

29th November 2006

Baroness Ashton of Upholland
Parliamentary Under Secretary of State
Department of Constitutional Affairs
Selborne House
54 Victoria Street
London SW1E 6QW

Dear Baroness Ashton,

The Newspaper Society welcomed the Prime Minister's statement at the Newspaper Conference Annual Lunch at the House of Commons on Monday that the Government 'will certainly consult' the Newspaper Society and others 'very widely' on its proposals to change the Freedom of Information Act and that the Government 'will listen carefully' to what is said and will 'take on board seriously' the concerns expressed by the regional newspaper industry and others.

The regional newspaper industry is deeply disturbed by the Government's announcement in its response to the Constitutional Affairs Committee Report on the first year of the FOI Act that it is 'minded to

- include reading time, consideration time and consultation time in the calculation of the appropriate limit (£600 for central government, £450 for other public bodies) above which requests could be refused on cost grounds; and
- aggregate requests made by any legal person, or persons apparently acting in concert, to each public authority (e.g. Government department) for the purposes of calculating the appropriate limit'

These could have a hugely detrimental effect upon use of the FOI Act at local level.

The lives of the 40 million adult readers of the local and regional press are closely affected by the work of their local public services and local public bodies – these public bodies make the decisions, allocate and spend public funds and provide the public services of immediate importance to the lives of those readers and their families - from all aspects of health, education, housing, to the effectiveness of controls over crime and anti-social behaviour, clean restaurants, speeding or parking fines, the provisions of sport and leisure facilities. Our members' 1300 local and regional newspapers obviously each continually monitor and report on the activities of the specific local and regional public bodies and services which affect their local community. Private individuals and journalists have therefore used the FOI Act from

the outset to obtain authoritative and accurate information from the relevant regional and local public bodies about a range of issues of interest and real importance to the public. This has assisted local public scrutiny of local public bodies, facilitating openness, transparency, probity and accountability. Such requests and the local media stories engendered by the information released have also helped to encourage those public bodies to release more information of interest to the public and of public interest, via publication schemes or otherwise, independent of specific requests. We fear that the Government's proposals will effectively prevent such use of the Act and discourage the development of greater openness.

As the Information Commissioner's progress report says, the first 18 months of FOI 'has been very much a learning experience' for the Information Commissioner's Office and public authorities. The Information Commissioner comments 'The vast majority of public authorities are taking freedom of information seriously. Regrettably, some are not.'

The Government's first proposal would provide an easy way for local public bodies to block investigation of matters of public interest. The time calculation would not as now only prevent requests from local journalists or private individuals for a large volume of information, or for information that is difficult to locate because of the 'search and location' time involved, (which if refused at least provides an opportunity to make a more manageable request, within the cost thresholds). The inclusion of reading time, consideration time and consultation time in the calculation of the £450 limit (calculated at £25 per hour) could provide a very easy way to simply refuse any 'difficult' request in its entirety, without give any reason or justification by reference to the Act other than cost estimate - and without any other ground for review or appeal.

Thus the public right to receive information would be defeated by a time/cost estimate. The Government's proposal will become a useful tool for any public body which does not wish to provide information that it would be otherwise obliged under the Act to release, perhaps because the disclosure could embarrass the body or officials or members, elected or otherwise. The proposal would indeed encourage those public bodies who are not taking FOI seriously to avoid any improvement of their attitude, compliance, records management, practice, procedures and training.

The local public body could all too easily claim that anything other than a simple request, for which there is already precedent for release, becomes cost barred. The public body might claim that it will take too long and exceed the cost threshold because it would have to consider the application of the Act very carefully, because it related to an unfamiliar area, or a sensitive area, especially if the request would otherwise require the release of information which the public body does not want to reveal. Easily located information which has not previously been requested would become subject to the cost threshold because any public body might claim it required careful consideration of exemptions, application of the public interest tests, or it might require liaison between different departments of local authorities, or might require the involvement of various senior staff and thence to the chief executive, who is

supposed to be championing FOI, the time spent reading, considering and consulting adding up at every stage. The local public body could notionally factor any or all such time for reading, considerations and consultations into the total time estimates and costs calculations and then be entitled to refuse the request as exceeding the £450 limit. The requester could not then attempt to reframe the request so as to reduce the time and cost, by reducing the volume of information required or more tightly defining the parameters of the request. The subject matter might indeed require substantive consideration and consultation time, but these should not automatically be disincentives permitting refusal.

The Government's proposed change in itself could not only encourage refusal contrary to the intention of the legislation, but also discourage use of the Act, by press and public alike, for anything but the most straightforward request strictly following such early precedents as have been set and insofar as the backlog of appeals to the Information Commissioner and Tribunal have allowed the parameters of the Act to be considered. The true boundaries of what the public has a right to know and what information the public sector is obliged to share would then never be properly delineated and institutional secrecy reinforced. There will be no culture change precipitated by the Act.

However, the problem is compounded by the Government's second proposal. The intention to allow aggregation of requests would permit the local public body to take into account all the time taken and all costs estimated for the purpose of the costs threshold of all requests from any and all individuals working for the same company, or same organisation, considered to be a 'legal person', as well as all requests made by the same person over any 60 working day period request. Thus in a local newspaper context, the first change would work against any individual journalist who submitted a request raising difficult issues, occasioning consideration and consultation time over the maximum cost threshold. However the second would work against any general news reporter or investigative journalist or specialist reporter such as the health or crime or local government correspondent who might be putting in different requests on different subjects to the same local public body, by allowing the cost threshold to be calculated by reference to all requests from that particular journalist and the time taken on each, including reading, consulting and consideration time, to be aggregated, irrespective of whether they were dealing with the same issue or different issues. Even worse, it would also allow a local authority or police force or any local or regional public body with wide ranging public functions to aggregate all the FOI requests in any 3 month period independently made by all and any journalists working for the same newspaper company (which might include a number of local and regional titles and their websites or multimedia activities in the region served by the public body). The time and hence the cost thresholds could quickly be exhausted and so practically all the journalists' requests would be refused on that ground alone, rendering the Act useless to the local media.

The combined effect of the Government's two proposed changes could thus effectively restrict the use of the Act by any local newspaper company to one request

by one of its journalist per quarter to any public body, despite the importance and range of that public body's responsibilities and diverse interests of the public whom it served, possibly across a wide geographic area. It could kill any use of the Act by the local media.

This problem is illustrated by one of the reports cited by The Frontier Economics Report. The Report does admit that there is no information available on the volume of FOI requests or the costs of such requests to public bodies other than central government. It carried out no research itself. However, it refers to the I&DeA Freedom of Information Act 2000: The first six months - The Experience of Local Authorities in England, 30 September 2005. The survey therefore covered the local authorities' reactions to this initial period combining peak numbers of requests and maximum unfamiliarity in dealing with the Act. It was based on substantive responses from 200 of the 387 local authorities in England. That report suggested private individuals were the largest single category of requesters (60%), followed by business (20%) and then journalists (10%). In the first six months district councils received on average around 50 requests and larger councils (county, metropolitan, unitary and London) around 150. The monthly volume of requests declined over the first six months, but the complexity of requests had grown. Only 8% were refused of which a third were subject to internal reviews because of requester dissatisfaction.

The local authorities estimated that the time taken to deal with the average request took around 12 hours for districts and 14 hours for other councils although 'a small number of complex requests mostly from local pressure groups and journalists which took considerably longer'. Two third of councils made no charge and of those that did, were mainly for copying and postage.

Yet under the Government's new proposals, had they been part of the Act as introduced, any one of those more difficult requests or any second request regardless of subject matter or complexity from any of those individuals, businesses or journalists could well have been refused for no reason other than the new basis for calculation of estimated time and/or aggregate of requests counting towards the £450 cost limit.

No review or appeal would have been possible other than on cost grounds. Few would have enthusiasm for another attempt. The Act would have been stifled at birth.

Yet what real justification could there have been to refuse the information which was actually released? The public did have the right to know - the Act required its release; it could not be lawfully withheld under any exemption. These requests were not frivolous, or vexatious, or particularly time consuming because an excessive volume of information had been requested or huge numbers of requests made by serial requesters. Media use was not identified as a problem, nor journalists accused of wasting public bodies' time and resources. After all, the biggest problems of compliance reported by the local authorities were 'applying exemptions, including the

public interest test; distinguishing between FOI and EEIR regimes; persuading colleagues to comply with timescales and use request tracking systems; and coping within stretched resources, sometimes with no budget and with staff allocated to FOI on a temporary basis’.

These are issues which the Government should be encouraging local public bodies to address, rather than providing them with an easy way to avoid releasing information in response to requests. According to the report, recognition of the importance of better records management was actually cited by the local authorities as one of the benefits of FOI. Indeed, although the local authorities were unhappy about the use of FOI by business, far from condemning media use of FOI, or deploring the time spent on consultation between departments because of FOI or requiring the involvement of senior management on FOI, they welcomed all these as positive advantage of the Act: ‘Other benefits are better engagement with the public and the media, identifying stakeholders and their concerns, and identifying problem in service delivery. FOI had also helped to increase co-operation and communication between departments.’ Suggestions for good practice included ‘seeking to ensure the continuing positive involvement of senior management in the context of the relationship of the council with the public and positive development of the publication scheme’.

We would prefer that the Government encouraged local and regional public bodies to improve their systems and publicised such positive benefits instead of encouraging new ways of obstructing the release of information under the Act.

The Prime Minister did ruefully remark to the audience at the NS Newspaper Conference lunch that ‘It’s a pity in some ways we don’t get a little more credit for actually having opened ourselves up in a way no government has done before us’.

The regional press has been a strong supporter of freedom of information over many years and supported Labour’s manifesto commitments on FOI for many years. Despite its opposition to the dilution of Labour’s original proposals for the Act and its lobbying for the legislation’s improvement during its parliamentary passage, the regional press has since worked with the Government to raise awareness of the Act as passed and the benefits that it might bring. The regional media’s own anticipated interest, in addition to its encouragement of its local readers’ use, has indeed been used by the Government to focus national, regional and local public bodies’ attention on the need to make proper preparations for the Act.

Lord Irvine, when Lord Chancellor, suggested that the Government and the Newspaper Society should work together to alert both local public bodies and the local press to the opportunities provided by the Act. Local and regional newspaper editors wrote to all their local public services and bodies, enclosing a letter from the Lord Chancellor, in order to open a constructive dialogue on preparations for the Act and the public’s and media’s use of it. The then FOI Minister chairing the Advisory Group on implementation of the Act welcomed our follow up survey ‘The Challenge

for Freedom of Information' as part of awareness raising to encourage preparation for the Act. You wrote to the NS on its publication, which revealed that further work needed to be done, that nonetheless 'The Freedom of Information Act is already making a very real difference to people's lives. More and more information is being released by local authorities and central government departments as they operate under the FOI regime. Freedom of Information marks a significant and hugely important change and the Government is fully committed to spearheading this process of change.'

The Government has used examples of regional press stories to illustrate the success of the FOI Act. The Lord Chancellor has highlighted some of them in his speeches. The Campaign for Freedom of Information and Information Commissioner have given examples of local newspaper stories derived from effective use of the Act. A quick search of regional press websites, or sites such as holdthefrontpage or Press Gazette archives which cover the regional press, would reveal a multitude of articles and investigations, where local and regional newspapers' journalists had used the Act to obtain information of interest, relevance, importance to their readership – and often prompted local public bodies in future to release such material as part of publication schemes. The regional press credit the Freedom of Information Act for releases of that information and thereby the Government.

Regional and local newspapers have welcomed the opportunities presented by the Act. They appreciate information released by central government which was unavailable in the past, and now repays analysis for relevant regional and local stories but the FOI requests that they have made to local and regional public bodies have also yielded much valuable and important information for stories of real public interest and strong relevance to the local community.

Our concern is that the Government's two proposals will undo 'the significant and hugely important change' to which you say it is fully committed. We find it very surprising that the Government wants to introduce any changes that will shut down release of information to the public and shut out the media, just as central government and local public bodies and the Act's users are acclimatising to the beginnings of the cultural change which the Act was indeed supposed to initiate.

Our lack of understanding perhaps is unsurprising since the Government has not yet published any detailed consultation document, provided no policy justification, provided no regulatory impact assessment, and produced no evidence based research on its local impact.

The Prime Minister referred to the cost benefit analysis. The Frontier Economics Report stated that it had no information about the number and cost of FOI cases outside central government. It estimated the annual total costs of FOI was estimated to be £35.5 million, of which an estimated £11.1 million was attributed to public bodies other than central government departments including an estimated £1.6

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million attributed to dealing with journalists' requests (£1.4m for requests and £140,000 internal reviews).

These seem paltry sums for any search for savings to justify such drastic restrictions on use of the legislation. We find it hard to believe that it can provide any justification for the Government's proposals which could sabotage freedom of information, within just two years of its introduction.

The Newspaper Society therefore asks the Government to reconsider its intentions on changing the Act and to honour the Prime Minister's commitment to consult widely before bringing forward any legislation to restrict use of the Act, directly or indirectly.

Yours sincerely,

Santha Rasaiah
Political Editorial and Regulatory Affairs Director

