Access Info Europe

Submission to UK Government

on Draft Regulation on Limits and Fees for FOI Requests

This submission by Access Info Europe aims to contribute to the consideration of possible amendments to the UK's Freedom of Information Act 2000 by presenting the pertinent aspects of international human rights law and comparative law and practice on the matter, as well as observations drawn from practice in a number of European states.

Access Info Europe finds that the governments proposes would result in inevitable violations of the right to information. These include violation principle of gratuity that is an intrinsic part of exercise of a fundamental right, violation of the right not to have to state the reasons for asking for information, and discrimination in the treatment of requestors.

It is Access Info Europe's opinion that the proposals are be grounded in a fundamental misconception of the nature of the right of access to information, namely that provision of information is a government service not part of an obligation imposed by a human right. The idea that the government can refuse access to information requests because they would in some way disrupt the normal functioning of the administration fails to recognize that providing information to the public is a central function of a modern democratic state.

Access to information is a right in and of itself, and also has an instrumental value as it facilitates protection of other human rights, ensures the availability of information necessary for exercise of freedom of opinion and expression, is the basis for participation in governance at election time and between polls, and helps guard against inefficiency, malpractice and corruption in government. As such, it has a value which cannot be brought down to a crude calculation of the costs. We submit that, in a less democratic country than the UK, a calculation of the cost savings to be made, for example, by not holding elections (which are extremely expensive exercises), would meet with immediate condemnation. In the same way, it is unacceptable to reduce the right of access to information (or any other civil and political right) to a simplistic cost-benefit analysis.

1. Access to Information is a Human Right

International and comparative law clearly establishes that access to information is a fundamental right and that governments are under a positive obligation to provide information to the public. The fundamental nature of the right was confirmed in September 2006[1] by a ruling of the Inter-American Court of Human Rights which stated:

> *...the Court finds that, by expressly stipulating the right to "seek" and "receive" "information," Article 13 of the Convention protects the right of all individuals to*

[1] Inter-American Court of Human Rights Claude Reyes et al. v. Chile Judgment of September 19, 2006, at paragraph 77.

request access to State-held information, with the exceptions permitted by the restrictions established in the Convention. Consequently, this article protects the right of the individual to receive such information and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case. The information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied.

The Council of Europe Recommendation 2002(2) on Access to Official Documents states clearly at Principle III, the General Principle, that:

Member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities.

In Europe, at least 43 of the 46 countries of the Council of Europe have either an access to information law or relevant administrative provisions. In addition, 37 have constitutional provisions on "freedom of information", with 24 constitutions also providing a direct right of access to government-held documents or information. Some countries have recently amended their constitutions to recognize this right, for example in 2004, Norway updated its constitutions to establish:

Everyone has a right of access to the documents of the State and of the municipal administration and a right to be present at sittings of the courts and elected assemblies. The law may prescribe limitations to this right in regard of the right to privacy or other weighty considerations.

These international standards make clear that any law that restricts public access to government-held information except on grounds of protecting from harm certain legitimate interests is introducing a violation of the right.

2. Principle of Gratuity – Comparative Analysis

Access to information as a right entails a number of fundamental elements including that exercise of the right should, in principle, be free of charge to the individual who exercises it. This principle has been captured in the Council of Europe Recommendation 2002(2), which clearly states at Principle VII that:

1. *Consultation of original official documents on the premises should, in principle, be free of charge.*
2. *A fee may be charged to the applicant for a copy of the official document, which should be reasonable and not exceed the actual costs incurred by the public authority.*

The bulk of European access to information laws adhere to this principle, with no charges for filing requests and minimal charges for obtaining copies. In compliance with the requirement that consultation of the original should be free of charge, many countries only impose costs for copies (and not costs where the information is provided electronically). France is typical of this with the following structure:

Access to administrative documents may be given:

a) on-the-spot, free-of-charge consultation, unless the preservation of the document makes it impossible to do so;

b) provided that reproduction does not adversely affect the preservation of the document, by the supplying of an easily intelligible copy on a medium identical to the one used by the public service or on paper, according to the requesting person's

preference within the limits of what is technically possible to the public service and at the requesting person's own expense, without such expense exceeding the reproduction cost, under such conditions as provided for by decree;
c) electronically and free-of-charge, if the document is digitised.
(Article 4 of the law of July 17, 1978).

Other countries, including in Europe at least Albania, Armenia, Bulgaria, Bosnia, Estonia, Georgia, Finland, Latvia, Macedonia, Montenegro, Norway, the Netherlands, Portugal, Romania, Serbia, Slovakia, Slovenia, and Sweden, follow this pattern and fit with the Council of Europe Principle. In Hungary the law allows for a charge for preparation of the response, but this is rarely applied. In the Czech Republic it is possible by law to levy a charge for "extraordinarily extensive information retrieval" but this is rarely imposed.

In none of these countries is the time burden on the authority a reason for refusing a request and so public officials do not have to waste time calculating how much time they are spending on each part of the handling of each request (something which is very hard to do because some of these processes occur in parallel in the minds of those who are reading, reviewing, and considering the request). In practice, in all these countries, the increasing reliance on electronic delivery of information means that exercise of the right of access to information is completely free of charge and, appropriately, the cost to government respecting the right is born entirely by the tax-payer.

In these countries, where requests are complex or voluminous or require consultation with third parties, the law provides for extensions of the time period for answering, but this can never be a ground for refusal of the request.

Worldwide other laws, such as the highly praised Mexican FOI law of 2002 do not require payments to be made anything more than the copies (and much information is distributed electronically free of charge). A similar regime obtains in Colombia, the Dominican Republic, Ecuador, and Peru.

In Canada, charges are levied but they are minimal. There is a CAN $5 filing fee (about £2.20) and after the first five hours there is a charge of CAN $2.50 (about £1.10) per person per quarter hour of search and preparation. A strikingly lower hourly rate than that applied in the UK. In addition, in Canada, fees can be waived, and there is a mechanism to appeal the fees. We note that the costs imposed here are more symbolic costs, designed not to have a chilling effect on exercise of the right to information.

3. The US Model and the Public Interest Test:
The picture in the US is more complex and with its older FOIA (1966) it takes a different approach. There is no fee for filing a request, but sometimes charges are imposed for searching. In the US, FOIA requesters are divided into three categories: commercial requesters; representatives of the news media and educational and scientific institutions; and "all other" requesters.

- Commercial requesters can be charged fees both for searching and reviewing of documents (this is an hourly rate, based on the level of the government official who does the searching and/or reviewing of the documents for release, as expressed in each agency's published fee schedule), as well as ordinary duplication fees.
- News media and educational requesters are charged only for duplication, and cannot be charged at all for search and review costs incurred by the agency.

- All other requesters are charged search fees and duplication only, but they generally receive the first 2 hours of search time for free (this means in most cases for simple requests that there will be no charge).

Usually, any fees are paid after the records have been processed. However, if the estimated fees are more than $250, the requester may have to pay in advance. Agencies should ordinarily charge search fees only to the first requester who seeks particular materials; these fees should be waived for any subsequent requesters, because the search has already been conducted.

The big difference between the US framework and the UK proposals (and this is the relevant comparison because the UK seems to be moving radically away from the European understanding of the right of access to information), is that that in the US information will not be refused on grounds of cost, but that charges may be levied. Given that the charges are generally levied on the commercial users, this is not perceived as a significant problem in the US in terms of the right to information.

Furthermore, the US model has one very important difference from what is being proposed in the UK, namely that there is a public interest consideration so that requestors acting in the public interest cannot be charged. Indeed, several significant information requests, eventually answered by US government agencies, could be rejected under the UK rules. These include an FOIA request filed by the American Civil Liberties Union that resulted in disclosure of information showing abusive Pentagon and FBI surveillance targeting peaceful protest groups in the United States; a request for information about detainees held by the United States overseas which exposed evidence of widespread and systemic mistreatment of prisoners in US detention facilities in Guantanamo Bay, Afghanistan and Iraq; a request for information regarding the use of torture filed in October of 2003, which has already resulted in the release of over 100,000 pages of documents. Each of these requests took hundreds of hours to process and manifestly resulted in information of critical public interest. Under the proposed UK regulations, each of these requests for information would likely have been dismissed as unduly burdensome.

4. Search Time as an Information Management Problem : Under the current UK FOIA an authority may deny requests where it would take more than three days of one person's time to search for and extract the requested information. Such provisions have already been criticized as they are likely to result in refusals from bodies with poor information management compared with those that have invested in internal efficiency. The tax-payer is thus penalized twice for inefficient government: once by paying for a poorly run service, and then again by being charged to have access to its information.

Submissions from UK groups to this consultation process point to cases where information requests have forced greater efficiency on public bodies. The same has been found in many countries worldwide, particularly in countries going through a period of democratic development where the demand for information has contributed to better information management, improvements in reporting on activities, improved generation of statistics, and hence to more fact-based policy debates.

Access Info Europe has had a request rejected by the UK government on the grounds that it would take too long to answer even though the authority confirmed that it held the information. This is not a situation that could arise in the majority of European countries: if an authority is in a position to confirm that it holds the information, it should be in a position to

supply it. The only grounds for refusal should be that the information is not held or that it is subject to an exemption.

The failure to consider the varying levels of information management across government and the resulting impact on search time undermines the current proposals.

5. First Request Only : Discrimination and Practical Challenges
The proposals suggest not considering the costs of answering a request if more than one requestor asks for the same information. In principle this sounds somewhat reasonable, but in practice it is problematic. The first problem is that if the first request is rejected on the grounds that it would take time to answer, each subsequent request might be as well, even though over time maybe 100 or more requests are filed for the same information. The proposals therefore do not take into account the level of public interest in the information.

Next, the application of the cost-consideration to the person who is unlucky enough to be the first requestor seems to be a form of random discrimination against requestors. Further, there is a practical problem in that many requests for similar information may not be phrased in exactly the same way. So in effect, what are essentially similar requests may not be subject to this waiver of the cost considerations. It is also not clear how this provision will be handled inside government, and what the mechanisms will be to ensure that the official handling the request knows that it has been answered previously.

5. The Value of the Duty to Assist:
The UK FOIA, like the majority of access to information laws, establishes a duty to assist requestors in order to avoid the problem of a simple question resulting in provision of a voluminous answer full of information that the requestor didn't even want. As the Consultation Paper notes, it is very rare that requestors want more than the answer to a one or a few specific questions. The consultation paper also notes, at point 28, that:

> *This risk [of a request being refused on cost grounds] could be mitigated by ensuring that guidance on the fee Regulations emphasises the importance of providing advice and assistance to applicants, to help them refine requests to bring them within the appropriate limit.*

The duty to assist is a key fundament of a government's obligation with respect to the right to information (The Council of Europe recommendation confirms this at Principle VI (5), noting that " [t]he public authority should help the applicant, as far as possible, to identify the requested official document".

Access Info is aware, however, of requests to the UK government being refused on the grounds that the time taken would be over the £ 600 limit without any attempt whatsoever having been made to assist the requestor to narrow the request. In our own experience in one case this resulted in an apology from an authority, but only after we formally appealed the failure of the duty to assist. The apology took five months to deliver. As the Frontier Economics survey notes, the cost of conducting an internal review is significantly higher than the cost of answering a request. Yet nowhere in its survey did it evaluate how often public authorities failed to assist the requestor and how often this resulted in a costly review process that could otherwise have been avoided.

It takes time to develop a culture of communication with requestors, either by phone or e-mail. It is our strong belief that greater compliance with the duty to assist provisions of the existing UK FOIA and the development, over time, of a greater willingness of government

officials to enter into a dialogue with requestors, will save time and hence money and would result in a more satisfactory outcome for both parties. It is irresponsible to propose refusing information on cost grounds without having fully evaluated how much of the current additional burden could indeed be mitigated through better communication with requestors.

6. Time for Consultation and Consideration of Exemptions:
Access Info Europe is of the opinion that it is entirely inappropriate that the time needed to consider whether information should be restricted from public access can in and of itself become a reason for refusing the information. This highly unusual proposal is particularly inappropriate in the early years of an access to information regime when the time for consideration of exemptions is longer as public officials get used the new culture of openness.

There is a great danger that while a culture of secrecy still endures (as is inevitable after just two years of a transparency regime) the proposed provisions will only encourage hesitation on the part of public officials and prolonged internal debates about exemptions. The government must be ready to take decisions on the exemptions and to be held accountable for them, rather than be encouraged to defer them.

At this point in the application of the law, what is needed is a review of the current decision-making mechanisms, an assessment of whether they are sufficiently efficient, and how they might be improved. There are many ways to facilitate such decision-making, including ensuring greater clarity within government as to which information is automatically to be made public, more wholesale declassification of old documents, and tighter criteria for application of exemptions. This is likely to happen as more decisions by the Information Commissioner and Information Tribunal establish more clearly the limits of the exemptions.

The same considerations apply to consultations with third parties. There are a number of steps that could be taken to reduce the need for such consultation, such as making it clearer from the outset which information provided to government by private entities will be liable to release under the FOIA. Currently private bodies are also still in the phase of adjusting to the new transparency regime, have not yet adapted to the idea that the price of doing business with the government is greater disclosure of information. At this stage it is inevitable that the back and forth consultations about release of information will be time-consuming, but this is something that will ease over time in the majority of cases.

7. Aggregation of Requests:
Of most serious concern are the government's proposals on aggregation of requests. Aggregating near-identical requests to facilitate answering them is one thing. Aggregating them in order, possibly, to refuse them, is quite another.

Aggregation of requests from multiple requestors is highly problematic. The proposed provisions that allow requests to be aggregated if requestors appear to be acting "in concert" or "in pursuance of a campaign" are extremely worrisome. It is proposed to aggregate requests from persons who in some sense are "conspiring" together to obtain information. Introducing such a provision would be likely to reinforce the UK's historical culture of secrecy, encouraging an us-and-them attitude within government while overlooking the ways in which information requestors sometimes spontaneously ask for similar information. For example, if a local authority announces a construction project, that may generate a wave of spontaneous requests from affected citizens about the background to the proposals, the cost, the contract, etc. That these requests may be aggregated and then refused by a public authority

which has no means of knowing the motives of or the relations between the requestors is highly inappropriate and would be a further violation of the rights of the requestors.

Aggregating multiple requests from single requestors is also a violation of the right. Enjoyment of a right cannot be rationed. In addition, there are practical problems. At present the main mechanism for determining the identity of a requestor is seems to be from analysis of e-mail addresses and other information provided in written requests. This is an inexact means of identification. To apply the proposed changes more accurately and to permit aggregation of requests from business and professional would require asking requestors who they are and even why they want the information and what they propose to do with it. The problem is that this is a violation of the rights of the requestors not to state their reasons for requesting the information. This is so fundamental that most access to information laws explicitly prohibit asking the reasons for the request. The Council of Europe has also made that exercise of the right should not be predicated on the reasons for wanting the information in Principle V(1) of its Recommendation 2002(2):

> *An applicant for an official document should not be obliged to give reasons for having access to the official document.*

The Consultation Paper is somewhat dismissive of the problem of "evasion" although does not give detail on how government bodies are spotting this at present. In fact, reports from the UK indicate that businesses along with media and NGOs are already asking private services to file requests for them. Those most likely to be in a position to pay others to request information for them in order to avoid aggregation are precisely the larger commercial users of the law. Furthermore, there is no consideration of the public interest in the information nor a mechanism proposed to evaluate it.

8. Conclusion: Violation of the Right for Unlikely Savings: Access Info Europe notes that the cost calculations made for the government do not seem to take into account the benefits of access to information (as other submissions in this consultation have noted with detailed examples) nor the additional burden that the new regime will place on the administration (with the time taken to comprehend, learn and apply this complex structure) nor the burden that will inevitably be placed on the Information Commissioner and the Information Tribunal by the additional appeals against the refusals to provide information on cost grounds. We submit that the government is considering introducing a violation of the rights of all requestors for a cost-saving end that they are most unlikely to achieve.

Department for Constitutional Affairs
Justice, rights and democracy

Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007

About you Please use this section to tell us about yourself

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If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Access Info Europe is a human rights organization dedicated to promoting and protecting the right of access to information in Europe and contributing to the development of this right globally.

Formed by European and international experts in access to information, Access Info Europe works to advance the highest standards of transparency in government and other public bodies, as well as to promote the right to information from private bodies where it is necessary for the protection of fundamental rights.

Access Info Europe is non-governmental organization formed under Spanish Association Law 1/2002 (*Ley Organica 1/2002 de 22 de marzo reguladora del Derech de Asociacion*) and registered with the Spanish Ministry of Interior. Registration number: 587828

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More information about Access Info Europe and its work can be found at www.access-info.org

List of questions for response

We would welcome responses to the following questions set out in this consultation paper. Please email your completed form to: informationrights@dca.gsi.gov.uk **Thank you!**

Question 1.	Are the Regulations prescriptive enough to ensure consistent calculation of the appropriate limit across public authorities or should they contain more detail? For example, taking into account the differing formats and quantity of information requested, should a standard reference (i.e. a 'ready reckoner') for how long a page should take to read be included in the Regulations or guidance?
Comments:	No. Access Info Europe believes that, in addition to being unacceptable from a human rights perspective, the proposed Regulations are complex and unworkable in practice. We note that across Europe the majority of countries do not have any similar provisions, adhering instead to the principle that exercise of the right to information is a right that should be exercised free of charge, with costs levied only for reproduction of copies of information (when it is not delivered electronically).

Question 2.	Does the inclusion of thresholds in the regulations provide sufficient flexibility, taking into account the differing complexity of requests received?
Comments:	No. The proposed regulations place the burden for complex requests on the requestor without taking into consideration other factors such as the state of information management within government, the frequent failure assist requestors in clarifying requests, and the impact of the current period of transformation from a culture of secrecy on review and decision-making processes.

Question 3.	Are the thresholds the right ones to make sure the balance is struck between allowing public authorities to count these activities but not refuse requests on one of these grounds alone?
Comments:	No. Access Info Europe is of the view that the authorities have no right to calculate the cost of these activities in consideration of whether or not they will answer a

request. International law establishes that requests may not be refused on cost grounds under any circumstances.

Question 4.	Are the regulations as drafted the best way of extending the aggregation provision?
Comments:	The proposed extension of aggregation is a violation of the right to information for a number of reasons, including that it may introduce discrimination and that it will require asking the purpose of the request. Access to information is a right and rights may not be subject to a government-imposed rationing system.

Question 5.	Do the factors that need to be taken into account when assessing if it is reasonable need to be explicitly stated in the regulations or can this be dealt with in the guidance?
Comments:	Access Info Europe is of the view that it is unreasonable to consider aggregating requests for any reason except to ensure that nearly identical requests are answered more rapidly. Aggregating the requests as a possible grounds for refusing to disclose information is not acceptable and is a violation of the right to information.

Question 6.	Are these the right factors?
Comments:	No. As noted in the commentary attached, Access Info Europe believes that the government should review other factors, such as whether public bodies have been complying sufficiently with the duty to assist requestors, before making any changes to the FOIA.

Question 7.	What guidance would best help public authorities and the general public apply both the EIRs and the Act effectively under the new proposals?
Comments:	The new proposals should not be adopted. Access Info Europe believes that greater guidance should be given on the application of the existing law to ensure more effective responses to requests.