

8th March 2007

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Submission by the Newspaper Society to the Department of Constitutional Affairs

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

The Newspaper Society represents the regional newspaper industry. Its members publish around 1300 local and regional newspaper titles. They also have a growing audience through their ever developing media portfolio with around 800 associated websites, 600 stand alone magazines, 28 radio stations and some television services. 83.4% of all British adults read a regional newspaper - 40 million people and 26.7% of those who read a regional newspaper do not read a national daily newspaper.

The regional press is seriously concerned by the Government's proposals set out in its consultation paper 'Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007'. Those concerns have been explained by editors and publishers in meetings with DCA Minister Baroness Ashton. Regional and local newspapers have also published numerous articles, detailing the information which their readers and reporters have obtained as a result of the Act and their opposition to the proposals which could undermine its effectiveness. Many examples were given by Members of Parliament during the adjournment debate on 7th February on the Government's proposals. The Newspaper Society's earlier letter to Baroness Ashton of 29th November and in its submission to the Constitutional Affairs Select Committee's inquiry have also summarised the industry's concerns.

The Government's proposals emanate from the Review of the Impact of the Freedom of Information Act conducted by Frontiers Economic Report, which simply concentrated on the cost element. As that report repeatedly stated, it had no reliable or detailed information on the time spent on FOI requests and their costs for the wider public sector, outside central government, with which the regional press is engaged. The Review essentially suggested that the way to cut the cost of delivery of Freedom of Information was to cut the delivery of information - and in ways that would particularly affect journalists, Members of Parliament, researchers and campaigners. The review did not consider the benefits of the release of information as a result of a request under the Act - whether its specific value and assistance to any individual, or the use of that information, through media investigation and publicity or otherwise, as a way of highlighting important issues, identifying problems or successes, its contribution to improvements to the work of public bodies and the provision of public services, such as better safeguards for public health and safety, or tighter controls over public spending. The consultant's costs analysis and the Government's proposals apparently do not

take into account any benefits which have resulted from the information revealed by those requests, including those promoting the Government's primary purpose in introducing the Freedom of Information Act of promoting - the beneficial effect of the resulting greater openness, public scrutiny and public accountability, upon the activities, administration, decision-taking of public bodies in discharging their public functions. The estimated costs of implementation of the FOI Act are modest - and the estimated £1.4 million cost of the wider public sector dealing with media requests is even more modest- and certainly do not provide justification for introducing legislation that would undermine the freedom of information regime within just two years of its introduction.

We are surprised therefore that the DCA's paper sets out draft regulations based on the review's proposals and the consultation is limited to their potential operation and how to broaden the grounds for refusal of requests on estimated costs grounds without consideration of their merits. Prior to the Act's introduction, the Government was keen to enlist the help of the regional press in alerting local public bodies to their obligations under the Act and to encourage its use by their readers. The Government's review arguably demonstrated the immediate success of the Act, despite its flaws - there is a demand for hitherto undisclosed information, people are using their rights to request that information and are making use of that information. Regional and local newspapers have used the Act to obtain information of importance and real public interest. Therefore we would have expected the consultation at least to seek views on whether the Government should introduce proposals intended to usher in such radical change to the operation of the legislation, by allowing public bodies to thwart the rights of the public that they serve, so recently granted, simply because of administrative inconvenience. The Newspaper Society members might also have been entitled to assume this from the Prime Minister's earlier public assurances to them.

We are disappointed that the Government is not consulting on how to improve public bodies' performance of their statutory FOI duties before legislating to lighten their obligations to the public. As the Newspaper Society's letter of 29th November pointed out, the I&DeA survey to which the Frontier Economics Report refers 'Freedom of Information Act 2000: The first six months - the experience of local authorities in England' actually reported that the local authorities considered 'better engagement with the public and the media' a benefit of the Act, irrespective of the time taken to answer more difficult and time-consuming requests. The Newspaper Society therefore feel that it would have been more constructive if the Government had first attempted to help local authorities to improve their delivery of FOI services - for example to encourage allocation of adequate resources and staff to fulfil their statutory obligations in response to public demands, the lack of which they felt hampered their FOI work, and to help local authorities overcome the initial problems that they did report in applying exemptions and the public interest test, distinguishing between FOI and EEIR regimes, persuading colleagues to comply with timescales and use request tracking schemes; and coping with stretched resources, sometimes with no budget and with staff allocated to FOI on a temporary basis. We note that the Government has established sector panels for the wider public sector, but these will not counteract the effect of legislation intended to reduce FOI requests by the media.

The regional press opposes the Government's proposals to allow public authorities in future to take into account the estimated time and therefore the estimated costs of reading the information, consulting others and considering the application of the Act's provisions and deciding whether to release the information. The regional press also opposes the Government's proposals to allow authorities to aggregate unrelated requests from the same

person or company, if it considers it reasonable to do so, in making the costs calculations. The new rules give public bodies a wide area of discretion to structure their FOI procedures to enable and justify refusals that would otherwise be unlawful under the Act. Regional and local newspapers will be particularly vulnerable to increased refusals of their FOI requests under the proposed provisions

The regional newspaper industry is opposed to the changes because they will allow public authorities to refuse requests simply on costs grounds, irrespective of the public interest in the release of the information, or the absence of other grounds to refuse lawfully the request.

The regional press is not convinced by the Government's suggestions that the changes are merely intended to allow a public body the right to refuse to provide any information to the occasional person who requests a large volume of information, refuses to refine his request or agree a departure from the statutory deadline. Nor do we consider that the few examples of requests whose motivation might have been less than serious put forward by the Review justify such measures. The Act already allows public bodies to refuse supply of information that it estimates it would cost more than £600/£450 limit to locate. The Act also already allows refusal of vexatious and repeated requests. We understand and share the DCA's concern that any requestor should not be labelled vexatious lightly; but we are equally concerned that the proposed changes will be used by public bodies as very convenient means of avoiding otherwise obligatory disclosures to local newspapers and their readers.

As the Government's partial regulatory impact assessment and consultants' report stated, these changes were framed with reference to the media's use of the Act, and will have a particular effect upon journalists and campaigning groups, as well as MPs and their researchers.

The regional press believes that the change to permit reading, consultation and consideration time will be used to justify refusal to release information in cases other than the occasional request which cannot be reduced or staggered. It could become a very convenient way of refusing to release information of real public interest, which the public body would prefer was not made publicly available for any reason. Such information requests might fall under exemptions and require public interest assessment under the Act may require longer time for consideration and consultation of senior staff or consultation of other bodies. The thresholds and ceilings will not prevent requests being turned down on estimated costs grounds alone as the regulations allow the addition of consultation time and reading/consideration time (as well as location, retrieval and extraction time) to bring estimates over the £600/£450 threshold. Moreover, the proposed changes to the regime could actually encourage inefficiency and ineptitude and even institutionalised avoidance mechanisms, such as haphazard record keeping, maximisation of the estimated involvement of staff and therefore calculations of more hours than necessary, or instigation of over elaborate consultation, (the draft rules do not make clear that this is 'third party external consultation'). The changes could be a disincentive to improve record keeping, development of staff expertise, championing of freedom of information by senior staff to promote disclosure or allocation of resources and help reinforce the notion of freedom of information as an unwelcome intrusion and imposition, rather than an integral part of the public bodies' work.

Regional newspaper companies are also very concerned by the proposed change to allow aggregation of unrelated requests if reasonable to do so. Regional newspapers are likely to seek accurate and authoritative information on numerous occasions from a number of

regional and local public bodies in their area, because those bodies have important and/or wide ranging responsibilities for matters that affect their readers' lives. The new power would allow any local authority or other regional or local public body, to accept just one request a quarter from any regional newspaper company, even though the requests may have been completely unrelated, made by different newspaper titles, by different specialist correspondents, or by different general news reporters, in order to obtain accurate and authoritative information from different departments of the same public body.

As regional newspaper editors have explained to the Government, some local and regional public bodies are already reluctant to release information in response to FOI requests - or tried to categorise media enquiries as FOI requests to justify delay and refusal. The Frontier Economics report expressly categorised journalists as commercial users and the Government's consultation paper suggests that the proposed power is appropriate to use against such users. The proposed regulation would therefore provide another legal device to avoid release of information, since it would give public bodies the power to aggregate all requests from any media company and effectively ration any media company to one FOI request a quarter (subject to the other changes to the calculations of estimated costs). Guidance on 'reasonableness' of aggregation will not be adequate protection against the use of the proposed legislation to curb local newspapers FOI requests.

The proposals could have a hugely detrimental effect upon the use and effectiveness of the Freedom of Information Act at local level by the local press and their readers. The Government's consultants estimated that media requests to public bodies outside central Government cost around £1.4 million. This cost does not justify the proposed restrictions to cut use of the Act.

The draft regulations' suggested cost thresholds and ceilings do not alleviate the concerns described since they would still allow requests to be refused, even if exemptions would not otherwise allow this and the public interest require it, on estimated costs grounds alone, through adding the new calculations together or by aggregation, in circumstances where that would not be currently possible.

The Government may suggest that the regulations are intended to assist public bodies faced with a potentially time consuming request which the requester is reluctant voluntarily to refine or agree an extended timetable. But the proposed legislative change would extend the right of all public bodies to refuse to supply any information to anyone, simply on estimated time and costs grounds. Guidance on the operation of the statutory provisions cannot prevent the use of the powers.

We anticipate that the Government's proposals will be counterproductive, as requestors will challenge more refusals, if based upon costs estimated, based upon time estimates and/or aggregation of unrelated requests and therefore lead the public body to incur more time and cost than in actually considering the original request.

The Newspaper Society therefore hopes that the Government will reconsider its proposals and decide against bringing forward the draft Regulations and making any such changes to the Act. The regional newspaper industry would oppose any regulations or other legislative proposals that take away the public's right to information under the Freedom of Information Act.

The Newspaper Society would be happy to provide any further information.

Questions 1, 2, 3

The Newspaper Society opposes the introduction of consultation and consideration time for the purposes of costs calculations and justification of refusal for the reasons set out above.

The Newspaper Society doubts that a 'ready reckoner' will necessary avoid manipulation of time calculations or threshold calculations, including reading/examination time or consideration time.

The draft regulations do not restrict consultation time to consultation of independent or third party bodies.

The thresholds and ceilings do not provide adequate protection for 'difficult' requests' and release of information being refused on costs grounds, instead of substantive legal and public interest grounds and irrespective of the public interest in the release of the information.

Any protection is reduced because they do allow consultation costs and consideration costs to be added together to exceed the costs limits of any one request (in addition to the location time) - and of course the problems are exacerbated by the proposal to allow aggregation of the costs of unrelated requests

Questions 4, 5, 6

The Newspaper Society opposes the extension of the aggregation provisions for the reasons set out above. The proposals would enable any public body to aggregate all the requests made by one newspaper company, which in respect of journalistic activities alone could affect many different journalists working for many different regional and local newspaper titles and local editions, with different readers and audiences. We suggest that public bodies already have adequate powers to refuse vexatious requests to deal with any problematic requests.

Question 7

The Newspaper Society would be concerned if guidance led to more restrictive information disclosure practice and procedure under the EIR.

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