

The Campaign for Freedom of Information

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Briefing

EDM 2699 Freedom of Information

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That this House welcomes the finding of the Constitutional Affairs Committee (HC 991) that the Freedom of Information Act has “already brought about the release of significant new information and...this information is being used in a constructive and positive way” and the committee's conclusion that it sees “no need to change” the Act's charging arrangements; views with concern reports that the Government is considering changing these arrangements to permit an application fee to be charged for all requests or to allow authorities to refuse, on cost grounds, a significant proportion of requests which they currently must answer; and considers that such changes could undermine the Act's benefits of increased openness, accountability and trust in the work of public authorities.

Background

The Government is believed to be considering a number of possible changes to the charging arrangements under the Freedom of Information Act. These would either deter a significant number of requests from being made in the first place or permit authorities to refuse a significant proportion of requests which are currently answered under the Act.

At present, FOI requests are normally answered free of charge apart from photocopying and postage costs. However, government departments can refuse to respond to a request if the cost of doing so would exceed £600. Other authorities can refuse if the cost exceeds £450. In deciding whether these limits have been reached, authorities can take account of the cost of establishing whether they hold the requested information and of locating, retrieving and extracting it. Staff time is costed at a flat rate of £25 per hour. These provisions are laid down in fees regulations under the Act.

The proposals

We understand that the Government is considering a combination of some, or all, of the following options:¹

(a) Introducing application fees for all FOI requests

This would presumably involve an application fee that would have to be paid for each request. Unfortunately, these would be likely to deter many requesters, particularly those on low incomes. The effect could be severe. In 2003, the Irish Government introduced a £10 application fee under its FOI Act. The immediate response was a 75% fall in the number of requests for non-personal information, compared to previous year.² Journalists' requests fell by 83% in the first quarter following the change.³ Ireland's Information Commissioner described this "immediate" and "dramatic" fall in use as "far beyond what I believe could have been envisaged by the...Government".

An additional complication is that under the UK legislation, *any* written request for recorded information is dealt with as an FOI request whether or not the applicant mentions the Act. Application fees could lead some authorities to charge for responding to requests made in ordinary correspondence of the "when did you last empty my bin" type.

Finally, the cost of raising an invoice for an FOI request is likely to exceed the actual fee recovered adding to rather than reducing officials' workload.

(b) Allowing 'consideration time' to be taken into account

In deciding whether the £600/£450 cost limit would be reached, authorities can include various costs, such as the cost of searching for the information, but not the cost of *deciding whether to release the information*. The Government is considering allowing this 'consideration time' to be taken into account in future. This would mean that the cost limit would be reached more quickly and more requests would be turned down on cost grounds.

It also means that requesters could be penalised for authorities' inefficient decision making. The longer the authority needed to consider the issue, the greater the chance of the request being refused.

Politically sensitive requests could become more likely to be refused merely on cost grounds. Ministers often insist on taking these FOI decisions themselves, so their time, plus the time of those briefing them, might be taken into account in future. This could mean even less chance of obtaining information on controversial subjects.

¹ Details of these were first revealed by the Sunday Times (30.7.06) which obtained a copy of a memorandum to the Cabinet's Domestic Affairs Committee, by Lord Falconer, the Constitutional Affairs Secretary. http://www.timesonline.co.uk/newspaper/0,,176-2291779_1,00.html

² Information Commissioner (Ireland), Annual Report 2004, page 5. The application fees does not apply to requests for personal information, the level of which has been largely unaffected.

³ Information Commissioner (Ireland), Review of the Operation of the Freedom of Information (Amendment) Act 2003, June 2004.

The task of the Information Commissioner, who enforces the Act, in overseeing this element of requests would also become more complex. The Commissioner has said that “the existing regime has the benefit, as I see it, of being simple, clear and certain and not acting as a deterrent to members of the public”.⁴

Note that the cost limits are absolute and not subject to any kind of public interest test. Once the cost limit has been reached an authority cannot be required to respond to the request, however pressing the case for disclosure.

(c) Allowing unrelated requests to be aggregated

At present, if an applicant breaks a large request down into several smaller requests, authorities are entitled to aggregate the costs and refuse if the *total* exceeds the cost limit.

The government is considering allowing *unrelated* requests to the same authority to be aggregated too. This would mean that if someone applies to an authority for information on a variety of different subjects, the requests could all be refused if their total cost exceeded the £600 or £450 limit.

This could severely ration the use of FOI by journalists, campaigners, MPs and others who use the Act to pursue different issues simultaneously.

The case for change

Vexatious requests

Ministers have suggested that changes are needed to deal with ‘frivolous’ or ‘vexatious’ requests. In fact, the Act already permits vexatious requests to be refused. The Information Commissioner has adopted a relatively broad definition of the term: his guidance indicates that requests can be regarded as vexatious if, for example, they (a) impose a significant burden on an authority and (b) clearly have no serious purpose or are obsessive or manifestly unreasonable.⁵

The Constitutional Affairs Committee’s report ‘Freedom of Information – One Year On’ (HC 991) published in June 2006 found that the Act:

“has already brought about the release of significant new information and that this information is being used in a constructive and positive way by a range of different individuals and organisations. We have seen many examples of the benefits resulting from this legislation. We are impressed by the efforts made by public authorities to meet the demands of the Act. This is a significant success.” (page 3)

It recommended that:

“problems with ‘frivolous’ requests should be dealt with through the existing provisions in the Act. We do not consider that this is an appropriate reason for reviewing the fees regulations” (para 100)

⁴ Evidence to the Constitutional Affairs Committee, 14.3.2006, Q.99

⁵ Information Commissioner, Awareness Guidance 22, Vexatious and Repeated Requests

It added: "We see no need to change the fees regulations." (para 104)

Complex requests

The leaked report of Lord Falconer's memorandum suggests that the changes are *not* in fact aimed at vexatious requests but at permitting "*the most difficult requests (generally received from determined and experienced requesters) to be refused on cost grounds*".

The Sunday Times report suggests that options (b) and (c) above (consideration time and aggregation) would together allow *17 percent* of the requests to government departments to be refused on cost grounds. This does not include the effect of application fees, which might be introduced as an additional measure.

The government received 38,000 requests in the Act's first year. *This implies that 6,460 of these requests could be refused on cost grounds under the proposals.*

If the object of the exercise is to achieve a 17% cut in requests, concentrating on the more complex applications, it is bound to have a substantial effect on the scrutiny of public authorities. The benefits of FOI will be undermined: it will become more difficult to hold government to account and there is likely to be less public understanding of and confidence in the work of government.

The evidence

During March this year, government departments carried out a survey of the FOI requests they received and the time required to deal with them. The results underpin the changes being considered.

The Campaign for Freedom of Information made an FOI request for the results of this survey and any assessment of them. The request has been refused.⁶ This means that precise information on the implications of the above options is not currently available.

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⁶ The government has argued that information is covered by the Act's exemption for the formulation of government policy and that the balance of public interest favours its withholding as disclosure would cause "significant detriment" to policy formulation. In fact s 35(4) of the FOI Act explicitly envisages that factual information about forthcoming decisions often will be released. It states that in considering the public interest in the disclosure of information relating to policy formulation, departments are required 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."