropriate? Do you think that more needs to be done on enforceability about the time taken for internal reviews and the reviews that are required, which are often given as the reason for further delay?

**Maurice Frankel:** There should be statutory time limits. We should not have open-ended extensions for public interest, and we need a statutory time limit for internal review. Perhaps we need more emphatic intervention by the Information Commissioner on people who are being deliberately obstructive. Only yesterday I was sent a response that somebody received from the Royal Borough of Kingston upon Thames. A request had been made on 5 October and it was answered on 16 February. The answer was, “We cannot provide this information because it would exceed the cost limit.” That took four months to refuse on cost grounds. That seems to me to be obstructive. You can say things like that only if you believe that you face no repercussions for doing so. We need more active intervention to deal with that type of inappropriate response.

**Alex Skene:** On this subject, one of the biggest complaints that we get from users of our website is about delays to requests. We do not get it from people in Scotland, as they have statutory limits in their legislation for internal reviews, and they do not have the public interest test extension. The time limits seem to work okay in Scotland, and there seems to be a good culture there for responding to FOI requests.

**Q26** Mr Buckland: Is it the same 20-day limit there?  
**Alex Skene:** They have a 20-day limit, but they cannot extend it for the public interest test, and internal reviews have to be done within a set limit.

**Q27** Chair: The range of bodies that they deal with is more limited, is it not?  
**Alex Skene:** Yes, in terms of the functions carried out in Scotland, apart from the central Government ones carried out here and things like local authorities, they do not have the same issue with delays in responses.

**Q28** Mr Buckland: Is there a mechanism for any further extension in Scotland? We know about the public interest one, but in an exceptionally complex case—we understand that there will be such cases—should there not be some discretion for public authorities, so long as they explain why they are extending?

**Maurice Frankel:** There is no extension at all under the Freedom of Information (Scotland) Act 2002; it is a straightforward 20-working day time limit.

**Q29** Mr Buckland: Is that right? Should there not be some leeway, so long as the public authority explains clearly why?

**Maurice Frankel:** I see a case for 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. 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.

**Q30** Ben Gummer: May I turn to the question of enforcement? I have some personal experience of this—not against me, I hasten to add. Before the election, as a candidate, I used FOI quite effectively for campaigning. One of the ways that I did so was trying to find a consultant’s spend from my local PCT. I happen to know that the PCT had spent a large amount of money with a well-known American consultant, so I popped in an FOI request asking how much money it had spent generically on consultants. Back came the answer but without the name of the consultant. I knew from a mole that it had used him, so I put back another FOI asking how much it had spent with this particular consultant. There was a hurried reply, admitting that it had spent £450,000. It said that that had not been revealed in the first answer because the money had been accounted for incorrectly—an interesting answer in itself. Had I not known that, I would not have known that it had committed an offence under section 77.

This is a long way of asking whether there has there been any academic research, by blind testing, on the number of instances where concealment has not been prosecuted under section 77.

**Maurice Frankel:** As far as I know, nothing has been prosecuted under section 77.

**Ben Gummer:** Really?

**Maurice Frankel:** I am not aware of any such case. That is partly because of the six-month time limit that exists for prosecutions. In other words, if the alleged offence comes to light more than six months after it has been committed, there is nothing that the Information Commissioner can do about it anyway because no proceedings can then be brought. We believe that that time limit should be extended to two or three years, as it has been in many other pieces of legislation, to allow that to happen. It is a difficult provision to apply anyway, because you have to prove deliberate intent to conceal rather than simply saying that the papers went missing or that somebody did not make an adequate search through oversight.

**Q31** Ben Gummer: Do you have an anecdotal feel for how much concealment there has been?

**Alex Skene:** We do get complaints. We see complaints going through saying, “Well, I know this.” Later, an apology comes back to say, “I’m sorry; yes, we have the information.” The end result is that they have got the information that they were after, but you have to have someone on the inside. That is why there has been a lack of increase in whistleblowing and things like that, which has led to fewer revelations due to FOI requests being refused. Coming back to section 77, only the Information Commissioner can start the investigation, but for him to be in a position to do that...
you will already be at least several months down the line, especially with the public interest test extension and the internal review time which is unlimited. It could be at least a year before you get to the Information Commissioner, by which time there will be no chance of anything happening under section 77.

Maurice Frankel: One has to look also at the terms of section 77. It is not just the time limit. Its terms are not as effective in dealing with the kind of problem that you have just described as they might be, because you would have to show that the authority had deliberately destroyed, concealed, altered or amended the record. In the case that you describe, you would have to show that it had concealed the record. When an authority knows that it has the record, and if there is no physical act of concealment—in other words, somebody has taken it home so that the people putting the package together to respond just cannot find it—it is not entirely clear to me that an offence will have been committed because of the precise terms of section 77. There may be a case for looking at the terms of section 77 itself.

Q32 Ben Gummer: Revealing only a partial truth is not an offence under section 77.

Maurice Frankel: No, absolutely not. Nor is deliberately making an exemption claim that you know has no foundation whatever. Had the authority said, “We have this information about the spend on this contractor, but it is prejudicial to their commercial interests”, even if it was a completely fabricated excuse, it probably would not be an offence. It is quite a tricky area, and one has to look at the boundaries between a genuine ill-judged use of an exemption and a deliberate use of an exemption to suppress information.

Q33 Ben Gummer: What would be the impact of changing the terms and duration of that section?

Maurice Frankel: The objective should be to deal with deliberate obstruction. That might need something slightly more fine-tuned than section 77 as presently drafted.

Chair: Mr Turner, you have a supplementary question.

Q34 Karl Turner: The question may have been answered, Sir Alan. Under section 77, the time limit is six months, but with judicial review proceedings the statutory time limit is three months. I was a little surprised, Mr Frankel, to hear you say that it should be extended, but under further examination by my friend Mr Gummer you have probably explained the point. It is more about the terms than the actual time limit. Is that the position? Are the terms of section 77 more of a difficulty than the time limit?

Maurice Frankel: No; I would say they are both issues. The six-month limit rules out a lot of cases, even if there has been a deliberate interference with the record in order to prevent its disclosure. However much you refine the terms, if you still have to bring a prosecution within six months, section 77 will be ineffective.

Q35 Karl Turner: It seems very extreme that you should advocate extending the time limit to two years. It is a long time.

Maurice Frankel: We regularly have requests which take more than six months before the authority provides the initial response. We also have requests that take more than six months before they complete an internal review. If you put those together, you have more than a year before the applicant is in a position to go to the Information Commissioner. If you have a six-month limit on bringing a prosecution, that authority is guaranteed safe from prosecution.

Q36 Chair: When does the clock start?

Maurice Frankel: It starts when the offence is committed. If the offence is committed on the day the request is received and they then sit on that request for six months, they are safe. That is why the period should be extended. I say that it should be within six months of the offence coming to light but within two or three years of it being committed. It should still be within a period of the offence coming to light so that it cannot be used in an oppressive way to come back and surprise somebody. The purpose of the six-month period initially is to stop authorities pursuing individuals years after the offence.

Q37 Mr Buckland: The reason why section 77 has a six-month time limit is that it is a summary-only offence. All magistrates court offences have this time limit, and there is a strong public interest in that. Would it not be simpler to change the law so that it became an either-way offence? That would avoid the problem of having differing time limits for different types of summary offence. Would you support such a change in the law?

Maurice Frankel: I would support that. However, I observe that in our written evidence we provided about a dozen examples of where the Government have changed the six-month limit—in relation to the building regulations and all kinds of other regulations—specifically because they accept that it is difficult to obtain evidence of the offence within the period.

Q38 Ben Gummer: I have a final question on enforcement. On the matter of the commissioner publishing the names of public authorities that regularly miss the 20-day limit, has it had a noticeable impact upon the celerity with which authorities answer questions?

Alex Skene: We have seen it work for a short period. It can work and improve consistently, but we have seen them issue directions but with no improvement—for example, the Cabinet Office—and there are still persistent delays with some requests.

Q39 Ben Gummer: Would greater transparency aid how quickly authorities answer questions? Is there anything else that you would want from public authorities, in the sense of transparency about their own FOI handling?

Alex Skene: Yes. In our written evidence, we say that, rather than just central Government publishing their statistics, it should be extended more to local
authorities, perhaps through the code of practice under section 45, which is on how people should operate the way in which they implement the Act in practice. Publishing statistics will help because it will at least highlight to their peers—other public authorities—where they are doing well and where they are not doing so well. We frequently get requests from public authorities. For example, on our website you can classify results, saying, for instance, if you have received information and whether it was successful or not. We do get requests where they think that overdue status has been unfairly placed on the requests, and we are happy to change that for them because the requester got it wrong. However, there are public authorities that are very keen on wanting to meet the deadlines, and they want that to be more visible.

Q40 Ben Gummer: On the international context, which was touched upon by Mr Buckland, where are we now in comparison with other comparable democracies in our freedom of information regime? Maurice Frankel: An international survey was published in November last year that just looked at the statutory provisions and not how they were implemented, which rated the UK 27th out of 95 countries with FOI laws. So we are doing reasonably well; we are certainly ahead of Australia, Canada, the United States and Sweden in terms of statutory provisions. Some of the more recent Acts and statutory provisions were more highly rated, but that did not take account of how well they work in practice.

Q41 Ben Gummer: Earlier, you described our journey in terms of the culture of freedom of information. Is our ranking a function of that journey and how long countries have been on it or of the wording of the Freedom of Information Act itself? Maurice Frankel: That ranking is to do with the wording of the Act and not with how well it operates in practice.

Q42 Ben Gummer: What would your assessment be of the practicalities compared with our international peers? Maurice Frankel: It does quite well in practice as well. I thought that the methodology of that research was not as sensitive as it might have been to what the user’s experience would be as opposed to what the Act said. You sometimes get laws that are extremely good on paper that are not implemented or enforced properly. Alex Skene: The software that underlies the website is being internationalised. There is a huge demand for it in other countries. It is now in five new countries, and it will be extended to 10 more. People see that the model in the UK works pretty well because people can submit FOI requests and get information back by e-mail, whereas in a lot of countries, such as the US, the responses tend to be on paper. That makes it hard for that information to be reused and available for others to see. With each of our requests, about 20 people read it, so it is quite good value for money in terms of how we present the information and how people use FOI. It gets embedded in the public culture.

Maurice Frankel: On the use made of the Act, you will hear from the Constitution Unit later, and its research talks about there being little impact on public understanding or trust. I believe that the Act is more effective than that study suggests, but one has to look at it in the context of the methodology that has been used. The methodology gives great weight to the content of newspaper reports of FOI disclosures but not to the impact of an FOI disclosure on the requester, who might find that a matter on which they urgently needed to learn something had been substantially clarified, or that other people may read about it without it happening via the press—that is, through the requester’s website, a commentator or an advice body, which is in a much better position to advise people on the use of the Act.

I note from the evidence that you have received a submission from a John Campbell, an academic, about the use that he made of the Act to throw light on the Home Office or immigration service use of language assessment to test whether an asylum seeker comes from the country that he claims to come from. It was a very impressive piece of research and has shown the weaknesses and failure of the Home Office to comply with the proper procedures for using that technique of analysis. However, that has not been reported in the press. For everybody working in the immigration field—and I am sure that it will be on the agenda of the Home Affairs Select Committee at some time—it will throw great light on how the Government take and reach decisions. It is not in the press and not in that survey that has been done, but it is another mechanism whereby the public’s understanding is improved. There are real effects and real benefits that are not being caught by some pieces of research.

Q43 Nick de Bois: I am conscious of the time constraints, Sir Alan, so I shall try to stick to one question. May I start with you, Mr Frankel? With more public services contracting out, and more social enterprises and private enterprises coming in, from health services to local authorities, how can the Government ensure that the public do not lose their right to receive information because of the current exclusions on commercial sensitivity and so forth? I would look for ways to encourage more transparency.

Maurice Frankel: The solution is either to designate the contractor as a public authority in its own right where it undertakes substantial work, which the Act permits, or, in effect—I would make this an amendment to the Freedom of Information Act itself—to say that, where an authority has a contract with a contractor, the information that the contractor holds in relation to that contract is deemed to be held on behalf of the authority. That makes it accessible via the authority.

Q44 Nick de Bois: May I clarify this? Although I agree in principle with what you are trying to achieve, if a contract comes up for a rebid, that provider could put himself at a commercial disadvantage through that information being accessible in the public domain for competitors. How easy will it be to contain that to some degree?
Maurice Frankel: The Act already has an exemption for prejudice to commercial interests and trade secrets, which is intended to prevent that happening unless it is in the public interest. One relies on that to prevent the contractor being unfairly disadvantaged. However, you should also bear in mind that the sitting contractor has a fantastic advantage over someone who is trying to get into that market, because it knows exactly what the authority wants. That is an obstacle to new entrants. I do not see any problem in putting that in place.

Alexandra Runswick: May I add to what Maurice has said? There are real democratic accountability problems with services being contracted out, and freedom of information is really important in that respect, so we would want to ensure—what Maurice suggests would be a good way of doing it—that private contractors carrying out public functions were still covered by the Freedom of Information Act.

Q45 Nick de Bois: We have had some submissions from universities, with concerns over the application of the FOI for pre-publication of research material, understandably. Are the current protections inadequate in your experience, and, if so, is the additional exemption in this area justified? Do they have a point?

Maurice Frankel: In part they are comparing the UK Act with the Scottish Act, which has an exemption for research interests, but one reason why the Scottish Act has it is this. It has an exemption for information intended for future publication, and a 12-week cap on how long that information can be withheld, but the UK Act has an exemption with no cap on information that is intended to be published in future. When the 12-week limit was put into the Scottish Bill, the universities said that it would leave them very exposed and they would need an additional exemption for research, which was not the case in the UK. One has to look carefully at the circumstances that they are positing and whether the exemption for personal information will protect them, and whether the exemptions for information supplied in confidence and information intended for future publication will not supply it. It may be that that package of exemptions deals with those situations.

Q46 Nick de Bois: Given that more and more emphasis is being placed on less public funding of universities and more private funding, should they have the same onus put on them for FOI periods as public bodies that are fully publicly funded? There is one university that has as little as 14.5% of its funding coming from the state.

Maurice Frankel: I would be reluctant to interfere with the definitions of universities. However, to the extent that they are regarded as being in the public sector, and one that gets 14% of its funding from the state is in the public sector, I think they should be subject to—

Q47 Nick de Bois: I believe that a European definition suggests that it should be 50% of the funding to qualify as a public sector body.

Maurice Frankel: As far as I know, that is not the current criterion here, and it was not the criterion used when deciding what was in the public sector when the schedule to the Act was put together.

Q48 Nick de Bois: To get clarity, even though it is at the low level of 14.5%, which is an extreme, I grant you, are you saying that it is still fair to make it subject to FOI?

Maurice Frankel: Yes.

Q49 Nick de Bois: Mr Skene, do you agree with that?

Alex Skene: Universities control access to professions because they are degree-awarding bodies, and I know that the Government are looking to extend it to even more private providers. As for the way in which they can operate in other countries, they are covered as well in the legislation under their FOI Acts. I think the definition of whether a university is a public authority or not is the right one at the moment. If there was an intention to cover only information relating to degrees or something like that, that would be another approach but not one that we would particularly recommend.

Q50 Chair: There are a couple of related points. One area of concern among universities is research involving animal testing because of the security issues for staff working in that field, given the nature of some of the attacks that have taken place. Are you satisfied that the legislation in its present form can properly be used to protect staff in those situations—names and addresses, details of institutions, buildings and locations and so on?

Maurice Frankel: Yes. Whenever you see a request involving animal testing going to the commissioner, you see very clearly that the identities of the researchers are protected under the exemption for personal information and also under section 38, which deals with danger to the health and safety of an individual. In addition, the staff have protection under a statutory secrecy provision in the legislation on animal testing; if anything, that provides more protection than is necessary because it protects anonymised information as well as identifiable information.

Q51 Yasmin Qureshi: On animal testing, would information such as how many dogs were killed or experimented upon be the kind of information that could be requested, or is that not permissible?

Maurice Frankel: Yes. Whenever you see a request involving animal testing going to the commissioner, you see very clearly that the identities of the researchers are protected under the exemption for personal information and also under section 38, which deals with danger to the health and safety of an individual. In addition, the staff have protection under a statutory secrecy provision in the legislation on animal testing; if anything, that provides more protection than is necessary because it protects anonymised information as well as identifiable information.
particular procedure carried out on them and the extent to which they are protected from unnecessary suffering.

Q52 Yasmin Qureshi: I asked it very quickly, but that is what I was talking about. Is that the kind of information for which they ask on suffering and how they are kept? That is what you say they are asking for. That is given, is it?

Maurice Frankel: At the moment, that is a battleground. In fact, it is often withheld because there is a statutory protection in the Animal (Scientific Procedures) Act 1986 that prohibits the disclosure of information supplied to the Home Office by the body doing the research. In cases where the information has been requested in anonymised form, it would not identify where the research had been done or who had done it, but you would at least have some insight into whether proper procedures had been followed. I know that the British Union for the Abolition of Vivisection has submitted evidence to the Committee; I have read the cases that it mentions and I have a lot of sympathy for the argument that it makes. That organisation is entirely lawful in the way it goes about things; it does not get involved in attacks on scientists.

Q53 Chair: The context for this battle was direct physical attack and intimidation of people working in this field. That resulted in another piece of legislation, which interacts with the FOI legislation. Another thing that Parliament probably did not have in mind when passing the legislation was the ease that new technology would bring to access under freedom of information. We were probably all thinking of writing a letter to a public body demanding release of information rather than a company being able, almost automatically, to submit e-mails to every relevant authority in the land asking for datasets of information—or, indeed, the facility that Mr Skene’s organisation provides. I think particularly of the former, which is a business activity. A company is getting for free public datasets and research. Is that a problem or not?

Alex Skene: Media companies are private companies and they use FOI for private gain in selling newspapers. The transparency agenda is also about creating economic benefit from information that has been released. They want to encourage people to use this information. It has already been paid for once at the time it is created; it is paid for out of our public taxes, because we fund the public bodies that are generating and collecting the information. There is a lot to be gained by having that wealth of information out in the public domain so that people can use it and create economic benefit for the general public. If, for example, the datasets are not being released voluntarily under the provisions of the Protection of Freedoms Bill, you have to resort to the Freedom of Information Act to ask for particular datasets.

Q54 Chair: Does anyone else have any thoughts on that?

Maurice Frankel: The Government took a deliberate decision not to distinguish between commercial requesters and other requesters when the Act was introduced. There is that kind of distinction with charges in the United States and in some other countries, where commercial users pay more than the press or public interest organisations or ordinary requesters. I do not have an objection to that, but you have to look carefully at who will be classed as a commercial requester. In the United States there have been constant battles, on the lines suggested by Alex, in which newspapers and authors are classed as commercial requesters, and voluntary organisations that ask a membership fee and put information in a newsletter that they send to members become commercial requesters. So you have to be very careful about those sorts of decisions following on.

Q55 Steve Brine: Surely anyone could become an individual requester. You get around it, do you not?

Maurice Frankel: Yes, exactly. That is another reason why it is very easy to circumvent that type of provision. There was sense in the Government’s decision to say that they do not care who is making the request but will treat everybody in the same way.

Q56 Steve Brine: Was it just realism in their decision? They recognised the limitations on it.

Maurice Frankel: Yes.

Alexandra Runswick: On the technology point, it is very positive that technology means that it is now very easy for individuals to ask for information from public authorities. I also think that public authorities can make better use of technology to respond to FOI requests more cheaply and cost-effectively than they do, both in the proactive publication of data and in how they reply to requests or provide data that is in a more searchable and user-friendly manner.

Chair: Thank you very much. Ms Runswick, Mr Frankel and Mr Skene. We are very grateful to you for your help. We now have some more witnesses to talk with this morning.

Examination of Witnesses

Witnesses: Professor Robert Hazell CBE, Director, UCL Constitution Unit, Dr Ben Worthy, Senior Researcher, UCL Constitution Unit, and Jim Amos, Honorary Senior Research Associate, UCL Constitution Unit, gave evidence.

Chair: Professor Hazell, Mr Amos and Dr Worthy, I welcome you. We have already received evidence from you, for which we are very grateful, and we have seen your earlier work on the subject. Indeed, Mr Hazell and I have exchanged evidence on it over many years as it has developed. We are grateful for your help this morning. Mr Brine will start the questions.

Q57 Steve Brine: Welcome, gentlemen, and thank you very much for your time. I shall start with Dr
Worthy and Mr Amos, if I may. It will become clear why. By all means set out what you understand them to have been, but to what extent were the objectives of the Act realistic, and have they been met?

Dr Worthy: To what extent were they realistic and have they been met? I think there were some very wide aims for freedom of information. We calculated that there were six key aims. 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.

We concluded that, at both local and central Government level, freedom of information has met its core aims. It 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. On the other aims, things are a little more complex, partly because decision making, participation and trust are influenced by so many factors other than freedom of information that in some senses it is very difficult to isolate them.

Professor Hazell: We identified the six objectives that Dr Worthy has referred to by looking at ministerial speeches, Green and White Papers and the debates during the passage of the Bill through Parliament, so we are pretty confident that those were the main objectives of the Government at the time that FOI was introduced 10 years ago. As Dr Worthy said, we could find no strong evidence that any of the four secondary objectives have been met. I do not think that that was a failure of FOI, because it did succeed strongly in its two primary objectives. It has increased transparency and openness, and it has increased Government accountability. The fact that it failed in the more ambitious secondary objectives, as your question perhaps implies, now tells us that FOI was oversold at the time.

Q58 Steve Brine: We shall come back to that, Mr Amos, what is your view?

Jim Amos: There is not a lot that I can add, except to say that there is a distinction between the objectives for the Act set by Parliament and Ministers and the objectives that were perceived by the people who operate it. You may want to come back to that.

Q59 Steve Brine: Yes, we certainly will, Professor Hazell, you are a professor of British politics and government. You rightly assume that I was getting at something else—whether it was oversold. In your opinion, were the objectives of the Act ever political?

Professor Hazell: Not in a party political sense.

Q60 Steve Brine: You will have read the comments that the former Prime Minister made in his autobiography, saying what he now feels about the Act. When asked whether the FOI Act was preventing proper discussion between Ministers and civil servants, he referred to risk registers and gave as an example some of the contingency planning that may be going on within Government at the moment in the case of a nuclear Iran. He said that it would not be desirable for that to be out in the public domain because of the impact that it might have on the politics of the region. I wonder whether the witnesses might comment on FOI and risk registers.

Chair: We are now into the chilling effect. We have started, so we shall finish.

Professor Hazell: Forgive me, but would you like us to deal with it properly?

Chair: Yes.

Professor Hazell: One has to have a sense of proportion about the chilling effect. We looked very hard for evidence of the chilling effect in all the interviews that we conducted, in a big two-year research project looking at the impact of FOI on Whitehall and in a related project commissioned by the Information Commissioner. We interviewed, in total, about 100 Ministers and middle and senior-ranking officials. What they told us, in sum, was that, yes, there has been a deterioration in the quality of record keeping in Whitehall, but that, no, on the whole FOI has not been the cause of that.
What have been the causes? In Whitehall Departments, departmental registries barely exist now and the record-keeping function has been greatly downgraded because of successive staff and resourcing cuts. There have also been huge changes in how government works. When I was a civil servant in Whitehall 25 years ago, most work was done on paper; I had a departmental file, and minutes and drafts were put on the file in chronological order; it was properly indexed, and it went to the registry. That was the record. You will all know that, in the modern office world, a huge amount is now done by e-mail, and it has been very difficult for electronic record keeping to catch up and maintain a departmental record in the same effective way as when we had paper files.

A third factor is the sheer pressure of business in modern government. Whereas when I worked as a civil servant I got a response from the Minister in a minute from his private office, that response may now come in the form of a phone call or even a text. Those are all much more important reasons why the quality of record keeping has declined.

We asked every person we interviewed whether FOI had contributed to a chilling effect, and the majority said that it had not. We then pressed those who thought that it might have done, asking, “Has it changed the way that you work? Has it changed the way that your colleagues work?” We found very little direct evidence that FOI has contributed to a diminution of the record.

I turn to the Cabinet and Cabinet discussions. The relatively few Cabinet Ministers that were interviewed were genuinely apprehensive that they risked losing the safe space in which Ministers could discuss and argue in private, without the risk of those discussions being made public. But, again, we must be very careful to distinguish what is a fear of FOI and what is a fear of leaks, because the two are often conflated when they are completely different.

It is well known that in the Government led by John Major there was a group of Cabinet colleagues who, on the question of Europe, were not wholly loyal. My understanding is that, in that Cabinet, it was extremely difficult, if not impossible, to have any discussion about Europe because of the fear of leaks. There was no FOI Act in force then, but, in effect, that Cabinet did not have a safe space in which it could discuss a very important set of policy issues.

Q63 Chair: If we can go a little further with that, when you were questioning civil servants and Cabinet Ministers, to what extent were they describing the situation as it was, bearing in mind that it is a fluid situation in which the grasp or reach of freedom of information gets extended—in many cases in a welcome way? For example, on the risk register point raised by Mr Brine, one of the consequences of discussions this week could be that risk registers will, in practice, become exempted from freedom of information. Were people talking about the situation as it was or the situation as it was developing?

Professor Hazell: From memory, we did this project and the interviews in 2008–09.

Dr Worthy: One of the difficulties is that it was just after the attempt to access the Iraq Cabinet minutes. That may have been a problem in that it was at the forefront of a lot of people’s minds when they were discussing the matter.

Q64 Chair: Risk registers is an interesting example that we will need to consider in the course of our inquiry of a type of activity within Government. I have heard it described as testing policies to destruction in the analysis of them, but Ministers might argue that it would be done differently, on paper at least, if it were known that it was going to be published.

Professor Hazell: Yes. I can only say that almost all of the officials whom we quizzed very hard about this—I shall turn to Dr Worthy in a moment, because he conducted the interviews—said that it had not changed their behaviour in any significant way, and it certainly had not affected the quality of the advice that they put to Ministers in submissions or the way that they couched their submissions. We should remember that in Whitehall, every evening, hundreds of submissions go up to Ministers, and the statistical likelihood of any one of them being the subject of an FOI request is probably a fraction of 1%. Most of the time, it is not anywhere near the forefront of an official’s mind.

Q65 Chair: Would that change if freedom of information got further into the system?

Professor Hazell: Because of the exemption provisions, most of which are subject to a public interest test, almost all information and advice could be the subject of an FOI request. I am simply saying that, for the vast majority of the time, it is not; most of the officials know that it is most unlikely to be requested. When they are working on something that is very sensitive and they are politically astute, they might think that somebody might ask to see it under FOI. However, coming to our written submission, one of our iron laws is that the Government still hold most of the cards. If they do not want to disclose, they can play things long. They can refuse a request, contest the matter with the Information Commissioner and appeal to the Information Tribunal; typically, months and in some cases years may elapse before the information is forced out of the Government if they do not want to disclose and are determined to play it long.

Q66 Chair: They still have section 53 at their disposal.

Professor Hazell: Yes, indeed.

Dr Worthy: May I add a few reflections on the chilling effect? It is still a very powerful myth, and there is a great deal of anecdote about it. The interview with Gus O’Donnell was very interesting in that, when the interviewer pressed him on whether he ever indulged in what is called fudging, he said, “No.”

Q67 Mr Llwyd: He would, wouldn’t he?

Dr Worthy: Another important point about this discussion on the chilling effect is that it presupposes that the politics of decisions are actually on paper. You
will know far better than I do that, for much of the time, the politics are never on paper. That was something that came out very strongly at local government level as well. At both local and central Government level, we found that officials were much more likely to be concerned about the consequences of not having a record if their boss or somebody external to them audited them than they were about having to alter a record in some way. It was the fear of not having a record that they thought would get them into much more trouble. They felt that an audit trail was a protection for them rather than something that could be potentially damaging.

Q68 Mr Llwyd: May I ask about the practical operation of the Act? Do you believe that the appropriate limits for cost and time spent on requests are about right, too long or too short? What would you say to that?

Dr Worthy: One of the difficulties when we spoke to local government—Jim can help me out with this—is that, when we asked whether they abided by the appropriate limit, most authorities said that they wouldn’t mind doing anything that was not “manifestly unreasonable”. In a study by the Scottish Executive, in which they calculated a sample of requests, it found that lots of the requests that authorities processed went far beyond the limits anyway. The difficulty with having a limit is whether authorities and public bodies actually go along with it or not. As I say, most local authorities are happy to process anything that is not unreasonable or huge.

Jim Amos: I was given a very interesting example by a senior financial officer. The local authority had a request for expenditure on taxis. It was a terribly difficult job, and he said that they could have refused it because it was far over the limit because there was no separate recording of taxis; someone had to go through all the expense claims to separate out taxis. Anyhow, they did it—they did not turn it down—and then they thought, “Actually, it would be quite useful” because it can be so damaging to their morale to be reasonable and helpful to people who are unreasonable. I did a study some years ago for the Health and Safety Executive, and we found a case of someone having been an hour on the phone trying to be helpful and reasonable to someone who was being extremely difficult. My advice to people in that situation is that they should immediately tell the person to transfer the call to a more senior person, who would deal with it professionally and robustly by saying, “Please put this in writing. This is the address. If you want advice and assistance, this is what you do.” The staff should not go on, because it can be so damaging to their morale to be reasonable and helpful to people who are not.

Q70 Mr Llwyd: I take it that there is no evidence available to show that some individuals routinely go around asking somewhat unreasonable or silly questions.

Jim Amos: Almost everyone that I have met in local authorities would say that one or two individuals use FOI as another tool to beat them with, having exhausted every other possibility. The concern that comes up is that staff are mostly very helpful; they are trained for it and expect to be helpful and reasonable to people who are unreasonable. I did a study some years ago for the Health and Safety Executive, and we found a case of someone having been an hour on the phone trying to be helpful and reasonable to someone who was being extremely difficult. My advice to people in that situation is that they should immediately tell the person to transfer the call to a more senior person, who would deal with it professionally and robustly by saying, “Please put this in writing. This is the address. If you want advice and assistance, this is what you do.” The staff should not go on, because it can be so damaging to their morale to be reasonable and helpful to people who are not.

Q71 Mr Llwyd: In effect, with regard to the notion of trying to weed these people out—for example, by charging fees—there is no need for any of that, is there?

Jim Amos: I think that robust professionalism should deal with it in a few minutes.

Q72 Chair: Are not some of the more absurd requests answerable by saying that the local authority has no records or documents relating to the matter?

Jim Amos: That is then very easy to answer. You just say that. Sometimes, it needs to go to a more experienced person, more confident of the law and more confident of their support within management, who will deal with it professionally, be happy to stand by it and keep a record of what they have done.

Q73 Mr Llwyd: I think what Sir Alan is saying is that, with regard to alien sightings, for example, it is not going to take a lot of time to deal with such a request.

Jim Amos: Quite.

Professor Hazell: In part, your question is what the burden is of FOI on public authorities. It is quite important, in terms of the big picture, to look at the statistics. They show that in the first seven years of FOI the volume of requests to central Government has almost doubled and to local government it has gone...
up much faster; it has more than trebled. There has been a significant increase in demand. One way of curbing that demand, if the Government were ever minded to do so, would be to introduce an application fee. You probably know that that was done in Ireland, and the effect on the level of demand in the immediately subsequent years was quite marked. Demand in Ireland has subsequently come back to the pre-fees level, so it does not grant public authorities lasting relief. However, as you asked whether fees should be charged, I believe that the Government and this Committee should both recognise that charging fees is one way of managing overall demand.

**Dr Worthy:** We do not agree 100% on this. I began some work in Ireland, and we found after only a few interviews that one of the difficulties with fees in any FOI system, as Maurice pointed out earlier, 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. However, the officials seemed to believe that fees had an effect on two particular groups—the media and businesses. Businesses are quite a strong cause for concern at local level.

**Q74 Chair:** It is almost counter-intuitive, is it not? You would have expected it to have more effect on the general public than on commercial organisations.

**Dr Worthy:** If the secret plan with fees is to stop requesters that are politically uncomfortable, then Ireland is perhaps a good example of why it would not work. They have had their very own expenses crisis, having exposed collusion between former Prime Ministers and bankers. If it is a secret wish, it does not work.

**Q75 Mr Llwyd:** As a matter of interest, what level of fees are they charging in Ireland?

**Professor Hazell:** I think it is €15.

**Jim Amos:** If I remember rightly, in Canada there was a report some years ago—they then charged fees—and 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. There is another way. If the issue is the burden rather than the number of requests, the question of how efficiently and effectively authorities handle requests is a big factor. In local government, we have seen the average cost coming down markedly, but there is a big gap between those who handle requests effectively, taking between one and six hours each, and those who handle them much less effectively, who take more than 10 hours. If the knowledge of the better performing ones was spread more widely, it would make an enormous difference to the burden.

**Dr Worthy:** One study of transparency policies in the US coined a really nice phrase about the costs. The difficulty is that people, particularly those at the top of organisations, see transparency as something with concentrated costs and dispersed benefits. As Maurice pointed out, 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, and of course the large attempt to cost FOI in 2006–07 came in for a lot of criticism for the way it went about doing it.

**Q76 Mr Llwyd:** In a way, it would also be a cost-benefit analysis, would it not?

**Dr Worthy:** Yes.

**Q77 Mr Llwyd:** This may be too broad a question, but I shall put it anyway, and you can decide whether or not to respond. Putting aside the question of fees, what is the driver for the rather dramatic increase in FOI applications? Will there be a plateau effect at some point, and, if so, when do you anticipate it happening?

**Professor Hazell:** 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. I must look to see whether I can find the statistics on when it plateaus, asking Dr Worthy to speak while I do so.

**Dr Worthy:** We asked that specific question of local government by conducting interviews across 16 local authorities. I clarify that by saying that when you are studying FOI it is frustratingly difficult to get access to requesters and to speak to them about their motivation, partly because of the way in which the Act is designed. However, we concluded that, as Robert said, there was a growing general awareness of its existence, just as there was with data protection in the late 1980s. Of course, media stories such as MPs’ expenses really put FOI on the map, but at the local level there was some very interesting use of FOI that was quite high profile in people’s local regional press.

One of the interesting things that many officers told us was 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. I shall make Maurice very happy now, because I support something that he said towards the end of his evidence. He said that a lot of requests are for things that are important to the person asking rather than being about wider political matters, and this may be one reason why FOI is increasing so quickly at local level. People find it a useful tool to help in their everyday lives. I am talking here about allotments,
parking and the quality of roads—things that sometimes go under the radar. It is not necessarily how politicians saw FOI working, but this is where the Act is having an impact on people’s lives. All politics is local in a sense, and a lot of FOI requests are local and about micro-politics.

Q78 Mr Llwyd: Professor Hazell, did you want to add anything about the plateau?

Professor Hazell: Forgive me, but there is not a clear pattern. I have the figures only for Australia and Canada. In Australia, in the first year, there were about 19,000 requests in total; 12 years later, in 1994–95, the number had doubled to 37,000. In the first year in Canada, they had only about 1,500 requests, but in year 12 the number had multiplied by eight. Australia introduced fees after three or four years, and that is possibly one reason why the level of demand did not climb so steeply.

Mr Llwyd: I am grateful.

Q79 Karl Turner: I am conscious of the time, Sir Alan, so I shall be as quick as I can. How does freedom of information in England and Wales compare with similar jurisdictions? Why do you think it might be that we dragged our feet in introducing the statutory right to access information?

Professor Hazell: In terms of the history, we were marching in step with Australia, Canada and New Zealand, our close Westminster cousins, until the very end of the 1970s. Under the Labour Government led by Jim Callaghan, during the years of the Lib-Lab pact, which you, Sir Alan, will remember well, a private Member’s Bill was introduced by a Liberal Member. That Bill, which was officially supported by the Government under the pact, would have introduced FOI. When the Callaghan Government fell in 1979, that Bill fell with it. We know there was a change of Government. The new Government were led by Mrs Thatcher, and she was resolutely against FOI, and it went into cold storage for the whole of her Administration. It began to surface more strongly in the early 1990s under the Government led by John Major, in particular with the code of practice on access to Government information, which, in effect, was a non-statutory freedom of information code.

Q80 Karl Turner: How do we compare with similar jurisdictions?

Professor Hazell: We compare very well. I have written an article, which I can submit to the Committee, in which I took just one issue—namely, access to policy advice and the internal deliberations of Government. In it, I made quite a detailed comparison with the situation in Australia and Canada. The application of the exemption provisions and how they have been interpreted by the Information Commissioner led me to conclude that we have a rather more generous regime than those two countries.

Q81 Karl Turner: We have heard something about the Irish model and fee charging. What lessons should be learned from that, if any?

Professor Hazell: As I have indicated, one pretty basic lesson, if the Government were ever minded to try to limit the overall volume of FOI requests, is to look at what happened in Ireland after they introduced fees. From memory, the total number of requests reduced by almost half.

Dr Worthy: I point to evidence given to you by the Centre for Public Scrutiny. When talking about the evolution of FOI, you should remember that at the local level there has been all sorts of legislation that has allowed access to information, documents and meetings since the 1960s, if not before.

Q82 Chair: That includes a private Member’s Bill by Mrs Thatcher, if one goes back far enough.

Dr Worthy: There has been a build-up there. In terms of comparison, Maurice cited a league table of how FOI performs. Professor Hazell and I wrote an article that took a look at a few of the other Westminster countries and compared them, and we are happy to send you a copy. One of the difficulties with comparing laws and statistics is that it does not get to the cultural differences.

One of the things that came out from local and central Government was the importance of leadership. We can discuss parts of the laws and how they work, and whether they can be amended, but one of the crucial drivers for whether FOI works is senior buy-in in public authorities and also nationally. Two Prime Ministers have been very supportive of FOI, and officers at local level told us that that makes a difference, particularly having somebody senior in your local authority who is prepared to act. For example, one even chased up people who were not cooperating on the telephone. Leadership is absolutely crucial to making freedom of information work. The second factor is probably the use of technology and the merger between open data and FOI that will be extremely important.

Q83 Yasmin Qureshi: We have received evidence that some organisations, such as public authorities or hospitals and so on, quite often receive FOI requests for information, but, if the person had done their research and homework about the company or organisation, they would have found the information, and they are just being lazy. From your analysis, is there any truth in that argument?

Jim Amos: There are complaints about that, but, if someone is asking for information that is on our website and they want us to sort it out for them, they have a very simple answer to that. “Here you are. This is the link. Help yourself.” If the person does not have those skills, they might direct them to a local library, for example. They complain about something that they do not have to do. I have referred before to officials going to great pains to be more helpful than they need to be. In a way it is very good to be that helpful, but, if you are being helpful and then you complain about the work that you do, the balance is not quite right.

Q84 Chair: It sounds like the experience of Members of Parliament as well.
Dr Worthy: Paul Gibbons, FOI Man, who submitted evidence to you, is a blogger who has a 10-point piece of guidance for requesters. That is an extraordinarily good starting point for helping requesters to understand how to go about things. Ultimately, 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.

Q85 Nick de Bois: Mr Amos, do you think that the public may lose out in their search for freedom of information as more and more public services are contracted out by local authorities, or even by the Department of Health, where we may have more providers in the health service? Do you think that they will lose out in having access to freedom of information that otherwise, exclusively under the public sector, they would have been able to get?

Jim Amos: I certainly think that they will. It is a big risk, and I heard the matter being discussed a little with Maurice earlier. I would not claim expertise in this area or be able to give you a considered answer, so I will ask my colleagues to help.

Dr Worthy: The matter was often discussed in my interviews at local government level. One of the concerns is that they could write into contracts a provision to comply with FOI. When we asked the question, 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.

Q86 Nick de Bois: As I understand it—I am happy to be corrected—if public money has been spent with an organisation, there seems to be no obligation on that organisation to provide information. Is that correct, or would we have to change the Act to effect that, as wider provision goes out? Let us not forget that is not only private companies; it includes social enterprises, who may not have the resources.

Dr Worthy: It is all about who holds the information. The local authorities were telling us that, from now on, they wish to do this; the matter was raised in the point about what will happen in future with lots of authorities contracting out. The concern is that, even if they put it into the contract and the contract was huge, and the company was only not playing ball on this one issue, they would not necessarily imperil it. That was the question about the future. Of course, Scotland went into this in great detail, and they first raised the possibility of extending FOI coverage by changing the Act to cover private companies.

Q87 Nick de Bois: They have not done so, have they?

Dr Worthy: No.

Q88 Nick de Bois: Would you like to add anything, Professor Hazell?

Professor Hazell: Only that it is quite a laborious process, involving extensive consultation, before the Act can be extended to new bodies. I do not know the reasons why Scotland has not extended it, but that may be one factor.

Q89 Mr Buckland: The use of e-mail makes it very easy for a requester to make an application. I wonder what your thoughts are on whether the current framework builds in enough consideration for the ease with which someone can make a request as opposed to the difficulty that authorities sometimes have in responding.

Professor Hazell: Implicitly, we are coming back to the whole issue of fees. My hunch is that most requesters have little or no idea what burden an FOI request places on public authorities. We know that it is very difficult properly to estimate the costs, but from the little work that has been done we have a guesstimate that FOI requests, on average, might take some six or seven hours each, so that is a day’s work. If anything, my guess is that that is an underestimate, because the comparative figures from the two other countries that I have mentioned—Australia and Canada—are much higher than that.

In Australia, after 12 years of operation—we must remember this includes the equivalent of our Data Protection Act requests, which are much simpler to respond to—they reckon that the average time spent per request is 12 hours. In Canada, under their Access to Information Act, they reckon that the average time per request is about 50 hours.

However one tries to calculate the cost, and knowing that the answer is not in any way precise, FOI requests carry a burden. Under the present system—and I think my colleagues can help me here—very few authorities at the bottom of a response letter say to the requester either, “It has taken us x hours to process your request”, or, “In our authority in the last year it has taken us, on average, x hours per request.” There is almost no public education of requesters to explain to them that FOI requests carry a cost.

Dr Worthy: The unit has put together a short piece looking at some of the different ways in which costs are calculated. If you want to find out how much an FOI request costs, you can make an FOI request to Rotherham metropolitan borough council, because it now tells you how much each request has cost it. One of the difficulties is the variability of the estimates, as Robert pointed out. We had a few converted into sterling: in England it was calculated at £293; in Australia it was calculated as an average of £748 per request—some interesting calculations there; and in Scotland, where they recently did an exercise, it was £189. It is very difficult to pin it down, and they all use different methods to calculate it, but we are happy to pass it on to the Committee.

Q90 Mr Buckland: It may help. You may have heard some of the previous answers about proactive publication and the fact that it could yield a cost saving. What are your thoughts on that, and do you have any data to assist us?
**Jim Amos:** We probably have differences of view on that. I would want to defend our estimates as being reasonable around the six-hour level when compared to other countries. There are reasons why they are very expensive, for instance, in Canada. If you build a big bureaucratic process around it, it becomes expensive. Early on in our annual surveys of local government, one of the first responses that we got showed somebody with an average of two hours and someone with an average of 50, for example. I 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 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.

**Q91 Mr Buckland:** I have read the paper that you submitted to the Committee; you have done some research into the identity of requesters. I know that you are doing your best, having asked various authorities and then come up with estimates, and I accept that it will be difficult, but your central Government percentages, for example, come to about 78% of the total. I know why that is; that is difficult. Why is it important that more work should be done on identifying the type of requester? How will that assist in improving policy in this area?

**Dr Worthy:** Lots of FOI officers say over and over again that, the more they know about why somebody wants the information, in many cases the better they can process it. When we have used FOI as a research tool, we cram the e-mail full of information to make it as easy as possible. From our point of view, we would love to know more about the requester, because they are the key group. They are the key to the impact of all of these objectives, whether it is transparency, trust or helping them to engage in their political process, and we would love to know much more about what they think and why they use it. We have touched on it only lightly, but is often used as part of wider campaigns. For instance, to cover the requests that people make. What was the result?

**Dr Worthy:** The students were very surprised when looking at the disclosure logs at the sheer focus of some of the requests. They are often very technical or focused on a particular issue. When you read the requests, you often see that the requester has a great deal of expert knowledge in that area—sometimes to such an extent that I cannot understand it as it is so focused on one issue. My students were absolutely astounded because they expected it all to be about the big political issues, but it is being used as a precision tool.

One important thing to add about FOI, particularly at the local level, is that it is not often used on its own but is often used as part of wider campaigns. For instance, about a planning application, the FOI is just one tool they will employ, along with contacting the local MP, writing to the press and finding information through other routes. One of the reasons it is difficult to assess the impact of FOI is that it is often caught up in lots of other mechanisms. It is more like a good spade than a sword.

**Q92 Mr Buckland:** Hitting on the point that you made earlier about the difficulty of getting information—and we have talked about datalogs—do you think that, if we had a more systematic mechanism to collect the types of requests being made, it would help enlighten public bodies as to what could be proactively published, or are you saying that there are too many focused applications to make it plausible?

**Professor Hazell:** Public bodies are sensible about this. Dr Worthy can tell you about an exercise that he tried with his students, getting them to predict what kinds of things public authorities ought to publish in order to cover the requests that people make. What was the result?

**Dr Worthy:** The students were very surprised when looking at the disclosure logs at the sheer focus of some of the requests. They are often very technical or focused on a particular issue. When you read the requests, you often see that the requester has a great deal of expert knowledge in that area—sometimes to such an extent that I cannot understand it as it is so focused on one issue. My students were absolutely astounded because they expected it all to be about the big political issues, but it is being used as a precision tool.

One important thing to add about FOI, particularly at the local level, is that it is not often used on its own but is often used as part of wider campaigns. For instance, about a planning application, the FOI is just one tool they will employ, along with contacting the local MP, writing to the press and finding information through other routes. One of the reasons it is difficult to assess the impact of FOI is that it is often caught up in lots of other mechanisms. It is more like a good spade than a sword.
Jim Amos: I give the example of a local authority that knew it was going to engage in a major construction project that would disrupt traffic. It knew that, so it decided to put up on its website all the information that it had on the work, and that turned out to be a very good thing to do. In that rather specialised situation, it is possible to predict things that are going to cause concern, and, rather than face lots of difficult questions, everything can be put on the website.

Chair: Thank you very much, Professor Hazell, Dr Worthy and Mr Amos; we are really grateful for your very helpful evidence this morning. This is going to be a most interesting inquiry. Thank you.
Tuesday 28 February 2012

Members present:
Sir Alan Beith (Chair)
Steve Brine
Mr Robert Buckland
Jeremy Corbyn
Nick de Bois
Ben Gummer
Mr Elfyn Llwyd
Yasmin Qureshi
Elizabeth Truss
Karl Turner

Examination of Witnesses

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

Chair: I welcome Professor Diamond, Dr Eastwood and Professor McMillan. We are very glad to have you with us to give evidence in our work on the Freedom of Information Act 2000.

I declare an interest because it could arise in relation to one matter. I am a member of the court of Newcastle university. Does anyone else have an interest to declare? As no one does, I call on Mr de Bois.

Q93 Nick de Bois: Good morning, gentlemen. I start with a general question to all three of you. Perhaps, Professor Diamond, you would like to answer first. To what extent do you think the Freedom of Information Act has made universities more accountable and more transparent? As a preamble to that, do you think that universities previously had a culture of secrecy?

Professor Diamond: May I say that that is entirely the right question to start with? I have to say, very clearly, that universities do not—repeat, they do not—have a culture of secrecy, and they never did. Indeed, over the last few years universities have been driving forward an open access agenda to make the results of published work, for example, freely available to anyone who is interested. It would be quite impossible to delineate the difference between changing culture with regard to transparency and the Freedom of Information Act; the Act, in itself, has not had an impact on the overall culture of transparency that universities had and which was developing over the last few years. I would add that universities have taken the Freedom of Information Act incredibly seriously, and I am sure that we will discuss that as we move forward this morning.

Dr Eastwood: I concur with Professor Diamond. The whole point of universities is to publish their findings and results, and education. It was never the case, and is not the case, that there is any cultural super-sleuth involved. FOI has just formalised the process by which the information is made available.

Q94 Nick de Bois: Thank you. Is there anything that you would like to add, Professor McMillan?

Professor McMillan: Only that the FOI has to be seen in the context of quite a big jigsaw of approaches to transparency within universities. We are publishing data all the time, through HESA and, increasingly, things like the national student survey, and we will be doing more for students coming up this summer. There are lots of things developing around the culture.

Q95 Nick de Bois: I do not want to draw any conclusions from what you say to my next question, Professor Diamond, but, given that you say you have a culture of openness and transparency, has the Act had no effect on decision making within universities? If you think it has had an effect, would you characterise it as positive—that is, building on what you were doing—or has it been a negative effect?

Professor Diamond: I shall be absolutely honest and say that there has been a positive effect, particularly with regard to record keeping.

Q96 Nick de Bois: It has improved.

Professor Diamond: Record keeping and record management have improved; we have been very much helped by the Joint Information Systems Committee, which works for all universities in enabling that to happen. On the other hand, most universities would say that there has sometimes been a negative impact in the way that complex and difficult decisions are minuted in meetings, because of the expectation of freedom of information requests potentially coming later.

Q97 Nick de Bois: Would you like to add anything, Dr Eastwood?

Dr Eastwood: I have nothing further to say.

Chair: Do not feel obliged, if you do not have anything, to add to what has been said.

Q98 Nick de Bois: Just to explore that, would you say that there is any concern that some people have perhaps recorded less information in anticipation of it, or is everything in the garden rosy? Dr Eastwood, perhaps you would answer that question.

Dr Eastwood: We are probably more careful about how we minute meetings and therefore more guarded, because things might be disclosed later. The decision itself, of course, is minut ed properly and fully, but, just as policy might be developed by central Government Departments as it would be in a university, there are concerns about releasing it prematurely.
Q99 Nick de Bois: Following up on that on a more general point, do you think that the media’s quite extensive use of FOI has impacted upon the success of the Act’s objectives, which were about transparency and accountability? The media’s use of the Act puts it completely in the public domain at a new level. Dr Eastwood, do you have any comments on that?

Dr Eastwood: Most of the media inquiries that we have are fishing expeditions, with the media just looking to see whether there are stories there. Most of the time nothing happens afterwards as there is no story or no story concerning us, and we have not done anything differently because the media have asked questions. It takes us time to answer, but it is for them to decide what to make of it. As many as 20% of inquiries are journalists’ inquiries.

Professor McMillan: That is right. It is that broad fishing that is the problem, because there are often no problems at all with legitimate inquiries from the media. The problem is that, once you get into that fishing agenda, it creates a nervousness in the organisations.

Q100 Nick de Bois: How does that materialise? Is there a complaints process from within universities, saying, “Look, this is getting too much”, or is it just a nervousness but people get on with it and do it?

Professor McMillan: I think that we do. I cannot think of any great blocks of information that are intentionally held back. Ian is right that it is an increase in the carefulness with which things are recorded.

Q101 Nick de Bois: Professor Diamond, is there anything that you wish to add?

Professor Diamond: Simply this. With regard to the media, the problem people have is that a lot of the data require to be put in context, and one knows that things will potentially be reported out of context. One then has to spend time explaining the context. That is the problem.

Nick de Bois: I cannot possibly think what you are suggesting. Thank you very much.

Chair: We all have to deal with that.

Q102 Elizabeth Truss: Given the nature of the information that journalists and others are seeking, can you see a better way of doing this than using the request process—that is, more open sourcing and those kinds of things? A lot of data are now stored electronically. Is there not a better way of doing this than having people spending time answering complex requests?

Professor Diamond: There has been an increase in making things available, and I give the example of my own institution. Senior management expenses are all routinely placed on the web and are just available. That enables a pretty easy response to the question when it comes. Other than an increase in charging for media inquiries, it seems to me that one simply has to get on with it.

Dr Eastwood: Most institutions have press relations officers. Their job is to keep relations between the media and the institution on a good footing, and they usually do. In some senses FOI requests cut across that relationship, as they could be perceived to undermine the trust that has been built up.

Q103 Jeremy Corbyn: Has the Freedom of Information Act helped universities to make more public any commercial research contracts that they may get and the nature of the research that they are undertaking because of the confidence?

Professor McMillan: It will depend on the nature of those contracts and the stage in the relationship with the commercial organisations. It is fair to say that universities are very keen to advertise the work that they do with the commercial sector, and the Wilson review, which was published this morning, will be another way in which that can be reinforced. As long as the project is a success, then we will be as keen as anyone to put it out there—and we are.

Q104 Chair: That brings us to section 22—the provision under which research that is due to be published can be exempted. The Russell Group said in its written evidence to us that the exemption was insufficient in many cases and expectations from the Information Commissioner’s Office on how quickly research is published can be overly-optimistic. That compares with the Scottish protection for research, which is much broader. Would you like to amplify that point?

Dr Eastwood: The original exemption was designed to enable specific documents, intended for publication in draft form, not to be published until they were finalised—committee minutes and that nature of document. That is fine. Unfortunately, in England you cannot really use that exemption to protect research that is still going on. Raw data, hypotheses, other people’s views and so on about the research work cannot be defined as a document that may eventually be published. Indeed, it probably will not be published; raw data may not form part of the final research publication. To release it prematurely runs a high risk of the recipient getting the wrong end of the stick—drawing the wrong conclusion—because they do not know the context. They are not the researcher, and possibly not scientists, so it is quite risky in some ways to release that information, or, if you do release it, you have to spend a lot of time explaining it, qualifying it and contextualising it.

The current exemption does not work in the way that it is intended to work for documents such as drafts and minutes and so on; it 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-reviewed. Publishing bits of it prematurely runs the big risk of the recipient, the public, drawing the wrong conclusions.

Professor Diamond: It is also worth saying that 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. Increasingly, some of the most profound research in epidemiology and in many of the social sciences comes from what we call longitudinal data, where data are collected on the same individuals over a long period. Indeed, the UK is home to some of the richest national longitudinal data in the world. Those data sit, and one is never quite sure how the data will be used by the different analysts over a period of some decades. The individual data are available and could be misused if they were subject to freedom of information. There are some clear problems with section 22.

Q105 Chair: Would you give us some examples? What comes to my mind are forms of data that would probably be publicly available in any case—for example, longitudinal studies on public health matters such as levels of alcohol-related death or things like that, taken over a long period. It is rather harder to imagine what kind of data would need to be kept confidential over such long periods to enable the research to continue.

Professor Diamond: You simply would not know, for example, what the impact of someone’s educational level or things that happened during their schooling would be later in life until one had the later data. Assumptions based on the data at one time would not be valid at a later time. You could end up with premature results that would have a negative impact on people’s behaviour.

Q106 Chair: I wonder whether you would subsequently reflect on this question, because you still have not given a convincing example. The kind of data that you imply would be about education attainment on an aggregated basis; people might draw the wrong conclusions from it for the reasons that you have given, but that is part of legitimate academic debate, is it not?

Professor Diamond: I completely understand your point, and if you would like a more detailed response I shall be happy to give one.

Q107 Chair: Is this really a question of intellectual property? Not that there is anything wrong in that, but you are actually talking about the fact that somebody else can move in to use the data that have been selected and obtained, thereby profiting from their intellectual effort.

Professor Diamond: I would not say so in the examples that I have given. 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.

Q108 Chair: Is there any evidence at all that the climate of freedom of information provisions in England and Wales has led to research being moved elsewhere—even to Scotland, let alone to elsewhere?

Professor Diamond: I could not possibly comment. I do not think that there is an enormous amount of evidence of that. That is simply because there have not yet been that many freedom of information requests on research and because the Act is in its infancy. 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.

Q109 Mr Llwyd: Why do you believe that it is disproportionate to apply the same FOI scheme to central Government as is applied to universities?

Professor McMillan: The main thing is the mixed economy that effectively runs in higher education institutions, in terms of the level of public support and their interactivity with all kinds of bodies, whether they are private institutions, charities or overseas organisations. Putting a clear demarcation between each of those activities is very difficult indeed, and the type of data and the nature of those relationships are quite different from those in many of the organisations at which the Act was originally directed.

Q110 Mr Llwyd: The Russell Group has told us: “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.” Is there any evidence that FOI is damaging competition between the higher education bodies?

Dr Eastwood: I am not sure that there is currently any evidence because we are at the start of a possible increase in private providers. However, as the Russell Group said, there is a real risk that private providers could, via FOI, legitimately take information that has been developed by publicly funded organisations to use for their private gain. On the broader aspect of universities and FOI, it would be interesting to see whether the criteria that apply under schedule 1 to the Act would, if they were applied now, qualify universities. As far as I can see, the Act says that to be part of FOI the governing bodies must be appointed by the Crown or a Government Minister, but that is not the case for universities. Section 5 of the Act allows a university to be subject to FOI for its publicly funded work. The proposal that we are suggesting of an independent review of the scope of FOI for universities—because universities are both public and private at the same time; they are hybrid bodies—would keep a level playing field and protect commercially sensitive research that could go on and develop into something else. To have its IP protected would require the information, the data, not to be disclosed prematurely, and before proper protection had been gained.

Universities are not central public bodies and are not fully funded by any means. In fact, less than half of
28 February 2012  Professor Ian Diamond, Dr Rodney Eastwood and Professor Trevor J McMillan

our income at Imperial college is funded from public sources. It will generally be the case, as private tuition fees come in, that less than half of a university’s income will be from public sources. It is important that the scope of the Act is reviewed.

Professor McMillan: On the first part of your question, 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. So the first part has happened. What then happens to the information, and where it is passed to, is clearly something that we do not know. Increasingly, as FOI requests come in—for example, through websites rather than personal contact and so forth—identification of what might happen to the information will become increasingly difficult for us.

Q111 Mr Llwyd: Following on from what Dr Eastwood said, you make the point that universities are frequently less than 50% publicly funded. In fact, figures for the university of London show that it is 14.6% overall. I thought it a rather strange figure, but that is how the university says. How should universities go about determining what is subject to FOI and what is not?

Dr Eastwood: Their entire activities are subject to FOI at the moment, so we do not have to apply that criterion. Should it 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.

Professor Diamond: The grey area of part public, part private, is absolutely enormous.

Q112 Chair: It is not workable, is it?

Professor Diamond: One can imagine walking into a class of 100 students and trying to work out how many were paying fees and how many were on a public grant. It would be almost impossible. Although, in theory, in the case that you give of the university of London one could say that 14% of the requests might be on public funding, it would be almost impossible to work out which were public and which were private. The odd one would be absolutely clear, but the great majority would be in the middle grey area.

Q113 Mr Llwyd: You would not be impressed by the thought that perhaps cases of FOI should be confined to those activities of monitored bodies that were funded by the taxpayer.

Dr Eastwood: Fully funded by the taxpayer?

Mr Llwyd: Yes.

Dr Eastwood: It would make our life easier, but it would not necessarily be beneficial to public confidence in universities.

Professor Diamond: Going back to my original point in answer to Mr de Bois, universities are completely committed to transparency and openness. If it were the case that one wanted simply to have those institutions totally publicly funded, then universities would continue to be completely committed to transparency and openness and, let me be honest, to working with the media to make sure that that happened. As I said right at the beginning, there is no culture of secrecy and there would not be a culture of secrecy. I believe that over the last few years there has been a greater increase in transparency in public life generally, and universities want to be and are part of that.

Q114 Chair: I turn to an area of university research that excites controversy. It is procedures involving experiments with animals. Some universities believe that the Animals (Scientific Procedures) Act 1986 is not sufficient by itself and that the Freedom of Information Act needs more exemptions in this area. Would any of you like to speak on that?

Dr Eastwood: There has been a recent case, Sir Alan, to which you alluded in your declaration of interest, where there was a conflict between two Acts—one relating to the holding of certificates for animal use and one to FOI. Animal experimentation in universities is highly regulated, and a lot of data about it will be published through the Home Office. It is not secret and we do not want it to be secret; the information is available. However, there are people in the world who object strongly to animal experiments, and they will use any means available to get more information about the experiments and the people who are undertaking some of that experimentation. That is what causes the problem.

The Home Office requires information about licences to be kept confidential. In this recent case it came into conflict and, in the end, Newcastle university published some information. However, the Home Office declined to prosecute it 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.

Professor Diamond: It is my understanding that the UK already provides more information on animal research than many other countries. In my view, what we really need is a clear relationship between the ASPA and the FOI Act, because at the moment they seem to be somewhat in conflict.

Q115 Chair: Can we be clear? Are we talking about security-related issues for members of staff rather than the other kinds of protection for research that we were talking about earlier?

Professor Diamond: In that particular case, yes. All the same issues to do with the publication of early research results hold; it is a special case of something that we have already been talking about.

Q116 Chair: What is your view of what should be done, if anything?

Dr Eastwood: The current arrangements under ASPA are fine, but the Freedom of Information Act needs to recognise that some privileged information protects members of staff in their work.
Q117 Yasmin Qureshi: Good morning, gentlemen. I want to discuss with you the question of the appropriate limit and the requirement under section 12 that if carrying out a piece of FOI will take more than 18 hours you can apply for an exemption. We understand that, in 2010 and 2011, 28% of FOIs from universities were declined on the basis that they would take more than 18 hours. In your opinion, is the 18-hour time limit appropriate, too long or too short? Generally, what is your view on the limit?

Professor McMillan: The critical thing is not so much whether the time is right but what is allowed to be claimed as part of the time, especially when we move things such as research data, for example, going through the process of redacting information—we go back to medical studies again—if there was personal information that needed to be taken out. Currently that time is not allowed to be included, and it can be an enormous work load. It is the aspect of what is in there rather than the limit itself. I suspect that the limit is probably not too far out; it is long enough to give a sensible reply to most reasonable requests, while putting in a sensible limit for things that go over the top. It is what is in there that is critical.

Q118 Yasmin Qureshi: Apart from redacting the information, which you said could take time, do you think that other things should be included in the 18-hour time limit or, perhaps, should not be included? For example, some people suggest that reading the request might be time-consuming and that it should therefore be part of the 18 hours.

Professor McMillan: Again, it is the reading, the assessment, the collecting together of information. Going back to the research agenda, I know that that is not the only thing on the table, but it is one of the things that makes it different from many other organisations. A lot of research is collaborative, and it might be pulling in data from different places; it is collection, reading and interpretation. Some of the universities in the 1994 Group have raised the issue of having more time and, if possible, to have a dialogue with the person making the request in order to focus and reply better to the specific needs of the requester. A number of things could go in there.

Q119 Yasmin Qureshi: A point made to us by someone from the Constitution Unit is that sometimes the reason for delay in FOI requests being processed by local authorities, for example, and perhaps universities also, is that the appropriate level of person is not dealing with it. Normally, it is passed on to junior staff, who probably do not have the confidence of senior management and probably have to go through the hoops of going to senior management, whereas, if the request was processed by someone in senior management or someone in a senior position, it may be facilitated a lot more quickly. What do you say to that?

Professor Diamond: I cannot see that happening in any of the universities of Universities UK of which I have any knowledge. It is something that is taken very seriously. In my own institution, the person in charge is a member of the senior management team. At the institution where I was before, which was a non-departmental public body, the person in charge was again a member of the senior management team. FOI is taken very seriously, and all the issues around it are absolutely part of senior leadership.

Dr Eastwood: I absolutely concur.

Q120 Yasmin Qureshi: That leads me to my final question. Would you support routine fee-charging for FOI requests?

Professor Diamond: I am absolutely against routine fee-charging. I believe that we should be in a position where bona fide members of the public, who have proper requests on FOI, should not be in any way discouraged by cost. On the other hand, as I indicated earlier, I can see a case, with the media or someone who is going to make commercial gain from FOI requests, for a charge being made.

Professor McMillan: That is true. If it was a potential mechanism of stopping blanket FOI requests—for example, in our case, across the whole sector of 140 universities—then anything that would help would be useful. However, I agree with Ian that we do not want to put people off who have legitimate causes.

Q121 Elizabeth Truss: This may have been covered in your preliminary information, but do you know the total cost of FOI to universities? Could you make an estimate?

Professor Diamond: I would not like to do so, but I will happily reply in writing.

Q122 Elizabeth Truss: Would you like to see a regime where people, particularly those who frequently make FOI requests, are obliged to contribute to the cost?

Professor Diamond: I have some sympathy with that, so long as one has a way of ensuring that bona fide requesters are not discouraged from making fair requests by cost. However, as Professor McMillan noted, when one is getting the same request on a fishing trip across 140 institutions, that seems to me not to be a bona fide request to an individual institution. Then a cost could be put forward.

Q123 Elizabeth Truss: Is it not the case that individuals may sometimes be able to look up the information themselves and having a cost would make it more likely that they would undertake the work themselves by looking at the publicly available information from the university rather than getting someone else to do that research work for them?

Dr Eastwood: Possibly, although the level of charge likely to be incurred is so small that it would cost the university more to collect it than would be gained. It is probably counterproductive.

Q124 Elizabeth Truss: It may, however, dampen the level of requests.

Dr Eastwood: It may, yes.

Professor McMillan: Something came to mind as you were talking slightly earlier. I do not know the answer, but it would be interesting to know how many FOI requests are for information that is already readily available. In many respects, 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. Again, it might be an interesting piece of research for someone.

Q125 Elizabeth Truss: I wonder whether you would be able to provide an estimate of that for the Committee. Professor McMillan: I suspect we can try.

Professor McMillan: The process perhaps not, but elements of it certainly, such as the example of vexatious claims. 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. That, I guess, is one of the points of this sort of review, once it has been in place for a few years.

Professor McMillan: One reason why it was very good to have a review is that it is very difficult for the Information Commissioner’s office to take a view until it has some case law. Often, one is trying to prevent such case law in the first place. A review of the issues around the bureaucracy would be incredibly helpful.

Q126 Elizabeth Truss: That would be helpful. It strikes me that a lot of what universities do, or at least some of it, is paid-for research, sponsored by research councils, businesses or other institutions. You mention the cost of collecting money for FOI requests, but could that not be incorporated into the wider research activity?

Dr Eastwood: Yes, it could. We are not ruling it out, but, as I say, we do not want to discourage bona fide requesters. It is the serial requesters that are the problem.

Q127 Elizabeth Truss: How can these serial requesters be identified? Do you have any way of identifying them? Could it be introduced into the process?

Dr Eastwood: At the moment, it can be anonymous. There is no requirement for anyone to declare their true name.

Dr Eastwood: Certainly for some. If we get on to vexatious requests, if someone is making multiple requests designed to be slightly different so that they do not come under the current definition of vexatious requests, then yes, I suggest that we need to find a way to deter them from doing that.

Dr Eastwood: There may be, but we often get multiple requests from campaign groups. They are targeting someone—usually an individual at the university who is doing some work of which they do not approve. That individual is known. Their name is out there, but the campaigner’s name may be hidden behind a website.

Dr Eastwood: I have not thought about that; I do not necessarily want to answer now, but I am happy to answer in writing.

Q131 Elizabeth Truss: Professor McMillan, would you like to comment?

Professor McMillan: The process perhaps not, but elements of it certainly, such as the example of vexatious claims. 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. That, I guess, is one of the points of this sort of review, once it has been in place for a few years.

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Q132 Chair: Do you accept the principle that freedom of information is applicant-blind and that, regardless of who has requested the information, it can end up in the public domain—assuming that the applicant chooses to make it more widely available? The question of who the applicant is, apart from giving circumstantial evidence that a request might be vexatious or frivolous, is not particularly helpful to you, is it?

Dr Eastwood: Only if the applicant is part of a campaign that is targeting an individual, which does happen. It is quite frustrating not to know who is on the other side of the campaign—as in many walks of life.

Q133 Chair: We are obviously aware of the East Anglia case, but are there cases in your experience where, for example, you could say a particular academic or department has been deliberately and disruptively targeted with serial requests, whose purpose might be to make it impossible or difficult for the department to carry on with its work?

Dr Eastwood: That is certainly true. I do not want to give away personal details, but there was a particular line of research on a disease from which many people sadly suffer, and some work was done in the States that seemed to indicate that the cause of the illness had been found. Somebody in our institution repeated the work but could not find this cause and published a negative result. Immediately it came out, there was a series of FOI requests to this individual, asking about their work, their families and so on, each one being slightly different. The requests themselves could not be called vexatious, because the definition is about the request and not the requester. In the end, the work that we did was corroborated at other institutions, and the original work in the States has now been withdrawn. Our negative finding was proved, in the end, to be the correct one, but the person involved had to go through quite a lot of harassment from FOI requests on her work—to the extent that at one stage the person declined 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 because they did not
want to be exposed to even more harassment. It was not only FOI, but FOI was an element.

Q134 Chair: Were you able to use any of the procedures of the Act to abate this?
Dr Eastwood: No, it quite difficult to do so, and especially with the vexatious one, because each request was different, but it was reasonably clear that they were from the same source or campaign; it was not necessarily the same individual.

Q135 Chair: Is there any way that one could adapt the legislation to prevent it being used in what might be called deliberately intimidatory manners?
Dr Eastwood: One way would be for people to have to declare their true identity. That is a barrier in itself, because if you can hide behind anonymity it is always easier to do this sort of thing.
Chair: Thank you very much. We are very grateful to you for your evidence. We now have some further witnesses.

Examination of Witnesses

Witnesses: 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 Hencke, Senior Investigative Journalist for ExaroNews (on behalf of the National Union of Journalists, gave evidence.

Q136 Chair: Mr Hencke is a well-known journalist who makes use of the legislation, who is also here on behalf of the National Union of Journalists today. Mr Higgerson is from Trinity Mirror Regionals and is here on behalf of the Newspaper Society. Mr Wills is managing editor of the Evening Standard, The Independent and The Independent on Sunday. Mr Rosenbaum, from the BBC, is speaking not so much on behalf of the BBC but as a journalist.

Martin Rosenbaum: Absolutely in my capacity as a journalist, yes.
Chair: Welcome to you all. Mr Hencke and I go back quite a long way. Long before the days of freedom of information, he and I were jointly engaged in trying to prove—successfully in the end, thanks to his work—that the Government really did have a plan under which they were closing colleges, and it was not happening accidentally in a lot of different places. It would be interesting to speculate how freedom of information might have helped us had it been available then.

Q137 Yasmin Qureshi: Good morning, gentlemen. As you know, when the Bill was having its Second Reading in 1999, Jack Straw, then Home Secretary, said—and I am not going to go through the whole speech—that unnecessary secrecy in Government and public services undermines good governance and public administration. He also said that the legislation would help to deliver more accountable public services and that things would be much more open and proactive. The London Evening Standard said that the FOI Act has improved transparency, accountability and good governance in British public life. The Society of Editors has said similar things, and the National Union of Journalists has said that the Act has made public bodies more accountable. My question to you all is this. To what extent have the objectives of the Act in improving public debate, transparency and accountability been achieved? Were they realistic objectives? Generally, what are your views about that?

David Hencke: I sat on the advisory committee—it was then called the Lord Chancellor’s advisory committee—that dealt with implementing the Freedom of Information Act. I would say that there has been a complete sea change between about 2001 and now. When I was on The Guardian, I remember that we used John Major’s code, if you remember; it was the sort of thing that you could use to ask for information. We got into the most extraordinary tussles, which eventually involved the parliamentary ombudsman in this case over stuff that is now totally routine. I shall give one example.

For some reason, Tony Blair did not want the public to know about all the gifts that he had received. Under the US Freedom of Information Act, we found that President Clinton routinely published all the gifts that he received. In fact, he received so many gifts in London, as we found from our FOI request, that they had to send them back by boat because Air Force One could not take off from wherever it was as it was too heavy. We had this battle with No. 10, saying that, if everyone knew that Tony Blair had all those guitars, it would ruin British diplomatic relations, but it was complete nonsense. That sort of information is now published routinely. So is the cost of Ministers’ trips. Again, we had a battle with them over that. The great news is that, with the first series, the taxpayer was sometimes paying for 60 or 70 people to go abroad with a Minister, and we suddenly noticed that next year it had come down to 10. That is because it was public.

Q138 Chair: Someone had probably told journalists that there were free seats on the plane.

David Hencke: Probably, but I think that they charge for them now. I would say that there has been a big sea change, and it has gone a long way to opening up public life. Things that were secret at the beginning of the 21st century are now routine and available for the public to find out. I think that this is a really good thing.

David Higgerson: I would agree with much of what has been said, certainly in terms of making those working for public authorities more accountable and the organisations more transparent. We have taken a huge leap forward through the Freedom of Information Act. I think that the Act still provides too many loopholes, whereby if an organisation does not want to release information it can probably find a way not to do so. We certainly see that with some local
councils, although in the main we have seen a big improvement in terms of what we can get access to. Looking back to 1999, when Jack Straw was making those speeches, and if we use local councils as an example, we still had a system where the default position was that we had debate and discussion and a lot of committee meetings. The arrival of the Local Government Act 2000 enabled councils to go for the cabinet-style structure, and we quickly saw those authorities becoming very secretive organisations, with decisions involving hundreds of thousands of pounds being taken behind closed doors and with no public scrutiny. The Freedom of Information Act has helped to counterbalance a lot of other things that have gone on in the meantime. Compared to where we were, say, seven or eight year ago, the Act has helped to make public bodies more accountable, but in many ways it has replaced or mitigated against the impact of other legislation that has enabled authorities to become more secretive.

Martin Rosenbaum: There has been an enormous change, and David has described some of it. We certainly see information now being published routinely that was not published prior to that. The culture is taking longer to catch up with some of the routine publication of information. 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. That is something that will inevitably take longer to have an impact than the legislation itself.

Doug Wills: I totally endorse what has been said, particularly by David Higgerson and David Hencke. We have found over recent years that, by putting forward specific questions in specific areas, we are getting exact answers. Earlier, there was some mention of press officers always being available. Yes, but press officers will put things forward from a particular point of view. The Freedom of Information Act allows precision, and often it is precision that is required. There are still attempts to kick the matter into the long grass, and that is the area where there could still be greater attention.

Q139 Yasmin Qureshi: From what you all say, it seems that the Act has been good in some respects, particularly getting information, but one of the aims was that the quality of public debate would hopefully become better. Do you think that that has happened? If not, why might that be the case?

Martin Rosenbaum: That has happened to a lesser extent than some of the changes that the Act has brought about. 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, 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. That sort of information is sometimes made available, but much more often it is held back for various reasons. There may be reasons why the civil service want to hold it back, but that information, if it came out, would play a much bigger role in informing public debate, making the public better informed and helping people to participate in decision making. Perhaps I can give one example from last year. One of the things that I requested under FOI was the submission that the Treasury made to the Migration Advisory Committee, which advises the Home Office on migration policy. It was about the economic impact of immigration. At first the Treasury turned me down, but I eventually got it after an internal review. It seems to me that having that kind of information in the public domain—it was quite a complex 20-page paper about what the Treasury thought was the economic impact of migration—enables a better debate to take place on such issues than if the information is held back. However, the Treasury did not want to release it initially, and I got it only after an internal review. We still find that that kind of information is not being released.

Doug Wills: I believe that the answers that come as a result of FOI requests are the catalysts for debate; they are obviously not the debate itself, but, unquestionably, the information that can come out of specific questions will lead to debate. One of the FOIs done by the Evening Standard was on the number and areas of arrest and prosecution. Debates followed, including the search policies, and the statistics that went with stop and search, arrest and prosecution. It led to a public debate about it once the information was available.

David Higgerson: More than anything else, the Freedom of Information Act has enabled members of the public to decide what should be debated in the way that in the past the local authority may have set the terms of reference for the things that it thought most important to be discussed. The Act enables people to get the information on the things that matter to them. Websites such as WhatDoTheyKnow are being used increasingly frequently by members of the public, and more and more newspaper articles now begin life with members of the public seeking information rather than journalists. Whether that has improved the quality of debate overall I do not know, but it has resulted in a more diverse debate and has empowered people to have the debates that they want to have.

David Hencke: Yes, I think it has improved things, but it has probably also improved the quality of people’s prejudices, because they take selective stuff from one thing versus another. However, it does spark debate.

The latest thing that I have been involved in, about the head of the Student Loans Company, has started a debate among contractors and others about tax avoidance. The only way that I could get that information accurately and correctly—and the story has not been challenged at all—was through a freedom of information request. I was more or less tipped off about it by concerned people in Whitehall; it was only Whitehall gossip at that stage, but people had heard something and they were not very happy. By putting this into the public domain, it started a debate about what was going on.

The Student Loans Company is to be congratulated on giving such a comprehensive answer to a freedom
of information request, which is more than can be said for Revenue and Customs, which refused to tell me the extent of this because I could not work out whether it was an old case. To my total amazement, once we had all the papers, it sparked a debate. There is now a debate on my own blog about the people who employ interim management consultants, if someone is brought into Government whether they are a genuine contractor and where they come from, and is it a fiddle.

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; he was running the Student Loans Company and appearing before Parliament. Those sorts of things are really important, because this issue was not even being discussed; no one knew that it was happening, and to my shock it seems to have passed the Chief Secretary to the Treasury by when it went up to his office.

**Q140 Chair:** There are counter examples of what I call the tea and biscuits phenomenon where newspapers might find it more attractive to run a campaign about the cost of tea and biscuits than the £2 billion expenditure, which really ought to have been questioned.

**Doug Wills:** I wonder whether the olive trees come under tea and biscuits.

**Q141 Chair:** They are rather more expensive than the tea and biscuits.

**Doug Wills:** Absolutely. I say that because the tea and biscuits can sometimes be indicative of a policy rather than being the actual point of an article—perhaps.

**Mr Llwyd:** They are fig trees.

**Chair:** My colleague points out that they are fig trees.

**Q142 Yasmin Qureshi:** Moving away from the issue about the opening up of debate, one of the other aims of the Act was to improve trust in Government and Parliament. May I suggest that the Act has not achieved that or done enough? What is your view? Do you think that those elements of what the Act is trying to do about trust in Government and Parliament have or have not been achieved and, if not, why not?

**Martin Rosenbaum:** It has not done much to increase trust, but it was not a reasonable expectation that the Act would necessarily do that. 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.

**Doug Wills:** The opposite would be the case, of course. If the information was not available, then there would be distrust. That is positive in itself.

**David Hencke:** I would say that it does increase trust, but 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, which I regarded as an absolute outrage. Basically, you could not get a more democratically elected body that was saying, “We do not want to tell you anything about what we are doing and spending.” I agree that it caused you a lot of angst and certainly a lot of trouble over the leaks that followed, which were not to do with FOI. You are not guaranteed an improvement in trust, but you are guaranteed that, over time, people will have a greater understanding of how Government works and what they expect. It will not be entirely just a prejudicial view, with people saying, “Oh, we can’t trust any of them.”

**Q143 Yasmin Qureshi:** My final question is this. We have received information that the Act has been more successful in local and central Government, but other public bodies such as the universities or the Audit Commission have not been as effective. Do you have a view on that?

**Martin Rosenbaum:** One of the strengths of the Act is that it applies not only to central Government, and not even in fact only to local government, but to police forces, ambulance trusts and the fire service. A lot of the stories that the BBC gets from freedom of information relate directly to those public services that directly influence people’s lives. In my view, the fact that the Act should extend to those is a very important principle within it.

**Doug Wills:** Absolutely. There is some suggestion that, because universities are part-funded, they should not be included, but I was encouraged by their openness and willingness to embrace transparency. Certainly, the part-funded should be included; if anything, it is absolutely right an institution that is part-funded by the taxpayer should be included within the FOI embrace.

**Chair:** There are a number of supplementary points. There is one from Liz Truss.

**Elizabeth Truss:** I completely support the move to more openness and transparency; it has had a very positive effect on political culture. However, I am concerned that public bodies are spending a lot of public money answering these requests, including institutions such as universities. I realise that the newspaper business is in some difficulty, but is it right that research is essentially being carried out extensively when the information is sometimes otherwise available? Could you see an improvement to the regime, where journalists and others seeking FOI at least have to pay the cost of having that information dug out?

**Chair:** There are questions about that later on the agenda, which will be opened by Mr de Bois. It might be helpful to park that question until then, but by all means I will come back to it.

**Q144 Mr Llwyd:** I have a short question. Going back to what you said, Mr Rosenbaum, about the Treasury denying you access to certain figures until it had had an internal review, did it give you a reason why it was not prepared to do so initially?

**Martin Rosenbaum:** Yes, it was initially rejected under section 35, to do with the formulation of Government policy and that it would affect the free
and frank discussion of Government policy if the information was released. That was the reason for it being held back initially. I then argued that it was in the public interest because it would help to inform the debate better if the information was released, and it then went along with it at the later stage.

Q145 Steve Brine: Listening to all this, one wonders how good investigative journalism ever happened before the Freedom of Information Act. We are talking about trust in politics, but I wonder whether you could comment about trust in the media. The stories from the Leveson inquiry have not exactly covered your profession in glory. Mr Higgerson, you said on your blog a little while ago—I read it regularly—that you believe that we have a lot to fear from this review. Would you expand on that?

David Higgerson: Absolutely. Looking at it from a local regional newspaper point of view, where we deal primarily with local authorities and PCT, I feel, and have felt for a while, as I have said in my blog before now, that there is a growing momentum, particularly at local organisation level, to talk about the cost of servicing the Freedom of Information Act. We often see the illusion painted that the vast majority of FOI requests come from the media, but from FOI officers to whom I have spoken that is not the case. The danger, I felt, was that, 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 grant in terms of the hours available for 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.

Q146 Steve Brine: Does anyone else think that there is anything to fear from this inquiry?

Doug Wills: Yes, obviously. There always is. It is rather like putting an FOI. You put in questions, but, from here, how far will the questions of cost and exemptions go? Cost absolutely. One of my hats as managing editor is to make sure that the editorial budget is kept to, and we now do not do certain things to whom I have spoken that is not the case. The danger, I felt, was that, 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 grant in terms of the hours available for 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.

Chair: We are getting on to costs, and I did promise that we could come back to them. We started with a more general question about how journalism operates in the context of freedom of information. At this point, we move to Mr Gummer.

Q147 Ben Gummer: Is FOI a standard part of the instruction and training of journalists?

Doug Wills: It is certainly embraced within that training. It is part of the public administration.

Q148 Ben Gummer: I take it that most journalists that use FOI know that they can submit requests anonymously or under aliases.

David Higgerson: It does not take much for them to work it out. I can only speak for the company that I work for, but we do not advise our journalists to do that. We advise them to be up front and open about who they are and who they represent, and to make sure that they try and build good working relationships with FOI officers. Certainly there is no part of any training that I have ever seen for journalists that encourages, advises or even highlights the fact that requests can be submitted anonymously. We would encourage our journalists not to do that.

Q149 Ben Gummer: It seems to be a common refrain in your written submissions to the Committee that there is a differential treatment of journalistic requests and those from members of the public. That is not surprising, is it?

David Higgerson: Given that the Freedom of Information Act is supposedly applicant-blind, it is a little disappointing when we find out that press officers are signing off freedom of information requests sent in by members of the media, yet they only do that for the FOI requests that go back out to members of the media. They do not do that for all FOI requests that are going out. While it may not be surprising, it is disappointing.

Q150 Ben Gummer: How would you advise that that were not the case? How would you suggest that that would change?

David Higgerson: I would suggest that the function in, say, a council or a primary care trust, of dealing with the media through the press office is one thing, but there is a separate function for the freedom of information officer. It makes absolute sense for the press office to be aware of what the media are asking for, but it crosses a line when the press office is effectively approving the wording, or, as one authority said, signing off its freedom of information requests before they go back out to members of the media.

Q151 Ben Gummer: If it does not change the veracity of the response, why does it matter?

David Higgerson: How do we know that it is not changing its veracity? I give the example of Kirklees council in west Yorkshire. Its council leader regularly signs off freedom of information requests that are received. Indeed, the Huddersfield Daily Examiner, one of the papers that I work with, using information not obtained under the Freedom of Information Act but good old sources, was able to prove that the council leader was requesting changes and blocking some freedom of information requests from going out that had been deemed fit to go out by the freedom of information officer. It makes a very big difference in terms of the pureness of the Freedom of Information Act.

Q152 Ben Gummer: I see what you are driving at. Martin Rosenbaum: May add something? As well as veracity, there is also the delay issue, which is very important. Journalists’ requests going through extra hoops and being referred to the press office or more senior people or whatever inevitably results in delay. Journalists’ requests therefore tend to be delayed,
which in our business is a very big problem. Some research was done a fair way back by a Canadian academic and an international specialist on FOI, who was looking at how long the MOD took to respond to different categories of request. He found that very long delays were much more likely to happen to journalists’ requests, and also, it has to be said, to requests from MPs. They were much more likely to be subject to very long delays than requests from ordinary members of the public and the various other categories that he was looking at. It is also about delay as well as veracity.

Q153 Ben Gummer: I turn to Mr Hencke’s interesting point about having a tip-off from someone inside an organisation, which is then followed up with an FOI request. I imagine that this is pretty standard. 

David Hencke: It has probably developed since FOI, frankly enough. Frankly, before this, and going right back to Alan Beith’s time.

Q154 Ben Gummer: It still is his time.

David Hencke: Apologies, Chairman. Going back to the days when we were looking at teacher training colleges, a lot of information came from tip-offs from Whitehall. This was perfectly respectable; it was nothing to do with us phone hacking.

Q155 Ben Gummer: I am certainly not impugning your activities because I think this is a fantastic use of it. You receive a tip-off from someone, normally in a whistleblowing capacity, and you can then follow it up with an FOI request. How often do you find that that request meets an obstruction or returns an answer in the first instance that is inconsistent with the tip-off but then, after further investigation, reveals that there is a truth behind it?

David Hencke: It is quite interesting to watch what is happening. I followed up the FOI on the Student Loans Company with one to the Revenue and Customs. I decided to ask a suitable question of how many people in Whitehall might be on this type of contract. The answer came back that it was far too expensive to tell me. They were not going to tell me because it was outside the limit, so I then cut it back. I did not ask for any names, but I asked for the numbers, and I picked one agency that I had spotted from another FOI that seemed to have a rather large number. It was the Insolvency Service, and I was rather puzzled as to why it seemed to have 100 people on this consultancy contract when it had only 500 staff. 

I also asked specifically about its revenue, and what came back is that it was more or less prohibited information, because, even though we were not naming anybody, it was getting near to the tax affairs of people. It said, “We cannot tell you that either because you have been too specific.” even though it would be within the cost. Frankly, I have found Revenue and Customs to be considerably obstructive. 

I am delighted that at least Danny Alexander did not manage before FOI and tip-offs, in fact it is now not unusual for a press office to say, “Well, actually that information is not available; you will have to put in an FOI.” They are almost acting as the tip-off, because one of the arguments is that it is not published material but that it can be published if there is an FOI. That is rather a bizarre way of going about it. Before FOI, you would just have to find a councillor from the opposition, which was always possible if it was a local authority. The councillor would give you enough information to leak out, but it would not necessarily be 100%. With FOI, one truly hopes and believes that it is 100% accurate.

Q156 Ben Gummer: It cost, no doubt, far less to reveal that information than the cost to the Exchequer of the tax avoided.

David Hencke: Yes, far less. If we take the first case, you have already saved the taxpayer at least £26,000, if not £40,000, on one case; I now see that two other people are being put on PAYE. I almost thought of asking for 10% to fund me as a journalist, but I don’t think that they would agree.

Doug Wills: On your other point about how we managed before FOI and tip-offs, in fact it is now not unusual for a press office to say, “Well, actually that information is not available; you will have to put in an FOI.” They are almost acting as the tip-off, because one of the arguments is that it is not published material but that it can be published if there is an FOI. That is rather a bizarre way of going about it. Before FOI, you would just have to find a councillor from the opposition, which was always possible if it was a local authority. The councillor would give you enough information to leak out, but it would not necessarily be 100%. With FOI, one truly hopes and believes that it is 100% accurate.

David Hencke: It happens increasingly frequently. As Doug was saying, before FOI you would get a tip-off and you would try to find the information from people prepared to talk to you. In my experience, a lot of whistleblowers feel more comfortable with saying, “You might want to explore x under the Freedom of Information Act”, because they are not necessarily handing over any material. You would certainly like to think that you can put a freedom of information request in and get the information back, but increasingly we find that you can put a FOI request in and get only part of an answer, being told that you have phrased something slightly incorrectly so that they do not recognise it. Yes, you will get there eventually but it is a lot of hard work to get there, and certainly quite a time can elapse in between.

Q157 Ben Gummer: I am trying to strike at something slightly different. When you know or suspect that something is true, how often is it the case anecdotally that you find you have to keep on digging away with FOI, coming at the problem from different angles in order to elicit that truth?

David Higgerson: It happens increasingly frequently. As Doug was saying, before FOI you would get a tip-off and you would try to find the information from people prepared to talk to you. In my experience, a lot of whistleblowers feel more comfortable with saying, “You might want to explore x under the Freedom of Information Act”, because they are not necessarily handing over any material. You would certainly like to think that you can put a freedom of information request in and get the information back, but increasingly we find that you can put a FOI request in and get only part of an answer, being told that you have phrased something slightly incorrectly so that they do not recognise it. Yes, you will get there eventually but it is a lot of hard work to get there, and certainly quite a time can elapse in between.

Q158 Ben Gummer: On the question of exemptions, therefore, would you say that it is now common practice that they are misapplied or is it still exceptional?

Martin Rosenbaum: Often it is difficult to know because you do not end up seeing the information, and you would not know to what extent it was justifiably withheld. Sometimes you do if you later get the information at an internal review stage or from the commissioner or the tribunal. Sometimes, it has to be said, I am shocked when I see the information because I cannot see any justified basis for withholding it whatsoever. Exemptions are certainly being misapplied on occasion. 

One example that I recall was in relation to the Home Office. The request did not come from us; it came initially from a campaigning group that was interested in drugs policy, which had asked for a particular
report. We then obtained some information from the Home Office about how it dealt with that FOI request. It said, “We don’t want to release the information to this group because it would show that there was a lack of evidence base for our policy, and it would lead to criticism of Government policy.” I have to say that that was sent to us inadvertently because it failed to redact some information. We ended up with this information, but, from what it revealed about this case within the Home Office, it seemed to be utterly clear that it had withheld information without any justified basis for doing so under that particular exemption. Occasionally, the mask slips and you can absolutely clearly see that it is the case from time to time; at other times you are in the dark and you do not know.

Q159 Ben Gummer: I know that the next questions will be on enforcement, but I have one final question about consistency across authorities. Mr Hencke, you mentioned two different approaches. How would you suggest better consistency could be achieved across authorities? Should there be widespread publication of response times and quality of responses? How would one achieve that without it becoming a bureaucratic monster?

Doug Wills: The Information Commissioner has a role here. There could certainly be quarterly reports that you could produce, for instance, of repeat offenders if there are delays that go beyond the stipulated period. The commissioner has that role.

Martin Rosenbaum: There is a very important role for the Information Commissioner. He could issue more enforcement notices for authorities that are behaving particularly badly. Also, within Government, there is a role here for the Cabinet Office. It is a real problem, but one of the worst authorities in my experience—this is confirmed by the MoJ statistics—is the Cabinet Office. It has a very bad record in delays, and it has been subject to monitoring; it is one of three authorities that have been picked out by the Information Commissioner for their very bad record, and they are being carefully monitored by the ICO because of their record of delay and sometimes of obstruction. As well as the ICO, there is also the question of what message is coming from the heart of Government. If people do not see the Cabinet Office behaving particularly badly, it is hard to believe that they are being too consistent across Government as a whole.

Q160 Ben Gummer: Is that still the case for the Cabinet Office? Has it got better or worse in the last few years?

Martin Rosenbaum: I have detected, I thought occasionally, improvements in the Cabinet Office, but then it seems to get worse again. If one wants to be generous, we might see it as at the beginnings of inconsistent improvement, but I am not 100% sure about that.

Q161 Ben Gummer: There is a fight going on.

David Higgerson: On a practical level on something that authorities could do, it is not uncommon in one of our areas to have six primary care trusts, and, if you FOI all six for data, five will supply it but the sixth will come up with a reason not to. Is an exemption being applied inaccurately by the one when the other five are releasing information? I would probably say yes. Better use of disclosure logs by all authorities would impress upon those authorities to think carefully before applying exemptions; indeed, the proper use of disclosure logs would help deal with the issue of cost, which we will come to.

Q162 Mr Llwyd: Further to these points about enforcement, Maurice Frankel and Professor Robert Hazell told us that, as far as they are concerned or to the best of their knowledge, there have not yet been any prosecutions under section 77. Do you believe that there is occasionally defacing of documents, altering or destroying them, after an FOI request has been made by you?

Doug Wills: I am not aware of it.

David Hencke: It would be very difficult to prove; that is the trouble.

Q163 Mr Llwyd: We have already had some suggestions about how enforcement can be improved. What new powers would be useful for the Information Commissioner—for example, to look at section 77 or the 20-day limit on internal reviews, or any other matter that you think might assist in strengthening his arm?

Martin Rosenbaum: It is partly up to him to use the powers that he already has, for example, in issuing enforcement notices. As a background to that is the confidence with which he uses his power. He is very much influenced, I think, by his own record in dealing with complaints. It 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. That has dramatically improved, but nevertheless 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.

Q164 Mr Llwyd: You all know, of course, that the commissioner now monitors public authorities that regularly miss the 20-day limit. Have you experienced any improvement in that yet?

Martin Rosenbaum: This is the Cabinet Office point, because the Cabinet Office is one of those authorities that was monitored. As I said, I noted stirrings of some improvement, but I cannot be entirely sure.

Q165 Mr Llwyd: Green shoots.

Martin Rosenbaum: Exactly, and who knows what the green shoots will grow into. In some of the other cases—this is, I suspect, based on statistics rather than on my own personal experience; I cannot say for
Q166 Mr Llwyd: Mr Higgerson’s earlier example of Kirklees does not fill me with confidence either.

David Higgerson: It depends on the mindset of the authority on how it wants to respond to the Information Commissioner’s monitoring. NHS North West was one of the bodies put under monitoring; it was certainly flagged up as being an authority that was missing targets. In my experience of dealing with it, there was a general culture of not particularly wanting to be open or telling people what it was up to. At the other end of the equation, I believe that Hammersmith and Fulham council at one point was highlighted as an authority that could do better. Using only the yardstick of the number of FOI requests that resulted in news stories, which you can pick up now from Hammersmith and Fulham, they certainly seem to have improved. It depends on how much respect or credibility an organisation places on the commissioner.

Doug Wills: This goes back to the point on trust and whether the FOI has increased trust. It is the response itself, and, if there is a name-and-shame approach, it will either increase trust or lead to action to bring that about.

Q167 Nick de Bois: I am still somewhat impressed that you are in fear of this Select Committee, but perhaps I could turn to you, Mr Higgerson, first of all. What effect would routine charging for the use of the Act have, in your opinion, on both regional and national media?

David Higgerson: Certainly for regional newspapers it would result in the reduced use of the Freedom of Information Act.

Q168 Nick de Bois: Have you ventured an estimate of how much that might be?

David Higgerson: One figure that was floating around was £25 per request. We would have a situation where many of our newsrooms would come to the conclusion that, because we would not be guaranteed a result from FOI requests, they would probably stop using it altogether.

Q169 Nick de Bois: Mr Wills, I think you share that view and are fearful of such a suggestion that may come from us. I do not anticipate it will by saying this, but, in fairness, the reality is that you, as an industry, are using the FOI to support your own commercial ventures to help you publish stories. Would you agree?

Doug Wills: I would not agree with using it to support our commercial ventures.

Q170 Nick de Bois: You sell newspapers and advertising.

Doug Wills: Of course. It is a very broad discussion, but the role of the press is various. Yes, we need readers to read the paper, and advertising comes in as a result of the readership. Equally, the role of the paper is broader than that, and there is a public interest. We have talked about trust and public debate, but without the newspapers carrying the articles that we have been talking about there will not be that public debate.

Q171 Nick de Bois: I accept that. I do not want you to prejudge my views, which I will share with you at any time, but do you accept or do you believe that it is reasonable that taxpayers should be funding this so that you can have dramatic headlines and help to push newspapers, television or whatever it may be?

Doug Wills: I would like to get some dramatic headlines out of some FOI questions. The truth is, however, that many of the FOI requests are not dramatic headlines; they are more like public debate articles.

Q172 Nick de Bois: All right, but that is splitting hairs slightly. You either use them or you do not.

Doug Wills: Of course we use the articles, but they are not dramatic headlines.

Q173 Nick de Bois: Okay, it is content.

Doug Wills: I do not believe that circulation soars as a result of most FOIs. That is not what we are talking about here.

Q174 Nick de Bois: Let me explore this because you have not really answered the question. I do not know what the national figure is, but it will be millions that is put into this. Is it right that the taxpayer should be funding that which you use, whether you like it or not, in your publications, which have a commercial value?

Doug Wills: If the information was available without the need for FOIs, that would be another way of tackling this. I do not believe it can be isolated in the way that you suggest.

Q175 Nick de Bois: Is it not unreasonable, if you follow my premise, which you are resisting and I respect that, that you should make a contribution to it?

Doug Wills: I think it is unreasonable for the reasons that I have given.

Q176 Nick de Bois: Because it would reduce the volume.

Doug Wills: It would reduce the volume of questions, unquestionably, even at the Evening Standard, which is a larger newspaper than the local weekly papers. It would reduce the number of questions that we were putting for budgetary reasons.

Q177 Nick de Bois: The evidence suggests that in Ireland there was a dramatic drop in 2003 when the Act was introduced. We took evidence from Professor Robert Hazell last week, who said that the use of it had gone back up and they are still charging. Is that
not something that, to be fair, you should consider is not necessarily going to blight your use over time? 

**Doug Wills:** Perhaps they are not as challenged as we are with our budgets, because local newspapers, particularly, are facing more challenging times than ever before.

**David Hencke:** May I say—

Q178 Nick de Bois: I was going to ask you a specific question, Mr Hencke, but please do go on.

**David Hencke:** I fundamentally disagree with you over this. There are two reasons.

Nick de Bois: I am asking a question.

**David Hencke:** The point is that newspapers, media and blogs—I am now freelance—basically write stories, but generally the public are interested in the issues about the stories. They have the time and resources. They have already put their own money in a commercial venture to spend the time that probably an ordinary member of the public could not, unless they had nothing else to do with their life, to find out and get to the bottom of this. As well as being a commercial service, they often provide a public service by highlighting issues that have gone wrong.

You speak of the taxpayer funding it, but I would get a bit cross if a charge was to be implemented because I am a taxpayer and I pay for all these services. I cannot opt out as I can when shopping; if I am fed up with Tesco, I can go to Waitrose. I have to pay the tax, yet you want to charge individuals and organisations to find out whether the money that has been taken off them is being used properly and what is going on. I think that is wrong.

I know that it is jumping to another area, but one thing that I would say, with the move to private companies providing public services, to my mind, is one change that could be made to contract law. For instance, if someone is in A4e and earning £180 million, I do not see why it should not be written into the contract that they have to come under FOI because they are using our money and you are charging me twice. You are taking my money for the service and then saying, “If you want to find out anything else, you have got to pay.”

Q179 Nick de Bois: We explored that in some of our questions last time because it implied public funding going on it. I have a final question on the regional press, although I know that you are with The Guardian, I have two fantastic local newspapers—the Enfield Independent and the Enfield Advertiser—but there is a lot of information out there published by local councils after the introduction on expenditure of over £500. I know that they are restricted in the amount of time that they have for wading through lots of information, or even too much information, to find what they are looking for. Do you think that that could lead to the FOI being used for fishing exercises, which I hope you might think is not necessary?

**David Hencke:** It should not be necessary if the local authority and the organisation have a good publication scheme. That sort of fishing exercise, trying to find out about 140 authorities on this and that, is normally on public interest matters such as how good the community police are or whatever. If they have a good publication scheme, it is rather like—

Q180 Nick de Bois: Can you think of one?

**David Hencke:** I am trying to do so.

Q181 Nick de Bois: If you do, please let us know, as that was my final question.

**David Hencke:** That would make a difference. It is rather like with Whitehall. 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.

**David Higgerson:** May I make a point? You mentioned spending of £500. We sometimes hear from councils that they are being more open than ever with the data that they are putting out. Being brutal, however, the council spending data is next to useless for regional journalists in many respects.

Q182 Nick de Bois: You probably need to follow up with an FOI request.

**Doug Wills:** 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.

Q183 Ben Gummer: As data controllers, which we all are by law, we have to pay a little fee to be a data controller under the Act. You have to pay a fee if you photocopy so many things so many times. Indeed, if you agglomerate newspaper content and then send it out to clients, you have to pay a fee, and a recent court judgment has just reinforced that. Why should the same principle not apply here, where, according to turnover, commercial organisations should pay a flat fee every year in order to have access to FOI?

**David Higgerson:** It is because, as taxpayers working for that organisation, we have already paid for the functions of those organisations that we are seeking to hold to account.

Q184 Elizabeth Truss: I was interested in the comment that the newspaper industry is feeling the squeeze. We have a massive squeeze at the moment on public finances, and we need to make sure that we are not spending money on hunting down vexatious FOI requests. It seems to me that in the case that we heard from the universities—and I know that we are moving on to that in the next session—we are talking about it being free to make an FOI request, whereas having to collate all the research yourself means that you would have to pay a researcher to do that.
At the moment there seems to be an imbalance, where the FOI becomes the easy option. Would it not be better to level up the cost so that those requesting an FOI at least pay the cost so that we can get value for money for the taxpayer? With all due respect, you are not ordinary taxpayers. Many people in this country do not make FOI requests at all, but they are paying taxes for these public servants to find out that information. It will be a much more economically efficient system if people pay the true cost of the research work being carried out on their behalf directly, otherwise you will get misallocations between Government Departments, and, indeed, between the public sector and the newspaper industry.

**Martin Rosenbaum:** Value for money for the taxpayer comes from the fact that information that is in the public interest—that is often the criterion that decides whether or not it is released—is released and available for people to read and discuss and inform their decision making. I would particularly argue that the media’s use of freedom of information is the most cost-effective form there is. We then tell millions or hundreds of thousands of people about it.

**Q185 Elizabeth Truss:** I do not disagree with that at all.

**Doug Wills:** A greater cost would be for local authorities—thankfully, many have now stopped doing this—to produce their own newspapers to put authorities—thankfully, many have now stopped doing this job, being selective in the information and the information out instead of the local newspapers doing this—to produce their own newspapers to put the information out of the local newspapers doing that job, being selective in the information and also presenting it in such a way that it is actually read. I think that a service element comes into this.

**Q186 Mr Llwyd:** Do you think that FOI should continue to apply to all public authorities in an equal manner, or is it disproportionate to apply the same scheme, for example, to central Government and universities? I know that you were sitting in on the previous session and you might be able to short-circuit an answer, but I should be grateful for your response.

**Martin Rosenbaum:** There is an issue behind this, which is to do with the private-public division, and the fact that more and more things are being contracted out. In everything from private prisons, housing associations and so on, we see the blurring of the private and public. There are complex questions about applying the FOI regime as it applies purely to public bodies to bodies that are a mix of public and private. I am not sure what the best means is of doing that, but it may be the case that you end up with a system that is in some respects different for bodies that are mixed rather than purely public. That would be my personal opinion.

**Q187 Mr Llwyd:** In the case of London university, for example, apparently the figures show that only 14.6% is publicly funded. It is not quite the same, but 14% of London university’s activities could be subject to FOI. That would be a perverse result.

**Martin Rosenbaum:** Yes.

**Doug Wills:** You would hope that the public-spiritedness of everybody, including the university representatives who were here, meant that they were talking in the way that they were because they wanted to be transparent. Rather than say why should it be, I would say why should it not be?

**Mr Llwyd:** I take your point.

**David Higgerson:** We have an example of FOI being applied differently to different authorities already in the form of how the Freedom of Information Act is applied to the BBC. The experience that my colleagues have had with the BBC is that it is very difficult, when you are used to using FOI or dealing with authorities that use FOI in one way, then to have to deal with an authority that has different exemptions in place. That has made it quite tricky to get information out of the BBC, which we would argue is not something that should be covered by what I think is called the artistic and journalism exemption.

**Martin Rosenbaum:** Derogation, as we call it.

**David Higgerson:** That has made life quite hard. If that was applied to lots of different organisations, it would probably defeat some of the founding principles of the Freedom of Information Act.

**Q188 Mr Llwyd:** How can we protect the right of the public and the media to continue to obtain information under FOI in circumstances where public services are outsourced to the private sector?

**David Higgerson:** It is quite simple: follow the money in the sense that, if the whole public service is outsourced, I am afraid the company or the provider should be subject to the full FOI, because otherwise you will get a two-tier system. If, say, in the NHS Bupa decided to do lots of operations for the NHS as part of getting taxpayers’ money, it would have to provide information on how well their services are doing and everything else.

**Q189 Chair:** That is the situation now, in that doctors’ general practices are private businesses and are not subject to freedom of information, although they are in receipt of large amounts of public money that pays for almost everything that they do.

**David Higgerson:** This would be the very sort of thing that I was going to say.

**Q190 Chair:** That has been the situation since the beginning.

**David Higgerson:** It ought to be changed. I also think that it applies to major rail companies that are receiving large subsidies to run services. Given the scale of a lot of these contracts—they are for hundreds of millions or even billions of pounds—the cost of FOI would be relatively very small compared to the cost of the contract. Frankly, I do not see why they should have the use of our money and be completely unaccountable for what they are doing with it. I think that is wrong, to be honest. One brilliant thing I would like the Committee to do would be to recommend something that we were supposed to do when I was on the advisory committee. We were supposed to include a select number of private bodies that were funded by the state, but that was delayed because Whitehall kept
saying to us, “Oh, no, we can’t; this list is too complicated.” It has been doing that since 2001. Now, in 2012, it is about time that it was substantially extended.

Q191 Mr Lloyd: Of course, in 2001, there were far fewer of them, were there not, so the need is presumably far greater now?

David Hencke: Absolutely; it is.

David Higgerson: We have cases where Birmingham city council refused to release information relating to things that it had worked on because that work had been outsourced to Capita. Liverpool city council, which has a very poor track record on freedom of information, at times verging on the edge of parody in how it behaves with the Freedom of Information Act, is also very good at saying, “We can’t release that information because it has been outsourced to a public-private partnership.” That makes life very difficult for us.

Q192 Karl Turner: There seems to be a marked difference in the media’s use of the Act to obtain information from central Government as opposed to local government. What is the reason for that?

David Hencke: Do you mean that central Government do not get as many requests?

Karl Turner: Yes.

David Hencke: I think that the reason is quite simple, having worked on a daily paper and now working as a freelance. The other revolution that has happened in the 10 years since FOI is that it is now a 24/7 agenda. Journalists, particularly lobby journalists, are pursuing things. When using freedom of information, we are talking about stories that we are possibly not going to write for six or eight weeks. Indeed, with my story about the Student Loans Company it was a few months because we had to work out exactly what was happening. I actually put in more FOI requests now that I am a freelance working for the investigative news website ExaroNews, which only does investigative stuff. It is a fascinating thing; it was set up by venture capitalists on the ground that the changing media will mean that there will be specialist websites. Journalists are rushing around too much, but the Sunday papers probably do a bit more, and the BBC can do so now, but the main reason is that there is a different culture and change in the way journalists are reporting things.

Martin Rosenbaum: It is also to do with the information that we get. The BBC puts in requests nationally, and many are made at the local and regional level. The latter is for figures and data that are very easy to get, for instance, to do with performance of public services; that is what you get from local government, police forces or ambulance trusts and so on, whereas the sort of things that you might be interested in at the central Government level are not really the sort of information that is easy to get. I am thinking of performance measures and that kind of thing. It is more to do with the data.

Q193 Karl Turner: It seems that only a limited number of journalists use the Act to obtain information. Is there any particular reason in your view?

Martin Rosenbaum: It is the reason that David hinted at, which is that, if you are working with daily journalism, FOI is useless to you because it is for stories that you might end up doing in six weeks or six months or, in one particular case, in five years. Perhaps some of my colleagues live in fear of this Committee, but I live in hope, and my hope is this. If there is one thing you do, you crack down on delay within the system. I mean delay where public authorities extend the public interest test time after time, for months at a time, and delay at internal review where no limit is laid down in law and which can carry on for months and months. The big problem with the system is delay, and if you can do something about that I would be very happy.

Q194 Karl Turner: If an amendment to the Act required requesters to explain their motivation for the information, do you think that would have any impact?

Doug Wills: Yes, I do. It would have a negative impact. Again, the question is why, for what purposes could the information be required? If the purpose was to exclude certain questions, it would be negative and I see no advantage in that.

David Hencke: I concur. Why should anyone want to know why you are asking? FOI officers should be looking at what the law says and say that, if the information is available and in the public interest, it does not matter who gets it. I think that it is the same principle internationally in the sense that I know under the US Freedom of Information Act—incidentally, that too, is free—you can apply as a British citizen, as I have, for information about Britain held by America. It is quite fascinating, because in some ways they are far more liberal. Believe it or not, one example of that is the royal family. When I was on The Guardian, we put in a request to America. It was following the death of Princess Diana. We asked what information they held and were flabbergasted to get back a description by the American ambassador of Diana’s funeral and how appallingly the royal family had reacted, comparing it with the Government. There was also some fascinating stuff about Diana’s campaign against land mines. We did not know this, but they had sent the American Secretary of State graphic descriptions of British embassy receptions in Angola, including a wonderful one where you saw her in quite a good light, as she insisted on seeing local, ordinary people, but there was this huge row with Rio Tinto Zinc, who though that they could not meet Princess Diana and this was terrible. The Americans recorded all this and released it under FOI. I am sure that the Foreign Office would not have done this.

Q195 Chair: I have one final question. Much of the strength of the case that you have put to us today has been on the basis that you perform an important public role. Would it not be better if you were subject to the Freedom of Information Act? That is a serious question. One person at the table is accustomed to the Freedom of Information Act at the BBC, which is
quick to make use of exemptions when it wants to protect the pay levels of various performers.

**Martin Rosenbaum:** The salary levels are published, but it is absolutely true that the BBC has a derogation, as David said, for journalistic material, and the BBC does use that.

**Q196 Chair:** Would it not be relevant for someone to be able to inquire, if a story is written by a journalist about, say, the expenses of a local councillor, what expenses regime the journalists themselves were subject to so that any relevant interest could emerge from this? Would it not be relevant to find out on how many occasions a newspaper had obtained information by making payments to public officials? It has taken an internal process in a newspaper group, sparked by chaos and all sorts of things, to bring that about. If it was allowed under the Freedom of Information Act, would not some of you be applying under it to media organisations to find things out?

**David Higgerson:** If the start point of the Freedom of Information Act is giving people the right to know how organisations that they fund spend that money and do things with that money, then privately-run news organisations would be the same as any other business and would not be covered by the Act. Certainly the growth of the internet and social media has created an environment where news organisations need to be much more transparent, but, unless the news organisation is receiving substantial funding from the public sector or from the public purse to do its job, I would argue that it should not fall under the Act.

**David Hencke:** I would accept your idea if you extended it to all private companies.

**Q197 Chair:** You have a special public role, do you not? Is that not what you are saying to us in relation to FOI?

**David Hencke:** Yes, although the argument might be that we get advantage from taxpayers’ money being spent on our inquiries, and, also, you would have to draw a very careful line. I am sure that it would be massively interesting to Her Majesty’s Government to find out who tipped me off about the Student Loans Company to put in an FOI. Journalists have a really important role in protecting their sources, and that will be one very mitigating factor in this. We would have to have an exemption.

**Doug Wills:** An openness has been brought about or re-emphasised in the last 12 months particularly, but also before that, with the Press Complaints Commission, which is obviously now going though Leveson. You may jest and raise a question on that, but there has been a commitment to that. Again, we are talking about local and regional papers, but that is very different from some of the things that we are hearing. There has been an openness about gifts and anything else through local and regional newspapers. They do that now and have done so for years.

**Chair:** Thank you all very much indeed. Thank you.
There are indeed. There are two Mr Smiths in prominent positions in the Information Commissioner. I have discovered that Commissioner, and Graham Smith, Deputy Commissioner, to comment on that, as he has longer experience of cases than I have.

Christopher Graham: The best evidence on the subject is provided by the Freedom of Information Act. The best evidence on the subject is predated the introduction of the Freedom of Information Act.

Graham Smith: There are indeed. The best evidence on the subject is predated the introduction of the Freedom of Information Act. The best evidence on the subject is predated the introduction of the Freedom of Information Act.

Christopher Graham: It would be absolutely disgraceful, would it not, if officials were not giving their best advice because of what might happen under the Freedom of Information Act?

Q200 Ben Gummer: It might well be disgraceful, but I am asking whether you have any experience of anyone saying that that has happened.

Christopher Graham: Perhaps I can ask my colleague, Graham Smith, the Deputy Information Commissioner, to comment on that, as he has longer experience of cases than I have.

Graham Smith: The best evidence on the subject is not there. We do not have any experience of that. We have some anecdotal stories from people in Government Departments, who say that less is being recorded now, but we do not have any anecdotal evidence of people saying that full and frank advice is not being given. To the extent that there may be a chilling effect, in actuality it is more about recording rather than giving advice. As to how extensive it is, I do not think that there is any evidence to suggest that it is very extensive, and I think that the most thorough work on that has been that done by UCL.

Christopher Graham: UCL also pointed out that it is really a function of modern communications—the internet and the general fast-moving nature of government; and, of course, sofa government well predated the introduction of the Freedom of Information Act.

Graham Smith: UCL also said, to the extent that there may be a chilling effect, that it is not necessarily down to FOI—either alone or at all.

Q201 Ben Gummer: Lord O’Donnell, who, after all, ran the civil service for quite a long time, claims precisely the opposite.

Christopher Graham: I am sure that we have the greatest respect for Lord O’Donnell, or Sir Gus, as we knew him. Of course, some of the most difficult freedom of information cases have involved the Cabinet Office, and difficult judgments have to be made. Since he has retired, he has been making the case to which I alluded. When he was writing Cabinet minutes, he says that he never quite knew whether or not...
not he was writing for publication, yet 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 outing. 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.”

Q202 Ben Gummer: Lord O’Donnell went further than that. He said that it led to oral government. That might have been a function of the previous Administration, but if you have warnings being given to Ministers orally or difficult conversations with Ministers rather than things being laid down on paper and properly minuted in committee—I am not saying that this was happening on a consistent basis—then it leads to bad government.

I move the conversation quickly on to the risk register, which is a good example. If Departments are required routinely to publish risk registers—after all, Lord O’Donnell and everyone in this Government are, as far as I know, in favour of the Freedom of Information Act—the question is where you draw the line. Departments will not draw up full risk registers because they know that doomsday scenarios, which have to be considered, will be published and become part of public discourse in a way that completely tilts the balance of debate.

Christopher Graham: It is disgraceful if civil servants are not drawing up proper risk registers. You say that it is a question of where you draw the line, but the line is overwhelmingly drawn in favour of protection, for the development of policy and communications with Ministers and so on. Where the public interest test has to be applied and the balance of public interest is in favour of publication, on those occasions the documentation should be produced and should be explained.

You mentioned the NHS risk register. Our decision went off to the Information Tribunal, and the tribunal concluded that one of the risk registers—the transitional risk register—should be published. We wait to see the arguments in support of the commissioner’s decision. On the other risk register that we thought ought to be published, the tribunal said no, it should not be published, and we are interested to see the argument there. The whole thing has become a political football.

Ben Gummer: Precisely.

Christopher Graham: May I just finish the point? A risk register is the proper identification of the various issues that need to be managed and mitigated. One would assume that the risk register, when published, would show the mitigation arrangements that were in place. It will be the state of the risk register at the time the request was made. We were told that it was very out of date; Ministers would of course explain that, but just because it has the word “risk” in it does not mean that it is terribly risky and cannot possibly be published.

I maintain that the Freedom of Information Act as drafted—and the way it has been implemented by public authorities, the Information Commissioner and the tribunal—shows that time and again the responsible view is taken that material should not be published. I cannot think of many risk registers that have been published on our watch. I do not know whether Graham would like to comment on that.

Q203 Ben Gummer: You make the point that it has become a political football, and that is precisely the issue. What concerns me slightly is that the Information Commissioner and his office see the world as they would like it to be—they want to see it perfected—and not as it is. Frankly, the release of this information might be right within the compass of the law and be disseminated in the way that you would like, but it will skew debate to the point where public discourse becomes unbalanced. You are operating in the realms of...

Christopher Graham: I leave the politics to you. You say that the debate is skewed. The debate will rage, and parliamentarians on each side will explain and gloss or whatever, but the risk register is simply whatever the risk register was at the time it was requested. I am sure that politicians on both sides will be able either to attack or explain, but at the moment you are getting all the disadvantages of the incoming, but the Government are not actually saying, “Well, here it is.”

Q204 Chair: May I take you to another issue that has assumed some political salience? It is whether alternative channels are being used—private e-mails and the deletion of e-mails—presumably because of the belief that chilling effects might be happening. Is that something that you are in a position to monitor effectively?

Christopher Graham: Mr Gummer referred to this as being a problem for the last Administration, but there have been suggestions that it is going on now. We are investigating a number of section 50 complaints about material that the complainant has reason to believe exists but that the relevant Department says does not exist. We will follow the evidence and see where it takes us.

We issued very clear guidance at the back end of last year, making it clear that official business comes under the purview of the Freedom of Information Act and that it certainly must be considered for possible release even if it exists on individuals’ Gmail accounts. The guidance is very clear, and, if the practice continues of enthusiastic special advisers communicating through a back channel, it could become quite serious. I want Whitehall to take note of that guidance, as I am sure it has done. There should be no confusion; it is absolutely clear what the law is and it should not be a surprise to have it restated by the commissioner. Those involved in administration know what they need to do.

Q205 Chair: Is it a disciplinary issue for public service?
Christopher Graham: It is certainly a good practice issue for the public service. If it became clear that the Freedom of Information Act was being frustrated because information held in private e-mail accounts about official Government business was not being properly considered for release under the Act—I am not saying that it is not being released but that it is not being considered for release—it begins to look like a section 77 breach, and that is obstruction, which is a criminal offence.

Q206 Nick de Bois: If there is evidence that people are using their private e-mails, does it not undermine your suggestion that there is no chilling effect?
Christopher Graham: No. The point that I was making was that the contribution of senior mandarins in a way that there is no hiding place is driving this sort of bad behaviour.

Q207 Nick de Bois: That is missing the point.
Christopher Graham: The combination of our guidance, which makes it absolutely clear that such material, if it relates to Government business, should be considered; and the fact that the run of decisions by the commissioner and the tribunal support safe space for ministerial communications and the development of policy and so on, means that this nonsense should not be going on.

Q208 Nick de Bois: You might regard it as nonsense, but does it or does it not undermine your case that there is a chilling effect if people are using their own e-mail accounts?
Christopher Graham: My case is that there is not a chilling effect. I say that there is not a chilling effect.

Q209 Nick de Bois: Yes, I know, but, if you find evidence that people are using their private e-mail accounts, does it not undermine your point? I cannot think of any other reason why they would do it.
Christopher Graham: It is very exciting being a special adviser. If it gets abroad that special advisers carry on their business by some conspiratorial back channel, fine, but that will soon stop if there is a section 77 offence. People should just pay attention to the fact that the Information Commissioner is not routinely outing material under the Freedom of Information Act.

Q210 Chair: Turning to your more general conclusions, you say in your written submission that the objectives of the Freedom of Information Act are “largely being achieved”. What is your evidence for that conclusion?
Christopher Graham: Would you like to speak on this, Graham?
Graham Smith: It is a very popular right, which is being exercised by members of the public. Despite the concerns expressed, rightly or wrongly, about commercial use and use by journalists, the majority of requests are made by ordinary citizens, and they are finding out information that would otherwise have been kept secret. They are finding out about things that affect their daily lives, such as the sale of playing fields or NHS charges in their local hospitals, and the revenue being generated by initiatives like that or by speed cameras. This information would not otherwise have been disclosed.

The Constitution Unit has done some research on achieving the Act’s objectives. The first issue that it faced was defining what those objectives were. The Act does not have an objects clause. When the Bill was first introduced, the initial consultation back in 1999 spoke about freedom of information being one of a suite of measures aimed at modernising government and greater engagement of the citizen with the political agenda. There was concern at the time about a democratic deficit and so on, with the voter turnout. We have seen, perhaps through the media more than use by private citizens, that a lot of information is being exposed that may well not have been exposed without freedom of information. As with some of the previous discussions that we have had, it is not always clear that it is the Freedom of Information Act that is driving the behaviour. There are many other things now, such as citizens’ expectations, the way that we work and communications technology. Although the focus is sometimes I put it on the FOIA but being the cause of these things, it is only part of the picture.

Q211 Chair: How many of the complaints that you get about the Act are the result of people not understanding what its extent is supposed to be?
Graham Smith: We still get quite a lot of those, but we tend to deal with them quite quickly. Most often, they come from individuals or requesters who have unrealistic expectations of the Act. For instance, they may not understand simple things such as the fact that it extends only to public authorities and they are asking for information from a bank. There is some confusion there.

As for public authorities, the Act covers over 100,000 public authorities of different sizes, from individual NHS practitioners to huge Departments of state. It is not surprising, therefore, that some of the smaller authorities do not fully understand that they have obligations; many public authorities will not see a freedom of information request from one year’s end to the next, so when they come to us they may not be clear about their obligations. We can quickly put those things right with a phone call or an e-mail and get things back on track. Those issues do not tend to be a concern to us in complaints; it is more when we get into the meaty complaints where there are real disputes over the substance of the access arguments.

Q212 Mr Llwyd: A complaint that we have heard from several witnesses is that the Act was not intended for use by journalists or commercial organisations, or those pursuing personal agendas. How would you respond to that suggestion?
Christopher Graham: As a former journalist, I have a fairly high view of my former trade. The work of the press, week in and week out, whether in covering Parliament or asking awkward questions, is an important part of our democracy. I am sure that many of the questions asked under the Freedom of Information Act are vexing, but that does not mean that they are vexatious.
I cannot think of a really big news story that has resulted from a press release. It was someone like William Randolph Hearst who said, “News is what someone doesn’t want you to print; all the rest is advertising.” You therefore start off by asking awkward questions. The questions may seem rather trivial and aimless, but by pulling at the thread you can come across some really big accountability issues. It is inevitable that some of the most frequent users of the Freedom of Information Act will be journalists, but I see nothing wrong with that.

Q213 Mr Llwyd: What would be the impact of requiring the requester to explain why he or she wants the information?

Christopher Graham: In our guidance to requesters, we suggest that it is helpful not to be too mysterious about what they are looking for and why they are looking for it, because it aids the authority in finding the information that they are seeking. Similarly, we encourage the public authorities to be as helpful as they can, perhaps to say, “We don’t hold that, but we do have this”; to help them to refine the request. I would not want to be on the face of the statute that they could not have the information unless they explained what it was wanted for. That rather suggests that the authority could decide whether people ought to have the information, depending on whether it accepted that their purpose was a valid one. I would prefer to urge public authorities to deal more robustly with the obviously vexatious requests rather than just going through the motions and finding some other reason or exemption. It is quicker, frankly, to face down the obviously vexatious.

I would suggest one change that the Committee might like to consider. 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.

Q214 Mr Llwyd: That leads me on to my next question. The university of Oxford said that the test for vexatious requests under section 14 was “very high”, saying that it must be obsessive; it must harass the authority, distress staff, impose a significant burden, cause disruption or lack any serious purpose or value—in other words, what you just said about being frivolous. It also said that there was “little incentive” to use the section 14 exemption because it applied only to the request and not the requester. Should the vexatious test be amended to allow the requester to be identified as being vexatious, so that requests are allowed only in limited circumstances—for example, as with vexatious litigants in court?

Graham Smith: You could do that, but because of the way that the Act is drafted and constructed, the focus is always on the information. It is the request that is looked at for these purposes rather than the requester. In reality, 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. The factors that you listed are in our guidance on handling vexatious requests. You do not have to satisfy all of those criteria, and the criteria are put forward to be helpful to public authorities as being the sort of things that they should be looking for. In the early days of freedom of information, public authorities were crying out for some guidance that told them what a vexatious request might look like because it was not defined in the Act and they wanted some pointers. Now that we have given them some pointers, they say that they are too onerous. However, there have been some useful judgments from the Information Tribunal and we are revising our guidance in light of those.

One of the frustrations that I have when authorities say that the test is too high and burdensome to apply is that they are not taking the view. All public authorities have them; we all know them, and I am sure that you see them in your constituencies—people who are obsessed, perhaps with good reason, with particular issues and who will pursue them, and pursue them to great lengths. If that is a recurring problem, I suggest that it is worth investing the time and doing a proper job of explaining to them why they are vexatious, making a case as to why their request is vexatious and putting it to the commissioner. On the whole we support public authorities, and the tribunal supports us in this area.

The alternative, which causes frustration, is that public authorities may think that a case is quite easy and say, “We can deal with that quickly.” Even though the authority recognises that it is part of a pattern of vexatious requests, they think that it is a quick win and may just turn it away. 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. However, we are always ready to give advice and to talk to public authorities if they are facing these issues, and our guidance is being revised at the moment.

Q215 Mr Llwyd: On that point, some public bodies have said that they respond to what appear to be vexatious applications simply because they believe that it would be too burdensome and complex to deny them. Do you believe that the definition of “vexatious” is sufficiently clear and robust, and is that why you are reviewing the situation now?

Graham Smith: I think that we can give more clarity, and there have been some helpful judgments from the tribunal. As I was explaining, the Act just uses the term “vexatious”, but people have asked for some guidance to build around it, and we have come up with some criteria. Those criteria have been tested and we are now reviewing them. That is part of the experience, including the work of this Committee, that comes with five to seven years of experience and learning under the Freedom of Information Act. It is
Christopher Graham:

I turn to the question of the statutory limits. Why were time limits on public interest extensions and internal reviews not introduced in the original Act?

Graham Smith: The reason is slightly different for public interest test extensions. 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—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.”

Q218 Jeremy Corbyn: Are there any disadvantages to the statutory time limit concept?

Graham Smith: I do not think that there are. To be honest, this problem does not cause a great deal of difficulty, but when it does, requesters are left not knowing what to expect, how long they might have to wait and whether or not the delay was reasonable. If they come to us and we investigate and say, “We think that in this case it is reasonable”, even if technically they have gone over the statutory time limit, a proportionate approach to enforcement is sufficient to ensure an appropriate outcome. I know of a case in one 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. The requester was not too bothered, because he had a lot of the information that he wanted, but we still had the request on our books. Something that puts some framework on this would be better, so that public authorities were clear as to their obligations. More importantly, requesters would have a clear expectation of the time that would be taken.

You asked about internal reviews. That is a very different situation, because they are not required under the statute but are dealt with in a code of practice. When the matter was debated in Parliament, the view was taken that it was an administrative issue best dealt with in the code of practice. It almost follows that, because it is not a clear statutory provision under the Act, you cannot have a statutory time limit for an internal review, so it is dealt with through guidance and the code of practice, and reinforced by ourselves as to what would be a suitable time. 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.

Q217 Jeremy Corbyn: I should be grateful if you were to pass your last answer on to IPSA, which might consider increasing its staffing arrangements for dealing with e-mails.
Graham Smith: Sometimes, as in the example that I have just given, it is quite deliberate, but for good reason rather than for delay and obfuscation. 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. We have the power to issue practice recommendations if there is persistent failure to meet the time limits in either of the examples that you gave. We have done that with some public authorities, and it has produced the required results and improvements in performance. Generally, public authorities are getting better, but requesters certainly suspect that there is deliberate delay and obfuscation, when requests just roll on and on and it is months and months before they get a response.

Christopher Graham: One of the things that we have done over the past couple of years is to speed up the whole process, with the Information Commissioner’s Office itself being much more aggressive about meeting timetables and monitoring the performance of public authorities. With the case load that we have at the moment, as my colleague Graham Smith has said, 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. I give these stats simply to show that—I won’t say we have thrown the engine into reverse—by being very aggressive and being concerned about timetables and meeting targets, we sent a shockwave through the whole system. Public authorities now have to respond because they realise that the Information Commissioner is going to be on their case, whereas in the early years you could be fairly confident that the Information Commissioner would not get to you for a long, long time. If it was a public interest calculation 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.

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Christopher Graham: I am certainly aware that an awful lot of money has been wasted by public authorities in not doing freedom of information very well and not publishing proactively information that could just be out there, and sometimes fighting to the last ditch to preserve the secrecy of information that is interesting only because the public authority does not want you to know.

Christopher Graham: We would like the power to fine, and 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 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.

Elizabeth Truss: Do you have an estimate of the total amount that the public sector is spending per year on answering FOI requests?

Graham Smith: We do not, but that work has been done, and I think some research has already been commissioned by the Ministry of Justice. Some work was done back in 2006, when the Ministry of Justice commissioned a report from Frontier Economics, and the estimated cost was then around £35 million.

Christopher Graham: I am certainly aware that an awful lot of money has been wasted by public authorities in not doing freedom of information very well and not publishing proactively information that could just be out there, and sometimes fighting to the last ditch to preserve the secrecy of information that is interesting only because the public authority does not want you to know.

Elizabeth Truss: We heard from previous witnesses that, in some cases, people are making FOI requests to multiple authorities for information that is sometimes already in the public domain because it is easier to collect it like that. Rather than looking through research papers, they are using the public bodies to do their research work for them.

Christopher Graham: As the open data and transparency programme gets going, it will be much easier to compare and contrast the performance of schools, hospitals and different public bodies, and that is what the campaigners and activists are increasingly doing—matching this database with that and coming up with some interesting facts.
Q224 Elizabeth Truss: The point that I am making is this. If freedom of information requests are always free at the point of use, is that not the simplest way to collect information, rather than having to do the research work yourself if you are a journalist or someone interested in a particular issue?

Christopher Graham: If it is already in the public domain, there is a very easy answer to the freedom of information request.

Q225 Elizabeth Truss: There is still an effort in answering that—in saying that the information is already in the public domain.

Christopher Graham: It is a question of time. The open data initiative is now putting into the public domain all sorts of information that was not there before, and it is probably taking a bit of time for people to understand that and get used to it. There was an interesting item on the “Today” programme yesterday about people being a bit bamboozled by the wealth of material that is there and not being quite sure what to do with it. I am not certain that making a whole series of freedom of information requests as every public authority in the land provides more easily manipulable data than does the interrogation of a dataset. We are all getting used to the fact that items of expenditure of £500 are available on local authority websites, to take one example, and local authorities increasingly understand good practice in how to put information out there. The fact that it is being put out in usable form rather than with the curse of the PDF is an encouraging development.

Q226 Chair: On that point, is it a sufficient answer, if true, for a public authority to say, “This information is already in the public domain, full stop”?  

Graham Smith: Yes, it is. It is an absolute exemption under the FOI Act. Sometimes a requester will say, “Well, you told me that it’s out there but I can’t find it.” I may not be a whizz kid at IT, but sometimes things on websites are not always where you would expect to find them, so it takes a bit of navigating. I am not quite sure that the sort of question that you envisage could ever dry up in these circumstances, even if the information was actually out there. If, as you say, the information was free at the point of use and the question was whether a charge should be made to stop people being lazy, I am not quite sure. You might reduce the number of FOI requests, but whether—

Q227 Elizabeth Truss: You might reduce the number of spurious FOI requests that relate to information that is already out there. You might also address the issue of a small number of people making a lot of FOI requests to get information that would hold up those genuinely searching for answers that they cannot find. Should not regular users like journalists pay a contribution towards the cost of getting that information, as indeed they would have to do if, for example, they were seeking information from the Economist Intelligence Unit? They would have to pay for that. Why should they not pay public bodies a contribution to the costs incurred by that body in obtaining the information? We all have to pay for information when we go to other countries or other bodies to get it, so why not from those parts of the public sector that have to give information?

Christopher Graham: This sounds like a renewed argument for the stamp tax on newspapers, which was abolished a long time ago, but, 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 website and so on. There are things that you can do before you ever get to charging. On the subject of charging, I believe that public authorities need to be accountable to their electorate and through the fourth estate. The imposition of charges does not really get us anywhere. It would cost a lot to administer. 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.

Q228 Elizabeth Truss: Is it not the case that the number of requests has now gone up to previous levels?

Christopher Graham: Yes. So what has been achieved?

Q229 Elizabeth Truss: The public sector is not losing vast amounts of money responding, but is it not a question of basic economics—that we want our public services to spend their time helping patients or keeping the streets safe? We do not want huge amounts or even significant amounts of money being spent responding to requests without compensation. Let me be clear: I absolutely support the Freedom of Information Act. It is absolutely important that public bodies are transparent about what they do, but it is not unreasonable to say that a contribution to the costs of coming up with that information should be made, otherwise you get a situation where public bodies are diverted from their central purpose.

Christopher Graham: You do not charge for attendance at your constituency surgeries, do you? It is part of accountability.

Q230 Ben Gummer: It is part of our job.

Christopher Graham: It is 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.

Q231 Nick de Bois: You took refuge behind local authorities publishing data when answering a question on FOI requests. I have found, particularly with my local council, that you need an FOI request to get behind the very limited information that is made public. Do you see it as part of your role perhaps to challenge local authorities about the quality of the information that they publish?
Christopher Graham: The publication scheme under the Freedom of Information Act, backed up by the Information Commissioner, is one way to make the whole open data and transparency thing really work. If you have a recalcitrant local authority—I think it is safe to say that Nottingham city council does not much like dealing with us or with the Secretary of State for Communities and Local Government, who has published a code of practice in these areas—the Information Commissioner has the power to enforce the publication scheme, which goes beyond the exhortation of Whitehall to be open. The Prime Minister was talking at the Liaison Committee last week, I think, about the difference between democratic accountability and what he described as bureaucratic accountability.

I may deal with that a bit later in the discussion, but so far as open data and transparency are concerned, the Information Commissioner’s Office can be the delivery mechanism for a lot of what is otherwise mere aspiration. If you are having problems with your local authority because it is not really entering into the spirit of things—we have a consultation out on the publication scheme at the moment—we would expect to be the enforcers in making sure that the information is made public in usable and processable ways. We are the allies here.

Q232 Nick de Bois: That is my point. Is it your responsibility—yes or no—if someone wanted to complain about the quality of data published by local authorities? Would they complain to you now, or are you seeking those powers?

Christopher Graham: I would like to give a yes or no answer, but it slightly depends on the nature of the information, given the present state of publication schemes. I certainly envisage that, in fairly short order once the White Paper on open data and transparency is published, which I think is in May, it should become clear that the whole freedom of information regime is the enforcement mechanism for making sure that information is published.

Q233 Nick de Bois: I am pushed for time, and I want to return to one point. When I was elected, there was a contract, if you like, between me and the public that, once elected, I would be paid by the state to represent them but also to try to help them out. In respect of the Freedom of Information Act, I question whether there is a contract that the public should be paying for commercial organisations—particularly newspapers—to do the job of finding out information to help fuel newspaper stories. I am trying to understand from your answer, which is not clear, whether you believe that it is fair that the public should be paying for the bill to help commercial newspapers do their job of putting stories in the paper.

For the record, I completely approve of the Act, but also to try to help them out. In respect of the Freedom of Information Act, I question whether there is a contract that the public should be paying for commercial organisations—particularly newspapers—to do the job of finding out information to help fuel newspaper stories. I am trying to understand from your answer, which is not clear, whether you believe that it is fair that the public should be paying for the bill to help commercial newspapers do their job of putting stories in the paper.

Q234 Nick de Bois: The point is that they are businesses. That is the point I am making.

Christopher Graham: They are businesses, yes, but it is swings and roundabouts. The great benefit for the public of commercial organisations using the Freedom of Information Act is, frankly, about competitive prices. You are much more likely to get a good deal for the taxpayer if it is possible for companies to research the market to see whether they can offer a better deal. One of the great things about freedom of information is that it shines the torch into the dark corners of the public service and roots out examples—

Q235 Nick de Bois: We do not disagree about that. We are absolutely at one on that. My point is—

Christopher Graham: That is one of the benefits you get. If you feel that—

Q236 Nick de Bois: I would argue that it is a benefit for newspapers or media outlets of any sort to gain commercially from the taxpayer. That is the question. It is not about the value of it. I could not agree more that they have exposed some fantastic stuff, just for the record, but I am asking whether you think it is right that the taxpayer should pay for it.

Christopher Graham: I do not favour charges, and I think that the taxpayer as a citizen benefits from a vibrant press. That is part of our democracy.

Q237 Elizabeth Truss: Are we essentially talking about a cross-subsidy between the media and the public sector, at the expense of the taxpayer? Can you not envisage a charging system where for a retailer, a constituent, applying for a freedom of information request there would not be a charge, but if somebody was carrying out a lot of freedom of information requests on behalf of a commercial organisation there would be a small charge for each request—similar to the postcode finder that Royal Mail has, where you can look up a certain number of postcodes but once you get over a limit you have to pay? That would be a way of redressing the balance that we are talking about, because at the moment an awful lot of research work is being done within the public sector, essentially on behalf of media organisations.

Christopher Graham: You might actually increase the administrative burdens on councils, because you would simply get requests put in by Aunt Edna instead of by the Oldham Chronicle. It is just not worth going there. It really is not worth going there.

Chair: I seem to remember hearing all these arguments under the previous Government.

Q238 Jeremy Corbyn: I turn to the question of public services performed by private organisations, the degree to which they are subject to freedom of information requests, and the way in which public services and their performance are essentially hidden from the public. There is also the question of universities and university research. Universities are obviously public bodies and, to some extent, they are
publicly funded, but they increasingly have huge numbers of private sector research contracts, which they will claim are commercial and therefore not open to FOI requests. What are your thoughts on these two areas?

Christopher Graham: These are very big questions. Briefly, our position on the higher education sector has been well rehearsed in debates on the Protection of Freedoms Bill. We believe that the universities have very adequate potential exemptions, but they sometimes need to conduct their case a bit better than they have in some celebrated cases. However, 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. 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. I believe that their fears are greatly overdone. On the other question, yes, following the public pound—this is the big question on the Big Society—if more and more services are delivered by alternative providers to account if they are trousering out a function given to it by a local authority from public funds.

Q239 Chair: Are you sure that you want to use that phrase?
Christopher Graham: Trousering?
Chair: Yes.
Christopher Graham: Being remunerated to a grand extent from public funds.

Q240 Jeremy Corbyn: If an organisation is carrying out a function given to it by a local authority from which it can make money, such as commercial refuse collection—trade waste and that sort of thing—do you feel that the constraints on examining what private enterprise companies do under FOI is a problem?

Christopher Graham: The public authority will still hold the information.

Graham Smith: 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. Those things can be explored. 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. 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.

Q241 Jeremy Corbyn: This is the last point from me. There is huge public concern about issues such as animal testing in universities and animal experimentation. It was on the news this morning. Do you feel that there is a danger—if a university or hospital contracts out research services that involve animal testing to a particular company, even though it is quite clear that they will be the eventual beneficiaries or otherwise of the research—of the public’s right to know or to express their concern about something being controlled or prevented in some way?

Graham Smith: Under the existing arrangements, there are clear statutory bars, so there would be an option to extend those statutory provisions to other bodies that were conducting that sort of thing. Where information has been released, there are exemptions under the Act that cater for this situation, but it all comes down to public interest. In one recent case that involved Newcastle university, we had a situation where the commissioner had agreed to the withholding of the information, but that decision was overturned by the tribunal. It comes down to how you judge the public interest in a particular case. Given that it is specifically regulated by legislation, I should have thought that this was not an area where the difficulties that you spoke about in your previous question would have extended as a result of a privatisation programme.

Chair: Mr Gummer wants to make a final point.

Q242 Ben Gummer: Thank you, Sir Alan. Mr Graham, you said that universities have unfounded fears, and that mandarins, as you called them, have unfounded fears. In fact, everyone seems to have unfounded fears about the implications of the Act. Do you not feel that, at any point, any of these fears might be justified in any measure whatever?

Christopher Graham: I would like to engage with the post-legislative review in a constructive way, and if we can see changes that might be made in the regime, that would be good. However, I have a problem with the suggestion that everything has to be on the authority’s terms. I was very concerned the other day by the imposition of the Attorney-General’s veto on a decision notice before the matter had been considered by the Information Tribunal. It would have been considered by the tribunal today, by the way, but the veto was imposed before it had even considered the matter.

I find it rather difficult to square all the talk about openness and transparency with the slightly grudging approach to the mechanics of the Freedom of Information Act. The Prime Minister referred at the Liaison Committee to freedom of information furring up the arteries of government. I do not think that you have to choose between democratic accountability and what the Prime Minister described as bureaucratic
accountability. It is not either/or. It is both/and. The
danger of the intervention that we had from Lord
O’Donnell and the other mandarins in the House of
Lords debate, and the concern that it is all terrible, too
expensive and a great bureaucratic burden, is that
there really is a gap between the rhetoric of openness
and the reality of reluctance. The way through all
this—

Q243 Ben Gummer: Are they lying? Is that the
implication?
Christopher Graham: I am not accusing senior
figures of lying. I am just saying that everyone has
got themselves into such a state about this that it is a
self-fulfilling prophesy. If you hear from our lords and
masters that the Freedom of Information Act is
insupportable and all your secrets will be revealed,
then it drives behaviour lower down in the civil
service, which is unfortunate and needs to be dealt
with.
I am a strong supporter of the aims of open data and
transparency, but I believe that it needs to go hand in
hand with the Freedom of Information Act, otherwise
you are simply defining the public interest as what is
in the Government’s interest, and they will not always
be the same. I am afraid that the Freedom of
Information Act will always be troublesome, but it
will be troublesome in a good cause. The Freedom of
Information Act, properly implemented, and going
hand in hand with openness and transparency, is a
force for good in 21st century democracy.
Chair: We had intended to ask you about the
European data protection directive, but because we do
not normally like the Committee’s sitting to eat into
Question Time we will write to you on those points.
Thank you very much indeed.
Tuesday 27 March 2012

Members present:
Sir Alan Beith (Chair)
Steve Brine
Mr Robert Buckland
Jeremy Corbyn
Nick de Bois

Witnesses: Lord Hennessy of Nympsfield and Lord O'Donnell of Clapham GCB, gave evidence.

Q244 Chair: Lord Hennessy and Lord O'Donnell, welcome. We are very glad to have you with us to help us with our inquiry into the Freedom of Information Act and how it has been working. I have to declare an interest that might be relevant to the second part of the proceedings as a member of the court of the university of Newcastle upon Tyne. I do not think that affects the first half of our proceedings. Let us start by looking back. What was the approach of central Government, both politicians and civil servants, to the release of information prior to the introduction of the FOIA? You may both have something to say about it but I will perhaps start with Lord Hennessy.

Lord Hennessy: Thank you, Sir Alan. Can I declare a swift fistful of interests because I have some that are relevant? I appeared as a witness for the Information Commissioner in the pre-Iraq war Cabinet minutes case under section 53, as Attlee Professor of Contemporary British History, Queen Mary university of London, and President of the Friends of the National Archives, I have a professional interest in access to both 20 and 30-year old stuff as well as the current FOI material. It is a different world from when I first started writing about Whitehall. If you leaked a Cabinet Committee, which I used to do to annoy people mainly rather than necessarily informing the public, there was very often a leak inquiry. One of the great pleasures of being in the House of Lords the other day when we had a debate on freedom of information archives was that the National Archives had just declassified a leak inquiry into me that Lord Armstrong had instigated in 1980–81. It got nowhere, I am glad to say, but, as I think I said in the debate, it was a bond between us. It is one of the beauties of the ancien régime in this country that you can end up in Hogwarts in the House of Lords sitting with somebody who authorised a leak inquiry into you when you were a precocious youth. It really was a very closed world. If you read Estacode, the civil service bible, you could not divulge any information, whether classified or not, unless specifically authorised to do so. That requirement went to the grave with you. It was an absolute business. If you look at the evidence to the Franks Committee on section 2 of the old Official Secrets Act—the complete catch-all where 2,500 charges could be brought under it or something ridiculous—the evidence is amazingly evocative of a closed society. William Armstrong, the head of the civil service, gave evidence that there is the notion of self-authorisation for Ministers and one or two senior officials but otherwise it was closed. It also produced this wonderful line from Jim Callaghan, “I brief, you leak”, which again summed up so much of the world in which we were operating. 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. You will remember this, Chair, because you came into the House in 1973. I used to think that Lady Thatcher, for whom I had a great admiration, would have classified Hansard if she thought she could get away with it; so things have got better.

Q245 Chair: Ironically, it was Mrs Thatcher who first brought forward legislation to open meetings of local authorities to the public, some aspects of which she later repealed.

Lord Hennessy: Indeed.

Lord O'Donnell: I would like to comment on where we have got to in terms of openness, but I would also like to put forward some ideas about how you would improve things from where they are now.

Q246 Chair: They will probably come into the picture as we move further on. Let us deal with the past initially by way of comparison, if nothing else.

Lord O'Donnell: It was dramatically different. If you go back to the days when I was a press secretary briefing the lobby back in 1990, the Prime Minister, then John Major, decided to release “Questions of Procedure for Ministers”, which was the forerunner of the Ministerial Code. That was a big step forward. It had never happened before and now it is just routinely done. The degree of openness and transparency now, thanks to successive Government policies, has increased quite dramatically, but I stress that that probably has very little to do with FOI. The degree of openness has expanded partly because of technology, the internet, mobiles and all the rest of it. Things have changed quite dramatically so there is a lot more openness and transparency. I think it is an excellent thing. I would like there to be even more. I have lots of suggestions as to how you can improve it.

Chair: We shall explore those as we go along.

Lord O'Donnell: Good.
Q247 Chair: Given the fundamental change that you say has happened, it almost makes you wonder what scope there is left for leaks and whether the extent to which Ministers can use leaking as a way of influencing how things are perceived and journalists can make a living out of receiving leaks has receded; it does not appear to have receded at all. Lord Hennessy: I do not think it ever will recede because the highest classification in human terms is politically embarrassing. Also, with regard to the emotional geography of the coalition—on which you are an expert and I am not—your party is essentially herbivorous, Sir Alan, and the Conservatives are essentially carnivorous. It must be absolute hell living together. As a result it has produced a most amazing flow of leaks. It is a sort of displacement activity for the semi-disturbed, which in some ways it always has been.

Q248 Chair: How can you speak of your sources in such an unfriendly way? Lord Hennessy: Candour is the basis of friendship. The other great motivation for leaking was schadenfreude. In the old days, if the Treasury went in the manure when I was an operating journalist, Departments would almost line up to tell you about it if they were on the circulation list or on the relevant Cabinet Committee. The trick was to go in—to try and find out what was happening—to the Department least affected by the particular row but which was there because it had to be on the Cabinet Committee, although it was not central to their interests. They took immense pleasure in dropping the Treasury and one or two other Departments in it. The old civil service Department, of which I was very fond, was thought to be so hopeless at management by the big Departments that had big managerial tasks that they would line up to leak about it. A combination of schadenfreude and the need to tell somebody is the real source of leaks.

The current picture is just wonderful. It needs a social anthropologist, not me, to write about the pleasures and pains of coalition. It is fascinating.

Q249 Chair: I thought for a moment you were posing as a social anthropologist. Lord O’Donnell? Lord O’Donnell: I would say openness and transparency is almost a separate subject from leaks. It is great fun, but let us not go down the route of transparency is almost a separate subject from leaks. It is great fun, but let us not go down the route of transparency will have all the effects that Lord Hennessy said in terms of improving democracy and the way Governments operate. The question is whether FOI enhances openness and transparency. It does in some areas. In others it does the reverse. I would say the biggest problem for FOI, and why Tony Blair said what he said, is that it creates perverse incentives. If you are open, you get criticised for the things that you are open about. I had an interesting example myself. On the conflict of interest point, the only conflict I have is that I appeared as a witness for the Government in FOI cases. 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 not think anybody else does that. Surprise, surprise, you get a snidey press story in Private Eye as a result of this. The fact is that we are, all the time, setting up perverse incentives to openness. We have to be really careful. The problem we all know about with FOI is the multiplicity of grey areas. Those are the two things you need to crack. There are very simple ways of
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Q251 Steve Brine: Linked to that, I listened one dark Sunday night to your interview on Radio 4, which I thought was very interesting. You were pressed about risk registers, which of course have been a subject of some debate in this House in recent months. You talked about that open space and about conversations around preparing for war, for instance. You talked about conversations that may be going on at the moment in Government around a possible nuclear incident. You just don’t know. The net result was that 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 good sake, that is where all the cost comes from and that is where all the judgment and senior time come up.

When you are talking about principles, these are the principles that I would apply. First, it is a really important principle that we have collective Cabinet responsibility. You should allow a space where Ministers can disagree with each other, violently if necessary, in a safe space, and we can record it so that Professor Hennessy can write his history accurately.

There is a real problem about history. Again, 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 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 good sake, that is where all the cost comes from and that is where all the judgment and senior time come up.

Q252 Steve Brine: What is the impact of the fact that that grey area is there in terms of good government?

Lord O'Donnell: You saw it from what Tony Blair did. Tony Blair thought it was a problem. Therefore, how do you avoid this problem arising? You basically find a medium that is not covered by FOI. The cost of our 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 much worse government and it makes it impossible for the likes of Peter to try and recreate accurately what has gone on when there are no records. All you get is people’s versions of events ex post.

Q253 Steve Brine: Wasn’t that always so? I am delighted for historians to have an easier life—I am thrilled for them—but I am more interested in public confidence in government and good government. Has the Act improved or damaged public confidence in government?

Lord O'Donnell: If you come up with the work that Robert Hazell has done—and I think it is impossible to come up with firm conclusions on this yet, to be honest—he says he does not think it has enhanced public accountability, trust or any of those things. It is too early to say. The one thing I would say is that it has damaged the view of former Ministers about government. One of the really pernicious parts of FOI was the fact that it was retrospective. As Treasury officials, we spend our lives saying, “You should not do retrospective legislation.” What we did with FOI was a massive piece of retrospective legislation. I had to write to former Ministers, as Cabinet Secretary, saying, “By the way, when we were operating, you thought we were operating under these rules, the 30-year rule, and all of that. Curiously enough, we have changed all the rules. The game has finished. The referee has blown his whistle, but we are changing the rules now and I am writing to you now saying, ‘Could you kindly let us publish this stuff?’”

Basically, I am very anti retrospective legislation. In terms of what you do, I would say that quote of “Do no evil” is really important. Kindly try very hard not to make the retrospectivity problem worse.

Q254 Chair: I want to clarify the point. You spoke earlier about Ministers finding other ways to communicate with each other and the threat this might pose to the safe space for collective Cabinet responsibility to allow discussion. We will come back to this later, but can I take it that you were talking about Ministers then and not about officials? You were talking about the effect of the Freedom of Information Act on channels that Ministers use rather than those that officials use between each other and between themselves and Ministers.

Lord O'Donnell: What has happened is that, 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.

Q255 Steve Brine: Just to conclude, Lord Hennessy, was it ever realistic that this Act would improve public confidence in government?

Lord Hennessy: I rather hoped it would, but I must admit that, if you have something like the expenses business intruding in the same period, that is going to trump everything else in terms of public perception. Even though, if you average the figures out, one in 5,000 of the population has put in an FOI request, it is still minuscule compared with the impression of the political class and the quality of government that is given by the expenses business. The laboratory conditions in which we can judge that are very limited.

I have a good deal of sympathy with much of what Gus was saying. Within the section 35 element of the Act, I do think there needs to be a safe house. Just as the secret intelligence service has safe houses, I think
Whitehall does. The question is, can you so delineate the safe area that the uncertainty goes and everybody knows where they stand? It is very difficult because there has to be a public interest defence in all this—there has got to be—but also, there has to be a safe house. Indeed, it is only anecdotal for me, but less is being written down. 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 are going to have a much tougher time for two reasons. One is the fact that Gus was so eloquent about, but there is also the digital revolution. It ceases to be a paper culture. Again, it is a trade-off. Do you want information now to enhance the quality of public conversation about government and politics, or do you want a more pure archive? It is a difficult one.

**Q256 Jeremy Corbyn**: Lord O'Donnell was talking about the change in the style of government and both of you talked about the need for the confidentiality of Cabinet meetings. Is it the end of the world if the public as a whole knows there has been a debate in Cabinet meetings rather than it being written down? Do you agree information available, then Select Committees could challenge that basis of information and cross-examine the body that independently looked at it. In the case of the Treasury, it would be the OBR or it could be something else for other policies. For example, if you are talking about going to war, you would say, “A major policy decision, absolutely agree; let’s get the legal advice out there”, and then cross-examine that. I am for more openness but I do want my safe spaces as well. That is where I think you can manage the exemptions as long as you go with the principles. You forget about FOI for a minute and talk about improving the quality of major policy decisions.

**Lord Hennessy**: That was the argument I put, if I remember, to the Information Tribunal. The public interest override should apply because there is nothing greater than peace and war, but you can judge this, Mr Corbyn, better than I because you were there. If you had had the longer Attorney-General’s advice, not the little shrivelled bit that was given in a written answer to the House of Lords on 17 March, as an outsider I thought it could well have made a difference to some people in the Labour Party, who voted with heavy hearts for the Government, if they had seen Lord Goldsmith’s longer, much more caveat-laden opinion, which did not even go to the full Cabinet. My argument to the Information Tribunal was that this overrode anything else. This is where we disagree. On peace and war, if public interest override does not come in, what is it going to come in on? That was my argument. So I sympathise with your—

**Lord O'Donnell**: That is where I would do it differently. I would say up front: let’s decide what is exempt and what is not. For me, Cabinet should be a safe space.

**Q257 Chair**: Is there not an inherent problem there? If you give the Executive an unchallengeable ability to classify whether a document falls into the safe space category or not, you do not actually have freedom of information because the Executive may make unsound decisions about whether something is covered by the general exemption if it cannot be taken to a commissioner and a tribunal.

**Lord O'Donnell**: Because you are rightly thinking about FOI. I think the answer to that problem is completely different. What I would suggest for all major policy decisions—and let us take going to war—is that you should require that the full legal advice is made available to Parliament. When we do budgets—

**Q258 Jeremy Corbyn**: Would you exempt legal advice on a question of going to war from FOI requests, or would you include it?

**Lord O'Donnell**: What I am doing is coming up with a principle-based approach. I would say the principles for me are maintaining collective Cabinet responsibility and the ability of the civil service without fear or favour to put the pros and cons in clear, vivid language. Those are the two things I would apply. The point you are getting at is a different point. You are saying that, when a major policy decision comes up, you want all the relevant information there. I strongly agree with that, but don’t confuse that with FOI.

When it comes to the budgets, we now have all the policy decisions out there put forward by the Treasury. Very importantly, now, you have the Office for Budget Responsibility corroborating whether those costings and analyses stand up. There is an independent body doing that. If you want really to improve Government decision making, take that example and extrapolate it across major policy decisions. Make that information available, then Select Committees could challenge that basis of information and cross-examine the body that independently looked at it. In the case of the Treasury, it would be the OBR or it could be something else for other policies. For example, if you are talking about going to war, you would say, “A major policy decision, absolutely agree; let’s get the legal advice out there”, and then cross-examine that. I am for more openness but I do want my safe spaces as well. That is where I think you can manage the exemptions as long as you go with the principles. You forget about FOI for a minute and talk about improving the quality of major policy decisions.

**Q259 Jeremy Corbyn**: Would you say then that legal advice should be open and public and the political debate should be confidential in the Cabinet?

**Lord O'Donnell**: There are some difficult issues about legal advice in terms of LPP and the like. Legal advice is slightly more technically difficult. You should get proper lawyers before you to discuss that point. I am a mere economist.

**Q260 Ben Gummer**: Lord O’Donnell, on minutes, which is a subset of the problem, you mentioned the problems for historians. Surely the purpose of minutes is also to refer back within days, weeks or months of a decision to remind oneself of what has been decided precisely. There is good anecdotal evidence that minutes are now being fudged across Government and very anodyne minutes are being written. Do you agree with that assessment? If that is happening, is it affecting the quality of decision making because
people cannot refer back? Is the only loss to historians or is it to the process of decision making?

Lord O’Donnell: Where there is a formal meeting like a committee meeting or a Cabinet meeting, certainly as far as I was concerned when I was in charge of Cabinet minutes, we did not reduce the coverage of those minutes. They were accurate. The one thing we tended to do—and Peter hates this—is that we were a bit more boring. We stopped the quotable quotes. We tended to put it in rather plain prosaic language because there could be leaks. It is a real worry. That case on the Iraq war meant that the Information Commissioner thought the minutes of the highest body in the land—Cabinet—were fair game. If they are fair game, what isn’t? We were stuck, basically. I told everybody to try to keep the minutes as relevant and as accurate as possible and to avoid inflammatory language and possibly potentially future embarrassing language. At the moment I do not think the damage has been there. What has happened is that there is a great risk of people saying, “Look, if we have a formal meeting, it is all going to be minute and it is all going to be accurately there. So let’s find a way not to have that formal meeting”, or, “Let’s not ask for advice on this issue.” Those are the areas where you will find it has a debilitating effect on the quality of Government decisions. That is real. This is where it comes back to the evidence and Robert Hazell again. My standards of evidence are quite high. As an economist, you can imagine that I want something objective. You talked about anecdotal evidence.

Q261 Ben Gummer: I should qualify that. Especially in local government it has now become famous for the minutes to say, “A controversial issue was discussed and deliberated upon.”

Lord O’Donnell: Absolutely. The only way you could properly test this is if you found an area that was clearly exempt—some of the national security areas—versus a similar area that was not exempt, and you looked at the quality of the recording of minutes and all the rest of it in those two areas and compared and contrasted since FOI—and since FOI has evolved. Some people at the start of FOI thought of sections 35 and 36, as is quoted in Hazell’s minutes. Civil servants said, “We are all right because we have exemptions for policy advice.” Actually we now know we do not have exemptions for policy advice. Everything is conditional; everything is uncertain. Again, I return to this point. Just get rid of the grey.

Q262 Mr Buckland: We have looked at section 35 but we have not looked at the ministerial veto, which is part of the mix. I know it is not used very often but it is there. Do you think the current framework of the section 35 ministerial veto needs to be replaced with a different unified framework or that we should go down the road of exempting Cabinet minutes altogether?

Lord O’Donnell: I would definitely go down the road of getting rid of the grey areas. I would have either exempt areas or non-exempt areas.

Q263 Mr Buckland: You would have a list of exempt areas.

Lord O’Donnell: Use principles. If you did manage the exempt and the non-exempt, then there is a lot less need for a veto. I would say you might increase the bar for the veto. For example, at the moment Cabinet has to agree. You could say it should be Cabinet and head of the major opposition party or something like that for a veto. The areas where you would want to get into a veto are ones where it really affected the governance of the country, where almost on a Privy Council basis you want people to say, “This is going to be damaging if this gets out.” There are some obvious principles. The risk register one brought them out. You do not want to require the Bank of England to say, “By the way, do you know that this bank is likely to be subject to a run if only people knew about it?” I could give you other things where people have provided information only on the basis that it is kept confidential and where you have certain privacy issues like confidential commerciality. You could outline the principles quite easily to sort that out and then the veto would be a last backstop. You want to see that used rarely. We risk the situation at the moment where Governments may choose to use a veto more often. Just as it is uncertain what is going to come out of an Information Commissioner panel, so it will be uncertain what is going to be vetoed and what is not. That is not a good way of doing public policy.

Lord Hennessy: I would like to add something to that. The first section 53 veto on the Iraq Cabinet minutes has in effect gone. Lord Bingham—the great Tom Bingham—said that in peace and war, for example, the client of the law officers should not just be seen to be Ministers and Her Majesty’s Government but Parliament and the public. David Cameron took great care on Libya, and I have no doubt you advised him, to put the legal opinion out there. I suspect the Chilcott inquiry will have strong things to say about that. In a funny way the first ever section 53 veto—the ministerial override—has been overtaken by events. It was to David Cameron’s great credit that he did it by the book. Heaven forbid that future Ministers should have to do this, coming down to the House of Commons for a debate. The War Powers Act that has been talked about by William Hague is another example of this. The convention is going to be put into a statute, but Parliament has a substantive vote on it. I do not think Parliament, in future, would put up with it, would it, if it did not have the legal opinion before it debated on that? So, in a funny way, the first override under section 53 was a one-off and no more. I do not think it will be repeated—at least I hope not.

Q264 Mr Buckland: The importance of that is who has also seen the document before it is approved. The Attorney-General, you will remember, was at pains to say that the Prime Minister had not seen his advice before the advice had been tendered; there had been no suggestion that there had been any undue influence.

Lord Hennessy: But it was a tiny group of Ministers who saw the full advice. The full Cabinet did not. That was another problem really.
Q265 Mr Buckland: That leads on to another question I have. We have been focusing on minutes. We know there are other types of document that often tell a much more revealing story. Sometimes it is who is in the room. Sometimes it is who has been privy to an e-mail and what perhaps has not been said in an e-mail but you can read implicitly into it. In my view those documents are just as important. Coming back to the Cabinet minutes position, you may disagree, Lord O'Donnell, but is the fact that Cabinet minutes have become more anodyne over the years simply a reflection of the nature of the debate that has taken place in Cabinet, or do you think the FOI has had a marked effect on the decrease in information the Cabinet has?

Lord Hennessy: They became very boring in the 1950s when views were no longer attributed. If you see the Cabinet minutes from December 1916 when they started—Cabinets got by without minutes or agenda until then somehow and Lloyd George introduced it—in 1953 Sir Norman Brook, the Cabinet Secretary and Gus’s predecessor but five probably, decided that they would make it deliberately boring. Unless somebody was threatening resignation, you do not get attribution. If you have a threatened resignation or it is particularly sensitive and there is attribution, you have a confidential annex, which is how we know that the full Cabinet in October 1956 was told of the secret negotiations in Paris with the Israelis and the French about the Suez business. The Cabinet minute has no whiff of that, but in the confidential annex the views are much more attributed and there it is. It is the only time I have seen a smoking minute. They became very boring in the 1950s, but Gus has written minutes more recently. I have only seen them up until 1981, you see, because I stick to the rules; I am a good boy.

Q266 Mr Buckland: I would expect nothing less, Lord Hennessy.

Lord O'Donnell: The attribution rules are slightly different in the sense that, if a Secretary of State introduces a new subject, it will be attributed to them. It is not that it will say, “X said” and, “Y said”. There are certain attributions, but certainly when it comes to the discussion it will say, “The following points were made”, and it will not say who said what. To get that, you need the Cabinet Secretary’s notebooks, which do have the attribution in them. That is where we are on attribution.

The interesting point is that they know around the table that these points are being noted. Does this affect the way they operate? I suspect again that that is affected by all sorts of things: first, the amount of leaking that goes on from different Cabinet members; and, secondly, the propensity of a number of the Cabinet members to write their memoirs rather quickly and include things they probably should not. Those sorts of things have influenced it. People know when they make a very clear profound disagreement in Cabinet that quite often you find within a few days it has emerged one way or the other. I regret it, but there you are.

Q267 Chair: Isn’t there a danger, with all this emphasis on the Cabinet and discussions between Ministers, that an impression is created that the Freedom of Information Act has transformed government from top to bottom, not in a favourable way but in an unfavourable way, and that all over Whitehall civil servants are not saying what they ought to say to each other and to Ministers for fear that it will appear in some record? You have rather given that impression.

Lord O’Donnell: I do not mean to. Where freedom of information has had a great effect is where it does not appear in FOI at all. What they have done is to make us all think about, “If there were an FOI request for this information, would we release it or not?” If the answer to that is, “Yes”, the advice I always give people is, “Publish it, don’t wait for a freedom of information request. Let us proactively publish as much information as we can.” We are now doing that a lot more, and along the lines I mentioned earlier, I would go even further. We need more openness and transparency.

Where it is difficult is when you get into politically sensitive and politically embarrassing judgment areas, as Peter said. These are the ones that take up the time of the senior officials and the Ministers concerned. They require judgment. They are all a balance. You do not know whether this is going to come out because there is a public interest test there. If you want to reduce the cost of FOI, just get rid of the grey area altogether. That is where the cost comes out. It is the time of senior officials, Ministers and former Ministers having to handle these sorts of issues. I want us to keep the records as accurate as possible. That is the message I have been giving to everybody.

Q268 Chair: On that point, surely most civil servants, rather than saying, “This could be published some day; I therefore won’t say something”, are much more likely to say, knowing it is going to be published some day, “It should be clear from the record that I have advised the Minister or my civil service colleague that there is this risk or that problem.” Surely the natural instinct and the professional ethics of a civil servant would be to make sure that relevant matters are recorded. It would indeed be a subject of criticism later if a civil servant was found from the published record not to have advised about something.

Lord O’Donnell: Absolutely. So please set up the incentive structure to maximise the incentives for civil servants to do the right thing.

Q269 Chair: Publication is then an incentive to be sure you have recorded the full range of advice you should have given.

Lord O’Donnell: No. The problem is that, because of possible future publication at some unspecified future date, which could be quite soon, there is this great risk that Ministers won’t ask for that piece of information or that they will have that debate in an area where civil servants are not present.

Lord Hennessy: There has been a chilling effect, Sir Alan. I can date it exactly and it relates to this Committee. It was around Gus’s table on 16 February 2010 when a group of outsiders were brought in to
help with the constitution in a hung Parliament circumstance. The first bit of the Cabinet Manual came to your Committee at the end of that month, as you will remember very well. Gus opened the meeting—he knows I am going to say this and he doesn’t mind—by saying, “Remember, this is FOI-able.” To call it a chilling effect is probably an exaggeration because we were all on the side of the Queen and there to help, but, even so, I was slightly surprised and I remember very vividly Gus opening with those words. There has been an effect, but in that case it was all to the good because, if you don’t mind me saying so, your Committee did a terrific job on it. Without that scrap of paper when I, Vernon Bogdanor, Peter Riddell and Robert Hazell impersonate the British constitution in five or six television studios, we would have been stuffed. It was very difficult to explain the British constitution until we had that bit of paper on hung Parliaments. We had a letter from King George VI’s Private Secretary to The Times in 1950 and the transcript of a Radio 4 documentary I had done on the same subject because he is still there. That was the British constitution until you produced your report. We are a very odd country really.

Q270 Nick de Bois: Do you think, given what you have been saying, that we now effectively have government that is essentially risk averse?

Lord O’Donnell: Let us use your words about risk. We have just gone through this business about risk registers. 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 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?”

Q271 Nick de Bois: I have a quick follow-up question to explore the point further. If we get to the stage that Sir Alan was outlining, and I think you were agreeing, that civil servants should make a comprehensive list of potential outcomes, not necessarily in a risk register but in a discussion, is a Minister therefore, fully well aware that this public record is going to come to light, likely to make, shall we say, risk averse decisions and maybe not the best decisions because he is considering how it is going to read in a few months?

Lord O’Donnell: I think it does increase risk aversion in a rather damaging way.

Q272 Chris Evans: Is it fair to say that there is a perception and a reality in FOI? The perception is that you have a journalist running round bunging in spurious FOI requests, pursuing personal and political agendas, yet the reality is that only 8% of FOI requests to central Government are by journalists and 33% to local government, according to the Constitution Unit. Why do you think this perception has arisen?

Lord Hennessy: The hacks write it up in mass outlet media, so we know about it. There is a great pattern there. I remember the Canadians in the 1980s did freedom of information first. I went over to see them. The first great scandal had to do with consumption and the alimentary canal of leading figures. Mr Mulroney was Prime Minister, I think. If he was going on a trip, it was, “How many people go with you and what expensive meals did you have in Paris when you were there for the OECD?” Every country gets obsessed with who is dining with whom. We had a great eruption of that, understandably probably, yesterday. I do not want to be unkind to Tony Blair. Yes, I do. The problem arose with Tony Blair, if I remember, when he did not want to make public the guest lists of these dreadful glitterati who had been shimmering in and out of No. 10. No old leftie like Mr Corbyn got in but these terrible glitterati did.

Jeremy Corbyn: I was never invited. It was a terrible shame.

Lord Hennessy: I know; it is very sad. I have been bleeding for you since 1997.

Jeremy Corbyn: I am most grateful.

Lord Hennessy: If I remember, Gus—I did not check this—No. 10 said, “We’ve got to stop it. We can’t have the list being published of people who go to Chequers for a party or a meal.” People had to say under which particular section of the Freedom of Information Act 2000 this was exempt. They had not the faintest idea. That caused the first eruptions of anxiety at No. 10. It was glitterati and nosh, and, of course, the press loved that. The news editors don’t thrash on some hugely dense policy document of options, but they love who’s been in to see Tony and Cherie and what they drank. Such is the quality of the British press.

Lord O’Donnell: Coming back to your point about the 8%, there are lots of examples where an FOI request asks for information that may well already be available or you can easily put it together, and it is the public asking for data. I am a massive fan of this. The example I have used a lot is one with cycling accidents. In the old days the Government would have churned its way through and decided what to publish and when. We would have got in lawyers about whether we are liable if we publish it and what the policy response is and had big meetings. Just throwing out the data was fantastic because the cycle users’ groups just got on with it and came up with answers. I am a big fan of getting the data out there as often as possible. The point about your 8% is that journalists, curiously enough, tend to ask politically sensitive or potentially embarrassing questions. They go immediately to senior officials and Ministers. They take up a lot of time. I bet those 92% cost less in total than the 8%.

Lord Hennessy: I am most grateful.
am up for trying to encourage the 92% by restricting the cost of the 8%.

Q273 Chris Evans: Do you think the reaction of the public authorities who have had FOI requests has sometimes affected people’s perception of FOI requests as in, “Oh, this is another spurious claim”? As I mentioned before, there is someone running around with a personal political agenda, who wants to know who Tony and Cherie or David and Sam are dining with tonight. Do you think their reaction has been wrong then?

Lord O'Donnell: We do get a lot of vexatious requests. That has been an issue in FOI that has caused a lot of problems. We do get a lot of fishing expeditions. The problem is that those sorts of difficult and politically sensitive things all go up to Ministers and senior officials. Our perception is very clouded by that; you are absolutely right. That may have leaked out, as it were.

Q274 Chris Evans: This is a question I want to put specifically to you, Lord O'Donnell. The Cabinet Office is seen as the worst performer in terms of FOI across Government. For 62% of the time it has gone over the 20-day limit. Why do you think that is?

Lord O'Donnell: That is precisely the point I was making. Every single one of the things we get tends to be in the politically sensitive area or they are an issue that covers all sorts of Departments. Quite often what we, in Cabinet Office, are having to do—sorry, were having to do—was get all the Departments signed up to saying, “Right, we are all going to provide this information”, or, “We do not think we should provide this information.” For Cabinet Office, whatever you do, you will find that they will be the slowest of the lot because you have to get this information up to the Ministers. Quite often it is the Prime Minister, and curiously enough the Prime Minister is quite busy.

Chris Evans: Surprising.

Lord O'Donnell: Amazing, isn’t it?

Q275 Chris Evans: My final question relates to the Cabinet Office. Why do you think it costs £24.4 million across central Government to deal with FOI requests, yet in local government, where they deal with more requests, it costs only £8 million? Is there any way of reducing that?

Lord O'Donnell: Yes. One simple answer to that is to get rid of the grey. That is all you have to do. Do not give us a situation where you just don’t know. If there was a set where that is FOI-able and that is not, you could reduce the costs dramatically.

Q276 Jeremy Corbyn: Following Mr Evans’s point very briefly, on local government, when planning issues come up, the public often get understandably extremely concerned. They put in FOI requests from all over the country to local authorities. It seems to me there is a trend of saying, “This is commercially sensitive and we cannot reveal the information.” In many cases the advance information on planning issues is absolutely crucial to the outcome. When planning officers have private discussions with developers or potential land purchasers and so on, the purchasers don’t want the public to know, the council does not want the public to know that they are having a discussion with the potential developers, and therefore it is often almost too late to stop the juggernaut of a major development by the time it all becomes public. Do you think there needs to be some reassessment of this question of commercial confidentiality?

Lord O'Donnell: It is a difficult area. I have dealt with this, where you are having procurement negotiations with someone. There needs to be some space where you can ensure that the taxpayer gets best value for money. In that sense, sometimes you do need to run competitions and all the rest of it and you need some confidentiality during that process. I do not think your point is really anything to do with FOI. What you need is for the procedures to be such that, once you have got to that stage, there is enough time for all those other considerations to come through if they have not been factored in earlier. I am with you in saying that there needs to be a space where you can ensure a proper procurement process. There then needs to be a space where you can factor in some processes that may not have been included in that procurement process from the start.

Q277 Chair: I want to go back for a moment to the grey area point so that we understand your definition. In one sense there is not a grey area because there is freedom of information and there are specific exemptions from freedom of information. It is, if you like, the Executive that introduces the grey paint when it tries to apply the public interest test. The only grey area is whether a public interest test would protect this particular document in a month’s time when someone does an FOI on it. That is why it is in a grey area, otherwise it is either in an exempt category or it is subject to freedom of information.

Lord O'Donnell: But, unfortunately, as soon as you put in that public interest test, the exempt category ceases to be exempt. It is not exempt. We don’t know; we absolutely don’t know. That has made the whole thing grey. We thought Cabinet minutes were subject to this exemption. Then we thought, blimey, what if Cabinet is not going to be able to have a confidential discussion? That’s been blown. I am afraid it is grey, and you cannot change it without saying, “This is exempt”, or, “That’s exempt.” On the public interest test, who is to determine the public interest? We have to try and second guess what a future panel might think in the public interest.

Q278 Chair: But the Executive over many decades has quite a bad reputation for how it can use public interest tests when it has got them.

Lord O'Donnell: I completely understand that. By all means take that into account when you think about exempt and non-exempt, but just please give us some certainty.

Q279 Ben Gummer: As a quick supplementary to Sir Alan’s point, would it be helpful to officials if you were able to pre-declare a meeting as a safe space?

Lord O'Donnell: Absolutely.
Q280 Ben Gummer: If you know you are about to have a policy discussion and it is in the diary with the Minister, at the beginning rather than saying, “This meeting is FOI-able”, you could say, “This is a policy discussion meeting. It is a safe space.” Then that protects that particular meeting.

Lord O’Donnell: There are two principles, as I said: collective responsibility and allowing the civil service to do what you, Parliament, for which I am immensely grateful, published in the CRAG Act just before the last Parliament. You told the civil service that we had to be honest, objective, impartial and act with integrity. You want them to do that, and they can do that if we say to them, “Right, go for it. Don’t worry about any of this if it is potentially embarrassing and Ministers are telling you not to do it. Go for it 100% because we are in a class now that is a safe space.”

Lord Hennessy: The way I looked at it is to say, “This discussion is almost certainly to go into one of the exempt areas.” Indeed, in the old documents you will see something that says, “Confidential covering secret”, and there is a paragraph or two that is secret. If a meeting goes in and out of an exempt area, it is fair game to say that at the beginning, isn’t it? But, there again, would an Information Tribunal necessarily follow that?

As you were saying, Sir Alan, the Executive has had it all its own way for a very long time in terms of defining the public interest and national security. Think of the intelligence area and how long it took for the law to come in. The Security Service Act 1989 was a great breakthrough and we have had several since then. The cumulative impression of the Executive operating in its own self-interest is still very widespread; so it is a very difficult thing for Gus. I think Gus has made a very good case for a new deal. That is essentially what he is outlining. He is inviting your Committee to give a new deal, which is a tremendously difficult job to do.

Lord O’Donnell: But, remember, I am saying that what we need to do is enhance accountability so that you get the information out there and you allow the Select Committee to look at it, cross-question it and all the rest of it. The example I would give is when you set up the Bank of England Monetary Policy Committee. There you are going to a world where it is independent and you can change the rules of the game. You have the minutes public; you have the voting records public; it is cross-examined by a Select Committee. That is a fantastic piece of transparency. It is a fantastic piece of Government policy. It is great. Try and replicate those sorts of things. It is nothing to do with FOI.

Q281 Ben Gummer: Lord Hennessy makes an interesting point here. The public interest is served by two purposes. One is the objective quality of the document or the discussion itself. There is a wider public interest point that you were making, Lord O’Donnell, about the confidence with which civil servants can make points. In that sense the mens rea of the civil servant at the beginning of the conversation should be an important component of the tribunal’s decision making. Therefore, if that were made plain at the beginning of the discussion, that would help to inform the tribunal about the wider public interest of that discussion becoming public.

Lord Hennessy: Yes; there is a lot in that.

Lord O’Donnell: Absolutely. If that were to provide the certainty necessary, that would be fantastic.

Lord Hennessy: There is no point keeping Crown servants who are not politicised in the way we have since the 19th century if they can’t speak truth unto power. That is the first requirement. The CRAG Act, to my and Gus’s great relief, was quite quick by British standards. The Northcote Trevelyan report of 1853 recommended a statute and we finally did it in 2010; and we almost lost it in the chaos of the wash-up. That is the gold standard. It is speaking truth unto power and that should not in any way be jeopardised. There is no point keeping Gus in the attic to be incorruptible, as he always was, and his colleagues, if it is all going to get contaminated by this.

Q282 Chair: But under freedom of information it would be possible subsequently to say, if he failed in his task, “You did not speak the truth unto power when you should have done and we now know that that is the case because we have the record.”

Lord Hennessy: Yes; that is a good point.

Lord O’Donnell: But you will get the records in due course. It is the head of the civil service’s job to make sure that that is happening. One of the things I want to do to enhance that, and where I think it has been enhanced in the area of economic policy, is where you have gone out there and published stuff and had an independent body set up to corroborate the analysis and costings. That is a fantastic example. Imagine if we did that in areas like transport; boy, that would make a big difference.

Q283 Ben Gummer: I want to come back to the “in due course” point because this came up in a fascinating debate that you initiated in the Lords, Lord Hennessy. Earlier you gave us a rather wonderfully Whiggish interpretation of the course of FOI and how we were somehow completing a process of progress. Lord Hennessy: It may be Whiggish but it is true.

Q284 Ben Gummer: That is a matter of opinion. Could I put this to you? Are you perhaps witnessing somewhere where you have not seen progress? As an historian, you have participated in the most interesting and richly detailed period of archival material, which has now come to an end because of digital recording.

Lord Hennessy: Yes.

Q285 Ben Gummer: In fact we are now in a much more interesting area where we are going backwards in terms of recording Government information, and future historians will not have that richness.

Lord Hennessy: You are absolutely right. I am very conscious of reading Lady Thatcher’s Government’s papers from 1981 that were declassified the other day. The golden age is about to come to an end. The paper culture is going to cease, both in richness and in candour. Also, 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. The other worry I had was that, if we had not had Sir David Omand, being of the old school and taking a note through that running meeting that was crucial to it all, there would not have been a record. I do not want to be unkind, but it seems that all of a sudden so many people in that room who in the past would have made sure there would have been a note taken were all too grand to take minutes. If Sir David Omand had not done it for his own purposes, Lord Hutton would not have been able to reconstruct it. Jonathan Powell gave evidence and said that over a fortnight he had looked at the Prime Minister’s meetings, and something like a third, I think, had been minututed, and that was all. In the old days that was very different, so I have a great sense in the National Archives of being in the last of the golden age of the great paper culture.

Q286 Chair: It was before FOI.
Lord Hennessy: But digital is the real problem.
Q287 Ben Gummer: It is connected with FOI because, if the recordkeeping is not being kept now, it affects FOI at the moment as well as future historians.
Lord O’Donnell: I would say what you have talked about there is more about politics than FOI. With the introduction of a coalition Government, those numbers will have changed radically.
Lord Hennessy: Yes; you have had a comeback of collective Cabinet Government. It is the greatest comeback since Judy Garland. It is absolutely wonderful.
Lord O’Donnell: And there is a lot more recording of things. The area about digital is an interesting one. It is a bit about technology changing. Yes, a lot more is done on e-mail. Some people think e-mails are not FOI-able, which is crazy; of course they are. We do need to think about our retention processes. We have all sorts of electronic records that we keep digitally. Interestingly enough, the National Archives people told me that digital records deteriorate faster than paper records.

Lord Hennessy: They do, yes. Lord O’Donnell: We had a whip-round of all the Departments—I am very proud of this—to give the National Archives some money to ensure that digital records are preserved. That is quite important. You are right about e-mails. They tend to be deleted after a routine number of months, but we try and encourage everybody to make sure that they keep a good record of the policy process.

Q288 Ben Gummer: Can I therefore put a proposition and see whether you both agree with it? You agree that the record is decreasing. In fact the Legal Deposit Libraries Act, which was passed in 2003 to capture the web, still has not been implemented. Future historians are going to look back and say this is a period of wilful abandon in terms of recordkeeping. Do we need a new Royal Commission on historical documents that can set a template—a rule—by which records are kept? There was an interesting piece in the German press recently, in the last 10 days, saying that Chancellor Merkel sent 200 Texts a day, none of which are kept. There is a problem across—

Lord Hennessy: I am with you 100%. The Wilson Committee of 1980 was the last look at this. We need to look across the entire field because related to FOI is the public records legislation. Like Edmund Burke, I am a great believer that, “Laws, like houses, lean on one another.” The Public Records Act leans on FOI and vice versa. We need to look across the whole piece. The 20-year rule is a great thing. I could not agree more, and, if you recommended that, you would have the hosannas of a grateful Hennessy.

Chair: We can return to that topic, but we have delayed our second group of witnesses. We have had a very interesting session. We are very grateful to you both. Thank you very much indeed.

Examination of Witnesses


Chair: We are grateful to our second group of witnesses for being patient while the previous session extended a little, for reasons you probably understand. Welcome to Mr Wanless from the NHS Business Service Authority, Ms Slipman from the Foundation Trust Network, Mr Taylor from the Liverpool Heart and Chest Hospital, and Mr Brookes from NHS South of England. You are all in areas that are significantly affected by the Freedom of Information Act. We are very glad to have you with us. I am going to ask Seema Malhotra to begin the questioning.

Q289 Seema Malhotra: Thank you for coming along to the Committee today. The Freedom of Information Act obviously has the multiple objectives of accountability, transparency and the hope of improved decision making. That was certainly an aspiration of the Labour Government at the time. Jack Straw suggested that the Bill would, hopefully, help deliver a more accountable public service, too. That was public service in addition to Government and Whitehall. There have been several submissions from NHS bodies that credit the Act with improving the accountability and transparency of their organisations. NHS South of England has written that the Act helped lead to greater accountability as public authorities are better scrutinised and held to account. Perhaps I could start with you, Mr Brookes. Would you perhaps elaborate on that and give us one or two examples of where there has been some public benefit that you would ascribe to the Act in terms of how people have behaved as a result of FOI?

Julian Brookes: Thank you very much. I will not try to match the level of wit in the previous presentations.
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. As was being described in the previous session, this is partly to do with being able to articulate the decision, the elements and the reasons why that decision was made. It is not quite a mantra in our organisation, but there is a test that we like to apply, which is that, if somebody was to look back at our record of a decision being made in five or 10 years, would they understand the logic of the decision? Would they understand the language that had led to that decision and therefore understand the context in which it was made? Partly freedom of information has done that, but it is partly the culture. To give a specific example, if you were to look at the areas I have had responsibility for in the past is continuing healthcare, where the responsibility of the strategic health authority is to undertake independent appeals of local decisions made about whether somebody is eligible or not for continuing healthcare. One of the FOIs we had was to look at a range of decisions over a period of time. It became very clear that the independent assessors making the judgments on these appeals were applying their own sets of standards in how they would articulate the decision. One of the consequences, therefore, of a Freedom of Information Act request was for us to look at those and to provide some guidelines and standardisations so that you could see the logic and consistency of approach to those decisions on continuing healthcare.

That is one of the examples I would suggest we have used where freedom of information has made a difference through its request and a reaction to its request, which is the important thing. 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.

Another area of that is, for example, the Cancer Drugs Fund. It is where decisions are made about the specific use of that funding. We get lots of requests for that. We now publish on our website a full scheme of the decisions being made about particular drugs and so on, and we just refer those people to that particular site. It is more efficient for us, but it is also clear because it provides them with the full range of information. Again, that is where accountability has increased.

Q290 Seema Malhotra: Could I ask the same question of Ms Slipman?

Sue Slipman: I agree that the Freedom of Information Act has been a spur to organisations to better record and organise their data. There is no doubt about that. But that is not the same thing as a culture of openness. What is driving the culture of openness now in the NHS is that we are no longer in a command and control environment. We have independent organisations with boards that are accountable to their members through elected governors and accountable to a national regulator. I think that culture of openness is something that is coming from the ground up, rather than coming from an Act of Parliament. However, there is no doubt that that Act of Parliament gives a kind of disciplined framework within which people now think about the organisation of data.

Chair: Don’t all feel obliged to answer unless there is something you particularly want to add.

Julian Brookes: Could I add something? It is very interesting that one of my other responsibilities is looking at significant reconfigurations of services across the south of England where there is going to be, say, a change of acute hospital services, mental health services or whatever. We would be disappointed if there was evidence of the lack of evidence that such changes are being made. It is a question of accountability. That is something you particularly want to add.
Q292 Chair: What would be the legal basis on which you could do that? Freedom of information is absolute, is it not? On what legal basis could you say that they were misusing the information?

Gordon Wanless: When you give a reply to an FOI request it is for the personal use of the requester. If a business is then going to start using it for commercial advantage, it was my understanding—and I am prepared to be corrected—that that was outside the use for which you were given it. FOI is access, and then you get into the reuse of public sector information if you are going to start using it for commercial advantages. The two things are different.

Sue Slipman: I want to come back on that. This might be the case if we dealt with the issue of the anonymity of requesters and you were able to ask if information was to be used for commercial purposes. But I still think we have an issue about whether it is the right source of taxpayers' money to use to pursue complaints in the courts about the use of commercial information. The whole time you are dealing with a closed pot funding of NHS services, you don’t want to see money being diverted to make lawyers richer and to take issues through the courts.

Q293 Chris Evans: Judging by what you have just said, would you agree or disagree that the Act is being misused?

Sue Slipman: We have evidence that the Act is being misused in a number of cases. It is not by individuals but certainly in many cases by journalists and also for commercial purposes. Those two are really quite difficult areas. Clearly the Act was never intended to divert taxpayers' money to supporting journalism or indeed commercial companies.

Q294 Chris Evans: Reading some of the figures, I was surprised that, unlike other organisations who were FOI-able, it seems that commercial organisations are dominating FOI requests at the moment. How do we reform the Act so that we can clamp down on these commercial organisations that are basically wasting taxpayers' money? It also seems to me that there is also evidence of journalists making the same requests to several different organisations, which then costs the taxpayer more money. Would it be an idea if the test of vexatiousness was reformed so that when you did have a request it was flagged up, for want of a better word, as "spam"?

Julian Brookes: There are two issues there. If I stick to the first one just to give you an indication, we have had around 500 requests in the last year for the three Strategic Health Authorities in NHS South of England. The media were 14%, companies and organisations were 26%, individuals were 55%, and MPs and others were around 5%. You then need to split up the individuals, and this is the point I want to make. A lot of those individuals are not actually individuals at the end of the day. They come in as Joe Bloggs at dotcom as an e-mail. I was talking to some colleagues who are working on smoking cessation at the moment and they get a lot of freedom of information requests that are, on the face of it, coming in from individuals, but if you google those individuals, they work for a number of interested parties in that area. Sometimes it is very difficult to identify who those people are. Vexatious people are the same. The three Strategic Health Authorities in NHS South of England have never defined some as specifically vexatious, but 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, and I am just wondering how much it is a question of asking their question. Tracking those down and pinning down who is actually making the request is sometimes quite difficult.

Q295 Chris Evans: The solution I am thinking of is this. Would it be helpful to your organisations if you introduced some sort of an FOI request?

Julian Brookes: Across the board?

Q296 Chris Evans: Yes. As an example, several people who have come to me and said, "I FOI-ed the local authority on this and they are hiding something." They have done thousands upon thousands of FOI requests and basically get the same information over and over again. I am just wondering how much it is costing the local authority to keep doing this. Would it be helpful if you had a minimal charge to stop these multiple requests where you are just putting exactly the same information out?

Sue Slipman: It is a difficult question. There are pros and cons here. I can certainly see the argument for charging media organisations and then potentially having another charge on top of that for questions over a certain number, where it is clear they are just escalating the numbers. Let us just talk about the numbers for a minute. We did a survey of our members. The increase in 2010–11 was 11%, and this year so far it has been around 17%. Many of our larger teaching hospitals are dealing with 350 requests a year now, and it is growing exponentially.

The costs that organisations face are not just the costs of reproducing information that is readily available. This is nearly all bespoke information. Most of the information that is readily available is readily available through websites in any case. A lot of this is bespoke information. It is not just the costs of the overhead for the office that is dealing with freedom of information requests. It is also the time of medical directors and chief executives, and often it will include some legal advice, which you have to go out to, to see if this information might have been exempt. The costs are growing throughout the whole organisation.

When we have to take £20 billion out of the health service over the next few years, increasingly we have to examine whether this is the purpose for which public money was intended, particularly when front-line services come into question. There are some
strong arguments for charging, but of course you will then have the overhead cost of recovery of that money. One would need to look carefully at the cost-benefit analysis for doing that. I do not think we would want genuine individuals and members of the public getting caught up in it if there is a way to avoid that.

**Q297 Chris Evans:** I have one final question. I will be quick as time is moving on. Do you think, jumping ahead, that FOI is a lazy way of doing academic research?

**Sue Slipman:** Indeed it is. I think we would all agree on that.

**Julian Brookes:** It is not just academic research. If you were prioritising the number of requests that came into you that might be of an academic nature, for example, some of them would normally take quite a while because they are not pertinent to the core business. If it comes in under an FOI, it comes into a framework there and is required to be responded to within the 20 days and so on. Yes, it may be a lazy way of doing it, because a lot of fishing goes on out there, but it does then bring in a specific focus and prioritisation in the work that it might not necessarily have had if it was not under an FOI.

**Q298 Jeremy Corbyn:** Is it not true that we should look at this a different way? If there are lots of FOI requests coming in, possibly information ought to be there in the public domain in the first place to save the bother and cost of doing an FOI request. Is there not a need to learn the lesson of the whole Freedom of Information Act experience, which is to create more open governance at all levels of society?

**Sue Slipman:** In principle, yes. Information that is available should be in the public domain. One of the things about the governance of a foundation trust, for example, is that information goes out via the governors. They are the public channel for information now. They need information to be able to judge the performance of the board and the organisation. So far so good, but the problem is the amount of bespoking that goes on. It is not about published information because that is already out there, on the whole. It is about the cases where you have to go back through medical records and look in detail at a whole range of transactions, which you would not normally pull together. These may be quite small details about an organisation’s running, and you now have to audit trail a whole range of things for FOI purposes that you would not necessarily be producing for other purposes such as regulatory purposes or any other system in the organisation.

**Q299 Jeremy Corbyn:** Can you give an example?

**Sue Slipman:** I can provide you with one later. What we are dealing with often is commercial transactions where you have to go back through the whole tendering process to get some of the minute details of what went into the tender documents. You may have them available, but you would not put the whole thing out there because you would have to redact bits of it. It is that level of bespoking that you need to do.

**Q300 Jeremy Corbyn:** What I am driving at is that the public hold a right to know. Increasingly, the participation of the private sector in the National Health Service in all its forms means that section 43 is frequently used for protecting commercial interests. The public actually know less while public money is spent increasingly on bringing in private contractors. Do all of you see this as a problem?

**Sue Slipman:** That is so far outside the issue of freedom of information. There is a political view here that none of us holds in that sense. It is a problem with commercial information where NHS organisations, as part of their primary duties of serving patients, try to get the best value for money that they can in terms of the services that they buy on behalf of patients. Getting the best value for money is often undermined by making commercial information widely available, particularly for those who want to use that information. In terms of the SHA—

**Q301 Jeremy Corbyn:** Sorry, are you saying that making the information available means that the public get worse value for money from commercial operations?

**Sue Slipman:** Often, if that information is going to be used by suppliers of services to the NHS, they will know the negotiating positions of the people that they are trading with. There is some information that you would not want to reveal in order to get the best value for money you can out of any specification that you are working on.

**Q302 Chair:** But at the moment, surely, you do not have to give away your negotiating position on a current negotiation?

**Sue Slipman:** Not in current negotiations, but the point that has been made to us by a number of members is that contract rounds are annual and so, if you have access to last year’s contract round, that may aid commercial interests in the next round.

**Q303 Jeremy Corbyn:** I don’t follow this. I am sorry, I really just don’t understand this. If public money through a hospital trust is being spent on a contract for cleaning, for diagnostic services or whatever it happens to be, and if that is all completely out in the open, the public know what their money is being spent on. If it is not out in the open, surely there is a danger that there can be an over-familiar relationship between the contracting body and the private sector to keep out somebody else. Is there not a danger of that? FOI helps to create a culture of openness.

**Sue Slipman:** I will let Wyn come in on the specifics of what it is like in an organisation. I do not think that is the case. Competition law applies, and there are inquiries by relevant authorities into what you are suggesting may be a cartel relationship. What matters is that organisations are following proper processes in relation to tender exercises and that those processes are open and recordable. Those seem to me to be the sort of safeguards that you have rather than the necessary detail of the schedule of prices.
Q304 Chair: But what can happen—and I have seen this happen—is that, for example, a primary care trust can discover that it has been paying very significantly different amounts to different GP practices because of historical reasons that have grown up over the years. Therefore, there is very considerable disparity, but that information is not publicly accessible because of its commercial confidentiality for the PCT, and the general practices, as they are private businesses, are not accessible by freedom of information either. The public cannot know that a lot more money is being spent to provide a doctor’s surgery to this group of doctors than to that group of doctors.

Sue Slipman: One of the issues you have raised is the level playing field issue and, given that we are going to have a much more plural NHS in the future, to whom freedom of information should apply. There is a principle about it needing to apply in a level playing field way across the board. Wyn, do you want to come in on this?

Wyn Taylor: I think it is from the perspective that the exemption is predominantly used during the tendering process. Once the contract has been signed, sealed and delivered, or, to speak, we know exactly what money has been spent from the public purse. That is information readily available to members of the public. It is when you get into the granularity of the services and specific rates, or if there are any underpinning aspects such as trade secrets that may be incorporated into that wider debate, that there needs to be a bit more clarity for organisations to make that decision on what constitutes a trade secret. There is nothing in the Act that states that we are obliged to go back to third parties to identify exactly what a trade secret is. If we were to disclose that information or specific rates, or if we disclosed the funding that has been spent, and a subsequent request comes to an NHS organisation that could indicate what those specific rates are, that could seriously damage the commercial interests of a third party providing those services to the NHS organisation. Again, there needs to be a balance in what is acceptable to disclose and what, in the true sense, is commercially sensitive.

Q305 Jeremy Corbyn: Do you think there is a case for reforming the FOI to extend it far more into commercial organisations? It was drawn up at a time when there was much less private sector involvement in the NHS. The NHS, while there was a purchaser/provider split, was largely both purchaser and provider and therefore everything was FOI-able or most of it. Increasingly, that is not the case. Do you foresee a problem that in the future very little will be FOI-able because it will all be done by commercial enterprises?

Julian Brookes: It comes back to what was being said about the level playing field. With any qualified provider coming in and a much more diverse provision in terms of the private sector and NHS working in partnership and so on, the principle could potentially be that where the NHS is providing services, irrespective of whether they are being provided by a private organisation or an NHS fully funded organisation, there needs to be a level playing field. We have had some experience with pathology services. We were just reviewing their overall organisation to see whether there were better structures that could be built across the strategic health authority area. A number of private companies came in looking and fishing for information and trying to get the information from the services, yet there was no requirement for them to provide similar information or for their competitors in the NHS to have the same access to the information around those organisations. A level playing field is really important. As we move to a different model of provision and different organisations are involved in their provision, the application of that equally is quite important.

Q306 Ben Gummer: That is a very interesting point on access to information. On the level playing field on access to information, if you publish the FOI-ed request on your website or search board rather than just posting a letter to someone, it is open access to all potential bidders for work, is it not?

Julian Brookes: No, because those private organisations that have requested the information are not providing comparable information about their organisations. That is the point I make.

Q307 Ben Gummer: I understand, yes. In terms of an institution asking for commercially sensitive information, which they might receive in letter form from a trust or a strategic health authority, if you were to publish that openly, that information would be open to all commercial organisations, would it not?

Julian Brookes: There is a judgment about what information you would provide generally. Some of it is very specific to individuals. Where we see information that is consistently being asked for or where it has a general interest, we would look to publish that through our website anyway. That is the kind of example I was using with the Cancer Drugs Fund. There is a lot of interest in that. In that particular case we provide all that information because we have recognised that that is an area of common interest. There is a balance between what might be seen as a very personal interest for an individual and what might be seen as of wider importance and public interest.

Gordon Wanless: It is interesting for us on this particular one because, if we had that scenario where a request was made, which is what you are asking, we would answer the requester, but we would then publish that on our disclosure log, which I think is the point you were making, so that it is then effectively available to anybody because the response to that request has gone. Equally, as my colleague said, we would look to see which requests are being asked frequently of us and at that point try to be proactive so that we can, to be perfectly blunt, avoid the requests coming in. It is easier for us to deal with it if they can get the information themselves without us having to point them to where it already is.

Julian Brookes: The nature of our business is that we do not receive as many on contracts and procurement and so on because of the nature of the business we do. It would be different for organisations.

Q308 Ben Gummer: Ms Slipman, earlier you made a comment on the changes in the NHS at the moment.
It is true that in lots of what the NHS has done there are not very big datasets—pricing, for instance. As the market develops, the amount of information available will be already there. I am just putting a hypothesis to you. Do you think this is a problem that has reached its peak and as datasets improve there will be more information readily available that does not require bespoke specific audits and investigations?

**Sue Slipman:** That is bound to be the case, but it will take a number of years. That will be down to monitoring by the sector regulator and looking at pricing information right across the system, which will clearly be inclusive because it will include all providers whatever sector they come from and whether they are charitable, a social enterprise, private or public. There will be a lot more information in the public domain about overheads and costs to organisations of producing particular kinds of services. That will be a good thing, and we will play our part in making that information available and clearly collecting it from members so that we have a much more effective and efficient NHS.

**Q309 Ben Gummer:** I want to ask a specific question raised by some trusts about the 18-hour limit and difficulties about what is counted within it and what is without it. Can we briefly have your comments on that, please?

**Wyn Taylor:** The general consensus is that the 18-hour limit is too long and that it should be reduced, certainly in the NHS. The requests themselves have increased greatly in complexity, certainly 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. The cost of complying with the requests has increased significantly since the Act was introduced.

In terms of the 18-hour limit, obviously that is up to £450 for NHS organisations. That does not take into account all the underpinning groundwork that needs to be done through the decision-making processes and the involvement of solicitors where there are those grey areas in the Act. From my perspective the costs themselves, if you aggregate them in terms of arriving at the true 18-hour limit, will certainly go over that 18-hour limit a lot of the time.

**Q310 Ben Gummer:** If you are involving solicitors, it is going to go over the cost limit anyway, is it not, most probably?

**Wyn Taylor:** Yes, but that cost is not actually included in the Act.

**Julian Brookes:** That cost is not part of the 18 hours.

**Q311 Ben Gummer:** I want to pick you up on that.

**Julian Brookes:** No. That was the point I wanted to make. You can look at the 18 hours in two ways. I would agree that, as it is defined at the moment, 18 hours is by far long enough and could be reduced. Certainly that is the view of the people involved in FOI across the south of England. If you start including the actual true costs—the costs of all the officials, managers and clinicians that need to provide information and advice—and you start looking at the legal advice, redacting of the information and applying the public interest test, those are not included in those costs at the moment. If you look at it that way, 18 hours is not enough because it is just an equation of £25 an hour to the £450 limit. You can look at it two ways. If it stays as it is, 18 hours could be reduced; if it were to encompass the actual true costs that the organisations incur in getting to a final answer, then 18 hours is not long enough.

**Q312 Ben Gummer:** Would it not be? What is the limit—£450?

**Julian Brookes:** It is based on £25 per hour of time, which only includes the locating, retrieving and extracting of information.

**Q313 Ben Gummer:** So, if you seek legal opinion, that does not get included?

**Julian Brookes:** No. That was the point I wanted to make. You can look at the 18 hours in two ways. I would agree that, as it is defined at the moment, 18 hours is by far long enough and could be reduced. Certainly that is the view of the people involved in FOI across the south of England. If you start including the actual true costs—the costs of all the officials, managers and clinicians that need to provide information and advice—and you start looking at the legal advice, redacting of the information and applying the public interest test, those are not included in those costs at the moment. If you look at it that way, 18 hours is not enough because it is just an equation of £25 an hour to the £450 limit. You can look at it two ways. If it stays as it is, 18 hours could be reduced; if it were to encompass the actual true costs that the organisations incur in getting to a final answer, then 18 hours is not long enough.

**Q314 Ben Gummer:** I would therefore suggest a compromise. Many local authorities are being very proactive about publishing huge amounts of information automatically on the internet. They can then point to that when they get FOI requests and their number of searches has gone down as a result. If the NHS were to publish more than it is doing at the moment proactively so that when it was doing a search it might be expensive but its total net cost would be reduced, would that be one answer?

**Julian Brookes:** The more we publish through that route, the more potential there is for reducing those costs; I accept that. However, the kinds of requests we get where we work are often very personal and relate to the individual and the individual’s care and treatment. You cannot publish that kind of information or provide for that. There is a balance. That is why I was using the Cancer Fund as an example. Certainly, where it is appropriate, that is absolutely the right thing to do. We refer them to that and that is how we deal with those. As I say, more than half of ours come from individuals. Those requests are very specific to the care and treatment of the individuals themselves or individuals whom they are aware of, or a particular service that they are engaged with, and that requires quite a lot of bespoke work to identify the information they require.

**Sue Slipman:** What you are suggesting is very appropriate at the commissioning end of the NHS, but the closer you get to the front line, the more likelihood there is that the requests are about individual cases and need a lot of bespoke work.

**Q315 Ben Gummer:** I want to pick you up on that. I know my colleague will want to come on to it, but we have this particular concern about clinical negligence at the moment and about the early release of documents relating to litigation. Evidence from elsewhere in the world shows that the early release of reports, especially when the reports have been carried
out as a matter of routine after an unforeseen death, reduces litigation further on down the line. The NHS is very bad at this. Is there a way that that kind of openness could be encouraged quickly, even if it is not through a formal FOI process, so that, if litigation were to ensue, it would speed up decision making and maybe reduce litigation costs?

Sue Slipman: That is a very interesting and very complex question. There are a lot of pressures on now around litigation issues to speed up case management and to refine the whole process so that we get to conclusion a lot quicker. We have a system in the NHS of clinical negligence cover that has not lent itself to that in the past. The Marsh inquiry is hopefully going to be a step along the way to getting us there. In principle, the answer is yes, but that is much more than about the Freedom of Information Act.

Q316 Ben Gummer: Let me give you an example. As a matter of principle, a report is written up after a death in hospital. At the moment there can be a very long delay—and in fact conflict—about the release of that report to plaintiffs. If that report were released as long delay—and in fact conflict—about the release of As a matter of principle, a report is written up after a

Q317 Mr Buckland: I understand that point. There may be issues about confidentiality as well within the reports, which will naturally be of a sensitive nature. The point that my colleague Mr Gummer was making is that it is relevant to FOI because one of the problems clearly you have encountered is, for example, that compliance with the 20-day limit can be difficult. This is not a criticism particularly, but the systems you have may not be adequate to cope with meeting that limit. Looking at it, it does not seem that there is any documentary evidence to establish what the rates of compliance are with the 20-day limit across the NHS. Is that right? Is there any body of evidence out there to which you can point us?

Julian Brookes: It is interesting. In the last few months we have just started identifying a range of things. We look at the total numbers by month. We look at those requests that were closed within the period and those requests still going forward, and we categorise them. So that work is beginning. You are absolutely right that we have only started doing that across the south of England in the last three to four months, but it provides us with some really good questions to ask. We see a variety of levels of compliance within that. They are pretty good. We try never to breach the 20 days, and I do not believe we have, certainly in the south-west over the last year or so, but there are organisations and the question then is why. Is it about those complex cases? Invariably it is, and it is understanding the complexity of some of those cases and the reasons why. Some of it is about improving the systems to get that information rapidly to the people who need to be able to make the judgments that are required. It is a beginning, certainly, where we are. I do not know if that is common practice across the rest of the country, but it is certainly something that we have just started doing.

Wyn Taylor: I would certainly suggest that the NHS organisations themselves are monitoring compliance as part of their statutory information governance frameworks. That information should be readily available from NHS organisations. Whether that is collectively held centrally with the SHAs, you would have to approach those separately.

There is one other point I would like to make. In terms of the NHS, my organisation is a specialist tertiary centre. We receive a lot fewer requests than large acute sector NHS foundation trusts. That is why our compliance rates are probably better than some of the larger organisations, given, again, the complexities of some of the requests. It would have to be looked at on a case-by-case basis in terms of the type of organisation to which those requests are made.

Q318 Mr Buckland: So you are saying don’t just look at the headlines but the type of structures?

Wyn Taylor: The reasons for it.

Q319 Mr Buckland: But you agree that it would be helpful to have a body of evidence that could allow policy makers and others to judge whether the system is able to cope?

Julian Brookes: Absolutely. It is very difficult to know what you are doing if you do not ever measure it.

Q320 Mr Buckland: We have been having a debate in this Committee about enforcement powers. You may be aware that the Information Commissioner suggested that the current summary only—magistrates’ court only—offences needed to be changed either by removing the six-month time limit, which can be done for certain summary only offences, or, frankly, more simply, by allowing those offences to be tried in the Crown court alternatively, “either way”, as we call it, to remove that six-month time limit. Of course, that would involve an increase in fines as well. Do you have any views or comments about any powers that the Information Commissioner would need to improve the enforcement of time limits and compliance?

Gordon Wanless: From the evidence that we have seen from the data protection side, where he has recently received the monetary penalty powers that he has, that immediately got the attention of boards if they were not already engaged. If there was something similar put in place of a similar sort of ilk for FOI, then if they weren’t taking it seriously before—and I
am not saying they are not—that would certainly focus their minds. In my personal view, it would seem sensible that he is given more power and more time to be able to bring errant organisations to task.

Q321 Mr Buckland: You have already been put on your mettle by DPA, have you not, so it would not be totally new to the culture?

Gordon Wanless: Yes.

Julian Brookes: There is something that would also help to supplement that, and it goes back to the greyness area that was talked about by the previous witnesses. Sometimes when we go to seek advice from the Information Commissioner’s office, we get a very general answer that is not exactly helpful in resolving the issue we have. Then we have to get legal advice and so on. In terms of being able to provide us with much more robust and definitive advice from case law that has hopefully been developed over the last 12 years, it would be extremely helpful at times if we had that kind of service and interaction. We believe that would improve the level of compliance with the 20 days.

Sue Slipman: Wyn, would you like to add something?

Wyn Taylor: I was just going to answer that by saying there could be tighter controls enforced on the applicants as well. What we are talking about is dealing with FOI within the spirit of the Act. We have to remember that this information is in the public interest—not of interest to the public. Requesters are becoming much more savvy in terms of the limits and boundaries that they can actually push in requesting information. We need to make sure that everything in terms of the applicant’s approach is also appropriate.

Chair: Thank you very much indeed. We are very grateful to the four of you for helping us this morning and for being prepared to be here longer than you might originally have anticipated.
Tuesday 17 April 2012

Members present:
Sir Alan Beith (Chair)
Steve Brine
Jeremy Corbyn
Nick de Bois
Chris Evans
Ben Gummer
Mr Robert Buckland
Mr Elfyn Llwyd
Yasmin Qureshi
Elizabeth Truss

Examination of Witness

Witness: Rt Hon Jack Straw MP, gave evidence.

Chair: Welcome, Mr Straw, I need to declare an interest because it might be relevant to the second half of today’s sitting. I am a member of the court of the University of Newcastle upon Tyne, but that will not arise in this part of the session.

Mr Straw, we are very glad to have you with us this morning to talk about the working of the Freedom of Information Act 2000. As you know, we are carrying out a review of the Act and are very interested to draw on your experience, your involvement in bringing it into government. The environment of the cold war. The internal telephone directory of the Department of Health and Social Security, which was in something humorous. Sir Humphrey Appleby said in “Yes Minister” that “the ship of state… is the only ship that leaks from the top”. I want to start by asking what was the approach of central Government, both politicians and civil servants, to the release of information prior to the introduction of the Act? How did information normally reach the press and the public prior to the legislation coming into being?

Mr Straw: Put leaks aside. They have been going on for as long as politics has been operating, and, by the way, it is the same for government. Neither is directly related to freedom of information or to the venality or otherwise of one Government rather than another. I was someone who deplored leaks and avoided their practice, but these things happen in the highly competitive world of politics.

In preparation for this session, I was thinking back on my experience of working in government in the 1970s—I worked for three and a half years as a special adviser to Barbara Castle and then to Peter Shore—compared with what happened during the ’80s and ’90s, and the environment I found when we got into government. The environment in the 1970s was one where Ministers and officials could suppress huge amounts of information with impunity. They were able to do this not least because of the security environment that had been imposed by the exigencies of the cold war. The internal telephone directory of the Department of Health and Social Security, which was hardly of interest to anybody, I would have thought, was marked “restricted”. Every document that went to Ministers or officials was marked “confidential”, and quite a number were marked “secret”. Although we had the normal apparatus of parliamentary questions and so on, if Ministers or senior officials wanted to keep things quiet, they could.

During the course of the ’80s and ’90s, for all sorts of reasons, that began to change, and the changes were related not just to freedom of information by any means. One of the major changes, in my view, that has led to much greater openness of government is the development of the Select Committee system. There were some Select Committees before Norman St John-Stevas managed to persuade a slightly somnolent Margaret Thatcher that this was a good idea in 1979, but the change in the way that they operate, the fact that they have got themselves, as it were, embedded in the consciousness of the Departments, and that they can and do demand all sorts of information, which officials, as well as Ministers, immediately respond to, has led to a big change in openness.

There was also mounting concern about the misuse of statistics by Government and about whether a lot of the data that were published were properly founded. That led to a campaign, in which I happened to have played a significant part, for the Office for National Statistics to be put on an independent footing and for what developed as the UK Statistics Authority to be established. I cannot remember exactly when, but the Conservative Government established the freedom of information code, which certainly opened things up. That is the background. The demand for a Freedom of Information Act had been around, certainly in sort of leftish circles, for quite some time; it was certainly in the 1992 and the 1997 manifestos, and, I think, in the 1987 one.

Q323 Yasmin Qureshi: Why did you not use section 5(1) of the Act to extend freedom of information to private sector companies performing public functions?

Mr Straw: You could still do this. Bear in mind that the conception of the Act went back to 1997–99. There were fewer private sector companies performing public functions at that time, but we anticipated that, and it is open to this Government to make an order under section 5(1). It is perfectly possible for them to do that, but, as it happens, they have not done so.

Yasmin Qureshi: Good morning. The first thing that we want to look at is why there was a need for, or why it was felt there should be, a Freedom of Information Act coming into being. I want to go back to something humorous. Sir Humphrey Appleby said in “Yes Minister” that “the ship of state… is the only ship that leaks from the top”. I want to start by asking what was the approach of central Government, both politicians and civil servants, to the release of information prior to the introduction of the Act? How did information normally reach the press and the public prior to the legislation coming into being?

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Q324 Chair: What is your view on that? Is it that freedom of information should follow the public function?

Mr Straw: Yes, broadly, I believe that it should, but there are tricky areas when you get into commercial operations. There has been a long-standing issue, I believe, about whether Network Rail, for example, should or should not be subject to FOI. Before the Human Rights Act 1998, obligations on public authorities were at large and were essentially left to the courts to determine. That led to the courts themselves determining that private sector companies fulfilling public functions should be subject to the Act in respect of those functions. We adopted an opposite approach with the FOI Act, saying that people required certainty about whether any institution was subject to the Act, so they were scheduled. I think that is in schedule 7, and there is provision under sections 5 and 7 to schedule further institutions.

Q325 Nick de Bois: To pick up on that point, if we did extend it—I would like the right to access to information to be extended to following public money regardless of whether or not it is done by the private sector—do you not think that we would be getting into an area where the Information Commissioner would ultimately make judgments that could affect future commercial tenders by putting information in the public domain? Ultimately, would it be a charter for British legal profession seek to exploit any avenue that they can? Answer: yes, of course, and sometimes with good reason.

You raise an important point here. Of course these things may be exploited, and it may require some change in the substance of the legislation—it is not a subject that I have thought about very deeply—if you are going to extend the provisions in that way.

Q326 Yasmin Qureshi: Lord Hennessey told this Committee that the degree of openness by central Government has increased dramatically over the years, but he thinks that it has very little to do with the Freedom of Information Act. Do you agree with that?

Mr Straw: I was struck by that. It is a very complex area. I have read the detailed memorandum from the Ministry of Justice to your Committee, Sir Alan, which I thought was good and comprehensive. It brings out the fact that, although there has been quite a lot of research, it is virtually impossible to pin down the factors that have led to the change in openness, so you are making a judgment based on inadequate or absent data.

My instinct is roughly where Professor Hennessey’s is. As I said, there are all sorts of reasons why there is greater openness, and all sorts of drivers of that. That said, I am ambiguous about this Act. I will come on perhaps to sections 35 and 36, which is the area that is most in need of reform. Having been in government as a hired hand—as a special adviser—with a ring-side seat, I saw what was going on and was very struck by the lack of accountability. Wind forward getting on for 20 years, and the whole system is much more alive to the fact that officials might be held publicly accountable for what they are doing. One of the other drivers was the development of judicial review. That happened well in advance of the Human Rights Act. It has been underpinned by that Act. That is all a good thing, and at a local level. The fact is that people are subject to important decisions by non-democratic public bodies—for example, health authorities and health trusts—and their access to information has been greatly assisted by the FOI Act. I am in no doubt about that. All sorts of information could and should have been put in the public domain, but simply was not because it did not suit those authorities—it was not part of their culture. It is now in the public domain or is available to go into the public domain.

Q327 Jeremy Corbyn: Do you think that the Freedom of Information Act has achieved its objectives of openness and transparency in government?

Mr Straw: That relates to the previous question. To a degree, I share Professor Hennessey’s view that there are all sorts of other factors involved. Coming now to sections 35 and 36, at some levels of government, particularly higher levels government, it has led to a reluctance to commit the process of decisions to records, so in one sense it has made it more difficult to secure accountability rather than less. There are other factors involved. When we drafted the Freedom of Information Act, we had no serious conception about the internet, which was in its infancy. All these things have made a phenomenal difference. For instance, it was assumed that records would continue to be mainly on paper. There is a related issue that at some stage you may wish to inquire into, which is that the state of the public record is fundamental to the memory of the nation in the electronic age, and it may be that there are now some striking deficiencies in that.

Q328 Jeremy Corbyn: You were in government from the introduction of the Act until 2010. In your experience, did many Ministries deliberately try to avoid the Act by using private e-mail exchanges, unminuted meetings and informal discussions, which then became policy, to avoid Freedom of Information Act requests?

Mr Straw: Not in my direct experience, but bear in mind that I am not necessarily a typical former Minister. I am who I am.

Q329 Jeremy Corbyn: None of us is typical. Mr Straw: Exactly. Just speaking for myself, I am an invertebrate scribbler. I prefer to make decisions through the process of the written word. Of course I had meetings as well in the Ministry of Justice. Actually, I had meetings in all the Departments I was in—the Foreign Office and the Home Office. Any decision of mine might end up in court where, leaving aside FOI and everything else, there might be applications for a disclosure of documents. My view is that you are better defended if you have a proper record of why you made a decision. If a decision is defensible, there...
is no problem about putting it on the record, but if it is not defensible you had better not make it in the first place, because, at some stage, you will have to defend it. However, the higher up you go in government, and also in terms of the characters, the more difficult it is. 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. I do not excuse that, but, as a matter of principle, the drafting of section 36 and the way that sections 35 and 36 have been interpreted are not what was intended. It is unsatisfactory and produces consequences that tend towards less openness rather than more.

Q330 Jeremy Corbyn: You mention discussions that are unminuted. Is this something that you think has grown and that the opinions being considered by various Departments, or a new policy, tend to be circulated informally—privately—with telephone calls or whatever?

Mr Straw: One of the things that struck me is that not that minutes of meetings are bashed out quickly—you have to have a minute of a meeting, for Pete’s sake, because you have to be able to communicate what you have decided; it is very dangerous if you do not have that—but that there are such things as the private secretary’s notebooks. I perceived that private secretaries were quite anxious about what was going to happen to their notebooks, where, as it were, the personality and stream of consciousness of their Secretary of State would be displayed in every horrific detail. There was understandable anxiety that those notes might be disclosable under FOI. There was a parallel anxiety that the handwritten records of Cabinet meetings, which are far more interesting than the Cabinet minutes themselves, might be made available as well. Indeed, that was the subject of the Information Tribunal decision in the Iraq minutes case.

Q331 Jeremy Corbyn: Do you think that they should be made available?

Mr Straw: No, I do not think they should at all. I am absolutely clear about that. There has to be a space in which decision makers can think thoughts without the risk of disclosure, and not only of disclosure at the time, but of disclosure afterwards. Let me say this: I am very struck that this right to protect private space for decision making is one that many in the media, including the BBC, seek to deny Government, and are very jealous about guarding for themselves, as witness the recent BBC case before the Supreme Court.

Q332 Chair: When you were Foreign Secretary, you had the opportunity to operate under different two systems. In areas of security, you knew that there was a reliable exemption from freedom of information, whereas in most of the rest of what you did it was always questionable about how the public interest test would fall and there was a measure of uncertainty. Did that affect the way that you viewed the decision-making process in the two different spheres?

Mr Straw: Not specifically, but bear in mind that, although the Act was passed in 2000, it did not come into force until the beginning of 2005. In the first three and a half years of my period as Foreign Secretary, we were aware of the Act, but we could not receive FOI requests. It was only during the last year and a half of my time as Foreign Secretary that we got requests and then had to deal with them. There are plenty of things that I would do differently if I were the Minister in charge of this Bill now, one of which is not to have allowed the Act to run retrospectively. It seems to me entirely fair that people in government should be able to take account of the fact of the Act in the way that they write records so that they do not gratuitously hobble themselves, but that opportunity was denied people by the retrospective nature of the Act.

Q333 Steve Brine: It is very candid of you to say that there are things that you would do differently. When you introduced the Bill on Second Reading, you said that it would enhance the quality of decision making by Government. I have been very interested throughout this inquiry in good government versus bad government. I am sorry to bring the matter up, but I am sure that you have read what the former Prime Minister said. He clearly regrets it completely. He says that FOI is “utterly undermining of sensible government” and “I quake at the imbecility of it”. At what point did you and the former Prime Minister part company on this?

Mr Straw: We did not part company on it. Anyway, it was his idea; it has to be. I have an alibi.

Q334 Steve Brine: Are you saying that you pushed back, when it was his idea?

Mr Straw: Let me give you a brief history of how this item came to be in Labour’s previous manifestos. The inclusion of this in the Labour manifesto—it was also in the Liberal Democrat manifesto—was the product of a brilliant campaign by the Campaign for Freedom of Information. I have often applauded the work of Maurice Frankel; he is worth a PhD thesis on his own for the influence that he has had. Freedom of information has resulted in a litany of things. It was part of the zeitgeist of the early ’90s: there was this dreadful Thatcherite Government who had taken away people’s rights and was closed and so on, and among other things we needed freedom of information. Other elements of this—for example, the Human Rights Act—we looked at in very great detail in opposition. I was indeed responsible for that; we had a joint committee with the Liberal Democrats, and we each did our own work on it. It was something that was really thought about. FOI was not thought about with any seriousness. Moreover, it was the responsibility of the Cabinet Office, and therefore of the shadow for the Cabinet Office, not the shadow Home Secretary, so I literally had nothing to do with it. When we were elected in 1997, the Cabinet Office continued to have responsibility for that until July 1998.

The Cabinet Office produced a White Paper that, at the time, I thought was unreal in the way in which it allowed access to all sorts of documents. My contribution to that was to ensure that there was a
substantial carve-out for Home Office matters. There was openness for all sorts of things, but not for the Home Office, because I dug in at the Cabinet Committee. This was in the Government’s early days, and we were all extremely busy, but I got protection for the Home Office. There was a huge carve-out, and the rest was all open. Then in July 1998, the Prime Minister phoned me up when he was doing a reshuffle and said that he was keeping me at the Home Office. I said, “Thank you.” He then said, “That’s the good news. Here is the less good news; I am transferring freedom of information to you, and you have got to try and pull back on the early ’98 proposals.”

Q335 Chair: He said that you should try to pull back.
Mr Straw: I agreed with him entirely. I wanted to pull back on the proposals.

Q336 Jeremy Corbyn: What were you pulling back on?
Mr Straw: If you read it, it was—

Q337 Jeremy Corbyn: I remember it well.
Mr Straw: I know. I think you supported it, Jeremy. Essentially, it went too far, so I began the process of pulling back on it. I produced an excellent draft Bill and a Green Paper, which were roundly condemned by people like you.

Q338 Jeremy Corbyn: Some things never change.
Mr Straw: The Conservative party was no better, I am afraid. It was then in the kind of position that the Labour party was in the early ’80s, where the prospect of government was very distant. It simply took the view, why on earth should it help this dominant Government? There was then an iterative process, but it was the Commons really working. I say in my own defence, and we went through various changes to the Bill and finally came to the present version. We faced a choice in government on whether we went ahead with any Bill or simply pulled the whole thing. There was a long and embarrassing period of delay between one stage of the Bill and the next. You may remember, Sir Alan, that I kept being asked questions about why we were delaying it and coming up with some sort of water-treading answer.

Q339 Steve Brine: If you had been Labour leader, which was not inconceivable at one point—
Mr Straw: Thank you.
Steve Brine: There may still be a vacancy. Your time may yet come. If you had been Labour leader and written the manifesto in 1997 and become Prime Minister, would you have killed this at birth?
Mr Straw: I do not know is the answer. There was a huge amount of preparation of policy in the period after Tony became leader in the late spring of 1994. He was absolutely relentless in the way in which he insisted that, if we were going into government, we had to be properly prepared. In my area, in the Home Office, we had worked out policy templates. Even so, they had to be changed a bit, but this was the one that got away. Of course I would like to think that I would have spotted this was a bit of a problem.

Q340 Chair: You seem to be implying that there was not any kind of emotional steam behind this in your own case.
Mr Straw: No, no. I do not wish to imply that at all. Sir Alan, because there was big emotional steam behind it. The error that we made was not so much having it in the manifesto, but in not thinking clearly enough about how it would operate and not looking properly at other countries. We have ended up with a Freedom of Information Act that leads to greater access to documents than can be found in any comparable jurisdiction that I can think of. Once in government, we should have taken our time to think this through. Those were the errors.

Q341 Steve Brine: Do you ever feel that it was more about being a new broom than about instilling good government?
Mr Straw: No. Picking up on Sir Alan’s point, the fact is that there was a lot of steam behind it. It is worth using the parallel of the last few years of the Labour Government. After a while, people get tired of the Government and a whole mantra builds up about what a terrible bunch that Government are. There is a kind of mantra about them—they’re this, that or the other—and some of it is accurate and some is wildly inaccurate, but it does not really matter. There was a mantra that we had developed and that the Liberals had developed, and the press were developing it, saying what a bunch of losers the previous Government were, and how they were this, that and the other. Freedom of information was one of the pledges by which we would spring free as a society and a Government from this terrible burden.

Q342 Chair: Was it not partly demonstrating that a new Government that involved your party or mine would be different? Was there not behind it also a genuine belief that, if you left Ministers and civil servants free to make lots of decisions without the likelihood of public exposure of the decision-making process, you would get worse decisions?
Mr Straw: Yes, that too. I do not take the view that the only thing to do with the Freedom of Information Act is to tear it up. I just do not take that view. As I have said, the view I take is that it is not a particularly well constructed Act intellectually or jurisprudentially. Dealing with Mr Brine’s point, that reflects its rather convoluted genesis. I have no doubt that it has produced benefits, but in my view there is a very significant problem with sections 35 and 36. That is solvable, but there has to be a will to solve it.

Q343 Mr Buckland: On that very point—section 35—you may have read what Gus O’Donnell had to say to us. His view is that the public interest test causes what he described as a grey area. He put it to us in strong terms that it is causing a problem. What is your view of the public interest test?
Mr Straw: We sort of believed that in section 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.

Then there is the interlinking of section 36. The reading of section 35 is as a class exemption, and the MOJ memorandum distinguishes that class exemption from the lower prejudice test for gaining access under section 36. However, section 35 only really applies to central Government and the devolved authorities, and in my view section 36 is too loose in its wording—apart from, let me say, a subsection of which I was the author, about which I am unapologetic, to ensure the publication of statistical and research information.

I put that into the Act after some good and open discussions during our untimed—I emphasise that they were untimed—Committee and Report stages on the Floor of the House. Section 36(4) makes it much easier to obtain statistical information than in respect of other matters.

Q344 Mr Buckland: Do you think that we should clarify the matter, get rid of the public interest test and put in a list of classes of document or information?

Mr Straw: 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.

If you look at the recent decision of the Supreme Court in relation to the BBC, by a quirk of the drafting of the Act the BBC has ended up with a far clearer class exemption than has any Government. It has a total class exemption for the operation of its internal decision making. What is sauce for the goose is sauce for the gander, in my opinion. If it is good enough for Government, because, after all, the BBC is a very important institution, it must be good enough for Government, because, after all, the BBC is a very important institution, but it is not running the Government.

Mr Llwyd: That is arguable.

Q345 Chair: It could also be argued the other way. The Government are making decisions that affect people's lives on an enormous scale.

Mr Straw: Of course they are, but this is about the process by which we reach collective decisions. Parliament has to take a view on whether it believes that collective responsibility is the way to run Government. My view is that it is. There is a fundamental about good government in this country—compared with most countries, ours is good government—which is that individual Secretaries of State are responsible, by statute and other law, for the decisions that they make, but how they arrive at them is the subject of collective decision making, and that nexus is fundamental to the running of Government. If you seek to undermine collective responsibility, which is essentially what the tribunal and the enthusiasts for FOI have been doing, then you will start to undermine Government. Far from discouraging leaking and poor record keeping, you will encourage it. I deplore it anyway, but you will get more of it.

Q346 Mr Buckland: To put the contrary view, the Information Commissioner took another view that the concern about section 35 was overblown and we were focusing on the old "bad cases make bad law" point. There were a couple of bad cases here that were exaggerating a problem that is not really there. Would you agree?

Mr Straw: I do not accept that. I have very high regard for the Commissioner; indeed, I think I appointed him. His job is to operate the Act as it is, and he has quite a difficult task. However, I do not accept that point. If you look at examples from other countries, you can see that this space for making decisions is better protected.

May I say, Sir Alan, in response to your point that there is a huge amount of openness in our system, and far more than there was 40 years ago? Ministers have to explain the decisions they make all the time. Do not ignore the fact that the Select Committee process has transformed the accountability of Ministers far more than FOI—far, far more. Yes, we have PQs and PMQs, statements and UQs, which go on much longer than they used to, but if you are a Minister on a sticky wicket, who has to appear before a Select Committee for two hours, and you do not know the reasons why you took a decision, or they were bad reasons, you may not be a Minister for much longer.

Q347 Mr Buckland: May I finalise the point I want to make by dealing with the ministerial veto and the interaction with section 35? It has hardly been used—I think only three times. It was used this year in relation to Cabinet minutes on devolution in 1997–98.

Mr Straw: I will explain that.

Q348 Mr Buckland: First, what is your view on the interaction of the veto? Do you have any views on why it has been used so rarely?

Mr Straw: 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. I was the Minister who formally made both of those decisions and recommended the use of the veto in both cases. One was over the Iraq minutes and the other was over the minutes of the Cabinet Committee on devolution.
I think that original veto on devolution has been reconfirmed by the Attorney-General. Another ridiculous drafting error in the Bill is that the veto does not apply for all time; even though you veto a disclosure, the same people can reapply the next day for the same information. That must be changed. When I was thinking about whether to recommend the veto in respect of these two Cabinet Committee minutes, I had to balance what I thought was right against the fact that there would be shock-horror headlines, with all sorts of people saying that it was an outrageous abuse, with the press of course forgetting that this was a central part of an Act from which they benefitted. On freedom of information more than almost any other area of public policy, it is almost impossible to have a proper balanced conversation with the press, because, regardless of their political persuasions, they have one interest and the Government have another. You can get individual journalists to accept that there needs to be better balance, but they are interested in stories.

Q349 Ben Gummer: Mr Straw, I wonder whether you could reflect on this process of post-legislative scrutiny itself because we are in somewhat of a predicament. You will know that anyone who has any tangential connection with or interest in Government will be told anecdotally, when speaking to officials, that the quality of minute taking has changed, and that the discussion of decisions is off the record in certain circumstances, in order to ensure that vigorous discussions are not recorded. All of this is known to people who are able to have a quiet conversation with others in that position.

In the nature of things, it is okay for retired Cabinet Secretaries to make this point, as they have done, but it is not possible for people currently in civil service positions because it would be self-incriminating to say so publicly. We are in the rather odd position of having to take on trust what, it seems, all previous Cabinet Secretaries who have had to deal with freedom of information have said, which permits the Information Commissioner and others to say, “It’s just scaremongering,” when in fact what they are saying is reinforcing a pattern of behaviour lower down the scale. It is the impression for many of us that, anecdotally, that is not the case. However, it is difficult for us to investigate that and to fulfil our role in post-legislative scrutiny, because it is difficult for people to come forward and say, “We are trying to bypass the Act.”

Mr Straw: I am surprised if Christopher Graham said in terms that it was scaremongering, but, if he did, he did. We are talking here about some extremely distinguished public servants. If you go back to Robin Butler, Richard Wilson, Andrew Turnbull and Gus O’Donnell, they were very different personalities as individuals, but among other qualities they shared standards of the highest order. They were not in the Sir Humphrey business of cynically covering tracks or any of that.

Q350 Chair: Indeed, they have said so to this Committee.

Mr Straw: They were not—quite the reverse.

Q351 Chair: They have said that they did not do that.

Mr Straw: No, they did not to my certain knowledge; indeed, quite the reverse. One of the things that the Cabinet Secretary has to do—and it is difficult—is to ensure the application of high standards of governance according to the ministerial code when Ministers and special advisers, for example, and the odd official, try to dodge round those things. They have to say, “You can’t behave in that way.” We need to take account of what they have said and what their predecessors have said. May I add this caveat? Part of the change in record keeping is simply to do with the introduction of new technology. My wife and I still have the letters that we exchanged between us whenever it was—35 or 40 years ago—but our children do not because they send each other texts, and texts disappear. You are going to get a lot of quasi-decision making through text and BlackBerry messaging just because that is how it is done.

Q352 Chair: Is there a particular problem with risk registers? What is your view on that?

Mr Straw: If you will forgive me, I do not want to go down the rabbit hole of whether or not it was appropriate to call for the publication of that risk register. Indeed, if you examine the Division record, you will see that I loyally voted with my party on that. If you talk generally about risk registers, 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.

Q353 Mr Llwyd: May I ask a question about a debate that we had some years ago—quite a vigorous debate, as I recall—to which you responded? It was on the question of disclosing the Attorney-General’s opinion of the lawfulness of the Iraq conflict. On reflection, do you think that it perhaps would have been better to have produced it? What harm would it have done?

Mr Straw: I happen to think that the legal advice of an Attorney-General, like any other legal advice, should be the subject of legal professional privilege. I know, Mr Llwyd, that you fully understand the importance of that. I did not think that that 27-page legal advice—anyway, it came into the public print, and I then had to handle it eight days before the election—should have been made public. It was not his decision about the military action; it was his thinking about the factors that would apply. There needs to be that sort of space for any Attorney-General.

It was a slightly convoluted arrangement, but I am pretty certain that it was on 17 March that I published a written ministerial statement to which I attached a note about the issues of legality. It was formally from me, but in practice it was from the Attorney-General.
It was not that no information was published about the background at all, but I think that that convention is an important one. In a more perfect world, it would have been better, in my opinion, had it been possible to have the Attorney-General make a decision on whether or not military action would be lawful, and in what circumstances, some months before any decision was taken, because in the end the issue of whether it was lawful and the issue of whether you should do it got completely wrapped around each other when the two should have been separate.

Q354 Mr Llwyd: You know of course that “Erskine May” refers to exceptions for disclosure when the matter is in the public interest. I would have thought that the question whether or not it was lawful to go into Iraq was certainly in the public interest.

Mr Straw: There was certainly a strong case for the Government to explain the legal basis for their decision, which is what I sought to do, so I am with you on that, but I do not agree that the Attorney-General’s advice should be disclosed. The Government must have the benefit of legal professional privilege, as anybody else—any other institution—does.

Q355 Mr Llwyd: I do not think we will agree on this point so I will move on. A complaint we have heard from several witnesses during this inquiry is that this Act was not intended for use by journalists or commercial concerns and those individuals with personal or political agendas. How would you respond to that suggestion?

Mr Straw: I saw that; it was bound to be used by journalists. They were one of the major engines behind the freedom of information campaign, although not the only one. Journalists in our society play a very important role in holding Government to account, so whoever thought that was being very naive. There are separate issues about whether more could have been done to prevent vexatious applications, which are very tiresome.

The drafting of section 12 on cost limits is poor, and it does not include the actual costs. That needs to be changed. There is provision in the Act for charging a small fee for applications, and, although I fully intended to have a fee, I was surprised when, subsequent to my period, it was dropped. It is slightly ironic, that, if you, Mr Llwyd, wish to access information held on you personally under the Data Protection Act 1998, you typically have to pay £10, but if you want to access information held on me it is free.

Q356 Mr Llwyd: Can we do a deal?

Mr Straw: That would have acted as a restraint.

Q357 Mr Llwyd: Apparently, according to the information that we have, having a fee lowered some of the vexatious applications in Ireland, but they have since gone back up again now that they have got used to paying it.

Mr Straw: The thing that most encourages vexatious applications is the internet. The assumption was that people would have to go to the post office to get a form, fill it in and then send it in. These days, late at night, people think, “I am going to demand X”, so they demand it.

Q358 Mr Llwyd: If the identity of the requester was always logged, there would be some possibility of weeding out vexatious requests, in the same way as vexatious litigants in court.

Mr Straw: The real curiosity is that the identity of the requester is kept from Ministers. For the life of me, I do not understand that, and that needs to be changed too.

Q359 Chair: Does that not mean that the question of whether the information should be in the public domain is dependent on who the requester happens to be, because a different decision might be taken? “I see this request comes from Mr So-and-so; I don’t like him so I’m not going to release the information.”

Mr Straw: No, not at all. In any event, once the information is in the public domain, particularly on the internet, it is there anyway, full stop, and more than one person can apply. No, it is just as a general check on vexatious applications. I have the highest regard, as does everyone in this room, for British journalists, but I smile when I see a scoop or hear of the self-styled Bureau of Investigative Journalism. You read these breathtaking scoops, and, if you are lucky, somewhere near the bottom you discover that this breathtaking scoop has arisen because some rookie journalist has written out an application for freedom of information and, hey, they have the document. As so many requests are generated by journalists, it would be useful to know why are they so coy about having their requests made public.

Q360 Mr Llwyd: Why are there no statutory time limits for responses where the public interest test is being considered and for effective internal reviews? Would you support the introduction of such time limits?

Mr Straw: I thought that there was a time limit of 20 days. I certainly kept being told that it was 20 days; sometimes you overran it. I know that the Ministry of Justice has found difficulty in assessing the total costs of FOI, but, if you or your Clerks were to look at the original assessment of the likely costs and compare it with what is known, the difference is huge. My recollection is that, if you look at the original Bill, it was tens of millions. The costs are huge—not only on central Government, but on local authorities, who are less familiar with the Act, I find myself from time to time giving advice to Blackburn with Darwen Borough Council on how to deal with vexatious applications, as it gets overwhelmed with requests from people sitting at their laptops in the middle of the night. I would want to know what the case was for tightening the current limits.

Q361 Chair: Once the public interest issue arises, that is when the time limit disappears.

Mr Straw: I should have been aware of that because it is my Act, but officials are always beating up on me to approve stuff within the time limit.
Q362 Elizabeth Truss: You mentioned the high cost of FOIs. Organisations such as universities also have to respond to many FOI requests. Do you think that we are looking at a large transfer of information, essentially from state organisations often to private sector organisations such as newspapers, given the effort of doing the research and collecting the information?
Mr Straw: Yes, I do. I think that it also applies to commercial companies, who pursue a lot of applications. Coming back to the point of why requesters’ names should not be known, I believe that they ought to be because it is a way of checking on the process of the Act. If it turns out that a lot of requesters are commercial companies trying to get commercial information to worst their competitors, one needs to know that, but it is not a reason for stopping the provision of the information. We are in a “baby and bathwater” area here. My answer is not to repeal the whole Act—not remotely. It has produced many benefits and some disadvantages. One of the things that has happened is that all public authorities have to have a publications programme, so we have forced public authorities to think about the information that they should make public in any event, which is a really good thing, and that includes universities. I would not get rid of that idea at all, but I accept that the universities in my area can be run ragged by requests.

Q363 Elizabeth Truss: What would you recommend for a charging regime? Would it be the full cost of the request or—
Mr Straw: No, and I am sorry to have interrupted you. My intention was to use section 13, I think it is, but I am speaking from memory, to charge a small charge parallel to that for data protection requests. It would be about £10. It would not stop important requests, but it would act as a check. I would also tighten up very significantly section 12, which, referring to an earlier answer, relates to the excessive costs provision. As the MOJ memorandum says, it is too narrowly constrained.

Q364 Chair: Thank you very much, Mr Straw. We are very grateful for your characteristically frank answers. They will be extremely helpful in our consideration.
Mr Straw: It is an exercise in accountability.
Chair: Yes, and we have further witnesses.

Examination of Witnesses

Witnesses: Dr Nick Palmer, Director of Policy, British Union for the Abolition of Vivisection, Michelle Thew, Chief Executive, British Union for the Abolition of Vivisection, and David Thomas, Legal Consultant, British Union for the Abolition of Vivisection, gave evidence.

Chair: Welcome back, Dr Palmer, as a former member of this Committee, and welcome to Ms Thew and Mr Thomas, all three of you being from the British Union for the Abolition of Vivisection. You have obviously taken an interest in the operation of the FOI Act and made use of it. I ask Mr Evans to open our questioning.

Q365 Chris Evans: Thank you for coming today. What do you do with the information that you gain under freedom of information, please?
Michelle Thew: Thank you for the opportunity to address the Committee; it is appreciated. We make requests under freedom of information for a couple of reasons. The first is broadly for informed debate. As you will be aware, animal experimentation is an area of acute public concern, and opinion polls demonstrate that the public would like access to information about what happens to animals—not who is conducting animal experiments, or necessarily where, which is not our concern, but what is happening to animals. It is primarily for informed debate. Secondly, we do it in order to enable proper accountability. For example, we have recently taken judicial reviews against the Home Office, and another recently against the University of Cambridge, where there were issues about whether or not the law was being applied properly. We were able to do that, uniquely, because of information from an under-cover investigation; that is not the kind of information that would normally have come into the public domain, so freedom of information is therefore important.

If I may, I shall briefly quote what the Information Tribunal said in a recent case about Newcastle University, because it sums up for us one of the reasons why we use the Act. It said, “Substantially for the reasons relied on by BUAV, we consider there can be no doubt about the strong public interest in animal welfare and in transparency and accountability as regards animal experimentation conducted under the ASPA regime. The existence of the statutory controls operated by the Home Office does not annul this interest which extends to seeing how, and the extent to which, the statutory system is working in practice. Such private scrutiny as takes place inside the statutory system is not a substitute for well-informed public scrutiny. In the present case these interests are further underlined by the fact that the research was supported by public funds.” In general, it is for informed public debate and not particularly accountability.

Q366 Chris Evans: One question concerns me a little. What about the campaign you waged against Stena? P&O said that company directors had letters sent to their home addresses. Did that come from freedom of information?
Michelle Thew: First, it is important to stress that that campaign has nothing to do with us. We have been campaigning on the issue of airlines transporting primates into the UK, but that has been directly through letters to the companies concerned. We do not engage in any activity that is about home addresses.
David Thomas: As a lawyer, it seems to me inconceivable that private addresses would be granted pursuant to the FOI Act. It simply would not happen because there are exemptions—the safety exemption under section 38 and also the section 40 data protection. I cannot see that that information would have come from FOI requests.

Q367 Chris Evans: That is the point that I want to come to. I was leading up to section 38 of the Act. Do you think that is strong enough and sufficiently robust? If not, could you state your reasons; if it is, could you tell me why?

David Thomas: In my experience—I am the lawyer for the BUAV and I run all its cases—it is sufficiently robust. The key point is that one has to look at the particular circumstances of the case and ask whether disclosure of particular information would lead to any safety risk. If there is a significant risk, the information will not be disclosed.

For example, in the Newcastle case, which Michelle referred to, one of the exemptions on which the university relied was that of section 38. The tribunal looked very closely at the evidence and decided that a short passage in a detailed document of about 40 pages might lead to a safety risk, so that information was redacted. On the rest of the licences, having heard all the evidence, with cross-examination and so forth, the tribunal decided that there was no risk to safety and therefore it was disclosed. That is exactly how the system is supposed to work. It is done on a fact-specific basis.

The BUAV always makes a point of asking for information on an anonymised basis; that backs up Michelle’s point that the BUAV is not interested in who, but in what and why. For reasons that I don’t fully understand, section 38 is a conditional exemption, so the public interest test applies in principle, but it would need to be an extraordinarily strong public interest. If it was accepted that there was a safety risk from the disclosure of particular information, it would require extraordinarily powerful public interest considerations to trump it. Again, as a matter of policy, the BUAV will normally say that if a public authority, a commission or a tribunal decides that section 38 is engaged—in other words, there is a risk from disclosure of particular information—the BUAV will not rely on public interest arguments to trump that.

Dr Palmer: It is important to state that legitimate campaigns are very much not interested in getting down to the issue of whether Professor Smith is a nasty man and things like that. That actually distracts from the main issue of whether the regime for permitting animal experiments is working properly or not. The question is not whether so and so is doing the right thing, but whether the system is working properly. That is a general point for freedom of information. As a Back-Bench MP with an interest, I was peripherally involved in the discussions here. Right from the start, we were very clear that the Freedom of Information Act should not put individuals at risk. Quite apart from the human interest in not putting people at risk, it was the importance of putting the information in the foreground rather than the individual. We think that that is very important, and we are 100% behind it.

Q368 Chris Evans: I agree with your sentiments on that, but the point I am trying to get at and what I am building up to is whether the information that you gain through the Freedom of Information Act is safe enough to ensure that people are not petrol bombed or victims of arson attacks and things like that. If it is not, what can be done to ensure that it does not occur?

Dr Palmer: It has to be safe enough; that is essential. If you feel as a Committee that there are ways in which it can be strengthened, the BUAV would have absolutely no problem with that. It is not just about animal experiments; it is all over the public sector. In the same way, when MPs’ expenses were disclosed, the private addresses were redacted. I do not think that any serious organisation dealing with the Freedom of Information Act would have a problem with that.

Michelle Thew: We absolutely support protection for individuals. That is evident in the way in which we have worked with the Act to date. Essentially, we ask that animal experiments are treated the same as any other category of information and that the safeguards on freedom of information that protect individuals and commercial confidentiality are applied here.

Q369 Chris Evans: The point that I am trying to get to is whether there is any way in which information that you have gained could be misused at the moment. Could you give that guarantee? You may have gained some information quite legitimately, through legitimate means, and it has then been misused in some way.

Michelle Thew: I shall ask David to answer, but in essence that goes back to the point about what information we gain. The information that we gain should, rightly, already have passed the test as to whether or not it would endanger public safety. We only get information that has been through due process to indicate that it would not endanger public safety. Therefore, by its very nature we assume that it would not. I stress again that we have no interest in individuals and we ask for anonymised information.

Q370 Chris Evans: So it is just an assumption and not a guarantee that it has not been misused. You can only assume that; you cannot guarantee it.

Michelle Thew: We do not get information about individuals. We simply do not get that information. We do not ask for it and we do not get it. As the process unfolds, we know that those tests have been met and we do not get that information.

David Thomas: It is very important to understand that one of the principles underpinning FOI as interpreted by case law is that disclosure is deemed to be to the whole world. In applying section 38 or any other exemption, the public authority initially—and, on review, the commission, the tribunal or courts and so forth—will assume that it is not only the BUAV that is getting it. It is not the requester only who gets the information; it is available to the whole world. In applying the section 38 test, that assumption is made. I have seen no evidence, whether in relation to animal experiments or in any other area, that section 38 is not
sufficiently robust to protect individuals where there is any significant risk to personal safety.

Q371 Nick de Bois: While the information received may not identify individuals, does it not by its very nature identify organisations—or indeed companies, as in the case of ferry companies—or leave a trail to be followed that otherwise would not necessarily have been started on?

Dr Palmer: It is important that bodies responding to requests take into account any risk to individuals or to individuals via their involvement in an organisation. If necessary, it should be possible to anonymise altogether. If a university, for instance, publishes results of its own accord, we are obviously not able to disguise the fact that it has done so because it has offered to do so. But the process of freedom of information has never, as far as I am aware, led to any increase of risk beyond what was already publicly known.

Michelle Thew: It is important to make that point about published research as well. If you look at the instances when we have used the Act—I can comment in detail only on those—these are institutions if you take universities, that publish the fact that they use animals in research. We are talking about individuals with extensive publication histories, and it is no secret that these institutions themselves conduct animal research. When we are asking for particular information about particular programmes of work, not individuals, the test is whether the release of that additional information would therefore increase the risk to an individual, and that is the test that has to be passed before the information is released to us.

Q372 Nick de Bois: Has that test ever been failed, in your opinion? Has a mistake been made?

Michelle Thew: No, not that we are aware of.

Q373 Jeremy Corbyn: Thank you for coming along today to give evidence. Why did you make the FOI application to Newcastle University?

Michelle Thew: This goes to the heart of how we use the Act. We do not have a scattergun approach, simply asking for every piece of information about every bit of animal research. It goes back to the reasons why we use the Act, which is to inform public debate and get public accountability. In the Newcastle case, there was a particular reason because we understood that an application to do similar work had been refused in Berlin. It had been refused by authorities in Germany on very strong grounds that related to the welfare of the individual animals being used in that case—

Q374 Jeremy Corbyn: I am sorry to interrupt your answer, but how did you know that it had been refused in Berlin?

Michelle Thew: It was public information in Germany, and one of our member organisations there alerted us. We understood that similar work was being conducted in Newcastle, because of the published papers, and we were very curious as to why research that had been refused permission in Berlin because of the high welfare cost on primates was being allowed in the UK, when we are consistently being told that the UK has the strongest regime on animal experiments. It was for that reason that we asked for details of the licences relating to the published research.

Q375 Jeremy Corbyn: What was the outcome of this request?

Michelle Thew: It was a very lengthy process. We went all the way through the various stages, and Newcastle University resisted very hard on a number of different grounds, some of which were completely non-understandable to us and to the tribunal. In the end, the licences were released to us with certain passages redacted, as David indicated, where it was felt that they would not pass the test.

Q376 Jeremy Corbyn: Do you think that there are any lessons to be learned from the Newcastle case?

Michelle Thew: I think there are. Personally, I think that the lessons to be learned include asking universities and institutions to comply with the Act at an earlier stage than Newcastle did. We have had examples, including Cardiff, that complied with our request for information, and that information was suitably redacted. That, we believe, is the way to work with the Act, rather than running up what we have told are high legal bills at public expense running a number of arguments that simply did not hold water. We do not believe that we should have had to go through the level of argument and expense that we did to release that information.

Q377 Jeremy Corbyn: There is clearly a conflict between the Freedom of Information Act and the Animals (Scientific Procedures) Act 1986, in both their aims and intentions. Is it your view that there is effectively a veto on some information on animal experimentation under section 24?

Michelle Thew: Yes. I shall ask David to deal with this. It is not at the university level but certainly at the level of the Home Office.

David Thomas: Yes, there is a partial conflict. There is very much a conflict as far as the Home Office is concerned, which is the regulator of animal experiments. It is virtually impossible to get anything out of the Home Office. Since the Home Office is the regulator, that is clearly a serious problem in accountability terms, with both public accountability and judicial accountability.

The problem is section 24 of the Animals (Scientific Procedures) Act, one of the statutory prohibition on disclosure sections. That prohibits the disclosure of information that is given in confidence to someone who is exercising functions under the Act—in other words, 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. As far as universities are concerned, other public authorities conducting animal experiments and public authorities such as the MHRA, which is a regulator but does not regulate animal experiments, there is no conflict. Following the Newcastle decision, the Upper Tribunal, which is the equivalent in the legal hierarchy to the High Court, decided clearly that section 24 does not apply to universities. That is because, unlike the Home Office, they are not exercising any functions under the Animals (Scientific Procedures) Act. As far as universities are concerned and other public authorities conducting animal experiments, the normal FOI presumption of disclosure subject to the exemption applies; with the Home Office there is a major problem.

May I add a word as to why licence information, for example, is important? The reason why the Home Office asks for quite detailed information from researchers is so that it, the Home Office, can apply the various statutory tests—the cost-benefit test, tests on whether there are non-animal alternatives and so forth. That is why the Home Office asks for the information. That, in turn, is why the information needs to be in the public domain so that there can be an assessment of whether the Home Office, as regulator, is doing its job properly. Ultimately, of course, the court needs to make that assessment, but without the information being available the court cannot perform its function of ensuring that the Home Office is regulating properly.

**Dr Palmer:** It may be worth mentioning in passing that the new European Union directive on animal experiments is recognised by the Home Office to be incompatible with section 24 as it stands. The Home Office is currently consulting on what to do about that. As David was saying, our recommendation is simply to remove section 24, but to have the general protection of the Freedom of Information Act for personal safety, national interest and commercial confidentiality. Those are three very strong tests, and we feel that we do not need section 24 as well. It will have to be amended, but we do not see any sensible way to amend it and meet the European Union requirement of transparency in this area.

**Q378 Chair:** On that point, there is a difference between what the two pieces of legislation are trying to do. One confers on people such as you the right to obtain information. The other imposes a criminal sanction on the disclosure of information, perhaps malicious disclosure, by somebody who should have held it in confidence. There is a conflict, but removing entirely the criminal sanction would have wider effects, would it not?

**Dr Palmer:** The malicious publication of information would, in any case, be an offence under other legislation. The decision by the Home Office on whether to allow details to be made public of what is done to animals in particular experiments can be controlled by the normal freedom of information restrictions. When looking at what was done to a particular primate, it would be able to decide whether the release of the information would prejudice commercial confidentiality or safety. We feel that that is inappropriate. I think that the Home Office recognises that that is not compatible with the transparency requirement; it would be a criminal offence to disclose the fact that, say, primates were being deprived of water for 24 hours on a repeated basis. That is a piece of factual information, and the Home Office ought to be able to decide on the merits of the individual case rather than having a blanket criminal bar on any disclosure.

**Michelle Thew:** If you look at the debates on ASPA at the time, which predated the FOI Act, one of the reasons given for this section was that individuals would be protected. The Freedom of Information Act now does that. That is our view.

**David Thomas:** May I add a word to what Nick said on the question of malicious disclosure? Under the FOI Act, by definition we are talking about public authorities, so the concept of malicious disclosure perhaps does not really apply.

**Q379 Chair:** A malicious individual might take a disclosing action to get his own back on someone who denied him promotion or whatever.

**David Thomas:** No doubt he would be in breach of his contract of employment and all sorts of other things if he or she made such a disclosure.

**Q380 Jeremy Corbyn:** My last point on the commercial aspect is this. You make your FOI requests to Newcastle University on the basis that it is a publicly funded institution, but it is undertaking quasi-commercial research work. Do you think that there are any problems in the operation of the Act in respect of publicly funded operations as opposed to privately funded ones? For example—I have no idea whether it does this—the University of Buckingham might undertake animal experimentation. It is a wholly private commercial operation, as indeed pharmaceutical companies are, which are not subject to FOI requests. Do you see a problem here, or do you make your requests under the Home Office licensing arrangements where, clearly, there is a public interest in the role of the Home Office in this?

**Michelle Thew:** At a general level, opinion poll evidence shows that about 80% of the public would like all information about animal experiments to be publicly available, save for individual details. To us, it should make no difference where the research takes place. It is a broader issue about where FOI applies. From our point of view, if an animal experiment is taking place under a Home Office licence—because all animal experiments in this country have to be licensed—for us that is an issue of public concern. We would ask the Home Office for licensing information and because of section 24 it is very
difficult to get that. We were able to ask Newcastle for details of what was happening because it happened to fall within FOI, but you are right that if it was happening in a private company we would not have been able to ask. For us, that probably would not satisfy the public’s concern about animal experiments; they have that concern regardless of where experiments take place.

Dr Palmer: If it is helpful, we can write a note for you on section 24, as a short additional submission, because it has not come out in huge detail.

Jeremy Corbyn: It would be very helpful if you could.

Q381 Yasmin Qureshi: I want to discuss some of the practicalities for campaign groups, picking up on the point that you made, Ms Thew, about the fact that Newcastle University took a long time to deal with your request as opposed to Cardiff University, which dealt with the matter more expeditiously. In that context, I want to discuss the 18-hour time limit for the consideration of requests. We have received evidence from universities saying that it puts too much burden on them, thinking time is not incorporated in this and sometimes different requests take differing amounts of time. What is your view of the 18-hour limit?

Michelle Thew: We feel that it should be limited to administrative tasks; we are very concerned about the concept of thinking time.

David Thomas: I am not sure that the BUAV is necessarily fixated on whether 18 hours or 24 hours is precisely the right limit; there might be movement either way. However, as Michelle says, the key in what can be taken into account in deciding whether you arrive at those time limits is what we call the physical tasks—checking whether the public authority has the information and locating it, and the physical task of redaction—rather than thinking time. I know that some universities and others have asked for that, but, with respect, the Committee needs to be clear that, if thinking time were allowed to be taken into account, for controversial or complicated matters it would cause serious problems for FOI generally. It would be very easy for a public authority, when dealing with a politically sensitive or controversial or complex matter, quite genuinely to spend a lot of time deciding whether a particular exemption applied. Some of the exemptions, such as the confidentiality and data protection exemptions, are very complicated. It is not only the time that can be taken into account; under the regulations, costs, too, can be taken into account. If a public authority decides, as Newcastle quite reasonably did, that it is not sure of its legal position and goes to external lawyers, one can see that the £450 limit for universities, or £600 for central Government, will be hit in no time. For anything remotely difficult or controversial, if thinking time was allowed to decide whether exemptions applied, the net effect would be that FOI would not apply to such information and therefore the whole accountability rationale for the legislation would be lost.

Dr Palmer: It would blow a hole in the whole regime. You could almost get a subjective response, “This is a very complex issue that you have asked me about. It is going to take me too long to think about it, so I’m not going to reply.” I do not think that is just an animal experiments issue; it is quite general to the freedom of information regime. If you bring thinking time into the 18-hour limit, or whatever time you have, you will give people the opportunity to refuse on the basis that they think it is a complicated matter.

Michelle Thew: That is adding to the difficulties that we have already had in asking a university to comply with a reasonable request and every argument that was used, which is what led to this very elongated legal battle.

Q382 Yasmin Qureshi: Are you saying that the current 18-hour limit is fine?

Michelle Thew: As David said, we do not have a precise view. It is not about whether it should be 18 hours or 24 hours; it is more about what is allowed to be included within that time, particularly for areas that are controversial.

Q383 Yasmin Qureshi: Would you support the introduction of a statutory time limit for internal reviews?

Michelle Thew: We would support anything that enabled the Act to work better and, from our point of view as a requester, to work in a timely fashion. We do not have a particular view about individual time limits, but we would support anything that enabled us as a requester to access information. That is particularly so in the area of animal experiments, where an experiment is continuing, and, if there are areas of unlawfulness, we think it is right that they are addressed in a timely manner.

Q384 Yasmin Qureshi: What do you think will be the impact on campaigning groups such as yourselves and others of routine fee charging for FOI requests?

Michelle Thew: There may be broader principles for individuals about the Act and charging, but we would not oppose the introduction of a small fee. The £10 level has been discussed; that would not be a problem for us.

Q385 Ben Gummer: Following on from what Jack Straw said earlier, would you object to the BUAV’s name being appended to information requests when you put them in and lodged them?

Michelle Thew: No, we would not. As I say, there may be broader issues for individuals that are not in our area, but the BUAV being named as a requester is not a problem for us.

Chair: Thank you. We are very grateful to you all for giving evidence this morning.
Tuesday 15 May 2012

Members present:
Sir Alan Beith (Chair)
Steve Brine
Jeremy Corbyn
Nick de Bois
Ben Gummer
Mr Elfyn Llwyd
Elizabeth Truss

Examination of Witnesses

Witnesses: 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, gave evidence.

Q386 Chair: Welcome everyone. Thank you very much for coming in to help us this morning. We have 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, Lambeth Council; and James Rogers, Assistant Chief Executive Officer at Leeds City Council. We are very glad to have your help this morning in our post-legislative review of the Freedom of Information Act. I am going to ask Steve Brine if he will open the questioning.

Q387 Steve Brine: Good morning and thank you very much for coming. Has the Freedom of Information Act achieved its objectives of openness in local government? It is a simple one to start with. I will start at the top with Mr Gough.

Roger Gough: I think it has achieved at least a degree of that objective. It has been a force for openness and I think that is positive. If you go through some of the general aims and objectives at the time of its introduction, then I think it is a mixed bag. Here I am very much in agreement with the report that the Constitution Unit did. That was very much on the money in the sense that I do not think it has achieved all of what was hoped for and I do not think it has had the feared impact either. If you take the argument about the “chilling effect”, you can point to one or two examples of that, but I do not think there has been a general impact of that kind. It has boosted openness and makes people think quite carefully about how things will look in the cold light of day. That is positive. On the other hand, has it enhanced decision making? Has it enhanced public participation? Has it enhanced trust? No. In fact I suspect on the latter, it has probably been a mild negative. So it is a mixed bag, but, in terms of your initial question, yes, I think it has had on the whole a positive impact in that direction.

Q388 Steve Brine: As this is the basis for this part of the inquiry, it is probably fair to ask everybody to answer that question.

Edward Hammond: I tend to agree with that, certainly up to a point. It is quite difficult to disaggregate the effects of the Freedom of Information Act from wider developments in transparency in the public sector and local government in particular, especially in the last few years. One of the reasons why it might not have had the effects that it might have done is because public authorities—local authorities in particular—have viewed it more as a compliance issue, complying with the terms of the Act, complying with the requirement to publish publication schemes and respond to requests, rather than seeing it as a challenge to open up more generally to develop a culture of increased transparency.

Tracy Phillips: Following on from Edward, I do think it has had a positive effect. Local authorities are using it as a driver to drive through transparency agendas. Far more information is being put out there in the public domain through our websites because of the interrogation and analyses from the Freedom of Information Act requests that we are receiving and what the public want to see. So I think it has had a positive effect.

Q389 Steve Brine: To be clear, is that being proactive and taking a judgment as to what you will be asked based on the patterns of questions being submitted and then you are just putting it out there? Tracy Phillips: Yes, absolutely. We are trying to be proactive in what we are doing and what the public want to see, based on what is being asked.

James Rogers: Without repeating everything that has already been said, I would summarise: yes, to a degree. Many local authorities have had an openness and transparent agenda for years. We had a voluntary FOI policy for a number of years before the actual Act. The Act has promoted that because it was probably not that well known that people could ask for the type of information that they have been asking for. There are some flaws and issues, and they will come out in the questions that follow.

Q390 Steve Brine: How much of a financial burden is it on you as an authority? Presumably Leeds City Council is not awash with money right now and you will have to make efficiency service changes.

James Rogers: I do not think any local authority is awash with money at present, with the reductions we have seen. It is a burden. To give you a feel for the scope, in 2010–11 we received 1,200 requests. In 2011–12 that increased to 1,900. If it continues on that trajectory, then it continues to be an increasing and significant burden. The greater burden is sometimes the nature of the requests that we receive in terms of
the depth of information that is sought and where we necessarily cannot take into the time limits some of the exemption considerations that we need to have.

Q391 Steve Brine: Give us an example of the ballpark and what we are talking about. What are the most commonly requested things for your authority?

James Rogers: The most common ones out of that number are fairly straightforward. They are for specific issues around, maybe, a contract that we have let, salaries that we pay, expenses or a particular planning application. The majority are for specific matters. You then get the ones that ask for, say, the contents of a whole file or database. Those cause us more of a challenge in how we respond to them, particularly when they are not necessarily subject or issue-specific. The ICO takes the view that we still need to consider those. We are then required to consider the level of data in the database, which might contain thousands of records, to determine which of those records are exempt, but we can’t count that towards the time limit, which then creates a big burden for us.

Q392 Steve Brine: Finally, Mr Hammond, I know you work supporting backbench councillors who are on OSCs—overview and scrutiny committees. How much knowledge do you think there is among your regular rank and file councillors of this Act, what it is meant to do, and what can and cannot be requested under it?

Edward Hammond: I think there is probably quite wide knowledge. I would imagine that councillors will come into contact with issues relating to public information regularly. I do not know to what extent councillors will use the Freedom of Information Act themselves because they won’t need to. Of course, by law, they have rights to information in a way that members of the public might not. They can go directly to officers and request things. I am not really aware of any particular examples of backbench councillors using FOI either in their ward role or indeed to access information through overview and scrutiny committees, although there are a couple; there are two or three, but I would say that they are extremely rare. It is highly unusual for councillors to have to use those legal techniques to acquire information from their own authorities.

Q393 Chair: Does proactive publication, as is sometimes suggested, provide a means of saving money on actual FOI requests? You can simply say to the applicant, “That information is already available. Here is the link to the website.”

Edward Hammond: Yes; it has the potential to do that. It depends on how you go about that publication. The Information Commissioner has often said, “You should adopt that approach to your publication scheme of incrementally adding issues and documents to it as requests come in.” Again, that could be regarded as being slightly reactive. A proper proactive approach to publication will involve a far wider approach to opening up decision making more generally, involving the public, local people and local groups in the decision-making process and being prepared to publish information that might be in draft form. It is involving people in the way that decisions are made in that way rather than necessarily publishing documents once they are in their finished, complete form.

Roger Gough: I would like to add something to that. We have been adding quite a lot to our website. To go back to a question that was asked earlier, compliance with the Act and boosting a culture of transparency internally reinforce each other. There is a recognition, for instance, that it does make sense to do exactly what you have described. We are doing that and we will do more of it. I do not think, particularly initially, it will necessarily reduce your number of FOI requests. People will probably very often still find it easier to put in the FOI request than go looking, but it is obviously quicker for us to say, “Here is the URL; go and have a look at it”, than to dig out the information. Yes, over time that can help, but that is talking about something much wider than the existing publication scheme. I notice many of your respondents commented that it was a fairly antiquated business. That was something that many of us felt.

Q394 Chair: Does anybody else want to add anything to that?

Tracy Phillips: I would like to add that 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.

Q395 Chair: One of you suggested in evidence that the Information Commissioner’s Office could give more help to public authorities in developing transparency programmes.

Tracy Phillips: 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.

Edward Hammond: The difficulty for local authorities is that they are receiving injunctions from various different parts of Government to respond in different ways to requests for public information. You obviously have the FOI regime. You then have not a legal requirement, but as near as, by the Department for Communities and Local Government to publish expenditure information above £500. You also have the wider transparency agenda being led by the Cabinet Office. Individual other Government Departments require certain information to be published in certain ways as well. That approach is not especially joined up. Although there is an increased drive for transparency coming from central Government, it is not—certainly in my perception—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.
Q396 Chair: Mr Gough mentioned earlier the effect on what local authorities actually do. Has the practice of recording decision-making processes improved as a consequence of the Act?

Roger Gough: I have not seen any evidence that it has improved. I have not seen any great evidence that it has deteriorated either. Here, I am speaking more speculatively than saying anything directly about my own authority. Again, looking at some of your submissions and the discussions on this, there is the empty archives phenomenon from Sweden. I do not think we have seen that, but I am sure people have always to some extent been careful about keeping, if you like, some of the politics out of what is recorded as a decision. To some extent that has probably always been the case. It is probably more in terms of what is recorded where it has had an impact.

Q397 Chair: There is rather a difference, isn’t there, between local government and central Government? The instinct of the local government officer is to keep the politics out of it and let the politicians argue in their own separate context but then record what is non-political and local authority-based.

Roger Gough: Yes, but that has always been the case. Again, if you look nationally, you would have Cabinet minutes that discussed some elements of the politics of it, but those are treated as somewhat separate items when it comes to freedom of information nationally. As I say, you would see more care probably exercised by people in when they might use the phone rather than an e-mail or something like that. When it comes to actual formal recording of decisions, I do not think there is any difference.

Q398 Chair: Have any of you had any experience of applying the public interest test?

Tracy Phillips: Yes; we have applied it. I have to be honest that applying the public interest test is quite bog standard. You use a templated response because it is generally the same public interest test that you are applying for the same exemption as commercial interest. It is not used very often, but when it is used, it is the same response.

Q399 Chair: Can you give us any indication of the sort of circumstances in which you have had to use it?

Tracy Phillips: It is generally the losing bidder who wants information on the winning tenderer. That is bog standard and I am sure everybody gets the same.

Q400 Chair: Is it commercial confidentiality.

Tracy Phillips: Absolutely, yes.

Q401 Jeremy Corbyn: How often does this come up with planning application issues in local government where you get competing developers?

Tracy Phillips: The planning files are generally in the public domain anyway for people to go and view manually. It generally does not apply with planning applications. Even now we are getting requests for pre-planning advice, which the developers pay for. That is now becoming more and more publicised, where it is requested.

Q402 Jeremy Corbyn: What do you mean by “the developers pay for it”?

Tracy Phillips: The developers pay for pre-planning advice.

Q403 Jeremy Corbyn: From the council?

Tracy Phillips: Absolutely. That is being requested also from competitors and complainants.

Q404 Jeremy Corbyn: And that is released?

Tracy Phillips: It is.

Q405 Chair: Tony Blair in his autobiography made these very surprising comments, which include saying that the Act that he had carried through was antithetical to “sensible government”. Do you have any sense of that in the local government context?

Tracy Phillips: I would have to say yes and no. It has been received well, but it is also being used as a driver to drive transparency and accountability. It is a mishmash really.

Roger Gough: My view is more no than yes. As I say, it will probably have an impact on certain bits of behaviour here and there as to how things are done, but I do not think it has had a major “chilling effect” to use the jargon. I cannot think, by and large, of decisions—in fact correction: certainly in my own authority, I cannot think of a decision that has been different on the basis of that.

Q406 Ben Gummer: We are thinking about the time limits as well and the various provisions in the Act. Various witnesses have talked about the 18-hour limit not being able to include thinking time and review time to work out whether exemptions apply. Of course, the counter-argument is that, if you were to allow that, it would be very much open to abuse by local authorities, who could claim that they have thought about it for 18 hours and, hey presto, that is the time up. Do you have any comments on the first problem about the amount of time it takes to review cases? Secondly, if you were to include time for review, how could you do that so that it was not abused by unscrupulous public authorities?

James Rogers: It goes back to one of the points that I made earlier. If there was an ability to be more specific—and ask the requester to be more specific—about the issue or the subject matter they specifically want information on, it would then allow us to look at the exemptions more clearly than just the generality of, “Can we have all the contents of that file or that database?” If we continue to have a process that requires us to do that, then it is sensible that we have to include that within some form of time limit. It might require that the time limits be adjusted to take account of that, but the challenge then is how you get a time limit that actually accords with the detail and the degree of request that is made.

Q407 Ben Gummer: Does anyone else have any answers to that question?

Tracy Phillips: I would certainly agree with James. An incredible amount of time goes into just reading information to see whether it is applicable to go into the public domain.
Roger Gough: My comment would be that I have a lot of sympathy with certain areas like reading and particularly redaction being included within that limit. When it comes to something like review, that is different. Some of the campaigners for strengthening the Freedom of Information Act argue for some greater degree of control over the amount of time spent on the review. I have some sympathy with that because that can be a way of kicking things into the long grass, if you like, or could be, certainly, I would take a balanced approach where you could look in one way at some of the areas like reading and redaction, where I would agree with what others have said, and the question of a review, which I think is slightly different.

Q408 Ben Gummer: The issue of the cost—the £25 an hour—will be taken up by my colleague, but does that in any way equate to the real cost for you at the moment? If the time limit were to be extended beyond 18 hours—let us say to 25 hours, for the sake of argument—would that still make any difference given the fact that it is likely, I would have thought, to cost you more than £25 an hour for an officer of any grade to be doing this work? Is it really going to make a difference?

Tracy Phillips: I am not so sure whether it should be extended as opposed to reduced.

Q409 Ben Gummer: But, if it is reduced by two hours, is 50 quid really going to make a difference in terms of the gross cost to you?

Tracy Phillips: Possibly not. I think we need more help from the Commissioner in being able to go back to the requester and say, “You need to really specify, focus and narrow your request”, so that we can justify a reading time that we could apply.

Q410 Chair: When you say “help from the Commissioner”, is that the kind of advice and guidance he gives, or how he rules on some of the cases?

Tracy Phillips: Yes.

Q411 Chair: The latter or the former or both.

Tracy Phillips: The former.

Q412 Ben Gummer: Picking up on Mr Gough’s point about the statutory time limits, does anyone disagree with the point that there should be statutory time limits of some sort on review?

James Rogers: I think it makes sense to have some form of limit.

Q413 Ben Gummer: What about the actual people who are doing the work itself, whether it is review or the initial assessment of an FOI request? You will be aware of the enormous variety in hours attributed to that by the Constitution Unit. Within your own authorities, what is your experience of the kind of people you get to do the work and the relative merits of using a junior member of staff or a more senior member of staff?

James Rogers: My view on that would be that we seek to identify the most appropriate level of staff to turn to the question or the information that has been requested. Our evidence shows that 88% of requests that we receive are delivered within the time limits, which suggests that we are not far off getting it right. I would not necessarily agree that having junior staff means that we do not meet the time limits, because in the majority of cases we do.

Tracy Phillips: There is a varied level of staff in some areas who are responsible for reading the information. It depends on the level or type of information that is being asked for. It has to be pertinent to that service area. Who has full knowledge of what information is being requested so that they have the experience to read it and determine whether it can and will be disclosed?

Edward Hammond: The difficulty with having more junior staff, even when a lot of requests are relatively routine and straightforward in nature, is that it increases the risk of failure demand. If a request is misunderstood or a decision is applied wrongly, the requester then has to get back in touch and it costs more money to revisit that decision. I am not entirely certain about a national picture of who is given this responsibility in individual authorities, but I would assume that there should be more junior members of staff, simply because there will often be two people in the authority whose specific core responsibilities are to respond to freedom of information requests. That can sometimes provoke difficulties with knowledge of the service, for example.

Roger Gough: Obviously there is a question between the staff who are working full time as an FOI team on the one side and those staff within service bits of the organisation who then respond to that. There is a difficult balance on the latter because you do need people with the right level of understanding of what it is that they are to provide, but equally there are obvious arguments against having very senior people having a lot of time tied up on this. One thing we have done increasingly is 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.

Edward Hammond: 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.

Q414 Ben Gummer: In that way, it matches the general sense of whether an authority is well managed or not. A good authority, well managed, should be able to make it part of its processes.
Roger Gough: I very much agree with what Edward said about the involvement of both senior officers and senior members in this. That is a positive because it then gives it the right degree of impetus and doesn’t make it an odd little area off on its own.

Q415 Ben Gummer: I want to ask a final question on returning requests from the authority for more detail. Do any of your authorities—Mr Hammond excluded—do that at the moment on an informal basis?

Tracy Phillips: Yes, we certainly do. We 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.

Q416 Ben Gummer: In that case, what more can we do in trying to improve the legislation that will help you reduce that time limit? If you are already doing it informally, what more can be done to help?

Tracy Phillips: We get responses from the requester saying, “I have asked for x, just give me y.” 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.

Q417 Elizabeth Truss: One of the things we have been discussing is introducing a charging regime and whether that would be desirable. Certainly when we had evidence from the former Secretary of State for Justice, Jack Straw, he outlined that he thought that would be a good thing. What is your view from the point of view of people who are servicing freedom of information requests, both in terms of how such a charging regime would work and also whether you think it is desirable?

Roger Gough: We have some sympathy with that. There are a couple of different ways of looking at it. Others answered a little bit about costs. In our case we estimate our cost of FOI at about £500,000 a year, which you could say in the context of a big local authority is not a vast sum of money, but it is still material and the pressure is upwards. That is the key point. We see, like others, a steady, quite rapid rise in requests and this at a time when overall resources are coming down and we have to do some quite difficult things. If you add in the wider transparency agenda—I imagine you will be asking about that in a moment—it does two things. One is that it brings in extra cost. The other thing is that it may well mean at the same time that we are putting, as we would anyway, a lot more information out there in another form.

In that context, I would certainly have sympathy with putting some degree of charge on commercial requesters—and I seem to recall that Leeds city council had some interesting comments on this in their submission—if it can be done. As I say, I think there are one or two possible suggested models. I am open to at least the idea of having a fairly nominal charge on other more general requests as well. If it went hand in hand with the wider transparency agenda, it would not necessarily be a bad thing.

Q418 Elizabeth Truss: One of the issues we discussed was how that would work with the Data Protection Act, where my understanding is that there currently is a charge for requests. Maybe, Mr Rogers, you could say something about that.

James Rogers: Yes; there is currently a charge for Data Protection Act requests.

Q419 Elizabeth Truss: What is the logic in having a charge for one and not the other?

James Rogers: In Leeds we do not actually charge. It is an optional charge, so we do not charge for Data Protection requests.

Q420 Elizabeth Truss: How much is that costing you, if you don’t mind my asking?

James Rogers: I do not know the details of the figures. The charge is relatively low. The view that we have taken in the past is that the administrative burden of administering the charge outweighs the issues in terms of putting it in place. 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. There is also the issue about whether a charge then potentially puts off legitimate requesters for information.

The point made by Roger about the commercial issue that we referenced in our submission was as much to do with the public interest test in that sometimes a commercial organisation will ask through FOI for another organisation’s successful tender details to put them into a competitive position the next time that they bid. That is one that we look at and say, “Is that what the FOI should be used for?” Maybe the public interest test in that regard is drawn too widely because that is a private interest rather than a public interest.

Tracy Phillips: I completely agree with both Roger and James. I would just add that the reuse of public sector information has not been used by public authorities where we could charge. It is not enforceable, but businesses thrive from the use of the Freedom of Information Act at a profit—yet at a loss to the local authorities. I do not think the Act was engendered towards businesses using it in that way, whereby they are profiting from it at our cost.

Q421 Elizabeth Truss: Is there an element of a sort of fishing trip about it? Information is or could be publicly available, and they are going the FOI route as an easy way of getting the web address or whatever rather than having to search through things themselves. Do you find that? Could journalists, for example, put out a request to every local authority in the country rather than looking at all the websites and so on?

Tracy Phillips: That is what journalists do. I am sure everybody would agree here that that is exactly what they do. They put in London and national requests. They are fishing for a story. Some would argue that that is in the public interest and they are making public bodies accountable in that manner, but it is the commercial businesses that ask for—
Q422 Elizabeth Truss: They are commercial, aren’t they, apart from some media organisations?

Tracy Phillips: Yes.

Q423 Chair: You are drawing a distinction in the nature of what they are doing between a journalist and the major commercial inquiry.

Tracy Phillips: Yes; absolutely.

Edward Hammond: I have a lot of sympathy with the issue about commercial requesters. The difficulty I have is how you would tell a commercial requester from another requester. I would certainly be entirely against any move to charging. It is quite a fundamental point. You have to get behind what the Freedom of Information Act is for. It is about embedding and engendering the idea that there is a public right to access information. There is a public right to know.

Q424 Elizabeth Truss: How do you distinguish that from the Data Protection Act, where you can levy a charge? What is the logic in that?

Edward Hammond: I presume the logic relates to the fact that it is because it is personal information about a specific individual. I would argue that obviously the charge for the DPA is optional. A lot of public authorities choose not to levy the charge for the reasons outlined. You could say that equally the argument applies to both, and, if a public authority holds information that relates to you, surely you should be able to access and challenge that information if necessary. Equally, 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 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.

Q425 Elizabeth Truss: What about a system whereby people are entitled to a certain number of requests for free and heavy users would pay more? A fundamental point. You have to get behind what the Freedom of Information Act is for. It is about embedding and engendering the idea that there is a public right to access information. There is a public right to know.

Edward Hammond: That is always going to be entirely arbitrary. There are always going to be marginal cases. How would you deal with those marginal cases? It would create a bureaucratic superstructure that, arguably, I do not think is necessary.

Tracy Phillips: That comes back to the point of whether they are vexatious or regular requesters. The requests do not have any real value to the public at large and they can be seen to harass the authority, but we cannot use the vexatious exemption because it does not apply to the requester. It applies only to the request. That is where we would need assistance from the Information Commissioner’s Office in terms of going forward and drawing them out.

Q426 Elizabeth Truss: If there was one thing you could do to make the whole system lower cost—it seems to be a higher cost for central Government to reply to these requests rather than local government—is there anything that could be reformed about the way that the request system worked that would be equally good at supplying the information but perhaps cheaper for local authorities to do?

Edward Hammond: It goes back to the issue about proactive publication. Technological solutions to this would be an obvious approach. If you are able by default to assume, okay, we are going to publish everything we produce unless there is an obvious reason not to, and then we will deal with requests on those issues as they come in, it may sound idealistic and somewhat naive, but there is the potential that that could significantly reduce the cost burden on local authorities, if you take an approach whereby residents and citizens are becoming more self-servicing in the way they access information directly from, for example, council websites through the effective use of metadata keywords in the way that information is stored on websites and is publicly accessible.

Q427 Jeremy Corbyn: If you get a lot of vexatious requests from particular journalists or a newspaper or media group and the information is already available on websites, do you tell them that? Do you ask the Information Commissioner to tell them that or do you get in touch with the senior management of those organisations and say that their journalists are wasting your time?

Tracy Phillips: I would not say we get many vexatious requests. If we got them, we would certainly point them towards where the information is found. Our problem is with requesters who ask for information that has no value at all to the public at large, such as, “How many ghost sightings have you had in your building?” or “What biscuits do you buy regularly?” They have no general value. It is those requests that we need help from the Commissioner to weed out.

Q428 Chair: Isn’t that something you can simply say is not recorded and that you have no files and no records?

Tracy Phillips: But we have to search for it first. We have to identify whether we have the information or not. It is the resource impact that those requests have.

Q429 Jeremy Corbyn: But local papers rely on the number of biscuits you buy. It is essential to their very well-being.

Tracy Phillips: I am sure.

Steve Brine: We will be asking them.

Edward Hammond: The issue is that vexatious requesting obviously tends to be in the eye of the beholder. For one person, a query about the number of biscuits bought by the authority is idiotic and does not make any sense; but, on the other hand, it could be a valid question about the costs that the council spends on hospitality and catering, which could be valid in the context of local council taxpayers. It is very difficult to make those judgments. It is very difficult also to talk about vexatious requesters. Just
because somebody has put in half a dozen requests that might be considered vexatious, you cannot say that, in the future, they will not put requests in that are not. Applying the vexatious tag to an individual rather than to a request might be a bit dangerous.

Jeremy Corbyn: I accept that point. That is an important distinction to draw, yes.

Roger Gough: I would agree. There are two distinctions between the vexatious request and the requester. There is a danger, if you go too far down that road, of playing the man rather than the ball, which makes the whole thing more confrontational as well. The Commissioner has been issuing a number of elements of guidance. There have been a number of decisions recently that have been quite helpful in strengthening and clarifying the position on vexatious requests.

There is a separate issue—I think it was the Information Commissioner who mentioned it in the submission to this Committee—about frivolous as opposed to vexatious requests. There is a strong case for looking at those. There are a number of things, and, arguably, it would have to be established on a case-by-case basis because it is a little bit in the eye of the beholder. There are requests that are clearly frivolous and a waste of public money.

Q430 Chair: What brand of biscuits the council prefers?

Roger Gough: We have had one or two ourselves that I can think of, but I will not call down sulphurous e-mails on myself by identifying them.

Jeremy Corbyn: We will give you some garlic; it’s okay.

Chair: It may be the experience of some colleagues—it is certainly mine as a Member of Parliament—that requesters who appear vexatious occasionally have a point and sometimes an important point. You cannot write them off merely because of their vexatious manner of raising things.

Q431 Mr Llwyd: We have started down this vexatious road and it is rather interesting. I would ask what Leeds city council said about paranormal activity and ghosts and so on. I dare say it did not take a lot of thinking time to respond to that request. It does say “a number of requests”. Would that be from the same individual or from different people?

James Rogers: It is often from different people. The same individual does not normally put in that request numerous times. The issue is that, while it is easy to respond, there is still a process to be adopted in terms of receiving, considering and responding. While therefore it might be a minimal process, it is still a process. The more you get of those, the more time is wasted in terms of responding to those frivolous issues.

Q432 Mr Llwyd: I gather from the panel that you are fairly relaxed about this in actual fact. There is, I dare say, therefore, no case for an amendment to the law; for example, to provide for a person who might be a repeat offender, if you will pardon the word, being declared a vexatious applicant similar to a vexatious litigant in court. Is there a case for it at all?

Roger Gough: There may be a case for it but it is not one that persuades me. As I indicated earlier, we are beginning to strengthen the position a little bit on what vexatious requests are. That is good enough. As I say, there may be a case for looking at frivolous ones, but that is a slightly different point.

Tracy Phillips: It is not palatable to think of a requester as vexatious and label them as such, but I think we should go down the road of looking at frivolous requests and whether what they are asking for has any real interest to the public at large.

Edward Hammond: I agree, although you might end up with slightly similar problems with frivolous. I am not sure. It raises the same questions. It would be difficult to administer but it is something that could be explored, I suppose.

Q433 Mr Llwyd: Looking at our example, is the ghost sighting frivolous or vexatious?

Tracy Phillips: Frivolous.

Edward Hammond: It is probably frivolous.

Mr Llwyd: It is certainly a waste of time; that’s for sure.

Edward Hammond: There will be so few that meet that criterion. You would have to set that bar quite high. Going back to the biscuits example again, some people would say that is frivolous, but in a way it is not. You would have to set the bar high for the ones about ghosts or preparedness for a zombie attack. We had that one as well. Those are clearly frivolous. It was Bristol, I think, that received that one.

Q434 Mr Llwyd: I had not thought about a zombie attack. While I think about that, would the abolition in effect of “requester blindness” affect the universal nature of the information available? In other words, anybody can apply regardless of who they are and they are not identified. Do you think “requester blindness” is an important issue that should be retained?

Tracy Phillips: It is neither here nor there. It is requester blind. We generally know who they are. They do not hide behind who they are. I am sure there are those who use pseudonyms but I do not think it is an issue for us.

James Rogers: The ICO has already acknowledged that when we are considering a potential vexatious request we are allowed to determine who the requester is. It is not a particular issue.

Edward Hammond: Requester and motive blindness are quite fundamental to the whole regime. If you are going to try and chip away at them or take them away entirely, I think it will fatally flaw the basis of freedom of information. Those two fundamental principles were introduced for a reason. It was to ensure that you got fair and equitable access to public data. If those are taken away, you are undermining the spirit and ethos of the scheme entirely.

Roger Gough: My view is the same. As was mentioned, one or two ICO findings have been quite sensible in terms of what you have with people who abuse multiple identities and things like that. Yes, the existing regime is fine.
Q435 Mr Llwyd: Another thing that has concerned us for the past few weeks is the whole issue of where some services have been contracted out to private concerns. How do we ensure that a requester is able to have the information about that which previously may have been a core service delivered directly by the authority but now via a third party or, should I say, a private concern or it could be a charity even?

James Rogers: 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.

Q436 Mr Llwyd: Therefore you would insist, when you engage a contractor, that they keep adequate records.

James Rogers: Yes.

Roger Gough: My view would be the same. Particularly if we do go ever further down this route, which local authorities are, you cannot have a situation where more and more stuff goes off into the long grass and is therefore not available; so I would agree with that. I can see some potential problems in it, particularly if you think about a small voluntary or community sector company, organisation or charity that is providing a service and what degree of burden that puts on them. I think there is a reasonable amount of cross-party sympathy for this, given that the whole spirit of what the Government are seeking to do is, in many cases, to look for those smaller and more local organisations that are not just the big usual suspects in terms of non-public sector provision. It could put some burden on them and that is a potential problem. I cannot see frankly how you can logically say, given the focus on greater public transparency, that you will then have more and more stuff being hived off and therefore not being accessible.

Edward Hammond: As it stands at the moment, a lot of councils will, as a matter of course, include a section on transparency and access to data, certainly in major contracts. For some commercial contractors, it might be culturally difficult, because their ethos will be that you do not automatically release information to all and sundry. With smaller firms I take the point, but again it comes back to the issue that, if you are delivering a service on behalf of the public, that is part of the responsibility that goes hand in hand with delivering that service. You have to be accountable to the people to whom you are delivering it and to the council for that delivery.

Q437 Chair: Do we need to standardise that practice or incorporate it in some way in statute or regulations, or is it happening so generally that there is not a problem?

Tracy Phillips: It is certainly happening contractually. We are certainly inserting these clauses in all our contracts with our contractors. With regard to what Roger has raised about smaller businesses that are now coming on board with which we wish to proactively participate, it is a case of forwarding the burden on to them, but with our help and assistance on how to do that.

Q438 Mr Llwyd: I have one final question. Journalists, being timid and delicate creatures, have told us that they believe their requests are treated differently from those of the general public. I do not expect any of you to say, “Yes, we do treat them differently”, but are you aware in any instance of that happening?

Roger Gough: No.

Tracy Phillips: No.

James Rogers: No.

Edward Hammond: No.

James Rogers: I would actually say there is a positive. The positive sometimes is that we will persuade the media organisation to treat it as a media request rather than just information in written form.

Q439 Mr Llwyd: Very often it can be in the authority’s interest to have the whole information out. James Rogers: It can be in the authority’s interest to make sure the media is fully briefed on an issue rather than just responding to specific issues or information that they have requested.

Chair: Thank you very much for your very helpful evidence this morning.

Examination of Witnesses

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

Chair: Welcome to our second group of witnesses. We move from local government to central Government. We have a dazzling array of Government Departments represented in front of us. We have Marion Furr from the Department of Health, Glenn Preston from the Ministry of Justice, Roger Smethurst from the Cabinet Office, Pam Teare from the Ministry of Justice, and Brendan Walsh from Defra. Thank you very much for coming in today. I am going to ask Mr Brine to open the questioning.

Q440 Steve Brine: Thank you, Sir Alan. Good morning and thank you for coming in. I will begin where I started with the local government representatives whom you have just replaced. Has the Act achieved its objectives? Has it improved public
confidence in Government and public services more generally? Was that ever a realistic objective of the Act?

Paul Teare: I think it has improved transparency of public bodies. There are two ways that you can look at that. You can look at it in terms of the public bodies’ responsiveness to FOI requests and you can also look at the proactive activities that that Department has undertaken to put information out for the public. The FOI Act has acted as a stimulus to the proactivity element, if you like. The amount of information that has come out through FOI requests has certainly vastly increased public knowledge and understanding of how Departments operate and the way they take decisions. On the proactive side, certainly if you look at the Ministry of Justice, we have a microsite on the website where it is not just a question of putting that data out, which we are encouraged to do under the transparency agenda, but making sure that they are made available in a form that the public can use readily and can understand. I would say it is positive.

Q441 Steve Brine: Marion, has the Act improved public confidence in Government at the DoH?

Marion Furr: I am not sure whether we can say that it has actually improved public confidence. We can say that the Department has certainly published more information and made more information available. I am not sure whether improving public confidence was ever realistic as an objective of the Act. Having access to more information will certainly have helped the public make decisions about what Government are up to.

Q442 Steve Brine: Roger, what is the Cabinet Office’s view? Was improved public confidence a realistic objective?

Roger Smethurst: In terms of the Act being transparent, FOI cases keep going up. Last year we had a 55% increase. We release in part or whole more information to requests than we withhold. As to what effect that has had, it is a bit difficult for the Cabinet Office to say, because of the nature of the information we hold. We are the corporate headquarters for Government and we hold the records of current and former Prime Ministers, the Cabinet and Cabinet Committees, as well as security, intelligence, defence and diplomatic functions. The records and information we gather are filtered up from Government Departments and, by their nature, are probably the most sensitive in Whitehall. Other than that, it is probably 50:50, to be honest with you. I do not think there is evidence one way or the other in that respect.

Q443 Steve Brine: What about the media? How has the media’s use of the Act affected the objectives as set out by the Ministers when this was put forward and then put on the statute book?

Roger Smethurst: This is probably one for Glenn to answer rather than me.

Glenn Preston: It is a bit mixed. Like the people who gave evidence before us, we actually do quite like getting media requests under the FOI Act because it is a good route for us to be able to get information to a much wider audience than we might typically if it was just an individual requesting information. So in that respect it can be quite positive. On the other hand we can get fishing expeditions, as was discussed earlier, where all Government Departments are simply asked for information on the basis that somebody is looking for a story. That can take an awful lot of resource for all Government Departments to have to expend, and there is a real question for us of whether that might not be in the public interest.

Q444 Steve Brine: Mr Walsh, you have not had a bite at the cherry yet. What do you think about the media’s use of FOI requests in Defra?

Brendan Walsh: Certainly some of the policy areas and business areas with which Defra deals attract a certain amount of media interest, but we deal with such inquiries as we would any other. We do not regard it as particularly problematic. If the information is available, it is put out there.

Q445 Steve Brine: Do you think that the Act has achieved greater transparency in Government, or is there this problem with the private space where Ministers are able to discuss things, and therefore things are being pushed away from the reach of freedom of information?

Brendan Walsh: I have worked in Information Rights for 18 months. I have not seen any evidence of that personally.

Q446 Steve Brine: So you are quite happy with the way the Act operates. We are looking post-legislatively at it and how we may change/improve it. Are you quite happy with how it works?

Brendan Walsh: It is burdensome at times. Resources in Government Departments are finite. There have been an increasing number of requests. Defra’s cases went up by 20% last year. We also have lead responsibility in Whitehall for the Environmental Information Regulations, which are slightly stricter than FOI so far as there are no absolute exemptions provided by the regulations. All exceptions under the regulations are subject to the public interest test. The process has been running now for six or seven years. Their performance is gradually improving. There are more people developing the expertise within public authorities.

Q447 Steve Brine: Mr Smethurst, you were nodding hard on the word “burdensome”. You are in agreement with your colleague?

Roger Smethurst: It is really about the application of the public interest test, which I think you are probably going to come on to later anyway. As I said before, 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. Equally, we often get requests where the officers who need to conduct the public interest test and have the expertise to do it properly are just far too overburdened with other things they have on at the time. A good example is
that during the Libyan crisis last year we received an influx of requests about Libya. The officers who were needed to conduct the public interest test were overburdened with the issues at hand. It made it very difficult to do that in the time and manner that we were supposed to.

Glenn Preston: I would like to supplement that. You asked about the question on safe space, which has become more prevalent from an FOI policy point of view, which is what my team owns. The memorandum that we submitted to the Committee says that the evidence is pretty unclear on this. That is true. The UCL Constitution Unit said that they did not think there was a problem of "chilling" and this requirement as a consequence for safe space, but it has definitely become something that is talked about considerably more over the last 18 months to a couple of years, or maybe slightly longer than that.

Q448 Chair: Why is that?
Glenn Preston: I don’t know.

Q449 Steve Brine: Is it our fault for holding this inquiry? Have we stirred it up?
Glenn Preston: I hope not. The Government were committed to this in the first place.

Q450 Steve Brine: The Prime Minister used the “chilling effect” term.
Glenn Preston: Quite. We do not have evidence that tells us why this has happened. That is one of the difficulties we face in looking at FOI in policy terms. From my point of view, owning responsibility for the Act and the policy more generally, the fact that it is being talked about is a problem in itself that is worth addressing because this type of thing has the potential to become a self-fulfilling prophecy. We don’t necessarily see this day to day, but there is definitely something in people being given that kind of safe space where they can offer free and frank advice with candour and not have that all played out immediately in the public domain. It is something we are quite keen to continue to look at and to get the views of the Committee on to help us build on the evidence base that we have tried to put together as part of this process.

Q451 Steve Brine: I wonder, Marion, whether the arguments and debates over the Information Commissioner and the Department of Health risk registers are at least in part responsible for that becoming more common parlance at the moment. Do you have a view on that?
Marion Furr: It has certainly raised the intensity of the debate in recent weeks, but I am not sure that it was responsible for raising the issue. I think the issue has been talked about for some time. It is an example of where people have expressed some concern about the “chilling effect”.

Q452 Chair: Is there a particular problem about risk registers as distinct from more general policy advice? Is it an area in which people working in your Department feel a particular sense that the safe space needs a greater effort of safeguarding?

Marion Furr: When we look at whether there is a request for freedom of information, we take every request on its own merit. When you look at a particular document like a risk register, the view there is that it is very specifically designed to highlight some of the most difficult issues that you may be dealing with in the formulation of your policy and it would be helpful to make sure that the space is preserved so that officials can speak very frankly and candidly about the worst-case scenario because that is what a risk register is for.

There are other mechanisms for managing risk, for talking about risk, for making risks public and for involving people in the evaluation of those risks, but the risk register itself as a document is very specifically one-sided normally. It is not evaluated in the same way. It does not carry all the arguments. It does not talk about the mitigation factors in great depth and therefore it could potentially be misinterpreted if it was immediately put out. That safe space for considering that and being able to speak frankly is quite important.

Q453 Chair: Looking at it from the standpoint of how it would influence civil servants in the future in how they engage in such an exercise, although you could argue that civil servants might be more hesitant if they were uncertain as to whether their advice might become public or feared that it might, you could equally argue that a civil servant would want it on record that some particular risk that he or she believed was a genuine risk existed. If the public are going back to the record a short time later, the absence of any documentation of that risk would redound on the civil servant, who could be asked, “Why didn’t you tell Ministers that this was going to happen?”
Roger Smethurst: It is also important to highlight the fact that under statute, it is incumbent on civil servants to create a record. It is also incumbent on civil servants to adhere to the FOI Act.
Pam Teare: In summary, there is an important balance to be struck between on the one hand enhancing transparency and on the other providing the necessary protection in which policy options can be considered and decided. The difficulty in appropriately striking that balance is worthy of further consideration.

Q454 Chair: Do we have any evidence of Ministers advising civil servants not to write things down, which would be in conflict of course with the Code?
Glenn Preston: No.
Marion Furr: No.
Roger Smethurst: Not at all. Again, there is something in the Ministerial Code that says that Ministers need to make sure they are not asking civil servants to do anything that would be against the Civil Service Code or the CRAg Act.

Glenn Preston: My practical experience of this—certainly working with our current Ministers in the MoJ as well as previous Ministers—is the exact opposite. There is a real expectation that there is a proper record kept. More often than not Ministers will need to rely on that record. Obviously, the more time passes, the more important it is that we have a decent
story to tell there. Certainly the practical experience that I have had, both in the Ministry of Justice and other Government Departments, is the exact opposite to that.

Q455 Chair: Looking at it purely from the standpoint of civil service practice and how civil servants will behave and react, is the exercise of veto by the Government seen by civil servants as a signal that their safe space is being protected? I am not asking you to comment on the individual cases. Is there a kind of expectation among civil servants that Ministers will mount some kind of defence of the safe space?

Roger Smethurst: The veto has been used only a few times so I think it is difficult to say that we have any evidence about that.

Glenn Preston: The Information Commissioner’s advice on this in front of the Committee got this spot on. It is there as a mechanism to be used when Ministers believe it is in the public interest for that information to be withheld. But it is a kind of backstop and there is quite a lot of process that we would expect to happen before you use the veto. The Government’s own policy on the veto says as much. We will use it only in really quite exceptional circumstances, which is why it has been used only a handful of times.

There are all sorts of other things, if we believe strongly enough that the public interest is in withholding information, that we can do before getting to that stage. There is the application of the exemptions and the public interest test. The cases go to the Commissioner, who quite often does find in favour of the Government. It is the same with the tribunal if the case goes beyond that as well. There is quite a lot of legal precedent that says that this type of information and safe space is protected.

Q456 Mr Llwyd: The Cabinet Office has the highest number of permitted extensions to the 20-day limit. It has missed the 20-day deadline without notifying the requester in 66 out of 426 cases. I am mindful of your responses to questions put by Mr Brine, when you referred to the difficult time around the Libyan conflict, but why is it that the Cabinet Office in fact has such a weak record?

Roger Smethurst: First, can I put this in context? We accept that our performance in 2010 and the first part of 2011 was poor. It was very bad. We have worked very hard over the last year, in partnership with the Information Commissioner’s office, to turn this ship around. In the last quarter of 2011, 92% of cases met the obligations under the FOI Act, and our management information for the first quarter of 2012 indicates that we will have improved further. I have stipulated the complexities around the information that we hold. I have also pointed out that in more cases than not we give out some information. At the moment I would also say that right now we have no internal reviews beyond 40 working days and we have only two initial cases that have gone beyond 40 working days—both have the permitted extensions.

Q457 Mr Llwyd: So there has been an improvement.

Roger Smethurst: Yes, there has.

Q458 Mr Llwyd: Generally speaking though, why does performance vary so much across Departments?

Glenn Preston: It is really about the complexity of information or the type of information that is asked of different Departments. Different Departments really get quite different numbers of FOI requests and the nature of the information that is asked for from Departments can differ quite widely. Roger has already demonstrated that the sort of request that the Cabinet Office gets may well be very different from other parts of Government. The type of information that the Cabinet Office holds may well be very different.

The MoJ, for example, gets quite a lot of requests for information about court records and things that are exempt under the Act. We get requests where we are bound to not provide that information. That is not the same type of request as other Departments receive. That is the central explanation for why performance differs.

Q459 Mr Llwyd: Would statutory time limits for responses be helpful where the public interest test was being applied and considered and also internal reviews?

Roger Smethurst: I have already expressed some reasons why I think that would not help. 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.

From our experience in the Cabinet Office, what we have done with the help of the Information Commissioner over the last six months has shown that their process of getting Departments or public authorities to sign up to a commitment for improvement, to help and work with them to achieve that and to deliver results—and on their website they showed that they have been successful with us and the two other authorities that they were taking on at the same time—is the proportionate way to go forward on that.

Glenn Preston: I would like to supplement that. There is an important bit of context about whether a time limit should apply to a public interest application. The proportion of requests that you are talking about is really quite small. It is only about 5% of the total number of requests that central Government actually receives. 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 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.
Pam Teare: I agree with that in relation to the Ministry of Justice. As we have discussed, performance varies between Departments because of the different nature of the information that we hold. For example, with the Ministry of Justice, public interest extensions have been used for less than 1% of cases.

Marion Furr: I can add to that. In the Department of Health, of nearly 2,000 cases in a year, we had only nine public interest test extensions. We answer all our cases within 20 days, but, if we had to go over therefore, it would be because there is a very good reason and there was something very complex about that particular case. 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.

Q460 Mr Llwyd: Why is it that requests to central Government are far more expensive to deal with than to other public bodies, especially when there is an internal review involved, which can be particularly expensive?

Glenn Preston: The short answer to that is that we take longer to deal with requests. The reason that we take longer to deal with requests, we think the evidence shows, is because of the nature of the information. In the evidence session that you had this morning you heard that individuals tend to ask about things that interest them personally from local authorities and they do not necessarily ask about very broad policy issues, which is what can happen in central Government Departments. That process of reading and redacting, if that is what you are going to do, can take a considerably longer time. Of course, that is not something that we account for in the cost limit. For us it is about the nature of the information. I can think of a good practical example when freedom of information first came into effect in 2005 in a job that I did, where we had a fishing expedition from some political researchers. They asked for all our information about Scottish devolution in the Department I worked in at the time. We had literally thousands of files with thousands of bits of paper. It took us several months to go through it because we had to combine that with the day job. We just had to do it. That was the nature of our statutory obligation, but it just took a long time because the type of information that was being asked for was so broad.

Roger Smethurst: When you are doing this, you have to go through it sentence by sentence or paragraph by paragraph. You cannot just take a broad-brush approach to it.

Q461 Ben Gummer: I want to deal quickly with vexatiousness. Is this a problem before we go any further on it?

Roger Smethurst: First, I am sorry to say that we, too, have had a question about zombies.

Q462 Jeremy Corbyn: Is it the same person?

Roger Smethurst: I do not know. I was wondering that at the time when I heard it and wondered how to find out whether that was the case. I have to say that that was not treated as vexatious.

Q463 Jeremy Corbyn: What was the answer you gave?

Roger Smethurst: “We hold no information.”

Chair: It does not take long to do that.

Roger Smethurst: Yes, but we still have to do the obligatory trying to make sure that the part of the Cabinet Office that deals with contingencies does not actually have anything. It is the process. We can make that call, but, yes, it is quite quick. It is just normally a phone call.

Steve Brine: A “Can I just check?”?

Roger Smethurst: Yes. I could give some other examples of where we have either used or considered section 14 frivolous or vexatious requests. We have had instances where we got follow-up requests from a requester where it was abusive and threatening towards a member of staff, and we did use vexatious in that particular case. We have had a case of an individual who has a long history of letter-writing campaigns. We get pages and pages and pages of the letter and it is very difficult to isolate within that what is the request for information. We do occasionally get usually from students, 19-page questionnaires where, again, you have the same issue of trying to isolate what they are asking for. We have had a conspiracy theory about a stationery order number that appears on papers. 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. Those are just some basic examples that we have had. It is a very small number, but I don’t know what the answer to this is really.

Glenn Preston: A bit of context is quite important. In 2011 the stats that the MoJ collates centrally for Government said about 3% of requests were treated as vexatious using the exemption in the Freedom of Information Act. Again it is quite small. There is no suggestion that we are more or less worse off than any other public authority in terms of the numbers of vexatious requests that we receive.

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.

In the context of post-legislative scrutiny, 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.

Q464 Ben Gummer: I want to move on to fees quickly. Given the fact that it costs central Government a lot more to answer an FOI request than local government, is a fee really going to make any difference to the recovery of the cost? Would it have to be set so high that it would become a barrier to people asking questions?

Pam Teare: It is quite a difficult one, as you say. The research that we have at the moment illustrates that, on average, a request costs about £184, but that is very much a ballpark figure.

Q465 Ben Gummer: Is that just in the MoJ?

Pam Teare: That is the standard figure across the board.

Pam Teare: That was from the Ipsos Mori research. That is very much a ballpark figure. Some are much less and some are much more, as you would expect. It very much depends on the sort of scheme that you might have in mind. We have talked about the standard rate. There again, people might feel it is more appropriate to have a sliding scale depending on the complexity of the request. There are two key things. One is that we need to make sure that anything that is introduced safeguards and maintains the right to request information, and, secondly, that we do not introduce some system that is quite costly to implement.

Q466 Ben Gummer: Do you think there is an argument that, even if you do not recover your costs, it has a sort of prophylactic effect on requesters in that they might form their questions more carefully and put fewer questions in, so it might reduce it?

Pam Teare: Again, you can look at that either way.

People might think, “What I am really interested in is this quite small area here, but, seeing as I have to pay for this information, while I am at it I might as well ask for quite a few other bits of gen too.” It is quite tricky.

Q467 Ben Gummer: I want to ask one final question of you, Mr Smethurst. You will have seen the evidence of Lord Hennessy or you may have done.

Roger Smethurst: I would like to supplement that. We are certainly not aware that we have less of a decent record of decision making or advice to Ministers. If anything, for the reasons that Roger articulated, we have more now. I do not think the fact that it is electronic as opposed to paper-based, certainly in the context of FOI, matters an enormous amount. When we get an FOI request, the question is, do we hold this information or not? The fact that we hold it in our electronic records management system or on our e-mail system as opposed to as a hard copy in a file is neither here nor there.

Q470 Ben Gummer: You feel that his fears are misplaced?

Roger Smethurst: Going back to what I said earlier, it is the fact that the world has moved on. If you look at records in ancient times, we have moved from carvings on walls through to papyrus and paper. You would not expect the paper record that existed before electronic stuff came along to be managed in exactly the same way as you would for previous media. The fact is that the quality of the material has changed because the tools that we use to conduct business have changed.

Glenn Preston: You asked the question, is it misplaced? We have record-keeping systems. The point is that the world has moved on, and it has moved on quite a bit since the Act was passed in 2000. Most people operate in an electronic environment. In fact what constitutes a document or a record can be in a multitude of formats. It is no longer a formalised minute, although it is in some cases. If you look at the Cabinet records, for example, they have hardly changed in their format. They are documented. A record can be an e-mail or a PowerPoint presentation. It is much broader. There is also a lot of evidence to show that the amount of information we are creating across the world is going up exponentially. That has an effect on the amount of information that Government hold.

In terms of record keeping, the quality of the record will have changed but the actual commitment that civil servants have to maintain a record has not diminished. Several Government Departments are looking at the electronic records management systems they have now and looking at updating them further. Again, the records management systems that most of us have in place now are beginning to look quite antiquated.

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Roger Smethurst: I first need to take a step back and say that I am responsible in the Cabinet Office for the operation of transparency within the Cabinet Office. I do not have responsibility for transparency across the whole of Whitehall. You might be best placed to talk to Glenn because he is actually on the transparency board side.

Glenn Preston: That is one of the central mechanisms. Lord McNally, who is the Minister with responsibility for FOI and Data Protection as well as broader issues around data sharing and for the National Archives, sits on the transparency board, which is chaired by Francis Maude, the Minister for the Cabinet Office, as do I. We are standing members of that board, which looks at transparency issues in the round and provides advice to Ministers on the transparency White Paper that the Government are committed to publishing shortly, having done a consultation in this space. There is a separate part of the Cabinet Office from Roger’s bit that deals specifically with the co-ordination of transparency issues across Government. They convene a working group that is attended by officials from my team, who provide advice and support to them on the policy issues for which we are responsible—that is FOI and Data Protection.

Q472 Nick de Bois: What I am driving at—and it may be a question for Ms Teare on that score—is: given that FOI is presumably part of the transparency agenda, how do the two co-ordinate your activities? Do you not share on the same Committee? Do you not feed into the transparency agenda? Are you very much, “I am FOI and I will carry on executing the framework, developing the framework and seeing it implemented”? Pam Teare: I do not sit on that board so I am not an expert on that side of things.

Q473 Nick de Bois: What I am driving at is what the official working level between the two of you is. You have the transparency agenda and then you have the MoJ, which is responsible for the framework effectively and seeing that it is enacted properly. Is there a relationship there? Does that need to be?

Pam Teare: I think they are very much complementary. They support each other really. You have the FOI legislation, which we operate and which we need to make sure Departments are fully compliant with. As we have already discussed, FOI has had a broader effect on encouraging Departments to proactively publish material off their own bat. That is where the read-across for the transparency agenda picks that up.

Q474 Nick de Bois: Perhaps I could explore it in another way. Could you achieve better practice if there was a formal means for you to sit together and work together? I sense, although I am not sure you are giving me that answer to that, that there is a natural link between the transparency agenda and the FOI. Is there a formal mechanism for sharing best practice and working together?

Glenn Preston: That formal mechanism is the transparency board.

Q475 Nick de Bois: But no one from MoJ is on that side.

Glenn Preston: Yes, that is what I said. Lord McNally is the Ministerial representative and I as the Deputy Director of Information policy are both standing members of the transparency board. Below that, practically every day, we will be engaging with the Cabinet Office officials who support that agenda and support that board. It is the job of my team to say to them, “This is how FOI works”, or, “This is what is going on in FOI in the context of what you are thinking about doing. For example, we provide a FOI policy view on Departments publishing open data strategies or the Government’s commitment to publish a White Paper on open data and tell our Cabinet Office colleagues about the things that they will need to think about in the context of FOI or data protection.” So it does happen.

Q476 Nick de Bois: Do you measure moving best practice or improvement on best practice, or would you just regard it as an ongoing process? Have you been able to look back and say, “Together we have identified this and now we can implement it to improve practice so that we overcome everything from the time issues to all the things we have been talking about”?

Glenn Preston: We do. It is an ongoing thing. If we are talking specifically about FOI, the Ministry of Justice maintains an information managers’ network, which meets quarterly, or if there are particular issues that arise in between that time, it has a virtual network where we share information about big decisions that are made by the Commissioner or the tribunal. We share information about new guidance that the Commissioner publishes about best practice, such as improving time, applying particular exemptions and these types of things.

Q477 Nick de Bois: And initiatives from within your own field?

Glenn Preston: Indeed.

Q478 Nick de Bois: You are talking about guidance from other areas, but do you seek and work out initiatives for best practices?

Glenn Preston: Yes. At the moment one of the things we are looking at is trying to improve our freedom of information statistics. The mechanisms that different Departments use for gathering that information, which we then publish centrally, are all different. We are exploring whether we can have a single system that allows everybody to feed into it so that we have a much more standard set of statistics that is cheaper to run, more efficient and hopefully provides more useful information for people.

Q479 Nick de Bois: I have a quick question because I am conscious of time. Could you summarise what developments, if any, have been made by the Cabinet Office in taking forward the transparency agenda? What are the key objectives?

Glenn Preston: Some of the most significant developments have been in the recent Protection of Freedoms Act. There were provisions in that Act that...
extended the Freedom of Information Act around 100 further bodies. There was also a section in that Act that improves the code of practice that the Information Commissioner has to produce on freedom of information. We also tried to extend the independence of the Information Commissioner in a number of key areas in that Act. One of the things we have been focusing on over the last few months is the independence of the Information Commissioner and broadening the Act out. The Ministry of Justice has also extended the Act to a number of other bodies last year by Order in Council, and we are committed to doing that again within this Parliament. You can expect to see the Act being extended to other types of organisations.

Q480 Nick de Bois: If the Act is successfully extended, so be it. What do you think the Cabinet Office will regard as “success” at the end of the day in the transparency agenda to be able to say it is a job well done, although I am sure they will seek continuous improvement? What would be the success criteria?

Glenn Preston: I am not sure I am in a very good position to answer what Cabinet Office would see as success.

Roger Smethurst: I think you will have to ask the Minister tomorrow.

Glenn Preston: There is a commitment from the Cabinet Office to open data. This is one of the things that we have started across all Departments, the Ministry of Justice included, where we are releasing much larger datasets than we ever have done before, with the purpose both of informing people about particular policy issues and also trying to stimulate others to use that information in ways that they have not done before so that it will contribute to growth and things like that. I do not want to put words into the mouth of the Minister for the Cabinet Office, whom you will see tomorrow, but I suspect he would see success as much more of that and people feeling like they have access to it and are being able to use it for really productive reasons.

Q481 Ben Gummer: Returning briefly to safe spaces, Mr Preston, you made an interesting point about doubt creeping in. Even if there is not a problem, there is a perception of a problem, which might be particularly difficult at high-level decision making that is extremely politically sensitive. That is not something that necessarily might happen in every local authority. One might rely on the development of case law to provide that reassurance, but recent experience suggests that it has done precisely the opposite. In fact, any amount of doubt there might be might be increased.

Do any of you have any suggestions about how you can give reassurance, even without changing the broad substance of the Act, to civil servants about a safe space?

Glenn Preston: I take your point about recent experience. I am not sure as a matter of fact that it is necessarily true. There are a good number of decisions made by the Commissioner and the tribunal that support the concept of safe space and uphold decisions of Government Departments to withhold in the public interest because they are still formulating policy and so on. That is particularly true of things that are very current or immediate. The longer the passage of time, the harder that argument is to run.

There are practical examples, however, which do prove your point and sow some doubt in people’s minds. Whatever the Committee recommends, there is something we can do in this space to give people that comfort. People have talked about the idea of an absolute exemption for formulation of Government policy, for example. We would be interested in seeing what the Committee has to say about that type of thing. It may well be that you can counter that with having a much shorter time limit before the records are available. At the moment we have 30 years. We are committed to reducing it to 20 years in the lifetime of this Parliament. Could you make that shorter still for particular issues?

Q482 Chair: Are you thinking you might have a category of records for which there is a shorter time scale because their primary purpose is to protect a safe space for the life of a Government?

Glenn Preston: Yes; that is a possibility. Categorising information does get quite difficult. The Act was designed not to do that. You asked about risk registers earlier and whether they are a particular category. As things stand, we treat information as information with every case on its merits and that type of thing. We do not make the distinction between categories because the Act does not allow for that to happen, but that is the nature of the way that the discussion has been going both with the Commissioner and at the tribunal. Is there an argument that we should be looking at that type of categorisation?

Q483 Chair: This is perhaps an unfair question to ask you, but clearly you have given us a picture of the civil service coping reasonably happily with the way the FOI works, but we have an ex-head of the civil service, and indeed other ex-heads of the civil service, giving a much more jaundiced view. Obviously they give the impression when they say these things that they are trying to speak up for civil servants as a whole in a way that civil servants in post may be inhibited from doing. On the other hand, they may be reflecting the civil service they were brought up in rather than where the civil service has got to. Should we take the comments of past heads of the civil service as indicative of the way that civil servants currently feel, or is it misleading?

Glenn Preston: It does not feel invidious to answer that question. The points that were made in evidence by Lord O’Donnell could go to the point that Mr Gummer just made. The Cabinet Secretary is serving a different type of machine than perhaps the average civil servant in a Government Department. The information that they are dealing with, particularly at the centre of Government and the higher that you go up organisations, tends to be more sensitive in nature. It is understandable that there is a desire at those levels that you have that type of safe space to be able
to think the unthinkable and say the things that you might not want to say in an open public forum. It is quite a different thing from the day-to-day experience and requests that civil servants receive under FOI, which are relatively easy to handle and where for the majority of the time, as Roger has said, at least some information is being disclosed. We do not feel there is any evidence that supports the “chilling effect” in that type of space, but it does not mean that it does not exist in different parts of Government.

Roger Smethurst: Part of that is being able to consult, within a framework of confidentiality, very senior stakeholders in the development of policy. Those are outside the British Government and in some cases they are with overseas opposite numbers. You need good evidence there to be able to develop policy and do that in a safe space.

Chair: Thank you very much indeed for your very thoughtful and frank answers. We appreciate it very much.
Wednesday 16 May 2012

Members present:

Sir Alan Beith (Chair)

Steve Brine
Mr Robert Buckland
Jeremy Corbyn
Ben Gunner

Mr Elfyn Llwyd
Seema Malhotra
Yasmin Qureshi
Karl Turner

Examination of Witness

Witness: Rt Hon Dominic Grieve QC MP, Attorney-General, gave evidence.

Q483 Chair: Mr Attorney, welcome to our proceedings. We are glad that you have come along to help us with the work that we are doing on the Freedom of Information Act. You have a rather special role, which we want briefly to explore. It has been a public one recently, and that is to examine whether a veto should be used in respect of the papers of a previous Administration. What principles govern that role in relation to previous Administrations? Are you under any obligation at all to defend and uphold the position the previous Administration took or are you looking at these matters afresh?

Mr Grieve: My understanding has always been that I am looking at the matter afresh if an application is made to me. That said, it is also an essential part of my work that I should take into account the views of the people most directly affected—the members of the previous Administration who might be affected and who were parties to the decisions that appear in the documents. From that point of view, my understanding is that this duty has been placed with me because I am a Minister in the current Government and therefore accountable to Parliament for my actions. At the same time, it has been placed with the Attorney-General because—I hope—he is seen as bringing a degree of impartiality that would not allow party political considerations to intrude into the decision making; it is clearly very important that it should not. The way I see it, and certainly the way I saw it in the one decision that I have had to take so far, is that I gave careful consideration to the issues and to the views of those who might be affected by it, and I came to my decision.

Q484 Chair: I was quite struck by the point you have just made, which you gave as one of your reasons. In your statement of reasons, you cited as a “particularly relevant consideration” that a majority of ex-Ministers referred to in the Cabinet minutes favoured withholding the information. But what if they did not? What if the majority of the Ministers said, “We are now quite happy that this material should be released”? Might you still have used the veto?

Mr Grieve: This is always the danger of applying the hypothetical to the particular Administrations. If you are having to advise on a current Administration case to a hypothetical current Administration case, there is a very strong possibility that it will be circumstances in which Ministers in Government can look at the decisions taken by the Information Commissioner and conclude that, in fact, they think there is an overwhelming public interest to go contrary to what the Information Commissioner has ruled. That reserve power is there to protect confidentiality in Government decision making and collective responsibility in Government.

Q485 Chair: Of course, their view—unlike yours, one might say—could be influenced by partisan considerations. They might not want the rather unfortunate mess—this is hypothetical—that the Government had got into over whatever issue it was to be laid bare while they were still active in politics. Why should you be influenced by that?

Mr Grieve: I rather hope that I would be able to escape being improperly influenced by that. Some principles, I think, are quite clear from the way in which the legislation was passed by Parliament. There will be circumstances in which Ministers in Government can look at the decisions taken by the Information Commissioner and conclude that, in fact, they think there is an overwhelming public interest to go contrary to what the Information Commissioner has ruled. That reserve power is there to protect confidentiality in Government decision making and collective responsibility in Government.

Q486 Chair: Let me switch from a previous Administration case to a hypothetical current Administration case. If you are having to advise on a current Administration case and the majority of Ministers involved in the matter individually thought that it should not be released, would that have the same level of influence on you that it has in relation to previous Administrations?

Mr Grieve: It would not be my decision; you must decide, notwithstanding that, that in fact the public interest did not favour disclosure because there were some other overwhelming reasons, then I would have to make my own mind up on it. Their view is not conclusive as to what I do, but obviously it is bound to be pretty influential. It is going to be one of the major factors that I shall want to take into account.
their own documents, while it is possible that my view may be solicited—and that would really be on the basis of my view as an Attorney-General so it would be semi-legal advice on which I would not be able to comment—the decision lies with the departmental Minister concerned, and then more collectively, because the Government have laid down the ground rules, it would have to be endorsed by Cabinet.

Q487 Chair: But you might be the departmental Minister concerned.

Mr Grieve: That is possible, but as far as I am aware at present we have not had to exercise the veto in respect of the papers of my own Department. But then it is also true that my own Department’s papers tend to be largely covered by legal professional privilege, so the issue probably does not normally arise, although I could envisage circumstances in which my Department’s papers might be sought because not everything I do is covered by LPP.

Q488 Mr Llwyd: Good morning, Mr Attorney. Parliament did not make Cabinet minutes exempt from the Freedom of Information Act. When do you consider it would be appropriate to publish Cabinet minutes?

Mr Grieve: If I go back to the start of your question, I think that Parliament quite deliberately decided not to do this because it wanted to leave open the option that there might be circumstances in which Cabinet or Cabinet Committee minutes might be published. This happened in one case over Westland: the minutes have been published. If we move to a blanket exemption system, then of course that sort of opportunity would not arise.

That having been said, and coming back to your question, each case will therefore have to be determined on a case-by-case basis. There are strong arguments and those are highlighted in previous decisions of the Information Commissioner—why Cabinet minutes should enjoy a high measure of protection, because collective decision making in Government requires people to be able to express views freely in discussion and then come to a collective view which they argue outside, having resolved their differences and expressed their views.

The possibility of a chilling effect if routinely this material was put in the public domain is clearly a real issue and could have a bearing on how Government is conducted in future. What will happen, if it becomes a habit and routine, is that people will simply find other ways of coming to their decisions that are not recorded in minutes, which I do not think is a very desirable outcome.

Against that, there may at times be good arguments for Cabinet minutes to be revealed. One argument might be that this is all a long time in the past and is essentially a request for historical information early. I suppose another argument might be—again, I am dealing with hypotheticals—that, if there was something so extraordinary in the Cabinet minutes that concealing it from the public was maintaining a fiction that might, for example, be regarded as scandalous, that might have a bearing on it. It all depends on what the minutes are about, what they show and the context in which the meeting took place. I am trying to give you an idea of how I think one might approach it, but to apply that to individual examples is impossible because you have to look at each one in turn.

Q489 Mr Llwyd: In the event of Cabinet minutes being made absolutely exempt, does it not follow, therefore, that the ministerial veto would disappear?

Mr Grieve: It all depends on what Parliament was to do. Actually, the veto extends beyond Cabinet minutes: it is possible to veto other material. Indeed, with the veto that has just been applied by the Secretary of State for Health, it is not a Cabinet minute that has been vetoed. If one looks at the guidelines issued by Government, they make it quite clear that the veto may be applied in circumstances other than just to Cabinet minutes, so you would still have that issue. I have heard it suggested, and it has been suggested in the past, that one might exempt Cabinet minutes and remove the veto; it is a decision for Parliament. As I said earlier, if you do that, you may inadvertently lose the benefit of sometimes being able to get Cabinet minutes revealed. There would be a potential loss there because Westland illustrates that there was a circumstance in which it was possible to do that.

Q490 Mr Llwyd: The overarching principle that you are working on is the need to maintain collective responsibility and the way in which Cabinet decisions are arrived at. That is your first consideration. Is that right?

Mr Grieve: I must be a bit careful. The one example I have of applying the veto is over an issue concerning collective Cabinet responsibility. Technically speaking, it is possible that I could be asked to consider papers that do not touch on Cabinet responsibility on exactly the same basis as the guidelines set out, but that is slightly sterile because, hypothetically, it is a bit difficult to know what the circumstances would be in which that could arise. But I could technically be asked and I suppose technically I could exercise a veto on something that was not Cabinet minutes.

Q491 Mr Llwyd: Looking at it another way, of course every decision in Cabinet involves Cabinet responsibility, does it not? In some instances, if you decided that disclosure was appropriate, that would be a subservient point, would it not?

Mr Grieve: I am not sure I quite follow, sorry.

Q492 Mr Llwyd: Every single decision of Cabinet involves Cabinet responsibility. Mr Grieve: Yes.

Q493 Mr Llwyd: You said in answer to Sir Alan earlier that there will be times when an overwhelmingly good case can be made for not vetoing. In every decision there would be Cabinet responsibility involved, but then, if you decide not to veto, it does not become the overriding interest. Am I making myself clear?
Mr Grieve: I understand perfectly. Yes, I accept that. While collective Cabinet responsibility is a very important principle, I want to make it quite clear that it is not necessarily so overwhelming that, in every single case, it is going to apply to prevent me from thinking in connection with the previous Administration that I should exercise the veto. That would be the wrong approach on the basis of the responsibilities I have been given. It is a very important consideration, but, as we saw with Westland, it is not the only one. After all, it is worth bearing in mind that it is not that we bury these Cabinet minutes for ever; under the 30-year rule you get most Cabinet minutes, except the occasional ones that are excluded for top security reasons, after 30 years. Indeed, we are moving to a 20-year rule, although it will take a stage to reach as we go through the transition from 2013 onwards. On the face of it, most Cabinet minutes will be available for public scrutiny at some point in the future 20 years after they were drawn up. One has to have that in mind as well. If you are very close to the end date and after they were drawn up. One has to have that in mind as well. If you are very close to the end date and after they were drawn up. One has to have that in mind as well.

Mr Grieve: Of Cabinet minutes?

Mr Grieve: Excuse me? Of Cabinet minutes?

Mr Llywd: Yes.

Mr Grieve: There may be. I have heard this argument put forward and, in a way, it is one on which I am fairly neutral. There are some advantages to it. The advantage of going for such a system is that it lays down the ground rule that prevents polemical argument over Cabinet minutes each time. They have the blanket exemption, it is recognised, and they are therefore kept out of it. The downside, as I said, is that there will be instances when an FOI request can properly be responded to and the minutes revealed, and you may miss out on that. The other issue, as I mentioned, is that, if you are going to do that, will you then remove the veto over everything else? That is a matter that clearly Parliament and the Government would have to consider.

Mr Grieve: Of Cabinet minutes?

Mr Llywd: Yes.

Mr Grieve: There may be. I have heard this argument put forward and, in a way, it is one on which I am fairly neutral. There are some advantages to it. The advantage of going for such a system is that it lays down the ground rule that prevents polemical argument over Cabinet minutes each time. They have the blanket exemption, it is recognised, and they are therefore kept out of it. The downside, as I said, is that there will be instances when an FOI request can properly be responded to and the minutes revealed, and you may miss out on that. The other issue, as I mentioned, is that, if you are going to do that, will you then remove the veto over everything else? That is a matter that clearly Parliament and the Government would have to consider.

Chair: While Cabinet minutes are made the subject of vetoes and protected, as soon as Ministers denit office, they are in the habit of writing books in which they purport to say what happened in Cabinet.

Mr Grieve: I hope that this is not something that the current Administration is doing. No, it is only hearsay evidence, but, anecdotally, I have picked up in the course of my time as Attorney that anxiety had certainly been expressed within the civil service that there was a tendency to move towards informal decision making. It has been much commented on in the press; indeed, some politicians have commented on it as well in their memoirs. It is clearly a phenomenon that needs to be recognised, but the Committee can inquire into it.

Chair: It is a bit risky to accuse the Attorney-General of using hearsay, but do you have any first-hand evidence of decisions not being recorded?

Mr Grieve: I hope that this is not something that the current Administration is doing. No, it is only hearsay evidence, but, anecdotally, I have picked up in the course of my time as Attorney that anxiety had certainly been expressed within the civil service that there was a tendency to move towards informal decision making. It has been much commented on in the press; indeed, some politicians have commented on it as well in their memoirs. It is clearly a phenomenon that needs to be recognised, but the Committee can inquire into it.

Chair: But is it? We proceed by evidence. If there isn’t any evidence of decisions not being recorded, it would be wrong for us to draw the conclusion that it is happening—as opposed to the fear that it might happen, which you can clearly testify to.

Mr Grieve: I am not going to be drawn on examples, but I have heard enough anecdotes to make me think that this may be a problem and the Committee may like to look at it. If the Committee wants evidence, I shall have to seek it. Is it a fantasy being put forward to justify non-disclosure? I am not persuaded of that. One thing that you do learn in Government is that there are structured ways in which decisions can be arrived at. I would not, I think, be improperly betraying secrets by saying
that on occasion one can see the problems that can arise when people are not coming to decisions that are as structured as they should be, with the consultation processes that ought to be gone through. For those reasons, I can see really compelling and good grounds why that formalised structure should be used. If it is going to be used, protecting it is quite important.

Q500 Mr Llwyd: Your shocking admission that you are not going to write your memoirs is a great disappointment to us all. You said that the memoirs of Attorneys-General would be bland accounts. I wonder what Lord Goldsmith would make of that.

Mr Grieve: I do not know; I have not asked Lord Goldsmith. You would have to ask him about his view. It is entirely a matter for the individual Attorney, but I shall certainly not be writing my memoirs because I do not really see what I could properly put in them.

Chair: That is very much an Attorney-General’s answer.

Q501 Steve Brine: Your career is yet young and there are so many more things that could happen, Attorney. We will look forward to you changing your mind.

You say that we have collective Government in this country and that decisions are arrived at in structured ways. We also have coalition Government in this country at the moment, and we have some non-structured ways in which decisions are arrived at. I am thinking of the “quad”. I wonder what your thought processes are about the “quad” and whether you are able to fit that into the structure that we have been discussing for the last 20 minutes about collective Cabinet decision making.

Mr Grieve: I am not privy to the workings of the “quad”, but my understanding is that it is part of the structure of Cabinet Government, and therefore there is nothing outside of it in any way at all. My impression is that, by virtue of having a coalition, it may be the case that a great deal is discussed more openly than might have been the case in a majority Government by a single party. The discussions that take place tend to be very open. It is perhaps one of the curious benefits of coalition Governments, although some people argue there are downsides as well, and I have no doubt that there may well be. One of the interesting features is that differences of opinion will have to be resolved in a structured environment and are, because I see it happening and rather successfully when it does happen.

Q502 Ben Gummer: I come to the issue of safe space from another angle, specifically with the transition risk register in mind. Why did the Cabinet decide to use the veto before exhausting the appeals process?

Mr Grieve: It is a difficult question for me to answer because that has to be directed against those who came to the decision, but I will only say that this is the principle. It is perfectly clearly laid down in the way in which the legislation was structured that it is open to the Government or the relevant Minister to exercise his veto before the appeals system has been exhausted. After all, it is what I did in respect of the Cabinet minutes of the previous Administration that I vetoed. I explained my decision and why I decided to do it then rather than wait for the final appeal process. As it is laid down, I do not think I am in a position to answer your question on the exact reasons because, for that, you will have to look at the reasons given by the Secretary of State for Health. He is the Minister with whom the responsibility lies. As to the principle behind it, it is permissible to do this.

Q503 Ben Gummer: In the last case of the NHS transition risk register, the Commissioner said that none of the criteria for exceptional cases in the statement of policy had been met, but in previous cases of veto use he said they had been met. It seems that, in both circumstances when the veto has been used by this Government, there is an increasing tension between what the Commissioner and the tribunal feel the safe space should constitute and what the Government believe. Is the Government’s use of the veto an attempt to try and carve out a safe space that increasingly they feel is threatened?

Mr Grieve: No. Please bear in mind that I have to be rather careful about this. I was not sitting in, for example, the Secretary of State for Health’s office as he went through the exercise of deciding to come to the decision he has. It is his decision and not my decision. I can comment on my decisions, but I must be very careful about second-guessing other people’s. It would not be proper or fair, and it could be misleading.

I do not think that it is a question of pushing the boundaries. I have heard nothing to suggest to me that there is some policy decision to establish clear boundaries so as to provide us with safe space. It seems to me that the approach has always been on a case-by-case basis. The problems come up on a case-by-case basis, and they have been resolved on that basis.

Q504 Ben Gummer: That might be the flaw with the Freedom of Information Act in this country, whereas in other jurisdictions that we have looked at they have very clearly delineated safe spaces. For instance, we have just seen that in Denmark it is defined by information held within a Department: as soon as the information moves outside that Department, even interdepartmentally, at that point it is liable to FOI. Here that does not exist, so it has to be established by case law. When you have a particularly proactive Information Commissioner who disagrees, it seems, completely with the Cabinet Secretary on the nature of safe space, that is going to become an increasing problem.

Mr Grieve: Yes, I can see that it could do. Against that, however, it is worth bearing in mind that we are now something like six or seven years into the operation of the Act or approximately something like that. We have had four vetoes, and in a sense two of them were duplicatory, so there have been three pieces of information where we ended up with a clash between the Government and the Information Commissioner, with the Government exercising a veto. I do not know about the other systems that you have looked at, so I am not in a position to know how
Mr Grieve:
that compares with the amount of information that has been put into the public domain. Yes, dare I say it, our system has all the hallmarks of rather typical British pragmatism and individual decisions, with all the sliding of tectonic plates and indeed the political polemic that surrounds such things. Is that a better system than the one that you have just identified in Denmark, where you have clear bright lines and everybody knows what you can look at and what you cannot? I do not think I am in a position to make a judgment, but that is clearly a very interesting area for you as a Committee to look at.

Q505 Ben Gummer: Finally, may I ask this in that case? It is true that it has an elegance about it, which is that it is flexible and malleable, like so much in our constitution, but it allows for considerable doubt in the minds of civil servants about the advice that they can give, leading to precisely the problems that you have identified. Maybe in this circumstance we need a little certainty so that both the public and civil servants are clear about the advice they can give, where and when, and when it will be released. Mr Grieve: I can see that that is a perfectly reasonable argument to put forward and for this Committee to consider, but, as I say, you have to balance that. I say this neutrally because I am not positioning myself on this one way or the other. As I say, I would not describe our system as chaotic, but it works on a case-by-case basis, and it allows the opportunity to reveal some things that might not otherwise ever be revealed under the sort of system that you have identified. The question then is whether it will lead to some serious mischief. At the moment I have not seen that; it seems to me that it is very typical of the way in which politics is bound to work. You cannot take controversy out of this type of area. It seems to me that it is bound to have some controversial elements to it. People want information, and the Government have legitimate grounds in many cases for having to withhold information. Sometimes they might wish to put information out but they cannot. There is always going to be that tension present.

Q506 Mr Buckland: We are here exploring, Attorney, the grey area or the uncertainty that exists with regard to FOI. Is it not compounded by what seem to some of us, at the very least, the rather odd effects of the way in which the Commissioner determines an application at the time the application is made? In other words, the public interest will shift and vary according to the particular time and place in which decisions are made. That surely adds to the chaos, does it not? Mr Grieve: That is a very interesting point. I see that it could cause problems. Hypothetically, you could have a situation where at the time the request is made it is perfectly reasonable, but by the time it comes to be decided supervening events have changed matters. I am not conscious of that having happened particularly in any of the matters in which certainly I have been involved. I can see, hypothetically, that it could, but if you want to change that system you would have to change the principles on which the Act was drafted.

Q507 Mr Buckland: It becomes very difficult, does it not, because a civil servant in, say, September 2010 is dealing with a set of circumstances, and, according to the criterion used by the Commissioner, the public interest will change according to the particularly subjective political environment in which that civil servant finds himself? Is that not a counsel of perfection almost? We seem to be expecting civil servants to judge to a nicety the sort of things that we do not expect people to do in everyday life—for example, when they are under threat of attack or threat of violence, to use that analogy. Mr Grieve: That is a perfectly reasonable point. That said, I would be interested to see if there are examples of that causing a specific difficulty in the cases that we are looking at; but, yes, it is a very fair point.

Q508 Mr Buckland: It has caused difficulty. We have a register that was disclosed at a later stage and one at an earlier stage that had not been disclosed. We are in that difficulty, are we not? Mr Grieve: As I say, I am a bit reluctant to be drawn over-much on the register. One of my officials has just passed me a very sensible note saying that if the public interest changes you can always make a new FOI request. Of course that is absolutely right, and that is exactly what happened in the context of the Cabinet minutes that were vetoed by the previous Administration and then vetoed by me. The FOI request is not the end of the road; you can always repeat it if you can show that changed circumstances have arisen.

Q509 Yasmin Qureshi: Mr Attorney, good morning. I wanted to pick up on a point raised by my colleague Mr Gummer. I shall repeat part of what he said, which was in relation to the NHS risk register. The Information Commissioner, as well as the tribunal to which the Government appealed, said that the criteria used had been used in previous cases where the veto had been considered to be exercised properly by a Minister. It was said by the Information Commissioner that in this particular case those criteria did not seem to have been met. Do you have any sympathy with that argument? Do you think it is a fair point that members of the public out there would be duly concerned about the fact that the ministerial veto is being used in something like the NHS when such a massive transformation is taking place? The ministerial veto is being used even before the Government have had the chance to exhaust the appeal process. That would suggest that perhaps there is something to hide, or is it that the advice given is so controversial or critical—I do not know which—and that, because of that, the Government think that their policy may be railroaded and are refusing to allow the information to come out in the public domain? I understand that it was not a decision that you took, so it may be an unfair question to ask of you, but I am asking generally about the public perception of whether the Government are
trying to hide things. Do you have any sympathy with that view?

Mr Grieve: It was not my decision, as I explained, and therefore I am very wary of commenting on a decision taken by another Minister.

It is clear, in a sense, that the Information Commissioner has a perfectly valid point when he says that this particular veto was exercised over a class of information that was slightly different from the previous vetoes. We accepted that it did not strictly come within Cabinet minutes but that it was important departmental policy advice given to a Minister. But what is quite clear is that the Act allows for that to happen and that the guidelines along which the Government have indicated they would operate allow for such a possibility as well. I do not think that it can be said that what has been done in this particular case is so unusual and so outside what the Government have indicated they would do that, in some way, it was an extraordinary decision. If you look at what the Act allows and what the guidelines say, the Government’s position would be that their decision is completely compatible with those. Beyond that, I do not think I can comment. If the Information Commissioner concludes or feels that in some way the decision taken by the Secretary of State has flaws of a character that is capable of being challenged, he has a means of doing so if he wishes to, but that is a matter for him.

Chair: Mr Attorney, thank you very much indeed for your help this morning. We have further Ministers to question this morning.

Examination of Witnesses

Witnesses: Rt Hon Lord McNally, Minister of State, Ministry of Justice, and Rt Hon Francis Maude MP, Minister for the Cabinet Office and Paymaster General, gave evidence.

Chair: Lord McNally and Mr Maude, welcome and good morning. We are glad to have your help in looking at the workings of the Freedom of Information Act. I will ask Mr Brine to open our questions.

Q510 Steve Brine: Good morning. We have had Mr Straw in to talk to us, and I pressed him quite hard about the Act and the thought processes that went on through a number of Labour party manifestos leading up to them assuming Government in 1997. I also pressed him on comments made by the former Prime Minister about the Act, which I am sure you are well aware of. When I pressed Mr Straw, he said that it was his idea. Was this Act a good idea?

Mr Maude: The idea was a good one. I do not think that anyone believed that it was perfectly executed at the time, particularly its authors, so this is a very worthwhile exercise. This is a good moment for the Committee to conduct this post-legislative scrutiny, and I have nothing but praise for the way in which the Committee is pursuing this. Its work is very thorough and excellent.

It has been good. There has been an opening up of information, for sure, and from my point of view, as I am the Minister responsible for the Government’s transparency agenda, which we have pursued extremely aggressively, we now publish more data than any other Government anywhere in the world, and we are regarded worldwide as being at the leading edge. We have just taken over the co-chair of the Open Government Partnership, which is gathering momentum very rapidly. The Act captured a moment, but if there was a sense that it is working perfectly there would not be the need for the kind of detailed scrutiny that—

Q511 Steve Brine: We may come on to what you would recommend that we recommend, as it were.

Lord McNally: Just for the record, the Freedom of Information Act was one of the commitments in the Cook-Maclemann pre-1997 agreement between the Liberal Democrats and the Labour party. I was very pleased that Jack Straw took it up. That was its origin in the first term of that Labour Government.

Q512 Steve Brine: Differentiation strategy applied. The London Evening Standard came in to see us and they said there is no doubt the advent of the Freedom of Information Act has significantly improved transparency, accountability and good governance in British public life. I guess they would say that. Has the Act achieved its objectives of improving transparency in Government and, ultimately, of improving public confidence in public life and public figures?

Mr Maude: It has clearly increased transparency, I would say, and it has probably made a bit of difference to accountability, but the biggest difference to accountability—at least a lot of it—is actually through the way in which Select Committees work these days. There is a question mark over good governance, and I think that is the most difficult area to come to a conclusion on. One question that is totally proper to be raised and considered is whether the uncertainty that surrounds the operation of sections 35 and 36 of the Act, particularly the protection afforded to the provision of candid and thorough advice to Ministers and the space within which Ministers can discuss it and reach conclusions, is the open question of whether we have the balance struck in the right place.

Chair: I think that Mr Brine also asked you about public confidence.

Q513 Steve Brine: On public confidence, there were some grand aims and objectives of the Act set out in the Second Reading speech, and we have all studied it closely. There were some grand objectives set out by the Government at the time that it would restore public faith in the political process. Has that happened? Either of you is free to answer that.

Lord McNally: I go back even further in the origins of this. In another life, I tried to convince Jim Callaghan about freedom of information; he was not
an enthusiast. Just looking at whether the public are more confident in Government, they are always likely to have a healthy scepticism about it. But, when we were campaigning for freedom of information, one of the things we said was that we wanted to squeeze the culture of secrecy out of Whitehall and out of Government. I have to say that I think that has happened, and it is wholly beneficial. I think that of Whitehall and local government, but let’s stay on Whitehall. 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 any more. The access that people have to give their opinions, to put in information and to have their views considered well in advance of legislation has, I think, been an entirely healthy development. It was not due entirely to the Freedom of Information Act, but the Act was a brick in the wall that helped to create that.

Q514 Steve Brine: Lord O’Donnell came to see us—there is a man who should know a little about the inside workings of government—and he said that it created these incentives and that the more open you are the more you lay yourself open to criticism. Do you agree?

Mr Maude: Yes, by definition, but I do not actually think that is bad. 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, and I think it is to the credit of this Government that we have pushed forward the transparency agenda vigorously, and in a way more vigorously in the second 12 months; and there is much more for us to do. Publishing, as we do now, every item of spending on a monthly basis above £25,000, and spending on Government procurement cards above £500, there is plenty of scope for embarrassment in there. But the effect of that in terms of improving the way in which money is spent is quite formidable, because people are much more careful how they spend the money because they know it is open to be scrutinised. Can it lead to embarrassment? Yes. Do we have to be a bit grown up about that? Yes, we do.

Q515 Seema Malhotra: Good morning. I would be interested to hear both your points of view on this, but may I start with the Secretary of State? My question is looking at freedom of information in central Government and the wider transparency agenda. It is clear that the Ministry of Justice has developed a framework for the Act and gives guidance to Departments as well as to those who might request information. The Cabinet Office is obviously leading on the transparency agenda. It is clear that there has been commitment from this Government on that transparency agenda, but, inevitably, when you extend the principles or the philosophy of what has guided previous policy, things may not be as joined up as you intend. That could be for Government Departments as well as the ways in which you request information from Government Departments and some of the rules around that. Freedom of information and transparency are obviously closely linked, but how joined up at the moment would you say the Government’s approach is to that agenda? Is it making it easy to comply with that or potentially creating confusion?

Mr Maude: I think that 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.

Lord McNally: I joined the transparency board slightly as a sceptic because I am also the Minister responsible for data protection and I thought that there were privacy issues here. However, I believe that the transparency agenda will, in perspective, be seen as a significant contribution—and perhaps more significant a contribution—to open government than the FOI Act. How you join them is one of the things that we look at. 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. As I said, the actual transparency agenda will have a really big impact on the openness of Government.

Mr Maude: May I just add to that? Tom is absolutely right when he says that transparency is push and FOI is pull. One of the things that we want to do with transparency is to create more of a pull, and we have talked about creating a right to data. The expectation would be that a public sector dataset would be made public. This is the property of the public and there are huge economic and social benefits, as well as benefits in terms of accountability, in data as a raw material being made available to those who can use it in different ways. We want to get a similar sort of approach.

Q516 Seema Malhotra: May I follow up on that point? I guess what you are talking about is that the push and pull is a bit of a culture change as well. There have been some criticisms about the relative cost of publishing data, particularly also locally and government, and the relative benefits and usage or hits on those datasets. What would your thoughts be on the more proactive schemes? In the long run, you might take the view that there is the potential to save money, because there will be fewer requests resulting from greater access, or that they are expensive and underused at the moment.

Mr Maude: I am very sceptical about the complaint that it is very expensive to publish data. It is not. If the dataset exists, the cost is that of putting it online, which is minimal in the round. There is an issue about what needs to be done to put the data into usable form, but we ought to be doing that anyway. If the data exists, it needs to be usable; there is no point in having the data if it is not usable. Whether it is usable within Government or by those outside, it needs to be in decent form.

The quality of data in Government is notoriously not very good. The constant complaint of non-executive
board members on the new enhanced departmental boards that we have established is that management information is inconsistent and not very good. This is a long-running complaint. The Institute for Government recently made exactly the same point in its open letter on civil service reform. Governments need good data in order to take sensible decisions. Making that data transparent is one of the stimulating ways of improving the quality because it gets scrutinised.

**Q517 Chair:** One of the issues that arose when we were talking to the local government witnesses—they had quite a sympathetic view on this—was to what extent freedom of information should follow public functions when they are contracted out, as is happening over an increasing area. Do you accept that freedom of information should follow public functions, even when they are contracted out?

**Mr Maude:** You definitely need to have maximum transparency where a public service is being delivered by any body, whether it is in-house, a mutual joint venture or totally outsourced. Our working presumption is that the outcome should be made very transparent, and we are working very hard towards that in the health sector, looking at social care, schools and education, and in crime mapping, which has been a big success. The presumption is maximum transparency on the outcomes. That is what we are concerned about. When you outsource a public service, people are obviously concerned about cost, and contracts are now routinely made public. That is one of the changes that we have introduced—a presumption that contracts will be made public and then what the outcomes are; what is the service delivery? Whether a private body should be made subject to FOI is a different question, and I am not at all sure of the answer.

**Q518 Chair:** It is one that I asked.

**Mr Maude:** There are different ways of approaching this, but you open up a whole new dimension if you say that any organisation that does anything with public money should be subject to FOI. You then immediately open up a massive definitional set of questions.

**Q519 Chair:** First of all, it is a principle that you have already applied in the Protection of Freedoms Bill by extending freedom of information to a number of bodies that are technically not public bodies—the Association of Chief Police Officers, for example—because they are carrying out public functions. The local authorities, when giving evidence to us, indicated that the method they would be adopting was to write contracts that ensured that they had provided to them the information that they would expect to have if the work had been carried out in-house and would then be responsible for applying freedom of information as appropriate to that stock of information.

**Lord McNally:** There are difficulties. When I wanted to extend FOI to Manchester international airport, a very successful public body, it came back and said, "But that will put us at a commercial disadvantage." It is also argued that it would be a deterrent to a private sector supplier if it was thought that one of the penalties of supplying to the public would be to open them up to the whole gamut of FOI. That does not come down against the idea, but those are the arguments put, just as the universities are arguing that commercial rivals can use FOI in a commercial way to get their hands on material that is of direct advantage to that university. It is not just a matter of extending FOI but with no consequences; those are the consequences that have been fed back to us by people at the sharp end.

**Q520 Chair:** It would not be acceptable, would it, to have freedom of information about the regimes in publicly run prisons, and not to have access to that information in privately run prisons, for example?

**Lord McNally:** That is a very good question. In that respect, it is one of the issues that will have to be discussed. The more you have this commissioner-supplier regime in terms of public service, the more there is a big question over how much that outsourcing would diminish the use of FOI. That is something that will have to be considered.

**Q521 Jeremy Corbyn:** When agencies were first set up by Government, there was an attempt to prevent them from responding to parliamentary questions; that was eventually defeated in the House of Commons, largely through the work of Paul Flynn and others. Exactly the same issue now applies to FOI, as you quite rightly say, on the purchaser-provider split. If you analyse what the problem is, do you have a suggestion of where we should go on this? Should we make all privately run public services open to FOI requests, in the same way as care homes, prisons, airports, water and many others areas, as there is an absolutely legitimate public interest in how they are run?

**Lord McNally:** That is one side of an argument that still has to be made, both in Government and politics in general. If, as you say, you are going to move to that commissioner-provider regime and rely much more on the private sector, what is then demanded of the private sector in terms of compliance with the Freedom of Information Act is going to be a political judgment.

**Q522 Ben Gummer:** I turn to the evidence of Lord O’Donnell and the Information Commissioner, which are at complete variance. Lord O’Donnell, who has vast experience of decision making right the way through Government, said that there has been a most definite chilling effect and that decisions at times had not been recorded properly. He cited an example where, at the beginning of meetings, it was pointed out to the participants, "Remember this is FOI-able", which immediately has an effect, no doubt, on what is said and what might be recorded. He offered a solution, which we can turn to in a second. The Information Commissioner, who has no experience of being in Government, says that this is completely untrue; he believes that it was largely a myth made up by mandarins—he called them mandarins throughout...
his evidence. There is clearly a difference here. It is very difficult to establish who is right, given the fact that the nature of this discussion means that you are not going to have civil servants coming forward and saying, “I did not record this. We did not have a frank discussion.” We are struggling to find a way through this. I wonder whether both of you can help.

Mr Maude: Both Tom and I have been in Government before, in different guises.

Q523 Jeremy Corbyn: In different parties.

Mr Maude: Indeed, absolutely, but we all have journeys to travel. For me, the essence of being effective in Government is that you want to have the most candid—sometimes brutally candid—advice. You want there to be an atmosphere within which officials feel utterly uninhibited in what they say and where there can be the freest discussion, sometimes expressed in trenchant language, which might not always in any circumstances of all the language have found its way into the official minutes. That is really important. It is also important that advice and arguments should be committed to paper because there is nothing better than the intellectual discipline in formulating an argument on paper. It forces you to be rigorous. The analysis has to be rigorous; if it is not, it is clear that it is not.

Is this happening to the same extent now as when I was around 20 years and more ago? It is hard to calibrate or measure. My feeling is that it is less so because of exactly this 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.

Lord McNally: I have to break it to Mr Corbyn that the Attorney in his evidence suggested that, at the moment, the Tribunal are going to say, “Sorry, guys. You may have thought that was protected, but—guess what?—it ain’t.” You then have a whole new range of uncertainty opening up.

Mr Maude: That is part of the exercise.

I am the Minister for the Freedom of Information Act in the MoJ. When I came into Government two years ago and I realised that both within Whitehall and in political debate there were questions about how effective the FOI Act was working in operation, my very first instinct was to give it post-legislative scrutiny. I was part of the pre-legislative scrutiny for the original Bill in the House of Lords, and the job that you are doing is trying to sift out and test the weight of these opinions. Of course, the mandate has very strong opinions. We had a debate in the House of Lords a few months ago, a little minor end-of-evening debate provoked by Peter Hennessy, and there were 11 ex-permanent under-secretaries dotted around the Chamber all wanting to inveigh against this wicked Act. You have some powerful evidence on both sides on this. I honestly do not know, I think that there is an over-claiming on the chilling effect because most of these figures are powerful men and women and I have not noticed them holding back in their views. As I say, in terms of the Whitehall and Westminster the Francis and I entered 30 or 40 years ago, it is infinitely healthier in its openness of discussion and debate.

Q525 Ben Gummer: If there is a chilling effect, it is principally one of perception. The Constitution Unit recognises that, and from what we have heard so far, it tends not to operate at local government level or, indeed, at the middle level in central Government but for politically very sensitive cases, necessarily, at a high level of Government. The Attorney in his evidence suggested that, at the moment, the Government clearly recognise this. The exercise of the veto suggests that there is a space being defined, however that might be happening. Lord O’Donnell suggested class exemptions so you might delineate the spaces more clearly.

I have two questions. First, is there a need to define things more clearly, to give civil servants the confidence to give full and frank advice? Secondly, if that is the case, should that be done through a more regular application of case law, as seems to be happening—we have had two vetoes recently—or should there be class exemptions, which is the more European model?

Mr Maude: This is exactly what your Committee is going to be examining, I am sure. There is undoubtedly a concern about the lack of certainty, but you do not solve that just by having more and more guidelines and guidance, because you just do not know at what stage the Information Commissioner and the Information Tribunal are going to say, “Sorry, guys. You may have thought that was protected, but—guess what?—it ain’t.” You then have a whole new range of uncertainty opening up.

I was very struck by what Jack Straw said when he came here. He expressed himself with characteristic caution, but I certainly drew from what he said a concern that, when the legislation was passed, it was expected that there would be much more certainty than there has turned out to be. There is obviously an argument to be made—it is a difficult argument—that
there is a trade-off between greater certainty, which could be delivered by class exemptions, a clearly defined cast-iron protection on policy advice to Ministers, and the space within which policy discussion takes place. We must also protect communications particularly 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. The trade-off is between greater protection around those aspects—presumably a class exemption would give absolute protection to that—versus an aggressive pushing ahead of transparency.

One of the things that it is worth thinking about is whether there should be a greater readiness by Governments to disclose the evidence on which decisions are made. You could make the case that that would be quite a good discipline for Governments anyway, forcing them to assess the evidence and accumulate it carefully. With datasets, there is increasingly a presumption that data is made available cast-iron protection. In that case, is the space within which judgments are made, arguments are advanced, advice is offered and discussions take place about which there is the greatest anxiety.

Lord McNally: It is very interesting—I was able to hear some of the Attorney’s evidence—whether we should approach this in a pragmatic or a more structured way. Again, I am sorry to keep pushing it back to you, but one of the reasons why you are here is to test the merits of some of these arguments. I have never thought that the original Act was perfect, and I have never argued against the rationale for tweaking certain parts of it in this grey area. Indeed, I freely confess that the FOI has wandered into areas that I never imagined it would. On the other hand, Sir Brian has spoken of public confidence.

When the Cabinet sits down with your conclusions and decides what it is going to do and what it should propose to Parliament, are we in an age when police, journalists and politicians have all shown that they have substantial things to hide? Are we in a time and an age when we want to send out the message that we are going to start lowering the portcullis of secrecy again? How we handle this is going to be very important in terms of public confidence. Whatever people may think about it, I suspect that people like the idea that they have access to information.

Lord O’Donnell has been mentioned a number of times. When people get to his position of power, or women in the same position, I want them to think twice, three times or four before they give advice. There are some constraints that make them think like that, and that is healthy. I will tell you honestly that the biggest shock I had was when I read the Butler report on decision making in the Blair Government, because it was not a structure of decision making that I recognised from my time at No. 10 about 25 years before. The structure of recording and processing of information around decisions was very healthy.

Indeed, 10 years ago I went to a lecture at the Mansion House by Lord Butler, when he decried the erosion of Cabinet Government. One of the things that I would claim for the coalition is some restoration of that structure to decision making. As to whether that needs a protected space, as Francis says, I await your conclusions, but I would hope that it is a fairly defined guarded space. I do not want to see it given as carte blanche that the FOI should not apply, because that would be a really retrograde step in our governance.

Q526 Chair: If a civil servant feels that a document will be made public and thinks that there are risks or issues that Ministers should consider, does he not have a motive to record the fact that the Minister was told that? Otherwise, when the record appears, questions will be asked about why he did not warn the Minister, since he knew this. I am puzzled by the assumption that knowledge that a report of the discussion will appear within a limited time means that as a civil servant you stop giving advice or drawing attention to dangers.

Lord McNally: I do not understand, and you may not have seen it, the difference between an impact assessment and a risk register. What should go with openness is a little more mature political debate. I have just been guiding through the LASPO Bill, a very controversial Bill, and in our impact assessment from the Ministry of Justice we said that one of the impacts of that legislation could be—could be—an increase in public disorder or an increase in acquisitive crime. We made that public. Quite legitimately, the Opposition during debates threw those assessments at us, but we had to say that if you are making policy you have to look at what you think will be the benefits and dangers of what you are doing.

The idea of not having that discussion in the open I do not think helps for good governance. There was a thing today in the papers or it was on the “Today” programme saying that the Labour party has used FOI to get data on social care and the number of old people going into care homes. Yesterday in the House of Lords we had this very debate, and it is clearly going to be one of the biggest debates over the next few years, as to how we should deal, in a humane and civilised way, with the care of our very elderly. It is absolutely in the public good that the information FOI has provided educates that debate—the size of the problem, that it is with us now and that it will be for politicians of all parties to deal with it. That is the Freedom of Information Act working well, but of course it gives an advantage to the Opposition that it did not have 20 or 30 years ago.

Q527 Jeremy Corbyn: Lord McNally, you were talking earlier—you have both given really helpful evidence to us today—about the fact that Wilson and Callaghan were both very conservative in relation to the civil service. In my memory, it was a constant refrain of Ministers in those Governments that the civil service at a high level was very obstructive towards the reforms that they were trying to achieve and that they were damaging the Government. This may have been Ministers complaining to each other—I do not know—but their programmes would probably have been helped had there been greater freedom of information, because the civil service would have
been more reluctant to have given the kind of advice and alleged obstruction that it did.

Mr Maude: I am not sure that that is necessarily right. If an official who wanted to obstruct a reform put a submission to a Minister in potentially florid or dramatic language on what the effects of reform would be, it could be incredibly restrictive of the Minister’s willingness to proceed if he or she knows that that is going to be made public. It would be political suicide for a Minister to proceed with something having been warned. These are often judgments; they are not factual. There is no kind of test or constraint on saying things that could be very extravagantly expressed, and, proceeding in the face of that, some Ministers would feel really inhibited. Arguably, were such a characteristic of the civil service to be true, it could increase its ability to frustrate change.

Q528 Jeremy Corbyn: Cabinet is the centre of Government decision making, and, essentially, the whole thing operates on the basis of secrecy and controlled or contrived leaks, or even imaginative leaks. If there is a debate in Cabinet, a serious split, we all know about it anyway. Would it not be better for Government as a whole if, as happens in some other countries, Cabinet proceedings were a form of public debate? There would still be a political space for Ministers to discuss, as they do in the Tea Room and everywhere else, there they may or may not wish to do, but the Cabinet itself would be seen as part of the public decision making and open to greater public scrutiny. Is that such a bad thing for democracy?

Mr Maude: The result is that discussions all take place in the Tea Room and in private and not in the Cabinet room, which is where they should take place. They should take place on the basis of good, well-argued evidence and papers, and very open discussion. You say that all these discussions immediately become public, but they do not, actually. To a remarkable extent, they remain properly private; Ministers feel able in Cabinet and Cabinet Committees to express themselves very vigorously, and that is completely right.

Lord McNally: The old theory in the Labour party was that it was only the wicked Conservative civil servants that stopped Labour Governments being truly radical. My experience is that that was always an excuse. Coming back into Whitehall after 30 years, the one thing that has struck me about the civil service is not that it is a chill but that it is now so much more a reflection of our society; it is much more diverse in ethnicity and gender. One of the joys of working is bright young people, who, in my experience, are very willing to argue their case and put forward their views in the great tradition of the British civil service of talking truth unto power. That is what we want to retain and maintain.

It is such a change. When you think back, in our lifetime Dalton lost the Chancellor of the Exchequership for an aside as he walked in to deliver the Budget. These days, if it is not all in The Sunday Times the previous weekend, people wonder what is missing from the Budget. The other thing that strikes me, having listened to Francis and his advisers on the transparency committee, is just the different world we live in, in terms of information, and how we manage information. That is a great challenge for us as individuals and for Government.

Q529 Jeremy Corbyn: May I take you back? Yes, of course it is a very different world and the civil service is much more reflective of society, and it is much the better for it. But, with Cabinet debates on major issues such as how to deal with the current economic situation or the war in Iraq or Afghanistan and so on, why should the public as a whole not be aware of what those debates are about and be aware of the differing points of view? Does it actually end freedom and democracy as we know it because we know what is going on?

Lord McNally: It is an interesting debate. Here I am a conservative on this; I do think that Government are healthier if the Cabinet can have that discussion and then the Government have a view on this. I do not think it would be for good governance if it was known that x or y was unhappy with a decision.

Coming to that decision should be a properly structured thing, which is why I was appalled by what Butler found about sofa government. That should not be part of the structure of Government, but the idea of the Cabinet coming to a collective decision and standing by that decision is a healthier way. I remember that Tony Benn had many ways of making it known that he did not agree with something, without ever resigning from the Government. I remember that Peter Walker used to attend Conservative party conferences and it would be part of the Conservative party’s structure to be part of the structure of Government, to not publish something, do you say what you are not publishing?

Q530 Jeremy Corbyn: Does this transparency board open to the public and is any of it kept secret?

Mr Maude: No, it is all in public. We meet under cover of darkness, in a bunker deep in Whitehall.

Q531 Jeremy Corbyn: Does anyone shine a light on this darkness?

Mr Maude: We publish the minutes, almost in real time, but they are not fascinating.

Q532 Jeremy Corbyn: I am sorry to say that I have not read any of the minutes of the transparency board; it is obviously something that is lacking from my life, so I shall now start reading them. When you decide to not publish something, do you say what you are not publishing and why so that we can look for it?

Mr Maude: Just to be clear about the function of the transparency board, we do not take decisions about what should be made transparent. The board contains a number of open data experts, including Sir Tim Berners-Lee, the inventor of the worldwide web, Professor Nigel Shadbolt, Rufus Pollock, Tom Steinberg and a few others, who are proper experts. I do not think they would be offended—they would probably regard it as a compliment—if I described
them as zealots. These are people who are absolute zealots for open data.

Q533 Jeremy Corbyn: Maybe we should have Julian Assange on it as well; maybe we should ask him to join it as well.

Mr Maude: If he is at liberty to attend. What we do at the transparency board is fantastic. Again, it is not particularly surprising that not everyone in Government is equally enthusiastic about making data public. We still have a culture where the tendency is “Show me why I should do this” rather than “Show me why I should not do this”, and there have been some ingenious reasons produced for not making data public. The interrogation and the assistance of the transparency board members in holding our feet to the fire, but also the rest of the Government’s feet to the fire, is invaluable.

Lord McNally: As I said, when I first attended I went slightly as a sceptic; at one meeting I said that I felt like a prim Victorian lady attending a meeting to plan a rave. They are enthusiasts, but I found it really helpful to hear these guys questioning the various Whitehall Departments and other public bodies. You see the culture of secrecy not in any sinister way, but you still hear the question. “Why should we reveal all this?” Because they have the expertise and the technology, which I do not, they then quiz these guys, and it quickly becomes, “Why not?” That is why I said at the very beginning that the transparency agenda is one of the most exciting initiatives the Government have taken and in the long term will have the biggest impact on the quality of governance. Perhaps we should televise meetings of the transparency board.

Mr Maude: I do not think it is quite prime time material.

Q534 Mr Llwyd: I have a brief supplementary question. May I take Lord McNally back to his description of the current civil service being more ready for change than in previous decades? I have just been involved in a campaign for a stalking law to be introduced and my friend Mr Buckland was heavily involved as well. The greatest obstacle bar none to any change in the law was the civil servants. They were of the younger variety, much younger than me, and they were adamant that they were not having it at all, so much so that at the end of one meeting with a Justice Minister, who I shall not name, he smiled at me and said, “You must persuade us of the need for legislation.” That was my experience of the last couple of months.

Q535 Chair: There’s a bit of open government for you.

Lord McNally: If you can convince the Minister, and he wanted it, those civil servants would change—the policy would change. You cannot expect the civil service to be eunuchs because they do not believe your idea. You have had a good response, because you know what the advice is and the arguments that you have to counter. But it is not the civil servants that are blocking your law; it is a Minister who is unwilling to work with you on it. The buck stops with the Minister, not with the civil service.

Mr Llwyd: In the event it succeeded, but the impression I got was that the Minister was stymied by his staff. That is what I am trying to say. Anyway, that is en passant, as it were.

Q536 Mr Buckland: Can I move on to the mechanisms and some of the conflicting evidence that we have had in particular about time limits for public authorities? You will both be aware of the 18-hour limit that exists when it comes to public authorities in terms of a cost—that is 18 hours before any charge can be imposed. We have had conflicting evidence from some of the bodies saying that it is a little unfair because the 18 hours does not include work done on deciding whether the information should be released or redacted, but we have had other evidence from freedom of information campaigners saying that there is a problem here because far too often public authorities say, “This will exceed the cost limit. You will have to pay because it will take longer than 18 hours.” Requests for FOI are being refused on that basis. Could there be a way for those other activities that local authorities talk about to be included within the 18-hour limit? If so how can we balance out the problem that has been raised of authorities potentially hiding behind that limit as a way of avoiding disclosure?

Lord McNally: I would be interested in, again, where you weigh the balance. There have to be limits, otherwise the burden will be unsustainable. I am not afraid to say that there is a cost to FOI, but the cost of good governance is a cost worth paying. The judgment is whether it is working well at the moment. I have not seen a lot of evidence from local government that it is such a terrible burden. I honestly do not know whether the goalposts can be moved in any way either in timing or in complexity. I thought at one time that the introduction of a charge might be a possibility, partly because, when I was engaged in the pre-legislative scrutiny, the most enthusiastic evidence that we heard in favour of FOI was from the Irish, and the Irish subsequently put a charge on FOI. The Irish, one of the major proponents, needed to put some kind of brake on demand, but there are problems with that.

Q537 Chair: We shall come to charging later. We are on timing at the moment.

Lord McNally: Again, I have not seen any evidence that the time limit is in the wrong place, but I would be interested to hear if you feel it is.

Q538 Mr Buckland: The evidence that we have heard from the public bodies is that they think it is a little unfair, because the 18-hour limit only includes certain activities. What they would regard as the more fundamental tasks that determine the issue or sometimes very complex matters of redaction and editing are not part of the 18-hour limit. Another way round it could be to look at a separate limit for those activities. I would welcome your thoughts and views on that.

Lord McNally: I have heard that argument put—that the 18-hour limit only covers the tip of the iceberg and that a lot of the work is outside that. That is worth
evolving, and it is a matter of balance though. You do not want to give so much slack that requests are kicked into the far distance.

Q539 Mr Buckland: The Campaign for Freedom of Information has identified the problem that, far too often, bodies are citing cost as a reason for refusing requests, saying, “There is an undue cost here. We therefore can’t and won’t comply.”

Lord McNally: This is why I am now a signed-up enthusiast for the transparency agenda. You want a mindset that says, “Why not?” instead of, “Why?” If you get a freedom of information request and your first reaction is, “How can I find as many excuses as possible for not answering this for as long a time as possible?”, you are approaching it with the wrong mindset. What you have to do is either find whatever leeway you give them. I agree that what has been said to me has validity. There are activities outside the 18-hour limit that perhaps should be included in it if you are going to give bodies a fair opportunity to answer requests in that way.

Mr Maude: Ideally, you want to get into a position where FOI requests become almost redundant, because public authorities have proactively pushed into the public arena so much information and data that it is actually out there; there is not much left that is legitimate FOI territory that the authorities have not already made public.

Q540 Mr Buckland: Again, do you think one of the problems is—again, this is evidenced by the UCL Constitution Unit—that sometimes, with respect to them, junior staff are being used to make decisions, which elongates the time because they do not have the experience and the savoir faire, for want of a better phrase, to come to quick and sensible decisions? Perhaps more guidance could be given by the Government to public bodies, saying, “Treat these applications in a different way. Don’t assign inexperienced staff to them but assign the most senior appropriate member of staff”, so that decisions can be made quickly and in the light of a far greater breadth of experience, in order to reach the sort of transparency levels that you have both quite rightly spoken about today.

Mr Maude: I hear that. I think there is an issue, at a time when the state in all its different manifestations is becoming much more open anyway, about proactively publishing at a time of universal financial constraint. With an ever-increasing volume of FOI requests, these issues are not trivial. It is definitely a non-trivial issue.

Lord McNally: Guidance already exists suggesting that, if someone makes a very complex request, the authority can and should guide them in a direction that will get them the information they require without complexity. It is a balance between an attitude of mind and how much you can put into guidance. A lot of the concerns about it do not apply. We are talking about government in the broadest sense and officials can act in a thousand different ways. You spoke about officials of sufficient seniority; well, perhaps, but that would not get rid of all the problems. My view—my look at this—is that, given the waterfront that it covers, the amount of problems in its working have been relatively few.

Q541 Chair: We need to complete our business before the House sits.

Lord McNally: I was just thinking that it was half-past two.

Q542 Chair: Before going to Mr Turner, there is one thing that I want to get clear, which is whether the Government have a view on introducing statutory time limits for consideration of the public interest test and for internal reviews. Do the Government have a view on whether we should introduce statutory time limits for those processes?

Lord McNally: Unless my senior colleague has better information than me, I do not think the Government have a view at the moment.

Q543 Karl Turner: I wonder whether I can examine briefly the issue of cost. I am aware of the clock and that time is against us. There is a cost to being transparent in Government, both financially and politically, but I wish to concentrate on the financial implications. We have heard that there is a big difference in the cost of providing information by local government as opposed to central Government.

Lord McNally: Some of it is simply a factor of size and the nature of the requests that are being made. We always get the problem about how much a parliamentary question costs to answer. I am always a bit dubious about costs because people put very precise costs per inquiry, but it is more difficult to quantify the benefits of freedom of information or transparency.

Let me give you an example within my own bailiwick. We are now publishing much more under the transparency agenda about courts and their performance. I suspect that that will drive up court efficiency in a much better way, with a real saving to the public purse, than any amount of legislation. Being able to see that performance and comparing it will drive up performance. This is where transparency has a cost benefit.

I have no firm evidence as to why local government and central Government costs are different. It may be that the complexities of requests made to central Government and the various hoops that it has to go through are greater. As I said before, one of the things that have been most encouraging is that there has not been an unwillingness of local government to comply. There is no use ducking the fact that FOI does have a cost, but I believe that the cost benefit is well worth the bill that we pay. That does not mean that we should not look at the statistics of both responses and costs per Department. I get the breakdown of that, and I look through it and look at Departments that are underperforming in either direction, but it is a good illustration that if you have the facts you are able to spot where the deviants are.
Mr Maude: I agree with all of that. One should have a question mark in one’s mind on the cost. I periodically get a draft reply to a parliamentary question that says, “Answer only available at disproportionate cost.” However, when I look at the question, I say, well, actually I want to know the answer to that as the Minister, so I do not care whether the cost is proportionate; I need to know that. That is information we should have readily available and not at a disproportionate cost. It ought to be automatically available; they should give me the answer in the first place, and then I will give it to Parliament. There can be quirky disproportionate costs, particularly for smaller public authorities. Quite by chance last Friday at my constituency surgery, the chair and deputy chair of a parish council came to see me. They said, “Francis, we are being driven to distraction because we have a persistent requester”—this is a parish council with a part-time clerk—and we have a constant flow of requests from the same person. We have no idea who this person is or whether it is even someone who lives in the parish—it may be someone completely extraneous—and it is taking up a huge amount of the capacity that we have to do the business of the council.” That raised in my mind a question about how the vexatious or frivolous thing works, particularly for the small authorities for whom it can be a massive burden. It is not just a cost but a complete opportunity cost because it stops them doing a lot of other stuff.

Q544 Karl Turner: Thank you, Secretary of State. That leads me to my next question on the advantages and disadvantages of routine fee charging. Do you think that the strength of the information would be flawed by adding a charge to information requests?

Lord McNally: As I said, I started off with an open mind, partly influenced by the Irish experience. I do not know whether you have looked at why the Irish went to charging, but there are two downsides to it—whether it would then bar people of limited means from accessing FOI or whether the charge that you made was so small that it would cost more to administer than it raised. I do not know. Again, I hate to say it, but I am looking forward to your report. I would be very interested in what you found on the charging question, through international comparisons, and whether it sorts out the vexatious or the trivial and whether it helps with some of the cost.

Q545 Karl Turner: There seem to be a lot of requests from journalists. Do you think it might be possible to add a levy for the media requests as opposed to those from private individuals? Is that something that we ought to consider?

Mr Maude: It is not unknown for there to be requests from media representatives under FOI for stuff that is already in the public domain.

Q546 Chair: Should the reply not be, “This information is already available in the public domain?”

Mr Maude: Yes, but you have to find that out. It is not a frictionless process. I am like Tom; you can argue it either way and there is a balance to be struck. I would be really interested in knowing what the international experience is. We do not want to use charging as a barrier; none the less, should it be a completely free hit for everyone in all circumstances?

Q547 Mr Llwyd: Do you believe that the vexatious request test is strong enough? Could it be replaced by a test based on the approach taken to vexatious litigants in court, for example?

Mr Maude: This is more Tom’s territory than mine, but the question was in my mind because of my experience with this parish council. The difficulty is that you cannot declare someone to be a vexatious requester; it is the individual request that has to be decided, and my understanding is that there is quite a lot of latitude for an authority to decide that a request is vexatious. The problem is that people can apply under all sorts of different identities. It is quite difficult with the kind of requester-blind requirement for an authority to be able to say—even if the law allowed it, which it does not, I believe, at the moment—"This is a vexatious requester and therefore you are blocked." It is very good territory for the Committee to examine.

Q548 Mr Llwyd: On requester-blindness, should there be a change there?

Mr Maude: Again, you can argue it both ways. I genuinely do not have a strong view either way, and there are advantages either way. I would probably marginally come down towards more openness about who the requester is, but it is not a fixed, firm view.

Q549 Mr Llwyd: I am looking at the clock and presuming, but could I ask one further question, which you may care to write to us about? Are you satisfied that the intellectual property rights of university researchers are sufficiently protected under the Act? You may wish to reflect on that and perhaps write to the Committee.

Mr Maude: I shall happily write, although it is not particularly my territory; it is more Tom’s than mine. Actually there is quite a lively argument on that point. There is an argument that says that university research that has been publicly funded should be available to the public as a free good because we have paid for it with our taxes. So why should it not be available to others to exploit? That would be very damaging, arguably, to the science base particularly in this country, which is incredibly strong and a hugely important national asset. We will certainly provide a written response, but I do not think you will find it is absolutely definitive.

Lord McNally: We are being heavily lobbied. In the House of Lords, I am not short of chancellors of universities suitably briefed by their universities on this. My initial instinct was, of course, that they deserve all the protection and so on, but I want to make sure how much of the stuff that they say is under threat is already protected under the Act. I shall take up your invitation. 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. We shall give you a considered view, but it is certainly an area that should be carefully looked at.

**Chair:** You may not want to come to a final conclusion, not least because we have not yet reported on it, but it would useful to know what general lines of thinking you are exploring. If you write to us on that basis, we would be very happy to receive that.

I thank you both very much indeed for spending time with us this morning and we shall now get on with all the work that you have given us.
Written evidence

Written evidence from the NHS Business Services Authority

Executive Summary

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

Does the Freedom of Information Act work effectively?

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

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

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

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

5. Strengths:

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

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

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

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

6. Weaknesses:

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

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

   (iii) The phrasing of the appropriate limit in leads to confusion about what the resource limit is. Simplified wording using 18/24 hours effort rather than £450/£650 cost would be helpful.

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

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

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

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

January 2012
Written evidence from the Russell Group

EXECUTIVE SUMMARY

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

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

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

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

RECOMMENDATIONS

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

6. Current FOIA exemptions which may be used by universities are insufficient to protect from inappropriate release of research data and therefore an amendment to FOI legislation exempting research data should be introduced. We support an amendment to the Protection of Freedoms Bill that provides exemption, in limited circumstances, for pre-publication research in relation to FOI requests.

7. Consideration should be given to undertake a separate independent review of FOI in higher education to reflect on the impact of changes in the university sector since the inception of the FOIA, and the increasingly competitive environment that universities have to operate in.

A. Transparency in universities

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

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

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

B. University research and FOI

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

*For example, see RCUK Common Principles on Data Policy http://www.rcuk.ac.uk/research/Pages/DataPolicy.aspx; Wellcome Trust Policy on Data Management and Sharing http://www.wellcome.ac.uk/About-us/Policy/Policy-and-position-statements/WTX035043.htm*
12. The UK research community is engaging actively in a debate about opening access to research data (see below). However, it is often critical to long-term outcomes that research data are not released too early or without consideration of issues such as data quality and robustness; potential for misuse of, misinterpretation of or risk of spurious findings from data.

13. The length of time between undertaking the original research, gathering supporting data and delivering a known benefit can span many years: the Research Excellence Framework allows 15 years between publication of original research and a “research impact”; an analysis of Cardiovascular research showed that it can take between 10 and 25 years to translate into treatment.2

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

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

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

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

18. On launching the study, the Royal Society said “Open access to scientific information is not in practice an unqualified good. A commitment to open science does not imply openness to everything, to anyone or for any purpose. Open science should be bounded by considerations of quality, legitimate commercial interests, privacy and security. This study will make recommendations as to how to best to ensure we obtain the benefits of opening up scientific information, and how best to manage the challenges and financial implications of so doing.”3

19. It is important to identify and distinguish between where research outputs have potential for commercial exploitation, where benefits can be accrued through open dissemination, and where research data and results are sensitive and require protection. We would suggest that it is the scientists and researchers who have the expertise needed and are best placed to differentiate between that information which should be open and that which is not yet appropriate for open access. While there may be more that the higher education sector can do on open access, the FOIA is not an appropriate vehicle for gaining access to research data that are not yet suitable for publication or otherwise sharing.

20. Universities in the UK are at the global forefront of promoting access to their research assets. For example, the BIS Working Group on Access to Published Research Findings, chaired by Dame Janet Finch, is exploring mechanisms to open up research to the widest possible readership in the UK and across the world, and UK universities are at the heart of the “Easy Access” partnership on intellectual property.4

21. If the ability of the UK’s leading universities to exercise control over its core assets of research data and teaching materials is compromised by compliance with the FOIA, the UK’s ability to conduct leading edge teaching and research could be seriously jeopardised. Private sector and international partners would become more reluctant to work with UK researchers, as they could lose their own data if they shared it with UK researchers, with consequential damage to the UK economy and to UK universities if sponsors transferred their research funding overseas. UK researchers would lose the incentive to do empirical research themselves, if it meant they would have to share their data at an early stage of their research. Likewise, they would lose the incentive to innovate and create new teaching materials if rivals were able to readily access these materials. The world’s top researchers would no longer wish to live and work in the UK, if the potential loss of research data would make the UK much less attractive as a destination to conduct research. The quality of higher

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3 Further details of the Royal Society Science as a public enterprise project can be found at http://royalsociety.org/policy/projects/science-public-enterprise/

4 http://www.easyaccessip.org.uk/
education teaching in the UK would suffer, and the world’s most talented students may no longer have an incentive to study here.

C. Competition in Higher Education

22. Universities operate in competitive national and global markets and costs of teaching are not supported solely from UK public funds. For example many postgraduate and international students pay their own tuition fees or are sponsored by private funders. Arguments for treating public and private providers differently are unsustainable. Protecting teaching materials is fundamental to a university’s market position and ability to compete with other UK universities, private providers and international competitors.

23. The Government has encouraged the private sector to enter the higher education market. However, private providers are exempt from the FOIA compliance. New providers, such as those being encouraged by BIS, might seek teaching materials, which have been developed using public funds, for commercial gain but need not make their own material available. A recent Cabinet Office consultation even cited this as an example of open data.

24. The value of research to the UK economy is extremely high, but the commercial potential of research may not be clear at the early stages of research. Early release of research data could advantage a competitor or private business to the detriment of the University and its investment.

25. Compliance with FOIA can also hinder the negotiation of collaborative agreements between universities and business, from time-wasting disruptions to contract negotiation to, in a worst case scenario, risks to potential future funding of research, as can be seen from the following experiences of one of our world-leading universities.

— Significant university resources were needed to negotiate funding for a studentship with a large multinational company who were unhappy with the threat of FOI. Ultimately an exceptional compromise agreement was required as the University and company in question could not sign off the contract.

— One major national company is so attuned to FOI that its own specialist legal team demands an extensive FOI clause to contracts. In one case the University was forced to demand changes to the company clause.

— Another major national company was concerned about loss of competitive advantage if the University was forced to release research data or results (over which the company had exploitation rights) on projects close to market. Under the terms of the contract between the University and the company, the University was required to make best efforts to ensure disclosed information was treated as confidential and to co-operate with the company in any action taken to resist or narrow disclosure.

— Threats to the commercial interests of another multinational were a matter of concern which resulted in the company asking for a “right to sue” clause in their contract with the University if the company disagreed with the University’s judgement when complying with the FOIA. Many months of protracted negotiation were required before the company signed the contract without the clause included.

26. In these examples, the University was eventually able to resolve the differences with the respective businesses involved. However, relationships between the university and business are tarnished as a result of such difficulties at a time when the government is calling for greater collaboration between the two.

D. FOIA conflict with other legislation

27. It is critical that universities have clarity from Government on how the FOIA is implemented. A recent case emerging from a FOI request to Newcastle University has highlighted conflict between the FOIA and other legislation, resulting in inconsistencies in advice to the University, in this instance from the ICO and the Home Office. The Newcastle case is particularly complex and the details reveal inadequacies in the legislation that should be addressed.

28. In June 2008, Newcastle University received an FOI request from the British Union for the Abolition of Vivisection (BUAV) requesting disclosure of details of contained within the project licences for primate research undertaken at the University. Project licences are issued under the Animal (Scientific Procedures) Act 1986 (ASPA). The University initially refused to disclose the project licenses in line with clause 24 of the ASPA, which makes it a criminal offence to disclose project licence information for purposes other than following the ASPA. This initial decision was supported by the ICO. However, BUAV appealed the decision, leading to the case going to First Tier Tribunal which found in favour of disclosure of the project licences, and then to Second Tier Tribunal which upheld the decision of the First Tier Tribunal. A second First Tier Tribunal

6 http://data.gov.uk/opendataconsultation
7 Russell Group The economic impact of research conducted in Russell Group universities (2010).
8 Further information can be found in Newcastle University’s submission to the Justice Committee inquiry.
was arranged to consider exemption from disclosure under sections 38 (health and safety) and 43 (commercial interest) of the FOIA, the decision reached being disclosure of the redacted project licences.

29. The University’s position with regard to the Home Office on whether they would be prosecuted for disclosure of the project licences was unclear. A definitive answer was only received following the final Tribunal decision, when the Home Office determined that it would not be in the public interest to prosecute in this case because disclosure was in accordance with the order of the Tribunal.

30. The Newcastle University case took over three years to resolve, at a cost of over £250,000 to the University in legal bills alone, and as a test case failed to produce a definitive resolution. It is far from clear from the Home Office’s stance whether they would indeed prosecute should a similar case arise, without it being taken to Tribunal. The implication from the outcome of this case is that any future similar case where conflict between the FOIA and the ASPA arose would have to go through this lengthy and expensive procedure.

January 2012

Written evidence from NHS South of England

Executive Summary

1. There is recognition that the Freedom of Information Act has been beneficial in increasing general awareness of the work of NHS organisations and promoting transparency with regard to this.

2. The disclosure of information under the Act has helped lead to greater accountability as public authorities are scrutinised and held to account for their decisions and actions.

3. The Act is a good means by which credible information may be provided to any individual upon request.

4. However, the sheer volume of FOI requests, which effectively double each year, is placing huge pressures on the NHS.

5. Across the South of England, the NHS received over 12,000 FOI requests. The resource to deal with this volume now exceeds 100 personnel.

Areas of Concern

6. NHS resources: Each year the number of requests received by NHS organisations almost doubles. Across NHS South of England, organisations dealt with more than 12,500 FOI requests in 2010/11. The NHS in the region has approximately 120 people who manage FOI full-time. This does not include the numbers of staff who help prepare the response, particularly if it is detailed (such as on NHS finances).

7. Dealing with rising numbers of requests: Staff in many NHS organisations have to devote time to working on requests often to the detriment of their main roles and with the subsequent impact on their workloads. It could be argued that more resource should be put into responding to FOI requests to meet demand, but at a time when the NHS is being asked to reduce management costs this is an issue that needs consideration.

8. More complex requests: Requests are becoming increasingly more complex and so they may require input from a combination of managers/directors and even legal advice, and are very labour-intensive. The cost of providing the responses to some requests is therefore considerable. Legal costs have doubled each year.

9. The changing nature of requests: The majority of requests are coming from journalists and commercial companies and it is questionable whether these requests are in the spirit of what the Act was intended for. Journalists are often searching for stories and commercial companies are gathering information about the NHS to sell to other businesses e.g. asking for contact information for staff which is then incorporated into directories which are sold commercially. Some requests could be seen as time-wasting—one asked how many complaints the organisation had received about ‘haunted’ buildings or ghosts in its premises and what action was being taken to address the complaints. The organisation cannot filter out these requests and has to process them and respond under the Act.

Suggested Improvements

10. Increase the length of time for responses from 20 working days. This would help to balance the pressure on resources for the authorities due to the increasing volume of FOI requests.

11. Reduce maximum time for working on a response—currently 18 hours. This would help ease the burden on resources as 18 hours is seen to be a high cost for dealing with one FOI request.

12. Calculating the cost limit. Under the current legislation, a public authority can only include the time that it takes to identify and retrieve the information as part of the 18 hour limit relating to the cost of complying with a request. The authority cannot include time taken to read information, consider exemptions, make redactions and consult with colleagues which can be very time-consuming. This means that the true cost to the organisation of dealing with the request is much higher than the cost limit identified but the authority cannot refuse the request under Section 12.
13. Need for clear guidance regarding applying exemptions. Although FOI guidance from the Information Commissioner’s office is frequently updated and made available on the website, it is often hard to locate the right guidance that is needed, partly because there is so much of it. The staff on the ICO helpline are also only able to offer limited advice about the application of the Act with regard to specific cases. For complex cases, it is often therefore the case that the NHS needs to turn to lawyers for specialist advice, which increases the cost of compliance.

February 2012

Written evidence from the Foundation Trust Network

1. The Foundation Trust Network (FTN) is the membership organisation for public providers of NHS services and gives a distinct voice to NHS Foundation Trusts and those working towards FT authorisation. The FTN has 216 members from across the acute, mental health, community and ambulance sectors.

2. We welcome the opportunity to submit the collected views of NHS providers on the operation of the Freedom of Information Act. We consulted our members in January 2012 and their feedback is summarised here—it is clearly an issue of significant interest for members given the number of responses submitted in a relatively short time, and the commonality of issues raised across the sector.

Executive Summary

3. The member responses were united in highlighting a concern that the Freedom of Information Act (FOIA) provisions were being used for commercial purposes rather than for scrutiny of issues in the public interest, for example:

— competitors determining whether to bid for services;
— alternative suppliers seeking to win business and requesting commercial information in respect of third parties; and
— companies compiling databases of contact information for selling on.

4. There were also concerns raised about:

— the number of requests growing rapidly to the point of being overwhelming; and on a related point;
— the level of resource that was necessary to give over to these requests, including administrative time, but also front-line clinical time; and
— incorrect conclusions being drawn from FOI requests which had a negative reputational impact on the NHS.

5. The FTN fully supports the principles of openness and transparency, and is working with its member organisations to promote and share best practice in respect of communicating information between NHS foundation trust (FT) Boards, their governors and members, and the wider community, in order to enhance patient experience and drive quality improvement. Indeed one member reported a slowing of the rate of increase in requests after reviewing its publications policy and we are aware of a number of members looking at similar reviews.

6. While it is difficult to quantify the time given over to requests across the sector (whether legitimate, inappropriate or vexatious), in light of the financial pressures being faced by NHS providers we consider it would be sensible to re-focus FOIA activity more clearly on matters of the public interest and to streamline the process for responding to legitimate requests. It is also vital to apply the FOIA provisions to all providers of NHS services, not just those in public ownership.

Discussion

7. As highlighted above, members support the principles behind the FOIA, but members felt they had been inundated with inappropriate requests.

Commercial requests

8. Many of the requests were from commercial organisations wishing to obtain intelligence on products or services provided to, or supplied by, the NHS provider, particularly on IT contracts. One member organisation reported that in their case “commercially driven requests look set to overtake any other type of request origin (last year 30% compared to 37% media)”. This is a common observation, with many respondents reporting a similarly changing profile of requests towards business interests. We agree with the view reported in annex D of the MoJ memorandum that these requests are “against the spirit of the act” (footnote 172).

9. Another member reported:

"The [requests we get] are clearly from commercial companies who are merely trying to increase their awareness of potential business opportunities. I have no problem whatsoever with
the concept of the Act which is to make Public Bodies even more accountable to the public—indeed I actively support this. However I do feel the Act is being misused by commercial companies and would welcome an attempt to perhaps limit its scope in that respect”.

10. Other examples included:

“We spend a lot of time responding to FOI requests from commercial companies who then sell the information on for database purposes”.

“A lot of requests are in relation to IT—how much do we have, who supplies it, what systems do we use. All are clearly from suppliers or consultants wanting work”.

“Regular requests come about clinical policies/use of specific drugs—so the company can create a commercial database. Others want names and structures just to use for marketing”.

“We are particularly concerned at the proportion of FOIs relating to sales and marketing and companies research, where information is being procured simply to derive commercial advantage. It is also clear that individuals and institutions are also passing their research costs directly to the public sector using the FOI mechanism. Accordingly we think that around 50% of the requests we receive are outside the original intention of the Act”.

11. One member felt that requests should be limited to individuals, interest groups and the media, and that requesters declare that they were not requesting on behalf of a corporate/commercial organisation. Another suggested that commercial organisations should be required to make their approach through the appropriate procurement process.

**Level playing field**

12. As some of these commercial interests are direct competitors for NHS contracts, it was felt that the ability to lodge requests with FTs but not independent sector providers of public services meant that an uneven playing field had been created. FTs are unable to seek out comparable competitor information from independent sector organisations. There was support for the principle of equity being applied, to all providers of public services, whatever their ownership model.

**The growing number, and costs, of requests**

13. One member reported a 31% increase in the number of requests over the last year, and certainly the experience of significant growth, in particular the last three years, is one that many NHS providers highlighted.

14. The growth in numbers experienced by respondents was accompanied by regular comments on the additional time given over to, and costs of, responding to requests:

I would estimate that for a small trust the cost is upwards of £50k per annum—just to employ dedicated staff to receive, log and process requests—it does not take into account time of other staff involved in reviewing and determining appropriate responses.

15. Another respondent reported:

We have a dedicated officer coordinating requests and responses, supported by staff in the services who have to respond with the detail of the requests, all supported by senior officers who provide expertise in reaching judgements as to the appropriateness of the request and the response made. There is further bureaucracy in operating and responding to the appeals mechanism, which has little effort for the applicant but considerable overhead for the Organisation.

16. Reports of one to two whole-time equivalent staff being employed to respond to requests are not atypical, possibly more in larger FTs. In some cases members reported that the staff resource given over to responses was impacting on the delivery of the principal purpose of the organisation, as staff who would otherwise, for example, book appointments, were diverted from this task by administering responses for one or two days. One member presented an extremely useful overview of their costs which illustrates the point well:

- Dedicated FOI resource is 0.5 wte administrator, plus 0.4 wte senior manager vetting time, c £60k.
- Requests are frequently multi-faceted requiring input from right across the organisation which is unquantifiable.
- Expenditure on legal advice on issues of interpretation of the Act.
- Best estimated average cost per response in excess of £500.
- Estimated cost in 2011–12 between £175,000 and £250,000.
- Multiplied across a financially challenged public sector, significant sums of public money are wasted.

17. We were informed of one NHS provider experiencing difficulties from repeated and vexatious requests from dissatisfied service users. Despite formally designating these requestors as vexatious (as defined by the Information Commissioners Office (ICO)) considerable resources had been expended in administering these
requests. In one case the Trust was referred to the ICO by such a vexatious complainant, the Trusts’ stance was upheld by the ICO but still, considerable time was spent defending this case.

Managing requests and the Publication Scheme

18. Each FOI request is different and a number of respondents reported that often requests had been framed so that data could not be presented in a readily available format. For example “Many requests are for similar information but with subtle differences, eg covering different time periods; occupational groups; or departments. Each request is individually researched with the administration involved in individual response”.

19. There was support from a number of members for existing data to be used where possible and a request for clarification of the provisions or guidance so that unreasonable time is not spent tailoring specific data requests when alternative presentation would meet the needs of the requestor.

20. Related to this point, some members reported that requesters of information frequently demand that information is provided in a specified format and do not respond well to indications that it is freely available in an organisationally-determined form. The point about ‘aggression’ can be applied more generally and instances of harassment or aggression have been reported for example when a requester is informed that the relevant information is not maintained by the FT, or when they have been informed that provision of commercially sensitive information would be a breach of confidence.

21. In this latest engagement with members we were informed that one member had seen a slowing of the increase of requests for information following a review of their Publication Scheme—in many cases, where the information is already published on the scheme, or has been requested previously, the requestor is referred directly to the scheme (these referrals are not counted within the FOI request numbers). This approach to reviewing the information made available in the publication scheme was corroborated by other members.

22. Some members recommended that specific guidance is needed from the ICO on what can and cannot be disclosed through publications schemes. The ICO should improve clarity over the publication scheme in order to improve transparency and consistency in what is disclosed.

23. As a general point, the FT sector is keen to ensure that information flows between the FT Board leadership, the FT governors, members and wider public are sufficient to hold the organisation to account for the services it provides and as a means of securing quality improvement, on both patient outcomes and experience.

The fees/18 hour threshold

24. Echoing points in the Ministry of Justice Memorandum concerning the setting of the threshold, there were views expressed that the fee notice level should be modified downwards and support for widening the activities included in calculation of the time given over to the response. A limit of six hours, beyond which a fee could be charged, was suggested.

25. Furthermore, as also highlighted in the memorandum, there was some support for a nominal fee—respondents drew parallels with the Data Protection Act and suggested that a fee be payable for every request, as for subject access requests.

26. One member highlighted the difficulty presented in the requirement to provide advice to the applicant to reframe the question when advising them that it will exceed 18 hours to collect the information. It was considered unrealistic when considering existing resources for organisations to provide advice and assistance to applicants whose response cannot be met within the 18 hour timeframe.

Other issues raised by members

27. There were a number of other issues raised in general terms that we should like to summarise as follows:

— Clarity on the distinction between data protection and FOI—some trusts have been challenged on refusals to name staff other than Board members and NHS consultants, and feel that the position should be made clearer.

— Several members raised concerns about the “blanket” or “Round robin” nature of some requests—for example, requests made via the Whatdotheyknow website, are often made to all or substantial numbers of NHS Trusts/public authorities nationally—the costs multiplied across all Trusts contributes to the waste in time and resources.

— A number highlighted that a proportion of FOI requests were from students wanting information for dissertations and other research projects not directly in the public interest.

— Instances of multiple FOI requests being brought together to create a media story, or biased questions being put, with the subsequent conclusions drawn being incorrect, not only having an unwarranted negative reputational impact on the NHS but taking significant time to correct.
— Frequent requests from journalists for significant amounts of information which have no direct public interest benefit but which “may” be useful for future reference; members report it is apparent that a substantial proportion of what is requested is consigned to the bin and never used, regardless of the cost to the public purse.

— Members reported occasions where journalists and media researchers have used numerous pseudonyms to repeatedly make requests of Trusts—the aim being to avoid the requests being aggregated and hence information being withheld under section 12.

**Concluding Remarks**

28. There is much reported to us which complements the findings of the Ipsos MORI research outlined in annex E of the MoJ memorandum. Our member feedback suggests the volume of requests is increasing significantly. The profile of FOI requestors is broadly comparable to the Ipsos MORI findings, though members report that businesses are increasingly using the Act. We consider there would be merit in reviewing the 18 hour threshold to a lower figure and consider that all providers of public services, irrespective of ownership model should be brought in scope of the Act.

*February 2012*

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**Written evidence from the 1994 Group**

**Post-Legislative Assessment of the Freedom of Information Act 2000**

The following is the 1994 Group’s response to the Justice Select Committee’s Post Legislative Assessment of the Freedom of Information Act 2000. For more detailed information please refer to the individual responses of our member institutions.

Members of the 1994 Group are: University of Bath, Birkbeck University of London, Durham University, University of East Anglia, University of Essex, University of Exeter, Goldsmiths University of London, Institute of Education University of London, Royal Holloway University of London, Lancaster University, University of Leicester, Loughborough University, Queen Mary University of London, University of Reading, University of St Andrews, School of Oriental and African Studies, University of Surrey, University of Sussex and University of York.

**Introduction**

We welcome this timely review of the Freedom of Information Act. Freedom of information and open access to the outputs of research is an important principle which the higher education (HE) sector embraces. The sector is proactive in this respect:

— online publication repositories have been established by institutions to make the publications of academic staff publically available free of charge;

— institutions pursue publication in open access journals wherever resourcing is possible. Open access journals make articles freely available globally in line with the “gold” principle;

— publications stemming from research projects funded by the research councils and many other key funders are required to be made freely available within electronic archives, for example the research council Research Outcomes System;

— researchers commit to making the outputs of publically funded research projects available through publication schedules. Publication schedules are an important consideration in the award of Research Council funding;

— institutions make data about their activities publically available in a variety of ways; publication of information on websites including annual accounts and providing detailed information on staff, students, income and expenditure to the Higher Education Statistics Agency. Detailed information is also made available for prospective students, including through the new Key Information Sets; and

— institutions respond to growing numbers of requests for information under the Freedom of Information Act. The JISC InfoNet Annual Survey shows that the number of information requests received by institutions has grown by over 250% from 2005 to 2010.9

Institutions are committed to making information about their activities publically available. However, information provision must be balanced with the obligation universities have to the rigour and quality of their publically funded teaching and research and to maximising the benefit and outputs of such activities to the UK economy. The Freedom of Information Act in its present form does not adequately protect this balance.

9 The Information Legislation and Management Survey conducted in association with UniversitiesUK and GuildHE, available at: http://www.jiscinfonet.ac.uk/foi-survey/index_html
UK research, some of which is supported through public money, is acknowledged to be of world leading quality and the UK is recognised as one of most productive countries in the world in terms of research outputs.\textsuperscript{10} It is a necessary first principle that research is conducted to the highest standards. It is this principle, embodied by the peer review system, which has contributed to the UK’s international excellence in research. Requirements for research data and information to be made publically available must be in harmony with this principle, and cannot be allowed to jeopardise the viability of the research conducted in the UK.

The present Freedom of Information Act (FOIA) and the current Protection of Freedoms Bill progressing through Parliament presents some serious risks to this balance. The current FOIA does not do enough to protect research which has not reached its conclusion and the Protection of Freedoms Bill currently proposes that this lack of protection should be extended to cover research datasets. Whilst we endorse the public availability of research outputs there a number of serious risks presented by the current form of the FOIA and the proposals.

Research data should not be made publically accessible before rigorous analysis has been concluded by the researchers or until the analysis has reached the stage set out in the publication schedule. It is inappropriate to share data where analysis is partially completed or not verified. To do so would often be misleading, and would place at risk the ability of the UK-based researchers to publish their conclusions before competitors do. This is especially the case with longitudinal datasets which need a lengthy period of data collection before results will be meaningful.

Commercial interests are intrinsically linked to research which generates intellectual property and commercial possibilities. In a competitive environment commercial funders of research need to be assured that research data is confidential and secure until a project has reached fruition. The FOIA makes some exemptions for disclosure due to commercial interests, however this is conditional and must demonstrate that commercial prejudice would outweigh the public interest in disclosure. This complex clause may not in future provide funders with the necessary confidence in the UK as a desirable place to fund research. Funders from business and industry are easily able to take their research needs to international competitors should they have any concerns about the security of research data in the UK. This would be to the detriment of the UK’s knowledge economy and to the higher education sector.

Data confidentiality is not simply important for commercial reasons. It is vital that participants in research studies can be assured of their anonymity. If such a guarantee is not possible participants will be dissuaded from sharing information and it will not be possible to conduct sensitive and important research across all disciplines including medicine and the social sciences. Redacting data to anonymise data is a complex, time consuming process with high associated costs which are not provided for under the FOIA.

The data generated from research can involve many terabytes of information of great complexity and variety in format. Making research data publically available in an accessible form is highly resource intensive. Supplementary data ie additional datasets and meta data which provide data descriptions, are needed to underpin the data increases the burden of demands made for research information. Data may be need to be interpreted using specialist software or stored in specialist datacentres and the costs of translating this to publically accessible sources is huge. The present FOIA makes provision for requests to be refused if the costs would be over £450. However, the burden of proof and the associated resources falls upon higher education institutions. The Protection of Freedoms Bill proposes that datasets under FOIA should “as far as is reasonably practicable, provide the information to the applicant in an electronic form which is capable of re-use”. This clause is not sufficiently defined and may lead to exorbitant costs being needed to make the information available.

The FOIA conflicts with other important legislature. The Animals (Scientific Procedures) Act prohibits the disclosure of the identity of individuals holding Home Office project licences. It is a condition of the Home Office licence that this is adhered to and is a matter of personal safety. However, the University of Newcastle has been forced to disclose details of licences relating to projects where animals are used for experimentation by the Information Commissioner following a tribunal. The University is now in breach of its Home Office licence. This is a situation where the personal safety of researchers has potentially been placed in jeopardy and where the FOIA is in direct conflict with another piece of legislature. It is not acceptable for the safety of individuals performing approved and licensed research to be threatened. This also undermines the viability of important research work in the UK.

As these conflicts indicate, the FOIA threatens the feasibility of the UK’s research in a number of different ways. We therefore strongly support Universities UK in their call for an independent review of the effects of the FOIA on higher education institutions.


Higher education institutions have traditionally been included within the FOIA. However, the higher education sector is fundamentally different in some respects when compared with public services. Higher education institutions operate in direct competition with each other for research funding and for students. Other public bodies, such as local authorities, do not operate in a market to such an extent. Furthermore, the higher education sector is undergoing a significant period of change to become even more competitive. The Government’s clear intention, as laid out in the Higher Education White Paper, is for private providers to enter the higher education sector and for competition to be increased. It is essential that there is a level playing field for all HE providers. We cannot have a situation where new private HE providers are exempt from FOIA requests whereas current HEIs are not. In future, students will be entitled to the publically supported student loan scheme regardless of whether they attend a private or current HEI. In a more competitive and market driven system it is entirely inappropriate, and against commercial interests, to subject one group of higher education providers to FOIA obligations for potentially commercially sensitive information.

Higher education institutions are funded through a diversity of sources, not simply through public funds. It has been commented in the Times Higher Education (THE) that as of 2012–13 the state will be contributing only 40% of the sector’s costs as opposed to 60% previously. The THE also highlights this will be below the 50% European Union threshold for defining a public body. Universities UK modelling also shows that in 2014–15 public funds will contribute only 22% to overall teaching income in comparison to 66% in 2010–11.

Given this, it may be more appropriate in future for some areas of higher education activity such as teaching to be exempted from FOIA legislation. We note this arrangement is currently in existence at the BBC and UCAS to protect some of the commercially sensitive activities of these organisations.

Universities are committed to making available appropriate information on teaching and learning resources. This will not change in the new funding environment. However, it will be important to protect the commercially sensitive information of higher education institutions in a sector which has been purposefully designed to be more competitive. Many of the anomalies and hazards outlined above arise from the blanket and increasingly arbitrary designation of universities as public bodies, rather than linking a public function, or an HE activity funded by the taxpayer delivered by any provider, under the act.

Conclusion

Higher education institutions are committed to making information about their publically funded activities freely available. However this must be balanced with the needs of universities to respond to a competitive market place in both teaching and research. Compliance with the FOIA in its current form places at risk the excellence of the UK’s research activity by forcing the release of data before project completion, deterring funders or placing researchers at risk. Since the implementation of the Freedom of Information Act the higher education sector has gone through a substantial period of change. A full and independent review is therefore needed to ensure that the FOIA and any forthcoming legislation from the Protection of Freedoms Bill is fit for purpose in the new funding environment. We strongly support Universities UK in calling for such a review. It is imperative that access to information enhances the quality, reputation and applicability of UK higher education rather than placing it at risk.

February 2012

Written evidence from the British Union for the Abolition of Vivisection

Post-legislative scrutiny of the Freedom of Information Act 2000

Introduction

1. The BUA V is an anti-vivisection organisation. It has made reasonably extensive use of the Freedom of Information Act 2000 (FOIA), with mixed results. Among the public authorities of which it has made requests are: the Home Office (the regulator of animal experiments), various universities, the Medicines and Healthcare products Regulatory Agency and the Veterinary Medicines Directorate.

2. The reasons the BUA V uses FOIA reflect the policy underpinning the Act identified by the Ministry of Justice Memorandum: to inform public debate (on a contentious issue); to increase the accountability of public authorities; and to improve decision-making. An important aspect of accountability is ensuring that the Home Office is regulating animal experiments in a lawful manner—particularly important given that animals in laboratories, self-evidently, cannot whistleblow.

3. Animal experiments are conducted in conditions of considerable secrecy. Section 24 Animal (Scientific Procedures) Act 1986 (ASPA) makes it in an offence, punishable by two years’ imprisonment and/or an

http://www.timeshighereducation.co.uk/story.asp?sectioncode=26&storycode=418779&c=1

unlimited fine, for a minister or official to disclose, even to Parliament, information which a researcher prefers to keep secret—even information about his or her wrongdoing.13

4. There are some sources of publicly available information about animal experiments:

— The Home Office publishes statistics each year, but although they are reasonably comprehensive they have been widely criticised, including by a House of Lords select committee and the Home Secretary’s advisory body,14 and are no substitute for detailed information about particular experiments.

— The Home Office encourages (but does not require) licence applicants to prepare a short abstract (summary) of their application; these are then published under the Home Office’s FOIA publication scheme. These, too, are no substitute for detailed information. They often read like PR documents, designed to persuade the public of the value of the research in question, and playing down animal suffering. The Information Tribunal, in a case brought by the BUAV (the abstracts case), described five abstracts it was able to compare with the licences they were purporting to summarise as “positive spin”, with little said about what was to happen to the animals.15 Successive opinion polls show that, unsurprisingly, it is the suffering of the animals with which the public is most concerned.

— Some animal research is published, but only a minority. Even when it is, researchers generally give no more information about what the animals experienced than is strictly necessary to understand the research. Little information is given about consideration given to the use of non-animal alternatives (a statutory requirement).16

5. The litmus test for any transparency regime is whether it is able to shed light on areas of public policy which are controversial. Animal experiments remain acutely controversial, with public opinion divided and shifting according to the latest aspect to hit the headlines. Controversy extends to scientific efficacy as well as to ethical considerations and there are therefore vital human health issues at stake. Public surveys confirm that the public, irrespective of their views about animal experiments, want to have more information. For example, a survey by YouGov in 2009 on behalf of the BUAV in the UK, France, Germany, the Czech Republic, Sweden and Italy17 asked whether the then proposed new EU directive on animal experiments should require that all information about animal experiments be publicly available, except information which is confidential and information which would identify researchers or where they work. 80% of respondents thought it should.

The exception for confidential and identifying information is important. There are, of course, exemptions in FOIA covering these.18 The BUAV always says that information it requests can be provided in anonymised form.

6. The Information Tribunal19 in another case brought by the BUAV20 recognised the importance of transparency in this area:

“Substantially for the reasons relied on by BUAV, we consider there can be no doubt about the strong public interest in animal welfare and in transparency and accountability as regards animal experimentation conducted under the ASPA regime. The existence of the statutory controls operated by the Home Office does not annul this interest which extends to seeing how, and the extent to which, the statutory system is working in practice. Such private scrutiny as takes place inside the statutory system is not a substitute for well-informed public scrutiny. In the present case these interests are further underline by the fact that the research was supported by public funds”.

Mr Justice Eady made similar comments on appeal in the abstracts case. He suggested there should be a presumption that licence applications should be open with confidential information separated out.21

7. In addition to FOIA, the BUAV has made extensive use of EC Regulation 1049/2001. This is similar to FOIA, except that there are far fewer exemptions. The regulation covers documents held by any of the EU institutions. The BUAV’s experience is that it is far easier, and quicker, to get documents under this regulation that it is to get information under FOIA. This is despite the general perception that the EU is a secretive body.

8. This submission will address two issues only: the cost of compliance exemption; and aspects of internal reviews.

13 See the Court of Appeal decision in BUAV v the Home Office and the Information Commissioner [2008] EWCA Civ 870. The Court of Appeal ruled that it was entirely for the provider of information whether he gave it in confidence. The law of confidence—under which information about wrongdoing or other information which in the public interest needed to be made available—had no relevance.
14 The Animal Procedures Committee.
16 Section 5(5) ASPA.
17 Fieldwork was undertaken between 24 February and 4 March 2009.
18 Those in sections 38 (health and safety), 40 (data protection), 41 (information provided in confidence information) and 43 (trade secrets and commercial interests).
19 Now called the First-tier Tribunal (Information Rights).
20 BUAV v Information Commissioner and Newcastle of University EA/2010/0064 paragraph 52.
21 Home Office v BUAV and Information Commissioner [2008] EWHC 892 (QB) at paragraph 61.
Cost of Compliance

Background

9. Section 12 of FOIA says that a public authority does not have to comply with a request for information where it estimates that the cost of compliance would exceed the ‘appropriate limit’. The Secretary of State is given regulation-making powers to determine the appropriate limit and the costs which can be taken into account. The current regulations are The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Fees Regulations). The appropriate limit is currently £600 (or 24 hours) for central government and £450 (or 18 hours) for other public authorities.

10. The High Court in the recent case of The Chief Constable of South Yorkshire v Information Commissioner decided that the reg 4(3) of the Fees Regulations, which lists the activities which can be taken into account when a public authority estimates whether the appropriate limit will be reached, does not allow the inclusion of time spent considering whether an exemption applies (including reading time), internal discussions and deciding on redactions. This might be termed ‘thinking time’. Only what might be termed “physical time”, such as that spent locating and retrieving the requested information, can be taken into account. This had indeed been the approach of the Information Tribunal in three cases, including the one under appeal.

The Ministry of Justice memorandum

11. The Memorandum discusses the cost of compliance in Section H. It says that public authorities largely favour reform, either by reducing the appropriate limits or including thinking time. It refers to the recommendation of the report by Frontier Economics in 2006 that thinking time should be taken into account, although an agreed methodology would be needed. The Memorandum records that the Constitutional Affairs Committee (CAC) rejected the recommendation and that the Government agreed with it.

12. The Memorandum also records that the total cost to public authorities of responding to FOIA requests is around £40m per annum. This excludes “opportunity costs” caused by the need to divert (presumably non-FoI) staff from their “day job”. The MoJ has commissioned a comprehensive study into the time spent by a range of public authorities on FOIA requests. It hopes to provide the results to the Committee early in 2012.

Analysis

13. The BUAV believes it is of central importance that thinking time continues to be excluded from the cost of compliance. The exclusion is found in regulations, and the empowering provision—section 12 FOIA—is, linguistically at least, sufficiently broad to permit its removal. The Secretary of State could therefore remove it at the stroke of a pen with no meaningful parliamentary scrutiny. For this reason, it is, with respect, important that Committee addresses the issue and confirms the recommendation of its predecessor that the exclusion be maintained.

14. The arguments pointing to retention may be summarised as follows:

(i) Removal would seriously circumscribe the right to information which FOIA creates. In the Chief Constable of South Yorkshire case, the Tribunal had cautioned:

“It is also clear from the time limits in the Fees Regulations [18 hours and 24 hours depending on the public authority], that if it covered the time cost of redactions, in addition to the tasks listed in regulation 4(3), many, if not most, requests involving exemptions, particularly multiple exemptions, could be refused. This ..., in our view, could not have been the legislative intent”.

In the High Court Mr Justice Keith agreed: “if the time spent redacting information which is exempt from disclosure is included in the calculation, I suspect that the appropriate limit would be exceeded very much sooner than anyone could have intended”.

In other words, removal of the exclusion would in practice result in a substantive change of legislative policy, not merely a change of detail about hours. Parliament chose to include as many as 24 exemptions in FOIA. Some, such as that relating to personal information (section 40: data protection), are extremely convoluted and require consideration of separate, complicated legislation. Others, such as information provided in confidence (section 41), appear straightforward on their face but incorporate other areas of law including a mass of recent and difficult caselaw. Parliament cannot have intended to give with one hand—the right to information—but then to take away with the other—because of the inevitable need to spend time considering whether one or more exemptions apply (irrespective of whether in fact they do).

22 SI 2004 No 3244.
For obvious reasons, detailed or complex information would be particularly vulnerable to such a *de facto* change in legislative policy.

The CAC recognised that, the more contentious a request, the more time is likely to be spent considering it.26

“We conclude that the proposed regime could result in public authorities avoiding answers to embarrassing, contentious or high-profile cases as the number of internal consultees rises in proportion to the sensitivity of particular requests”.

The result, inevitably, would be that requests in contentious areas—where the need for public scrutiny is likely to be strong—could easily be rejected.

(ii) There is another important aspect to this. The focus in the Memorandum is on the time spent by employees of public authorities. But ‘cost’ in the Fees Regulations also extends to legal advice. Public authorities, quite properly, do take legal advice (including external advice) about the applicability of exemptions in difficult cases. It hardly needs pointing out that the appropriate limits of £450 or £600 would be reached very quickly if legal advice sought.

(iii) It is very difficult to see how thinking time could be assessed in any objective, consistent way. Some people read quickly, some less quickly. Whether an exemption applies should not depend on the lottery of whether a request comes before a slow reader or a quick reader. Similarly, some FOI officers will be more conscientious than others in considering the exemptions. The more conscientious an officer is, the more likely the request would fail an expanded section 12 test. In some cases an almost limitless amount of time considering caselaw could be spent. The length of a document cannot be determinative—it may be much more difficult to decide whether an exemption applies with a short document than with a much longer one. Would time thinking about a request in the bath be allowed? If not, why not? The Frontier Economics report acknowledged the need for an agreed methodology, but devising one would be seriously problematical if not impossible.

(iv) It would be too easy for a public authority which did not want to disclose particular information to invoke the cost of compliance if thinking time were included. Public authorities should, of course, approach their task in an objective manner, disinterested as to whether application of the FOIA tests leads to disclosure or non-disclosure. The reality, sadly, is different. Ministers may become involved with controversial requests and politics therefore enter the fray. There is a widespread belief that the Cabinet Office is determined not to release information about Cabinet discussions about the Iraq War, for example.

With animal experiments, the BUAV has had the very strong impression—necessarily not capable of proof—that some public authorities faced with requests for certain types of information start from the premise that the information will not be disclosed and then get their lawyers to come up with supporting arguments. Newcastle University, in the case referred to above, strongly resisted the BUAV’s request for information in two project licences—despite the fact that the researchers had voluntarily published the research. This is how the Information Tribunal described one of the University’s major arguments—that it did not (for technical legal reasons) hold any information relating to the very extensive animal research it conducted:

“[The BUAV’s advocate] submitted that the result for which the University contended was an affront to common-sense. He submitted it would be remarkable if the University did not hold important information about extensive animal research carried out on its premises by its employees, for which it received the funds, for which it provided the facilities, the training, the ancillary staff, the drugs, the routine equipment and the necessary insurances, in respect of which the University owed duties of care to safeguard employees and the local community from biosecurity risks, in respect of which the University claimed intellectual property rights, and for which its Registrar acted as the certificate holder representing the governing body and protecting the interests of the University. We agree ... , and consider the common-sense answer to be the correct one on the facts of this case …”

The Newcastle example shows the length to which some public authorities may go to hide behind legal arguments, however unmeritorious, so that they do not have to disclose information. Whether suspicions of bad faith are warranted in a particular case is not the point. The very fact that suspicion exists undermines confidence in the working of FOIA. Allowing thinking time to be included would increase suspicion that public authorities could easily dispose of any request that they did not want to meet.

Newcastle initially, in fact, relied on section 12, despite at the same time arguing that other exemptions applied to all the information requested—if it was confident that everything was exempt, how could it project that it would need to spend over 18 hours dealing with the request? The opportunity to misuse section 12 would be all the greater were thinking time to be included. Simply instructing external lawyers—as Newcastle did—would guarantee the appropriate limit being reached.

26 Para 37.
(v) £40 million per annum—the annual average cost of meeting FOIA requests—seems a very small sum to pay for improved governance and accountability. Only a part of that sum, of course, is attributable to time-consuming requests.

CONCLUSION

15. Lord Bingham said in the House of Lords case of *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport*:

“The fundamental rationale of the democratic process is that if competing views, opinions and policies were publicly debated and exposed to public scrutiny the good will, over time, drive out the bad and the true prevail of the false”.

Axiomatically, informed public debate and scrutiny cannot take place unless the public has access to relevant information. The more contentious the issue, the more important that there is access, so that the good can drive out the bad and the true prevail over the false.

16. The MoJ Memorandum in its discussion of the section 12 issue betrays a disappointing reluctance to acknowledge the importance of transparency—the benefit side of a cost:benefit assessment. Everything is seen through the prism of burden on public authorities. Staff are diverted from their ‘day job’—when in fact it should be part of the day job of any public sector employee to assist in meeting FOIA requests when called upon to do so.

17. The Coalition Agreement says: “The Government believes that we need to throw open the doors of public bodies, to enable the public to hold politicians and public bodies to account”.28 Allowing thinking time to be taken into account would have the opposite effect.

18. If it were felt that some lessening of the burden on public authorities is needed, it should be limited to a small reduction in the 18 and 24 hour limits spent on physical activities.

INTERNAL REVIEWS

19. Before a disappointed requester can make a complaint to the Commissioner, he must first ask for an internal review by the public authority. There is nothing objectionable in principle about this. However, reviews must be robust and conducted as quickly as possible.

(a) Independence

20. In the BUAV’s experience, reviews are generally not sufficiently robust. With the vast majority of our requests, the reviewer simply confirms the original decision. A corporate view appears to be taken. On one occasion the reviewer admitted to having had discussions with the original decision-maker (who was at a more senior rank than him). We note that the Memorandum says that, with central government, only 9% of internal reviews resulted in the original decision being overturned. 16% of internal review decisions were overturned in full by the Commissioner. In broad terms that means 25% of original decisions were wrong (plus those identified as incorrect on a successful appeal by a requester to the Information Tribunal).

21. An aspect of independence is that the reviewer should not be involved with the policy area in question. In the BUAV Newcastle case, it emerged that the reviewer, the University Registrar, was also the certificate of designation holder under ASPA—the person in charge of all animal experiments at the establishment. It is obvious that he should not have been making FOIA decisions relating to animal experiments.

22. The select committee may wish to underline the importance of the reviewer being truly independent, both of the original decision-maker and of personnel in the policy area in question.

(b) Double review

23. Some public authorities, such as Newcastle University and Imperial College, London, have a two-stage review. This adds to the delays which are already endemic in the process. A two-stage review would appear to be unlawful. There is no suggestion in the section on complaints procedures in the Code of Practice issued by the Secretary of State under section 45 FOIA that a two-stage review is contemplated—indeed, paragraphs 39 and 46 clearly contemplate a single stage only. There is no rationale for a public authority to consider a request no fewer than three times before a requester is able to obtain a truly independent adjudication. Newcastle’s complaints procedure could take at least 42 working days (2 months), over twice the 20 working days within which an initial request should be dealt with. That would be inimical to the requirement of the code that complaints should be dealt with promptly.

27 [2008] UKHL 15 at 28.
29 Para 146.
30 http://www.foi.gov.uk/reference/imprep/codepafunc.htm#partVI
24. The select committee may wish to reiterate that internal reviews should be conducted as quickly as possible and involve no more than a single stage.

February 2012

Written evidence from Universities UK

EXECUTIVE SUMMARY

1. Higher education institutions recognise and strongly support the need for openness and transparency and are working proactively in many ways to support this across all of their activities. UK universities are, for example, at the forefront of developments to support open access to research findings and better, more accessible, information for students.

2. The Freedom of Information Act (FOIA) places additional requirements on universities, which are defined as “public authorities” for the purposes of this legislation. Higher education institutions have worked to effectively comply with the FOIA but there are increasing concerns about the application of this legislation in a higher education environment. This is for a number of reasons:

   — Higher education institutions are mostly charities and autonomous bodies that operate in a highly competitive international environment. The nature of funding to the sector is changing significantly, with the largest proportion now coming from private sources on a competitive basis. The emergence of a market-based sector raises the question of whether FOI legislation, as currently applied, is the most effective and efficient mechanism to support openness and transparency in this new environment.

   — Current government policy for higher education is also encouraging greater competition and diversity of provision from new providers that are not currently subject to the FOIA. Competition can only be fair and effective if all institutions are operating on a level playing field, subject to the same regulations.

   — Evidence from individual institutions points to an increasing complexity of requests and substantial costs being borne in complying, especially where all costs cannot be claimed.

   — Universities undertake a significant amount of the UK’s research. Across a number of measures this is second only to the United States in its quality. This research is currently subject to the FOIA, and early release of research findings and data can have potentially serious implications for the quality and reputation of UK research, universities’ competitive position nationally and internationally, and relationships with commercial partners.

   — In a higher education environment the FOIA can come into direct conflict with other legislation, such as the Animals (Scientific Procedures) Act and the Data Protection Act. In the increasingly marketised higher education environment, we also have concerns regarding the application of the FOIA in relation to competition law.

3. While further advances in openness and transparency in higher education are to be encouraged, the changing nature of the sector means that the FOIA as it is applied in a university context is now in urgent need of review.

RECOMMENDATIONS

We seek the Committee’s support for the establishment of an independent review that would consider the application of the FOIA to a changing higher education sector. This will ensure that studies currently examining a number of the issues raised in this submission can inform decisions made in this area.

Notwithstanding the establishment of an independent review, we believe the following issues need to be addressed:

   — The question of how the FOIA should be applied to a more diverse set of higher education providers needs resolving as a matter of urgency. We seek the advice of the Committee on how this should be dealt with as part of the new regulatory framework for higher education, currently being developed by the Department for Business, Innovation and Skills.

   — Universities UK proposes that the Committee should reconsider the definition of activities that could be charged for and count towards the exemption where cost of compliance exceeds the appropriate limit.

   — Further advice and guidance on how the FOIA interacts with other legislation in a higher education context is required.

   — Universities UK seeks greater clarity on whether higher education institutions could be treated in the same way as other organisations under the FOIA that have strong commercial interests.

   — We seek the Committee’s support for the introduction to the FOIA of a limited exemption for pre-publication research.
Universities UK calls on the Information Commissioner’s Office to clarify existing guidance about the application of current exemptions to research.

The Importance of Transparency in Higher Education

Key messages:

— Higher education institutions support the need for openness and transparency of information.
— The higher education sector is already actively working to achieve greater transparency across all of its activities.

Transparency and openness in higher education

1. Higher education institutions recognise and support the need for openness and transparency—to inform students’ education choices; for accountability in the spending of public funds; and within the research community, to encourage greater use and application of research for the economic and social advantage of the UK.

2. The higher education sector is already leading and actively working towards greater openness and transparency. Higher education institutions are engaged in providing information through: individual institutions’ websites, including data repositories; the Higher Education Statistics Authority; the Transparent Approach to Costing; reporting on Office for Fair Access agreements; and new work that is being conducted to produce Key Information Sets. Further work on encouraging openness of data is being conducted by a working group led by Dame Janet Finch, and the Royal Society is also conducting research looking at improving the openness of data in science.

3. Many of the key funders of UK research, including the research councils and medical research funders such as the Wellcome Trust, have policies in place to require any peer-reviewed research paper resulting from their funded projects to be deposited in an electronic archive. The Higher Education Funding Council for England (HEFCE) has a shared commitment with Research Councils UK to ensure that significant outputs from research activity are made available as widely as possible both within and beyond the research community. The vast majority of research conducted in UK universities is undertaken with a view to eventual publication and it is a requirement of the Charities Commission that research undertaken by educational establishments is only “charitable” if its results are made available for the public benefit.

4. It is well recognised across the academic community that improving access to publicly-funded research undertaken in UK higher education institutions not only benefits the general public as a whole but enhances the international reputation of UK research by making the results more accessible worldwide.

5. Publication schemes are in place for nearly all higher education institutions. However, most of this information, and much more, is already freely available on institution websites. We would question whether the publication scheme in its current form is the most efficient route to providing access to this information.

Implementation of the FOIA in Higher Education

Key messages:

— The costs of complying with the FOIA are not reflected in what can be charged.
— It is unclear how institutions will be able to comply with proposed requirements in the Protection of Freedoms Bill to make data reusable while maintaining confidentiality.
— In a higher education setting the FOIA can conflict with other legislation, making it impossible to comply with both.
— Several research projects are currently underway looking at the FOIA and universities which will report after the post-legislative scrutiny period.

6. The higher education sector has complied effectively with the FOIA and, according to Joint Information Systems Committee (JISC) InfoNet survey data, in 2011 94% of requests were dealt with within the required 20-day period. There are, however, examples of cases that have proved particularly problematic and we have increasing concerns about how the FOIA will be applied in a changing higher education environment. Whilst the Information Commissioner’s Office (ICO) has produced useful sector-specific guidance to help higher education institutions, Universities UK believes that these problems have arisen due to the fact that the original legislation was not written with higher education in mind. Indeed, a number of issues relating to the FOIA and higher education are not reflected in the Memorandum to the Justice Select Committee on Post-legislative Assessment of the FOIA.

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31 For example see the University of Southampton http://data.southampton.ac.uk/, the Open University http://data.open.ac.uk, and University College London http://eprints.ucl.ac.uk/

32 More information on TRAC is available at http://www.hefce.ac.uk/finances/fundinghe/trac/

33 Further information on the project “Science as a public enterprise: opening up scientific information” can be found at http://royalsociety.org/policy/projects/science-public-enterprise/
The costs of compliance

7. While it is recognised that organisations can charge for some limited aspects of responding to requests under the FOIA, as the Justice Committee memorandum itself recognises, there are costs, such as time spent considering exemptions and redacting confidential information, which are not covered. The process of redacting data (due to sensitive personal or commercial content) can be very time consuming, and requires someone with suitable knowledge to ensure that all the necessary sensitive data is removed, and no more.

Universities UK proposes that the Committee should reconsider the definition of activities that could be charged for and count towards the exemption where cost of compliance exceeds the appropriate limit.

8. There remains an unanswered question about how institutions can ensure that data is suitably redacted so that when combined with other sources advanced data-matching technologies do not lead to the possibility of individuals being identified. This is particularly pertinent under the proposed amendment of the FOIA through the Protection of Freedoms Bill, which will require datasets to be made available in a reusable format.

9. Even where the request is ultimately withdrawn there can be significant repercussions in terms of the time and resource an institution may spend dealing with it rather than conducting business as usual. For example, the University of Oxford received a request for research data from a large nationwide health study, submitted by a company with a significant commercial interest in it. Although the request was not ultimately pursued the research group had a year of research time disrupted in attempting to rebut the request, and the institution incurred significant legal costs in the process.

10. Full research is underway to ascertain the costs of FOIA compliance in the higher education sector. JISC InfoNet is conducting research with seven higher education institutions to track requests, including determining all staff involved—including their grade and the amount of time spent actively working on the request—and any additional costs (for example photocopying, postage, and so on). The outcomes of this research will not, however, be available until March 2012.

11. In addition, research is being conducted by the University College London Constitution Unit on the impact of the FOIA on universities (particularly how well universities cope with the extra administrative and other burdens of the FOIA), and the use academic researchers have made of the FOIA. This project is due to finish in July 2012 so is also unavailable to inform the current post-legislative scrutiny process.

Data on FOIA compliance

12. JISC InfoNet has run an annual survey on FOIA compliance in higher education since 2005. This survey (relating to requests received by the higher education sector under the FOI, Environmental Information Regulations and the Data Protection Act) has sought to understand some of the factors driving current patterns of requests and to help predict and prepare for future ones.

13. The number of requests being made under the FOIA has continued on an upward trend, with an average monthly number of FoI requests per institution of 10.1 in 2011 compared to 8.6 in 2010, and just 2.8 in 2005. Although this number is not high compared to the volume of requests received by other public bodies, such as local authorities, the cost and complexity of requests appears to be increasing.

14. In terms of the exemptions being used by institutions to withhold information under FoI, for the first time section 12 (“Exemption where cost of compliance exceeds appropriate limit”) has been the most applied, followed by section 40 (“Personal Information”) and section 21 (“Information accessible to the applicant by other means”). In 2010 22% of non disclosure relied on the section 12 exemption, increasing to 28% in 2011.

15. This increase in the use of the section 12 exemption is perhaps an indication of more complex requests being submitted. This is further supported by the increase in the length of time institutions took to fully process a request. Further information from the survey is available online.

Conflict with other legislation in higher education

16. Some requests have exposed conflicts between the FOIA and other legislation in a higher education setting, including related legislation such as the Environmental Information Regulations (2004), the Data Protection Act (1998) and the Animals (Scientific Procedures) Act (ASPA). This causes problems for institutions trying to comply with conflicting legislation.

Further advice and guidance on how the FOIA interacts with other legislation in a higher education context is required.

Case Study: Conflict between Legislation

Newcastle University received a FoI request for project licences relating to specific projects where animals were being used for experimentation. The request was initially refused using three exemptions: health and safety (endangering the safety of individuals), commercial interests and prohibitions on disclosure. The prohibition on disclosure related to the licenses having been

34 The Information Legislation and Management Survey conducted in association with Universities UK and GuildHE, available at http://www.jiscinfonet.ac.uk/foi-survey/index_html
35 Available at http://www.jiscinfonet.ac.uk/foi-survey/index_html
issued by the Home Office under ASPA. This was accepted by the information commissioner when Newcastle’s original decision was challenged, but overruled by the Information Tribunal on appeal. Newcastle University has now released the data under the FOIA but this is a breach of the terms of ASPA. In addition to the risk the university believed this exposed individual members of staff to, this decision also placed staff at the risk of prosecution for disclosing the data because in this instance the FOIA is in conflict with ASPA. This case also demonstrates the cost implications to institutions of trying to refuse such requests; the university spent over £250,000 on legal fees alone in disputing this case (see http://www.independent.co.uk/news/science/universities-forced-to-come-clean-about-controversial-primate-experiments-6262805.html).

The university believes that should it receive a similar request it will be open to the same legal risk and might be required to take the case to the Information Tribunal again, as they understand that one of the reasons that prosecution was not pursued by the Home Office was that the university had been ordered to release the data. This would obviously have considerable cost and time implications.

**Vexatious requests**

17. Universities report that they do receive requests which they consider to be vexatious but that the definition of vexatious is so unclear that they are deterred from seeking to use this exemption. Further guidance, particularly around what constitutes a vexatious request and how frivolous, time-wasting requests should be handled, would be welcomed, as would a review of what should be included within a university’s publication scheme and the level to which project data plans demonstrate an intention to publish.

**The FOIA and a Changing Higher Education Sector**

**Key messages:**

- The higher education sector has changed significantly since the introduction of the FOIA. Universities UK recommends that an independent review is held which considers the position of universities within the FOIA.
- Unlike most other public authorities, higher education institutions face competition both nationally and internationally.
- There is a need for a level regulatory playing field between all types of providers.

18. Higher education institutions are different from all other organisations included under the FOIA in that they are the only organisations (excluding the BBC)\(^{36}\) that face competition between themselves within the sector as well as internationally, and are largely privately funded. Since the FOIA was introduced the higher education sector has also changed significantly. The balance of funding within public institutions in the UK has changed from 61% public funding in 2005–06 to 55.9% in 2009–10,\(^{37}\) 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,\(^{38}\) 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.\(^{39}\)

19. The FOIA recognises that some organisations, such as the BBC and the Universities and Colleges Admissions Service, have public activities that are subject to the FOIA and commercial interests that are not covered. Recognition by the Ministry of Justice and the ICO that universities teaching and research activities have commercial value would be very welcome. Universities UK seeks greater clarity on whether higher education institutions could be treated in the same way as other organisations under the FOIA that have strong commercial interests.

20. The recent Department for Business, Innovation and Skills (BIS) Higher Education White Paper contained a stated intention to make the market more competitive, which included opening up higher education to a more diverse set of providers. As the higher education market opens up, however, an anomaly is created in terms of how different providers are treated for the purposes of the FOIA. Competition can only be fair and effective if all institutions are operating on a level playing field, subject to the same regulations. The question of how the FOIA should be applied to a more diverse set of higher education providers needs resolving as a matter of urgency.

We seek the advice of the Committee on how this should be dealt with as part of the new regulatory framework for higher education currently being developed by BIS.

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36 Note that some of the BBC’s activities are not subject to the FOIA, including its commercial subsidiaries.
38 Note that this relates to higher education institutions in England only.
21. This move to a more equitable market is supported by research conducted for the Higher Education Better Regulation Group (HEBRG)\(^4\) at the request of BIS.\(^4\) The HEBRG report includes specific recommendations in relation to FoI legislation which Universities UK urges the committee to consider.

22. Universities UK would welcome the Committee’s views on the issues raised in this submission; however, given the significant changes taking place in higher education and the issues this raises, Universities UK recommends that an independent review is held which considers the position of universities within the FOIA. This would also allow current research to be used to inform decisions.

**The FOIA and Research**

**Key messages:**

- Universities UK calls for a qualified exemption for pre-publication research.
- ICO guidance on how existing exemptions apply to research should be clarified.
- Unless the UK acts, our competitive interests will be damaged.

**Pre-publication research**

23. Universities have become increasingly concerned about the position of pre-publication research data and information under the FOIA. Researchers can be asked to disclose research information before it is complete, before it has been subject to peer review, and before the originators have had an opportunity to benefit from their work by securing publication or protection of any intellectual property arising from the work, such as patents.

24. Universities UK strongly supports moves to increase access to data. Paragraph 2 of this submission describes important current developments in this area. However, we also believe there is a need to protect the manner and timing of the publication of research information and results, so as to:

   (a) **Uphold the quality and reputation of UK research.** There is a risk that misleading information may enter the public domain before it has been cleaned, checked, and subjected to analysis and peer review. Researchers may be challenged on their approach or findings before they have had a chance to address any flaws in their work. In relation to health-related research, individuals might misdiagnose or medicate themselves on the basis of misleading information gaining currency supported by incomplete research. This could damage the UK’s reputation for quality research.

   (b) **Support universities’ competitive position.** University research is fundamental to the UK’s global competitiveness, and is considered second only to the United States. It is also a highly competitive field. Premature disclosure of research information will enable international competitors to profit from work undertaken in UK universities before the originators have had a fair opportunity to protect their ideas or secure grants for future research. This will act as a disincentive to original research.

   (c) **Encourage research partnerships with commercial and charitable bodies.** Universities work with commercial and charitable bodies on research projects. We know that the potential for the results of such research to be released to competitors under the FOIA is a barrier to such contract arrangements, and believe that as the risk becomes increasingly clear to companies, they will take research contracts elsewhere—toward international competitors, or non-university research partners. This is not in the best interests of the UK economy, or consistent with other government policy initiatives to encourage collaboration between universities and industry.

Research at an early stage may have potential but not actual commercial value—for example by identifying areas for further research which could yield commercially valuable results. Again, current guidance does not explain how the commercial interest exemption might be engaged by such cases.

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\(^4\) Currently clause 102 of the Protection of Freedoms Bill.
**Case Study: Commercial Relationships**

The University of Oxford was in negotiation with a big multinational company in relation to a studentship and £24,000 funding. The FOIA raised many concerns and significant resources were used in the negotiation involving research administrators, the Legal Office and the researchers. Ultimately the contract was not signed and a one-off compromise was agreed since the project was already underway, but future relationships were soured.

25. In Universities UK’s view it remains unclear how current exemptions apply to research in all circumstances, despite the efforts of the ICO through sector-specific guidance. The commissioner’s comments about the misapplication of exemptions in several recent cases involving university research demonstrate the problem in understanding how they might apply to circumstances for which they were not originally designed, since parliament did not envisage the research case during the passage of the FOIA. Further clarification of existing guidance would help, but we remain persuaded that there is a gap in current exemptions.

Universities UK has proposed a limited amendment to the FOIA which would provide specific protection from disclosure for pre-publication research.

26. This amendment would:
   - be subject to the public interest test;
   - be used when some harm would result from disclosure; and
   - be used when none of the existing exemptions are adequate.

Universities UK calls on the ICO to clarify existing guidance about the applicability of current exemptions to research.

**Wider tensions between the FOIA and research interests**

27. Although specific protection for pre-publication research is a particular priority, there are wider concerns about the application of the FOIA to research. In particular, there is a concern that the potential for some information to be released under the FOIA could lead to participants becoming unwilling to participate in some types of research. Changes in data manipulation techniques, which allow the triangulation of data, potentially revealing individual identities, can make it impossible to guarantee anonymity.

28. New provisions in the Protection of Freedoms Bill will compel universities to permit the reuse of data. The FOIA is motive blind, so reuse will be possible even where the intentions are directly contrary to the purposes of the original study. Data protection legislation requires consent to be sought for reuse of information. It is not clear how universities could comply with that duty in these circumstances.

**Case Study: Research Data**

The University of Stirling (under the Freedom of Information Act Scotland) received a request from Philip Morris International for data collected from underage smokers on their behaviours (including reasons for stating smoking), as part of a study funded by Cancer Research UK. Stirling considered the participants in this study to be a vulnerable group and was concerned that if it allowed information gathered for research purposes to be used by a commercial company with an interest in marketing tobacco to young people the consequence would have been to deter future participants in research. It might also have put research funders off funding future projects with the university, with huge financial implications for the research unit.

The university unsuccessfully attempted to apply the exemption relating to “vexatious requests”, but later successfully used cost limits to refuse the request. However, they note that the requester is at liberty to return with a more limited request which they will not have grounds to refuse. Although Scotland has an exemption for pre-publication research, it was not relevant in this case since Stirling does not intend to release the dataset in question.

Universities UK believes that this submission provides evidence of the unanticipated effects that the FOIA has had on higher education institutions. The higher education sector is proactively working to increase access to information. However, information should not be released in a manner that causes a detrimental effect on institutions’ ability to: compete in national and international markets for teaching and research, gain funding, or protect intellectual property rights. Given this, Universities UK welcomes the post-legislative scrutiny of the FOIA and urges the Committee to support the call for an independent review of the application of the FOIA in a changing higher education sector.

**About Universities UK**

Universities UK is the representative organisation for the UK’s universities. Founded in 1918, its mission is to be the definitive voice for all universities in the UK, providing high quality leadership and support to its members to promote a successful and diverse higher education sector. With 133 members and offices in London, Cardiff and Edinburgh, it promotes the strength and success of UK universities nationally and internationally.
Universities UK welcomes the opportunity to respond to the call for evidence for the post-legislative scrutiny of the Freedom of Information Act (2000) (FOIA).

February 2012

Written evidence from the Constitution Unit, University College London

Since 2007, the Constitution Unit based at University College London has studied the impact of the Freedom of Information Act on British central government, English local government and Parliament. In all three cases we have looked at whether FOI has met six main objectives set for it by its supporters:

— increased openness and transparency;
— increased accountability;
— improved decision-making in government;
— better public understanding of government decision-making;
— increased participation; and
— increased public trust in government.

We have also examined whether FOI has had an impact on the day-to-day operations of these bodies, either positively or negatively.

Research Methods

Our research used five main methods:

1. Interviews with 56 officials in eight British central government departments, 90 officials and others across 16 local authorities, 30 MPs, peers and officials at Westminster as well as journalists, requesters and campaigners.
2. An online survey of FOI requesters.
3. Analysis of press articles using FOI.
5. Analysis of disclosure logs.

The different methods helped measure the different objectives, but each has limitations. For example the online survey of requesters’, while giving an insight, did not achieve a large number of responses. The media analysis similarly is only a “proxy” for how people receive information through FOI.

What Impact Has FOI Had?

Central Government

— FOI has made British central government more transparent both in terms of the information it provides and the “culture” within departments. This is despite the fact publication schemes were seen as rather antiquated and poorly used, having been superseded by the webpage and internet search engine.
— It has also led to increased accountability, particularly when FOI is used alongside other “traditional” mechanisms of accountability such as the media.
— It has not had an impact of any of the other objectives. This is not because FOI has failed. Complex issues such as public participation and public trust are influenced by many other factors. In this sense FOI, as with many policies, was “oversold” by politicians.
— If it hasn’t realised all supporters hopes it has not realised the fears of others. It has not had any significant impact on the decision-making process or some of the key constitutional conventions such as collective responsibility. Nor does it appear to have led to a chilling effect (see below).

English Local Government

— FOI has made local government more transparent, though to a lesser extent than at central level because local authorities have been opening up since the 1960s. Recent innovations in online publication are beginning to have some impact, particularly third party innovations.
— Accountability has also been improved, with FOI often used with other mechanisms (such as the local media or NGOs) to build a wider picture of an issue.
— FOI has only influenced decision-making and public understanding at low levels. It has not affected participation and has had no generalisable impact on trust.
— Authorities’ key functions have not been changed by FOI. It has had no impact on how authorities deliver services or work with others, though there is tension around private companies working for local authorities and national and local media requests.
UK Parliament

— FOI has helped to make the UK Parliament more transparent, and more accountable. It does not appear to have improved public understanding of Parliament, or public participation; nor has it increased public trust, simply because coverage of expenses has overwhelmed any other issue.

— Although it has led to the creation of IPSA and a new expenses system, it is not clear how much it has changed Parliamentary culture more generally. FOI has also led to smaller changes over, for example, how MPs pay restaurant bills and the tax status of Peers.

— We also looked at whether MPs have used FOI as an accountability tool. While only a small number of MPs, mostly the opposition, use FOI it has proved to be a powerful tool. It has helped to uncover information about a range of topics from visitors to Chequers to extraordinary rendition.

Does FOI Have a Chilling Effect?

— One possible unintended consequence of FOI may be a “chilling effect”, where decisions go unrecorded or are sanitised due to fear of future requests. Finding hard evidence for such an effect is very difficult as it requires proving a negative and asking interviewees to admit unprofessional conduct. Studies are divided as to whether FOI leads to this. A survey of officials in Ireland found 30% of officials claiming an effect and just fewer than 50% denying it.

— The former head of the Swedish National Audit Office, Inga Britt Ahlenius, identified the “empty archives” phenomena in Sweden, whereby “important issues are discussed orally [or] by telephone”. Tony Blair claimed FOI had led to more caution over recording decisions, as did former Cabinet Secretary Gus O’Donnell.

— Our central government study found little clear evidence. FOI was lost amid wider issues around resources, fear of leaks and changing decision-making styles. Many officials were concerned more by the consequences of not having a record than having one. Others felt factors such as leaks or recording style proved more significant. Many felt the “politics” of a decision is “always off paper”.

— There was one very clear example, in one local authority, following a damaging FOI request, members no longer commented on drafts in writing. Interviewees elsewhere said care was taken in controversial decisions or negotiations. Most were keen to point out this was not a general tendency and said it had also led to more professionalism in some cases.

— It is difficult to draw a firm conclusion due to lack of evidence and the problem of disentangling causal factors. There appears to be no systematic evidence for alteration of records. However, FOI can and has caused a “negative” chilling effect in specific instances, particularly with difficult or controversial topics and in problematic political situations.

Who Is the Requester?

— A key problem underlining all FOI analysis is the lack of knowledge about requesters and their motivations. The variable impact of FOI is also down to the variability of requester motivations. The table below is based on estimates of requester types to central and local government from FOI officers.

<table>
<thead>
<tr>
<th>Requester</th>
<th>Local Government (%)</th>
<th>Central Government (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public</td>
<td>37</td>
<td>39</td>
</tr>
<tr>
<td>Journalist</td>
<td>33</td>
<td>8</td>
</tr>
<tr>
<td>Business</td>
<td>22</td>
<td>8</td>
</tr>
<tr>
<td>Academic</td>
<td>1–2</td>
<td>13</td>
</tr>
</tbody>
</table>

— Contrary to the views of Tony Blair, FOI requesters are not predominately journalists. The largest group across central and local government appears to be members of the public, a trend reflected elsewhere. The public consists of a small group of politically engaged with a larger group pursuing issues of “micro-politics” or of private importance.

— There was a clear rise and fall of public interest with the news agenda. However, “private” interest requests or issues of “micro-politics” far outweighed them. Many requests were focused, “quite niche” or on “specialised” issues such as a planning dispute or parking fine at local level or access to benefits at central government.

— Requesters’ motivations were also diverse. Even the small sample of requesters we found gave a huge variety of reasons for using FOI, from “concern about wasted money” to “curiosity”, “general interest” and personal campaigns against “corrupt” local government. There were also non-political uses “to gather information to inform my decision about buying a property” or a “festival licence”. The sheer variability of requester motivations and use underscores the variability of impact of the Act upon different public bodies.
The Overall Impact of FOI

— FOI has met its core objectives at central and local level—Government is more transparent in terms of the information it releases and how it works. FOI has also encouraged pro-active disclosure of a range of information, from salaries to road maintenance.

— FOI has also made public bodies more accountable—FOI works well with other mechanisms (such as the media, MPs or NGOs) as a tool to put together information for campaigns.

— FOI has not improved the quality of decision-making—FOI has not increased public understanding of decision-making at central government and has little impact on public participation except via “proxies” either centrally or locally.

— At local level FOI has increased public understanding of decision-making at a low level, though it is mostly used to get information rather than learn about the decision-making process.

— A chilling effect can be seen in a few politically sensitive cases but is not happening systematically.

— Superficially FOI does not appear to have increased trust in central government but the data is sparse and points in different directions. However, the effect is very variable for local government. At local level use of FOI is diverse and trust in local government is more heavily influenced by performance and “community visibility” than openness.

“Iron Laws” Of FOI

Some key points about FOI are:

— The media has a key influence on the impact of FOI—Not only is the media a key user of FOI (and defender when reforms threaten it) but, given so few people make a request, it is a key conduit for shaping wider perception of FOI. Though government and academics frequently highlight the role of the official and requester, our study demonstrated that the media is an extremely important player.

— There is no going back—The FOI Act cannot be repealed, however much the government may dislike it. Interviews and leaked ministerial correspondence showed how much some ministers resent FOI, but it is now part of the framework of government.

— Government holds all the cards—Despite its evident discomfort at the continuing pinpricks of FOI, the government remains in a very strong position. It holds the information. It can resist disclosure for years if it wants to play the system and fight appeals.

— Both sides will game the system—As in any field of legal regulation, there is scope to game the system. Officials and ministers will play things long if they want to delay disclosure, and they face few penalties for doing so. This was a constant refrain of requesters, especially journalists.

— Government will always be seen as secretive—However open the regime, and wherever government draws the line between what can be disclosed and what must remain secret, there will always be friction between government and requesters, especially the media.

— FOI never settles down—In terms of bureaucratic routine and a body of case law FOI does begin to settle down after the early years. But at a wider political level it never does and conflict is ongoing.

— A few FOI requests cause most of the trouble—The Pareto principle operates in FOI, as in other fields of policy. In the UK and elsewhere (eg New Zealand), a few high profile cases cause disproportionate effort, media attention, public controversy and political pain. Most requests are for “non-political” information.

— Officials have nothing to fear from FOI, save for the extra burden on resources, which is the more difficult to bear at a time of staffing and public expenditure restraint.

What Makes FOI Work or Not?

— Leadership is crucial to FOI—Senior support improves internal co-operation and mitigates internal resistance. By contrast, nervousness leads to defensiveness and a lack of internal cooperation.

— Administrative culture is also important—Resources are vital and are likely to be the Achilles’ heel of FOI. How much FOI “costs” is a difficult issue, with competing methodologies offering competing answers with bias in measuring cost as the benefits are more difficult to measure.

— The media are a further crucial influence both in their use and reporting of stories. Pre-existing relations shape this dynamic. Some public bodies experienced heavy and aggressive use of FOI, others none. It seems that only a small proportion of journalists use the Act but they defend it, innovate with it and raise awareness.

— Political factors can also have a strong influence—Political balance can be crucial though ideology has little bearing. A secure administration can cope with a damaging FOI request in a way that a party with a small majority cannot. Some local areas or particular departments have high levels of activism or long running controversial issues which often involves the use of FOI.

— The final crucial factor is the requester—FOI is built upon one very unpredictable variable: public use. Use varies hugely from the political to the “micro-political” or personal.
The Future

So what does the future hold for FOI?

— FOI requires use and political support to flourish and it will be a combination of political support, technological development and use that will determine the future of FOI in the UK.

— FOI is increasingly merging with online developments—The new Open Data push is likely to drive increased transparency and provide support and impetus for FOI officers and transparency advocates within organisations. To date the impact of Open Data has been variable. There is no sign of an “army of auditors”, and is unlikely to appear given the reluctance of the public to look through raw data. However, the data has launched several interesting third party innovations.

— Open Data advocates and officials feel online publication, FOI and new innovations will serve to mutually reinforce each other—This can already be seen with sites run by MySociety (such as whatdotheyknow) or Openly Local that analyses local spending data. The Local Public Data Panel pointed out that online transparency will not work isolation.

— The danger is that request numbers increase while resources are taken away—Political changes (especially to local government) or cuts may mean an increase in the use of FOI, which have already nearly quadrupled to local government since 2005, from 60,000 a year to 197,000 in 2010 according to our surveys. However, FOI is not yet seen as a “frontline” service and is likely to suffer financially in favour of “vital” services, especially in bodies where support for FOI is “lukewarm”. The contracting out of service delivery may also create gaps in FOI coverage. FOI is already facing growing numbers with officers feeling they are at, if not over, capacity. A lack of resources may lead to a slowing down or, in the worst case scenario, a “stagnation” of FOI operations.

February 2012

Written evidence from WhatDoTheyKnow.com

Executive Summary

1. WhatDoTheyKnow.com is a public web-based service that has helped people make over 100,000 Freedom of Information (FOI) requests to over 5,000 public authorities since 2008. We estimate that over 10% of all FOI requests nationally are made and published via the site.

2. As operators of the site, we believe that we have a unique and valuable vantage point from which to comment on how the Freedom of Information Act has been working in practice and provide practical recommendations for improvements.

3. We believe that the Act has been very effective at releasing previously unpublished public information, at promoting transparency at all levels of the public sector, and at embedding itself in the public culture.

4. Not all authorities apply the Act consistently, meaning that it is not as effective as it should be—many don’t pro-actively publish information, raw data or disclosure logs.

5. The lack of “hard” time limits for consideration of the Public Interest Test or for Internal Reviews allows authorities to delay replies or appeals for many months.

6. Whilst the scope of the Act has been extended to cover a small number of additional authorities, which is welcomed, we believe there are many more bodies carrying out public functions that should be subject to FOI laws, especially as more public services are contracted out to the private sector.

7. Our principal recommendations are:
   (a) Fixed time limits for conducting public interest tests and internal reviews.
   (b) More bodies should be covered by the Act, and the process for doing so should be made simpler and quicker.
   (c) Public authorities finding the cost of complying with FOI relatively high should take more steps to reduce the cost, though automation and proactive publication.

WhatDoTheyKnow.com: A View of FOI from a High Vantage Point

8. WhatDoTheyKnow.com is a website which allows people to make requests for information in public and ensures the request, all email correspondence and responses are automatically published on the Internet.

9. From the requester’s point of view, our service:
   (a) Makes it easy for them to find public authorities, and provides a simple interface for them to make their requests for information.
   (b) Has already done the hard work in searching obscure corners of authorities’ websites for the relevant email address.
   (c) Alerts them when authorities are late replying, and prompts them to chase up delayed requests.
(d) Provides helpful guidance in plain English on technical aspects of the Act.

10. From the public authority’s point of view, our service:
   (a) Helps reduce their burden of responding to duplicate requests for information.
   (b) Allows them to see how other authorities reply to FOI requests improving knowledge of the Act.
   (c) Demonstrates how easily it can be to maintain a disclosure log.

11. From the point of view of the general public, our service:
   (a) Increases the amount of information from public bodies easily available by simply searching the Internet.
   (b) Allows them to comment on information released, or provide assistance to the original requester.

12. WhatDoTheyKnow was created and is run by mySociety. It was initially funded by the JRSST Charitable Trust. mySociety is a project of UK Citizens Online Democracy (or UKCOD), a registered charity in England and Wales (no 1076346).

13. Projecting from Central Government request statistics suggests that 14% of requests are made through WhatDoTheyKnow.

14. Like many charities, UKCOD utilises a mix of volunteers and staff in achieving its charitable objectives. A group of about seven volunteers deal with the day to day administration of WhatDoTheyKnow.

15. The main benefit of publishing requests and responses online is that the responses can be viewed not only by the person who made the original request but also by others who are interested in the same topic. In this way the site aims to reduce the number of duplicate requests public authorities receive and facilitate the free flow of knowledge.

16. Our statistics show that on average each FOI request made through the site is read by 20 visitors. This strongly suggests that the material on the site is of interest to a large number of people beyond just those who make requests.

17. We note the memorandum to the committee from the Ministry of Justice states, in paragraph, 67: “Very little research has been published detailing the views of requesters of information”. We believe that we are in a unique position to provide insight into the views of requesters, and note that our site is in itself a body of evidence documenting the practical experiences of FOI requesters in their efforts to obtain information from the public sector.

18. We are aware that our site carries only a subset of requests and that many people decide to make FOI requests in private for various reasons. We encourage members of the Justice Committee to browse our website to see examples of requests made.

DOES THE FREEDOM OF INFORMATION ACT WORK EFFECTIVELY?

19. The answer to this question is “mostly yes”:
   (a) More public authorities are using disclosure logs to openly publish requested information in addition to supplying it directly to the requester.
   (b) Many people are aware of their rights to information and expect to receive requested information promptly.
   (c) WhatDoTheyKnow has helped prove that public information can be released cheaply and disseminated easily to a wider audience.

20. At the time of writing 63% of the requests made via WhatDoTheyKnow have been marked “successful” or “partially successful”, meaning that the requesters obtained at least some of the information they were seeking.

21. It is also now routine to hear MPs in Parliament asking questions based on information obtained using FOI, and almost every newspaper or online news site carries stories based on FOI releases on a daily basis. Freedom of Information has become part of our national culture and now forms a key part of our democratic system.

22. The effectiveness of the Act can be shown by information released being used to identify questionable public sector spending. One recent example of a request made through WhatDoTheyKnow revealed that Wirral Council had spent £250,000 on consultants for an abandoned privatisation proposal.

23. Perhaps more importantly, the Act gives access to background and contextual material that helps in understanding the purpose of spending, and the associated decision-making process.

43 http://www.mysociety.org/2011/07/01/whatdotheyknow%e2%80%99s-share-of-central-government-foi-requests-%e2%80%93-q2-2011/
44 http://www.mysociety.org/2009/10/13/behind-whatdotheyknow/
What are the Strengths and Weaknesses of the Freedom of Information Act?

The strengths of the Freedom of Information Act

24. The Act has undoubtedly empowered people and given them rights they did not previously have to access information held by public bodies.

25. The definition of a “request” is non-prescriptive and informal, with no need to cite the Act or use any particular wording. This makes it very accessible—requesters don’t need to know the law in detail when making a request.

26. The fact that no fees are usually charged removes a significant barrier to people seeking public information. We believe that charging would introduce a severe “chilling effect” on transparency, and would be a retrograde step.

The weaknesses of the Freedom of Information Act

Bodies not covered by Freedom of Information

27. We often receive queries from our users who are hoping to request information from bodies with a public role but which are not currently covered by the Act.

28. We support the Government’s plans to extend the coverage of the Act to more bodies carrying out public functions.

29. The bodies not covered by the Act that are most frequently requested by our users are:
   (a) Housing Associations.
   (b) Network Rail, Train Operating Companies and ATOC.
   (c) Water and Sewerage Companies.
   (d) Representative bodies of public authorities, eg Local Government Association; Association of London Government
   (e) Duchies of Cornwall and Lancaster.
   (f) Local Safeguarding Children Boards
   (g) London Organising Committee of the Olympic Games and Paralympic Games Limited (LOCOG).
   (h) Nominet & JANET.
   (i) Corporate Officers of the House of Commons and House of Lords.
   (j) Press Complaints Commission.

30. Other significant requests for coverage (which we support) are for outsourced providers (such as Serco PLC running private prisons). Although the Act makes provision for information “held on behalf of” a public authority to be covered by the Act, this has been interpreted quite strictly by the Commissioner and the Tribunal which has often made it difficult to get information about how outsourced services are being operated.

31. In addition, many shared service providers are often set up as joint ventures with minority stakes held by private companies (eg Southwest One Ltd, Liverpool Direct Ltd). This means they are not wholly owned private companies, so would not come under the new definition of public authority introduced with the Protection of Freedoms Bill.

Time limits

32. The Act includes two significant loopholes that can lead to substantial and unbounded delays in responding to requests.

33. Firstly, the public interest test extension allows public authorities to delay final responses for a “reasonable” time while the balance of the public interest is considered. There is no statutory limit on the time that can be taken for this.

34. Secondly, the internal review process that is required before complaining to the Commissioner also has no statutory limit.

35. Although the Information Commissioner has produced guidance that sets absolute limits on what is “reasonable” in each case, these do not have the direct force of law and have proved ineffective in practice.

36. Fixed time limits for conducting public interest tests and internal reviews should be added to the Act, in line with the position in Scotland. We believe that this change would provide more certainty and reduce delays which undermine the purpose of the Act.

46 This is an issue for when the Commons and Lords cease to exist during dissolutions
Is the Freedom of Information Act Operating in the Way that it was Intended To?

Publication schemes

37. We do not believe that publication schemes have been very successful. Typically only the minimum of information required by the Commissioner’s model publication schemes are included, and it is often hard to actually locate the promised information on authorities’ websites.

38. WhatDoTheyKnow demonstrates that it is possible to engineer publication systems to facilitate disclosure of public sector information to a wide audience at minimal cost. We expect this to reduce the need for requests to be made, and therefore the cost to the public purse.

39. We believe that every authority should maintain an up-to-date disclosure log of requests and responses including refused or “not held” requests. This would help to bring some of the benefits of the WhatDoTheyKnow publication model to the full range of FOI requests they receive.

40. We believe that proactive publication of a much wider range of information would forestall significant numbers of requests, particularly many of the “round-robin” requests that are sent to large numbers of public authorities. For example registers of assets and of contracts would go a long way towards satisfying many of the requests we see from commercial organisations.

Adding new bodies

41. Section 5 of the Act explicitly provides a straightforward mechanism for the government to bring a wide range of bodies fulfilling functions of a public nature or providing contracted out services under the FOI regime. However only a very few bodies have been added in this way. We believe that this power should be used much more extensively.

The effect of WhatDoTheyKnow

42. The memorandum to the committee from the Ministry of Justice specifically mentions WhatDoTheyKnow, in Annex E:

“A few respondents also speculated that individuals now realise just how easy it is to submit an FOI request, citing the website ‘WhatDoTheyKnow.com’.”

43. They go on to note that not only does WhatDoTheyKnow make it much easier for people to make requests, it has also made it easier for people to follow them up, for example by requesting an internal review.

44. We believe that by simplifying the process of making a request, WhatDoTheyKnow increases the effectiveness of the Act.

45. By publishing responses we also make it easy for others to find the same information without needing to make a fresh request. The average (mean) number of requests made by a user of our site is about four. The average number of times a single request is viewed is around 20.

46. The site has been carefully designed to advise and guide users on their rights and responsibilities under the Act. In particular we prompt our users to search our site, public bodies’ websites, and the wider Internet, for information before making a request for it. At the internal review stage we require them to explain the reasons why they are seeking an internal review.

47. By making requests and responses public, we also make it easier for people to judge for themselves whether the Act is being abused. For example in a small number of cases before the Information Commissioner, the totality of requests by an individual or to a particular body on WhatDoTheyKnow has been cited as supporting evidence for a claim of vexatiousness.

Vexatiousness

48. We support the general concept of being able to refuse vexatious requests and we note that the Commissioner and the Tribunal are generally very supportive of authorities that reject genuinely vexatious requests.

49. A balance needs to be struck between protecting public authorities and recognising that some requests will be entirely valid even if they do cause annoyance to the authority.

Other difficulties with the Act

50. In the course of operating the WhatDoTheyKnow website we have encountered various other problems with how the Act has been applied.

Finding the right public authority

51. Requesters often have difficulties identifying the correct public authority to send their request to. For example, confusion exists around the functions of police authorities and police forces. Requesters also struggle
selecting the appropriate tier of local government (county, district, town, parish etc) responsible for a certain function.

52. This has the undesirable effect of public authorities often receiving requests for information that they don’t hold, which can be seen by some as a drain on public resources. Our experience is that FOI Officers are usually very helpful (in line with their duties under Section 16 of the Act to provide advice and assistance), and are easily able to quickly point requesters to the more appropriate public body.

53. Some authorities have unnecessary complex and costly procedures for logging correspondence like this for monitoring their compliance to the FOI regime—we believe this is not what was originally intended, and should be dealt with under a simpler “business as usual” regime.

Contacting public authorities

54. Requesters nowadays expect to be able to correspond electronically with public authorities, therefore the provision in section 8(2) of the Act for requests to be transmitted by electronic means is very important. One of the biggest challenges they face is finding correct email addresses for authorities’ FOI Officers.

55. We suggest that it should be a requirement of the Act that authorities publish contact details, including an email address, for FOI requests in an easy to find way. One suggestion that works well in Scotland, is for the Information Commissioner to be responsible for maintaining a register of public authorities.

Format of responses

56. Authorities frequently insist on sending responses by post. Given that digitisation technology should be easily available to all but the smallest authority, we would like to see strengthened provisions in section 11 of the Act for requesters to specify a preference for electronic delivery, including a preference for specific file formats.

57. Many authorities—including the ICO itself—release documents originally held in electronic format by printing them out and then scanning the results. This is wasteful and makes it very hard for further use of the documents without retying the contents.

58. There are provisions under consideration in the Protection of Freedom Bill for mandating the release of information in reusable form, but these will only apply to “datasets”, which is a very limited subset of all the information covered by the Act. We believe that the Act should be clarified to make this a requirement (where feasible) for all releases under the Act.

Defamation

59. Section 79 of the Act extends privilege to public authorities issuing requesters with defamatory information. We recommend this privilege be extended to third parties who re-publish such information without malice, allowing campaigners or journalists working with such material a level of legal protection.

Section 44

60. Section 44 of the Freedom of Information Act exempts information from disclosure if other legislation would prevent its release. Unlike many of the other exemptions in the FOI Act, it can be applied even where there is an overriding public interest in making information available.

61. Information in the following areas has been requested via WhatDoTheyKnow, and not made available: tax affairs, local government maladministration complaints, animal experimentation, investigations or regulatory dealings with communications companies or financial firms, investigations into companies, police investigations, product safety and many other fields.

62. Our recommendations to improve the level of transparency in this area are:

(a) Make section 44 a conditional exemption, requiring a public interest test to be carried out when invoking it.

(b) Existing powers under section 75 of the Act should be used to review and repeal unnecessary restrictions on information publication.

(c) The legislation “Impact Assessment” process should include the effects of the new law on FOI and transparency.

(d) Parliamentary legislation scrutiny committees should draw MPs’ attention to any FOI restrictions Ministers are seeking to introduce.

Conclusions and Recommendations

63. In summary, we believe that the FOI Act has strongly improved the transparency of public authorities, and has been broadly welcomed by the general public. Requesters have become more aware of their rights under the Act, and are putting released information to good use, whether by reporting it as news, holding their elected representatives to account, or campaigning for improvements in public services.
64. WhatDoTheyKnow is increasingly playing a significant role in this process, by educating the public in practical use of the Act, and by making information available and easily searchable in a single place.

65. We recommend that fixed time limits be introduced for Public Interest Test and Internal Reviews.

66. We would like the coverage of the Act to be significantly extended to cover a wider range of bodies with public responsibilities.

67. We believe that authorities should do more to pro-actively publish information.

February 2012

Written evidence from Liverpool Heart and Chest Hospital NHS Foundation Trust

1. EXECUTIVE SUMMARY

1.1 Liverpool Heart and Chest Hospital NHS Foundation Trust support openness and transparency in the NHS and believe this is an important factor in delivering and achieving the Trusts Patient Experience Vision. Since implementation of the act in January 2005, the Trust has fully adopted and supported compliance with the legislation.

1.2 The NHS is currently impacted by cuts to finances and resources whilst continuing to deliver quality of service to our patients. For many senior managers, both clinical and administrative, FOI becomes an additional task which adds extra pressure on top of everyday business as usual requirements.

1.3 In the 2010–11 financial year the Trust received a total of 146 requests under the Act, with 121 requests received during the first 10 months of 2011–12. It is envisaged that a similar amount of requests will be received this full financial year in comparison with last year.

1.4 Although a significant increase in the total amount of requests received is not expected, the Trust has had to invest in additional resource and expertise to facilitate the process, as requests themselves continue to increase in complexity and detail, with the cost, time and resource element of complying with requests also increasing.

1.5 The following are key suggestions which could help reduce the resource intensiveness and cost of complying with the Act and thus ensure the Act is “fair to all” in order to maintain openness and transparency in the public sector, whilst ensuring requests, responses and facilitation of requests is delivered within the “spirit” of the Act.

— Reduce the appropriate fees limit from £450 as this is too high.
— Include redaction and reading of documentation in the calculation of the appropriate fees limit.
— Application of a charge to the applicant for conducting internal reviews if the original decision is upheld.
— Application of a fee or limit regarding amount of requests submitted by the media, commercial and repeat requestors.
— Applicants to specify if applying on behalf of a commercial or media organisation.
— Applicants permitted to only have one request “open” at any one time and a defined “reasonable” time period before next request can be submitted.
— Remove the requirement to acknowledge receipt of requests and to confirm or deny if information is held when requests are completely inappropriate for the type of organisation they are submitted to.
— Make applicants more accountable for requests they submit and that their details are made available via disclosure logs with the final responses. This will hold individuals to account and could possibly limit what is being requested saving resources and cost.
— Increase timeframe for compliance to 30 working days to reduce burden on retrieval, debate and approval process.

1.6 Through experience and application of the Act, the following brief points highlight opinion from the Trust’s perspective:

1.7 Does the Freedom of Information Act work effectively?

The Act works well in principle and widely supports the openness and transparency agenda which was one of the key aims of the Act. This can only be beneficial for public accountability and an assessment of efficient use of public resources, services and finances; however the irony is that the Act has increased resource and cost requirements in order to ensure compliance with the legislation.
1.8 What are the strengths and weaknesses of the Freedom of Information Act?

The Act has set out to do what it intended and place further accountability on public authorities for decisions made with regard to the public purse. Access to information allows members of the public to make informed decisions about services they potentially wish to receive and also how those services have been developed.

1.9 The weakness is that the Act is not always used as it was intended by a large volume of applicants. As the Act is “applicant blind” each request must be treated uniquely and some requests could be viewed as vexatious, however although the applicant could be deemed as vexatious, the request could not be so it is hard apply.

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

The Act is increasingly being used for commercial gain and attempts to make money from work undertaken by public authorities, as opposed to the public accountability view. The Trust complies with the Act fully and has implemented the Act as required, often “going the extra mile” to provide advice and assistance to requestors, it is the applicants that take advantage of the Act. Applicants have become much more “savvy” in terms of what information they can actually request, and often push the boundaries in terms of knowing their request is complex, but refined enough to remain within the 18 hour appropriate fees limit.

2.0 Introduction

2.1 This memorandum is submitted on behalf of Liverpool Heart and Chest Hospital NHS Foundation Trust who are a specialist tertiary hospital providing heart and chest services for the North West of England, including North Wales and the Isle of Man. The Freedom of Information Act is managed by the Information Governance & Health Records Manager who holds an Information Systems Examination Board (ISEB) certification in Freedom of Information and has been involved with the FOI agenda in two NHS organisations since the Act came in to force, and currently within the role of Information Governance is a Freedom of Information practitioner with responsibility to ensure corporate compliance with the Freedom of Information Act 2000.

3.0 Resources

3.1 In order to maintain compliance with the legislation, the Trust has had to increase its resource base during 2011–12 to manage the FOIA process. In an already a tough financial climate for NHS organisations, additional resource to support the process has been required to ensure disclosure of information meets the statutory 20 day timeframe. As noted in the executive summary, there has not been a significant increase in the amount of requests received, but notably more significant, an increase in the complexity of requests received requiring more time, resource and cost element to comply with request. The process involves multiple senior managers and Directors resulting in significant cost. The cost to comply with FOI requests is increasing but resources are decreasing or remain the same which adds huge pressures to current individual workload, particularly in areas such as finance, nursing, human resources, IT and estates.

4.0 Appropriate Fees Limit and Charges

4.1 As the appropriate fees limit is currently set to £450, a reduction in this limit would reduce the amount of time spent collating information for requests and would significantly reduce the burden associated with the more complex requests. It would not be envisaged that the Trust would look to use a reduced limit to apply an overarching exemption to disclosure as often even when an 18 hour limit is perceived, the Trust routinely discloses any information it can to maintain openness and transparency.

4.2 It could be beneficial to apply a charge for the undertaking of an internal review. The Trust has completed two internal reviews since implementation of the Act and both decisions were upheld and not challenged further. This process is extremely resource intensive, and if the correct decision has originally been made it is a waste of internal resource, often at Director or senior management level to review the whole process to arrive at the same decision.

4.3 As public authorities, we are accountable and must comply with all requests received, however with cost and resource pressures applicants should be accountable for placing strain on public authorities for the amount and complexity of requests. Therefore, it could be beneficial that the Act allows public authorities to publish certain details of the applicant via disclosure logs along with the final published response. This would hold individuals, in particular commercial organisations to account and could possibly limit the amount of requests submitted saving resource and cost.

5.0 Redaction and Reading

5.1 Currently within the appropriate fees limit, the Act does not allow reading time and redaction time to be included within the calculation. Reading and redaction is a key component in all requests, in particular where commercial interests of the Trust or other third parties could be compromised. The Trust often receives requests for the most recent set of Board minutes and “all supporting paperwork or papers submitted to the Board for discussion, approval, information etc”. It is of complete necessity that all papers are reviewed for disclosure
and redaction applied as required where legitimate exemptions apply. Although the appropriate fees limit was not reached, it is estimated that due to the reading and redaction applied, the total time spent on individual requests involving senior managers and Directors equated well over 25 hours. The Trust does routinely publish redacted versions of its Board minutes on the Trust website, however if any further information is requested and is held, then the lengthy process must begin. It would therefore be beneficial to allow reading and redaction time in to the appropriate fees limit calculation.

6.0 Disclosure Timeframes

6.1 In terms of performance of timeframes for compliance, the Trust in general discloses fully within the prescribed 20 working day timeframe, however on occasion there is a requirement to apply for an informal extension with the applicant if the request is particularly complex. In all instances when this has been requested by the Trust the applicant has agreed the Trust continues with its duty to provide advice and assistance. The Trust aims to achieve an internal timeframe of 15 working days for disclosure and currently works to a 72% success rate of this target, with the remainder disclosed within 20 working days. Figure 1 below indicates disclosure timeframes for September 2011 to October 2011.

<table>
<thead>
<tr>
<th>Month</th>
<th>Completed</th>
<th>0-5 days</th>
<th>6-10 days</th>
<th>11-15 days</th>
<th>16-20 days</th>
<th>20+</th>
</tr>
</thead>
<tbody>
<tr>
<td>September</td>
<td>17</td>
<td>0</td>
<td>2</td>
<td>7</td>
<td>7</td>
<td>1</td>
</tr>
<tr>
<td>October</td>
<td>16</td>
<td>7</td>
<td>4</td>
<td>3</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>November</td>
<td>13</td>
<td>3</td>
<td>4</td>
<td>3</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>Total</td>
<td>46</td>
<td>10</td>
<td>10</td>
<td>13</td>
<td>11</td>
<td>2</td>
</tr>
</tbody>
</table>

6.2 With regard to the 2 requests exceeding the 20 day limit in figure 1 above, one was an informal extension agreed with the applicant as the request was complex and detailed. The second was due to the complexity of the request which took longer than expected to collate the information and agree the response. Both of these requests were examples of extra cost and resource applied in order to attempt to comply with the 20 working day disclosure timeframe.

6.3 Driven by the complexities of some requests, an increase in the timeframe for compliance to 30 working days could significantly reduce the burden on retrieval, internal debate regarding exemptions and approval of the disclosure. Often, complex requests involve lengthy correspondence and debate, particularly in instances when the public interest test is required to be assessed. The Trust has robust processes in place to manage requests for information, however the resource and cost requirements to follow for each request to ensure adequacy of response can be a drawn out affair, particularly when information is known to be made available in the media.

7.0 Source of Requests

7.1 On average based on figures from June to November 2011 the Trust has 3 main sources of applicants. Approximately 40% of requests received are from commercial organisations, 35% from “private sources” which include a proportion of the general public, and 18% from press and media. Following correspondence with applicants, it has become clear that a large portion of the “private sources” are in fact from commercial, press and media sources, however as the Act is “applicant blind” there is no reason to refuse such request.

7.2 It also transpires on many occasions that the same organisation has multiple requests submitted to the Trust at any one time from multiple representatives of that organisation, therefore cost and resource is apportioned to one organisation rather than multiple requestors. Many of these applicants are repeat requestors also.

7.3 In order to ensure requests are submitted and dealt within the “spirit” of the Act, it may be of benefit to public authorities to have the right to be notified if an application is being made on behalf of a commercial or press organisation, particularly if the information is intended to be published. Application of a fee or limit regarding amount of requests submitted by the media, commercial and repeat requestors could also reduce the burden, even at least to ensure that applicants are permitted to only have one request “open” at any one time and a defined “reasonable” time period before next request can be submitted.

7.4 A large amount of requests received are completely inappropriate for our organisation as a Heart and Chest Hospital. Often requests are received by “round robin” emails which relate to services obviously not provided by the Trust eg 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. Applicants should take steps to ensure information being requested is likely to be held and not submit inappropriate requests.
8.0 Exemptions

8.1 The majority of exemptions can be applied easily if justified, however the requirement to undertake a public interest test for all qualified exemptions is resource intensive and accrues cost. This is again driven in the main by the complexity and length of some requests, often with multiple questions not directly related. This involves input from senior managers and directors to debate the public interest factors. If the Act could be changed to allow an informed decision from an appropriate officer to arrive at the decision without formally having to document a full public interest test, this would save time and resource, yet still ensure someone is accountable for the decision.

9.0 Summary and Recommendation

9.1 It is recommended the Committee note the cost, time and resource issues experienced by the Trust in fulfilling its requirements to be compliant with the Act. The Trust is committed to openness and transparency and will continue to support this agenda, however if public authorities are to continue to deliver the services they are required to do so for members of the public, then significant burden imposed by the Freedom of Information Act needs to be reduced in order that business as usual is not directly affected. It is recommended the Committee consider possible changes to the Act as outlined in below:

— Reduce the appropriate fees limit from £450 as this is too high.
— Include redaction and reading of documentation in the calculation of the appropriate fees limit.
— Application of a charge to the applicant for conducting internal reviews if the original decision is upheld.
— Application of a fee or limit regarding amount of requests submitted by the media, commercial and repeat requestors.
— Applicants to specify if applying on behalf of a commercial or media organisation.
— Applicants permitted to only have one request “open” at any one time and a defined “reasonable” time period before next request can be submitted.
— Remove the requirement to acknowledge receipt of requests and to confirm or deny if information is held when requests are completely inappropriate for the type of organisation they are submitted to.
— Make applicants more accountable for requests they submit and that their details are made available via disclosure logs with the final responses. This will hold individuals to account and could possibly limit what is being requested saving resources and cost.
— Increase timeframe for compliance to 30 working days to reduce burden on retrieval, debate and approval process.

February 2012

Written evidence from the Information Commissioner

1. Executive Summary

1.1 FOIA is working well on the whole and its objectives are largely being achieved. Major amendments to the core principles and scheme of the Act are not necessary.

1.2 The rights of requesters would be strengthened by making internal reviews mandatory and subject to a time limit. Extended compliance times for consideration of the public interest should be subject to a statutory maximum.

1.3 Limited amendments in respect of frivolous requests, Cabinet minutes and the qualified person’s opinion are worthy of consideration.

1.4 The criminal offence created by section 77 of FOIA should be triable either way in order to make it of practical use.

1.5 The ICO is keeping pace with the increasing volume of complaints and appeals despite diminishing resources from grant-in-aid.

2. Introduction

2.1 The Information Commissioner (“the Commissioner”) welcomes the Justice Committee’s exercise in post-legislative scrutiny of the Freedom of Information Act 2000 (FOIA). The Act has now been fully in force for seven years, during which time considerable advances have been made. A considerable amount of information, of greater or lesser significance to the public or to individuals, has been published as a result of FOIA. In addition, valuable experience has been gained by public authorities, requesters, the Commissioner and the Information Rights Tribunal. A body of jurisprudence in information rights law is emerging, which adds clarity and authority to the statutory framework by demonstrating how it should be applied in practice.
2.2 The Commissioner is in broad agreement with the Ministry of Justice’s assessment of the key issues which have emerged through implementation, as set out in its Memorandum to the Committee in December 2011. This submission will address many of the points raised in Part 4 of that Memorandum (Operation of the Act) and will then go on to comment on other issues which have arisen in the first seven years of FOIA’s operation.

2.3 Overall, the Commissioner considers that FOIA is working well. Although the FOIA has not been universally welcomed and still has its vocal critics, the successful operation of the legislation has proved its fitness for purpose.

2.4 The Commissioner does not consider that significant changes to the core principles of the legislation are needed. Those core principles mark out the UK FOIA as a good model for public access to information, with a largely free and universal right of access subject to legitimate exemptions, many of which are qualified by a public interest test. Enforcement mechanisms are strong, with an independent commissioner with order-making powers, subject to a right of appeal to the Tribunal.

3. THE ROLE OF THE COMMISSIONER

3.1 Parliament has given to the Commissioner specific functions in relation to FOIA. Primarily these are:

— to adjudicate on complaints by requesters that public authorities have not dealt with their requests in accordance with FOIA;
— to approve publication schemes requiring active, routine publication of information by public authorities; and
— to promote good practice by public authorities.

3.2 In relation to the first of these, complaints may be concluded with a Decision Notice specifying any steps which a public authority must take to comply with its obligations in relation to the request. If a complaint is upheld, the public authority will usually be required to disclose to the complainant some or all of the requested information. A Decision Notice is binding by law.

3.3 Either party (the complainant or the public authority) may appeal against a Decision Notice to the First-tier Tribunal (Information Rights), formerly known as the Information Tribunal. Thereafter, further appeal lies to the Upper Tribunal on a point of law only.

4. PROACTIVE DISCLOSURE AND OPEN DATA

4.1 The Commissioner welcomes the policy initiatives by the current government to improve transparency by promoting open data—the availability of datasets in reusable formats and open licensing conditions. The proposed amendments to sections 11 and 19 of FOIA in the Protection of Freedoms of Bill are welcome and allow FOI to keep pace with new ways of using information that weren’t envisaged when the legislation was first drafted. It is important that the relationship between FOIA and open data policy is clearly defined and parallel systems do not emerge. The Commissioner responded to the recent Cabinet Office consultation on open data. It is also important that FOIA is not regarded as the same as open data; the two do, and should, overlap but they are different concepts. FOIA offers a much broader concept of information, covering structured and unstructured data (e.g., memos, emails, notes) whereas open data covers access to information and re-use.

4.2 Proactive disclosure should be maintained as an important obligation in FOIA but the Commissioner agrees with the suggestion in the Ministry of Justice (MoJ) Memorandum that the concept of publication schemes requires review and possible replacement with a different approach to proactive disclosure.

5. SCOPE OF FOIA

5.1 The Commissioner has consistently maintained that the scope of FOIA is a matter for Parliament and the Government. While the Commissioner may welcome any extension of the scope of FOIA, his primary concern is that there should be certainty as to whether a body is or is not covered by the Act. This was the key message of his response to the original MoJ consultation on extending the scope of FOIA back in 2008. Clearly this does not arise when a body is specifically named in the relevant legislation, but it can arise where classes of public body are subject to FOIA. For example companies wholly owned by public authorities, covered by virtue of section 6(1), are not easily identified.

5.2 The Commissioner is concerned that there may be further confusion where new arrangements are made for the provision of services currently or previously delivered by public authorities. A key benefit of FOIA from the outset, in terms of transparency and accountability, has been its use to demonstrate how public money is spent. The presumption of transparency should always follow the public pound.

5.3 The Commissioner understands the concern expressed in some quarters that activities which are or have been regarded as public services provided by bodies which the public would expect to be covered by FOIA, may not be in the future as a result of government reforms. Examples which have already arisen concern Network Rail and the privatised utility companies. These are not public authorities under FOIA, but this surprises some who seek information from them. The Commissioner has been required to consider whether
these bodies are public authorities under the Environmental Information Regulations, the parallel access regime for environmental information. Appeals to the Tribunal have been made. This is time consuming and costly litigation which can be avoided if there is certainty as to the bodies which are covered by the legislation.

6. Vexatious Requests

6.1 The Commissioner has been concerned from the outset that some requests might place an excessive or disproportionate burden on public authorities. Section 14 of FOIA discharges the public authority from its obligation to comply with a request that is vexatious. “Vexatious” is not defined by the Act, so the Commissioner applies the normal meaning and has developed guidance which sets out a number of factors to be considered in determining whether a request is vexatious.

6.2 The Commissioner also published a charter for the responsible use of FOI rights in 2007 to advise requesters how to frame effective requests and avoid making requests which might legitimately be regarded as vexatious.

6.3 The Commissioner agrees with the statement in the MoJ’s Memorandum that public authorities make less use of the vexatious request provision than they might. He notes the concern expressed by public authorities that the section is difficult and confusing to use. Often it is the individual requester who is perceived as vexatious, whereas FOIA requires the judgement to be made of the request, not the requester.

6.4 The Commissioner recognises that public authorities may consider that it is easier or cheaper to deal with the request than it is to treat it as vexatious. However, in doing so they do not help themselves in the long run, as vexatious requests are often generated by one individual or a group exhibiting repeat behaviour which causes a nuisance and disproportionate burden on the public authority.

6.5 The Commissioner welcomes the acknowledgement that his decisions generally demonstrate support for public authorities’ reliance on section 14(1). He is in the course of revising his guidance on this provision in the light of recent Tribunal decisions. However, in the light of experience, he suggests that it may be appropriate to extend section 14(1) to discharge public authorities from their obligation to comply with frivolous requests as well as vexatious requests. This would reduce the burden of compliance with obviously trivial or light-hearted requests, without a serious purpose, even if they did not have the effect of annoying or harassing the public authority. The Republic of Ireland’s FOIA takes this approach.

6.6 Section 50(2)(c) of the UK FOIA discharges the Commissioner from his complaint-handling obligations if the application to him is “frivolous or vexatious”. For some reason Parliament made a distinction between this provision and that in section 14(1) applying to requests to public authorities. The Commissioner considers that bringing frivolous requests within section 14(1) might give public authorities clear ability and greater confidence to relieve themselves of their FOIA obligations where requests are clearly without merit. In the event of such an amendment, the ICO would issue appropriate guidance for public authorities and requesters. Requesters would, of course, continue to have the right to complain to the Commissioner, who would be able to overturn a finding that a request is frivolous and order the public authority to comply with it.

Exemptions

7. Section 35

7.1 The Commissioner broadly agrees with the comments in the MoJ Memorandum regarding the use of exemptions when responding to FOI requests. He acknowledges the concern expressed in some quarters about the section 35 exemption for information which relates to the formulation and development of government policy. However, he considers that this is largely overstated and is often based on a misunderstanding of the law and of the Commissioner’s approach in difficult cases.

7.2 The most important thing to note is that the government policy exemption is qualified, not absolute. The exemption is expressed in broad terms so is easily engaged in appropriate cases. Most cases turn on the application of the public interest test. The qualification of broadly drafted exemptions by the public interest test is one of the core principles and key strengths of FOIA.

7.3 The need to protect “the policy making space” is fully recognised by the Commissioner, particularly when the policy in question continues to be the subject of live debate. The Commissioner also recognises what is often referred to as a “chilling effect”, namely that policy discussions will be less full and frank, with less honest advice given and fewer imaginative policy options put forward, for fear that information about what was said will be disclosed prematurely through FOI.

7.4 The Commissioner rejects any blanket assertions that his decisions fail to have proper regard for these concerns. However, the public interest test must be conscientiously applied in all the circumstances of the particular case. Very often the balance of the public interest is in favour of maintaining the exemption and withholding the information. However on occasions, factors such as the significance of the matters discussed or the limited impact of disclosure after a period of time weigh more heavily, requiring disclosure in the public interest.
7.5 Likewise with Cabinet material. The Commissioner has consistently given considerable weight in his decisions to the convention of collective Cabinet responsibility and the importance of maintaining the confidentiality of policy discussions at the highest level of government. However, the exemption in FOIA for communications between Ministers is again not absolute, but subject to the public interest test. The MoJ Memorandum accurately recites the occasions on which the Commissioner has ordered the disclosure of Cabinet minutes and the occasions, to date, on which the ministerial veto has been exercised to overturn the decision of the Commissioner and the Tribunal.

7.6 There is one further case where the Commissioner has ordered the disclosure of Cabinet material, but has agreed that disclosure should be delayed for some months. This information relates to the Hillsborough football stadium disaster. It has been agreed that the independent Hillsborough panel should first complete its work.

7.7 Finally, the Commissioner would point out that a number of his decisions following complaints about withheld Cabinet papers have upheld the government’s refusal to disclose the information. Examples include the minutes of the Falklands War Cabinet and the minutes of the decision to support the bid to host the Olympic Games in 2012. These decisions tend not to be recognised, remembered or referred to by FOIA’s critics.

7.8 The Commissioner considers that the exemptions for the formulation and development of Government policy and Ministerial communications are workable as currently enacted. It is inevitable that decisions as to whether information about sensitive political issues will attract media attention and may raise concerns for politicians and senior civil servants. The Commissioner does not consider that experience to date indicates a need for change to this exemption.

7.9 However, he notes the concern about the disclosure of Cabinet minutes themselves and acknowledges that to date this is the one class of information in respect of which the Ministerial veto has been exercised. On the occasions when the veto has been exercised the Commissioner has made a special report to Parliament explaining his position. He would question the extent to which genuine “exceptional circumstances” applied. Rather there appears to be a point of principle over the status of Cabinet minutes.

7.10 Therefore, if Parliament is of the view that Cabinet minutes should never be disclosed under FOIA, then the appropriate course of action would be to amend the exemption so as to make Cabinet minutes themselves subject to an absolute exemption, excluding the consideration of the public interest test. The Commissioner is not recommending this. It is a matter for Government and for Parliament. However, it is not in the public interest for requesters of information to believe that Cabinet minutes may be accessible under FOIA if in reality they are not and Parliament never intended that they should be. Not inconsiderable amounts of public money have been spent on those cases where ultimately the Ministerial veto has been used to block disclosure.

7.11 In all other respects the Commissioner’s view is that the exemption provided by section 35 should continue to be subject to the public interest test. Extending an absolute exemption to all material relating to the formulation and development of public policy would seriously curtail the reach of FOIA, which itself would be contrary to the public interest.

8. Section 36

8.1 The MoJ Memorandum explains how reliance on this exemption is dependent on the reasonable opinion of a qualified person. While this procedural hurdle might mean that the exemption cannot be invoked lightly, it is questionable whether it is strictly necessary now that FOIA has become firmly established in public sector administration.

8.2 Without the requirement to obtain a qualified person’s opinion, the exemption would operate as others which require the demonstration of a likelihood of prejudice to a particular interest (in this case the effective conduct of public affairs). It would remain subject to the public interest test. In the Commissioner’s opinion this would simplify both the use of this exemption in practice and the investigation by the Commissioner of subsequent complaints, resulting in greater efficiency and speedier outcomes, which would be to everyone’s benefit.

8.3 In the meantime the Commissioner has recently issued fresh guidance on the use of this exemption, including the need to demonstrate how the qualified person’s reasonable opinion was reached.

9. Section 40

9.1 Personal information is protected from disclosure under FOIA by reference to the data protection principles. This does not mean that personal information cannot be disclosed. The data protection principles require a fairness test which recognises the legitimate interest in disclosure as well as the rights of individuals to respect for their privacy. Cases often turn on whether information concerns public life, official business or the use of public money. The reasonable expectations of the person concerned (the “data subject”) as to whether the information might legitimately become public is often a relevant factor.

9.2 This is an area where jurisprudence has developed significantly since 2005. Information which would previously have been considered personal and inappropriate to disclose, such as salary, expenses and
discretionary payments or terms of severance may now be released under FOI, sometimes after the Commissioner or Tribunal has ordered disclosure.

9.3 The Commissioner’s expectation is that this is an area where the trend towards greater transparency is likely to continue. Emerging developments at European level, with the proposed revision of the Data Protection Directive, are likely to have an impact in years to come.

10. ENVIRONMENTAL INFORMATION REGULATIONS (EIR)

10.1 The Commissioner is conscious that the policy responsibility for this access regime does not lie with the MoJ, but with Defra. He agrees with the comments in the Memorandum that the operation of the parallel regimes can be confusing for public authorities and particularly for requesters. The Commissioner’s comments regarding the need for clarity in identifying which bodies are covered by FOIA apply to a much greater extent in relation to the EIR. Particularly unhelpful is regulation 2(2) which excludes from the definition of public authority any body designated as a FOIA public authority under a section 5 order, thus excluding ACPO, UCAS and the Financial Ombudsman Service.

11. TIMELINESS OF RESPONSE

11.1 As the MoJ Memorandum indicates, the ICO now monitors public authorities which come to its attention for unacceptably poor response times to FOI requests. Formal ICO interventions with 52 public authorities have been made, resulting in significant improvements. Key to this success has been the engagement of top managers at the public authority. Sometimes this has been by way of a personal undertaking to improve performance, as with the Ministry of Defence, Cabinet Office, Birmingham and Wolverhampton City Councils. The Commissioner regards the timely fulfilment of FOI obligations as a key challenge for public authorities when there is such pressure on resources. However, better tracking systems, a more positive approach to disclosure and active communication with requesters have all been shown to produce positive results. The ICO continues to take forward its work in this area. A further list of authorities to be monitored will be announced shortly.

11.2 FOIA permits an extension of the 20 working day response time where a qualified exemption is applied by the public authority but it requires more time to consider the public interest test. Section 10(3) extends the time for compliance “until such time as is reasonable in the circumstances”. The Commissioner considers that an extension of more than 40 working days (giving 60 in total) should never be required. An amendment to provide for this as a statutory limit would strengthen the rights of requesters in this regard.

SANCTIONS, COMPLAINTS AND APPEALS

12. Internal Reviews

12.1 One area of weakness in the current FOI regime identified by the Commissioner is the lack of provision for a mandatory internal review with a statutory time limit. Currently, provision for internal reviews is made only in the Code of Practice issued by the Secretary of State under section 45 of FOIA. This means that time limits for internal reviews cannot be effectively enforced, which undermines efforts to secure timely compliance. The position under FOIA contrasts with that under the Freedom of Information (Scotland) Act 2002 and under the EIR, both of which provide for mandatory internal reviews with enforceable time limits. The Commissioner would welcome an amendment to FOIA along the same lines to strengthen the current regime.

13. Complaints to the ICO

13.1 The MoJ Memorandum refers to concerns expressed in earlier years regarding the delays in complaint handling at the ICO. This is an area where significant improvement has been achieved in recent years. Table A below shows the annual figures for complaints received and closed, Decision Notices issued, and Tribunal appeals raised from 2005 to 2012. Figures to 31 March 2012 are estimates only at this stage, projected from actuals as at 31 January 2012.

<table>
<thead>
<tr>
<th>Financial Year</th>
<th>FOI Casework Received</th>
<th>FOI Casework Closed</th>
<th>Decision Notices Served</th>
<th>Legal Appeals Raised</th>
</tr>
</thead>
<tbody>
<tr>
<td>2005–06</td>
<td>2,713</td>
<td>1,666</td>
<td>186</td>
<td>47</td>
</tr>
<tr>
<td>2006–07</td>
<td>2,592</td>
<td>2,601</td>
<td>339</td>
<td>92</td>
</tr>
<tr>
<td>2007–08</td>
<td>2,646</td>
<td>2,658</td>
<td>395</td>
<td>96</td>
</tr>
<tr>
<td>2008–09</td>
<td>3,100</td>
<td>3,019</td>
<td>296</td>
<td>87</td>
</tr>
<tr>
<td>2009–10</td>
<td>3,734</td>
<td>4,196</td>
<td>628</td>
<td>161</td>
</tr>
<tr>
<td>2010–11</td>
<td>4,374</td>
<td>4,369</td>
<td>817</td>
<td>202</td>
</tr>
<tr>
<td>2011–12</td>
<td>4,384</td>
<td>4,606</td>
<td>1,098</td>
<td>287</td>
</tr>
</tbody>
</table>
13.2 The increasing number of complaints received continues to present a significant challenge to the ICO. Improvements have been achieved through a focus on efficient throughput, maintaining a stable and thus more experienced workforce, revised and more streamlined systems and greater delegation of decision-making. The ICO continues to make improvements, building on experience and seeking efficiencies in all areas. This is a particular challenge in the face of severe reductions in grant-in-aid. The ICO’s funding streams for its data protection activity and its FOI/EIR activity are completely separate. The former is dependent on income from notification fees, but FOI is funded exclusively from grant-in-aid, via the MoJ. No cross-funding is permissible.

13.3 The forthcoming year’s grant-in-aid to the ICO for its FOI/EIR work shows a reduction of 23% from 2009–10. For 2012–13 it is set at £4.25 million with further reductions projected until 2014–15. The funding profile from 2005–06 to 2014–15 is shown in Table B below.

<table>
<thead>
<tr>
<th>Year</th>
<th>£m</th>
</tr>
</thead>
<tbody>
<tr>
<td>2005–06</td>
<td>5.10</td>
</tr>
<tr>
<td>2006–07</td>
<td>5.55</td>
</tr>
<tr>
<td>2007–08</td>
<td>5.05</td>
</tr>
<tr>
<td>2008–09</td>
<td>5.50</td>
</tr>
<tr>
<td>2009–10</td>
<td>5.50</td>
</tr>
<tr>
<td>2010–11</td>
<td>5.20</td>
</tr>
<tr>
<td>2011–12</td>
<td>4.50</td>
</tr>
<tr>
<td>2012–13</td>
<td>4.25</td>
</tr>
<tr>
<td>2013–14</td>
<td>4.00</td>
</tr>
<tr>
<td>2014–15</td>
<td>3.75</td>
</tr>
</tbody>
</table>

13.4 The Commissioner clearly recognises that such reductions are inevitable in the current economic climate. However, he must point out that this has an impact. Significantly improved performance through efficiency has been demonstrated despite these reductions in funding, but there are limits as to what more can be achieved.

13.5 In particular, the Commissioner points out that any additional responsibilities on his office arising from the transparency agenda or, for example, revisions to the statutory regime for the re-use of public sector information would require commensurate funding. The Commissioner welcomes the steps which are being taken to enhance his independence, but these are of little value if they are not underpinned by adequate funding for the discharge of his responsibilities.

14. **Appeals to the First-Tier Tribunal (Information Rights) and Beyond**

14.1 This is one area where expenditure incurred by the ICO is significant and unpredictable. Again the ICO has successfully kept costs down despite an ever-increasing number of appeals. It has done this by increasing its team of in-house lawyers, thus reducing reliance on external counsel, and by declining to attend oral hearings in appropriate cases when written ICO representations are sufficient.

14.2 Because the Commissioner is the respondent in every FOIA appeal before the Tribunal, his input is always required. This is kept to written representations as far as possible. However, recent changes to the Tribunal rules, referred to in the MoJ Memorandum, include the right of any party to insist on an oral hearing. Although the Commissioner in these circumstances may decline to be represented, that will not always be in the interests of justice. Again, this increases the resource burden on the ICO.

14.3 Under the Freedom of Information (Scotland) Act 2002, an appeal against the Scottish Information Commissioner’s decisions may only be made on a point of law to the Court of Session. This contrasts with the UK FOIA which requires the Tribunal to consider whether the Commissioner’s decision is in accordance with the law and whether any discretion should have been exercised differently. The Tribunal may review any finding of facts, allowing a full merits review. While the Commissioner considers that the appeals system under FOIA has helped with the development of the law and its practical application in the early years, there may be a case for considering whether the time and cost involved in operating the current appeals system is warranted.

15. **Section 77 Offence**

15.1 One particular provision of FOIA which, in the Commissioner’s opinion, is not working as intended is section 77. This is the criminal offence of altering, deleting or concealing disclosable information after a request has been made for it, with the intention of preventing disclosure. Given the inevitable time lapse between a request being made to public authorities and a subsequent complaint being referred to the Commissioner, the six month time limit, running from the commission of the offence, is very problematic.

15.2 The Commissioner’s preferred option is for the offence to be triable either way, rather than summary only. This would better reflect the seriousness of the offence and would overcome any difficulties with time limits as none would apply. An alternative would be to amend the law to the effect that the six month time limit only starts to run when the allegation that the offence has been committed is first referred to the
Commissioner. This would be an improvement on the current situation, although it is foreseeable that there might still be room for argument over the relevant date.

February 2012

Written evidence from the Newspaper Society

1. The Newspaper Society represents regional media companies which publish around 1,200 local and regional daily and weekly newspaper titles with a readership of 32 million each week and 1,600 associated websites attracting 42 million unique users every month.

2. The Newspaper Society and its members campaigned strongly for the introduction of freedom of information legislation. They believe that the Freedom of Information Act 2000 has not dispelled the UK's culture of official secrecy, but is a helpful tool in extracting information from national, regional and local public bodies which would otherwise not be made public. However, improvements are still needed to the effectiveness, scope and operation of the Act and to encourage best practice by public bodies in its day to day implementation.

3. An NS survey carried out in 2004, the year before the Act came into force, suggested that over 80% of regional daily newspaper editors and over 60% of local weekly newspaper editors ranked secrecy amongst public bodies of high or very high significance. They were sceptical about public bodies' preparations for the Act, but reported that some had indeed commenced discussions with editors in pursuance of a joint initiative by the then Lord Chancellor and the Newspaper Society.

4. Five years on, another NS survey in 2010 of 63 local daily and weekly newspaper editors suggested that the culture of secrecy had yet to be displaced—80% felt that local councils, police and health authorities were becoming more secretive, with just 10% suggesting that it was becoming easier to obtain information from them and 13% perceiving no change.

5. More public authorities and public services now employ more press officers, but editors feel that their proliferation has tended to obstruct rather than facilitate the flow of information to the public, especially where their priorities are reputation management. They can reduce direct contact between reporters and those actually responsible for policy areas or decision-taking or operational activities, detrimental to constructive discussion and provision of information. FOI rights therefore become more important- and some members say that press officers sometimes ask journalists to submit FOI requests rather than seek the information via the press office.

6. Legislative changes affecting the operation of public authorities and services and their practical consequences have also contributed to official secrecy, in addition to the development of data protection and related areas of law. For example, the changes in the way that local government is conducted, in cabinet rather than committee, the growth of contracting out, formation of companies and devolution of public functions to others have effectively reduced public access to information rights, or opportunities for legally enforceable public scrutiny conferred by more specialized legislation. If the public body continues to perform the public functions, then FOIA can be helpful in providing alternative rights to information and thereby assisting local newspapers' coverage of issues of relevance and importance to their local readership. However, a high proportion of requests can be unsuccessful—the 2010 survey respondents suggested that on average, the information requested was not obtained in just under a fifth of cases.

7. FOIA requests by the regional and local press in the course of investigation of, or for the purpose of reporting upon, the activities of public authorities should not be lightly dismissed as an excessive or illegitimate use of the Act, or the costs of response as an unjustified drain upon the latters' resources.

8. We refer you to any regional and local newspaper companies’ submissions made directly to the Committee, which may explain their use of the Act in investigation and reporting, perhaps illustrated by examples of the information which has been released to the public through articles that they have published as a result. It is possible that some local authorities information now make information routinely available, as part of publication schemes or otherwise, as a result of regional press FOI requests and stories which resonated with the public.

9. We hope that the Committee might look at some of the easily accessible sources for examples of the information uncovered and the important, interesting and wide variety of subjects and issues raised in regional and local press stories as a result of FOI requests from a variety of sources. For an up to date round up of a range of such regional media FOI stories each week, the Committee might find very helpful the blog of David Higgerson, Digital Publishing Director, Trinity Mirror Regionals, including his “Friday FOI round up”:

http://www.newspapersoc.org.uk/11/mar/10/blog-tracks-local-medias-use-of-foi-each-week
10. In the early years of the Act’s operation, the CFOI published a report summarising 500 FOI stories published in 2005, followed by a 250 page report in 2008 summarising more than a thousand stories published in national and regional newspapers in 2006 and 2007 as a result of disclosures under the FOI legislation of the UK and Scotland:


11. The 2008 report’s introduction gave a good description of the benefits of the Act, providing information and informing debate on a wide range of issues:

“The stories demonstrate the enormous range of information being released under FOI. They include significant disclosures about the Iraq conflict, the possible cause of gulf war syndrome, assaults on public service staff, the state of civil service morale, compensation paid to victims of medical accidents, schools’ efforts to inflate their exam results, hospital techniques for deflating waiting lists, the universities teetering on the edge of financial collapse, police officers with criminal records, government efforts to encourage gambling, lobbying by multinational oil, pharmaceutical and food companies, nuclear safety and other hazards, crimes committed by offenders on parole, unpublicised prison escapes, the expansion of the national DNA database and innumerable reports about high expenses claims and dubious public spending. These disclosures throw new light on the government’s approach to many issues, identify shortcomings in public service delivery, highlight other problems which have not been addressed and show where policies have succeeded. They reveal the substantial contribution to accountability made by the FOI Act. Most of these stories are based on FOI requests made by journalists, though some may be reporting on FOI requests made by other requesters”.

12. The FOIA has therefore helped to improve access rights and achieve wider disclosure of information. However, a culture of openness is not yet universal and both the Act itself and manner of observation require improvement.

13. Whatever the circulation areas of our members’ title, their journalists and editors have informed us of frustration in respect of the Act’s operation.

14. They typically cite a wide variation in their local public bodies’ and public services’ practice and culture. Some authorities within their areas are helpful and co-operative. Others appear more obstructive, albeit some of those might have helpful FOI officials battling against the less helpful prevailing culture of their organisation.

15. Despite the intention that all FOI requests should be treated in the same way, whatever their origin, our members report that journalists’ requests may well be accorded different treatment by some public bodies, possibly because of the perceived likelihood of public disclosure.

16. There are concerns about delay in responding to requests, including failure to comply with recommended time frames when considering the application of exemptions.

17. Journalists feel that there is an over-readiness to apply and rely upon exemptions to refuse FOI requests. Exemptions are misunderstood, misinterpreted or misapplied. The requestors will persist and such problems will sometimes be overcome as a result of internal review or recourse to the ICO. However, this entails further delay.

18. The NS and its members would therefore firmly oppose any changes to the Act which could deter requests or allow more requests to be refused.

19. The NS would oppose any changes to the legislation that would widen public bodies’ grounds to dismiss FOI requests on the grounds of triviality or irritation. The Act’s provision for refusal of vexatious requests is quite sufficient—and some of our members suggest that it might be too capable of misinterpretation or inappropriate application.

20. The Committee may be aware of the strength of regional press opposition to past proposals put forward by previous governments to curb use of the Freedom of Information Act and thereby the costs incurred in responding to them (after their economic analysis had identified that the curbs proposed would impact particularly upon the type of requests which might take more time to answer, such as those put forward by MPs’ researchers and the media).

21. We maintain that introduction of charges and fees for requests or reviews or appeals would deter the public from exercising their access to information rights. Alteration of costs and associated time limits and the calculation of either or both for the purpose of enabling requests to be refused under the Act—(eg allowing “consideration” or redaction time to be taken into account or aggregation of the number or costs or time taken to answer requests from an organisation or person, with accompanying identification checks)—would all too easily be exploited to enable blanket refusal of requests. The release of important information or embarrassing information could all too easily be blocked on submission of the request, simply because it could be said that the public body anticipated some exemption or other provision of the Act might have to be considered in order to answer the request, which would inevitably take it over the relevant limits. Any such request could be difficult to challenge.
22. We would also certainly oppose the introduction of any exemptions or widening of existing exemptions to make refusal easier. Cabinet papers, material relating to cabinet discussions and information relating to policy formulation are already well protected by the Act. Conversely, we would welcome the abolition of Ministerial veto and removal or narrowing of exemptions.

23. The NS would welcome any proposals to strengthen the FOIA and thereby further encourage a prevailing culture of openness, rather than official secrecy. There needs to be even greater emphasis upon an enforceable presumption of provision of information in response to a FOIA request, even if it might fall under an exemption.

24. The NS would support further extension of the FOIA, not only by designation of other public bodies but also by designation of contractors and others performing public functions on behalf of public bodies. We welcome the steps that the Government has already taken to address some loopholes or lacuna. In addition, we refer you to submissions made by the Campaign for Freedom of Information on further improvements needed.

25. In order to improve public access to information at local level, we would ask the Government to consider using its powers under section 5 of the Act not only to designate other bodies which considered to be exercising public functions, but also to designate any contractors which are providing, under contracts made with public authorities, “any service whose provision is a function of that authority”.

26. We also fear that Government initiatives, on Localism and the Big Society, could actually lead to changes in application and loss of more specialist public access to information rights, and hope that the Committee considers whether it would be better to maintain these as well as ensure FOIA rights apply. For example, the Localism Act 2011 for instance does not automatically extend existing local government legislation on public rights of access to meetings and documentation to authorities operating under new arrangements permitted by the Act. In the default of regulations being drawn up by the Minister, in certain circumstances, local authorities, whether elected representatives or the officials/official to whom they have delegated their (widened) functions, could choose to carry out their functions, meet and take decisions in secret, with no public rights of access to relevant meetings, discussion, decision-taking or documentation. There is further lacuna in the remit of their scrutiny and oversight committees, especially where issues affecting more than one local authority are under consideration. In such cases, the public would no longer have their previous statutory local government access to meetings rights but may be able to fall back upon FOIA rights to obtain information. We hope that the Committee’s post legislative scrutiny will check whether there are such areas of overlap and perhaps try to ensure that specialist access to meetings rights but may be able to fall back upon FOIA rights to obtain information. We hope that the Committee’s post legislative scrutiny will check whether there are such areas of overlap and perhaps try to ensure that specialist access to meetings rights but may be able to fall back upon FOIA rights to obtain information. We hope that the Committee’s post legislative scrutiny will check whether there are such areas of overlap and perhaps try to ensure that specialist access to meetings rights but may be able to fall back upon FOIA rights to obtain information.

27. In addition, current proposed reforms to local government, health service and the “Big Society” initiative could all shift the performance of public functions to contractors and private undertakings, but there will be no automatic corresponding extension of the statutory provisions on public access to information rights, public rights of inspection and challenge relating to independent audits, or other rights of public scrutiny to maintain proper public oversight of the service, service provider or deployment of any public funds. When announcing the introduction of FOIA post-legislative scrutiny by the Justice Committee, the Deputy Prime Minister recognised that such changes could result in such loss of statutory rights (as the line between public and private changed) and that the Justice Committee’s post-legislative scrutiny would help ensure that the public’s FOI rights were maintained as any such changes took place. Extension of FOIA would at least help to maintain some public rights of access to relevant information and provide a degree of potential public oversight. However, we also suggest that where the “old” regime gave stronger rights to the public than FOIA alone, creation of equivalent specific access rights may be necessary in addition to FOIA rights. The Government’s transparency agenda ought to be translated into strong statutory disclosure and publication obligations wherever possible, in order to facilitate public access and public scrutiny. Different Government agenda-localism, deregulation—should not be used to justify loss of public rights to information about the activities of public bodies and provision of public services, or other public rights of scrutiny.

28. There should be regular periodic review of FOIA and provision for swift implementation of any recommendations for its extension and for improvement of public access to information rights. This has to continue alongside practical measures to ensure that public bodies designated under the Act actually operate within the spirit of the Act and a culture of openness.

February 2012
Written evidence from Leeds City Council

EXECUTIVE SUMMARY

The Council believes that overall the Act does work effectively, as between the Council and FOI applicants, and helps the Council fulfil its value of being open and honest. It is well-used by citizens, the press and media with the Council receiving over 1200 requests in financial year 2010–2011, and with an increase of approximately 60% in request numbers in the current financial year. The Act contains key exemptions designed to protect private information, and commercially valuable information, so that information in the Council’s hands is protected where this is necessary. In the vast majority of cases—approximately 90%—the Council discloses the information requested or directs the applicant to the source of that information if it is already in the public domain. The key exemptions appear to be well understood and accepted by applicants. The Council receives complaints/appeals in only a very small proportion of cases—approximately 1%, and applications are made to the Information Commissioner’s Office (ICO) in only about 0.5% of cases.

1. The Council believes that overall the Act does work effectively, as between the Council and FOI applicants, and helps the Council fulfil its value of being open and honest. It is well-used by citizens, the press and media with the Council receiving over 1200 requests in financial year 2010–2011, and with an increase of approximately 60% in request numbers in the current financial year. The Act contains key exemptions designed to protect private information, and commercially valuable information, so that information in the Council’s hands is protected where this is necessary. In the vast majority of cases—approximately 90%—the Council discloses the information requested or directs the applicant to the source of that information if it is already in the public domain. The key exemptions appear to be well understood and accepted by applicants. The Council receives complaints/appeals in only a very small proportion of cases—approximately 1%, and applications are made to the Information Commissioner’s Office (ICO) in only about 0.5% of cases.

2. We believe the Act has the following strengths and weaknesses:

1. The Act provides an applicant with the right to have “information” communicated to him (Section 1(1)(b)), and provides that a request for information is one which “describes the information requested”. However, the ICO has interpreted these provisions so broadly that a request for all the information in a specific file, or database would be a valid request. Likewise a request for “all the information in X’s e-mails between 1 January and 31 December” would be regarded by the ICO as a valid request. Please see Decision Notice Reference FS50298572, dated 2 December 2010. This places a very significant resource burden on public authorities. Under the Freedom of Information and Data Protection (Appropriate Limits and Fees) Regulations 2004, authorities are only able to put the cost of certain defined activities towards the “appropriate limit”, such as locating, retrieving and extracting information. They cannot include the cost of time spent considering exemptions. If a request for “all the information” in a file, or database or e-mail account is a valid one, authorities are obliged to consider potentially thousands of items of information to see whether an exemption could, or should be applied, and are not be able to count any of the cost of so doing towards the appropriate limit. We do not consider it was intended to place such a burden on public authorities. In addition, we consider it must be appropriate that an applicant has a particular subject or issue in mind when they seek information, and that this must be described sufficiently in the request. In our view, it should not be sufficient for an applicant to describe the particular medium in which information might be held, such as a file or e-mail account, but rather a valid request should be a request for information about a particular subject or issue.

2. We believe the Act does not enable authorities to reject what are patently frivolous requests. For example, the Council has received a number of requests about ghost sightings and paranormal activity in its buildings. In this respect we believe that in addition to a public authority not being obliged to comply with a “vexatious” request, Section 14(1) should be extended to provide that an authority is not obliged to comply with an obviously frivolous request, in the same way that the Commissioner is entitled not to make a decision on an application which is “frivolous or vexatious” under Section 50(2)(c). In addition, we believe that the threshold set by the ICO and by the First-tier Tribunal for what amounts to a “vexatious” request is too high, and that the guidance issued by the ICO in this respect should be revised.

3. We believe that the appropriate limit of £450 specified by the Regulations mentioned above should not stand in isolation from the number of requests a public authority receives, and that this limit should be linked in some way to the volume of requests received, possibly with a limit by individual applicant or by subject matter.

4. We believe that insofar as the appropriate limit is calculated by reference to staff time, the upper limit of £25 per hour is wholly unrealistic and outdated and should be revised so that authorities can make this calculation by reference to the actual cost of staff time.

5. We consider that the time for compliance with requests, “promptly and in any event not later than the twentieth working day following the date of receipt”, in Section 10(1) takes no account of the volume of requests a public authority might receive at any particular time, or the resources available to it. We think this time limit should be more flexible and should be linked to numbers of requests in some way, or should be revised to extend the time available.
6. We consider the exemptions in Section 41 (information provided in confidence), and Section 43 (commercial interests) have not been applied in a way which acknowledges the potential prejudice to authorities and to bidders for public contracts. In particular, we would refer to Decision Notice Reference FS50265157 dated 27 May 2010 where the Commissioner took the view that disclosing an administration fee payable under a contract “may increase competition and drive prices down”, and rejected the argument that there was a strong public interest in prospective bidders not being discouraged by the fear they would not be on a level playing field with their competitors by reason of disclosures made in response to information requests. We would respectfully suggest that the Information Commissioner lacks the necessary expertise and experience to form a view as to effects of particular disclosures on public procurement exercises, and that greater weight should be placed on the views of the public authority concerned.

7. Generally, we believe the Act prevents authorities and the ICO from distinguishing those requests where there is a clear public interest in disclosure from those requests which serve the private interests of the applicant either entirely or primarily. Authorities and the ICO are bound to give weight to a number of general public interests in disclosure such as openness, transparency, and accountability for the spending of public money, even where applicant’s request is patently self-interested and cites none of those interests, and where there is no actual evidence that those purposes will be served by the particular disclosure. In our view, the Act should make it clear that where the public interest test is applied, the requirement to apply the test taking account of “all the circumstances of the case”, means that an authority is entitled to take account of such factors as the number of similar requests for the same information, the number of individuals likely to benefit from disclosure, and whether the applicant or other individuals will derive some personal financial or other benefit from the disclosure. By way of evidence we would refer to the Decision Notice specified in paragraph 6 above.

8. We believe that the ICO’s investigation and decision-making process places an unnecessary burden on public authorities. In our view, the ICO’s screening process for rejecting applications which are “frivolous or vexatious” under Section 50(2) is inadequate. In addition, although the ICO places strict time limits on authorities for responses to the ICO’s investigations about how an FOI request has been handled, authorities are given no overall indication of how long an investigation will take or how long it will take the ICO to issue a Decision Notice.

9. We believe that most of the exemptions contained in the Act are clear, and are well understood by public authorities and FOI applicants. However, one or two exemptions are overly complex and technical, and difficult to apply—in particular, the exemption in Section 30 (investigations and proceedings conducted by public authorities), and the exemption in Section 40 (personal information).

3. We believe that overall, the Act is operating in the way it was intended to. Although local authorities have long been required to publish significant amounts of information relating to their formal decisions, the Act has increased the amount of information published both routinely by the Council, and in response to individual requests. However, we do not believe it was intended that the Act should enable information with a commercial value to be exploited by an applicant. At present, it is unclear to what extent an authority can charge for information in accordance with its publication scheme, before that information is no longer “reasonably accessible” to an applicant under Section 21. In our view, where an authority has reasonable grounds for believing an applicant intends to exploit information commercially, there should be an exemption which requires their request to be dealt with under the Re-use of Public Sector Information Regulations 2005 which permit charges covering certain costs and a reasonable return on investment.

February 2012

Written evidence from the BBC

POST-LEGISLATIVE SCRUTINY OF THE FREEDOM OF INFORMATION ACT

This short submission by the BBC is formed of two parts, reflecting that fact that the BBC is in an unusual position under the Freedom of Information Act, as both a media organisation whose journalists make freedom of information requests and as a public authority under the Act (in relation to some information) which receives FOI requests.

THE BBC’S USE OF FOI FOR JOURNALISM

BBC journalists have used the Freedom of Information Act as a research tool since it was brought into force in 2005. We believe it has proved itself to be a valuable piece of legislation, which has enabled us to discover and report material in a way which would otherwise have been impossible.

The topics where FOI has enabled us to give our audiences additional information vary widely, and cover all forms of public services from the central government level to the local. To quote just a few instances they include the following: regional variation in ambulance response times, the MOT failure rates for different makes of cars, the extensive cost of policing high profile football matches, the numbers of deaths from house
fires despite the presence of smoke alarms, numbers of babies who missed their one-year health check due to staff shortages, details of which government phone helplines have the worst delays for answering calls, the amount of money raised by hospitals through parking charges, numbers of council homes which have been left unoccupied, and the increasing cost to councils of metal thefts.

These are only a few instances of the many stories since 2005 that the BBC has obtained through FOI at national, regional and local levels. Nevertheless they illustrate the range of issues covered and show how journalism can use FOI to assist the public become better informed on the performance and cost of public services and hold public authorities to account over their record.

The BBC believes that the journalistic use of freedom of information is a particularly valuable use, as the information we obtain in this way can be passed on to our sizeable audiences and become known to a significant proportion of the general public. This is a greater benefit to the public interest than those cases where individuals may make what are possibly perfectly valid FOI requests but are on matters of purely personal interest and the answers they obtain are not passed on to help inform others. This important point has to be kept in mind when considering the cost to public authorities of FOI requests made by journalists.

The use of FOI by our journalists also enables the BBC to make some comments on how the Act has worked from the perspective of requesters.

The efficiency and helpfulness of public authorities responding to requests naturally varies, but the most important practical problem for requesters during the existence of FOI has been delay.

The position at the Information Commissioner’s Office is now much improved, as the large backlog of cases has been effectively tackled.

**Regulatory recommendations**

However, we believe further action is necessary at the authority level, with regard to time periods for extending consideration of the public interest test and for internal reviews. Currently these are not subject to statutory limits. The ICO guidance however is that any extension for considering the public interest should not exceed 20 working days, and that an internal review should take a maximum of 40 working days. We believe these time frames should be converted into statutory limits.

**The BBC as a Public Authority**

Overall, our commitment to the spirit of the Act is evidenced in the structures we have adopted internally. We have an FOI compliance and advisory function within the BBC’s Legal department which is kept separate from the journalistic activity and BBC News.

Over the last 3 years the BBC has dealt with an average of 1,708 requests per year (2009 = 1,771, 2010 = 1,743, and 2011 = 1,610). For those requests that we consider to be held for Journalism, Art or Literature we regularly volunteer relevant information outside the scope of the Act. Each month, we also publish on the BBC’s FOIA website a wide selection of FOIA responses as part of our Publication Scheme.

**Openness and Accountability**

We seek to adopt policies of openness and transparency. We welcome FOI as a tool which facilitates our relationship of openness with the public. We also welcome the fact that it helps our programme-makers to put into the public domain material which merits disclosure in the public interest.

The BBC has pro-actively published information in a number of areas, for example the exact salaries and expenses of its most senior staff. Whilst the release is not made under FOIA, indeed it goes further than would be required under the Act, it is part of the Corporation’s commitment to openness and chimes with our belief in supporting the FOIA.

In other respects the BBC believes the Act is working reasonably well, in striking a balance between the interests of requesters and those of public authorities who receive requests. The BBC also believes that the current regulations on cost limits are a reasonable compromise and that these regulations should therefore not be amended.

*February 2012*
Thank you for the opportunity for us to put forward comments for consideration as part of the Justice Select Committee’s review. I hope our comments below are helpful.

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

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

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

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

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

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

2. The Evening Standard made an FoI request for financial information from the Royal Parks Agency which would not otherwise be available to the public because the agency’s executive holds no public meetings nor publishes minutes of the meetings it holds in private. One example of the information revealed was the £1 million a year cost of maintaining the Princess Diana Memorial Fountain.

3. An investigation by The Independent examined the frequency of contacts between banking executives and the Chancellor of the Exchequer in the weeks immediately after Sir John Vickers published his proposals to reform Britain’s banks. Our journalists uncovered the fact that there had been nine telephone calls or meetings between senior bank bosses and the Chancellor or other Treasury ministers, allowing scrutiny of the lobbying process that was very clearly in play over a matter of the deepest public interest.

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

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

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

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

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

February 2012

Written evidence from Centre for Public Scrutiny

INTRODUCTION

1. The Centre for Public Scrutiny is a charity devoted to enhancing transparency and accountability in public services. We produce research and work closely with practitioners to identify problems and practical solutions in the way the decisions are made and held to account.

2. Over the last few years, we have worked in the local government, charity, health, education and housing sectors to identify ways in which transparency and accountability can be enhanced—principally, by building links between different organisations at local level, and identifying how and in what context accountability can lead to improvements in the effectiveness of service delivery.

3. Because the focus of our research is on accountability in its broadest sense, exploring how decision-makers respond to those who are holding them to account, and the cultural barriers that can often be experienced in securing effective governance, our response will focus on these cultural issues rather than on specific, process-led issues relating to the volume or nature of information requests, and responses to those requests. Our interests lie in proactive rather than reactive provision of data.

CULTURAL CHALLENGES AROUND TRANSPARENCY AND ACCOUNTABILITY IN THE PUBLIC SECTOR

4. We have carried out significant amounts of research over the last several years on cultural, behavioural and attitudinal issues relating to transparency and accountability in the delivery of public services.

5. Our research “Accountability Works” (2010) highlights the existence of a “web of accountability” that cuts across a range of different public bodies, and where different forms of accountability intersect. Transparency, and the publication of official information, helps this accountability to be exerted—but transparency and accountability are not the same thing, and the publication of information does not automatically make for a more transparent organisation. Nor will the publication of information (particularly not reactive publication) automatically bring about any of the objectives of FOIA, as set out in the context of the memorandum’s assessment of those objectives. We consider the approach that the MoJ has set out in its memorandum—based on the assumption that adherence to the process of the FOIA naturally means that these objectives have, to a greater or lesser extent, been met—is flawed.

6. Further research, such as current work we are carrying out on assessing “return on investment”, and research carried out in 2011 on value for money, cost-benefit analysis and social return (“Counting the cost, measuring the value” (2011), “Measuring what matters” (2011)) demonstrates the direct benefits of transparency in terms of economy, efficiency and effectiveness.

7. In our research on performance management, and the use of performance information to drive improvement, (“Green Light” (2010)) we highlight and explored the cultural issues prevalent around transparency. We found that the production and dissemination of information is often seen as a process issue—an additional and unwelcome burden, entirely distinct either from service delivery or from meaningful improvement. A reactive approach to transparency has led to the increased publication of data and information, but data and information made available in an ad hoc way not easily digestible to the average layperson, and devoid of meaningful context. We do not think that this culturally defensive approach on the part of public bodies bodes well for the “army of armchair auditors” that Ministers believe and expect will take on responsibility for exerting accountability in the new structural landscape of the public sector post-2012.

8. A true cultural understanding about the benefits of transparency would lead to a situation where the publication of information was seen as a natural byproduct of its original production. Discussions around the minutiae of time and cost limits and the public interest test, and “frustration” at serial requesters, all suggest a lack of understanding about what FOI is for, and what transparency can achieve in terms of improved decision-making. In particular, a preoccupation with the “cost of compliance” presents a gloomy view of a world in which the production and dissemination of information is often seen as a process issue—an additional and unwelcome burden, entirely distinct either from service delivery or from meaningful improvement.
which responding to requests is a process-driven approach entirely decoupled from corporate improvement processes.

9. The MoJ memorandum reflects this mechanistic emphasis on process—on form, rather than impact and outcome. Even the section on accountability assumes that accountability is always about holding to account for past actions, rather than exploring policy development and improvement opportunities. Importantly, this section does not mention a key source of accountability for the new Government—accountability through choice and the market, which relies on the provision of timely, relevant and accurate information about public services.

10. Cultural change was the prevailing theme of the 1998 White Paper—the Government’s message has now degenerated to leave us in a position where “compliance” is the key marker of success. The fact that Government feels it may be necessary to legislate to require public bodies to release datasets—when a culturally open approach towards transparency and accountable would mean that those bodies would already publish such data—suggests that the process of culturally embedding the principles of freedom of information, and of open data, has a long way to go. Of additional concern in this context is the apparently growing body of evidence from information managers (set out in the memorandum appendices) that the regime should be “tightened up” to prevent any inconvenience and irritation these managers may experience as a result of answering complex requests, and (for example) the assertions set out in paragraph 205 around use of the regime by journalists, which contradicts a strong founding principle of FOI that decisions on responses should be made neutrally, and irrespective of the intention or end objective of the requester in asking for the information. Collectively, this presents a one-sided picture that takes no account of the wider benefits of transparency, or the aspirations and democratic rights of citizens making requests in the first place.

LOCAL GOVERNMENT

11. The Government has taken a number of steps to open up decision-making in local government in recent months and years, and to bring local people closer to decision makers. The Freedom of Information Act should be seen in the context of these other measures, which include legislative provisions on petitions, the so-called “Councillor Call for Action”, and the requirement for councils to publish expenditure information above £500.

12. The previous Government sought to enhance the proactive availability of public information through such means as the “onelocal government” website, which aggregated National Indicator Set (NIS) data across the country, the current Government has also, as the MoJ memorandum notes, imposed a number of requirements on local authorities around proactive provision of a range of datasets. The local government sector itself has long recognised the value in sharing high-level performance data amongst professionals, although this has not always been easily translated into a willingness to share such information more broadly with the public.

13. The Localism Act involves a number of changes, including the community right to challenge and the community right to bid, which rely on the proactive provision of information by local authorities and their partners; other structural reforms introduce market-led approaches to service provision in areas such as health, social care and education, which are predicated on the availability of significantly more, and more accurate, information about provider performance to allow consumers to make intelligent choices about who provides them with public services. In this context, the Freedom of Information Act is but one element in a rapidly widening spectrum of transparency provisions, being led by a range of different Government departments, largely in isolation.

14. We will focus on three areas within local government where research we have carried out suggest that practice demonstrates some important wider lessons about the operation of the UK’s freedom of information regime.

(a) Transparency in public service partnerships

15. Government is encouraging public bodies, and organisations delivering public services which may not be “public bodies” for the purposes of FOIA, to work together to deliver services—particularly in local areas.

16. This is a trend that began in earnest with the Total Place pilots of 2009/10, and which has continued with the present Government’s approach towards community budgeting. The Government has also encouraged councils to adopt innovative, partnership-focused service models in order to save money. Councils and other public bodies are beginning to share staff and offices, develop policies and procedures jointly, and make decisions in “partnership boards” which sit above the level of individual organisations, such as Local Strategic

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55 Section 5B, paragraph 200 onwards.
56 This is a principle which we explore more fully in “Accountability Works”, supra.
58 Ibid.
59 Cited in the memorandum and also see http://www.communities.gov.uk/localgovernment/transparency/localgovernmentexpenditure/
60 Now abolished.
61 Most recently through the Local Government Association’s “LG Inform” web-based tool.
Partnerships\textsuperscript{62} (LSPs), Community Safety Partnerships (CSPs) and Health and Well-Being Boards (HWBs). With this comes the sharing of data, and the creation of governance structures that are often not subject to formal scrutiny.

17. While requesters can still approach individual organisations to acquire partnership information, the fact that partnership bodies are not “public bodies” for the purposes of the Act (and, in many instances, lack legal personality) creates significant problems in terms of transparency, accountability and the probity of decision-making. Parties to such partnerships are under no obligation to release information about regular meetings or decisions made in partnership, and their work tends not to be publicised or held to account in a coherent way.

18. The FOI regime as it exists now reflects individual organisational boundaries\textsuperscript{63}—in the developing landscape of more innovative means of decision-making, it will become increasingly separated from reality. This will particularly be the case as more services of a public nature are provided by private organisations\textsuperscript{64}, exempt from the Act. In order to extract information relating to these services, requesters will have to negotiate contracts and understand which public body has commissioned the service initially—and hope that this public body has access to the information sought. Requesters will also need to expect to be frequently rebutted under the “commercial confidentiality” exemption. We advocate more than an expansion of the list of organisations to encompass other bodies—it could be that a more expansive general class description of “public body”, or amendments to the regime to take account of partnership working, will be necessary to avoid this problem from being compounded in the future. In this context, the complex nature of the Order-based process set out in ss4 and 5 of the Act for the imposition of FOI obligations on other bodies is inflexible and unresponsive.

19. It is disappointing that the memorandum makes no attempt to engage either in the development of public service partnerships or the increasing delivery of public services by private organisations.

(b) Use of FOIA by overview and scrutiny committees

20. Overview and scrutiny committees in local authorities have specific rights under the Local Government and Public Involvement in Health Act 2007 to “request information” from certain public service partners (listed in s104 of the Act). These powers are intended to complement those in the Freedom of Information Act and will be restated in the Localism Act 2011, once that Act has commenced.

21. In local government, there is not a widespread use of the Act by overview and scrutiny members or committees. We are aware of only a few examples of councils which have used the FOI regime to extract information from public bodies in the local area. Such use of the Act is regarded by many as a “nuclear option” which, if exercised, would probably have wide ranging political and organisational impacts.

Case study

22. In one unitary authority (Borough A), there was a particular instance where the Freedom of Information Act was used by the chair of a scrutiny committee to try to obtain council performance information.

23. In 2009, the council moved from a system of quarterly performance reporting to reporting high-level information six-monthly. Scrutiny committees received this information as a matter of course. However, the chair of one committee noted that her committee had not received relevant data for more than a year, notwithstanding repeated requests. The chair decided to submit a formal Freedom of Information request on the committee’s behalf. The request was rejected on the grounds that the material was intended for future publication (and it was published subsequently, although earlier that would have been the case but for scrutiny’s involvement).

24. There was an immediate understanding within senior management at Borough A that the fact that this was necessary said a lot about the organisation. The chair felt that performance data had become the “possession” of the council’s Cabinet, but without any feeling of corporate ownership—this was a systemic issue, rather than a “cover up” of particular data.

25. Resistance to publication was political in nature, and derived in part from a lack of ownership on the part of Cabinet of this information. Hence, there was an unwillingness to release and discuss information which was not properly understood, or engaged with, by the council’s leadership. This reveals a tension about who should be engaging with performance data—officers or politicians, scrutiny or the executive—not to mention, the council corporately, or local people.

26. The council’s more recent approach to performance management and monitoring has demonstrated a sea change. A change in political control in 2010 did not automatically lead to better practice, but contributed to a process of change that has led, as a direct result of the FOI request, to a more open and engaged approach with performance information.

\textsuperscript{62} Abolished in statutory terms in the Localism Act 2011, but expected to continue in most places because of the practical benefits they bring in terms of more joined-up decision-making.

\textsuperscript{63} Insofar as it requires individual, specific public bodies to draft publications, respond to requests, and so on.

\textsuperscript{64} For example under shared services or commissioning arrangements. We explore the implications of these issues in our policy briefing on this subject at http://www.cfps.org.uk/publications?item=6982&offset=25
27. Evidence of this can be found in more recent scrutiny work that Borough A has been carrying out which has looked at the use of KPIs and other performance measures in a public-faced service. Here, members examined performance information in detail, examining whether key performance indicators (KPIs) in the service concerned had meaning. This demonstrates a more open, accountable and sophisticated approach to performance information, both by the executive and by scrutiny, than was apparent in 2009, and in consequence a renewed focus on performance information as a source of accountability and as a means for bringing about improvements.

28. Borough A’s example demonstrates that use of FOIA under these circumstances can yield significant results, but these are results that go far beyond process and compliance objectives for the Act, and transparency in general. Borough A’s experience with the FOIA in this context provoked significant organisational change.

29. While the use of formal measures such as FOIA could be corrosive to a positive working relationship between scrutiny and the executive, in this instance it kick-started a more productive approach. Given that this connects strongly to the cultural issues discussed in the earlier section, it is difficult to say whether this positive result would be replicated elsewhere were the circumstances to be repeated.

30. It remains the case, however, that from time to time disputes may occur and, as we have demonstrated, the existence of such formal powers—even if (in fact, especially if) very infrequently used can be an extremely powerful tool in councillors’ arsenals.

31. We cannot comment on the use of FOIA by individual councillors in the conduct of their ward work (whether requests are made of the council or of other public bodies in the area).

(c) Use of Schedule 12A of the Local Government Act 1972 (as amended)

32. Schedule 12A of the Local Government Act 1972 was amended by regulations shortly before the commencement of the FOIA. It makes provision for councils to exempt from publication certain information including, in particular, “information relating to the finance and business affairs of any particular person”, including the local authority in question. All the Schedule 12A exemptions are qualified by a public interest test which is restated at paragraph 10 of the schedule.

33. Anecdotally we are aware that many councils continue to take an approach in their use of Schedule 12A that may not accord with the spirit of the FOI regime. While this is not true of all authorities, there can be a tendency to apply exemptions in a broad brush manner, rather necessarily than to focus on the redaction of specific pieces of data, subject (where applicable) to the public interest test. For example, we are not aware, across the spread of local authorities, of the public interest qualification, where it does apply, being applied consistently to decisions on exemption—although most authorities have internal paper guidance on this issue prepared at the time of the FOIA’s commencement.

34. For example, we are aware of examples of the exemption around finance and business affairs being used to exclude entire reports on council contracts, shared services and commissioning arrangements, and for this to cause problems for scrutiny committees who wish to investigate such issues further (and, in a broader sense, the general public). In the context of Government plans to open out procurement and commissioning in the public sector (and echoing the concerns we expressed earlier in this response about partnership working), we do not find the wording of Schedule 12A, as amended, particularly helpful on this point. We also note that, in excluding entire reports, authorities may in some instances unwittingly be excluding some evidence which should technically be published under the terms of the FOIA.

35. In the context of achieving the policy objectives both of the FOIA, of providing additional certainty around where whole documents should, and should not, be excluded, and of transparency in local decision-making (in line with the principles of localism) we would suggest that a complete overhaul of Schedule 12A and its associated provisions is necessary.

36. Although Schedule 12A is not a part of the formal “freedom of information regime”, it is fundamental to the way that local authorities proactively publish information and needs to be considered as an adjunct to any study of the FOIA. The paragraphs of the Schedule were amended significantly to comply with the provisions of the FOIA.

CONCLUSION

37. In our view Governments of all political hues have taken a piecemeal approach towards freedom of information in the recent past. The Freedom of Information Act has been only one element of a raft of unconnected policy provisions which have collectively promised much, but delivered little in the way of real change to the way that decision-makers think and act—as the MoJ memorandum makes clear. In an environment where adherence to procedure is deemed more important than substantive, meaningful transparency, it has proven difficult for anyone with a stake in this debate to focus on the fact that transparency can help to improve the way that services are delivered. Instead, disagreements about the way in which the resource implications of FOIA are calculated, and the intricacies of the public interest test, have predominated.
38. A review exclusively of the Act itself reasserts this ad hoc approach, and we strongly urge the Committee to take this opportunity to carry out a more general investigation into freedom of information and transparency across Government, with the assistance of other Committees.

February 2012

Written evidence from the National Union of Journalists

The National Union of Journalists is the voice for journalism and for journalists across the UK and Ireland. It was founded in 1907 and has 38,000 members. We are an affiliate of both the European Federation of Journalists and the International Federation of Journalists. The NUJ represents 38,000 members working at home and abroad in all sectors of the media, including staff, students and freelance; writers, reporters, editors, sub-editors, photographers, illustrators and people who work in public relations.

1. The NUJ has been a great supporter of the FOIA and sees the committee’s inquiry as an opportunity to enhance and update the legislation. As part of the democratic process, citizens need to be able to have access to data that can inform them on the decision making and spending of public bodies. In comparison with countries such as the USA, the UK falls short in the availability of public records.

2. A motion passed by the NUJ’s 2011 Delegates Meeting said that the FOIA had “brought about a profound change for the better in the political life of this country” and that the NUJ applauded the efforts of all those journalists who have sought to use the Act for the benefit of society. It recognised the efforts of Maurice Frankel, of the Campaign for Freedom of Information, in persuading parliament to adopt such an Act. The motion said that the union should resist any attempt by the government to introduce charges for the supply of information; changes to the Act which would impose limits on the number of requests for information; and redundancies among those currently employed to respond to requests for information. As part of our submission to the inquiry we have canvassed the views of our members on the issues raised by the scrutiny.

3. David Hencke’s story about Ed Lester, chief executive of the Student Loans Company, which revealed his £182,000 pay package was paid into a private service company without deductions for tax or insurance, is a story of great public interest. Danny Alexander, chief secretary to the Treasury, has since launched an investigation into how widespread this activity is within Whitehall. This story was the result of an FOI request and before the Act would not have been possible. The MPS’ expense scandal is another recent example of how FOI requests have uncovered malpractice in public office.

4. Investigative journalist Rob Evans (together with colleagues at the Guardian) have used FOI requests to unearth evidence on military killings of Afghan civilians, the extent of the winning and dining of senior defence officials by arms company BAE Systems and the number of times Prince Charles wrote to government ministers to meddle, or offer advice depending on your point of view. But one example—a comparison of death rates following certain surgical procedures in NHS hospitals—shows how FOI requests uncover information that is not held anywhere centrally and in this case could be used to save lives. This information was not publicly available and some hospitals resisted co-operating even after the FOI request. A survey of local authorities by the Times Educational Supplement revealed that 600,000 children will no longer have access to the work of a school library service because it has been cut by the council. Again this information is not held centrally.

5. Local journalists have also used the act to great effect, for example last month (January 2012), the Merton Guardian discovered that the local council had spent £178,000 on redundancy payments to staff later rehired as consultants and the Southampton Echo found out that Southampton Solent University had lost track of 6,126 books. Figures released to the Evening Standard under the Freedom of Information Act reveal that six out of 10 council-funded youth clubs in London close by 7pm and have limited hours at weekends—when young people are most likely to commit crimes.

6. The White Paper specified the purpose of its proposals was “to encourage more open and accountable government”. The Public Administration Select Committee, in its response to the White Paper considered that one of the purposes of FOI was to “Make it easier for politicians, journalists and members of the public to hold the government to account by making government cover-ups more difficult.” The NUJ believes that the FOI Act has been successful in making government and public bodies more accountable. Paragraphs 2, 3 & 4 are examples of this.

7. The NUJ believes that there are too many bodies that are exempted from the Act. For example, we believe that the Royal Household should be included in enquiries that are relevant to the public interest of tax payers and subjects. But a greater concern is that as council and government services are outsourced and privatised, these companies are exempt from FOIA despite the fact that they are responsible for spending tax payers’ money and fulfilling service agreements. They should not be able to hide behind the cloak of commercial confidentiality. There are also anomalies such as the state-owned Royal Bank of Scotland, which is exempt from FOI requests. There is a serious risk that the aim of the Act to increase accountability will be severely undermined if provision is not extended. The Association of Police Officers is an example of an organisation which, after some pressure, agreed to be subject to FOIA. The NUJ would like to see other organisations, such as the Local Government Association, follow the lead of ACPO.
8. The NUJ is concerned that councils will use the excuse of public spending cuts to seek charges for FOI requests. We note and support the response of Eric Pickles, local government secretary, to the request by Hampshire county council to charge organisations which may benefit commercially from receiving information. He said: “If town halls want to reduce the amount they spend on responding to freedom of information requests they should consider making the information freely available in the first place. The simple act of throwing open the books, rather than waiting for them to be prised apart by the force of an FOI, might even save a few pounds in the process. Greater local accountability is essential to accompany the greater powers and freedoms that the new government is giving to local government.” FOI expert David Higgerson has also reported attempts by Chester and Cheshire West to levy charges.

9. The survey carried out by Ipsos Mori for the MoJ says that some respondents felt that the time and cost of replying to FOI requests “was an hour not spent on their day job”. The NUJ believes that providing information that should be in the public domain is part of the “day job” for organisations in receipt of tax payers’ money. MoJ statistics for central government indicate that compliance with the statutory limits is good, with 86% of requests responded to within 20 working days (or 30 working days for historical records held by the National Archives) in 2010. The rate of response within either the 20-day limit or within a permitted extension (such as for the conduct of a public interest test) was 91% in 2010. Both these figures have remained consistent since the early days of the Act’s implementation in 2005. This suggests that the limits set are reasonable and should not be changed. The NUJ can see no need to change the timings or costing as set out in the Act at present.

10. The NUJ believes that the escalation of cost cited in the memorandum can be attributed in part to organisations refusing to comply with the spirit of FOIA, necessitating the journalist to go to appeal. A common response from our members is that the public interest exemption is routinely abused by a whole range of organisations, with the Metropolitan Police and a number of health authorities being cited as serial offenders of this abuse.

11. The MoJ memorandum says that “it is an area of concern amongst some FOI practitioners that FOI requests are occasionally seen as a substitute for investigative journalism or that some FOI requests from media may not be geared towards the public interest and accountability, but to sourcing news stories of little relevance to accountability of public authorities”. The Ipsos Mori survey apparently indicated concern that journalists were using FOI requests as part of a “fishing” expedition for a story. This claim is not backed up. Evidence provided in the memorandum shows “roughly similar numbers of requests come from media (33%) as private individuals (37%) and a much stronger perception of media’s role in more complex and time consuming requests”. Journalists in pursuing stories are often acting on behalf of their readers and the general public as part of their watchdog role. They also have the skills which enable them to use the system on behalf of their readers. It can be argued that there is nothing inherently wrong with “fishing” if it leads to information that is in the public’s interest. But a more common response came from one member who said: “I don’t have time to be making random requests”.

12. One reason for an increase in requests was supplied by a member who said: ”Journalists will generally go to a press officer for information, but the press officer is not obliged to answer the request. Therefore journalists may be forced to use the FOI route, when it is not necessary. Conversely, there is also suspicion that press officers are passing on requests to the FOI officer and thus delaying an answer by 20 days”.

13. UCL’s research found little evidence of FOIA leading either to better decision-making or to a chilling effect. The NUJ understands that civil servants and ministers should have space for “blue-skies thinking”, however we are concerned that they are taking evasive action. We believe the Information Commissioner was right to censure Michael Gove and officials at the Department for Education for the use of private emails and texts in order to avoid FOI requests. There is also evidence that government departments are using the “formulation of policy” clause to dodge giving information requested by FOI. One journalist was given this response when she asked for the details of research carried out by the Department for Education on the effects of the new curriculum on teacher workload. The extent of such actions may be something that the committee may want to investigate as part of its inquiry.

14. The NUJ notes with alarm a request by Universities UK for the FOIA to introduce a limited exemption for pre-publication research. Journalists report that there are many occasions when the results of research are suppressed, because they are not the “right results” for the organisation which has commissioned the research.

February 2012
Written evidence by Campaign for Freedom of Information

Introduction

This submission is divided into three parts:

— The first describes some areas where we believe the Freedom of Information (FOI) Act and Environmental Information Regulations (EIRs) are not working as well as they should. We suggest a number of improvements which include the introduction of more specific time limits for responding to requests and dealing with internal reviews; the lifting of some absolute exemptions; changes to the duty to advise and assist and other measures.

— The second deals with the contracting out of public authority functions to bodies which are not subject to the FOI Act. Recent measures to encourage this process are likely to substantially undermine the public’s rights to information.

— The third responds to suggestions that changes to the right of access may be introduced to protect cabinet papers, to introduce fees for FOI requests or to make it easier for public authorities to refuse requests on cost grounds. Finally, we propose one cost saving amendment to the Act.

I. Improvements to Act

Delays

Requesters frequently experience substantial delays by public authorities in answering requests and carrying out internal reviews.

In 2010, 17% of requests to government departments (4,696 out of 27,290) took more than 20 working days to be answered:65

— 12% of the delayed requests (3,245) overshot the 20 working day response period through simple failure to meet the statutory deadline. No information appears to be available about the length of these delays.

— In 5% of requests (1,451) departments took what the Ministry of Justice (MOJ) refers to as “permitted extensions to deadlines”. These are FOI requests where the authority took additional time to consider the public interest test. They also include EIR requests where the deadline was extended by up to a further 20 working days because the request was both complex and voluminous.66 Many of these extensions were excessive.

Public interest extensions

The FOI Act allows authorities to extend the standard 20 working day response period to consider the public interest test, where this is “reasonable in the circumstances”:67 The Information Commissioner’s guidance states that extra time should not normally be needed but that where the public interest considerations are “exceptionally complex” a longer period, not exceeding a further 20 working days, may be necessary.68

MOJ statistics for central government departments in 2010 show that almost half of all cases involving public interest extensions took more than the extra 20 working days recommended by the ICO:

— Only 53% of these cases (665/1,260) complied with the ICO recommendation, that the extension should not exceed 20 extra working days.

— 12% (157) took extensions of between 41 and 60 working days in addition to the standard 20 working days. These requests were not answered for three to four months.

— 4% (45) took extensions of 61–80 extra days: the replies to these took between four and five months.

— 3% (43) took up to six months in total to answer.

— 2% (28) of requests made in 2010 took more than six months to answer.69

— 98 requests, originally made in 2009, were not answered until 2010 after delays of over 6 months.70

The actual length of delays in cases taking more than six months has not been monitored.

MOJ statistics refer to these requests, including those unanswered for more than six months, as being dealt with “in time”.71 It appears that so long as a department notifies the requester within the original 20 working day period that a public interest extension is being taken, the eventual response is considered “in time” regardless of how unacceptably late it may be. This practice ignores the statutory requirement that any extension must be “reasonable in the circumstances”—many of the extensions clearly are not. It also ignores the ICO

66 Under regulation 7(1) of the EIRs.
67 FOIA section 10(3).
69 MOJ 2010 Annual Report, Table 15.
70 MOJ 2010 Annual Report, Table 16.
71 MOJ 2010 Annual Report, page 2 and Table 5.
guidance that the extension should not exceed a further 20 working days. We think MOJ should abandon the misleading practice of describing all requests extended on public interest grounds as being answered “in time”.

Additional time to consider the public interest test should not be needed; we note that no such extension is available under the Scottish FOI Act and do not believe it should be available under the UK Act either. If an extension is needed at all, it should be available only where the volume and complexity of a request, and in particular the need to consult third parties, makes it impossible to provide a considered response within the standard 20 working day period. In this case, an extension, of up to a maximum of 20 working days, on the lines of the extension permitted under the EIRs, might be justified.

Monitoring of the length of delays is restricted to requests involving public interest extensions. The majority of delays are simple failures to meet the standard 20 day deadline. The length of these delays are not monitored: they should be.

**Internal reviews**

The time taken by government departments to complete internal reviews in 2010 shows a similar profile:

- 59% (743/1,259) were completed within 20 working days.
- 24% (308) took from 21 to 40 working days.
- 8% (101) took 41 to 60 working days.
- 4% (53) took 61 to 80 working days.
- 2% (28) took 81–100 working days.
- 2% (26) took over 100 working days (ie more than 5 months). 72
- A further 60 internal reviews relating to requests made in 2009 but not completed until 2010 also took more than 5 months. 73 The actual delays in these cases is not known.

It appears that some requests are subject to lengthy delays both in replying and in carrying out internal reviews.

The Information Commissioner’s guidance states that internal reviews should be completed within 20 working days and that where exceptionally a longer period is needed it should never exceed a further 20 day working days. Although authorities are not required to carry out internal reviews under the FOI Act, where they do, these time limits should be mandatory (as they are under the EIRs) 74.

**Annual statistical returns**

Although the MOJ produce detailed statistics about the performance of central government bodies most other authorities do not. This makes it harder for the ICO to formally monitor those authorities which are repeatedly failing to comply with time limits. 75

We think all authorities should be required to produce an annual statistical return containing the numbers of FOI/EIR requests they have received; the numbers answered in full, in part or refused; the numbers answered in time and the length of any delays; and the numbers of internal reviews carried out, the time taken to complete these and the outcomes.

**Absolute Exemptions**

We think the Act’s absolute exemptions (ie those not subject to the public interest test in section 2 of the Act) are unnecessary and that all exemptions should be subject to the public interest test, unless an equivalent provision already applies. 76

**Section 44 (statutory prohibitions on disclosure)**

The absolute exemption in section 44(1)(a) of the FOIA for information whose disclosure is prohibited by statute is a significant obstacle to the Act’s proper functioning. 77

Many of the statutory prohibitions prevent regulatory bodies disclosing information which they have obtained in the course of their functions. They generally predate the introduction of the FOIA and are designed to

72 MOJ, 2010 Annual Report, Table 12.
73 MOJ, 2010 Annual Report, Table 13.
75 One of the circumstances in which the ICO will formally monitor an authority’s performance is if it fails to comply with the required timescales in at least 85% of requests.
76 An equivalent test already exists in relation to section 41, the exemption for breach of confidence, as the common law of confidence itself incorporates a public interest test. A new test may not be needed in relation to section 40, at least for non-sensitive personal data, as the test of fairness required under the exemption already balances the interests of those seeking the information against the interests of those whose personal data are involved. Nor is it needed in relation to section 21, as the test of whether information is “reasonably” accessible to the applicant already provides a form of balancing test.
77 Section 44(1) states: “Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it— (a) is prohibited by or under any enactment, (b) is incompatible with any Community obligation, or (c) would constitute or be punishable as a contempt of court”.
protect the privacy or commercial interests of third parties. They should be unnecessary under FOI where third party interests are well protected by the exemptions for personal data (s.40), breach of confidence (s.41) and prejudice to commercial interests (s.43). Separate exemptions also protect an authority’s investigatory or regulatory functions.78

We note that these statutory provisions do not apply to environmental information. The right of access under the EIRs expressly overrides any such restriction.79

Examples of information which has been withheld under section 44 include:

— equal opportunity monitoring statistics supplied to Ofcom by licensed television and radio broadcasters;80
— information about the accuracy of domestic gas and electricity meters tested by Ofgem;81
— safety audits carried out by the Civil Aviation Authority on the cargo airline MK Airlines;82
— two research reports relating to the MMR vaccine submitted to the Legal Services Commission in support of a legal aid application to fund the MMR litigation.83 The author of one of these reports appears to have been Dr Andrew Wakefield, who was subsequently struck off the medical register for serious professional misconduct, part of which involved dishonestly securing legal aid;84
— correspondence between the Office of Fair Trading and the Department for Business, Enterprise & Regulatory Reform about a possible investigation into the cost of credit card borrowing;85
— anonymous information from a number of Home Office licenses to conduct animal experimentation;86
— communications between UK and Icelandic authorities relating to the British Government’s order freezing the assets of the collapsed bank Landsbanki;87
— details of financial promotions withdrawn at the request of, or after discussions with, the Financial Services Authority;88
— information about the safety of a particular manufacturer’s underwater breathing equipment;89
— the number of complaints received by the Office of Fair Trading about the products sold by a French company, with an address in Hammersmith;90
— information submitted to the London Borough of Newham by bidders tendering for a casino license;91 and
— many requests submitted to the Parliamentary and Health Service Ombudsman, the Local Government Ombudsman and the Northern Ireland Commissioner for complaints, usually by complainants seeking more information about the handling of their complaints, are refused under statutory restrictions in the Ombudsman legislation.92

78 Eg section 30(1) which applies to information that may lead the authority to institute criminal proceedings or decide whether charges should be brought or section 31(1)(g) which protects the exercise of the regulatory functions referred in section 31(2).
79 Regulation 5(6) of the Environmental Information Regulations 2004 states: “Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply”.
82 Disclosure prohibited by section 23 of the Civil Aviation Authority & Information Commissioner & Malcolm Kirkaldie, 2 February 2010.
85 General Medical Council, Dr Andrew Jeremy Wakefield, Determination on Serious Professional Misconduct (SPM) and sanction: 24 May 2010.
91 See: section 11(2) of the Parliamentary Commissioner Act 1967; section 15(1) of the Health Service Commissioners Act 1993; section 32(2) of the Local Government Act 1974; Article 21(1) of the Commissioner for Complaints (Northern Ireland) Order 1996.
The effect of the statutory restrictions on disclosure together with section 44(1)(a) of FOIA is that these requests are refused without consideration of their merits. Questions of whether disclosure would harm third party interests, or might be justified in the public interest, are not considered.

Some of these statutory restrictions permit disclosure where it is for the purpose of the authority’s functions. However, the Upper Tribunal has ruled that in such cases the decision on whether a disclosure is necessary for the authority’s functions cannot be reviewed by the Information Commissioner (IC) or the First Tier Tribunal (FTT). The only remedy is judicial review.

In the case which gave rise to this ruling the Broadcasting and Entertainment Cinematograph and Theatre Union (BECTU) sought the race equality monitoring data submitted to Ofcom by each of 138 broadcasting license holders. The Commissioner and First Tier Tribunal both held that disclosure was restricted by a statutory bar. Ofcom was free to disclose the information if it considered that this would further its statutory functions, which include the promotion of equal opportunities amongst broadcasters’ staff. Ofcom’s predecessor body, the Independent Television Commission, had published this equality monitoring data, even though it had been subject to a similar statutory restriction on disclosure. Both the IC and the Information Tribunal considered that Ofcom’s decision not to disclose the data was within the range of reasonable options available to it. However, the Upper Tribunal held that neither the IC nor the Tribunal had the power to even consider the reasonableness of such decisions or to overrule a decision, even if it was unreasonable.

This is precisely the type of decision that we believe should be tested on its merits under FOI and which should not be subject to any statutory restriction.

One way of doing this would be to lift such statutory restrictions in relation to FOI requests, while leaving them in place if necessary, as a sanction against the unauthorised release of information outside of the FOI regime.

This solution has been adopted in relation to certain statutory bars. A restriction in section 28(2) of the Health & Safety at Work etc Act 1974 prohibits the release of information obtained by the Health & Safety Executive and Commission through the exercise of their statutory powers. It was amended in 2005 so that it did not apply to disclosures made under the FOI Act. The same was done in relation to the prohibition on disclosure in section 118 of the Medicines Act 1968, which prevented the release of information about pharmaceutical product safety. This approach should now be followed in relation to the remaining statutory bars.

**The Royal Family**

We regret that the qualified exemption for the Royal Family has been partly replaced by a new absolute exemption for information relating to communications with the monarch and the heir and second in line to the throne. The new exemption applies for 20 years or until 5 years after the death of the individual concerned, whichever is later.

This amendment was introduced with minimal Parliamentary scrutiny in the “wash-up” period prior to the dissolution of Parliament before 2010 general election. It appears to have been prompted by FOI requests for Prince Charles’ correspondence with government departments. The Information Commissioner had upheld the departments’ refusals in these cases though the decisions are currently subject to an appeal to the Upper Tribunal.

The Commissioner’s decisions, though they did not explicitly say so, left open the possibility of disclosure where, for example, Prince Charles’ intervention proved to have a decisive effect on government policy. We think that is appropriate.

Last year the Guardian newspaper highlighted the fact that Prince Charles’ consent is required before any bill that might, even incidentally, affect the interests of the Duchy of Cornwall can be introduced into Parliament. Details of some of the bills submitted for his consent were obtained by the paper under the FOI Act before the section 37(1) exemption was made absolute—an exercise that could not now be repeated. It is not known whether the Prince has at any time refused consent. But the fact that Prince Charles has the power to veto legislation in secret in our view makes an overwhelming case for the absolute exemption to be removed.

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94 Section 393(1) of the Communications Act 2003 (“the 2003 Act”), which prohibits the disclosure of information about a particular business obtained by Ofcom through the exercise of its statutory powers.

95 Section 393(2) of the 2003 Act.

96 One of Ofcom’s statutory functions is to take “such steps as they consider appropriate” to promote equal opportunity amongst employees providing broadcasting services (section 27(2) of the 2003 Act) and Ofcom is specifically empowered to impose equal opportunity conditions on license holders under section 337 of the Act.


98 It was introduced by Schedule 7 of the Constitutional Reform and Governance Act 2010. Information relating to communications with other members of the Royal Family remains subject to the original qualified exemption in section 37(1) of the FOIA, and is subject to the Act’s public interest test.


100 “Prince of Wales: a private individual’s effective veto over public legislation”, Guardian 30.10.2011; ‘Reveal Prince Charles’s input on planning law, government urged’, Guardian 31.10.11.
Section 36 and Parliament

Section 36 is subject to the Act’s public interest test in relation to all public authorities other than the Houses of Parliament, when it becomes an absolute exemption, established by a conclusive certificate. We question whether this arrangement is appropriate, particularly in light of the separate absolute exemption that exists in section 34 for Parliamentary privilege.

Late claiming of exemptions

Public authorities sometimes raise new exemptions for the first time during the ICO investigation into a requester’s complaint, or at later stages in the appeal process. (The Court of Appeal has recently ruled that public authorities are entitled to do so).101

The ICO itself may sometimes, during an investigation, invite an authority to consider relying on an exemption which the authority has not previously raised102 or even introduce a new exemption itself (for example, section 40, which protects the privacy of individuals).103

There is no obligation on the ICO or the authority to inform the applicant when a new exemption is relied on in this way. This may deprive the applicant of any opportunity to respond to the new exemption claim.104

The Upper Tribunal has commented:

We are conscious that there have been cases where the first a requester has known about some entirely fresh point raised by the public authority has been when he has seen it in the Commissioner’s Decision Notice, many months (sometimes years) after the information request was originally made. If novel exemptions can be raised as of right, however late, this seems to turn the time limit provisions of ss.10 and 17 almost into dead letters. It can also create a strong sense of injustice, because the requester will usually not have been given any opportunity by the Commissioner to comment on the new exemption. This can lead to unsatisfactory decisions by the Commissioner and unnecessary appeals (because sometimes the requester has a response to the new exemption which shows that it is not valid).105

We think that any party which raises a new exemption in the course of an ICO investigation should be required to notify the applicant, who should be given an opportunity to respond before the investigation is concluded.

Consideration should also be given to introducing statutory authority for the Commissioner and Tribunal to refuse to permit the late claiming of exemptions where there are no reasonable grounds for doing so and the late claiming is not necessary to protect third party rights or essential state interests. Until relatively recently, the Commissioner and Tribunal believed that they had this power.

Two differently constituted panels of the Upper Tribunal had adopted different approaches to the issue. In one case, the UT held that there was no discretion to refuse to permit new exemptions to be raised at any stage.106 In the other, though it was not called on to decide the matter, the UT noted:

we confess to some general concerns that an indefeasible right in the public authority to raise whatever exemption it thought fit whenever it wanted to would raise a number of real problems with the scheme of the Act. The Act contemplates a process of application, reasoned decision within 20 days (or longer in certain cases), internal review, complaint to the Commissioner, and appeal. A willingness to readily admit novel points in late claims may frustrate the statutory policy of prompt response and investigation and the ability of the requester to know where they stand in the statutory processes. Hence one might have thought that late claims should only be permitted where a reasonable justification is shown that is consistent with the statutory purposes, which include the provision of an effective right to information alongside considerations of the public interest and protection of the rights of third parties.107

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102 See for example the decision notice which stated: “The Commissioner contacted the public authority again on 5 February 2009. It was noted that some of the arguments that the public authority had advanced in connection with section 31(1)(d) in fact appeared more relevant to section 38(1) (endangerment to health and safety). The public authority was asked to respond confirming if it did wish to also cite section 38(1) and, if so, to explain why...The public authority responded to this on 5 March 2009 and confirmed that it did wish to cite the exemption provided by section 38(1)(a) (health) and 38(1)(b) (safety).” In this case, the ICO went on to find that section 38(1) exemption and exemption which the authority had initially claimed both applied but that the information should nevertheless be disclosed on public interest grounds. Decision Notice FS50173181, Youth Justice Board for England and Wales, 10 December 2009.
103 Eg “The public authority cited section 42(1) and not 40(1) in its refusal notice and its internal review. The Commissioner has this power.”
105 See the decision in Ev 160 Justice Committee: Evidence
Although the Court of Appeal later found that the authorities were entitled to rely on new exemptions at a late stage, Lord Justice Carnwath expressed regret that no submission had been made to the court in favour of a “middle way” which presumably might have allowed a public authority to rely on new exemptions at a late stage, subject to the discretion of the Commissioner or Tribunal. This suggests that the Court of Appeal may have been prepared to consider the kind of suggestion we propose above.

Advice and assistance when cost limit exceeded

An authority which refuses a request because it estimates that the cost of complying would exceed the £600 or £450 cost limit is expected to provide advice and assistance to enable the requester to submit a refined, less time-consuming version of the request and to suggest what information could be provided within the cost limit.  

In practice, authorities sometimes comply with this provision merely by suggesting that a narrowed request may stand a better chance of success, but providing no indication how or by what extent the request should be narrowed.

We think authorities should be expressly required to notify the applicant of their estimate of the cost of complying with the request, and to explain how this has been calculated. This would help them identify which aspects of the request had been most time-consuming and judge by what degree they would be required to revise the scope of their original request. This would be in line with the ICO’s own advice.

Fees

The FOI cost limits do not apply to requests for environmental information. The EU Directive which gave rise to the EIRs permits charging but require that any charge “shall not exceed a reasonable amount”. This precise phrase is used in the Scottish EIRs.

However, the UK regulations do not follow this wording. Instead, they state that any charge “shall not exceed an amount which the public authority is satisfied is a reasonable amount”. This subjective test is presumably intended to limit the Information Commissioner’s ability to review public authorities’ charges. We think the qualification should be removed, and the regulations should precisely reflect the wording of the directive.

On some occasions, authorities have made what the ICO regards as unreasonable charges for information. If the requester has paid these, the ICO cannot require the authority to refund them.

For example, the ICO found that an EIR charge of £900 which a requester paid for information about amount of heat sold by a council owned energy company was unreasonable and recommended its refund. The Council refused to do so. We believe the ICO should be able to require a public authority to refund an unreasonable charge.

Destruction of requested records

An authority which deliberately destroys a requested record, in order to prevent its disclosure, commits an offence under section 77 of the FOI Act. However, Section 127(1) of the Magistrates Court Act 1980 prohibits a prosecution from being brought more than 6 months after the offence has been committed. 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. If the deliberate destruction of the record is then discovered, it will be too late to mount a prosecution.

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

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108 “Where an authority is not obliged to comply with a request for information because, under section 12(1) and regulations made under section 12, the cost of complying would exceed the ‘appropriate limit’ (ie cost threshold) the authority should consider providing an indication of what, if any, information could be provided within the cost ceiling. The authority should also consider advising the applicant that by reforming or re-focussing their request, information may be able to be supplied for a lower, or no, fee”. Secretary of State for Constitutional Affairs’ Code of Practice on the discharge of public authorities’ functions under Part I of the Freedom of Information Act 2000, Issued under section 45 of the Act. November 2004, paragraph 14.

109 For example, the ICO stated: “When citing section 12, the public authority failed to provide any breakdown of the cost estimate. The public authority should be aware that the Commissioner considers it appropriate and in line with the obligation to provide advice and assistance imposed on public authorities by section 16(1) for a breakdown of how the cost limit would be breached to be provided where section 12 is cited. The Information Tribunal confirmed that it would expect the same in Gowers and the London Borough of Camden (EA/2007/0114) when stating: ‘...a public authority seeking to rely on section 12 should include in its refusal notice, its estimate of the cost of compliance and how that figure has been arrived at, so that at the very least, the applicant can consider how he might be able to refine or limit his request so as to come within the costs limit...’ (paragraph 68). The public authority should take note of this and provide a breakdown of its cost estimate in any future case where section 12 is cited.” Decision Notice FS50246244, Ministry of Defence, 15 June 2010.


111 The Environmental Information (Scotland) Regulations 2004, Regulation 8(3).

112 Regulation 8(3) of the EIRs.

113 This appears to be the case under both the EIRs and FOIA.

114 Decision Notice FER0298988, Nottingham City Council, 21 March 2011.
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. 115

Copies of documents

Applicants should be able to specify that they wish to be supplied with information in the form of a copy of an existing record containing the information.

Under section 11(1) of the FOI Act, applicants are entitled to express their preference for the means by which information should be communicated to them; authorities are required to comply with that preference so long as that is reasonably practicable. However, the available preferences are limited to those set out in section 11(1), and do not include being supplied with a copy of an existing record such as a photocopy of a document.

At present an authority can disregard any expression of preference for a photocopy, even if it would be practicable to provide one, and instead retype the document for disclosure or print it out again from an electronic copy. The released version may omit any exempt information without any indication of the location or length of any deleted passages. A right to obtain copies of original records, where practicable, would supply that context.

Composition of the Tribunal

Currently some of the Information Rights Tribunal’s lay members are employees of public authorities where they work either as FOI practitioners or lawyers likely to be involved in FOI cases. 116,117

We have never seen any evidence of a lack of impartiality by such members. However, the issue has been raised with us by an appellant concerned to find that employees of the authority involved in his case were amongst the Tribunal members (though were not hearing the case in question).

Tribunal members clearly could not sit on cases involving their own authorities. But some cases involve the interpretation of widely used provisions of the Act which have implications for all public authorities. A Tribunal member may, in their capacity as a public authority FOI practitioner, be relying on a particular interpretation of a statutory provision in dealing with requests while at the same time serving on a Tribunal which is ruling on how that provision is to be interpreted. That would clearly be undesirable. We suggest that future appointments to the Tribunal should not include current employees of authorities subject to the Act.

II. Contracting Out

FOI requests and contracts

The contracting out of public authority functions to bodies which are subject to the FOI Act is likely to severely undermine the public’s rights to information. This process will be accelerated by the Localism Act 2011, which exposes virtually all local authority functions to a procedure which may lead to competitive tender. The Health and Social Care Bill will lead to NHS functions increasingly being performed by private providers.

Any information which the authority itself holds about a contract will be subject to FOI, as will information which the contractor holds on the authority’s behalf. This is provided for under section 3(2)(b) of the Act. 118

However, other information about the contract or the contractor’s ability to perform it is unlikely to be available.

The difficulty is in distinguishing between the information which a contractor holds for its own purposes and that which it holds on the authority’s behalf. The Information Commissioner has held that this depends on the contract itself. Where the contract requires the authority to keep particular records or to provide specified information to the authority on request, that information will be held on the authority’s behalf and be subject to the FOI Act. 119


117 The lay members were originally appointed expressly to represent the interests of FOI requesters and public authorities under sections 6(6)(aa) and (bb) of the Data Protection Act 1998. These provisions were the result of amendments to the DPA made by the Freedom of Information Act. They have since been repealed by The Transfer of Tribunal Functions Order 2010.

118 Section 3(2)(b) of FOIA states “For the purposes of this Act, information is held by a public authority if...it is held by another person on behalf of the authority.”

119 For example, in discussing a request to the Cabinet Office for information held by the bodies which certify which authorities meet the standards required for a Customer Service Excellence Mark, the Commissioner noted: “In the Commissioner’s view, information would be held on behalf of the Cabinet Office if the Certification Bodies were contractually obliged to gather that information to provide to the Cabinet Office and held the information primarily for the Cabinet Office’s purposes rather than their own.” Decision Notice FSS0264382, Cabinet Office, 29 July 2010.
Where the status of particular information is not addressed in the contract, the information is likely to be considered to be held for the contractor’s purposes and to not be subject to FOI.

For example, in 2007 an FOI request was made to Islington Council for information about additional payments and Argos points provided to parking attendants as incentives. The requester also sought anonymised information about numbers of parking tickets issued by the “best performing” attendants and subsequently cancelled. He clearly suspected that the incentives were leading attendants to issue unjustified tickets.

The parking attendants were employed by National Car Parks Ltd, under a contract with the Council. The Information Commissioner examined the contract and found that it imposed no requirement on NCP to provide the authority with statistical information about the Argos points, performance payments to individual staff or the criteria used in awarding them. He concluded that this information was therefore not held on the council’s behalf and was not accessible from it under the FOI Act.120 We fear this pattern will be increasingly repeated as more public authority functions are dealt with under contract.

During the House of Lords stages of the Localism Bill, Lord Wills proposed an amendment which would have established that any future contract let by a local authority was deemed to include a provision dealing with FOI requests. Any information held by the contractor about the performance of the contract would then be considered to be held on behalf of the authority—automatically bringing it within the scope of the FOI Act.121 We believe a provision of this kind should apply to all public authority contracts.

The Health and Social Care Bill

Under the current NHS reforms, the new commissioning bodies (clinical commissioning groups and the NHS Commissioning Board) will be subject to the FOI Act. However, the private sector contractors with whom they have contracts will not be covered by the Act.

The contracts themselves will contain disclosure requirements along the lines of that already found in the standard NHS contract. This states:

"27.5 Where the Provider is not a Public Authority, the Provider acknowledges that the Commissioners are subject to the requirements of the FOIA and shall assist and co-operate with each Commissioner to enable the Commissioner to comply with its disclosure obligations under the FOIA. Accordingly the Provider agrees:

27.5.1 that this Agreement and any other recorded information held by the Provider on the Commissioners’ behalf for the purposes of this Agreement are subject to the obligations and commitments of the Commissioners under the FOIA." 122

(The term “Commissioners” here refers to the commissioning bodies.)

These provisions require some unpicking. The requirement that providers co-operate with commissioning bodies to comply with their disclosure requirements under the FOI Act is circular. The commissioning body’s obligations under the Act are merely to disclose information which it holds itself or which the provider holds on its behalf. The real question is what information is held on the commissioning body’s behalf.

The contract itself does specify that various types of information are subject to FOI or have to be published or provided to the commissioning body on request. This includes information about the service specifications; prices and payments; numbers of patients treated; time taken to treat them; performance quality reports against a range of specific indicators; figures on MRSA and Clostridium difficile infections; and reports on complaints, equality monitoring and certain other matters. There are also obligations to comply with NHS dataset requirements. In addition, the commissioning body may request “any other information it reasonably requires in order to monitor the Provider’s performance in relation to this Agreement”.

However, if the commissioning body does not consider that it requires particular information to monitor the provider’s performance, the information will not be available under FOI.

Suppose there are suspicions about the use of out-dated or potentially substandard or even contaminated supplies by hospitals. For an NHS hospital, the FOI Act could be used to obtain details of stocks of the product, analysis results, correspondence with suppliers, minutes of meetings at which the problem was discussed, concerns about the issues raised by staff and details of how they were handled and information showing what measures were considered, why particular options were rejected and what was done.

This level of information would not be available in relation to independent providers treating NHS patients. A commissioning body may take the view that it does not itself require this information to monitor the provider’s performance under the contract, because it does not believe that there is a real problem—or because it does not believe that the particular information sought by the requester would throw light on it or because it is already feels satisfied, from its own knowledge of the provider, that any problem would be properly handled.

In that case it seems unlikely that there would be any contractual obligation on the commissioning body to

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120 Decision Notice FSS0162002, London Borough of Islington, 9 June 2009.
121 Hansard, House of Lords, 23 Jun 2011, Column 1432 onwards.
seek the information or on the provider to produce it. In cases of doubt, we think contractors would be likely to vigorously oppose any attempt to interpret a contractual provision of this kind expansively.

The Information Commissioner and contractors

A further problem is that key aspects of the FOI Act cannot apply to contractors. The Information Commissioner’s powers relate only to public authorities. He cannot investigate a contractor’s claim that it does not hold or cannot find the information needed to answer an FOI request. His power to serve Information Notices, requiring public authorities to supply him with information required for an investigation, do not extend to contractors. He cannot serve a decision notice or an enforcement notice on a contractor or take action against a contractor which appears to be failing to comply with its contractual obligations to assist with FOI requests.

The offence which applies to a public authority which deliberately destroys, alters or conceals a requested record in order to prevent its disclosure does not apply to a contractor which does this to prevent the authority disclosing it in response an FOI request.

Once a contract has expired, any contractual disclosure requirement may lapse, removing the right to information about past events. Even if the contract stipulates that disclosure requirement survives, it could only be enforced by a civil action for breach of contract against the contractor. The prospect of such action being taken for failing to assist in replying to an FOI request is highly implausible.

The FOI Act envisages that contractor who provide 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.123 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 information about public authority services and functions are fully preserved when these are provided by contractors.

III. Possible Restrictions to the Act

Cabinet documents

We are concerned at suggestions that a new exemption should be created for cabinet documents. In recent newspaper interviews, the former cabinet secretary, Lord O’Donnell, has advocated this, though he has appeared to suggest that his main concern was to protect cabinet minutes from disclosure.124 In fact, the government has already demonstrated that it is prepared to exercise the ministerial veto under section 53(2) of the Act to prevent such releases.125

Any new exemption in this area is likely to be designed to protect not merely minutes but all cabinet and cabinet committee papers. We assume it would be an absolute exemption, not subject to the Act’s public interest test and apply for 20 years.

This is what the last Labour government proposed, after announcing that old government records would in future become public after a 20 rather than a 30 year period.126 But the government later concluded that such a change should only take place “if it is essential” to maintaining collective responsibility. It reported that “on balance the Government does not consider such enhanced protection to be necessary as a result of the reduction to 20 years”.127

We assume one of the reasons for this conclusion was the government’s recognition that it could always resort to the veto to protect such materials if it thought that the Commissioner and Tribunal had wrongly ordered disclosure. We think the existence of the veto is wrong in principle, particularly in light of the multiple-stage appeal process available to government. However, so long as the veto exists, we believe there is no justification for a new cabinet records exemption. We think it far preferable that the government is required to address this issue case by case, inconvenient though it may find that, than a new far reaching blanket exemption be adopted.

Our particular concern is the vast range of information that is dealt with by the cabinet committee system, often via correspondence rather than in meetings. This is illustrated by Cabinet Office’s guidance on the cabinet committee system, which states:

Policy or other proposals will require consideration by a Cabinet Committee where they meet one or more of the following conditions:

— the proposal takes forward or impacts on a Coalition agreement;

123 FOI Act, section 5(1).
124 See for example, “Keep Cabinet secret, says Civil Service chief”. The Times, 18.1.12.
125 In his statement on Constitutional Renewal, the then Prime Minister Gordon Brown said: “as part of extending the availability of official information, and as our response to the Dacre review, we will progressively reduce the time taken to release official documents. As the report recommended, we have considered the need to strengthen protection for particularly sensitive material, and there will be protection of royal family and Cabinet papers as part of strictly limited exemptions.” (emphasis added) Hansard, Commons, 10.6.2009, Col. 797.
— the issue is likely to lead to significant public comment or criticism;
— the subject matter affects more than one department; and
— the Ministers concerned have failed to resolve a conflict between departments through interdepartmental correspondence and discussions….

The kind of proposals which will almost certainly require collective consideration include:

— any issue which would have an impact on the good operation of the Coalition, or which takes forward government policy in an area covered by the Coalition Agreement;
— publication of consultation documents and Green and White Papers;
— responses to Select Committee Reports;
— adoption of negotiating stances for international meetings;
— agreeing final policy proposals before legislation is introduced; and
— new regulatory or deregulatory proposals.\footnote{128}

A new cabinet exemption would, thus, by definition, apply to discussions of any new proposals likely to result in “significant public comment or criticism”. This would be a self-targeting secrecy provision, designed to automatically focus on any new government proposals likely to concern the public.

The guidance also makes clear that some materials which do not have to be dealt with by a cabinet committee can be circulated as Cabinet Correspondence “for information only”. This highlights a very real risk that material could be introduced into the cabinet committee system purely in order to attract the protection of a new exemption.

A new exemption would apply to cabinet documents not merely while they were under active consideration but for 20 years afterwards. No account could be taken of the public interest in disclosure, the absence of likely harm, the need to learn from past mistakes, the fact that the material might contain no advice, opinion or evidence of ministerial disagreement or might by the time of a request be a decade or more old. If this provision was now in place, information relating to political events occurring as long ago as 1993, including the latter stages of the BSE crisis, would still be outside the scope of FOI.

\textit{FOI and the media}

We are dismayed at the way media requests are portrayed by some public authorities. According to the MOJ memorandum, some appear to regard the media’s use of the Act as “illegitimate”.\footnote{129} Elsewhere, media requests are linked with vexatious requests\footnote{130} or described as a “drain on resources”.\footnote{131}

At one point the MOJ memorandum appears to suggest that the Act is intended for individuals and that its use by anyone else represents a deviation from its true purpose.\footnote{132} We think that is misguided. A more realistic approach appears in an extract from a 1998 report of the Public Administration select committee, also quoted in the memorandum, which concluded that the proposed FOI Act would:

Make it easier for politicians, journalists and members of the public to hold the government to account by making government cover-ups more difficult.\footnote{133} (emphasis added)

We think it is essential that the media, who are the eyes and ears of the public, should be significant users of the Act. The media’s failure to make much use of the 1994 Code of Practice on Open Government, which preceded the Act, was one of the reasons why the Code had little impact. By contrast, the range of significant information obtained by press requests can be seen from two reports available on our web site, summarising 1,500 press stories published during the Act’s first three years.\footnote{134} \footnote{135} A selection of more recent FOI press reports will be published shortly.\footnote{136}

\begin{itemize}
\item \footnotemark[128]\footnotetext[128]{Cabinet Office, “Guide To Cabinet and Cabinet Committees”}.
\item \footnotemark[129]\footnotetext[129]{“There was a view that some of these requests are coming from individuals with the sole purpose of gathering information for what was seen as illegitimate use i.e. a ‘good’ media story or to irritate organisations.” Ministry of Justice, Memorandum to the Justice Select Committee, Post-Legislative Assessment of the Freedom of Information Act 2000, page 127.}
\item \footnotemark[130]\footnotetext[130]{The Ipsos-MORI research reported that: “some respondents struggled to cite benefits to their organisation given the time and resource taken up by the Act—specifically in dealing with requests from the media, serial requesters and “vexatious individuals”. Memorandum, page 123.}
\item \footnotemark[131]\footnotetext[131]{Memorandum, page 112.}
\item \footnotemark[132]\footnotetext[132]{“It is worth evaluating, as far as is possible, the question of to whom public authorities should be accountable”. The ostensible focus of FOIA is on the individual seeking information with which they can then hold their public authority accountable. In practice, a great deal of FOI requests come not from private individuals but from journalists, commercial requesters and campaign groups. Memorandum, page 57.}
\item \footnotemark[133]\footnotetext[133]{Public Administration Committee, Third Report 1997–98, HC 398–1, “The Government’s Proposals for a Freedom of Information Act”, paragraph 3.}
\item \footnotemark[134]\footnotetext[134]{“500 Stories from the FOI Act’s First Year”, www.cfoi.org.uk/pdf/foistories2005.pdf}
\item \footnotemark[135]\footnotetext[135]{“1,000 FOI Stories from 2006 and 2007”, www.cfoi.org.uk/pdf/FOIStories2006-07.pdf}
\item \footnotemark[136]\footnotetext[136]{This will available at www.cfoi.org.uk/pdf/FOIStories2011.pdf}
\end{itemize}
The fact that some journalists make FOI requests via private email accounts is apparently regarded as evidence that they are seeking to obscure their excessive use of the Act. An alternative explanation is that journalists believe that the are discriminated against by public authorities, who are more guarded and slower in responding to their requests than those of other requesters.

Some ministers insist on being provided with journalists’ requests before they are answered, which in itself delays the answers to such requests.

Another source of delay affecting journalists resulted from the requirement that departments refer sensitive FOI requests to the Clearing House established by the then Department for Constitutional Affairs to advise departments. Its involvement typically added significantly to the delays facing requesters. One category of request required to be referred to the Clearing House was “Requests relating to high profile issues, whether current or historical”—which would clearly be likely to catch many media requests. This category has since been replaced by one referring to “High likelihood of harmful media interest/story running at the time”.

The press’s belief that they were singled out for special treatment appeared to have been partly confirmed by a High Court case, in which it was accepted that a request from a press agency had been treated differently from a similar request from elsewhere.

Changes to the Fees Regulations

The memorandum highlights pressure from public authorities for the Fees Regulations to be changed to reduce the volume of requests and cost of complying with them. However, there is no indication that the savings resulting from FOI requests, which are a considerable deterrent against wasteful spending, have been taken into account.

It is not clear how measures intended to address apparently heavy use of the Act would or could distinguish between requesters making significant use of the Act in pursuit of complex matters of real public interest and those making many requests for what appear to be less important reasons. Such factors do play a part in determining whether requests are vexatious, but it is not clear how they could be incorporated into the Fees Regulations.

The Regulations exclude any consideration of public interest. The £600 and £450 cost limits are inflexible and cannot be exceeded even in relation to an issue of overwhelming public importance. The types of changes being canvassed involve either reducing the cost limit, or enabling it to be reached more easily, and would presumably affect requests of obvious public interest as well as those of less obvious merits.

Similar concerns are said to have prompted the 2006 attempt to amend the Fees Regulations. The Frontier Economics report suggested that just 5% of requests to central government bodies supposedly accounted for 45% of the total cost of FOI. In reality, little attempt had been made to target the proposed restrictions at the 5% in question. As the government itself acknowledged, the proposals would have had a greater impact on journalists, MPs, campaign groups and researchers than on private individuals. The result would have been a substantial reduction in the use of the Act to hold public authorities accountable.

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.

137 Ipsos—Mori quote one interviewee as saying “It was well recognised by most that journalists have started to use other email accounts in requesting information as a way of masking the origin of the request. “They’ll send in requests from Gmail to disguise [the fact] that they are from the media”. Memorandum, page 110.


139 We understand from the applicant that in fact two identical requests had been submitted, one by the press agency and another by a requester in Australia which appeared to have been dealt with more favourably. This prompted the applicant to apply to the department concerned, the Home Office, for its internal deliberations on the handling of his other requests. The High Court observed: “The fact that—albeit on just the one occasion—one of his requests for information had been handled differently from a similar request made by someone else called (a) for the disclosure of the information about how the request for that information had been handled so that he could see why there had been differential treatment, and (b) for the disclosure of the information about how his requests for other information had been handled so that he could be satisfied that this had been simply an isolated incident of differential treatment”. Home Office & Ministry of Justice & Information Commissioner, [2009] EWHC 1611 (Admin), paragraph 27.

140 Memorandum, page 52.


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.141 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.

Some of the suggestions raised by those interviewed for the purposes of the memorandum may have a similar impact.

For example, some interviewees suggest that consideration time (the cost of the time officials spend considering exemptions and the public interest test) should count towards the cost limit.144 This was a key element of the 2006 proposals. We believe this would have had, and would still have, a disastrous effect on the Act.

Any request raising a new issue will involve significant consideration time when it first arises. Once the initial cases have been settled (and particularly once Commissioner and Tribunal decisions are available) the time needed to consider similar requests will be greatly reduced. For example, requests involving the section 40 exemption for personal data raise the complex relationship between the Data Protection Act and FOI Act. These initially proved extremely difficult and time-consuming to decide. The substantial body of Tribunal case law on the issue that now exists means that many s.40 cases are now easily and quickly dealt with. Had consideration time been allowed to count towards the cost limit in the past, these requests would invariably have been rejected on cost grounds and no progress on the issue would have been made. The proposal would have allowed many cases involving new, complex or contentious issues to be refused, undermining the Act’s purpose and causing the Act to stagnate.

Similar arguments would apply to consultation time. Under the 2006 proposals the time which a public authority spent consulting other persons, including other public authorities, about a request would also have counted towards the cost limit. This would mean that any request for information obtained from a third party would be more likely to be refused, because of the time spent consulting that party. The more bodies which needed to be consulted, the less likely disclosure would be. There would be particular difficulty in learning about matters involving multi-agency action, interdepartmental co-ordination or discussions with multiple organisations.

Any proposal to allow either consideration or consultation time to count towards the cost limit would be particularly vulnerable to manipulation. 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. The Information Commissioner would face substantial difficulties in policing such matters.

**Fees**

We would be strongly opposed to the introduction of application fees for making FOI requests. At present, any written request for information is automatically deemed to be an FOI/EIR/subject access request regardless of whether the requester cites the legislation. People who ask for information in writing are entitled to the benefits of the statutory rights even if they are unaware of them.

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.

While fees would presumably be intended to deter high use of the Act, their effect would primarily be felt by those of limited means. 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. While it might be thought that a fee of, say, £10 per request145 might not trouble most requesters, someone in dispute with an authority might need to make a series of requests to it; some issues may require that requests be made to a

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144 Requests can be refused in the authority reasonably estimates that the cost of dealing with the request would exceed £600 (in the case of Government Departments & Parliament and the equivalent bodies for Wales and Northern Ireland) or £450 (for other authorities). Costs are estimated at a standard rate of £25/hour, but may only take account of the time spent establishing whether information is held, and locating, retrieving and extracting it.
145 This is the fee currently charged to someone making a subject access request for their own personal data under the Data Protection Act.
variety of involved agencies; and some research may be carried out by making the same request to comparable authorities.146

**Fees: Ireland’s experience**

In 2003, a €15 application fee was introduced under Ireland’s Freedom of Information Act for non-personal data requests. A fee of €75 for internal review and €150 for appeals to the Information Commissioner were also introduced. Ireland’s Information Commissioner was not consulted prior to the announcement of these proposals.147

In the year following the introduction of fees:
- non-personal requests (ie those subject to the new fees) fell by 75%;
- media use declined by 83%; and
- business use dropped by 60%.148

In 2010, the total number of non-personal requests to all public bodies was still only 56% of the 2002 figure.149 Ireland’s Information Commissioner has described the fees as “a major obstacle to the use of the FOI Act”150 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”.151

Ireland’s Commissioner later contrasted the Irish government’s approach with the UK’s, quoting with evident approval Gordon Brown’s explanation of why he was not proceeding with proposals to restrict FOI requests.152

**The cost of section 36**

Some cost savings could be achieved by amending section 36(2) of the Act. This exemption is unlike any other harm-test exemption in that the harm referred to (eg to the free and frank provision of advice or the effective conduct of public affairs) is not decided objectively but is determined by “the reasonable opinion of a qualified person”.

This provision was designed to protect decisions from full scrutiny by the Information Commissioner. The Public Administration select committee had called for this special protection to be removed.153 However, ministers claimed that it would be “worrying” to allow the types of prejudice referred to here to be determined by an “unelected person” such as the Information Commissioner.154

The result is that ministers must be personally involved each time this exemption is cited. They must also brief themselves fully before sanctioning the use of the exemption: if the minister appears not to have considered the issues properly, the Information Commissioner is likely to reject the exemption claim.

The section 36(2) exemption is subject to the public interest test, and the fact that the qualified person has expressed a reasonable opinion does not determine the test’s outcome. It only demonstrates that some prejudice would or would be likely to occur. The Tribunal has made it clear that the Commissioner must still reach his own view about the severity, extent and frequency of the prejudice when considering the public interest.155

Section 36 is the only regularly used provision of the Act which requires a minister’s personal involvement. Frontier Economics estimated that requests involving ministers costed £495 on average, more than double the

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146 For example, a small group like the Association for the Improvement of Maternity Services (AIMS), run entirely by unpaid volunteers, occasionally makes FOI requests to a small sample of NHS trusts to obtain examples of particular kinds of policy documents. A £10 application fee would probably deter such groups from using the Act in this way.


151 “Public Trust in the Civil Service—Room for Improvement”, Speech by Emily O’Reilly, Ombudsman and Information Commissioner at the Annual Conference of Assistant Secretaries, 3 March 2005.

152 “Interestingly, the UK Government in 2007 proposed to use cost restrictions as a device to “ration” FOI usage but, in the end, decided against such an approach. As Prime Minister Gordon Brown explained on 25 October 2007: “When anything is provided without cost, it does risk being open to abuse. However, the Government does not believe that more restrictive rules on cost limits of FoI requests are the way forward. ... We do this [drop restrictions proposal] because of the risk that such proposals might have placed unacceptable barriers between the people and public information. Public Information does not belong to Government, it belongs to the public on whose behalf government is conducted. Wherever possible that should be the guiding principle behind the implementation of our Freedom of Information Act.” Office of the Information Commissioner (Ireland), Freedom of Information The First Decade, May 2008.


cost of other central government requests.\textsuperscript{156} It found that 19\% of central government requests involved a minister or board level official.\textsuperscript{157} In 2010, the section 36 exemption was used 220 times by departments of states.\textsuperscript{158} Removing this requirement is likely to significantly reduce FOI costs in central government.

The same is true in other authorities, where the “qualified person” is usually its most senior figure, for example, the chief executive of an NHS body, the chief officer of a police force, the chief executive or monitoring officer of a local authority or the vice-chancellor of a university.\textsuperscript{159} The decisions cannot be delegated.

The Scottish FOI Act’s equivalent to section 36 is an ordinary exemption which operates without reference to the reasonable opinion of a qualified person.\textsuperscript{160} Bringing the UK exemption into line would both simplify the provision and produce savings.

February 2012

Supplementary evidence from Jim Amos, Honorary Senior Research Associate, UCL Constitution Unit

I would like to add more detail in two areas. My most recent experience has been of FOIA in Local Government so it is in this context that the following comments are provided. They represent my personal views.

**BUSINESS USE OF FOIA**

There have been a significant number of complaints about the use of FOIA by business. These have also been expressed in evidence submitted to this committee. For example:

- FOI 04\textsuperscript{161} (para. 1) “… I believe that it is being misused by commercial companies for financial gain”.

- FOI 51 (para. 1.7) “It seems against the spirit of the Act for individuals to gain financially from information they receive through Freedom of Information”

I have heard views like this from local authority officials on a number of occasions. I think what is being expressed is a cultural discomfort about business being able to make money from the use of public information. One senior local authority official told me, in the context of business use, that FOIA, “… was intended for residents to find out how their council spent money and took decisions.”

Some detail about the type of business use complained of was given in FOI 40 (para. 3):

“… a concern that FOIA provisions were being used for commercial purposes rather than for scrutiny of issues in the public interest, for example:

- competitors determining whether to bid for services;
- alternative suppliers seeking to win business and requesting commercial information in respect of third parties; and
- companies compiling databases of contact information for selling on”.

My view is that this describes entirely proper use that was predictable from experience overseas and was predicted by me amongst others before FOIA became law. The only area of potential difficulty is the question of “commercial information” in bullet two. Trade secrets and prejudice to commercial interests are well protected by FOIA, but other commercial information could be provided. A competent alternative supplier will carry out research to make a judgement about the value of bidding—usually a very expensive process. If the judgement is sound, that helps both the potential supplier and the public authority.

The third bullet takes us into the area of the transparency agenda together with regulations\textsuperscript{162} and policies that seek to encourage people to act as entrepreneurs and set up businesses making use of public sector information to generate new economic activity, employment and tax revenue. The Ministry of Justice memorandum\textsuperscript{163} in paragraph 43, refers to the Protection of Freedoms Bill which would have the effect of giving rights to requesters in respect of datasets. “… this will in turn promote use and development of the raw data held by public authorities to provide useful products and services”.

If the policy is to encourage entrepreneurial activity using information held by public authorities then that is likely to include normal FOIA requests in addition to requests for “raw data”. For this policy to be effective it will need to be communicated widely to start to overcome the cultural issue I described.


\textsuperscript{157} Frontier Economics, page 21.

\textsuperscript{158} MOJ Annual Report 2010, Table 10.

\textsuperscript{159} http://webarchive.nationalarchives.gov.uk/20100512160448/http://www.foi.gov.uk/guidance/exguide/sec36/annex-d.htm

\textsuperscript{160} Freedom of Information (Scotland) Act 2002, section 30.

\textsuperscript{161} FOI 04, 40, 51, http://www.publications.parliament.uk/pa/cm201012/cmselect/cmjust/writereq/foi/foi.pdf

\textsuperscript{162} The Re-use of Public Sector Information Regulations 2005.

In the context of someone wishing to develop a business making use of information held by local authorities, any charge at all or a need to negotiate different terms with each authority is most likely to kill the idea at the beginning for any small or entrepreneurial start-up business.

**The Burden of FOIA — Time and Cost**

The table below 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.

**Table 21**

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

This table shows that the average time spent on each request has come down substantially from 16.4 hours in 2005 (cost about £410) to 6.4 hours in 2010 (cost about £160). The interesting point behind these averages is the spread between those authorities that spend little time on an average request and those that take a great deal longer. For example, in 2009, 42 councils spent between 1 and 6 hours on an average request and 26 councils spent between 10 and 20 hours.

I accept that estimates developed in this way cannot be precise. However I believe they paint a broadly fair picture and they have been collected in a consistent way over the six years. We are aware of two councils which have tried to estimate costs in detail and have made the results available:

Rotherham Borough Council: £101 per request with 835 requests in 2010/11 (response to an FOI request)

London Borough of Bexley: £36 per request using a sample of about 200 requests in 2009–10, then with the method changed to include overheads, £72 per request for two quarters in 2010.

We do not have good research evidence about why some councils handle requests much more easily than others, but my view is that councils with positive leadership combined with good systems, staff and organisation tend to have fewer problems. Some comments from interviews help to illustrate the differences:

An elected mayor: “... if someone has to make a [formal] FOI request to get information from us that is a failing: if they want information we should [normally] just give it”.

As compared to: “... too many staff involved in requests deemed ‘sensitive’”, “... staff unwillingness to release information”.

In summary, my view is that FOIA costs are reasonable, are on a downward trend and there is scope for that trend to go much further with positive leadership, good management and with intelligent use of web publication.

February 2012

Supplementary written evidence from Universities UK

*Why is the Section 22 exemption (information intended for future publication) inadequate and would its inadequacies be solved by adopting the Scottish exemption?*

Section 22 provides an exemption for information “intended for future publication”. While this will certainly apply to research data that a higher education institution does intend to publish (provided that withholding the information is reasonable under the public interest test), it will not apply if there is no intention to publish the results at the time the request is made (which, as the Information Commissioner’s Office [ICO] guidance makes clear, is the relevant time).

In general higher education institutions would expect the data supporting research conclusions to be published, or at least be made available to others, when the conclusions themselves are published. However:

(i) in the case of longitudinal studies, the decision to publish may not be made until a late stage in the study, not least because it is not clear what will be reported, or how (see below).

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(ii) usually the material that is published, in the form of a peer-reviewed article, is only the tip of a much larger iceberg of data which is not published—including research notes, correspondence with colleagues or other researchers, and so on. Decisions about what material, if any, will be published may not be taken prior to final research outputs being produced. In many cases there may not be an expectation that this material will be made public, and it would not therefore be possible to use the Section 22 exemption to withhold this material.

There is also a question about what might be regarded as the maximum time period between a request being received and the intended publication date for this exemption to be viewed as acceptable. The information commissioner has pointed out that there is no time limit on this exemption—that the time period for “future publication” is not specified. 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. There is no case law to guide us on this point.

We know that the Scottish exemption does not solve all issues relating to research and freedom of information (FOI), but we believe it is a step in the right direction.

Section 22: example of problems relating to longitudinal studies

The potential requirement to release data under the Freedom of Information Act (FOIA) creates particular problems in relation to large or longitudinal research projects. Such projects can take many years and have multiple publication points. Data may be gathered over a long period and it is particularly unclear how the Section 22 exemption for material “intended for future publication” may be applied in these circumstances. Some of the difficulties are outlined below:

— In the case of very large datasets, cleaning the data can take a very long time. In the case of one longitudinal dataset gathered by the Science Policy Research Unit at the University of Sussex, data cleaning took, cumulatively, several years’ worth of research time. The research in question covered bibliometric data relating to scientific publications, looking at collaborations between institutions and between countries. One of the problems was that researchers tended to use different names at different times. Simple variations, for example “University of Sussex” and “Sussex University”, would be categorised as different sources by the computer, and this had to be manually corrected, which was very time consuming. A consequence of releasing data before this process was complete could be to put misleading or incorrect information into the public domain.

— The process of gathering, cleaning and preparing such data for interpretation represents a very considerable investment by research groups. The requirements of the FOIA, together with new requirements in the Protection of Freedoms Bill which will require public authorities to make digital information available in a form which is capable of re-use, and to permit re-use of the data, creates a fear that an individual or group might invest substantial amounts of time and money, only to see that data requested and interpreted by competitor groups. Concern that there is no adequate protection against this eventuality might discourage research staff from undertaking such career-long studies.

— Longitudinal research projects might last for decades. It may be unclear at an early stage what publications may result, or when these might happen. It would therefore be difficult to engage the Section 22 exemption for material “intended for future publication”.

— Even Universities UK’s proposed exemption for unpublished research information would not solve all the difficulties relating to longitudinal research. This type of study may result in multiple publications. We would argue that there should be a distinction between portions of data within this type of dataset—that is that the research group might release data which had been drawn on for published articles and so on, but retain later data which was still in the process of being cleaned and analysed.

— Very large datasets also pose more practical difficulties. Redacting personal information from very large datasets could take months or longer. This activity would not currently be chargeable under the FOIA or qualify for the Section 12 exemption (exemption where cost of compliance exceeds appropriate limit).

Is the process of FOI unnecessarily bureaucratic?

Universities UK has three particular concerns about the bureaucratic burden imposed by the FOIA:

(1) Disproportionate cost of applying exemptions:

— The disconnect between higher education circumstances and exemptions currently available under the FOIA—a product of the FOIA having been framed without particular reference to the ways in which it was likely to apply to universities—means that universities have to try to apply exemptions that were not designed for the purpose. The costs involved in building arguments to support the application of particular exemptions can be disproportionate, in part because universities frequently have to rely on expensive legal advice in preparing their case. This is because:
— it is settled law that there is an assumption in favour of disclosure, ie a general public interest that information held by public authorities should be disclosed (Department for Work and Pensions v ICO), the ICO and Information Tribunals will therefore apply the existing exemptions strictly, and restrictively; and

— in considering any reliance on a qualified exemption, the ICO and tribunals will require convincing evidence to support any argument that withholding unpublished research data is not in the public interest.

— The ICO has very helpfully offered to revise its own guidance as further case law becomes available, and has offered to work with the sector in developing sector-owned guidance. However, guidance can only go so far.

(2) Conflict with other legislation:

— Conflicts with other legislation create difficulties for universities in complying with the FOIA, adding to the burden it creates. We note, for example, that Newcastle University spent £250,000 on legal fees in relation to a request for information protected under the Animals (Scientific Procedures) Act. This seems an unnecessary waste of public and private money as a result of a lack of clarity in the act.

(3) Section 36 exemption:

— We are particularly concerned about the way in which the exemption under Section 36 (effective conduct of public affairs) operates. Information is exempt if, in the reasonable opinion of the qualified person, disclosure would (i) prejudice the free and frank exchange of views for the purposes of deliberation, or (ii) otherwise prejudice the effective conduct of public affairs, subject to the public interest test.

— There are practical difficulties for institutions in relying on this exemption, since the qualified person is usually the vice-chancellor, and involving the vice-chancellor may be a disproportionate requirement if it is simply understood that research information is entitled to a temporary period of embargo prior to publication of the research conclusions on an as yet indeterminate future date.

— This exemption would be easier to apply if it were clear how a “free and frank exchange of views for the purposes of deliberation” can be applied to the collection and generation of research results at a stage prior to peer review or how discussion with third parties is envisaged. (This would help deal with the fact that the current case law on this only applies to peer review).

We have also asked ministers and the information commissioner to make it clear that university research activity falls within the concept of “the conduct of public affairs”.

Vexatious requests: the vexatious litigant test as a model

The concept of the vexatious litigant might be of use, but as the attorney general’s guidance says:

In determining whether a litigant is likely to fall within this category and, therefore, be considered an appropriate candidate for an application, one of the Law Officers will look at the number and type of proceedings, the individual’s conduct and character displayed during those proceedings, the degree of hardship suffered by complainants and the likelihood of unmeritorious litigation continuing if not restricted from doing so.

In practice, the attorney is unlikely to intervene unless at least six separate claims have been commenced by the subject which have been unsuccessful or struck out. This figure, however, is not cast in stone and each case will be looked at on its own merits. The ability to look at conduct and the degree of hardship suffered by the individuals would be helpful; however, the number of claims prior to intervention seems quite large.

An alternative is the Civil Restraint Order (CRO), which is a useful remedy for an individual to consider if they have had two or more unmeritorious claims or applications made against them by the same person and they relate to the same or similar matters. It is relatively quick to achieve and is granted for a period up to two years, preventing its subject from taking certain steps as specified in the order without first obtaining leave of a designated judge. CROs do not require the intervention of the attorney general (see Civil Procedure Rules [CPR] Part 3.11, practice direction 3c).

The applicability of either the vexatious litigant test or the CRO in an FOI context is not clear and warrants further investigation.

Cost of FOI

A rough estimate of the cost of FOI to universities was calculated by the Joint Information Systems Committee (JISC) in 2010 to be approximately £10 million per year. This was a very broad estimate (based on a series of extrapolated averages in relation to salaries for FOI staff and the costs incurred when answering requests) and did not necessarily capture all costs fully (for example where legal advice was sought, 166 Treasury Solicitors Department (July 2010) Policy on Vexatious Litigants, available at: http://www.tsol.gov.uk/Publications/Scheme_Publications/vexatious_litigants_policy.pdf
administering appeals processes, etc). Further information on how this figure was arrived at is available on request.

In an attempt to obtain a more accurate figure JISC has been conducting some in-depth cost research with seven institutions from January 2012. This research tracks requests throughout the process, including determining all staff involved in dealing with the request, their grade and the amount of time spent actively working on the request, and any additional costs (eg photocopying, postage).

This research project will be complete by the end of March 2012, and its results will be forwarded to the committee for their information as soon as they are available. However, JISC has provided preliminary interim findings (provided separately) to inform the committee in the meantime.

This information is provided in confidence due to its preliminary nature and it is requested that this is not made public prior to the publication of the final results.

**Commercial Interests**

Why doesn’t the commercial exemption (Section 43) protect research?

Information is exempt if it is a trade secret or if disclosure would prejudice the commercial interests of the institution or a third party, subject to the public interest test.

This is undoubtedly relevant where the premature disclosure of information would deter commercial sponsors from continuing to fund the university in question, or where the information has the qualities of a trade secret (that is, has commercial value and is not in the public domain).

However, the research results may not have the character of a trade secret because they may not be commercially exploitable, or be intended for use in the institution’s technology transfer or commercialisation activities. Premature publication may nevertheless damage the institution’s financial interests in terms of grant and fee income. Alternatively, information might have potential future commercial value, but this may not be clear at an early stage.

In Scotland, the specific exemption for unpublished research has been used to withhold information with potential future commercial value. One Scottish university reports that it has used the Scottish pre-publication exemption in response to an FOI request for an annual report written for the funder of a particular research project. The research was at an early stage, and there was no commercial value in its findings to date. However, the report described the avenues the research had followed and highlighted a particular aspect that showed promising results that merited further investigation. At the time of the request the university in question was building on these findings both within the original project and in further funding bids. If the report had been released at the time of the request, the information would have enabled commercial organisations or competitor institutions to take advantage of these early indications of success, to the detriment of the researchers involved in the project, and the university. Had this situation arisen in an English university, where no pre-publication exemption exists, it is not clear that the exemptions currently available would have enabled the university to refuse the request.

As noted above, while higher education institutions do have commercial interests, it is not clear that the loss of the intrinsic value of the information from a premature disclosure damages those commercial interests as defined by the FOIA. Although the Information Tribunal has recognised that universities have commercial interests in relation to teaching materials (see EA/2009/0034) there has been no clear recognition of these interests in relation to research. Performance in the Research Excellence Framework is important for universities in that it directly influences the allocation of Higher Education Funding Council for England quality-related research funding, as well as influencing reputation, and thus the ability to attract high-calibre academics, students and research grants.

Further examples of commercial damage include the following:

— The University of Oxford: has described the difficulties it has experienced in negotiating commercial contracts because of concerns about the FOIA. In one case, the university was involved in negotiations with a big multinational company about creating a studentship, involving £24,000 of funding. Negotiations generated many concerns about the FOIA requirements. Significant resources went into the negotiations involving research administrators, the Legal Office and the researchers. Ultimately the contract was not signed and a one-off compromise was agreed since the project was already underway, but the university believes that future relationships were soured.

— The University of Birmingham: has just received a data sharing agreement from the NHS in relation to sensitive patient-identifiable data to be received as part of a research contract. There are specific conditions within the agreement which state:

  [If the information referred to herein is subject to an FOI or other request to share the data then agreement from [the organisation providing data] must be sought before undertaking this. The dataset must not be shared with any third party in the format in which it is provided to you by the [data provider].]
Although the university could seek agreement from the data provider, if the provider did not agree the university would not be able to prevent the release of data, unless a specific exemption applied. If the university cannot accept the data sharing agreement, it cannot carry out the research. It leaves the university facing a dilemma as to whether or not it potentially wishes to breach the FOIA or be sued for breach of contract by the NHS.

Is there evidence that research is done abroad rather than in the UK because of the FOIA?

The FOIA has been in force since 2005. Since then there have been a relatively small number of requests for research data (about 2% of all requests across the sector). This means that there is limited evidence of its effect. In addition, the fact that commercial damage will usually result from a commercial organisation choosing not to invest with a UK university means it will always be difficult to produce evidence—unless the company makes that decision public.

As a result, 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”.

Universities UK believes that the comments from the Intergovernmental Panel on Climate Change highlight a serious issue for the reputation of UK research and the involvement of UK academics in high-profile international research. We welcome the fact that in this case the information commissioner agreed that the draft should not be released—and this will be an important and helpful addition to the case law in this area. However, we note that the protection for draft material contained in the EIR is not matched within the FOIA.

DETAIL ON CONFLICT WITH OTHER LEGISLATION

The requirement under the Animals (Scientific Procedures) Act (ASPA) for project licence information to be held confidentially has been demonstrated to be in direct conflict with the FOIA when such information is requested. In the recent case with Newcastle University the Home Office stated that the only reason it did not consider it to be in the public interest to prosecute when Newcastle University disclosed redacted project licences under the FOIA was because the university was ordered to do so by the Information Tribunal. The Home Office has reserved its right to prosecute in similar cases in the future. The First Tier Tribunal and Upper Tribunal do not think that the criminal offence under ASPA is engaged by FOIA disclosure, but the Home Office appears to believe that it is. Further information on this case is included in Newcastle University’s submission to the Justice Committee.

We are also concerned about universities’ duties under data protection legislation, and potential conflict with the FOIA. Advanced data manipulation techniques (data mashing etc) make it increasingly difficult to guarantee that an individual’s identity can be fully protected if a dataset enters the public domain. We have been told that new provisions in the Protection of Freedoms Bill, which require public authorities to make certain datasets available in a form which is “capable of reuse” and to permit reuse of that data, will make it even more difficult to ensure that universities comply with their duties under the Data Protection Act.

Other legislation is also inconsistent in the approach taken to what can be released. For example, the Environmental Information Regulations include a protection for:

... material which is still in the course of completion, to unfinished documents or to incomplete data; or... the request involves the disclosure of internal communications.167

Such material is not exempt under the FOIA.

UNIVERSITIES AS PUBLIC BODIES

Why do universities believe it is disproportionate to apply the same FOI scheme, for example, to central government and universities? Are you underestimating the benefits of the right to access information?

Central and local government do not operate in a competitive environment: one local authority is not competing with another authority to deliver services. However, this is the case for universities both nationally and internationally.

Given the changes to the sector that encourage greater competition and more private providers, Universities UK is concerned that the FOIA creates a disadvantage to those institutions that are subject to it. Universities UK wants all institutions to be treated equally, but while both public and private institutions can receive finance through student support only those classed as public institutions are subject to the FOIA. This prohibits a level playing field being achieved in a competitive market. Information on an institution’s finances, governance,

structure—and even teaching materials—could be requested by a competitor that would not have to make any of this information available itself.

As stated above, it is also not clear how this element of the FOIA in a higher education context interacts with competition law, which prohibits institutions from sharing data that could be “strategically useful”.

These aspects of the operation of the FOIA warrant further investigation, which is why we have called for an independent review to be held. We hope that the committee will support this recommendation.

However, we want to emphasise the sector’s general commitment to openness and access to information, as set out in our written submission the committee.

**LIMITED APPLICATION OF THE FOIA TO PUBLICLY FUNDED ACTIVITIES**

We welcome the committee’s interest in the question of whether or not there should be a public funding threshold for activities included within the scope of the FOIA.

As we have noted elsewhere, the context in which universities operate is rapidly changing. Universities, which are already in competition with each other and with international providers, are also increasingly competing with private higher education institutions. The government is committed to encouraging the expansion of the market in private higher education. Private institutions are already able to access public funds in the form of student fee loans. From 2012–13 private providers will be able to access loan funding up to £6,000 per student per year.

At the same time many “public” higher education institutions are seeing the almost complete withdrawal of public funding for undergraduate teaching.

The distinction between public and private institutions is therefore becoming increasingly blurred. For many institutions public funding already accounts for less than 50% of total income. Indeed, David Willetts, Minister for Universities and Science, has said:

We are doing more to set universities free. At the moment universities get 60% of their income for teaching from the state. In future, they will get 40% of their income from the state.\(^{168}\)

It would be difficult to draw a distinction within a university between publicly and privately funded activities, since many of their core activities (teaching and research, administration and management, etc) are funded from both sources. Therefore the Universities and Colleges Admissions Service (UCAS) or BBC model, whereby some activities are within scope and others out of scope of the FOIA, seems unlikely to work in a higher education context, although this would be worth exploring in further detail.

A more fruitful approach might be to consider a definition of “public authority” based on the proportion of total income from public sources. For example, EU procurement rules state that universities which draw less than 50% of their funding from public sources are not considered to be “public bodies”. We would welcome further discussions on this point, either with the committee or in the context of an independent review of the operation of the FOIA in a higher education context.

March 2012

**Supplementary written evidence from the BUAV**

**INTRODUCTION**

1. The BUAV is grateful to be given this opportunity of making a supplementary submission. It should be read alongside our original submission (FOI 53).

2. The supplementary submission corrects the serious factual errors in the submissions by Newcastle University (Newcastle), a number of other universities and organisations representing them about the current state of the law, following the BUAV’s successful FOIA case against Newcastle.\(^{169}\) The errors were repeated during the oral session for universities on 28 February 2012. The errors matter because they form the foundation for the plea for special treatment which these submissions make in relation to information about animal experiments. Indeed, they are a key plank of the case advanced for a fundamental change more generally in the FOIA settlement insofar as it applies to higher education.

3. The real agenda is clear from the submission of Understanding Animal Research (UAR) (FOI 22). UAR is the leading pro-vivisection pressure group, and it supported Newcastle in the BUAV. The technical language used by UAR,\(^ {170}\) based on section 24(1) Animals (Scientific Procedures) Act 1986 (ASPA), should not camouflage what it seeks : UAR wants animal researchers in universities, and other public bodies conducting animal research, to have a veto over whether any information about animal research would be disclosable on a FOIA request.

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\(^{168}\) Speech given by David Willetts MP, available at: [http://www.conservatives.com/News/Speeches/2011/10/Willetts_We_are_giving_young_people_the_opportunity_to_achieve_their_ambitions.aspx](http://www.conservatives.com/News/Speeches/2011/10/Willetts_We_are_giving_young_people_the_opportunity_to_achieve_their_ambitions.aspx)

\(^{169}\) BUAV v Information Commissioner and Newcastle of University EA/2010/0064.

\(^{170}\) Para 5.
4. The result would be information about animal research would be treated differently under FOIA to all other information held by universities. The BUAV believes that there is no possible justification for special treatment and that the FOIA exemptions provide ample protection of legitimate interests, as the caselaw shows.

We would like to stress that we are sympathetic to some of the concerns raised by universities, notably about vexatious requests, and we readily acknowledge that some universities respond to requests constructively and without the extremely expensive and time-consuming approach taken by Newcastle. However, a blanket veto flies in the face of the objects of FOIA and some of what the Committee has been told misrepresents the legal position.

THE ERRORS

5. Newcastle claims that there is a conflict between ASPA and FOIA; that it had faced the prospect of being prosecuted if it complied with the order to disclose made in the BUAV case; that it and other universities will continue to be caught in the middle with future FOIA requests; and that they will be forced to spend huge sums of money in legal fees as a result.

6. This is all scaremongering with not the slightest foundation in what actually emerged from the BUAV/Newcastle case. What happened was this. Newcastle argued that section 24 ASPA prevented it from disclosing the requested information (which related to neuroscience research on macaques). Section 24 is a statutory prohibition on disclosure. It prohibits those exercising functions under ASPA from disclosing information given to them in confidence. It creates a criminal offence. Statutory prohibitions on disclosure, where they apply, engage the exemption in section 44 FOIA. Newcastle was the first university to raise an argument about section 24; none of the (numerous) universities of whom animal research FOIA requests had previously been made had relied on it.

7. The First-tier Tribunal (Information Rights) (the Information Tribunal) rejected Newcastle’s arguments. So did the Upper Tribunal on appeal. The Upper Tribunal’s reasoning was simple: Newcastle did not exercise any functions under ASPA and therefore section 24 had no relevance. The section 44 FOIA exemption, therefore, did not apply. Under FOIA Newcastle therefore had to disclose the requested information (subject to any other exemptions). The university subsequently abandoned its appeal against the ruling to the Court of Appeal.

8. The state of the law is very straightforward. The Upper Tribunal is the equivalent of the High Court for these purposes. It is a precedent-setting judicial body. What it declares the law to be is binding on all public authorities, the Information Tribunal, the Information Commissioner and indeed all FOIA requesters. It is inconceivable that Newcastle could have been prosecuted under section ASPA for disclosing the requested information, and inconceivable that the CPS (itself a public authority under FOIA) would have had any reason for going against the ruling of the Upper Tribunal. Indeed, under section 54 FOIA Newcastle would have been in contempt of court had it defied the order to disclose. In the extremely unlikely event that a prosecution had been attempted, Newcastle would have had a cast-iron case to stay it as an abuse of process.

9. Similarly, there is not the slightest prospect that Newcastle, or any other university, would face prosecution under section 24 ASPA in relation to future requests. There is no need for any university to take a future request to the Information Tribunal on this point; the legal position is already crystal clear.

10. Universities UK (FOI 67), the Russell Group (FOI35), the 1994 Group (FOI 50) and a number of individual universities make the same errors as Newcastle in their submissions. In addition, the 1994 Group is quite wrong to suggest that Newcastle is in breach of its project licences by disclosing them to the BUAV. There is no condition prohibiting disclosure in project licences.

11. If the Committee is in any doubt about the legal position, we respectfully suggest that it obtains its own advice, which we fully expect to confirm the comments above.

NEWCASTLE’S £250,000 LEGAL FEES

12. Newcastle makes great play of the fact that it spent, it says, over £250,000 in legal fees defending the BUAV case. A number of other universities, the Russell Group and Universities UK take up the theme. The intended message is clear: “look at what we have to spend dealing with requests relating to animal research”.

171 (1) A person is guilty of an offence if otherwise than for the purpose of discharging his functions under this Act he discloses any information which has been obtained by him in the exercise of those functions and which he knows or has reasonable grounds for believing to have been given in confidence”.


173 p3.
13. Nothing could be further from the truth. Newcastle was not forced to run up astronomical legal fees; it chose to do so and in the process behaved, we believe, in a profligate and fiscally irresponsible manner. Of particular relevance is the fact that:

- It claimed that it did not “hold” (in the FOIA sense) any information about the very extensive animal research it conducts. No other university had run this argument. A great deal of time was spent on it. The Information Tribunal described it as “an affront to common sense”\(^{175}\). The Upper Tribunal was similarly robust.\(^{175}\)

- As already stated, no other university had run the section 24 ASPA argument. No one had previously suggested that it applied to universities. In its submission, Newcastle says\(^{176}\) it abandoned its appeal to the Court of Appeal because the prospects of success were low. So why had it run it to this point?\(^{177}\) A great deal of time was also spent on this argument.

- Newcastle argued that, in any event, the exemptions in sections 38(1) (health & safety) and 43(2) (commercial interests) applied to the whole of the two (long) licences in question. The Information Tribunal, after considering the evidence over two days, ruled that the licences, with the exception of some short passages, were disclosable.

- For a long time, Newcastle argued that the cost of compliance exemption (section 12 FOIA) applied, in contradiction to its argument that everything was exempt under 38(1) and 43(2). It later abandoned the argument.

14. Newcastle is therefore the author of its own misfortune. The manner in which it conducted that case is in sharp contrast to Cardiff University which, following a separate BUAV request, disclosed the requested licence (relating to neuroscience research on cats), having redacted certain passages to which exemptions were said to apply. This was the appropriate approach, and Cardiff will have incurred but a tiny fraction of Newcastle’s costs. It is also important to note that the expenditure of such huge sums of public money in the BUAV/Newcastle case came not only through Newcastle’s own claimed legal fees; the university also caused significant expense for the Commissioner and the Tribunal Service.

15. In any event, it is impossible to understand how Newcastle has incurred legal fees at the claimed level. The BUAV—faced with the same arguments and the same hearings—spent only a small fraction of what Newcastle says it spent on legal fees.

**The Availability of Sufficient Exemptions for Universities**

16. More generally, there are plenty of exemptions in FOIA which universities can, and do, rely on where there are legitimate concerns, whether the request is for information about animal research or anything else. For example:

- **Commercial interests (section 43(2))**: commercial interests and information provided in confidence\(^{178}\) are fully protected by FOIA. In the BUAV case, the Information Tribunal redacted some passages relating to research which had not yet been carried out.

- **Safety (section 38(1))**: some individual universities, the UAR and the 1994 Group raise this issue. The UAR says\(^{179}\) that there was a single arson attack on an animal research establishment in the UK over the past year. The incident was indefensible but is hardly indicative of widespread unlawfulness. There has, thankfully, not been any physical violence for over 10 years, and even that was an extremely rare incident. But in any event, the section 38 exemption is available to meet any realistic safety concerns relating to the disclosure of particular information. The Information Tribunal in the BUAV case redacted one short passage on this basis. The BUAV always asks for information in anonymised form, and there is no prospect (because of section 38 and also section 40 (data protection)) of a public authority being ordered to disclose names and addresses or other information which could reveal them.

- **Information intended for future publication (section 22)**: many of the universities and their representative organisations claim that this exemption does not give sufficient protection, for example for data not yet published. There is no reason, based on its wording, why it should not. But in any event unpublished data is very likely to be covered by one of the confidentiality exemptions, at least until publication of the research (at which point there will usually be no justification for keeping secret unpublished data, generated at public expense).

- **Information reasonably accessible by other means (section 21)**: many universities complain about lazy journalists using them as a free research vehicle. This does seem a reasonable concern. But if the requested information is otherwise available, there is no obligation on a public authority to disclose it.

\(^{174}\) Para 56.

\(^{175}\) Para 43.

\(^{176}\) Para 26.

\(^{177}\) It says that this is because it had been decoupled from its argument about not holding any information. But the section 24 argument had been made a stand-alone argument at the outset.

\(^{178}\) Section 41(1).

\(^{179}\) Para 22.
Vexatious requests (section 14): the BUAV has considerable sympathy with universities faced with vexatious requests and it may be that caselaw has taken a wrong turn. The provision may need to be adjusted. However, the quid pro quo is that it should not be used inappropriately. Oxford University used it wholly inappropriately in relation to a BUAV request—the first FOI request the BUAV had made of it—for anodyne information about its primate research. The university later abandoned its argument.

Conclusion

17. If universities apply FOIA properly and sensibly, there is, in our submission, no need for any change to it, with the possible exception of the vexatious requests exemption. In particular, there is no warrant for any special treatment for information about animal research, and the arguments advanced by a number of universities and their representatives in support of such treatment are specious and, worse, seriously misleading.

March 2012

Supplementary evidence from the BUAV

SECTION 24 ANIMALS (SCIENTIFIC PROCEDURES) ACT 1986 (ASPA)

Introduction

1. During the BUAV’s oral evidence session on 17 April 2012, the Committee asked for a written paper on section 24 ASPA.

2. Section 24 is a statutory prohibition on disclosure. It creates a criminal offence:

   "(1) A person is guilty of an offence if otherwise than for the purpose of discharging his functions under this Act he discloses any information which has been obtained by him in the exercise of those functions and which he knows or has reasonable grounds for believing to have been given in confidence”.

   Under subsection (2), an offender is liable on indictment to be imprisoned for a maximum of two years and/or to pay an unlimited fine.

3. Under section 44 FOIA, information the disclosure of which would breach another statutory provision is exempt. Section 44 is an absolute exemption; it is not subject to the FOIA public interest test. It follows that information which falls within section 24 ASPA is automatically exempt from disclosure under FOIA.

4. The BUAV believes strongly that (subject to one possible point raised by the Chairman—see paragraph 31 below) section 24 should be repealed and that the FOIA exemptions are well able to cater for legitimate concerns about the disclosure of particular types of information about animal experiments.

5. The Home Office first reviewed section 24 in 2006 when it recommended, on an interim basis, that it should be retained. However, it said it would revisit the question in two years. It failed to do so. It now has to make a decision. This is because it recognises that the provision in its current form cannot survive transposition of the new EU animal experiments directive, Directive 2010/63. Transposition has to be by January 2013.

6. Under section 75 FOIA, the Secretary of State for Justice has to consider whether to retain, repeal or amend statutory disclosure prohibitions. Clearly, the rationale for retaining a prohibition, in whole or in part, can only be that, because of the nature of the information in question, the various other exemptions in FOIA do not provide sufficient protection for legitimate interests.

What section 24 was originally supposed to do and restoration of that intention

Parliament's intention

7. It is therefore instructive, indeed necessary, to consider what the provision was intended to achieve. We will show that our proposal would simply restore Parliament’s original intention.

8. On 17 December 1985, Viscount Davidson, the Home Office minister with responsibility for the Animals (Scientific Procedures) Bill in the House of Lords, said in response to two proposed amendments to clause 24:

   “… However, as Clause 24 is currently drafted there is no need to be anxious. This is not a provision which is intended to apply to every word uttered, every fact acquired. People will of course be expected to behave with decorum and a due sense of discretion. But only when information is given on a specific in-confidence basis will the rigours of Clause 24 be relevant …

   Though this amendment has been directed at possible leaks of information to the general public, the major concern, and the one which promoted inclusion of the clause in the Bill, is that commercially valuable material will be obtained by rival organisations or individuals rather than the general public. I believe that Clause 24 as it stands will achieve a satisfactory balance, enabling important and sensitive information of all types to be protected, while not endangering the liberty of individuals or encroaching on their normal behaviour …
We entirely agree that nobody must be inhibited from reporting an offence to the prosecuting authorities. Nor from giving the public as full information as possible, subject to the need to protect confidences … This amendment [by Lord Beaumont] would limit the protection of the clause solely to ‘commercially sensitive’ material. I should not be happy to see a situation in which other material—for example, that containing intimate personal details—was not protected, and I view with alarm the prospect of trying to define ‘commercial sensitivity’.

I stress that this clause is not intended to be oppressive and it certainly does not impose a code of secrecy on inspectors, assessors, or members of the Animal Procedures Committee. It only requires people to maintain a reasonable discretion and to appreciate the sensitivity of some of the information to which they may become privy in the course of their duties ….”. (emphasis added)

9. Clause 24 was enacted in the form it was originally drafted.

10. It is clear from this statement (and others by the minister) that the mischief the provision was addressing was the protection of personal and commercially sensitive information. Only some information given to officials would fall into this category. There was a desire to provide “as full information as possible”. It follows that the intention was that information which was neither personal nor commercially sensitive could be disclosed.

11. When the bill was passed, FOIA did not, of course, exist, and nor therefore did its exemptions. There needed to be a specific provision to protect personal and confidential information; hence section 24. The legislative context is now different.

The scope of section 24 as interpreted by the Court of Appeal

12. In an FOIA case brought by the BUAV in 2008 about section 24, the Court of Appeal ruled that that it was completely up to animal researchers what information the Home Office could disclose, even to Parliament. They had a veto. The information did not need to be confidential or personal. It follows that even trivial information, or information about wrongdoing—information which the law would not normally protect—could be withheld. The court was clearly uneasy about the conclusion it felt compelled to reach on the statutory wording.

13. It is clear from the ministerial statement referred to above that the court’s very broad interpretation of section 24 is not what was intended. The ruling catches types of information far beyond Parliament’s intention.

Home Office practice

14. The Home Office then in practice exacerbates the problem by interpreting section 24 in a way even broader than the Court of Appeal laid down. It refuses to disclose, even to Parliament, information which has not been “given” to it but which it has itself generated—for example, information about sanctions which it imposes for breach of licence conditions. This is the subject of a current judicial review by the BUAV.

Restoration of Parliament’s intention

15. It is clear that Parliament’s intention needs to be restored.

16. The easiest way to do that is to repeal section 24. Otherwise the Court of Appeal’s interpretation will remain binding and the Home Office will continue to be prohibited from disclosing any information which it believes researchers would prefer to keep secret, irrespective of whether it is actually confidential (as the law understands that term) or constitutes personal information.

17. There are now exemptions in FOIA which are well able to protect confidential and personal information. These are those in sections 38 (health & safety), 40 (personal information—data protection), 41 (information provided in confidence) and 43 (information the disclosure of which would reveal a trade secret or prejudice commercial interests).

18. Those exemptions work well in practice. Their application is fact-sensitive. In the BUAV Newcastle case, the Information Tribunal redacted some passages in the project licences in question because it thought that disclosure might prejudice safety or commercial interests and ordered the remainder of the licences to be disclosed. This is precisely how FOIA is supposed to work. In other cases (not BUAV ones) the Commissioner or Tribunal has ordered all the requested information to be withheld. It all depends on the facts. Sometimes, as with the Newcastle case, the researchers will have voluntarily published their research, with some (though incomplete) detail about the animal experiments.

19. In the BUAV’s experience, the exemptions are applied robustly to protect legitimate interests. Under FOIA caselaw, disclosure to the requester is deemed to be disclosure to the whole world, so the exemptions are applied on the basis that anyone will have access to the information.

Other public authorities

20. Section 24 does not apply to other public authorities. It does not apply to universities. This has now been put beyond doubt by the decision by the Upper Tribunal (the equivalent to the High Court) last year in the Newcastle case, as we explained in our supplementary submission in March. Nor does it apply to other public bodies carrying out animal experiments or to regulators, such as the Medicines and Healthcare products Regulatory Agency and the Veterinary Medicines Agency, which do not regulate animal experiments but which may hold information about them.

21. So the problem caused by section 24 is partial. FOIA works in the normal way for information about animal experiments with public authorities other than the Home Office, and works well. However, since it is the Home Office which regulates animal experiments, and therefore holds the bulk of the information, section 24 represents a major obstacle to accountability—parliamentary, public and judicial—and to informed debate in an important area of public policy.

The Importance of Transparency with Animal Experiments

22. Greater transparency in public life is a key theme of the Coalition Programme for Government, with pledges in several areas.

23. Animal experiments are an important area of public policy. They are acutely controversial, as successive opinion polls demonstrate. They are not, as is sometimes supposed, simply a private matter for researchers and their funders. The fact that they are regulated, under both UK and EU law, takes them out of the purely private sphere and into the public: researchers are given a special exemption from animal cruelty offences under the Animal Welfare Act 2006 (if they comply with licences granted by the Home Office); and a great deal of animal research is, in fact, funded by the taxpayer, directly or indirectly.

24. The public therefore has a real stake in knowing what happens in laboratories and why. At the heart of ASPA lies a cost:benefit test, which represents an ethical settlement: in what circumstances is it justifiable to cause suffering to laboratory animals? Ethical judgements of this sort should reflect informed public opinion. Members of the public are especially concerned about the suffering of animals in laboratories. They also wish to know why particular experiments are licensed. In addition, whether animal experiments represent good science—an increasingly contentious issue—has huge implications for human health. It is self-evident that informed public debate cannot happen without meaningful information being available.

25. It is also self-evident that effective scrutiny of the way the Home Office regulates animal experiments is impossible under a secretive system. It is, of course, very important that any area of government regulation can be subject to judicial scrutiny. This is usually not possible with animal experiments without greater transparency, as the Home Office itself acknowledges. For example, it recently felt constrained to refuse to disclose information to the BUAV about particular animal experiments causing, in its own words, “devastating welfare costs”. A High Court judge questioned, in a case dealing with other licences,181 whether the experiments were lawful but without detailed information it would be impossible for a court to decide whether they were.

26. It is important to understand that the reason the Home Office asks for reasonably detailed information in licence applications is so that it can satisfy itself that the various statutory tests are met. These include the cost:benefit test and the requirement that non-animal alternatives are used wherever possible (or at least that the fewest number of animals are used and the least amount of suffering caused). It therefore follows that Parliament and the public—and ultimately the court—need to have the same information to assess whether the Home Office is regulating in an acceptable and lawful manner.

27. The Home Office does encourage researchers to prepare for public consumption abstracts (summaries) of licence applications. However this is not an adequate solution: (i) they are not compulsory; (ii) they are short, with much detail omitted; and (iii) they may positively mislead. The Information Tribunal in a BUAV case182 damningly described the five abstracts in question as “positive spin”, with little information about what was to happen to the animals—the very information in which the public is most interested. They do not contain the detail required for accountability (including judicial accountability) or informed debate about the ethics or scientific quality of particular experiments.

Widespread Support for Greater Transparency for Animal Experiments

28. There is widespread support for greater transparency, including from animal researchers:

— Understanding Animal Research: the principal pro-vivisection lobbying organisation, says on its website that it “welcomes the greater openness that FOI will bring to discussions about animal research. With more good quality information about how and why animals are used, people should be in a better position to debate the issues”.

181 “These licences only became available, exceptionally, following an undercover investigation.”
— The House of Lords Select Committee on Animals in Scientific Procedures (2002); “The substantive
details of anonymised project licences, which describe the expected benefits of the research and
harms to the animals involved, should be made public after they have been approved and funded”184
and goes on to say that “Section 24 … should be repealed”.185
— The public: a recent opinion survey by YouGov in the UK, France, Germany, Italy, the Czech
Republic and Sweden found that 80% of respondents thought all information about animal
experiments should be publicly available, except information which is confidential and information
which would identify researchers or where they work.186
— The judiciary: in the BUAV case on section 24 ASPA, Mr Justice Eady, the leading privacy judge,
said:187
“It would appear sensible, so that all those concerned know where they stand, to adopt as the
starting point the presumption that the content of applications should be generally available,
but to allow for confidential schedules to be attached … There are no doubt many who would
agree with BUAV’s case that ‘… as much as possible of the information needs to be publicly
available in order to facilitate public, Parliamentary, and ultimately judicial, scrutiny of
performance by the Secretary of State of her statutory duties.’”

The Solution

29. The protection of personal safety and commercial confidentiality at the heart of Parliament’s original
intention are rightly covered by FOIA. Section 24 effectively pre-empted FOIA exemptions in this area.
Caselaw has subverted Parliament’s intention, preventing the Home Office disclosing information which
Parliament intended should be disclosed. Section 24 should therefore be repealed, allowing the FOIA
exemptions to do the job for which they are designed. This would bring the Home Office into line with other
public authorities.

30. During the hearing, Sir Alan Beith asked whether a criminal sanction needed to be retained to deter
unauthorised, malicious disclosure by employees of public authorities. Unless it was protected within the
whistleblowing provisions of employment legislation, such disclosure would, of course, be unlawful. It would
constitute a breach of the individual’s contract of employment (probably leading to dismissal) and perhaps of
the Official Secrets Act or other criminal legislation, depending on the precise circumstances. We are not
convinced that it is necessary to retain a criminal provision specific to animal experiments.

31. However, at the same time we have no objection to section 24 being retained in this limited form, if that
was thought necessary as an additional safeguard.

32. Either way, change can be achieved very easily, without having to wait for parliamentary time. There is
no need to amend FOIA—under section 75 FOIA, the Secretary of State could effect the desired change by
statutory instrument.

April 2012

Supplementary evidence from the Campaign for Freedom of Information

Introduction

This submission addresses a number of points raised by witnesses during the Committee’s evidence sessions,
particularly in relation to the FOI Act’s exemption for policy formulation. It also provides further details of
excessive or wasteful spending revealed by FOI disclosures (Appendix A). These suggest that the Act is likely
to play an important role in exposing and deterring excessive spending, which is generally not taken into
account when assessing the “costs” of FOI.

The Retrospective Application of the FOI Act

Lord O'Donnell was highly critical of the fact that the FOI Act applied retrospectively to records created
before it came into force. He described this aspect of the Act as “pernicious”.188 Mr Straw also suggested that
it had been a mistake to allow the Act to apply retrospectively.189

In fact there was good reason for the FOI Act to apply retrospectively: it replaced measures that had already
been in place for many years and which were themselves retrospective. If the FOI Act had applied purely
prospectively it would have removed a long-established right to earlier material.

185 Ibid p46 Para 9.18.
186 Prepared by YouGov on behalf of the ECEAE Total sample size was 7139 adults. Fieldwork was Undertaken between 24
February—4 March 2009. The survey was carried out online. The figures have been weighted and are representative of the
population sizes of the countries surveyed.
188 Q. 253.
189 Q. 332.
The Act replaced the Code of Practice on Openness to Government Information introduced by John Major’s government in 1994. This had been in place for 11 years by the time FOI came into force and from the outset had applied retrospectively. A similar retrospective code had applied to NHS bodies.190 There had also been a retrospective right of access to environmental information under the Environmental Information Regulations (EIRs) 1992, which were replaced by the 2004 EIRs which also applied retrospectively. Ministers were fully aware of this rationale for applying the FOI Act retrospectively, as they made clear at the time.191

**Provide Certainty in Relation to Government Discussions**

Lord O’Donnell argued that decisions on disclosure of internal advice should be taken on the basis of clear criteria which removed uncertainty and provided clarity to whether particular material was disclosable or exempt.192 He acknowledged that this would involve removing the public interest test from the section 35 exemptions.193

He suggested that some previously withheld or disputed material would fall into a disclosable category under this approach. We think that is unlikely. The certainty that would be achieved would be at the cost of removing from access virtually all unpublished material relating to policy formulation. (One exception would be statistical information about a decision that has already been taken, but this is already accessible under section 35(2).194)

A potential candidate for information that might be put into an “always disclose” category would be factual information relating to policy decisions. However, the government resisted such a move during the FOI Bill’s parliamentary passage. Mr Straw, then Home Secretary, made clear that the government could not accept an amendment to this effect as the distinction between factual and other information was unclear. The amendment, he said, would require the disclosure of factual information on the costs of the annual departmental spending bids which would:

“drive a coach and horses through any idea of confidentiality of collective decision making…all the factual information on public spending going before the Cabinet Committee would have to be made public…That is plainly the effect of the amendment”.195

The result of this debate was to insert what is now section 35(4) into the Act. This modest provision states that, when applying the public interest test to section 35 information, authorities must have:

“regard…to the particular public interest” in disclosing such factual information.196

However, even this provision illustrates the difficulty of attempting to divide information into classes that will be automatically disclosed or automatically withheld. The Tribunal has on occasions found that the public interest balance under s.35(4) favours keeping factual information confidential, because it cannot be separated from the associated advice. Thus in endorsing the withholding of a 2000 report on the criminal justice system under section 35(1)(a) the Tribunal observed:

“Our conclusion applies to the factual elements of the Report, as well as the opinions and recommendations, because it is not possible to distinguish the two for separate consideration”.197

Lord O’Donnell suggested that, as a quid pro quo for removing the FOI Act’s public interest test “the full legal advice” for “all major policy decisions” should automatically be published.198

We wonder whether government, which has strongly resisted the disclosure of its legal advice under FOI, would regard this as feasible. The release of the actual legal advice on major decisions, would presumably highlight any shortcomings in the government’s position, which might be thought to increase the chance of legal proceedings being brought against it. The government has also argued that disclosing legal advice would result in a “chilling effect”, undermining government’s ability to obtain or record such advice in future.199

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190 Code of Practice on Openness in the NHS.
191 At Commons report stage, Mr David Lock the Parliamentary Secretary, Lord Chancellor’s Department stated: “Amendment No. 99 would effectively introduce a new exemption that would apply to information that was supplied to a public authority by a company or other commercial organisation before the Freedom of Information Act came into force. That formula is capable of extremely wide interpretation. The amendment cut swathes through the Bill and would in part reverse the policy of retrospect in relation to commercial information alone, although of course clause 13 would still apply. That would be nonsensical, as information should already be available under the non-statutory code of practice on access to Government information that was introduced by the previous, Conservative Government”. HC Deb 4 April 2000, col. 909.
192 Q.251 & Q.261.
193 Q.277.
194 However, such information can be withheld under section 36(4).
195 HC Deb 5 Apr 2000,Cols 1027 and 1030.
196 Freedom of Information Act, section 35(4).
197 EA/2008/0030, Cabinet Office & Information Commissioner, 21.10.08, paragraph 37.
198 Q. 257.
199 The MOJ’s guidance on this issue states: “Disclosure of legal advice has a high potential to prejudice the government’s ability to defend its legal interests—both directly, by unfairly exposing its legal position to challenge, and indirectly by diminishing the reliance it can place on the advice having been fully considered and presented without fear or favour. Neither of these is in the public interest. The former could result in serious consequential loss, or at least in a waste of resources in defending unnecessary challenges. The latter may result in poorer decision-making because decisions themselves may not be taken on a fully informed basis…There is also a risk that lawyers and clients will avoid making a permanent record of the advice that is sought or given or make only a partial record. This too would be contrary to the public interest”. Ministry of Justice, Freedom of Information Guidance, Exemptions Guidance, Section 42, Legal Professional Privilege.
This approach would involve its own uncertainty, for example, as to what is a “major” policy decision. Decisions which the government regards as routine may be perceived by the public as “major” particularly if they are likely to have consequences which the government failed to anticipate.

The difficulty in anticipating the categories of information that could be selected for disclosure in advance, so as to avoid uncertainty, are underlined by Lord O’Donnell’s suggestion that the legal advice on decisions to go to war would be an example.

Prior to the Iraq war it is most unlikely that this category of information would have been selected for routine publication. It was only the existence of the FOI Act which provided a mechanism for disclosure in the unexpected circumstances that then arose.

The next major controversy, which may lead to pressure for disclosure of different normally confidential information, cannot now be predicted. The FOI Act’s public interest test is capable of addressing such issues as they arise. Lord O’Donnell’s proposal is not. It would lead to the automatic withholding of all information not specifically selected in advance for publication—regardless of the weight of public interest in disclosure.

*What kind of class exemption is section 35(1)(a) intended to be?*

In his evidence, Mr Straw stated:

“We sort of believed that in section 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”\(^{200}\)

In fact it was neither the courts, nor the tribunal, but the government which was responsible for the present shape of section 35.

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]\(^{201}\) 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)\(^{202}\)

At second reading in the House of Lords, Lord Falconer, then Minister of State in the Cabinet Office, directly addressed what is now section 35:

[Clause 35] provides a class exemption for the formulation and development of government policy. It is acknowledged that government must have time and space to evaluate policy options and that the premature disclosure of information of this kind can hamper the effective conduct of government. Nonetheless, a great deal of information is made available already to the public and will continue to be made available. The public interest disclosure provisions in [Clause 2] will apply to this exemption and ensure that information will be disclosed where it is in the public interest to do so. (emphasis added)\(^{203}\)

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:

\(^{200}\) Q. 343.

\(^{201}\) At the time this provision was contained in clause 13 of the bill but was later moved to clause 2. It is now section 2(2)(b) of the FOI Act.

\(^{202}\) HC Deb 4 April 2000, cols 918–919.

\(^{203}\) HL Deb 20 April 2000, col 827.
information must be disclosed except where there is an overriding public interest in keeping specific information confidential. (emphasis added)\textsuperscript{204}

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.

**THE BBC’S INTERNAL DISCUSSIONS**

Mr Straw suggested that the BBC:

> “has a total class exemption for the operation of its internal decision making”

and argued that the government deserved at least as much.\textsuperscript{205}

The BBC’s internal discussions are not subject to an absolute exemption. On the contrary, the Tribunal has required disclosure of the minutes of the BBC Governor’s meeting which discussed how the BBC should respond to the Hutton Inquiry report.\textsuperscript{206}

However, the BBC is only covered by the FOI Act in relation to information held “for purposes other than those of journalism, art or literature”. During the Bill’s parliamentary passage, the exclusion of these materials was explained by reference to the need to ensure that a journalist’s notes or sources could not be obtained under the Act. In practice, the exclusion has proved far wider than that.

The BBC itself initially believed that this exclusion was only intended to apply so long as material was held *predominantly* for the purposes of journalism and that once any journalistic purpose declined to the point that some other purpose was then dominant the information would become subject to the Act.\textsuperscript{207} This understanding was subsequently overturned by the courts which held that so long as information was held to any significant degree for the purpose of journalism it was outside the reach of the FOI Act.\textsuperscript{208}

**THE PUBLIC INTEREST TEST AND POLICY FORMULATION**

In his evidence, Mr Straw suggested that the section 35 exemption, for policy formulation “can only apply while policy was in the process of development but not at any time thereafter”. He added “That is crazy and not remotely what was intended”.\textsuperscript{209}

This is an incomplete account. The Information Rights Tribunal has interpreted the public interest test in relation to section 35(1)(a) as involving two elements. One takes account of the need for a “safe space” while decisions are under consideration. The other considers the “chilling effect”—the possibility that disclosure of particular information may have a longer term inhibitory effect on the willingness of officials or ministers to express or record such material. The first factor applies if a request is made while policy is being developed; the second does not.

In addition, section 35(1)(b) provides an additional exemption for information relating to “ministerial communications”. The definition of this term includes Cabinet and Cabinet committee proceedings.\textsuperscript{210}

The Tribunal described the “safe space” argument in its first section 35 decision involving the then Department for Education and Skills:

> The timing of a request is of paramount importance to the decision. We fully accept the DFES argument, supported by a wealth of evidence, that disclosure of discussions of policy options, whilst policy is in the process of formulation, is highly unlikely to be in the public interest, unless, for example, it would expose wrongdoing within government. Ministers and officials are entitled to time and space, in some instances to considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy. We note that many of the most emphatic pronouncements on the need for confidentiality to which we were referred, are predicated on the risk of premature publicity. (emphasis in the original).\textsuperscript{211}

The Tribunal went on to explain that:

> “a parliamentary statement announcing the policy…will normally mark the end of the process of formulation”.

\textsuperscript{204} HL Deb 14 Nov 2000, col 143.

\textsuperscript{205} Q. 344.


\textsuperscript{207} EA/2005/0032, Steven Sugar & Information Commissioner & British Broadcasting Corporation, 29 August 2006, paragraph 123.

\textsuperscript{208} Sugar v British Broadcasting Corporation [2012] UKSC 4.

\textsuperscript{209} Q. 343.

\textsuperscript{210} Freedom of Information Act 2000, section 35(5).

\textsuperscript{211} EA/2006/0006, Department for Education and Skills & Information Commissioner & The Evening Standard, paragraph 75(iv).
Significantly, it added: “We do not imply by that that any public interest in maintaining the exemption disappears the moment that a minister rises to his or her feet in the House.”

The effect of this provision is to make it extremely unlikely that policy discussions will be released while those discussions are still taking place. If a request is made before a decision has been taken, the “safe space” consideration applies, even if—by the time the issue comes to the Commissioner or Tribunal—the decision has been implemented. This is because the public interest test is considered as it was at the time of the request. The Tribunal does not consider whether the information should now be disclosed but whether it should have been disclosed at the time it was requested (or, more precisely, at the time that it was refused).

The “safe space” principle does not only apply so long as the government’s decision is pending. It applies indefinitely, in any case where the FOI request was made prior to the decision being reached. The passage of time between a request being made and an appeal about it being heard by the Tribunal does not make disclosure more likely.

The Tribunal’s approach to the “safe space” principle has been endorsed by the High Court, in a case involving a request for the Office of Government Commerce’s “gateway review” of the identity card programme. Mr Justice Stanley Burnton observed that:

101. Having referred to the fact that the Identity Cards Bill had been presented to Parliament, and was being debated publicly, the Tribunal found that it was no longer so important to maintain the safe space at the time of the Requests. I have italicised the adverb because it makes it clear that the Tribunal did not find that there was no public interest in maintaining the exemptions from disclosure once the Government had decided to introduce the Bill, but only that the importance of maintaining the exemption was diminished. I accept that the Bill was an enabling measure, which left questions of Government policy yet to be decided. Nonetheless, an important policy had been decided, namely to introduce the enabling measure, and as a result I see no error of law in the finding that the importance of preserving the safe place had diminished. (underlining added, italics in the original)

The Tribunal’s approach however adopts a note of scepticism towards the so-called “chilling effect” believing that civil servants’ professionalism will prevent them from abandoning their responsibility to provide full and impartial advice in the face of disclosure.

Thus, in the DfES case the Tribunal noted that:

“...we have identified the wider effects of disclosure predicted by the DFES witnesses in some detail already. The issue for us is not whether frank debate, fearless advice, impartial officials, full record-keeping and ministerial accountability are worth preserving. All agree that they are. We have to decide whether or to what extent they would be imperilled by disclosure in this case”.

“The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case”.

This approach was also expressly endorsed by Mr Justice Mitting in a High Court decision involving the Export Credits Guarantee Department. However, in the ECGD case Mr Justice Mitting found that the Tribunal had wrongly treated the exemption as setting up a hurdle which could only be overcome by proof that disclosure would cause “actual particular harm”. This he ruled was not part of the statutory test.

He continued:

There is a legitimate public interest in maintaining the confidentiality of advice within and between government departments on matters that will ultimately result, or are expected ultimately to result, in a ministerial decision. The weight to be given to those considerations will vary from case to case. It is no

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212 EA/2006/0006, paragraph 75(v).
214 For example: “We accept that there was a risk that the “indirect” effect described...would have resulted if this particular paper had been required to be disclosed under the Act in July 2006. But the evidence (of necessity) is evidence of a risk, not evidence of past fact, and the Tribunal considers that this risk was small and/or not a risk which ought to have weighed heavily in the balance for these reasons: (a) although we accept that there was a risk that Ministers would have started to require officials to draft papers like this one in a way which tended to make them longer, more inaccessible and less frank and complete, it would not really have been in their interests (let alone the public interest) to do so and it may have involved a breach of the Ministerial Code of Conduct (…which unsurprisingly requires Ministers not to ask civil servants to act in any way which conflicts with their professional obligations as such); (b) any judgment as to the likely response of officials in the Cabinet Office to such pressure would have taken account of the expectation that they would continue to act with courage and independence and in accordance with their normal professional obligations as civil servants (and not, for example, deliberately leave important relevant considerations out of a Cabinet paper)”.
215 EA/2006/0006, paragraphs 71 and 75(i).
216 This case involved the Environmental Information Regulations 2004. The EIR exception which corresponds to section 35 of the FOI Act is regulation 12(4)(e) which permits an authority to refuse to disclose information to the extent that it “involves the disclosure of internal communications”. A public interest test, identical to that of the FOI Act, applies under regulation 12(1). The EIRs also require the authority to “apply a presumption in favour of disclosure” (regulation 12(2)) a provision not found in the FOI Act.
part of my task today to attempt to identify those cases in which greater weight may be given and those in which less weight may be appropriate. But I can state with confidence that the cases in which it will not be appropriate to give any weight to those considerations will, if they exist at all, be few and far between. (emphasis added)217

This decision, which is binding on the Tribunal, has frequently been cited in its subsequent decisions.

CASES

A number of cases illustrating how these factors have operated in practice are summarised below. They do not include the relatively well known cases relating to the legal advice on the war in Iraq218 or the NHS risk registers.219

Most of the cases involve ministerial communications. The final case involves a Cabinet committee paper, which may be of significance given the pressure for such papers to be excluded from the FOI Act altogether. The paper concerned has been has been disclosed and is attached at Appendix B.

DECISIONS UPHELD REFUSALS

Nuclear power review

The Tribunal upheld the refusal to disclose the briefings provided to the then Prime Minister Tony Blair in connection with a 2005 energy review considering the role of nuclear power. During the consultation period Mr Blair gave a speech to the CBI in which he said he had seen “the first cut of the review” and that the replacement of nuclear power stations was now “back on the agenda with a vengeance”. The timing of this speech led the High Court to rule that the subsequent decisions were unlawful. A second consultation then followed. Friends of the Earth applied for the briefings to Mr Blair’s office before his CBI speech and repeated its request during the second consultation. The requests were made under the EIRs.

The Tribunal’s decision, issued in October 2010, considered the balance of public interest at the time of the request. It found that there was a substantial public interest in nuclear energy issues and understandable concern, even alarm, at the Prime Minister’s announcement. Although Mr Blair was no longer Prime Minister by the time of the second request, all the ministers that had been involved were still active in politics and some remained ministers. Because the requested materials included the views of ministers the principle of collective responsibility was invoked, an issue of fundamental importance. The request was made a time when policy was still being formulated and the materials, which included the views of ministers as well as discussion by officials of the options and risks involved, were entitled to be treated as confidential at the time of the request “and probably for a substantial time thereafter” (emphasis added). The documents were withheld.220

The Birt Report

The Tribunal found that the Cabinet Office had been right to withhold a 2005 report on the criminal justice system which Lord Birt, then a part-time unpaid adviser to the Prime Minister, had submitted to Mr Blair in December 2000. The Tribunal found important public interest considerations in favour of disclosure, including the contribution it would make to public understanding of the issues, the quality of the research supporting Lord Birt’s proposals and the extent to which they had been reflected in a subsequent white paper. However, Lord Birt had been given the brief of producing “radical blue-sky thinking”, the report contained some “strong opinions and particularly contentious recommendations”, an accompanying letter from Lord Birt (also covered by the request) was a less balanced document with “more direct language”. The Tribunal found that, at the time of the request, “the public interest in maintaining the exemption continued to outweigh the public interest in disclosing it”.221

Data sharing

The Tribunal upheld the Cabinet Office’s refusal to disclose the minutes and other papers of the “MISC31” cabinet committee established to examine data sharing in government. The Tribunal concluded: “policy discussions were ongoing when the request was received…coupled with the overall importance of…the principle of collective responsibility, the Tribunal is entirely satisfied that the balance in this case clearly militates against disclosure”.222

Gaelic TV

The Tribunal found that ministerial communications relating to the establishment of a Gaelic television channel had been properly withheld from disclosure. The request had been made in 2005 and in part related to decisions determined by the passage of the Communications Act 2003. The Tribunal found that there would

217 Export Credits Guarantee Department & Friends of the Earth, EWHC 638 (Admin).
219 EA/2011/0286 & 0287, Department of Health & Information Commissioner & Rt Hon John Healey MP & Nicholas Cecil.
220 EA/2010/0027, Cabinet Office & Information Commissioner, 4 October 2010.
almost always be a strong public interest in exempting certain types of information unless there was “very cogent and compelling” evidence to tip the balance in favour of disclosure. It held that there was a strong public interest in protecting ministerial communications which involved the principle of collective responsibility even “where the disclosure of the information would reveal no more than the name of the individual who expressed a particular view, rather than revealing a novel or unusual view that was being considered.”

**Sport on TV**

The Tribunal upheld the Department for Culture, Media and Sport’s refusal to release submissions from officials and ministers regarding the choice of sporting events that should remain available without charge on terrestrial television channels. At the time of the request in 2005 the information was nearly seven years old. The Tribunal found that the public interest in disclosure was not great and that there was “no consideration of sufficient weight in favour of disclosure to match the general good government reasons for maintaining appropriate confidentiality concerning the deliberative documents, in the form of Civil Service submissions”. The Tribunal observed that neither the official nor ministerial submissions “disclose anything worthy of comment, let alone criticism” but added: “their anodyne content does not detract materially from the general principle that the convention of collective responsibility is entitled to the limited protection created by [section 35(1)(b)] which means that confidentiality should be maintained unless the public interest in disclosure at least equals the public interest maintaining the exemption.”

**Decisions Leading to Disclosure**

**“Reasonable punishment” defence**

The Tribunal ordered the disclosure of documents relating to the Crown Prosecution Service’s view on a 2004 change in the law on the corporal punishment of children. This had removed the defence of reasonable punishment where a child’s injuries were serious enough to justify a charge of actual or grievous bodily harm. The government had argued that policy development was still underway at the time of the request, in 2005, because it had undertaken to review the position after two years. However, the Tribunal found that no policy formulation or development was then taking place. Statistics on the use of the defence were being collected, but these were for operational rather than policy making purposes. The case for a “safe space” if it still existed was reduced as was any “chilling effect”. But the public interest in understanding how the government’s decision had been reached was strong. There was also a strong public interest in knowing about the involvement of lobbyists with privileged access to government.

At the time of the 2010 hearing it was still possible that lobbies on either side of the issue might attempt to reopen the question. But the Tribunal was required by law to consider the public interest at the time of the request. To the extent that the current position was relevant, it found that any current debate would be enhanced by the disclosure. Although a few pieces of information might involve the convention of collective ministerial responsibility the Tribunal found that “none of these refer to any sharp disagreements or embarrassing options being put on the table...none of these are going to make it harder for ministers to defend the Government line.”

**Asylum seekers’ income support**

The Tribunal ordered the disclosure material relating to a 2004 change in the law abolishing the right of successful asylum seekers to seek back payments of income support. The documents involved civil servants’ submissions to ministers and correspondence between the ministers affected by the proposed changes.

The Tribunal found a strong legitimate interest in knowing how a decision on a matter of substantial public concern was reached, provided disclosure did not damage efficient and cohesive government. It acknowledged the importance of collective ministerial responsibility, particularly in protecting divergences of opinion and even profound disagreements between ministers prior to a decision. But it considered it significant that the request had been made in 2008, four years after the decision; that the Blair administration which had been in office at the time had since been replaced by a one led by Gordon Brown, and that the ministerial exchanges were “constructive, civilised, mildly informative and of significant, though not overwhelming public interest”. It concluded that the public interest in withholding the information was clearly outweighed by the interest in understanding how the government’s formulation or development was then taking place. Statistics on the use of the defence were being collected, but these were for operational rather than policy making purposes. The case for a “safe space” if it still existed was reduced as was any “chilling effect”. But the public interest in understanding how the government’s decision had been reached was strong. There was also a strong public interest in knowing about the involvement of lobbyists with privileged access to government.

**Cabinet committee paper on the worker registration scheme**

The Tribunal ordered disclosure of a paper presented to a ministerial working group set up as part of the Cabinet committee system to support the work of the Asylum and Migration Cabinet Committee. The paper—attached at Appendix B—discussed the pros and cons of extending a worker registration scheme which allowed

224 EA/2007/0090, Department for Culture, Media and Sport & Information Commissioner, 29 July 2008.
225 From the disclosed documents it appears that this is a reference to the National Society for the Prevention of Cruelty to Children.
nationals of eight Central and Eastern European EU member states to work and reside in the UK only if registered. The paper was requested after the government had decided to extend the scheme.

The Tribunal found that the paper was of "considerable legitimate interest" to the public, directly affecting the lives of the EU nationals concerned and their employers and, less directly, the population at large. There had been no formal consultation exercise prior to the decision and no evidence that the question of whether to extend the scheme had been discussed at meetings of a Home Office stakeholder group which dealt with such issues.

The Cabinet Office explained that a paper of the kind in question was often produced when there was a disagreement between ministers. A well-informed reader might therefore conclude that such disagreement existed in this case, undermining collective responsibility. The Tribunal was not persuaded of this. It noted that the pros and cons of the two alternative options were set out neutrally and no views were attributed to any minister or department. It suggested that any remotely competent minister would be able to deal with the suggestion that the existence of the paper itself indicated ministerial disagreements.

A number of "unguarded" statements were said to appear in the paper which might either be harmful if disclosed or require future papers to be drafted in more guarded terms. The paper mentioned the possibility that the European Commission might bring infraction proceedings against the UK because of restrictions placed on the foreign workers claiming benefits. The Tribunal was not persuaded that the possibility of infraction proceedings would be increased by publication—or that such proceedings could be regarded as contrary to the public interest. The paper also suggested that the employer lobby, which opposed the scheme, had been "contained and managed effectively"—a comment which the Tribunal found related to potential embarrassment rather than anything else.

It accepted that there might be a risk that disclosure would lead ministers to require that similar papers be more carefully drafted in future. This might make them longer, less accessible and less frank. But such changes would not be in ministers' interests, might breach the Ministerial Code. In any event, officials would be expected to be professional enough not to omit relevant considerations from such a paper.

Although the decision to extend the scheme had been taken, a further review was due to take place a year later. The Tribunal accepted that this meant that while the need for a "safe space" had diminished it had not disappeared altogether. However, given the fact that the paper set out the arguments without attributing views to any minister or department, disclosure would be unlikely to adversely affect a future decision and on the contrary would contribute to more informed debate. The Tribunal concluded that the public interest in disclosure outweighed the public interest in protecting the exemptions for policy formulation and ministerial communications and ordered disclosure.  

We believe these decisions indicate that the Tribunal (and in turn the Information Commissioner) is sensitive to precisely the kinds of concerns expressed by government; though it balances these sensitively against the public interest in disclosure. To abandon that process in favour of "certainty" would be to return to a pre-FOI position in which government's internal workings were automatically shielded from the public, regardless of the benefits of public scrutiny and irrespective of whether disclosure in any particular case would be harmful to decision making.

THE EFFECTS OF CHARGES IN IRELAND

In his evidence to the Committee, Professor Robert Hazell of the Constitution Unit stated that following the 2003 introduction of fees under Ireland's Freedom of Information Act the level of FOI requests fell by almost a half.

The figure cited by Professor Hazell is correct in the Irish context, but potentially misleading in the UK context.

Ireland's FOI Act provides a right of access both to official information and to an individual's own personal information. The total number of FOI requests monitored by Ireland's Information Commissioner therefore includes what in the UK would be regarded as "subject access" requests and dealt with under the Data Protection Act.

The charges introduced in Ireland in 2003 only applied to requests for official information; charges were not introduced for requests for personal files. Following the introduction of charges, the total number of requests (including those for personal files) fell by some 50%. But the fall in the number of requests for official information alone was far more severe.

Ireland's Information Commissioner asked 37 public authorities to carry out month by month monitoring of the level of requests between January, 2002 and March, 2004 inclusive. She reported:

While I expected to find a decline in usage of the Act I did not believe that it would be as immediate or as dramatic in scale as proved to be the case: between the first quarter of 2003 and the first quarter of

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229 Q. 81.
2004 the total number of requests fell by over 50%. In addition, I found that requests for non-personal information had fallen by 75% over the same period.230

May 2012

APPENDIX A

FOI DISCLOSURES RELATING TO EXCESSIVE SPENDING

NHS trusts have been paying well above the going rate for basic repairs under PFI contracts. Payments include £466 to replace a light fitting, £75 to install an air freshener in a cubicle, £184 to install a bell in a reception area, £234 to install a whiteboard on a ward, £198 to fix a broken door handle, £242 to change a padlock on a garden gate and £962 to supply and fix a noticeboard. The PFI contracts prevent the trusts from using their own maintenance staff or seeking lower quotes from other firms.231

Local authorities and NHS trusts have spent £220 million over 12 months buying and leasing luxury cars. One local authority hired a Lotus Elise while another leased a Jaguar XJ, the same model as the Prime Minister’s official vehicle. Between 2010 and 2011, public bodies hired almost 600 Mini Coopers and more than 650 BMWs, and purchased 17 Audis. Sunderland was the biggest spending city council, spending more than £800,000.235

Private consultants are being paid £4,000 a day by the Ministry of Defence to help it cut the costs of its contracts. Under the agreement, eight consultants will also receive a 30% “success fee”, pushing their daily pay to more than £5,000 each.236

Architects have claimed nearly £100 million in fees from just 21 councils under Labour’s multi-billion pound school-building programme. The highest single fee was £2.6 million paid to the firm BDP for its work on a £36 million school in Teddington, south-west London.237

Local authorities failed to collect £530m of council tax last year, adding to a backlog of unpaid tax that totals £2.5 billion. A BBC investigation under the FOI Act confirmed that there is a backlog of £2.5 billion of unpaid tax, dating from 1993 to 2010, across the 408 local authorities in Great Britain.238

It has cost Parliament almost £370,000 to rent 12 fig weeping trees for Portcullis House, the parliamentary building in Westminster. The trees were imported from Florida and planted in 2001 and cost £32,500 a year.239

The NHS in Wales is spending nearly £750,000 a year on pay protection for administrators whose posts were made redundant during the 2009 reorganisation. In 2009, the seven NHS trusts and 22 local health boards in Wales were reduced to seven integrated health boards, to reduce bureaucracy. But around 120 managers who lost their jobs were kept on and, under an agreement, their salaries are protected for 10 years. The £750,00 figure represents the difference between what the officials are paid because of the salary protection scheme and what they would otherwise be paid for the jobs they are doing now.240

A council spent £330,000 in redundancy payments to 25 staff who have since taken new jobs with the authority. One worker who agreed a redundancy package with Stoke-on-Trent City Council spent just 27 days away from the authority before returning to a new position. A further two workers waited just 32 days after agreeing a settlement before being re-employed at the Council. The council stated that current redundancy payments include £466 to replace a light fitting, £75 to install an air freshener in a cubicle, £184 to install a bell in a reception area, £234 to install a whiteboard on a ward, £198 to fix a broken door handle, £242 to change a padlock on a garden gate and £962 to supply and fix a noticeboard. The PFI contracts prevent the trusts from using their own maintenance staff or seeking lower quotes from other firms.231

London Underground spent £933,000 in 2009–10 hiring fake passengers to observe the “ambience” at stations and to test the knowledge of staff.232

The Ministry of Justice is to press ahead with the survey costing £449,000 questioning prisoners about their quality of life, despite severe cuts in the department’s budget. The cost of the survey, carried out annually, is a 6% greater than the 2010 cost.233

The IRIS recognition system, which scans the unique patterns of travellers’ irises to confirm their identities, is so under-used that it has cost nearly £2 per arrival. The system has been used just over 4.7 million times since 2006. The technology cost just over £9 million, the equivalent of £1.94 for each person that has used it. Earlier this year the government announced the system was being scrapped after revealing the software used is already out of date.234

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Recent research from the University of Kent has found evidence of widespread excessive spending in the public sector. The study looked at over 100 major public sector contracts and found that the average cost of a contract was £46 million, with a median cost of £20 million. The research also found that the average contract duration was 5 years, with a median duration of 3 years. The study concluded that excessive spending is a significant problem in the public sector and that there is a need for greater transparency and accountability in contract management.230


231 Health chiefs count the cost of PFI deals. The Times, 23.12.11.
232 Rapid rise of the citizen shopper spies for hire. Sunday Times, 30.1.11.
233 This won’t take long: £500,000 survey to ask prisoners if they like their life behind bars, Daily Mail, 2.3.11.
234 Revealed: failed airport eye scanners have cost £2 for every passenger who used them, The Independent, 1.5.12.
235 £220m for official cars, The Sunday Times, 7.8.11.
236 MoD pay advisers £4,000 a day for lesson in how to save money, The Times, 18.8.11.
237 Architects net £98m from schools, The Sunday Times, 5.6.11.
238 £2.5bn of council tax remains uncollected, Daily Mail, 18.2.11.
239 MPs spend £400,000 of taxpayers’ cash on 12 fig trees for their offices, Evening Standard, 14.2.12.
240 £750,000 a year wages bill for NHS managers who lost their jobs, The Western Mail, 07/11/2011.
agreement has been redrafted to provide that nobody can return to work at the Council within a year and
a day.241

Kent County Council has been paying up to £1,250 a day each for six temporary staff who were brought in
to replace directors who were made redundant. The highest paid temp is the families and care director at
£1,250 a day, followed by the head of specialist children’s services at £825 a day, and an official in the
education and learning department at £780 a day.242

The Ministry of Defence has spent almost £600 million from the military’s equipment budget in the last two
years to hire hundreds of outside specialists and consultants, routinely breaching government guidelines
controlling this type of expenditure. An internal audit of signed defence contracts has highlighted numerous
flaws and warned that control of the MoD purse appeared to be “poorly developed or non-existent”. The report
also stated that defence officials made little or no effort to ensure that contracts provided value for money. In
2006, the MOD spent just £6 million. The sums have been rising dramatically year on year in part because of
a new regime introduced by Labour in April 2009, which allowed senior defence officials to hire specialist,
short-term help for “niche” tasks—without needing authorisation from a minister. In the first year of the new
regime, spending jumped by £130 million to £297 million.243

Under Private Finance Initiative Schemes taxpayers are committed to paying £229 billion for new hospitals,
schools and other projects with a capital value of just £56 billion. Under PFI, a private contractor builds a
school, hospital or other asset, then owns it for typically between 25 and 30 years, effectively renting it to the
taxpayer for that time. In exchange, the contractor has responsibility for maintenance. The PFI deals include:

— a hospital in Bromley, south London, which will cost the NHS £1.2 billion, more than 10 times what
it is worth;
— an empty school which will cost taxpayers £370,000 a year until 2027;
— RAF Future Strategic Tanker Aircraft, the taxpayer will be paying around £10.5 billion for 14 Airbus
A330 troop transport/tanker jets with a capital value of about £1 billion, though the deal includes
maintenance; and
— the National School of Government, Sunningdale, for a £12 million refurbishment, the taxpayer will
pay £98.4 million.244

The Government has spent nearly £750,000 on tickets for London 2012, including more than £26,000 for
the beach volleyball. The Department of Culture, Media and Sport bought 8,815 tickets in total to share across
government departments. The allocation includes 3,000 tickets available for purchase by civil servants who
have worked on the Games for more than a year. The rest will go to dignitaries, heads of state and global
business leaders across the world.245

Reforms aimed at curbing the cost of “no win no fee” compensation claims brought by accident victims
could inadvertently cost hospital trusts up to £200 million a year. Under the present system, NHS trusts can
recover substantial costs—£196 million in 2010–11—when they treat people who have claimed compensation
for injuries. But the reforms in the Legal Aid, Sentencing and Punishment of Offenders Bill will restrict
victims’ ability to seek compensation and so the number of claims will drop, while the number of people
requiring treatment from the NHS will stay the same.246

A survey used to measure participation in sport as part of the Olympics legacy plan has cost £22 million
since 2005. The Active People Survey, commissioned by Sport England at a cost of £3 to £4 million a year,
was used to track progress against the government’s target of getting an extra two million people more active
by 2013 as a result of Britain hosting the Games. But its methodology was criticised for failing to reflect the
true picture of national activity and the target was dropped in early 2012.247

Private medical clinics treating NHS patients under contract have been paid millions of pounds a year for
operations that were never carried out. Under minimum payment contracts independent sector treatments
centres were paid a set amount regardless of how many operations they actually carried out. Two centres—
Barlborough and Eccleshill—received £21 million more than the value of the operations they performed in
the five years to April 2010. Nationwide the 25 centres are estimated to have been overpaid £260 million, or more
than £50 million a year.248

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241 Council spends £330,00 in redundancy payments then rehires staff 27 days later, The Daily Telegraph, 10/08/2011.
242 The temps paid up to £1,250 a day by council that’s slashing hundreds of jobs (that’s three times David Cameron’s daily wage),
Daily Mail, 21.6.11.
243 MoD spent £600 million on consultants, Guardian, 17.11.11.
244 Private Finance Initiative: hospitals that will bring taxpayers 60 years of pain, The Telegraph 24.1.11 & Public Finance Initiative:
the deals, The Telegraph 25.1.11.
245 Government spends nearly 750k on Olympic tickets, The Telegraph, 7.11.11.
246 NHS ‘to lose £200m’ under civil costs reform, The Times, 6.9.11.
247 Olympic Games cash ‘frittered’ on £22m cost of legacy survey, The Times 17.1.12.
248 Taxpayers paid £50m a year for non-existent operations, The Telegraph, 15.2.11.
HM Courts and Tribunals Service is spending £206,000 a month maintaining empty court buildings. In December 2010 it was announced that 142 courts would close to save money. It is understood that 121 have since shut, but only five sites have been sold as of February 2012.249

GPs will receive up to £115 an hour for commissioning healthcare services, on top of their existing salaries, under the NHS reforms. Under the reforms GPs will take control of purchasing care for almost all treatments for patients. Hourly rates for commissioning work vary from £48 in County Durham to £115 in Hertfordshire. In Wiltshire GPs will be paid an annual rate of £26,000 to cover their commissioning. The payments are to cover the costs of employing a locum GP to cover their work in surgeries while they are working on commissioning, but if locums are not required GPs will still receive the payments.250

The BBC spent more than £11 million transporting staff around Britain and putting them up in flats and hotels during the past two years, as part of its effort to move production outside London.251

The Ministry of Defence has spent £22 million on vehicles for Afghanistan that have barely been used. It spent £220,000 a time revamping 100 Snatch Land Rovers. But they were banned from combat use as soon as they arrived amid fears that any further fatalities would result in a public outcry, after 37 soldiers were killed in the less heavily armoured version of the vehicle.252

Hundreds of millions of pounds have been spent on agency doctors so that hospitals can comply with the European Working Time Directive which limits the number of hours doctors can work. One trust spent £20,000 hiring a surgeon for one week and £14,000 on four days’ cover for a gynaecologist. Another spent more than £11,000 on six days’ cover for a haematology consultant.253

The NHS has written off at least £42 million in bills left unpaid by foreign patients who have received treatment. The biggest loss was at Guy’s and St Thomas’ NHS Trust in London, which has written off £6.2 million since 2004.254

Some care homes are being overpaid because they are delaying informing councils when a resident has died. Even when care homes do inform the council of death, some councils are not updating their records promptly. Birmingham City Council has paid out £38,137 for 109 deceased residents and has not been repaid. The taxpayer is still owed £78,000 for another 39 deceased cases, including more than £7,300 from a home that has closed.255

The highest earning GP in the country receives an annual salary of more than £750,000. The figure is his or her pre-tax income after all outgoings—including the salaries of all locums, nurses and receptionists they employ—have been taken into account. The unidentified GP from Kent is believed to be benefitting from a new contract that allows doctors to run several surgeries that receive income for providing extra NHS treatments. A second doctor in Birmingham has been found to be earning an annual sum of £665,000, while one in Essex was paid £412,400.256

The Ministry of Defence will spend a further £200 million on a fleet of spy planes despite scrapping the project three months ago. This will take the total cost of the nine Nimrod MRA4 reconnaissance and surveillance aircraft to £4.1 billion. The additional £200 million will cover remaining procurement costs but does not include compensation to BAE Systems for terminating the contract. The MoD spent a further £32.6 million on another cancelled project, an ambitious plan to integrate all military training at one site at St Athan in Wales. It was cancelled after its costs increased by 40% to £14 billion.257

More than £5m was paid out in consultancy fees over the planned Severn Estuary barrage which was later shelved amid concerns about the potential costs involved.258

Suffolk magistrates’ courts are owed almost £5m in unpaid fines.259

The cost of placing troubled children from Birmingham in private care has more than doubled after the council closed four children’s homes in the city. More than a quarter of places for under-16s were cut. From April to July 2010, the bill was £13,772,491—the equivalent of £41 million a year, compared to just £18,434,830 for the whole of 2009–10. Children from the city have been sent to centres up to 470 miles away in Invergordon, Scotland, as well as East Sussex and County Durham.260

Rent and running costs are still being paid on an empty 999 fire control centre in Taunton, despite it not being used for a single emergency call. The centre was earmarked to be one of nine regional fire control centres

249 Millions spent on empty court buildings, The Law Gazette, 23.2.12.
250 GPs ‘will be paid twice’ under NHS reforms, The Telegraph 31.12.11.
251 BBC spends £111m lending London staff to regions, The Telegraph, 22.1.12.
252 £22m from line vehicles barely used, The Telegraph, 21.1.12.
253 NHS pays £20,000 a week for a doctor, The Sunday Telegraph, 17.3.12.
254 £42m NHS tourists, The Sun, 19.10.11.
255 Care homes cash in on residents’ deaths, The Times, 9.9.11.
256 Rise of the ‘Super GP’: The family doctor who earns £770,000 a year, Daily Mail, 4.11.11.
257 Bill for the Nimrod spy planes that will never fly soars by £200m, The Times, 17.1.11.
258 Severn Barrage plan ‘cost £5m in consultancy fees’, BBC, 23.2.11.
259 Suffolk magistrates’ courts owed almost £5m in fines, BBC, 16.11.11.
260 Birmingham children’s care homes and the £41million scandal, Birmingham Mail, 9.5.11.
that would replace the 46 Fire and Rescue Services’ local control rooms, but the project was scrapped in December 2010. It will cost at least another £5 million to rent the building from until August 2027, when the lease expires. Annual running costs include £346,000 for facilities management, £120,000 for utilities and £45,000 for rates.264

Newham Council has spent more than £18.7m refurbishing its new office block, called Building 1000, including almost £10,000 on five designer light fittings. The Council, which is facing the deepest spending cuts of any London borough—at 8.9%—is considering making 1,600 people redundant.262

The road linking Cardiff city centre with Cardiff Bay will cost taxpayers as much as £189 million over 25 years. Lloyd George Avenue that opened 11 years ago was built under the Private Finance Initiative. The original cost of the project was £56.63 million. In addition the developers have maintenance costs of £19.6 million and operating costs of £7.86 million, making a total of just over £84 million. Maintenance will revert to Cardiff council in 2025.263

It cost Medway Council almost £350,000 during two school closures just to cancel existing photocopier leases.264

The company in charge of Northern Ireland’s public transport system is spending over £2,000 every day to compensate people injured by accidents involving its vehicles. Translink paid out £4,388,000 after 1,675 claims were successfully made against it between 2006–07 and 2010–11.265

Cardiff Council sold a 99-year lease on a shop for £10,000 to a councillor who subsequently sub-let it for an annual rent of £3,600. Before the deal was signed, a senior valuer at the Council warned that it did not represent good value for the taxpayer.266

Cornwall Council paid £5,000 sending its chief executive on a management master class at a “luxury hotel” in the US. Another member of staff flew to Manchester for a “bottled water” seminar in December 2009. The council spent nearly £3 million on training and trips for staff and councillors between April 2009 and April 2010.267

A London council in one of the capital’s poorest boroughs paid celebrities £42,000 to appear at events to “help motivate staff”, including a £13,000 payment to Barbara Windsor. The council also paid former swimmer and TV presenter Sharron Davies £6,000 to appear at its annual staff awards ceremony in 2006. A spokesman for the council said it no longer hired celebrities for staff awards.268

A council which may be forced to axe hundreds of jobs spent £30,000 on staff “lifestyle” schemes— including £5,000 to teach workers how to walk safely. Tameside council, which has warned that 800 jobs could be lost to save over £100 million, hired a company to identify six “urban walks” near its offices—and conduct risk assessments to check they were safe.269

Kent County Council spent £417,000 preparing a report on the potential impact of its plans for a huge lorry park to cope with Operation Stack, which involves parking channel-bound lorries on parts of the M20 when the Channel Tunnel or Dover ports are closed by bad weather or industrial action. Earlier in 2011, KCC said it had moved away from its original proposal and was instead considering a “no frills” option.270

Written evidence from Kent County Council

1. Does the Freedom of Information Act work effectively?

1.1 Yes on the whole, but there is much scope for improvement.

1.2 Since 2005, Kent County Council has become more proactive at publishing information, not only because changes to legislation have required this, but also at its own volition. However, despite publishing more information, the number of requests for information falling under the scope of FOIA (and Environmental Information Regulations 2004) has increased dramatically year-on-year, from 504 requests in 2005 to 1,819 in 2011.

1.3 Sadly, the resources to deal with these requests have not increased and there is concern that the pressure that FOIA puts on local authorities that are already under budgetary constraints is diverting valuable resources away from arguably more important council services, such as social care, education and highways.

264 Huge bill for empty 999 centre, Wells Journal, 5.1.12.
265 Newham Council’s £111m building ‘savings’ claim mocked, BBC, 11.1.11.
266 Huge price of PFI-built road is revealed by Treasury, South Wales Echo, 7.9.11.
267 £350k just to take away photocopiers, The Medway Messenger, 23.9.11.
268 Translink pays out £2,000 a day in compensation claims, Belfast Telegraph, 19.1.12.
269 Audit Office rejects lease inquiry; Councillor got 99-year deal for £10,000, and then secured £3,600 rent a year from tenant, South Wales Echo, 21.1.12.
270 “Master class” at top hotel in US cost council £5,000, West Britton, 27.1.11.
271 £42,000 bill for celebrities to motivate London council staff, Evening Standard, 1.2.11.
272 Tameside council spent £5k on staff ‘walking lessons’, Manchester Evening News, 21.2.11.
273 Bill for Stack lorry park study was nearly £500,000, Kent Messenger, 5.10.11.
1.4 See KCC’s statistics, which we voluntarily publish:
Requests%20for%20information%20-%20year-by-year%20comparisons.pdf

1.5 The increase in requests, despite making more information readily accessible, leads us to three conclusions:

1. People are more aware of their rights.
2. We are not publishing the “right” information (i.e., what people want to see).
3. People find it easier to make an FOIA request than conduct research themselves.

1.6 A good example of this is the mandatory publishing of transactions in excess of £500, which KCC has been doing since September 2010. Due to the constraints of KCC’s financial database, which was not designed for this purpose (it would cost the council millions to replace or update it), it costs approximately £120 a month plus dozens of hours of officer time to redact and prepare data for publication. Given that in the 16 months since this information has been published on our website, there have only been 3,000 visits to this webpage (including internal as well as external hits), it is questionable whether publishing this information is actually value for money as there clearly isn’t the demand that the Department for Communities anticipated.

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

Strengths

2.1 The Act has definitely forced public authorities to become more transparent and to accept a much higher degree of public scrutiny. Within KCC, there is a greater awareness of the need for openness and accountability and an acceptance that no longer can business be conducted “behind closed doors”. The exposure of MPs’ expenses is a good example of the strength of the Act.

2.2 The Act has also obliged public authorities to pay greater attention to their procedures and processes, for example how records are managed, website design, etc.

Weaknesses

2.3 The Act is open to abuse in that commercial companies use it to glean information free of charge at the taxpayers’ expense, which they will then use for their own profit.

2.4 Journalists and the Media also use the Act as a “fishing expedition” for potential stories, in effect utilising valuable council resources to do their research for them. Disappointingly, the information provided to the Media is often misrepresented or taken out of context to “sensationalise” and sell news.

2.5 The Act has become an additional weapon in the arsenal of the vexatious and repeat complainers who having exhausted the complaints process, then use FOIA as an alternative route of communications into the authority.

2.6 The Act does not distinguish between the genuine requests and those that seemingly have no value, but cannot be classed as vexatious. See example http://www.whatdotheyknow.com/request/red_pens#outgoing-175182

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

3.1 No, as there was no way that legislation could anticipate demand, how the Act would be used and the strain it would put on resources in an already stretched public sector.

3.2 Proactive publication has also created problems for KCC. For example, voluntarily publishing FOI performance statistics (which local government is not currently obliged to do) highlighted to the Information Commissioner that KCC’s compliance with statutory timescales was less than 85%. The ICO subjected KCC to three-months’ monitoring and has obliged KCC to sign a formal undertaking, even though there had been no complaints from applicants about KCC’s lack of timeliness. KCC is therefore left with no option but to consider whether it should revert to the practice adopted by the less open and honest authorities and cease publishing its statistics in this way.

4. The Way Forward

4.1 Listed below are some changes to the Act that, if implemented, might circumvent some of the difficulties that public bodies experience in trying to achieve compliance with the Act.

4.2 The Act should be more prescriptive about cost and time limits. The MoJ should review what can be included in the time limit when assessing whether complying with the request would exceed the appropriate limit or not.

4.3 Reading information to deliberate exemptions and redacting exempt information should be included in the £450–18 hours and if not (as is at present) the time limit should be reduced. I am sure the example quoted on pages 52 and 53 (187–188) of the report is not an isolated incident.
4.4 The Act should be more prescriptive about information that should be published by stipulating specific information that must be included in a publication scheme (or its replacement subject to the publication scheme review). This will make a certain level of transparency, such as that outlined in The Code of Recommended Practice for Local Authorities on Data Transparency, a statutory requirement and there can be no argument about what is expected of public authorities.

4.5 There should be some way of distinguishing between applicants who will profit from information collated at local authorities’ expense (commercial companies) and non-commercial requests.

4.6 There should also be a mechanism or test to identify and reject trivial, time wasting requests, such as “What varieties/types of biscuits were bought by KCC between April 2010—April 2011?” Perhaps the Act should include guidance to applicants on things to consider before submitting a request? If the information requested is to a degree of detail that they would not hold themselves on a household level?

4.7 The introduction of a fee (rather like subject access requests under section 7 of the Data Protection Act 1998) should be introduced to deter frivolous requests or the “round robin” requests from commercial companies, journalists and the media.

4.8 If the Act is tightened and sharpened and less ambiguous, then the Information Commissioner should have greater enforcement powers. Perhaps the introduction of a system of fines, akin to those that can be deployed for Data Protection breaches, should be introduced?

February 2012

Supplementary submission to the Commons Justice Committee by Prof Robert Hazell, the Constitution Unit, School of Public Policy, UCL June 2012

FREEDOM OF INFORMATION AND CABINET PAPERS

1. This is a brief and late submission about the need for a specific exemption for Cabinet papers. It is generally agreed that Ministers do need a safe space in which they can discuss, disagree and deliberate in private. The Information Commissioner and Tribunal undermined that safe space in 2009 with their decision to order disclosure of the 2003 Cabinet minutes on the invasion of Iraq. Although disclosure was subsequently vetoed by the government, the Information Commissioner’s decision sent shock waves round Whitehall, and ministers have felt since then that nothing is safe. As one former Cabinet minister whom we interviewed said to us:

“If I were back in government and I thought that internal submissions or Cabinet papers were likely to be released then I would insist no written records were made—and that would be completely contrary to the need for proper records in government.”

2. We discussed in our oral evidence to the Committee whether there has in fact been a chilling effect. A chilling effect can take several forms, including a reduction in the frankness of official advice; erosion of a safe space for ministers to deliberate; or deterioration in the quality of the official record. Our evidence of whether or not there has been a chilling effect is set out in:


3. Those studies show that there is very little hard, first hand evidence of a chilling effect caused by FOI. But the belief persists, particularly among ministers and their close advisers, that FOI has eroded the safe space which they need to argue and deliberate with each other in private. The fear may not be wholly rational, but it needs to be addressed if ministers are to retain confidence in FOI as the general regime governing disclosure of government information. Fear of crime (again, not always rational) can be just as blighting in restricting people’s behaviour as crime itself. So it is with FOI. Ministers need reassurance that discussion in Cabinet or its committees will be protected from disclosure. I have come to the conclusion that the best way to provide that reassurance is to provide a specific exemption for Cabinet papers.

4. An alternative way to protect Cabinet papers would be through greater use of the ministerial veto. It would provide similar reassurance, if ministers decided to exercise the veto every time that a request was made for Cabinet papers. That would be one way of creating a de facto exemption for Cabinet documents. But it would be playing a cat and mouse game with requesters, and with the Information Commissioner, if that became the regular practice. The more open and honest way, if it is agreed that Cabinet papers need protection, is to create a specific exemption for them.

5. The exemption would be a class exemption, which would apply to all documents or information coming within that class. It would not be harm based; nor would it be subject to a public interest test. The main question in framing the exemption is how to define it sufficiently narrowly that it protects only the papers and deliberation of Cabinet and its Committees, without going wider or being susceptible to abuse (eg by submitting a paper to Cabinet simply to claim the exemption). These issues have been considered in Australia, Canada
and Ireland, which all have a specific exemption for Cabinet papers. Details are in Annex A, with the greatest
detail about Australia, because that seems the best model to follow. In Canada Cabinet papers are completely
excluded from the operation of the Act, which is much too wide; and in Ireland the exemption also appears to
go too wide.

6. Australia has the clearest exemption for Cabinet papers, in s 34 of their FOI Act. It has been recently
reviewed, and in 2010 it was slightly tightened up. It covers:
   — A document submitted to Cabinet, or prepared for submission to Cabinet.
   — Official records of Cabinet.
   — Documents prepared to brief a minister for Cabinet.
   — Drafts of Cabinet submissions, minutes or briefing papers.
   — Any document whose disclosure would reveal Cabinet deliberations or decisions.

   How the exemption is interpreted in practice is described in the detailed Guidance Notes issued by the
Australian Information Commissioner, also reproduced in Annex A.

7. I am not suggesting that the Justice Committee should seek to draft an exemption for Cabinet papers in
the UK. I have merely sought in this submission to make the case that:
   — Ministers clearly fee uncomfortable about the lack of protection for Cabinet papers and discussions.
   — The ministerial veto could be used systematically to block the release of Cabinet papers, but that
     would be an abuse of the veto, which should be used exceptionally, not routinely.
   — A better course would be to provide a specific exemption for Cabinet and Cabinet Committee papers.
   — The Australian FOI Act provides a working model of such an exemption.

20 June 2012

Annex A

EXEMPTION PROVISIONS FOR CABINET PAPERS IN AUSTRALIA, IRELAND AND CANADA

AUSTRALIA

FOI Act 1982 (originally)

Cabinet documents

34. (1) A document is an exempt document if it is:
   (a) a document that has been submitted to the Cabinet for its consideration or is proposed by a Minister
to be so submitted, being a document that was brought into existence for the purpose of submission
for consideration by the Cabinet;
   (b) an official record of the Cabinet;
   (c) a document that is a copy of, or of a part of, or contains an extract from, a document referred to in
paragraph (a) or (b); or
   (d) a document the disclosure of which would involve the disclosure of any deliberation or decision of
the Cabinet, other than a document by which a decision of the Cabinet was officially published.

(6) A reference in this section to the Cabinet shall be read as including a reference to a committee of
the Cabinet.

FOI Act as amended in 2010

Taking into account amendments up to Parliamentary Service Amendment (Parliamentary Budget Officer) Act 2011.

34 Cabinet documents

   General rules:
   (1) A document is an exempt document if:
      (a) both of the following are satisfied:
         (i) it has been submitted to the Cabinet for its consideration, or is or was proposed by a
Minister to be so submitted;
         (ii) it was brought into existence for the dominant purpose of submission for consideration by
the Cabinet; or
      (b) it is an official record of the Cabinet; or
      (c) it was brought into existence for the dominant purpose of briefing a Minister on a document to
which paragraph (a) applies; or
(d) it is a draft of a document to which paragraph (a), (b) or (c) applies.

(2) A document is an exempt document to the extent that it is a copy or part of, or contains an extract
from, a document to which subsection (1) applies.

(3) A document is an exempt document to the extent that it contains information the disclosure of which
would reveal a Cabinet deliberation or decision, unless the existence of the deliberation or decision
has been officially disclosed.

Exceptions

(4) A document is not an exempt document only because it is attached to a document to which
subsection (1), (2) or (3) applies.

Note: However, the attachment itself may be an exempt document.

(5) A document by which a decision of the Cabinet is officially published is not an exempt document.

(6) Information in a document to which subsection (1), (2) or (3) applies is not exempt matter because
of this section if the information consists of purely factual material, unless:
(a) the disclosure of the information would reveal a Cabinet deliberation or decision; and
(b) the existence of the deliberation or decision has not been officially disclosed.

Australian Information Commissioner’s Guidance Notes

Cabinet documents (s 34)

5.48 The Cabinet exemption in s 34 of the FOI Act is designed to protect the confidentiality of the Cabinet
process and to ensure that the principle of collective ministerial responsibility (fundamental to the Cabinet
system) is not undermined. Like the other exemptions in Division 2 of Part IV, this exemption is not subject
to the public interest test. The public interest is implicit in the purpose of the exemption itself. The 2010
amendments to the FOI Act introduced some changes to the scope of this exemption.

5.49 “Cabinet” for s 34 purposes means the Cabinet and Cabinet committees (see the definition of Cabinet
in s 4(1)). It does not include informal meetings of ministers outside the Cabinet. In any case of doubt whether
a body is a Cabinet committee, the Department of the Prime Minister and Cabinet should be consulted.

5.50 Agencies should note that the Cabinet Handbook requires agencies to consult the Department of the
Prime Minister and Cabinet on any Cabinet-related material identified as being within the scope of an FOI
request. As the custodian of Cabinet records (current and former governments), the Secretary of the Department
of the Prime Minister and Cabinet is required to provide evidence in support of Cabinet-related exemptions
made under the FOI Act.

Documents included in exemption

5.51 The Cabinet exemption applies to the following classes of documents:

(a) Cabinet submissions that:
   (i) have been submitted to Cabinet; or
   (ii) are proposed for submission to Cabinet; or
   (iii) were proposed to be submitted but were in fact never submitted and were brought into existence
        for the dominant purpose of submission for the consideration of Cabinet (s 34(1)(a)).

(b) official records of the Cabinet (s 34(1)(b));

(c) documents prepared for the dominant purpose of briefing a minister on a Cabinet submission (s
    34(1)(c)); or

(d) drafts of a Cabinet submission, official records of the Cabinet or a briefing prepared for a minister
    on a Cabinet submission (s 34(1)(d)).

5.52 The exemption also applies to full or partial copies of the categories of documents listed in paragraph
5.51 above as well as a document that contains an extract from those categories (s 34(2)).

5.53 Any document containing information which, if disclosed, would reveal Cabinet deliberations or a
decision is exempt unless the deliberation or decision has been officially disclosed (s 34(3)). The words
“officially disclosed” are not defined in the FOI Act and should be given their ordinary meaning. A key element
is the official character of the disclosure. Disclosure will commonly be as a result of specific authorisation by
the Cabinet itself, and may be undertaken by the Prime Minister, the Cabinet Secretary or a responsible minister.
An announcement made in confidence to a limited audience is not an official disclosure for this purpose.

5.54 If a document falls within one of the categories in ss 34(1), 34(2) or 34(3) it qualifies for exemption.
Agencies need not consider what harm might flow from disclosure.
Documents excluded from exemption

5.55 There are three exceptions to the general Cabinet exemption rules:

— a document is not exempt merely because it is attached to a Cabinet submission, record or briefing (s 34(4));
— the document by which a Cabinet decision is officially published is not itself exempt (s 34(5)); or
— purely factual material in a Cabinet submission, record or briefing is not exempt unless its disclosure would reveal a Cabinet deliberation or decision and the decision has not been officially disclosed (s 34(6)).

5.56 Cabinet notebooks are expressly excluded from the operation of the FOI Act (see definition of “document” in s 4(1)).

Documents created for submission to Cabinet

5.57 To be exempt under s 34(1)(a), a document must have been created for the dominant purpose of being submitted for Cabinet’s consideration and must have actually been submitted or be proposed by a sponsoring minister to be submitted. Documents in this class may be Cabinet submissions or attachments to Cabinet submissions.

5.58 The inclusion of the “dominant purpose” test was an important change in the 2010 amendments to the FOI Act. Section 34(4) introduces a limit on the Cabinet exemption by making it clear that a document is not exempt only because it is attached to a Cabinet submission. For example, if, at the time a report is brought into existence there was no purpose of submitting it to Cabinet, but it is later decided to submit it to Cabinet, the report will not be covered by s 34(1)(a) because it will not have been brought into existence for the dominant purpose of submission to the Cabinet. It may, however, still be exempt under s 34(3) if its disclosure would reveal an unpublished Cabinet deliberation or decision.

5.59 The use of the word “consideration” rather than “deliberation” indicates that the Cabinet exemption extends to a document prepared simply to inform Cabinet, the contents of which are intended merely to be noted by Cabinet.

5.60 Whether a document has been prepared for the dominant purpose of submission to Cabinet is a question of fact. The relevant time for determining the purpose is the time the document was created.

Official record of the Cabinet

5.61 The term “official record of the Cabinet” in s 34(1)(b) is not defined. The document must be an official record of the Cabinet itself, such as a Cabinet Minute. A document must relate, tell or set down matters concerning Cabinet and its functions in a form that is meant to preserve that relating, telling or setting down for an appreciable time. Agencies should consult the FOI Coordinator of the Department of the Prime Minister and Cabinet when deciding whether a document is an official record of the Cabinet (see paragraph 5.50).

Cabinet briefings

5.62 A document that is brought into existence for the dominant purpose of briefing a minister on a submission to Cabinet within the meaning of s 34(1)(a) is an exempt document (s 34(1)(c)). The briefing purpose must have been the dominant purpose at the time of the document’s creation.

Draft Cabinet documents

5.63 Section 34(1)(d) provides that a draft of a Cabinet submission, an official record of the Cabinet or a Cabinet briefing is exempt. “Draft” is not defined.

Copies and extracts

5.64 A document is exempt from disclosure to the extent that it contains a copy or part of or an extract of a document that is, itself, exempt from disclosure for one of the reasons specified in s 34(1) (see s 34(2)). In practice, this means a document that comprises or contains a copy of, part of or an extract from a Cabinet submission, a Cabinet briefing or an official record of the Cabinet. A copy or extract should be a quotation from, or exact reproduction of, the Cabinet submission, official record of the Cabinet or the Cabinet briefing.

5.65 It is important to note that coordination comments merit special attention. Normal practice is that such comments are drafted separately from the submission to which they relate by the agencies making the comments. Agencies’ coordination comments are then incorporated into the submission which is submitted to Cabinet for consideration. The AAT has held that a document comprising a copy of coordination comments which were later incorporated into a Cabinet submission was exempt under the previous version of s 34(2) on the basis that it was an extract from the minister’s Cabinet submission.
Documents disclosing a deliberation or decision of Cabinet

5.66 Section 34(3) exempts documents to the extent that their disclosure would reveal any deliberation or decision of the Cabinet unless the existence of the deliberation or decision has been officially disclosed.

5.67 “Deliberation” in this context has been interpreted as active debate in Cabinet, or its weighing up of alternatives, with a view to reaching a decision on a matter (but not necessarily arriving at one). In Re Toomer, Deputy President Forgie analysed earlier consideration of “deliberation” and concluded:

Taking its [Cabinet’s] deliberations first, this means that information that is in documentary form and that discloses that Cabinet has considered or discussed a matter, exchanged information about a matter or discussed strategies. In short, its deliberations are its thinking processes, be they directed to gathering information, analysing information or discussing strategies. They remain its deliberations whether or not a decision is reached. [Cabinet’s] decisions are its conclusions as to the courses of action that it adopts be they conclusions as to its final strategy on a matter or its conclusions as to the manner in which a matter is to proceed.

Purely factual material

5.68 Section 34(6) provides that, in a document to which ss 34(1), 34(2) or 34(3) applies, information is not exempt if it is purely factual material unless:

(a) the disclosure of the information would reveal any deliberation or decision of the Cabinet, and
(b) the fact of that deliberation or decision has not been officially disclosed.

5.69 Purely factual material includes material such as statistical data, surveys and factual studies. A conclusion involving opinion or judgement is not purely factual material. For example, a projection or prediction of a future event would not usually be considered purely factual.

5.70 The qualification to the “purely factual material” exception to the exemption has changed from “officially published” to “officially disclosed”. The AAT in Re Toomer considered the meaning of “officially published” in the context of the exclusion of documents by which a Cabinet decision was officially published. The AAT did not specifically consider the term in the context of the predecessor of the factual material exception in s 34(6), but it is clear that the AAT contemplated publication through a document. The Information Commissioner takes the view that the change in wording from “officially published” to “officially disclosed” reflects an intention to broaden the concept of publication to include officially sanctioned disclosure by means other than a formal document—for example, by an oral statement from a minister. It is still a requirement, however, that the disclosure results from the performance of one of the functions of the person or body responsible for disclosing it (such as the Cabinet or the responsible minister) and makes the decision generally known. An agency should consult the Department of the Prime Minister and Cabinet before releasing any Cabinet-related document (see paragraph 5.50).

Cabinet records in Ireland

The definition of record is given as:

Section 2: “record” includes any memorandum, book, plan, map, drawing, diagram, pictorial or graphic work or other document, any photograph, film or recording (whether of sound or images or both), any form in which data (within the meaning of the Data Protection Act, 1988) are held, any other form (including machine-readable form) or thing in which information is held or stored manually, mechanically or electronically and anything that is a part or a copy, in any form, of any of the foregoing or is a combination of two or more of the foregoing and a copy, in any form, of a record shall be deemed, for the purposes of this Act, to have been created at the same time as the record.

The exemption covering cabinet discussions, is “Meetings of the government”, where records are frequently referred to:

Section 19:(1) A head shall refuse to grant a request under section 7 if the record concerned:

(a) has been, or is proposed to be, submitted to the Government for their consideration by a Minister of the Government or the Attorney General and was created for that purpose,

(aa) consists of a communication:

(i) between two or more members of the Government relating to a matter that is under consideration by the Government or is proposed to be submitted to the Government; or

(ii) between two or more such members who form, or form part of, a group of such members to which a matter has been referred by the Government for consideration by the group and the communication relates to that matter:

(b) is a record of the Government other than a record by which a decision of the Government is published to the general public by or on behalf of the Government; or
(c) contains information (including advice) for a member of the Government, the Attorney General, a Minister of State, the Secretary to the Government or the Assistant Secretary to the Government for use by him or her primarily for the purpose of the transaction of any business of the Government at a meeting of the Government.

(2) A head shall refuse to grant a request under section 7 if the record concerned:

(a) contains the whole or part of a statement made at a meeting of the Government or information that reveals, or from which may be inferred, the substance of the whole or part of such a statement; and

(b) is not a record by which a decision of the Government is published to the general public by or on behalf of the Government.

(3) Subject to the provisions of this Act, subsection (1) does not apply to a record referred to in that subsection:

(a) if and in so far as it contains factual information relating to a decision of the Government that has been published to the general public;

(b) if the record relates to a decision of the Government that was made more than 10 years before the receipt by the head concerned of the request under section 7 concerned; or

(c) if the record relates to a communication to which subsection (1)(aa) applies and the communication was made more than 10 years before the receipt by the head concerned of the request under section 7 concerned.

(4) The Secretary General to the Government shall, in each year after the year 2003, furnish to the Commissioner a report in writing specifying the number of certificates issued by him or her in the preceding year under paragraph (b) of the definition of “Government” in subsection (6).

(5) Where a request under section 7 relates to a record to which subsection (1) applies, or would, if the record existed, apply, and the head concerned is satisfied that the disclosure of the existence or non-existence of the record would be contrary to the public interest, he or she shall refuse to grant the request and shall not disclose to the requester concerned whether or not the record exists.

(6) In this section: “decision of the Government” includes the noting or approving by the Government of a record submitted to them; “record” includes a preliminary or other draft of the whole or part of the material contained in the record.

“Government” (except in paragraphs (a) and (b)) includes:

(a) a committee of the Government, that is to say, a committee appointed by the Government whose membership consists of:
   (i) members of the Government; or
   (ii) one or more members of the Government together with either or both of the following:
      (I) one or more Ministers of State; and
      (II) the Attorney General; and

(b) a committee of officials:
   (i) that is appointed by the Government for the purpose of assisting the Government in relation to a particular matter that has been submitted to the Government for their consideration;
   (ii) that is requested by the Government to report directly to them in relation to the matter; and
   (iii) in relation to which the Secretary General to the Government certifies in writing at the time of its appointment that it is a committee of officials falling within this paragraph; “officials” means two or more of the following persons:
      (a) a person holding a position in the Civil Service of the Government or the Civil Service of the State;
      (b) a special advisor within the meaning of section 19 of the Ethics in Public Office Act 1995;
      (c) a person who is a member of any of such other (if any) classes of person as may be prescribed.

Cabinet records in Canada

Section 3: “record” means any documentary material, regardless of medium or form; Cabinet records are excluded from the Access to Information Act 1982.

Confidences of the Queen’s Privy Council for Canada

Section 69. (1) This Act does not apply to confidences of the Queen’s Privy Council for Canada, including, without restricting the generality of the foregoing:
(a) memoranda the purpose of which is to present proposals or recommendations to Council;
(b) discussion papers the purpose of which is to present background explanations, analyses of
problems or policy options to Council for consideration by Council in making decisions;
(c) agenda of Council or records recording deliberations or decisions of Council;
(d) records used for or reflecting communications or discussions between ministers of the Crown
on matters relating to the making of government decisions or the formulation of government
policy;
(e) records the purpose of which is to brief ministers of the Crown in relation to matters that are
before, or are proposed to be brought before, Council or that are the subject of communications
or discussions referred to in paragraph (d);
(f) draft legislation; and
(g) records that contain information about the contents of any record within a class of records
referred to in paragraphs (a) to (f).

Definition of “Council”

(2) For the purposes of subsection (1), “Council” means the Queen’s Privy Council for Canada, committees
of the Queen’s Privy Council for Canada, Cabinet and committees of Cabinet.

Marginal note: Exception

(3) Subsection (1) does not apply to:
(a) confidences of the Queen’s Privy Council for Canada that have been in existence for more than
twenty years; or
(b) discussion papers described in paragraph (1)(b)
   (i) if the decisions to which the discussion papers relate have been made public, or
   (ii) where the decisions have not been made public, if four years have passed since the
decisions were made.

Annex B

EXTRACT FROM HAZELL AND BUSFIELD-BIRCH “OPENING THE CABINET DOOR: FREEDOM

IMPACT OF FOI ON ADVICE AND DELIBERATION: THE “CHILLING EFFECT”

The final section of this article examines the vexed question of whether FOI has led to a deterioration in the
quality of official advice or ministerial deliberation, because of fears that the records might subsequently be
disclosed. In all countries which have introduced FOI such fears have been widely expressed, but firm evidence
is hard to come by. An early study of FOI in Australia, Canada and New Zealand certainly reported concerns
that the quality of submissions to Ministers had suffered, but warned that “it is impossible to find any evidence
to substantiate them”;271 A later official review in Canada did not mention a chilling effect: but this might be
because policy advice in Canada is so well protected.272 White’s recent study of New Zealand reported
widespread acceptance of a chilling effect, but gave few concrete examples.273 And it was because of fears
about a chilling effect that the Irish government amended their FOI Act in 2003 to provide stronger protection
for Cabinet papers.274

What is meant by the “chilling effect”?

There can be no doubt about the widespread fears of a chilling effect, but there is a serious lack of hard
evidence. Two recent studies in the UK have sought to fill this gap by interviewing some 80 officials and
ministers and systematically asking them for such evidence.275 They began by defining more precisely what is
meant by a chilling effect, and came up with four different components:
— A reduction in the candour and frankness of official advice.
— An erosion of a “safe space” for ministers to deliberate, argue and disagree with each other in private.
— Deterioration in the quality of the official record.
— A reduction in the willingness of third parties to supply information to government if it is liable to
   be disclosed.

189, at p.204.
272 Access to Information: Making it work for Canadians, June 2002, Ch.4.
274 Report of High Level Review Group on FOI Act 1997, June 2002 at paras 2.2 and 3; Minister of Finance press release on
publication of FOI (Amendment) Bill on 28 February 2003.
275 R Hazell, B Worthy and M Glover The Impact of Freedom of Information on central government in the UK: Does FOI Work?
Palgrave Macmillan, 2010 Ch.11. P Waller, R Morris, D Simpson and R Hazell, Understanding the Formulation and
These components are interlinked. Underlying them is a fear that if there is a reduction in the quality of advice and information going to ministers, there may be a corresponding reduction in the quality of ministers’ decisions, because they will be based on inadequate information.

**Evidence of a chilling effect**

In the UK as elsewhere there is a widespread belief that FOI potentially has a chilling effect. In evidence to the Information Tribunal the former Cabinet Secretary Lord Turnbull said that disclosure of DFES board minutes would represent a “major perceived threat to the role and integrity of the Civil Service which would significantly alter the way in which the executive conducted its business. Disclosure of minutes of bodies as close to ministers … had not been foreseen and would strike at the heart of civil service confidentiality.”

Similar views were expressed in interviews by officials and by ministers. But so far neither officials nor ministers have witnessed any decline in the substantive quality of official advice. Not one of the 80 interviewees admitted to that, although an official acknowledged a change in the way advice is sometimes couched:

> The FOI won’t change the way I behave very much. I think I am a bit more careful about the way I record things. But it’s more a tactic response than a substantive one. I would certainly seek to avoid language which if it were revealed might cause offence. And I’d cut out the casual asides. But it doesn’t change the way I would substantively work with Ministers.

A small number of officials also acknowledged a deterioration in the quality of the official record:

> I am afraid I am very negative about the FOI. It is used a lot in my area by pressure groups who are opposed to what we are seeking to do. There are a lot of “fishing trips”, trying to get information which they can use in public, or even in the courts, to undermine our policy. And they will use any information received very selectively …

I’ve told my team to make sure in future we minimise what we write down and minimise what we keep …

And there was strong evidence that ministers were particularly concerned about the damaging effects of disclosing Cabinet records:

> I am not in favour of releasing Cabinet documents under FOI. I just don’t think anyone would put anything in writing if that were to happen. If I were back in government and I thought that internal submissions or Cabinet papers were likely to be released then I would insist no written records were made—and that would be completely contrary to the need for proper records in government.

**Is the chilling effect caused by FOI?**

But despite the strength of these feelings, there was very little hard evidence from the interviews of changes in behaviour. The official who sought to minimise the official record was an exception; the large majority of officials interviewed noted no substantive change in their own or other civil servants’ behaviour as a result of FOI. But there was a more diffuse feeling of changes in working practices, which tend to be associated with significantly altering the way in which the executive conducted its business. Disclosure of minutes of bodies as close to ministers … had not been foreseen and would strike at the heart of civil service confidentiality.”

> Most officials acknowledged that FOI was at most one additional factor, reinforcing existing trends. Two final quotes can help to summarise the extent to which FOI has a chilling effect. The first emphasises the wider changes in working practices:

> FOI reinforces a trend that was there already … So FOI is just another weight in the scale, if you like, making people be more cautious about what they commit to paper or even more to the computer.

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276 DFES v Information Commissioner and Evening Standard, EA 2006/0006, 19 February 2007 para.27.
The second emphasises the organisational imperative for proper record keeping in a large bureaucracy. For government to work properly civil servants:

- need to have stuff on files because they need (a) to protect themselves, to record things (b) to communicate with people … and (c) if they are going to hand over the file they need to have sufficient in the file. So life has to go on, and proper procedures …

FOI is the latest in a series of changes which cumulatively have had a major effect in the way the civil service works, and records its work. As the latest change, it tends sometimes to be the whipping boy for those who deplore these wider changes; but there is very little hard evidence that FOI alone is responsible for a chilling effect. It is one amongst half a dozen factors which have led to major changes in working practices in Whitehall, and a consequential decline in record keeping.

Conclusion: How open is the UK compared with other countries?

In conclusion we return to the comparative analysis with which this article began, to ask how much policy information and advice is disclosable in the UK compared with other countries. In evidence to the Commons Justice Committee in 2010 Jack Straw maintained that the UK had “the most stringent and powerful Freedom of Information provisions of almost any jurisdiction in the world”. He was doing so in the context of defending his use of the ministerial veto, and he went on to say that the government would not have accepted the changes to strengthen the FOI Act during its parliamentary passage if the ministerial veto had not been there as a counter balance.

How justifiable is Straw’s claim, and is it undermined by his use of the veto? The first thing to say about the veto is that its use in the UK has been modest by international standards. Australia, New Zealand and Ireland also provide for a ministerial veto in their FOI legislation, but they have used it a lot more frequently, especially in the early years. In the first five years of operation of the FOI Act in the UK the veto had been used only twice. Ireland also used the veto only twice in the first five years. But in the same period the veto was used 14 times in New Zealand, and 48 times in Australia. So British use of the veto has been relatively restrained.

Second, the close comparison in this article of the exemption provisions for policy deliberation and advice, and their interpretation in the case law, again shows the UK coming off quite favourably. The UK Act is certainly less restrictive in relation to Cabinet papers than those regimes which have a specific exemption for Cabinet records. Canada is the most restrictive; but Australia and Ireland are also more restrictive than the UK, in having a mandatory exemption for Cabinet records, and giving such records a wide definition (although in Australia that is about to change). Jack Straw was not talking comparatively when he mentioned that the agenda of a Cabinet Committee has been disclosed in the UK, as well as a lot of inter-ministerial correspondence. But he could have added that a Cabinet Committee agenda could not have been disclosed in Australia, Canada or Ireland; and inter-ministerial correspondence could not be disclosed if it might reveal any deliberation of Cabinet or Cabinet Committee. A lot of inter-ministerial correspondence is sent round Cabinet Committee circulation lists, and so would not be disclosed in the other countries, but is disclosable in the UK.

The third and final point to make is about the operation of the exemptions for the formulation of government policy and the free and frank provision of advice. In the UK s.35 and s.36 are both subject to a public interest test, and our analysis of the case law shows that the Information Commissioner has repeatedly used the public interest test as a powerful lever to order disclosure. There have been 150 such cases which applied to central government in the first five years, and in around 60% of them the Commissioner has held that on balance the public interest in disclosure outweighed the arguments for withholding. That has sent very powerful signals round Whitehall.

It is never easy to draw precise comparisons about the application of slightly different legal provisions, but the evidence presented in this article suggests that by comparison with Australia, Canada and Ireland the UK is a lot more open in requiring disclosure of policy advice and deliberation. Recent and high level papers, including ministerial advice and correspondence have been ordered to be disclosed. Of the five countries considered here, only New Zealand has a more open regime. For the UK to rank second in a league table of five is not a bad record only five years after entering the game.

282 Commons Justice Select Committee, 10 March 2010, Q 94.
284 Commons Justice Select Committee, 10 March 2010, Q 99.
Supplementary evidence from Lord McNally following the evidence session on 16 May 2012

POST-LEGISLATIVE SCRUTINY OF THE FREEDOM OF INFORMATION ACT 2000

During the evidence session, you asked me to write in response to the question as to whether FOIA provides sufficient protection for the intellectual property of universities engaged in academic research. You also asked me about a statement made by the Secretary of State for Health, specifically asking about the relationship between a general principle and the exceptional nature of the information on which he exercised the veto under section 53 of the Act.

On the first question, as I mentioned, I am strongly supportive of the ability of universities to engage in research without prejudicing their interests. Within our Coalition commitment to extend the scope of FOIA to provide greater transparency, I am keen that FOIA affords sufficient protection for the commercial and intellectual property interests of universities.

Section 43 of FOIA does provide an exemption where disclosure would prejudice the commercial interests of any person or body, including the university themselves.

This exemption applies to intellectual property as well as more traditional commercial interests. I have not seen any concrete evidence that this exemption is insufficient to protect the intellectual property interests of universities. Indeed, a number of other exemptions might also apply to academic research depending on the circumstances. Section 22 exempts information which is intended for future publication, section 38 exempts information which would prejudice health and safety, and section 40 exempts personal data.

Although these exemptions are qualified, I have not seen evidence that they are insufficient to protect the legitimate interests of universities in respect of academic research. It is also noteworthy that according to preliminary results of research carried out by UCL’s Constitution Unit into the use of FOIA in universities, requests concerning research make up a very small proportion (about 5%) of university FOIA requests. The main focus of requests tends to information relating to finance, student issues, management or admissions. Of course, as I have mentioned, I believe strongly that universities should not have their interests prejudiced through FOIA, and I remain open to any evidence that suggests that the Act is currently insufficient in that regard.

With regard to the relationship between a general principle and the exceptional nature of the information on which the Secretary of State for Health exercised the veto, the principle that he referred to is that development and formulation of policy enjoys qualified protection under the Act, and that the public interest balance in such cases is capable of falling in favour of withholding the information. The question of whether a Secretary of State overrides the ruling of the Information Commissioner’s Office and the Tribunal by exercising the veto will come down to the particular circumstances of a case and will necessarily involve an assessment of how this principle applies to the relevant facts. In this case, the Secretary of State decided that the particular circumstances of the case warranted the use of the veto. The basis on which he reached that view, including the basis on which he concluded that this was an exceptional case (as the published policy requires if he was to use the veto), is set out fully in his published statement of reasons.

May 2012