

The Campaign for Freedom of Information

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November 24 2006

I am writing to set out in more detail why we are so seriously concerned about the government's proposals to revise the fees regulations under the Freedom of Information Act.

The government has proposed two changes to the FOI fees regulations:

- (1) to allow all the time spent by officials or ministers in dealing with a request to count towards the £600 or £450 cost limit, rather than just the time spent finding the information
- (2) to allow the cost of unrelated requests from the same individual or organisation to be aggregated and refused if the combined cost exceeds the £600 or £450 cost limit.¹

Either of these proposals would in our view be deeply damaging to the legislation. We find it hard to imagine how the government could even contemplate adopting both.

¹Government Response to the Constitutional Affairs Select Committee Report, 'Freedom of Information One Year On', October 2006, Cm 6937, paragraphs 50 to 51.

1. Allowing 'consideration' time to count towards the cost limit

At present, an FOI request can be refused if the cost of dealing with it exceeds £600, in the case of a government department, or £450 for any other public authority.² In deciding whether the limit has been reached the authority can take into account the costs of determining whether the information is held and of locating, retrieving and extracting it. Staff time is costed at £25 an hour.

The government is proposing to allow the costs of the time spent reading the information, consulting others about it and considering whether to release it to also be counted. The £600 or £450 limit would thus be reached more easily and many requests which currently have to be dealt with would be refused on cost grounds.

This would have particularly severe effects on complex or politically contentious requests.

(a) Complex requests

Any request which raises a new and complex issue for the first time would be at risk of being refused without consideration of its merits. Such requests are by their nature time-consuming, at least at first, because they challenge long-held assumptions.

Once the initial decision has been taken, follow-up requests for similar information can often be dealt with relatively easily. But under the proposals the initial request is likely to be rejected out of hand.

Examples of disclosures which would probably not have taken place under the proposed rules include the decisions to reveal the amount of EU subsidies paid to individual farmers, the success rates of cardiac surgeons, restaurant inspection reports and details of ministerial meetings with outside bodies. These decisions will have involved substantial consultation and deliberation initially, taking them well beyond the cost limits.

Equivalent new disclosures would be unlikely in future, striking at the heart of the FOI Act. If requests can be turned down merely because of the consultation and consideration time involved, no complex new issue will ever be considered, no new boundary will ever be crossed and freedom of information will stagnate.

² The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004

(b) Politically sensitive requests

Politically contentious requests will also involve substantial consideration and consultation time.

The mere fact that a minister chooses to become involved in an FOI decision may itself be enough to take costs over the £600 limit. The Frontier Economics report³ indicates that 1 in 5 requests to government departments are dealt with by ministers,⁴ and that on average requests involving ministers take five and a half hours longer than other requests.⁵ The extra cost of this time amounts to £137,⁶ almost quarter of the cost limit. A minister's involvement will itself be enough to tip many requests over the threshold.

This has a number of consequences:

- it will protect ministers themselves from scrutiny, since requests about their own conduct or decisions are normally referred to them, adding to the hours and increasing the chances of a cost refusal
- it will prevent scrutiny of politically contentious matters, since such requests are likely not only to be referred to ministers but also to consume more official time generally. Requests which suggest that a policy is not working, an error has been made or a problem is much worse than has been admitted would be more likely to be refused on cost grounds, preventing the Act from making any contribution to political accountability
- departments may be able to manipulate the time needed to deal with an unwelcome request, by deliberately consulting ministers, lawyers, other specialists, other departments or Downing Street itself, ratcheting up the time involved at each stage.

The close attention already paid to politically contentious requests can be seen from the operation of the DCA Clearing House which advises Whitehall departments on sensitive requests. The very fact that a request is referred to the Clearing House would increase the chances of it being refused in future, since its staff time and that of those they consult would count towards the limit.

³ Frontier Economics, Independent Review of the impact of the Freedom of Information Act, A Report Prepared for the Department for Constitutional Affairs, October 2006

⁴ Frontier Economics, page 38

⁵ Frontier Economics, page 2

⁶ That is, 5.5 hours at the standard rate of £25 per hour

The requests which departments are instructed to refer to the Clearing House include: “requests relating to high profile issues, whether current or historical”, “requests...relating to...high profile procurement projects”, cases where “the application of FOI...is complex and/or technically difficult”, “requests that obviously involve cross-Whitehall issues”, “anything relating to Ministers”, “notes of meetings between Ministers”, “all cases relating to Cabinet and its Committees” and “anything relating to the current Prime Minister”.⁷

There would be a inbuilt bias against responding to requests on “high profile” and other important issues in future. The fact that information would contribute to public debate on significant issues would now increase the chance of it being refused, defeating one of the Act’s chief purposes. Perversely, the approach would favour obscure requests of interest to no-one but the applicant, while penalising those of widespread interest.

Moreover, applicants would lose the opportunity they currently have to avoid a cost refusal by limiting the scope of their requests. At present, a request’s costs reflect the volume of information sought. If a request is refused, the applicant is usually invited to narrow it down to cover a smaller volume of records, often allowing a proportion of the information to be obtained. But a request which is refused because it raises complex or sensitive, and therefore time-consuming, issues cannot be made less demanding. It can only be dropped.

2. Aggregating unrelated requests from the same requester

The government is also proposing to allow unrelated requests from the same individual or organisation to be aggregated. If the total cost of all an organisation’s requests to an authority during a given period exceeds the £600 or £450 limit, they could all be refused. No-one from the organisation could make any further requests for a set period, presumably 60 working days.⁸

In many cases a *single* request will cost close to £600 or £450, particularly if reading, consultation and consideration time are counted. Requesters would often be limited to just a single request to a particular public authority in any 60 day period.

⁷ Department for Constitutional Affairs, “List of 'triggers' for referral to the DCA Clearing House”

⁸ Sixty working days is the period which applies for the purpose of aggregating the costs of closely related requests, under the existing fees regulations.

The effect on those whose work involves the reporting, monitoring or scrutiny of particular authorities would be brutal:

- A journalist asking the Home Office for information about, say, prison escapes, could use up most of the £600 limit in one go. Any subsequent request to the Home Office from any of the paper's journalists could be refused, whether it dealt with immigration, policing, drugs, passports, anti-social behaviour orders, race relations, equal opportunities, animal experimentation, DNA testing or airport security. Once the 60 day wait was over, someone on the paper could make one more request, before using up the quota again.
- A local paper, whose job it is to report on what its council is doing, would have one request per quarter to use in covering the whole range of council activities: housing, social services, education, public safety, planning, licensing, parking, libraries, the arts, road maintenance, parks, building control, food safety, council tax and local elections. The FOI Act would no longer contribute to keeping the public informed about the activities of the authorities that serve them.
- Community organisations trying, for example, help patients dealing with NHS bodies, would be limited to one request per quarter to each. A single request about waiting lists for one procedure could prevent it asking about any other waiting list for 60 working days. It would also be barred from enquiring about hospital cleanliness, surgical success rates, access to new treatments, medical negligence, ambulance services, facilities for the disabled, interpreting services, clinical trials, investments plans, staffing levels, service cuts and other aspects of patient welfare.

Other implications

These proposals, as set out, would neuter the FOI Act as an instrument of scrutiny, accountability and public participation and undermine efforts to move towards a more open culture. The Act would remain useful to casual requesters, making occasional requests, while becoming almost unusable for those seeking to use the Act for public purposes.

Organisations would no longer have any reason to encourage their staff to learn how to use the FOI Act. On the contrary, they would have to train them to *avoid* making FOI requests, so that they did not ask for information in writing or by email without first confirming that their organisation was content for them to use up what might be the whole of its quota.

Naturally, some requesters will resort by subterfuge. To prevent requests being 'aggregated' they will apply from a variety of unrelated email addresses, or farm requests out to friends and neighbours. To maintain their disguise, they will no longer discuss their requests with the authority in person. Authorities will become increasingly suspicious about the true identities of requesters, less willing to offer advice and assistance and more bureaucratic and distant in their approach. Requesters and authorities will be less ready to speak to each other. The Act will become more confrontational and the potential benefits, of improved public understanding of and confidence in the work of public authorities, will be lost.

Unlike the Act's exemptions, most of which are subject to a public interest test, the cost limits are absolute. An authority cannot be required to breach them, however compelling the public benefit from disclosure.

By permitting more requests to be refused, regardless of their contribution to the public interest, the proposals would make it easier for authorities minded to do so to withhold information about dangers to public safety, abuse of power, wasteful spending, unjust treatment of individuals, misconduct in public office, failure to honour commitments or the likely effects of new decisions.

Frontier Economics suggest that the total annual cost of the FOI Act, for the whole of the public sector including the cost of the Information Commissioner's office and the Information Tribunal, is £35.5 million. This is about one ninth of the amount that the government spends on information campaigns through the Central Office of Information.⁹ Frontier Economics suggest that the two proposals would save around £11.8 million per annum.¹⁰ The damage done by these proposals would be out of all proportion to such relatively modest savings.

The FOI Act is one of the means by which excessive spending is being detected and deterred. Many requests are made about the costs of public sector contracts, the failure of contractors to deliver on time, the costs of consultants, expenses claims, the use of expensive agency staff to replace full time employees and why it costs some authorities so much more to deliver services than others. As public authorities come to recognise that such information cannot be withheld, the pressure to ensure that spending is justifiable has increased. The FOI changes would relax that pressure. At a time when the cost of the Olympics alone appear to

⁹ The COI had a turnover of £321 million according to its annual report for the year to 31 March 2006

¹⁰ Frontier Economics, Table 14, page 54

be billions of pounds more than the public were promised, limiting the public's right to learn about such miscalculations seem deeply misguided.

We recognise that some FOI requests can be very time-consuming to deal with; and that not all requests further the public interest. We have no objection to examining ways of making the Act work more efficiently, provided these do not fundamentally undermine the legislation itself. Unfortunately, this is not what is envisaged by the current proposals.

Consultation

We are particularly alarmed at the speed with which the proposals appear to be moving towards implementation. It seems likely that draft regulations to implement the new proposals will soon be published.

The government is consulting the DCA 'Information Rights User Group' of which I am a member, but no formal public consultation is taking place. Neither I nor any other member of the User Group purports to speak for requesters in general and consultation with the group, much though we may individually appreciate it, does not satisfy the need for wider consultation.

The document setting out the new proposals states merely that: *"The Government will take stock of the responses to [these proposals]... before bringing forward secondary legislation."*¹¹

There is no explicit invitation to comment; no specific questions are asked; no list of consultees is included; no address to which responses should be sent is given and no deadline for responding is mentioned. Not surprisingly, people wrongly assume that some separate consultation is about to be issued.

We have now encouraged the organisations we deal with to submit comments on the proposals to the department. But a proper consultation exercise remains essential.

The Cabinet Office states that: *"Government departments should carry out a full public consultation whenever options are being considered for a new policy or if new regulation is planned"*.¹² The Cabinet Office code of practice on consultation

¹¹ Government Response to the Constitutional Affairs Select Committee Report, Cm 6937, para 51

¹² <http://www.cabinetoffice.gov.uk/regulation/consultation/>

says there should be *“a minimum of 12 weeks for written consultation”*.¹³ The Cabinet Office also requires a Regulatory Impact Assessment to be completed *“for all policy changes, whether European or domestic, which could affect the public or private sectors, charities, the voluntary sector or small businesses.”*¹⁴ The changes to the FOI regime will clearly have an extremely significant effect on those sectors, yet the required assessment has not been carried out.¹⁵

There is no reason why the issue should be dealt with in such haste. The government says it shares the Constitutional Affairs select committee's view that the Act has been *“a significant success”* and adds that it believes *that “a culture of greater openness and improved access to information is emerging”*.¹⁶ That makes it even harder to understand not only why these proposals are being brought forward at all, but why the government seems to be acting on them in such speed. The implication will be that the government does not want to consult because it does not want to be deflected from the course of action which it is determined to pursue.

In your own evidence to the Constitutional Affairs select committee on April 18 2006 you stated that if the government proposed to make changes to the fees regulations *“we have to do a public consultation”*. You added: *“If we did a public consultation, it would be a standard public consultation that would be undertaken”*.¹⁷

That is an important commitment which would normally be regarded as binding. We urge you to ensure that it is honoured.

Yours sincerely

Maurice Frankel
Director

¹³ <http://www.cabinetoffice.gov.uk/REGULATION/consultation/code/criteria.asp>

¹⁴ http://www.cabinetoffice.gov.uk/regulation/ria/overview/who_needs_ria.asp

¹⁵ The Frontier Economics report does not satisfy this requirement as it looks only at the cost savings that would result from the proposed changes, not at the implications for users.

¹⁶ Government Response to the Constitutional Affairs Select Committee Report Cm 6937, para 4.

¹⁷ Oral Evidence to Constitutional Affairs select committee, 18.4.06, questions 210-211. <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmconst/991/6041804.htm>