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Constitutional Affairs Select Committee

Submission by the Campaign for Freedom of Information

This submission by the Campaign for Freedom of Information deals briefly with the work of the Information Commissioner's office.

The backlog

There is a significant backlog of unresolved complaints in the Commissioner's office which amounted to some 1300 cases at the end of 2005. The existence of a backlog is not in itself unique: significant backlogs have occurred in other jurisdictions at various times as well as under the UK's Open Government code.¹

In some respects, this problem is not surprising. In our oral evidence to this committee's previous inquiry, into the implementation of the Freedom of Information Act, we suggested that a serious backlog might be one consequence of the government's decision not to phase in the Act, but to bring it into force for 100,000 authorities on one day. It seemed possible that this might result in a large volume of complaints, from across the whole public sector, arriving at the Commissioner's office at around the same time.

¹ When the Code was introduced in 1994, the Parliamentary Ombudsman who supervised it set a target of 13 weeks for completing investigations. The average time taken during for cases completed during 1994 in fact was 15 weeks. By 1996, the average time to complete an investigation had risen to 52 weeks.

However, the existence of a large backlog at such an early stage in the life of the Freedom of Information Act creates a particular problem, since there are so far relatively few decision notices dealing with substantive issues of interpretation under the Act.

The first decision notices, starting in June 2005 dealt mainly with procedural matters, such as complaints about delays, failure to respond to requests, fees or disputes about whether information was held at all. Few involved substantive issues about the use of exemptions or the Act's public interest test. Although decisions involving exemptions have begun to appear, they still represent a small proportion of the total. The situation as of March 3 2006 was that:

- Of the 155 decision notices issued by the Commissioner's office only 23% (36) dealt with exemptions while 77% (119) involved procedural issues.
- During the same period, the Scottish Information Commissioner issued 120 decision notices of which 54% (65) dealt with exemptions and 46% (55) involved procedural matters.

It is not clear why there should have been such a significant difference between the two Commissioners, particularly as the Scottish Commissioner's office has a smaller staff and has had less time to prepare for the legislation.² The result is that the interpretation of the Act, as elucidated by the Commissioner's decisions, is notably less advanced than might have been expected after 14 months.

One of the key issues under the Act is whether disclosure is likely to affect the formulation of government policy or the frank discussion of policy issues. This issue was first addressed in a decision of the Scottish Information Commissioner in July 2005.³ The first equivalent decision involving a UK government department

² The post of Scottish Information Commissioner was created under Freedom of Information (Scotland) Act 2002. The Scottish Commissioner had less than 2 years from the date of his appointment to full implementation of the Scottish FOI Act. The office of the UK Information Commissioner (at that time headed by Elizabeth France) was already in existence when the UK Act was passed in November 2000.

³ Decision 015-2005, Mr John Hodgson (Chairman of the Skye Windfarm Action Group Ltd) and the Scottish Executive, 21.7.05

was only issued in January 2006.⁴ In itself, this is an important and robust decision, but it seems to have been the first decision notice to deal with the use of an exemption by a government department.

The relatively slow progress that has been made in addressing the Act's exemptions does not merely affect the complainants and authorities awaiting decisions. It has implications for the speed with which authorities move towards greater openness generally. If the Commissioner's decisions are delayed, poor practice may continue unchecked or become even more entrenched. Conversely even a single decision by the Commissioner to require disclosure may, depending on the case, unlock a substantial volume of information across a whole sector.

We assume that most authorities will voluntarily adapt their approach if they realise that it is not consistent with the Commissioner's decisions. Some FOI practitioners have told us that they would prefer to release more information in certain situations but cannot persuade their authorities to do so without 'case law' demonstrating that the Commissioner requires it. Once such decisions are in place requesters will also be better placed to recognise and successfully challenge unreasonable refusals or to accept that information has been legitimately withheld. This may tend to reduce the number of unnecessary appeals that are made.

Quality of decision notices

Some the Commissioner's early decision notices provided little information about the circumstances of the complaint or the reasons for the Commissioner's decision. In some cases the Act's requirements were described in an oversimplified manner. These would have been of limited use to anyone trying to understand what ought to be done in similar circumstances. So even where decisions had been published, their value to others was more limited than they should have been.⁵ This may

⁴ Decision Notice 74589, Department for Education and Skills, 4.1.06

⁵ For example, one decision notice dealt with a complaint that the Crown Prosecution Service had failed to respond to a request. The decision notice stated that the "the Crown Prosecution Service have stated that they did not comply with the complainant's request for information as they did not consider this request to be valid for the purposes of section 1 of the Act. The Commissioner considers that this request was valid" (Decision notice 71320, 13.9.05). The decision notice does not explain why the CPS considered the request to be invalid, nor why the Commissioner reached the opposite decision. No-one else facing the equivalent situation – and the problem involved is not unusual – would have been able to point to this notice in support of their case.

indicate problems relating to staff training and supervision. More recent notices are generally of a better standard and many contain a much fuller account of the Commissioner's reasoning.

One area where decision notices still fail to provide the necessary clarity is the extent to which requests for information involve "environmental information". Such information is exempt under the Freedom of Information Act and must be dealt with under the Environmental Information Regulations instead. The distinction between the two is sometimes important, as there are significant differences between the regimes.

- The Commissioner has issued a series of notices involving requests for information about planning. Most state that the information in question "is environmental information" and deal with the matter under the EIRs.⁶ Others make no reference to the EIRs and deal with the matter under the FOI Act.⁷ The basis for these distinctions is not explained in the notices.
- A decision notice dealing with a request for a copy of an "environmentalist's report" about rights of way has been dealt with under the FOI Act not the EIRs.⁸
- Four decision notices relating to information about waste disposal have been issued under the FOI Act.⁹

We understand that the Commissioner has been content to deal with requests for environmental information under either regime, so long as the outcome of the case is not affected. We see no reason to object to that policy, so long as it is explained in the decision notices concerned – but this has not been done. The result may be to encourage authorities to disregard the boundaries between the two regimes. In

⁶ Requests for planning information which have been dealt with under the EIRs include those described in Decision Notes 61168, 62329, 67003, 77187 and 74855.

⁷ Requests for planning information which have been dealt with under the FOI Act include those in Decision Notices 79178, 76778

⁸ Decision Notice 74966, East Riding of Yorkshire Council

⁹ Decision Notices 74785, 71182, 84406 and 79280.

certain cases this may lead to the withholding of information which should be released.

Tribunal decisions

Some of the Information Tribunal's decisions have highlighted shortcomings in the Commissioner's investigations:

- In the *Barber* case¹⁰, a request was made for information about the way the Inland Revenue had dealt with various examples of what the applicant called 'maladministration' and 'failed standards' in refunding overpaid tax. The Revenue denied that there had been such failings and maintained that it therefore held no information corresponding to the terms of the request. The Commissioner's decision notice described the applicant's request as "subjective" and "opinionated" and agreed that the Revenue was entitled to state that it held no such information. This decision was criticised by the Tribunal, which noted that the Inland Revenue had publicly apologised for the shortcomings identified in the request and observed that "Any reasonable Public Authority, knowing the historical context of the request...would have understood the basis of [the] request". It also expressed surprise that the Commissioner's investigation had been carried out purely on the basis of the initial papers supplied by both parties, without either side having been contacted during the course of the investigation.
- In the *Bowbrick* case¹¹ (which is still before the Tribunal), the Commissioner's office accepted the local authority's assertion that, with minor exceptions, it did not hold the requested information. The Tribunal proceedings have established that a substantial volume of information relating to the request is in fact held by the authority.

¹⁰ Mr E A Barber v the Information Commissioner, Information Tribunal Decision No EA/2005/0004

¹¹ Decision Notice 63475, Nottingham City Council, 5.7.2005

- In the *Bustin* case¹² the Commissioner's office accepted that an “approved drawing” under the Highways Act (which was subsequently disclosed) was not held at the time of the request, inasmuch as formal approval for the drawing had not then been given. The Tribunal found that “the Commissioner's finding, that the approved plan was not held by the Council on the date of the information request, is open to question. It appears more likely that the Council held the approved plan at the time of the request and did not deal with the request in a satisfactory manner.”

These cases suggest that the Commissioner's office may sometimes have been too ready to accept an authority's explanation of the facts of a case, a worrying prospect. More searching enquiries will clearly be needed in such circumstances. This may also complicate efforts to speed up the handling of apparently straightforward cases in order to reduce the backlog.

Approaching the backlog

In dealing with the backlog, several alternative strategies may be possible. One is to work through the cases in the order in which they were received, regardless of the significance of the cases. A second is to prioritise those cases that can be dealt with most quickly, so as to clear as many cases in as short a time as possible. A third approach, which we hope will be adopted, is to prioritise those cases which raise issues of greatest public interest or address the most significant obstacles to the progress of the legislation.

Finally we note that in January this year the Commissioner's web site was advertising for new staff “to join our Freedom of Information and Data Protection teams, investigating breaches of the law and resolving complaints”. The starting salary for these posts was £15,612 which is a low salary given the complexity of the work involved. Even apparently basic tasks, such as establishing the facts of a disputed case, are complex matters requiring considerable experience and judgement. There may be a question as to whether the Commissioner's office is recruiting staff at levels of pay which are too low to attract the more experienced

¹² Mr R Bustin v the Information Commissioner, Information Tribunal Decision No EA/2005/009

staff needed to tackle the backlog effectively and to avoid whatever problems may have contributed to it.

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8 March 2006