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RESPONSE TO

FEES REGULATIONS CONSULTATION PAPER

21.3.07

1. Summary

We believe the proposed changes[1] to the Freedom of Information Act fees regulations will cause fundamental damage to the Act.

A high proportion of requests which raise new, complex or contentious issues are likely to be refused in future, regardless of their merits. Journalists or others whose work involves pursuing a variety of different issues simultaneously may find they are prevented from using the Act to do so.

There has been no assessment of the nature of the requests that would be refused under the proposed regulations or of the public benefit that might be lost. The government has offered no evidence to suggest that the restrictions would target requests that were themselves unreasonable or constituted an abuse of the Act.

The changes are said to be justified by the need to reduce costs. But costs of the Act are low. The report commissioned by the government from Frontier Economics[2] estimates the total annual cost of the FOI Act at £35.5 million[3] and the maximum likely savings from the proposals at £10 million across the whole public sector.[4] These sums are modest in terms of public expenditure and it is hard to see how the savings could justify the damage likely to be caused.

Even if authorities chose not to rely on the new restrictions, and disclose information which they could in theory refuse, these disclosures are likely to take place on a voluntary basis, outside the scope of the Act. The Information Commissioner may be unable to investigate complaints that the exemptions had been misapplied or that unjustified delays had occurred.

2. Cost data

We question some of the key cost figures relied on in the consultation document. This suggests that the changes are intended to reduce the:

> "small percentage of requests [which] place a disproportionate resource burdens on public authorities".

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[1] These are set out the Department for Constitutional Affairs consultation paper 28/06 "Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007

[2] Frontier Economics, Independent Review of the Impact of the Freedom of Information Act, A Report Prepared for the Department for Constitutional Affairs, October 2006

[3] Frontier Economics report, page 1

[4] Frontier Economics report, Table 15, estimates that the savings to central government from both proposals would be £3.9 million and the saving to the remainder of the public sector would be £6 million.

It goes on:

> "Approximately 5% of central Government requests cost more than £1,000 and account for more than 45% of the combined costs of time spent dealing with initial requests." [5]

The consultation document refers twice more to this 5% figure, implying that the object is to address this minority of requests.[6] Elsewhere this is stated explicitly.[7]

In fact, the Frontier Economics report suggests that the number of requests refused across the *whole* public sector would be up to 15% of the total and involve up to 17,500 requests.[8] We suspect the actual figure could be substantially higher.[9]

We question the significance attached to the £1,000 figure. The existing fees regulations acknowledge that the costs of finding information may themselves reach £600. It was always understood, and accepted, that the process of responding to the requests, if costed, would sometimes take total well above £600. The fact a minority of requests might cost £1,000 or more would have been recognised by government from the outset.

We also have doubts about some of Frontier Economics' figures. To take one example: the report found that ministers were consulted in 1 of 5 FOI requests - an extremely high figure - and that consulting them was "the most expensive component of the request process".[10] However, it priced ministers' time at the extraordinary rate of £300 an hour, which is likely to artificially inflate the apparent costs of requests.[11]

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[5] Consultation document, page 8 para 12

[6] See also page 31, paragraph 9 and page 32 paragraph 10.

[7] According to a written answer by Vera Baird, the Parliamentary Under Secretary of State for Constitutional Affairs: "Our proposals are designed to address this issue [of disproportionate costs] by targeting the 5 per cent. of requests that account for 45 per cent. of the time spent dealing with initial requests, as detailed at Figure 5 of the Frontier Economics report." Hansard 27.2.07, col 1270W

[8] This the sum of the volume reduction figures for central government and the wider public sector of the first two options shown in Table 3 on page 7 of the Frontier Economics report, ie 17,469. Page 1 of the report estimates that central government will receive 34,000 FOI requests annually and that the rest of the public sector will receive 87,000 requests, making a total of 121,000 requests.

[9] Frontier Economics assessed the impact of the two proposals (consideration etc time and aggregation) separately. The combined effect is likely to be greater than the sum of their individual effects.

The impact of the proposal to aggregate unrelated requests was assessed on the assumption that *only* the costs of locating, retrieving and extracting information would count towards the cost limit. If the permitted costs *also* include the costs of reading, consulting and considering each of the individual requests (as a result of first proposal) the aggregated costs will be much more likely to exceed the cost limit, and the effect of the aggregation proposal will be far more severe than Frontier Economics recognised.

[10] Frontier Economics report, pages 27 and 38.

[11] This includes the cost of their private offices' time. Frontier Economics report, page 58.

An alternative perspective on the workload is provided by the Information Commissioner's annual polling data. This shows that the number of public authorities which felt that the Act caused them extra work fell from 83% in 2005 to 73% in 2006. The number which thought the Act was a burden fell from 38% to 36%. The survey also found that 82% of FOI officers agreed that the Act was needed.[12]

3. Consideration time

Under the existing fees regulations, authorities can refuse a request if the cost to them of dealing with it exceeds £600 for a government department or £450 for other authorities. Only the cost of determining whether information is held and locating, retrieving and extracting it, can be included. The government now propose to also allow the cost of the time spent reading, considering and consulting about the request to be counted. Many requests which currently fall within the cost limits would not do so in future.

The result would be that requests which involve any degree of complexity will be likely to be refused on cost grounds in future, particularly if other cost elements (such as time spent locating or extracting the information) are also present.

New issues

In particular, we think that requests which raise new issues for the first time would usually exceed the cost limit in future, as the consideration of new issues is always time consuming. Once an initial decision has been taken, subsequent requests for related information are likely to be much simpler. But if the initial request is turned down on cost grounds, as we think likely, the Act will no longer be capable of opening up new areas of information or of moving the boundaries of openness forward. This could bring progress under the Act to a halt.

In a speech last year, Lord Falconer the Constitutional Affairs Secretary, said:

> "the boundaries between disclosure and retention require subtle and complex judgements to be made."[13]

[12] Report on the Information Commissioner's Annual Track 2006, SMSR Ltd July 2006. http://www.ico.gov.uk/upload/documents/library/corporate/research_and_reports/2006_annual_tracking_report%20-%20organisations_final.pdf

[13] Lord Falconer, speech at the International Conference of Information Commissioners, Manchester, 22.5.06

This is the problem which the proposals overlook. Complex and therefore time-consuming judgements are inherent in the Act. They cannot be eliminated without damaging it.

Public interest

The new proposals are also likely to penalise those requests involving the Act's public interest test. In 2005, government departments extended the normal 20 working day response period for 10% of all requests, specifically to allow time to consider the public interest issues involved.[14] Lord Falconer has suggested that this additional time often works in favour of disclosure.[15]

Under the proposals the opposite would be the case. The more time that was likely to be spent considering the public interest arguments, the more likely that the request would be refused on cost grounds without addressing the issue involved. To penalise requests because they raises issues of public interest is a perverse outcome which undermines the Act's purpose.

Contentious requests

Requests may also be time-consuming because an authority *chooses* to spend time on them, for example, because the issue is contentious and disclosure may expose the authority to criticism. Although ministers are involved in a very high proportion of all requests, adding significantly to the costs, they do so voluntarily - their involvement is not required.[16]

It may or may not be reasonable for the minister to take a personal interest in particular requests, but it is entirely wrong that their involvement should in itself increase the chances of the request being refused. The effect would be to further bias the Act against disclosure in areas which were politically significant.

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[14] DCA, Freedom of Information Act Annual Report 2005, Table 2.

[15] Lord Falconer said: "*In a number of cases, departments have needed additional time to consider whether the public interest lies in favour of disclosure or retention. Whilst this may involve a longer wait for some requests, this reflects our dual responsibilities under the Act. A duty to disclose – but also a duty to consider the public interest factors thoroughly and scrupulously. And in many cases such extensions work in favour of disclosure. In many cases - such as the disclosure of details of subsidies paid under the Common Agricultural Policy I mentioned earlier – additional time considering the public interest leads to a positive outcome."* Speech at the FOI Live conference, 16.6.05

[16] A minister's involvement is only required if a department refuses information relying on an exemption in section 36 (eg for disclosures likely to inhibit the free and frank provision of advice). In such cases a minister must personally take the decision. Section 36 was relied on by government departments in only 512 cases out of a total of 19,710 requests made to departments in 2005, that is in 2.6% cases. (DCA, Freedom of Information Annual Report 2005, Tables 3 and 5.)

Manipulation

There is obvious scope for authorities to inflate the time needed on requests by involving more people in decisions than are strictly necessary. Ministers or lawyers might be consulted when this would not otherwise have been done. Face to face meetings might be held instead of phone conversations or more people might be invited to meetings than are strictly needed. Since a refusal could be based on the *estimated* time needed to consider a request, such an approach would be costless to the authority.

Regardless of whether such practices occur, the suspicion that they do is likely to generate large numbers of appeals.

4. Consultation time

Including consultation time in the cost calculation would particularly affect requests with implications for more than one authority or department. Much government business is dealt with interdepartmentally, as indicated by the fact that there are no less than 49 cabinet committees, sub-committees and policy working groups.[17]

The ministerial committee on the Olympic games, for example, involves 16 ministers; the ministerial committee on identity management has 17 ministers; the ministerial sub-committee on freedom of information comprises 18 ministers. Background papers submitted to such committees or correspondence relating to issues dealt with by them could be placed beyond the scope of any FOI request simply by the costs of consulting those involved and considering their responses.

The same is true for requests for minutes of a meeting between an authority and a variety of participants (eg the companies and trade associations in a particular sector) or for those relating to multi-agency bodies.

5. Reading time

The consultation document proposes that reading time be taken into account, provided it is not double-counted. It recognises that *determining whether information is held* or *locating information* may already incorporate reading time.

[17] http://www.cabinetoffice.gov.uk/secretariats/committees/index.asp

We think reading time is also likely to be covered by:

- the time spent *extracting* information. DCA guidance makes clear that this includes “editing or redacting” the information, which involves reading it.[18]

- the time spent *considering* exemptions. Deciding what information is exempt must require fine distinctions to be made between obviously exempt material and neighbouring material sharing some of the same characteristics. This too must involve reading it.

Where exempt material is distributed throughout a document, it therefore seems unlikely that any separate accounting for reading time would be justified.

Reading time seems only likely to merit treatment as a self-contained element where (a) the material has been identified as relevant to a request without having to be read, and (b) it contains little or no exempt information (where there is significant exempt information, reading time will be included in consideration and redaction time) and (c) the absence of exempt information could only be established after careful reading of the whole material.

The consultation document asks whether there should be a standard reading charge per page. We do not support this given that:

- repetitive material (eg multiple pages of statistics, bibliographies of published material) will usually not need to be read in full

- some pages (eg title pages, fax cover sheets) will involve no reading time

- the amount of information on a page will vary depending on line spacing, type size, the presence of illustrations etc

- the bulk of an email exchange may consist of automatically generated ‘quotes’ of the previous exchanges between the participants. A 'per page' approach would overestimate the actual reading time.

[18] DCA, Guidance on the application of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004, paragraph 2.3.2

6. Subject access requests

The draft regulations would permit reading time to also be taken into account in dealing with subject access requests for unstructured personal data.[19]

We do not think this is justified. There are important differences between subject access and FOI requests:

- Authorities are not required to advise and assist people making subject access requests. Authorities could refuse a request, partly because of reading time, without advising the applicant how to reformulate the request.

- People making subject access requests can be charged an application fee which is non refundable, even if no information is disclosed. Counting reading time towards the cost limit would increase the chances of applicants paying while receiving nothing.

- Subject access requesters have substantially less appeal rights than FOI requesters:

  (a) applicants are not entitled to know whether and on what grounds information has been withheld from them

  (b) any complaint they make to the Information Commissioner is likely to result in a relatively low level "assessment" of whether it is "likely" that the Data Protection Act has been breached.[20] This would usually not lead to an enforcement notice

  (c) applicants who are dissatisfied with the outcome of their complaint to the Commissioner have no right of appeal to the Information Tribunal.

[19] Draft regulation 5(2)(d)
[20] Under section 42 of the Data Protection Act 1998

7. Aggregation of requests

The draft regulations would also allow authorities to aggregate unrelated requests made by the same individual or organisation and refuse them all if the combined cost exceeded the £600 or £450 limit.

Where this was done it could mean that a newspaper, campaigning organisation, MP or councillor could be limited to a just single request to a particular authority in a three month period - a severe restriction.

Authorities would have to show that it was "reasonable in all the circumstances" to aggregate requests in this way. We recognise the inclusion of this test is an improvement over the original proposal, where no such test was mentioned. We nevertheless think the proposal is still liable to be oppressive. In particular, it takes no account of the legitimate role played by the press and others who may be using the Act to inform the public.

An applicant who makes an extremely large number of requests in a short period of time can already be dealt with under the Act. If an applicant:

- makes a request which is substantially similar to one which he has previously made the authority can refuse it unless a reasonable period of time has since elapsed.[21]

- makes a series of requests for related information within 60 working days of each other, the authority can refuse them all if their combined cost exceeds the cost limit.[22]

- makes other unrelated requests, the authority can refuse them as vexatious if to comply would cause a significant burden and the requests (a) clearly have no serious purpose or value (b) are designed to disrupt or annoy the authority (c) have the effect of harassing the authority or (d) are obsessive or manifestly unreasonable.[23]

Given these provisions, it is difficult to understand why a further power to aggregate unrelated requests should be required.

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[21] Freedom of Information Act, section 14(2)
[22] The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004, Regulation 5.
[23] Information Commissioner, Awareness Guidance No 22, Vexatious and Repeated Requests

The consultation paper suggests four factors that authorities would be encouraged to take into account when considering whether aggregation would be reasonable. Although we comment on the detail of these below, we believe that the proposal itself is unnecessary in light of existing powers and should not be adopted.

The four factors and our comments are:

> Factor 1:
> "the costs which the authority would incur only in dealing with the most recent request, i.e. ignoring any costs which would have to be incurred in any event in dealing with earlier requests (the greater the additional costs imposed by the latest request, the more reasonable it may be to aggregate costs for the purpose of responding to that request)"

It is not clear how a decision to aggregate a series of requests could be taken solely on the basis of the cost of any single one of them (ie "the most recent request").

In our view aggregation should not be possible at all if:

- the individual cost of most of the requests is significantly below the cost limit (eg there are 10 requests each costing £70) or

- the combined cost of all the requests exceeds the cost limit by only a modest degree. Aggregation should not be available unless the combined cost of all requests exceeds the cost limit by a substantial factor, of several orders of magnitude.

> Factor 2:
> "the level of disruption to the public authority, or to particular departments or individuals within the authority, that would be caused by answering a series of non-similar requests (it may be more reasonable to aggregate such requests where the same officials would be required to deal with them and the cumulative effect of doing so would be to interfere disproportionately with the delivery of their duties)"

There is no need for a new power to deal with requests which cause disruption by distracting particular officials from their other responsibilities. Such requests can, if they are clearly unreasonable, already be dealt with as vexatious. The Scottish Information Commissioner has, in two cases, found a large series of requests to be

vexatious partly because of their overwhelming impact on the handful of officials capable of dealing with them.[24]

If aggregation is proceeded with, not just disruption but *substantial* disruption to an authority's work should be a precondition, expressed on the face of the regulations themselves.

> Factor 3:
> "whether the requester is an individual who is not making the request in the course of a business or profession (it may be more reasonable to aggregate requests made by a company or by an individual for commercial or professional purposes);"

This proposal is wrong in principle. There is no reason to assume that requests made for professional purposes are in any way less deserving than those made by individuals. Individuals may of course be motivated by a wish to ensure that authorities deal with them fairly or respond properly to their or their communities' needs. They may also be obsessive or trivial. Equally, many professional bodies are as, if not more, likely to be acting in the public interest than in pursuit of a private interest, particularly in the case of the press, campaign groups or elected representatives.

A key principle of the Act is that decisions should be "applicant blind" and depend on the consequences of disclosure not the identity of the applicant. According to Lord Falconer:

> "Apart from the vexatious request - such as "does the Lord Chancellor exist?" - our FOI regime is blind to both the identity and purpose of requests. It is rightly blind. The decision whether to disclose must be based on an objective application of the principles to the information requested, irrespective of who has asked, and for what reason. The information released must be evaluated against how it promotes empowerment, and how it improves good decision-making."[25]

Factor 3 would repudiate this "applicant blind" principle.

> Factor 4:
> "the course of dealings between the requester and the public authority in relation to the requester's FOI requests, which could include requests made outside the 60-day period (it may be more reasonable to aggregate requests made by a person who had made a large number of requests to the authority in the past, or whose conduct in relation to previous requests has been uncooperative or disruptive)."

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[24] Scottish Information Commissioner, Decisions 062/2005 and 063/2005.
[25] Lord Falconer, speech at the International Conference of Information Commissioners, Manchester, 22.5.06

We are concerned at the suggestion that aggregation should be more likely in the case of applicants who have been "uncooperative or disruptive". Although this is presumably not the intention, it may encourage some authorities to penalise requesters who have repeatedly appealed against their decisions, criticised their approach to the FOI Act or used information in ways which have displeased the authority.

It may also permit authorities to adopt a coercive approach towards applicants. They may warn those who make even small numbers of requests that, if they fail to comply with the authority's advice to narrow or withdraw their request, this will be treated as a lack of cooperation leading to their future requests being aggregated and refused. This would transform the duty to advise and assist into a power to *instruct* applicants.

Unreasonable applicants who are completely unresponsive to reasonable suggestions made by an authority can already be dealt with under the Act's powers, for example, by refusing a request which is repeated or vexatious or which the applicant refuses to clarify.[26]

Most conspicuously, none of the factors make any reference to the public interest in providing the requested information. This wholly unbalances any assessment. It cannot be right to only take into account the costs, disruption and applicant's status and behaviour - but ignore the importance of the information to the public.

8. Harmonisation with Environmental Information Regulations

We do not believe that EIR requests should continue to be linked, in guidance, to the FOI cost limits if these are to be calculated in line with the current proposals.[27] There should be no assumption that a request for environmental information should be dealt with free of charge only up to the £450 or £600 limits, if these are calculated as proposed. These limits could not be regarded as points above which it may become reasonable to charge for environmental information without throwing into doubt the UK's compliance with the Environmental Information directive.

[26] Freedom of Information Act, sections 14(1) and 1(3)
[27] Consultation document, page 15, paragraph 44

9. Can these effects be minimised?

Advice and assistance

The partial Regulatory Impact Assessment (RIA) included with the consultation document suggests that the impact of these proposals could be moderated by authorities providing requesters with advice and assistance as required by section 16 of the Act.[28] We do not agree.

The duty to advise and assist may help where the time needed to *find* the requested information is excessive. Applicants can be advised to ask for less information.

But such advice cannot help where a request unavoidably raises a complex and time-consuming issue. It will not be possible to reduce the need for 'thinking time' by narrowing the request's scope. The request could only be refused.

Similarly, a request for the minutes of a single meeting involving multiple participants may require each of those participants to be consulted before disclosure. If the time needed to consult, deal with their questions and consider their representations exceeds the cost limit, there would be nothing the applicant could do to prevent this.

It is likely that a request for the legal advice on the war in Iraq would be refused on cost grounds under the new proposals. Providing advice and assistance to the applicant would be pointless. The complexity of the public interest arguments and the need for consultation between the government departments concerned could not be avoided.

Thresholds and ceilings

The proposed ceilings and thresholds, though intended to provide some safeguards, will make only a marginal difference.

Setting *separate* ceilings of £400 for the maximum cost of consideration or consultation time ensures that neither element on its own can exceed the £600 central government limit.[29] But the fact that consideration time and consultation time *together* could exceed the limit indicates that relatively little protection would be provided unless the ceilings are reduced significantly. Most requests liable to be

[28] Consultation document, page 38, paragraph 28
[29] The £300 ceiling for other authorities would have the same effect in relation to the £450 cost limit.

caught by the new proposals will include a variety of costable elements (eg time spent checking if information is held, searching for it, retrieving, extracting or redacting it) which, in combination with reading, consideration and consultation time, may take the costs over the £600 or £450 limits.

The proposed *thresholds*, which would prevent consideration or consultation time being taken into account unless it exceeded £100 for central government or £75 for other bodies, will help in those cases which would be close to the cost limit already. But their value is limited by the fact that where the threshold is exceeded, the *full* costs including the first £100 or £75 would be counted.

10. Removal of appeal rights

Some FOI practitioners have suggested to us that they are not minded to rely on the new fees regulations, but will continue to respond to requests as they have in the past. The new powers would only be used exceptionally, if at all. Although we recognise the positive intention behind such statements they suggest that the new proposals are not needed. They also overlook a key aspect of the fees regulations.

An authority which provides information which it believes it could have refused on cost grounds would be disclosing information *voluntarily*, outside the scope of the Act. Applicants would lose any right to complain to the Information Commissioner about withheld information or delays.

This is apparent from section 12(1) of the Act, which states:

> "Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit."

The Commissioner can only compel an authority to disclose information where it is required by section 1(1). He cannot do so where the cost limit has been exceeded, even if the authority is willing to release some of the information voluntarily.

An authority which replies to a request by saying "although the time needed to deal with your request means that we could refuse it we are nevertheless providing some information to you" would in effect be free from challenge (except in relation to its calculation of costs).

The DCA's existing fees guidance explicitly recognises this:

> "If a request would cost more than the appropriate limit to answer, the requirements of section 1(1) and of those parts of the Act which depend on an authority's compliance with section 1(1) cease to apply. For example, authorities are not legally obliged to comply with section 9(1) (which states that authorities must issue a fees notice when charging a fee); section 10(1) (which sets a time limit of 20 working days for answering a request); or section 11(1) (whereby authorities should put information in the preferred format of the applicant where reasonably practical) when choosing to answer a request that exceeds the appropriate limit."[30] *(our emphasis)*

This has also been recognised in decisions of the Scottish Information Commissioner. In at least two cases, both involving extremely large volumes of information, the Scottish Commissioner has asked the Scottish Executive to consider whether the cost limit had been exceeded, after the Executive had failed to do so. After being informed, and confirming, that the limit would be exceeded the Commissioner rejected each appeal, without examining the exemption claims, commenting:

> "I have no power to force the release of information should I find that the cost of responding to any single request for information exceeds this [£600] amount."[31]

Although we think it unlikely that either Commissioner would normally intervene in this way, these examples confirm that once an authority correctly estimates that the cost limit would be exceeded, the applicant's appeal rights would disappear. This will be so even if the cost issue is not raised until the Commissioner's investigation is underway.

11. The costs of the new system

While the existing costs of complying with requests have been carefully assessed the costs of the new proposals appear to have been minimised.

For example, the partial Regulatory Impact Assessment states:

> "The costs to public authorities of these proposals would be minimal. There would be no requirement to introduce major changes to their systems for dealing with information requests, as the changes are simply extensions of existing provisions."[32]

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[30] DCA, Guidance on the application of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004, paragraph 4.3
[31] Scottish Information Commissioner, Decisions 204/2006 and 228/2006.
[32] Consultation document, page 44, paragraph 49

Currently, if authorities have to estimate the time needed to locate information, they can examine a sample of the files involved and calculate how long it would take to examine *all* the files. This approach cannot be used to estimate how much time will be needed to consider complex issues. The measures required are not "simply extensions" of existing procedures.

Even the current fee regulations are still sometimes misunderstood.[33] The new regulations are vastly more complex. Not only would they allow three unfamiliar cost elements to be taken into account, they require that two of these be applied only where the costs fall between the "threshold" and "ceiling". A significant investment in training would be needed.

Substantial work will also be needed to ensure that authorities' estimates under the new rules are robust enough to satisfy both the Information Commissioner *and* the requester that they are justified. The Commissioner already expects tht:

> "where a public authority is citing, or should cite, the cost limit, they should provide to the requester a breakdown of how their cost estimate was formed."[34]

The new cost estimates will have to be properly documented to withstand the inevitable appeals. Authorities may need to produce 'baseline' data, showing how much consideration or consultation time is needed for routine requests, before estimating what more complex requests may involve.

They will also have to ensure internal consistency between staff, so that applicants are not penalised if their request is dealt with by an official who works more slowly than his or her colleagues. We doubt that authorities would regard any of this as costless.

Moreover, once applicants are told how much time is spent actually *considering* their requests, this will focus attention on the reasons for the prolonged delays sometimes found. Over 200 requests a quarter to government departments currently take more than 60 working days before being answered, supposedly to allow time for the public interest test to be properly considered.[35] Once systematic records of how time is spent are kept, applicants will be able to discover how much

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[33] For example nearly a year after the Act came into force a large county council attempted to charge the Campaign a £20 fee for the 1 hour spent by officials responding to its FOI request, although such charges are not permitted.

[34] Decision Notice FS50090699 (Cabinet Office). See also Decision Notice FS50072719 in which the Commissioner found BNFL in breach of its duty to provide advice and assistance partly because it "did not provide to the complainant any information as to how they had made their estimate [that the cost limit would be exceeded]".

[35] DCA, Freedom of Information Act, Statistics on Implementation in Central Government, Q3. July-September 2006, Table 7.

time is actually used for this purpose, adding to the pressure for requests to be dealt with "promptly", as the Act requires. This too would have workload implications.[36]

Refusals under the new fees regulations will also result in:

- increased costs to authorities in dealing with internal reviews and appeals to the Information Commissioner
- increased costs to the Commissioner, whose efforts to deal with the existing backlog of complaints, are likely to be undermined
- increased volumes of Parliamentary Questions to central government, not least from MPs whose own FOI requests have been refused as a result of the new regulations.

It is also likely that, in an attempt to ensure that their requests are not aggregated, some requesters will deliberately submit requests through third parties or from email addresses which conceal their true identities. These requesters will not be prepared to contact the authorities to seek advice and assistance and will be less likely to respond to authorities' offers of advice. The result will be less dialogue and understanding between requesters and authorities, a greater tendency towards a confrontational or bureaucratic approach and an undermining of the opportunity the legislation provides to enhance public confidence in the work of public authorities.

12. Conclusions

We have previously made clear our serious concern not only about the proposals themselves but about the way in which they have been developed. Neither requesters nor public bodies have been asked about their experiences of the legislation, about any problems they may have encountered, whether any changes to address them are necessary and, if so, what these might be.

The present consultation is extremely limited. It deals with technical questions about the most effective way of implementing *some* of the proposed changes. Even some aspects of the new proposals are not mentioned in the consultation document proper.[37]

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[36] Freedom of Information Act section 10(1)
[37] For example, the proposal to allow reading time to count towards the cost limit for subject access requests is mentioned in the consultation document only in the footnote on page 4.

In this response we comment on some of the wider issues. But we think the failure to address these issues of principle is a fundamental defect.

The absence of public involvement or consultation on the wider issues is not merely procedurally unfair, it has distorted the exercise itself. Although the costs of the Act have been documented in minute detail, the benefits have been ignored. Even Frontier Economics acknowledge that:

> "the public value of the information and the public good value of FoI have not been taken into account".[38]

The partial RIA states merely that:

> "There may be some cost to requesters, and the public at large, if the proposals result in a decrease in the volume of information released under the Act. It is impossible to quantify such costs."[39]

The result has been a one-sided assessment, which exaggerates the case for change because the nature and value of the information that would be lost under these proposals has been overlooked.

Yet the value of the released information is clear not only from the widespread opposition to these proposals but from the words of ministers themselves:

- the Constitutional Affairs minister, Baroness Ashton, has described the £25 million cost of the Act to central government as "money well spent"[40]

- the Constitutional Affairs Secretary, Lord Falconer, recently described the Act as the "single most significant act of any Government, in improving transparency, accessibility and accountability" and as "the platform for building an improved relationship between the citizen and the state"[41]

- the Government has stated that it is "pleased by the significant success that FOI represents" and that "it will continue to build on that success".[42]

This perspective is completely absent from the current proposals. There is no attempt to protect requests that would be in the public interest or to ensure that restrictions apply only to those that are clearly unreasonable.

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[38] Frontier Economics report, page 51
[39] Consultation document, page 42, paragraph 44
[40] Interview in Press Gazette, 2 February 2007
[41] Speech by Lord Falconer at the Canadian High Commission, 6 March 2007
[42] Government Response to the Constitutional Affairs Select Committee Report, Freedom of Information-One Year On, October 2006, Cm 6937

The proposal to allow consideration time to count towards the cost limit has been justified simply on the grounds that a proportion of requests are significantly more time-consuming than the average and should therefore be blocked. The nature of the requests affected appears to be of no concern. It is of course a statistical feature of any normal distribution of requests that some will be much more expensive than the average. This will continue to be the case even if the current proposals are adopted.

The consultation paper indirectly recognises the failure to take account of the public interest in disclosure by acknowledging that the changes will have a greater impact on "journalists, MPs, campaign groups and researchers" than on private individuals.[43]

It is no coincidence that these are the groups most likely to use information to promote wider discussion of issues of public concern and to greater scrutiny of the work of public authorities.

A possible solution might be to insert a public interest test into each of the two proposals. This would avoid some of their most undesirable consequences. However, the result will be a complex and largely unnecessary set of tests.

A second option would be to ensure that existing measures to target clearly unreasonable requests were used before even considering taking additional powers. Yet this possibility is not mentioned in the consultation paper. On the contrary, it appears to be dismissed as part of what is inaccurately described as a 'do nothing' option:

> "The first option is to do nothing, and leave the 2004 fee Regulations in force.
>
> The findings of the independent review make it clear that at present a small percentage of requests and requesters are imposing a disproportionately large burden on public authorities. Doing nothing would leave public authorities without an effective means of dealing with such requests. They would continue to be obliged to comply with requests that impose disproportionate burdens on them, which would in turn affect their ability to deliver other core public services effectively and efficiently."[44] *(our emphasis)*

This is misleading. Authorities have a range of powers capable of being used against disproportionately burdensome requests. These include the power to refuse unspecific requests which the applicant refuses to clarify, to refuse repeated

[43] Consultation document, page 42, paragraph 40
[44] Consultation document, pages 33-34, paragraphs 18-20

requests for similar or identical information, to aggregate related requests and to refuse vexatious requests.

Many of the examples cited to illustrate the need for new powers could in fact be dealt with under these existing powers. Frontier Economics recognised that these are not being fully used,[45] while failing to appreciate their extent.[46] Even its short list of supposedly 'frivolous' or 'disproportionately burdensome' requests include several which could obviously be refused under the existing provisions without any burden on authorities whatsoever.[47]

The failure to adopt a targeted approach is presumably what has prompted some practitioners to suggest that they would not make use of the new powers, other than in exceptional cases. Unfortunately, where only partial disclosures are made requesters may lose their appeal rights.

The only proposal which would not cause serious damage might be to allow reading time, which at least reflects the physical volume of information, to count towards the cost limits.

Consideration and consultation time relate to an entirely different type of exercise. We do not think they can be included in a cost limit designed to take account of the time spent *searching* for information. These elements do not belong on the same scale. They cannot be combined in a way that allows a 'reasonable' request to be distinguished from an 'unreasonable' one.

The proposal to allow unrelated requests to be aggregated is also severely flawed. The way in which it is proposed to do this would in our view distort the Act's objectives. In any event, authorities can already deal with multiple requests which impose unjustified burdens on them.

We do not think any restrictions should be brought forward, particularly at this early stage in the Act's life. If, at a later stage, measures to improve the operation of the Act are thought necessary, these should also address the problems faced by

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[45] "…it is not clear that all practitioners are making full use of the provisions in relation to aggregation and vexatious requests". Frontier Economics report, page 53

[46] The Frontier Economics report states: "Vexatious requestors tend to make repeated requests for information with the aim of disrupting the work of an organisation or harassing the individuals within it." (page 31). This is narrower definition of 'vexatious' than that adopted by the Information Commissioner.

[47] For example, one of the 9 supposedly unreasonable requests stated: "I want to have an affair – how can I make it constitutional?" This is more likely to have been intended as an ironic comment on the conduct of a particular minister than as a serious request. If it was, it could have been refused on the grounds that no record containing such information was held. There would have been no 'disproportionate' burden to the department concerned. Frontier Economics report, pages 2-3.

requesters, particularly, delay. No restrictions on access should be considered unless:

- there is clear evidence that unreasonably demanding requests are being made that cannot be dealt with under the Act's existing powers
- they are preceded by an assessment of the costs and benefits of the proposed changes which takes into account the public interest in the information whose disclosure might be affected
- they are strictly limited in scope to the kinds of requests found to cause problems.
