

# The Campaign for Freedom of Information

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**Response to Ministry of Justice consultation**

## **Freedom of Information Act 2000: Designation of additional public authorities**

Campaign for Freedom of Information  
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## Introduction

We welcome the government's decision to consider extending the Freedom of Information Act to some of the private sector and other bodies which are capable of being designated under section 5 of the Act. This represents an important change of direction from recent attempts to restrict access under the Act.

We hope there will be a significant increase in the scope of the Act, matched by an appropriate increase in the funding of the Information Commissioner's office.

The consultation paper asks:

**Q1: Do you support extending the coverage of the FOI Act to organisations that carry out functions of a public nature and to contractors who provide services to a public authority whose provision is a function of that public authority?**

We support the extension of the FOI Act to both classes of organisation. In particular, we think there should be a strong presumption in favour of designating contractors providing services which, until recently, were provided directly by public authorities themselves. The contracting out of these services has involved a reduction in or loss of a right of access which otherwise would have existed under the Act. The opportunity to restore that right should be taken, wherever possible, by directly designating the contractor as a public authority in its own right in relation to that service.

**Q2: Of the five proposed options, which do you consider the best option? Or would some other option, or combination of options, be preferable? Please explain your reasoning.**

As might be expected, we see no merit in Option 1, which is to do nothing.

Option 2 involves encouraging private contractors providing public services and bodies with public functions to adopt FOI-like principles through a voluntary code of practice. We understand that a small number of bodies not covered by the Act (including the Law Society and the Royal Household) already do so, a welcome development.

However, this option provides no external enforcement mechanism and no remedy for the applicant in case of dispute. Even where an authority has legitimately withheld information, requesters will have no way of establishing, and the organisation will have no way of demonstrating, that this is in fact the case. The absence of an independent enforcement mechanism may undermine the credibility of the arrangement, even where the

organisation is conscientiously striving to comply. Where it is not seeking to comply at all, the lack of an enforcement mechanism will be a fatal defect. We do not see this as a genuine alternative to designation.

Option 3 suggests that contractors providing public services might be subject to a contractual obligation requiring them either to supply information to requesters directly or provide information to the authority, for its use in answering requests about the contract.

The difficulties with this option are that:

- Such clauses are more likely to be included in *new* contracts than inserted retrospectively into *existing* contracts, according to the consultation paper. The process is therefore likely to be extremely slow. It will also create anomalies between new contractors, who will be affected, and existing contractors, who will not.
- Access rights would be dependent on contractual obligations rather than the FOI Act. The Information Commissioner would have no jurisdiction over these obligations, multiplying the kinds of undesirable problems caused by the decision in the BBC/Steven Sugar case.<sup>1</sup> Requesters seeking information whose provision was governed by a disclosure clause could not ask the Commissioner to investigate a contractor's failure to comply with the clause.
- The result would be a split jurisdiction in which the Commissioner:
  - (a) *could* examine an *authority's failure* to release information which the contractor had provided to it, but
  - (b) *could not* investigate the *contractor's failure* to supply information either to the authority or to the applicant.

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<sup>1</sup> The BBC and Channel 4 are subject to the FOI Act only in relation to information which is held for purposes other than the purposes of journalism, art of literature. If the Information Commissioner finds that information is subject to the Act, but that an exemption applies, the requester can appeal to the Information Tribunal against the decision notice in the ordinary way. But if the Commissioner finds that the information is *not* subject to the Act (eg because it *is* held for the purposes of journalism), that decision does not involve a decision notice and the Tribunal has been found to have no jurisdiction to hear an appeal on the issue. The Court of Appeal recently upheld a decision of the High Court that the requester's only remedy would be to seek judicial review. (BBC v Sugar & Anor [2007] EWHC 905 and <http://business.timesonline.co.uk/tol/business/law/article3252052.ece>)

Although the authority would presumably be able to bring a civil action to require compliance, it may be unwilling to do so because of the cost. The consultation paper suggests that requesters might be given standing to enforce these obligations. Unfortunately, few requesters, other than a contractor's commercial rivals, would have the resources to do so.

- Finally, a “chain of information” solution (contractor provides information to authority, authority provides information to requester) would have the disadvantage of bringing the Act’s exemption for breach of confidence (section 41) into play. The contractor may claim that the information it provides to the authority is confidential in nature, supplied in confidence, and likely to harm the contractor’s interests if disclosed. Such a request would then involve a claim that section 41 (breach of confidence) and perhaps also section 43 (prejudice to commercial interests) apply. A direct request to the contractor for the same information would only involve section 43 or, in some cases, no exemption at all.

The implications can be seen from a recent case. Oxford City Council had received a request for information about the price at which it had sold land for use as a football stadium. The contract of sale included a confidentiality clause. The council asked for the purchaser’s consent to release the information which was refused. The council then withheld the information under sections 41 and 43, although the Information Commissioner subsequently ruled that neither exemption applied.<sup>2</sup> However, the purchaser threatened legal action against the council for breach of contract and/or confidence if it complied with the Commissioner's decision. Although the council itself had no objection to releasing the information, it continued to refuse to disclose, for fear of legal action and appealed against the Commissioner’s decision to the Information Tribunal. Only when the purchaser abandoned its threat of legal action did the council withdraw the appeal and disclose the information.<sup>3</sup>

This scenario is likely to be repeated under *Option 3* and we suspect that the threat of legal action for breach of confidence is likely to deter authorities from disclosure.

A direct right of access to information from the contractor would eliminate this possibility. The contractor could not invoke section 41 for information which it had generated itself. Section 43 of the Act should protect information whose disclosure would prejudice is

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<sup>2</sup> Decision Notice FS50090744, Oxford City Council, 1 February 2007

<sup>3</sup> ‘Was Stadium Sale Good Value?’, Oxford Times, 19.10.07

commercial interests. Disputes about this exemption would be settled without the involvement of the courts.<sup>4</sup>

If contractors are not designated in their own right the only way of avoiding the threat of civil action would be for:

- (a) contracts to include a term expressly setting aside any expectation of confidentiality in relation to information which the contractor supplied to the authority
- (b) this no-confidentiality clause to extend to information supplied to the authority informally and to information supplied during the tendering process, prior to the contract's existence. But the provision need not prevent an obligation of confidence (i) existing during the tender process itself, and (ii) applying to information supplied by unsuccessful tenderers.

Option 4 is that there would be a *single* section 5 order, and no further orders.

Option 5 is for a series of section 5 orders, progressively widening the Act's coverage over time. We think this has obvious advantages over a single order.

The disadvantages of a *single* order are that:

- (a) contracts are time limited and each will expire after a number of years. The effect of a single order will gradually be nullified if there is no mechanism for bringing the successor contracts within the Act's scope.
- (b) services which are not contracted out at present may become so in future, removing existing FOI rights. A process for bringing such new contracts under the Act is needed.
- (c) the range of candidates for designation is potentially vast and inevitably some significant bodies will be overlooked initially.

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<sup>4</sup> It would also allow the contractor to act on its own behalf in dealing with requests. It would not be required to attempt to persuade the public authority holding its information that an exemption applied. It would also be entitled to make its own representations to the Information Commissioner in case of complaint, something which - as a third party - it is not entitled to do under existing arrangements.

- (d) there is likely to be pressure for further designations as the public becomes accustomed to the Act applying to contractors and bodies with public functions or as news events focus public attention on the role of previously obscure bodies.

### **Bodies with Public Functions**

**Q3: Should some form of public funding be essential in order for an organisation to be considered for inclusion in a section 5 order, or should this be just one of a number of relevant factors to be considered?**

A body which receives substantial public funding may, because of that, be a strong candidate for designation, but the public interest in an organisation's work may be entirely unrelated to the level of public funding it receives.

**Q4: Are there any organisations or categories of organisations that do not receive public funding but that you believe should be covered by the Act? Please explain why.**

We believe that non-statutory self-regulatory bodies, which may be funded by the industry or profession concerned, should be covered by the Act, even though they may receive no public funds.

**Q5: Do you agree that the balance between the public interest and the potential burden of FOI is an appropriate consideration when deciding whether to cover an organisation?**

**Q6: To what extent do you think that the factors listed, or any other factors, should be taken into account in determining whether organisations performing public functions should be brought within the ambit of the Act?**

We think it difficult to make straightforward estimates either about the degree of public interest in designating any particular function or the potential burden of complying with the FOI Act. Although there is a logic in suggesting that the equation favours designating bodies which provide services to large numbers of people, there may be small organisations (eg care homes) on which small numbers of vulnerable people are entirely dependent, where the case for designation may be greater than staff numbers alone would suggest. The fact that, under the FOI Act, individual general practitioners are public authorities in their own right also suggests that designation decisions should not depend purely on size.

The potential burden of dealing with FOI requests depends largely on the volume of requests received, which may be difficult to anticipate. Other requirements, such as the duty to provide a publication scheme, can be dealt with by use of model schemes, as already occurs in some sectors. The limited scope of many schemes, which only cover information which the authority was publishing before the Act's introduction, suggests that this requirement has not been a burden in practice even to small organisations.

In particular, we do not agree with the suggestion that has been made on behalf of the voluntary sector that they should be exempted from designation merely because of their status. The voluntary sector as a whole receives some £10 billion of public funds annually, a figure which has doubled since 1997.<sup>5</sup> The turnover of some voluntary organisations runs to many millions of pounds and may be greater than that of many public authorities.<sup>6</sup> Many housing associations, for example, have been created solely for the purpose of taking over a local authority's housing stock and are made up of its former staff.<sup>7</sup> The transfer of public authority functions to the voluntary sector as a result of explicit government policy has removed much information from the Act's scope. We think it appropriate that it should be restored.

We agree that bodies which carry out 'core functions of the state' should be prime candidates for designation. We think the term 'core functions' should include not only law enforcement, administration of justice and the operation of the prison system, but also health, education, social services, transport and the protection of public safety.

We do not agree that the fact that a body is subject to oversight by a regulator weakens the case for designating it under the FOI Act. There may be failings by the regulator. Requests may relate to matters over which the regulator exercises no control. Even where the regulator has intervened some regulators are prevented by statute from disclosing information obtained under their powers.<sup>8</sup> In other cases, FOI exemptions (such as those

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<sup>5</sup> Evidence of Phil Hope MP, Minister for the Third Sector, to the Public Administration Committee, 20.11.07, Q350

<sup>6</sup> For example, Barnardo's state "we receive 55% of our funding from the state and this goes directly to providing the public services that we are contracted to provide" (Written Evidence to Public Administration committee, Third Sector Commissioning, March 2007). Barnardo's income for 2007 was over £190 million (Annual Report & Accounts 2007), indicating that its public funding to provide public services exceeded £100 million.

<sup>7</sup> "In around two-thirds of transfers, local authorities have sold their homes to new organisations created from authorities' housing departments specifically to receive the stock". National Audit Office, 'Improving Social Housing Through Transfer', HC 496, Session 2002-03, March 2003.

<sup>8</sup> In such cases the information concerned becomes exempt from access under section 44 of the FOI Act. Regulators whose use of the section 44 exemption has been upheld by the Information Commissioner include the Financial Services Authority, the Office of Gas and Electricity Markets, the Office of Fair Trading, the Independent Police Complaints Commission, the Standards Board for England, HM Revenue and Customs, the Civil Aviation Authority, the Local Government Ombudsman, the Parliamentary and Health Service Ombudsman and the Information Commissioner himself.

for investigations or breach of confidence) may in practice prevent the release of information about particular regulated bodies.

We do not think it likely that designation would adversely affect an organisation's ability to compete against other providers who are not covered by FOI. The section 43 exemption, for information whose disclosure would prejudice an organisation's commercial interests, is designed to prevent this occurring.

**Q7: Do you agree that the coverage of FOI should extend to contractors who provide services under contract with a public authority whose provision is a function of that authority?**

We agree with this proposal. However, we do not agree with the suggestion in paragraph 32 that designating contractors could lead to a reduction in the number of organizations likely to bid for public service contracts.

In particular, we disagree with the suggestion that while public sector bodies are in effect *required* to provide a service “contractors are often business or voluntary and community organisations which choose to provide services”. Organisations choose to bid for public sector contracts in precisely the same way that individuals “choose” to seek jobs, that is, in response to an economic imperative which they are not free to ignore.

**Q8: Do you agree that information relating to an organisation's administration of a public service or function, for example in the areas listed in paragraph 33, should be subject to FOI?**

We agree with this statement. There will be situations in which the quality of the service or function provided depends on the numbers, qualifications and training of staff involved. Excluding such matters could make it impossible for requesters to identify factors responsible for shortcomings in the service. Similarly, where an organisation claims not to hold information relating to a request, a requester may legitimately wish to seek information about its records management practices. Such administrative matters should be subject to the Act.



**Q9: Which organisations, or types of organisations, do you believe should be considered for inclusion in any extension of FOI under s.5 of the Act, and why?**

## **NHS**

Private or voluntary sector bodies providing treatment or diagnosis to patients under the NHS should be subject to the FOI Act. The Department of Health has stated that it “will ensure there is a level playing field for all NHS providers in future”.<sup>9</sup> Patients should be in a similar position. Their rights to information should not be weakened where an NHS service is provided by a non-NHS body. They should have the same rights to information about staffing levels and qualifications, procedures and equipment used, quality of care, treatment outcomes, complications, cleanliness, complaints and other matters.

If possible, FOI rights should be preserved, through appropriate contractual provision, even if services such as surgical procedures are provided at overseas facilities.

## **Social care**

The majority of social care services for adults is now provided by the private and independent sectors. In March 2001, 92 per cent of residential care homes (excluding nursing homes) were provided by the private and voluntary sectors. The arrangements for children were more complex and varied.<sup>10</sup> The care provided to those in homes is of such central importance to the lives of the individuals affected that we think the bodies responsible should be prime candidates for designation under the Act.

## **Education**

We agree with the consultation document that it is anomalous that academies are not subject to the FOI Act and believe they should be designated.

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<sup>9</sup> Department of Health press release, 15.11.07 (‘Johnson outlines new measures to deliver more choice and faster treatment to patients’)

<sup>10</sup> Memorandum from the Department of Health to the Joint Committee on Human Rights, May 2003. <http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/39/39we03.htm>

Private sector companies, brought in to manage failing or other schools, should be subject to the Act,<sup>11</sup> as should local education authority functions which have been transferred to private contractors. Some of these have involved contracts worth £100 million or more.<sup>12,13,14</sup>

## Partnerships

Bodies such as the New Deal Communities Partnerships and Local Strategic Partnerships should be subject to the Act.

In 2005 the Audit Commission reported that there were some 5,500 partnerships in the UK accounting for some £4 billion of public expenditure. While acknowledging the potential benefits of such arrangements, the report also warned of “complexity and ambiguity that can generate confusion and weaken accountability”. It continued:

“A third of those working in partnerships experience problems, according to auditors. These problems arise when governance and accountability are weak: leadership, decision-making, scrutiny and systems and processes such as risk management are all under-developed in partnerships.”

The case for designation may be greatest where a partnership involves private or voluntary sector bodies which are not themselves subject to the FOI Act, as their involvement may create particular obstacles to the release of information by authorities which are subject to the Act. They may consider that such information is held “on behalf of

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<sup>11</sup> See for example Education Guardian (23.4.07) which describes the role of Edison Schools UK, the subsidiary of a US company, which recently won a £1 million contract to take over the running of an Edmonton comprehensive school. “For the first time in the UK, the company has brought in its own staff - a headteacher and two senior assistants - as part of its school improvement package, which also includes spending 25 days each term on professional management and staff development.

The deal, described as a partnership by Edison, was agreed with the school governors, paid for out of the school budget and endorsed by local education authority, the London borough of Enfield.

But unlike some of Edison's other clients, Salisbury is not a failing school. It was taken out of special measures in 2003 and its latest 2005 Ofsted report classified it as "satisfactory".

Today, Edison said the key difference between its role in the US and what it is doing in the UK, is that in America it has directly managed whole schools.

Although this has not happened in the UK yet, the development of the government's flagship school academy and trust programme - where schools are sponsored by outside organisations and have greater autonomy in how they are run - could open the door for it to adopt the US model here, the company confirmed.”

<sup>12</sup> For example, the contract worth more than £100 million, under which Walsall Metropolitan Borough Council transferred the bulk of its education functions, and large numbers of its staff, to Serco in 2002. [http://www.serco.com/media/pressreleases/2002/013\\_2002.asp](http://www.serco.com/media/pressreleases/2002/013_2002.asp)

<sup>13</sup> In 2001, the London Borough of Waltham Forest awarded a £200 million contract to contractors Amey and Nord Anglia to provide a range of services at its 92 schools, including welfare, special needs, literacy and numeracy strategies, financial management, human resources and information technology. <http://news.bbc.co.uk/1/hi/education/1453157.stm>

<sup>14</sup> In 2004 the then Department for Education and Skills awarded a contract worth £177 million to Capita to manage the government's literacy and numeracy projects <http://education.guardian.co.uk/specialreports/privatisation/story/0,,1318041,00.html>

another person” and is therefore not held by the authority itself for the purpose of section 3(2)(a) of the Act. Alternatively, the information may be regarded as having been supplied to the individual authority by an “other person” in circumstances in which the section 41 exemption for confidential information applies.<sup>15</sup>

### **Registered social landlords**

A substantial proportion of local authority housing stock has been transferred to housing associations. One of the benefits of the exercise is said to be to increase tenant choice and participation.<sup>16</sup> These objectives could be furthered by bringing housing associations and other registered social landlords within the scope of the FOI Act.

Although the Housing Corporation acts as a regulator, its ability to provide information about individual housing associations is affected by section 41 of the Act. The Information Commissioner has held that the Corporation was entitled to withhold letters sent to it on behalf of a housing association under section 41.<sup>17</sup>

The case for designating these bodies is highlighted by a 2005 Guardian report which revealed that the Housing Corporation, which regulates housing associations:

“has placed 36 associations, about one-fifth of the total, under supervision at one time or another since 1988. Such action, which involves the appointment of external experts to the board of the association, is only triggered by poor performance or serious management irregularities.”<sup>18</sup>

### **The Justice system**

Bodies responsible for the custody of prisoners or detained persons should be particularly strong candidates for designation. These include the contractors responsible for:

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<sup>15</sup> An analogous example can be found in a decision of the Information Commissioner relating to Boston Borough Council. A request had been made for information supplied to the council by a charitable company (Boston Sports Initiative) which the council itself had set up to develop and manage a sports arena and on whose board a councillor sat. The Commissioner held that a progress report which the BSI had supplied to the council involved confidential information supplied to the council by another person in circumstances creating an obligation of confidentiality and that the report was exempt under section 41. (Decision Notice FS50064581)

<sup>16</sup> National Audit Office, 'Improving Social Housing Through Transfer', HC 496, Session 2002-03, March 2003, page 2

<sup>17</sup> Decision notice FS50145988, 18.12.07. Although the letters were sent to the Housing Corporation by solicitors acting for the association it was not suggested that they were legally privileged, as they were not legal advice given either to the association or to the Housing Corporation.

<sup>18</sup> “One in five transfer landlords needs supervision”, Society Guardian, 25.5.05

- privately operated prisons, immigration removal centres, secure training centres, and police custody suites
- prisoner escort services
- the electronic monitoring of offenders.
- probation services under the Offender Management Act 2007.
- the operation of courts.

## **Transport**

Bodies responsible for public transport should be major candidates for designation because of their direct impact on the daily lives of a major proportion of the population and because of their vital responsibilities for public safety.

Such bodies include National Air Traffic Systems, which is responsible for air traffic control, BAA, bus and tram operating companies, port authorities, Network Rail, train operating companies and London Underground Infrastructure Companies (Tube Lines and any successor to Metronet).

### *Bodies subject to the Environmental Information Regulations*

Some of these bodies may be subject to the Environmental Information Regulations, though not to the FOI Act. This creates an anomaly, whereby the organisation may be required to answer requests for information about noise or emissions but not about more acute risks to health and safety. For example, an organisation might be required to release information about an accident which resulted in a fuel spillage but not about one causing direct loss of human life.

A further advantage of designating such bodies is that it would end the disputes which currently arise in relation to the scope of the EIRs. The Port of London Authority, for example, consistently opposed suggestions that it was subject to the regulations, even after the Information Commissioner held that it was. The issue was finally settled by the Information Tribunal's decision that they were covered.<sup>19</sup> On the other hand, the Tribunal

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<sup>19</sup> Information Tribunal, Port of London Authority & Information Commissioner & Mr John Hibbert, EA/2006/0083

found that Network Rail is not subject to the EIRs, an outcome which it found “clearly unsatisfactory” and suggested should be rectified.<sup>20</sup>

Designating such bodies under section 5 of the FOI Act would ensure that they automatically, and beyond doubt, became public authorities for the purposes of the EIRs.

### **Private security firms**

Private security firms working for British government departments in Iraq or Afghanistan should be candidates for designation.

### **Self-regulatory bodies**

Bodies such as the Press Complaints Commission, Advertising Standards Association, Solicitors Regulation Authority, and other bodies carrying out self-regulatory functions which the government itself would otherwise undertake, should also be designated.

### **Standards setting bodies**

Bodies with a national standard setting role, such as British Standards Institute, should be designated.

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*3 March 2008*

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<sup>20</sup> Information Tribunal, Network Rail Ltd & Information Commissioner & Network Rail Infrastructure Ltd, EA/2006/0061 and EA/2006/0062, paragraph 58.