

Baroness Ashton  
Selborne House  
54 Victoria Street  
London  
SW1E 6QW  
United Kingdom

**BY POST & EMAIL**

(Email: c/o \_\_\_\_\_)

9 November 2006

Dear Baroness Ashton  
**FOI – Amendments to Fees Regulations**

**FRIENDS OF THE EARTH  
RIGHTS & JUSTICE CENTRE**

Solicitor: Phil Michaels  
Direct Line:  
Direct Fax:  
Email: \_\_\_\_\_

We are writing in connection with potential changes to the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations') as foreshadowed at paras 49-51 of the Government's response to the report of the Constitutional Affairs Select Committee *Freedom of Information – One Year On*.

We are writing now because it has very recently come to our attention the Government is considering proceeding with amendments to the Fees Regulations without carrying out a proper public consultation. It is our view that the Government is not entitled to proceed with such changes without proper public consultation (including impact assessment) in accordance with the Government's Code of Practice and associated guidance (including RIA guidance) and as you indicated would happen in your evidence to the Select Committee (below).

Annexed to this letter are some initial comments in response to the 'invitation' at para. 51. For the reasons set out in this letter those comments are preliminary only and are made in the expectation that the Government will shortly proceed to issue a full and fair public consultation on the proposals to which Friends of the Earth and others might respond.

**I. Your evidence to the DCA Select Committee**

In oral evidence to the DCA Select Committee (Q209-213) on 18 April you stated that (1) DCA was at the stage of exploring the issues but that it had not '*made any decisions or discussed this in any great detail*'; (2) that DCA was "*nowhere near*" holding a public consultation; that (3) if you made significant changes to the fees regime you would have to hold a public consultation; (4) that such consultation would involve consulting first the User Group and second the broader public who are interested and involved in the issues; and (5) that such consultation would be a 'standard consultation'. Your evidence in this respect built upon previous Government statements including those of the Undersecretary of State Mr Leslie to the Standing Committee on Delegated Legislation on 10 February 2005 that the anticipated review of the Fees Regulations would involve '*public discussion and disclosure of many of our findings*'.

Even on the figures provided by Frontier Economics (which are open to debate) the changes that you are now proposing would have the effect of permitting public authorities to refuse

Community  
Legal Service



Friends of the Earth  
England, Wales and Northern Ireland  
National Office 26-28 Underwood Street London N1 7JQ  
Telephone 020 7490 1555 Fax 020 7566 1715 Email info@foe.co.uk Website www.foe.co.uk  
Friends of the Earth Limited Registered in London No 1012357

between 12,000 and 20,000<sup>1</sup> requests without having to give any consideration to either (1) the application of particular exemptions; or (2) the public interest. On any standard such changes are highly significant and amount to something quite different from the regime currently in place.

On the basis of your evidence to the Committee it would be unfair to proceed now with the changes intended without carrying out a full public consultation. Further and specifically, members of the public, and particularly those with an interest in this area and who would be disproportionately affected by the proposed changes, have a legitimate expectation that you will consult fully and fairly on the issue.

Even without your evidence to the Committee this is a case in which we consider that public consultation is plainly required in accordance with case law and with the Government's own Code of Practice (and associated Guidance). The effect of the changes proposed will be to permit public authorities to refuse even to process very significant numbers of requests for information and will therefore significantly weaken the right to know provided for in s.1 of FOIA 2000. Furthermore, the changes proposed will disproportionately impact on particular groups including both campaigning organisations and the press.

## **II. The para. 51 'invitation'**

Having spoken earlier in the week with the DCA we understand that the Government is of the view that a consultation of sorts is already under way and that the statement at para. 51 of the Government's Response that "*the government will take stock of the responses to this position before bringing forward secondary legislation*" is intended to be a written invitation to the public to comment on the proposals sketched in the preceding two paragraphs.

In our view, that is an entirely unsatisfactory and unlawful approach to public consultation. Furthermore, it is entirely at odds with the Government's Code of Practice on Consultation and associated guidance. If the Government does intend to depart from its own policy on consultations (in an exceptional case) then clear and cogent reasons are required to be stated. No such reasons have been provided nor, in our view, would they apply in this instance.

The law, and the Government's own Code of Practice, requires that a properly conducted public consultation will be one in which there is clarity as to: (1) the objectives to be achieved; (2) the nature of any proposals to achieve the objectives and the reasons for those proposals; (3) the timescale within which responses are sought; (4) the issues/questions in respect of which the views of the public (or a sector of the public) are sought; and (5) sufficient information to allow a proper and informed response.

The Government's written 'invitation to respond' has none of those features.

1. The Government has not set out the objectives of the proposed changes or the reasons for seeking change. Reducing the costs of FOI delivery for the public sector is plainly one such objective. However, no information is provided as to why the Government considers that the costs are too great or as to the basis on which the Government has reached that conclusion. No information is provided as to the extent by which the Government considers that the cost of FOI is excessive. We consider that the first question that requires to be asked in any public consultation is whether, and if so why,

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<sup>1</sup> Approximately 12,000 requests would be capable of refusal under the proposal to allow aggregation. Approximately 8,000 requests would be capable of refusal under the proposal to include reading, consideration and consultation time. Without further analysis it is not clear the extent to which there may be overlap between those two figures.

changes are needed to the Fees Regulations.

2. The nature of the proposed changes is entirely unclear. The proposed changes are set out in 'headline terms' in a single paragraph. There is insufficient detail for considered responses to be provided. As the authors of the Frontier Economics report acknowledge, any such changes would give rise to complex issues of practical implementation. Those are precisely the sorts of issues that should be set out and made the subject of full public consultation.
3. No indication is provided as to the timescale within which responses should be provided to the proposals in para. 50, or indeed as to how members of the public should respond. Having spoken with the DCA we understand that the Government intends to bring forward secondary legislation imminently. That is entirely unsatisfactory and inconsistent with the Code.
4. No indication is given of the sectors which are most likely to be affected by the proposed changes and, so far as we are aware, no particular attempt has been made to seek their responses to the proposed changes. It is plain from reading the detail of the Frontier Economics report that certain groups will be affected more significantly than others (including campaign and media groups).
5. No indication is given as to the questions in respect of which public views are sought. As is clear from the Frontier Economics report it is plain that the proposed changes require a number of complex questions to be addressed including questions of practical implementation. The Government's indication that it will "take stock of responses" provides no indication of areas in which response are sought.
6. Much underlying data which is necessary fully to respond has not been provide.

Furthermore, it is essential that consultation be carried out at a stage when proposals are at a formative stage and that the product of such consultation be taken conscientiously into consideration before proceeding with any decision. In this instance it would appear that the proposals are not at a formative stage. Rather the Government has stated that it is minded to proceed with two specific options (by way of secondary legislation). As set out below, there are a number of important precedent questions that the Government needs to consider (and seek views on) before it proceeds with specific proposals.

It is clear that the Frontier Economics Report forms a significant part of the basis for the Government's proposals. However, the terms of that report give rise to serious concerns. They also support our contention that the Government must not bring forward the proposed changes without proper public consultation (we also refer to the matters set out in the annex to this letter).

1. The terms of reference are set out on p.13 of the report. It appears that, by the date that the review was commissioned, the Government had already concluded that change to the fee regime was needed and had already identified four options for Frontier Economics to consider (of which the Government now proposes to take two forward).
2. None of the objectives of the review as summarised in the terms of reference include consideration of whether the cost of FOI implementation (in particular responding to requests) is, in fact, excessive, and of whether any change was required.

3. The Frontier Economics report was written on the basis of written and oral evidence from public authorities (principally Government) stakeholders. The views of those who would be most affected by the changes (including members of the public generally, campaign groups and journalists) have not been sought by the Report's authors. (We note, in passing, that the Select Committee call for evidence did not explicitly seek evidence on this issue).
4. Perhaps unsurprisingly, the Frontier Economics Report contains no consideration of the effect of the proposed changes on the issues which are at the heart of any consideration of changes to the FOI regime (i.e., transparency, accountability and good governance).

A crucial component of a fair and lawful public consultation is that the underlying evidence is made available to public scrutiny. In this case we understand that the Campaign for Freedom of Information has requested from DCA, and been refused, the information relating to the one week sample which underpins the Frontier Economics report. We would join with CFOI in calling upon the DCA to release that evidence as a matter of urgency. It is also plain that other significant information, of a type that should normally be found in a Central Government consultation document, is also missing and should be urgently released. With that in mind we set out below a number of requests for information.

### **III. Request for action**

As should be clear the purpose of this letter is to request that the DCA take steps to ensure that any proposals for change to the Fees Regulations are properly consulted on in accordance with law and the Government's own Code of Practice. Such a consultation must be carried out with an open mind as to the need for change and at a formative stage. Views must therefore be sought not only on the details of any proposals but also on the underlying issues and policy. To that extent a consultation on the detail of draft secondary legislation will not be sufficient.

If, notwithstanding this letter, the Government intends to proceed with the changes proposed without carrying out a proper public consultation then you should explain to us in the clearest terms why you are not carrying out such a consultation.

### **IV. Requests for Information and clarification**

We should be grateful for clarification as follows:

Please clarify, and provide full details of, each of the process(es) by which the DCA:

1. concluded that the costs of responding to FOI requests was too high.
2. identified four particular options for amending the fee regime.
3. determined that it was not necessary to carry out a full public consultation in accordance with the Cabinet Office Code of Practice.

Please would you provide the following information by return:

1. The quantitative information relied upon by Frontier Economics as referred to at paragraph 1.2 (p.14) of the Frontier Economics Report (to the extent that they are not already publicly available and readily accessible). To the extent that they are available and accessible please indicate where they can be found.
2. Full (anonymised if necessary) records of the 30 interviews carried out with the FOI practitioners referred to within the same paragraph of the Frontier Economics Report.
3. A copy of the terms of reference provided to Frontier Economics.

4. A copy of any draft report produced by Frontier Economics and any correspondence between the DCA and Frontier Economics with respect to such draft(s).
5. Full details of any consideration given to the question whether or not to carry out a public consultation in respect of the proposed changes to the Fees Regulations, including copies of all relevant internal communications.
6. Internal DCA documents (since 1 January 2006) (including internal reports and memoranda) in respect of the DCA's consideration of potential changes to the Fees Regulations.

In relation to the above requests, and so far as necessary, we rely on the provisions of s.3(2)(b) of the 2000 Act in respect of information held by Frontier Economics on behalf of the DCA.

We look forward to your early reply.

Yours sincerely

Phil Michaels

**Cc:** Laurence Fiddler  
Consultation Co-ordinator  
(Email: \_\_\_\_\_)

## **Friends of the Earth**

### **Initial response to the proposal at paragraph 50 of the Government's Response to the report of the Constitutional Affairs Select Committee *Freedom of Information – One Year on* ('the Paragraph 50 proposals') and the accompanying report by Frontier Economics ('the FE Report')**

#### **Introduction**

1. For the reasons set out in the letter to Baroness Ashton (8 November 2006) it is not possible for Friends of the Earth to respond as it would wish.
2. Friends of the Earth looks forward to responding in due course to a full and proper public consultation on the important issues foreshadowed in the paragraph 50 proposals.
3. The comments below reflect our understanding of the para. 50 proposals in light of the FE Report.

#### **Friends of the Earth**

4. For many years Friends of the Earth has campaigned on issues concerned with access to information.
5. Friends of the Earth's Rights & Justice Centre represents members of the public who wish to make use of their rights under FOIA (and EIR) and provides them with advice and information and represents them where appropriate in relation to complaints to the Information Commissioner and appeals to the Information Tribunal.
6. Friends of the Earth also makes considerable use of the right to know enshrined in FOIA 2000 (and EIR 2004).
7. Friends of the Earth provided oral evidence to the Constitutional Affairs Select Committee's inquiry *Freedom of Information – One year on*.

#### **Point of process**

8. We consider that
  - a. any significant changes to the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations') are premature.
  - b. no changes to the Fees Regulations (or to the Government's underlying policy in this area) should be made without full and proper public consultation (including a regulatory impact assessment).
9. In addition to the points below Friends of the Earth considers that there are a range of issues on which Friends of the Earth would wish to respond in the context of a proper public consultation. Those include (without limitation):
  - a. International comparitors;
  - b. Whether any change is needed at all;

- c. Ways of making public authorities more efficient;
- d. Whether, if savings are needed, there are alternative options for achieving those changes;
- e. Detailed critique of the Frontier Economics Report
- f. The effect of the proposed changes;

## **Substantive comments**

### ***General Comments***

10. Friends of the Earth is very concerned by the proposals (as we currently understand them) because we think that they will have a significant harmful effect on the ability of members of the public to access information in particular where such information is complex, voluminous or politically sensitive.
11. Friends of the Earth notes that no reasons have been provided by the Government as to why it considers that change to the Fees Regulations is desirable or necessary or why it has determined that the particular changes proposed are the most appropriate changes.
12. The FE report contains an economic analysis of the costs of one aspect of delivering FOI (responding to requests). Further information about the underlying data is required (and has been requested) in order to allow proper engagement with the detail of the report. However, even at this stage it is important to note clearly some serious limitations of the Frontier Economics Report:
  - a. The Frontier Economics Report does not seek to analyse the societal/governance cost (whether monetarised or not) of reducing access to information either generally or in respect of the type of information that is likely to be refused as a result of the proposed changes. That is of fundamental importance as it makes it extremely difficult for either Government or stakeholders to weigh the proposed benefits (or 'cost savings') against the potential costs of the proposed changes.
  - b. The authors of the Frontier Economics Report apparently carried out approximately 30 in-depth interviews with a range of FOI practitioners and stakeholders across central government and the wider public sector. However, the authors did not carry out any such interviews or other stakeholder involvement with users of the legislation including, in particular, those who would be particularly affected by the proposed changes – whether requesters generally or particular classes of requester (such as journalists and campaigning organisations).
  - c. The Frontier Economics Report does not consider the underlying principles behind the FOI regime and the extent to which they might be imperilled by the approaches recommended for consideration.
  - d. The Frontier Economics Report does not provide any real analysis of the nature of the requests that would be refused on cost (or aggregation) grounds. For the reasons set out below that is important.
  - e. The Frontier Economics Report does not include any consideration of whether

time savings can be made by public authorities in terms of the way in which they handle requests for information. By way of example only, Friends of the Earth considers that considerable savings could be made by reducing (by way of internal guidance and good practice) (a) the number of requests that are taken to Ministers; and (b) reducing the amount of internally duplicated time involved in reaching an 'official' view and then seeking a 'ministerial' view (often with input from separate ministerial support officials). Friends of the Earth also considers that there may be other areas in which cost savings can be made and that these require further exploration and consultation. Friends of the Earth suspects that (potentially considerable) savings could be made in respect of the amount of time spent 'considering responses' (and would question what is actually involved in that time). From our experience using FOIA we consider that there may also be other areas of potential cost savings including better use of the 'advice and assistance' provisions of s.16 FOIA in order better to understand a request for information. Our view is that considerable further investigations in this area should be undertaken before proceeding with the steps proposed.

***Inclusion of reading time, consideration time and consultation time in the calculation of the appropriate limit above which requests could be refused on costs grounds***

13. Since Right to Know came into force Friends of the Earth (and those we act for through our Rights & Justice Centre) have experienced the effect of the 'appropriate limit as currently drafted'. We are currently involved in two complaints to the Information Commissioner concerning the way in which the appropriate limit has been considered.
14. It is our experience that reliance by public authorities upon s.12(1) as a way to refuse to release information has been proportionate. It is our view, and on the basis of discussions with those in public authorities, that this is because the matters which may be taken into account in estimating the *appropriate limit* costs are tightly prescribed.
15. It is our view that the current proposals would result in a very significant increase in the reliance by public authorities on the appropriate limit and that the effect of the changes proposed would be greater than presented by Frontier Economics.
16. Section 12(1) and the Fees Regulations have the potential seriously to curtail the right of access to information provided for in FOIA 2000. If it is estimated (by the public authority) that the cost of dealing with the request will exceed the appropriate limit then the public authority does not need to comply with the request. The manner in which the appropriate limit falls to be calculated can therefore have a profound effect on the effectiveness of the Act and on the ability of members of the public to assert their Right to Know.
17. It is therefore essential that the matters which the public authority is entitled to take into account when estimating the cost are tightly prescribed.
18. Permitting public authorities to take into account the factors proposed is likely to result in many more requests being refused. The FE report estimates that 8%<sup>2</sup> of current requests will be refused (or refusible) under the proposals. Of itself that is a serious and significant curtailment on the right of access to information provided for in FOIA 2000. However, our view is that the figure is an underestimate and fails to

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<sup>2</sup> 6% for wider public sector

take into account the likely practical effect of the proposal. At present, public authorities are reluctant to apply s.12(1) because the matters on which they can rely are narrow. Were those matters to be expanded as envisaged then we consider it likely that public authorities would be much more willing to place early reliance upon s.12(1) and to do so in a way that stretched the language of the Fees Regulations.

19. We also consider that the proposal would be likely to lead to considerable confusion, lack of consistency across the public sector and increased recourse to internal reviews (and complaints).
20. It is also our view that the proposals would have a particularly damaging effect on a particular class (or classes) of request namely those that are complex, voluminous or on matters of political sensitivity. That is because such requests are likely either to involve greater consideration or political (Ministerial) consideration. However, the information sought in those types of requests will often be of particular public interest (and political significance).
21. We also consider that the policy objective behind the proposal is ill-conceived and that there are good reasons of principle why it is not appropriate for reading time, consideration time and consultation time to be included as factors to take into account in estimating the cost of dealing with a request.
  - a. Including reading time penalises those who are seeking access to a large document (or to a number of documents). A requester may want to have access to a document (or documents) of considerable public importance and public interest but which happens to be lengthy. There is no principled reason why such a document should be automatically capable of withholding simply because of its length.
  - b. Including consideration time would result in requesters being penalised for inefficiencies in the way in which requests are handled. Furthermore, the fact that a request requires detailed consideration of, for example, the public interest balancing exercise, cannot amount to a principled basis on which to permit withholding of information. Indeed, in many cases requests that require more consideration time (e.g., in respect of the public interest balancing exercise) that are likely to be of greatest political significance (and public interest).
  - c. Including consultation time is inappropriate. Members of the public should not be penalised for the time that is anticipated to be taken by a public authority in liaising with (a) other public authorities; or (b) third parties. Those are costs that should be borne internally by the public authority receiving a request for information.
22. We note what the Frontier Economics Report says about issues of practical implementation. Indeed, it is plain that the Government's proposal raises very serious practical (and principled) difficulties concerning how public authorities would (consistently and fairly) estimate the time involved in carrying out particular functions (reading, consideration, consultation). Those are issues which should certainly be made subject to full public consultation. However, and without further detail, we are not convinced that there is any practical way in which reading, consultation and consideration time can be taken into account in a manner which does not result in a considerable degree of arbitrariness and inconsistency.

23. As a result, we consider that there is a real likelihood that cost savings resulting from the proposed changes would be significantly offset by a significant increase in the number of internal reviews and complaints to the Commissioner arising. The Frontier Economics Report alerts the DCA to this risk but provides no quantification (or cost analysis) of any such increase.
24. The Frontier Economics Report sets out the proportion of requests by cost bracket concluding that eliminating the most time consuming 5% of cases would result in a 54% reduction in the cost of officials time. Apart from noting that the cost of those requests tend to be driven by volume of reading material and/or the need for extensive consultation or consideration no information is provided as to the nature of these further requests. That is a significant gap in the evidence base.
25. We agree with DCA that FOI is intended to be a resource for members of the public generally and not the exclusive preserve of campaign groups and the media. Nonetheless, it is important to recognise that the use of FOIA by those groups (particularly journalists) who, it is said, are likely to make the most time consuming requests, may have an additional value that has not been taken into account in the Frontier Economics Report. For example such groups are likely to have the ability to give disclosed information wide currency and use the information more effectively to hold public authorities to account. The Frontier Economics Report (unsurprisingly) has not given any consideration to this issue. In our view it is not possible to reach a cost-benefit conclusion on this issue without doing so.

#### *Aggregating requests*

26. The proposal to aggregate requests made by any legal person (regardless of subject matter) is unprincipled and ill-conceived.
27. Such a change is likely in practice to impact negatively on particular types of organisations (such as campaigning organisations and the media). That is because such groups will often (by virtue of their size and diversity of interest) make a variety of requests to a single (large) department which itself has a range of public responsibilities and functions. Particular consideration needs to be given to this issue.