

# The Campaign for Freedom of Information

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Kevin Fraser  
Department for Constitutional Affairs  
30 Millbank  
London SW1P 4XB

27 October 2006



Dear Kevin,

## **Request for internal review**

This is a request for internal review of the DCA's decision of 14 September 2006 to refuse my request of August 17.

I requested information about the exercise carried out by government departments to assess the costs of dealing with FOI requests. I asked for:

- (a) the individual returns submitted by departments/central govt bodies following the exercise this March in which they monitored the costs of responding to FOI requests
- (b) any summary of this data produced by DCA
- (c) any analysis of the above data, whether by departments or the DCA.

The request was refused on the grounds that the information falls within the section 35(1)(a) exemption for information relating to the formulation of government policy and that the balance of public interest favours confidentiality.

The larger part of this request relates purely to factual information, the results of an exercise to monitor the time spent responding to FOI requests during a given period. I assume this merely records the time taken (and perhaps the grade of staff involved and salary costs) on various tasks connected with each request, eg the time needed to establish whether the information is held, to locate and retrieve it, to read it, consult about it, consider whether the information should be disclosed and to reply to the requester.

As you know, in considering the public interest test in relation to the policy formulation the department is required by section 35(4) to have regard to:

"the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking"

This provision envisages that factual background information about issues under discussion will normally be available even *before* those decisions are taken.

The main part of the information I have requested (and perhaps all of it) is purely factual and does not reveal options being considered, officials' views on them or recommendations to ministers.

Yet in explaining its refusal the department refers to the considerations that might apply to the disclosure of *internal discussion*. It simply asserts that these factors apply equally to the background factual information. There is no indication that it has *separately* considered the release of the factual information, even though it takes the form of a separate, self-contained survey.

Thus the letter states:

"In order for government to succeed in upholding the public interest in high quality policy making, officials need to be able to gather and share all available information, consider the important issues at stake and policy options in respect of those issues, and debate them vigorously in order to expose their merits or demerits and to understand their possible implications."

"If the perception existed that information and analyses concerning sensitive issues were liable to be released at too early a stage of the policy process, the free and frank exchange of information between officials and government departments and the candid discussions between officials and ministers that are so vital to high quality policy formulation would be inhibited, to the detriment of both present and future policy formulation." (all underlining, here and below, is mine).

It cannot be legitimate to suggest that the sensitivity which may attach to the vigorous debate of policy options also applies to the gathering and sharing of raw factual data – particularly where, as in this case, it involves an objective factual survey.

The requested information includes such simple figures as the number of FOI requests received by each department during the week in question, the number of these made by journalists or by others and the length of time they took to process. To suggest, as the department has, that releasing this information would have been (or might still be) detrimental to "both present and future policy formulation" is absurd. It is inconceivable that no part of this factual information could have been disclosed without "significant detriment to the policy formulation process".

Disclosing the survey results would not have revealed the options under consideration. The existence and nature of this survey had been publicly acknowledged by ministers before my request. For example, in a Parliamentary Answer on 8/2/06 (col 1195W) the Transport Minister Karen Buck said:

"Department for Transport along with other central Departments is currently participating in a monitoring exercise to record the costs of responding to all FOI requests received during the week commencing 30 January 2006. This survey will be completed on 20 March and is intended to reveal actual costs of handling FOI cases, and particularly the activities where most cost is incurred."

The DCA's written evidence to the Constitutional Affairs committee earlier this year stated:

"The Government is...conducting an exercise to assess the time taken by officials to process requests, including activities that do not currently fall within the £600 appropriate limit, such as time spent reading the relevant information. This information will provide a firm evidence base to inform any potential review and any changes to the charging regime."

Given what had already been disclosed, I do not see how revealing what factors were being monitored could have indicated anything significant about the policy options being discussed. It was a matter of record that these included taking account of officials' time. The specific time elements which might be monitored would be self-evident to anyone thinking about such an exercise.

In paragraph (c) of my request I also asked for "any analysis" of the factual information. This may or may not raise a separate issue. To the extent that the analysis merely involves a clarification of or elaboration on the factual data it would itself be essentially factual. But if the analysis discussed how the volume of requests would be affected by the various policy options being considered, the department's arguments would be relevant to *that portion* of the analysis. However, no such distinction appears to have been made.

The department's response appears to completely disregard its own guidance to Whitehall on this exemption.<sup>1</sup> The DCA guidance stresses the importance of disclosing factual information:

"Section 35 is concerned to ensure that the formulation and development of government policy and government decision making can proceed in the self-contained space needed to ensure that it is done well, while enabling proper public participation in policy debates, not least by making available relevant statistical and factual information." (para 3.3)

The guidance explains that factual information does not need to be withheld until after a decision has been taken:

"the provision on factual information refers to information 'which is intended to be used' in providing an informed background to decision making. There is no provision that a specific decision must have been taken." (para 3.7)

This is of course clear from the section 35(4) itself.

The guidance also states:

"Assessing the public interest in withholding information, which could be classified as factual background information, requires particularly clear evidence that disclosure would be contrary to the public interest." (para 3.8)

No such evidence is mentioned in the letter.

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<sup>1</sup> DCA, FOI Full Exemptions Guidance. Section 35: Formulation of Government Policy, Chapter 3. <http://www.foi.gov.uk/guidance/exguide/sec35/chap03.htm>

The guidance continues:

“If it was not in the public interest to release such information it is likely to be for one of two reasons:

because the information is exempt under one of the other sections of the Act, as well as under section 35 (1)(a); or

because the factual information is so intimately integrated in the advice that it forms part of the argument, rather than informed background to the decision-making. This may particularly be the case in relation to information created before the passage of the Freedom of Information Act, when the distinction was less relevant. In the future, advice to Ministers should be constructed so that it is possible to identify clearly relevant background factual information.”

There is no indication that either of these conditions is relevant here.

Finally, the guidance states:

“The disclosure of factual background information will assist in discharging the public interest in disclosure outlined above - it will allow more informed debate, give a wider number of people the opportunity to contribute to that debate and increase trust in the quality of the decision making.” (para 3.5)

From my point of view, the effect on trust has been significant and negative. It suggests that where the Act's requirements are inconvenient they are set aside, even by DCA itself.

Since my request, the government has of course published its proposals for changing the fees regulations. It has also released the report on the Act's costs produced by consultants Frontier Economics, partly based on the withheld information.

The public interest in seeing the factual basis on which this assessment was based is obvious, not least because of the major impact the proposals will have on the operation of the FOI Act.

A major stated aim of the new proposals is to cut the number of FOI requests made by journalists. The Frontier Economics report estimates of the cost of responding to various media organisations' requests, including those of the Guardian newspaper. It calculates that the Guardian makes 500 to 700 requests to central government annually at a cost of between £250,000 and £350,000 (Table 5, page 30).

This estimate appears to bear little relationship to the actual position. Rob Evans of the Guardian, who submits the great majority of requests made on behalf of that paper, informs me that from January 1 2006 to October 30 2006 he will have submitted a total of 222 requests. Extrapolating to the end of the year would give a total of 266 requests. This is about half the lower limit (500) assumed in the Frontier Economics report and just over a third of their upper limit (700). Even if

there are some additional requests from other Guardian journalists, the Frontier Economics figure appears to be a substantial exaggeration.

This suggests the potential for significant errors in the report's cost estimates, which underpin the government's proposals to restrict use of the Act.

Since the request is for the raw data behind these proposals, the public interest in disclosure was and remains very considerable. The release of this data might have allowed some potentially inaccurate assumptions about the volume and cost of requests to have been corrected before being fed into the policy-making process.

The data may also throw light on the nature of the more time consuming requests which are likely to be refused on cost grounds in future. The Frontier Economics report barely mentions this issue, though it is critical to understanding the impact of the government's proposals. In our view this data should have been in the public domain when the proposals were announced.

Although I hope the survey will now be released, significant opportunities to make effective use of the information have now been lost.

Finally, some if not all the requested information constitutes "statistical information" since it involves the numerical results of an exercise to monitor the volumes of requests received and the time spent on them. Section 35(2) of the Act provides that:

"Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded...for the purposes of subsection (1)(a), as relating to the formulation or development of government policy"

As the government has now announced its decision, any statistical information covered by the request cannot be withheld under that exemption.

Yours sincerely

Maurice Frankel  
Director